Water Permit No. 2191-2

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SOUTH DAKOTA
WATER PERMIT NO. 2191-2

Date of first receipt of application August 7, 1991.

The Water Management Board approved Water Permit Application No. 2191-2 on December 2, 1992 for US Fish and Wildlife Service, Denver Federal Center, PO Box 25486, Denver CO 80225 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. 2191-2 appropriates 4.44 cubic feet of water per second (1444.7 acre-feet of water annually) from six natural springs. The points of diversion from the six springs are located in the SE 1/4 NW 1/4 Section 25, SW 1/4 NW 1/4, SE 1/4 NE 1/4 Section 26, NW 1/4 NW 1/4, NW 1/4 NE 1/4 Section 27; all in T36N-R37W and the SW 1/4 NW 1/4 Section 30-T36N-R36W. The places of use of the water are located in portions of the W 1/2 SW 1/4, S 1/2 SE 1/4 Section 22, SW 1/4 SW 1/4, SE 1/4 SE 1/4 Section 23, E 1/2 SW 1/4 Section 24, NE 1/4 NW 1/4 Section 25, N 1/2 Section 26; all in T36N-R37W and the W 1/2 NW 1/4 Section 30-T36N-R36W.

2. The water appropriated shall be used for the purpose of creating 235 acres of marshes, sloughs and wet meadows through small dams and control structures for waterfowl propagation and enhancement of wildlife habitat and may not exceed the amount of water needed for beneficial use as described above.

3. The water is to be used during the following described annual period: January 1 - December 31.

4. The date from which applicant may claim right is August 7, 1991.

5. Water rights obtained in compliance with the laws of the State of South Dakota may not be unlawfully impaired by this appropriation.

QUALIFICATION

Use of water authorized by this permit may not impair the use of any lands adjoining the LaCreek National Wildlife Refuge including, but not limited to, flooding or specific alteration of plant species directly attributable to water use under this permit. Flooding of adjoining land may occur if a written flood easement is obtained from the property owner or owners.

WATER MANAGEMENT BOARD

By: _____ MAR 29 1995

John Hatch, Chief Engineer — date
Water Rights Division
Department of Environment and Natural Resources

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, AND LAWRENCE KOCER	)	
Appellant,	)	CHRONOLOGICAL INDEX
v.	)	WATER PERMIT APPLICATION NO. 2191-2
SOUTH DAKOTA WATER MANAGEMENT BOARD AND DEPARTMENT OF WATER AND NATURAL RESOURCES	)	
Appellee.	)	

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STATE OF SOUTH DAKOTA)
: SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, AND LAWRENCE KOCER

Appellant,

v.

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

Appellee.

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Volume 3 of 3 . . . . . Separate

STATE OF MONTANA)
) ss. AFFIDAVIT
COUNTY OF Fergus)

I, Charles J. Ritts, being first duly sworn, do depose and say that I was first employed on the Cedar Creek Ranch Company - Alvin Brown, Manager, in 1951 and worked there intermittently until 1963. During this period, I was familiar with and personally witnessed use made of the waters of Springs located in Sections 25, 26 and 27 T36N R37W and Section 30 T36N R36W, Sixth P.M., Bennett County, South Dakota.

I further depose and say that I am 63 years of age, and make this Affidavit for the purpose of establishing the Beneficial Use for this Vested Water Right.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 17 day of Jan, 1984.

Charles J. Ritts

The foregoing Affidavit was subscribed and sworn to before me this 17 day of January, 1984.

Leslie Y. English
Notary Public
Kay, MT. 59471

My Commission Expires: May 8, 1984

1

United States Department of the Interior
FISH AND WILDLIFE SERVICE

MAILING ADDRESS:
Post Office Box 25486
Denver Federal Center
Denver, Colorado 80225

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228

IN REPLY REFER TO:

FR/EN
WR SD

JUN 27 1984



South Dakota Department of Water
and Natural Resource Development
Water Rights Division
Joe Foss Building
Pierre, SD 57501

Dear Sirs:

Enclosed please find the following documents related to Application for Permit to Appropriate Water for the LaCreek National Wildlife Refuge located in Bennett County, South Dakota:

Application for Permit (Vested Right), Lake Creek

Application for Permit (Vested Right), Springs

Application to Amend Permit No. 265-2 with Application of Water to Beneficial Use Permit No. 265-2, Cedar Creek

Filing Map No. 6R-SD-176-WR-P-5.0, 2 sheets

Exhibits A & B, Aerial Photographs, 2

Also enclosed is Government Purchase Order in the amount of $26.50 to cover the required filing fees. Please sign on the back and return to this office or issue an invoice so that payment can be issued.

We have submitted an Application for Water Quality Analysis to the State Conservation Commission and await the results.

2

Also, prior to publication, please advise this office of the newspaper chosen to publish the Notice of Hearing so that the necessary documents can be forwarded to them.

If you have any questions or require further information, please contact Ms. Ginger Chesy of our Water Resources Section at (303) 234-3616.

Sincerely,

ROBERT H. SHIELDS
Acting Regional Director

Enclosures (8)

FORM 2: Application for irrigation (type or print)

V/R

No. 1926-2 Hydrologic Unit 10140203
Map No. same Basin WH #2
Newspaper Bennett Co Booster It, Box 610, Martin

Mail to: Water Rights Div.
DWNR, Foss Bldg.
Pierre, SD 57501
(605) 773-3352

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

9:46 AM. JUL 1984 DIVISION OF WATER RIGHTS Pierre, SD

Type of Application: Check one or more of the following;

New ☐ Vested Right ☒ Future Use ☐

☐ Application to amend Permit No._____ with old priority date retained

☐ Change diversion point(s) ☐ Add diversion point(s) ☐ Change acreage ☐ Other ☐

☐ Application to: ☐ Change use ☐ Change diversion point(s) ☐ Add diversion point(s)

☐ Add Acreage ☐ Increase diversion rate ☐ Other _____ See Permit No._____

☒ Application to: ☒ Use ☐ Transfer water reserved by Future Use Permit No._____

1. Name of Applicant Dept. of Interior, U.S. Fish & Wildlife Service Phone No. (303) 234-3616

   Post Office Address P.O. Box 25486, Denver Federal Center, Denver, State CO 80225
   (Street. RR or Box) Zip Code

2. Amount of water claimed (c.f.s) 3.36 Total acres irrigated 235
3. Source of Water supply Springs
4. Location of point of diversion See attachment #1

   _____ County Bennett
5. Counties where water will be used Bennett
6. Annual period during which water is to be used January 1 through December 31.
7. List below each forty acre subdivision, or lot, or fraction thereof and show number of acres to be irrigated in each.

Land Description	No. Acres Irr.	Land Description	No. Acres Irr.
See Attachment #2			

Attach sheet if more space is needed

8. Give a brief description of proposed project. When available include any preliminary engineering report or other reports or information that will help explain the project. (Attach sheet if more space is needed)

   Channel plugs for flood irrigation.

Attachments: Attach Form 2A if diversion from a well or dugout, or if storage of water, is proposed. Attach map (see instruction)

STATE OF COLORADO
County of Jefferson)ss

I, Bob Shields the applicant, certify that I have read the foregoing application, have examined the attached map and that the matters therein stated are true and that I intend, and am able to complete the necessary construction.

Signed Bob Shields
acting Regional Director

Subscribed and sworn to before me this 27th day of June 19 84

My Commission Expires April 2, 1986 Mildred Lee Fuller
Notary Public (or other qualified officer)

4

WATER PERMIT

The Water Management Board hereby approves Water Permit Application No. _____

_____ (Applicant) _____ (Post Office Address)

_____ (State) _____ (Zip Code) With the following qualifications.

Date of first receipt of application _____, 19____.

Date of return to applicant for correction, amendments or changes required _____, 19____.

Date of receipt of corrected application _____, 19____. Approved _____, 19____.

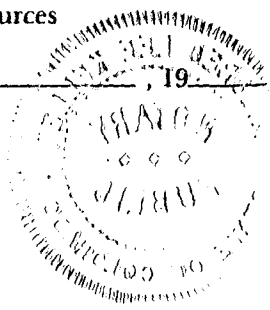
The Water Management Board hereby approves this Water Permit No. _____ authorizing the construction of the water use system and the placing of water to beneficial use as stated in the Application and as qualified in the Water Permit approval, subject, however, to the following limitations and conditions:

1. The date from which applicant may claim right is _____, 19____.
2. One-fifth of the work is to be completed on or before _____, 19____.
3. The whole of said work is to be completed on or before _____, 19____.
4. The time limit for proof of beneficial use of water is _____, 19____.
5. The water appropriated shall be used for the purpose of _____
6. The prior right of all persons who, by compliance with the laws of the State of South Dakota, have acquired a right to the use of water must not be unlawfully impaired by this appropriation.
7. The amount of the appropriation herein granted shall not exceed _____ cubic feet per second; neither shall it exceed the capacity of the above described water supply system nor shall it exceed the amount of water needed for beneficial uses served. For irrigation purposes said appropriation must be limited to not more than 2 acre feet per acre per year and be limited to not more than one-seventieth (1/70) of one cubic foot of water per second of time for each acre of land to which water is actually and beneficially applied for irrigation on or before _____, 19____; said water to be used during the following described annual period: _____

WATER MANAGEMENT BOARD

By: _____
Chief Engineer
Division of Water Rights
Dept. of Water and Natural Resources

_____, 19____



Form 2B

Affidavit of Water Use

No. _____

(Type or Print in Ink)

Note: This Form is supplemental to Form 2 and is to be used when an affidavit pertaining to construction and water use already constructed is needed, primarily with vested right claims.

Affidavit Of Construction Of Water Use System And Application Of Water To Beneficial Use

Name of Applicant (Same as Form 2) Dept. of Interior, U.S. Fish & Wildlife Service

Post Office Address P.O. Box 25486, Denver Federal Center, Denver, CO 80225
(Street, RR or Box) (State) (Zip Code)

A. Notice of Appropriation unknown Date of Posting unknown

Date of recording unknown Recording date unknown
Where Book Page

B. Date of start of construction of water supply system prior to 1939

C. Date that water was first applied to beneficial use prior to 1939

D. Name of owner of original water supply system Cedar Creek Ranch Co. (Berthol Brown)

E. Amount of water originally applied to beneficial use unknown

F. Present Use of Water - Amount of water now being used 235 acres Irrigation-Fish & Wildlife: 3.36 cfs

Date that this water was first used September 2, 1971, date of acquisition

G. Chronological History of Water Use

Former landowner historically irrigated since 1930's. A fish hatchery was also operated on Spring #C. Upon acquisition of lands by FWS, the irrigation usage continued without interruption.

See Exhibits A & B (1937 aerial photographs)

Attach to this Form 2B any copies of notices, postings, filings, publications, affidavits, or other records that apply. You may also attach any written statement by you, or by others, that you deem pertinent.

State of COLORADO)
ss
County of Jefferson)

I, Bob Shields (print or type) the applicant, certify that I have read the foregoing and that the matters therein stated are true.

Signed Bob Shields
Acting Regional Director

Subscribed and sworn to before me June 27, 19 84

My Commission Expires April 2, 1986

Mildred Lee Fuller
Notary Public or other qualified officer

I, the undersigned do hereby certify that I know about the water use system described above, that I have read the foregoing, and that the matters therein stated are true.

See attached affidavit 19____
(Print name)

_____ 19____
(Print name)

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Attachment #1

Springs - Point of Diversion

A. NW1/4 NW1/4 NW1/4 Sec. 27, T36N, R37W

B. NW1/4 NW1/4 NE1/4 Sec. 27, T36N, R37W

C. SW1/4 SW1/4 NW1/4 Sec. 26, T36N, R37W

D. SW1/4 SE1/4 NE1/4 Sec. 26, T36N, R37W

E. SW1/4 SE1/4 NW1/4 Sec. 25, T36N, R37W

F. SE1/4 SW1/4 NW1/4 Sec. 30, T36N, R36W

Attachment #2

	Acres Irrigated-Springs	# of Acres
A.	W1/2 SW1/4 Sec. 22, T36N, R37W	20
B.	S1/2 SE1/4 Sec. 22, T36N, R37W	20
C.	N1/2 NW1/4 Sec. 26, T36N, R37W and SW1/4 SW1/4 SW1/4 Sec. 23, T36N, R37W and W1/2 NW1/4 NE1/4 Sec. 26 T36N, R37W	50
D.	N1/2 NW1/4 Sec. 26, T36N, R37W and SW1/4 SE1/4 SE1/4 Sec. 23, T36N, R37W	50
E.	NE1/4 NW1/4 Sec. 25, T36N, R37W and E1/2 SW1/4 Sec. 24, T36N, R37W	75
F.	W1/2 NW1/4 Sec. 30 T36N, R36W	20
	TOTAL	235

...rtment of Agriculture
vvl#1
3/82

SOIL/WATER COMPATIBILITY PERMIT APPLICATION FORM

Division of Conservation

Office Use Only

WR#

DEPT. OF INTERIOR, U.S.FISH & WILDLIFE SERVICE

OWNERS NAME: _____ OWNERS ADDRESS: P.O. BOX 25486, DFC DENVER, CO 80225

COUNTY LAND LOCATED IN: BENNETT PHONE: (303) 234-3616

TENANT'S NAME AND ADDRESS: NONE Refuge Manager, Lacreek National Wildlife Refuge, Star Route 3, Box 14, Martin, SD 57551 Ph 685-6508

LEGAL DESCRIPTION: (Show Legal Description to Nearest 10 Acres)

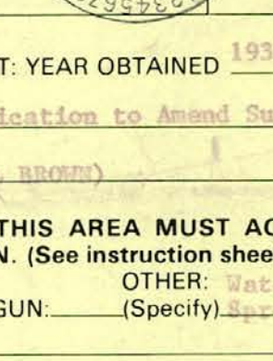
1. WELL LOCATION SPRINGS (6)

   Depth Unknown

2. SURFACE WATER SOURCE AND DIVERSION LOCATION: _____

   Diversion Location SEE ATTACHMENT #1

Legal Description	Acres	Legal Description	Acres
SEE ATTACHMENT #2			



3. SHOW ANY PORTION OF LAND THAT PRESENTLY HOLDS AN IRRIGATION PERMIT: YEAR OBTAINED 1933

   LEGAL DESCRIPTION: S½NW¼, S½NE¼ and N½SE¼ SEC. 25, T36N R37W; NW¼NW¼SW¼ and S½NW¼ SEC. 30 T36N R36W (Application to Amend Submitted)

   IN WHAT NAME: U.S. FISH AND WILDLIFE SERVICE (FORMERLY BERTHOL BROWN)

4. LOCATION OF AREA TO BE IRRIGATED NOTE: **SOILS INFORMATION FOR THIS AREA MUST ACCOMPANY THE APPLICATION. (See instruction sheet)**

5. **TYPE OF IRRIGATION:** GRAVITY: X TOWLINE: _____ CENTER PIVOT: _____ GUN: _____ OTHER: (Specify) Water Spreading

6. CROPS TO BE IRRIGATED: MEADOW GRASS FOR WATERFOWL HABITAT

WATER QUALITY: (TO BE COMPLETED BY SDSU WATER QUALITY LABORATORY)

7. WATER SAMPLE NUMBER: 84-0357
8. SALINITY (EC X 10^6): 110
9. SODIUM (SAR): 0.39
10. ADJUSTED (SAR): 0.38
11. PERCENT SODIUM 19.65

I hereby certify that I personally obtained or that I personally observed that taking of a sample of the water to be used in irrigating the above-described land. I also hereby certify that the required procedures for the taking of the sample (see instruction sheet) were followed, and that the sample was taken at _____ a.m./p.m., on _____, 19_____, at the following location: _____ by (individual who took sample if other than applicant). I also hereby certify that the water sample taken has NOT been adulterated or tampered with in any manner, and is TRULY REPRESENTATIVE of the water which will be used in irrigating the above-described land.

_____
Signature, of Water Sampler.

I understand that the Division of Conservation or agents thereof may obtain water samples from wells and surface bodies to be used for irrigation purposes to validate water samples taken at the time of application. The Department of Agriculture may also gather technical information necessary to protect the land. (46-5-6.4).

SUBSCRIBED AND SWORN BEFORE ME THIS 15TH DAY OF June, 19 84.

Trivet Lee Kelly
(NOTARY PUBLIC)
My Commission Expires April 2, 1986

_____
APPLICANT'S SIGNATURE REGIONAL DIRECTOR

_____
Director, Division of Conservation

9-13-84
Date

_____ APPROVED
_____ DISAPPROVED
X CONDITIONALLY APPROVED

IMPORTANT

Action by the Department of Agriculture or the State Conservation Commission is not the final action on any application. In **all** cases a WATER RIGHT must be obtained from the Board of Water Management, Foss Building, Pierre.

Conditional soil/water permits will be recorded by the Department of Agriculture, with the County Register of Deeds.

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RECEIPT

Division of Water Rights

South Dakota Department of Water and Natural Resources

No 4 9966

Pierre, March 11, 19 85

RECEIVED OF Dept. of Interior U.S. Fish & Wildlife, Water Resources Section, Box 25486, Denver Fed. Center Denver, CO 80225

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

Fee for Application for Permit No. 1926-2 to Appropriate Water, to construct works and to put water to beneficial use	VR	XX 8	XX 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. _____		2	50
Fee for Filing Transfer Form			
Fee for Filing Extension Request			
Fee for Certified Copy of			
Fee for Print Copy of Map			
Fee for Certifying			
Fee for _____ (Any Other Work Provided by Law) **Total**		10	50

By John Hatch
Chief Engineer JOHN HATCH (ms)

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VESTED RIGHT

Considered: _____

Refuge Mgr. Ralph Kraft, Martin
605-685-6508

WATER PERMIT NO. 1926-2

MAP No. Same

Name of Applicant Dept of Interior, US Fish and Wildlife Service

Post Office Address Box 25486, Denver Federal Center, Denver CO 80225

Amount of Water Claimed 3.36 Total Acres 235

Source of Water Supply Springs

Water to be used for IRR FWP County Bennett

About _____ miles _____ of _____.

PROOF OF PUBLICATION: Received _____ Not Received _____

APPLICATION: Approved _____ Subject to _____

F.F.& C.L. Adopted _____ Not Approved _____ Deferred _____

PRIORITY 1/1/39 ~~5/20/33~~ Date Received 7/9/84 Fee $10.50 Remarks _____

To irrigate meadow grass for waterfowl habitat

Corrected Application Received _____ Period of Annual Use _____

WATER QUALITY APPROVAL RECEIVED 9/17/84 APPROVED/CONDITIONAL (Circle one)

WI-1 Description same as Application YES x NO ___ REMARKS _____

Diversion Point _____

see attachment

Land to be Irrigated _____

see attachment

Well Log: Driller _____ Licensed YES ___ NO ___

Depth of Well _____ REMARKS _____

Type of Map drawn PREPARED BY US Fish and Wildlife service Reviewed and the Number assigned on May 6, 1985 By Kevin C. Farran

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Report on
Vested Water Right Claim No. 1926-2
Dept of Interior, US Fish & Wildlife Service
August 28, 1990

Background

Vested Water Right Claim No. 1926-2 claims appropriation of 3.36 cubic feet of water per second (cfs) from 6 springs. The diversion points are located in Sections 25, 26, and 27, T36N-R37W; and Section 30, T36N-R36W, in Bennett County. The water is used to irrigate 235 acres of land to provide wildlife habitat on La Creek National Wildlife Refuge. The land is located in Sections 22, 23, 24, 25, and 26, T36N-R37W; and Section 30, T36N-R36W.

Discussion

Vested Water Right Claim No. 1926-2 claims a priority date of 1939. However, there is no document in the file that would support this date. An affidavit signed by Charles J. Ritter states that he had witnessed water use on the land from 1951 until 1963.

On August 14, 1990, this vested water right claim was inspected. The inspection showed that the land, as shown on the map, is being irrigated and is used for providing wildlife habitat.

Conclusions and Recommendations

1. The claim was inspected and found to exist as described.

2. There is no documentation on file to support a claimed priority date of 1939.

3. It is recommended that Vested Water Right Claim No. 1926-2 be validated for a diversion rate of 3.36 cfs from 6 springs for irrigation of 235 acres with a priority date of January 1, 1951, based on the Charles J. Ritter affidavit.

M. RASSOOL AHADI
Natural Resources Engineer II

Approved By:

DELVIN D. BROSZ, P.E.
Natural Resources Engineer IV

RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT
APPLICATION NO. 1926-2, U.S. Fish and Wildlife Service

Pursuant to SDCL 46-2A-2, the following is the recommendation of the Chief Engineer, Water Rights Division, Department of Water and Natural Resources concerning Water Permit Application No. 1926-2, U.S. Fish and Wildlife Service, Department of Interior, P.O. Box 25486, Denver Federal Center, Denver CO.

The Chief Engineer is recommending VALIDATION of Application No.1926-2 for 3.36 cfs because 1) water has been appropriated as described for irrigation use with a priority date of January 1, 1951, 2) the use has been developed without unlawful impairment of existing rights, 3) the use is a beneficial use and 4) it is in the public interest.

See report on application for additional information.

JOHN HATCH, Chief Engineer
August 30, 1990

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

August 30, 1990

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

Bob Shields, Regional Director
US Fish & Wildlife
Box 25486, DFC
Denver CO 80225

Dear Mr. Shields:

Water Permit Application Nos. 1926-2 and 1927-2 for irrigation and fish and wildlife production 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 Bennett Co. Boosier II printed at Martin SD. For your information, a copy of the notice is enclosed. Copies of the report and the Chief Engineer's recommendation will be sent to you at a later date. 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 Intent to Appropriate Water 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. We must receive Proof of Publication before the application can be considered by the Water Management Board.

Sincerely,

Eric Gronlund

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

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

August 30, 1990

Bennett Co. Booster II
Box 610
Martin SD 57551

ATTN: Legal Publications:

Enclosed is a Notice of Hearing on Application Nos. 1926-2 and 1927-2 to be published twice. Please publish the first notice on or before September 5, 1990 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 Dept of Interior, US Fish and Wildlife, Box 25486, Denver Federal Center, Denver, CO 80225.

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

Please be sure the SECOND publication is returned IMMEDIATELY with the enclosed Proof of Publication form. DO NOT WAIT until the end of the month or the billing cycle. The permit application cannot be considered by the Water Management Board until proof of publication has been received.

Sincerely,

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

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

FIRST TRANSMITTAL NOTICE

No._____

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

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

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_____ _____
Name Newspaper

Instruction to Newspaper - Publish first Notice on or before September 5, 1990 with 2nd publication 7 days later. The applicant is responsible for payment.

NOTICE OF HEARING To Validate Vested
Water Right Application Nos. 1926-2 and 1927-2 to Appropriate Water

Notice is given that U. S. Fish and Wildlife Service, Department of Interior, P.O. Box 25486, Denver Federal Center, Denver CO 80225 has filed applications to validate Vested Water Right Claims No. 1926-2 and No. 1927-2.

Application No. 1926-2 is to validate a vested right claim to appropriate 3.36 cubic feet of water per second from 6 springs to irrigate 235 acres with a priority date of January 1, 1939. The points of diversion are located in the NW1/4 NW1/4, NW1/4 NE1/4 Section 27, SW1/4 NW1/4, SE1/4 NE1/4 Section 26, SE1/4 NW1/4 Section 25; all in T36N-R37W and the SW1/4 NW1/4 Section 30 T36N-R36W. The irrigated acreage is located in the W1/2 SW1/4, S1/2 SE1/4 Section 22, SW1/4 SW1/4, SE1/4 SE1/4 Section 23, E1/2 SW1/4 Section 24, NE1/4 NW1/4 Section 25 and N1/2 Section 26; all in T36N-R37W and the W1/2 NW1/4 Section 30 T36N-R36W.

Application No. 1927-2 is to validate a vested right claim to appropriate 10.0 cubic feet of water per second from Lake Creek to irrigate 700 acres with a priority date of January 1, 1939. The points of diversion are located in the NW1/4 SW1/4, NW1/4 SE1/4 Section 22, SE1/4 SW1/4 Section 23, NW1/4 SE1/4 Section 24; all in T36N-R37W. The irrigated acreage is located in the S1/2 Section 13, Section 22, Section 23, N1/2, NW1/4 SE1/4 Section 24, all in T36N-R37W.

Pursuant to SDCL 46-2A-2, the Chief Engineer of the Water Rights Division recommends VALIDATION of Vested Water Right Application Nos. 1926-2 for 3.36 cfs and 1927-2 for 10.0 cfs because 1) water has been appropriated as described for irrigation with a Janaury 1, 1951 priority date, 2) the use has been developed without unlawful impairment of existing rights, 3) it is a beneficial use of water and 4) it is in the public interest. This application will be considered by the Water Management Board in the Brule County Courthouse, Community Room 300 Courtland, Chamberlain, SD on October 3, 1990 at 10:00 am. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve validation, 2) approve the validation with qualifications, 3) defer or 4) deny validation of the application based on the facts presented at the public hearing.

Any interested person that intends to participate in the hearing on either application before the Board by presenting evidence or cross-examining witnesses according to SDCL 1-26, must file a written petition on the respective application with BOTH the applicant and Chief Engineer by September 21, 1990. The Chief Engineer's address is "Water Rights Division, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)". The petition may be informal, but must include a statement describing the petitioner's interest in the applications, the petitioner's reasons for opposing or supporting the applications and the signature and mailing address of the petitioner or legal counsel if legal counsel is obtained. The applicant need not file a petition. Contact the Water Rights Division to request information on this application or to assure access to the hearing by the handicapped.

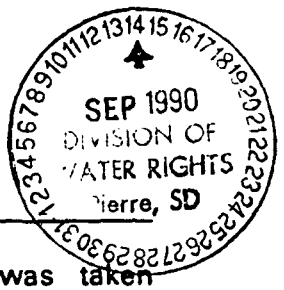
This hearing is an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. The time of the hearing will also be automatically delayed for at least twenty days upon written request to the Chief Engineer from the applicant or a petitioner. The request for a delay must be received by September 21, 1990.

This application is made pursuant to SDCL 46-1-1 thru 46-1-9, 46-1-12 thru 46-1-15; 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-18; 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, 46-5-49; 46-6-3, 46-6-3.1, 46-6-6.1, 46-6-10, 46-6-13, 46-6-14; and Board Rules ARSD 74:02:01:01 thru 74:02:01:15 and 74:02:01:19 thru 74:02:01:22.

Form 8 - Proof of Publication

PROOF OF PUBLICATION

STATE OF SOUTH DAKOTA)
) ss.
County Bennett)



I, Mary E. Long

certify that the attached printed Notice was taken from the Bennett County Booster II

A newspaper which during the whole time of publication of said notice herein after stated, has been and is printed and published in the

City of Martin

County of Bennett and State of South Dakota; that the said notice was published in said newspaper on the following two dates:

September 5, 1990

September 12, 1990

Mary E. Long
(Signature)

Publisher
(Title)

September 12, 1990
(Date Signed)

Cost of Printing: 57.73

NOTICE OF HEARING
To Validate Vested Water Right Application Nos. 1926-2 and 1927-2 to Appropriate Water

Notice is given that U.S. Fish and Wildlife Service, Department of Interior, P.O. Box 25486, Denver Federal Center, Denver, CO., 80225 has filed applications to validate Vested Water Right Claims No. 1926-2 and No. 1927-2.

Application No. 1926-2 is to validate a vested right claim to appropriate 3.36 cubic feet of water per second from 6 springs to irrigate 235 acres with a priority date of January 1, 1939. The points of diversion are located in the NW¼ NW¼, NW¼ NE¼ Section 27, SW¼ NW¼, SE¼ NE¼ Section 26, SE¼ NW¼ Section 25; all in T36N-R37W and the SW¼ NW¼ Section 30 T36N-R36W. The irrigated acreage is located in the W½ SW¼, S½ SE¼ Section 22, SW¼ SW¼, SE¼ SE¼ Section 23, E½ SW¼ Section 24, NE¼ NW¼ Section 25 and N½ Section 26; all in T36N-R37W and the W½ NW¼ Section 30 T36N-R36W.

Application No. 1927-2 is to validate a vested right claim to appropriate 10.0 cubic feet of water per second from Lake Creek to irrigate 700 acres with a priority date of January 1, 1939. The points of diversion are located in the NW¼ SW¼, NW¼ SE¼ Section 22, SE¼ SW¼ Section 23, NW¼ SE¼ Section 24; all in T36N-R37W. The irrigated acreage is located in the S½ Section 13, Section 22, Section 23, N½, NW¼ SE¼ Section 24, all in T36N-R37W.

Pursuant to SDCL 46-2A-2, the Chief Engineer of the Water Rights Division recommends VALIDATION of Vested Water Right Application Nos. 1926-2 for 3.36 cfs and 1927-2 for 10.0 cfs because 1) water has been appropriated as described for irrigation with a January 1 1951 priority date, 2) the use has been developed without unlawful impairment of existing rights, 3) it is a beneficial use of water and 4) it is in the public interest. This application will be considered by the Water Management Board in the Brule County Courthouse, Community Room 300 Courtland, Chamberlain, SD on October 3, 1990, at 10:00 a.m. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve validation, 2) approve the validation with qualifications, 3) defer or 4) deny validation of the application based on the facts presented at the public hearing.

Any interested person that intends to participate in the hearing on either application before the Board by pre-



September 17, 1990

U.S. Fish & Wildlife Service
Department of Interior
P.O. Box 25486
Denver Federal Center
Denver, Colorado 80225

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Chief Engineer
Water Rights Division
Foss Building
523 East Capitol
Pierre, South Dakota 57501

RE: Objections to Applications No. 1926-2 & 1927-2

Gentlemen:

The undersigned hereby petition the above Applicant and Chief Engineer for the right to participate in the hearings scheduled on Applications No. 1926-2 and 1927-2, which are scheduled to be heard on October 3, 1990, at 10:00 A.M., in the Brule County Courthouse in Chamberlain, South Dakota.

The undersigned also requests the automatic delay for at least twenty (20) days to allow the undersigned to adequately prepare for participation in the hearing.

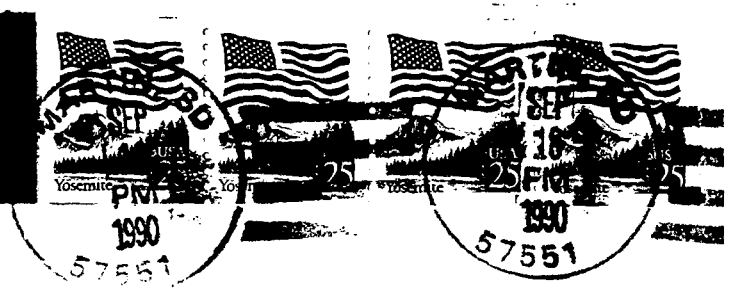
The undersigned are interested in the application because the undersigned are owners or operators or both of real estate located either downstream from the properties in question or adjacent to the properties in question. The undersigned oppose the issuance of either water right because the actions of the Applicant in utilizing and manipulating the water flow through the property controlled by the Applicant has resulted in damage to property owned and controlled by the undersigned.

Name	Address	Date	Signature
Raymond J. Kocer	Martin, S.D.	9-17-90	Raymond J Kocer
BRETT A. HEATH	MARTIN, S.D.	9-17-90	Brett Heath
Randell DeKay	Tuthill SD	9-17-90	Randell DeKay
Lawrence H Kocer	Box 156 Martin SD	9-17-90	Lawrence H Kocer
Kenneth M. Keegan	HWC 3, Box 24 Martin	9-18-90	Kenneth M. Keegan
Charles W. Emley	Box 673 Martin	9-18-90	Charles W Emley

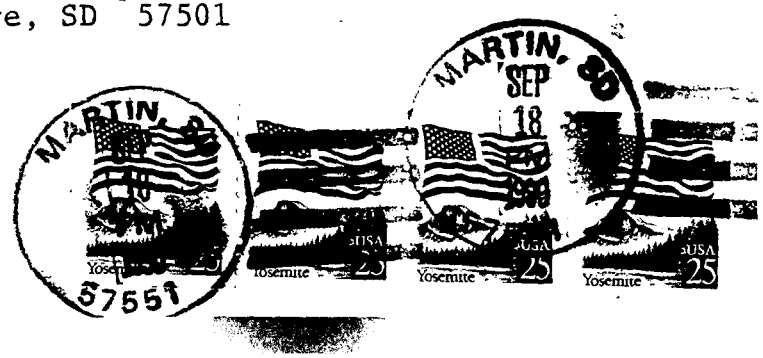
20

Box 628
Martin, SD 57551

CERTIFIED
P 614 019 428
MAIL



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



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United States Department of the Interior
FISH AND WILDLIFE SERVICE

MAILING ADDRESS:
Post Office Box 25486
Denver Federal Center
Denver, Colorado 80225

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:

BA/EN
WR SD
Mail Stop 60190

SEP 1990
DIVISION OF
WATER RIGHTS
Pierre, SD

SEP 19 1990

John Hatch, Chief Engineer
South Dakota Department of
Water and Natural Resources
Water Rights Division
523 East Capitol, Foss Building
Pierre, South Dakota 57501-3181

Dear Mr. Hatch:

The Fish and Wildlife Service Vested Water Right Application Nos. 1926-2 and 1927-2 for the Lacreek National Wildlife Refuge are currently scheduled for consideration by the Water Management Board in the Brule County Courthouse, Chamberlain, South Dakota, on October 3, 1990, at 10:00 a.m.

The Service is currently operating under restrictions of an uncertain fiscal year 1991 budget, imposed travel restrictions for the first 2 weeks of the fiscal year, and notice of possible employee furloughs during the same period. These constraints hinder our efforts for preparation and attendance of an October hearing. We, therefore, request that an extension of at least 60 days be granted so that proper preparation can be accomplished, and the necessary budget and travel arrangements made.

If you have any questions or require further information, please contact either Cheryl Williss or Ginger Chesy of our Engineering Division at (303) 236-5321.

Sincerely,

Acting
Regional Director

22

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

September 24, 1990

NOTICE

TO: U.S. Fish & Wildlife Service
Department of Interior
P.O. Box 25486
Denver Federal Center
Denver, Colorado 80225
and Parties of Record (see attached list)

FROM: John Hatch, Chief Engineer
Water Rights Division
605 773-3352

SUBJECT: Automatic Delay of Hearing on Vested Water Right Application Nos. 1926-2 and 1927-2

A petition opposing Vested Water Right Application Nos. 1926-2 and 1927-2 has been filed with this office. The petition also requests postponement of the hearing. Therefore, the hearing on Application Nos. 1926-2 and 1927-2 is automatically delayed pursuant to SDCL 46-2A-4 and 46-2A-5 and will not be held on October 3, 1990.

The Water Management Board will now consider Application Nos. 1926-2 and 1927-2 on December 5, 1990 at 11:00 am in the Deerfield Room, Hilton Inn, 445 Mt. Rushmore Road, Rapid City, SD. The agenda time is an estimate. The actual time of the hearing may be later that 11:00 am due to prior agenda items. Applicable provisions of the Notice of Hearing published September 5 & 12, 1990 in the Bennett County Booster II will still apply at this hearing.

cc: Cheryl Williss, USF&WS
Rolf Kraft, LaCreek Refuge Manager
Water Management Board
John Guhin, Deputy Attorney General
John Haak, Assistant Attorney General

CERTIFICATION

I hereby certify that on September 24, 1990 I have personally deposited with the U.S. Mail postage prepaid envelopes containing a Notice of Automatic Delay of Hearing on Vested Water Right Application Nos. 1926-2 and 1927-2 addressed as stated on the attached list.

Marie R. Arthur
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 2nd day of October, 1990.

John Hatch
Notary Public

JOHN HATCH
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA
My Commission Expires Apr. 1, 1993

October 11, 1990

Raymond Kocer
Box 388
Martin, SD 57551

Dear Mr. Kocer:

Enclosed are the reports and recommendations prepared for Vested Water Right Claim Nos. 1926-2 and 1927-2 that you requested. I have also attached a copy of water rights law.

You also asked the question of how much water was being passed through LaCreek National Wildlife Refuge. The USGS has a gaging station just below the Refuge which shows median yearly discharge to be 17 cubic feet of water per second (7600 gallons per minute).

If you have any additional questions, please feel free to contact me.

Sincerely,

Eric Gronlund
Water Rights Division
605 773-3352

enc.

United States Department of the Interior
FISH AND WILDLIFE SERVICE

MAILING ADDRESS:
Post Office Box 25486
Denver Federal Center
Denver, Colorado 80225

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:

BA/EN
WR SD
Mail Stop 60190

OCT 23 1990

OCT 1990
DIVISION OF
WATER RIGHTS
Pierre, SD

Chief Engineer
South Dakota Department of
Water and Natural Resources
Joe Foss Building, 523 E. Capitol
Pierre, South Dakota 57501-3181

Dear Sir:

Due to petition of objection and the U.S. Fish and Wildlife Service's (Service) request for extension, the hearing to consider Vested Water Right Application Nos. 1926-2 and 1927-2 for the Lacreek National Wildlife Refuge (NWR) has been rescheduled until December 5, 1990.

Since there are several closely related applications in various stages of completion, the Service requests a further extension until March 1991. It would be in the best interest and more convenient for all concerned parties, that this hearing be postponed and all related Refuge applications be considered at one time.

The following outline is offered as explanation:

1. Application No. 1921-2 to Amend Permit 265-2 is closely related to the subject applications and was submitted at the same time but was delayed pending receipt of a water analysis.

2. The Service is currently preparing an additional application for permit to cover a proposed Ducks Unlimited project on Refuge Pool 9 which should be submitted within the next month.

3. We have begun a full review of the Lacreek NWR water rights and water management practices. Additional applications for permit or application to amend existing rights may result from this review.

4. The solicitor representing the Service at the upcoming hearing was just recently assigned the case and requires additional time in which to prepare.

We appreciate your consideration in this matter. If you have any questions or require further information, please contact either Ginger Chesy or Cheryl Williss at (303) 236-5321.

Sincerely,

William A. Godby
Regional Engineer



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

October 30, 1990

NOTICE

TO: William A. Godby
Post Office Box 25486
Denver Federal Center
Denver, CO 80225
and Parties of Record (see attached list)

FROM: John Hatch, Chief Engineer
Water Rights Division
605 773-3352

SUBJECT: Continuance of Vested Water Right Application Nos. 1926-2 and 1927-2

The hearing by the Water Management Board to consider Vested Water Right Application Nos. 1926-2 and 1927-2 has been continued until the February 27 & 28, 1990 board meeting in Pierre SD. This continuance was requested by the applicant to allow all related Lacreek National Wildlife Refuge applications to be considered at one time.

Future notice will be given of the meeting time and place. Applicable provisions of the Notice of Hearing published September 5 & 12, 1990 in the Bennett County Booster II will still apply at this hearing.

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

cc: John Guhin, Deputy Attorney General
John Haak, Assistant Attorney General

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CERTIFICATION

I hereby certify that on October 30, 1990 I have personally deposited with the U.S. Mail postage prepaid envelopes containing a Notice of Continuance of Vested Water Right Application Nos. 1926-2 and 1927-2 addressed as stated below.

William A. Godby, P.O. Box 25486, Denver Federal Center, Denver CO 80225
Raymond J. Kocer, RR, Martin SD 57551
Brett Heath, HWC 3 Box 20, Martin SD 57551
Wendell DeKay, Tuthill SD 57574
Lawrence H. Kocer, Box 156, Martin SD 57551
Kenneth M. Keegan, HWC 3 Box 24, Martin SD 57551
Charles W. Emley, Box 673, Martin SD 57551

Marie R. Arthur
Marie R. Arthur
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 31st day of October, 1990.

JOHN HATCH
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL
My Commission Expires Apr. 1, 1993

John Hatch
Notary Public

DEPARTMENT OF WATER & NATURAL RESOURCES
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

December 14, 1990

William A. Godby, Regional Engineer
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver, CO 80225

RE: Vested Right Claims for the Lacreek National Wildlife Refuge in Bennett County, South Dakota

Dear Mr. Godby:

Currently, the U.S. Fish and Wildlife Service has two vested right claims for the Lacreek National Wildlife Refuge filed with this office. The claims were filed on July 9, 1984. Since these claims were filed prior to July 1, 1986, the public notice must be published in accordance with South Dakota Codified Law (SDCL) 46-2A-16.

Statute 46-2A-16 states that the notice shall be published once a week for two consecutive weeks in a newspaper of general circulation in the county in which water is diverted or to be used. This notice process also requires a 90 day public comment period with a copy of the notice to be sent to all known water right or water permit holders in that county.

Previous notice for Vested Right Claim Application Nos. 1926-2 and 1927-2 was published in accordance with SDCL 46-2A-4. This notice procedure is insufficient for Vested Right Claims filed prior to July 1, 1986. Based on advice from our attorney, these claims must be published in accordance with SDCL 46-2A-16 to ensure proper notice. Therefore, no hearing will be held before the Water Management Board on February 28, 1991 to consider these vested right claims.

We will be preparing a revised public notice to ensure proper public notice is given. The Water Rights Division will bear the cost of this public notice and notification of current water right and permit holders for Vested Right Claim Nos. 1926-2 and 1927-2.

The public notice process for pending Application No. 1921-2 to change the acres irrigated under Water Permit No. 265-2 and Water Permit Application No. 2147-2 to construct subimpoundment 9B will follow the public notice process in accordance with SDCL 46-2A-4.

I realize this may be an inconvenience for you and your staff, however, we feel it is necessary in order to avoid possible legal entanglements. As you are aware, the refuge's vested right claims and pending permit have met with opposition.

If you or your staff have questions regarding the notice procedure, please contact Eric Gronlund at 605 773-3352.

Sincerely,

John Hatch
Chief Engineer
605 773-3352

cc: Cheryl Williss, USFWS
Ginger Chesy, USFWS
Parties of Record (see attached list)
Pat Ginsbach, Farrell, Farrell & Ginsbach
John Haak, Assistant Attorney General

GREAT FACES. GREAT PLACES.

DEPARTMENT OF WATER & NATURAL RESOURCES
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

December 14, 1990

Pat Ginsbach
Farrell, Farrell & Ginsbach
441 N. River
Hot Springs, SD 57747

Dear Mr. Ginsbach:

Enclosed is the information you requested regarding U.S. Fish and Wildlife Service's applications for Lacreek National Wildlife Refuge. The report and recommendations for Vested Right Claim Application Nos. 1926-2 & 1927-2 are included in this packet, however, the report and recommendations for Water Permit Application Nos. 1921-2 and 2147-2 have not been finalized and will be forwarded to you at a later date.

Also, you should have recently received a letter sent to William Godby of the U.S. Fish & Wildlife Service explaining the need to publish a new notice of intent to validate Vested Right Claim Nos. 1926-2 & 1927-2. A new notice of intent to validate will be published in accordance with SDCL 46-2A-16.

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

Sincerely,

Eric Gronlund

Eric Gronlund
Water Rights Division
605 773-3352

enc.



DEPARTMENT OF WATER & NATURAL RESOURCES
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

January 3, 1991

William A. Godby
PO Box 25486
Denver Federal Center
Denver, CO 80225

Dear Mr. Godby:

The original notice of hearing for Vested Water Right Nos. 1926-2 and 1927-2 were published by error in accordance with SDCL 46-2A-4. Therefore, the notice of hearing needs to be readvertised as a notice of intent to validate in accordance with SDCL 46-2A-16. A notice of intent to validate has been sent to the Publisher of the Bennett Co. Booster II printed at Martin, SD. For your information, a copy of the notice is enclosed. Please review the notice prior to publication and notify this office, if you have any corrections or questions.

The cost of publication of this notice will be paid by the Division of Water Rights. Please contact us if you have any questions.

Sincerely,

Eric Gronlund

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

cc: Ginger Chesy

GREAT FACES. GREAT PLACES.

DEPARTMENT OF WATER & NATURAL RESOURCES
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

January 3, 1991

Bennett Co. Booster II
502 Second Street
Box 610
Martin, SD 57551

Dear Sir:

Enclosed is a Notice of Intent to Validate on Vested Right Nos. 1926-2 and 1927-2 to be published twice. Please publish the first notice on January 9, 1991, with the second publication 7 days later.

Please bill the Water Rights Division for the cost of the advertisement.

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

Please be sure the SECOND publication is returned IMMEDIATELY with the enclosed Proof of Publication form. DO NOT WAIT until the end of the month or the billing cycle. The permit application cannot be considered by the Water Management Board until proof of publication has been received.

Sincerely,

Eric Gronlund

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

---CUT HERE---

FIRST TRANSMITTAL NOTICE

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

No._____

Date_____

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

_____ _____

Name Newspaper

Instruction to Newspaper - Publish first Notice on January 9, 1991 with 2nd publication 7 days later.

NOTICE OF INTENT to Validate
Vested Water Right Claim Nos. 1926-2 and 1927-2
Lacreek National Wildlife Refuge

Notice is given that the following Vested Water Right Claim Nos. 1926-2 and 1927-2 for Lacreek National Wildlife Refuge filed on July 7, 1984 by the U.S. Fish & Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225 are eligible for validation by the Water Management Board pursuant to SDCL 46-2A-17 without a hearing unless a petition to oppose validation is filed pursuant to SDCL 46-2A-16. Readvertisment of the Notice of Hearing on Vested Right Claim Nos. 1926-2 and 1927-2 published September 5 and 12, 1990 in the Bennett County Booster II is necessary because of deficiencies in the original notice.

Vested Right Claim No. 1926-2 claims 3.36 cubic feet of water per second from 6 springs to irrigate 235 acres with claimed priority date of January 1, 1939. The points of diversion from the springs are located in the NW1/4 NW1/4, NW1/4 NE1/4 Section 27, SW1/4 NW1/4, SE1/4 NE1/4 Section 26, SE1/4 NW1/4 Section 25; all in T36N-R37W and the SW1/4 NW1/4 Section 30 T36N-R36W. The irrigated acreage is located in the W1/2 SW1/4, S1/2 SE1/4 Section 22, SW1/4 SW1/4, SE1/4 SE1/4 Section 23, E1/2 SW1/4 Section 24, NE1/4 NW1/4 Section 25 and N1/2 Section 26; all in T36N-R37W and the W1/2 NW1/4 Section 30 T36N-R36W.

Vested Right Claim No. 1927-2 claims 10.0 cubic feet of water per second from Lake Creek to irrigate 700 acres with a claimed priority January 1, 1939. The points of diversion are located in the NW1/4 SW1/4, NW1/4 SE1/4 Section 22, SE1/4 SW1/4 Section 23, NW1/4 SE1/4 Section 24; all in T36N-R37W. The irrigated acreage is located in the S1/2 Section 13, Section 22, Section 23, N1/2, NW1/4 SE1/4 Section 24; all in T36N-R37W.

Any person who wishes to oppose validation of either vested right claim shall, prior to April 17, 1991, file a petition of intent to oppose the validation with the Chief Engineer, Water Rights Division, Department of Water and Natural Resources, Joe Foss Building, 523 East Capitol, Pierre, SD 57501 and with the U.S. Fish and Wildlife Service at the address listed above. The petition may be informal, but it must include a statement describing the petitioner's opposition to the claim, and the signature and mailing address of the petitioner or his legal counsel if legal counsel is obtained.

If a petition of intent to oppose the validation of a vested water right claim is filed, the Chief Engineer will schedule a hearing before the Water Management Board. The parties will be notified of the time and place of the hearing. If no person opposes validation of a vested water right claim pursuant to SDCL 46-2A-16, the Water Management Board will issue an order pursuant to SDCL 46-2A-17, validating the vested water right claims.

The validations are made pursuant to the provisions of SDCL 46-1-1 thru 46-1-9, 46-1-14; 46-2-3.1, 46-2-9, 46-2-11, 46-2-17; 46-2A-16 thru 46-2A-18; 46-5-1 thru 46-5-6.1, 46-5-8.2, 46-5-13 thru 46-5-15, 46-5-30.2 thru 46-5-37.1, 46-5-46, 46-5-49; 46-7-1 thru 46-7-5.3, 46-7-12, 46-7-14, 46-7-15 and Board Rules ARSD 74:02:01:01 thru 74:02:01:05.03 and 74:02:01:20 thru 74:02:01:22.

Any person wishing to assure access to the hearing by the handicapped (if a hearing is held), further information on the claim, the vested right claim list for another county or a summary of South Dakota Water Law and Water Rights Information can contact the Chief Engineer, Water Rights Division, Joe Foss Building, 523 East Capitol, Pierre, SD 57501, (605 773-3352).

Affidavit of Publication



State of South Dakota } ss.
County of Bennett }

Mary E. Long

being duly sworn, says: That Bennett County Booster II is, and during all the times hereinafter mentioned was, a weekly legal newspaper as defined in SDCL 17-2-2, as amended published at Martin, Bennett County, South Dakota by Bennett County Booster Corporation; that affiant is and during all of said times was, an employee of the publisher of such newspaper and has personal knowledge of the facts stated in this affidavit; that the notice, order or advertisement, a printed copy of which is attached, was published in said newspaper for 2 successive issues, bearing the following dates:

January 9, 19 91

January 16, 19 91

_____, 19___

_____, 19___

_____, 19___

_____, 19___

that the full amount of the fee charged for publishing the same, to-wit, the sum of $ 45.16, inures solely to the benefit of the publisher of said newspaper; that no agreement or understanding for the division of the fee has been made with any person, and that no part of the fee has been agreed to be paid to any other person.

Mary E. Long

Subscribed and sworn to before me this 18 day of January 1991

Beth Streff
Notary Public
County of Bennett, South Dakota

NOTICE OF INTENT
To Validate Vested Water Right
Claim Nos. 1926-2 and 1927-2
Lacreek National Wildlife Refuge

Notice is given that the following Vested Water Right Claim Nos. 1926-2 and 1927-2 for Lacreek National Wildlife Refuge filed on July 7, 1984, by the U.S. Fish & Wildlife Service, P. O. Box 25486, Denver Federal Center, Denver, CO 80225 are eligible for validation by the Water Management Board pursuant to SDCL 46-2A-17 without a hearing unless a petition to oppose validation is filed pursuant to SDCL 46-2A-16. Readvertisement of the Notice of Hearing on Vested Right Claim Nos. 1926-2 and 1927-2 published September 5 and 12, 1990, in the Bennett County Booster II is necessary because of deficiencies in the original notice.

Vested Right Claim No. 1926-2 claims 3.36 cubic feet of water per second from 6 springs to irrigate 235 acres with claimed priority date of January 1, 1939. The points of diversion from the springs are located in the NW¼ NW¼, NW¼ NE¼ Section 27, SW¼ NW¼, SE¼ NE¼ Section 26, SE¼ NW¼ Section 25; all in T36N-R37W and the SW¼ NW¼ Section 30 T36N-R36W. The irrigated acreage is located in the W½ SW¼, S½ SE¼ Section 22, SW¼ SW¼, SE¼ SE¼ Section 23, E½ SW¼ Section 24, NE¼ NW¼ Section 25 and N½ Section 26; all in T36N-R37W and the W½ NW¼ Section 30 T36N-R36W.

Vested Right Claim No. 1927-2 claims 10.0 cubic feet of water per second from Lake Creek to irrigate 700 acres with a claimed priority January 1, 1939. The points of diversion are located in the NW¼ SW¼, NW¼ SE¼ Section 22, SE¼ SW¼ Section 23, NW¼ SE¼ Section 24; all in T36N-R37W. The irrigated acreage is located in the S½ Section 13, Section 22, Section 23, N½, NW¼ SE¼ Section 24; all in T36N-R37W.

Any person who wishes to oppose validation of either vested right claim shall, prior to April 17, 1991, file a petition of intent to oppose the validation with the Chief Engineer, Water Rights Division, Department of Water and Natural Resources, Joe Foss Building, 523 East Capitol, Pierre, SD 57501 and with the U.S. Fish and Wildlife Service at the address listed above. The petition may be informal, but it must include a statement describing the petitioner's opposition to the claim, and the signature and mailing address of the petitioner or his legal counsel if legal counsel is obtained.

If a petition of intent to oppose the validation of a vested water right claim is filed, the Chief Engineer will schedule a hearing before the Water Management Board. The parties will be notified of the time and place of the hearing. If no person opposes validation of a vested water right claim pursuant to SDCL 46-2A-16, the Water Management Board will issue an order pursuant to SDCL 46-2A-17, validating the vested water right claims.

The validations are made pursuant to the provisions of SDCL 46-1-1 thru 46-1-9, 46-1-14, 46-2-3.1, 46-2-9, 46-2-11, 46-2-17, 46-2A-16 thru 46-2A-18, 46-5-1 thru 46-5-6.1, 46-5-8.2, 46-5-13 thru 46-5-15, 46-5-30.2 thru 46-5-37.1, 46-5-46, 46-5-49, 46-7-1 thru 46-7-5.3, 46-7-12, 46-7-14, 46-7-15 and Board Rules ARSD 74:02:01:01 thru 74:02:01:05.03 and 74:02:01:20 thru 74:02:01:22.

Any person wishing to assure access to the hearing by the handicapped (if a hearing is held), further information on the claim, the vested right claim list for another county or a summary of South Dakota Water Law and Water Rights Information can contact the Chief Engineer, Water Rights Division, Joe Foss Building, 523 East Capitol, Pierre, SD 57501, (605) 773-3352.

2t 32

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DEPARTMENT OF WATER & NATURAL RESOURCES
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

GREAT FACES. GREAT PLACES.

January 3, 1991

Pat Ginsbach
Farrell, Farrell & Ginsbach
441 N. River
Hot Springs, SD 57747

Dear Mr. Ginsbach:

Enclosed is the Notice of Intent to Validate Vested Right Claim Nos. 1926-2 and 1927-2. These vested right claims had been filed by the U.S. Fish & Wildlife Service for the Lacreek National Wildlife Refuge.

This notice will be published for two consecutive weeks in the Bennett County Booster II and a copy of the notice will be sent to all known water right/permit holder in Bennett County in accordance with SDCL 46-2A-16.

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

Sincerely,

Eric Gronlund

Eric Gronlund
Water Rights Division
605 773-3352

enclosure

Water Rights Division - DENR
Conversation File Documentation

NAME OF PERSON OR FILE: **U.S. Fish and Wildlife Service**

ADDRESS: **Denver, CO** COUNTY: **Bennett**

DATE: **1/5/91** TELEPHONE: **303 236-5321**

RE: **Discussion with Cheryl Williss and Ginger Chesy of USFWS**

COMMENTS:

I returned Cheryl Williss and Ginger Chesy's phone call regarding Water Permit Application No. 2191-2. They feel the U.S. Water Withdrawal that we felt might have covered the use of water they were applying for was too general and they want to move forward with the application. The reasons they gave for the water use not being covered by the U.S. Water Withdrawal were:

1) The USFWS had filled out a completion report on the U.S. Water Withdrawal that did not include the use of water from the springs.

2) The property that the springs are located on were not part of the refuge when the U.S. Water Withdrawal was issued.

We also discussed the timing of the hearing on USFWS applications before the Water Management Board. I stated that I would like to schedule the hearings for the March meeting so the entire Board could hear the testimony. They indicated that they may have a witness problem during the winter period and would prefer the hearing be held in May (the witness will not fly and will only drive if weather conditions permit). I indicated what we might do is schedule the hearing for the March meeting and then either the applicant or parties in opposition could ask for a automatic delay which would continue the hearings until the May meeting.

File in Permit or other file as necessary. Use to document conversations and what the other party was told; why action or decision was made.

NAME: Eric Gradlund

GREAT FACES. GREAT PLACES.

DEPARTMENT OF WATER & NATURAL RESOURCES
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

January 7, 1991

NOTICE

TO: Water Right and Water Permit Holders
Bennett County

FROM: John Hatch, Chief Engineer
Water Rights Division
605 773-3352

SUBJECT: Notice of Intent to Validate Vested Water Right Claims

Enclosed is a Notice of Intent to Validate Vested Water Right Claim Nos. 1926-2 and 1927-2, Lacreek National Wildlife Refuge, U.S. Fish and Wildlife Service. State Statute 46-2A-16 requires that a copy of the notice of intent to validate a vested right claim filed prior to July 1, 1986 be mailed to all known water right or water perit holders in that county. This notice will also be published for two consecutive weeks in the Bennett County Booster II.

Validation is a legal procedure where those vested water right claims established prior to 1907 or between 1907 and 1955 without publication and notice, may be quantified, validated and have official legal status.

If you have questions, please contact the Water Rights Division, Department of Water and Natural Resources, Joe Foss Building, 523 East Capitol, Pierre, SD 57501-3181, (605) 773-3352.

enclosure



DEPARTMENT OF WATER & NATURAL RESOURCES
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

February 21, 1991

Ginger Chesy
US Fish and Wildlife Service
Denver Federal Center
Box 25486
Denver, CO 80225

Dear Ginger:

As you requested, enclosed please find copies of documents regarding Mr. George Heath.

I believe the problem started shortly after Mr. Heath purchased the land adjacent to the Refuge. Jim Winterton responded to the complaint and investigated the problem. Jim does not work for the State any more.

If I can be of further assistance, please let me know.

Sincerely,

MRAhadi

M. RASSOOL AHADI
Natural Resources Engineer III
Phone: (605)773-3352

enclosures

South Dakota

GREAT FACES. GREAT PLACES.

DEPARTMENT OF WATER & NATURAL RESOURCES
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

March 14, 1991

NOTICE

TO: William Godby, Regional Engineer
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver, CO 80225

FROM: John Hatch, Chief Engineer
Water Rights Division
605 773-3352

SUBJECT: Notice of Intent to Intervene in Vested Right Claim Nos. 1926-2 and 1927-2

I am writing to notify you that pursuant to the Notice of Intent to Validate Vested Water Right Claim Nos. 1926-2 and 1927-2 that I intend to oppose validation of these claims. The basis for the opposition from the Chief Engineer is that there was not sufficient documentation submitted to support the priority claim date of January 1, 1939. The affidavit submitted by Charles J. Ritter provided documentation of water use since 1951.

A hearing will now be scheduled before the Water Management Board. Future notice will be provided of time and place of the hearing. Applicable provisions of the notice of intent to validate published on January 9 & 16, 1991 in the Bennett County Booster II will still apply at this hearing.

cc: Diane Best, Assistant Attorney General
Ginger Ghesy, USFWS
Pat Ginsbach

CERTIFICATION

I hereby certify that on March 14, 1991, I have personally deposited with the U.S. Mail, postage prepaid envelopes containing a Notice of Intent to Intervene in Vested Right Claim Nos. 1926-2 and 1927-2 addressed as stated on the Notice.

Jaci R. Konop

JACI R. KONOP
Senior Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 15th day of March, 1991.

JOHN HATCH
NOTARY PUBLIC
SEAL SOUTH DAKOTA SEAL
My Commission Expires Apr. 1, 1993

John Hatch
Notary Public

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD



WENDELL DeKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, vs. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	PETITION TO OPPOSE APPLICATION FOR VALIDATION OF VESTED WATER RIGHT CLAIMS NOS. 1926-2, 1927-2 and 1921-2

COMES NOW WENDELL DeKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, by and through their lawyers of record, Farrell, Farrell & Ginsbach, and for their Petition to Oppose state and allege as follows:

I.

THAT the Petitioners are all landowners residing within Bennett County, South Dakota, and are affected by the Application of the United States Fish and Wildlife Service to validate Claim Nos. 1926-2, 1927-2 and 1921-2.

II.

THAT the Petitioners opposed the Applications of the United States Fish and Wildlife Service for the following reasons:

a. That the use has been developed so that it has unlawfully impaired the existing rights of the Petitioners in that the use has damaged privately owned crop land, has started to develop saline problems, and has impaired the use of the water by Petitioners;

b. That the use is not a beneficial use in that it has not developed good forage for wildlife, and to allow the continuing use of the water management practices that the United States Fish and Wildlife Service presently exercises will not improve the conditions for wildlife, nor is the flooding of

land, in the manner in which the practice is exercised by the United States Fish and Wildlife Service, a beneficial use of the water since it allows water to be appropriated for the purpose of cultivating food for wildfowl on land that is unenclosed and uncultivated;

c. That the use of the water is not in the public interest in that it allows water to be used in such a manner as to constitute waste and for the support of wildlife and wildfowl when the United States Fish and Wildlife Service presently has sufficient water to handle those needs without the validation and appropriation of further water rights;

d. That water has not been appropriated as described in Application Nos. 1927-2, 1926-2 and 1921-2 for irrigation use with a priority date of 1939, or 1951, and in fact water was not used on the land from 1946 through 1974.

III.

THAT the Petitioners, in addition to themselves testifying, expect to call approximately seven other witnesses, most of whom are residents of Bennett County, South Dakota, including the owners and users of the land which is the subject of Application Nos. 1927-2, 1926-2 and 1921-2 prior to its acquisition by the United States Fish and Wildlife Service, and the Petitioners request a postponement from the hearing scheduled in May, 1991 and respectfully request that the Water Management Board schedule this matter for hearing in Martin, South Dakota, for the convenience of these witnesses upon whom it would work a hardship to have to travel to Pierre, South Dakota because of the distance and because the majority of the witnesses' present occupation is farming and ranching and the springtime of the year is a critical time for the parties because they are either calving cow herds or preparing the land for cultivation, and further that the Petitioners believe that an examination of the land and the practices of the United States Fish and Wildlife Service in Bennett County,

South Dakota, will be beneficial to the Water Management Board to help them understand the evidence and testimony of the Petitioners in opposition to Application Nos. 1927-2, 1926-2 and 1921-2; or, in the alternative, the Petitioners would request that the Water Management Board appoint a hearing examiner to take testimony and make recommendations to the Water Management Board concerning the United States Fish and Wildlife Service Application Nos. 1927-2, 1926-2 and 1921-2.

WHEREFORE, Petitioners respectfully request the Water Management Board to deny Application Nos. 1927-2, 1926-2 and 1921-2, and grant such other and further relief as the Water Management Board deems just and equitable.

Dated this 15 day of April, 1991.

FARRELL, FARRELL & GINSBACH

JANE M. FARRELL

PATRICK M. GINSBACH
Farrell, Farrell & Ginsbach
Lawyers for the Petitioners
441 North River St.
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed a true and correct copy of the foregoing Petition to the individuals herein next designated, all on the date below shown, by depositing the same in the United States mail in an envelope securely sealed and with first-class postage thereon fully prepaid and addressed to:

John Hatch, Chief Engineer
Dept. of Water and Natural Resources
Joe Foss Bldg.
523 East Capitol Ave.
Pierre, SD 57501-3181

William A. Godby
Regional Engineer
United States Fish and Wildlife Service
Denver Federal Center
P.O. Box 25486
Denver, CO 80225

on the 15 day of April, 1991.

Patrick M. Ginsbach

PATRICK M. GINSBACH

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD



WENDELL DeKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners,	MOTION FOR CONTINUANCE/
vs.	APPOINTMENT OF HEARING EXAMINER
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	

COME NOW the Petitioners, WENDELL DeKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, by and through their lawyers of record, Farrell, Farrell & Ginsbach, and move the Water Management Board pursuant to SDCL 46-2A-5, for a postponement of the hearing scheduled for May 1, 1991, in Mitchell, South Dakota, concerning the Applications filed by the United States Fish and Wildlife Service for validation of Water Right Nos. 1926-2, 1927-2 and 1921-2, and for the matter to be rescheduled and heard in Bennett County, South Dakota, and respectfully request the Water Management Board to conduct any hearing in this matter at the Bennett County Courthouse in Martin, South Dakota, or, in the alternative, to appoint a hearing examiner to take testimony and evidence concerning the Petitioners' opposition to Application Nos. 1927-2, 1926-2 and 1921-2, upon the following grounds and reasons:

1. The Petitioners are all residents of Bennett County, South Dakota, and engaged in farming or ranching activities and during the month of May the Petitioners' business activities include either calving out their cattle herds or preparing the cattle herd to be bred for the following year, or cultivating the land or planting crops, and as such it would work a hardship upon them to have to take time away from their occupation at this crucial time of the year to

be present and give testimony in Mitchell, South Dakota, on their Petition in Opposition; and

2. In addition to the Petitioners' testimony, they would also intend to call a number of fact witnesses, approximately seven in number, who from their investigation have testimony and information which are pertinent to the Petition in Opposition, and it would be extremely difficult to physically arrange to have these witnesses travel to Mitchell, South Dakota, to give testimony or to Pierre, South Dakota, because some of the witnesses are also involved in farming and ranching and at this time of the year it would be impossible for them to leave their business activities behind to give testimony; and

3. The water rights which the United States Fish and Wildlife Service wishes to validate are part of the entire operation of the LaCreek Wildlife Refuge and for the Water Management Board to gain a better understanding of the practices and how the United States Fish and Wildlife Service wishes to put to use this water the Petitioners believe that it will be necessary for the Water Management Board to inspect the land area affected by these applications and the manner in which the water is presently being used to show the detrimental and harmful effect it has upon the Petitioners, this visual inspection would include the damage that has been done to crop land, the evidence of the development of saline problems, the waste committed by the United States Fish and Wildlife Service, and the use of the water.

WHEREFORE, the Petitioners respectfully request the Water Management Board to adjourn the hearing scheduled for May 1, 1991 in Mitchell, South Dakota and to reschedule the matter for hearing at the Bennett County Courthouse in Martin, South Dakota some time during the summer of 1991, or, in the alternative, to appoint a hearing examiner to take testimony in this matter pursuant to SDCL 1-26-18.1.

Dated this 15 day of April, 1991.

FARRELL, FARRELL & GINSBACH

JANE M. FARRELL

PATRICK M. GINSBACH
Farrell, Farrell & Ginsbach
Attorneys for the Petitioners
441 North River St.
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed a true and correct copy of the foregoing Motion to the individuals herein next designated, all on the date below shown, by depositing the same in the United States mail in an envelope securely sealed and with first-class postage thereon fully prepaid and addressed to:

John Hatch, Chief Engineer
Dept. of Water and Natural Resources
Joe Foss Bldg.
523 East Capitol Ave.
Pierre, SD 57501-3181

William A. Godby
Regional Engineer
United States Fish and Wildlife Service
Denver Federal Center
P.O. Box 25486
Denver, CO 80225

on the 15 day of April, 1991.

PATRICK M. GINSBACH

Parties of Record before Water Management Board WP Appl No. 1921-2

VR Claim Nos. 1926-2 & 1927-2 (US Fish & Wildlife Service)

William Godby, Regional Engineer
U.S. Fish & Wildlife Service
Denver Federal Center
Box 25486
Denver, CO 80225

John Kunz
Rocky Mountain Regional Solicitor's Office
730 Simms St - Suite 450
Golden, CO 80401

OPPONENTS

Jane Farrell
Pat Ginsbach
Attorney at Law
441 N River
Hot Springs, SD 57747

Representing:
Raymond Kocer, RR, Martin, SD 57551
Lawrence Kocer, Box 156, Martin, SD 57551
Wendell DeKay, Tuthill, SD 57574
Charles Emley, Box 673, Martin, SD 57551
Brett Heath, HWC 3, Box 20, Martin, SD 57551

(1926-2 & 1927-2 only)
Kenneth Keegan, HWC 3, Box 24, Martin, SD

DEPARTMENT OF WATER & NATURAL RESOURCES
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

April 23, 1991

NOTICE

TO: William A. Godby, Regional Engineer
U.S. Fish and Wildlife Service
Denver Federal Center
P.O. Box 25486
Denver, CO 80225
and Parties of Record (see attached list)

FROM: John Hatch, Chief Engineer
Water Rights Division
605 773-3352

SUBJECT: Automatic Delay of Hearing on Water Permit Application No. 1921-2 and Postponement of Hearing of Validation of Vested Right Claim Nos. 1926-2 and 1927-2.

On April 17, 1991, a petition opposing Water Permit Application No. 1921-2 and Vested Right Claim Nos. 1926-2 and 1927-2 was received from Jane Farrell and Patrick Ginsbach, attorneys representing Wendell DeKay, Charles Emley, Brett Heath, Raymond Kocer and Lawrence Kocer. The petition also requested a postponement of the May 1, 1991 hearing and that the Water Management Board schedule this matter for a hearing in Bennett County. Therefore, the hearing on Application No. 1921-2 is automatically delayed pursuant to SDCL 46-2A-4 and 46-2A-5 and will **NOT** be held on May 1, 1991. The hearing to consider validation of Claim Nos. 1926-2 and 1927-2 will be scheduled with Application No. 1921-2.

The Water Management Board will consider at the May 1, 1991 meeting the request for the hearing to be held in Bennett County or that a hearing examiner be appointed. This request will be heard at 10:00 am in the meeting room at Chef Louie's, 601 E. Havens, Mitchell, SD. The agenda time is an estimate and may be delayed due to prior agenda items. There will be no testimony and evidence taken during the May 1, 1991 meeting concerning Application No. 1921-2 and Claim Nos. 1926-2 and 1927-2.

Notice of the time and place of the hearing will be given at a later date.

cc: Water Management Board
John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General

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4/22/91
(date)

page _____

Parties of Record before Water Management Board WP Appl No. 1921-2
(US Fish & Wildlife Service) & VR Claim Nos. 1926-7 & 19

	Opponents
William Godby, Regional Engineer	
U.S. Fish & Wildlife Service	Jane Farrell
Denver Federal Center	Pat Ginsbach
Box 25486	Attorney at Law
Denver, CO [redacted]225	441 N. River
	Hot Spring, SD 57747
	Representing
	Raymond Roser
	Lawcense Roser
	Wendell DeKay
	Charles Emley
	Brett Heath

CERTIFICATION

I hereby certify that on April 23, 1991 I have personally deposited with the U.S. Mail postage prepaid envelopes containing a Notice of Delay of Hearing on Water Permit Application No. 1921-2 and Postponement of Hearing of Validation of Vested Right Claim Nos. 1926-2 and 1927-2 addressed William A. Godby, Regional Engineer, U.S. Fish and Wildlife Service, Denver Federal Center, P.O. Box 25486, Denver, CO 80225 and Parties of Record.

Cheryl F. Frost

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 24th day of April, 1991.

John Hatch

Notary Public

JOHN HATCH
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA
My Commission Expires Apr. 1, 1993



STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER,	)	
Petitioners,	)	APPLICATION FOR VALIDATION OF VESTED WATER RIGHT CLAIMS
v.	)	
UNITED STATES FISH AND WILDLIFE SERVICE,	)	
Applicant.	)	Nos. 1926-2, 1927-2, & 1921-2

MOTION FOR CONTINUANCE/SETTING OF HEARING DATE

COMES NOW the United States Fish and Wildlife Service (FWS), a component agency of the United States Department of the Interior, by and through counsel, and pursuant to SDCL 46-2A-5, hereby requests that, irrespective of where the hearing might be held, the hearing in the subject matter be continued until the Water Management Board's next regularly-scheduled meeting in October, 1991. The reason for this request is that FWS will need all of this time to adequately prepare its case and respond to the objections raised in the petitioners' Petition to Oppose. This continuance is not being sought for purposes of delay, and previous to this request, FWS has not sought, nor has it been granted, any other continuances in the subject case.

For the above reasons, FWS believes that good cause exists for granting this request, and hereby states that the granting of this request will best serve the interests of justice.

DATED this 26th of April, 1991.

John R. Kunz
For the Regional Solicitor
Rocky Mountain Region
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225
(303) 236-8444

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 1991, true and correct copies of the foregoing Response to Motion for Continuance/Appointment of Hearing Examiner were mailed, via overnight mail, to the following:

Mr. John Hatch, Chief Engineer
Water Rights Division
Dept. of Water & Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

Jane M. Farrell, Esq.
Patrick M. Ginsbach, Esq.
Farrell, Farrell, & Ginsbach
441 North River Street
Hot Springs, SD 57747

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES



WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER,	)	
Petitioners,	)	APPLICATION FOR VALIDATION OF VESTED WATER RIGHT CLAIMS
v.	)	
UNITED STATES FISH AND WILDLIFE SERVICE,	)	
Applicant.	)	Nos. 1926-2, 1927-2, & 1921-2

RESPONSE TO MOTION FOR CONTINUANCE/
APPOINTMENT OF HEARING EXAMINER

COMES NOW the United States Fish and Wildlife Service (FWS), a component agency of the United States Department of the Interior, by and through counsel, and hereby responds to the petitioners' Motion for Continuance/Appointment of Hearing Examiner.

In their motion, petitioners ask that the hearing in this matter be held at the Bennett County Courthouse, Martin, South Dakota, or in the alternative, that a hearing examiner be appointed to take evidence and testimony. Petitioners also move the Water Management Board (the Board) to continue the subject hearing to "some time during the summer of 1991."

By this response, FWS hereby states for the record that it has no objection to this matter being heard in Martin, South

Dakota. Moreover, FWS does not object to the hearing of this matter being continued. Indeed, as evinced by the separate Motion for Continuance filed herewith, FWS desires that the subject hearing be conducted in October, 1991.

However, FWS is concerned with, and hereby objects to, petitioners' request that a hearing examiner be appointed to hear this matter. FWS's concern is that, if a hearing examiner is appointed, undoubtedly one side or the other will disagree with the examiner's proposed findings of fact, conclusions of law, and decision. Depending on the parties' respective positions, this will no doubt result in a need for further appearances before the full Board to move the Board to either accept, reject, or modify the examiner's findings, conclusions, and/or decision. Indeed, it is conceivable that one or both of the parties may even seek a *de novo* review of the case by the full Board. Since the resolution of this case will ultimately rest with the full Board anyway, it makes little sense to go through the intermediate step of utilizing a hearing examiner, and incurring the additional (and unnecessary) time and expense that this process would entail.

Additionally, and solely for the purposes of illustration and not by way of impugning the impartiality or integrity of any individual member of the Board, the FWS hereby respectfully submits that the interests of justice would be

better served if the subject case were heard before the full panel of the Board. For these reasons, FWS hereby objects to the petitioners' request that a hearing examiner be appointed, and moves that this matter be heard before the full Board.

DATED this 26th day of April, 1991.

John R. Kunz
For the Regional Solicitor
Rocky Mountain Region
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225
(303) 236-8444

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 1991, true and correct copies of the foregoing Response to Motion for Continuance/Appointment of Hearing Examiner were mailed, via overnight mail, to the following:

Mr. John Hatch, Chief Engineer
Water Rights Division
Dept. of Water & Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

Jane M. Farrell, Esq.
Patrick M. Ginsbach, Esq.
Farrell, Farrell, & Ginsbach
441 North River Street
Hot Springs, SD 57747



John R. Kn

FARRELL, FARRELL & GINSBACH
LAWYERS
441 NORTH RIVER STREET
HOT SPRINGS, SOUTH DAKOTA 57747

(605) 745-5161

Martin P. Farrell
Jane M. Farrell
Patrick M. Ginsbach

Beverly J. Irwin
Certified Legal Assistant



May 2, 1991

Rodney Freeman, Chairman
South Dakota Water Management Board
P.O. Box 176
Huron, SD 57350

Re: DeKay et al v. United States Fish and Wildlife Service;
Contested Hearing for validation of water rights contained in
Application Nos. 1927-2, 1926-2 and
For Change of Use in Application No. 1921-2

Dear Chairman Freeman:

This is to confirm the telephone call I had with you on Wednesday evening, May 1, 1991.

As I explained to you in the telephone call, I understood on Wednesday morning that the Board was appointing Joel Rickenbach, who is a member of the Water Management Board, to act as the hearing examiner in the above-referenced contested case. Upon my return to my law office in Hot Springs on Wednesday evening, my senior partner, Martin P. Farrell, informed me that he had performed legal services for Mr. Rickenbach in the past although he was not currently representing Mr. Rickenbach in performing any legal services.

Based upon my limited research, I could not find any case authority as to whether or not it would be a conflict for Mr. Rickenbach to continue acting as the hearing examiner in light of the fact that one of my partners has performed legal services for him in the past and we are representing one of the parties in the contested case proceeding in the above-referenced matter. I believe Mr. Rickenbach could act as a fair and impartial hearing examiner and would have no objection to him continuing as hearing examiner if that is the wish of the Board.

You asked me to send you a letter in writing disclosing this information and to provide a copy to the attorney for the United States Fish and Wildlife Service so that he would have an opportunity to respond. Therefore, I am providing a copy of this letter to John R. Kunz, the Regional Solicitor's Office, for the Rocky Mountain Region, and to John Hatch, the Chief Engineer, and Dianne Best, Assistant Attorney General for the Water Rights Division.

Yours truly,

PATRICK M. GINSBACH
PMG/bji
cc: John Hatch
John R. Kunz
Dianne Best

60

STATE OF SOUTH DAKOTA

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

MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

MAY 1991
WATER RIGHTS
Pierre, SD

May 8, 1991

Patrick Ginsbach
Attorney at Law
441 North River St.
Hot Springs, SD 57747

Re: DeKay et al. v. United States Fish and Wildlife Service; Contested Hearing for validation of water rights contained in Application Nos. 1927-2, 1926-2 and For Change of Use in application No. 1921-2

Dear Mr. Ginsbach:

This letter is confirm our telephone conversation of May 8, 1991, wherein we discussed your concerns regarding the appointment of Mr. Joel Rickenbach as hearing examiner in the above-entitled proceeding. Apparently one of your law partners has performed legal services for Mr. Rickenbach at some point in the past.

The Division of Water Rights has no objection to the continued appointment of Mr. Rickenbach as hearing examiner in this matter. It is the position of the Division of Water Rights that Mr. Rickenbach would be a fair and impartial hearing examiner.

Sincerely,

Diane

Diane Best
Assistant Attorney General

DB:js
cc: John R. Kunz
John Hatch
Rodney Freeman
John Guhin

United States Department of the Interior
OFFICE OF THE SOLICITOR
ROCKY MOUNTAIN REGION
730 SIMMS STREET - SUITE 450
GOLDEN, COLORADO 80401

TELE: 303/236-8444
FTS: 776-8444
FAX: 303/236-8644
FTS: 776-8644

MAILING ADDRESS:
P.O. BOX 25007
DENVER FEDERAL CENTER
DENVER, COLORADO 80225

TAKE PRIDE IN AMERICA

May 9, 1991

FWS.RM.0636

Mr. Rodney Freeman
Chairman, South Dakota Water Management Board
P.O. Box 176
Huron, SD 57350

Re: DeKay et al. v. United States Fish and Wildlife Service; Contested Hearing in Application Nos. 1927-2, 1926-2, and 1921-2

Dear Chairman Freeman:

I recently received a copy of a May 2, 1991, letter sent to you from Mr. Patrick M. Ginsbach. In that letter, Mr. Ginsbach stated his understanding that Mr. Joel Rickenbach, a member of the Water Management Board, has been appointed to act as the hearing examiner in the captioned matter. Mr. Ginsbach further indicated that Mr. Martin P. Farrell (Mr. Ginsbach's senior partner) has previously performed legal services for Mr. Rickenbach. Apparently, Mr. Farrell is not currently performing any legal services for Mr. Rickenbach. Lastly, Mr. Ginsbach stated that he was providing me with a copy of his letter so that I would have an opportunity to respond.

I appreciate Mr. Ginsbach's forthrightness in disclosing this matter, and the opportunity to respond. In light of the above situation, although I too am unable to state any case authority indicating whether it would be a conflict for Mr. Rickenbach to continue to be the hearing examiner, for the following reasons, I think that it would be prudent to appoint another hearing examiner.

It cannot be denied that there has been a past relationship between Messrs. Farrell and Rickenbach. Although Mr. Farrell is not currently representing Mr. Rickenbach, there is no guarantee that this relationship will not continue at some point in the future. Given the fact that there has been and might continue to be a professional relationship between Messrs. Farrell and Rickenbach, there is at least the possibility of an existing or future conflict. Admittedly, Mr. Ginsbach is not a direct party to the relationship between Messrs. Farrell and Rickenbach. However, it is a well-established principle that a conflict as to one member of a firm is a conflict as to all members of the firm.

For these reasons, and to avoid the mere appearance of impropriety, I would object to the appointment of Mr. Rickenbach and would strongly suggest that another hearing examiner be appointed.

I wish to emphasize that I am not attacking Mr. Rickenbach's credibility or impartiality. I have no reason to believe that Mr. Rickenbach would not be a fair and impartial hearing examiner. However, for the reasons stated, I firmly believe that the most prudent and professional approach would be to appoint a new hearing examiner.

Thank you and Mr. Ginsbach for giving me the opportunity to comment on this matter. I look forward to the Board's ruling. Incidentally, I have not yet received a copy of the Board's ruling concerning the hearing held on May 1-2, 1991. I am particularly interested in knowing when and where the scheduled hearing for the captioned matter will be. I assume that an order of the Board will be forthcoming, and I also look forward to receiving a copy of the same. Thank you for your consideration.

Sincerely,

John R. Kunz
For the Regional Solicitor
~~Rocky~~ Mountain Region

cc: Patrick M. Ginsbach, Esq.
Farrel, Farrell and Ginbach
441 North River Street
Hot Springs, S.D. 57747

Ginger Chesy, Region 6, U.S. Fish and Wildlife Service



DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3181

May 10, 1991

1926-2

NOTICE

TO: William Godby, Regional Engineer
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225
and Parties of Record (see attached sheet)

FROM: John Hatch, Chief Engineer
Water Rights Division
605 773-3352

SUBJECT: Appointment of a Hearing Officer for Water Permit Application No. 1921-2 and Vested Water Right Claim Nos. 1926-2 and 1927-2

On May 1, 1991, the Water Management Board appointed Joel Rickenbach to act as hearing examiner for Water Permit Application No. 1921-2 and Vested Water Right Claim Nos. 1926-2 and 1927-2. A hearing will now be scheduled in Bennett County. A future notice of the hearing time and place will be sent to all parties in the upcoming weeks.

Applicable provisions of the Notice of Hearing published March 27, 1991 and April 3, 1991 for Water Permit Application No. 1921-2 and January 9 & 16, 1991 for Vested Water Right Claim Nos. 1926-2 and 1927-2 in the Bennett County Booster II will still apply at this hearing.

This hearing is an adversary proceeding. Any person having filed a petition and the applicant have the right to be represented by a lawyer. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and the State Supreme Court as provided by law.

cc: Diane Best, Assistant Attorney General
John Kunz, US Fish & Wildlife Service
Ginger Chesy, US Fish & Wildlife Service

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Parties of Record for Vested Water Right Application No. 1926-2
U.S. Fish & Wildlife Service
September 18, 1990

U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Raymond J. Kocer
RR
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Wendell Dekay
Tuthill
South Dakota 57574

Lawrence H. Kocer
Box 156
Martin, SD 57551

Charles W. Emley
Box 673
Martin, SD 57551

Pat Ginsbach
Farrell, Farrell & Ginsbach
441 N. River
Hot Springs, SD 57747
745-5161

1926-2

CERTIFICATION

I hereby certify that on May 10, 1991 I have personally deposited with the U.S. Mail postage prepaid envelopes containing a Notice of Appointment of a Hearing Officer for Water Permit Application No. 1921-2 and Vested Water Right Claim Nos. 1926-2 and 1927-2 addressed as follows:

William Godby, Regional Engineer, U.S. Fish & Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

John Kunz, U.S. Fish & Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

Ginger Chesy, U.S. Fish & Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

Parties of Record:

Raymond J. Kocer, RR, Martin, SD 57551.
Brett Heath, HWC 3, Box 20, Martin, SD 57551.
Wendell Dekay, Tuthill, SD 57574.
Lawrence H. Kocer, Box 156, Martin, SD 57551.
Charels W. Emley, Box 673, Martin, SD 57551.
Pat Ginsbach, Farrell, Farrell & Ginsbach, 441 N. River, Hot Springs, SD 57747.

Interoffice 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 14th day of May, 1991.

JOHN HATCH
NOTARY PUBLIC SOUTH DAKOTA
SEAL SEAL
My Commission Expires Apr. 1, 1993

John Hatch

Notary Public

SPECIAL TELEPHONIC MEETING OF THE WATER MANAGEMENT BOARD
DULY CALLED BY CHAIRMAN FREEMAN
ROOM 413, JOE FOSS BUILDING, PIERRE, SD
MAY 24, 1991

Those present for the telephonic Water Management Board meeting were Board members: Rodney Freeman, Marian Gunderson, Francis Brink, Roger VanderVorst, Dwayne Rollag

John Kunz, attorney, representing U.S. Fish & Wildlife Service

Pat Ginsbach, attorney for opposing parties

Water Rights Division

John Hatch
Eric Gronlund
Rassool Ahadi
Jaci Konop

Deputy Attorney General

John Guhin

Assistant Attorney General

Diane Best

The meeting was formally called to order by Chairman Freeman at 10:05 am.

Chairman Freeman stated that the record should show that the telephone operator is trying to get Joel Rickenbach on the line to join in the meeting.

Chairman Freeman stated that this meeting was called to appoint another hearing officer to conduct a hearing on Water Permit Application No. 1921-2 and Vested Water Right Claim Nos. 1926-2 and 1927-2, and to set a date for a hearing. The Department of Interior has objected to Mr. Rickenbach being the hearing officer.

John Kunz and Pat Ginsbach agreed with Chairman Freeman.

Chairman Freeman questioned how long the hearing on the applications would take.

Mr. Kunz stated that he estimated it would be three days.

Mr. Ginsbach agreed with Mr. Kunz.

Chairman Freeman stated that the hearing dates could be June 26, 27, and 28 and in Martin.

Mrs. Gunderson stated that she could be the hearing officer.

Mr. Brink, Mr. Rollag, and Mr. VanderVorst were all in agreement.

Mr. Brink MOVED, SECONDED by Mr. VanderVorst to set the hearing for June 26, 27, and 28 in Martin, with Marian Gunderson appointed as hearing officer subject to Mr. Rickenbach's consent to withdraw as hearing officer. MOTION CARRIED.

Chairman Freeman suggested that prior to the hearing the issues should be set forth, the exhibits identified, the witnesses and what their testimony will be, and the parties positions' on the issues.

Chairman Freeman suggested that Mrs. Gunderson and Mr. Guhin determine what should be in a prehearing order and Mr. Guhin could coordinate a time for submitting it with the various parties involved.

Mr. Ginsbach agreed with Mr. Freeman.

Chairman Freeman requested that Mr. Hatch contact Mr. Rickenbach to see if he is agreeable with withdrawing as hearing officer.

Mr. Hatch stated that this would be done.

Chairman Freeman asked Mr. Ginsbach to check with the court and make certain there would be a room available for the three days.

Mr. Ginsbach stated that this would be done.

Mr. Hatch suggested they start the meeting at 9:00 am.

Mr. Kunz and Mr. Ginsbach agreed with the time.

Mr. Rollag MOVED, SECONDED by Mr. Brink for the meeting to adjourn. MOTION CARRIED.

Meeting adjourned at 10:20 am.

Rodney Freeman, Chairman

Bernita Loucks, Secretary

Following the meeting, Mr. Rickenbach submitted a letter stating that he agreed to withdraw as hearing officer (copy on file).

South Dakota



GREAT FACES. GREAT PLACES.

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3181

May 24, 1991

NOTICE

TO: William Godby, Regional Engineer
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225
and Parties of Record (see attached sheet)

FROM: John Hatch, Chief Engineer
Water Rights Division
605 773-3352

SUBJECT: Appointment of a Hearing Officer for Water Permit Application No. 1921-2 and Vested Water Right Claim Nos. 1926-2 and 1927-2

On May 24, 1991, during a telephone Conference Call Board meeting, the Water Management Board appointed Marian Gunderson to act as hearing examiner for the hearings on Water Permit Application No. 1921-2 and Vested Water Right Claim Nos. 1926-2 and 1927-2 subject to previous hearing examiner, Joel Rickenbach consenting to withdraw as hearing examiner. The hearing to consider these applications has been scheduled for June 26-28, 1991. The hearing is scheduled to begin at 9:00 am. MST, June 26, 1991 in the American Legion Dining Hall, Martin, SD 57551.

Applicable provisions of the Notice of Hearing published March 27, 1991 and April 3, 1991 for Water Permit Application No. 1921-2 and January 9 and 16, 1991 for Vested Water Right Claim Nos. 1926-2 and 1927-2 in the Bennett County Booster II will still apply at this hearing.

This hearing is an adversary proceeding. Any person having filed a petition and the applicant have the right to be represented by a lawyer. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and the State Supreme Court as provided by law.

cc: Diane Best, Assistant Attorney General
John Guhin, Deputy Attorney General
Ginger Chesy, US Fish & Wildlife Service
Marian Gunderson, Water Management Board Hearing Officer

4/22/91
(date)

page

Parties of Record before Water Management Board WP Appl. No. 1921-2
(US Fish + Wildlife Service) & VR Claim Nos. 1926-7 + 192

	Opponents
William Godby, Regional Engineer	
U.S. Fish + Wildlife Service	Jane Farrell
Denver Federal Center	Pat Ginsbach
Box 25486	Attorney at Law
Denver, CO 80225	441 N. River
	Hot Spring, SD 57747
John Kunz	Representing
Rocky Mountain Regional Solicitor's Office	Raymond Kocer
730 Simms St. - Suite 450	Lawrence Kocer
Golden, CO 80401	Wendell DeKay
	Charles Emley
	Brett Heath

CERTIFICATION

I hereby certify that on May 24, 1991, I have personnally deposited with the U. S. Mail postage prepaid envelopes containing a Notice Appointment of a Hearing Officer for Water Permit Application No. 1921-2 and Vested Water Right Claim Nos. 1926-2 and 1927-2 addressed as stated on the Parties of Record Sheet and the following:

Ginger Chesy, U.S. Fish & Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225

Marian Gunderson, 811 W 3rd, Yankton SD 57078

Copy sent interoffice to:

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

Cheryl F. Frost

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 28th day of May, 1991.

JOHN HATCH
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA
My Commission Expires Apr. 1, 1993

John Hatch

Notary Public

May 24-91

Dept. of Environment and Natural Resources
Water Rights Division
Pierre S.D.
Mr. John Hatch Chief Engineer
Dear Sir

This is to inform you that I am in complete agreement with the action of the Board of Water Management in removing the ex hearing officer in the Matter of Permit Application 19210-2 and Claims 1926-2 and 1927-2. The hearings to be held in Martin S.D. June 26-27-28-1991.

I also agree that Marcia Anderson be appointed to be said officer for the hearings.

Sincerely
Joel Rickenbach



Joel Rickenbach
Box 97
Oelrichs, S. D. 57763

Jacie
For Martin SD
hearing file

1921-2
1926-2
1927-2

JR

STATE OF SOUTH DAKOTA



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



MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

May 31, 1991

MEMORANDUM

TO: Parties interested in Water Permit Application No. 1921-2 and Vested Water Right Claim Nos. ~~1926-2~~ 2191-2 and 1927-2

FROM: John P. Guhin, Deputy Attorney General

RE: **Prehearing Order**

I am herewith enclosing a Prehearing Order entered at the direction of the hearing officer, the Honorable Marian Gunderson.

The Prehearing Order is being sent by FAX to the United States to facilitate its ability to make the first submission.

JPG:do
cc: (See Certificate of Service)
Marian Gunderson

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION TO VALIDATE VESTED WATER RIGHT CLAIM NOS. 1926-2 AND 1927-2, LACREEK NATIONAL WILDLIFE REFUGE	)	PREHEARING ORDER
and	)	
IN THE MATTER OF APPLICATION NO. 1921-2 TO AMEND WATER PERMIT NO. 265-2	)	

The following order is herewith entered at the direction of the hearing officer, the Honorable Marian Gunderson.

A. Briefing to be supplied to all parties and the hearing examiner.

1. The United States Fish and Wildlife Service and any party supporting its position shall, by or on June 7, 1991, place in the United States mail, First Class postage prepaid, the following:

> a. A brief description of the relief requested pursuant to each of the above-entitled applications and a brief statement of the facts the proponents intend to prove which give rise to such relief;
>
> b. An identification of any extraordinary legal issues which may arise during the hearing and a statement of how those legal issues should be resolved.
>
> c. Any other concise briefing or argument the proponents of the applications desire to make.

2. Any party opposing any application of the United States Fish and Wildlife Service shall place in the

United States mail, First Class postage prepaid, the following materials by June 17, 1991:

a. A short statement of the relief requested with regard to each of the above applications and a brief statement of the facts the opponents intend to prove in support of their position.

b. A short statement with regard to any of the legal arguments raised by the United States Fish and Wildlife Service. Identification of any further extraordinary legal issues which may reasonably be anticipated to arise at hearing, and a statement as to how they should be resolved.

c. Any other concise briefing or argument the opponents wish to file.

3. The United States and any other proponent may make any reply they desire to make to the position of the opponents by placing such reply in the mail by June 21, 1991.

4. The materials and statements required by paragraph A. shall be mailed to all parties, to the hearing examiner and to the counsel to the hearing examiner.

B. Agreement among the parties regarding admission of facts and regarding documents which may be admitted into evidence without objection.

1. The United States Fish and Wildlife Service and any party supporting the United States shall, by or on June 7, 1991, place in the United States mail, First Class postage prepaid, the following:

a. A statement of any facts which the United States Fish and Wildlife Service desires to stipulate into evidence.

b. An identification of any documentary evidence which the United

States Fish and Wildlife Service wishes to introduce into evidence along with copies of such evidence.

2. Any party opposing the application of the United States Fish and Wildlife Service shall reply to the submission of the United States by placing in the United States mail by June 17, 1991, the following materials:

a. A statement of agreement or disagreement to any facts which the United States has proposed to be stipulated into evidence.

b. A statement as to whether the opponents agree to allow any proposed documentary evidence into the record without objection.

c. An identification of any further facts which may be stipulated into evidence. An identification of any documentary evidence which the opponents wish to introduce into evidence. The opponents shall supply copies of such evidence to the proponents and other parties.

3. The United States shall, by June 21, 1991, state its agreement or disagreement with any proposed facts which the opponents wish to stipulate into evidence and shall state whether it objects to the admission of any documentary evidence proposed for admission into evidence by the opponents.

4. The parties may vary the scheduled events set out in paragraph B. by mutual consent without order of the hearing examiner. The intent of paragraph B. is to encourage the parties to enter into such agreements for the admission of exhibits and the stipulation of facts as are appropriate but not to interfere with the litigation of the

case as the parties believe to be appropriate. The submissions identified in paragraph B. are not to be supplied to the Hearing Examiner or counsel to the Hearing Examiner. Nothing in paragraph B. is intended to preclude admission of any evidence if there has been a reasonable effort to comply with paragraph B.

C. The parties shall, at the commencement of the hearing in this matter, clearly identify any facts which the parties have agreed will be stipulated into evidence. The parties shall also identify, at the time of commencement of the hearing, any exhibits which may be admitted into evidence without objection.

Dated this 31st day of May, 1991.

HEARING EXAMINER

John L. Gelder for Marian Gunderson

Marian Gunderson
Hearing Examiner
Water Management Board

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BEFORE THE WATER MANAGEMENT BOARD

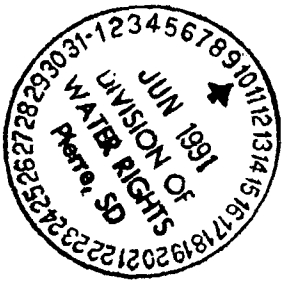
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION TO VALIDATE VESTED WATER RIGHT CLAIM NOS. 1926-2 AND 1927-2, LACREEK NATIONAL WILDLIFE REFUGE	)	CERTIFICATE OF SERVICE
and	)	
IN THE MATTER OF APPLICATION NO. 1921-2 TO AMEND WATER PERMIT NO. 265-2	)	

The undersigned hereby certifies that true and correct copies of a Presentence Order in the above-entitled matter were served by First Class mail, postage prepaid on William Godby, Regional Engineer, U.S. Fish & Wildlife Service, Denver Federal Center, Box 25486, Denver, CO 80225; and Jane Farrell, Pat Ginsbach, Attorneys at Law, 441 N. River, Hot Springs, SD 57747; and served by FAX at 303-236-8644 on John Kunz, Rocky Mountain Regional Solicitor's Office, 730 Simms St., Suite 450, Golden, CO 80401; and served by Interoffice mail on John Hatch, Chief Engineer, Department of Environment and Natural Resources, Division of Water Rights, 523 E. Capitol Ave., Pierre, SD 57501-3182; and hand-delivered to Diane Best, Assistant Attorney General, 500 E. Capitol, Pierre, SD 57501-5070, on this 31st day of May, 1991.

John P. Guhin
Deputy Attorney General
500 E. Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA



IN THE MATTER OF THE APPLICATION TO VALIDATE VESTED WATER RIGHT CLAIM NOS. 1926-2 AND 1927-2, LACREEK NATIONAL WILDLIFE REFUGE,	)	PREHEARING BRIEF
and	)	
IN THE MATTER OF APPLICATION NO. 1921-2 TO AMEND WATER PERMIT NO. 265-2	)	

COMES NOW the United States Fish and Wildlife Service (FWS), the applicant in the captioned proceeding, and pursuant to the May 31, 1991, Prehearing Order of the Honorable Marian Gunderson, Hearing Examiner, hereby submits the following prehearing brief.

I. APPLICATION NO. 1926-2

A. DESCRIPTION OF RELIEF REQUESTED

In Application No. 1926-2, FWS has applied for a permit to appropriate some 3.36 cubic feet per second (CFS) of water to flood irrigate some 235 acres of land located on FWS's LaCreek National Wildlife Refuge (NWR). In this application, FWS has requested that it be given a vested right in and to said water (referred to hereafter as the Springs Water), with a claimed priority date of January 1, 1939. For purposes of this brief, and without attempting to provide detailed legal descriptions of the water sources or the lands irrigated by such water 1/, the

1/ Such detailed legal descriptions can be found in FWS's application on file with the Water Management Board (the Board).

Springs Water comes from six springs located to the south of Lake Creek on the LaCreek NWR, Bennett County, South Dakota. The Springs Water irrigates NWR lands to the north of the Springs, which lands are generally located on the west end of the LaCreek NWR.

B. STATEMENT OF FACTS WHICH FWS INTENDS TO PROVE GIVING RISE TO REQUESTED RELIEF

Although not intended to be an exhaustive or detailed listing of all the facts which FWS will adduce at the hearing, in support of its application, FWS will prove the following salient facts at the hearing:

1. The original appropriator of the Springs Water was Mr. Berthol Brown.

2. As early as 1937, but in any event, no later than 1939, water from the Springs was used to flood irrigate lands adjacent to the Springs.

3. By a Warranty Deed dated September 2, 1971, FWS acquired all of Mr. Brown's right, title, and interest in and to the Springs Water.

4. Since September 2, 1971, FWS has, without interruption, continued to use the Springs Water to flood irrigate lands on the LaCreek NWR.

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5. Based on findings that FWS has appropriated the Springs Water for irrigation use, and that FWS's use of the Springs Water has been developed without unlawful impairment of existing rights, constitutes a beneficial use, and is in the public interest, the Chief Engineer, Department of Environment and Resources, Division of Water Rights, has recommended that FWS's application be validated with a priority date of January 1, 1951. 2/

6. FWS has, in fact, appropriated the Springs Water for irrigation use, and FWS's use of the Springs Water does not unlawfully impair existing rights, does constitute a beneficial use, and is in the public interest.

C. IDENTIFICATION OF EXTRAORDINARY LEGAL ISSUES WHICH MAY ARISE DURING THE HEARING

Although the FWS cannot be certain, from the objectors' Petition to Oppose FWS's application, it is apparent that, during the hearing, the following legal issues may arise:

1. FWS's use of the Springs Water has unlawfully impaired the objectors' existing rights because such use has damaged privately owned crop land, developed saline problems, and

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2/ At the hearing, FWS will prove that, despite the State Engineer's finding, FWS's application should be validated with a priority date of January 1, 1939. FWS will prove this fact in direct contravention to the objectors' allegation that the Springs Water has not been appropriated as above-described, and that the Springs Water was not used from 1946-1974.

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has impaired the use of the water by the objectors. See paragraph II.a of the objectors' petition.

RESPONSE AS TO HOW THIS ISSUE SHOULD BE RESOLVED: Section 46-2A-9 of S.D. Codified Laws Ann. (SDCL) provides that a permit to appropriate water may be issued if: (1) there is a reasonable probability that there is unappropriated water available; (2) the proposed diversion can be developed without unlawful impairment of existing rights; (3) the proposed use is a beneficial use; and (4) the proposed use is in the public interest. 3/

In objecting to FWS's application, the objectors allege that FWS's use of the Springs Water violates the second prong of the above statute. That is, the objectors allege that FWS's use of the Springs Water impairs the objectors "existing rights." However, in making this objection, the objectors' completely misconstrue the language and intent of the statute. It is clear from the context of SDCL, §§ 46-2A et

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3/ The precise statutory language is as follows:

> 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.

SDCL, § 46-2A-9.

seq. 4/, that the sole purpose of these statutes is to govern the appropriation/adjudication of water rights. Hence, when SDCL, § 46-2A-9 states that permits may be issued to appropriate water only if the proposed diversion can be developed without unlawful impairment of "existing rights," the unambiguous intent of the language is to proscribe the unlawful impairment of existing water rights. Thus, this statute does not concern, as the objectors assert, the possible impairment of real property rights. Accordingly, there is no legal basis for the objectors' allegation that FWS's use of the Springs Water unlawfully impairs their existing real property rights. 5/

The objectors further allege that FWS's use of the Springs Water "has impaired the use of the water by [objectors]." Contrary to the previously-discussed allegation, in making this argument, the objectors at least facially succeed in making an allegation arguably covered by SDCL, § 46-2A-9. However, to the best of FWS's knowledge, the objectors do not have any existing or vested rights in and to the Springs

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4/ This group of statutory provisions pertains to the procedures governing the appropriation of water. SDCL, § 46-2A-9--the statute under discussion--is one of these statutes.

5/ The objectors might argue that this reasoning is unduly harsh, and that it deprives them of a legal remedy to seek redress for injuries to their real property. This is not true. If the objectors feel that their real property has been damaged by FWS's use of the Springs Water, there are separate legal remedies that the objectors can pursue. However, such remedies sound in tort, and are completely separate from and unrelated to the context of the subject application, and the relief being sought by FWS. Therefore, in the context of these proceedings, the Board should not consider such objections.

Water. Simply put, the objectors have no "use of the water" (legal or otherwise) for FWS to impair. For this reason, there is no factual or legal basis for the objectors' allegation, and it must be disregarded.

2. FWS's use of the Springs Water is not a beneficial use in that it has not developed good forage for wildlife, and will not improve conditions for wildlife. Additionally, FWS's use of the Springs Water is not a beneficial use since it allows water to be appropriated for the purpose of cultivating food for wildfowl on land that is unenclosed and uncultivated. See paragraph II.b of objectors' petition.

RESPONSE AS TO HOW THIS ISSUE SHOULD BE RESOLVED: SDCL, section 46-1-6.(3) defines beneficial use as "any use of water . . . that is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interest of the public of this state in the best utilization of water supplies." A key part of this definition is that the use must be useful and beneficial to the appropriator. The FWS is the Federal agency entrusted with managing the LaCreek NWR. The management of the refuge involves a myriad of institutional and individual experience and expertise. Although the objectors are certainly entitled to their opinions, by alleging that the FWS's use of the Springs Water is not a beneficial use because it does not develop good forage or improve conditions for wildlife, the objectors place themselves in the rather unique and

unenviable position of dictating, contrary to the institutional and individual experience and expertise of FWS--the actual appropriator of the water--what the beneficial use is. 6/ This is contrary to logic, common sense, and the language and intent of SDCL, § 46-1-6.(3). Accordingly, there is no merit to the objectors' allegation, and it must be disregarded.

Objectors also allege that FWS's use of the Springs Water is not a beneficial use because it allows water to be appropriated for the purpose of cultivating food for wildfowl on land that is unenclosed and uncultivated. Although FWS is unclear as to the objectors' basis for this argument, FWS is aware of one appropriative state that has refused to appropriate water for irrigation of unenclosed and unoccupied lands for the sole purpose of propagating wild water fowl. See Lake Shore Duck Club v. Lake View Duck Club, 50 Utah 76, 80-81, 166 P. 309 (1917). However, South Dakota has not adopted this rule. Indeed, no other appropriative state has adopted this principle. Additionally, it must be noted that the Utah decision is a fairly old one, made well before recreational facilities and wildlife habitats became an important part of Western water development. For these reasons, it would be folly, as the objectors suggest, for

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6/ In point of fact, and completely contrary to the objectors' assertions, testimony will be adduced at the hearing which will prove that FWS's use of the Springs Water does develop good food--not necessarily, as the objectors allege, good "forage", and enhances wildlife habitat.

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the Board to adopt such a position. Moreover, it must be noted (as will be adduced at the hearing), that, at the LaCreek NWR, the lands are not irrigated for the sole purpose of propagating wild water fowl. FWS's stated use of the Springs Water is to flood irrigate. This water is used to irrigate meadows, wild hay, and even grain. Although some of this crop is not cut or otherwise harvested, thus leaving wildfowl habitat and food, much of the crop is harvested or used for pasture. Thus, there is absolutely no merit to the objectors' argument, and it must not be given any consideration.

Consistent with the above reasoning, although there is no South Dakota law on point, at least six other appropriative states recognize that irrigation of uncultivated lands for wild hay, wild meadow, or native grasses is a valid use for which water might be appropriated. 7/ There is no question that, on the LaCreek NWR, the Springs Water is used to irrigate wild hay, wild meadow, and/or native grasses. Hence, FWS's practice is completely consistent with other state law and is not inconsistent with South Dakota state law. Accordingly, the Board should have no difficulty in

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7/ See Campbell v. Ingram, 37 Cal. App. 728, 730-31, 174 P. 366 (1918); Oliver v. Skinner, 190 Or. 423, 437-38, 226 P.2d 507 (1951); In re Silvies River, 115 Or. 27, 41, 237 P.2d 322 (1925); Jensen v. Birch Creek Ranch Co., 76 Utah 356, 361-62, 289 P. 1097 (1930); Rodgers v. Pitt, 129 F. 932, 942 (C.C. D. Nev. 1904); Anderson Land & Stock Co. v. McConnell, 188 F. 818, 822 (C.C. D. Nev. 1910); Rudge v. Simmons, 39 Idaho 22, 27-28, 226 P. 170 (1924); and Sayre v. Johnson, 33 Mont. 15, 19, 81 P. 389 (1905).

concluding that the FWS's use of the Springs Water is a validly recognized use for which water might be appropriated.

For the above reasons, the arguments of the objectors are without merit, and they must be disregarded.

3. FWS's use of the Springs Water is not in the public interest because it supports wildlife and wildfowl, and constitutes waste (presumably because FWS already has, in the words of the objectors, "sufficient water") to manage the LaCreek NWR without the validation and appropriation of further water rights. See paragraph II.c of objectors' petition.

RESPONSE AS TO HOW THIS ISSUE SHOULD BE RESOLVED: The objectors have not explained why the support of wildlife and wildfowl is contrary to the public interest. Obviously, FWS strongly disagrees with this position, and will adduce facts at the hearing proving that the existence and management of the LaCreek NWR is squarely in the public interest. 8/

Concerning the objectors' allegation that the FWS's use of the Springs Water constitutes waste, FWS once again strongly

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8/ Indeed, FWS will adduce facts at the hearing which will prove that at least one of the objectors directly profits from the wildlife that inhabits the LaCreek NWR. This would strongly suggest that, at least with respect to this objector, FWS's use of the Springs Water is in the "public interest."

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disagrees, and submits that the objectors will be unable to adduce any facts proving this allegation. Notwithstanding this fact, the objectors put themselves in a totally unsubstantiated and insupportable position by stating that FWS already has sufficient water to meet its needs. FWS submits that it is the only entity with the experience and expertise to make this determination, and that if FWS had determined that it already had sufficient water to manage the LaCreek NWR, it would not have filed the subject application. 9/

For the above reasons, the objectors' arguments are specious and must fail.

II. APPLICATION NO. 1927-2

A. DESCRIPTION OF RELIEF REQUESTED

In Application No. 1927-2, FWS has applied for a permit to appropriate some 10 CFS of water to flood irrigate some 700 acres of land located on FWS's LaCreek NWR. In this application, FWS has requested that it be given a vested right in and to said water (referred to hereafter as the Lake Creek Water), with a claimed priority date of January 1, 1939. For purposes of this brief, and without attempting to provide detailed legal descrip-

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9/ It must be noted that the previously-appropriated, i.e., "sufficient" water to which the objectors refer, services only those lands lying on the East end of the refuge, and is not adequate, either as to flow or location, to service the lands covered by the subject application. Therefore, this existing water right bears no relationship to the subject application, and is totally irrelevant to the relief which FWS seeks. The objectors' argument is, therefore, without factual or legal basis, and completely without merit.

tions of the water sources or the lands irrigated by this water 10/, the Lake Creek Water is diverted from Lake Creek on FWS's LaCreek NWR, Bennett County, South Dakota. The Lake Creek Water irrigates LaCreek NWR lands to the north and south of Lake Creek, which lands are generally located on the west end of the LaCreek NWR.

B. STATEMENT OF FACTS WHICH FWS INTENDS TO PROVE GIVING RISE TO REQUESTED RELIEF

With the exception that this application deals with the Lake Creek Water, whereas the previously-discussed application pertains to the Springs Water, the salient facts under this application are the same as those set forth above. For this reason, reference is made to the above facts which will not be repeated here.

C. IDENTIFICATION OF EXTRAORDINARY LEGAL ISSUES WHICH MAY ARISE DURING THE HEARING

The objectors' petition alleges the same legal issues for all three of FWS's applications. Since these issues have been addressed above, they will not be repeated here.

III. APPLICATION NO. 1921-2

A. DESCRIPTION OF RELIEF REQUESTED

In Application No. 1921-2, FWS has filed an application to amend existing Water Permit No. 265-2 by changing the diversion points and the acreage presently covered by the existing water

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10/ See note 1, supra.

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permit. More specifically, existing Water Permit No. 265-2 appropriates 4.45 CFS from Cedar Creek to irrigate some 366 acres. The point of diversion for Water Permit No. 265-2 is located in the SW1/4 SW1/4, Section 25, T36N, R37W, Bennett County, South Dakota. This application proposes to change the diversion point to the SE1/4 NW1/4, Section 25, T36N, R37W. The acreage authorized under existing Water Permit No. 265-2 is located in the S1/2 NW1/4, S1/2 NE1/4, N1/2 SE1/4, Section 25, T36N, R37W, and SW1/4, S1/2 NW1/4, Section 30, T36N, R36W. The subject application requests to change the irrigated land to the N1/2, SW1/4, N1/2 SE1/4, Section 25, SE1/4, SE1/4 NE1/4, Section 24, all in T36N, R37W, and the E1/2, Section 19, T36N, R36W, for a total of 362 acres ((3.89 CFS).

B. STATEMENT OF FACTS WHICH FWS INTENDS TO PROVE GIVING RISE TO REQUESTED RELIEF

At the hearing, FWS will adduce facts to prove that its current use of the water is consistent with the proposed changes outlined above. Additionally, FWS will show that, based on a finding that this application is in the public interest, the State Engineer has recommended that this application be approved.

C. IDENTIFICATION OF EXTRAORDINARY LEGAL ISSUES WHICH MAY ARISE DURING THE HEARING

As previously stated, the objectors' petition alleges the same legal issues for all three of FWS's applications. For the sake of argument and not by way of admission, even though the objectors' allegations might have some applicability to Application Nos. 1926-2 and 1927-2, such allegations clearly have no relationship to the subject application. This is so because, all

that the subject application proposes to do is make some pro forma changes to a presently existing water permit. Given this, the objectors have no legal or factual basis for making an objection. For these reasons, FWS strongly urges that the objectors' allegations concerning the subject application be dismissed, and that the Board approve the application.

DATED this 7th day of June, 1991.

John R. Kunz
Counsel for FWS
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO. 80225
(303) 236-8444

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 1991, true and correct copies of the foregoing prehearing brief were mailed, postage pre-paid in United States First Class Mail, to the following:

Ms. Marian Gunderson
Hearing Examiner
811 West Third Street
Yankton, S.D. 57078

John P. Guhin, Esq.
Deputy Attorney General
500 East Capitol
Pierre, S.D. 57501-5070

Diane Best, Esq.
Assistant Attorney General
500 East Capitol
Pierre, S.D. 57501-5070

Patrick M. Ginsbach, Esq.
Farrel, Farrel and Ginsbach
441 North River Street
Hot Springs, S.D. 57747

John Hatch
Chief Engineer
Department of Environment and Resources
Division of Water Rights
523 East Capitol Ave.
Pierre, S.D. 57501-3182

Frederick A. Johnson

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STATE OF SOUTH DAKOTA

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

MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

June 13, 1991

Kenneth M. Keegan
HWC 3, Box 24
Martin, SD 57551

Re: **Fish & Wildlife Service Vested Water Right Application Nos. 1926-2 and 1927-2**

Dear Mr. Keegan:

This letter concerns your September 17, 1990, objection to the above-referenced vested water right claims which was filed with the South Dakota Water Rights Division. A copy of your objection is attached.

On May 1, 1991, and on May 24, 1991, the South Dakota Water Management Board conducted short procedural motion hearings and, as a result, has appointed Ms. Marian Gunderson, a Board member, as hearing examiner in this matter. The Board has also scheduled a hearing in Martin, South Dakota. At this point, no testimony or evidence has been presented before the Water Management Board concerning the above-referenced permits.

Evidence and testimony will be presented at the hearing on June 26-28, 1991, in Martin, South Dakota. (The notice of hearing is attached.) Based on your previously filed objection, you will be considered a party to this proceeding.

Unfortunately, the Division of Water Rights recently discovered that it had inadvertently omitted your name from the mailing list for notices in this proceeding. I apologize for any inconvenience this may have caused you.

I have brought this matter to the attention of the general counsel for the South Dakota Water Management Board, John P. Guhin. Mr. Guhin asked me to provide you with a copy of the

prehearing order, which, based on the mailing list problem, was not provided to you. The prehearing order is enclosed.

You will notice that the prehearing order requires you to submit certain filings to the hearing examiner and the other parties to the proceeding on or before June 17, 1991. I recognize, based on the time frame that is now involved, that you may have difficulty in responding to this order. Because I am counsel for the Water Rights Division staff, and not the Board itself, I do not have the authority to relieve you from this order. On behalf of my client, the Water Rights Division staff, I am informing you that the Division staff will have no objection if you appear at the hearing and present relevant testimony and evidence concerning the water permit applications even if you have not had an opportunity to comply with the prehearing order.

I have also contacted John R. Kunz, counsel for the Fish & Wildlife Service, concerning this issue. I am authorized to state that the Fish & Wildlife Service would not object if you presented properly admissible testimony and evidence at the administrative hearing in this matter even if you do not have an opportunity to comply with the prehearing order. Mr. Kunz also asked me to provide you with a copy of the prehearing brief which has previously been filed by the Fish & Wildlife Service. The brief is enclosed.

I have attempted to contact Jane Farrell and Patrick M. Ginsbach, attorneys for Wendell DeKay, Charles Emley, Brett Heath, Raymond Kocer, and Lawrence Kocer regarding this matter as well. I have not had an opportunity to reach those attorneys and cannot speculate on whether they would object to your testimony at the hearing if you do not comply with the prehearing order. Ultimately, if you do not comply with the prehearing order based on the time frame involved, the hearing examiner will be the decision maker with regard to whether you would be allowed to present any testimony or evidence in this proceeding during the hearing. This letter assumes, of course, that you wish to testify. If you do not wish to testify, you will not be required to do so.

I will be providing you with a copy of the Division's prehearing brief submitted in response to the prehearing order. Additionally, attorneys Ginsbach and Farrell are, by

copy of this letter, being advised that they need to provide a copy of their brief to you as well.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB/db
Enclosures
cc/enc John R. Kunz
Patrick Ginsbach
Jane Farrell
John P. Guhin

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION TO VALIDATE VESTED WATER RIGHT CLAIM NOS. 1926-2 AND 1927-2, LACREEK NATIONAL WILDLIFE REFUGE,	)	
and	)	CERTIFICATE OF SERVICE
IN THE MATTER OF APPLICATION NO. 1921-2 TO AMEND WATER PERMIT NO. 265-2	)	

The undersigned hereby certifies that true and correct copies of Objections to Applications Nos. 1926-2 and 1927-2, Notice of Hearing, Prehearing Brief and Prehearing Order were served by United States mail, first class, postage prepaid, upon Kenneth M. Keegan, HWC 3, Box 24, Martin, South Dakota 57551, this 13th day of June, 1991.

Diane Best

Diane Best
Assistant Attorney General
500 E. Capitol
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA



IN THE MATTER OF THE APPLICATION TO VALIDATE VESTED WATER RIGHT CLAIM NOS. 1926-2 AND 1927-2, LACREEK NATIONAL WILDLIFE REFUGE,	)	PREHEARING BRIEF
and	)	
IN THE MATTER OF APPLICATION NO. 1921-2 TO AMEND WATER PERMIT NO. 265-2	)	

PRELIMINARY STATEMENT

Based on the May 31, 1991, Prehearing Order of Marian Gunderson, hearing examiner in the above-entitled matter, the Water Rights Division of the South Dakota Department of Environment and Natural Resources (Division) hereby submits its prehearing brief.

The Prehearing Order required that any parties supporting the above-referenced application of the United States Fish and Wildlife Service (FWS) should file a prehearing brief on or before June 7, 1991. The order also required that any party opposing the FWS application should submit a prehearing brief on or before June 17, 1991. The Division is, to some extent, opposed to the FWS application in vested right claim Nos. 1926-2 and 1927-2, but supports FWS application No. 1921-2. The parties have previously been made aware of the Division's position by means of the chief engineer's reports dated August 28, 1990 (vested right water claims 1926-2 and 1927-2) and February 12, 1991,

(water permit application no. 1921-2). Based on these facts the Division hereby submits its brief pursuant to the June 17, 1991, requirement.

In the event that the hearing examiner determines that the Division should have followed the June 7, 1991, filing date the Division hereby requests leave to file this brief late. The Division submits that such filing is without prejudice to the other parties in the above-entitled proceeding.

VESTED RIGHT CLAIM NOS. 1926-2 AND 1927-2

A. Relief requested.

The Division opposes validation of vested right water claim nos. 1926-2 and 1927-2 insofar as insufficient documentation has been submitted to the Division to support the FWS claimed priority date of 1939. Instead, the Division supports a priority date of January 1, 1951. The Division's position is based upon an affidavit signed by Charles J. Ritter which was filed with the FWS application. In the affidavit Mr. Ritter stated that he had witnessed water use on the land from 1951 to 1953. Although the Division opposes the 1939 validation date, the Division supports approval of vested right water claim nos. 1926-2 and 1927-2 with a priority date of July 1, 1951.

In support of its position the Division intends to show:

1. That, based on its inspections, the physical descriptions set forth in vested water right claim nos. 1926-2 and

1927-2 exist as described in the FWS application.

2. That, based on its inspections, the property described in the FWS applications for both vested water rights claim is being irrigated.

3. That, based on its inspections, the claimed water use is, as set forth in both FWS applications, being put to a beneficial use in providing wildlife habitat.

4. That, based on its review of the documents provided in the FWS applications, the priority date of January 1, 1951, is appropriate given the affidavit of Charles J. Ritter.

B. Extraordinary legal issues.

FWS indicated in its June 7, 1991, Prehearing Brief that at least three unique legal issues could arise with regard to the FWS vested right applications. The Division's position with regard to those issues is:

1. Impairment of existing rights. Neighboring landowners Wendell DeKay, Charles Emley, Brett Heath, Raymond Kocer, and Lawrence Kocer (landowners) have intervened in this administrative proceeding, claiming that the FWS water use involved in these applications has been such that the landowners' property has been damaged and that their water rights have been impaired.

With regard to the property damage issue, FWS claims that under SDCL 46-2A-9, the concept of "unlawful impairment of existing rights" applies only to existing water rights and not to existing property rights of landowners.

The Division's position is that while FWS may arguably be correct in its construction of "existing rights" within the parameters of SDCL 46-2A-9, the landowners' property damage claims could be considered by the Board as part of its "public interest" determination. Based on this rationale, the Division does not object to testimony or exhibits regarding property damage,

so long as such testimony or exhibits would properly be admissible under SDCL ch. 1-26 and the Water Management Board administrative rules. The Division does not, of course, agree to the submission of testimony or exhibits showing property damage caused by water use which is not involved in the particular vested right applications in this case (whether such property damage is caused by FWS or any other party).

Also, while the Division does not oppose relevant testimony or exhibits concerning the property damage issue, the Division does not agree (1) that the landowners' property has been damaged by the FWS water use involved in this administrative proceeding, or (2) that any damage caused by FWS to the landowners' property warrants denial of the vested right claims involved in this proceeding.

The landowners' Petition to Intervene also claims that the water use described in the vested water right claims would impair the existing water rights of those landowners. FWS, on the other hand, claims that the landowners have no legal right to use the water.

The landowners do, of course, have the right to domestic use of water pursuant to SDCL §§ 46-1-5 and 46-1-6(4). Additionally, at least one protestant (Kenneth Keegan) may present evidence regarding any effect on his water permit or vested water right. The Division does not believe that the landowners' water use could possibly be adversely affected by the FWS water use. The situation involved here is not a lack of water, but an excess.

Therefore, the Division does not agree that the FWS water use involved in these applications has impaired any of the landowners' water rights.

2. Beneficial use. The landowners' petition to intervene appears to take the position that the FWS water use is not beneficial in that (1) the use has not served its purpose of promoting wildlife habitat, and (2) that the water use is not beneficial in that it is undertaken in an unenclosed and uncultivated area. FWS does not agree. FWS, in its Prehearing Brief, claims that the first issue involves the management of the

LaCreek National Wildlife Refuge, and is not an issue that should be considered in this administrative proceeding. Secondly, FWS claims that its water use in providing food for water fowl on unenclosed and uncultivated land is, according to established case law, beneficial use.

The disposition of the first issue is dependent on the meaning of "beneficial use." SDCL 46-1-6(6) defines "beneficial use."

> (6) "Beneficial use," any use of water or outside the state, that is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interests of the public of this state in the best utilization of water supplies.

Based on this definition, it is apparent that the concept of beneficial use includes <u>both</u> a use which the appropriator considers to be beneficial as well as a use which is in the public interest. A determination of whether a use has been undertaken which is beneficial to the appropriator is largely a management question of the National Wildlife Refuge. The public interest consideration must also be addressed when examining the beneficial use question. If the FWS management of its water use is such that it has an adverse affect on the public interest, consideration should be given to such management.

Although the Division's position is that the landowners are entitled to present relevant evidence which would tend to show that the water management techniques utilized by FWS are not consistent with the public interest, the Division does not agree that (1) FWS has improperly managed water resources on the wildlife refuge, or (2) that any improper management on the wildlife refuge is inconsistent with the public interest.

The second issue concerning beneficial use is the issue of whether water should be appropriated for the purpose of cultivating food for wild fowl on land that is unenclosed and uncultivated. The FWS prehearing brief sets forth cases from other jurisdictions concerning this issue.

The Division believes it is significant to point out that the beneficial use issue should not focus on whether the area to be irrigated is enclosed or unenclosed. South Dakota statutes

pertaining to water rights do not make this distinction. This issue simply does not arise in the context of water permit proceedings. Also it should be recognized that water used for wildlife habitat is considered to be beneficial use. The Water Management Board has consistently approved applications to use water for wildlife purposes.

3. Factual issues. The landowners indicate, in their petition to intervene, that the FWS water use involved in this proceeding (1) constitutes waste and (2) would be excessive in that FWS already has adequate water rights. In its prehearing brief FWS disagreed, based on the facts it intends to produce at hearing. As a factual matter the Division does not believe the FWS use constitutes waste. Also, the Division does not agree that the FWS use would be excessive given the topography of the refuge.

The Division submits that this issue is really a matter of fact which will be addressed by the various parties during the administrative hearing in this proceeding. The issue is not a question of law, and therefore, is not further addressed in this brief.

In addition to the issues presented by FWS, the Division finds it necessary to point out one additional legal issue.

Definition of irrigation. In the landowners' petition to intervene and in the FWS prehearing brief the issue of whether the FWS water use in question constitutes "irrigation," has been, to some extent, addressed. In the event that any doubt exists regarding this issue, the Division's position is that the water use involved in the pending applications is irrigation use. The use involved is consistent with the administrative rules of the South Dakota Water Management Board:

> ARSD 74:02:01:01. Definitions. Terms defined in SDCL 43-17-20, 46-1-6, 46-1-9, and 46-6-1 have the same meaning when used in this article. In addition, terms used in this article mean:
>
> . . .

(2) "Irrigation," the artificial application of water for the purpose of supplying sufficient moisture for plant growth. Disposal of contaminated water is not considered to be irrigation unless other water is used along with the contaminated water.

Based on the above definition there can be little doubt that the water use involved in the pending application is, in fact, irrigation. It should be noted that the above definition does not require that water be used for commercial or agricultural use in order to be considered irrigation.

APPLICATION NO. 1921-2

A. Description of relief requested.

The Division recommends that application no. 1921-2, which is designed to amend existing water permit no. 265-2, be approved.

In support of its position the Division intends to show:

1. That, based on its inspections, the physical descriptions set forth in water permit application no. 1921-2 exist as described in the FWS application.

2. That, based on its inspections, the property described in the FWS application will be capable of being irrigated from the proposed diversion point set forth in that application.

3. That, based on its inspections, the proposed water use, as set forth in the FWS application, allows for a beneficial use in promoting wildlife habitat.

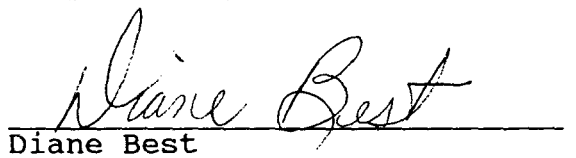
B. Extraordinary legal issues.

The legal issues discussed with regard to vested right application nos. 1926-2 and 1927-2 apply to water permit application no. 1921-2 as well. The Division is

unaware of any extraordinary legal issues which are particular to water permit application no. 1921-2.

Dated this 15th day of June, 1991.

Respectfully submitted,



Diane Best
Assistant Attorney General
Office of Attorney General
500 E. Capitol
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215

db:do

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Prehearing Brief in the matter of **Application to Validate Vested Water Right Claim Nos. 1926-2 and 1927-2, LaCreek National Wildlife Refuge, and Matter of Application No. 1921-2 to Amend Water Permit No. 265-2**, was served by United States mail, first class, postage prepaid upon Marian Gunderson, Hearing Examiner, 811 West Third St., Yankton, SD 57078; John R. Kunz, P.O. Box 25007, D-105, Denver Federal Center, Denver, CO 80225; Jane Farrell, Patrick M. Ginsbach, Farrell, Farrell and Ginsbach, 441 N. River St., Hot Springs, SD 57747, and was sent by interoffice mail to John Hatch, Chief Engineer, Department of Environment and Natural Resources, Division of Water Rights, 523 E. Capitol Ave., Pierre, SD 57501; and was hand-delivered to John P. Guhin, Deputy Attorney General, 500 E. Capitol, Pierre, SD 57501, on the 15th day of June, 1991. Service on John R. Kunz was also made by FAX at 303-236-8644 on the 15th day of June, 1991.

Diane Best

Diane Best
Assistant Attorney General

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BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA



In the Matter of the Application to Validate Vested Water Right Claim Nos. 1926-2 and 1927-2, LaCreek National Wildlife Refuge, and In the Matter of Application No. 1921-2 to Amend Water Permit No. 265-2.	)	OPPONENTS' OBJECTIONS TO PREHEARING STATEMENT OF FACTS WHICH FWS DESIRES TO STIPULATE INTO EVIDENCE

Come now the Opponents to Application to Validate Vested Water Right Claim Nos. 1926-2 and 1927-2 and No. 1921-2 to Amend Water Permit No. 265-2, and object to the following facts which the United States Fish and Wildlife Service desires to stipulate into evidence for purposes of the subject hearing:

1. The LaCreek National Wildlife Refuge (NWR) was established by executive order dated August 26, 1935, as a refuge and breeding ground for migratory birds and other wildlife. OPPONENTS DEKAY, EMLEY, HEATH, L. KOCER AND R. KOCER HAVE NO OBJECTION.

2. The LaCreek NWR is a refuge and breeding grounds for many animal species, including without limitation, blue winged teals, mallards, cadwalls, pintails, widgons, redheads, wood ducks, canvasbacks, Canada geese, snow geese, trumpeter swans, white pelicans, sandhill cranes, pheasant, grouse, white-tailed and mule deer, rainbow and brown trout, northern pike, bass, crappie, perch, saugeye, beaver, muskrat, mink, racoon, coyote and various other raptors, passerines, shore and marsh birds. OPPONENTS DEKAY, EMLEY, HEATH, L. KOCER AND R. KOCER HAVE NO OBJECTION TO THIS PROPOSED STIPULATION OF FACT.

3. FWS is the valid and legal holder of existing Water Permit No. 265-2. OPPONENTS DEKAY, EMLEY, HEATH, L. KOCER AND R. KOCER OBJECT TO THIS PROPOSED FACT.

4. FWS has held existing Water Permit No. 265-2 since on or about September 2, 1971. OPPONENTS DEKAY, EMLEY, HEATH, L. KOCER AND R. KOCER OBJECT TO THIS PROPOSED STIPULATED FACT.

5. As early as 1939, Mr. Birthol Brown used water from the springs to irrigate portions of his then-existing ranch. OPPONENTS DEKAY, EMLEY, HEATH, L. KOCER AND R. KOCER OBJECT TO THIS PROPOSED STIPULATION.

6. As early as 1939, Mr. Birthol Brown diverted water from Lake Creek to irrigate portions of his then-existing ranch. OPPONENTS DEKAY, EMLEY, HEATH, L. KOCER AND R. KOCER OBJECT TO THIS PROPOSED STIPULATION OF FACT.

7. By a warranty deed dated September 2, 1971, FWS acquired all of Mr. Brown's right, title and interest in and to Mr. Brown's ranch. OPPONENTS DEKAY, EMLEY, HEATH, L. KOCER AND R. KOCER WOULD OBJECT TO THIS PROPOSED STIPULATION OF FACT BECAUSE IT IS INCORRECT. MR. BIRTHOL BROWN HAD CONVEYED HIS INTEREST IN THE RANCH TO CEDAR CREEK RANCH OF NEBRASKA BY WAY OF A DEED RECORDED IN BOOK 15 OF DEEDS, PAGES 13-14 IN THE BENNETT COUNTY REGISTER OF DEEDS OFFICE. THEREAFTER, CEDAR CREEK RANCH IN NEBRASKA CONVEYED ITS PROPERTY TO CEDAR CREEK RANCH OF SOUTH DAKOTA, ACCORDING TO A DEED RECORDED IN BOOK 15 OF DEEDS, PAGES 32-44 IN THE BENNETT COUNTY REGISTER OF DEEDS OFFICE. IN 1969, CEDAR CREEK RANCH COMPANY, A SOUTH DAKOTA CORPORATION, WAS DISSOLVED AND ITS INTEREST WAS DISTRIBUTED TO THE SHAREHOLDERS, NAMELY EUGENE R. BROWN AND LILLIAN E. BROWN, ROYCE AND RUTH BROWN, EVA MAE LINENBRINK AND JOHN H. LINENBRINK, WILLIAM KNUTH AND VERA KNUTH, BETTY JANE HOFF AND REX L. HOFF, AND HARLAN V. BROWN AND PAULINE LENORE BROWN. IT WAS THESE GRANTEES WHO DEEDED THEIR INTEREST IN WHAT WAS KNOWN AS THE CEDAR CREEK RANCH TO THE UNITED STATES OF AMERICA BY WAY OF A WARRANTY DEED DATED SEPTEMBER 15, 1971 AND RECORDED IN BOOK 15 OF DEEDS, PAGES 347-349 IN THE BENNETT COUNTY REGISTER OF DEEDS OFFICE. TO THESE FACTS, THE OPPONENTS WOULD HAVE NO OBJECTION.

8. Based on the finding that FWS' use of the springs water does not unlawfully impair existing rights, is a beneficial use, and is in the public interest, the Chief Engineer, Water Rights Division, Department of Water and Natural Resources, has recommended that FWS' Application No. 1926-2 be validated with a priority date of January 1, 1951. OPPONENTS DEKAY, EMLEY, HEATH, L. KOCER AND R. KOCER OBJECT TO THIS PROPOSED STIPULATION.

9. Based on a finding that FWS' use of the Lake Creek water does not unlawfully impair existing rights, is a benficial use, and is in the public interest, the Chief Engineer, Water Rights Division, Department of Water and Natural Resources, has recommended that FWS' Application No. 1927-2 be validated with a priority date of January 1, 1951. OPPONENTS DEKAY, EMLEY, HEATH, L. KOCER AND R. KOCER OBJECT TO THIS PROPOSED STIPULATION OF FACT.

10. The objectors to FWS' Application Nos. 1926-2, 1927-2 and 1921-2 do not presently have (nor have they ever had) valid permits to appropriate the water which is the subject of said Applications. OPPONENTS DEKAY, EMLEY, HEATH, L. KOCER AND R. KOCER OBJECT TO THIS PROPOSED STIPULATION OF FACT.

Dated this 17 day of June, 1991.

FARRELL, FARRELL & GINSBACH

By: _____
JANE M. FARRELL

By: _____
PATRICK M. GINSBACH
Lawyers for DeKay, Emley, Heath,
L. Kocer and R. Kocer
441 North River St.
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17 day of June, a true and correct copy of the foregoing Opponents' Objections to Prehearing Statement

of Facts Which FWS Desires to Stipulate into Evidence was mailed regular United States mail with first class postage prepaid in an envelope securely sealed and addressed to:

John R. Kunz
Counsel for FWS
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225

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

John Hatch
Chief Engineer
Dept. of Environment and Resources
Division of Water Rights
523 East Capitol Ave.
Pierre, SD 57501-3182

PATRICK M. GINSBACH

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA



In the Matter of the Application to Validate Vested Water Right Claim Nos. 1926-2 and 1927-2, LaCreek National Wildlife Refuge, and In the Matter of Application No. 1921-2 to Amend Water Permit No. 265-2.	)	OPPONENTS' OBJECTIONS TO PREHEARING EXHIBITS OF DOCUMENTARY EXHIBITS

Come now the Opponents Wendall DeKay, Charles Emley, Brett Heath, Lawrence Kocer and Raymond Kocer, by and through their lawyers Farrell, Farrell & Ginsbach, and pursuant to the May 31, 1991, Prehearing Order of the Honorable Marian Gunderson, do hereby object to the following Prehearing Identification of Documentary Exhibits submitted by the United States Fish & Wildlife Service:

1. A copy of the August 26, 1935 Executive Order establishing the LaCreek National Wildlife Refuge. (NWR copy attached). OPPONENTS HAVE NO OBJECTION.

2. A copy of the March 14, 1939 letter from John N. Ball to Brice McBride. OPPONENTS HAVE NO OBJECTION.

3. A copy of the March 13, 1939 letter from Earl W. Craven to Regional Director, Bureau of Biological Survey. OPPONENTS HAVE NO OBJECTION.

4. A copy of a February 13, 1939 letter from Brice McBride to Earl W. Craven. OPPONENTS HAVE NO OBJECTION.

5. A copy of a September 2, 1971 warranty deed from Eugene R. Brown, et al. to the United States of America. OPPONENTS HAVE NO OBJECTION.

6. A copy of an application for a permit to appropriate water dated May 27, 1933 and accompanying memorandum concerning the issuance of Water Permit No. 265-2. OPPONENTS HAVE NO OBJECTION.

7. A copy of an August 28, 1990 report from the State Engineer's office concerning Application No. 1926-2. OPPONENTS HAVE NO OBJECTION TO THE ADMISSION INTO EVIDENCE OF THIS DOCUMENT, BUT WOULD RESERVE THE RIGHT TO OBJECT IN THE EVENT THE AUTHOR OF THE DOCUMENT DESIRES TO AMEND ANY PORTION OF IT AS PART OF HIS TESTIMONY TO THE HEARING EXAMINER.

8. A copy of an August 30, 1990 recommendation of the Chief Engineer concerning Application No. 1926-2. OPPONENTS WOULD HAVE NO OBJECTION TO THE ADMISSION INTO EVIDENCE OF THIS DOCUMENT, BUT WOULD RESERVE THE RIGHT TO OBJECT TO THE DOCUMENT IN THE EVENT THAT THE AUTHOR WOULD WISH TO AMEND OR MODIFY THIS DOCUMENT TO ANY EXTENT AT THE TIME HE TESTIFIES BEFORE THE HEARING EXAMINER.

9. A copy of an August 28, 1990 report from the State Engineer's office concerning Application No. 1927-2. OPPONENTS HAVE NO OBJECTION TO THE ADMISSION INTO EVIDENCE OF THIS DOCUMENT, BUT WOULD RESERVE THE RIGHT TO OBJECT IN THE EVENT THE AUTHOR OF THE DOCUMENT WOULD WISH TO AMEND OR MODIFY THIS DOCUMENT AT THE TIME OF HIS TESTIMONY BEFORE THE HEARING EXAMINER.

10. A copy of an August 30, 1990 recommendation from the Chief Engineer concerning Application No. 1927-2. OPPONENTS HAVE NO OBJECTION TO THE ADMISSION INTO EVIDENCE OF THIS DOCUMENT, BUT WOULD RESERVE THE RIGHT TO OBJECT IN THE EVENT THE AUTHOR OF THE DOCUMENT WOULD WISH TO AMEND OR MODIFY THIS DOCUMENT AT THE TIME OF HIS TESTIMONY BEFORE THE HEARING EXAMINER.

11. A copy of a February 12, 1991 report from the State Engineer's office concerning Application No. 1921-2. OPPONENTS HAVE NO OBJECTION TO THE ADMISSION OF THIS DOCUMENT, BUT WOULD RESERVE THE RIGHT TO OBJECT IN THE EVENT THE AUTHOR OF THE DOCUMENT WOULD WISH TO AMEND OR MODIFY THE DOCUMENT AT THE TIME OF TESTIFYING BEFORE THE HEARING EXAMINER.

12. A copy of a February 13, 1991, recommendation of the Chief Engineer concerning Application No. 1921-2. OPPONENTS HAVE NO OBJECTION TO THE

ADMISSION OF THIS DOCUMENT, BUT WOULD RESERVE THE RIGHT TO OBJECT IN THE EVENT THE AUTHOR OF THE DOCUMENT WOULD WISH TO AMEND OR MODIFY THE DOCUMENT AT THE TIME OF TESTIMONY BEFORE THE HEARING EXAMINER.

13. A copy of an aerial photograph taken in 1937 of the LaCreek National Wildlife Refuge, and the lands lying to the west of the Refuge, which lands are the subject of the Application Nos. 1926-2 and 1927-2. OPPONENTS WOULD OBJECT AT THIS TIME WITHOUT HAVING THE ABILITY TO FIRST EXAMINE THE PHOTOGRAPH OR TO DETERMINE ITS AUTHENTICITY.

14. A copy of an enlarge topographic map depicting the LaCreek National Wildlife Refuge and adjacent areas with an accompanying overlay showing the existing water system. OPPONENTS WOULD OBJECT TO THIS DOCUMENT UNTIL THE CARTOGRAPHER OF THE TOPOGRAPHIC MAP AND ACCOMPANYING OVERLAY HAVE BEEN EXAMINED TO DETERMINE THE RELIABILITY AND AUTHENTICITY.

15. A photographic mosaic created from 1937 aerial photographs of the LaCreek NWR, with an accompanying overlay depicting various interpretative annotations. OPPONENTS WOULD OBJECT AS TO THE AUTHENTICITY AND RELIABILITY OF THIS PROPOSED DOCUMENT UNTIL THE OPPONENTS HAVE HAD AN OPPORTUNITY TO OBSERVE THE DOCUMENT, DETERMINE ITS RELIABILITY, AND HAVE ALSO HAD AN OPPORTUNITY TO CROSS EXAMINE THE PREPARER OF THE DOCUMENT AS PART OF ANY FOUNDATION FOR ITS INTRODUCTION INTO EVIDENCE.

16. Copies of maps dated 1935-36 (drawn from original surveys) of the LaCreek NWR and adjacent areas. OPPONENTS WOULD OBJECT TO THE AUTHENTICITY AND RELIABILITY OF THESE MAPS UNTIL THEY HAVE HAD AN OPPORTUNITY TO EXAMINE THEM AND LEARN THE SOURCE OF THEIR ORIGIN.

Dated this 17 day of June, 1991.

FARRELL, FARRELL & GINSBACH

By: Jane M. Farrell
JANE M. FARRELL

By: Patrick M. Ginsbach

PATRICK M. GINSBACH
Lawyers for DeKay, Emley, Heath,
L. Kocer and R. Kocer
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17 day of June, a true and correct copy of the foregoing Opponents' Objections to Prehearing Exhibits of Documentary Exhibits was mailed regular United States mail with first class postage prepaid in an envelope securely sealed and addressed to:

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Patrick M. Ginsbach
PATRICK M. GINSBACH

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA



In the Matter of the Application to Validate Vested Water Right Claim Nos. 1926-2 and 1927-2, LaCreek National Wildlife Refuge,

and

In the Matter of Application No. 1921-2 to Amend Water Permit No. 265-2.

OPPONENTS PREHEARING BRIEF

Come now the Opponents Wendell DeKay, Charles Emley, Brett Heath, Lawrence Kocer and Raymond Kocer, (Opponents), the Opponents in the above-captioned proceeding, and pursuant to the May 31, 1991, Prehearing Order of the Honorable Marian Gunderson, Hearing Examiner, hereby submit the following Prehearing Brief.

I.

Application No. 1926-2:

A. Description of Relief Requested.

In Application No. 1926-2, the Fish & Wildlife Service has applied for a permit to appropriate some 3.36 cubic feet per second (cfs) of water to flood irrigate approximately 235 acres of land located on the Fish & Wildlife Service's LaCreek National Wildlife Refuge (NWR). The Opponents are requesting that this Application be denied because it has unlawfully impaired existing rights of some of the Petitioners, the use by the Fish & Wildlife Service is not a beneficial use nor is it in the public interest and the water has not been appropriated as described in the Application for Irrigation Use with a priority date of 1939 or 1951.

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B. Statement of Facts Which Opponents Intend to Prove in Support of Their Position.

1. History of Refuge

The LaCreek National Wildlife Refuge was established in 1935 by Executive Order of President Roosevelt, and it was located originally in parts of Townships 36 and 37 North, Range 36 West of the 6th Principal Meridian, Bennett County, South Dakota.

In July of 1968, the U.S. Fish & Wildlife Service entered into a lease and option to purchase lands belonging to the Cedar Creek Ranch Company, which were located adjacent to the original Refuge in Bennett County, South Dakota. This ranch was originally started by Birthol Brown and later incorporated into the Cedar Creek Ranch Company by Brown and his children. In 1971, the Cedar Creek Ranch Company had dissolved and the shareholders of that ranch company executed a warranty deed pursuant to the terms of the lease and option to purchase executed in July of 1968 conveying all of their interest in 6,665.24 acres to the United States of America, which became part of the United States Department of the Interior, Fish & Wildlife Service, LaCreek National Wildlife Refuge. This land is described as:

Township 36 North, Range 36 West, 6th P.M.

Section 29: SW¼, S½SE¼
Section 30: NE¼, Frac. W½
Section 31: All
Section 32: NW¼

Township 36 North, Range 37 West, 6th P.M.

Section 13: N½, NE¼SW¼, S½SW¼, SE¼
Section 14: NE¼
Section 22: All
Section 23: NE¼NE¼, E½NW¼NE¼, S½NE¼, S½
Section 24: E½, E½NW¼, NE¼SW¼, S½SW¼
Section 25: N½, SW¼, N½SE¼
Section 26: All
Section 27: All
Section 28: All
Section 29: E½

2. Proceedings involving Application No. 1926-2.

In June of 1984, the U.S. Fish & Wildlife Service made application for a permit to appropriate 3.36 cubic feet per second of water to irrigate 235 acres. The source of the water to be used for irrigation would be from springs and the land to be irrigated included the following:

Township 36 North, Range 37 West, 6th P.M.

Section 22: W½SW¼, S½SE¼
Section 23: SW¼SW¼SW¼, SW¼SE¼SE¼
Section 24: E½SW¼
Section 25: NE¼NW¼
Section 26: N½NW¼, W½NW¼NE¼,
Section 30: W½NW¼

Notice of Hearing to validate Vested Water Right Application No. 1926-2 was published in the Bennett County Booster commencing September 5, 1990 and thereafter Raymond J. Kocer, Brett A. Heath, Wendell DeKay, Lawrence H. Kocer, Kenneth M. Keegan and Charles W. Emley filed a Petition opposing the issuance of the water right.

3. The Opponents.

Raymond Kocer owns land in the NW¼ of Section 23, Township 36 North, Range 37 West, 6 P.M. that adjoins that portion of the Cedar Creek Ranch Company that was purchased by the Fish & Wildlife Service. Charles W. Emley leased land in the NW¼SW¼ of Section 13, and in the W½NW¼ and the NW¼SW¼ of Section 24, all in Township 36 North, Range 37 West, 6th P.M. The later portion of Emley's property described herein is completely surrounded, except for the northwest corner, by property owned by the United Fish & Wildlife Service which was formerly the Cedar Creek Ranch Company. Brett A. Heath owns the W½ of Section 19, Township 36 North, Range 37 West, 6th P.M. and is surrounded on three sides by the Fish & Wildlife Service, which was formerly the Cedar Creek Ranch Company. Lawrence Kocer owns the W½ of Section 18, Township 36 North, Range 36 West, 6th P.M. and is surrounded on the west and east by the U.S. Fish &

Wildlife Service land, which was formerly the Cedar Creek Ranch Company. Wendell DeKay's ranch is below the Refuge in Section 30, Township 37 North, Range 35 West, 6th P.M., and is one of the first private pieces of property that the Fish & Wildlife Service discharges water from the Refuge onto after it has flowed through the Refuge pools.

4. History of the Use of the Springs.

The Opponents expect the evidence will establish that Birthol Brown was an enterprising entrepreneur when he owned the Cedar Creek Ranch. The evidence will show that the ranch was developed to produce livestock such as cattle and sheep, to produce a hay crop, and that there was even at times a fish hatchery and a power plant on the property. The evidence will establish that Brown built the dams to support pools for the breeding of fish in connection with his fish hatchery and built a dam to develop a hydroelectric power plant. That originally the ditches were constructed on the bottom land of the Cedar Creek Ranch Company to try and drain the fields because the land was subirrigated and there was too much water on the fields. That Brown and his children constructed ditches in the 1940's to try and irrigate the fields for alfalfa, but the alfalfa did not pan out. People who operated on the Cedar Creek Ranch Company from 1952 through 1971 are expected to testify that the land was never irrigated. That after the Refuge took over the operation of the Cedar Creek Ranch in 1971 they began to flood irrigate the hay meadows. Through the Fish & Wildlife Service's utilization of the water on the former Cedar Creek Ranch Company, they damaged the productivity of the ground for crop land, and that their true intent is not to irrigate the land for crop or forage production for wildlife, but to create sloughs for waterfowl. The evidence will show that through the Fish & Wildlife Service's utilization of the water on the Refuge they have consistently flooded Raymond and Lawrence Kocer's land and due to the

diversion structures on Lake Creek, those diversion structures slow down the movement of the water and as a result the water's ability to carry suspended solids downstream is decreased. The sedimentation buildup of Lake Creek elevates the channel of the creek and results in water flooding out of the banks of Lake Creek and onto the private land of Brett A. Heath, Charles Emley, and Lawrence Kocer. That when the water from Lake Creek is discharged off the Refuge into DeKay's property, it looks and smells "putrid". The water is so bad that DeKay's cattle will walk from the creek up to the buildings to drink water out of a tank rather than drink the water discharged from the Refuge. At times in the spring and early summer, the Refuge's obstruction of Lake Creek is such that there is no flow to the water so that even those landowners downstream from DeKay like Ken and Beverly Hines oftentimes will not have water for their livestock.

C. Identification of Extraordinary Legal Issues which may Arise During the Hearing on Application No. 1926-2.

Issue 1. Whether the approval of the U.S. Fish & Wildlife Service Application 1926-2 would impair the rights of others.

The South Dakota Supreme Court has held:

> that the right to water by prior appropriation is limited in every case in quantity and quality by the uses for which the appropriation is made. (emphasis added).
>
> ". . . the appropriation does not confer such an absolute right to the body of water diverted that the owner can allow it, after its diversion, to run to waste and prevent others from using it for mining or other legitimate purposes."
> Stenger v. Tharp, 94 N.W. 402, 404 (1903).

In the instant case, the Opponents expect the evidence to show that Wendell DeKay runs a cattle operation downstream from the U.S. Fish & Wildlife Service. That the U.S. Fish & Wildlife Service set up a number of diversions to spread the water from the springs over the land which was the Cedar Creek Ranch Company

thereby obstructing the natural flow of those springs. That after the spring water has been diverted the excess eventually rejoins the natural flow and is discharged onto the private land owned by DeKay. That the quality of the water discharged onto DeKay's land by the U.S. Fish & Wildlife Service is such that DeKay's cattle refuse to drink from the stream so that they would walk to water tanks near the DeKay ranch headquarters to obtain their drinking water rather than drink from the stream. Opponents expect evidence will also be introduced that other downstream landowners are deprived of water during critical times in their operations because of the obstructions the U.S. Fish & Wildlife Service had placed in the flow of water through the Cedar Creek Ranch.

Because the U.S. Fish & Wildlife Service's utilization of the water has affected the quality and the quantity of the water, this issue should be resolved by denying the Application.

Issue 2. Whether the U.S. Fish & Wildlife Service's Application No. 1926-2 is a beneficial use of water when the U.S. Fish & Wildlife Service's use of water has resulted in flooding private land adjoining the Refuge owned by the U.S. Fish & Wildlife Service.

The U.S. Fish & Wildlife Service argues that the beneficial use is determined by whether the use of the water is reasonable and useful and beneficial to the appropriator. This argument neglects to read the entire definition of "beneficial use" found at SDCL 46-1-6(6) which reads:

> "Beneficial Use" Any use of water within or outside the state, that is reasonable and useful and beneficial to the appropriator and at the same time is consistent with the interests of the public of this state and the best utilization of water supplies; (emphasis added)

Thus, the definition of "beneficial use" requires a two-pronged test to be used to make a determination if indeed the use of water constitutes a beneficial use. In summary, that two-pronged test is:

(1) That the use of the water is reasonable and useful and beneficial to the appropriator; and
(2) That the use is consistent with the interests of the public and the best utilization of water supplies.

Opponents contend that even under the first prong of the definition of "beneficial use" the Application must fail. The evidence will demonstrate that the use of water is not reasonable and useful and beneficial when that use causes flooding of adjoining private lands. It stands to reason that if the Fish & Wildlife Service's utilization of water results in flooding of adjoining private lands that they are using more water than they need. Our Court in the past has focused attention on the matter of efficient utilization of water so as to take into consideration if there is an unwarranted waste of water. Cook v. Evans, 185 N.W. 262, 265 (S.D. 1921), modified on other grounds, 186 N.W. 571, (S.D. 1922). Furthermore, the Legislature has provided that no appropriation of water in excess of the reasonable needs of the appropriators may be allowed. SDCL 46-5-5. A South Dakota riparian is limited by the concept of "reasonable use", he can claim only water which he can use for a beneficial purpose. Redwater Land and Canal Company v. Reed, 128 N.W. 702 (S.D. 1910). In this case case the lands are subirrigated and do not need to be irrigated. It is logical to conclude that the U.S. Fish & Wildlife Service is claiming more water than it can use when it floods adjoining private land.

The second prong of the test is determination of whether the use is consistent with the interests of the public and the best utilization of water supplies.

Our Legislature has recognized that because of the prevailing conditions in South Dakota our water resources must be put to the fullest extent of the beneficial use of which they are capable. The U.S. Fish & Wildlife Service is creating marginal conditions even to support wildlife and waterfowl by their utilization of the water resources. Furthermore, they have approximately 9,300 acres available as part of the original Refuge to create slough-like conditions for waterfowl to exist in. If the evidence establishes

that there is no need to irrigate in order to provide sufficient forage for wildlife and waterfowl, then it can an inference can be drawn that the Fish & Wildlife Service wants to spread water over the land under the guise of irrigation to create slough-like conditions for waterfowl. However, they have approximately 9,300 acres in the original Refuge boundaries that contain adequate slough-like conditions to meet the needs of waterfowl.

Our State also gives domestic use of water precedence over appropriative rights. SDCL 46-1-5. The Opponents urge the Water Management Board, based upon consideration of the circumstances and facts present in this case, to determine that it is not a beneficial use to allow water to be appropriated for cultivating food for wildlife and waterfowl as was done in Lake Shore Duck Club v. Lakeview Duck Club, 166 P. 309 (UT 1917).

Furthermore, the adoption of such a rule would be consistent with the proposed amendments to the general rules adopted by the Department of Water and Natural Resources, Division of Water Rights, and the definition for "stock watering" found at ARSD 74:02:01:01 as reworded to strike "buffalo, deer, elk, antelope and other wild animals that are managed for the public by a governmental agency" from that definition of stock watering of animals.

Consequently, this issue should be resolved by denying the Application.

Issue 3. Whether the Application is in the Public Interest when it Seeks to Appropriate Water for Wildlife and Waterfowl Habitate and Forage that Results in Flooding Adjoining Landowners.

Opponents contend that the standard for determining what is in the public interest is set forth in SDCL 46-1-4 which provides in pertinent part:

> It is hereby declared that because of conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow

> of water in or from any natural stream or watercourse in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of division of water.

Accordingly, if the evidence demonstrates that the U.S. Fish & Wildlife Service's utilization of water results in flooding of adjoining landowners, that the land the U.S. Fish & Wildlife Service seeks to irrigate has sufficient moisture already to provide native grasses, wild hay or wild meadow without the artificial application of water, then it is not in the interests of the public to approve the Application.

The U.S. Fish & Wildlife Service strongly disagrees with any contention that they are committing waste, but Opponents contend that not only do their practices indicate that they have no intention of irrigating the land, but even the words of the representative of the U.S. Fish & Wildlife Service reveal that their intent is to spread water out over the land to create sloughs for waterfowl. That in 1984 in connection with Application No. 1921-2 the representative of the U.S. Fish & Wildlife Service stated that they let the water flow over the land when the dam is full to create a larger slough for the "little duckies". The Opponents recognize that these statements were not made in connection with Application No. 1926-2, but when considered along with all the evidence concerning Application Nos. 1927-2, 1926-2 and 1921-2, the evidence will demonstrate that there is no need to irrigate the lands in question under Application No. 1926-2 and that the Application is being used as a subterfuge in order to create sloughs for waterfowl.

Because the Application to appropriate the water does not support a practice of irrigation as defined by ARSD 74:02:01:01, but does support the contention that the water is being wasted, then it is not in the public interest to grant the Application. This issue should be resolved by denying the Application.

Issue 4. Whether the Application has any Priority when the Applicant's Predecessor in Interest Did not use the Water for Irrigation from 1951 through 1971.

The Opponents expect the evidence to show that the U.S. Fish & Wildlife Service's predecessor in interest to the land which is the subject of these proceedings originally tried to develop the water for hydroelectric power and creating a fish hatchery. That ditches were used to drain the water off the fields. That there was some irrigation in the 1940's to try to develop an alfalfa crop, but the Opponents expect the testimony to show that this was discontinued by 1951 and from 1951 through 1971 the owners and operators of the land which is the subject of this Application did not use the water for irrigation purposes. That after the U.S. Fish & Wildlife Service obtained ownership of the land in 1971, they began to use water by diverting it and spreading it out over the land.

South Dakota law provides that if there is a failure to use beneficially appropriated water, subsequent use of the water does not revive the water right. SDCL 46-5-37. In re Cancellation of Stabio Ditch Water Right on Spearfish Creek, 417 N.W.2d 391 (S.D. 1987). Further, vested rights is defined at SDCL 46-1-9(1) as:

> The right of a riparian owner to continue to use water actually applied to any beneficial use on March 2, 1955, or within three years immediately prior to that date, to the extent of the existing beneficial use made of the water;

Opponents contend that if the water was not used from 1951 through 1971 then the applicant has no vested right to be validated. This issue should be resolved in favor of the Opponents by denying the Application.

II.

Application No. 1927-2:

A. Description of Relief Requested.

In Application No. 1927-2, the U.S. Fish & Wildlife Service has applied for a permit to appropriate 10 cubic feet per second (cfs) of water from Lake Creek to flood irrigate approximately 700 acres of land located on the Fish & Wildlife Service's LaCreek National Wildlife Refuge. The Opponents are requesting that this Application be denied because it has unlawfully impaired existing rights of some of the Petitioners, the use by the Fish & Wildlife Service is not a beneficial use nor is it in the public interest, and the water has not been appropriated as described in the Application for irrigation use with a priority date of 1939 or 1951.

B. Statement of Facts which Opponents Intend to Prove in Support of Their Position.

Opponents would rely upon the same or similar facts contained in Part I.B. of this Brief with the following exception. Evidence will be produced that because of the diversions placed across Lake Creek sedimentation builds up in Lake Creek and elevates the channel of the creek and forces water onto adjoining private land. Furthermore, the diversions in Lake Creek result both in rising water tables in a wide area and overland flow progresses beyond the boundary of the Refuge onto private adjoining property.

C. Identification of Extraordinary Legal Issues which may Arise during the Hearing.

The same issues identified in Part I.C. of this Brief will apply to this Application also. Since these issues have been addressed above, they will not be repeated except to the extent of the following issue:

Issue: Whether Application No. 1927-2 should be denied when the diversions placed on Lake Creek result in the flooding of adjoining land.

SDCL 46-5-2 provides:

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

Furthermore, the South Dakota Supreme Court has held that where there was a seepage of water onto land because of an increased water level in the river due to a dam and interference with the drainage off an adjoining landowners land, that the dam owner constitutes a flooding within the meaning of SDCL 46-5-2 (formerly SDC 61.0101). Willadsen v. Crawford, 60 N.W.2d 692 (S.D. 1953). Opponents believe that the evidence will demonstrate that not only did the diversions on Lake Creek by the Applicant result in the flooding of adjoining private land, but also flooded out a county road belonging to Bennett County, which flooding persisted until such time as the U.S. Fish & Wildlife Service dredged Lake Creek on its side of the county road.

This issue should be resolved by determining that the diversions constitute flooding adjoining private land and that consequently the Application should be denied.

III.

Application No. 1921-2:

A. Description of Relief Requested.

In Application No. 1921-2, the U.S. Fish & Wildlife Service has filed an application to amend existing Water Permit No. 265-2 by changing the diversion points and the acreage presently covered by the existing Water Permit. Under the existing Water Permit, it allows for appropriation of 4.45 cfs from Cedar Creek to irrigate some 366 acres. The Application proposes to change the

point of diversion from the Southwest Quarter of the Southwest Quarter (SW¼SW¼) in Section 25, Township 36 North, Range 37 West, Bennett County, South Dakota to the Southeast Quarter of the Northwest Quarter (SE¼NW¼), Section 25, Township 36 North, Range 37 West, Bennett County, South Dakota. The original Permit allows the following land to be irrigated, namely: South Half of the Northwest Quarter (S½NW¼), South Half of the Northeast Quarter (S½NE¼), North Half of the Southeast Quarter (N½SE¼), Section 25, Township 36 North, Range 37 West; Southwest Quarter (SW¼), South Half of the Northwest Quarter (S½NW¼), Section 30, Township 36 North, Range 36 West of the 6th P.M., Bennett County, South Dakota, containing approximately 366 acres. The Application requests a change in the land affected by the water use to the North Half (N½), Southwest Quarter (SW¼), North Half of the Southeast Quarter (N½SE¼), Section 25; the Southeast Quarter of the Southeast Quarter of the Northeast Quarter (SE¼SE¼NE¼), Section 24; all in Township 36 North, Range 37 West; and the East Half (E½) of Section 19, Township 36 North, Range 36 West, Bennett County, South Dakota, for a total of 362 acres with an appropriation of 3.89 cfs.

Opponents are requesting that this Application be denied because there is no need to irrigate the land requested to be changed as affected by the Water Permit, and the Applicant's practice of spreading water over this changed irrigated land does not constitute irrigation, and for these reasons, the Opponents request that the Application be denied.

B. Statement of Facts which Opponents Intend to Prove in Support of their Position.

The Opponents expect the evidence to demonstrate that the land to which the Application wishes to have the irrigation permit changed does not need to be irrigated. The Applicant's predecessors in interest did not need to flood irrigate these grasslands to produce hay and it is not necessary to flood irrigate these same grasslands to create wildlife habitat. That when this

Application was originally submitted in June of 1984 the Chief Engineer recommended denial of Application No. 1921-2 on May 24, 1985 because of information received that the proposed flooding of land for fish and wildlife production did not constitute irrigation and therefore the irrigation water rights should not be tranferred to the new owner. Further, the Opponents expect the evidence to show that when the Application was originally submitted Rolph Craft, the project manager for the U.S. Fish & Wildlife Service, made a statement to Betty Westland, a representative of the Water Rights Division, that the U.S. Fish & Wildlife Service let the water flow over the land when the dam is full to create a larger slough, for the "little duckies". Craft also stated that they are not going to plant anything on the land.

Thereafter, apparently the U.S. Fish & Wildlife Service changed its position and in letters to the Division of Water Rights the Applicant contended that the water covered under the permit is not changed and it would be the Service's practice to flood irrigate native grasses for the purpose of providing wildlife with food and habitat which would not vary from the practices of those who irrigate the same type of crop for cattle grazing.

C. Identification of Extraordinary Legal Issues Which may Arise during the Hearing.

Issue 1: Whether an Applicant has met its burden for amending a permit to sever and transfer irrigation rights to different land when the basis of the Application when the dam which was authorized as the diversion point under the original Permit was breached and not in working condition.

SDCL 46-5-34 governs, in pertinent part, those situations in which an amendment of a water permit is required for severance and transfer. It provides:

> All water used in this state for irrigation purposes shall remain appurtenant to the land upon which it is used. However, if for any reason it should become impracticable to use all or any part of the water beneficially or economically for irrigation of any land to which the right of its use is appurtenant, all or any part of the right may be severed

> from the land and simultaneously transferred and become appurtenant to other land without losing priority of right previously established, subject to existing rights, upon approval of an application for an amended permit. No increase in total acres irrigated may be allowed under this section.

Consequently, the water rights for irrigation may not be transferred to different land unless it becomes impractical to use all or part of the water beneficially or economically for irrigation, then the right may be severed from the land without loss of priority if there is no detriment to existing rights. In the instant case, the Applicant has made no showing as to why it is impractical to use all the water beneficially or economically for irrigation on the land to which it is appurtenant. There is some indication in the permit that the existing dam has fallen into disrepair. But the Applicant has not demonstrated why that dam cannot be repaired to continue its use under the existing Water Permit, particularly if it was of earthen construction.

Issue 2: Whether it is in the public interest and a beneficial use of water to allow an existing Water Permit to be severed from the land and simultaneously transferred and become appurtenant to other land without losing priority of right when the practices of the Applicant and the representations made by the Applicant's representatives indicate the water is to be used to create a slough for waterfowl.

It is clear from SDCL 46-5-34 and 46-5-34.1 that when an application is made for approval of the severance of irrigation water to be used for irrigation of other land, the applicant must continue to use the water for irrigation purposes. When an appropriator changes from irrigation to another use, the Commission cancels the first permit and issues another; thus, the old priority date is lost and a new priority acquired on the date the new permit is issued. In the instant case, the Opponents expect the evidence will demonstrate that the land which Applicant wishes to have the water permit transferred to does not need to be irrigated to provide native grasses for forage and that the Applicant's present use of this Water Permit is to create a slough for waterfowl. Consequently, this issue should be resolved by denying the

Application.

Dated this 17 day of June, 1991.

FARRELL, FARRELL & GINSBACH

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By: Patrick M. Ginsbach
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17 day of June, a true and correct copy of the foregoing Opponents' Prehearing Brief was mailed regular United States mail with first class postage prepaid in an envelope securely sealed and addressed to:

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JUN 1991 DIVISION OF WATER RIGHTS Pierre, SD

June 18, 1991

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RE: **LaCreek Water Rights Applications**

Dear Ms. Farrell, Mr. Ginsbach & Mr. Kunz:

This letter is deigned to address several prehearing issues in the LaCreek water rights cases which will be heard next week.

1. Stipulation to Documents

The Division of Water Rights agrees to stipulate to the admission of FWS 1-13 as listed on the FWS Prehearing Identification of Documentary Exhibits. I have not received a copy of FWS 14, the enlarged topographic map. Once I have either received a copy of this map or have had an opportunity to examine the exhibit that will be filed with the Board, I will review the map with the Chief Engineer and will advise you accordingly. Likewise, I have not seen FWS 15. I expect, however, the division will not be objecting to the photographic mosaic. Once the division has either received a copy of the overlay accompanying this photographic mosaic or has had an opportunity to examine this overlay, I will advise you of whether I expect to object to the admission of this document. I have, on today's date, received copies of the three 1930's maps. (FWS 16.) Before stipulating to the admission of these exhibits, I will need some additional information by way of foundation. Possibly,

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Mr. Kunz, you could provide me with a short description of this foundation.

I have also reviewed the First Amended Prehearing Identification of Documentary Exhibits filed by FWS and have no objection.

2. Stipulation of Facts

I have reviewed Prehearing Statement of Facts Which FWS Desires to Stipulate into Evidence. The division agrees to stipulate to FWS assertions 1-4 and 8 and 9. At this time, the division holds FWS to its proof on its assertions 5 and 6 concerning the irrigation practices of Mr. Birthol Brown in 1939. Perhaps, Mr. Kunz, you could provide me with further documentation on how you intend to prove these facts. Then, the division may be in a better position to stipulate to such facts.

Finally, the division objects to factual assertion 10. The objection is twofold. First, Objector Keegan does have a currently valid permit to appropriate water. While I understand that Keegan may not appear or present testimony or evidence in this proceeding, he is considered to be a party to this case insofar as he has not withdrawn his objection. Secondly, the division objects to assertion No. 10 if it is designed to imply that none of the objectors have any water rights at all. They, of course, have rights as domestic users. This statement may already be clear but perhaps it can be amended to remove any doubt.

3. Water Rights Files

Ordinarily the official file in water rights proceedings (which is kept by the Chief Engineer) is entered into evidence, in total, at the beginning of the administrative proceeding. These files include the filed application, any filed procedural documents or correspondence, the Chief Engineer's report, and other public documents.

In order to explain what is contained in these formal files and to request that you stipulate accordingly, I am providing each party with an index of the files. The dates listed for the documents are the dates on which those documents were received by the Division of Water Rights. If you wish to be provided with a copy of any these documents, please feel free to contact me.

I have not provided you with the actual files because each of you already has a copy of a significant portion of each file. In fact, you have already reviewed and agreed to the admission of some of these documents.

If, after reviewing the index or any documents referred to in the index, you believe that any of the documents are not properly admissible as part of the formal file in this proceeding, please let me know.

3. Review of Site

It is my understanding that we were going to work out a stipulation for reviewing the refuge site. I believe, Mr. Ginsbach, you had intended to execute a stipulation which would set forth the particular locations that you feel should be the subject of such a visit. Additionally, we have previously discussed the issue of whether any experts or attorneys would be entitled to provide a narrative during the site visit. It's my understanding that we agreed that such a narrative would probably be inappropriate. We need to work out this written stipulation yet.

4. Transcript Fees

Because a majority of the Water Management Board will not be present, they will need to review transcripts in order to make their decision. It is my understanding that in the past parties have agreed to split the cost for transcripts. In this case, I am proposing that the objectors pay one third, the division pay one third and FWS pay one third. Let me know your thoughts.

5. Witness List

It might be useful for us to exchange lists of witnesses in advance of hearing. The division's only witness will be M. Rassool Ahadi, an engineer with the division staff. Mr. Ahadi will testify regarding the division's recommendations. I expect that the division will be presenting Mr. Ahadi's testimony previous to the testimony of the other parties. This timing for the presentation of the staff recommendation would be consistent with previous Water Management Board hearings where the staff has begun the hearing with its recommendation.

Please provide me with a list of your witnesses as well as a very short broad statement of what you expect from

them by way of testimony. (Just a few sentences for each witness.)

6. Permit Qualifications

If each of you determines that it is in the best interest of the parties concerned to stipulate to qualifications or conditions on the management of water use in the LaCreek refuge, the division would be willing to examine such permit qualifications or conditions and, if they are acceptable, may be willing to revise its recommendation in this case accordingly.

I would like to schedule a teleconference among the parties yet this week. Please advise me of the time that is convenient for you.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB:sks

JUN 1991
DIVISION OF
WATER RIGHTS
Pierre, SD

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION TO VALIDATE VESTED WATER RIGHT CLAIM NOS. 1926-2 AND 1927-2, LACREEK NATIONAL WILDLIFE REFUGE, and IN THE MATTER OF APPLICATION 1921-2 TO AMEND WATER PERMIT NO. 265-2.	MOTION TO WITHDRAW APPLICATION TO VALIDATE VESTED WATER CLAIM NO. 1926-2

COMES NOW the United States Fish and Wildlife Service (FWS), the applicant in the captioned proceeding, and hereby moves that it be allowed to withdraw, without prejudice, its Application No. 1926-2 presently before the State Water Management Board (the Board). This motion is made on the grounds that, as presently constituted, FWS finds it necessary to significantly amend the provisions of Application No. 1926-2. Such amendments would possibly include changing the application from a vested right to a new application, and/or changing the claimed priority date. Although it might be possible for FWS to propose these amendments under the auspices of the captioned proceeding, given the nature of the contemplated amendments, FWS submits that, to avoid "cluttering" the captioned proceeding with unnecessary and irrelevant evidence, and to avoid confusing the issues that would legitimately remain before the Board, the interests of justice and administrative economy would best be served if the Board were to grant this motion. Additionally, the granting of this motion would obviate any notice problems that might arise if FWS at-

tempted to amend its application during the course of the captioned proceeding.

FWS makes this motion in good faith and not for purposes of delay or undue advantage. Rather, as previously explained, this motion is made solely for the purpose of allowing FWS to amend and resubmit its application. FWS admits that, if this motion is granted, upon submission of its (FWS') amended application, the same objectors may well again oppose the application. However, FWS submits that the filing of its amended application may well eliminate many of the legal and factual issues raised by the objectors in the captioned proceeding. Therefore, at this time, it makes little or no sense for FWS and the parties to proceed with the hearing of the presently-constituted Application No. 1926-2.

For the above reasons, FWS urges the Board to grant this motion, and allow FWS to withdraw, without prejudice, Application No. 1926-2.

DATED this 21st day of June, 1991.

John R. Kunz
Counsel for FWS
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO. 80225
(303) 236-8444

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 1991, true and correct copies of the foregoing Motion to Withdraw Application to Validate Vested Water Right Claim No. 1926-2 were mailed, via overnight mail, and also sent via FAX transmission to:

Ms. Marian Gunderson
Hearing Examiner
811 West Third Street
Yankton, SD 57078

John P. Guhin, Esq.
Deputy Attorney General
500 East Capitol
Pierre, SD 57501-5070

Patrick M. Ginsbach, Esq.
Farrel, Farrel and Ginsbach
441 North River Street
Hot Springs, S.D. 57747

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

John Hatch
Chief Engineer, Dept. of Environment and Resources
Division of Water Rights
523 East Capitol Ave.
Pierre, SD 57501-3182

I further certify that on the 21st day of June, 1991, a true and correct copy of the foregoing Motion to Withdraw Application to Validate Vested Water Right Claim No. 1926-2 was hand-delivered to:

Kenneth M. Keegan
HWC 3, Box 24
Martin, SD 57551

Kaylynne Henry



Office of the Solicitor

Rocky Mountain Region
United States Department
of the Interior

TELEFAX MESSAGE

TO: John Hatch

OFFICE:

ROOM NUMBER:

FAX NUMBER: 605-773-6035

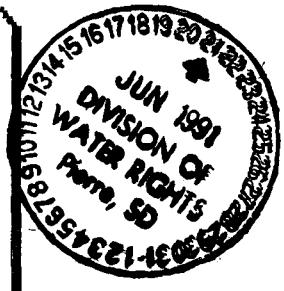
TELEPHONE NUMBER: 605-773-3352

NUMBER OF PAGES TO FOLLOW: 3

From: John Kunz

Date: 6 - 21 1991

Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225
Telefax Number: FTS 776-8644
Comm'l Number: 303-236-8644
Confirmation Number: FTS 776-8444
Comm'l Confirmation: 303-236-8444



SPECIAL INSTRUCTIONS:

STATE OF SOUTH DAKOTA

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

MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

JUN 1991
DIVISION OF
WATER RIGHTS
Pierre, SD

June 21, 1991

Marian Gunderson
811 W. Third St.
Yankton, SD 57078

Re: In the Matter of the Application to Validate Vested Water Right Claim Nos. 1926-2 and 1927-2, LaCreek National Wildlife Refuge and In the Matter of Application No. 1921-2 to Amend Water Permit No. 265-2

Dear Ms. Gunderson:

This letter is designed to respond to that portion of your Prehearing Order in the above-entitled matter which allows the parties to file responsive briefs on or before June 21, 1991. The Division has reviewed the Opponent's Prehearing Brief filed on behalf of the Protestants in this proceeding. The Water Rights Division has determined that it will not be filing a responsive brief in this matter.

Sincerely,

Diane Best
Assistant Attorney General

DB:ss

cc: John R. Kunz
Jane Farrell
Patrick M. Ginsbach
John Hatch
John P. Guhin

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STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATION TO VALIDATE VESTED WATER RIGHT CLAIM NUMBERS 1926-2 AND 1927-2 LACREEK NATIONAL WILDLIFE REFUGE	ORDER OF CONTINUANCE
and	
IN THE MATTER OF APPLICATION NO. 1921-2 TO AMEND WATER PERMIT 265-2	

The following Order is herewith entered at the direction of the Hearing Officer, the Honorable Marian Gunderson.

1. Three combined matters, including two applications to validate vested water right claims and one application to amend a water permit are scheduled for hearing in Martin, South Dakota, before the Hearing Officer on June 26, 1991. The parties have suggested that a three day hearing may be required and an on-site inspection may be requested.

2. On June 21, 1991, the undersigned Hearing Officer received a "Motion to Withdraw Application to Validate Vested Water Claim No. 1926-2." The Motion was submitted on behalf of the United States Fish and Wildlife Service.

3. The motion of the United States indicates that it desires to withdraw its present application to validate water right 1926-2 without prejudice and that it intends to "significantly amend" the application. The U.S. Fish and

Wildlife Service thus admits it will desire a hearing in the future on vested water right claim number 1926-2.

4. The materials submitted by the parties indicate that the two vested water right claims and the application for the new water right are intertwined. It follows, therefore, that if an on-site inspection, and a hearing on-site in Martin, South Dakota, is necessary for the two claims which would remain if the motion to withdraw is granted, then quite likely a new on-site inspection might be needed and an on-site hearing held when 1926-2 is eventually amended and heard. Moreover, it is not at all certain whether the amended 1926-2 would be heard by this or another Hearing Officer or by the entire Board.

5. For these reasons, it is inappropriate as a matter of judicial economy to allow severance of these matters.

6. At the same time, the Hearing Officer finds that the application to withdraw the validation of vested water claim 1926-2 was made in good faith and for legitimate purposes.

7. The Hearing Officer believes that the most appropriate solution is continue this entire matter, including both vested right applications and the application to amend water permit 265-2, for a period of 90 days to allow the U.S. Fish and Wildlife Service to amend Application No. 1926-2.

ORDER

The hearing scheduled for June 26, 1991, in Martin, South Dakota, in each of the above-entitled matter is continued for a period of ninety (90) days from June 26, 1991. Unless otherwise directed by the Hearing Officer, each of the above-entitled matters shall be re-noticed prior to a new hearing on this matter.

By Marian Gunderson
Marian Gunderson
Hearing Officer by John Nelson

m-pld54.jpg

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Order of Continuance in the matter of **Application of Validate Vested Water Right Claim Nos. 1926-2 and 1927-2 LaCreek National Wildlife Refuge and In The Matter of Application No. 1921-2 to Amend Water Permit 265-2**, was telefaxed to Patrick Ginsbach, Esq., Farrell, Farrell and Ginsbach, 441 North River Street, Hot Springs, South Dakota 57747, at (605) 745-3154 and to John Kunz, U.S. Department of the Interior, Denver, Colorado, (303) 236-8644; and hand delivered to Diane Best, Esq., Assistant Attorney General, State Capitol, Pierre, South Dakota 57501; John Hatch, Chief Engineer, Division of Water Rights, Department of Water and Natural Resources, Joe Foss Building, Pierre, South Dakota 57501; and mailed by United States mail to Kenneth Keegan, HWC 3, Box 24, Martin, South Dakota 57551; all on June 21, 1991.

John P. Guhin
Deputy Attorney General
500 East Capitol
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215

United States Department of the Interior
FISH AND WILDLIFE SERVICE

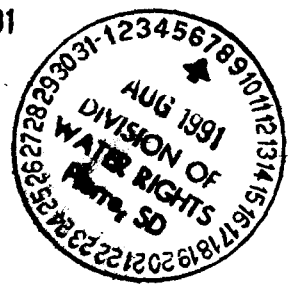
MAILING ADDRESS:
Post Office Box 25486
Denver Federal Center
Denver, Colorado 80225

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228

IN REPLY REFER TO:

BA/EN
WR SD
Mail Stop 60190

AUG 01 1991



South Dakota Department of Water
and Natural Resource Development
Water Rights Division
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

Dear Sir or Madam:

Enclosed please find the following documents related to applications for permit to appropriate water for the Lacreek National Wildlife Refuge in Bennett County, South Dakota:

1. Application for Permit to Appropriate Water REPLACING Application Number 1926-2 covering Springs;

2. Money Order in the amount of $500 to cover filing fee.

Exhibits A & B, Aerial Photographs, Filing Map No. 6R-SD-176-WR-P-5.0, and the required Water Quality Analyses remain unchanged.

If you have any questions or require further information, please contact Ginger Chesy of our Engineering Division at (303) 236-5321.

Sincerely,

ACTING /s/ WILBUR N. LADD JR.
Regional Director

Enclosures (2)

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

Mail to: Water Rights Div.
523 E. Capitol
Pierre, SD 57501
(605) 773-3352

No. 2191-2 Hydrologic Unit 10140203
Map No. _____ Basin White River
Newspaper Bennett Co. Booster II, Box 610
Martin, SD 57551 (Wed)

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

Check use of water: Industrial ☐ Commercial ☐ Municipal ☐ Other Common Distribution System ☐
Rural Water System ☐ Suburban Housing ☐ Geothermal Heat ☐ Institutional ☐ Recreational ☒
Domestic ☐ (above 18gpm) Other ☐ Fish & Wildlife

Type of Application: Check one or more of the following

New ☒ Vested Right ☐ Future Use ☐ Change Use ☐
☐ Amend Permit No._____ with old priority date retained
Change diversion point(s) ☐ Add diversion point(s) ☐ Other ☐ _____
☐ Application to: Change diversion point(s) ☐ Add diversion point(s) ☐ on Permit No. _____
☐ Construction to use water reserved by Future Use Permit No._____

AUG 1991 DIVISION OF WATER RIGHTS Pierre, SD

1. Name of Applicant Department of Interior United States Fish and Wildlife Service Phone No. (303)236-5321
   Post Office Address P.O. Box 25486, Denver Federal Center, Denver, State Colorado 80225
   (Street, RR or Box) (City) Zip Code
2. Amount of water claimed (c.f.s) 4.44
3. Source of water supply Springs
4. Location of point of diversion See Attached
   _____
   _____ County Bennett
5. Counties where water will be used Bennett
6. Annual period during which water is to be used January 1 through December 31
7. Give a brief description of proposed project. When available include any preliminary engineering report or other reports or information that will help explain the project. (Attach sheet if more space is needed)
   Natural Springs, dams & control structures create marsh, sloughs & wet meadows for waterfowl propagation & enhancement of wildlife habitat, and flood irrigation.

   Maximum use calculated to be 1,444.7 acre-feet annually.

Attachments: Attach Form 2A if diversion from a well or dugout, or if storage of water, is proposed. Attach map (see instruction)

STATE OF COLORADO)
County of JEFFERSON)ss

I, Wilbur N. Ladd, Jr. 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 ACTING REGIONAL DIRECTOR

Subscribed and sworn to before me this first day of August 1991

Susan E. Craddock Notary Public

My Commission Expires Aug 5, 1993

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4-87

Attachment #1 to Application for Permit to Appropriate Water - SPRINGS
U.S. Fish and Wildlife Service - Lacreek NWR



Question No. 4 - Location Point(s) of Diversion

SPRING	Points of Diversion	Nature of Diversion
ALL T36N, R37W, BENNETT COUNTY		
A -	NW1/4 NW1/4 NW1/4 Sec. 27	Natural Spring/Marsh Conditions - No Improvements
B -	NW1/4 NW1/4 NE1/4 Sec. 27	Natural Spring into Pond - Existing Dam with stoplog structure.
C -	SW1/4 SW1/4 NW1/4 Sec. 26	Natural Spring into "Hatchery Pond" - Existing Dam - Deteriorated Raceways/Fish Hatchery works with a "morning glory" spill structure. Service replaced a culvert with stoplog and riprapped to prevent erosion of dam bank. Pre-existing ditches located below Spring C.
D -	SW1/4 SE1/4 NE1/4 Sec. 26	Natural Spring, No Improvements. Pre-existing ditch below.
E -	SW1/4 SE1/4 NW1/4 Sec. 25	Natural Spring. Flows into a small marsh then 300-400 yards to Pond with Dam and Stoplog Structure. Free flows over spillway and continues on natural course.
T36N, R36W, BENNETT COUNTY		
F -	SE1/4 SW1/4 NW1/4 Sec. 30	Natural Spring, No Improvements.

Question No. 5 - Counties, Place of Use

SPRING	PLACE OF USE	NO. OF ACRES
All on Service-Owned Lands, T36N, R37W, Bennett County		
A & B -	W1/2 SW1/4, S1/2 SE1/4 Sec. 22	40
C & D -	SW1/4 SW1/4, SE1/4 SE1/4 Sec. 23 and N1/2 Sec. 26	100
E -	E1/2 SW1/4 Sec. 24 and NE1/4 NW1/4 Sec. 25	75
T36N, R36W, Bennett County (Spring Originates on Service lands, with marsh extending onto inholding.)		
F -	W1/2 NW1/4 Sec. 30	20
	TOTAL	235

RECEIPT

412732

Division of Water Rights

South Dakota Department of Water and Natural Resources

Pierre, August 8, 1991

RECEIVED OF U.S. Dept Interior, Fish & Wildlife Serv, P.O. Box 25486, Denver, CO 80225

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

Fee for Application for Permit No. 2191-2 to Appropriate Water, to construct works and to put water to beneficial use	500	00
Fee for Application for Permit No. _____ to Appropriate Water for Future Use		
Fee to retain Future Use Permit No. _____ after period of seven years.		
Fee for Inspecting Constructed Works, confirming beneficial use and issuing Water License No.		
Fee for Filing Transfer Form		
Fee for Filing Extension Request		
Fee for Certified Copy of		
Fee for Print Copy of Map		
Fee for Certifying		
Fee for _____ (Any Other Work Provided by Law) **Total**	500	00

By John Hatch (CE)
Chief Engineer

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Considered: _____ WATER PERMIT NO. **2191-2**

Phone: **303 236 5321**

Name of Applicant: **US Fish and Wildlife Service**

Post Office Address: **PO Box 25486, Denver Federal Center, Denver, CO 80225**

Amount of Water Claimed: **4.44 cfs (1444.7 ac-ft)** Total Acres: _____

Source of Water Supply: **6 Natural Springs**

Water to be used for: **Fish and Wildlife - Recreation** County: **Bennett**

About _____ miles _____ of _____

PROOF OF PUBLICATION: Received _____ Not Received _____

APPLICATION: Approved _____ Subject to _____

F.F.& C/.L. Adopted _____ Not Approved _____ Deferred _____

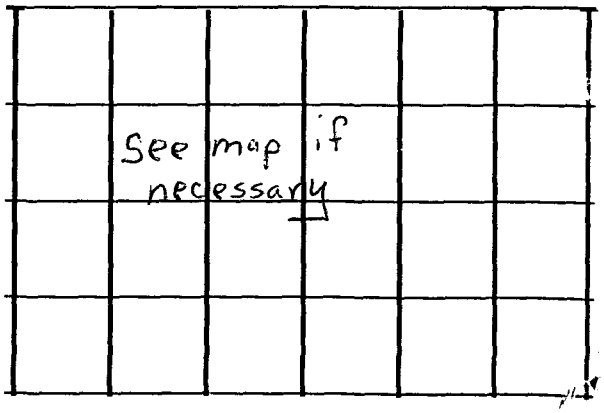
PRIORITY Date Received: **8/7/91** Fee: **$500** Remarks **Replaces previous VR Application No. 1926-2**

Corrected Application Received _____ Period of Annual Use _____

WATER QUALITY APPROVAL RECEIVED _____ APPROVED/CONDITIONAL (Circle one)

WI-1 Description same as Application YES ___ NO ___ REMARKS _____

Diversion Point: **NW1/4 NW1/4, NW1/4 NE1/4 Section 27, SW1/4 NW1/4, SE1/4 NE1/4 Section 26, SE1/4 NW1/4 Sect.25, T36N, R37W; SW1/4 NW1/4 Sect. 30 T36N, R36W**



Well Log: Driller: _____ Licensed YES ___ NO ___

Depth of Well: _____ REMARKS _____

Type of Map: **Plat** PREPARED BY: _____ Reviewed and the Number Assigned on **8/9/91** By **Eric Gronlund**

2191-2

Department of Agriculture
WI#1
5/87



SOIL/WATER COMPATIBILITY PERMIT

Division of Conservation

Office Use Only: 4639

WR#:

OWNERS NAME: U.S. FISH & WILDLIFE/DEPT OF INTERIOR OWNERS ADDRESS: P.O. BOX 25486
DENVER COLORADO 80225

COUNTY LAND LOCATED IN: BENNETT PHONE: (303)236-5321

(6)/X/Springs

LEGAL DESCRIPTION: ☐ Well ☒ Surface

1. LOCATION #1 NW¼ NW¼ NW¼ 27-T36N-R37W; #2 NW¼ NW¼ NE¼ 27-T36N-R37W; #3 SW¼ SW¼ NW¼ 26-T36N-R37W; #4 SW¼ SE¼ NE¼ 26-T36N-R37W; #5 SW¼ SE¼ NW¼ 25-T36N-R37W; #6 SE¼ SW¼ NW¼ 30-T36N-R36W

Depth

Legal Description	Acres	Legal Description	Acres
W½ SW¼ 22-T36N-R37W S½ SE¼ 22-T36N-R37W	40	E½ SW¼ 24-T36N-R37W NE¼ NW¼ 25-T36N-R37W	75
		W½ NW¼ 30-T36N-R36W	20
SW¼ SW¼ 23-T36N-R37W SE¼ SE¼ 23-T36N-R37W		TOTAL ACRES	235
N½ 26-T36N-R37W	100		

2. **TYPE OF IRRIGATION:** GRAVITY: XXX TOWLINE: ____ CENTER PIVOT: ____ GUN: ____ OTHER: (Specify) WATER SPREADING

3. CROPS TO BE IRRIGATED: MEADOW GRASS FOR WATERFOWL HABITAT

WATER QUALITY:

4. WATER SAMPLE NUMBER: 84-0357
5. SALINITY (EC X 10^6): 110
6. SODIUM (SAR): 0.39
7. ADJUSTED (SAR): 0.38
8. PERCENT SODIUM 19.65

Requirements:

XXX APPROVED ____ REQUIREMENTS
____ DISAPPROVED
____ WAIVER

Director, Division of Conservation

AUGUST 21, 1991
Date

Soil/water permits will be recorded by the Department of Agriculture, with the County Register of Deeds.

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Report on Water Permit Application No. 2191-2
US Fish and Wildlife Service
September 23, 1991

Background

Water Permit Application No. 2191-2 requests appropriation of 4.44 cubic feet of water per second (1444.7 acre feet annually) from six (6) springs. The springs are located in the NW1/4 NW1/4, NW1/4 NE1/4 Section 27; SW1/4 NW1/4, SE1/4 NE1/4 Section 26; SE1/4 NW1/4 Section 25, T36N-R37W, and SW1/4 NW1/4 Section 30, T36N-R36W, in Bennett County. The water is used in the W1/2 SW1/4, S1/2 SE1/4 Section 22, SW1/4 SW1/4, SE1/4 SE1/4 Section 23, E1/2 SW1/4 Section 24, NE1/4 NW1/4 Section 25, N1/2 Section 26; all in T36N-R37W and the W1/2 NW1/4 Section 30, T36N-R36W. The water is used to create 235 acres of marshes, sloughs, and wet meadows through small dams and control structures for waterfowl propagation and enhancement of wildlife habitat.

Discussion

On August 14, 1990, the springs and the area listed in the application were inspected. The inspection showed that the water from the springs was being used to flood the area.

The springs are tributaries of Lake Creek which flows through the LaCreek National Wildlife Refuge and enters the Little White River in Section 17, T37N-R35W. There is no historical data regarding flow rates from the springs.

On November 26, 1990, in a meeting between Division of Water Rights engineers and landowners adjacent to the Refuge, concerns were expressed by the landowners that operational procedures and management practices of the Refuge during high flows have caused flooding of some of the area outside the Refuge.

Existing Water Permits

A) Bennett County:

The following water permits/rights exist downstream from the springs:

US No. 2-2 for United States Fish and Wildlife Service, for storage of 23,710 acre feet annually from Lake Creek and tributaries with a priority date of October 16, 1934.

US No. 3-2 for USFWS, for a total storage of 2,670 acre feet, with a priority date of December 13, 1935 and a diversion rate of 60 cubic feet per second from the Little White River, with a priority date of May 27, 1940.

Water Permit No. 2147-2, for USFWS, for storage of 167.5 acre feet annually from Lake Creek and tributaries, with a priority date of November 1, 1990.

Water Permit No. 265-2, USFWS (originally Berthol Brown), for irrigation of 366 acres using 4.45 cfs of Cedar Creek water. The land authorized under this permit was acquired by the USFWS in 1972.

Water Permit Application No. 1921-2 for the USFWS is pending approval by the Water Management Board. The application requests changing acreage and a diversion point authorized under Water Permit No. 265-2.

Vested Water Right Claim No. 1927-2, for USFWS, is pending validation by the Board. The claim is for the flooding of 700 acres from Lake Creek to provide wildlife habitat.

There are no other water permits/rights on Lake Creek, Cedar Creek, or the Little White River, in Bennett County, which would be adversely affected.

B) Mellette County:

Water Right No. 253-2, White River Hydroplant No. 1, is authorized to appropriate 400 cfs of water from the Little White River for power generation in Mellette County, with a priority date of November 14, 1929.

In a May 27, 1940 agreement between Fred W. Schwarz, owner of the powerplant, and the United States of America, the right to use any and all of the waters of the Little White River above the confluence of the Little White River and Lake Creek and also any and all waters of Lake Creek above Dam No. 10 on the LaCreek National Wildlife Refuge was granted to the United States of America. According to this agreement, the refuge is entitled to all the water of Lake Creek and its tributaries.

Water Permit No. 884-2 for John Didier, authorizes appropriation of 6.4 cfs from the Little White River for irrigation of 448.2 acres with a priority date of March 1, 1966.

Conclusions and Recommendations

1. The August 14, 1990 inspection showed that water from the springs is used to flood the acreage in the application.

2. Unappropriated water is available from the springs.

3. No water permits will be adversely affected by this application.

4. According to an agreement, between the United States of America and then owner of the White River powerplant, the

USFWS is entitled to all the Lake Creek and Little White River water and tributaries above their confluence.

5. The Water Management Board has recognized use of water for wildlife propagation as a beneficial use of water.

6. It is recommended that Water Permit Application No. 2191-2 for USFWS be approved for appropriation of 4.44 cfs (1444.7 acre feet annually) from six springs for flooding of 235 acres of land within the LaCreek National Wildlife Refuge boundaries.

7. If Application No. 2191-2 is approved, it does not authorize flooding of land outside the Refuge boundaries.

MRAhadi

M. RASSOOL AHADI
Natural Resources Engineer III

Approved By:

Delvin D. Brosz

DELVIN D. BROSZ, P.E.
Natural Resources Engineer IV

RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT
APPLICATION NO. 2191-2, US Fish and Wildlife Service

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. 2191-2, US Fish and Wildlife Service, PO Box 25486, Denver Federal Center, Denver, CO 80225.

The Chief Engineer is recommending APPROVAL of Application No. 2191-2 because 1) there is reasonable probability that there is unappropriated water available for the applicant's proposed use, 2) the proposed diversion can be developed without unlawful impairment of existing rights, 3) the proposed use is a beneficial use and 4) in the public interest with the following qualification:

Approval of Application No. 2191-2 does not authorize flooding of land outside of the Refuge boundaries.

See report on application for additional information.

JOHN HATCH, Chief Engineer
October 4, 1991

South Dakota

GREAT FACES. GREAT PLACES.

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3181

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

December 16, 1991

Wilbur N Ladd, Jr.
US Fish and Wildlife Service
Denver Federal Center
PO Box 25486
Denver, CO 80225

Dear Mr. Ladd:

Water Permit Application No. 2191-2 for waterfowl propagation and enhancement of wildlife habitat 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 Bennett County Booster II printed at Martin, SD. 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

Eric Gronlund
Natural Resources Engineer
605 773-3352

cc: Ginger Chesy, US Fish and Wildlife Service
Pat Ginsbach, Attorney, 414 N River, Hot Springs, SD 57747
Kenneth Keegan, HWC, Box 24, Martin, SD 57551
John Kunz, Regional Solicitors Office, 730 Simms St., Ste 450, Golden, CO 80401
Rolf Kraft, USFWS, LaCreek National Wildlife Refuge, Martin, SD 57551

enclosures

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

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South Dakota

GREAT FACES. GREAT PLACES.

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3181

December 16, 1991

Bennett County Booster II
Box 610
Martin, SD 57551

ATTENTION: Legal Department

Enclosed is a Notice of Hearing on Application No. 2191-2 to be published twice. Please publish the first notice on January 8, 1992, 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 the US Fish and Wildlife Service, Denver Federal Center, PO Box 25486, Denver, CO 80225.

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

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

Sincerely,

Eric Gronlund

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

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

FIRST TRANSMITTAL NOTICE

No._____

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

Date_____

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

_____ _____

Name Newspaper

Instruction to Newspaper - Publish first Notice on January 8, 1992, with the second publication 7 days later. The applicant is responsible for payment.

NOTICE OF HEARING on Application No. 2191-2 to Appropriate Water

Notice is given that the US Fish and Wildlife Service, PO Box 25486, Denver Federal Center, Denver, CO 80225 has filed an application for a water permit to appropriate 4.44 cubic feet of water per second (1444.7 acre-feet of water annually) from six natural springs. The points of diversion from the six springs are to be located in the SE 1/4 NW 1/4 Section 25, SW 1/4 NW 1/4, SE 1/4 NE 1/4 Section 26, NW 1/4 NW 1/4, NW 1/4 NE 1/4 Section 27; all in T36N, R37W and the SW 1/4 NW 1/4 Section 30, T36N, R36W. The places of use of the water are to be located in portions of the W 1/2 SW 1/4, S 1/2 SE 1/4 Section 22, SW 1/4 SW 1/4, SE 1/4 SE 1/4 Section 23, E 1/2 SW 1/4 Section 24, NE 1/4 NW 1/4 Section 25, N 1/2 Section 26; all in T36N, R37W and the W 1/2 NW 1/4 Section 30, T36N, R36W. The water is to be used to create 235 acres of marshes, sloughs and wet meadows through small dams and control structures for waterfowl propagation and enhancement of wildlife habitat.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 2191-2 because 1) unappropriated water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest. Unless a petition is filed opposing the application or the applicant files a petition contesting the chief engineer's recommendation, the Water Management Board will NOT CONDUCT a HEARING to consider this application and the chief engineer will issue the permit as recommended. Petitions filed in support of the application will NOT require the Board to hear the application.

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 Division, 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 January 27, 1992. 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.

For purposes of publishing 1) the notice of hearing on Application No. 2191-2 and 2) the chief engineer's recommendation, a meeting at the Division of Water Rights office to hear this application is scheduled for February 4, 1992, at 9:00 am in Room 413, Joe Foss Building, 523 E Capitol, Pierre SD. If this application is opposed or the recommendation is contested, the February 4, 1992, hearing date will be rescheduled for a regularly scheduled Board meeting. Notice of the time and place of the rescheduled hearing before the Board will be given by First Class Mail to the applicant and persons filing petitions. Anyone not filing a petition, but interested in attending the hearing, may contact the Division of Water Rights to confirm a hearing date and location. The February 4, 1992, 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 January 27, 1992.

If a hearing is held, 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. 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 the Water Rights Division to request copies of information pertaining to this application or to assure access to the hearing by the handicapped.

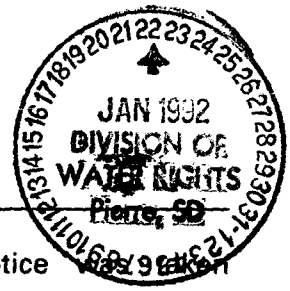
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This application is made pursuant to SDCL 46-1-1 thru 46-1-9, 46-1-12 thru 46-1-16; 46-2-3.1, 46-2-9, 46-2-11, 46-2-13, 46-2-17; 46-2A-1 thru 46-2A-10, 46-2A-12, 46-2A-14, 46-2A-15; 46-5-1 thru 46-5-11, 46-5-13 thru 46-5-15, 46-5-24, 46-5-25, 46-5-30.2,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

Form 8 - Proof of Publication

PROOF OF PUBLICATION

STATE OF SOUTH DAKOTA)
) ss.
County Bennett)



I, Mary E. Long

certify that the attached printed Notice was taken from the Bennett County Booster II

A newspaper which during the whole time of publication of said notice herein after stated, has been and is printed and published in the

City of Martin

County of Bennett and State of South Dakota; that the said notice was published in said newspaper on the following two dates:

January 8, 1992

January 15, 1992

Mary E. Long
(Signature)

Publisher/Ad Mgr.
(Title)

1/15/92
(Date Signed)

Cost of Printing: 67.54

5-88

NOTICE OF HEARING
on Application No. 2191-2
to Appropriate Water

Notice is given that the US Fish and Wildlife Service, PO Box 25486, Denver Federal Center, Denver, CO 80225 has filed an application for a water permit to appropriate 4.44 cubic feet of water per second (1444.7 acre-feet of water annually) from six natural springs. The points of diversion from the six springs are to be located in the SE¼ NW¼ Section 25, SW¼ NW¼, SE¼ NE¼ Section 26, NW¼ NW¼, NW¼ NE¼ Section 27; all in T36N, R37W and the SW¼ NW¼ Section 30, T36N, R36W. The places of use of the water are to be located in portions of the W½ SW¼, S½ SE¼ Section 22, SW¼ SW¼, SE¼ SE¼ Section 23, E½ SW¼ Section 24, NE¼ NW¼ Section 25, N½ Section 26; all in T36N, R37W and the W½ NW¼ Section 30, T36N, R36W. The water is to be used to create 235 acres of marshes, sloughs and wet meadows through small dams and control structures for waterfowl propagation and enhancement of wildlife habitat.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 2191-2 because 1) unappropriated water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest. Unless a petition is filed opposing the application or the applicant files a petition contesting the chief engineer's recommendation, the Water Management Board will NOT CONDUCT a HEARING to consider this application and the chief engineer will issue the permit as recommended. Petitions filed in support of the application will NOT require the Board to hear the application.

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 Division, 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 January 27, 1992. 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.

For purposes of publishing 1) the notice of hearing on Application No. 2191-2 and 2) the chief engineer's recommendation, a meeting at the Division of Water Rights office to hear this application is scheduled for February 4, 1992, at 9:00 a.m. in Room 413, Joe Foss Building, 523 E Capitol, Pierre, SD. If this application is opposed or the recommendation is contested, the February 4, 1992, hearing date will be rescheduled for a regularly scheduled Board meeting. Notice of the time and place of the rescheduled hearing before the Board will be given by First Class Mail to the applicant and persons filing petitions. Anyone not filing a petition, but interested in attending the hearing, may contact the

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Division of Water Rights to confirm a hearing date and location. The February 4, 1992, 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 January 27, 1992.

If a hearing is held, 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. 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 the Water Rights Division to request copies of information pertaining to this application or to assure access to the hearing by the handicapped.

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; 46-5-1 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; and Board Rules ARSD 74:02:01:01 thru 74:02:01:15.

2t-32

FARRELL, FARRELL & GINSBACH
LAWYERS
441 NORTH RIVER STREET
HOT SPRINGS, SOUTH DAKOTA 57747

(605) 745-5161

Martin P. Farrell
Jane M. Farrell
Patrick M. Ginsbach

Beverly J. Irwin
Certified Legal Assistant

Attorney General

DEC 30 1991

December 26, 1991

Diane Best
Assistant Attorney General
State Capitol Bldg.
500 East Capitol Ave.
Pierre, SD 57501

Re: Application No. 2191-2 with the Water Management Board

Dear Diane:

I received the Notice of Hearing on Application No. 2191-2 filed by the U.S. Fish & Wildlife Service which seeks to appropriate 4.44 cubic feet of water per second to be used to create 235 acres of marshes, sloughs and wet meadows. Could you please provide me with a copy of the U.S. Fish & Wildlife Service's actual application.

Also, in connection with the recommendation of the Chief Engineer, I note he states that approval of the application does not authorize flooding of land outside of the Refuge boundaries.

Could you please advise me as to how this condition could be enforced and what, if any, penalties could be assessed against the U.S. Fish & Wildlife Service for violating this provision of the permit.

Unlike other land owners who violate the conditions of their permit that result in damage to my clients' property, my clients, if they wish to proceed in any kind of civil litigation with the United States of America have to proceed under the Federal Tort Claims Act which requires the filing of an administrative claim and then any trial in front of a United States District Court Judge. If it were any other private landowner, my clients could commence suit immediately in Circuit Court in a State court action and seek to enjoin the flooding and also seek monetary damages for any damage caused to their land by the flooding. As you can see, my clients are mainly concerned that if this is going to be a condition of the permit how it will be enforced and what kind of teeth the enforcement provisions will have.

Thank you for your cooperation in this matter.

Yours truly,

Patrick M. Ginsbach

PATRICK M. GINSBACH
PMG/bji
cc: Clients

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STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD



WENDELL DeKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER,	)	
Petitioners,	)	PETITION TO OPPOSE APPLICATION
vs.	)	FOR WATER PERMIT NO. 2191-2
UNITED STATES FISH AND WILDLIFE SERVICE,	)	
Applicant.	)	

COMES NOW WENDELL DeKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, by and through their lawyers of record, Farrell, Farrell & Ginsbach, and for their Petition to Oppose state and allege as follows:

I.

THAT the Petitioners are all landowners residing within Bennett County, South Dakota, and are affected by application by the United States Fish and Wildlife Service for Water Permit No. 2191-2.

II.

THAT the Petitioners have previously filed oppositions to the United States Fish and Wildlife Service's applications to valid claim numbers 1926-2, 1927-2 and 1921-2.

III.

THAT this application is being used to replace the application to validate claim number 1926-2 which was withdrawn by the United States Fish and Wildlife Service prior to the June, 1991 scheduled hearing which was later continued by the hearing examiner.

IV.

THAT the Petitioners oppose Application no. 2191-2 by the United States Fish and Wildlife Service for the following reasons:

a. That the use sought to be developed by Application No. 2191-2 would unlawfully impair the existing rights of the Petitioners in that the use would damage privately owned crop land, further aggrevate saline problems, and impair the use of water by Petitioners;

b. That the use is not a beneficial use and that it would not develope good forage for wildlife, and to allow the use of these water management practices sought to be developed under Application No. 2191-2 will not improve the conditions for wildlife nor is the flooding of the land sought by Application No. 2191-2 a beneficial use of the water since it allows water to be appropriated for the purpose of cultivating food for wildfowl on land that is unenclosed and uncultivated;

c. That the use of the water is not in the public interest in that it allows water to be used in such a manner so as to constitute waste and for the support of wildlife and wildfowl when the United States Fish and Wildlife Service presently has sufficient water to handle those needs without the appropriation of further water rights.

V.

THAT the Petitioners, in addition to themselves testifying, expect to call approximately seven other witnesses, most of whom are residents of Bennett County, South Dakota, and would request a postpone from the hearing scheduled on February 4, 1992 and respectfully request that the Water Management Board either allow the hearing examiner appointed by it to continue to hear this case in Bennett County, South Dakota, in May, June or July of 1992 or that the Board as a whole schedule the matter for hearing in Martin, South Dakota during its July meeting so that the hearing examiner, or in the alternative the Board, would have a better opportunity to examine the land and the practices of the United States Fish and Wildlife Service in Bennett County, South Dakota, which would be

beneficial to help them understand the evidence and testimony of Petitioners in opposition to Application No. 2191-2.

WHEREFORE, Petitioners respectfully request the Water Management Board to deny Application No. 2191-2 and grant such other and further relief as the Water Management Board deems just and equitable.

Dated this 16 day of January, 1992.

FARRELL, FARRELL & GINSBACH

JANE M. FARRELL

PATRICK M. GINSBACH
Farrell, Farrell & Ginsbach
Lawyers for Petitioners
441 North River St.
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the original of the foregoing Petition upon the individuals herein next designated, all on the date below shown, by depositing the same in the United States mail in an envelope securely sealed and with first-class postage thereon fully prepaid and addressed to:

John Hatch
Chief Engineer
Water Rights Division
Foss Bldg.
523 East Capitol
Pierre, SD 57501

William A. Godby
Regional Engineer
United States Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

John R. Kunz
Counsel for United States Fish and Wildlife Service
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225

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

on the 16 day of January, 1992.

Patrick M. Ginsbach

PATRICK M. GINSBACH



STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

WENDELL DeKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, Petitioners,	)	
vs.	)	MOTION FOR CONTINUANCE
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	

COMES NOW the Petitioners, WENDELL DeKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, by and through their lawyers of record, Farrell, Farrell & Ginsbach, and move the Water Management Board pursuant to SDCL 46-2A-5 for a postponement of the hearing scheduled on February 4, 1992 in Pierre, South Dakota concerning application filed by the United States Fish and Wildlife Service for Water Permit No. 2191-2 and for the matter to be rescheduled and heard in Bennett County, South Dakota, and would respectfully request the Water Management Board to conduct any hearing in this matter at the Bennett County Courthouse in Martin, South Dakota, or in the alternative to allow the hearing examiner, Marion Gunderson, previously appointed by the Board to take testimony concerning Petitioners' opposition to Application Nos. 1927-2 and 1921-2 to also be appointed to take testimony regarding Petitions' opposition to Application No. 2191-2, upon the following grounds and reasons:

1. The Petitioners are all residents of Bennett County, South Dakota, and engaged in farming or ranching activities and during the month of February and the rest of the spring of 1992 it would work a hardship upon them to have to take time away from their occupation at this crucial time of the year to be present to give testimony in Pierre, South Dakota on their Petition in Opposition; and

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2. In addition to the Petitioners' testimony, they would also intend to call a number of fact witnesses, approximately seven in number, who from their investigation have testimony and information which are pertinent to the Petition in Oppostion, and it would be extremely difficult to physically arrange to have these witnesses travel to Pierre, South Dakota to give testimony because some of the witnesses are also involved in farming and ranching and it would be a hardship for them to leave their business activities behind at this time of the year to give testimony; and

3. The water rights which the United States Fish and Wildlife Service seek in connection with Application No. 2191-2 are part of the entire operation of the LaCreek Wildlife Refuge and for the Water Management Board to gain a better understanding of the practices and how the United States Fish and Wildlife Service wishes to put this water to use, the Petitioners believe it will be necessary for the Water Management Board, or in the alternative the hearing examiner, to inspect the land area affected by this Application and the manner in which the water is presently being used to show the detrimental and harmful effect it has upon the Petitioners. This visual inspection would include the damages that has been done to crop land, the evidence of the development of saline problems, and the waste committed by the United States Fish and Wildlife Service in the use of this water. Petitioners believe the best time of the year to examine these water management practices would be in May, June and July.

WHEREFORE, Petitioners respectfully request the Water Management Board to adjourn the hearing scheduled for February 4, 1992 in Pierre, South Dakota, and to reschedule the matter for hearing at the Bennett County Courthouse during their July, 1992 meeting or, in the alternative, to appoint Marion Gunderson to act as hearing examiner in connection with Application No. 2191-2 and to take

testimony in this matter pursuant to SDCL 1-26-18.1 in Bennett County, South Dakota some time during the months of May, June or July of 1992.

Dated this 16 day of January, 1992.

FARRELL, FARRELL & GINSBACH

JANE M. FARRELL

PATRICK M. GINSBACH
Farrell, Farrell & Ginsbach
Lawyers for Petitioners
441 North River St.
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served true and correct copies of the foregoing Motion for Continuance upon the individuals herein next designated, all on the date below shown, by depositing the same in the United States mail in an envelope securely sealed and with first-class postage thereon fully prepaid and addressed to:

John Hatch
Chief Engineer
Water Rights Division
Foss Bldg.
523 East Capitol
Pierre, SD 57501

William A. Godby
Regional Engineer
United States Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

John R. Kunz
Counsel for United States Fish and Wildlife Service
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225

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

on the 16 day of January, 1992.

PATRICK M. GINSBACH



STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners,	)	APPLICATION TO APPROPRIATE WATER
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	WATER PERMIT APPLICATION NO. 2192-2

RESPONSE TO MOTION FOR CONTINUANCE

COMES NOW the United States Fish and Wildlife Service (FWS), a component agency of the United States Department of the Interior, by and through counsel, and hereby responds to the Petitioners' Motion for Continuance (Motion) on file herein.

I. SUMMARY OF PETITIONERS' MOTION

In their Motion, Petitioners move for a postponement of the hearing of the captioned matter. The matter is currently scheduled for hearing on February 4, 1992 in Pierre, South Dakota. Specifically, Petitioners ask that: (1) this matter be rescheduled for hearing before the entire Water Management Board (the Board) at the Bennett County Courthouse during the Board's regularly scheduled July, 1992, meeting; or (2) that Ms. Marian Gunderson be appointed as a Hearing Examiner to hear this matter in Bennett County, South Dakota some time in May, June, or July, 1992. Petitioners have also asked that a physical inspection of the land affected by FWS' application be conducted some time in May, June, or July, 1992.

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II. RESPONSE TO PETITIONERS' MOTION

A. HEARING DATE

As a preliminary matter, FWS does not object to this matter being heard in May or June, 1992. However, FWS does state its preference that the matter be heard at the Board's regularly scheduled meeting in July, 1992.

B. PHYSICAL INSPECTION OF THE LAND

Subject only to those matters stated in more detail below, FWS does not object to a physical inspection of the lands affected by FWS' application.

C. HEARING BEFORE THE FULL BOARD

S.D. Codified Laws Ann. § 1-40-15 (1985) provides that the Board shall consist of seven members. S.D. Codified Laws Ann. § 1-40-16 (1985) further provides that, of these seven members: (a) one shall be experienced in municipal government and operations; (b) one shall be experienced in irrigation methods and techniques; (c) one shall have knowledge concerning domestic water users; (d) one shall be experienced in the area of industrial uses of water; (e) one shall represent fish and wildlife interests; and (f) two shall represent the public at large. From this statute, it is clearly evident that the South Dakota State Legislature wisely dictated that a wide variety of interests be represented on the Board. By enacting this statute, the Legislature has thus ensured that, when matters are heard by the Board, there will be complete objectivity, with no one particular interest receiving more emphasis than another.

The subject case obviously involves a dispute between competing interests. While FWS recognizes that, pursuant to S.D. Codified Laws Ann. § 1-26-18.1 (1985), the Board may appoint a Hearing Examiner to hear the subject case, and while FWS has absolutely no reason to impugn or otherwise question the objectivity of an individual Hearing Examiner, FWS nonetheless strongly feels that, because of the factual and legal complexity of this matter, the full Board should hear the case. Additionally, as the Board knows, this case concerns FWS' attempt to appropriate water for the propagation and enhancement of migratory waterfowl and other wildlife at FWS' La Creek National Wildlife Refuge. FWS therefore submits that this case is of extreme importance to the public 1/, and should be heard by the full Board.

For the foregoing reasons, FWS strongly urges that this case be heard before the full Board. Consequently, if the Board is willing to convene in Martin, South Dakota, then FWS hereby joins with the Petitioners' request that this case be heard at the Bennett County Courthouse during the Board's regularly scheduled July, 1992, meeting. However, FWS recognizes that the

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1/ *See North Dakota v. United States*, 460 U.S. 300, 309 (1983). ("The protection of migratory birds has long been recognized as 'a national interest of very nearly the first magnitude.'") *Quoting Missouri v. Holland*, 252 U.S. 416, 435 (1920). *See also Murdock v. United States*, No. 89-2303, slip op. at 6 (8th Cir. Dec. 18, 1991) (WESTLAW, CTA8 Database). (The United States Court of Appeals for the Eighth Circuit will hear cases *en banc* where such cases are, *inter alia*, of exceptional public importance.) *Accord Chambers v. Omaha Girls Club, Inc.*, 840 F.2d 583 (8th Cir. 1988).

Board may not desire to convene its July, 1992, meeting in Martin, South Dakota. While FWS is not insensitive to the various needs of the Petitioners and their witnesses (*see* Motion at 1-2), for the foregoing reasons, FWS strongly urges that these needs are outweighed by the need to have this matter heard before the full Board. Therefore, if the Board does not desire to convene in Martin, South Dakota, FWS hereby moves that the subject case be heard before the full Board at its regularly scheduled July, 1992, meeting in Pierre, South Dakota, or such other locale as the Board may order.

As stated above, FWS does not object to Petitioners' request that the land affected by FWS' application be physically inspected. Nor, does FWS object to the proposed timing of this inspection. However, given the fact that FWS has moved that this matter be heard before the entire Board, if FWS' request is granted and the Board chooses to not convene in Martin, South Dakota, an obvious problem exists. To alleviate this potential problem, FWS hereby suggests that a Hearing Examiner be appointed solely for the purpose of making the physical inspection of the land and reporting the results to the full Board.

D. CONCLUSION

WHEREFORE, for the above reasons, FWS hereby respectfully requests that this case be heard by the full Board either in Martin or Pierre, South Dakota, or such other locale as the Board may order. Additionally, FWS hereby states its

preference that the physical inspection of the land and the hearing of this matter be conducted in July, 1992.

Concerning the Motion, FWS' response thereto, and the matters raised in both of these pleadings, if necessary and proper, FWS moves that these matters be heard on February 4, 1992, at 9:00 A.M. in Room 413 of the Joe Foss Building, or at such other time and place as the Board may order. Alternatively, if necessary and proper, pursuant to S.D. Codified Laws Ann. §§ 1-25-1 (as amended) and 15-11-6 (as amended), FWS moves that the hearing of the above matters be conducted telephonically.

DATED this 24th day of January, 1992.

John R. Kunz

John R. Kunz, Esq.
For the Regional Solicitor
Rocky Mountain Region
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225
(303) 236-8444 (Commercial)
776-8444 (FTS)

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 1992, true and correct copies of the foregoing Response to Motion for Continuance were mailed, via overnight mail to:

John Hatch
Chief Engineer
Water Rights Division
Foss Building
523 East Capitol
Pierre, SD 57501

Patrick M. Ginsbach, Esq.
Farrell, Farrell, and Ginsbach
441 North River Street
Hot Springs, SD 57747

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

Kayhynne Henry

STATE OF SOUTH DAKOTA

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

MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

January 27, 1992

Patrick M. Ginsbach
Attorney at Law
441 N. River St.
Hot Springs, SD 57747

Re: **Application No. 2191-2 with the Water Management Board**

Dear Pat:

This letter is in response to your correspondence of December 26, 1991, regarding the U.S. Fish & Wildlife Service Application No. 2191-2 which is pending before the South Dakota Water Management Board.

In your letter, you requested a copy of the U.S. Fish & Wildlife Service application. Given the time that has now passed, I expect you may have already obtained a copy of that application elsewhere. In any event, I have asked the Division of Water Rights, Eric Gronlund, to send one out to you today.

Also, your letter discussed the difficulty of pursuing an enforcement action against the U.S. Fish & Wildlife Service for compliance with permit conditions. As you have outlined in your letter, private landowners who seek to enforce a state permit requirement concerning Fish & Wildlife Service property do face a greater procedural burden than if they were filing a claim against another private landowner.

In addition to the procedure that you have outlined in your letter, violations of permit conditions may also be cause for revocation of a permit to appropriate water in the State of South Dakota. If a permit condition has been violated, a revocation proceeding would need to be held under the South Dakota Administrative Procedures Act. Then, if the permit were revoked and the Fish & Wildlife Service continued to appropriate water, the Division of Water Rights would, I believe, be in a position to seek injunctive relief. This state enforcement of water rights laws would not, of course, result in monetary damages for your clients.

Finally, I regret the delay in responding to your inquiry.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB:ss

cc: John Hatch✓

GREAT FACES. GREAT PLACES.

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3181

January 27, 1992

NOTICE

TO: Wilbur N. Ladd, Acting Regional Director
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver, Colorado 80225
and Parties of Record (see attached list)

FROM: John Hatch, Chief Engineer
Water Rights Division
605 773-3352

SUBJECT: Continuance of Hearing for Water Permit Application No. 2191-2, U.S. Fish and Wildlife Service

A petition in opposition to Water Permit Application No. 2191-2 has been filed with this office by Jane Farrell and Patrick Ginsbach, attorneys representing area landowners. The meeting at the Division of Water Rights office to hear this application will no longer be held on February 4, 1992.

The petitioners have requested a continuance of this hearing and that the hearing be held in Martin, South Dakota. The hearings on Vested Water Right Claim No. 1927-2 and Water Permit Application Nos. 1921-2 and 2191-2 will be scheduled for the July 22 and 23, 1992 Water Management Board meeting. I will request the Board to have the July meeting in Martin.

Notice of the time, date and location of the hearings to be held by the Water Management Board will be provided to all parties of record. If you have any questions regarding these applications or scheduling of the hearing before the Water Management Board, please contact Eric Gronlund at 773-3352.

cc: Diane Best, Assistant Attorney General
John Kunz, Counsel for USFWS
Ginger Chesy, USFWS

PARTIES OF RECORD

WATER PERMIT APPLICATION NO. 2191-2

Applicant

Wilbur N. Ladd, Acting Regional Director
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, Colorado 80225

Petition of Opposition

Attorneys:
Jane M. Farrell &
Pat Ginsbach
Farrell, Farrell & Ginsbach
441 North River St.
Hot Springs, SD 57747

Representing:
Wendell DeKay
Charles Emley
Brett Heath
Raymond Kocer
Lawrence Kocer

CERTIFICATION

I hereby certify that on January 27, 1992 I have personally deposited with the U.S. Mail postage prepaid envelopes containing a Notice of Continuance of Hearing for Water Permit Application No. 2191-2, U.S. fish and Wildlife Service addressed as stated below:

Wilbur N. Ladd, Acting Regional Director, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver, CO 80225.

John Kunz, Counsel for USFWS, Rocky Mountain Regional Solicitor's Office, 730 Simms St., Suite 450, Golden, CO 80401.

Ginger Chesy, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver, CO 80225.

Jane M. Farrell & Pat Ginsbach, Farrell, Farrell & Ginsbach, 441 North River St., Hot Springs, SD 57747.

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 28th day of January, 1992.

John Hatch
Notary Public

JOHN HATCH
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL
My Commission Expires Apr. 1, 1993

GREAT FACES. GREAT PLACES.

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3181

January 27, 1992

Pat Ginsbach
Farrell, Farrell & Ginsbach
441 North River St.
Hot Springs, SD 57747

Dear Mr. Ginsbach:

Enclosed is a copy of U.S. Fish and Wildlife Service's water permit application (No. 2191-2) which was submitted to this office on August 7, 1991. It is my understanding that you requested this information a few weeks ago and it is unknown whether the information was forwarded to you.

I apologize for any inconvenience this may have caused.

Sincerely,

Eric Gronlund

Eric Gronlund
Water Rights Division
605 773-3352

enclosure

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STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners,	)	APPLICATION TO APPROPRIATE WATER
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	WATER PERMIT APPLICATION NO. 2192-2

MOTION FOR ORDER TO COMPEL EXCHANGE OF WITNESS LISTS

COMES NOW the United States Fish and Wildlife Service (FWS), a component agency of the United States Department of the Interior, by and through counsel, and hereby moves the Water Management Board (the Board) to issue an order compelling the parties to exchange lists of witnesses that the parties may or will call at the hearing of the captioned matter. This motion is made in the interests of justice, administrative economy, and to provide the parties the opportunity, pursuant to S.D. Codified Laws Ann. § 1-26-19.2 (1985), to depose witnesses that the parties may or will call at the hearing of the captioned matter.

As of the date of preparation of this motion, an exact hearing date for the subject case has not been set. However, the parties have both indicated that they would not object to a hearing in July, 1992. Assuming that the hearing is held in July, 1992, and further assuming that the Board grants the

instant motion, to enable the parties to timely take any desired depositions, FWS respectfully requests that the Board order the parties to exchange their witness lists no later than April 15, 1992, or such other time as the Board may order.

WHEREFORE, for the above reasons, FWS hereby respectfully moves that the Board order the parties to exchange, no later than April 15, 1992, or such other date as the Board may order, lists of witnesses that the parties may or will call at the hearing of the captioned matter.

DATED this 27th day of January, 1992.

John R. Kunz

John R. Kunz, Esq.
For the Regional Solicitor
Rocky Mountain Region
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225
(303) 236-8444 (Commercial)
776-8444 (FTS)

CERTIFICATE OF SERVICE

I hereby certify that on this 27TH day of January, 1992, true and correct copies of the foregoing Motion for Order to Compel Exchange of Witness Lists were mailed, via first-class United States mail, postage prepaid, to:

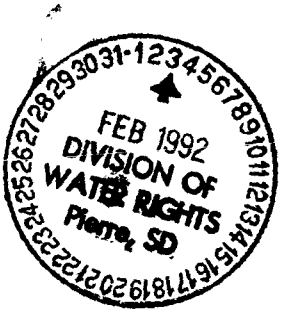
John Hatch
Chief Engineer
Water Rights Division
Foss Building
523 East Capitol
Pierre, SD 57501

Patrick M. Ginsbach, Esq.
Farrell, Farrell, and Ginsbach
441 North River Street
Hot Springs, SD 57747

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

Valrae A. Larson

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES



WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	APPLICATION TO APPROPRIATE WATER WATER PERMIT APPLICATION NO. 2192-2

PETITIONER'S RESPONSE TO MOTION FOR ORDER TO COMPEL EXCHANGE OF WITNESSES

COMES NOW the Petitioners, WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, by and through their lawyers, Farrell, Farrell & Ginsbach, and makes this response to the Applicant's Motion for Order to Compel Exchange of Witness Lists. The Applicant apparently seeks to have the Board order the parties to exchange witness lists and apparently are also asking the Board to allow the parties to take depositions, if they so desire, pursuant to SDCL 1-26-19.2. SDCL 1-26-19.2 does allow the Board the power to cause the deposition of witnesses residing within or without the state to be taken or other discovery procedure to be conducted upon notice to the interested person, if any, in like manner that depositions of witnesses are taken or other discovery procedures to be taken in civil actions pending in circuit court in any matter concerning contested cases.

The Petitioners would request that if the Board considers authorizing the taking of depositions that it also expand upon that order and provide a discovery schedule under which the parties would be entitled to make requests for

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production of documents and to serve interrogatories. The reason for this request is that the Applicant has within its possession information that the Petitioners believe would support and corroborate the objections they have to Application No. 2192-2 as well as Application No. 1921-2 and 1927-2 and Petitioners may not be able to obtain without proper discovery. The Petitioners would have no objection to the motion sought by the Applicant as long as it is expanded to include such other discovery as permissable under the rules of civil procedure SDCL 15-6, as is allowed in the circuit courts of the State of South Dakota. Since apparantly the parties are anticipating a hearing date in July or the summer of 1992, the Petitioners would request that the discovery deadline be set for completion as of May 1, 1992.

Dated this 1st day of February, 1992.

FARRELL, FARRELL & GINSBACH

BY: Patrick M Ginsbach

PATRICK M. GINSBACH
441 N. River Street
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 1992, true and correct copies of the foregoing Response was deposited in the United States mail, with first-class postage prepaid, in envelopes addressed to:

John Hatch
Chief Engineer
Water Rights Division
Foss Building
523 East Capitol Ave.
Pierre, SD 57501

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

John R. Kunz
Office of the Regional Solicitor
Rocky Mountain Region
P. O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225

Dated this 1st day of February, 1992.

Patrick M. Ginsbach

PATRICK M. GINSBACH

South Dakota
GREAT FACES. GREAT PLACES.

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3181

February 3, 1992

NOTICE

TO: Wilbur N. Ladd, Acting Regional Director
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver, Colorado 80225
and Parties of Record (see attached list)

FROM: John Hatch, Chief Engineer
Water Rights Division
605 773-3352

SUBJECT: U.S. Fish and Wildlife Service's Motion For Order to Compel Exchange of Witness Lists

The United States Fish and Wildlife Service, through their counsel has motioned the Water Management Board to issue an order compelling the parties to exchange lists of witnesses in the matter of Water Permit Application No. 2191-2. The Water Management Board will hear this motion at 10:45 am on March 4, 1992 in the Conference Room, Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre, SD 57501. The agenda time is an estimate and may be delayed due to prior agenda items.

If you have any questions regarding the scheduling of this motion before the Water Management Board, please contact Eric Gronlund at 773-3352.

cc: Diane Best, Assistant Attorney General
John Kunz, Counsel for USFWS
Ginger Chesy, USFWS

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CERTIFICATION

I hereby certify that on February 3, 1992 I have personally deposited with the U.S. Mail postage prepaid envelopes containing a Notice of U.S. Fish and Wildlife Service's Motion For Order to Compel Exchange of Witness Lists on Water Permit Application No. 2191-2 addressed as stated below:

Wilbur N. Ladd, Acting Regional Director, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver, CO 80225.

John Kunz, Counsel for USFWS, Rocky Mountain Regional Solicitor's Office, 730 Simms St., Suite 450, Golden, CO 80401.

Ginger Chesy, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver, CO 80225.

Jane M. Farrell & Pat Ginsbach, Farrell, Farrell & Ginsbach, 441 North River St., Hot Springs, SD 57747.

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 4th day of February, 1992.

Notary Public

JOHN HATCH
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA
My Commission Expires Apr. 1, 1993

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES



WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners,	)	APPLICATION TO APPROPRIATE WATER
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	WATER PERMIT APPLICATION NO. 2192-2

REPLY TO PETITIONERS' RESPONSE TO MOTION FOR ORDER TO COMPEL EXCHANGE OF WITNESSES

COMES NOW the United States Fish and Wildlife Service (FWS), a component agency of the United States Department of the Interior, by and through counsel, and hereby files this reply to the Petitioners' Response to Motion for Order to Compel Exchange of Witnesses (the Response).

In the Response, Petitioners state, *inter alia*, that FWS is apparently asking the Board to allow the parties to take depositions pursuant to S.D. Codified Laws Ann. § 1-26-19.2 (1985). Response at 1. Petitioners further state that, if the Board authorizes the taking of depositions, then the Board should also order that the parties be allowed to make requests for the production of documents and serve written interrogatories. Response at 1-2. Lastly, Petitioners request that, if the Board orders such discovery, a discovery deadline of May 1, 1992 be established. Response at 2.

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Apparently, FWS' position concerning some of the above matters needs to be clarified. S.D. Codified Laws Ann. § 1-26-19.2 provides that:

> Each agency and the officers thereof charged with the duty to administer the laws and rules of the agency *shall have the power to cause* the deposition of witnesses residing within or without the state or absent therefrom to be taken or other discovery procedure to be conducted upon notice to the interested person, if any, in like manner that depositions of witnesses are taken or other discovery procedure is to be conducted in civil actions pending in circuit court in any matter concerning contested cases.

Emphasis added.

As FWS interprets the above statute, the parties to an administrative proceeding do not need the permission of the administering agency to conduct discovery proceedings. 1/ Rather, from the language of the statute, it appears that the parties are completely free to conduct such proceedings. It further appears that, only in cases where a party might object to discovery, then the administering agency has "power to cause" the discovery to take place. In other words, the statute appears to vest the administrative agency with "subpoena power" or contempt authority.

Applying the above principles to the present case, and respectfully realizing that it is not a regular practitioner of South Dakota State law, FWS nonetheless submits that it does not need the Board's authorization to depose opposing witnesses or

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1/ Pursuant to the statute, such discovery proceedings would include depositions, and "all other discovery procedures." Clearly, "all other discovery procedures" would include requests for production of documents, and written interrogatories.

conduct other forms of discovery. However, to aid the parties in conducting their respective discovery, FWS does desire that the Board use its inherent administrative and hearing authority to order the parties to exchange witness lists. 2/

Consistent with the above reasoning, FWS has no objection to the Petitioners making requests for production of documents or serving written interrogatories. Neither, does FWS object to Petitioners' desire that a discovery deadline be established. However, if, as the Petitioners suggest, the discovery deadline is set for May 1, 1992, then FWS respectfully asks that the parties be ordered to exchange their witness lists much sooner than the April 15, 1992, deadline suggested by FWS in its Motion for Order to Compel Exchange of Witnesses. The reasons for this request are obvious. The above timetable would only allow the parties a two week period of time in which to conduct rather extensive discovery. FWS submits that this is an insufficient period of time. Ideally, FWS would request that the parties be given at least a month to complete their discovery. Additionally, FWS sees no reason why discovery has to be complete prior to June 1, 1991. 3/ FWS therefore urges the Board to

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2/ FWS realizes that a list of such witnesses could, no doubt, be obtained through routine discovery proceedings. However, by making its Motion for Order to Compel Exchange of Witnesses, FWS is merely attempting to eliminate a possibly onerous and time consuming part of the discovery proceeding.

3/ If discovery were completed by this date, and assuming that the subject case is heard in the latter part of July, 1992, discovery would still be complete almost two months before the scheduled hearing.

establish a discovery deadline and a date for exchanging lists of witnesses accordingly.

DATED this 5th day of February, 1992.

John R. Kunz, Esq.
For the Regional Solicitor
Rocky Mountain Region
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225
(303) 236-8444 (Commercial)
776-8444 (FTS)

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 1992, true and correct copies of the foregoing Reply to Petitioners' Response to Motion for Order to Compel Exchange of Witnesses were mailed, via first-class United States mail, postage prepaid, to the following:

John Hatch
Chief Engineer
Water Rights Division
Foss Building
523 East Capitol
Pierre, SD 57501

Patrick M. Ginsbach, Esq.
Farrell, Farrell, and Ginsbach
441 North River Street
Hot Springs, SD 57747

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

Kay Lynne Henry

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DeKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, vs. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	APPLICATION TO APPROPRIATE WATER WATER PERMIT APPLICATION NO. 2192-2 APPLICATION FOR VALIDATION OF VESTED WATER RIGHT CLAIM NO. 1927-2 APPLICATION FOR WATER PERMIT NO. 1921-2

STIPULATION TO ALLOW DISCOVERY

WHEREAS, the Applicant has moved for an Order to Compel Exchange of Witness Lists; and

WHEREAS, Petitioners have responded seeking an Order from the Water Management Board asking for an Order allowing all discovery permissible under the Rules of Civil Procedure, SDCL 15-6, as is allowed in the Circuit Courts of the State of South Dakota; and

WHEREAS, the parties hereto have no objection to making the Rules of Civil Procedure found at SDCL 15-6 for discovery purposes made applicable to this proceeding, the parties do hereby agree

I.

That the deposition of witnesses residing within or without the State of South Dakota or absent therefrom may be taken under the Rules of Civil Procedure found at SDCL 15-6.

II.

That the parties hereto agree that the discovery procedures, provided for in SDCL 15-6, shall be allowed to be conducted in the proceeding before the

Water Management Board regarding Application Nos. 2192-2, 1927-2, and 1921-2, in the same manner and with the Rules as discovery is conducted in civil actions pending in Circuit Court in the State of South Dakota.

III.

That all discovery in Application Nos. 2192-2, 1927-2 and 1921-2 be completed on or before June 1, 1992, unless a Stipulation for Extension of Discovery is entered into by all parties to these proceedings.

IV.

The parties further to adhere to the Prehearing Order entered by Hearing Examiner Marian Gunderson on May 31, 1991, and update any of the materials submitted in connection with that Prehearing Order, with the United States Fish & Wildlife Service or any parties supporting its position submitting materials on or before July 7, 1992 in place of the June 7, 1991 date, and that any party opposing any of the Applications shall place in the mail the materials required on or before July 17, 1992 in place of the June 17, 1991 date, and that the United States Fish & Wildlife Service and any other proponent may make any reply they may desire to make to any position taken by the Opponents by placing such reply in the mail by July 21, 1992, in place of June 21, 1991 as stated in the original Prehearing Order.

Dated this 27th day of February, 1992.

JANE M. FARRELL
One of the Lawyers for Petitioners
441 North River St.
Hot Springs, SD 57747
(605) 745-5161

Dated this 4th day of March, 1992.

John R. Kunz

JOHN R. KUNZ, Esq.
Lawyer for the Applicant
Regional Solicitor
Rocky Mountain Region
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225

Dated this 4th day of March, 1992.

Diane Best

DIANE BEST
Assistant Attorney General
Lawyer for the South Dakota Division
of Water Rights
500 East Capitol Ave.
Pierre, SD 57501-5070

DATE: March 11, 1992

MEMO TO: File

FROM: M. Rassool Ahadi MRA

RE: A Complaint-Flooding of Land-LaCreek National Wildlife Refuge

On March 10, 1992, a complaint was received from Brett Heath regarding flooding of his property by the LaCreek National Wildlife Refuge.

On March 11, 1992, I responded to the complaint and visited with Mr. Heath at his place. I arrived at Mr. Heath's place at 12:00 noon CST. Mr. Heath and I drove to the flooded area which is located in the NW1/4 Section 19, T36N-R36W.

At the time of inspection, water was still flowing out of Lake Creek onto Mr. Heath's property. Approximately 12-15 acres of Mr. Heath's property was either wet or had water standing on it.

The cause of flooding seemed to be deposition of sand in the creek channel and consequently decreasing the channel's carrying capacity. Mr. Heath pointed out the sandbars deposited in the creek channel all the way to where Lake Creek enters Pond #2. Apparently, impoundment of water in Pond #2 causes water to slow down and deposits sand that it carries from the sand hills upstream.

Mr. Heath stated that the Refuge had taken the stop logs out and the water level had dropped, compared to yesterday. Mr. Heath stated that all he wanted is not to get flooded again. Mr. Heath stated that this piece of property was one of the best in the area. He showed me pictures of the land when it was dry and he had hay bales on the it.

After I left Mr. Heath, I visited with Mr. Rolf Kraft, Manager, LaCreek Refuge. He stated that he was aware of the flooding, but he could not do anything about it. He said dredging the channel may work but it is too costly to do. Besides dredging may increase sand deposits in Pond #2. He said the Refuge would like to buy that piece of property from Heath. He also stated that if Mr. Heath would do dredging on his property, he would do the same on the Refuge side. I left the Refuge at approximately 5:00 pm.

GREAT FACES. GREAT PLACES.

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3181

March 15, 1992

NOTICE

TO: Wilbur N. Ladd, Jr., Acting Regional Director
United States Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225
and Parties of Record (see attached sheet)

FROM: John Hatch, Chief Engineer
Water Rights Division
605 773-3352

SUBJECT: Scheduling of Hearing for Vested Water Right Claim No. 1927-2 and Water Permit Application Nos. 1921-2 and 2191-2, U.S Fish and Wildlife Service

The Water Management Board will consider Vested Water Right Application No. 1927-2 and Water Permit Application Nos. 1921-2 and 2191-2 for the Lacreek National Wildlife Refuge beginning at 9:00 am on July 22, 1992 in the American Legion Dining Hall, Main Street, Martin SD. The Board meeting is scheduled for July 22 and 23, 1992; however, it may be necessary to continue consideration of these applications to the morning of July 24, 1992. These applications have been continued over the past several months to allow for a Board meeting to be scheduled in Martin SD. An agenda for this meeting will be sent to all parties of record in early July.

Applicable provisions of the Notice of Hearings published in the Bennett County Booster II on March 27 and April 3, 1991 for Water Permit Application No. 1921-2, January 9 and 16, 1991 for Vested Water Right Application No. 1927-2 and January 8 and 15, 1992 for Water Permit Application No. 2191-2 will still apply at these hearings. Any party wishing to assure access to the hearings by the handicapped must contact the Water Rights Division, Foss Building, 523 East Capitol, Pierre, SD 57501 prior to the meeting so that appropriate arrangements can be made.

If you have any questions regarding the scheduling of the hearings before the Water Management Board or need arrangements to provide access to the hearings by the handicapped, please contact Eric Gronlund at (605) 773-3352.

cc: Diane Best, Assistant Attorney General
Ginger Chesy, USFWS, Denver CO
Cheryl Williss, USFWS, Denver CO
Rolf Kraft, USFWS, Martin SD

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PARTIES OF RECORD

VESTED WATER RIGHT APPLICATION NO. 1927-2 AND
WATER PERMIT APPLICATION NOS. 1921-2 AND 2191-2.

APPLICANT

Wilbur N. Ladd, Acting Regional Director
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, Colorado 80225

Solicitor

John Kunz
Rocky Mountain Regional
Solicitor's Office
730 Simms St. - Suite 450
Golden, Colorado 80401

PETITION OF OPPOSITION

Jane M. Farrel & Patrick Ginsbach
Farrell, Farrell & Ginsbach
441 North River Street
Hot Springs, SD 57747

REPRESENTING

Wendell DeKay, Tuthill, SD 57574
Charles Emley, Box 673, Martin, SD 57551
Brett Heath, HWC 3, Box 20, Martin, SD
Raymond Kocer, RR, Martin, SD 57551
Lawrence Kocer, Box 156, Martin, SD

(2191-2 and 1927-2 only)

** Kenneth Keegan
HWC 3, Box 24
Martin, SD 57551

** - Mr. Keegan did not formally file a petition in the matter of Water Permit Application No. 2191-2, but did file a petition for the Vested Right Application No. 1926-2 (withdrawn) which was for these acreages and his previously submitted petition will provide him party status in the matter of Water Permit Application No. 2191-2.

2191-2

CERTIFICATION

I hereby certify that on May 15, 1992, I have personally deposited with the United States Mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated May 15, 1992, regarding Scheduling of Hearing for Vested Water Right Claim No. 1927-2 and Water Permit Application Nos. 1921-2 and 2191-2, U.S. Fish and Wildlife Service addressed as stated below and on the attached list:

Wilbur N. Ladd, Jr., Acting Regional Director, United States Fish & Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

Ginger Chesy, US Fish & Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

Cheryl Williss, US Fish & Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

Rolf Kraft, Project Manager, LaCreek National Wildlife Refuge, Martin, SD 57551.

Copy Hand Delivered 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 21st day of May, 1992.

JOHN HATCH
NOTARY PUBLIC
SOUTH DAKOTA
SEAL SEAL
My Commission Expires Apr. 1, 1993

John Hatch
Notary Public

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STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, AND LAWRENCE KOCER, Petitioners,	)	APPLICATION NOS. 2192-2, 1927-2, AND 1921-2
v.	)	
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	

APPLICANT'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

COMES NOW the United States Fish and Wildlife Service (FWS), a component agency of the United States Department of the Interior, and pursuant to the Stipulation to Allow Discovery executed by the parties, and S.D. CODIFIED LAWS ANN. §§ 15-6-33 and 15-6-34 (1984), hereby propounds this First Set of Interrogatories and Request for Production of Documents to Wendell DeKay, Charles Emley, Brett Heath, Raymond Kocer, and Lawrence Kocer.

DEFINITIONS

The following definitions will govern this First Set of Interrogatories and Request for Production of Documents:

1. "You", "your", and "yours" refers to the petitioners in the captioned proceeding, Wendell DeKay, Charles Emley, Brett Heath, Raymond Kocer, and Lawrence Kocer and their attorney(s).

2. "Document(s)" refers to any documents, writings, *etc.*, as such terms are more fully set forth in S.D. CODIFIED LAWS ANN. § 15-6-34(a) (1984).

3. "Person" means the plural as well as the singular, and includes any natural person, corporation, association, partnership, or other legal entity.

4. To "identify" a person means to state with respect to each person, his or her name, last known residential address, last known business address, and last known position of employment.

5. To "identify" a document means to state the nature of the document, *e.g.*, letter, report, map, *etc.*, its date, the author(s), the name and present business address of the person now having custody thereof, and enough of its substance to distinguish it from other similar documents.

INSTRUCTIONS

In each of your answers to this First Set of Interrogatories and Request for Production of Documents, you are requested to provide not only such information as is in your possession, but all information which is reasonably available. In the event that you are able to provide only part of the information requested by a particular interrogatory, please provide all the information you are able to provide and state the reason for your inability to provide the remaining information sought by the interrogatory.

Every interrogatory contained herein is a continuing interrogatory and you must supplement answers promptly if and when relevant information is obtained in addition to, or in any way inconsistent with, the initial answer to each such interrogatory.

INTERROGATORIES

INTERROGATORY NO. 1: Identify each witness that you will call to support your allegations contained in paragraph nos. IV. a., b., and c. of your January 16, 1992, Petition to Oppose Application. As to each such witness, briefly state the substance to which he or she is expected to testify.

INTERROGATORY NO. 2: Identify each witness that you will call to support the allegations contained in paragraph nos. II. a., b., c., and d. of your April 15, 1991, Petition to Oppose Application For Validation of Vested Water Right Claims Nos. 1926-2, 1927-2, 1921-2. As to each such witness, briefly state the substance to which he or she is expected to testify.

INTERROGATORY NO. 3: With respect to the allegations more particularly described in Interrogatory Nos. 1 and 2, state the specific facts and inferences which support such allegations.

INTERROGATORY NO. 4: Identify all documents that you might refer to in answering these interrogatories. In lieu of identifying these documents, produce a complete and legible copy of each such document with a notation describing the interrogatory to which the document relates.

INTERROGATORY NO. 5: If different than those documents which you will identify in answering Interrogatory No. 4, identify all other documents that support or otherwise relate to your allegations more particularly described in Interrogatory Nos. 1 and 2. In lieu of identifying these documents, produce a complete and legible copy of each such document with a notation describing the interrogatory to which the document relates.

INTERROGATORY NO. 6: Identify each person whom you anticipate calling as an expert witness at the hearing herein, and as to each such person: (a) state the subject matter on which he or she is expected to testify; (b) state the substance of facts and opinions to which he or she is expected to testify; and (c) state a summary of the grounds for each such person's opinions.

DATED this 17th day of March, 1992.

John R. Kunz

John R. Kunz, Esq.
Attorney
Rocky Mountain Region
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225
(303) 236-8444 (Commercial)
776-8444 (FTS)

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 1992, true and correct copies of the foregoing Applicant's First Set of Interrogatories and Request for Production of Documents were mailed, postage pre-paid in the United States Mail to:

State Water Management Board
ATTN: Mr. Rod Freeman
c/o John P. Guhin, Esq.
Deputy Attorney General
500 East Capitol
Pierre, SD 57501-5070

Patrick M. Ginsbach, Esq.
Farrell, Farrell, and Ginsbach
441 North River Street
Hot Springs, SD 57747

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

John Hatch
Chief Engineer
Water Rights Division
Foss Building
523 East Capitol
Pierre, SD 57501

Kayhynne Henry

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United States Department of the Interior

OFFICE OF THE SOLICITOR
ROCKY MOUNTAIN REGION
P.O. BOX 25007
DENVER FEDERAL CENTER
DENVER, COLORADO 80225

Telephone: (303) 236-8444
FAX: (303) 236-8644

April 27, 1992

APR 1992
DIVISION OF
WATER RIGHTS
Pierre, SD

VIA FAX TRANSMISSION
(Copy also sent via Certified Mail)

FWS.RM.0636

Patrick M. Ginsbach, Esq.
Farrell, Farrell and Ginsbach
441 North River Street
Hot Springs, SD 57747

Re: Application Nos. 2191-2, 1927-2, and 1921-2 before the South Dakota Water Management Board

Dear Patrick:

I have attempted to contact you a couple of times by telephone, but have not been able to reach you, and you have apparently been unable to get back to me. I am writing this letter to inquire about the interrogatories and request for production of documents that I served on you on or about March 17, 1992. According to my calculations, the answers to this discovery were due on or about April 16, 1992, almost two weeks ago. To the best of my knowledge, you have not sought or obtained a protective order, nor have you contacted me and requested an extension of time in which to provide the answers.

I am perfectly amenable to allowing you a little leeway in answering the discovery. However, as you know, pursuant to our Stipulation to Allow Discovery, we are on a tight schedule, and every day that goes by means a potential crunch at the end. This is particularly so, because as you know, I plan on conducting several depositions. Additionally, we both have strict deadlines for the submission of what will probably be extensive pre-hearing briefs.

As you know, we stipulated that all discovery in this case was to be conducted pursuant to S.D. CODIFIED LAWS ANN. §§ 15-6 *et seq.* I sincerely hope that, as a result of this letter, I will receive the answers to my discovery no later than May 1, 1992, or some other mutually agreeable date. If not, then, pursuant to S.D.

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CODIFIED LAWS ANN. § 15-6-37, I shall be forced to seek other appropriate relief.

Thank you very much for your attention to this matter and for your consideration. I look forward to your reply.

Sincerely,

John R. Kunz
Attorney

cc: State Water Management Board
ATTN: Mr. Rod Freeman
c/o John P. Guhin, Esq.
Deputy Attorney General
500 East Capitol
Pierre, SD 57501-5070

John Hatch
Chief Engineer
Water Rights Division
Foss Building
Pierre, SD 57501

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

Ginger Chesy, Region 6, FWS

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STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, AND LAWRENCE KOCER,	)	
Petitioners,	)	APPLICATION NOS. 2191-2, 1927-2, AND 1921-2
v.	)	
UNITED STATES FISH AND WILDLIFE SERVICE,	)	
Applicant.	)	

NOTICE OF DEPOSITIONS

TO THE ABOVE-NAMED PETITIONERS AND THEIR COUNSEL OF RECORD:

You and each of you will please take notice that the above-named applicant, the United States Fish and Wildlife Service (FWS), will, at the dates and times indicated below, take the depositions upon oral examination of the following individuals:

MONDAY, MAY 18, 1992

1:00 P.M. and continuing thereafter until his deposition is completed-Denny Simonson.

TUESDAY, MAY 19, 1992

9:00 A.M. and continuing thereafter until his deposition is completed-Perry Rahn.

WEDNESDAY, MAY 20, 1992

8:00 A.M. and continuing thereafter until her deposition is completed-EVA MAE BROWN.

9:00 A.M. or upon completion of the deposition of Ms. Brown and continuing thereafter until her deposition is completed-JOYCE TOZCEK.

10:00 A.M. or upon completion of the deposition of Ms. Tozcek and continuing thereafter until his deposition is completed-MIKE HARRIS.

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11:00 A.M. or upon completion of the deposition of Mr. Harris and continuing thereafter until his deposition is completed-FRANK BUCKLES.

1:30 P.M. or upon completion of the deposition of Mr. Frank Buckles and continuing thereafter until his deposition is completed-JIM BUCKLES.

2:30 P.M. or upon completion of the deposition of Mr. Jim Buckles and continuing thereafter until his deposition is completed-CHARLES EMELY.

4:00 P.M. or upon completion of the deposition of Mr. Emely and continuing thereafter until his deposition is completed-WENDELL DEKAY.

THURSDAY, MAY 21, 1992

8:00 A.M. and continuing thereafter until his deposition is completed-RAYMOND KOCER.

11:00 A.M. or upon completion of the deposition of Mr. Raymond Kocer and continuing thereafter until his deposition is completed-LAWRENCE KOCER.

2:30 P.M. or upon completion of the deposition of Mr. Lawrence Kocer and continuing thereafter until his deposition is completed-BRETT HEATH.

The above depositions will be taken in accordance with the provisions of S. D. CODIFIED LAWS ANN. §§ 15-6 (1984). The depositions of Messrs. Simonson and Rahn will be taken at the Feeham Law Office, 825 Columbus Street, Rapid City, SD (telephone number is (605) 341-7971). The remainder of the depositions will be taken at the Headquarters Building of the LaCreek (South Dakota) National Wildlife Refuge, Martin County, SD (telephone number is (605) 685-6508). FWS will provide a court reporter for all of the above depositions.

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Pursuant to S. D. CODIFIED LAWS ANN. § 15-6-30(5) (1984), you and each of you are hereby requested to bring to your deposition any and all documents 1/in either your or your counsel's possession concerning which you might testify at the hearing of the captioned matter.

DATED this 13th Day of May, 1992.

John R. Kunz, Esq.
Attorney
Rocky Mountain Region
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225
(303) 236-8444

1/ As this term is defined in Applicant's First Set of Interrogatories and Request for Production of Documents on file herein.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 1992, true and correct copies of the foregoing Notice of Depositions were mailed, postage pre-paid in the United States Mail to:

State Water Management Board
ATTN: Mr. Rod Freeman
c/o John P. Guhin, Esq.
Deputy Attorney General
500 East Capitol
Pierre, SD 57501-5070

Patrick M. Ginsbach, Esq.
Farrell, Farrell, and Ginsbach
441 North River Street
Hot Springs, SD 57747

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

John Hatch
Chief Engineer
Water Rights Division
Foss Building
523 East Capitol
Pierre, SD 57501

Kayhynne Henry

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, AND LAWRENCE KOCER, Petitioners, vs. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	APPLICATION NOS. 2191-2, 1927-2, AND 1921-2

NOTICE OF DEPOSITION

TO THE ABOVE-NAMED APPLICANT AND IT'S COUNSEL:

Please take notice that the above named Petitioners will at 9:00 o'clock a.m. on May 22, 1992 at the Headquarters Building of the LaCreek National Wildlife Refuge, Bennett County, South Dakota take the deposition upon oral examination of Rolf Kraft.

Dated this 19th day of May, 1992.

Jane M. Farrell
One of the Lawyers for the
Petitioners
441 N. River St.
Hot Springs, SD 57747
Phone:(605)745-5161

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she hand delivered a true and correct copy of the foregoing Notice upon the individual hereinafter next designated on May 20, 1992 at the following address:

John Kunz
Lawyer for Applicant

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Crossroads Inn
Martin, SD

and the undersigned further certifies that she mailed a true and correct copy of the foregoing Notice to the individuals hereinafter next designated all on the 20th day of May, 1992 by depositing the same in the United States mail, with first class postage affixed, in envelopes addressed to:

State Water Management Board
c/o John P. Guhin, Esq.
Deputy Attorney General
500 East Capitol Ave.
Pierre, SD 57501

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

John Hatch
Chief Engineer
Water Rights Division
Foss Building
523 East Capitol
Pierre, SD 57501

Jane M. Farrell

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, AND LAWRENCE KOCER, Petitioners, vs. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	APPLICATION NOS. 2191-2, 1927-2, AND 1921-2

SUBPOENA DUCES TECUM

TO: ROLF KRAFT AND JOHN KUNZ COUNSEL FOR THE APPLICANT:

ROLF KRAFT YOU ARE HEREBY COMMANDED to appear at 9:00 o'clock a.m. on May 22, 1992 at the Headquarters Building of the LaCreek National Wildlife Refuge, Bennett County, South Dakota for the purpose of taking your deposition. You are to bring with you the following documents (as that term is defined in Applicant's First Set of Interrogatories and Request for Production of Documents on file herein):

1. Any and all documents in either your or your counsel's possession concerning which you might testify at the hearing of the above captioned matter;

2. Records kept by the LaCreek National Wildlife Refuge for the yearly total rainfall for the years 1984 through April 30, 1992;

3. Plats, correspondence or documents prepared by, or transmitted to, O. T. Moe relating to the construction of the LaCreek National Wildlife Refuge, or to procedures or remedies necessary to alleviate sedimentary buildup in Lake Creek or any structures constructed on refuge property;

4. Correspondence or documents prepared by, or transmitted to, Harold Burgess relating to the construction, or to procedures or remedies necessary to alleviate sedimentary buildup, of the ditch upon the George and Joy Heath property that straightens out the channel of Lake Creek;

5. Any reports, studies or correspondence prepared by or on behalf of the United States Fish and Wildlife Service between the years 1970 and 1991 relating to the development of the Birthol Brown ranch land by the United States Fish and Wildlife Service;

6. Any engineering reports or studies prepared by or on behalf of the United States Fish and Wildlife Service relating to the construction, or development, of any structures on the Birthol Brown ranch land in connection with Application 2191-2;

7. Any engineering reports or studies prepared by or on behalf of the United States Fish and Wildlife Service relating to the construction, or development, of any structures on the Birthol Brown ranch land in connection with Application 1927-2;

8. Any engineering reports or studies prepared by or on behalf of the United States Fish and Wildlife Service relating to the construction, or development, of any structures on the Birthol Brown ranch land in connection with Application 1921-2;

9. Any engineering reports or studies prepared by or on behalf of the United States Fish and Wildlife Service relating to the construction, or development, of any structures or dikes on Pools 2, 7 and proposed Pool 9 of the LaCreek National Wildlife Refuge;

10. Any reports, documents, studies or correspondence prepared by or transmitted to the United States Fish and Wildlife Service concerning

the acquisition of real property belonging to Charles Emley, Raymond Kocer, Lawrence Kocer, George Heath or Brett Heath;

11. Any reports, documents, studies or correspondence prepared by or transmitted to the United States Fish and Wildlife Service concerning the number of ducks, other waterfowl and wildlife raised at the LaCreek National Wildlife Refuge between the years 1965 to 1991;

12. Any reports, documents, studies or correspondence prepared by or transmitted to the United States Fish and Wildlife Service concerning the migratory patterns in the United States of America of waterfowl, and any changes in those migratory patterns for the years 1965 to 1991;

13. Any reports, documents, studies or correspondence prepared by or transmitted to the United States Fish and Wildlife Service concerning the migratory patterns over the LaCreek National Wildlife Refuge of waterfowl, and any changes in those migratory patterns for the years 1965 to 1991;

14. Copies of any and all water permits now held by the LaCrekk National Wildlife Refuge.

Dated this 20th day of May, 1992.

Jane M. Farrell
One of the Lawyers for the
Petitioners
441 N. River St.
Hot Springs, SD 57747
Phone:(605)745-5161

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she hand delivered a true and correct copy of the foregoing Notice upon the individual hereinafter next designated on May 20, 1992 at the following address:

Rolf Kraft
Crossroads Inn
Martin, SD

John Kunz
Attorney for the Applicant
Crossroads Inn
Martin, SD

Oglala Sioux Tribe

ATTORNEY'S OFFICE
1-605-867-5104
or 867-5149
P.O. BOX 1053
PINE RIDGE, SOUTH DAKOTA 57770

MARVIN AMIOTTE
ATTORNEY AT LAW

RUSSEL D. ZEPHIER
ATTORNEY AT LAW

JUN 1992
DIVISION OF
WATER RIGHTS
Pierre, SD

June 2, 1992

John Hatch
Chief Engineer
Environment and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

Re: Application of LaCreek National Wildlife Refuge application for water rights on irrigation water for W½, NW¼, NE¼, Sec. 23, T36N, R37W

Dear Sir:

Please be advised that the Oglala Sioux Tribe does fully support the aforementioned application of LaCreek National Wildlife Refuge.

We are requesting that we be allowed to testify during your July 22nd and 23rd meeting at Martin.

Respectfully,

Marvin Amiotte
Attorney at Law

xc: Robin White

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THOMPSON & THOMPSON
REGISTERED PROFESSIONAL REPORTERS

T. Daniel Thompson
1939-1989
Judith M. Thompson

#203 Capitol Bldg.
415 S. Main
Aberdeen, SD 57401
(605) 229-5175

832 St. Joseph Street
Eilers Building, Third Floor
Rapid City, South Dakota 57701
(605) 348-8610
1-800-456-0831



June 5, 1992

SD State Water Management Board
Department of Water and Natural Resources
ATTN: Rod Freeman
c/o John P. Guhin, Esq.
Deputy Attorney General
500 East Capitol
Pierre, SD 57501-5070

IN RE: DeKay, et al. vs. U.S. Fish & Wildlife Service

Dear Mr. Freeman:

Enclosed please find the original depositions taken May 20 through May 22, 1992 in the above-entitled case. I am filing them with the Water Management Board.

Also enclosed is a form which I ask that you please date and sign showing that you have received the transcripts. I have enclosed a self-addressed, stamped envelope for your convenience in returning the form.

Thank you for your courtesies.

Sincerely,

Carol A. Cantwell

Carol A. Cantwell, RPR

Enc.(12)

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FARRELL, FARRELL & GINSBACH

LAWYERS

441 NORTH RIVER STREET

HOT SPRINGS, SOUTH DAKOTA 57747

(605) 745-5161

Martin P. Farrell
Jane M. Farrell
Patrick M. Ginsbach

Beverly J. Irwin
Certified Legal Assistant



June 10, 1992

John Hatch
Chief Engineer
Water Rights Division
Foss Building
523 East Capitol Ave.
Pierre, SD 57501

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

John R. Kunz
Office of the Regional Solicitor
Rocky Mountain Region
P. O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225

John P. Guhin
State Water Management Board
Deputy Attorney General
500 East Capitol Ave.
Pierre, SD 57501

Re: DeKay, et al vs. U.S. Fish and Wildlife Service

Enclosed please find a copy of the Amended Notice of Deposition of Bob Green, Bill Pearson and Joe Brummer as well as the Subpoena Duces Tecum served on each individual.

Thank you very much.

Sincerely,

Jane M. Farrell

JANE M. FARRELL

jc

Enclosure

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STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, Petitioners,	)	
vs.	)	APPLICATION NOS. 2191-2, 1927-2, AND 1921-2
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	

AMENDED NOTICE OF DEPOSITION

TO THE ABOVE-NAMED APPLICANT AND ITS COUNSEL:

Please take notice that the above named Petitioners will at 11:30 o'clock a.m. on June 8, 1992 at Room 200 of the Fish and Wildlife Services Office located at 134 Union Street, Lakewood, Jefferson County, Colorado, to take the deposition upon oral examination of Bill Pearson.

Dated this 8th day of June, 1992.

Jane M. Farrell

JANE M. FARRELL
One of the Lawyers for the Petitioners
441 N. River Street
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she hand delivered a true and correct copy of the foregoing Notice upon the individual hereinafter next designated on June 8, 1982, at the following address:

Bill Pearson
Fish and Wildlife Service Office
134 Union St.
Lakewood, CO 80215

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John Kunz
Attorney for the Applicant
Fish and Wildlife Service Office
134 Union St.
Lakewood, CO 80215

and the undersigned further certifies that she mailed a true and correct copy of the foregoing Notice to the individuals hereinafter next designated all on the 10th day of June, 1992 by depositing the same in the United States mail, with first class postage affixed, in envelopes addressed to:

State Water Management Board
% John P. Guhin, Esq.
Deputy Attorney General
500 East Capitol Ave.
Pierre, SD 57501

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

John Hatch
Chief Engineer
Water Rights Division
Foss Building
523 East Capitol
Pierre, SD 57501

Jane M. Farrell
JANE M. FARRELL

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, Petitioners,	)	
vs.	)	APPLICATION NOS. 2191-2, 1927-2, AND 1921-2
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	

AMENDED NOTICE OF DEPOSITION

TO THE ABOVE-NAMED APPLICANT AND ITS COUNSEL:

Please take notice that the above named Petitioners will at 9:30 o'clock a.m. on June 8, 1992 at Room 200 of the Fish and Wildlife Services Office located at 134 Union Street, Lakewood, Jefferson County, Colorado, to take the deposition upon oral examination of Joe Brummer.

Dated this 8th day of June, 1992.

Jane M. Farrell

JANE M. FARRELL
One of the Lawyers for the Petitioners
441 N. River Street
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she hand delivered a true and correct copy of the foregoing Notice upon the individual hereinafter next designated on June 8, 1992, at the following address:

Joe Brummer
Fish and Wildlife Service Office
134 Union St.
Lakewood, CO 80215

John Kunz
Attorney for the Applicant
Fish and Wildlife Service Office
134 Union St.
Lakewood, CO 80215

and the undersigned further certifies that she mailed a true and correct copy of the foregoing Notice to the individuals hereinafter next designated all on the 10th day of June, 1992, by depositing the same in the United States mail, with first class postage affixed, in envelopes addressed to:

State Water Management Board
% John P. Guhin, Esq.
Deputy Attorney General
500 East Capitol Ave.
Pierre, SD 57501

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

John Hatch
Chief Engineer
Water Rights Division
Foss Building
523 East Capitol
Pierre, SD 57501

Jane M. Farrell
JANE M. FARRELL

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, Petitioners,	)	
vs.	)	APPLICATION NOS. 2191-2, 1927-2, AND 1921-2
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	

AMENDED NOTICE OF DEPOSITION

TO THE ABOVE-NAMED APPLICANT AND ITS COUNSEL:

Please take notice that the above named Petitioners will at 7:00 o'clock a.m. on June 8, 1992 at Room 200 of the Fish and Wildlife Services Office located at 134 Union Street, Lakewood, Jefferson County, Colorado, to take the deposition upon oral examination of Bob Green.

Dated this 8th day of June, 1992.

Jane M Farrell

JANE M. FARRELL
One of the Lawyers for the Petitioners
441 N. River Street
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she hand delivered a true and correct copy of the foregoing Notice upon the individual hereinafter next designated on June 8, 1992, at the following address:

Bob Green
Fish and Wildlife Service Office
134 Union St.
Lakewood, CO 80215

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John Kunz
Attorney for the Applicant
Fish and Wildlife Service Office
134 Union St.
Lakewood, CO 80215

and the undersigned further certifies that she mailed a true and correct copy of the foregoing Notice to the individuals hereinafter next designated all on the 10th day of June, 1992, by depositing the same in the United States mail, with first class postage affixed, in envelopes addressed to:

State Water Management Board
% John P. Guhin, Esq.
Deputy Attorney General
500 East Capitol Ave.
Pierre, SD 57501

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

John Hatch
Chief Engineer
Water Rights Division
Foss Building
523 East Capitol
Pierre, SD 57501

Jane M. Farrell
JANE M. FARRELL

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, Petitioners,	)	
vs.	)	APPLICATION NOS. 2191-2, 1927-2, AND 1921-2
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	

SUBPOENA DUCES TECUM

TO: BOB GREEN AND JOHN KUNZ, COUNSEL FOR THE APPLICANT:

BOB GREEN, YOU ARE HEREBY COMMANDED to appear at 7:00 o'clock a.m. on June 8, 1992 at Room 200 of the Fish and Wildlife Services Office located at 134 Union Street, Lakewood, Jefferson County, Colorado. You are to bring with you the following documents (as that term is defined in the Applicant's First Set of Interrogatories and Request for Production of Documents on file herein):

1. Any and all documents in either your or your counsel's possession concerning which you might testify at the hearing of the above captioned matter;

2. Any and all notes made by you to aid you concerning which you might testify at the hearing in the above captioned matter;

3. Any materials relied upon you in forming any opinions concerning Application Nos. 2191-2, 1927-2, and 1921-2;

4. Any reports, studies and correspondence concerning which you might testify at the hearing in the above entitled matter;

5. Any engineering reports or studies prepared by you relating to the construction or development of any structures on the LaCreek National Wildlife Refuge;

6. Any and all photographs, maps, and exhibits either in your or your counsel's possession concerning which you might testify at the hearing of the above captioned matter.

Dated this 8th day of June, 1992.

JANE M. FARRELL
One of the Lawyers for the Petitioners
441 N. River Street
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she hand delivered a true and correct copy of the foregoing Notice upon the individual hereinafter next designated at the following address:

Bob Green
Fish and Wildlife Service Office
134 Union St.
Lakewood, CO 80215

John Kunz
Attorney for the Applicant
Fish and Wildlife Service Office
134 Union St.
Lakewood, CO 80215

on the 8th day of June, 1992.

JANE M. FARRELL

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, Petitioners,	)	
vs.	)	APPLICATION NOS. 2191-2, 1927-2, AND 1921-2
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	

SUBPOENA DUCES TECUM

TO: JOE BRUMMER AND JOHN KUNZ, COUNSEL FOR THE APPLICANT:

JOE BRUMMER, YOU ARE HEREBY COMMANDED to appear at 9:30 o'clock a.m. on June 8, 1992 at Room 200 of the Fish and Wildlife Services Office located at 134 Union Street, Lakewood, Jefferson County, Colorado. You are to bring with you the following documents (as that term is defined in the Applicant's First Set of Interrogatories and Request for Production of Documents on file herein):

1. Any and all documents in either your or your counsel's possession concerning which you might testify at the hearing of the above captioned matter;

2. Any and all notes made by you to aid you concerning which you might testify at the hearing in the above captioned matter;

3. Any materials relied upon you in forming any opinions concerning Application Nos. 2191-2, 1927-2, and 1921-2;

4. Any reports, studies and correspondence concerning which you might testify at the hearing in the above entitled matter;

5. Any engineering reports or studies prepared by you relating to the construction or development of any structures on the LaCreek National Wildlife Refuge;

6. Any and all photographs, maps, and exhibits either in your or your counsel's possession concerning which you might testify at the hearing of the above captioned matter.

Dated this 8th day of June, 1992.

JANE M. FARRELL
One of the Lawyers for the Petitioners
441 N. River Street
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she hand delivered a true and correct copy of the foregoing Notice upon the individual hereinafter next designated at the following address:

Joe Brummer
Fish and Wildlife Service Office
134 Union St.
Lakewood, CO 80215

John Kunz
Attorney for the Applicant
Fish and Wildlife Service Office
134 Union St.
Lakewood, CO 80215

on the 8th day of June, 1992.

JANE M. FARRELL

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, Petitioners,	)	
vs.	)	APPLICATION NOS. 2191-2, 1927-2, AND 1921-2
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	

SUBPOENA DUCES TECUM

TO: BILL PEARSON AND JOHN KUNZ, COUNSEL FOR THE APPLICANT:

BILL PEARSON, YOU ARE HEREBY COMMANDED to appear at 11:30 o'clock a.m. on June 8, 1992 at Room 200 of the Fish and Wildlife Services Office located at 134 Union Street, Lakewood, Jefferson County, Colorado. You are to bring with you the following documents (as that term is defined in the Applicant's First Set of Interrogatories and Request for Production of Documents on file herein):

1. Any and all documents in either your or your counsel's possession concerning which you might testify at the hearing of the above captioned matter;

2. Any and all notes made by you to aid you concerning which you might testify at the hearing in the above captioned matter;

3. Any materials relied upon you in forming any opinions concerning Application Nos. 2191-2, 1927-2, and 1921-2;

4. Any reports, studies and correspondence concerning which you might testify at the hearing in the above entitled matter;

5. Any engineering reports or studies prepared by you relating to the construction or development of any structures on the LaCreek National Wildlife Refuge;

6. Any and all photographs, maps, and exhibits either in your or your counsel's possession concerning which you might testify at the hearing of the above captioned matter.

Dated this 8th day of June, 1992.

JANE M. FARRELL
One of the Lawyers for the Petitioners
441 N. River Street
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she hand delivered a true and correct copy of the foregoing Notice upon the individual hereinafter next designated at the following address:

Bill Pearson
Fish and Wildlife Service Office
134 Union St.
Lakewood, CO 80215

John Kunz
Attorney for the Applicant
Fish and Wildlife Service Office
134 Union St.
Lakewood, CO 80215

on the 8th day of June, 1992.

JANE M. FARRELL

FARRELL, FARRELL & GINSBACH
LAWYERS
441 NORTH RIVER STREET
HOT SPRINGS, SOUTH DAKOTA 57747

(605) 745-5161

Martin P. Farrell
Jane M. Farrell
Patrick M. Ginsbach

Beverly J. Irwin
Certified Legal Assistant

Attorney General

JUN 26 1992



June 25, 1992

John P. Guhin
Assistant Attorney General
State Capitol Building
500 East Capitol Avenue
Pierre, SD 57501

Re: Application numbers 2191-2, 1927-2, 1921-2 by the United States Fish and Wildlife Service before the water management board.

Dear John:

Enclosed please find original depositions of Robert G. Green, William Joseph Pearson, II, and Joe Brummer. I am filing these with you.

Yours truly,

PATRICK M. GINSBACH
PMG/bac
cc: John Kunz, Dianne Best

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STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL

500 EAST CAPITOL
Pierre, South Dakota 57501-5070
Phone (605) 773-3215

MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

JUN 1992
DIVISION OF
WATER RIGHTS
Pierre, SD

June 29, 1992

MEMORANDUM

TO: John Hatch, Chief Engineer, Div. of Water Rights

FROM: John P. Guhin, Deputy Attorney General

RE: **Application Nos. 2192, 1927-2 and 1921-2**

I am enclosing a letter from Pat Ginsbach along with the original depositions of Robert Green, William Joseph Pearson and Joe Prummer. Mr. Ginsbach had sent these depositions to me to be filed; I assume they should be filed with your office.

Please give me a call if you have questions or comments.

JPG:clr

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THOMPSON & THOMPSON
REGISTERED PROFESSIONAL REPORTERS

T. Daniel Thompson
1939-1989
Judith M. Thompson

#203 Capitol Bldg.
415 S. Main
Aberdeen, SD 57401
(605) 229-5175

832 St. Joseph Street
Eilers Building, Third Floor
Rapid City, South Dakota 57701
(605) 348-8610
1-800-456-0831



July 11, 1992

SD State Water Management Board
Department of Water and Natural Resources
ATTN: Rod Freeman
c/o John P. Guhin, Esq.
Deputy Attorney General
500 East Capitol
Pierre, SD 57501-5070

IN RE: DeKay, et al. vs. U.S. Fish & Wildlife Service

Dear Mr. Freeman:

Enclosed please find the original depositions taken May 18 and May 19, 1992, in the above-entitled case. I am filing them with the Water Management Board.

Also enclosed is a form which I ask that you please date and sign showing that you have received the transcripts. I have enclosed a self-addressed, stamped envelope for your convenience in returning the form.

Thank you for your courtesies.

Sincerely,

Carol A. Cantwell

Carol A. Cantwell, RPR

Enc.(4)

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I, the undersigned, do hereby acknowledge receipt of the original depositions of Perry H. Rahn, Ph.D., and Dennie Simonson in the case of DeKay, et al. vs. U.S. Fish and Wildlife Service, and hereby state that the same was filed with the SD Water Managment Board on July 13, 1992 (date).

By: John W. Hatch

JOHN HATCH, CHIEF ENGINEER
Water Rights Division
523 E. Capitol Avenue
Pierre, SD 57501
Ph# (605) 773-3352

JUL 1992
DIVISION OF
WATER RIGHTS
Pierre, SD

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, AND LAWRENCE KOCER,	)	
Petitioners,	)	APPLICATION NOS. 2191-2, 1927-2, AND 1921-2
v.	)	
UNITED STATES FISH AND WILDLIFE SERVICE,	)	
Applicant.	)	

AMENDED CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of July, 1992, true and correct copies of the foregoing Amended Certificate of Service were mailed, postage prepaid in the United States Mail to:

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

Marian Gunderson
811 West Third
Yankton, SD 57078-3702

Bernita Loucks
219 42nd Street
Rapid City, SD 57702-2123

Dwayne A. Rollag
320 Lincoln Lane South
Brookings, SD 57006-2741

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

Joel Rickenbach
P.O. Box 97
Oelrichs, SD 57763-0097

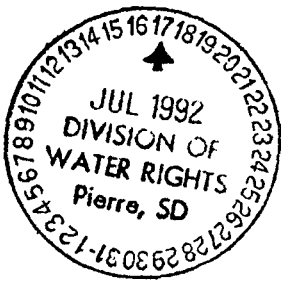
Leo Holzbauer
RR 1, Box 170
Wagner, SD 57380

State Water Management Board
c/o John P. Guhin, Esq.
Deputy Attorney General
500 East Capitol
Pierre, SD 57501-5070

Patrick M. Ginsbach, Esq.
Farrell, Farrell, and Ginsbach
441 North River Street
Hot Springs, SD 57747

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

John Hatch
Chief Engineer
Water Rights Division
Foss Building
523 East Capitol
Pierre, SD 57501



STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, AND LAWRENCE KOCER,	)	
Petitioners,	)	APPLICATION NOS. 2191-2, 1927-2, AND 1921-2
v.	)	
UNITED STATES FISH AND WILDLIFE SERVICE,	)	
Applicant.	)	

MOTION IN LIMINE

I. INTRODUCTION

COMES NOW the United States Fish and Wildlife Service (FWS), by and through counsel, and hereby moves, *in limine*, that, at the hearing of the captioned matter, the Water Management Board (Board) exclude and refuse to hear any and all testimony or evidence pertaining to the objections of Wendell DeKay, Charles Emley, Lawrence Kocer, and to a certain extent, Brett Heath (the Objectors). The grounds for this motion are as follows.

The three applications comprising the captioned proceeding (the Subject Applications) and the Objectors' allegations with respect thereto, have been thoroughly discussed in FWS' July 7, 1992, Prehearing Brief (Prehearing Brief) on file herein. Accordingly, a detailed discussion of these matters will not be repeated herein. Additionally, in the Prehearing Brief, FWS has provided detailed reasons why the Board should exclude and refuse

to hear testimony or evidence from the Objectors. For purposes of this motion, FWS will not repeat these detailed reasons. Rather, FWS will only provide general statements of the relevant facts and refer the Board to the appropriate portions of the Prehearing Brief. However, FWS urges the Board to fully consider those portions of the Prehearing Brief cited in support of this motion.

To better understand this motion, a little background concerning the Subject Applications is necessary. Application No. 1927-2 requests a permit to appropriate water from Lake Creek to irrigate lands generally to the north and south of Lake Creek. 1/ Application No. 2191-2 requests a permit to appropriate water from six natural springs (the Springs). 2/ The Springs are generally located to the south of Lake Creek. Finally, Application No. 1921-2 pertains to Cedar Creek (which generally flows from the south to the north and into Lake Creek), and requests that existing water permit No. 265-2 be amended to reflect a change in the diversion point and the areas irrigated. 3/

1/ For a more detailed discussion of this application, see pp. 3-7 of FWS' Prehearing Brief.

2/ For a more detailed discussion of this application, see pp. 43-45 of FWS' Prehearing Brief.

3/ For a more detailed discussion of this application, see pp. 47-48 of FWS' Prehearing Brief.

II. ARGUMENT

As will be explained in more detail below, the Objectors' allegations have no logical relationship or nexus to what FWS is seeking in the Subject Applications. Therefore, such allegations are completely irrelevant and wholly extraneous to the captioned proceedings. Accordingly, in the interests of fairness, justice, and particularly, administrative economy, the Board should exclude and refuse to hear testimony or evidence concerning such allegations.

A. Wendell Dekay

Because FWS' management practices purportedly cause the water in Lake Creek (as it flows through Mr. DeKay's property) to be "muddy" and "smelly," FWS expects Mr. DeKay to allege that his use of the Lake Creek water for stockwatering is "impaired." *See* the Prehearing Brief at 10-11. However, Mr. DeKay's allegations have nothing to do with the substance of the Subject Applications. That is, the Subject Applications seek permits to appropriate water from Lake Creek and the Springs, and to amend existing Permit No. 265-2 for Cedar Creek. *See, id.* at 11. Mr. DeKay's objections center on property which is located miles to the east of any land even possibly affected by the Subject Applications. Simply, there is no correlation between the Subject Applications and the allegations which Mr. DeKay seeks to

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raise. Accordingly, for the reasons stated in more detail on pages 11-13 of the Prehearing Brief, the Board should grant the relief requested in this motion. 4/

B. Charles Emley

(1). Elm Creek Property

Because waters from Elm Creek purportedly flood his property, FWS expects Mr. Emley to allege that it is not in the public interest to approve the Subject Applications. *See* the Prehearing Brief at 20 and 23-24. However, what might or might not be happening on or around *Elm* Creek has absolutely no bearing or relevance to what FWS is seeking with respect to *Lake* and *Cedar* Creeks, or the Springs. Accordingly, for the reasons stated in more detail on pages 23-25 of the Prehearing Brief, the objections which Mr. Emley desires to raise are wholly irrelevant and otherwise superfluous. Thus, the Board should grant the relief requested in this motion. 5/

4/ This position is supported by the Water Rights Division of the South Dakota Department of Environment and Natural Resources (the Division). ("Obviously exhibits or testimony regarding real property damage caused by water use not involved in the particular [water] right application . . . (whether such property damage is caused by FWS or any other party) *would be inappropriate in this proceeding*.") *See* the Division's July 7, 1992, Prehearing Brief at 6 (emphasis added).

5/ *See* note 4, *supra*.

(2). Church Property

Because waters from Lake Creek purportedly flood the Church Property, FWS expects Mr. Emley to allege that the granting of Application No. 1927-2 would not be in the public interest. *See* the Prehearing Brief at 20 and 25. However, Mr. Emley is only a *lessee* of the Church Property. The fee owner is the Episcopal Church (the Church). Obviously, Mr. Emley objects to water from Lake Creek being on this property. However, as far as the Church is concerned, FWS is receiving mixed signals. On the one hand, it has been represented to FWS that the Church will go along with the wishes of Mr. Emley. On the other hand, FWS hears that the Church wants water from Lake Creek on this property, and that it does not want these proceedings to preclude this from happening in the future. Hence, the question is whether the Church is a necessary party to these proceedings. For the reasons stated in more detail on pages 26-27 of the Prehearing Brief, FWS feels that the Church *is* a necessary party to these proceedings, and that, absent the participation of the Church, full and complete relief cannot be accorded between FWS and Mr. Emley. Accordingly, unless or until the Church is joined as a necessary party to these proceedings, any objections that Mr. Emley might raise are simply not probative of the underlying substantive issues. Consequently, unless the Church is joined as a necessary party, the Board should grant the relief requested in this motion.

C. Lawrence Kocer

As a result of FWS' practices on the "Old Refuge" 6/ which purportedly cause water from Lake Creek to "back up" onto his property, FWS expects Mr. Kocer to allege that Application No. 1927-2 is contrary to the so-called public interest. *See* the Prehearing Brief at 20 and 31-32. However, for the reasons stated more fully on page 34 of the Prehearing Brief, what FWS has historically done or is currently doing on the Old Refuge has utterly nothing to do with the substance of Application No. 1927-2. Were FWS' diversions from Lake Creek actually raising or otherwise increasing the amount of water in Lake Creek, then Mr. Kocer's objections might arguably have some relevancy to Application No. 1927-2. However, this is not the case. Accordingly, any objections that Mr. Kocer's might wish to raise, are wholly superfluous and completely irrelevant. For these reasons, the Board should grant the relief requested in this motion. 7/

D. Brett Heath

Similar to that noted above for Mr. Kocer, as a result of FWS' practices on the Old Refuge which purportedly cause water

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6/ "See" the Prehearing Brief at 31.

7/ *See* note 4, *supra*.

from Lake Creek to "back up" onto his property, FWS expects Mr. Heath to allege that it is not in the public interest for the Board to grant Application No. 1927-2. *See* the Prehearing Brief at 20 and 36. 8/ However, for precisely those same reasons stated under the above discussion of Mr. Kocer's property, and on page 38 and note 48 of the Prehearing Brief, this particular allegation of Mr. Heath has absolutely no bearing or connection to what is being sought in Application No. 1927-2. For these reasons, the Board should grant the relief requested herein. 9/

III. CONCLUSION

"The purpose of a motion in limine is to avoid the injection into the trial, of matters which are *irrelevant*, inadmissible, and *prejudicial*." *Fedding v. Ferguson*, 501 S.W. 2d 717, 722 (Tex. Civ. App. 1973) (emphasis added). (Cited in *South Dakota v. Cochrun*, 328 N.W. 2d 271 (S.D. 1983). As stated by the South Dakota Supreme Court in *Cochrun, supra.*: "Such a motion [in limine] is a useful tool in preventing *immaterial matter from encumbering the record*." 328 N.W. 2d at 272, *quoting Wagner v. Larson*, 257 Iowa 1202, 136 N.W. 2d 312, 326 (1965) (emphasis added).

8/ Mr. Heath also apparently has other objections pertaining to FWS' diversions of water from Lake and Cedar Creeks. *See* the Prehearing Brief at 36-37. FWS does not dispute that these objections--however meritless--are properly before the Board as part of the captioned proceedings.

9/ *See* note 4, *supra*.

Applying the above principles to the subject case, one can hardly imagine more "irrelevant and "prejudicial" testimony and evidence than that which the Messrs. DeKay, Emley, Kocer and Heath seek to inject into the captioned proceedings. As explained in more detail, *supra*, such testimony and evidence are *not*, under any stretch of the imagination, probative of any of the substantive issues, or even related to the relief being sought in the Subject Applications. The introduction of such testimony and evidence would only serve to cloud the real issues and create potential prejudice towards FWS.

True, there are some common "threads" between the Objectors' allegations and the Subject Applications. For example, both matters involve water. Indeed, in some instances, the water is even from the same source, *i.e.*, Lake Creek. Both matters involve the same parties. However, aside from the mere existence of these common facts, the "threads" of commonality are very slim. Indeed, they are virtually non-existent.

Notwithstanding the persuasiveness of the above arguments, FWS appreciates that, as one of the bodies charged with administering the water laws of the State, the Board might well be disposed to "go ahead" and give the Objectors their "day in court." However, even assuming, *arguendo*, that there is some validity to the Objectors' allegations, there are other legal

remedies and courses of action that they can and must pursue. Such courses of action might well involve proceedings before the Board. 10/ The point is, however, that the *instant proceedings* are simply *not* the proper forum for the Objectors to air such complaints.

Given the above facts, the principles of justice, fairness, and administrative economy demand that the Board not expend its time, and FWS not exhaust its resources, hearing the specious and otherwise irrelevant testimony and evidence of the Objectors. This point is clearly illustrated by the fact that only two days are scheduled for the hearing of the captioned matter. If necessary, the hearing will be continued to a third day. 11/ Not counting the factual testimony of various lay witnesses for both the Objectors and FWS, it is expected that expert testimony will also be adduced from at least four witnesses. Additionally, a field inspection of the Objectors' lands is scheduled. FWS is certain of one thing. If, at the captioned proceedings, the Board allows any and all testimony and evidence--no matter how tenuous and irrelevant such testimony and evidence might be--the captioned proceedings and the scheduled inspection will *not* be

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10/ Thus, they will not be deprived of their so-called "day in court."

11/ "See" the proposed agenda for the July, 1992, Water Management Board meeting (under cover of a July 6, 1992, letter).

completed in two, let alone three days. Substantially more time will be necessary. 12/

For all of the above reasons, FWS respectfully moves, *in limine*, that, with respect to the captioned proceeding, the Board exclude any and all testimony or evidence pertaining to the allegations of Wendell DeKay, Charles Emley, Lawrence Kocer, and to a certain extent, Brett Heath, and for such other and further relief as is just and equitable in the premises.

DATED this 16th day of July, 1992.

John R. Kunz, Esq.
Attorney
Office of the Regional Solicitor
Rocky Mountain Region
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225
(303) 236-8444
Counsel for FWS

12/ Obviously, FWS is not advocating the position that, just because of potential scheduling problems, the testimony and evidence of the Objectors should be excluded. Such problems do, however, clearly underscore the point that the instant proceedings are not the proper forum for the Objectors to air their extraneous and superfluous complaints.

CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of July, 1992, true and correct copies of the foregoing Motion in Limine were mailed to the following individuals:

VIA OVERNIGHT MAIL

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

Marian Gunderson
811 West Third
Yankton, SD 57078-3702

Bernita Loucks
219 42nd Street
Rapid City, SD 57702-2123

Dwayne A. Rollag
320 Lincoln Lane South
Brookings, SD 57006-2741

State Water Management Board
c/o John P. Guhin, Esq.
Deputy Attorney General
500 East Capitol
Pierre, SD 57501-5070

Patrick M. Ginsbach, Esq.
Farrell, Farrell, and Ginsbach
441 North River Street
Hot Springs, SD 57747

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

John Hatch
Chief Engineer
Water Rights Division
Foss Building
523 East Capitol
Pierre, SD 57501

VIA REGULAR MAIL

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

Joel Rickenbach
P.O. Box 97
Oelrichs, SD 57763-0097

Leo Holzbauer
RR 1, Box 170
Wagner, SD 57380

DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3181

July 29, 1992

NOTICE

TO: Wilbur N. Ladd, Acting Regional Director
US Fish and Wildlife Service
Denver Federal Center
PO Box 25486
Denver, CO 80225
and Parties of Record (see attached list)

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

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

The Water Management Board has directed John Guhin, The Board's attorney to prepare proposed Findings of Fact, Conclusions of Law and a Final Decision on approval of Water Permit Nos. 1921-2 and 2191-2, and validation of Vested Right Claim No. 1927-2. The Board will consider the proposed Findings, Conclusions and Final Decision at 1:00 pm, September 30, 1992, Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol, Pierre, SD. The agenda time is an estimate. The actual time of consideration may be delayed due to prior agenda items.

The Board's motion to approve the three applications included the following qualification (we have modified qualification for clarity):

> Use of water authorized by this Permit (Vested Water Right) may not impair the use of any lands adjoining the LaCreek National Wildlife Refuge including, but not Iimited to, flooding or specific alteration of plant species directly attributable to water use under this Permit (Vested Right).

The Board has requested that a copy of the proposed Findings, Conclusions and Final Decision be mailed to each Board member and all Parties of Record and their attorneys (copy enclosed) by September 10, 1992. Any comments pertaining to the proposed Findings, Conclusions

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and Decision are to be mailed to each Board member, the Board attorney and all Parties of Record and their attorneys by September 21, 1992.

The public hearing was completed July 24, 1992. No additional testimony will be received on September 30 1992.

cc: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General
Ginger Chesy, US Fish and Wildlife Service
Cheryl Williss, US Fish and Wildlife Service

PARTIES OF RECORD

VESTED WATER RIGHT APPLICATION NO. 1927-2 AND
WATER PERMIT APPLICATION NOS. 1921-2 AND 2191-2

APPLICANT

Wilbur N. Ladd, Acting Regional Director
US Fish and Wildlife Service
Denver Federal Center
PO Box 25486
Denver, CO 80225

SOLICITOR

John Kunz
Rocky Mountain Regional
Solicitor's Office
730 Simms St - Suite 450
Golden, CO 80401

PETITION OF OPPOSITION

Jane M. Farrell & Patrick
Ginsbach
Farrell, Farrell & Ginsbach
441 North River Street
Hot Springs, SD 57747

REPRESENTING

Wendell DeKay, Tuthill, SD
Charles Emley, Martin, SD
Brett Heath, Martin, SD
Raymond Kocer, Martin, SD
Lawrence Kocer, Martin, SD

CERTIFICATION

I hereby certify that on July 29, 1992, I have personally deposited with the United States Mail at Pierre, South Dakota, First Class postage, prepaid envelopes containing a Notice dated July 29, 1992, regarding Preparation of Findings of Fact, Conclusions of Law and Final Decision (Water Permit Nos. 1921-2 and 2191-2, and Vested Right Claim No. 1927-2) addressed to:

Wilbur N. Ladd, Acting Regional Director
US Fish and Wildlife Service
Denver Federal Center
PO Box 25486
Denver, CO 80225

and Parties of Record (as shown on the attached list)

Copies of the Notice were sent to:

Ginger Chesy, US Fish and Wildlife Service, Denver, CO
Cheryl Williss, US Fish and Wildlife Service, Denver, CO

Copies of the Notice were sent inter-office to:

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

Jaci R Konop

JACI R. KONOP
Senior Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 29th day of July, 1992.

JOHN HATCH
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL
My Commission Expires Apr. 1, 1993

John Hatch

Notary Public

STATE OF SOUTH DAKOTA

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

MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

SEP 1992
DIVISION OF
WATER RIGHTS
Pierre, SD

September 4, 1992

MEMORANDUM

TO: Attorneys and Parties

FROM: John P. Guhin, Deputy Attorney General/Board Attorney

RE: Water Permit Nos. 1921-2, and 2191-2 and Vested Claim No. 1927-2 (LaCreek Refuge)

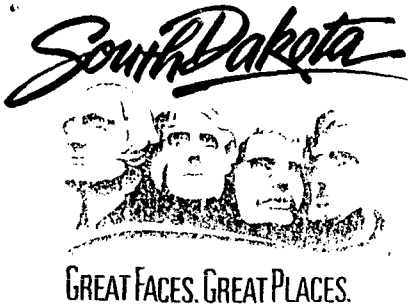
As you are aware, the Water Management Board directed the Board attorney to prepare Findings of Fact, Conclusions of Law and a proposed Final Decision on the above-entitled matters by September 10, 1992. However, as of September 4, 1992, only a portion of the transcript has been supplied to the Board attorney.

To assure full consideration of the transcript and record, Hearing Chairman Freeman has directed that the date for the Board attorney's submission of Findings of Fact be changed from 20 days before the October hearing of the Water Management Board until 20 days before the December hearing of the Water Management Board. The Chief Engineer is requested to issue a new Notice setting out the applicable dates for submission of findings and responses.

Hearing Chairman Freeman has also indicated that each of the parties should be notified that if he or she has any objection to this procedure, then he or she should promptly file appropriate documents with him and the other parties requesting further consideration of this matter.

JPG:do
cc: William Ladd
John Kunz
Jane Farrell & Patrick Ginsbach
Diane Best
John Hatch
Water Management Board

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DEPARTMENT OF WATER & NATURAL RESOURCES
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

September 9, 1992

NOTICE

TO: Wilbur N. Ladd, Acting Regional Director
US Fish and Wildlife Service
Denver Federal Center
PO Box 25486
Denver, CO 80225
and Parties of Record

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

SUBJ: Water Permit Nos. 1921-2, 2191-2 and Vested Claim No. 1927-2
(LaCreek National Wildlife Refuge)

This is a follow-up to the Notice dated July 28, 1992, directing John Guhin, the Board's attorney, to prepare Findings of Fact, Conclusions of Law and Final Decisions in regard to the above-referenced matters by September 10, 1992.

To date, Mr. Guhin has received only a portion of the transcript. For this reason, the proposed Findings, Conclusions of Law and Final Decisions will not be heard at the September 30, 1992, Water Management Board meeting.

Hearing Chairman Freeman has directed the Board attorney's submission of proposed Findings, Conclusions of Law and Final Decision now be mailed to each Board member and all Parties of Record and their attorneys by November 12, 1992. The Board will now consider the proposed Findings, Conclusions of Law and Final Decision at 1:00 pm, December 2, 1992, Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol, Pierre, SD. The actual time of consideration may be delayed due to prior agenda items.

Any comments pertaining to the proposed Findings, Conclusions of Law and Final Decisions are to be mailed to each Board member, the Board attorney, all parties of record and their attorneys by November 23, 1992.

If there are any objections to this procedure, promptly file appropriate documents with Hearing Chairman Freeman and the other parties requesting future consideration of this matter.

The public hearing was completed July 24, 1992. No additional testimony will be received on December 2, 1992.

cc: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General
Ginger Chesy, US Fish and Wildlife Service
Cheryl Williss, US Fish and Wildlife Service

PARTIES OF RECORD

VESTED WATER RIGHT APPLICATION NO. 1927-2 AND
WATER PERMIT APPLICATION NOS. 1921-2 AND 2191-2

APPLICANT

Wilbur N. Ladd, Acting Regional Director
US Fish and Wildlife Service
Denver Federal Center
PO Box 25486
Denver, CO 80225

SOLICITOR

John Kunz
Rocky Mountain Regional
Solicitor's Office
730 Simms St - Suite 450
Golden, CO 80401

PETITION OF OPPOSITION

Jane M. Farrell & Patrick
Ginsbach
Farrell, Farrell & Ginsbach
441 North River Street
Hot Springs, SD 57747

REPRESENTING

Wendell DeKay, Tuthill, SD
Charles Emley, Martin, SD
Brett Heath, Martin, SD
Raymond Kocer, Martin, SD
Lawrence Kocer, Martin, SD

CERTIFICATION

I hereby certify that on September 10, 1992, I have personally deposited with the United States Mail at Pierre, South Dakota, First Class postage, prepaid envelopes containing a Notice dated September 9, 1992, regarding Preparation of Findings of Fact, Conclusions of Law and Final Decision (Water Permit Nos. 1921-2 and 2191-2, and Vested Right Claim No. 1927-2) addressed to:

Wilbur N. Ladd, Acting Regional Director
US Fish and Wildlife Service
Denver Federal Center
PO Box 25486
Denver, CO 80225
and Parties of Record (See attached list)

Copies of the Notice were sent to:

Ginger Chesy, US Fish and Wildlife Service, Denver, CO
Cheryl Williss, US Fish and Wildlife Service, Denver, CO

Copies of the Notice were sent inter-office to:

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

Jaci R Konop

JACI R. KONOP
Senior Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 11th day of September, 1992.

JOHN HATCH
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL
My Commission Expires Apr. 1, 1993

John Hatch

Notary Public



STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FISH & WILDLIFE SERVICE FOR) VESTED WATER RIGHT NO. 1927-2; WATER PERMIT APPLICATION NO. 1921-2 TO CHANGE THE LOCATION OF LAND AND DIVERSION POINT AUTHORIZED UNDER WATER PERMIT NO. 265-2; AND WATER RIGHT APPLICATION NO. 2191-2.	PETITIONERS' OBJECTIONS TO THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FINAL DECISION

COMES NOW the Petitioners Wendall DeKay, Charles Emley, Brett Heath, Raymond Kocer and Lawrence Kocer, by and through their lawyers, Farrell, Farrell & Ginsbach, and file the following objections to the Findings of Fact and Conclusions of Law served on November 12, 1992.

I.

Petitioners object to proposed Finding of Fact IV. on the grounds that it is in reality a Conclusion of Law and consequently improperly designated as required by SDCL 15-6-52(a); Petitioners further object to the proposed Finding on the ground that the use of the water is not reasonable and useful and beneficial to the appropriator inasmuch as the evidence established that the U.S. Fish and Wildlife Refuge (hereinafter referred to as Refuge) consumption of additional quantities of water are not going to increase the production of migratory birds and wildlife since the total duck production from 1983 in the amount of 12,915 has decreased to 1,360 in 1990; for the additional reason that the use of the water is not reasonable and useful and beneficial because it causes flooding of adjoining private lands and as a consequence of causing the flooding, it can be inferred that the Refuge is using more water than they need; by flooding adjoining land the Refuge is wasting water which is unwarranted, and pursuant to Cook v. Evans, 185 N.W. 262, 265 (S.D. 1921), the Petitioners contend that any additional appropriation of water under these applications is

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unreasonable; the Petitioners further object to the proposed Finding in that it is inconsistent with proposed amendments to the general rules adopted by the Department of Water and Natural Resources, Division of Water Rights, as it relates to the definition for "stock watering" found at ARSD 74:02:01:01 in that the Division of Water Rights proposes to strike the wild animals managed for the public or governmental agency from the definition of stock watering of animals in that proposed rule, therefore the Petitioners contend that an examination of the facts and of the Division of Water Rights' own proposed rules as to what constitutes stock watering, in determining the appropriation of water under SDCL 46-1 and 46-6, leads to the conclusion that the appropriation of this water is not beneficial or in the public interest.

II.

That the Petitioners object to proposed Finding of Fact V. on the grounds that it is designated as a Finding of Fact but in reality is a Conclusion of Law and as such is improperly designated and thus does not comply with SDCL 15-6-52(a), which requires that certain Findings of Fact and Conclusions of Law be separately stated; Petitioners also object to proposed Finding V. on the grounds that the evidence has demonstrated that the Refuge is flooding adjoining privately owned land and as such constitutes a waste of water, contrary to the legislative intent for adopting SDCL 46-1 and 46-6, which is to put to use our water resources to the fullest extent of which they are capable; also the Petitioners contend that the Refuge is creating marshlike conditions even to support wildlife and water fowl by their utilization of water resources which does not justify the additional appropriation of water under the facts presented; the Petitioners also object to this proposed Finding on the grounds that the Refuge has approximately 9,300 acres available as part of the original Refuge to create slough-like conditions for water fowl to exist in and

therefore do not need additional water; the Petitioners further object to this proposed Finding and urge the Board to determine that it is not in the public interest of or beneficial use to allow water to be appropriated for cultivating food for wildlife and water fowl consistent with the Utah Supreme Court's ruling in Lake Shore Duck Club v. Lakeview Duck Club, 166 P. 309 (UT 1917); that the use of water to provide a refuge and breeding ground for migratory birds is not in the best interests of the public and that the Refuge, through their water management practices, have flooded adjoining lands, committing waste, and the appropriation of the water does not support a practice of irrigation as defined by ARSD 74:02:01:01.

III.

That the Petitioners object to proposed Finding of Fact VI. in that there was no evidence to demonstrate how the U.S. Fish and Wildlife Services conscientiously dealt with the challenge to successful provision of a refuge for migratory water fowl and wildlife, the annual report prepared by the Refuge for 1971 showed that there was a carp problem, on the original refuge, that never could be erradicated. In that annual report there was no plan at that time to create large pools of water on the Brown Ranch.

IV.

That the Petitioners object to Finding of Fact VII. in that the evidence does not support that the Refuge has decreased the carp population to a substantial degree, nor was evidence offered to show specifically what measures the Refuge did employ to try and decrease the carp population. An annual report that was introduced as part of the cross-examination of Rolf Kraft demonstrated that the Refuge would never be able to eliminate the carp problem but would simply be able to control it by the use of structures and impoundments, yet no evidence was offered by the Refuge to demonstrate that any structures were built to control the carp.

V.

That the Petitioners object to proposed Finding of Fact VIII. in that the pictures taken of the private adjoining land to the Refuge property shows concentrated thistle problem that the Refuge has not dealt with.

VI.

That the Petitioners object to proposed Finding of Fact IX. in that the total duck production for the years 1983-1990 reveals that duck production has dramatically decreased at the LaCreek Refuge in that in 1983, according to the Refuge's own records, the total duck production was 12,915 yet in 1990 the total duck production was 1,360, with the intervening years showing a steady decrease in the number of ducks; nor was any evidence offered to demonstrate why the appropriations of additional water to the Brown Ranch were necessary to increase duck production when there is sufficient water resources available from the original Refuge property to support over 12,000 ducks without the use of the Brown Ranch.

VII.

That the Petitioners object to proposed Finding of Fact X. in that the Refuge failed to demonstrate how the application of additional amounts of water to the Brown Ranch were necessary to support the geese, crane and swans, and in particular when the Refuge's own goose expert testified that the geese used the the Refuge as a staging area to gather for continuing their migratory flights.

VIII.

That the Petitioners object to proposed Finding of Fact XI. for the reasons stated herein in paragraphs I. through VII.

IX.

That the Petitioners object to proposed Finding of Fact XIII. in that the Ritts testimony is flawed in that he was an employee for the Refuge and

retired as an employee for the Refuge and only worked intermittently for the Brown family who owned the ranch until it was purchased by the Refuge; furthermore, the testimony of Eva Mae Linenbrink, who was married to Alvin Brown, who was the ranch manager for the Brown Ranch, corroborated the Petitioners' position that there was no irrigation on the Brown Ranch except for intermittently in the late 1940s when Alvin Brown attempted to irrigate but found that it was useless because the land involved contained subirrigated meadows, this fact is more credible than Ritts' in that Mrs. Linenbrink lived on the Brown Ranch from 1937 until Alvin Brown's death in 1962, Eva Mae Linenbrink testified that during this time period she had numerous occasions to drive by the locations where there were diversions created for allegedly irrigation purposes and that at one point they used one of the these diversion areas to take baths in and that the Brown family never did irrigate after 1950; also, Joyce Toczek testified that she was the daughter of Alvin Brown and helped in the summers in the hay fields during the 1950s through 1959, and then returned to the Brown Ranch in 1963, along with her husband who managed the ranch from 1963 through 1968, during that time period when she worked in the hay fields in the 1950s and again when she and her husband managed the ranch, there was never any irrigation out of those diversions; that the only evidence as far as documentation that the Refuge offered to support irrigation during this time period was a conversation that a staff person with the Division of Water Rights had had with an individual who identified himself as the owner of the Brown Ranch, but that this memorandum and conversation had no credibility inasmuch as the Brown Ranch was a corporation at the time and clearly it was established that during that time period Joyce Toczek and her husband were the managers; during the general discussion of the Board, while there was divided feelings about whether or not a priority date of 1951 had been established, one of the

Board members had suggested that no harm would be done by granting a priority date of 1951, however the Petitioners would contend that the burden of proof is upon the Refuge to establish that priority date and they failed to do so under the evidence presented to the Board; furthermore, the harm that is done is that the Refuge did not have to process the application and get a soil compatibility permit in connection with Application for Vested Water Right No. 1927-2, and thus the Petitioners were denied an opportunity to contest that matter to the Department of Agriculture.

X.

That the Petitioners object to proposed Finding of Fact XV. in that it misconstrues the testimony of Raymond Kocer in that he said that the reason that he gave permission to allow them to push water across his property was that he believed the Refuge had a water right which allowed them to utilize the water in this matter and that Kocer testified that on numerous occasions, even after he rescinded the right to push water across his property, that the Refuge still flooded his property and used the drainage channel to push water from one area of the Refuge property to another area of the Refuge property, and in the process flooded Kocer's property.

XI.

That the Petitioners object to proposed Finding of Fact XVI. in that the Petitioners contend that the manner in which the Refuge pushed water across the Raymond Kocer property showed that they were wasting water and preventing others from using it for legitimate purposes and contravention of the law established in Stenger v. Tharpe, 94 N.W. 402, 404 (S.D. 1903).

XII.

That the Petitioners object to proposed Finding of Fact XVII. in that it attempts to establish a Finding that the area affected by the "irrigation

practices of the Refuge is a high water table and that the ground is easily saturated by major precipitation events, regardless of the activities of the U.S. Fish and Wildlife Service," however this Finding ignores the fact that both the Kocers and Emley had operated in that area prior to the Refuge acquiring the Brown Ranch and that they never experienced the same types of problem they presently experience with the Refuge until such time as the Refuge started to "irrigate" the Brown Ranch; the Petitioners further object on the grounds that the evidence established through a soil conservationist that given the soil conditions, any flood irrigation of the land was harmful and would result in raising the water table at or above the surface, which evidence was uncontested.

XIII.

That the Petitioners object to proposed Finding of Fact XIX. as it applies to the Refuge's practices of backing water up on to Charles Emley's property through the diversions they have created on Elm Creek for the reason that the evidence offered by the Petitioners demonstrate that the water management practices that have been adopted by the Refuge on Elm Creek establish a pattern which the land owners can expect to be repeated by the Refuge when water is diverted out of LaCreek, pursuant to Application for Vested Water Right No. 1927-2; additionally, the Petitioners object to that portion of the Finding of Fact that provides "that the waters of Elm Creek are not subject to any claim for a water right by the U.S. Fish and Wildlife Service here. Therefore, the provision regarding the grant of a vested right when a water source may have been unlawfully developed is not applicable here" in that it is within the purview of the Water Management Board to determine whether or not the applicant is committing waste and to adopt a course of action to eliminate that waste, pursuant Romey v. Landers, 392 N.W.2d 415 (S.D. 1986), and that it was within the purview of the Board to determine whether or not waste is being committed

through the utilization of the Refuge and other areas affecting the Brown Ranch which would justify denying the Application for Vested Water Right No. 1927-2.

XIV.

That the Petitioners object to proposed Finding of Fact XX. that provides that the opinion of the owner of the property is a special weight in determining whether actual harm is being done to the property in that there is no law contained in SDCL 46-1 or SDCL 46-6 or in any of the South Dakota Supreme Court cases regarding the use and development of water in South Dakota that gives special weight to the owner of the property in determining whether or not waste is being committed or that that property is being adversely affected; furthermore, the evidence clearly showed that the south 40 acres of Church property is actually Indian trust land and that the Bureau of Indian Affairs did not take any position on whether they favored the flooding of the property which the evidence showed was under lease to Charles Emley.

XV.

That the Petitioners object to proposed Finding of Fact XXI. in that the Refuge contention that the diversion was closed down in 1982 was contradicted by Mr. Emley.

XVI.

That the Petitioners object to proposed Finding of Fact XXII. in that not only pictures taken in May of 1991 but a series of other pictures show the type of vegetation in that area that have been adversely affected by having water sit on his property, which testimony, offered by a soil conservationist, was that it could only occur as a result of the water utilization practices of the Refuge, which testimony was uncontradicted by the Refuge.

XVII.

That the Petitioners object to proposed Finding of Fact XXIII. in that it fails to take into consideration that the only time the water runs over tops

of the road isn't just during significant rain fall events, it is a combination of significant rain fall events and when the Refuge is flood irrigating its land which causes the water to top over the road and that no amount of proper cleaning of the culverts or change in the size of the culverts will alleviate this problem, in fact it will allow more water to pass on to the Church property leased by Emley.

XVIII.

That the Petitioners object to proposed Finding of Fact XXIV. on the grounds that it fails to take into consideration that Emley had only given the Refuge permission to push water across the Church property because he believed the Refuge had a water right which allowed them to do so.

XIX.

That the Petitioners object to that portion of proposed Finding of Fact XXV. that finds that the U.S. Fish and Wildlife Service has not engaged in a systematic disregard of the rights of Mr. Emley in that the map attached to the original Application 1927-2 shows that the Refuge seeks to use the water to irrigate not only their own land but the Church property leased by Emley, and since the Refuge acquired the Brown Ranch they have consistently used their land for constructing diversions that block the natural drainage of the land which results in the impounding of water wherein the Refuge property that borders the Church ground was flooded nearly season-long and has resulted in the development of wetland vegetative type and that the white and yellowish grass depicted in the photographs indicate ponds of water have gathered on the Church ground and that the diversion built on the East Half of Section 23 by the Refuge has affected the productivity of 40% of that property known as the Church ground which Emley has under lease; furthermore, the evidence showed that there was no systematic method to the Refuge's impoundment of water on the East Half of

Section 23 and as a result the persistent flooding of the soils in that area allowed the water to flow underground from the Refuge property on to the private Church property; also the Petitioners demonstrated by evidence that the extreme southern end of the Church property is affected by the flooding program of the Refuge to such a magnitude that at harvest time the water is above the soil surface, preventing the harvesting of the site.

XX.

That the Petitioners object to that portion of proposed Finding of Fact XXVII. that finds that part of the problem of Lawrence Kocer's property is natural in origin and is associated with a high water table and significant precipitation events and that this Finding fails to take into account the testimony that it was actually the design changes in the Refuge's diversion system commenced in 1951 which failed to adequately bypass the flood flows of LaCreek so as to constitute flooding of the Lawrence Kocer property; it also fails to take into consideration the testimony of Lawrence Kocer that, until the Refuge bought the Brown Ranch and started diverting water out of LaCreek on to the Brown Ranch, the only time Lawrence Kocer had ever had water on his quarter section was when the Refuge to the east was diverting water and there was a large amount of rain.

XXI.

That the Petitioners object to proposed Finding of Fact XXVIII. in that while there may not have been specific times of complaints of the flooding, the evidence clearly establishes that the natural grasses on the Lawrence Kocer property have been drowned out so that only slew grass and buck brush grows and that this is the type of forage that cattle won't eat; it also shows in aerial photographs taken over a series of years, bails of hay that are surrounded by water that cannot be moved because of the flooding on the Lawrence Kocer

property as a result of the Refuge's utilization of water; the flooding also shows that a change of vegetation on Kocer's property is of little value to the ranch operation for livestock raising or hay production.

XXII.

That the Petitioners object to proposed Finding of Fact XXIX. in that the vested right use has been developed with unlawful impairment of Lawrence Kocer's rights to use his land in that the quantity of water being impounded by the Refuge is wasteful and unreasonable when it floods adjoining privately owned land.

XXIII.

That the Petitioners object to proposed Finding of Fact XXXVIII. in that there was testimony offered by Brett Heath, which went unchallenged, that his father only constructed the ditch to straighten out the channel of LaCreek after he was promised by the Refuge manager that the Refuge would undertake the responsibility to keep the ditch cleaned out and dredged and that given the amount of money which was spent on the construction of the ditch, it seems unreasonable that George Heath would have went to that expense absent some understanding with the Refuge and that it can be inferred from the testimony that the Refuge would be estopped, either equitably or through the doctrine of promissory estoppel, from denying the responsibility of dredging the ditch which was constructed by George Heath to straighten out the channel of LaCreek as it flowed through his property.

XXIV.

That the Petitioners object to proposed Finding of Fact XL. in that it fails to take into consideration that provision of the law that provides in SDCL 46-5-2 that any person who constructs or maintains a dam across a nonnavigable stream may only do so as long as the water from that dam does not flood

adjoining property owners land, and that Refuge, by maintaining diversions on LaCreek, have violated this statute which has impaired Heath's existing rights.

XXV.

That the Petitioners object to proposed Finding of Fact XLI. in that the South Dakota Supreme Court, in Stenger v. Stark, supra at 404 stated that the right to use water is limited in every case in quantity and quality by the uses for which the appropriation is made; and that the Petitioner has offered evidence to show that the quality of the water discharged on to DeKay's land was substantially impaired as a result of the water fowl and the impoundment of the water for lenghty periods of time; also, the Petitioners have demonstrated that the quantity of the water has been impaired through the testimony of Ken Hines, who is also a land owner below the Refuge who testified that while quantities of water were backed up by the Refuge on to the Heath property, there was no water being released into LaCreek at the time he needed the water to water his livestock and as a consequence it was necessary for him to move his livestock to another area to obtain water.

XXVI.

That the Petitioners object to proposed Conclusion of Law contained in XLIV. in that the evidence established that at the time of the hearing that water has not been continuously appropriated for irrigation purposes since January 1, 1951, and in fact has not been used for irrigation purposes until after 1971 when the Brown Ranch was acquired by the Refuge.

XXVII.

That the Petitioners object to proposed Conclusion of Law contained in paragraph XLV. in that the evidence established that the impairment of existing rights has occurred as a result of the development of water and there is no evidence to support the conclusion that the Fish and Wildlife Service has not

been consistently conscientious with regard to the limiting of flooding on the Petitioners' lands and that the Conclusion of Law fails to take into consideration the fact that the Refuge is wasting water and that the waste of water is so flagrant that it has affected the vegetation of adjoining privately owned land.

XXVIII.

That the Petitioners object to proposed Conclusion of Law XLVI. in that the Refuge has sufficient water on the old Refuge to support the water fowl population currently utilizing the Refuge and that the flooding of adjoining property fails to establish that the use of the water is consistent with the interests of the state and the best utilization of water supplies when the Refuge has approximately 9,300 acres available as part of the original Refuge to create slough-like conditions for water fowl to exist in.

XXIX.

That the Petitioners object to the Conclusion of Law contained in XLVII. in that the testimony was that Rolf Kraft told a representative of the Water Rights Division that the purpose of impounding water on the Brown Ranch was to create a larger slough for the "little duckies" and that the definition provided for in ARSD 74:02:01:01 only allows for the application of water for the purposes of supplying sufficient moisture for plant growth, and the manner in which the Refuge seeks to use the water is not to promote plant growth but is to kill the vegetation to create sloughs which will be inhabited by insects that the water fowl will feed off of.

XXX.

That the Petitioners object to the Conclusion of Law contained in paragraph XLVIII. in that the Refuge has failed to establish with competent and credible evidence pursuant to the burden of proof required of them by the South

Dakota Supreme Court to establish a priority date on this permit of January 1, 1951, since members of the Brown family testified that from 1950s through 1971 there was no irrigation practiced on the Brown Ranch.

XXXI.

That the Petitioners object to proposed Conclusion of Law contained in XLIX. as being in the public interest in that the evidence has demonstrated the utilization of water by the Refuge results in flooding of adjoining land owners which affects the operation of their ranches and farms and destroys the vegetation on those ranches and farms and that the land the Refuge seeks to irrigate has sufficient moisture to provide native grasses, wild hay or wild meadow without the artificial application of water and that any waste of water by the Refuge is sufficient to determine it is not in the public interest to appropriate additional quantities of water.

XXXII.

That the Petitioners object to the Final Decision contained in paragraph L. in that granting the vested right allows for the continued waste of water and is based upon a priority date that has no basis in fact in the record.

XXXIII.

That the Petitioners object to proposed Finding of Fact LII. which incorporates Findings I. through X. for the reasons set forth in Petitioner's objections in Paragraphs I. through VII.

XXXIV.

That the Petitioners object to proposed Findings of Fact LIV. and LV. only to the extent that it appears that the Refuge seeks to reserve water for future use pursuant to SDCL 46-2A-10 and 46-5-38 and as such they are not listed as one of the entities entitled to reserve water for contemplative future needs.

XXXV.

That the Petitioners object to proposed Finding of Fact LVI. upon the grounds and for the reasons that the reservation for future use of the springs is not permitted to the United States of America pursuant to SDCL 46-2A-10 and 46-5-38; for the further reason that the Refuge has failed to establish with evidence that there is a need for the development of these springs at this time and that the use of the water is reasonable and useful and is consistent with the interests of the public and the best utilization of water supplies given the evidence that the development of the springs by the Refuge will be only used to create wetlands habitat similar to the habitat already created on the boundaries of the original Refuge; Petitioners further object to the proposed Finding inasmuch as it is not a reasonable use of water given the fact that development of the springs results in a waste of water and since the Refuge already has sufficient water resources to provide for the needs of the wildlife habitat they are already serving.

XXXVI.

That the Petitioners object to proposed Conclusion of Law contained in paragraph LIX. inasmuch as it appears that the proposed decision is that the Refuge's application for the appropriation of water does not involve a future use and yet makes a determination that there is a reasonable probability that there is appropriated water available for the applicant's proposed use which is one of the conditions required to be determined by SDCL 46-2A-10, reservation of water for future use.

XXXVII.

That the Petitioners object to proposed Conclusion of Law contained in paragraph LX. in that the evidence has demonstrated development of the springs will result in flooding of adjoining private property or raising the water table of adjoining private property which will affect the vegetation on that adjoining private property.

XXXVIII.

That the Petitioners object to proposed Conclusion of Law LXI. on the grounds that it does not involve the best utilization of water supplies and is not reasonable and useful and beneficial to the appropriator given the fact that the appropriator, namely the Refuge, has sufficient water resources on the original boundary to meet its wildlife needs.

XXXIX.

That the Petitioners object to proposed Conclusion of Law LXII. on the grounds and for the reasons that the testimony was that they have no immediate plans for the development for the six springs and the other two springs will result in flooding adjoining land on the Church property and the Heath property; and for the further reason that the underlying reason for the application is to protect future loss of the water and its subsequent development by other property owners; the use sought is a future use because it does not involve the current development and appropriation of the water for any specific purposes on four of the six springs.

XL.

That the Petitioners object to proposed Conclusion of Law LXIII. upon the grounds and for the reasons that it does not involve the best utilization of water supplies inasmuch as the evidence demonstrated that the current water resources available to the Refuge are being wasted by allowing that water to flood the adjoining privately-owned property.

XLI.

That the Petitioners object to proposed Final Decision contained in paragraph LXIV. on the grounds that the Refuge has failed to establish with competent and credible evidence that the Application for Water Right No. 2191-2 constitutes a beneficial use and is in the public interest and would not impair any existing rights, therefore the application should be denied.

XLII.

That the Petitioners object to proposed Finding of Fact LXVII. upon the grounds and for the reasons that that proposed Finding incorporates Findings I. through X., therefore the Petitioners object based upon the objections contained in paragraphs I. through VII. of these objections, which are specifically incorporated herewith.

XLIII.

That the Petitioners object to proposed Finding of Fact LXIX. in that the testimony of Eva Mae Linenbrink, Joyce Toczek and the Petitioners indicated that the water permit has not been continuously used.

XLIV.

That the Petitioners object to proposed Finding of Fact LXX. in that the utilization of this water clearly constitutes an opportunity for the Refuge to waste water and will have the potential of flooding the privately owned property of Brett Heath.

XLV.

That the Petitioners object to proposed Finding of Fact LXXI. upon the grounds and for the reasons that the Refuge has failed to establish with competent and credible evidence that it is impractical to use all the water, beneficially or economically, for the irrigation of the land to which it is appurtenant, nor were any estimates presented as far as testimony as to what it would cost to repair the dam at its original location, nor has the Refuge demonstrated that the land to which the water is to be appropriated is appurtenant to the original land; and for the further reason that the use to which the Refuge wishes to put the water, by transferring the water right to a new location, does not constitute irrigation.

XLVI.

That the Petitioners object to proposed Conclusion of Law contained in paragraph LXXIV. upon the grounds and for the reasons that the granting of this permit would impair existing rights of Brett Heath and Wendall DeKay.

XLVII.

That the Petitioners object to proposed Conclusion of Law contained in paragraph LXXV. in that proposed use of the water to develop habitat for wildlife and migratory bird habitat propagation is not a beneficial use in that it gives priority to development of wildlife over domestic use and furthermore the development of the water for wildlife and migratory bird habitat is inconsistent with the definition of irrigation.

XLVIII.

That the Petitioners object to proposed Conclusion of Law contained in paragraph LXXVI. upon the grounds and for the reasons that the evidence demonstrates that presently the Refuge is wasting its water resources and to allow the development of additional water resources is not in the public interest.

XLIX.

That the Petitioners object to proposed Conclusion of Law contained in paragraph LXXVII. upon the grounds and for the reasons that the Refuge has not met its burden for amending a permit to sever and transfer irrigation rights to a different land when the basis of the application is that the dam which was originally authorized as a diversion point under the original permit was breached and not in working condition and also for the reason that the Refuge has failed to show that it is in the public interest and a beneficial use of water to allowing an existing water permit to be severed from the land and simultaneously transferred and become appurtenant to other land without losing priority of right when the practices of the Refuge and the representations made

by the Refuge's representatives indicate that the water is to be used to create a slough for water fowl on a piece of land that is not appurtenant to the original land which the water right was tied to.

XLX.

That the Petitioners object to the proposed Final Decision contained in paragraph LXXVIII. upon the grounds and for the reasons that the Refuge has not met its burden to allow the application to be granted as required by the statutes of the State of South Dakota.

Dated this 24th day of November, 1992.

JANE M. FARRELL
One of the Lawyers for Petitioners

PATRICK M. GINSBACH
One of the Lawyers for Petitioners

Farrell, Farrell & Ginsbach
Lawyers for Petitioners
441 N. River Street
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24 day of November, 1992, a true and correct copy of the foregoing Petitioners' Objections to Proposed Findings of Fact and Conclusions of Law and Decision was mailed by regular United States mail, with first-class postage prepaid, in envelopes securely sealed and addressed to:

Francis E. Brink
1214 S. Wells St.
Aberdeen, SD 57401-7351

Marian Gunderson
811 West Third
Yankton, SD 57078-3702

Bernita Loucks
219 42nd St.
Rapid City, SD 57702-2123

Dwayne A. Rollag
320 Lincoln Lane South
Brookings, SD 57006-2741

Rodney Freeman, Jr.
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PATRICK M. GINSBACH

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STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATION OF THE U.S. FISH & WILDLIFE SERVICE FOR VESTED WATER RIGHT NO. 1927-2; WATER PERMIT APPLICATION NO. 1921-2; AND WATER PERMIT APPLICATION NO. 2191-2	)))))))

COMMENTS PERTAINING TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION

I. PRELIMINARY STATEMENT

In a September 9, 1992, Notice, the Chief Engineer of the South Dakota Water Rights Division notified the parties that, with respect to the captioned proceeding, John Guhin, the Water Management Board's attorney, would be preparing proposed findings of fact, conclusions of law, and a final decision. The above Notice further directed the parties to mail to each Board member, Mr. Guhin, and all parties of record, no later than November 23, 1992, any comments they might have pertaining to the proposed findings of fact, conclusions of law, and final decision. Pursuant to the above Notice, the U.S. Fish and Wildlife Service (FWS) hereby submits the following comments.

II. COMMENTS

The following comments are non-substantive in nature, and pertain mainly to typographical or wording changes that FWS believes would be appropriate.

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1. Proposed Finding of Fact No. III, page 1, line 4: FWS believes that the word, "grounds", should be "ground".

2. Proposed Finding of Fact No. XII, page 4, line 2: FWS believes that: (1) the words, "per second", are duplicitous and should be deleted; and (2) "LaCreek" should be changed to "Lake Creek".

3. Proposed Finding of Fact No. XV, page 5, line 7: FWS believes that the word, "when", should be deleted.

4. Proposed Finding of Fact No. XXI, page 7, line 5: FWS believes that the word, "the", between the words, "in" and "1982", should be deleted.

5. Proposed Finding of Fact No. XXIV, page 8, line 2: FWS believes that the word, "to", should be inserted between the words, "permission" and "the".

6. Proposed Finding of Fact No. XXVIII, page 9, line 1: FWS believes that the word, "although", should be deleted.

7. Proposed Finding of Fact No. XXXI, page 10, line 2: FWS believes that in two instances, the words, "LaCreek", should be changed to "Lake Creek".

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8. Proposed Finding of Fact No. XXXI, page 10, line 4: FWS believes that the word, "the", between the words, ""on" and "river", should be changed to "a".

9. Proposed Finding of Fact No. XXXIII, page 10, line 2: FWS believes that the word, "LaCreek", should be changed to "Lake Creek".

10. Proposed Finding of Fact No. XXXIV, page 10, line 1: FWS believes that: (1) the word, "be", should be deleted; and (2) a comma should be inserted after the name, "Heath".

11. Proposed Finding of Fact No. XXXVII, page 11, line 2: FWS believes that the word, "from", should be changed to "of".

12. Proposed Finding of Fact No. XXXVII, page 11, line 4: FWS believes that the word, "a", should be changed to "an".

13. Proposed Conclusion of Law No. XLV, page 13, line 4: FWS believes that the word, "objector's", should be changed to "objectors'".

14. Proposed Conclusion of Law No. XLVI, page 14, line 4: FWS believes that the word, "biological", should be changed to "biologically".

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15. Proposed Final Decision No. L, page 14, line 2: FWS believes that: (1) the word, "LaCreek", should be changed to "Lake Creek"; and (2) the word "of" should be inserted before the word, "water".

16. Proposed Finding of Fact No. LI, page 15, line 2: FWS believes that the figure, "4.4", should be changed to "4.44".

17. Proposed Conclusion of Law No. LVIII, page 16, line 2: Reference is made to "Conclusions of Law I and II above." However, the referenced Conclusions of Law do not seem to track with the prior numbering scheme. The referenced Conclusions of Law should be changed appropriately.

18. Proposed Conclusion of Law No. LXI, page 16, line 3: FWS believes that the word, "a", should be inserted after the word, "is".

19. Proposed Conclusion of Law No. LXII, page 17, line 4: FWS believes that the word, "uses", should be changed to "use".

20. Proposed Finding of Fact No. LXV, page 17, line 3: FWS believes that the word, "the", should be deleted.

21. Proposed Finding of Fact No. LXVIII, page 18, line 4: FWS believes that the word, "agencies", should be changed to "agency".

22. Proposed Finding of Fact No. LXIX, page 18, line 1: FWS believes that the word, "the", should be deleted.

23. Proposed Finding of Fact No. LXIX, page 18, line 2: The name, "Ralph", should be changed to "Rolf".

24. Proposed Finding of Fact No. LXXI, page 18, line 2: FWS believes that: (1) the word, "a", should be deleted; and (2) the word "use" should be changed to "divert".

25. Proposed Conclusion of Law No. LXXIII, page 19, line 2: *See*, comment No. 17 above. Additionally, FWS believes that the word, "of", between the words, "Law" and "I", should be deleted.

26. Proposed Final Decision No. LXXVIII, page 19, line 2: FWS believes that the words, "the change", should be transposed to "change the".

27. Proposed Final Decision No. LXXVIII, page 20, line 2: FWS believes that a colon should be inserted after the word, "qualification".

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The following comments are more substantive in nature. However, for the reasons set forth in the comments, FWS urges the Board to make the suggested changes.

28. Proposed Finding of Fact No. XIX, page 6: FWS fully agrees with the Board's finding that, ". . . the waters of Elm Creek are not the subject of any claim for a water right by the US Fish and Wildlife Service here." Nonetheless, the proposed finding also states that:

> The Board further finds, however, that the treatment of the Elm Creek situation by the Applicant mandates that strict qualifications regarding flooding be imposed upon the US Fish and Wildlife Service so as to guarantee that the grant of the vested right permit will be in the public interest.

It seems inconsistent that, on the one hand, the Board finds that the waters of Elm Creek are not subject to any claim by FWS, while on the other hand, it finds that FWS has somehow mishandled the treatment of the "Elm Creek situation." In other words, based on the record, FWS fails to see anything that it might do with regard to its vested right permit that could in any way impact the "Elm Creek situation." For this reason, FWS urges the Board to strike the last sentence of this finding ("The Board further finds, however, . . .").

29. Proposed Finding of Fact No. XXIII, pages 7 and 8: Based on the record, FWS urges the Board to add the following sentence to the end of this finding: "The Board further finds,

however, that the referenced culverts belong to Bennett County, and not the US Fish and Wildlife Service."

30. Proposed Final Decision No. L, page 14: Although there is not necessarily any support for this language in the record, based on a potential practical solution which may or may not come to pass, FWS urges the Board to change the proposed qualification as follows (FWS' proposed change is contained in brackets):

> [Unless otherwise agreed to by the US Fish and Wildlife Service and the affected party(ies) by easement, contract, or other appropriate agreement or document, u]se of water authorized by this Vested Water Right may not impair the use of any lands adjoining the LaCreek National Wildlife Refuge including, but not limited to, flooding or specific alteration of plant species directly attributable to water use under this vested right.

31. Proposed Finding of Fact No. LI, pages 14 and 15: Based on the record, FWS urges the Board to change the last sentence of this finding as follows (FWS' proposed change is contained in brackets):

> The water is to be used to create 235 acres of marshes, sloughs, and wet meadows, [either through the natural flow of the springs, or] through small dams and control structures [,] for waterfowl propagation and enhancement of wildlife habitat.

32. Proposed Final Decision No. LXIV, page 17: *See*, comment No. 29 above.

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33. Proposed Final Decision No. LXXVIII, pages 19 and 20: *See*, comment No. 29 above.

III. CONCLUSION

For the reasons more fully set forth above, FWS requests the Board to amend the proposed findings of fact, conclusions of law, and final decision in the manner indicated. Additionally, FWS appreciates the efforts of Mr. Guhin in drafting the proposed findings of fact, conclusions of law, and final decision. Additionally, FWS appreciates the indulgence of the Board, the Chief Engineer, and the parties in allowing FWS to submit the above comments.

DATED this 24th day of November, 1992.

John R. Kunz, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 1992, true and correct copies of the foregoing Comments Pertaining to Proposed Findings of Fact, Conclusions of Law, and Final Decision were mailed, via overnight mail, to:

John P. Guhin, Esq.
Deputy Attorney General
500 East Capitol
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Brookings, SD 57006-2741

Bernita Loucks
219 42nd Street
Rapid City, SD 57702-2123

I hereby further certify that on this 24th day of November, 1992, true and correct copies of the foregoing Comments Pertaining to Proposed Findings of Fact, Conclusions of Law, and Final Decision were mailed, postage prepaid in the United States mail, to:

Joel Rickenbach
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Oelrichs, SD 57763-0097

Rodney Freeman, Jr.
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Huron, SD 57350-0176

Leo Holzbauer
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STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATION OF THE U.S. FISH & WILDLIFE SERVICE FOR VESTED WATER RIGHT NO. 1927-2; WATER PERMIT APPLICATION NO. 1921-2; AND WATER PERMIT APPLICATION NO. 2191-2	)))))))

NOTICE OF EXTENUATING CIRCUMSTANCES AND UNAVOIDABLE DELAY

COMES NOW the United States Fish and Wildlife Service (FWS), by and through counsel, and notes the following. In a September 9, 1992, Notice, the Chief Engineer of the South Dakota Water Rights Division notified the parties that, with respect to the captioned proceeding and the proposed findings of fact, conclusions of law, and final decision on file in such proceeding, the parties should mail to each Board member, Mr. John Guhin, and all parties of record, no later than November 23, 1992, any comments they might have pertaining to the proposed findings of fact, conclusions of law, and final decision.

You may have heard in the media by now that, on November 23, 1992, Denver, Colorado suffered a very severe winter snowstorm and blizzard. As a result of this storm, many of the city's offices were closed. The offices of FWS and its counsel were among those facilities that were closed. As a result of these

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office closures, FWS was unavoidably delayed, until November 24, 1992, in mailing its comments pertaining to the proposed findings of fact, conclusions of law, and final decision.

Because of the above-explained extenuating circumstances, and in the interests of fairness, justice, and equity, FWS hereby moves the Board and the parties to accept FWS' delayed mailing of its comments pertaining to the proposed findings of fact, conclusions of law, and final decision. FWS believes and hereby urges the Board to find that no prejudice will result to any party if the above request is granted.

DATED this 24th day of November, 1992.

John R. Kunz

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 1992, true and correct copies of the foregoing Notice of Extenuating Circumstances and Unavoidable Delay were mailed, via overnight mail, to:

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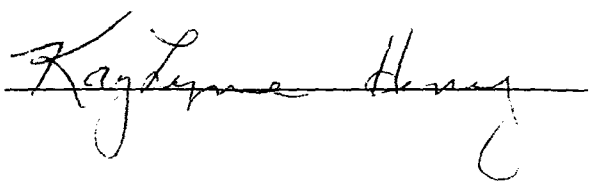
Bernita Loucks
219 42nd Street
Rapid City, SD 57702-2123

I hereby further certify that on this 24th day of November, 1992, true and correct copies of the foregoing Notice of Extenuating Circumstances and Unavoidable Delay were mailed, postage prepaid in the United States mail, to:

Joel Rickenbach
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Oelrichs, SD 57763-0097

Rodney Freeman, Jr.
P.O. Box 97
Huron, SD 57350-0176

Leo Holzbauer
RR 1, Box 170
Wagner, SD 57380



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STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FISH AND WILDLIFE SERVICE FOR VESTED WATER RIGHT NO. 1927-2; WATER PERMIT APPLICATION OF NO. 1921-2 TO CHANGE THE LOCATION OF LAND AND DIVERSION POINT AUTHORIZED UNDER WATER PERMIT NO. 265-2; AND WATER RIGHT APPLICATION NO. 2191-2	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISIONS

FINDINGS OF FACT

I

This matter involves applications by the United States Fish and Wildlife Service to obtain (1) a vested right permit, (2) an amendment to an existing permit and (3) a new permit.

II

Each of the permits sought concerns United States Fish and Wildlife Service interests in the LaCreek National Wildlife Refuge.

III

The LaCreek Migratory Waterfowl Refuge was established by Executive Order of President Franklin Roosevelt on August 26, 1935. The Order reserved certain lands subject to valid existing rights "as a refuge and breeding ground for migratory birds and other wildlife." It also provided that private lands within the area described in the executive order should become a part of the refuge "upon the acquisition of title or lease thereto by the United States . . . ."

IV

The use of water by the United States to provide a refuge and breeding grounds for migratory birds and wildlife constitutes a beneficial use under state law.

V

The use of water to provide a refuge and breeding ground for migratory birds and other wildlife is within the public interest.

VI

The United States Fish and Wildlife Service has dealt with challenges to successful provision of a refuge for migratory waterfowl and wildlife. Among the challenges faced by the refuge has been a problem with carp invading the waters of the refuge. The carp tend to feed at the bottom of the pools of water and cause turbulence in the water. The turbulence decreases the light at the bottom of the pool and inhibits growth of vegetation within the pool. The migratory bird population therefore suffers because a major source of food has been affected or in some cases eliminated.

VII

The United States Fish and Wildlife Service has in the past decade employed a series of measures to decrease the carp population. The fact that the refuge has not been, to date, entirely successful in eliminating carp in the refuge does not, in the view of the Board, indicate that the refuge is not being utilized in the public interest. Likewise it does not indicate that its use is not a beneficial use.

VIII

The United States Fish and Wildlife Service has also addressed a problem of Canadian thistles within the refuge and adjoining land. As with the challenge faced with regard to carp, the fact that the refuge faces a challenge with regard to Canadian thistles does not, in the view of the Board, mean that the refuge is not being utilized in the public interest nor that the use is not a beneficial use.

IX

The number of ducks flying the central flyway has declined both nationally and at the LaCreek Refuge. While part of the problem at the Refuge may arise due to the carp population, the Board has found that the refuge has made progress in eliminating that problem. Moreover, the Board finds that the causes of the decline in the duck population nationally are not attributable to LaCreek but are rather a part of a larger national trend. The Board finds that it would be in the public interest to maintain LaCreek Refuge to provide what assistance it can in the central flyway to rehabilitating the duck population.

X

The Board also finds that the population of other species utilizing the LaCreek National Wildlife Refuge has been on the increase. These include Canada Goose, Snow Goose, Blue Goose and Sandhill Crane. The refuges also provide a significant habitat for Trumpeter Swans.

XI

Board Findings I through X, above, are herewith incorporated.

XII

The Application for Vested Water Right No. 1927-2 claims appropriation of 10.0 cfs of water from Lake Creek to irrigate 700 acres within the refuge with a priority date of January 1, 1939. Lake Creek has also been known historically as LaCreek.

XIII

There is insufficient evidence in the record to justify validation of a priority date of 1939 as asserted by the United States Fish and Wildlife Service. The Board, however, credits the testimony of Jack Ritts who, as an employee on the Brown ranch, personally engaged in diversion of water from Lake Creek for alfalfa and grasses. The Board finds that the description by Mr. Ritts of the manner of irrigation gives his testimony credibility outweighing that of testimony to the contrary. The Board therefore finds that consistent with the Ritts testimony, irrigation commenced in 1951 and a January 1, 1951 priority date can be justified.

XIV

The Board has examined the allegations of land owners in the area that the use of the water by the US Fish and Wildlife Service under the right claimed in this proceeding has harmed the land owners and that the use has been developed through unlawful impairment of existing rights. Alternatively, landowners contend

that the use is not in the public interest because of harm to their property. After careful consideration, the Board rejects these claims for the reasons set forth below.

XV

With regard to the property of Mr. Raymond Kocer, the Board finds that a natural drainage channel crosses Mr. Kocer's property in a west to east direction. The Board further finds that, in approximately 1978, Mr. Kocer gave permission to the US Fish and Wildlife Service to push water through this channel. Included within this agreement was the assurance of the US Fish and Wildlife Service that the drainage would be halted at the appropriate times of the year to allow haying by Mr. Kocer.

XVI

The agreement was apparently rescinded some time in 1992. The Board finds that no claim of "unlawful impairment" can be based upon acts which occurred during the term of the agreement. In the view of the Board, deviations from the agreement should be handled as a contractual matter between the parties and are not the sort of activity classified by the legislature as "unlawful impairment."

XVII

The Board furthermore finds that the flooding of Mr. Kocer's property which occurred during the term of the agreement was contributed to both by the US Fish and Wildlife Service and by causes other than the drainage through the US Fish and Wildlife Service channels. The area has a high water table

and the ground is easily saturated by major precipitation events regardless of the activities of US Fish and Wildlife Service.

XVIII

The Board finds that the treatment of the Raymond Kocer flooding situation by the US Fish and Wildlife Service mandates that strict qualification regarding flooding be imposed upon the US Fish and Wildlife Service so as to guarantee that the grant of the vested right is in the public interest.

XIX

With regard to the property of Mr. Charles Emley the Board first considers the allegations regarding points at which Elm Creek runs through Mr. Emley's property. The Board finds that water from Elm Creek is occasionally backed up onto the property of Mr. Emley as a result of vegetation and diversion culverts on the US Fish and Wildlife Service property. The Board finds, however, that the waters of Elm Creek are not the subject of any claim for a water right by the US Fish and Wildlife Service here. Therefore, the provision regarding the grant of a vested right when a water source may have been unlawfully developed is not applicable here. The Board further finds, however, that the treatment of the Elm Creek situation by the Applicant mandates that strict qualifications regarding flooding be imposed upon the US Fish and Wildlife Service so as to guarantee that the grant of the vested right permit will be in the public interest.

XX

With regard to the "Church property" the Board finds that this land is leased by Mr. Charles Emley. The Board further finds that the owner of the property, the Episcopal Church, does not object to the grant of the vested right to the US Fish and Wildlife Service and that the opinion of the owner of the property is of special weight in determining whether actual harm is being done to the property.

XXI

The Board finds that Mr. Emley complains of water flowing through US Fish and Wildlife Service property onto the church property causing severe damage to his hay in 1982. However, the uncontradicted testimony is that the diversion in question was closed down at the time of this flooding in 1982. The Board does not credit this allegation.

XXII

Mr. Emley's complaints were supported principally by photographs taken in May of 1991. The Board declines to find these pictures indicative of a normal or typical situation given the 9.29 inches of rainfall in May of 1991.

XXIII

The Church property was also alleged to be occasionally flooded by water which overtopped a road to go on the Emley property. The Board credits the evidence which indicates that water only overtops the road during significant rainfall events. The Board also finds that this problem could be alleviated by the use of the proper size of culverts and with the proper cleaning

of the culverts. The Board further finds that the referenced culverts are located in the public right-of-way.

XXIV

The Board finds that Emley had, in the past, given permission to the US Fish and Wildlife Service to run water across the church property. Emley, has not, apparently, rescinded such permission although he apparently now believes that the water does more harm with regard to changing the quality of the grass than it does good with regard to providing moisture.

XXV

The Board finds that the US Fish and Wildlife Service actions have contributed to flooding on Emley's property. The Board does not find, however, that the US Fish and Wildlife Service has engaged in a systematic disregard of the rights of Mr. Emley with regard to the Church property so as to preclude the grant of a vested right on the grounds that the water source has been developed through unlawful impairment of the existing rights of others. The Board finds, however, that the public interest demands a strict qualification on the continuing development of the water right by the US Fish and Wildlife Service to assure protection of the public interest.

XXVI

The Board rejects the assertion that a prescriptive easement has arisen on the Emley property. The testimony with regard to the flooding is that it began to occur in 1971; permission was sought to send the water across the property in

1983. The period is less than 20 years; therefore the time period does not give rise to a claim of prescriptive easement.

XXVII

The Board finds that flooding can occur on the Lawrence Kocer property when water reaches a cement structure on US Fish and Wildlife property and backs up. According to the testimony of Mr. Kocer, when the structure is fully opened, the flooding is alleviated and the land is quickly dried. In addition to a problem with the structure, the Board finds that part of the problem of Mr. Kocer's property is natural in origin and is associated with the high water table and significant precipitation events.

XXVIII

The Board finds that the record indicates Mr. Lawrence Kocer complained from time to time to the US Fish and Wildlife Service. The record does not, however, indicate with clarity the number, precise nature or precise demands involved within those communications. Nor does the record indicate with clarity the amount of flooding which may have occurred from year to year.

XXIX

The Board finds, with regard to the property of Mr. Lawrence Kocer, that the vested right use has been developed without unlawful impairment of existing rights and that the use may be found in the public interest if the permit is appropriately and strictly qualified.

XXX

The Board finds the record insufficient to invoke the legal doctrine of prescriptive easement with regard to the property of Mr. Lawrence Kocer.

XXXI

Brett Heath's problems are alleged to emanate from a small dam on Lake Creek in what is known as Pool Two. Lake Creek naturally carries a high amount of sand as sediment. The Board finds that when a dam is built on a river, the velocity of the water is reduced or eliminated. This results in concomitant decrease in the ability of the stream to transport sediment, which in turn causes a delta to form.

XXXII

The Board finds that a delta has formed upstream of Pool Two. The effect of the delta is to raise the stream bottom thus allowing flooding where such would not otherwise occur if the stream bed were at its original lower level.

XXXIII

The Board finds that the existence of the small dam on Lake Creek has formed a delta and has had the effect of increasing flooding on the Heath property.

XXXIV

The Board finds that Mr. George W. Heath, predecessor to the Plaintiff, on June 3, 1976 made a formal demand of the United States Department of the Interior for one hundred twenty five thousand dollars ($125,000) damages for "permanent injury" to property as a result of the act in question. The claim was

denied on September 1, 1976 and no appeal was taken to the United States District Court.

XXXV

The predecessor to Mr. Brett Heath also attempted to deal with the problem by building a ditch in 1977 at a cost in the thousands of dollars.

XXXVI

The understanding of Mr. George Heath was that he would not thereafter have to dredge and furthermore that he would not have flooding problems.

XXXVII

After construction of the ditch the flooding problems were alleviated for a period of four to five years. Thereafter, it became necessary to dredge but the parties had apparently not come to an understanding as to whose responsibility the dredging would be.

XXXVIII

There is no agreement in the record indicating that the United States undertook any obligation to dredge on the Heath property.

XXXIX

The Board finds that for the ditch to be fully operational and to relieve flooding as it was intended, it must be open and be regularly dredged.

XL

Given the abandonment of the legal effort of Mr. George Heath to obtain damages from the United States, and given the

uncertain arrangement of Mr. George Heath and the previous Wildlife Refuge Manager regarding the ditch and the alleviation of flooding, the Board cannot find that the actions of the US Fish and Wildlife Service in failing to relieve the Heath property of flooding constitutes a development of the water right by unlawful impairment of existing rights. Rather, the claims of Heath are more appropriately addressed under the public interest umbrella. In particular, the Board finds that flooding on the Heath property caused in part by the delta formed in the stream (a development attributable to the US Fish and Wildlife Service) and caused in part by the closing of the ditch can be addressed by strictly qualifying the vested right permit to be granted to the US Fish and Wildlife Service.

XLI

The Board finds that the complaints of Mr. Wendell DeKay with regard to water quality at a point substantially below the water right requested does not raise a substantial issue. Mr. DeKay asserts that the water quality problems exist as a result of the proliferation of carp in the refuge. The refuge is, however, maintaining an effort to eradicate the carp and has moved in that direction. In any event, the unintentional development of a carp population in a water supply is of limited, if any, relevance to whether a vested water right should be granted.

Conclusions of Law relating to Application for Vested Right No. 1927-2.

XLII

The Board has jurisdiction of this matter. The Board specifically finds that no substantial question of jurisdiction over the US Fish and Wildlife Service arises in this case because the US Fish and Wildlife Service has voluntarily submitted to the jurisdiction of this Board.

XLIII

The US Fish and Wildlife Service, having applied to the Board and having litigated its rights before the Board, is bound by the Board determination whether to grant or not to grant the permit, whether to qualify the permit and whether to suspend, revoke or otherwise deal with the permit.

XLIV

The amount of water provided for in the Final Decision has been continuously appropriated for irrigation use since January 1, 1951.

XLV

The use has been developed without unlawful impairment of existing rights. The Board finds that the US Fish and Wildlife Service has not been consistently conscientious with regard to the limiting of flooding on the objectors' lands, and that its actions have contributed to the flooding problem; the Board also finds that its actions have not been so repeated and flagrant as to preclude the recognition of a vested right on the grounds that there has been "unlawful impairment of existing rights."

XLVI

The US Fish and Wildlife Service use of water constitutes a beneficial use in that it does in fact promote migratory birds and wildlife through creation of areas which are biologically appropriate for such uses. The Board finds the existence of a beneficial use even though the crops are not harvested by human beings but are utilized by the migratory birds and wildlife.

XLVII

The use in question is an "irrigation use" under statute and regulation.

XLVIII

The priority date for this permit is January 1, 1951.

XLIX

The grant of the Permit, as strictly qualified below, is in the public interest.

Final Decision in Vested Right 1927-2

L

Application No. 1927-2 for a vested right for 10.0 cfs of water from Lake Creek is granted with a priority date of January 1, 1951 subject to the following qualification:

> Use of water authorized by this Vested Water Right may not impair the use of any lands adjoining the LaCreek National Wildlife Refuge including, but not limited to, flooding or specific alteration of plant species directly attributable to water use under this vested right. Flooding of adjoining land may occur if a written flood easement is obtained from the property owner or owners.

Findings of Fact with regard to Application No. 2191-2.

LI

This is a new application which requests an appropriation of 4.44 cfs of water or 1,444.7 acre feet annually from six springs. The water is to be used to create 235 acres of marshes, sloughs, and wet meadows, either through the natural flow of the springs, or through small dams and control structures, for waterfowl propagation and enhancement of wildlife habitat.

LII

Findings I through X, above, are herewith incorporated.

LIII

Each of the six springs at issue provides a distinct benefit to wildlife by forming pools for the growth of aquatic plants which themselves provide a habitat for aquatic insects. The springs also provide water for the growth of cover for younger and older wildlife.

LIV

Part of the Applicant's motivation for filing for a water right with regard to this water is the perception that it is necessary to protect the use of water for wildlife.

LV

The water, at present, provides essentially the same kinds of habitat that the Applicant desires to create. There is nothing in the record which indicates that any development of the springs has or will result in damage to any of the opponents.

LVI

The Board finds that the refuge has a federal mandate to expand the size of the refuge and to expand the amount of habitat which can beneficially be used by the migratory waterfowl and wildlife population. The Board rejects the assertion of the opponents that the area sought is not "needed" by the refuge for these purposes. The continuing national decline in the number of ducks and the gradual decline in the national availability of adequate wildlife and migratory bird habitat indicates the need for more habitat.

LVII

The Board finds that the US Fish and Wildlife Service has not been consistently conscientious with regard to its use of water within the Refuge and that any permits or amendments granted to the Applicant in the immediate future should be strictly qualified consistent with the public interest.

Conclusions of Law with regard to Application No. 2191-2

LVIII

The Board has jurisdiction of this matter. Conclusions of Law XLII and XLIII above, are incorporated herein.

LIX

There is a reasonable probability that there is unappropriated water available for the Applicant's proposed use.

LX

The proposed diversion can be developed without unlawful impairment of existing rights.

LXI

The proposed use of water for the provision of habitat for migratory birds and wildlife, and in particular to create marshes, sloughs, wet meadows and small patches of open water is a beneficial use.

LXII

The use sought is a present use and is not a use which will occur only in the future. The use sought is not a "future use" merely because the Applicant wishes to protect the water supply from the future use by others.

LXIII

The grant of the application would be in the public interest as strictly qualified below.

Final Decision in No. 2191-2

LXIV

The application for Water Permit No. 2191-2 is granted with the following qualification:

> Use of water authorized by this permit may not impair the use of any lands adjoining the LaCreek National Wildlife Refuge including, but not limited to, flooding or specific alteration of plant species directly attributable to water use under this permit. Flooding of adjoining land may occur if a written flood easement is obtained from the property owner or owners.

Findings of Fact relation to Water Permit Application No. 1921-2.

LXV

Water Permit Application No. 1921-2 is requested for the purpose of changing the location of the land and the diversion point authorized under Water Permit No. 265-2.

LXVI

Water Permit No. 265-2 authorizes appropriation of 4.45 cfs for irrigation, water power development and domestic use. The water under this permit was allowed to be used during the growing season for irrigation and during the entire year for power and domestic use.

LXVII

Findings I through X are incorporated herewith.

LXVIII

Water Permit No. 265-2 was transferred and notice of transfer was filed in January of 1972 by the Bureau of Sport Fisheries and Wildlife, United States Department of Interior, the predecessor agency to the US Fish and Wildlife Service. The transfer was made because the title to the lands had been transferred to the Bureau.

LXIX

The Board finds that Water Permit No. 265-2 has been continuously used as indicated by the testimony of Mr. Rolf Kraft and the memorandum of August 11, 1967 of Richard Schmoyer, Water Right Specialist for the Division of Water Rights.

LXX

The Board does not find substantial evidence that utilization of this water right has harmed any of the objectors, including, specifically, Mr. Heath.

LXXI

The US Fish and Wildlife Service has demonstrated that it is impracticable to divert water for irrigation at its original location given the high costs of a dam at the original location.

LXXII

The Board finds that the US Fish and Wildlife Service has not been consistently conscientious with regard to its use of water within the Refuge and that any permits or amendments granted to the Applicant in the immediate future should be strictly qualified consistent with the public interest.

Conclusions of Law with relation to Water Permit Application No. 1921-2.

LXXIII

The Board has jurisdiction of this matter. The Board specifically incorporates Conclusions of Law XLII through XLIII, above.

LXXIV

The proposed diversion can be developed without unlawful impairment of existing rights.

LXXV

The proposed use of water to develop habitat for wildlife and migratory bird habitat propagation is a beneficial use.

300

LXXVI

The grant of the permit is in the public interest as strictly qualified in the Final Decision.

LXXVII

The Board concludes that the Applicant has shown sufficient evidence to justify severance of the water from the land identified in the original permit pursuant to SDCL 46-5-34.

Final Decision in Water Permit Application No. 1921-2.

LXXVIII

Water Permit Application No. 1921-2 to change the location of land and change the diversion point authorized under Water Permit No. 265-2 as set out in the notice of hearing of this matter is granted subject to the following qualification:

> Use of water authorized by this permit may not impair the use of any lands adjoining the LaCreek National Wildlife Refuge including, but not limited to, flooding or specific alteration of plant species directly attributable to water use under this permit. Flooding of adjoining land may occur if a written flood easement is obtained from the property owner or owners.

Dated this 7 day of January, 1993

BY THE BOARD

Francis E. Hunt
Chairman

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DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3181

January 14, 1993

NOTICE

TO: Wilbur N. Ladd, Acting Regional Director
US Fish and Wildlife Service
Denver Federal Center
PO Box 25486
Denver, CO 80225
and Parties of Record (see attached list)

FROM: John Hatch, Chief Engineer
for Water Rights Division
605 773-3352

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

This is to notify you that a Final Decision, including Findings of Fact and Conclusions of Law, was adopted by the Water Management Board for Water Permit Nos. 1921-2 and 2191-2, and Vested Right Claim No. 1927-2 at the December 2, 1992, meeting.

A copy of the signed final Decision, Findings and Conclusions is enclosed for the applicant and Parties of Record. South Dakota Statutes provide that decisions of the Board may be appealed to the Courts.

cc: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General
Cheryl Williss, US Fish and Wildlife Service

PARTIES OF RECORD LIST

John Kunz
Rocky Mountain Regional
Solicitor's Office
730 Simms St - Suite 450
Golden, CO 80401

Jane M. Farrell & Patrick
Ginsbach
Farrell, Farrell & Ginsbach
441 North River Street
Hot Springs, SD 57747

Wendell DeKay
Tuthill, SD 57574

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
RR
Martin, SD 57551

Lawrence Kocer
Box 156
Martin, SD 57551

CERTIFICATION

I hereby certify that on January 14, 1993, I have personally deposited with the United States Mail at Pierre, South Dakota, First Class postage, prepaid envelopes containing a Notice dated January 14, 1993, regarding Adoption of Findings of Fact, Conclusions of Law and Final Decision for Water Permit Nos. 1921-2 and 2191-3, and Vested Right Claim No. 1927-2 addressed to:

Wilbur N. Ladd, Acting Regional Director
US Fish and Wildlife Service
Denver Federal Center
PO Box 25486
Denver, CO 80225
and Parties of Record (as shown on the attached list)

A copy of the Notice and Findings were sent to:

Cheryl Williss, US Fish and Wildlife Service, Denver Federal Center, PO Box 25486, Denver, CO 80225

A copy of the Notice and Findings were sent inter-office to:

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

Jaci R Konop

JACI R. KONOP
Senior Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 19th day of January, 1993.

John Hatch

Notary Public

JOHN HATCH
NOTARY PUBLIC SEAL SEAL SOUTH DAKOTA
My Commission Expires Apr. 1, 1993

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF BENNETT)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT
Civ. 93-____



In the Matter of the Application of the United States Fish & Wildlife Service for Vested Water Right No. 1927-2; Water Permit Application No. 1921-2 to Change the Location of Land and Diversion Point Authorized under Water Permit No. 265-2; and Water Right Application No. 2191-2.

NOTICE OF APPEAL

TO: JOHN HATCH, Chief Engineer, Water Rights Division,
SOUTH DAKOTA DIVISION OF WATER RIGHTS,
SOUTH DAKOTA WATER MANAGEMENT BOARD,
UNITED STATES FISH & WILDLIFE SERVICE:

NOTICE IS HEREBY GIVEN that Wendell DeKay, Charles Emley, Brett Heath, Lawrence Kocer and Raymond Kocer appeal to the Circuit Court from the final decision of the Water Management Board dated January 7, 1993, and served upon the parties on January 14, 1993, a copy of which Decision and Notice is attached hereto as Exhibit "A" and incorporated herein by reference.

Dated this 9th day of February, 1993.

FARRELL, FARRELL & GINSBACH
Farrell, Farrell & Ginsbach
Attorneys for Wendell DeKay,
Charles Emley, Brett Heath,
Lawrence Kocer and Raymond Kocer

JANE M. FARRELL
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304

F SOUTH DAKOTA)
)SS
COUNTY OF BENNETT)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT
Civ. 93-____



In the Matter of the Application of the United States Fish & Wildlife Service for Vested Water Right No. 1927-2; Water Permit Application No. 1921-2 to Change the Location of Land and Diversion Point Authorized under Water Permit No. 265-2; and Water Right Application No. 2191-2.

CERTIFICATE OF SERVICE

Jane M. Farrell hereby certifies that she is the attorney for the Appellants Wendell DeKay, Charles Emley, Brett Heath, Lawrence Kocer and Raymond Kocer in the above-captioned matter; that on the 9th day of February, 1993, she caused to be mailed by certified mail, return receipt requested, a true and correct copy of the Notice of Appeal to each of the following named persons by enclosing the same in envelopes securely sealed with first-class postage prepaid thereon and deposited in the United States mail at Hot Springs, South Dakota, addressed as follows:

John Hatch
Chief Engineer
Water Rights Division
523 East Capitol Ave.
Pierre, SD 57501-3181

Diane Best
Assistant Attorney General
State Capitol Bldg.
500 East Capitol Ave.
Pierre, SD 57501

Francis E. Brink
Water Management Board
1214 S. Wells St.
Aberdeen, SD 57401

Wilbur N. Ladd
Acting Regional Director
U.S. Fish & Wildlife Service
Denver Federal Center
P. O. Box 2546
Denver, CO 80225

John Kunz
Rocky Mountain Regional Solicitor's Office
730 Simms St., Suite 450
Golden, CO 80401

Dated this 9th day of February, 1993.

FARRELL, FARRELL & GINSBACH
Farrell, Farrell & Ginsbach
Attorneys for Wendell DeKay,
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Lawrence Kocer and Raymond Kocer

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STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, AND LAWRENCE KOCER,	)	
Petitioners,	)	APPLICATION NOS. 2191-2, 1927-2, AND 1921-2
v.	)	
UNITED STATES FISH AND WILDLIFE SERVICE,	)	
Applicant.	)	

July 7, 1992

PREHEARING BRIEF OF APPLICANT, UNITED STATES FISH AND WILDLIFE SERVICE

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STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD
DEPARTMENT OF WATER AND NATURAL RESOURCES

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, AND LAWRENCE KOCER,	)	
Petitioners,	)	APPLICATION NOS. 1927-2, 1921-2, AND 2191-2
v.	)	
UNITED STATES FISH AND WILDLIFE SERVICE,	)	
Applicant.	)	

PREHEARING BRIEF

COMES now the United States Fish and Wildlife Service (FWS), the applicant in the captioned proceeding, and by and through counsel hereby files with the South Dakota State Water Management Board (Board) the following Prehearing Brief.

I. PROCEDURAL BACKGROUND

1. As originally styled, the subject proceedings initially involved the following applications by FWS: Application Nos. 1927-2, 1921-2, and 1926-2. These applications were initially opposed by Messrs. Wendell DeKay, Charles Emley, Brett Heath, Raymond Kocer, Lawrence Kocer, and Kenneth Keegan (hereafter collectively referred to as the Objectors). 1/ The hearing of

1/ Apparently, Mr. Keegan has since withdrawn his objection to FWS' applications.

these applications was originally scheduled for June 26, 1991, in Martin, South Dakota.

2. In a May 31, 1991, Prehearing Order, pursuant to an established schedule, the then Hearing Examiner, Ms. Marian Gunderson, ordered the parties to submit prehearing briefs and various other prehearing pleadings.

3. Subsequent to the entry of the above order, on or about June 21, 1991, based on the grounds that it would have to significantly amend the application, FWS filed with the Board a motion to withdraw Application No. 1926-2.

4. On or about June 21, 1991, in an Order of Continuance, the Hearing Examiner granted the above motion, and ordered that the hearing, originally scheduled for June 26, 1991, be continued.

5. In the place of withdrawn Application No. 1926-2, FWS has since filed a replacement application, Application No. 2191-2. As presently constituted, the subject proceedings thus involve the hearing of Application Nos. 1927-2, 1921-2, and 2191-2.

6. The Board has determined that the hearing of the subject proceedings will be held in Martin, South Dakota on July 22 and 23, 1992.

7. In a February 27, 1992, Stipulation to Allow Discovery, the parties stipulated, *inter alia*, that, with certain date changes specified in the Stipulation, they would adhere to the above-referenced May 31, 1991, Prehearing Order of the then Hearing Examiner. It is pursuant to this Stipulation that FWS now submits the following prehearing brief.

II. APPLICATION NO. 1927-2

A. DESCRIPTION OF REQUESTED RELIEF

In Application No. 1927-2, FWS has applied for a permit to appropriate some 10 cubic feet per second (CFS) of water from Lake Creek (the Lake Creek Water). The Lake Creek Water is diverted from four separate locations 2/, and is beneficially used to flood irrigate some 700 acres of land on FWS' LaCreek National Wildlife Refuge (NWR). 3/ Application No. 1927-2 is a vested rights application with FWS claiming a priority date of January 1, 1939.

2/ The exact locations of these diversions is noted on Exhibit A attached hereto. This exhibit was originally attached to FWS' application. Although opposing counsel has not formally stipulated this document into evidence, FWS has no reason to believe that there will be any objections to its admissibility.

3/ The exact nature of this use will be described in more detail at the hearing of the subject application.

B. GENERAL STATEMENT OF FACTS WHICH FWS WILL PROVE IN SUPPORT OF THE REQUESTED RELIEF

At the hearing of the captioned matter, FWS expects to adduce evidence which will prove the following. The LaCreek NWR was established by Executive Order dated August 26, 1935, and was established as a refuge and breeding ground for migratory birds and other wildlife. 4/ On September 2, 1971, FWS expanded the boundaries of the Refuge by acquiring title to certain real property which will hereafter be referred to as the Brown Ranch. 5/ When FWS acquired the Brown Ranch, to create additional habitat for waterfowl and wildlife, FWS began to divert water from Lake Creek to flood irrigate various portions of the Brown Ranch, including certain meadows, wild grasses, and even grain. 6/ This flood irrigation process actually accomplishes

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4/ The parties have previously stipulated to this fact. *See* paragraph 1 of the June 17, 1991, Opponent's Objections to Prehearing Statement of Facts Which FWS Desires to Stipulate into Evidence.

5/ The legal description of the Brown Ranch is as follows: Township 36 North, Range 36 West, 6th P.M.--SECTION 29: SW¼, S½SE¼; SECTION 30: Fractional W½, NE¼; SECTION 31: All; SECTION 32: NW¼. Township 36 North, Range 37 West, 6th P.M.--SECTION 13: N½, NE¼SW¼, S½SW¼, SE¼; SECTION 14: NE¼; SECTION 22: All; SECTION 23: NE¼NE¼, E½NW¼NE¼, S½NE¼, S½; SECTION 24: E½, E½NW¼, NE¼SW¼, S½SW¼; SECTION 25: N½, SW¼, N½SE¼; SECTION 26: All; SECTION 27: All; SECTION 28: All; and SECTION 29: E½. A copy of the Warranty Deed whereby FWS acquired title to the Brown Ranch is attached hereto as Exhibit B. A copy of this deed has previously been stipulated into evidence by the parties. *See* paragraph 5 of the June 17, 1991, Opponent's Objections to Prehearing Exhibits of Documentary Exhibits.

6/ This practice is particularly useful in dry years--a not uncommon occurrence in this part of South Dakota (*see*, for example, the May 21, 1992, deposition of Raymond Kocer (on file (continued...)

several goals. First, it enhances the growth of the wild grasses and the grain, which in turn provides shelter and food for the waterfowl. *See* the May 21, 1992, deposition of Rolf Kraft (on file herein) at 38 and 172. Second, it creates water impoundments which give young waterfowl critical protection from predators. *See id.* at 38-39. Additionally, these water impoundments provide a medium for the growth of aquatic plants, which in turn provide critical habitat for aquatic insects. These aquatic insects comprise a significant portion of a young waterfowl's diet, and also provide high protein necessary for the egg laying of roosting waterfowl. *See id.* at 39 and 172-73.

FWS further expects to adduce evidence which will show that, prior to FWS' acquisition of the Brown Ranch, as early as 1937, certain unidentified individuals in the chain of title to the Brown Ranch diverted water from Lake Creek to flood irrigate certain wild hay meadows. These meadows were subsequently mowed and harvested. 7/ Additionally, on the Brown Ranch, as early as

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6/ (...continued)
herein) at 16 and 25). *See also* the May 20, 1992, deposition of Charles Emley (on file herein) at 43 (in dry years, a certain amount of surface water on the meadows will actually help the growth of the wild grasses).

7/ *See*, for example, the June 8, 1992, deposition of Bill Pearson (on file herein) at 11-13. The opinions of Mr. Pearson are corroborated by the article entitled, "Early Irrigating in Bennett County." *See* Exhibit C attached hereto. Opposing counsel has previously stipulated this document into evidence. *See* paragraph 2 of the June 19, 1991, Opponents' Objections to U.S. Fish & Wildlife Service's First Amended Prehearing Identification of Documentary Exhibits.

1939, Birthol Brown diverted water from Lake Creek to flood irrigate "meadow land", *i.e.*, land containing wild grasses. 8/ Moreover, on the Brown Ranch, as early as 1951, Alvin Brown and/or the Cedar Creek Ranch Company diverted water from Lake Creek to flood irrigate certain wild grass meadows. 9/ At the hearing, FWS expects to prove that, since its acquisition of the Brown Ranch, and consistent with the afore-described practices of its predecessors in interest, it (FWS) has in the manner specified and for the purposes stated, continued to divert water from Lake Creek to flood irrigate portions of the Brown Ranch. 10/ The previous facts are the basis for FWS' vested rights applica-

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8/ *See*, for example, copies of a February 13, 1939, letter from Brice McBride to Earl W. Craven, and a March 13, 1939, letter from Earl W. Craven to Regional Director (attached hereto as Exhibits D and E, respectively. Opposing counsel has stipulated these two documents into evidence. *See* paragraphs 3 and 4 of the June 17, 1991, Opponent's Objections to Prehearing Exhibits of Documentary Exhibits.

9/ *See*, for example, the affidavit of Charles J. Ritts, a copy of which is attached hereto as Exhibit F. Pursuant to a discovery request, a copy of this document has previously been provided to opposing counsel. Mr. Ritts will also testify at the captioned hearing. Although the Objectors might well dispute Mr. Ritts' statements, it cannot be disputed that Birthol and Alvin Brown made diversions off of Lake Creek to irrigate certain alfalfa and rye fields. *See* the May 20, 1992 deposition of Eva Mae Linenbrink (on file herein) at 11, 17, and 23.

10/ There is one small distinction between the current practices of FWS and those of its predecessors in interest. Rather than mowing and haying them, FWS allows the wild grasses which are irrigated to continue to grow. As previously stated, this provides protection and food for the waterfowl. Despite this difference in the end use of the wild grasses, it is important to note that, under both uses, the wild grasses are (were) flood irrigated. Additionally, as explained in more detail, *supra.*, besides enhancing the growth of the wild grasses, FWS' irrigation practices accomplish other important goals.

tion and claimed priority date of January 1, 1939. In the alternative, if the Board does not agree with the January 1, 1939, priority date, then pursuant to the Ritts affidavit (*see* Exhibit F), FWS requests the Board to award a priority date of January 1, 1951. 11/ The Chief Engineer, Department of Environment and Resources, Division of Water Rights, has recommended that the subject application be approved (*see* Exhibit G).

C. ANALYSIS OF ISSUES WHICH MIGHT ARISE AT THE HEARING

1. Statutory Standard For Issuing Permits To Appropriate Water

Pursuant to S.D. CODIFIED LAWS ANN. § 46-2A-9 (1987), a permit to appropriate water may be issued if the following four criteria are met: (1) there is a reasonable probability that there is unappropriated water available; (2) the proposed diversion can be developed without unlawful impairment of existing rights; (3) the proposed use is a beneficial use; and (4) the proposed use is in the public interest. 12/

11/ This is consistent with the August 28, 1990, report and recommendation of the Chief Engineer. *See* Exhibit G attached hereto. Subject to a procedural rather than a substantive reservation, opposing counsel has stipulated this report into evidence. *See* paragraph 9 of the June 17, 1991, Opponents' Objections to Prehearing Exhibits of Documentary Exhibits.

12/ The precise language of S.D. CODIFIED LAWS ANN. § 46-2A-9 is as follows:

> A permit to appropriate water may be issued only if there is reasonable probability that there is unap-

(continued...)

(a). Reasonable Probability That Unappropriated Water Is Available

To the best of FWS' knowledge, the Objectors have never contested the subject application on the grounds that unappropriated water is not available. Indeed, the underlying issues all seem to involve not a lack of water, but an excess thereof. Accordingly, this criterion does not apply to the instant proceeding, and does not preclude the Board from approving the subject application.

(b). Unlawful Impairment of Existing Rights

(1). Interpretation and Meaning of "Existing Rights"

FWS expects the Objectors to allege that FWS' diversion of water from Lake Creek unlawfully impairs their existing rights, damages their crop land, develops saline problems, and impairs their use of the water. *See* paragraph II.a. of the April 15, 1991, Petition to Oppose Application For Validation of Vested Water Right Claims Nos. 1926-2, 1927-2, and 1921-2. With the possible exception of Objector DeKay (who will be discussed in

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12/ (...continued)
propriated 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.

more detail below), none of the Objectors *has* any existing, vested, or appropriated rights in and to the Lake Creek Water. Stated differently, with the possible exception of Mr. DeKay, none of the Objectors has (as they so allege) a "use of the water" (legal or otherwise) for FWS to impair. For this reason, there is no factual or legal basis to this particular allegation, and the Board must disregard it.

Aside from those matters discussed above, to properly consider the remainder of the Objectors' allegations, the Board must interpret the words, "existing rights", as such words appear in S.D. CODIFIED LAWS ANN. § 46-2A-9. It is clear from the context of this statute and the other statutes in the same Chapter of the South Dakota Code, that the *sole* purpose of these statutes is to govern the appropriation/adjudication of *water* rights. Hence, when S.D. CODIFIED LAWS ANN. § 46-2A-9 states that permits may be issued to appropriate water only if the proposed diversion can be developed "without unlawful impairment of existing rights," the plain and unambiguous intent of the statutory language is to proscribe the unlawful impairment of existing *water* rights. Accordingly, there is no merit or legal basis to the Objectors' allegation that FWS' use of the Lake Creek Water somehow unlawfully impairs their existing *real*

property rights, *i.e.*, damages to their crop lands and purportedly creates saline problems. 13/

(2). Allegations Of Mr. DeKay

FWS recognizes that, pursuant to S.D. CODIFIED LAWS ANN. § 46-5-8 (1987), Mr. DeKay has the right to use water from Lake Creek to water his stock. 14/ *See also* S.D. CODIFIED LAWS ANN. § 46-1-6 (4) (as amended 1989). 15/

FWS expects Mr. Dekay to allege that FWS' management practices make the Lake Creek Water "full of mud," "not good . . . for cattle to drink," and cause the water to "smell[] bad." *See*

13/ The Objectors might argue that this interpretation is unduly harsh, and that it deprives them of a legal remedy to seek redress for purported damage to their real property. This is not true. If the Objectors feel that their real property is being damaged by FWS' use of the Lake Creek Water, there are legal remedies which the Objectors can pursue. However, such remedies sound in tort and are completely separate from and unrelated to the "impairment of existing rights" standard announced in S.D. CODIFIED LAWS ANN. § 46-2A-9. Apart from available tort remedies which the Objectors should pursue, to the extent that the Board does wish to consider the purported impairment of the Objectors' real property rights, FWS submits that such issues are more properly considered under the "public interest" prong of S.D. CODIFIED LAWS ANN. § 46-2A-9, rather than the "unlawful impairment of existing rights" portion of this statute. Consistent with this reasoning, FWS will address these issues in an ensuing portion of this brief.

14/ In pertinent part, this statute provides that, "[a]ny person desiring to make reasonable domestic use of water from any source may do so without obtaining a permit from the water management board . . . ."

15/ Among other things, this statute defines stock watering as a "domestic use."

pages 7 and 10 of Mr. DeKay's May 20, 1992, deposition (on file herein). To better understand Mr. DeKay's allegations, the Board needs to understand that FWS does release water from an impoundment known as "Pool 10" into the Lake Creek Channel that flows through Mr. DeKay's property. Among other things, FWS expects Mr. DeKay to allege that the afore-mentioned problems are caused by carp in Pool 10 (*see id.* at 12), and the fact that the water flows released from Pool 10 are just too slow (*see id.* at 11). As a result of all these factors, FWS expect Mr. DeKay to allege that his domestic use of the Lake Creek Water, *i.e.*, stockwatering, is "impaired."

Mr. DeKay's allegations are without merit, and must fail for several reasons. First, as pointed out in more detail above, this application concerns four diversions off of Lake Creek to flood irrigate portions of the *Brown Ranch*. Mr. DeKay's property is located miles to the east of the Brown Ranch and the property affected by this application. Additionally, Mr. DeKay's complaints have nothing to do with FWS' diversions of the Lake Creek Water. Rather, his complaints pertain to FWS' purported failure to release into Lake Creek sufficient water from Pool 10. Accordingly, Mr. DeKay's complaints have no relevancy to the subject application and must be disregarded. 16/

16/ Assuming, *arguendo*, that Mr. DeKay does have a legitimate complaint, this is not to say that he has no remedy. There are separate remedies that he can pursue. However, administrative economy and fairness demand that such complaints not (continued...)

Second, assuming, *arguendo*, that the Board were to consider Mr. DeKay's complaints as part of the subject application, the applicable statute [S.D. CODIFIED LAWS ANN. § 46-1-6 (4)] (quoted previously), does not necessarily guarantee pristine water quality. It merely says that persons may make "*reasonable* domestic use of water from any source." Mr. DeKay's domestic use is to water stock. Certainly, a "reasonable domestic use" for cattle implies that the water quality might well be less than that required for human beings. For these reasons, Mr. DeKay's allegations concerning "muddy" and "smelly" water are wholly irrelevant, without any merit, and must be disregarded. 17/

Third, except for the reference to "reasonable domestic use," S.D. CODIFIED LAWS ANN. § 46-1-6 (4) does not say anything about the quantity of water to which Mr. DeKay is entitled. Mr. DeKay has alleged that he gets low and slow flows from Pool 10. *See* his deposition at 11. However, to the best of FWS' know-

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16/ (...continued)
be heard as part of the instant proceeding. To be heard as part of the instant proceeding, common sense and fairness dictate that his complaints should have some logical connection or nexus to what is being sought in the subject application. In the instant case, this nexus is simply not present. Since this nexus is not present, Mr. DeKay's complaints merely cloud the issues and unfairly create potential prejudice against FWS. For these reasons, the Board should not give any further consideration to Mr. DeKay's allegations.

17/ Indeed, Mr. DeKay admits that, even when the water quality is extremely low, the cattle will still drink it. *See* his deposition at 15.

ledge, Mr. DeKay has never alleged that the quantity is insufficient to meet his stock watering needs. 18/ Lastly, Mr. Dekay acknowledges that, when there is a lot of rain, his problem seems to get better. 19/ *See id.* at 11. From a practical standpoint, this appears to make sense. However, it totally ignores the fact that, during the typically hot and dry summer months, to ensure that there is a steady supply of water flow over the summer, FWS must carefully release the water from Pool 10 into Lake Creek. This might well result in lower than desired, albeit legal, downstream flows in Lake Creek.

For the foregoing reasons, the Board must find that Mr. DeKay's "unlawful impairment" allegations are without merit. Consequently, such allegations should not preclude the Board from approving the subject application.

18/ Indeed, Mr. DeKay admits that, even when he is experiencing low flows of water, he has never specifically gone and talked to anybody at the Refuge about this problem. *See* his deposition at 13. If FWS were specifically made aware of this potential problem, it would no doubt do everything that it reasonably could to ameliorate the situation.

19/ This presents a rather ironic predicament for FWS. The situation for Mr. DeKay is better when it rains. However, the other Objectors allege that their problems are made worse by rainfall. *See*, for example, Mr. Emley's deposition at 19. Unfortunately, FWS cannot control nature. Even if it could, it would not be able to simultaneously please all of the Objectors.

(c.) Beneficial Use

(1). The Objectors' Claim That FWS' Use Of The Water Does Not Improve Conditions For Wildlife Or Develop Good Forage

FWS expects the Objectors to allege that FWS' use of the Lake Creek Water is not a beneficial use because it does not "develop good forage for wildlife," or "improve conditions for wildlife." *See* paragraph II.b of the April 15, 1991, Petition to Oppose Application For Validation of Vested Water Right Claims Nos. 1926-2, 1927-2, and 1921-2. FWS expects the Objectors to also allege that FWS' use of the Lake Creek Water is not beneficial because it is only creating "marginal conditions [for the] support [of] wildlife and waterfowl." *See*, the June 17, 1991, Opponents Prehearing Brief at 7.

S.D. CODIFIED LAWS ANN. § 46-1-6 (6) (as amended 1989) defines "beneficial use" as "any use of water . . . that is reasonable and useful and beneficial *to the appropriator*, and at the same time is consistent with the interest of the public of this state in the best utilization of water supplies." (Emphasis added). A key part of this definition is that the use of the water must be useful and beneficial *to the appropriator.* FWS is the Federal agency entrusted with managing the LaCreek NWR. Management of the Refuge involves a myriad of institutional and individual experience and expertise. Although the Objectors are

certainly entitled to their opinions, by making the above allegations, the Objectors place themselves in the rather presumptuous position of dictating, contrary to the institutional and individual experience and expertise of FWS, whether its use of the Lake Creek Water is indeed "beneficial." According to S.D. CODIFIED LAWS ANN. § 46-1-6 (6), the *appropriator* determines whether its use of the water is beneficial. Common sense dictates that this must be so. Consequently, the Objectors' imperious attempts to tell FWS that its use of the Lake Creek Water is not beneficial must be disregarded. 20/

(2). Irrigation Of The Brown Ranch Lands

FWS expects the Objectors to also argue that, since the Refuge already has some 9,300 acres of land on the original Refuge to create "slough-like" conditions for waterfowl habitat, FWS does not need to create additional habitat on the Brown Ranch. *See* the June 17, 1991, Opponents Prehearing Brief at 7-9. 21/ Accordingly, the Objectors argue that it is not necessary

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20/ Admittedly, under S.D. CODIFIED LAWS ANN. § 46-1-6 (6), the definition of "beneficial use," must also consider whether the appropriator's use of the water is consistent with the interest of the public and in the best utilization of water supplies. Since these two factors more properly deal with the "public interest" prong of S.D. CODIFIED LAWS ANN. § 46-2A-9, they will be discussed in more detail under an ensuing portion of this brief.

21/ This is an interesting argument indeed. FWS submits that *it* (not the Objectors) must determine whether there is sufficient waterfowl habitat to realize FWS' goals. In this (continued...)

for FWS to irrigate the Brown Ranch lands, and that the use of the Lake Creek Water for this purpose is not a beneficial use. *See id.* at 9.

In making the above arguments, the Objectors completely misconstrue FWS' practices and intent. The stated purpose of the subject application is to flood irrigate some 700 acres of land on the Brown Ranch. As stated in more detail above, this flood irrigation process actually accomplishes several important goals. It enhances the growth of wild grasses 22/, and it also provides standing water for the propagation of aquatic plants and insects. The Objectors apparently think that there is some insidious or otherwise impermissible connection between irrigating the wild grass meadows, while at the same time creating impoundments of

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21/ (...continued)
regard, FWS is *always* seeking to provide just as much habitat as is possible. Generally speaking, the greater the habitat, the greater the waterfowl production. In other words, provide the habitat and let Mother Nature take her course. *See*, the deposition of Rolf Kraft at 167 and 171-72. This is not to say, however, that, if habitat is increased, it is axiomatic that waterfowl production will increase. The are other factors (predators for example) that will ultimately affect this process. *See, id.* at 182-83. Nonetheless, as stated previously, all that FWS can do is provide the habitat and then let nature do the rest.

22/ This is completely consistent with administrative rules of the Board which define "irrigation" as:

> the artificial application of water for the purpose of supplying sufficient moisture for plant growth. Disposal of contaminated water is not considered to be irrigation unless other water is used along with the contaminated water.

ARSD 74:02:01:01(2).

standing water for waterfowl habitat. This is simply not true. As stated previously, irrigation of the Brown Ranch lands actually accomplishes multiple beneficial uses. 23/

For the above reasons, the Objectors' claims are without merit and they must not preclude the Board from approving the subject application.

(3). Use Of Appropriated Water To Cultivate Food For Waterfowl On Land That Is Unenclosed And Uncultivated

Lastly, FWS expects the Objectors to assert that FWS' use of the Lake Creek Water is not a beneficial use because it allows appropriated water to be used for the purpose of cultivating food for wildfowl on land that is unenclosed and uncultivated. *See* paragraph II.b of the April 15, 1991, Petition to Oppose Application For Validation of Vested Water Right Claims Nos. 1926-2, 1927-2, and 1921-2. In making this argument, the Objectors

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23/ FWS expects the Objectors to argue that, because many of the wild grass meadows are subirrigated, there is no need to use surface irrigation to supply additional water. *See* for example the June 17, 1991, Opponents Prehearing Brief at 9. This argument must fail for several reasons. First, notwithstanding the subirrigation, particularly in dry years--a common occurrence for this part of South Dakota--the surface irrigation is definitely beneficial to the growth of the wild grasses. Second, coupled with the subirrigation, the application of the surface irrigation creates marshy conditions. Although this might not be an ideal environment for the growth of some grasses that cattle, for example, might prefer to eat, FWS is *not* cultivating the grass for cattle or other livestock. FWS' stated purpose is to provide habitat for *waterfowl*. Accordingly, the addition of surface water onto the subirrigated meadows is definitely beneficial to FWS.

apparently rely on the case of *Lake Shore Duck Club v. Lake View Duck Club*, 50 Utah 76, 80-81, 166 P. 309 (1917) 24/ (State refused to appropriate water for irrigation of unenclosed and unoccupied lands for the *sole* purpose of propagating wild waterfowl). 25/

Concerning the above argument, it is important to note that South Dakota has not adopted this rule. Indeed, as pointed out in the June 15, 1991, Prehearing Brief previously filed by the Water Rights Division of the South Dakota Department of Environ-

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24/ See the June 17, 1991, Opponents Prehearing Brief at 8.

25/ FWS also expects the Objectors to argue that were the Board to adopt a rule stating that it is not a beneficial use to allow water to be appropriated for cultivating food for waterfowl, this:

> would be consistent with the proposed amendments to the general rules adopted by the Department of Water and Natural Resources, Division of Water Rights, and the definition of stock watering found at ARSD 74:02:01:01 as reworded to strike buffalo, deer, elk, antelope and other wild animals that are managed for the public by a governmental agency from that definition of stock watering of animals.

June 17, 1991, Opponents Prehearing Brief at 8.

In responding to the above argument, FWS is not aware, nor have the Objectors pointed out with any specificity, how the adoption of this rule would be consistent with the proposed amendments to the general rules. Indeed, the Objectors have failed to identify precisely what proposed amendments might be involved. Additionally, for purposes of the administrative rules, it seems perfectly logical that buffalo, deer, elk, antelope and other wild animals would be deleted from the definition of "stock watering." Lastly, quite frankly, FWS fails to see any connection between the subject application, the change to the "stock watering" definition, and the rule announced in the *Lake Shore Duck Club* case, *supra*.

ment and Natural Resources, "water used for wildlife habitat is considered to be [a] beneficial use. The Water Management Board has consistently approved applications to use water for wildlife purposes." Prehearing Brief at 6. 26/ Additionally, although there does not appear to be any South Dakota case law on point, at least six other appropriative states recognize that irrigation of uncultivated lands for wild hay, wild meadow, or native grasses is a valid use for which water can be appropriated. 27/

For the above reasons, the foregoing arguments of the Objectors must fail, and must not preclude the Board from approving the subject application.

26/ *See also*, the February 12, 1991, report and recommendation of the Chief Engineer concerning Application No. 1921-2 attached hereto as Exhibit H (the Water Management Board recognizes the use of water for wildlife propagation as a beneficial use). Subject to only a procedural rather than a substantive objection, opposing counsel has stipulated that this document may be admitted into evidence. *See* paragraph 11 of the June 17, 1991, Opponents' Objections to Prehearing Exhibits of Documentary Exhibits.

27/ *See Campbell v. Ingram*, 37 Cal. App. 728, 730-31, 174 P. 366 (1918); *Oliver v. Skinner*, 190 Or. 423, 437-38, 226 P.2d 507 (1951); *In re Silvies River*, 115 Or. 27, 41, 237 P.2d 322 (1925); *Jensen v. Birch Creek Ranch Co.*, 76 Utah 356, 361-62, 289 P. 1097 (1930); *Rodgers v. Pitt*, 129 F. 932, 942 (C.C. D. Nev. 1904); *Anderson Land & Stock Co. v. McConnell*, 188 F. 818, 822 (C.C. D. Nev. 1910); *Rudge v. Simmons*, 39 Idaho 22, 27-28, 226 P. 170 (1924); and *Sayre v. Johnson*, 33 Mont. 15, 19, 81 P. 389 (1905).

(d). Public Interest

FWS expects the Objectors to assert that FWS' use of the Lake Creek Water is not in the public interest because FWS' use of the water results in the flooding of adjoining lands. *See* the June 17, 1991, Opponents Prehearing Brief at 7-9. 28/ Additionally, the Objectors assert the now familiar argument that it is not in the public interest to "irrigate" lands which already have sufficient moisture for cultivation of native grasses and wild hay/meadows. *See id.* 29/ To adequately address the issue of the purported flooding of the Objectors' lands, both from a legal and a factual standpoint, each of the Objector's claims needs to be considered in some detail.

(1). Raymond Kocer Property

Generally speaking, a natural existing channel flows across Mr. Kocer's property in an east-west direction. *See* the May 21, 1992, deposition of Raymond Kocer (on file herein) at 28-29. For

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28/ Recall that a previous portion of this brief discussed the issue of "impairment of existing rights." In that discussion, FWS urged the Board to not consider the real property claims of the Objectors as "impairments of existing rights." Rather, FWS suggested that such claims were more properly considered under the "public interest" test. FWS will now address such claims under this particular test.

29/ FWS believes that it has already adequately addressed this argument in the foregoing portions of this brief. Accordingly, FWS will not further address this argument.

the exact location of this channel, *see also* Exhibit I attached hereto. 30/ Admittedly, surface irrigation water from FWS' Diversion #1 flows through this channel and then back onto FWS property. *See* Mr. Kocer's deposition at 29. *See also* the May 21, 1992, deposition of Rolf Kraft at 20-21. FWS expects Mr. Kocer to claim that the water in this channel floods his lands. *See* Mr. Kocer's deposition at 29.

Concerning the above claims of Mr. Kocer, it is important to note several facts. First, Mr. Kocer expressly gave FWS permission to run surface irrigation waters through the naturally existing channel described above. *See id.* at 31. Indeed, Mr. Kocer has admitted that he thinks having the water run through this channel would be good for his lands. *See id.* at 32. 31/ Concerning Mr. Kocer's permission to run surface irriga-

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30/ Exhibit I is a copy of a map which is substantively identical to the map which FWS originally submitted with its application (a copy of which has previously been attached hereto as Exhibit A). The only difference between Exhibits A and I is that the latter exhibit uses hand-written notes to identify certain locations. Many of these locations are critical to an understanding of these proceedings. Accordingly, to better understand these matters, FWS believes that Exhibit I will be a useful tool. Opposing counsel has not yet had an opportunity to review this exhibit. However, given the fact that it is virtually identical to Exhibit A, FWS trusts that opposing counsel will not object to the admission of Exhibit I.

31/ It should be noted that Mr. Kocer's consent was contingent upon FWS shutting off the surface irrigation flows in sufficient time to allow Mr. Kocer to hay (usually by late July). *See* his deposition at 36. Although Mr. Kocer believes that FWS has not complied with this condition (*see*, for example, his deposition at 35), at the hearing, FWS will adduce contrary evidence showing that it has made every best and reasonable

(continued...)

tion water through this channel, at the hearing, FWS will adduce evidence showing that, sometime in the Spring of 1992, Mr. Kocer rescinded this permission. However, the evidence will also show that, immediately upon learning this, FWS took appropriate measures to stop the flow of the surface irrigation waters. *See*, for example, the deposition of Mr. Kraft at 138. This resulted in a drastic reduction of water on Mr. Kocer's land. *See* Raymond Kocer's deposition at 50-51. In sum, until this very year, based on an understanding that the flow of the water across Mr. Kocer's lands would be mutually beneficial to both parties, FWS has always believed that it had permission to run water through this channel.

Second, the evidence will show that, irrespective of FWS' irrigation practices, this naturally existing channel also receives some drainage (particularly during spring run-off and heavy rainfall) from the watersheds to the north and northwest of Mr. Kocer's property. Obviously, FWS has no control over this natural occurrence.

31/ (...continued)
effort to abide by this condition. *See* the deposition of Mr. Kraft at 113-114. The evidence will also show that, on many instances where Mr. Kocer has complained that his property was wet, a heavy rainfall had previously occurred. Mr. Kocer admits to this fact. *See*, for example, his deposition at 59-60. On another occasion when Mr. Kocer complained, the evidence will show that a certain individual, acting on his own and without permission from FWS, opened up an irrigation control structure which resulted in excess water on Mr. Kocer's property after the July cut-off date. *See*, for example, Mr. Kraft's deposition at 177-78. Obviously, FWS cannot control nature or the intentional wrongful acts of others.

For the above reasons, Mr. Kocer has not, will not be able to prove that FWS' use of the Lake Creek Water is contrary to his "public interest." Hence, Mr. Kocer's assertions should not preclude the Board from approving the subject application.

(2). CHARLES EMLEY PROPERTY

(a). Elm Creek

FWS expects Mr. Emley to allege that FWS' practices flood two separate property areas. The first is where Elm Creek runs through his property and then onto FWS land (for the exact location of this property, *see* Exhibit I attached hereto). More specifically, FWS expects Mr. Emley to allege that the water in Elm Creek "runs real good" until it hits the Refuge boundary fence (which runs in an east-west direction (the flow of Elm Creek is from the south to the north). *See* Mr. Emley's May 20, 1992, deposition (on file herein) at 21. Mr. Emley also claims that, to the north of the afore-mentioned Refuge boundary fence, FWS has put culverts with controls in them into the channel of Elm Creek. *See id.* at 25. This purportedly causes sand to "dump out" of the creek, which in turn builds up the stream bed. This further results in water backing onto Mr. Emley's property. *See*

id. at 26-27. 32/ As a consequence, Mr. Emley wants FWS to dredge the Elm Creek channel on the north side of the Refuge boundary fence. *See id.* at 29-30. 33/

Mr. Emley's arguments concerning Elm Creek must fail, and the Board should not give them any further consideration. More specifically, from reading the subject application, it is obvious that FWS is attempting to obtain a permit to appropriate water from *Lake* Creek. 34/ Concerning this particular piece of property, Mr. Emley's complaints all pertain to purported flooding caused by *Elm* Creek. It is true that the waters from Elm Creek do run through Mr. Emley's property and eventually onto Refuge lands. However, contrary to what Mr. Emley would have the Board believe, there is absolutely no connection between this fact and the relief that FWS is seeking in the subject application. Accordingly, even assuming, *arguendo*, that there is some validity to Mr. Emley's complaints, the instant proceeding is *not* the proper forum for Mr. Emley to air such complaints. The principles of fairness and administrative economy demand that the

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32/ For a "scientific" explanation of what is happening, *see* note 44, *infra*.

33/ It is worthy to note that, concerning the Elm Creek situation, Dr. Perry Rahn, one of the experts retained by the Objectors has stated that dredging would "not even [be] a solution." *See* Dr. Rahn's May 19, 1992, deposition (on file herein) at 36.

34/ FWS' other applications under consideration pertain to the appropriation of water from the Springs, and the amendment of a permit whereby water is appropriated from Cedar Creek.

Board not spend its time hearing complaints which have no logical nexus or relevancy to the subject application. For these same reasons, FWS should not be required to expend its time and resources to defend such claims.

For all of the above reasons, it is obvious that Mr. Emley does not have a sufficient basis to argue that the relief which FWS seeks is contrary to his public interest. Accordingly, the Board must dismiss Mr. Emley's complaints, not allow Mr. Emley to cloud the issues and clutter the instant proceedings with such complaints, and find that Mr. Emley's complaints do not preclude the Board from approving the subject application.

(b). "Church Property"

(1). Issues Pertaining To Standing And The Joinder Of The Episcopal Church As A Necessary Party To This Proceeding

The second property area about which Mr. Emley complains is the so-called "Church" property. This is so because Mr. Emley currently leases (and apparently has leased for many years) this tract of land from the Episcopal Church. *See* Mr. Emley's deposition at 6. 35/ FWS expects Mr. Emley to assert that FWS' practices flood and otherwise cause damage to this property.

35/ For the exact location of this property, *see* Exhibits A and I attached hereto.

Before further analyzing the above assertions, however, Mr. Emley's status as a mere lessee of the Church property (rather than the fee owner), raises some significant legal questions that must be considered. More specifically, absent participation of the Church in these proceedings: (1) does Mr. Emley even have standing to object to FWS' application; and (2) notwithstanding the question of Mr. Emley's standing, is the Church a necessary party to these proceedings?

Even assuming, *arguendo*, that Mr. Emley does have standing to object to the subject application, South Dakota statutory law provides that:

> A person who is subject to service of process shall be joined as a party in the action if . . . in his absence complete relief cannot be accorded among those already parties[.] . . . If he has not been so joined, the court shall order that he be made a party. . . .

S.D. CODIFIED LAWS ANN. §15-6-19(a)(1) & (2) (1984). Applying the above statute to the instant proceeding 36/, there is no question that the Church is subject to service of process. Additionally, absent the Church's presence in these proceedings, it is clear that complete relief cannot be accorded between the

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36/ Admittedly, S.D. CODIFIED LAWS ANN. § 15-6-19(a) is a Rule of Civil Procedure for Circuit Courts which does not expressly pertain to proceedings before the Board. However, the General Administrative Rules of the Board do not address the instant factual and legal setting. Accordingly, for purposes of this proceeding, FWS urges the Board to abide by the provisions of the above statute. Certainly, it would not be an abuse of discretion for the Board to do so, nor would such an action offend the principles of justice, equity, or fairness.

parties. 37/ For the above reasons, FWS strongly urges the Board to find that, pursuant to

S.D. CODIFIED LAWS ANN. § 15-6-19(a), the Church should be joined as a necessary party to these proceedings. *See also Shangreaux v. Westby*, 281 N.W. 2d 590, 592 (S.D. 1979) (where a person is a necessary party for a just adjudication and joinder is feasible, the trial court must order joinder).

(2). FWS' Acquisition Of A Prescriptive Easement On The Church Property

No matter how the Board ultimately decides the above jurisdictional and procedural issues, for purposes of this brief, the substantive issues pertaining to the Church property must still be considered. Basically, FWS expects facts to be adduced at the hearing which will show that FWS has, since it acquired the Brown Ranch in 1971, openly and continuously run surface irrigation water across the Church Property in a certain naturally existing channel. For the location of this channel, *see* Exhibits A and I attached hereto (the channel generally bisects the Church property in an east-west direction). Among other things, FWS expects

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37/ Obviously, Mr. Emley does not want FWS surface irrigation waters on this property. However, he is only a lessee of the property. Even though he has leased this property for some time, there is no guarantee that he will continue to do so after his current lease expires. Indeed, logic dictates that, at *some* point in time, Mr. Emley will in fact *not* be a lessee of the property. On the other hand, as the fee owner of the property, the Church may or may not agree with the position of its current lessee. Since the Board's ruling will ultimately affect this particular situation, absent the Church's presence, complete relief cannot be accorded between the parties.

Mr. Emley to allege that he does not want the water to flow through this channel because it purportedly causes flooding of the Church property. Additionally, FWS expects Mr. Emley to allege that, in certain locations, FWS' irrigation waters ultimately seep or "pipe" through the subsurface from FWS' property onto the Church Property.

The above arguments of Mr. Emley must be analyzed in context with the appropriate law. Several laws apply to the instant proceeding. First, S.D. CODIFIED LAWS ANN. § 46-5-2 (1987) provides that:

> Any person owning land through which any nonnavigable stream passes, may construct and maintain a dam across such nonnavigable stream if the course of the water is not changed, vested rights are not interfered with, and no land flooded other than that belonging to the owner of such dam *or upon which an easement for such purposes has been secured.* 38/

Emphasis added.

Second, S.D. CODIFIED LAWS ANN. § 43-14-2 (1983) provides that:

38/ The Objectors rely upon this very same statute in arguing that, because it results in the flooding of adjoining lands, FWS has no right to construct diversions (dams) on Lake Creek. *See* the June 17, 1991, Opponents Prehearing Brief at 12. In making this argument, however, the Objectors fail to take into account the part of the statute pertaining to the securing of an easement. As will be shown in more detail, *infra.*, FWS has acquired a prescriptive easement across the affected portions of the Church property. Therefore, the Objectors' reliance on SOUTH DAKOTA CODIFIED LAWS ANN. § 46-5-2 and the case of *Willadsen v. Crawford*, 60 N.W. 2d 692 (S.D. 1953) (*see id.*) (flooding includes the seepage of water onto others' lands because of an increased water level in the river due to the construction of a dam), is misplaced, and must be disregarded.

> Occupancy for any period prescribed by any law of this state as sufficient to bar an action for the recovery of property, confers a title thereto denominated a *title by prescription, which is sufficient against all.*

Emphasis added.

Third, a venerable principle of South Dakota State law holds that:

> The right of flooding another's land is an *easement*, the acquisition of which, *by prescription*, requires, *inter alia*, continuous enjoyment for the period of the statute of limitations governing actions for the recovery of real property, *which, in this state, is 20 years*.

Shearer v. Hutterische Bruder Gemeinde, 28 S.D. 509, 134 N.W. 63, 64 (1912) (citations omitted), *cited with approval* in *Shippy v. Hollopeter*, 304 N.W. 2d 118, 121 (S.D. 1981) (emphasis added).

Lastly, the South Dakota Supreme Court has held that:

> The prevailing rule is that where a claimant has shown an *open, continued and unmolested* use of land for a period of time sufficient to acquire an easement by adverse user 39/, the use will be presumed to be under a claim of right. The owner of the servient estate, *in order to avoid the acquisition of an easement by prescription, has the burden of rebutting this presumption by showing that the use was permissive.*

Kougl v. Curry, 73 S.D. 427, 44 N.W. 2d 114, 117 (1950) (citations omitted) (emphasis added).

Applying the above principles to the instant proceeding, it is undisputed that FWS owns the Brown Ranch, and that Lake Creek flows through this property. Accordingly, provided that FWS

39/ *I.e.*, the 20 year period cited in the *Shearer* and *Shippy* cases, *supra*.

secures a flowage easement across the lands of others, it clearly has the right to construct a dam (or dams) on Lake Creek and to divert water from such structure(s) to irrigate its land. *See* S.D. CODIFIED LAWS ANN. § 46-5-2. FWS can acquire this easement by prescription, which is "sufficient against all." *See* S.D. CODIFIED LAWS ANN. § 43-14-2. For FWS to acquire such a prescriptive easement, it must openly and continuously enjoy the land for a period of 20 years. *Shearer* and *Shippy*, *supra*. If the preceding conditions are met, by presumption, the law vests in FWS a prescriptive easement. *See Kougl*, *supra*. For the Objectors to successfully rebut this presumption, they must do so by proving that FWS' use of the property was permissive. *See id.*

In the instant case, for more than 20 years, *i.e.*, since it acquired the Brown Ranch in 1971, FWS has openly and continuously been running water through the naturally occurring channel on the Church property. 40/ Additionally, even assuming that there is some validity to Mr. Emley's "seepage" claims, this has also been happening openly and continuously for at least 20 years. 41/ These uses have not been permissive. 42/ According-

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40/ *See* the deposition of Mr. Emley at 10 (the problems with FWS have been occurring since FWS acquired the Cedar Creek Cattle Ranch from the Browns).

41/ *See, id.*

42/ Mr. Emley states that he has been leasing the Church Property for "probably 30 years or more." *See* his deposition at 6. During this period of time, he has never given FWS or anybody else permission to move the water across this land. Indeed, the (continued...)

ly, by operation of law, FWS has undeniably acquired a prescriptive easement across the affected portions of the Church property.

For the above reasons, Mr. Emley's complaints about the flooding of the Church property do not rise to the level of being contrary to the public interest. Indeed, given the fact that the law has vested a prescriptive easement in FWS, Mr. Emley has no claim at all. Consequently, Mr. Emley's complaints are without merit and must be disregarded. For this reason, the Board should find that Mr. Emley's complaints do not preclude the Board from approving the subject application.

(3). LAWRENCE KOCER PROPERTY

Generally, FWS expects Mr. Kocer's objections to center on FWS' practices on what will be called the Old Refuge, *i.e.*, that portion of the Refuge which was originally acquired and established in 1935, and which has existed since then. 43/ More

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42/ (...continued)
evidence will show that Mr. Emley has openly complained about this situation. *See*, for example, his deposition at 11.

43/ To better understand Mr. Kocer's objections, some background information will be useful. As the water in Lake Creek flows from the west to the east through the Brown Ranch, it eventually flows through Mr. Brett Heath's land, and then onto the Old Refuge. At this point on the Old Refuge, pursuant to a previous water permit granted to FWS, FWS has constructed various dikes and diversion structures which create several impoundments or pools of standing water. For example, "Pool 7" is shown on Exhibit I.

specifically, FWS expects Mr. Kocer to complain that the creation of the diversions and pools on the Old Refuge causes the flow of Lake Creek to slow down, which in turn backs water up onto his property. *See* the May 21, 1992, deposition of Mr. Kocer at 9 and 13-14. 44/ However, for the following reasons, Mr. Kocer's complaints concerning the purported flooding of his lands must fail.

(a). Mr. Kocer Has "Come To The Nuisance"

At common law, the doctrine of "coming to the nuisance" was an absolute bar to recovery by the complainant. *See, Carpenter v. Double R Cattle Co.*, 105 Idaho 320, 669 P.2d 643, 655 (Ct. App. 1983). The common law has gradually evolved to where the above doctrine is no longer an absolute bar to recovery. However, it is still a factor that must be considered under a totality of all the circumstances. *See id., citing Kellogg v. Village of Viola*, 67 Wis. 2d 345, 227 N.W. 2d 55 (1975) and *Spencer*

44/ From a more scientific standpoint, FWS expects the Objectors to adduce expert testimony at the hearing which will show that, when the water from Lake Creek flows onto the Old Refuge and hits a diversion structure in the vicinity of Pool 2, the flow does in fact slow down, which in turn causes sediment from the creek to settle out into the stream bed. This eventually forms a delta. *See* the May 19, 1992, deposition of Dr. Perry H. Rahn (on file herein) at 12. Due to the so-called "backwater curve" (*see id.* at 19), this aggradation of the stream bed can potentially cause upstream flooding. *See id.* at 20. It is important to note that FWS does not necessarily disagree with the above-stated principles. *See*, for example, the June 8, 1992, deposition of Robert G. Green (on file herein) at 18-19 and 49.

Creek Pollution Control Ass'n v. Organic Fertilizer Co., 264 Ore. 557, 505 P.2d 919 (1973).

Applying the above principles to the instant proceeding, although FWS cannot successfully argue that Mr. Kocer's complaint is absolutely barred because Mr. Kocer has "come to" the problems which FWS' practices might have caused on his land, this is certainly one factor which the Board must consider. More specifically, Mr. Kocer cannot deny that his father purchased the subject property sometime in either 1955 or 1957. *See* Mr. Kocer's deposition at 8. Recall that the Old Refuge was established in 1935. Therefore, for some *20 years* before the Kocers ever obtained this property, FWS had been carrying on its practices at the Old Refuge. Hence, to the extent that Lake Creek is slowing down and causing sediment to build up in the Lake Creek channel, this was happening well before the Kocers ever obtained title to this property. In sum, to the extent that an aggradation problem exists, the Kocers "bought into" this problem. In other words, they "came to" an already existing "nuisance." From the Kocers' standpoint, this is regrettable, but undeniably true. In any event, Mr. Kocer's contentions to the contrary, FWS is not now responsible for a problem that has historically existed for years, and which the Kocers "inherited" when they purchased this property.

What other factors should the Board consider? It must be remembered that the subject application deals with diversions of water from Lake Creek to irrigate lands on the *Brown Ranch*. What FWS has historically done or is currently doing on the Old Refuge has absolutely nothing to do with the relief which FWS is seeking in the subject application. The only common thread between FWS' irrigation of the Brown Ranch and the way FWS has managed the Old Refuge is Lake Creek. However this thread is just too slim, and does not constitute a sufficient nexus to enable Mr. Kocer to use the instant proceedings to air his complaints. It may very well be that, as a result of FWS' practices on the Old Refuge, Mr. Kocer has a claim against FWS. However, such a claim must be heard in a separate forum and under the auspices of a different proceeding. It simply is not administratively economical for the Board, in the instant proceeding, to hear *every* claim--however remote and irrelevant--that Mr. Kocer (or the other Objectors) might desire to bring.

For the foregoing reasons, Mr. Kocer's complaints simply do not pass muster, must be disregarded, and must not preclude the Board from approving the subject application.

(b). FWS' Acquisition Of A Prescriptive Easement On Mr. Kocer's Property

Even assuming, *arguendo*, that there is some validity to Mr. Kocer's claims, and that the Board decides this is the proper

forum to hear such claims, for the same reasons as those analyzed under the discussion of Mr. Emley's property, Mr. Kocer's complaints must be disregarded. More specifically, for the following reasons, FWS has, by operation of law, acquired a prescriptive easement across the affected portions of Mr. Kocer's property. Lake Creek flows through the Old Refuge. FWS has a statutory right to construct a dam (or dams) on this creek. If this results in the flooding of Mr. Kocer's lands, provided that FWS has an easement, this is permissible. If FWS continuously and openly uses the land for a period of 20 years (without the permission of the landowner), FWS can acquire this easement by prescription. As previously stated, Mr. Kocer's father acquired the subject lands sometime in either 1955 or 1957. Accordingly, to the extent that flooding has occurred on these lands, it has been happening since the Kocers acquired their property in 1955 or 1957. 45/ Indeed, to the extent that flooding has occurred, it has been happening since the establishment of the Refuge in 1935--well before the Kocers even bought their property. Thus, the "20 year" test for prescriptive easements has been met. Finally, to the extent that flooding has occurred, the evidence will show that it has not been permissive. 46/ Consequently, by

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45/ *See*, for example, Mr. Kocer's deposition at 14: "[E]ver since I can remember, there's always been water down there. . . . Then back when I was just a kid, I can remember water sitting down there."

46/ *See*, for example Mr. Kocer's deposition at 22-23: "[W]e used to go over and talk with all the Refuge personnel--not all of them, but the Manager or whoever was there and com-

(continued...)

operation of law, FWS has acquired a prescriptive easement on the affected portions of Mr. Kocer's property. For this reason, there is no basis to Mr. Kocer's complaint that purported flooding of his property is contrary to the "public interest", and this complaint must not preclude the Board from approving the subject application.

(4). BRETT HEATH PROPERTY

(a). Generally

FWS expects Mr. Heath to lodge various complaints about the purported flooding of his land. Mr. Heath's main complaint appears to be virtually identical to that lodged by Mr. Lawrence Kocer. Namely, that the structures and impoundments on the Old Refuge slow the flow of Lake Creek, which in turn causes sand to filter out of the creek. This raises the elevation of the creek bed which results in water flowing back onto Mr. Heath's land. *See* Mr. Heath's May 21, 1992, deposition (on file herein) at 58-59. FWS expects Mr. Heath to also claim that FWS diverts water from Lake Creek and from Cedar Creek which

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46/ (...continued)
plain to them about the water . . . . It goes all the way back to when Ken Krumm was here . . . . He was the Refuge Manager in the 1950s, early '50s."

ultimately flows back onto his lands. 47/ *See* Mr. Heath's deposition at 10.

(b). Mr. Heath Has "Come To The Nuisance"

Concerning Mr. Heath's claims about FWS' practices on the Old Refuge, it is undisputed that Mr. Heath's father bought the subject property in 1951. *See* Mr. Heath's deposition at 6. As previously stated, the Refuge was established in 1935. Therefore, for the exact same reasons as those discussed for Mr. Lawrence Kocer's property, *i.e.*, because the Heaths "came to" an already existing "nuisance," Mr. Heath's claims are without merit and they must fail. More specifically, to the extent that FWS' practices on the Old Refuge have flooded Mr. Heath's land, this same flooding has been occurring since the establishment of the Refuge in 1935 (and possibly even before that)--at least

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47/ Obviously, these allegations involve factual matters. Although it will not take to do so in this brief, at the hearing, FWS will adduce facts which will prove that, to the extent Mr. Heath's lands are flooded by Lake Creek, as a result of his intentional acts, Mr. Heath is actually contributing to such flooding. Concerning purported flooding from Cedar Creek, at the hearing, FWS will adduce facts which will show that, to the extent flooding is occurring, it does *not* result from FWS' diversions from Cedar Creek. Rather, it is a natural occurrence. Accordingly, Mr. Heath is simply mistaken concerning this particular allegation. Aside from the factual matters discussed above, to the extent that the Board might find some validity to Mr. Heath's claims concerning the purported flooding of his lands from Lake Creek or Cedar Creek diversions, for the same reasons discussed in more detail in other portions of this brief, by operation of law, FWS has acquired prescriptive easements across the affected portions of Mr. Heath's lands. Accordingly, Mr. Heath's claims are without merit, and they must fail.

16 years before the Heaths ever bought their property. Hence, when the Heaths bought this property, it is unfortunate but true that they too "bought into" an already existing problem. Despite Mr. Heath's fervent desires to the contrary, FWS is simply *not* responsible for a situation that naturally existed well before the Heaths bought the property.

Moreover, for precisely the same reasons as those discussed for Mr. Lawrence Kocer's property, because they bear no relevancy or logical nexus to the subject application, the allegations of Mr. Heath pertaining to FWS' practices on the Old Refuge are not worthy of further consideration. To reiterate, the subject application deals with diversions of water from Lake Creek to irrigate lands on the *Brown Ranch*. What FWS has done or is currently doing on the Old Refuge has absolutely nothing to do with the relief which FWS is seeking in the subject application. Accordingly, the Board should not expend its time, nor should FWS be required to exhaust its resources defending this specious claim. 48/

48/ This is even more so for the following reasons. Concerning the Heath property, there has been a long-standing dispute between Mr. George Heath (Brett's father) and FWS. For the exact same reasons as those discussed in more detail above, as early as 1959, Mr. Heath complained to FWS about Lake Creek silting up with sand, and consequently flooding his property. *See* Exhibit J attached hereto (a memorandum to the file prepared by the then Refuge Manager, C.A. Hughlett). On or about June 3, 1976, this long-standing dispute eventually culminated in Mr. Heath filing a formal claim against the United States. *See* Exhibit K attached hereto (a June 3, 1976, letter from Mr. Heath's counsel to the then Secretary of the Interior). However, (continued...)

(c). FWS Has Acquired Prescriptive Easements Across Mr. Heath's Property

Lastly, for the same reasons as those discussed for Mr. Lawrence Kocer's property, since FWS has, by operation of law, acquired a prescriptive easement across the affected portions of Mr. Heath's land, Mr. Heath's allegations must be disregarded. More specifically, to the extent that flooding has occurred, it has been happening openly and continuously for at least 20 years 49/. FWS' use of the Heath property has not been permissive. 50/ Accordingly, Mr. Heath's allegations are without merit and they must fail. Moreover, they should not preclude the Board from approving the subject application.

48/ (...continued)
as evinced by Exhibit L attached hereto (a September 1, 1976, letter from the Office of the Solicitor, U.S. Department of the Interior to Mr. Heath), pursuant to 28 U.S.C. § 2401(b), it was determined that Mr. Heath's claim was barred. As indicated on Exhibit L, upon the administrative denial of his claim, Mr. Heath was afforded the opportunity to file suit in the United States District Court. To the best of FWS' knowledge, Mr. Heath has never pursued this remedy. Accordingly, pursuant to Federal law, his claim is now forever barred. Brett Heath is now merely attempting to use this forum as a vehicle to accomplish that which the law already clearly, definitively, and unequivocally precludes him from doing. For these reasons, the Board should not allow Mr. Heath to "cloud" the subject proceedings with this particular allegation. (Note that Exhibits J, K, and L have not been stipulated into evidence by the Objectors. However, pursuant to a discovery request, such exhibits have previously been supplied to opposing counsel. Therefore, FWS has no reason to believe that opposing counsel will challenge the admissibility of these exhibits into evidence.)

49/ Exhibit J demonstrates that the flooding has occurred since at least 1959.

50/ As previously explained, from at least 1959, there has been a long-standing history of complaints from Mr. Heath to FWS.

(5). THE "PUBLIC INTEREST" AS IT PERTAINS TO ALL OF THE PARTIES

Notwithstanding all of the foregoing arguments, one overriding principle must still be considered. The United States Supreme Court has heretofore held that, "[t]he protection of migratory birds has long been recognized as *'a national interest of very nearly the first magnitude.'*" *North Dakota v. United States*, 460 U.S. 300, 309 (1983), *quoting Missouri v. Holland*, 252 U.S. 416, 435 (1920) (emphasis added).

Applying the above principle to the subject case, the purposes and goals of the LaCreek NWR must indeed be given a priority "of very nearly the first magnitude." Consequently, the Board should not have any difficulty in finding that what FWS is seeking is, indeed, in the public interest of not only the nation, but especially the citizenry of the State of South Dakota. This is particularly so because, as recognized in the *North Dakota* case, *supra.*, "[t]he principal waterfowl breeding grounds in the continental United States are located in four States of the northern Great Plains--North Dakota, *South Dakota*, Minnesota, and Montana." 460 U.S. at 304 (emphasis added).

This is not to say that the Refuge's goals of protecting and creating habitat for migratory waterfowl necessarily take precedence over the individual property rights of the Objectors. FWS desires to be a good neighbor, and it is sympathetic to the

Objectors' claims. However, in cases such as the instant proceeding, an overall consideration of a totality of the circumstances, and some balancing may very well be necessary. As stated in the case of *Romey v. Landers*, 392 N.W. 2d 415 (S.D. 1986), "[t]he state's authority to regulate water use is a *police power*." 392 N.W. 2d at 421, *citing Knight v. Grimes*, 80 S.D. 517, 527, 127 N.W. 2d 708, 713 (1964) (emphasis added). Moreover, the South Dakota Supreme Court has held that:

> *All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded*, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the *police power* of the state. The boundary at which the conflicting interests *balance* cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by the decisions that this or that concrete case falls on the nearer or farther side.

Knight v. Grimes, 127 N.W. 2d 708, 712 (S.D. 1964), *quoting Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908) (emphasis added).

In other words, South Dakota's exercise of the police power may well, and as a practical matter, very frequently does, involve the balancing of conflicting interests and supposedly "absolute" rights.

The instant proceeding involves a classic case of conflicting interests between the Objectors and FWS. In carrying out its statutory mandate, the Board must balance these interests. FWS

realizes that the Objectors consider their individual property rights to be inviolate. With this as a premise, FWS understands that the Objectors have intense personal feelings and prejudices concerning the subject proceedings. However, because of these very feelings and long-standing prejudices, the Objectors are not able to look at the situation objectively. In deciding the subject case, however, the Board must remain completely objective, and not allow itself to be swept up by the tide of the Objectors' personal passions. Concerning the Objectors' allegations, the Board must realize that, no matter how strong and even well-intended, such allegations are hollow and without any real legal substance. The Board therefore faces the difficult but necessary task of balancing the empty, albeit heartfelt, claims of the Objectors against the Refuge's absolute need to have the water right which it seeks. Quite simply, without this water right, FWS cannot accomplish the mission and goals of the Refuge. In balancing these competing interests, for all of the reasons that have been set forth in more detail, *supra.*, FWS is confident that the Board will faithfully discharge its duty and find that the "public interest" will indeed be served if it approves the subject applications. For these reasons, the Board should approve the subject application.

II. APPLICATION NO. 2191-2 (FORMERLY 1926-2)

A. DESCRIPTION OF REQUESTED RELIEF

In Application No. 2191-2, FWS has applied for a permit to appropriate some 4.44 CFS of water. This is a new application with a priority date to be established as of the date that FWS filed the application. As stated in the application, the beneficial use of this water is to create, on some 235 acres of land, marsh, sloughs, and wet meadows for waterfowl propagation and enhancement of wildlife habitat. The water to be appropriated (hereafter "the Springs Water") comes from six natural springs (hereafter "the Springs") located to the South of Lake Creek. The Springs are designated by the letters A through F on Exhibits A and I. For purposes of this brief, FWS will not provide a detailed legal description of the Springs' locations or the areas they irrigate. 51/

51/ Such detailed information is contained in the application which FWS has filed with the Board.

B. GENERAL STATEMENT OF FACTS WHICH FWS WILL PROVE IN SUPPORT OF THE REQUESTED RELIEF

At the hearing of the captioned matter, FWS expects to adduce evidence which will prove the following. 52/ LaCreek NWR was established by Executive Order dated August 26, 1935, and was established as a refuge and breeding ground for migratory birds and other wildlife. On September 2, 1971, FWS expanded the boundaries of the Refuge by acquiring title to the Brown Ranch. The Springs Waters are located on the Brown Ranch. To enhance and create additional habitat for waterfowl and wildlife, FWS diverts water from the Springs in the manner described in the subject application. As explained in the application, the diverted water is used to create various marshes, sloughs, and wet meadows for waterfowl propagation and habitat. As explained in more detail in a foregoing portion of this brief, the creation of these impoundments actually accomplishes several goals: (1) it enhances the growth of the wild grasses (particularly in dry years), which in turn provides shelter and food for the waterfowl; (2) it creates water impoundments which give young waterfowl critical protection from predators; and (3) it provides a medium for the growth of aquatic plants, which in turn provide critical habitat for aquatic insects. These aquatic insects

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52/ Many of the facts pertaining to this application are virtually identical to those set forth above for Application No. 1927-2. Accordingly, these facts will not be repeated in detail here. However, a brief statement of the salient facts will again be provided.

comprise a significant portion of a young waterfowl's diet, and also provide high protein necessary for the egg laying of roosting waterfowl. The Chief Engineer, Department of Environment and Resources, Division of Water Rights, has recommended that this application be approved. 53/

C. ANALYSIS OF ISSUES WHICH MIGHT ARISE AT THE HEARING

Generally speaking, FWS expects the Objectors to allege that its use of the Springs Water unlawfully impairs their existing rights in that it damages their crop land, aggravates saline problems, and impairs the use of water by the Objectors. *See* paragraph IV.a of the January 16, 1992, Petition to Oppose Application for Water Permit No. 2191-2. Moreover, FWS expects the Objectors to allege that its use of the Springs Water is not beneficial because it does not develop good forage for wildlife, and allows the appropriation of water for cultivating food for wildfowl on land that is unenclosed and uncultivated. *See, id.* at paragraph IV.b. Lastly, FWS expects the Objectors to allege that, since FWS already has sufficient water to handle its needs, FWS' use of the Springs Water is not in the public interest because it constitutes waste. *See, id.* at paragraph IV.c.

53/ *See* the September 23, 1991, Report on Water Permit Application No. 2191-2 attached hereto as Exhibit M. Opposing counsel has not yet stipulated to the admission of this exhibit into evidence. However, FWS has no reason to suspect that opposing counsel will not do so.

The above arguments are not unique. FWS has fully addressed them in the preceding portions of this brief. Nonetheless, it is worthy to note that, the only Objector who would even arguably have a claim against FWS for its use of the Springs Water would be Brett Heath, *i.e.*, his is the only land that possibly *could* be flooded by the Springs. Yet, as far as FWS can tell, Mr. Heath has not alleged any damage to his property resulting from the Springs Water. 54/

For the above reasons, there is absolutely no merit to the Objectors' contentions concerning the Springs Water. Indeed, it would appear that the Objectors have contested this application solely as a means to create prejudice against FWS and cloud the real issues. Consequently, such contentions must be disregarded and must not preclude the Board from approving the subject application.

54/ To the best of FWS' knowledge, as discussed in more detail, *supra.*, Mr. Heath has alleged damage to his property only from FWS' practices on the Old Refuge, diversions from Lake Creek, and diversions from Cedar Creek. To the extent that Mr. Heath *might* allege damage to his property from the Springs Water, it is important to note that, for the most part, the Springs Water *naturally* flows from the individual springs to already existing marshes, ponds, and natural drainages. Therefore, to the extent that Springs Water might be inundating Mr. Heath's lands, it is doing so as it *naturally* has done from time immemorial. Accordingly, FWS is *not* (nor has it ever), by its use of the Springs Water, contributed to any purported flooding of Mr. Heath's property. Quite simply, FWS is not, nor should it be, held responsible for the acts of nature.

III. APPLICATION NO. 1921-2

A. DESCRIPTION OF REQUESTED RELIEF

In this application, FWS seeks to amend existing water permit No. 265-2 by changing the diversion points and the acreage covered to reflect the current situation on the ground. More specifically, existing Water Permit No. 265-2 appropriates some 4.45 CFS of water from Cedar Creek to irrigate some 366 acres. As stated on the existing permit, the point of diversion was located in the SW1/4 SW1/4, Section 25, Township 36 North, Range 37 West, Bennett County, South Dakota. By this application, FWS seeks to change this diversion point to the SE1/4 NW1/4, Section 25, Township 36 North, Range 37 West. 55/

Additionally, the acreage covered under existing Water Permit No. 265-2 is located in the S1/2 NW1/4, S1/2 NE1/4, N1/2 SE1/4, Section 25, Township 36 North, Range 37 West, and the SW1/4, S1/2 NW1/4, Section 30, Township 36 North, Range 36 West. The subject application requests to change the acreage covered by the permit to the N1/2, SW1/4, N1/2 SE1/4, Section 25, SE1/4, SE1/4 NE1/4, Section 24, all in Township 36 North, Range 37 West,

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55/ It is necessary to change this diversion point because the previous diversion point has washed out and will not be replaced. *See*, the deposition of Rolf Kraft at 31.

and the E1/2, Section 19, Township 36 North, Range 36 West--a total of some 362 acres and 4.45 CFS of water.

If approved, this application would give FWS the same priority date as that of the original appropriator--May 20, 1933 (see below for further details concerning this appropriation date).

B. GENERAL STATEMENT OF FACTS WHICH FWS WILL PROVE IN SUPPORT OF THE REQUESTED RELIEF

At the hearing of the subject application, FWS expects to adduce facts showing the following. Mr. Birthol Brown originally obtained the subject water permit on or about September 1, 1933, with an appropriation date of May 20, 1933. 56/ Mr. Brown appropriated some 4.45 CFS of water from Cedar Creek (hereafter, "the Cedar Creek Water") for irrigation, water power development, and domestic use. 57/ When FWS acquired the Brown Ranch in 1971, it also acquired this water right. Since it acquired this water right, FWS has continuously used the Cedar Creek Water to flood irrigate portions of the Brown Ranch. The Chief Engineer has recommended that this application be granted. *See* the February 12, 1991, Report on Water Permit Application No. 1921-2 previously attached hereto as Exhibit H.

56/ *See* the Application for Permit to Appropriate Water Within the State of South Dakota attached hereto as Exhibit N. The Objectors have previously stipulated this document into evidence. *See* paragraph 6 of the June 17, 1991, Opponents' Objections to Prehearing Exhibits of Documentary Exhibits.

57/ *See*, Exhibit N.

C. ANALYSIS OF ISSUES WHICH MIGHT ARISE AT THE HEARING

SOUTH DAKOTA CODIFIED LAWS ANN. § 46-2A-12 (1987) clearly applies to the subject application. This statute provides that:

> An amendment of an existing permit or license may be granted for a change in use, *a change in point of diversion or other change* only if the change does not unlawfully impair existing rights and is for the beneficial use and in the public interest.

Emphasis added.

Using the above statute as a basis, FWS expects the Objectors to lodge the now familiar arguments that amending the subject permit will unlawfully impair existing rights, not result in a beneficial use, and not be in the public interest. *See* the June 17, 1991, Opponents Prehearing Brief at 15. 58/ These legal issues have already been discussed in detail, *supra*. Accordingly, these issues will not be further discussed here. Suffice it to say, however, that to the extent that flooding has occurred on Mr. Heath's property from Cedar Creek, for those same reasons set forth under the discussion of Mr. Heath's property, FWS has, by operation of law, acquired a prescriptive easement across the affected portions of Mr. Heath's property. Accordingly, there is

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58/ Practically speaking, the only Objector that can possibly complain about purported flooding from Cedar Creek is Mr. Brett Heath. *See* his deposition at 10, and the detailed discussion of this matter under the previous portion of this brief specifically dealing with Mr. Heath's property.

no substance to these complaints, and they must be disregarded. The Board must, therefore, approve the subject application.

There is, however, one legal issue which the Objectors might raise that is unique to this particular application. More specifically, the Objectors refer to a State statute which provides that:

> All water used in this state for irrigation purposes shall remain appurtenant to the land upon which it is used. However, if for any reason it should become impracticable to use all or any part of the water beneficially or economically for irrigation of any land to which the right of its use is appurtenant, all or any part of the right may be severed from the land and simultaneously transferred and become appurtenant to other land without losing priority of right previously established, subject to existing rights, upon approval of an application for an amended permit. No increase in total acres irrigated may be allowed under this section.

SOUTH DAKOTA CODIFIED LAWS ANN. § 46-5-34 (1987).

Concerning the subject application, recall that, because the old diversion has permanently washed out, FWS proposes to change the diversion point. FWS expects the Objectors to argue that, because the diversion point has changed, the Cedar Creek water right has been "severed from the land," and is no longer "appurtenant to the land upon which it is used." *See* the above statute and the June 17, 1991, Opponents Prehearing Brief at 15.

FWS strongly disagrees with the Objectors' interpretation of SOUTH DAKOTA CODIFIED LAWS ANN. § 46-5-34. Obviously, this

statute is clearly intended to cover a situation where a party desires to transfer a water right to a wholly separate and distinct parcel of land. In such a case, the water right would be severed and it would no longer be appurtenant to the land upon which it was originally used. However, this is clearly not the case in the instant proceeding. Just because the diversion point has physically changed, this does not mean, as the Objectors assert, that the Cedar Creek water right is being severed, and is no longer "appurtenant to the land upon which it is used." To the contrary, despite the change in the diversion point, only a very slight change is being made to the acreage being irrigated. Accordingly, the Objectors' argument is without merit, and it must fail.

IV. CONCLUSION

SOUTH DAKOTA CODIFIED LAWS ANN. § 46-2A-7 (1987) provides that:

> If the water management board determines, based upon the evidence presented at the hearing, that *the applicable requirements for the permit, license or amendment have been met, it shall approve the permit, license or amendment.* If the board determines that such requirements have not been met or that the evidence is insufficient to support a determination, it shall disapprove the application or defer it for further study.

Emphasis added.

Based on all of the reasons set forth in the preceding portions of this brief, FWS urges the Board to find that all applicable

requirements for the relief requested in Application Nos. 1927-2, 2191-2, and 1921-2 have been met. Indeed, FWS feels that it has presented a compelling case as to why these applications should be approved. In objecting to these applications, the Objectors have raised several arguments. However, for the factual and legal reasons discussed in more detail above, these arguments are empty and wholly without merit. Simply stated, the Objectors have not, nor will they be able to, prove that what FWS seeks: (1) impairs existing rights; (2) is not a beneficial use; or (3) is contrary to the public interest. Accordingly, FWS urges the Board to accept the recommendations of the Chief Engineer and approve the subject applications.

At the very least, FWS recognizes that:

> The water management board may issue any permit or license subject to terms, conditions, restrictions, qualifications, quantifications, or limitations on perpetuity consistent with this chapter which it considers necessary to protect the public interest and which are related to matters within the jurisdiction of the board.

SOUTH DAKOTA CODIFIED LAWS ANN. § 46-1-14 (1987).

Based on the various analyses of this brief, FWS has every reason to believe that, with respect to the relief requested in the subject applications, the applicable statutory and regulatory requirements *have* been met. However, if, for *any* reason, the Board should find that this is not the case, then FWS still strongly believes that such a finding should not preclude the

Board from approving the subject applications. Rather, pursuant to the above statute, and subject only to such reasonable and necessary conditions or qualifications as the Board may deem necessary and proper, the Board should exercise its discretion and approve the subject applications.

DATED this 7th of July, 1992.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 1992, true and correct copies of the foregoing Prehearing Brief were mailed via overnight mail to:

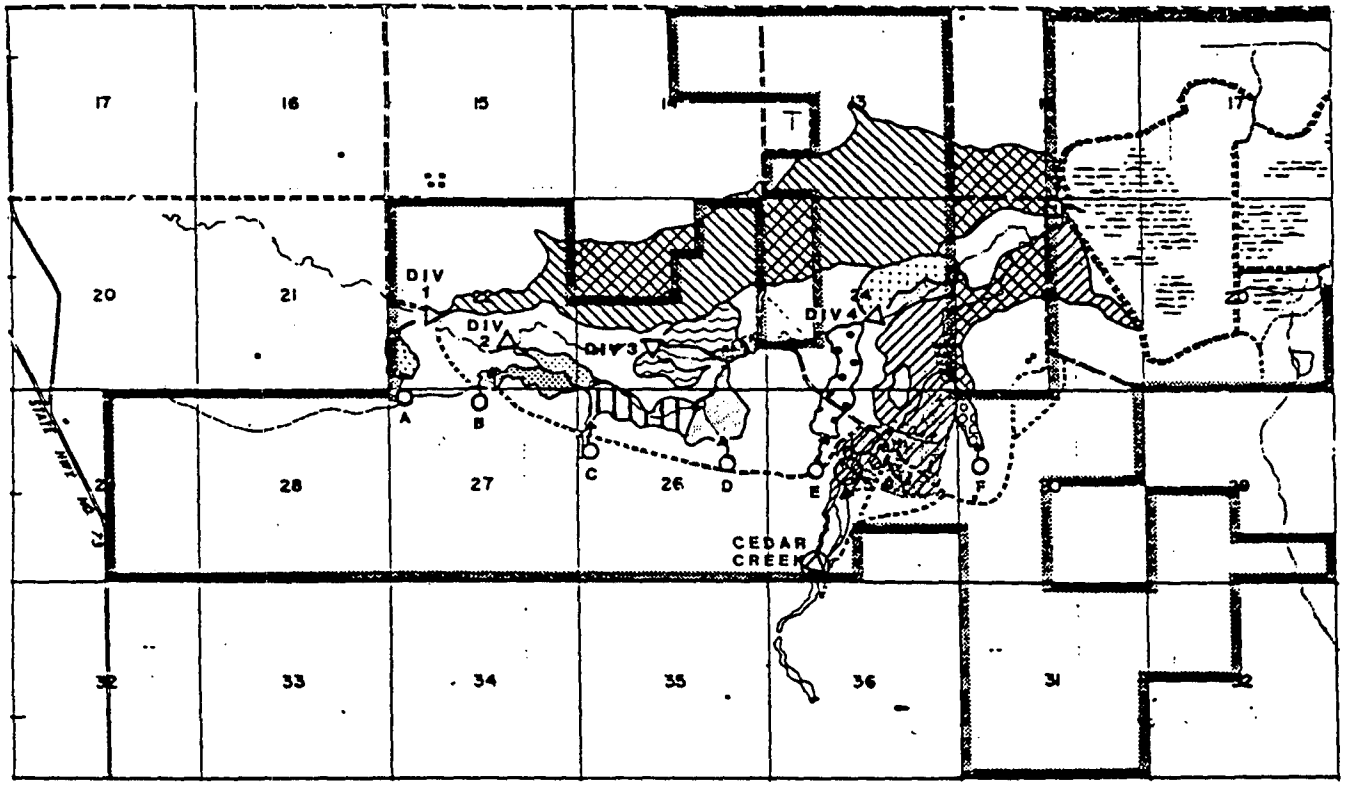
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LEGEND

- REFUGE BOUNDARY
- POINT OF DIVERSION
- SPRING

AREAS IRRIGATED

LAKE CREEK
- DIVERSION 1
- DIVERSION 2
- DIVERSION 3
- DIVERSION 4

- CEDAR CREEK

SPRINGS

- A
- B
- C
- D
- E
- F

- PRIVATE LANDS IRRIGATED—NOT PART OF APPLICATION

R. 37 W. R. 36 W.

SIXTH PRINCIPAL MERIDIAN

TRUE NORTH

0 1320 5280 7920 10560 FEET
0 1/2 1 1 1/2 2 MILES

STATE OF SOUTH DAKOTA } SS
COUNTY OF BENNETT }

I, KENNETH C. ROZAS, OF DENVER, COLORADO, DO HEREBY CERTIFY THAT THIS MAP WAS PREPARED FROM NOTES AND INFORMATION OBTAINED FROM AN ACTUAL SURVEY AND THAT IT CORRECTLY REPRESENTS THE FACILITIES FOR THE ACCOMPANYING APPLICATION.

REGIONAL ENGINEER

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
ENGINEERING

LA CREEK
NATIONAL WILDLIFE REFUGE
BENNETT COUNTY, SOUTH DAKOTA

WATER RIGHTS FILING MAP

DESIGNED	DRAWN	CHECKED	DATE	
RG	RG		6-84	DENVER, COLO.

DRAWING NO. 6R-SD-176-WR-P-5.0 SHEET 2 OF 2

EXHIBIT A

WARRANTY DEED

THIS INDENTURE, Made this 2 day of November, 19 71, between EUGENE R. BROWN and LILLIAN E. BROWN, his wife, of Martin, in the County of Bennett, ROYCE BROWN and RUTH BROWN, his wife, of Ft. Pierre, in the County of Stanley, and EVA MAE LINENBRINK and JOHN H. LINENBRINK, her husband, of Norris, in the County of Mellette, all in the State of South Dakota; WM. KNUTH and VERA KNUTH, his wife, of Kilgore in the County of Cherry, and BETTY JANE HOFF and REX O. HOFF, her husband, of Lincoln, in the County of Lancaster, all in the State of Nebraska; and HARLAN V. BROWN and PAULINE LENORE BROWN, his wife, and HARLAN V. BROWN, in trust for the benefit of R. Maureen Brown and Kristine Y. Brown, all of Upland, in the County of San Bernardino and State of California, grantors, and the UNITED STATES OF AMERICA and its assigns, Washington, D.C., grantee,

WITNESSETH, That the grantors, for and in consideration of the sum of Six Hundred Sixty-six Thousand Five Hundred Twenty-four and no/100 Dollars ($666,524.00) to them in hand paid by the grantee, the receipt whereof is hereby acknowledged, do by these presents Grant, Bargain, Sell and Convey unto the grantee and its assigns, Forever, all that tract or parcel of land lying and being in the County of Bennett and State of South Dakota described as follows, to-wit:

Township Thirty-six (36) North, Range Thirty-six (36) West, Sixth Principal Meridian: In section twenty-nine (29), the Southwest Quarter (SW¼) and the South Half Southeast Quarter (S½SE¼); and

In section thirty (30), the fractional West Half (W½) and the Northeast Quarter (NE¼); and

In section thirty-one (31), all; and

In section thirty-two (32), the Northwest Quarter (NW¼); and

Township Thirty-six (36) North, Range Thirty-seven (37) West, Sixth Principal Meridian: In section thirteen (13), the North Half (N½), the Northeast Quarter Southwest Quarter (NE¼SW¼), the South Half Southwest Quarter (S½SW¼) and the Southeast Quarter (SE¼); and

In section fourteen (14), the Northeast Quarter (NE¼); and

In section twenty-two (22), all; and

In section twenty-three (23), the Northeast Quarter Northeast Quarter (NE¼NE¼), the East Half Northwest Quarter Northeast Quarter (E½NW¼NE¼), the South Half Northeast Quarter (S½NE¼) and the South Half (S½); and

In section twenty-four (24), the East Half (E½), the East Half Northwest Quarter (E½NW¼), the Northeast Quarter Southwest Quarter (NE¼SW¼) and the South Half Southwest Quarter (S½SW¼); and

In section twenty-five (25), the North Half (N½), the Southwest Quarter (SW¼) and the North Half Southeast Quarter (N½SE¼); and

RECORDED
Date: 9-29-71
Book: 15
Page: 347-8-9

EXHIBIT B

In section twenty-six (26), all; and

In section twenty-seven (27), all; and

In section twenty-eight (28), all; and

In section twenty-nine (29), the East Half (E½).

The above-described tract of land contains 6,665.24 acres, more or less.

The above-described lands are acquired for administration by the Secretary of the Interior through the United States Fish and Wildlife Service.

TO HAVE AND TO HOLD THE SAME, Together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the grantee and its assigns, FOREVER. And the said grantors, for themselves, their heirs, executors and administrators, do covenant with the grantee and its assigns, that they are well seised in fee of the lands and premises aforesaid and have good right to sell and convey the same in manner and form aforesaid, and that the same are free from all encumbrances whatsoever, except

SUBJECT, However, to statutory road easements 66 feet in width lying 33 feet on either side of all section lines; to an easement granted to Bennett County, as recorded in Book 6 Miscellaneous, page 423; to a highway right-of-way granted to Bennett County, as recorded in Book 4 Deeds, page 558; to unrecorded rights-of-way for roads, telephone lines and power lines; to the outstanding rights to one-half (½) of the minerals, oil and gas in all of said lands except the NE¼ of section 30, Township 36 North, Range 36 West, and the S½SW¼ of section 22, the NE¼NE¼, E½NW¼NE¼ and S½NE¼ of section 23, and the N½NW¼ of section 27, Township 36 North, Range 37 West, which rights were reserved to Birthol B. Brown and Bertha E. Brown by deeds recorded in Book 11, pages 302 and 307, and Book 15, page 15; to the rights of the United States and third persons, if any, as provided for by the Patent of record; and

RESERVING unto the grantors, the use of the land herein described for agricultural purposes until December 31, 1971.

PROVIDING, However, that the use, occupation and operation of the reservation retained herein shall be subordinate to and subject to such rules and regulations as may be prescribed by the Secretar of the Interior governing the use, occupation, protection, and administration of inviolate bird sanctuaries under and in compliance with the provisions of Section 6 of the Act of February 18, 1929 (45 Stat. 1222), as amended by Section 301 of the Act of June 15, 1935 (49 Stat. 381), and the above bargained and granted lands and premises in the quiet and peaceable possession of the grantee and its assigns against all persons lawfully claiming or to claim the whole or any part thereof, the grantors will WARRANT AND DEFEND.

IN WITNESS WHEREOF, The grantors hereunto set their hands the day and year first above written.

/s/ Eugene R. Brown L. S.
Eugene R. Brown

/s/ Lillian E. Brown L. S.
Lillian E. Brown

/s/ Royce Brown L. S.
Royce Brown

/s/ Ruth Brown L. S.
Ruth Brown

/s/ Eva Mae Linenbrink L. S.
Eva Mae Linenbrink

/s/ John H. Linenbrink L. S.
John H. Linenbrink

/s/ Wm. Knuth L. S.
Wm. Knuth

/s/ Vera Knuth L. S.
Vera Knuth

/s/ Betty Jane Hoff L. S.
Betty Jane Hoff

/s/ Rex O. Hoff L. S.
Rex O. Hoff

/s/ Harlan V. Brown L. S.
Harlan V. Brown

/s/ Pauline Lenore Brown L. S.
Pauline Lenore Brown

Harland V. Brown L. S.
Harlan V. Brown
Trustee for R. Maureen Brown and
Christine Y. Brown
Kristine (MBB)

sparks flew through the cracks and my mattress burned up but not my house."

Some lumber for the new Presbyterian church was burned up. The daughters of John O'Neill jumped into the stock tank to escape the fire. One lady tells she put her small child in a well hole to escape the fire. Many horses and cattle were burned — some so badly they had to be destroyed.

One old timer recalls he could ride horseback for days in the 20's and not see anyone and "the grass was so tall you'd wear out the toes of your boots while horseback riding."

The Harrington school was in District 7 and school board meetings were held at the old dance hall in Vetal. The yearly meeting drew nearly all the parents from the whole district. Most generally they were hot argumentative meetings.

Big boys — the age of 18 or 19 — came to school. One big boy jumped on the lady teacher and put her on the floor after she corrected him. She pulled out a hose and said, "If you don't straighten up I'll use this on you and if I can't I have a husband who can use it on you."

In the 1930's cream sold at 8¢ per butterfat, eggs were 9¢ per dozen, wheat 12¢ per bu., corn 8 to 10¢ per bu: pigs were $1.65 per hundred weight. Later serum pigs sold for 3¢ per lb. They had to weigh between 50 & 80 lbs. A good cow would bring $15 to $20. Many people lived on P.W.A. They also got relief grants.

HARRINGTON UPDATE

1980 — People who now live in the community are: Mr. and Mrs. Wendell Johnson, Mrs. R'Lou Pisha, Mr. and Mrs. Donald Byrne, Mr. and Mrs. Lee Deaver, Mr. and Mrs. Jimmie O'Neill, Mr. and Mrs. Dan O'Neill, Mr. and Mrs. Tom Jacquot, Mr. and Mrs. Carl Peterson, Mr. and Mrs. Joe Valandra, L. D. Putnam Ranch, Mr. and Mrs. Dean O'Neill, Mr. and Mrs. Art Young, Mr. and Mrs. B. DeWayne Lancaster.

EARLY IRRIGATING IN BENNETT COUNTY

Recollection of Art Clifford
as related to Emma V. Jacobs

Art Clifford recalls that irrigating in the vicinity of LaCreek was started about 1900 or 1901.

A surveyor by the name of Brown was hired to survey and stake out the dam and ditches. As soon as he completed the surveying, he left.

The project began by damming up LaCreek about one-fourth mile west of Muddy Spring, sometimes referred to as "Stinkin' Spring." The dam was built about one mile east of old Highway 73 or one mile east along the Refuge Road and one mile south near the Fred Ruff allotment.

A flume had to be built across Muddy Spring to carry water from the dam to the main canal. Water gates were put in to let the water through.

The work was done with one team slips and plows, each man manning his own slip or plow. The ground was first plowed then the slip was used to move the dirt. A slip hauled about one-eighth to one-fourth yard of dirt at a time.

There were probably four or five miles of ditches. When the water was turned into the ditches, the water had to be watched very closely. It wasn't an uncommon sight to see the water run into gopher holes.

By about 1906, the flume across Muddy Spring had rotted away so it was decided to dam up Muddy Spring. This eliminated the flume. By damming up Muddy Spring, water was ditched directly from the dam to the ditch. The old ditches were used to carry the water.

In the early days there was little farming. The water was used mainly to irrigate meadows belonging to Orlando Clifford, George Ruff and an oat field belonging to Bill Ruff. The last person on the ditch was Pete Skalinder, so from his meadow the water went its own course.

Some of the men who helped build the dams and ditches were Orlando Clifford, John Clifford, George, Art and Bill Ruff and Pete Skalinder.

The old ditch was renovated in later years, beginning in the '40s. Some of the later people who used the old ditch were B. B. Brown, Riner Johnson and Harland Todd. Just last summer (1979) the LaCreek Refuge sent a caterpillar tractor to clean out a ditch and do some irrigating.

LaCREEK OLD TIMERS

By Louise V. Swallow

Joseph Brown, Jr. and Joseph Brown, Sr. moved to LaCreek from Manderson, S. Dak. in 1898.

Joseph Brown, Jr. raised a big family on their place where the LaCreek refuge buildings stand at present.

Four of his boys served in World War I. William Denver Brown left April, 1918, for the service and gave his life in Germany for his country.

There were 14 children in the family.

Alice Pourier, Joseph, Jr.'s wife, was the oldest daughter of big Bat Pourier.

I, Louise, am a member of the Joe Brown, Jr. family and lived at Lake Creek all my childhood life from 1898 to 1920, when I married and moved away.

I am now the wife of Ben Swallow, brother of John Swallow, who was married to Hattie Stover and owned the land on which Martin is located. He also owned, or partly owned, a store in Martin in the early days.

My brother, Carl, served in World War I and married Jennie Williams from LaCreek.

EXHIBIT C

R - LaCreek, S.D.

437 Federal Building
Salt Lake City, Utah
February 13, 1939

Mr. Earl W. Craven,
LaCreek Migratory Waterfowl Refuge,
Martin, South Dakota.

Dear Mr. Craven:

A copy of your letter of January 28 to the Regional Director, relative to the diversion of water from Lake Creek by Mr. Birthol Brown, has been sent to me.

You state that you contacted the Registrar of Deeds at Martin to ascertain whether or not Mr. Brown has any water filings on record. According to the 1919 State law of South Dakota, application for water rights should be made to the State Engineer and a copy of the final certificate filed with the County Registrar of Deeds. I have searched the State Engineer's files and found no record of filings by Mr. Brown; therefore, he has evidently made no filings.

This does not mean necessarily that he has no right to the use of water, since it has been held by the courts that the use made of the water is the measurement of the right, regardless of whether or not the details of filing have been complied with.

Mr. Young called my attention to Mr. Brown's use of water some time ago. According to information we had at that time, Mr. Brown has been using this water for many years prior to the building of the La Creek Refuge. If this is true, there is nothing we can do to prevent Mr. Brown from continuing to use this water, since he has not only a right by use but also a riparian right because of his ownership of land bordering on the creek.

Another point which may have some bearing on the case is the fact that the Indians have a prior use to all the water flowing across the Indian Reservation. As I understand this situation, it applies only to actual use by the Indians, and the right does not become pertinent to the land upon transfer to a white settler.

Regardless of Mr. Brown's right to the use of the water, the point that is of most concern to us is how much his use actually

EXHIBIT D

affects the water supply for the LaCreek Refuge. If his use is only on a small area adjacent to the creek and most of the water returns to the creek, it is probable that he is not doing us much damage. My suggestion to you in following up this matter is to ascertain how much water Mr. Brown needs and the length of time he has been using this water.

Very truly yours,

Brice McBride,
Hydraulic Engineer.

cc: Mr. Maurek
Washington
BM:jm

UNITED STATES DEPARTMENT OF AGRICULTURE
BUREAU OF BIOLOGICAL SURVEY

LACREEK MIGRATORY WATERFOWL REFUGE
Martin, South Dakota
March 15, 1939

Lacreek
Watershed dams

Regional Director
Bureau of Biological Survey
P. O. Box 1269
Omaha, Nebraska

Dear Sir:

Reference is made to our letter of January 29, 1939, and Mr. McBride's reply under date of February 13, 1939, (copy of which was sent to your office), in regard to water diversion from Lake Creek by Mr. Birthol Brown.

From such information as I have been able to gather to date, it seems that Mr. Brown has been flooding his meadow land for a period of five, or more, years. The Browns have informed me that they filed for water rights some five or six years ago and I understood that it is on these filings that they constructed and are using their fish ponds on Cedar Creek. Mr. Brown told me that the diverting of Lake Creek was accomplished by cutting through a sand bank that had formed across the old channel of Lake Creek and the diversion merely follows both old and new channels to flood the meadow land.

In checking over his set-up, it appears doubtful that there could be an excessive loss of water by the diversion since most of the flood water returns to Lake Creek within approximately one mile of the diversion. We estimate approximately 200 acres as being flooded at this time, but of course all of this acreage could not be said to be flooded by Brown (at this time) since the normal rise of the creek, ice jams, beaver dams, etc., would cause a natural flooding at the run-off.

If you require more information, or different information than is included above, please instruct me.

Yours very truly,



Earl W. Craven
Refuge Manager

EWC/rhb

cc—McBride

EXHIBIT E

STATE OF ARIZONA }
} ss. AFFIDAVIT
COUNTY OF YAVAPAI }

I, Charles J. Ritts, being 70 years of age and duly sworn, do depose and say that I was first employed by the Cedar Creek Ranch Company, Alvin Brown, Manager, in 1951, and I worked there intermittently until 1963. During this period, I was familiar with, and personally witnessed use made of the waters from Lake Creek flowing through Sections 22, 23, 24, T36N, R37W, to irrigate lands in Sections 13, 14, 22, 23, and 24, T36N, R37W to Wit:

A diversion for irrigation from Lake Creek was located, and in use, about one-half mile north west of the Brown Ranch Headquarters where the road crosses Lake Creek (Diversion #1, NW¼, SW¼, Sec 22, T36N, R37W) at the time I went to work on the ranch in 1951. I had been on the ranch and had seen the diversion in operation several years earlier, but I cannot remember the exact years. The diversion was used to irrigate the fields to the northeast of the diversion (S½, NE¼, Sec 22), the Belsky Quarter (NW¼, Sec 23), the meadows east of the Belsky Quarter (NE¼, Sec 23), the church ground (W½, NW¼, Sec 24), the 40 acre tract below the Grace Cemetery (SW¼, SW¼, Sec 13), the meadows south of Raymond Kocer's house (most of the S½, Sec 13 and the N½, Sec 24, all in T36N, R37W). All left over irrigation water flowed into the ditch on the county road and then flowed south into a ditch on the east section line of Section 24, T36N, R37W, down to Lake Creek. I also witnessed use made of waters from the Hatchery Pond spring (NW¼, Sec 26, T36N, R37W) to irrigate 20 to 30 acres of grass land northeast of the spring and south of the willow bog that lies to the north.

Mr. Brown also had a hydroelectric power plant on Trout Pond #1. This dam washed out in 1961 or 1962 and a lot of sand washed down Cedar Creek and settled out in the Cedar Creek and Lake Creek channels. There was a lot of sand and numerous trout lying on the grasslands below the washed out dam. After that, Lake Creek over-flowed its banks more frequently and reduced the amount of hay that could be harvested on the Heath's property. Heath hayed more acres prior to the dam washing out. „

Further, affiant sayeth naught.

IN WITNESS THEREOF; I have hereunto set my hand and seal this 4th day of October, 1991.

Charles J. Ritts

Charles J. Ritts

The foregoing Affidavit was subscribed and sworn to, before me this 4th day of October, 1991.

Notary Public

My Commission Expires: My Commission Expires May 31, 1993

EXHIBIT F

Report on
Vested Water Right Claim No. 1927-2
Dept of Interior, US Fish & Wildlife Service
August 28, 1990

Background

Vested Water Right Claim No. 1927-2 claims appropriation of 10.0 cubic feet of water per second (cfs) from Lake Creek. The diversion points are located in Sections 22, 23, and 24, T36N-R37W; in Bennett County. The water is used to irrigate 700 acres of land to provide wildlife habitat on La Creek National Wildlife Refuge. The land is located in Sections 13, 22, 23, and 24, T36N-R37W.

Discussion

Vested Water Right Claim No. 1927-2 claims a priority date of 1939. However, there is no document in the file that would support this date. An affidavit signed by Charles J. Ritter states that he had witnessed water use on the land from 1951 until 1963.

On August 14, 1990, this vested water right claim was inspected. The inspection showed that the land, as shown on the map, is being irrigated and is used for providing wildlife habitat.

Conclusions and Recommendations

1. The claim was inspected and found to exist as described.

2. There is no documentation on file to support a claimed priority date of 1939.

3. It is recommended that Vested Water Right Claim No. 1927-2 be validated for a diversion rate of 10.0 cfs from Lake Creek for irrigation of 700 acres with a priority date of January 1, 1951, based on the Charles J. Ritter affidavit.

M. RASSOOL AHADI
Natural Resources Engineer II

Approved By:

DELVIN D. BROSZ, P.E.
Natural Resources Engineer IV

EXHIBIT G

RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT APPLICATION NO. 1927-2, U.S. Fish and Wildlife Service

Pursuant to SDCL 46-2A-2, the following is the recommendation of the Chief Engineer, Water Rights Division, Department of Water and Natural Resources concerning Water Permit Application No. 1927-2, U.S. Fish and Wildlife Service, Department of Interior, P.O. Box 25486, Denver Federal Center, Denver CO.

The Chief Engineer is recommending VALIDATION of Application No. 1927-2 for 10.00 cfs because 1) water has been appropriated as described for irrigation use with a priority date of January 1, 1951, 2) the use has been developed without unlawful impairment of existing rights, 3) the use is a beneficial use and 4) it is in the public interest.

See report on application for additional information.

JOHN HATCH, Chief Engineer
August 30, 1990

Background

Water Permit Application No. 1921-2 requests to change the location of land and the diversion point authorized under Water Permit No. 265-2. Water Permit No. 265-2 appropriated 4.45 cubic feet of water per second (cfs) from Cedar Creek to irrigate 366 acres. The point of diversion for Water Permit No. 265-2 was located in the SW1/4 SW1/4 Section 25, T36N-R37W, in Bennett County. The diversion point for Application No. 1921-2 is a dam located in the SE1/4 NW1/4 Section 25, T36N-R37W. The acreage authorized under Water Permit No. 265-2 is located in the S1/2 NW1/4, S1/2 NE1/4, N1/2 SE1/4 Section 25, T36N-R37W, and SW1/4, S1/2 NW1/4 Section 30, T36N-R36W. The application requests to change the irrigated land to the N1/2, SW1/4, N1/2 SE1/4 Section 25, SE1/4, SE1/4 NE1/4 Section 24, all in T36N-R37W; and E1/2 Section 19, T36N-R36W, for a total of 362 acres. The water will be used to flood the land for the purpose of wildlife propagation.

Discussion

On August 14, 1990, the land irrigated by the applicant was inspected. The inspection showed that the dam authorized as a diversion point under Water Permit No. 265-2 was breached and was not in working condition. The new diversion point (another dam) is located in the SE1/4 NW1/4 Section 25, T36N-R37W, approximately 1/2 mile to the north (downstream) of the old diversion point. The dam is 13.1 feet high and has a storage capacity of 30.0 acre feet. The approximate date of construction of the dam is 1935. Due to the small size of the dam, it does not have to meet dam safety criteria. The priority date of May 20, 1933, from Water Permit No. 265-2, will be retained if the application is approved.

On November 26, 1990, during a meeting with landowners adjacent to the Lacreek National Wildlife Refuge, questions were raised regarding operational procedures and management of the Refuge. The concern expressed was during high flows in the creek some of the adjacent lands are flooded by runoff from the Refuge.

The Refuge, for the most part, is bordered by roads. These roads act as a barrier to the flow of water from the Refuge. Where necessary, pipes are installed underneath these roads to control the flow.

Existing Water Rights

The United States Fish and Wildlife Service holds two water permits in the area. US Withdrawal No. 2-2 with a priority date of October 16, 1934, for storage of 23,710 acre feet of water from Lake Creek and tributaries, and US Withdrawal No. 3-2 with a priority date of December 13, 1935, for storage of 2,670 acre feet of water and diversion of 60 cfs from the South Fork of the Little White River and its tributaries. The only water permit in the area that appropriates water directly from Cedar Creek is Water Permit No. 2101-2 for Cedar Creek Sportsmen. This permit is for storage of 84.0 acre feet from the Cedar Creek springs, with a priority date of September 18, 1989. The diversion point for Water Permit No. 2101-2 is located upstream

water permits/rights in the area will not be adversely affected this application.

Conclusions

1. The land authorized under Water Permit No. 265-2 was acquired by the US Fish and Wildlife Service on September 2, 1971. According to the affidavit of water use, the land listed on Water Permit Application No. 1921-2 has been irrigated continuously without interruption.

2. No opposition is on file to Water Permit No. 265-2. In a meeting with concerned landowners adjacent to the Refuge; however, the question of flooding of their land by the Refuge and its management was raised.

3. Due to the small size of the dam, the dam safety criteria do not apply.

4. No water permits in the area will be adversely affected by this application.

5. Approval of Water Permit Application No. 1921-2 is in the public interest.

6. The Water Management Board has recognized use of water for wildlife propagation as a beneficial use of water.

M. RASSOOL AHADI
Natural Resources Engineer III

Approved By:

DELVIN D. BROSZ, P.E.
Natural Resources Engineer IV

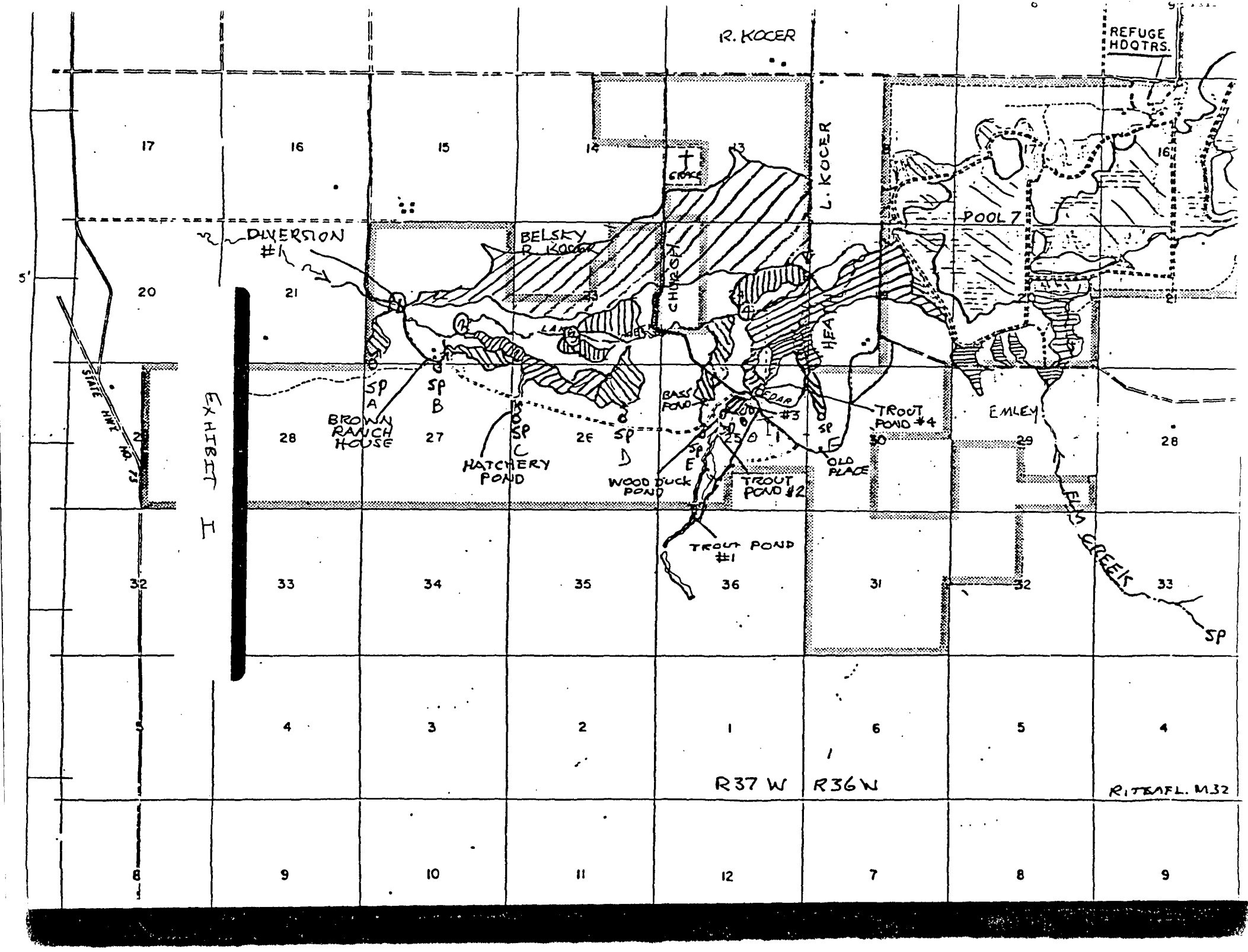
RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT
APPLICATION NO. 1921-2, U.S. Fish & Wildlife Service

Pursuant to SDCL 46-2A-2, the following is the recommendation of the Chief Engineer, Water Rights Division, Department of Water and Natural Resources concerning Water Permit Application No. 1921-2, U.S. Fish & Wildlife Service, Denver Federal Center, PO Box 25486, Denver CO.

The Chief Engineer is recommending APPROVAL of Application No. 1921-2 because 1) the proposed diversion can be developed without unlawful impairment of existing rights, 2) the proposed use is a beneficial use, and 3) in the public interest.

See report on application for additional information.

JOHN HATCH, Chief Engineer
February 13, 1991


R. KOCER
REFUGE HDQTRS.
L. KOCER
POOL 7
DIVERSION #1
BELSKY
R. KOCER
CHURCH
LAKE
HEA
STATE HWY 10
EXHIBIT I
SP A
SP B
SP C
SP D
SP E
SP
BROWN RANCH HOUSE
HATCHERY POND
WOOD DUCK POND
BASS POND
CEDAR
#3
TROUT POND #4
OLD PLACE
TROUT POND #2
TROUT POND #1
EMLEY
ELM CREEK
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R37 W
R36W
R.1E.A.F.L. M32

Flooding of Privately owned Hay meadow.

On July 23, 1959 Mr. George Heath, who owns a 320 acre hay meadow adjacent to the west boundary of the refuge, called at the refuge office and complained that sand being carried by Lake Creek was being deposited on his land. The creek channel is bank full of sand and water is flooding out over the meadow. It is impossible to mow the hay in some places. Mr. Heath said that he thought he would be able to mow his hay if several of the stop logs in the inlet control to pool no. 7 were removed. This would drop the water level on his land and permit haying operations. Mr. Heath was given permission to remove two stop logs from each bay of the control. This dropped the water level about one foot since the stop logs are constructed of 2" x 6" planks. Mr. Heath was then able to mow almost all of the hay on his meadow.

I explained that sand was continually being carried into the refuge by Lake Creek and that it presented a constant maintenance problem. We had dredged about 3,000 yards of sand out of the creek channel in the late winter of 1958-59. I suggested that Mr. Heath hire someone to perform a similar operation on the creek channels on his land. He seemed unwilling to do this.

The stop logs were replaced in No. 7 inlet structure in mid November following the freeze-up. Water was diverted around pools 7 and 8. The main flow of Lake Creek passed the inlet to pool 7 and continued through pools 2,3, and the display pool to pool 5. A small flow passed into pool 7, then into pool 8, and into pool 5.

Mr. Heath came to the refuge office on December 27 to complain that water from Lake Creek and Cedar Creek was flooding his hay meadow. Several of his hay stacks were already standing in several inches of water. He said that the sand deposited in the channels of the two creeks was acting as dams in several locations, causing the water to flow out over the meadow. On December 28 Mr. Ireland took out two stop logs in the inlet to pool 2 and one log out of the north bay in the inlet to pool 7.

EXHIBIT J

On December 29 Mr. Heath called to ask if the refuge dragline could be used to clean out the channels of Cedar and Lake Creeks on his land since flooding was still occurring. He said that water was covering much more of his meadow. He also asked if the refuge staff could furnish dynamite and blast out some of the sand dams in the creeks. He was told that government equipment could not be used to perform work on private lands.

On January 5 Mr. Heath came to the refugein the evening. Mr. Ireland called Refuge Manager Hughlett who was on leave regarding the flooding. Mr. Hughlett talked to Mr. Heath also and explained that the refuge staff could not perform work on Heath's land without some strong proof that refuge operations were causing the flooding. It was pointed out to Mr. Heath that sand deposition in creeks flowing out of the sandhills is a normal process. Refuge channels had been cleaned the winter before and about 3,000 yards of sand removed with the dragline. Mr. Heath said that he intended to contact a lawyer and have him start proceedings to force the government to clean out the creek channels and also to pay for the damage to hay stacks and meadow. Mr. Ireland was instructed to call the Regional office the next day and explain the situation and obtain instructions on how to proceed.

January 6, 1960. Mr. Ireland called the Regional office and talked to Mr. Forrest Cappenter. Mr. Carpenter suggested that the remaining stop logs be removed from the inlet controls to pools 2 and 7 but nothing further be done until refuge manager Hughlett returned from leave. Mr. Ireland removed two stpp logs from each bay of the inlet to pool two that day. All stop logs are out of this structure.

January 7, 1960, Mr. Ireland was able to remove two logs from the north bay of the inlet to pool 7. Great difficulty was encountered because of ice conditions. This resulted in a further drop of water levels in Lake Creek on the refuge of about one foot since each stop log was a 6" plank. Water levels inside the refuge had dropped slightly before stop logs were removed from pool 2 and pool 7 controls but no difference could be seen on creek levels on Mr. Heath's land. After the two logs were removed from the inlet to pool 7, the water dropped rapidly on private lands.

Velocity of the creek was increased greatly and sand began moving from private land down into the refuge.

On January 11 the refuge manager returned from leave. Mr. Heath called at the refugeoffice and discussed the flooding that had occurred during the past three weeks. Mr. Hughlett accompanied Mr. Heath to the flooded hay meadow and appraised the damage. Water levels had dropped about one foot on the portions of the creek nearest the refuge and the ice had caved in on these section . Water was still flowing across the hay meadow on the west side. Mr. Heath pointed out several places where sand dams in the creek channels had caused water to flow out and across the meadow. He reiterated his position about flooding. No commitments were made by Mr. Hughlett as to blame for the flooding. Again it was pointed out that sand deposition and winter flooding of sandhills hay meadows could be expected annually.

1/12/60 Mr. Hughlett called the Regional office and described the flooding and the discussion with Mr. Heath. Messrs. Carpenter and Nelson suggested that a cooperative agreement for cleaning the creek channels be worked out with Mr. Heath.

Brooks + Ireland pulled 1 log on N. bay of #7 + 3 on S. Bay.

1/13/60 Mr. Hughlett called Mr. Heath and suggested that a cooperative creek channel cleaning operation be started as soon as the refuge dragline was repaired. Mr. Heath seemed reluctant to pay for any part of the cleaning but finally agreed to buy some dynamite that would be needed.

1/15/60 Mr. Hughlett received a telephone call from Messrs. Burwell and Huenecke regarding a letter from Senator Francis Case regarding the flooding of the Heath hay meadow. The emergency nature of the letter was discounted by Mr. Hughlett since Mr. Heath has much hay stored from last year and about 360 head of the 600 he must feed are on the refuge. Messrs. Hughlett and Ireland walked over Mr. Heath's hay meadow in the afternoon, counting damaged hay stacks. Five stacks were measured as a sample of the volume of hay involved. The creek has dropped back into its channel over almost all of the meadow. Only one serious sand dam remains. Ice around some of the stakks is over a foot thick. Thirty seven and one-half stacks were counted as damaged. Some were in very little ice and could have had little damage to them while others may

have lost up to a third of the volume.

(C. A Hughlett)

LAW OFFICES

KELTON S. LYNN (1945-1974)
HORACE R JACKSON
DONA[illegible] SHULTZ
[illegible]
GENE N LEBRUN
GREGORY A. EIESLAND
THOMAS G. FRITZ
FRED M. WINKLER
HAVEN L. STUCK

LYNN, JACKSON, SHULTZ, IRELAND & LEBRUN, P. C.
724 ST. JOE STREET
RAPID CITY, SOUTH DAKOTA 57701

POST OFFICE BOX 1377
TELEPHONE 342-2592
AREA CODE 605

June 3, 1976

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

United States Department of the Interior
Fish and Wildlife Service
Washington, D.C. 20240

Attn: Honorable Nathaniel Reed, Secretary

Re: United States Department of the Interior, Fish and Wildlife Service, Bureau of Sport Fisheries and and Wildlife, LaCreek National Wildlife Refuge, South Route, Martin, South Dakota

CLAIM FOR PROPERTY DAMAGES

1. Name of Claimant: George W. Heath.

2. Address of Claimant: Martin, South Dakota.

3. Description of Claim: This is an official claim pursuant to USC §2675 and Code of Federal Regulations Title 28; Part 14. This claim is for money damages for property damage caused by the negligent and wrongful acts and omissions of the employees of the Fish and Wildlife Service of the Department of the Interior while acting within the scope of their employment. George Heath is the fee title owner of the West Half of Section Nineteen, Township 36, Range 36, in Bennett County, South Dakota, and has been for a number of years. This claim is based upon the placement of a sand trap on the LaCreek National Wildlife Refuge adjoining Mr. Heath's property and by reason of the placement of that sand trap, water has been caused to accumulate, causing sand and material to obstruct the creek beds, constituting a continuing nuisance and trespass to Mr. Heath's property by reason of causing a change of velocity and direction of the creek beds of LaCreek and Cedar Creek which flow across Mr. Heath's property onto the Refuge. By reason of the placement of the trap and the acts of your employees, sand and other material now has accumulated in the creek beds causing the water to overflow and damaging Mr. Heath's property for the period of the growing months of the hay on Mr. Heath's land causing damage to Mr. Heath in the sum of $10,000 for the year 1974 and $10,000 for the year 1975.

EXHIBIT K

Further, by reason of the above-mentioned acts, Mr. Heath claims damages for permanent injury to the property in the sum of $125,000.

4. I declare under the penalties of perjury that the amount of this claim covers only damages and injuries caused by the accident above described.

I agree to accept the sum of $145,000 in full satisfaction of this claim.

George W. Heath

Subscribed and sworn to before me this 4th day of June, 1976.

Lucella Cozad
Notary Public, South Dakota

My Comm. Expires: 3-11-77

(SEAL)

cc: Harold H. Burgess, Refuge Manager, Martin, SD
Rolf L. Wallenstrom, Area Manager, Pierre, SD
Lynn Greenwalt, Director, Washington, D.C.
Doreen McCoi, Secretary, Martin, SD

Complaints - Geo Heat

LAW OFFICES
LYNN, JACKSON, SHULTZ, IRELAND & LEBRUN, P. C.
724 ST. JOE STREET
BOX 1377
RAPID CITY, SOUTH DAKOTA 57701



United States Department of the Interior
Fish and Wildlife Service
Bureau of Sport Fisheries and Wildlife
LaCreek National Wildlife Refuge
South Route
Martin, SD 57551

Attn: Mr. Harold H. Burgess,
Refuge Manager

United States Department of the Interior
OFFICE OF THE SOLICITOR
ROOM 211 - FEDERAL BUILDING
P.O. BOX 519
ABERDEEN, SOUTH DAKOTA 57401

LAC

September 1, 1976

COPY

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. George W. Heath
Martin, South Dakota 57551

Dear Mr. Heath:

Your tort claim in the amount of $145,000.00 for damages allegedly caused by the negligent and wrongful acts of the employees of the Fish and Wildlife Service, has been duly considered.

Your claim is based upon the asserted placement of a sand trap on the LaCreek National Wildlife Refuge adjoining your property described as the W½ Sec. 19, T. 36 N., R. 36 W., Bennett County, South Dakota. Such sand trap is asserted to have caused water to accumulate and sand and other material to obstruct the creek beds which constitutes a continuing nuisance and trespass upon your property by reason of causing a change of velocity and direction of the creek beds of LaCreek and Cedar Creek which flow across your property onto the Refuge. You assert that Federal employees actions in the placement of such trap have caused sand and other material to accumulate causing the water to overflow and damage your land during the months of the hay growing thereon in the sum of $10,000 for 1974 and $10,000 for 1975. You assert permanent injury to your property in the sum of $125,000.00.

On June 21, 1976, I requested your attorney to submit any and all additional evidence to me that is deemed proper, however, no evidence has been received. I must assume you believe additional evidence is unnecessary.

The report from the Fish and Wildlife Service relates that the W½ Sec. 19, as described in your claim, has been a natural sandhill marsh since before settlement. Such Refuge was acquired by the United States in 1936, and has always been a natural disposal area for the sands that wash out of the sandhills down LaCreek and Cedar Creeks.

US FISH AND
RECEIVED
SEP 02 19
PIERRE
AREA

EXHIBIT L

You apparently made your first complaint of sanding and flooding on July 23, 1959, about 17 years ago, and have filed similar complaints with Senators and Congressmen periodically since then.

Report is made that other land owners routinely clean and maintain their sandhill drains through such wet areas on an annual basis as does the Refuge Management. Federal personnel assert that instead of cleaning your drains and culverts you insist that the sanding is caused by the Refuge operations and that the Refuge Management should maintain your drains.

The report relates that Mr. Carl W. Stephan, Regional Hydraulic Engineer, investigated your complaint in 1972, and found the water would back into your land at 3,089 feet elevation, but that the maximum operating level of Pool 2 was 3,087.7 feet and of Pool 7 was 3,086 feet. That control structures above these pools were operated at normal stream flow levels. Mr. Stephan concluded that the siltation occurring on your land and within the Refuge was due to natural deposition, which is characteristic of streams in the area.

In addition, and significantly, the report relates that surveys by Charles Waller and James Turner in February, 1975, indicate that the bottom elevation of LaCreek Creek falls 6.1 feet from your west to east boundaries. Thus it appears that the Refuge maximum level at Pool 2 would have to be raised at least 7 feet to flood all the land you claim is damaged.

Also, and most revealing, Larry Johnson, U.S. Geological Survey, has indicated that Cedar Creek drops 14 feet in crossing your land.

Additional statements might be related from the Fish and Wildlife Services report, however, such statements relative to elevations are most persuasive that the activities of the Fish and Wildlife Services at such Refuge were not the cause of your alleged damages.

The sole basis of your claim is the placement of a sand trap on the Refuge adjoining your property which you assert has caused water to accumulate, causing sand and other material to obstruct the creek beds. You fail to submit evidence thereon, except for your statement, or to provide elevations, acreage, or other details. Such failure of proving your claim mandates its denial.

In addition, a copy of a letter to Senator Case in 1960 reveals that the same problem regarding sand and the flooding of your land existed then. Pursuant to 28 U.S.C.A. §2401 (b) a tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues. As personnel from the Fish and Wildlife Service advise, there has been no construction or alteration within the past two years which may have caused the water in such creeks to be raised, and it appears your claim is barred by such statute.

In view of the above, your claim should be and is hereby denied.

NOTICE

Notice is hereby given that this determination constitutes a final denial of your claim by this Department, and if you are dissatisifed with this action, you are entitled,

(1) To resubmit your claim to this office for reconsideration within a period of six (6) months from the date of the mailing of this notification of the determination, or

(2) To file suit in an appropriate United States District Court within six (6) months of the date of the mailing of this determination.

Very truly yours,

Wallace G. Dunker
Field Solicitor

cc: Law Offices, Lynn, Jackson, Shultz, Ireland & Lebrun, P.C.
Rolf L. Wallenstrom, Area Manager, Fish & Wildlife Service

Report on Water Permit Application No. 2191-2
US Fish and Wildlife Service
September 23, 1991

Background

Water Permit Application No. 2191-2 requests appropriation of 4.44 cubic feet of water per second (1444.7 acre feet annually) from six (6) springs. The springs are located in the NW1/4 NW1/4, NW1/4 NE1/4 Section 27; SW1/4 NW1/4, SE1/4 NE1/4 Section 26; SE1/4 NW1/4 Section 25, T36N-R37W, and SW1/4 NW1/4 Section 30, T36N-R36W, in Bennett County. The water is used in the W1/2 SW1/4, S1/2 SE1/4 Section 22, SW1/4 SW1/4, SE1/4 SE1/4 Section 23, E1/2 SW1/4 Section 24, NE1/4 NW1/4 Section 25, N1/2 Section 26; all in T36N-R37W and the W1/2 NW1/4 Section 30, T36N-R36W. The water is used to create 235 acres of marshes, sloughs, and wet meadows through small dams and control structures for waterfowl propagation and enhancement of wildlife habitat.

Discussion

On August 14, 1990, the springs and the area listed in the application were inspected. The inspection showed that the water from the springs was being used to flood the area.

The springs are tributaries of Lake Creek which flows through the LaCreek National Wildlife Refuge and enters the Little White River in Section 17, T37N-R35W. There is no historical data regarding flow rates from the springs.

On November 26, 1990, in a meeting between Division of Water Rights engineers and landowners adjacent to the Refuge, concerns were expressed by the landowners that operational procedures and management practices of the Refuge during high flows have caused flooding of some of the area outside the Refuge.

Existing Water Permits

A) Bennett County:

The following water permits/rights exist downstream from the springs:

US No. 2-2 for United States Fish and Wildlife Service, for storage of 23,710 acre feet annually from Lake Creek and tributaries with a priority date of October 16, 1934.

US No. 3-2 for USFWS, for a total storage of 2,670 acre feet, with a priority date of December 13, 1935 and a diversion rate of 60 cubic feet per second from the Little White River, with a priority date of May 27, 1940.

EXHIBIT M

Water Permit No. 2147-2, for USFWS, for storage of 167.5 acre feet annually from Lake Creek and tributaries, with a priority date of November 1, 1990.

Water Permit No. 265-2, USFWS (originally Berthol Brown), for irrigation of 366 acres using 4.45 cfs of Cedar Creek water. The land authorized under this permit was acquired by the USFWS in 1972.

Water Permit Application No. 1921-2 for the USFWS is pending approval by the Water Management Board. The application requests changing acreage and a diversion point authorized under Water Permit No. 265-2.

Vested Water Right Claim No. 1927-2, for USFWS, is pending validation by the Board. The claim is for the flooding of 700 acres from Lake Creek to provide wildlife habitat.

There are no other water permits/rights on Lake Creek, Cedar Creek, or the Little White River, in Bennett County, which would be adversely affected.

B) Mellette County:

Water Right No. 253-2, White River Hydroplant No. 1, is authorized to appropriate 400 cfs of water from the Little White River for power generation in Mellette County, with a priority date of November 14, 1929.

In a May 27, 1940 agreement between Fred W. Schwarz, owner of the powerplant, and the United States of America, the right to use any and all of the waters of the Little White River above the confluence of the Little White River and Lake Creek and also any and all waters of Lake Creek above Dam No. 10 on the LaCreek National Wildlife Refuge was granted to the United States of America. According to this agreement, the refuge is entitled to all the water of Lake Creek and its tributaries.

Water Permit No. 884-2 for John Didier, authorizes appropriation of 6.4 cfs from the Little White River for irrigation of 448.2 acres with a priority date of March 1, 1966.

<u>Conclusions and Recommendations</u>

1. The August 14, 1990 inspection showed that water from the springs is used to flood the acreage in the application.

2. Unappropriated water is available from the springs.

3. No water permits will be adversely affected by this application.

4. According to an agreement, between the United States of America and then owner of the White River powerplant, the

USFWS is entitled to all the Lake Creek and Little White River water and tributaries above their confluence.

5. The Water Management Board has recognized use of water for wildlife propagation as a beneficial use of water.

6. It is recommended that Water Permit Application No. 2191-2 for USFWS be approved for appropriation of 4.44 cfs (1444.7 acre feet annually) from six springs for flooding of 235 acres of land within the LaCreek National Wildlife Refuge boundaries.

7. If Application No. 2191-2 is approved, it does not authorize flooding of land outside the Refuge boundaries.

M. RASSOOL AHADI
Natural Resources Engineer III

Approved By:

DELVIN D. BROSZ, P.E.
Natural Resources Engineer IV

RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT
APPLICATION NO. 2191-2, US Fish and Wildlife Service

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. 2191-2, US Fish and Wildlife Service, PO Box 25486, Denver Federal Center, Denver, CO 80225.

The Chief Engineer is recommending APPROVAL of Application No. 2191-2 because 1) there is reasonable probability that there is unappropriated water available for the applicant's proposed use, 2) the proposed diversion can be developed without unlawful impairment of existing rights, 3) the proposed use is a beneficial use and 4) in the public interest with the following qualification:

Approval of Application No. 2191-2 does not authorize flooding of land outside of the Refuge boundaries.

See report on application for additional information.

JOHN HATCH, Chief Engineer
October 4, 1991

Form 1—Application for Permit to Appropriate Water—Original

No. 265-2

Water Division No. 2 So. Fork-White River District
(Blanks to be Filled by the Engineer for the W. R. C.)

APPLICATION FOR PERMIT

To Appropriate Water within the State of South Dakota

(NOTE—Draw a line through items not applicable.)

1. Name of applicant ~~Birthof-Green~~ BUREAU OF SPORT FISHERIES & WILDLIFE

Postoffice address Martin, County Bennett, State South Dakota

I. If a corporation No

(a) Name of same None

(b) Date and place of incorporation None

(c) Amount of capital stock None

(d) Amount paid in None

(e) Names and addresses of directors None

(NOTE—A certified copy of articles of incorporation must accompany the application.)

II. Method of accomplishing the work and financial resources of the applicant:

(a) Method of accomplishing work (Whether by contract, employment of others, or by direct labor)
Self and direct labor

(b) Cash on hand, $ 500.00 (c) Treasury stock, $ None

(d) Bonds to be issued, $ None (e) Other resources, $ 5,000.00

2. Name of diversion work Cedar Creek

3. Amount of water claimed 4.45 cubic feet per second

4. Source of water supply Cedar Creek

5. Location of point of diversion 362.5 ft. N 10 degrees 25' W of a point 1120'W of ¼ cor. between Sec.25 & 30, T36N, R37W on right bank County.

6. Annual period or periods during which water is to be used During growing season for irrigation; entire year for domestic and power purpose

7. To be used for:

I. Irrigation or domestic use: Gravity, overhead sprinkling or combination system?

(a) Number of acres to be irrigated 366 acres

(b) Legal subdivisions to be irrigated S½ of NW¼ Sec.25,T36,R37; S½ of NE¼, Sec.25,T36,R37; N½ of SE¼,Sec.25,T36,R37; N½ of NW¼ of SW¼ & S½ NW¼, Sec.30,T36,R36.

(NOTE—A list of lands to be irrigated, giving each subdivision and fraction with acreage thereof, should be written here, or may be appended as a part of this application. Same must also be shown on accompanying map.)

(c) Statement as to domestic use (giving location, etc.) Pipe line will be run to house located on the NW¼ of the SW¼ of the SW¼ of Sec.30,T36,R36, Bennett Co.,South Dakota.

II. Stockwatering, mining, milling, power, fish culture, fire protection and public recreation:

(a) Nature of use For development of power for household, lighting and power.
Name any of the above uses claimed

(b) Amount of power to be generated 9½ horse power.

Amount claimed for engine cooling

(c) Location of plant At dam.

(d) Method of developing power Turbine and generator

(e) Point where water will be returned to stream Immediately below dam.

EXHIBIT N

8. Estimated cost of work:

(a) Head Gates, $ 50.00 (b) Pumping plant, $ None

(c) Fluming, $ 150.00 (d) Canal-earth, $ 1200.00 Rock, $

(e) Other structures Earth dam $ 1050.00 Total, $ 2450.00

9. Description of diversion works:

I. Nature of works: (Reservoir, dam, ditch, flume, pumping plant, etc.)

Concrete core earth dam, reservoir, wood flume, and canals.

II. Dimensions of works.

(a) Dam: Height 34½ feet; length at bottom 12 feet; length at top 115 feet; thickness at bottom 132 feet; thickness at top 10 feet; slope at front water face 2-1; slope at back face 1½ - 1 material used in construction Adjacent sandy soil

(b) Reservoir: Capacity when filled 18 acre feet. Surface area at highwater mark 3 - 1 acres.

DEPTH AT OUTLET-FEET	SURFACE AREA AT EACH ____ FEET DEPTH AT OUTLET—ACRES	ACRE-FEET CAPACITY

(c)* Head gate: Width 4 feet; height 4½ feet; Material Wood

(d) Canal: Total length 2 - 0 miles.

LOCATION BELOW HEADGATE	DEPTH	BOTTOM WIDTH	WIDTH AT WATER-LINE	GRADE PER MILE
At ____ Mile	____ feet	____ feet	____ feet	____ feet
At ____ Mile	____ feet	____ feet	____ feet	____ feet
At ____ Mile	____ feet	____ feet	____ feet	____ feet
At ____ Mile	____ feet	____ feet	____ feet	____ feet
At ____ Mile	____ feet	____ feet	____ feet	____ feet
At ____ Mile	____ feet	____ feet	____ feet	____ feet

(Give dimensions where reductions in size are made.)

10. Time required for completion of work 2 years.

11. Time required for complete application of water to the proposed beneficial use 2 years.

12. Choice of newspaper for publication of notice of intention to appropriate Martin Messenger

STATE OF SOUTH DAKOTA
County of Bennett } ss.

I, Birthol Brown, being first duly sworn on my oath depose and say: That my relation to the above described undertaking is that of owner, that I have read the above foregoing statement, examined the map accompanying the same, and that I know of my own personal knowledge that the matters therein stated and shown are true.

Signed Birthol B. Brown

Subscribed and sworn to before me this 27th day of May 19 33

David Heppson (S E A L)

Notary Public (or other qualified officer.)

*Each diversion must have a headgate or measuring device.

Remarks by State Water Resources Commission:

After examination, application was held for further information as to details of construction of dam. This additional information having been received on July 21, 1933 and being generally satisfactory, the application is approved September 1, 1933.

STATE OF SOUTH DAKOTA }
County of Hughes } ss.

Pierre, South Dakota, September 1, 1933

This is to certify that the foregoing application was received by the Commission at 8:00 o'clock a. m. upon the 31st day of May, 1933

State Water Resources Commission

Signed Charles A. Trimmer
Chief Engineer, Executive Officer
By: C. R. _____ Deputy State Engineer

Number of permit 265-2

Date of first receipt of application May 20, 1933

Date of return to applicant for correction, amendments or changes required as follows: May 24, 1933

Date of receipt of corrected application May 31, 1933 Full information received July 2, 1933

Date from which applicant may claim right May 20, 1933

Approved September 1, 1933, Recorded in Book Nov. 27th Page 413-419

This is to certify that we have examined the foregoing application for a permit to appropriate water of the State of South Dakota, and we hereby grant the same as stated herein, subject, however, to the following limitations and conditions:

1st. The equivalent of at least one-fifth of the work above specified is to be completed on or before September 1st, 1934

2nd. The whole of said work is to be completed on or before September 1st, 1935

3rd. The limit of time for proof of beneficial use of water appropriated in accordance herewith is September 1st, 1935

4th. The water appropriated shall be used for the purpose of Irrigation, water power development, and domestic use.

5th. The prior right of all persons who, by compliance with the laws of the State of South Dakota, have acquired a right to the use of water must not be injuriously affected by this appropriation.

6th. The amount of the appropriation herein granted shall not exceed 4.45 cubic feet per second; neither shall it exceed the capacity of the above described system of diversion works nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of the best husbandry; and further, said appropriation must be limited to not more than one seventieth (1/70) of one cubic foot of water per second of time for each acre of land to which water is actually and beneficially applied for irrigation on or before May 20, 1935; said water to be used during the following described annual period:

During growing season for irrigation. During entire year for power and domestic use.

Witness my hand this 1st day of September, 1933

State Water Resources Commission

Signed By: Charles A. Trimmer
State Chief Engineer, Executive Officer
By: C.R. _____ Deputy

Certificate of Construction issued _____, 19____

Water License issued _____, 19____

P 2—Application for Permit to Appropriate Water—Original

NO.....

Water Division No. ..... District.
(Blanks to be Filled by the State Engineer.)

8:00 a.m.

APPLICATION FOR A PERMIT
To Appropriate Water Within the State of South Dakota

(NOTE—Draw a line through items not applicable.)

1. Name of applicant Berthol Brown

Postoffice address Martin, County Bennett, State So. Dak

I. If a corporation —

(a) Name of same —

(b) Date and place of incorporation —

(c) Amount of capital stock —

(d) Amount paid in —

(e) Names and addresses of directors: —

(NOTE—A certified copy of articles of incorporation must accompany the application.)

II. Method of accomplishing the work and financial resources of the applicant:

(a) Method of accomplishing the work. (Whether by contract, employment of others, or by direct labor) Direct Labor

(b) Cash on hand, $— (c) Treasury stock, $—

(d) Bonds to be issued, $— (e) Other resources, $—

2. Name of diversion works Cedar Creek

3. Quantity of water claimed 445 cubic feet per second.

4. Source of water supply Cedar Creek

5. Location of point of diversion 362 ft N10°25'W of a point 1120' West of ¼ Cor. between Sec 25&30 T36N,R37W on Right bank.
(Right or left bank looking down stream.)

6. Annual periods during which water is to be used Growing Season

7. To be used for:

I. Irrigation or domestic use:

(a) Number of acres to be irrigated 366 acres.

(b) Legal subdivisions to be irrigated.....
(NOTE—A list of lands to be irrigated, giving each subdivision and fraction with acreage thereof, should be written here, or may be appended as a part of this application. Same must also be shown on accompanying map.)

(c) Statement as to domestic use (giving location, etc.)

Pipe line will probably be run to house from ditch

II. Mining, power, manufacturing, transportation, or other purposes:

(a) Nature of use Possibly for power at some future date

(b) Amount of power to be generated 9½ horse power.

(c) Location of plant At Dam

(d) Method of developing power Turbine & generator.

(e) Point where water will be returned to stream Immediately below dam

8. Est d cost of works:
(a) Head gates, $ 50 (b) Pumping plant, $ —
(c) Fluming, $ 150 (d) Canal-earth, $ 1200 Rock, $ —
(e) Other structures Earth Dam $ 1050 Total, $ 2450.00

9. Description of diversion works:
I. Nature of works: (Reservoir, dam, ditch, flume, ~~pumping plant~~, etc.)

II. Dimensions of works:
(a) Dam: Height 34½ feet; length at bottom 12 feet; length at top 115 feet; thickness at bottom 132 feet; thickness at top 10 feet; slope of front (water) face 2:1; slope of back face 1½-1; material used in construction Adjacent sandy soil

(b) Reservoir; Capacity when filled 18 acre feet. Surface area at highwater mark 3.1 acres.

DEPTH AT OUTLET—FEET	SURFACE AREA AT EACH ____ FEET OF DEPTH AT OUTLET—ACRES	CAPACITY ACRE-FEET

(c) Head gate: Width 4' feet; height 4½ feet;
Material Wood

(d) Canal: Total length 2.0 miles.

LOCATION BELOW HEADGATE	DEPTH	BOTTOM WIDTH	WIDTH AT WATER LINE	GRADE PER MILE
At ____ Mile	____ feet	____ feet	____ feet	____ feet
At ____ Mile	____ feet	____ feet	____ feet	____ feet
At ____ Mile	____ feet	____ feet	____ feet	____ feet
At ____ Mile	____ feet	____ feet	____ feet	____ feet
At ____ Mile	____ feet	____ feet	____ feet	____ feet

(Give dimensions where reductions in size are made.)

10. Time required for completion of work 2 years.

11. Time required for complete application of water to the proposed beneficial use 2 years.

12. Choice of newspaper for publication of notice of intention to appropriate Martin Messenger

STATE OF SOUTH DAKOTA, }
County of Bennett } ss.

I Berthol B. Brown, being first duly sworn on my oath depose and say: That my relation to the above described undertaking is that of owner (Owner, manager, engineer.), that I have read the above and foregoing statement, and examined the map accompanying the same, and that I know of my own personal knowledge that the matters therein stated and shown are true.

Signed Berthol B. Brown.

Subscribed and sworn to before me this 15 day of May 1933

Harold Evans
Notary Public (or other qualified officer.)

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

WENDELL DeKAY, CHARLES EMLEY, BRETT HEALTH, RAYMOND KOCER, and LAWRENCE KOCER,	)	
Petitioners,	)	PREHEARING BRIEF
v.	)	
UNITED STATES FISH AND WILDLIFE SERVICE,	)	
Applicant.	)	

PRELIMINARY STATEMENT

Consistent with the schedule previously authorized by the South Dakota Water Management Board, the Water Rights Division of the South Dakota Department of Environment and Natural Resources (hereinafter Division) hereby submits its prehearing brief.

This case involves three water rights applications filed by the United States Fish and Wildlife Service (hereinafter "FWS"). These applications include (1) a vested right claim, (2) an application to amend a water permit, and (3) an application for a new water permit. This brief is designed to identify issues which will arise at hearing with regard to each of the three applications.

VESTED RIGHT CLAIM NO. 1927-2

FWS has applied for validation of a vested right water claim for 10.0 cubic feet of water per second from Lake Creek in Bennett County, South Dakota. The water is being used for the LaCreek National Wildlife Refuge. The application for this

vested right validation was filed according to the procedure set forth in SDCL 46-5-49.*

The legal standard for determining whether a vested right exists is set forth in SDCL 46-1-9. That statute lists five separate circumstances under which the term "vested rights" would apply. In this case, the vested right would be that right defined in SDCL 46-1-9(1):

> The right of a riparian owner to continue to use water actually applied to any beneficial use on March 2, 1955, or within three years immediately prior to that date to the extent of the existing beneficial use made of the water

The Division expects that there will be four principal areas of dispute with regard to whether the FWS application meets this standard.

A. Priority date.

The first area of dispute is with regard to what priority date would apply to the vested right, if granted. Although all parties appear to agree that the water was actually used previous to March 2, 1955, as required by SDCL 46-1-9(1), they disagree regarding the actual date involved and whether the use was subsequently abandoned. FWS claims a priority date of 1939. The neighbors who have intervened in this matter may claim that any pre-1955 use was abandoned.

The Division supports a priority date of January 1, 1951. The Division's position is based upon an affidavit signed

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* The statutes pertinent to all three water rights applications are included in the Appendix.

by Charles J. Ritter which was filed with the FWS application. In the affidavit Mr. Ritter stated that he had witnessed water use on the land from 1951 to 1953. Although the Division opposes the 1939 validation date, the Division supports approval of this vested right water claim with a priority date of July 1, 1951.

B. Beneficial use.

The Division expects that the second disputed issue will be with regard to whether the FWS use of this water constitutes a "beneficial use" as required by SDCL 46-1-9(1). As stated in SDCL 46-1-8, "beneficial uses is the basis, measure and the limit of the right to the use of water subscribed to the title." Absent beneficial use, FWS would not be entitled to validation of this water right. The beneficial use concept is also set forth in SDCL 46-1-4. In order to show beneficial use, an applicant must meet the standard set forth in SDCL 46-1-6(3).

> (6) "Beneficial use," any use of water within or outside the state, that is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interests of the public of this state in the best utilization of water supplies.

Neighbors Wendell DeKay, Charles Emley, Brett Heath, Raymond Kocer, and Lawrence Kocer have intervened in this administrative proceeding, claiming that the FWS water use involved in this application does not constitute a beneficial use. The neighbors' petition to intervene appears to take the position that the FWS water use is not beneficial in that (1) the use has not served its purpose of promoting wildlife habitat, (2)

that the water use is not beneficial in that it is undertaken in an unenclosed and uncultivated area, and (3) that FWS already has adequate water rights and the proposed water use would constitute waste.

Wildlife management. The concept of beneficial use includes both a use which the appropriator considers to be beneficial as well as a use which is in the public interest. A determination of whether a use has been undertaken which is beneficial to the appropriator is largely a management question of the National Wildlife Refuge.

The public interest consideration is the second component of the beneficial use question. The neighbor/intervenors are, of course, entitled to present relevant evidence in support of their position that the water management techniques utilized by FWS are not consistent with the public interest. The Division does not, however, agree that FWS has improperly managed water resources on the wildlife refuge, or that any improper management on the wildlife refuge is inconsistent with the public interest.

Unenclosed and uncultivated area. The Division expects that another issue concerning beneficial use is the issue of whether water should be appropriated for the purpose of cultivating food for wild fowl on land that is unenclosed and uncultivated. The Division believes it is significant to point out that the beneficial use issue should not focus on whether the area to be irrigated is enclosed or unenclosed. South Dakota statutes

pertaining to water rights do not make this distinction. This issue simply does not arise in the context of water permit proceedings. Also it should be recognized that water used for wildlife habitat is considered to be beneficial use. The Water Management Board has consistently approved applications to use water for wildlife purposes.

Waste/adequate water rights. Also, as a third claim regarding beneficial use, the Division expects the neighbor/intervenors to argue that FWS use of the water would be a waste and that FWS already has adequate water rights. The issue of whether FWS already has adequate water rights would be germane only to a case where new water use was being proposed. In this case, FWS seeks validation of its long-time water use. It does not seek to expand existing water use. Moreover, with regard to the waste question, the Division does not agree that this existing water use is excessive given the topography of the refuge.

C. Impairment of existing rights.

The neighbor/intervenors have claimed in their petition to intervene, that approval of this water use is inappropriate in that the use constitutes an impairment of their existing property rights and water rights. For purposes of a vested right validation, evidence concerning this issue would appropriately be considered by the Board as part of the "public interest" facet of the beneficial use determination. Obviously, exhibits or testimony regarding real property damage caused by water use not

involved in the particular vested right application in this case (whether such property damage is caused by FWS or any other party) would be inappropriate in this proceeding.

While the Division does not oppose relevant and otherwise admissible testimony or exhibits concerning the real property damage issue, the Division does not agree (1) that the neighbor/intervenor's property has been damaged by the FWS water use involved in this administrative proceeding, or (2) that any damage caused by FWS to the property warrants denial of the vested right claims involved in this proceeding.

The neighbor/intervenor's Petition to Intervene also claims that the water use described in the vested water rights claims would impair the existing water rights of those landowners.

The neighbor/intervenor's do, of course, have the right to domestic use of water pursuant to SDCL §§ 46-1-5 and 46-1-6(4). Additionally, at least one intervenor who has not been actively involved in the prehearing stage of these applications (Kenneth Keegan) may present evidence regarding any effect on his water permit or vested water right. The Division does not, however, believe any of the intervenor's water use could possibly be adversely affected by the FWS water use. The situation involved here is not a lack of water, but an excess.

Therefore, the Division does not agree that the FWS water use involved in these applications has impaired any of the landowners' water rights.

D. Irrigation definition.

As a fourth principal issue, the Division expects that a dispute will arise at hearing with regard to the definition of "irrigation." The FWS application asserts that the water use is for irrigation purposes. In the event that any doubt exists regarding this issue, the Division's position is that the water use involved in the pending applications is irrigation use. The use involved is consistent with the administrative rules of the South Dakota Water Management Board:

> ARSD 74:02:01:01. Definitions. Terms defined in SDCL 43-17-20, 46-1-6, 46-1-9, and 46-6-1 have the same meaning when used in this article. In addition, terms used in this article mean:
>
> . . . .
>
> (2) "Irrigation," the artificial application of water for the purpose of supplying sufficient moisture for plant growth. Disposal of contaminated water is not considered to be irrigation unless other water is used along with the contaminated water.

Based on the above definition there can be little doubt that the water use involved in the pending application is, in fact, irrigation. It should be noted that the above definition does not require that water be used for commercial or agricultural use in order to be considered irrigation.

APPLICATION NO. 1921-2

Application No. 1921-2 is designed to amend existing water permit No. 265-2 by changing the point of diversion and the

acreage irrigated within the wildlife refuge. The division recommends approval.

Water rights permits may be amended pursuant to SDCL 46-5-30.4, SDCL 46-5-31 and SDCL 46-2A-12. Under SDCL 46-5-30.4, such an amendment may not impair existing rights. Additionally, beneficial use must be considered pursuant to SDCL 46-1-8 and 46-1-4. SDCL 46-2A-12 provides that an existing permit may be amended for a change in use or a change in point of diversion "only if the change does not unlawfully impair existing rights and is for beneficial use and in the public interest."

The Division expects that issues regarding beneficial use and impairment of existing rights will again be raised by the neighbor/intervenors in this proceeding. Although application No. 1921-2 is a different type of application from a vested right application, several of the same issues arise, i.e., impairment of the existing property and water rights, refuge management issues, and waste of water. Also, the Division expects that the irrigation definition will again be at issue since the permit involved in Application No. 1921-2 is also an irrigation permit.

The Division expects, however, that one unique issue will arise with regard to this application. That issue is whether the provisions of SDCL 46-5-34 and SDCL 46-5-34.1 apply. Those provisions pertain to transfers of irrigation rights when the proposed use is not appurtenant to the land. In this case, neither the change in acreage irrigated nor the change in diversion point are the type of water rights transfer

contemplated by SDCL 46-5-34 and SDCL 46-5-34.1. Those statutes are designed to apply to situations where water is to be piped or channeled to a distant point for use.

SDCL 46-5-34 and SDCL 46-5-34.1 are not pertinent; the legal standard set forth in those statutes is inapplicable.

APPLICATION NO. 2192-2

Water Permit Application No. 2191-2 requests appropriation of 4.44 cfs from six (6) springs. The water is used for water fowl propagation and enhancement of wildlife on the wildlife refuge. The Division recommends the approval of this permit.

SDCL 46-2A-9 applies to the issuance of new permits:

> A permit to appropriate water may be issued only if there is a 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 right and that the proposed use is a beneficial use and in the public interest.

The Division expects that the issues involved with regard to this application will be (1) whether a reasonable probability exists that the proposed diversion can be developed without unlawful impairment of existing rights, and (2) whether a reasonable probability exists that the proposed use is a beneficial use and in the public interest. These issues are the

same as those described in the discussion of the vested right validation (with the exception of the priority date question discussed in the vested right application).

Dated this ____ day of _____, 1992.

Diane Best
Assistant Attorney General
Office of Attorney General
500 E. Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Prehearing Brief in the matter of Wendell DeKay, et al. v. United States Fish and Wildlife Service, was served by United States mail, first class, postage prepaid, upon

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on the 14th day of July 1992.

Service on John R. Kunz was also made by FAX at (303) 236-8644 on the 14th day of July, 1992.

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July 17, 1992



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Pierre, SD 57501

Re: DeKay, Emley, Heath & Kocer v. U.S. Fish & Wildlife Service;
Application Nos. 1927-2, 1921-2 and 2191-2

Dear John:

Enclosed please find the Petitioners' Brief in the above-referenced matter. By way of this letter, I am providing copies to the members of the Board, John Hatch, Diane Best and John Kunz.

Yours truly,

PATRICK M. GINSBACH

PMG/jc

cc: John Hatch
Diane Best
John Kunz
Water Management Board Members

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA



WENDALL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, Petitioners,	)	APPLICATION NOS. 2191-2, 1927-2 and 1921-2
vs.	)	
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	

PETITIONERS' RESPONSE TO MOTION IN LIMINE

Come now the Petitioners and for their response to the Applicant's Motion in Limine would state as follows:

1. First, the Motion in Limine is not timely. Depositions were taken by the Applicant of the parties to these proceedings and their expert witnesses during the week of May 21, 1992. The Applicant has now allowed more than two months to pass before filing a Motion in Limine on the eve of the hearing. Because of the untimeliness of the Motion, it should be denied; and, or in the alternative

2. The thrust of the Applicant's Motion in Limine seeks to foreclose any public input in these proceedings. Yet the Water Management Board, in deciding whether to grant the request for the appropriation of water, must determine, pursuant to SDCL 46-2A-9 that there is unappropriated water available, that the proposed diversion can be developed without unlawful impairment of existing rights, and that the proposed use is a beneficial

use. SDCL 46-2A-9. The thrust of the Petitioners' arguments and evidence is that presently the water management practices of the Refuge constitute waste and to allow them to appropriate water with a State permit is not in the public interest nor a beneficial use considering the underlying reasons for the Refuge's request for the appropriation of water and also taking into consideration the fact that for whatever reasons the Refuge has availed itself at this time of the jurisdiction of the Water Management Board in order to legitimatize the water taking that has been on-going through the years. Rolf Kraft, Manager of the LaCreek Wildlife Refuge, testified in his deposition taken on May 21, 1992, that the Refuge did not intend on using any more water than it used on the average over the past ten years and that would be true in the case the permits are granted. The thrust of the Motion in Limine seems to be that because the Refuge has been using this water all along no public input is needed or required in order to determine whether these Applications should be granted. If the Board takes this view, it would be abdicating its responsibility to the citizens of South Dakota to determine issues concerned with whether a water permit is appropriate. The Refuge has made application to the Water Management Board.

SDCL 46-2A-5 provides:

> The Applicant or <u>any person</u> who has filed a petition to oppose or support an application, may submit a written notice to the chief engineer requesting a postponement of the date set for hearing on the application. Upon receipt of the written notice, the chief engineer shall cancel the original hearing on the application and reschedule the application for hearing by the water management board not less than twenty days after the published date for hearing. The notice shall be filed at least ten days before the published date for hearing. (emphasis added).

South Dakota law does not restrict access to the Water Management Board in making its determination as to whether a proposed use is a

beneficial use and in the public interest. To disallow public input would be contrary to the statutory requirement.

Counsel for the government took the depositions of Charles Emley, Lawrence Kocer, Raymond Kocer, Brett Heath and Wendall DeKay on May 20 and 21, 1992. Counsel was well aware of the testimony that would be offered by these witnesses and is attempting to discourage the Board from this input by arguing that the hearing may take longer than originally anticipated. Whether the time alloted for this hearing is appropriate remains to be determined, however to grant the Motion in Limine on the basis that the Board would not have time to hear their testimony would also be contrary to the Board's responsibility in determining the public interest and the beneficial use of the Applications.

WHEREFORE, Petitioners respectfully request that the Applicant's Motion in Limine be denied.

Dated this 17th day of July, 1992.

FARRELL, FARRELL & GINSBACH

JANE M. FARRELL

PATRICK M. GINSBACH
Attorneys for the Petitioners
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of July, 1992, a true and correct copy of the foregoing Petitioners' Response to Applicant's Motion in Limine was mailed regular United States mail with first class postage prepaid in an envelope securely sealed and addressed to:

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BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

WENDALL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, Petitioners, vs. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	APPLICATION NOS. 2191-2, 1927-2 and 1921-2

July 17, 1992

PREHEARING BRIEF OF PETITIONERS, WENDALL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER AND LAWRENCE KOCER

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

WENDALL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, Petitioners,	)	
vs.	)	APPLICATION NOS. 2191-2, 1927-2 and 1921-2
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	

PETITIONERS' PREHEARING BRIEF

Come now the Petitioners Wendell DeKay, Charles Emley, Brett Heath, Lawrence Kocer and Raymond Kocer, (Petitioners), the Petitioners in the above-captioned proceeding, and pursuant to the May 31, 1991, Prehearing Order of the Hearing Examiner, hereby submit the following Prehearing Brief. Attached hereto as an Appendix is a map of the Refuge, Brown Ranch, and the location of Petitioners' Emley, Heath and Kocer properties. Also included on this map is the location of the diversions on Lake Creek in connection with Application No. 1927-2; the approximate location of the springs that are part of Application No. 2191-2; and the location of the dam and its changed location in connection with Application No. 1921-2.

I.

PROCEDURAL BACKGROUND:

The Petitioners accept the procedural background set out in the Applicant's Brief dated July 7, 1992, with the following additions.

Originally, the Petitioners received notice by publication that Application Nos. 1927-2 and 1926-2 (now resubmitted as Application No. 2191-2) were to be heard before the Water Management Board on October 3, 1990. The Petitioners, along with Kenneth N. Keegan, submitted objections to those Applications on September 17, 1990. At that time, they requested an automatic delay for at least 20 days to allow adequate preparation for participation in the hearing. Thereafter, John Hatch with the Water Rights Division gave notice to the Applicant that based upon the Applicant's request, the hearing to consider Application Nos. 1926-2 and 1927-2 was continued to February 27 and 28, 1991.

Thereafter on December 14, 1990, the Chief Engineer, John Hatch informed the Applicant that the previous notice procedure on Application Nos. 1926-2 and 1927-2 was insufficient and to insure proper notice, the hearing scheduled for February 28, 1991 was cancelled and the Notices were published again. On May 1, 1991, the Water Management Board appointed Marian Gunderson as the hearing office to take testimony commencing on June 26, 1991.

Thereafter, the Applicant filed a Motion to Withdraw Application No. 1926-2. In that Motion the Applicant contended that it would have to make significant amendments to the Application and then it would be resubmitted. The Applicant made the representation that the Motion to Withdraw was being made in good faith and not for the purpose of delay or undue advantage, but went on to point out that if the Motion was granted, he had recognized the same objectors may well again oppose the Application. Faced with that Motion, the hearing examiner found the materials submitted by the parties indicated the two water right claims and any Application for the new water right are intertwined and it did not make sense to conduct the hearing on

June 26th only to have to conduct another hearing later. That it was inappropriate as a matter of judicial economy to allow the Applications to be severed, therefore she entered an Order continuing the matter for 90 days. Thereafter, the Applicant submitted Application No. 2191-2 to replace 1926-2, which was dated August 1, 1991. Notice of Hearing on that Application was published in the Bennett County Booster after December 16, 1991, and the Petitioners filed an Objection to Application No. 2191-2. All three of the Applications were then scheduled for hearing on February 4, 1992, before the Water Management Board in Pierre, South Dakota. The Petitioners then moved to appoint a hearing examiner to hear all the Applications and to allow the hearing to take place in Bennett County or alternatively, to schedule the matter for hearing at the Bennett County Courthouse during the full Board's hearing in July of 1992. The Applicant filed a Response requesting the full Board to hear this matter rather than to allow the hearing examiner to take testimony and make divisional inspection of the premises. The Board, at its meeting on February 4, 1992, granted that request and scheduled the matter to be heard during the Board's regular meeting, which meeting would be held in Martin, Bennett County, South Dakota, commencing on July 22, 1992.

APPLICATION NO. 1927-2:

A. Description of Relief Requested.

In Application No. 1927-2, the U.S. Fish & Wildlife Service has applied for a permit to appropriate 10 cubic feet per second (cfs) of water from Lake Creek to flood irrigate approximately 700 acres of land located on the Fish & Wildlife Service's LaCreek National Wildlife Refuge. The Petitioners are requesting this Application be denied because it has unlawfully impaired the existing rights of some of the Petitioners, the use

by the Fish & Wildlife Service is not a beneficial use nor is it in the public interest, and the water has not been appropriated as described in the Application for irrigation use with a priority date of 1939 or 1951.

B. Statement of Facts Which Petitioners Intend to Prove in Support of Their Position.

1. History of Refuge

The LaCreek National Wildlife Refuge was established in 1935 by Executive Order of President Roosevelt, and it was located originally in parts of Townships 36 and 37 North, Range 36 West of the 6th Principal Meridian, Bennett County, South Dakota.

In July of 1968, the U.S. Fish & Wildlife Service entered into an option to purchase lands belonging to the Cedar Creek Ranch Company, which were located adjacent to the original Refuge in Bennett County, South Dakota. This ranch was originally started by Birthol Brown and later incorporated into the Cedar Creek Ranch Company by Brown and his children (The Cedar Creek Ranch Company shall hereinafter be referred to as the "Brown Ranch"). In 1971, the Cedar Creek Ranch Company had dissolved and the shareholders of that ranch company executed a warranty deed pursuant to the terms of the option to purchase executed in July of 1968 conveying all of their interest in 6,665.24 acres to the United States of America, which became part of the United States Department of the Interior, Fish & Wildlife Service, LaCreek National Wildlife Refuge in September of 1971. This land is described as:

Township 36 North, Range 36 West, 6th P.M.

Section 29: SW¼, S½SE¼
Section 30: NE¼, Frac. W½
Section 31: All
Section 32: NW¼

Township 36 North, Range 37 West, 6th P.M.

Section 13: N½, NE¼SW¼, S½SW¼, SE¼
Section 14: NE¼
Section 22: All
Section 23: NE¼NE¼, E½NW¼NE¼, S½NE¼, S½
Section 24: E½, E½NW¼, NE¼SW¼, S½SW¼
Section 25: N½, SW¼, N½SE¼
Section 26: All
Section 27: All
Section 28: All
Section 29: E½

In 1971 when the Refuge acquired the Brown Ranch the duck production that year was 6,008, according to the Annual Water Program Report. According to information received from the U.S. Fish and Wildlife Service, in 1990 the total duck production was 1,360, a decrease in duck production of 4,638.

2. Proceedings involving Application No. 1927-2.

In June of 1984, the U.S. Fish & Wildlife Service made application for a permit to appropriate 10 cubic feet per second of water to irrigate 700 acres. The source of the water to be used for irrigation would be from diversions created on Lake Creek which flows through the Brown Ranch, through part of the Church property under lease to Charles Emley and through the Brett Heath property. The points of diversion would consist of earthen plugs in the channel with 5 foot check boards and 48 inch corrogated metal pipe for flood irrigation. These diversions would be located as follows:

Diversion No. 1 - NE¼NW¼SW¼, Section 22.

Diversion No. 2 - SE¼NW¼SE¼, Section 22.

Diversion No. 3 - NE¼SE¼SW¼, Section 23.

Diversion No. 4 - SW¼NW¼SE¼, Section 24.

All of the above diversions are located in Township 36 North, Range 37 West of the Sixth Principal Meridian, Bennett County, South Dakota.

In Application No. 1927-2 it provides in Paragraph 6 that the annual period during which water is to be used is irrigation season. According to the report issued by M. Rassool Ahadi, Natural Resources Engineer II with the South Dakota Division of Water Rights, on August 28, 1990, his recommendation was to allow diversion of 10.0 cfs from Lake Creek for irrigation.

3. The Petitioners.

Raymond Kocer owns land in the NW¼ of Section 23, Township 36 North, Range 37 West, 6 P.M. that adjoins that portion of the Cedar Creek Ranch Company that was purchased by the Fish & Wildlife Service. Charles W. Emley leased land in the NW¼SW¼ of Section 13, and in the W½NW¼ and the NW¼SW¼ of Section 24, all in Township 36 North, Range 37 West, 6th P.M. The later portion of Emley's property described herein is completely surrounded, except for the northwest corner, by property owned by the United Fish & Wildlife Service which was formerly the Brown Ranch. Brett A. Heath owns the W½ of Section 19, Township 36 North, Range 37 West, 6th P.M. and is surrounded on three sides by the Fish & Wildlife Service, which was formerly the Brown Ranch. Lawrence Kocer owns the W½ of Section 18, Township 36 North, Range 36 West, 6th P.M. and is surrounded on the west and east by the U.S. Fish & Wildlife Service land, which was formerly the Brown Ranch.

Wendell DeKay's ranch is below the Refuge in Section 30, Township 37 North, Range 35 West, 6th P.M., and is one of the first private pieces of property that the Fish & Wildlife Service discharges water from the Refuge onto after it has flowed through the Refuge pools.

4. History of the Use of Lake Creek and the Springs on the Brown Ranch.

Petitioners expect the evidence will establish that Birthol Brown was an enterprising entrepreneur when he owned the Cedar Creek Ranch. The evidence will show that the ranch was developed to produce livestock such as cattle and sheep, to produce a hay crop, and that there was even at times a fish hatchery and a power plant on the property. The evidence will establish that Brown built the dams to support pools for the breeding of fish in connection with his fish hatchery and built a dam to develop a hydroelectric power plant. That originally the ditches were constructed on the bottom land of the Cedar Creek Ranch Company to try and drain the fields because the land was subirrigated and there was too much water on the fields. That Brown and his children constructed ditches in the 1940's to try and irrigate the fields for alfalfa, but the alfalfa did not pan out. People who operated on the Brown Ranch from 1952 through 1971 are expected to testify that the land was never irrigated.

In September of 1971, the Refuge took over the Brown Ranch. In the Annual Water Program covering the year 1971 the Refuge reported that it acquired Cedar Creek Ranch and that the

> "new area includes about 2,000 acres of wet meadow that will present a real management challenge in the next few years. It is not intended that large pools be constructed to flood this meadow. Rather, management will be concentrated on working within the area's present capabilities. Considerable experimentation will be done in 1972 of the irrigation system and ponds on the area."

(See page 1 of the Annual Water Program submitted to the regional supervisor for the Division of Wildlife Refuges in 1972.)

The Acting Regional Engineer with the Division of Wildlife Refuges in a memo dated February 29, 1972, stated in response to the Annual Program Report that

> "...however we do not own all of the land on the north side of Lake Creek, through which some of the old irrigation feeder canals deliver water from Lake Creek. We should be careful not to divert water across these private lands without first having approval from the land owners."
> s/ Edwin B. Stevenson

That during the Refuge's operation of the Cedar Creek Ranch they flood irrigated the hay meadows. Through the Fish & Wildlife Service's utilization of the water on the former Brown Ranch, they damaged the productivity of the ground for crop land, and that their true intent is not to irrigate the land for crop or forage production for wildlife, but to create sloughs for waterfowl. The evidence will show that through the Fish & Wildlife Service's utilization of the water on the Refuge they have consistently flooded Raymond and Lawrence Kocer's land and due to the diversion structures on Lake Creek, those diversion structures slow down the movement of the water and as a result the water's ability to carry suspended solids downstream is decreased. The sedimentation buildup of Lake Creek elevates the channel of the creek and results in water flooding out of the banks of Lake Creek and onto the private land of Brett A. Heath, Charles Emley, and Lawrence Kocer. That when the water from Lake Creek is discharged off the Refuge into DeKay's property, it looks and smells "putrid". The water is so bad that DeKay's cattle will walk from the creek up to the buildings to drink water out of a tank rather than drink the water

discharged from the Refuge. At times in the spring and early summer, the Refuge's obstruction of Lake Creek is such that there is no flow to the water so that even those landowners downstream from DeKay like Ken and Beverly Hines oftentimes will not have water for their livestock.

5. Summary of Petitioners' individual problems incurred as a result of the Refuge's water management practices.

(a) BRETT HEATH

Brett Heath and his father before him own the West Half (W½) of Section 19, Township 36 North, Range 36 West of the 6th P.M. in Bennett County, South Dakota. Heath is surrounded on the east by the Refuge property that contains the original Refuge operations. To the south of Heath's property is the Refuge operation which includes a spring identified as "F" in the Application contained in No. 2191-2, and to the west of Heath in Section 24, Township 36 North, Range 37 West, is Refuge property that includes land that will be flooded by the spring identified as "E" in Application No. 2191-2, and by a dam on Cedar Creek that is affected by Application No. 1921-2 that will flood the Northeast Quarter (NE¼) of Section 25 of the Refuge property and the Southeast Quarter (SE¼) in Section 24 of the Refuge property, and portions of the Heath property according to the map which is attached to the Application. To the north of Heath is the Lawrence Kocer property.

The Petitioners expect that the evidence will show that Heath's father purchased the property he now lives on for hay production and running livestock. The land has never been farmed. In fact, in previous internal correspondence from the Refuge, a Refuge manager in 1945 recognized that the Heath property was very good for hay production. At that time, the property was owned by the Williams family.

The Heath family started to have problems with the Refuge in about 1959 when they drained Pool Number 7 and started pushing water up around the headquarters of the Refuge and then water started backing up onto the Heath property as a result of the water management practices at the Refuge. Lake Creek would flood out of its channel because the creek channel had been filled in with sand and sediment as a result of the diversions on Lake Creek by the Refuge. The more the creek channel was filled in the more Lake Creek flooded out of its banks. Initially the Refuge had a drag line and was engaged in a regular dredging process of Lake Creek to prevent any sediment or siltation.

Eventually, based upon representations made by Harold Burgess, the Superintendent of the Refuge, that if George Heath would dig a straight ditch from the east end of his property to the west end of his property to join up with Lake Creek and straighten the creek channel out that the Refuge would maintain that ditch and keep it clean and would dredge it. George Heath hired Gene Stewart of Valentine, Nebraska, to construct a straight ditch across his property to carry the flow of Lake Creek. The first few years of the operation of the ditch it drained off the Heath home place and the west half of the Heath property and carried the siltation out. However, Heath contends that the Refuge didn't maintain the dredging as promised and as a result, the siltation continued to fill back in on the new ditch and the new ditch would then have water flowing out of its banks. The Heaths never tried to dredge out their own ditch since the Refuge was not taking any action to dredge out the portion of the creek that was on the Refuge property that was being filled in with sediment. Pictures taken in January of 1975 and March of 1975 show the north side of the Heath property under water. Pictures taken in June of 1975 show the cattails and water on the

Heath property on Heath's barbed water fence being under water. The photos taken in July of 1989 show the same type of flooding. There are also photos of Lawrence Kocer's property taken in 1986 that show hay bales surrounded by water.

Heath has had an opportunity to observe the Brown Ranch to the west of him and notes that it produces sufficient forage even when it isn't irrigated.

Part of the problems Heath is experiencing presently are due to the water management practices of the Refuge on the original Refuge structure. Heath contends that by granting Application Nos. 2191-2, 1927-2 and 1921-2 allowing the Refuge to continue using that water, it will further compound the problems he is presently experiencing in connection with the original Refuge structure. On the original Refuge structure a 3 foot corrogated metal pipe drop structure between Pool No. 2 and Pool No. 3 is the main cause of the sediment problems at Pool Two and the nearly constant flooding of the private property of Brett Heath. That structure was installed by Rolf Kraft, the LaCreek Refuge Manager in the early 1980's.

Apparently the Refuge takes the position that if the 3 foot corrogated metal pipe drop structure was removed it would only shift the problem to an area immediately downstream from the structure. However, the sandbar below the 3 foot corrogated metal pipe drop structure formed after the structure was put in place and the ditch had functioned satisfactorily up to that time until a series of other structures were also put in place that slowed the flow in the ditch which in turn resulted in the deposition of sediment.

An examination of the supply ditch at the west end of Pool No. 2 reveals the sediment accumulation. The Refuge contends that the problem created by the sediment buildup could have been corrected if Heath would

agree to regulate and maintain the dredging program on that portion of the Lake Creek ditch that runs through his property. However, the Petitioners contend that the problem originated when the Refuge installed the 3 foot drop structures in the channel and then have not completed the periodic dredging that became necessary. Since the Petitioners were not a party to the creation of this problem, they should not contribute financially to correcting it.

Brett Heath has described the system's original design as functioning satisfactorily to all concerned without any undue amount of maintenance. The ditches were systematically dredged and the water levels in Lake Creek were never such as to cause unwarranted flooding. Rolf Kraft, on March 31, 1992, in a field inspection trip stated that there was not a scheduled amount of dredging accomplished each year under the present Refuge operations. Photos taken of the site where sediment accumulated are very dramatic and show that the channel's capacity on Lake Creek has been reduced by an estimated 80% because of the sediment.

Furthermore, the structures installed under the Refuge's original design corroborates the problems that Lake Creek is experiencing with sedimentation. For example, the Petitioners expect the evidence to show that the siphon, a 15", 560 foot corrogated metal pripe under Lake Creek appears to have silted full and is no longer functional. A 600 foot spillway into Pool No. 7 has been diked off so that it no longer is in use. Also, the ditch into Pool No. 7 is silted in to the extent that it no longer serves its purpose. The supply ditch at the west end of Pool No. 7 has not been maintained. The ditch was designed with a three foot wide bottom and with a six foot flow deck. Under the Refuge's original plan, in order to handle the drainage of 40,000 to 45,000 acres of flood flow, the Refuge had

planned on 1400 feet of spillways into Pool No. 7 and an open ditch system which was to handle Lake Cree's normal stream flow. However, the design structure has been changed by installing a series of three foot tubes leading into Pool No. 7 which cannot handle the drainage.

One of the reasons the channel alignment completed by George Heath in constructing the ditch through his property failed was because the Refuge installed structures in the channel that caused a pooling of the water in Pool No. 2 which in turn resulted in the deposition of sediment in the channel. Presently, sedges, rushes and foxtail barley predominate the vegetation on Heath's property. The Refuge contends that the site always was predominantly sedges and rushes. However, the vegetation on these sites are water tolerant grasses and sedges. It is only when the water table is maintained at or near the surface season long that only sedges, rushes and foxtail barley predominate.

Even if the U.S. Fish and Wildlife Service came to Brett Heath and said that every year they would dredge that portion of Lake Creek that runs through Heath property and then dredge that portion of Lake Creek that runs through Refuge property, there would still be the problem of the water. Heath would not have the sediment, but the water would still be there. Because the Refuge has a three foot tube, or five of them, in that dike, the first one you come to is silted in and not even functional so that isn't helping, so that leaves the other ones operating. Also, a series of photos taken by and in the possession of Brett Heath, identified as Hearing Exhibits "R" through "V" also further demonstrate the flooding problems caused by the Refuge.

(b) LAWRENCE KOCER

Lawrence Kocer owns the West Half of Section 12, Township 36 N, Range 36 West of the Sixth Principal Meridian, Bennett County, South Dakota. It

appears from the maps submitted with the applications that Lawrence Kocer's property would be directly affected by Application #1927-2, which seeks to divert water from Diversion #1 at Lake Creek to take water and irrigate it over Raymond Kocer's property, Refuge property, Charles Emley's church ground, Lawrence Kocer and Brett Heath property and would reenter into Refuge property. Lawrence Kocer has been having problems with flooding presently due to the current design and construction of the original Refuge, which is located in Section 17, 18, 19, 20 in Township 36 N, Range 36 West of the Sixth Principal Meridian.

The design changes in the Refuge's diversion system commenced in 1951 failed to adequately bypass the flood flows of Lake Creek and to allow for additional diversion of Lake Creek to directly flood across Lawrence Kocer's property will exasperate his problem.

A system of water level control structures and siphons have created what is designated as Pool #2 on the Refuge property. Presently, there's a 3' CNP drop structure between Pool #2 and Pool #3. This structure is the main cause of the sediment problem in Pool #2 and the nearly constant flooding of the private property of Lawrence Kocer. This structure was installed by Ralph Craft, LaCreek Refuge Manager, in the early 1980s.

An examination of the supply ditch at the west end of Pool #2 substantiates the sediment accumulation. The sediment accumulation originated when the Refuge installed the 3' drop structures in the channel and then have not completed the periodic dredging that becomes necessary. An examination of the system installed under the Refuge's original 1937 plant also further corroborates what is contributed to the sediment problem in Lake Creek. A siphon-15" by 250' CNP under Lake Creek appears to have silted the flow and is no longer functional. The 600' spillway into Pool #7

has been dyked off so that it no longer is in use. Also, the ditch into Pool #7 has silted in to the extent that it no longer serves its purpose. The supply ditch at the west end of Pool #7 has not been maintained. The ditch was designed with a 3' wide bottom and with a 6' flow depth. The approximately 40,000 acres of flood flows through the series of 3' tubes leading into Pool #7 presently. When the Refuge's original plan in 1937 was developed, it contained 1400' of spillways into Pool #7 and an open ditch system which appeared to handle the normal stream flow of Lake Creek. Under the present situation, at the end of Pool #2 there is only a 3' tube to take the water out of Pool #2. As a result, there can't be more than a 3' flow of water.

The bottom half of Lawrence's quarter section is what is affected by the Refuge's operations of diverting water from Lake Creek, resulting in backing water up onto Lawrence Kocer's bottom quarter section. The Petitioners expect the evidence to show that there have been times when this bottom quarter of Kocer's section of land has been under water for as long as a week. Lawrence Kocer is opposed to the Applications because by allowing the Refuge to irrigate their land that lies to the west of Kocer's, and given the fact that he believes that they presently can't properly manage the water they now use, it's going to create further problems for him. The Petitioners believe the evidence will show that when Lawrence Kocer's father bought the quarter section, the old Refuge bordered that quarter section to the east. The only time that there had ever been water on this quarter section when there was just the Refuge to the east diverting water was when there was a large amount of rain. Otherwise there was no problem. As a result of backing water up on Lawrence Kocer's property it drowns out the natural grasses so there is only slew grass and buck brush

that cattle can't eat. Whenever Lawrence Kocer would complain to the Refuge about the flooding, the Refuge would not open up the gates to release more water down stream because the Refuge claimed they needed the water in certain parts of the Refuge to create habitat.

The Petitioners believe the evidence will also show that Lawrence Kocer has been unable to remove bales of from his land because it was under water. That the level of water flowing in the silted part of Lake Creek has been raised, which in turn has raised the water table in the soils adjacent to the creek. During the periods of high volume flood flows, the water is out of channel and results in extended periods of flooding of the Lawrence Kocer property.

The adverse affects of extended period of flooding has resulted in a change of vegetation on Kocer's property to that of a marsh-type consisting of foxtail, barley, smartweed, sedges and rushes. This vegetation is of little value in Kocer's ranch operation for the livestock grazing or hay production.

The seriousness of the problem becomes evident when one considers that the soils of the affected area are Gannett fine sandy loam and Loup fine sandy loam, which when in excellent condition produces about 5800 pounds and 4800 pounds of air dry weight of herbage per acre respectively on the Gannett and Loup sandy loams.

(c) RAYMOND KOCER

Raymond Kocer owns the Northwest Quarter, and the Northwest Quarter of the Northeast Quarter of Section 23, Township 36 North, Range 37 West of the Sixth Principal Meridian, Bennett County, South Dakota.

Raymond Kocer uses this land for growing alfalfa.

The Petitioners believe the evidence will show that the Refuge

consistently flooded his property which results in the loss of alfalfa and his hayland. The loss of productivity is due to two things. First, the affect of persistent flooding on vegetated growth and second, the inability to harvest a field on a timely basis due to extended flooding.

The water table on Raymond Kocer's property was maintained at and above the soil surface during the growing season from three sources. One source of flooding was the discharge from a Refuge impoundment structure located along the East edge of the Refuge's property in the Northeast Quarter of Section 22, Township 36 North, Range 37 West. The capacity of the supply ditch located on the Kocer property was constantly exceeded and the out-of-channel flow flooded the hayland. The Refuge impoundment was above the level of the Kocer property and when flooded the water pipes below the surface and enters the ground water, causing a persistent water table at or above the surface of the soil. The Refuge's flooding activities on the Southwest Quarter of Section 23, Township 36 North, Range 37 West maintains the water table at or above the soil surface on Raymond Kocer's adjoining properties in the Northwest Quarter of Section 23. Observations of the field shows the increase of saline areas and areas where alfalfa was repeatedly drowned out and replaced by native grass species.

One of the important things to take into consideration is the type of soil on the Refuge property and Raymond Kocer's property where they join each other. It is Loup soil. Loup is a fine sandy loam. The problem is that once you get the first 18" of the Loup soil saturated you get movement into the subsurface. The Petitioners believe the evidence will show that the subsurface water moves laterally and results in the water being piped onto the adjoining land, which is owned by Raymond Kocer. So that when the water pipes up onto Raymond Kocer's property it affects his vegetation.

When water pipes it can travel 10', 20', 50', 100' and come up at some other point. It can also travel as far as a half a mile or can go all the way for a couple of miles. In connection with Raymond Kocer's property, not only is there sand in the soil but there's also a natural grade that allows the water on Raymond Kocer's land to flow great distances.

The affect of the flooding on Raymond Kocer's property is that the vegetation has replaced the native grasses with rushes and smartweed on the edges and cocktail barleys on the extreme edges. There are cattails present also. The Petitioners belive that the evidence will show the presence of cattails indicates the area is under water most of the year, instead of during the "irrigation season" as indicated in the Applications filed in this matter. Along the fence line, there are willows present on both Kocer's and the Refuge properties. In order for those willows to be present there would have to be a high water table. The presence of the smartweed indicates the area has a water table at or near the surface for a considerable portion of the growing season.

As a result of the water management practices on the Refuge property, Raymond Kocer has had seasons when his hay has been surrounded by water which prevents him from removing it. In the past, Raymond Kocer gave the Refuge permission to push water across his property. The Petitioners believe the evidence will show that he did so because he believed that they had the right to do that. Given the fact of the harm this practice is doing to his property and given the fact that the soil conditions make the property subirrigated, there is no need to irrigate his land because the subirrigated soil should be sufficient to allow him to raise the necessary alfalfa. The Petitioners will submit the photographs to document the loss of grass, alfalfa and hayland and the area is converted to a marsh-type vegetation by the near yearlong flooding.

(d) CHARLES EMLEY

Charles Emley owns or leases property that is affected by the Applications to be considered by the Water Management Board. He presently owns the North Half (N½) of Section 29 in Township 36 North, Range 36 West, through which Elm Creek flows; along with the North Half of the Southeast Quarter (N½SE¼) of Section 29, Township 36 North, Range 36 West, through which Elm Creek also flows. The other piece of property he has under his control is leased from the Episcopal Church, described as:

The West Half of the Northwest Quarter (W½NW¼) and
The Northwest Quarter of the Southwest Quarter (NW¼SW¼) in
Section Twenty-four (24),
Township Thirty-six (36) North,
Range Thirty-seven (37) West,
Bennett County, South Dakota.

This is known as the Church Property.

EFFECTS ON CHURCH GROUND OWNED BY EMLEY

In the map which was attached to the original Application 1927-2 it shows that from Diversion One, which is a diversion on Lake Creek, which the Refuge seeks to have validated as a vested water right dating back to the date the Browns had the property, that water will be used to irrigate land owned by the Refuge and the Church ground leased by Emley.

Emley has had this land under lease and expects to present at the hearing documentation from the owner of that land, the Episcopal Church, that they consent to his participation in the proceedings on their behalf and to represent their interest.

On the east edge of this property the Refuge has constructed a diversion that blocks the natural drainage of the land, this diversion being on the East Half (E½) of Section 23. The result of this diversion or ditch

is to impound water wherein the flooding is nearly season long and has resulted in the development of a wetland vegetative type. There has been a loss of productivity and Mr. Emley is prevented from harvesting the site. In a photo display which will be presented to the Water Management Board it will show white and yellowish grass. The yellowish grass indicates where ponds of water gather. This is evidence of how the interference with the drainage has caused different vegetation to spring up. Furthermore, the Petitioners expect to present evidence that the interference with the drainage that is a result of the Refuge's constuction of the raised ditch affects 40% of that property known as the Church Ground Mr. Emley has under lease.

The Church Ground contains two types of soils, Loup fine sandy loam, (Lo) and Dunday and Elsemere loamy fine sand (Du) which constitute the bulk of the soils found on both adjoining Refuge and the privately owned Church properties. Both the Loup and Dunday soils are subirrigated and have a water table that may reach the surface for short periods during the opening season and does not drop beyond 36 to 60 inches below the surface for the remainder of the growing season. The persistent flooding of these soils by the Refuge adversely affects the productivity of these soils and has resulted in major areas being degraded to a marsh type vegetation. The Refuge practices of using water by impounding it allows for the underground flow of water from the Refuge property onto the private "Church Property". Because of the indiscriminate irrigation on the Church Property as a result of the water management practices of the Refuge it interferes with the natural processes and limits the type of vegetation that one would customarily find on the soils located on the Church Property.

Moving south from the site of the Church Property, one can observe the wetland sites that developed below the Refuge impoundment. The Petitioners

expect the evidence to show that the Refuge's practice of flooding this area begins in February and continues into July and sometimes as late as August and results in maintaining the water level at or near the surface of these soils. The Refuge's impoundment structure is above the level of the property and when filled the water pipes below the fill and raises the ground water causing a persistent water table at or near the soil surface in the soils immediately below the structure.

The Petitioners expect the evidence will show that Emley has been unable to harvest the hay from this area until late in the haying season.

The Petitioners further expect the evidence will show that at the extreme southern end of the Church Property the flooding program of the Refuge that existed is of such a magnitude that at harvest time the water is above the soil surface, preventing harvesting of the site. The condition is created by a diversion structure constructed by the Refuge and located south and east of the site. This diversion has created the sediment buildup that in turn causes flooding of the private properties.

Finally, the Petitioners expect the evidence to show that Emley had no problems in operating his property at the Church Ground until the Refuge took over the operation of the Brown Ranch and began its water management practices.

(e) ELM CREEK GROUND OWNED BY EMLEY

The Refuge, in its Brief, contends that Emley's Elm Creek property has no bearing on these proceedings. The Petitioners contend that the effects Emley has experienced on his Elm Creek property as a result of the Refuge's water management practices clearly demonstrate the type of waste that private land owners can expect to endure as a result of the Refuge's water management practices to allow to divert water from Lake Creek or further develop Springs for flood irrigation.

The effects upon the property owned by Charles Emley through which Elm Creek flows is a result of the fact that the Refuge has installed control structures in the Southeast Quarter (SE¼) of Section 20, Township 36 North, Range 36 West, which obstructs the flow of Elm Creek thus resulting in the buildup of sediment in the channel. Because of the buildup of sediment in the channel, this results in an out-of-channel flow and season long flooding of the Emley property causing the vegetation to change to a sedge-rushfoxtail barley type. The Petitioners believe the evidence will show that the control structure was built to aide the Refuge in attempting to develop wetlands habitat on their property. Part of the problem with the control structures that have been installed is the size of the siphon. What they have done is place siphons in the control structures to allow the water to flow through to Pool No. 7 but their siphons are so small they cannot handle the flow of the water. As a result, Elm Creek goes down and goes through a culvert instead of flowing on into Pool No. 7. The diverted Elm Creek slows the progess into Pool No. 7 and as a result it causes Elm Creek to go out of its banks. By the Refuge's backing water up on Emley's property through which Elm Creek flows it causes ponding and results in the vegetation developing into foxtail barley. By backing the water up onto Emley's property, it kills out the plants that are there that can't stand season long flooding. Elm Creek is a perennial stream. When you have severe conditions and the flow leaves sediment silted in, it changes the vegetation and affects the productivity of the ground.

The Petitioners expect the evidence will show that Emley on his own made an attempt to correct the siltation but because of the Refuge's continued practices, which practices include damming up the flow of the creek which causes the creek to settle outside its banks, that results in siltation damages to the adjoining crop land.

One of the problems Emley has, in trying to use this area in Section 29 for pasture, is that it causes foot rot of the cattle due to the water saturation of the ground.

The Petitioners expect the evidence will show that at one time in the 1940s and 50s before the water management practices adopted by the Refuge on Elm Creek the creek was deep enough to swim in. Now, it's silted in, and the water backs up on Emley and interrupts the free flow of the water.

It should be noted and is conceded by the Petitioners that while the flooding on Emley's property in Section 29 is, known as the Elm Creek property, is not the result of any of the water sought to be developed on the Applications now pending before the Water Management Board, this flooding shows the Refuge is wasting water as a result of their water management practices and until the Refuge can control its water management practices so as not to damage adjoining private land, they should not be granted any further water permits.

(f) WENDALL DeKAY

Wendall DeKay runs a cattle operation downstream from the U.S. Fish & Wildlife Service. That the U.S. Fish & Wildlife Service set up a number of diversions to spread the water from the springs over the land which was the Cedar Creek Ranch Company thereby obstructing the natural flow of those springs. That after the spring water has been diverted the excess eventually rejoins the natural flow and is discharged onto the private land owned by DeKay. That the quality of the water discharged onto DeKay's land by the U.S. Fish & Wildlife Service is such that DeKay's cattle refuse to drink from the stream so that they would walk to water tanks near the DeKay ranch headquarters to obtain their drinking water rather than drink from the stream. Petitioners expect evidence will also be introduced that other

downstream landowners are deprived of water during critical times in their operations because of the obstructions the U.S. Fish & Wildlife Service had placed in the flow of water through Cedar Creek Ranch.

Because the U.S. Fish & Wildlife Service's utilization of the water has affected the quality and the quantity of the water, this issue should be resolved by denying the Application.

C. Identification of Extraordinary Legal Issues which may Arise During the Hearing on Application No. 1927-2.

Issue 1. Whether the approval of the U.S. Fish & Wildlife Service Application 1926-2 would impair the rights of others.

The South Dakota Supreme Court has held:

> that the right to water by prior appropriation is limited in every case in quantity and quality by the uses for which the appropriation is made. (emphasis added).
>
> ". . . the appropriation does not confer such an absolute right to the body of water diverted that the owner can allow it, after its diversion, to run to waste and prevent others from using it for mining or other legitimate purposes."
> Stenger v. Tharp, 94 N.W. 402, 404 (1903).

In the instant case, the Petitioners expect the evidence to show that Wendell DeKay runs a cattle operation downstream from the U.S. Fish & Wildlife Service. That the U.S. Fish & Wildlife Service set up a number of diversions to spread the water from the springs over the land which was the Cedar Creek Ranch Company thereby obstructing the natural flow of those springs. That after the spring water has been diverted the excess eventually rejoins the natural flow and is discharged onto the private land owned by DeKay. That the quality of the water discharged onto DeKay's land

by the U.S. Fish & Wildlife Service is such that DeKay's cattle refuse to drink from the stream so that they would walk to water tanks near the DeKay ranch headquarters to obtain their drinking water rather than drink from the stream. Petitioners expect evidence will also be introduced that other downstream landowners are deprived of water during critical times in their operations because of the obstructions the U.S. Fish & Wildlife Service had placed in the flow of water through the Brown Ranch.

Because the U.S. Fish & Wildlife Service's utilization of the water has affected the quality and the quantity of the water, this issue should be resolved by denying the Application.

Issue 2. Whether the U.S. Fish & Wildlife Service's Application No. 1927-2 is a beneficial use of water when the U.S. Fish & Wildlife Service's use of water has resulted in flooding private land adjoining the Refuge owned by the U.S. Fish & Wildlife Service.

The U.S. Fish & Wildlife Service argues that the beneficial use is determined by whether the use of the water is reasonable and useful and beneficial to the appropriator. This argument neglects to read the entire definition of "beneficial use" found at SDCL 46-1-6(6) which reads:

> "Beneficial Use" Any use of water within or outside the state, that is reasonable and useful and beneficial to the appropriator and at the same time is consistent with the interests of the public of this state and the best utilization of water supplies; (emphasis added)

Thus, the definition of "beneficial use" requires a two-pronged test to be used to make a determination if indeed the use of water constitutes a beneficial use. In summary, that two-pronged test is:

(1) That the use of the water is reasonable and useful and beneficial to the appropriator; and
(2) That the use is consistent with the interests of the public and the best utilization of water supplies.

Petitioners contend that even under the first prong of the definition of "beneficial use" the Application must fail.

The Applicant argues in the Prehearing Brief that appropriator of the water determines whether its use of the water is beneficial and that the Petitioners attempts to tell the Refuge that its use of Lake Creek is not beneficial must be disregarded. However, in the documents the Refuge provided to the Petitioners through the discovery process reveal that they're not increasing duck production on the Refuge. Total duck production for the years 1983 through 1990 reveal the following:

YEAR:	TOTAL DUCK PRODUCTION:
1983	12,915
1984	6,770
1985	6,419
1986	3,519
1987	2,886
1988	2,510
1989	1,259
1990	1,360

Clearly, these records reflect the Refuge's consumption of additional quantities of water are not going to add to duck production. In fact, when the Refuge acquired the Brown Ranch in 1971, their duck production was only 4,638. Rolf Kraft, in his deposition, blames the decrease of ducks on the carp population. But as far back as 1971 the Refuge recognized the Refuge would probably never erradicate carp from the Refuge but that good barriers would help control the population. Evidently those barriers have only helped to flood adjoining private property and not control the carp.

The evidence will demonstrate the use of water is not reasonable and useful and beneficial when that use causes flooding of adjoining private lands. It stands to reason that if the Fish & Wildlife Service's utilization of water results in flooding of adjoining private lands that they are using more water than they need. Our Court in the past has focused attention on the matter of efficient utilization of water so as to take into consideration if there is an unwarranted waste of water. Cook v. Evans, 185 N.W. 262, 265 (S.D. 1921), modified on other grounds, 186 N.W. 571, (S.D. 1922). Furthermore, the Legislature has provided that no appropriation of water in excess of the reasonable needs of the appropriators may be allowed. SDCL 46-5-5. A South Dakota riparian is limited by the concept of "reasonable use", he can claim only water which he can use for a beneficial purpose. Redwater Land and Canal Company v. Reed, 128 N.W. 702 (S.D. 1910). In this case case the lands are subirrigated and do not need to be irrigated. It is logical to conclude that the U.S. Fish & Wildlife Service is claiming more water than it can use when it floods adjoining private land.

Furthermore, it is interesting that the Refuge application states that it wishes to use the water to flood irrigate the Brown Ranch and that this irrigation will occur during the irrigation season. However, the Petitioners expect the evidence will show that the "irrigation" occurs on the Brown Ranch from February through as late as August of each year and that this is not the "irrigation season" in Bennett County. Furthermore, the evidence will demonstrate that the soil content on the Brown Ranch is not suitable to flood irrigation. A soil survey map shows that the predominant soil on the Brown Ranch are Lamo (La), Loup (Lo), Dunday (Du). According to the irrigation guide published by the United States Department

of Agriculture, Soil Conservation Service, for 1978, these soils are not suitable for surface irrigation as contemplated by the Refuge. Quite clearly it would appear that the Refuge is attempting to use the guise of irrigation to create wetland habitat.

The second prong of the test is determination of whether the use is consistent with the interests of the public and the best utilization of water supplies.

Our Legislature has recognized that because of the prevailing conditions in South Dakota our water resources must be put to the fullest extent of the beneficial use of which they are capable. The U.S. Fish & Wildlife Service is creating marginal conditions even to support wildlife and waterfowl by their utilization of the water resources. Furthermore, they have approximately 9,300 acres available as part of the original Refuge to create slough-like conditions for waterfowl to exist in. If the evidence establishes that there is no need to irrigate in order to provide sufficient forage for wildlife and waterfowl, then an inference can be drawn that the Fish & Wildlife Service wants to spread water over the land under the guise of irrigation to create slough-like conditions for waterfowl. However, they have approximately 9,300 acres in the original Refuge boundaries that contain adequate slough-like conditions to meet the needs of waterfowl.

Our State also gives domestic use of water precedence over appropriative rights. SDCL 46-1-5. Petitioners urge the Water Management Board, based upon consideration of the circumstances and facts present in this case, to determine that it is not a beneficial use to allow water to be appropriated for cultivating food for wildlife and waterfowl as was done in Lake Shore Duck Club v. Lakeview Duck Club, 166 P. 309 (UT 1917).

Furthermore, the adoption of such a rule would be consistent with the proposed amendments to the general rules adopted by the Department of Water

and Natural Resources, Division of Water Rights, and the definition for "stock watering" found at ARSD 74:02:01:01 as reworded to strike "buffalo, deer, elk, antelope and other wild animals that are managed for the public by a governmental agency" from that definition of stock watering of animals.

Consequently, this issue should be resolved by denying the Application.

Issue 3. Whether the Application is in the Public Interest when it Seeks to Appropriate Water for Wildlife and Waterfowl Habitate and Forage that Results in Flooding Adjoining Landowners.

Petitioners contend that the standard for determining what is in the public interest is set forth in SDCL 46-1-4 which provides in pertinent part:

> It is hereby declared that because of conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of division of water.

Accordingly, if the evidence demonstrates that the U.S. Fish & Wildlife Service's utilization of water results in flooding of adjoining landowners, that the land the U.S. Fish & Wildlife Service seeks to irrigate has sufficient moisture already to provide native grasses, wild hay or wild meadow without the artificial application of water, then it is not in the interests of the public to approve the Application.

The U.S. Fish & Wildlife Service strongly disagrees with any contention that they are committing waste, but Petitioners contend that not only do their practices indicate that they have no intention of irrigating the land, but even the words of the representative of the U.S. Fish & Wildlife Service reveal that their intent is to spread water out over the land to create sloughs for waterfowl. That in 1984 in connection with Application No. 1921-2 the representative of the U.S. Fish & Wildlife Service stated that they let the water flow over the land when the dam is full to create a larger slough for the "little duckies". The Petitioners recognize that these statements were not made in connection with Application No. 1927-2, but when considered along with all the evidence concerning Application Nos. 2191-2 and 1921-2, the evidence will demonstrate that there is no need to irrigate the lands in question under Application No. 1927-2 and that the Application is being used as a subterfuge in order to create sloughs for waterfowl.

Because the Application to appropriate the water does not support a practice of irrigation as defined by ARSD 74:02:01:01, but does support the contention that the water is being wasted, then it is not in the public interest to grant the Application. This issue should be resolved by denying the Application.

Issue 4: Whether Application No. 1927-2 should be denied when the diversions placed on Lake Creek result in the flooding of adjoining land.

SDCL 46-5-2 provides:

> Any person owning land through which any non-navigable stream passes, may construct anf maintain a dam across such non-navigable stream if the course of the water is not changed, vested rights are not interfered with, and no land flooded other than that belonging to the

such purposes has been secured.

Furthermore, the South Dakota Supreme Court has held that where there was a seepage of water onto land because of an increased water level in the river due to a dam and interference with the drainage off an adjoining landowners land, that the dam owner constitutes a flooding within the meaning of SDCL 46-5-2 (formerly SDC 61.0101). Willadsen v. Crawford, 60 N.W.2d 692 (S.D. 1953). Petitioners believe the evidence will demonstrate that not only did the diversions on Lake Creek by the Applicant result in the flooding of adjoining private land, but also flooded out a county road belonging to Bennett County, which flooding persisted until such time as the U.S. Fish & Wildlife Service dredged Lake Creek on its side of the county road.

This issue should be resolved by determining that the diversions constitute flooding adjoining private land and consequently the Application should be denied.

The Applicant, in its Prehearing Brief, contends that any question concerning the flooding of adjoining lands on Emley's Church Property, Lawrence Kocer and Brett Heath's property should be disregarded because the Refuge has acquired a prescriptive easement across the affected portions.

However, Petitioners contend the law concerning prescriptive easements does not pertain to the situation. First, in order to claim a prescriptive easement the Refuge would have show a continuous use of the property for twenty (20) years. The evidence will show the Refuge acquired the property in September of 1971. Up until that time, the property was being leased by the Buckles. Petitioners expect the Buckles to testify they did not irrigate the land when they operated it. Furthermore, the Refuge's annual report covering the year 1971 states that in connection with the acquisition

of the Brown Ranch in 1971, "This new area includes about 2,000 acres of wet meadow that will present a real management challenge in the next few years. It is not intended that large pools be constructed to flood this meadow. Rather, management will be concentrated on working within the area's present capabilities." Additionally, the report issued by Edwin B. Stevenson on February 29, 1972, with the Division of Wildlife Refuges shows the Refuge recognizes that they do not own the land on the north side of Lake Creek and that they should be careful not to divert water across these private lands without first having approval from the landowners. Quite clearly it would seem that any diversion of water across the lands of Emley, the Kocers or Heath was done with their approval and not by adverse action which is acquired under the prescriptive easement statutes.

Second, the Refuge would need to show when they commenced using Emley, the Kocers and Heath's property for flooding purposes without the Petitioners' permission. Our Supreme Court has held that in the case of an easement the owner of the servient estate (in this case the Petitioners) in order to avoid the acquisition of an easement by prescription, has the burden of rebutting this presumption by showing the use was permissive. Kougel v. Curry, 44 N.W.2d 114, 117 (S.D. 1950). In this case, it would appear from the records provided by the Refuge in 1971 they anticipated they would only be pushing water across this property with the permission and consent of the private land owners. Furthermore, the Petitioners contend that no easement can be claimed in this case because the water does not flow over the real property of the Petitioners, but rather sits on the real property and saturates it so that the land in question cannot be farmed. Our South Dakota Supreme Court has held that a dominant landowner (in this case the Refuge) may only cast surface waters "over" and not "on" the

servient estate (in this case, the Petitioners property). Winterton v. Elverson, 389 N.W.2d 633, 636 (S.D. 1986). Petitioners contend that due to the continuous but slower rate of discharge the surface water now remains on many of the Petitioners lands and therefore such action is not permissible under South Dakota law.

Furthermore, our Court has held that the drainage rights of the dominant landowner must also be exercised reasonably, even though the surface water is discharged into a natural watercourse. Feistner v. Swenson, 368 N.W.2d 621, 623 (S.D. 1985).

In Thompson v. Andrews, 165 N.W. 9, 13 (S.D. 1917) the Court set forth a reasonableness doctrine.

> But even though the waters of the basin in question are surface waters and there is a legal burden upon respondent's lands to receive such waters through the natural water course crossing such lands, such burden and the accompanying easement is one that is reasonable, or, as above noted, one consenant with good neighborliness. Under the claim of an easement, appellant could not rightfully turn upon the servient estates large volumes of water, out of all proportion to the capacity of the water course, and thus cause serious damage to respondent.

Petitioners contend the problems that Lawrence Kocer and Brett Heath experience are not as a result of irrigation practices, but resolve down to the method in which the Refuge handles the drainage on Lake Creek, and that allowing for sediment to build up into Lake Creek so that it flows out of its channel to sit on the Petitioners' property, the Refuge's claim to a prescriptive easement fails.

Finally, Petitioners contend the Refuge should be barred from contending they have a prescriptive easement over Petitioners' property

inasmuch as this hearing was set to be tried to the Water Management Board in June of 1991 to resolve any question as to what rights the Refuge had, and at that time the Refuge filed a motion to withdraw its application, thus causing a delay of these proceedings of more than a year. At the time the Refuge made the motion, it stated that it was done in good faith and not for the purpose of delay or undue advantage. Quite clearly, by delaying the proceedings for past the September, 1991 date for hearing the Refuge got in their 20 years of ownership and claimed a prescriptive easement from September of 1971. Our Supreme Court has previously held in a case in which a prescriptive easement was being claimed that there is an equitable maxim and that "he who comes into equity must come with clean hands". Miller v. County of Davison, 452 N.W.2d 119, 121 (S.D. 1990). This doctrine demands that the party seeking equity, such as obtaining a prescriptive easement, must have acted fairly and in good faith as to the controversy in issue. Petitioners contend that to claim a prescriptive easement based on a 20 year use from September of 1971 as the result of a motion to withdraw a previous application which was resubmitted causing a continuance of these proceedings cannot be construed to have been done fairly and in good faith if the Refuge seeks to invoke the doctrine of prescriptive easement.

Courts have held that if a prescriptive right could be acquired, it must necessarily be restricted to its limits when the period of prescription commenced, even though the right be asserted on behalf of the public . . . A prescriptive right is not enlarged by the enlarged use during the period of prescription, enjoyed by those who claim it, but is measured by the extent of the use at the commencement of the prescriptive period. Behnisch v. Cedarburg Dairy Co., 192 N.W. 447, 448 (Wis. 1923). Consequently, if the Refuge persists in its claim for a prescriptive easement, it must

demonstrate what amount of land was originally affected when it first commenced and what amount of water was originally pushed across that property when the prescriptive easement commenced.

As for the Refuge's argument that Heath and Kocers "came to the nuisance", the Petitioners contend tht this argument must fail under the evidence that will be presented to the Water Management Board. The Petitioners expect the evidence to show that Emley and the Kocers had no problems in operating their property until after the Refuge acquired the Brown Ranch and started using the water on the Brown Ranch to create diversions and pools.

With respect to Brett Heath, based upon correspondence from Homer Bradley, the Refuge Manager at LaCreek in 1945, to the Regional Director in a letter dated August 1, 1945, he recognizes the problem on the property, which was owned by the Williams at that time and subsequently acquired by Heath, that a flooding situation has occurred on the Heath lands and anticipates possible future flooding because "the Lake Creek channel has been continually building up with shifting sands and that the flooding situation may become worse in the future". Quite clearly the Heaths, after they acquired the land, intended to take care of the nuisance of the sediment buildup in what they thought was an agreement with the Refuge to build a straight channel for Lake Creek to flow through, and that the Refuge would keep the Creek dredged so that there would not be any sediment buildup.

Finally, arriving first in an area and maintaining a nuisance does not grant a perpetual easement to continue the nuisance. Kellogg v. City of Viola, 227 N.W.2d 55 (Wis. 1975).

Issue 5. Whether the Application has any Priority when the Applicant's Predecessor in Interest Did not use the Water for Irrigation from 1951 through 1971.

The Petitioners expect the evidence to show the U.S. Fish & Wildlife Service's predecessor in interest to the land which is the subject of these proceedings originally tried to develop the water for hydroelectric power and creating a fish hatchery. That ditches were used to drain the water off the fields. That there was some irrigation in the 1940's to try to develop an alfalfa crop, but the Opponents expect the testimony to show that this was discontinued by 1951 and from 1951 through 1971 the owners and operators of the land which is the subject of this Application did not use the water for irrigation purposes. That after the U.S. Fish & Wildlife Service obtained ownership of the land in 1971, they began to use water by diverting it and spreading it out over the land.

South Dakota law provides that if there is a failure to use beneficially appropriated water, subsequent use of the water does not revive the water right. SDCL 46-5-37. In re Cancellation of Stabio Ditch Water Right on Spearfish Creek, 417 N.W.2d 391 (S.D. 1987). Further, vested rights is defined at SDCL 46-1-9(1) as:

> The right of a riparian owner to continue to use water actually applied to any beneficial use on March 2, 1955, or within three years immediately prior to that date, to the extent of the existing beneficial use made of the water;

Opponents contend that if the water was not used from 1951 through 1971 then the applicant has no vested right to be validated. This issue should be resolved in favor of the Opponents by denying the Application.

II.

APPLICATION NO. 2191-2:

A. Statement of Facts which Opponents Intend to Prove in Support of Their Position.

Petitioners would rely upon the same or similar facts contained in Part I.B. of this Brief.

B. Proceedings involving Application No. 2191-2.

In June of 1984, the U.S. Fish & Wildlife Service made application for a permit to appropriate 3.36 cubic feet per second of water to irrigate 235 acres. The source of the water to be used for irrigation would be from springs and the land to be irrigated included the following:

Township 36 North, Range 37 West, 6th P.M.

Section 22: W½SW¼, S½SE¼
Section 23: SW¼SW¼SW¼, SW¼SE¼SE¼
Section 24: E½SW¼
Section 25: NE¼NW¼
Section 26: N½NW¼, W½NW¼NE¼,
Section 30: W½NW¼

Notice of Hearing to validate Vested Water Right Application No. 2191-2 was published in the Bennett County Booster after December 16, 1991, and thereafter Raymond J. Kocer, Brett A. Heath, Wendell DeKay, Lawrence H. Kocer, Kenneth M. Keegan and Charles W. Emley filed a Petition opposing the issuance of the water right.

C. Identification of Extraordinary Legal Issues which may Arise during the Hearing.

The same issues identified in Part I.C. of this Brief will apply to this Application also. Since these issues have been addressed above, they

will not be repeated, except for the additional argument that Rolf Kraft, at his deposition on May 21, 1992, stated that the Refuge wanted a water right on the springs to protect the amount of water that is coming out of the springs and that the reason the Refuge decided they wanted that water right is that an number of years ago there was some discussion that some private interests were wanting to use water out of the Oglala Aquifer and transport the water to Texas and the Refuge's concern was that if water mining reduced the amount of water in the sandhills, it might reduce the water table in the Sandhills to the point it might impact the Refuge's springs, and without a water right the Refuge wouldn't have much recourse in that regard. Kraft Deposition, pages 181-182. Clearly, if the underlying reason for seeking a water right on the springs is to protect subsequent development of that water by a third party, then the Refuge is conceding that it does not need the water for irrigation purposes, which is the purpose of Application No. 2191-2.

III.

APPLICATION NO. 1921-2:

A. Description of Relief Requested.

In Application No. 1921-2, the U.S. Fish & Wildlife Service has filed an application to amend existing Water Permit No. 265-2 by changing the diversion points and the acreage presently covered by the existing Water Permit. Under the existing Water Permit, it allows for appropriation of 4.45 cfs from Cedar Creek to irrigate some 366 acres. The Application proposes to change the point of diversion from the Southwest Quarter of the Southwest Quarter (SW¼SW¼) in Section 25, Township 36 North, Range 37 West, Bennett County, South Dakota to the Southeast Quarter of the Northwest

Quarter (SE¼NW¼), Section 25, Township 36 North, Range 37 West, Bennett County, South Dakota. The original Permit allows the following land to be irrigated, namely: South Half of the Northwest Quarter (S½NW¼), South Half of the Northeast Quarter (S½NE¼), North Half of the Southeast Quarter (N½SE¼), Section 25, Township 36 North, Range 37 West; Southwest Quarter (SW¼), South Half of the Northwest Quarter (S½NW¼), Section 30, Township 36 North, Range 36 West of the 6th P.M., Bennett County, South Dakota, containing approximately 366 acres. The Application requests a change in the land affected by the water use to the North Half (N½), Southwest Quarter (SW¼), North Half of the Southeast Quarter (N½SE¼), Section 25; the Southeast Quarter of the Southeast Quarter of the Northeast Quarter (SE¼SE¼NE¼), Section 24; all in Township 36 North, Range 37 West; and the East Half (E½) of Section 19, Township 36 North, Range 36 West, Bennett County, South Dakota, for a total of 362 acres with an appropriation of 3.89 cfs.

Petitioners are requesting that this Application be denied because there is no need to irrigate the land requested to be changed as affected by the Water Permit, and the Applicant's practice of spreading water over this changed irrigated land does not constitute irrigation, and for these reasons, the Petitioners request the Application be denied.

B. Statement of Facts which Opponents Intend to Prove in Support of their Position.

The Petitioners expect the evidence to demonstrate that the land to which the Application wishes to have the irrigation permit changed does not need to be irrigated. The Applicant's predecessors in interest did not need to flood irrigate these grasslands to produce hay and it is not necessary to

flood irrigate these same grasslands to create wildlife habitat. That when this Application was originally submitted in June of 1984 the Chief Engineer recommended denial of Application No. 1921-2 on May 24, 1985 because of information received that the proposed flooding of land for fish and wildlife production did not constitute irrigation and therefore the irrigation water rights should not be tranferred to the new owner. Further, the Petitioners expect the evidence to show that when the Application was originally submitted Rolf Kraft, the project manager for the U.S. Fish & Wildlife Service, made a statement to Betty Westland, a representative of the Water Rights Division, that the U.S. Fish & Wildlife Service let the water flow over the land when the dam is full to create a larger slough, for the "little duckies". Kraft also stated that they are not going to plant anything on the land.

Thereafter, apparently the U.S. Fish & Wildlife Service changed its position and in letters to the Division of Water Rights the Applicant contended that the water covered under the permit is not changed and it would be the Service's practice to flood irrigate native grasses for the purpose of providing wildlife with food and habitat which would not vary from the practices of those who irrigate the same type of crop for cattle grazing.

C. Identification of Extraordinary Legal Issues Which may Arise during the Hearing.

Issue 1: Whether an Applicant has met its burden for amending a permit to sever and transfer irrigation rights to different land when the basis of the Application when the dam which was authorized as the diversion point under the original Permit was breached and not in working condition.

SDCL 46-5-34 governs, in pertinent part, those situations in which an amendment of a water permit is required for severance and transfer. It

provides:

> All water used in this state for irrigation purposes shall remain appurtenant to the land upon which it is used. However, if for any reason it should become impracticable to use all or any part of the water beneficially or economically for irrigation of any land to which the right of its use is appurtenant, all or any part of the right may be severed from the land and simultaneously transferred and become appurtenant to other land without losing priority of right previously established, subject to existing rights, upon approval of an application for an amended permit. No increase in total acres irrigated may be allowed under this section.

Consequently, the water rights for irrigation may not be transferred to different land unless it becomes impractical to use all or part of the water beneficially or economically for irrigation, then the right may be severed from the land without loss of priority if there is no detriment to existing rights. In the instant case, the Applicant has made no showing as to why it is impractical to use all the water beneficially or economically for irrigation on the land to which it is appurtenant. There is some indication in the permit that the existing dam has fallen into disrepair. But the Applicant has not demonstrated why that dam cannot be repaired to continue its use under the existing Water Permit, particularly if it was of earthen construction.

Issue 2: Whether it is in the public interest and a beneficial use of water to allow an existing Water Permit to be severed from the land and simultaneously transferred and become appurtenant to other land without losing priority of right when the practices of the Applicant and the representations made by the Applicant's representatives indicate the water is to be used to create a slough for waterfowl.

It is clear from SDCL 46-5-34 and 46-5-34.1 that when an application is made for approval of the severance of irrigation water to be used for irrigation of other land, the applicant must continue to use the water for irrigation purposes. When an appropriator changes from irrigation to another use, the Commission cancels the first permit and issues another; thus, the old priority date is lost and a new priority acquired on the date the new permit is issued. In the instant case, the Petitioners expect the evidence will demonstrate that the land which Applicant wishes to have the water permit transferred to does not need to be irrigated to provide native grasses for forage and that the Applicant's present use of this Water Permit is to create a slough for waterfowl. Consequently, this issue should be resolved by denying the Application.

Dated this 17 day of July, 1992.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of July, 1992, a true and correct copy of the foregoing Petitioners' Prehearing Brief was mailed regular United States mail with first class postage prepaid in an envelope securely sealed and addressed to:

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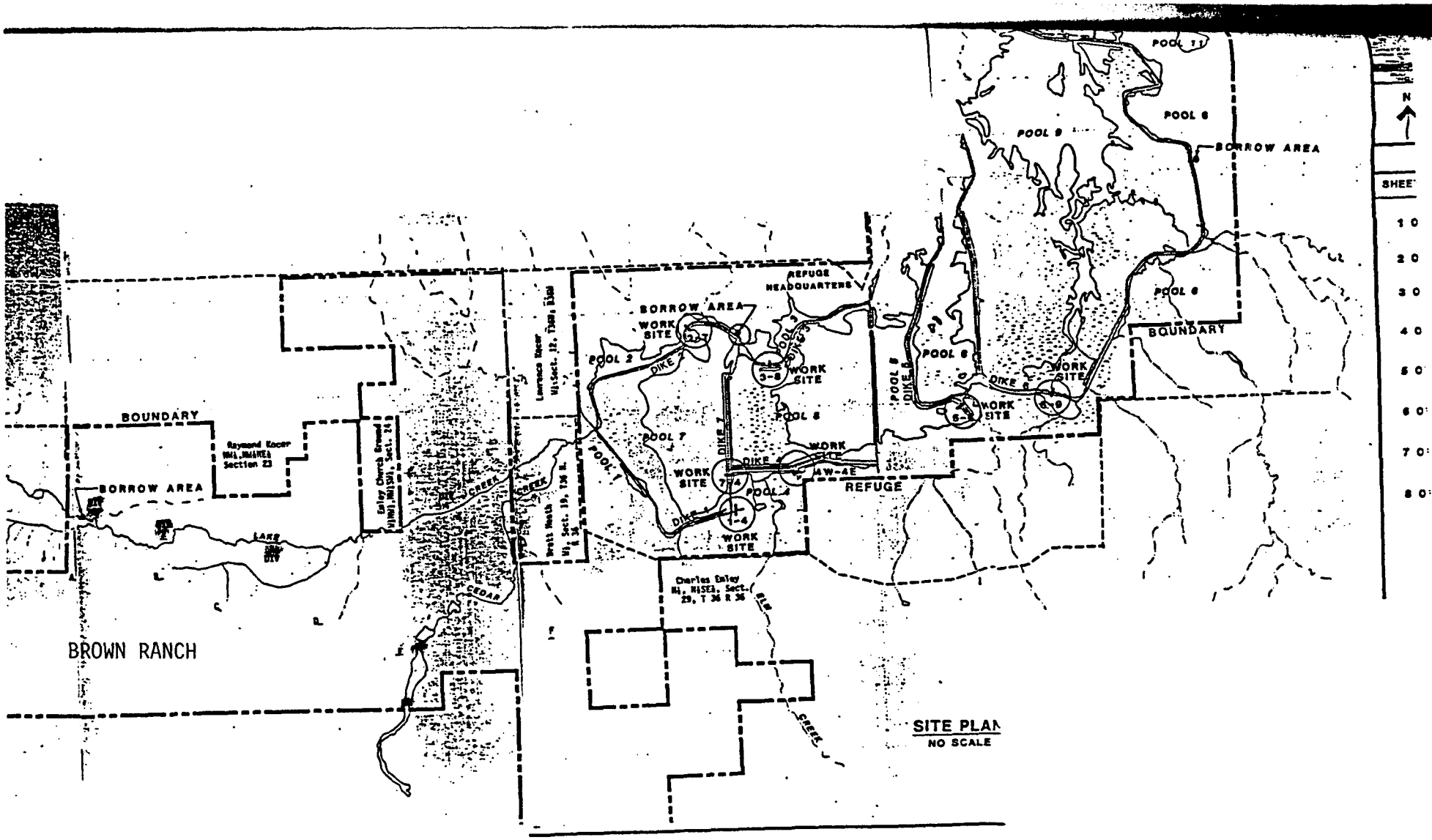
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MAP OF THE AFFECTED AREA-Not to Scale-For Demonstrative Purposes Only

Petitioners property labeled with names,legal descript and yellow color

The four proposed diversions on Lake Creek labeled with "DIV" followed by the appropriate number and colored pink

The six springs are labeled with the following letters: "A,B,C,D,E,F" and colored blue

Change of location of the dam in App. #1921-2 is marked in green

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Re: Application for vested water right no. 1927-2; water permit application no. 1921-2; and water permit application no. 2191-2

Dear John:

I am sorry that I was unable to make the meeting on November 18, 1992 in Martin. However, I learned that during the course of the meeting Mr. Emley indicated that the South 40 acres of his "Church property" was still being flooded. This is actually the NW½SW¼ of Section 24, Township 36 North, Range 37 West, which is Indian Trust property.

Could you advise me as to whether or not you or any of your associates went out to investigate that situation and what, if any, action was taken.

I am enclosing five pictures that Mr. Emley had Dennie Simonson take on November 18, 1992, to show the flooding.

Photo No. 1 is of Diversion No. 4 on the Brown Ranch which shows the discharge and the diversion structure. Please note the level of the pond surface. The soil survey map indicates the soil in this area is Loup. Considering that Loup soils have loamy, fine sand at 11 to 18 inches and fine sand at 18 to 36 inches, the flow water goes directly into ground water. I believe it can be presumed that this structure has a direct effect upon the ground water conditions that have developed on the Brett Heath property. The water table of the Marsh and Gannett soils are directly affected. A waterlogged condition develops with Gannett and foxtail barley becomes the predominant grass.

Photograph No. 2 is also a picture of Diversion No. 4. The view is looking east and northeast. You will see the two stoplogs in the vicinity of the control structure. According to Emley, all the other stoplogs are still in place and the water level is three feet from the top of the halfround corrugated metal pipe structure.

Photo No. 3 is also a photograph of Division No. 4. Once again, this closeup photo shows all the stoplogs in place except the two that apparently had been removed by the Refuge. The pond level is short of elevation which would cause a flow in the diversion ditch to the north and east across the Fish & Wildlife Service property. Maintaining the pond level at this elevation causes the water

table on the South 40 of the "Church property" to remain at or near the surface, which adversely affects any hay production and interfers with the lessee's haying operation. The soils on this "Church property" and the Refuge lands to the north and east of this diversion are Loup which would have a water table at or near the surface for a short period in early spring and usually drops to a depth of two to five feet by midsummer. The measurement from the water surface to the top half of the round portion of the structure is three feet.

Photo No. 4 shows the 40 acres of the "Church property" under lease at about 1:30 o'clock p.m. on November 18th. The view is looking south and east showing water at the surface (foreground). The surrounding area according to Simonson and Emley is spongy and if probed has a water table immediately below the soil surface. My clients contend that maintaining a high water table in Diversion No. 4 (which can be seen in the background on the left) has a direct influence on the water table of the adjoining "Church property".

Finally, Photograph No. 5 is a photo of the site at Diversion No. 4 and the view is looking north and east showing a diversion ditch and a shallow pond. The soils, according to the soil survey map, are Loup and the high water level in the diversion structure produces a persistent high water table downslope.

It is my understanding that Mr. Kraft from the Refuge indicated at the meeting on November 18, 1992, that he hadn't checked this area so wasn't aware of the condition.

I do not know what, if any, legal action can be taken since the Water Management Board's decision in July was a tentative decision and the final decision won't be rendered until their meeting in December, but I find it somewhat peculiar and troubling that the United States represents they don't intend to divert any water out of Lake Creek and yet clearly Diversion No. 4 shows they are diverting water by not removing all the stoplogs in the diversion.

I know the Board does not want to take any additional testimony at its meeting on December 2nd, but my clients wish to pursue this matter as a complaint of a violation of the tentative decision rendered in July.

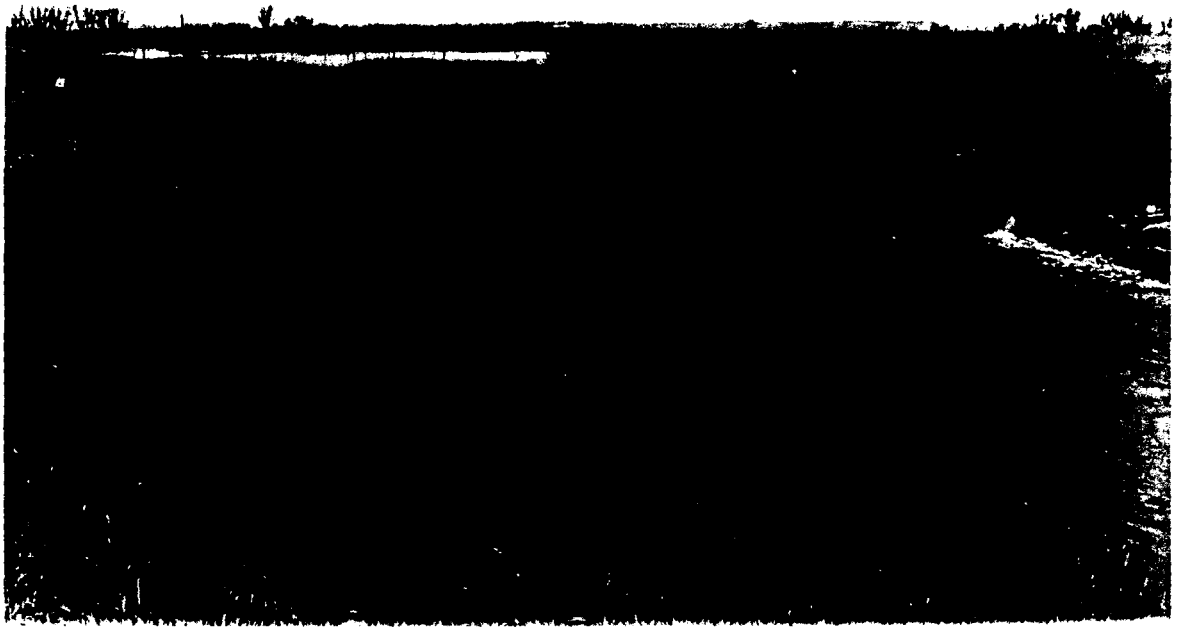
I am providing a copy of this letter to John Kunz, along with copies of the pictures.

Sincerely,

JANE M. FARRELL
JMF/bji

cc: John R. Kunz
Clients

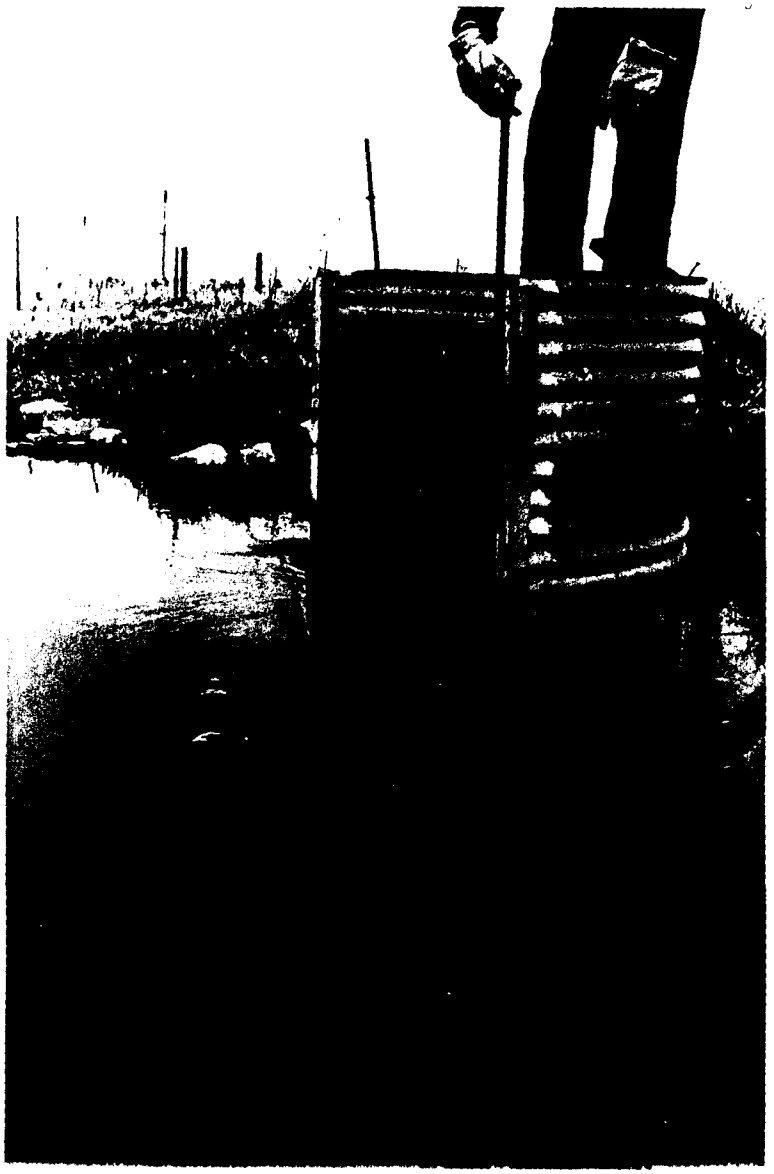
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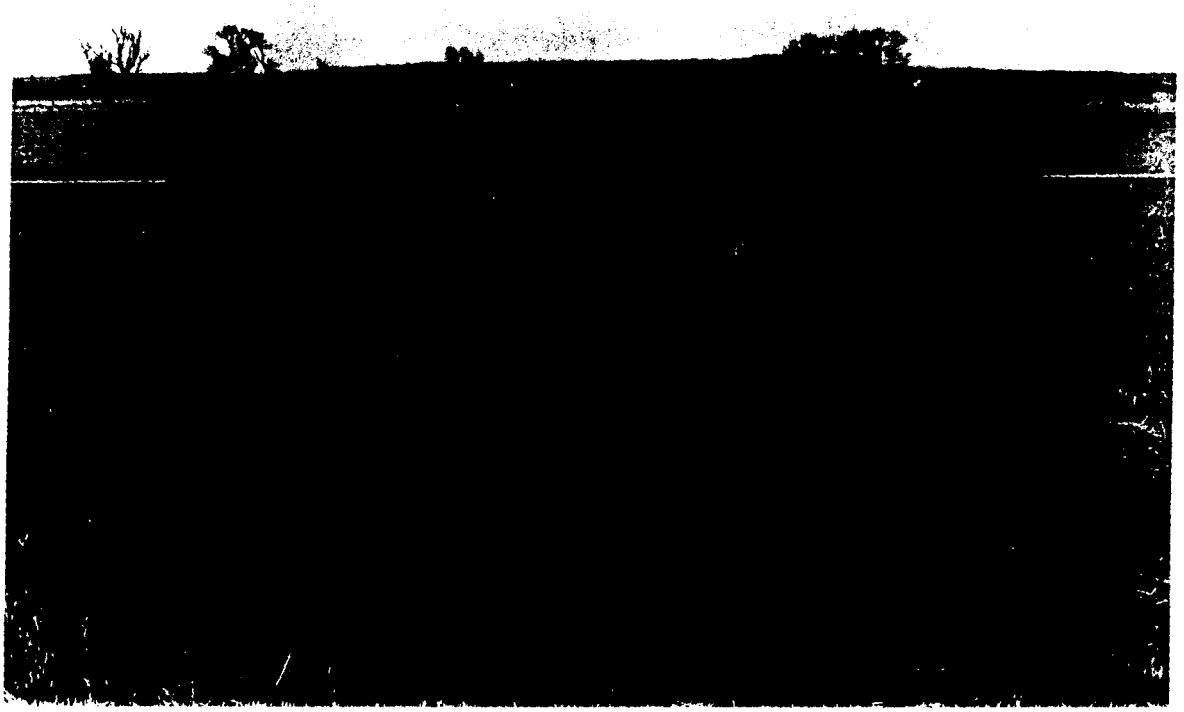
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#3



H 4



H 5



2191-2

GREAT FACES. GREAT PLACES.

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3181

December 8, 1992

Jane M. Farrell
Farrell, Farrell and Ginsbach
441 North River Street
Hot Springs, SD 57747

Re: Application for Vested Water Right No. 1927-2, Water Permit Application No. 1921-2, and Water Permit Application No. 2191-2.

Dear Ms. Farrell:

I am writing in response to your letter of November 30, 1992. I was not aware that a request had been made to investigate alleged flooding of the Indian Trust property at the November 18, 1992 meeting in Martin. I was also not aware that Dennie Simonson had taken pictures of the property that day. This was not mentioned at the meeting. A comment was made at the meeting that there was still concern with water on the property. The U.S. Fish and Wildlife Service agreed to look at it and make some elevation measurements. If a request for an investigation by the Division of Water Rights would have been made, we would have investigated the matter the next day.

After receiving your letter, I had Rassool Ahadi contact Rolf Kraft. Mr. Kraft stated that no water was being diverted at Diversion Point No. 4 and that no diversion took place on November 18. Mr. Kraft surveyed the area on December 3 and determined that the wet spot on the Church property was 2.5 feet higher than the water level in the pond at Diversion Point No. 4. Mr. Kraft also removed one more stoplog from the half circular corrugated metal pipe which has lowered the water level in the pond an additional 6 to 8 inches. They would like to keep the remaining stoplogs in so as to prevent carp from moving upstream.

At this time, I do not believe that there has been a violation of the qualifications to approval of the applications by the Water Management Board. The study that is being proposed by the U.S. Fish and Wildlife Service should provide data that will result in the best water management decisions.

Very truly yours,

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

cc: Diane Best, Assistant Attorney General
John R. Kunz, Attorney, USFWS
Rolf Kraft, Manager, LaCreek National Wildlife Refuge

United States Department of the Interior

FISH AND WILDLIFE SERVICE

Mountain-Prairie Region

IN REPLY REFER TO:
BA/WTR
SD20.00.10
Mail Stop 60189

MAILING ADDRESS:
Post Office Box 25486
Denver Federal Center
Denver, Colorado 80225

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228

TAKE PRIDE IN AMERICA

DEC 1992
DIVISION OF
WATER RIGHTS
Pierre, SD

DEC 0 9 1992

John Hatch, P.E.
Chief Engineer
Division of Water Rights
Joe Foss Building
523 East Capitol Avenue
Pierre, SD 57501

Dear John:

Thanks for attending the meeting in Martin on November 18, 1992, and for your help in reviewing the draft study plan. Rolf Kraft is coming to Denver on December 15, and we will revise the plan according to the comments received at the meeting.

Meanwhile, the Service has been working on some parts of the plan, and I understand that you have received complaints of flooding from Brett Heath and Charles Emley, so I thought that I would bring you up-to-date on refuge activities.

There has been a misunderstanding, both within the Service and with you and the landowners, regarding the four diversion points in Lake Creek. Most of us thought that no diversions meant that all the stoplogs in the structures would be removed. Refuge personnel thought that enough stoplogs would be removed to keep Lake Creek within its banks. The situation has been cleared up with respect to diversions 1, 2 and 3; all the stoplogs will be removed. Diversion 4 presents a special problem, the refuge has been using it as a carp barrier to prevent carp movement to upper Lake Creek. The barrier serves two purposes, (1) it slows the repopulation of carp in the refuge pools after treatment by preventing their escape up the creek, and (2) the state has identified some native fish species in upper Lake Creek that need to be protected, both from competition by the carp and from the rotenone if the Service has to treat Lake Creek above diversion 4.

For the present, we are consulting with fishery experts to determine the minimum number of stoplogs we need to maintain a positive carp barrier. We will evaluate all the options for diversion 4, including fish screens, over the winter and hope to have a plan by spring thaw. I discussed the situation with Charles Emley by phone, he made some suggestions about bar screens and continued to express concern about flooding on the Indian trust land. I said that we would consider his suggestions when Rolf was in Denver next week.

In the conversation with Mr. Emley, I mentioned that the refuge had pulled all the stoplogs on the Elm Creek diversions, the only ones remaining are in an off-stream pond. Mr. Emley appreciated the effort, but said he believed that some dredging was still needed to eliminate the flooding problem on his land.

The refuge plugged the breech in the dike along the west boundary of Brett Heath's property. There was some misunderstanding about whether Brett wanted the natural flow from the northwest during the study period, so I called Brett and asked him. At first he thought that he wanted the natural flow, but I explained that there was no drainage for the water until the refuge completed dredging in pools 2 and 7. Also, there appears to be a low spot in the northeast corner of Brett's property, where water would collect. After considering the situation, Brett said that the breech should remain closed. At the same time, he agreed with the refuge plan to remove the plug in the ditch that prevents the flow from reaching Lake Creek. The plug will be removed as soon as possible.

The refuge has been dredging where Lake Creek enters pools 2 and 7, but had to stop for the winter before the work was complete. The channel through pool 2 has a high part, and the outlet from pool 2 to pool 7 is high, so the refuge has had to raise the level of pool 2 to try to pass the flow of Lake Creek and Cedar Creek under ice conditions while minimizing the flooding potential on Brett Heath's property. The Service has removed some stoplogs to see if pool 2 could be operated a little lower and still pass the flow. The refuge plans to resume dredging in the spring, and should resolve the water level problems. I discussed the situation with Brett, and he said he understood that the dredging had to stop. He had noticed the higher level of pool 2, and hopes that removing the stoplog will reduce the flooding on his land. I said that some flooding was likely once the creek froze over.

The Service is continuing to follow-up on the comments received at the meeting in Martin, we will send out copies of the final plan after December 15. I plan to return to Martin in late January or early February to check each feature of the plan to eliminate any misunderstandings about procedures. At that time I plan to meet with the landowners, either separately or together. I'll let you know the exact date, you or your staff are welcome to join me.

If you have any questions, please call me or Cheryl Williss at 303-236-5322.

Sincerely,

Robert G. Green, P.E.
Regional Hydrologist

cc: Brett Heath
Raymond Kocer
Lawrence Kocer
Charles Emley
Wendell DeKay
St. Katherine's Episcopal Church
Bureau of Indian Affairs

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF BENNETT)

IN CIRCUIT COURT

SIXTH JUDICIAL DISTRICT

IN RE: WATER RIGHT CLAIM NO. 1927-2, WATER PERMIT APPLICATION NO. 1921-2, WATER PERMIT APPLICATION NO. 2191-2

WENDALL DeKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER,

Petitioners/Appellants,

vs.

UNITED STATES FISH AND WILDLIFE SERVICE,

Applicant/Appellee,

and

WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA,

Appellee.

BRIEF OF WENDALL DeKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER AND LAWRENCE KOCER, PETITIONERS/APPELLANTS

APPEAL FROM THE WATER MANAGEMENT BOARD

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TABLE OF AUTHORITIES

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INTRODUCTORY STATEMENT

This appeal is the result of the United States Fish and Wildlife Service filing three applications with the South Dakota Division of Water Rights. All three applications were consolidated for hearing on July 22-24, 1992, before the Water Management Board. The first application filed by the United States Fish and Wildlife Service is labeled 1927-2 and seeks to validate an alleged vested water right. The second application is 2191-2 which is an application for a permit to appropriate water out of six springs on land owned by the United States Fish and Wildlife Service. The third application is No. 1921-2 which seeks to amend existing Water Permit No. 265-2. As a result there are three separate certified administrative records for each application. But only one hearing transcript and one set of Exhibits.

Documents found in the Certified Record for Water Permit No. 1921-2 will be identified as "1921-2 R" with the appropriate number; documents found in the Certified Record for Water Permit No. 1927-2 will be identified as "1927-2 R" with the appropriate number; and documents found in the Certified Record for Water Permit No. 2191-2 will be identified as "2191-2 R" with the appropriate number.

The transcripts of the July 22 - July 24, 1992 hearing are referred to as "TR1", to refer to Volume 1 of the transcript of the hearing on those dates, and "TR2", to refer to Volume 2 of the transcript, and "TR3", to refer to Volume 3 of the transcript of the hearing on those dates. A transcript of the hearing on December 2, 1992, is referred to as "TR4". References to Findings of Fact and Conclusions of Law refer to those adopted by the Water Management Board dated January 7, 1993, unless otherwise noted.

The Exhibits used at the hearing will be identified as "Exhibit" followed by the number or letter assigned at the hearing. Attached hereto as an Appendix is a map of the USFWS, Brown Ranch and the location of Petitioners' Emley, Heath and Kocer properties. Also included on this map is the location of the diversions of Lake Creek in connection with Application No. 1927-2; the approximate location of the springs that are part of Application No. 2191-2; and the location of the dam and its changed location in connection with Application No. 1921-2.

Wendall DeKay, Charles Emley, Brett Heath, Lawrence Kocer and Raymond Kocer, Petitioners and Appellants, will be referred to as "Petitioners". Water Rights Division, State of South Dakota, Appellee, will be referred to as "Division". The Water Management Board is referred to as "Board". The United States Fish and Wildlife Service, Applicant/Appellee is referred to as "USFWS".

JURISDICTIONAL STATEMENT

This is an appeal from a Decision of the Board dated January 7, 1993. Notice of Appeal was filed on February 9, 1993, and as such this Court has jurisdiction pursuant to SDCL 1-26-30.2.

PROCEDURAL BACKGROUND

Originally, the Petitioners received notice by publication that Application Nos, 1927-2 and 1926-2 (now resubmitted as Application No. 2191-2) were to be heard before the Water Management Board on October 3, 1990. The Petitioners, along with Kenneth N. Keegan, submitted objections to those Applications on September 17, 1990. (1927-2 R.20-21; 2191-2 R.20-21).

At that time, they requested an automatic delay for at least

20 days to allow adequate preparation for "participation in the hearing. Thereafter, John Hatch with the Water Rights Division gave notice that based upon the Applicant's request, the hearing to consider Application Nos. 1926-2 and 1927-2 was continued to February 27 and 28, 1991. (1927-2 R.24-25; 2191-2 R.23-24).

Thereafter on December 14, 1990, the Chief Engineer, John Hatch informed the Applicant that the previous notice procedure on Application Nos. 1926-2 and 1927-2 was insufficient and to insure proper notice, the hearing scheduled for February 28, 1991 was cancelled and the Notices were published again. (1927-2 R.31-38; 2191-2 R.30-37). On May 1, 1991, the Water Management Board appointed Marian Gunderson as the hearing officer to take testimony commencing on June 26, 1991. (1921-2 R.84-86; 1927-2 R.62-64; 2191-2 R.64-66).

Thereafter, the Applicant filed a Motion to Withdraw Application No. 1926-2. In that Motion the Applicant contended that it would have to make significant amendments to the Application and then it would be resubmitted. The Applicant made the representation that the Motion to Withdraw was being made in good faith and not for the purpose of delay or undue advantage, but went on to point out that if the Motion was granted, he had recognized the same objectors may well again oppose the Application. Faced with that Motion, the hearing examiner found the materials submitted by the parties indicated the two water right claims and any Application for the new water right are intertwined and it did not make sense to conduct the hearing on June 26th only to have to conduct another hearing later. That it was inappropriate as a matter of judicial economy to allow the Applications to be severed, therefore she entered an Order continuing the matter for 90 days. (1921-2 R.147-150; 1927-2 R.134-137; 2191-2 R.140-143).

Thereafter, the Applicant submitted Application No. 2191-2 to replace 1926-2, which was dated August 1, 1991. Notice of Hearing on that Application was published in the Bennett County Booster after December 16, 1991, and the Petitioners filed an Objection to Application No. 2191-2. All three of the Applications were then scheduled for hearing on February 4, 1992, before the Water Management Board in Pierre, South Dakota. The Petitioners then moved to appoint a hearing examiner to hear all the Applications and to allow the hearing to take place in Bennett County or, alternatively, to schedule the matter for hearing at the Bennett County Courthouse during the full Board's hearing in July of 1992. (1921-2 R.155-157; 1927-2 R.142-144; 2191-2 R.196-198). The hearing commenced on July 22, 1992 and concluded on July 24, 1992. On January 7, 1993, the Board adopted Findings of Fact and Conclusions of Law, which were mailed on January 7, 1993 to Petitioners. Petitioners filed their Notice of Appeal on February 9, 1993.

STATEMENT OF FACTS

A. History of Refuge

The LaCreek National Wildlife Refuge was established in 1935 by Executive Order of President Roosevelt, and it was located originally in parts of Townships 36 and 37 North, Range 36 West of the 6th Principal Meridian, Bennett County, South Dakota. (Exhibit E).

In July of 1968, the USFWS entered into an option to purchase lands belonging to the Cedar Creek Ranch Company, which were located adjacent to the original Refuge in Bennett County, South Dakota. Exhibit E. This ranch was originally started by Birthol Brown and later incorporated into the Cedar Creek Ranch Company by Brown and his

children (The Cedar Creek Ranch Company shall hereinafter be referred to as the "Brown Ranch"). In 1971, the Cedar Creek Ranch Company had dissolved and the shareholders of that ranch company executed a warranty deed pursuant to the terms of the option to purchase executed in July of 1968 conveying all of their interest in 6,665.24 acres to the United States of America, which became part of the United States Department of Interior, USFWS, LaCreek National Wildlife Refuge in September of 1971. (Exhibit G). This land is described as:

Township 36 North, Range 36 West, 6th P.M.

Section 29: SW¼, S½SE¼
Section 30: NE¼ Frac. W½
Section 31: All
Section 32: NW¼

Township 36 North, Range 37 West, 6th P.M.

Section 13: N½, NE¼SW¼, S½SW¼, SE¼
Section 14: NE¼
Section 22: All
Section 23: SE¼SE¼, E½NW¼NE¼, S½NE¼, S½
Section 24: E½, E½NW¼, NE¼SW¼, S½SW¼
Section 25: N½, SW¼, N½SE¼
Section 26: All
Section 27: All
Section 28: All
Section 29: E½

In 1971, when the USFWS acquired the Brown Ranch, the duck production that year was 6,008, according to the Annual Water Program Report. According to information received from USFWS, in 1990 the total duck production was 1,360, a decrease in duck production of 4,638. (TR1 p.189).

B. History of the Use of Lake Creek (and the Springs) on the Brown Ranch.

The evidence established that Birthol Brown was an enterprising entrepreneur when he owned the Cedar Creek Ranch. The

ranch was developed to produce livestock such as cattle and sheep, to produce a hay crop, and that there was even at times a fish hatchery and a power plant on the property. (Exhibit E). Brown built the dams to support pools for the breeding of fish in connection with his fish hatchery and built a dam to develop a hydroelectric power plant. (TR2 p.330). Originally ditches were constructed on the bottom land of the Cedar Creek Ranch Company to try and drain the fields because the land was subirrigated and there was too much water on the fields. (TR2 p.341). That Brown constructed a ditch to irrigate trees and a garden around the house but discontinued using it because it was too sandy and washed out. (TR2 p.331). In 1947, Brown created Diversion No. 1 in Application No. 1927-2 to try and irrigate the fields for alfalfa, but the alfalfa did not pan out and it was not used again after 1947. (TR2 p.334-335). People who operated on the Brown Ranch from 1952 through 1971 testified that the land was never irrigated. (TR2 p. 331,341).

These people included Birthol Brown's daughter-in-law, Eva Mae Linenbrink, who lived on the ranch from 1934 until the death of her husband, Alvin Brown, in 1961; Joyce Toczek, who is Alvin Brown's daughter and who worked in the hay fields from 1952-1958, (TR2 p.341) which the USFWS now wants to divert water onto, Toczek and her husband managed the ranch after her father's death in 1963 until 1968 (TR2 p.342); finally, Frank Buckles, who leased the Brown Ranch from 1969 until 1971 when the USFWS exercised the option to purchase the Brown Ranch.

That during the USFWS' operation of the Cedar Creek Ranch, they flood irrigated the hay meadows. Through the USFWS' utilization of the water on the former Brown Ranch, they damaged the productivity

of the ground for crop land, and that their true intent is not to irrigate the land for crop or forage production for wildlife, but to create sloughs for waterfowl. (TR2 p.197).

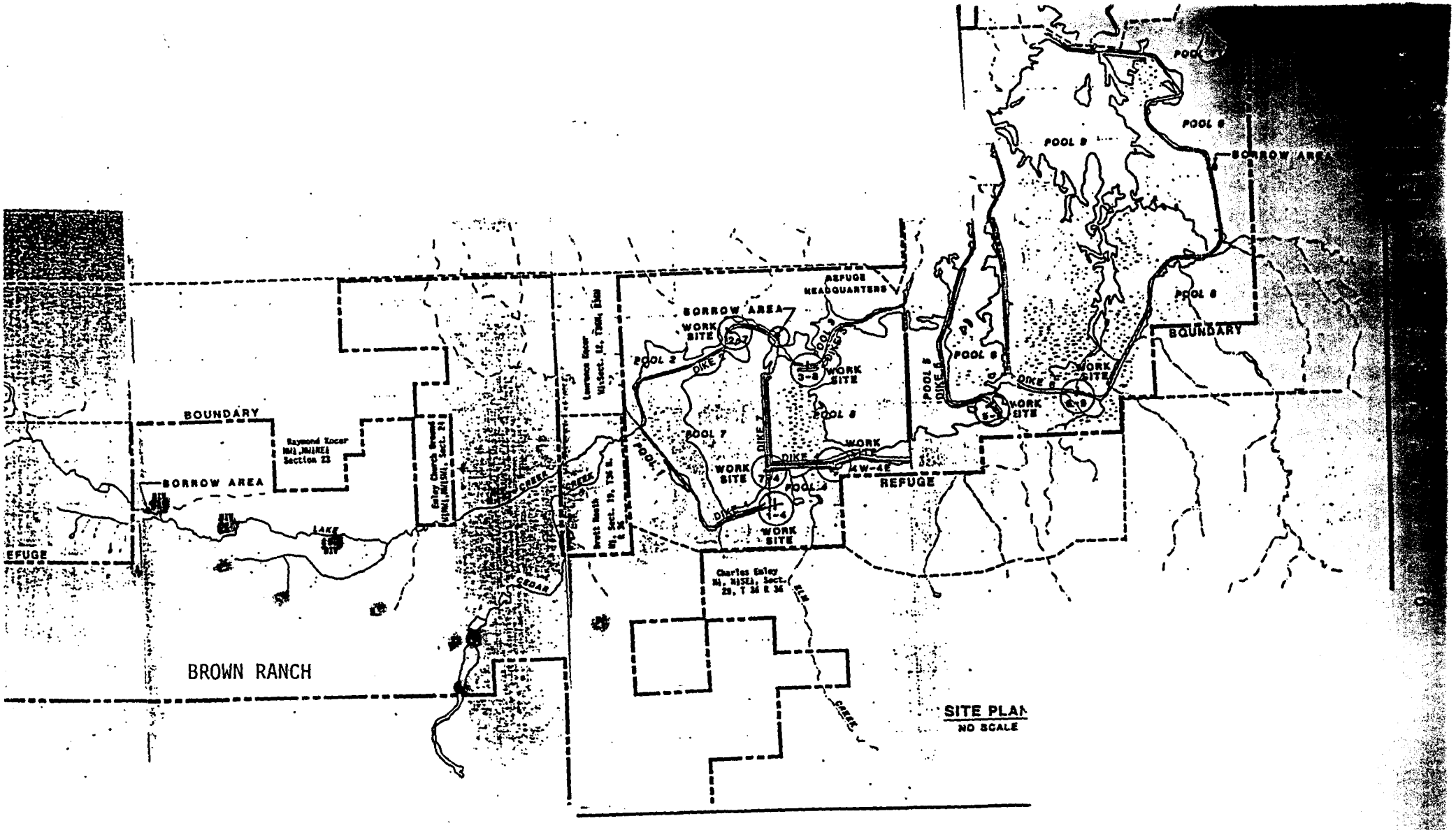
That through the USFWS' utilization of the water on the Refuge they have consistently flooded Raymond and Lawrence Kocer's land and due to the diversion structures on Lake Creek, those diversion structures slow down the movement of the water, and as a result the water's ability to carry suspended solids downstream is decreased. (Exhibit AA p.2, TR2 p.452-453, 456). The sedimentation buildup of Lake Creek elevates the channel of the creek and results in water flooding out of the banks of Lake Creek and onto the private land of Brett A. Heath, Charles Emley, and Lawrence Kocer. (TR3 p.671, TR2 p.422-425). That when the water from Lake Creek is discharged off the Refuge into DeKay's property, it is quite foul smelling. (TR2 p.455). The water is so bad that DeKay's cattle will walk from the creek up to the buildings to drink water out of a tank rather than drink the water discharged from the Refuge. (TR2 p.367, 377). At times in the spring and early summer, the USFWS' obstruction of Lake Creek is such that there is no flow to the water so that even those landowners downstream from DeKay, like Ken and Beverly Hines, oftentimes will not have water for their livestock. (TR2 p.346).

C. The Petitioners

Raymond Kocer owns land in the NW¼ of Section 23, Township 36 North, Range 37 West, 6 P.M. that adjoins that portion of the Cedar Creek Ranch Company that was purchased by the USFWS. (Exhibits 33; TR2 p.491). Charles W. Emley leases land in the NW¼SW¼ of Section 13, and in the W½NW¼ and the NW¼SW¼ of Section 24, all in Township 36

North, Range 37 West, 6th P.M. (Exhibit 33, TR2 p.381-382). The latter portion of Emley's property described herein is completely surrounded, except for the northwest corner, by property owned by the USFWS which was formerly the Brown Ranch. Brett A. Heath owns the W½ of Section 19, Township 36 North, Range 37 West, 6th P.M. and is surrounded on three sides by the USFWS, which was formerly the Brown Ranch. (Exhibit 33, TR2 p.538). Lawrence Kocer owns the W½ of Section 18, Township 36 North, Range 36 West, 6th P.M. and is surrounded on the west and east by the USFWS land, which was formerly the Brown Ranch. Wendell DeKay's ranch is below the USFWS land in Section 30, Township 37 North, Range 35 West, 6th P.M. and is one of the first private pieces of property that the USFWS discharges water from the Refuge onto after it has flowed through the Refuge pools. (TR2 p.362, Staff Exhibit #3).

The following page is a map of the affected area. Four of the Petitioners' properties are highlighted in yellow; the four diversion points are highlighted in pink; the six springs are highlighted in blue and the change of location of the dam in Application No. 1921-2 is highlighted in green.



MAP OF THE AFFECTED AREA-Not to Scale-For Demonstrative Purposes Only

Petitioners property labeled with names,legal descript and yellow color

The four proposed diversions on Lake Creek labeled with "DIV" followed by the appropriate and colored pink

The six springs are labeled with the following letters: "A,B,C,D,E,F" and colored blue

Change of location of the dam in App. #1921-2 is marked in green

D. Proceedings involving Application No. 1927-2.

In June of 1984, the USFWS made application for a permit to appropriate 10 cubic feet per second of water to irrigate 700 acres. (1927-2 R.4-6). The source of the water to be used for irrigation would be from diversions created on Lake Creek which flows through the Brown Ranch, through part of the Church property under lease to Charles Emley and through the Brett Heath property. The points of diversion would consist of earthen plugs in the channel with 5 foot check boards and 48 inch corrogated metal pipe for flood irrigation. These diversions would be located as follows:

Diversion No. 1 - NE¼NW¼SW¼, Section 22.

Diversion No. 2 - SE¼NW¼SE¼, Section 22.

Diversion No. 3 - NE¼SE¼SW¼, Section 23.

Diversion No. 4 - SW¼NW¼SE¼, Section 24.

All of the above diversions are located in Township 36 North, Range 37 West of the Sixth Principal Meridian, Bennett County, South Dakota. (1927-2 R.4-6).

In Application No. 1927-2, it provides in Paragraph 6 that the annual period during which water is to be used is "irrigation season". (1927-2 R.4-6). According to the report issued by M. Rassool Ahadi, Natural Resources Engineer II with the South Dakota Division of Water Rights, on August 28, 1990, his recommendation was to allow diversion of 10.0 cfs from Lake Creek for irrigation. (1927-2 R.13).

E. Proceedings involving Application No. 2191-2.

In June of 1984, the USFWS made application to validate a vested water right claim to appropriate 3.36 cubic feet per second of water to irrigate 235 acres. ((2191-2 R.4-7). Thereafter, in June of

1991, that application was withdrawn by the USFWS and on August 1, 1991, the USFWS submitted a new application which merely sought a water permit to irrigate the same number of acres from Six Springs located on the Brown Ranch. (2191-2 R.145-146). The land to be irrigated included the following:

Township 36 North, Range 37 West, 6th P.M.

Section 22: W½SW¼, S½SE¼
Section 23: SW¼SW¼SW¼, SW¼SE¼SE¼
Section 24: E½SW¼
Section 25: NE¼NW¼
Section 26: N½NW¼, W½NW¼NE¼,
Section 30; W½NW¼

Notice of Hearing to validate Vested Water Right Application No. 2191-2 was published in the Bennett County Booster after December 16, 1991, and thereafter, Raymond J. Kocer, Brett A. Heath, Wendell DeKay, Lawrence H. Kocer, and Charles W. Emley filed a Petition opposing the issuance of the water right. (2191-2 R.160-163).

F. Proceedings involving Application No. 1921-2.

In Application No. 1921-2, the USFWS has filed an application to amend existing Water Permit No. 265-2 by changing the diversion points and the acreage presently covered by the existing water permit. (1921-2 R.15-17). Under the existing water permit, it allows for appropriation of 4.45 cfs from Cedar Creek to irrigate some 366 acres. The Application proposes to change the point of diversion from the Southwest Quarter of the Southwest Quarter in Section 25, Township 36 North, Range 37 West, Bennett County, South Dakota, to the Southeast Quarter of the Northwest, Section 25, Township 36 North, Range 37 West, Bennett County, South Dakota. The original Permit allows the following land to be irrigated, namely: South Half of the Northwest Quarter, South Half of the Northeast Quarter, North Half of the Southeast

Quarter, Section 25, Township 36 North, Range 37 West; Southwest Quarter South Half of the Northwest Quarter Section 30, Township 36 North, Range 36 West of the 6th P.M., Bennett County, South Dakota, containing approximately 366 acres. The Application requests a change the land affected by the water use to the North Half, Southwest Quarter North Half of the Southeast Quarter, Section 25; the Southeast Quarter of the Southeast Quarter of the Northeast Quarter Section 24; all in Township 36 North, Range 37 West; and the East Half of Section 19, Township 36 North, Range 36 West, Bennett County, South Dakota, for a total of 362 acres with an appropriation of 3.89 cfs. (1921-2 R.15-17).

G. Relief Requested from the Water Management Board.

In Application No. 1927-2, the USFWS has applied for a permit to appropriate 10 cubic feet per second (cfs) of water from Lake Creek to flood irrigate approximately 700 acres of land located on the USFWS' LaCreek National Wildlife Refuge. (1927-2 R.4-6). The Petitioners requested that this Application be denied because it unlawfully impaired the existing rights of some of the Petitioners, the use by the USFWS is not a beneficial use nor is it in the public interest, and the water had not been appropriated as described in the Application for irrigation use with a priority date of 1939 or 1951. (1927-2 R.44-47).

In Application No. 2191-2, the USFWS applied for a permit to appropriate 3.36 cubic feet per second of water to irrigate 235 acres. (2191-2 R.145-146). The Petitioners requested that this application be denied because the application was in essence a reservation of a future use of water to which the United States of America is not entitled to such reservation and even if it was not a reservation of a future use of water the application would impair the existing rights of some of

the Petitioners and the use of the water by the USFWS is not a beneficial use nor is it in the public interest. (2191-2 R.160-163; TR3 pp.810-811).

In Application No. 1921-2, the USFWS has filed an application to amend existing Water Permit No. 265-2 by changing the diversion points and the acreage presently covered by the existing water permit. (1921-2 R.15-17). The Petitioners requested that this application be denied because the USFWS failed to prove that the dam on which the original permit was located could not be rebuilt, and that the change in location of the original permit was not for the purpose of continuing to use the permit for irrigation which was the original reason that the permit was granted, and finally the land to which the water permit was going to be transferred was not appurtenant to the land which was originally irrigated by the permit and as such the Board could not transfer the permit pursuant to SDCL 46-5-34. (1921-2 R.58-61).

H. Summary of Petitioners' Individual Problems Incurred as a Result of the Refuge's Water Management Practices.

1. BRETT HEATH

Brett Heath and his father before him own the West Half (W½) of Section 19, Township 36 North, Range 36, West of the 6th P.M. in Bennett County, South Dakota. (TR2 p.538). Heath is surrounded on the east by the USFWS property that contains the original USFWS operations. To the south of Heath's property is the USFWS operation which includes a spring, identified as "F" in the Application contained in No. 2191-2, and to the west of Heath, in Section 24, Township 36 North, Range 37 West, is USFWS property that includes land that will be flooded by the spring, identified as "E" in Application No. 2191-2, and by a dam on Cedar Creek that is affected by Application No. 1921-2

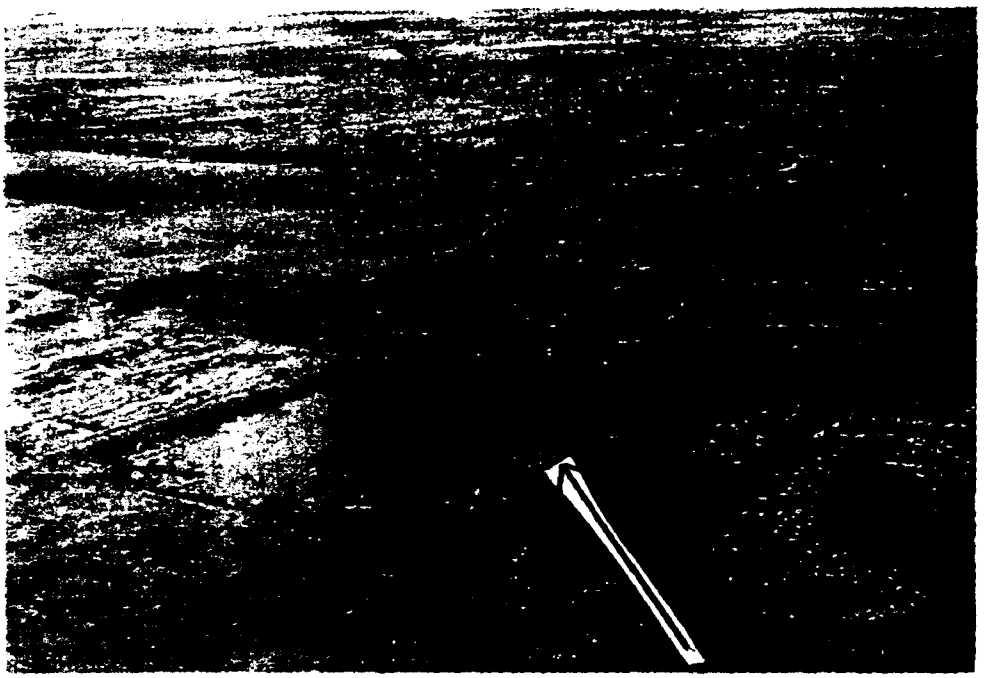
that will flood the Northeast Quarter (NE¼) of Section 25 of the USFWS property and the Southeast Quarter (SE¼) in Section 24 of the USFWS property and portions of the Heath property, according to the map which is attached to the Application. To the north of Heath is the Lawrence Kocer property. (Exhibit 33).

Heath's father purchased the property he now lives on for hay production and running livestock. (TR2 p.538). The land has never been farmed. In fact, in previous internal correspondence from the USFWS, a USFWS manager, in 1945, recognized that the Heath property was very good for hay production. (Exhibit B). At that time, the property was owned by the Williams family.

The Heath family started to have problems with the USFWS property in about 1959 when they drained Pool Number 7 and started pushing water up around the headquarters of the Refuge property and then water started backing up onto the Heath property as a result of the water management practices at the USFWS. (TR 2 p.540). Lake Creek would flood out of its chanel because the creek channel had been filled in with sand and sediment as a result of the diversions on Lake Creek by the USFWS. (Exhibit AA; TR2 p.454). The more the creek channel was filled in, the more Lake Creek flooded out of its banks. (TR2 p.464). Initially, the USFWS had a drag line and was engaged in a regular dredging process of Lake Creek to prevent any sediment or siltation. (TR2 p.561).

Eventually, based upon representations made by Harold Burgess, the Superintendent of the USFWS, that if George Heath would dig a straight ditch from the east end of his property to the west end of his property to join up with Lake Creek and straighten the creek

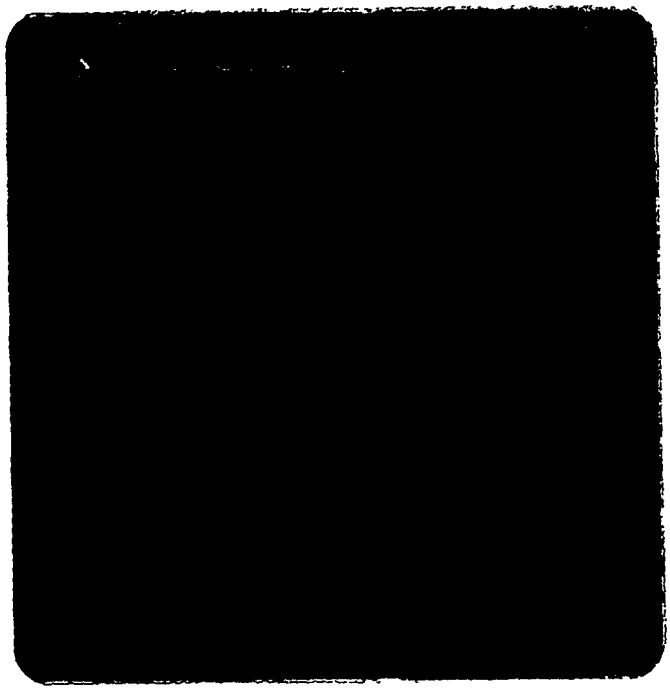
channel out that the USFWS would maintain that ditch and keep it clean and would dredge it. George Heath hired Gene Stewart of Valentine, Nebraska, to construct a straight ditch across his property to carry the flow of Lake Creek. (TR2 p.558-561). The first few years of the operation of the ditch it drained off the Heath home place and the west half of the Heath property and carried the siltation out. (TR2 p.560). However, the USFWS didn't maintain the dredging as promised and as a result, the siltation continued to fill back in on the new ditch and the new ditch would then have water flowing out of its banks. (TR2 p.561). The Heaths never tried to dredge out their own ditch since the USFWS was not taking any action to dredge out the portion of the creek that was on the USFWS property that was being filled in with sediment. Pictures taken in January of 1975 and March of 1975 show the north side of the Heath property under water.



4

(The above photo is Exhibit R2 #4, which shows the north part of Heath's property under water during the winter)

Pictures taken in June of 1975 show the cattails and water on the Heath property and Heath's barbed wire fence being under water. The photos taken in July of 1989 show the same type of flooding. (Exhibit "U"; TR2 p.557). There are also photos of Lawrence Kocer's property taken in 1986 that show hay bales surrounded by water. (TR2 p.572-573).



E

(The above photo is Exhibit R1 #5 taken in 1975 which shows Heath's haystacks surrounded by water that flooded out of Lake Creek as a result of the USFWS water management practices. TR2, p. _____).

Part of the problems Heath is experiencing presently are due to the water management practices of the USFWS on the original USFWS structure. Heath contends that by granting Application Nos. 2191-2, 1927-2 and 1921-2 allowing the USFWS to continue using that water, it will further compound the problems he is presently experiencing in connection with the original USFWS structure. (TR2 p.583). On the original USFWS structure a 3 foot corrogated metal pipe drop structure

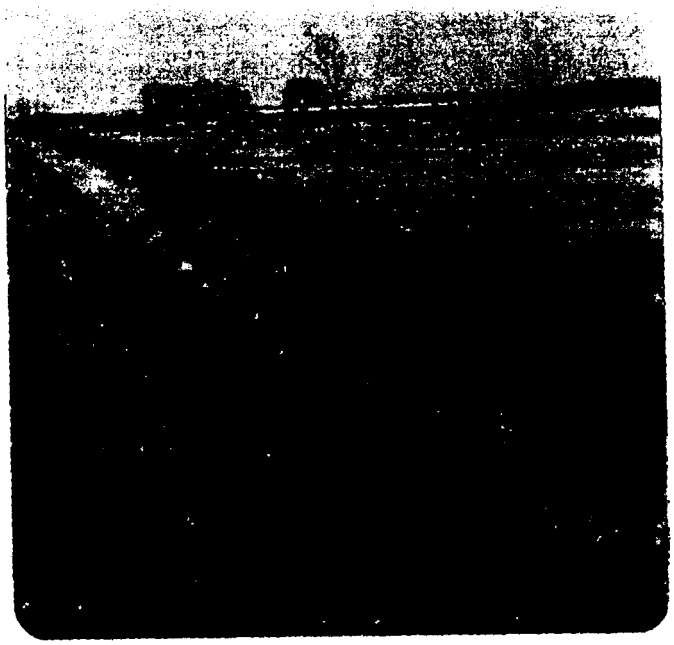
between Pool No. 2 and Pool No. 3 replaced the original 600 foot spillway, and now that three foot metal pipe is the main cause of the sediment problems at Pool Two and the nearly constant flooding of the private property of Brett Heath. (TR3 p.673-676). That structure was installed by Rolf Kraft, the LaCreek Refuge Manager in the early 1980's. (TR2 p.568).

The USFWS during the course of the hearing stipulated that sediment accumulation is created at the west end of Pool No. 2. (TR3 676). The USFWS contends that the problem created by the sediment buildup could have been corrected if Heath would agree to regulate and maintain the dredging program on that portion of the Lake Creek ditch that runs through his property. However, it appears the problem originated when the USFWS installed the 3 foot drop structures in the channel and then have not completed the periodic dredging that became necessary. (TR3 p.673-676).

Brett Heath has described the system's original design as functioning satisfactorily to all concerned without any undue amount of maintenance. The ditches were systematically dredged and the water levels in Lake Creek were never such as to cause unwarranted flooding. (TR2 p.584). Rolf Kraft, USFWS refuge manager, testifed that there was not a scheduled amount of dredging accomplished each year under the present USFWS operations. (TR1 pp.214-215). Photos taken of the site where sediment accumulated are very dramatic and show that the channel's capacity on Lake Creek has been reduced because of the sediment.

Presently, sedges, rushes and foxtail barley predominate the vegetation on Heath's property. (TR2 p.594; TR3 p.667). The USFWS

contends the site always was predominantly sedges and rushes. However, the vegetation on these sites are water tolerant grasses and sedges. It is only when the water table is maintained at or near the surface season long that only sedges, rushes and foxtail barley predominate. (TR3 p.668).



F

(This photo is Exhibit R1 #6. It shows water in the road ditch along the Heath fenceline and the sedges, rushes, and foxtail barley that predominate in that area.)

Even if the U.S. Fish and Wildlife Service came to Brett Heath and said that every year they would dredge that portion of Lake Creek that runs through Heath property and then dredge that portion of Lake Creek that runs through USFWS property, there would still be the problem of the water. Heath would not have the sediment, but the water would still be there. Because the USFWS has a three foot tube, or five of them, in that dike, the first one you come to is silted in and not even functional so that isn't helping, so that leaves the other ones

operating. Also, a series of photos taken by and in the possession of Brett Heath, identified as Hearing Exhibits "R" through "V" also further demonstrate the flooding problems caused by the USFWS.

2. LAWRENCE KOCER

Lawrence Kocer owns the West Half of Section 12, Township 36 N, Range 36, West of the Sixth Principal Meridian, Bennett County, South Dakota. It appears from the maps submitted with the applications that Lawrence Kocer's property would be directly affected by Application 1927-2, which seeks to divert water from Diversion 1 at Lake Creek to take water and irrigate it over Raymond Kocer's property, USFWS property, Charles Emley's church ground, Lawrence Kocer and Brett Heath property and would reenter into USFWS property. Lawrence Kocer has been having problems with flooding presently due to the current design and construction of the original Refuge, which is located in Section 17, 18, 19, 20 in Township 36 N, Range 36 West of the Sixth Principal Meridian. (TR2 p.421-422)

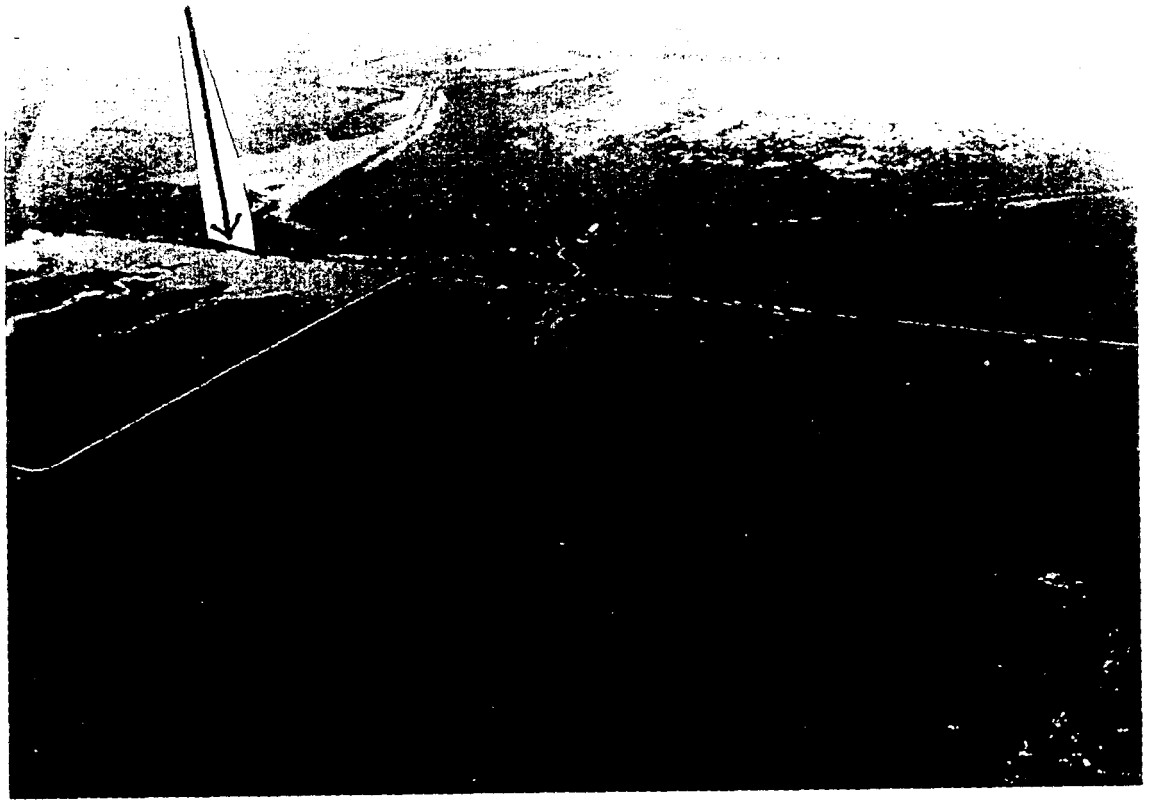
A system of water level control structures and siphons have created what is designated as Pool 2 on the USFWS property. Presently, there's a 3' CMP (Corrugated Metal Pipe) drop structure between Pool 2 and Pool 3. This structure is the main cause of the sediment problem in Pool 2 and the nearly constant flooding of the private property of Lawrence Kocer. (TR3 673-676). This structure was installed by Rolf Kraft, LaCreek Refuge Manager, in the early 1980s. (TR2 p.568).

The bottom half of Lawrence's quarter section is what is affected by the USFWS's operations of diverting water from Lake Creek, resulting in backing water up onto Lawrence Kocer's bottom quarter section. (Exhibit V6). There have been times when this bottom quarter

of Kocer's section of land has been under water for as long as three weeks. (TR2 p.425). Lawrence Kocer is opposed to the Applications because by allowing the USFWS to irrigate their land that lies to the west of Kocer's, and given the fact that Fish and Wildlife Service doesn't properly manage the water they now use, granting Application 1927-2 creates further problems for Lawrence Kocer. (TR2 p.436). When Lawrence Kocer's father bought the quarter section, the old Refuge bordered that quarter section to the east. The only time that there had ever been water on this quarter section, when there was just the Refuge to the east diverting water, was when there was a large amount of rain. Otherwise, there was no problem. (TR2 p.428).

As a result of backing water up on Lawrence Kocer's property, it drowns out the natural grasses so there is only slew grass and buck brush, that cattle can't eat. (TR2 p.426). Whenever Lawrence Kocer would complain to the USFWS about the flooding, the USFWS would not open up the gates to release more water down stream because the USFWS claimed they needed the water in certain parts of the USFWS property to create habitat. (TR2 p.423).

Lawrence Kocer has been unable to remove bales of hay from his land because it was under water. (TR2 p.552-553).



6

(This photo depicts the East side of Lawrence Kocer's property in 1986 with hay bales under water as a result of the Refuge's water management practices.) (Exhibit V6; TR2 pp.493,496)

That the level of water flowing in the silted part of Lake Creek has been raised, which in turn has raised the water table in the soils adjacent to the creek. During the periods of high volume flood flows, the water is out of channel and results in extended periods of flooding of the Lawrence Kocer property. The adverse affects of extended period of flooding has resulted in a change of vegetation on Kocer's property to that of a marsh-type, consisting of foxtail, barley, smartweed, sedges and rushes. This vegetation is of little value in Kocer's ranch operation for the livestock grazing or hay production. The seriousness of the problem becomes evident when one considers that the soils of the affected area are Gannett fine sandy loam and Loup fine sandy loam, which when in excellent condition

produces about 5800 pounds and 4800 pounds of air dry weight of herbage per acre, respectively, on the Gannett and Loup sandy loams, without flood irrigation. Now those same soils have created marshlike vegetation. (TR3 pp.664-668).



(This photo is Exhibit V3 which shows the water sitting on Lawrence Kocer's property that creates marshlike vegetation.)

3. RAYMOND KOCER

Raymond Kocer owns the Northwest Quarter, and the Northwest Quarter of the Northeast Quarter of Section 23, Township 36 North, Range 37 West of the Sixth Principal Meridian, Bennett County, South Dakota. (Exhibit 33). This is known as Belski's Meadow. (TR2 p.491). Raymond Kocer uses this land for growing alfalfa. (TR2 p.499).

The USFWS consistently flooded his property, resulting in the loss of alfalfa and his hayland. (TR2 p.500). The loss of productivity is due to two things. First, the affect of persistent flooding on vegetated growth and, second, the inability to harvest a field on a timely basis due to extended flooding. (TR2, pp.506-509).

The water table on Raymond Kocer's property was maintained at and above the soil surface during the growing season from three sources. (TR3 p.679).

One source of flooding was the discharge from a USFWS impoundment structure located along the East edge of the USFWS's property in the Northeast Quarter of Section 22, Township 36 North, Range 37 West. The capacity of the supply ditch located on the Kocer property was constantly exceeded and the out-of-channel flow flooded the hayland. The USFWS impoundment was above the level of the Kocer property and, when flooded, the water pipes below the surface and enters the ground water, causing a persistent water table at or above the surface of the soil. (TR2 p.501). The USFWS's flooding activities on the Southwest Quarter of Section 23, Township 36 North, Range 37 West maintains the water table at or above the soil surface on Raymond Kocer's adjoining properties in the Northwest Quarter of Section 23. Observations of the field shows the increase of saline areas and areas

where alfalfa was repeatedly drowned out and replaced by native grass species. (TR2 p.503; TR3 pp.679-682).

One of the important things to take into consideration is the type of soil on the USFWS property and Raymond Kocer's property where they join each other. It is Loup soil. Loup is a fine sandy loam. (TR3 pp.659-666). The problem is that once you get the first 18" of the Loup soil saturated, you get movement into the subsurface. The evidence showed the subsurface water moves laterally and results in the water being piped onto the adjoining land, which is owned by Raymond Kocer. So that when the water pipes up onto Raymond Kocer's property it affects his vegetation. (TR3 pp.681-682).

When water pipes it can travel and come up at some other point. (Exhibit EE; TR3 p.680).

The affect of the flooding on Raymond Kocer's property is that the vegetation has replaced the native grasses with rushes and smartweed on the edges and cocktail barleys on the extreme edges. There are cattails present also. (TR3 p.682). The presence of the smartweed indicates the area has a water table at or near the surface for a considerable portion of the growing season. (TR3 p.678,682).



4

(This photo is the approach to the Belski Meadow owned by Raymond Kocer where the Refuge pushes water across this meadow and down the road ditch to create the smartweed and bullrushes that can be seen throughout the Belski Meadow and the road ditch. Exhibit Y2#4; TR2 pp.504,505).

As a result of the water management practices on the USFWS property, Raymond Kocer has had seasons when his hay has been surrounded by water, preventing him from removing it. In the past, Raymond Kocer gave the USFWS permission to push water across his property. He did so because he believed that they had the right to do that. (TR2 p.502). Given the fact of the harm this practice is doing to his property and given the fact that the soil conditions make the property subirrigated, there is no need to irrigate his land because the subirrigated soil should be sufficient to allow him to raise the necessary alfalfa. The Petitioners submitted photographs to document the loss of grass, alfalfa and hayland and the area is converted to a marshtype vegetation by the near yearlong flooding. (TR3 pp.677-678).

4. CHARLES EMLEY

Charles Emley owns or leases property that is affected by the applications to be considered by the Water Management Board. He presently owns the North Half of Section 29, Township 36 North, Range 36, West, through which Elm Creek flows; along with the North Half of the Southeast Quarter of Section 29, Township 36 North, Range 36 West, through which Elm Creek flows. (Exhibit 33; TR2 p.381)

The other piece of property he has under his control is leased from the Episcopal Church, described as:

The West Half of the Northwest Quarter (W½NW¼), and
The Northwest Quarter of the Southwest Quarter NW¼SW¼) in
Section Twenty-four (24),
Township Thirty-six (36) North,
Range Thirty-seven (37) West,
Bennett County, South Dakota.

This is known as the Church property. (Exhibit 32; TR2 p.381).

a. Effects on Church Ground Owned by Emley

In the map which was attached to the original Application 1927-2, it shows that from Diversion One, which is a diversion on Lake Creek, which the USFWS seeks to have validated as a vested water right dating back to the date the Browns had the property, that water will be used to irrigate land owned by the USFWS and the Church ground leased by Emley. (1927-2 R.4-6). Emley has had this land under lease. (TR2 p.381)

On the east edge of this property the USFWS has constructed a diversion that blocks the natural drainage of the land, this diversion being on the East Half of Section 23. The result of this diversion, or ditch, is to impound water wherein the flooding is nearly season long

and has resulted in the development of a wetland vegetative type. (TR2 pp.388-394). There has been a 40% loss of productivity, and Mr. Emley is prevented from harvesting the site. (TR3 p.684). In a photo display presented to the Water Management Board, it showed white and yellowish grass and a hatch of ducks. (TR3 p.683; Exhibit 00). The yellowish grass indicates where ponds of water gather. This is evidence of how the interference with the drainage has caused different vegetation to spring up. (TR2 p.382). Furthermore, the interference with the drainage that is a result of the USFWS's construction of the raised ditch affects 40% of that property known as the Church Ground that Mr. Emley has under lease. (TR1 p.684).

The following two photographs demonstrate how the productivity of the Church ground is affected by the USFWS water management practices.



(This photo shows the water coming off USFWS Brown Ranch and flows into a culvert that runs underneath the road. Exhibit W7; TR2 p.383).



(This photo shows where the water from the Refuge property depicted in the previous photograph runs under the road and out onto the Church ground and actually travels as far as the trees located in the distance of this photograph, which is the length of approximately 1/4 of a mile. Exhibit W8; TR2 393-394).

The Church Ground contains two types of soils, Loup fine sandy loam, (Lo) and Dunday and Elsemere loamy fine sand (Du) which constitute the bulk of the soils found on both adjoining USFWS property and the privately owned Church properties. (TR1 p.660). Both the Loup and Dunday soils are subirrigated and have a water table that may reach the surface for short periods during the opening season and does not drop beyond 36 to 60 inches below the surface for the remainder of the growing season. (TR1 p.664). The persistent flooding of these soils by the USFWS adversely affects the productivity of these soils and has resulted in major areas being degraded to a marsh type vegetation. The USFWS practices of using water by impounding it allows for the underground flow of water from the USFWS property onto the private "Church Property".

Moving south from the site of the Church Property, one can observe the wetland sites that developed below the USFWS impoundment. The Petitioners expect the evidence to show that the USFWS's practice of flooding this area begins in February and continues into July, sometimes as late as August, and results in maintaining the water level at or near the surface of these soils. (TR2 p.386). The USFWS's impoundment structure is above the level of the property and when filled the water pipes below the fill and raises the ground water, causing a persistent water table at or near the soil surface in the soils immediately below the structure.

Emley has been unable to harvest the hay from this area until late in the haying season. (TR2 p.384,386).

At the extreme southern end of the Church Property the flooding program of the USFWS that existed is of such a magnitude that

at harvest time the water is above the soil surface, preventing harvesting of the site. The condition is created by a diversion structure constructed by the USFWS and located south and east of the site. This diversion has created the sediment buildup that in turn causes flooding of the private properties. (TR2 pp.387-391, 458).

Finally, Emley had no problems in operating his property at the Church Ground until the USFWS took over the operation of the Brown Ranch and began its water management practices. (TR2 p.383)

5. ELM CREEK GROUND OWNED BY EMLEY

The USFWS contended that Emley's Elm Creek property has no bearing on these proceedings. The Petitioners contend the effects Emley has experienced on his Elm Creek property is a result of the USFWS's water management practices and clearly demonstrate the type of waste private land owners can expect to endure as a result of the USFWS's water management practices to allow to divert water from Lake Creek or further develop Springs for flood irrigation. The Board admitted this evidence on Elm Creek. (TR1 p.24, TR2 p.394).

The effects upon the property owned by Charles Emley through which Elm Creek flows is a result of the fact that the USFWS has installed control structures in the Southeast Quarter of Section 20, Township 36 North, Range 36 West which obstructs the flow of Elm Creek, thus resulting in the buildup of sediment in the channel. Because of the buildup of sediment in the channel, this results in an out-of-channel flow and season long flooding of the Emley property, causing the vegetation to change to a sedge-rush-foxtail barley type. (TR3 p.685).

Emley, on his own, made an attempt to correct the siltation (TR2 pp.397-398) but because of the USFWS's continued practices, which

practices include damming up the flow of the creek which causes the creek to settle outside its banks, that results in siltation damages to the adjoining crop land. (TR2 p.395).

At one time in the 1940s and 50s, before the water management practices adopted by the USFWS on Elm Creek, the creek was deep enough to swim in. (TR2 p.431). Now it's silted in, and the water backs up on Emley and interrupts the free flow of the water. (TR2 p.395).

It should be noted, and is conceded by the Petitioners, that while the flooding on Emley's property in Section 29, known as the Elm Creek property, is not the result of any of the water sought to be developed on the Applications granted by the Water Management Board, this flooding shows the USFWS is wasting water as a result of their water management practices.

6. WENDALL DeKAY

Wendall DeKay runs a cattle operation downstream from the USFWS. The USFWS set up a number of diversions to spread the water from the springs over the land which was the Cedar Creek Ranch Company thereby obstructing the natural flow of those springs. That after the spring water has been diverted the excess eventually rejoins the natural flow and is discharged onto the private land owned by DeKay. That the quality of the water discharged onto DeKay's land by the USFWS is such that DeKay's cattle refuse to drink from the stream so that they would walk to water tanks near the DeKay ranch headquarters to obtain their drinking water rather than drink from the stream. (TR2 p.367). Other downstream landowners are deprived of water during critical times in their operations because of the obstructions the USFWS had placed in the flow of water through Cedar Creek Ranch.

LEGAL ISSUES PRESENTED ON APPEAL

I.

The Decision of the Board to Grant Application No. 1927-2 was clearly erroneous in that there was a lack of evidence to substantiate that a vested right to use water existed within three years prior to March 2, 1955 as required by SDCL 46-1-9(1).

II.

The Board's decision to grant Application No. 1927-2 was clearly erroneous in that the applicant failed to establish that granting the permit would not impair the rights of others and was a beneficial use of water and in the public interest.

III.

The decision of the Board to grant Water Permit Application No. 2191-2 was clearly erroneous in that the applicant failed to establish that the permit would not impair the rights of others and was a beneficial use of water and in the public interest.

IV.

The decision of the Board to grant Application No. 2191-2 was clearly erroneous in that the evidence established that the water permit on the springs identified in the Application was a reservation of future use of water to which the United States of America is not entitled.

V.

The decision of the Board was clearly erroneous when it granted Water Permit Application No. 1921-2 in that the United States Fish & Wildlife Service had not met its burden for amending the permit to severe and transfer the irrigation rights to different land.

VI.

The decision of the Board to grant Water Permit Application No. 1921-2 was clearly erroneous when the evidence indicated that the water was to be used to create a slough for waterfowl and not for irrigation.

STANDARD OF REVIEW

SDCL 1-26-36 provides as follows:

The Court shall give great weight to the 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 captricious 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.

Under the clearly erroneous standard, the agency decision is to be upheld unless the reviewing Court is left with a definite and firm conviction that a mistake has been committed. Fraser v. Water Rights Commission, 294 N.W.2d 784 (S.D. 1980).

I.

THE WATER MANAGEMENT BOARD ERRED IN GRANTING APPLICATION NO. 1927-2.

A. USFWS failed to meet its burden of proof to allow the Board to validate Water Claim No. 1927-2.

The USFWS had submitted Application No. 1927-2 which sought to validate a vested water right claim on Lake Creek out of four Diversions, which have been specifically identified. Our legistature recognized that a riperian owner who applied water to have beneficial use within three years prior to March 2, 1955, had a vested right to

continue to use such water thereafter. SDCL 46-1-9(1). This legislation was adopted in 1955. Our Supreme Court has held that the legislation was designed to prevent the accrual of unused riperian rights which had not vested by actual application to have beneficial use prior to March 2, 1955. Belle Fourche Irrigation District v. Smiley, 204 N.W.2d 105 (S.D. 1973).

Furthermore, the right to use appropriated water is forfeited for nonuse. SDCL 46-5-37 provides, in pertinent part:

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

The Petitioners contend that the USFWS failed to meet the burden of proving that the diversions in Application No. 1927-2 on Lake Creek were in use for at least three years immediately prior to March 2, 1955 for a continuous period since 1955, as the Water Management Board found. It must be remembered that the USFWS claimed a priority date of the year 1939 on water right claim no. 1927-2. This claim was based upon aerial photographs that were taken in 1939, interpreted by a witness called by the USFWS.

The area where the four diversions are located on Lake Creek which is the subject to vested Water Right Claim No. 1927-2 were originally part of the Brown Ranch prior to the time the ranch was acquired by the USFWS. Petitioners called as a witness the former wife of Alvin Brown, who operated the Brown Ranch. Brown's wife, Eva Mae Linenbrink, testified that she married Alvin Brown in 1936 and that

in the fall they moved up to the area on the ranch where Diversion No. 4 is located. (TR2 pp.329-330). She lived there until 1943. (TR2 p.332). During that time, she passed the location where Diversion No. 4 is now identified and never saw any water being appropriated from Lake Creek for irrigation purposes. (TR2 p.331). Linenbrink went on to testify that she lived in that area where Diverion No. 4 is located until 1943, when her husband bought a place just south of where the diversion was located. (TR2 p.332; Exh. 33). She also testified that the land on which diversion no. 1 is located was purchased by her husband in 1946. (TR2 pp.333-334). It was her testimony that after 1946 when they bought the north half of the property, her husband, Alvin Brown did try diverting water out of Diversion No. 1 up on Lake Creek to irrigate the north half of that section for alfalfa, but it didn't pan out. (TR2 pp.334-335). The reason she can remember the use of the diversion for irrigation didn't pan out in 1946 is that by 1949 they were using that spillway for a bath place on Saturday nights. (TR2 p.335).

Also, Joyce Toczek, Alvin Brown's daughter, testified that she worked out in the hay fields where the four diversions are located from 1952-1958. (TR2 pp. 340-341). During that time period, there was no irrigation out of Lake Creek by her father. (TR2 p.341). Toczek also testified that she came back with her husband following her father's death in 1966 and operated the ranch with her husband until about 1968. (TR2 p.342). During that time period, there was no irrigation. (TR2 p.342).

For the years 1969 and 1970, the ranch was leased to Frank Buckles, who testified that during the time he had the land under lease he put up hay and never irrigated out of Lake Creek. (TR2 pp. 352-353).

There was ample testimony that after the USFWS acquired the Brown Ranch in 1971, they began to divert water out of Lake Creek at those four diversions. However, our Supreme Court has held that the forfeiture of a water right, under SDCL 46-5-37, may not be revived by reinitiating the diversion of water. In Re Cancel. of Stabio Ditch Water Right, 417 N.W.2d 391, 395 (S.D. 1987).

The only testimony USFWS offered on the priority was the testimony of Jack Ritz. However, Mr. Ritz was only able to testify that while he worked for the Browns, sometime during the years 1951-53 and again at the time of Mr. Brown's death in 1962, that they diverted water off of Lake Creek. (TR2 pp.313-314, 308). But when the question was put to him to describe the diversion points off of Lake Creek that he diverted the water when he worked for the Browns, he was only able to identify Diversion No. 1. (TR2-309, 318, 322).

Based upon the evidence that was presented, the Petitioners contend that a mistake was made by the Water Management Board to validate this vested water claim because the evidence did not establish a priority date of 1951. The standard that the Court must find to reverse, that it has a definite and firm conviction that a mistake has been made, can be easily corrobarated by examining the Board's own deliberations as applied to Water Right Claim No. 1927-2. (TR3 pp.858-868). The Board had no interest in giving it a priority date of 1937. Mr. Brink made a motion to validate the vested water right with the 1951 priority date. (TR3 p.859). There was no second to that motion when it was first made. (TR3 p.859). Mr. Rollag stated that he was convinced that there had not been a continuous use of that water since 1939. (TR3 pp.859-860). Mr. Brink asked the members of the

Board whether or not they would accept a priority date of 1971, when the ranch was acquired by the USFWS. (TR3 p.860). They were then instructed by their lawyer, John Guhin, assigned to advise the Board on matters, that to validate a vested water right, the right had to arise by three years prior to March 2, 1955. (TR3 p.860). The acting chairman of the board, Mr. Freeman, stated that priority was one of the issues, but that the Board could decide whatever they wanted to because there was clear testimony in the record to support that it wasn't used. (TR3 pp.860-861). Mr. Freeman raised the question that if the Board didn't validate the vested water right claim, what happens to the USFWS, what are they going to do. Mr. Holzbauer responded that the USFWS should get a new water right. Mr. Freeman, who is a licensed lawyer, disregarded the advice the legal counsel had given to the Board and made the following statement:

> "What do they do in the meantime? Are we going to grant them a new one? If we're of a mind to grant them a new one, why not grant them this one? Why put everybody through this exercise. Without this permit, see I don't think the date makes much difference at all. Not like we have other prople with water rights who are screaming. Got landowners who are being affected, but not being affected because of not enough water coming down to them. But they have acquired, we've all -- we being the American taxpayers, spent a great deal of money buying the Brown Ranch and developing it and trying to do what's right for waterfowl. Which obviously they've been declining nation wide, it's a very serious concern. I don't want to shut these folks down." (TR3-861).

Mr. Brink made a second motion to validate the vested right with the 1951 priority date. There was no second. Mr. Freeman urged the other Board members to disregard the "legal niceties" and take a practical approach in granting the permit. He stated as follows:

> "I think the reason nobody wants to vote on that is I don't think people they want to vote on vested right.

"Again, my question is what is the refuge going to do without the vested right, without the water? And to me, I know we got all kinds of legal niceties, but to my way of thinking whether it's a new permit or vested right, in this case doesn't amount to a hill of beans because we don't have a lot of other water users. The entire fight the last three days has been the land use, not you are taking all of the water. That's usually what we've got to fight over. So why do we care if a '51 vested right or a new permit." (TR3-866)

Thereafter, Mr. Rickenbach made the motion to validate the vested water right claim with a 1951 priority date. The motion carried with one "no" vote.

Clearly, this exchange between the Board indicates that they were not persuaded the Refuge had even established a vested water right claim with a 1951 priority date, but skirted their legal responsibilities for the purpose of administrative economy so they would not have to rehear the matter as a new application. The reason for the statutes allowing for the validation of vested rights for the determination of the abandonment for use of water is that the public interests require that this natural resource be applied to a beneficial use or that it be rendered available for appropriation in use by others. Cundy v. Weber, 300 N.W. 17 (S.D. 1941). The "legal niceties" have been enacted to provide for a method determining water rights in the state of South Dakota.

The Board's decision to validate the water right with a 1951 priority date was clearly erroneous in light of the entire evidence in the record on the issue of the existence of a vested water right, the priority of any water right and the landowners abandonment of any water right, therefore the decision should be reversed by the Circuit Court on this issue.

If the Court determines that the USFWS has met its burden in establishing a claim for validation of Water Claim No. 1927-2 with a priority date of 1951, they still have to demonstrate that the claim does not impair the rights of others, constitutes a beneficial use and is in the public interest. See SDCL 46-1-9(1) and 46-1-6(3).

B. Whether the approval of the USFWS Application 1927-2 impairs the rights of others.

The South Dakota Supreme Court has held:

> that the right to water by prior appropriation is limited in every case in quantity and quality by the uses for which the appropriation is made. (emphasis added).
>
> ". . . the appropriation does not confer such an absolute right to the body of water diverted that the owner can allow it, after its diversion, to run to waste and prevent others from using it for mining or other legitimate purposes." Stenger v. Tharp, 94 N.W. 402, 404 (1903).

In the instant case, Wendell DeKay runs a cattle operation downstream from the USFWS. The USFWS developed three of the four diversions to spread the water from Lake Creek over the land which was the Brown Ranch, thereby obstructing the natural flow of Lake Creek. (TR1 pp.195-196). That after the spring water has been diverted, the excess eventually rejoins the natural flow and is discharged onto the private land owned by DeKay. That the quality of the water discharged onto DeKay's land by the USFWS is such that DeKay's cattle refuse to drink from the stream so that they would walk to water tanks near the DeKay ranch headquarters to obtain their drinking water rather than drink from the stream. The evidence showed that other downstream landowners are deprived of water during critical times in their operations because of the obstructions the USFWS had placed in the flow of water through the Brown Ranch.

Kenneth Hines testified that he leased land in 1985 just below the Refuge, through which Lake Creek ran. (TR2 p.346). That in July of 1985 Lake Creek dried up so that there was no water with which to water his livestock. (TR2 p.346). Hines contacted the Refuge manager, Kraft, to complain about the lack of water flowing down through Lake Creek, and while the Refuge manager agreed to release more water, it was not enough to get down to the property where Hines was located, so that he could water his cattle. (TR2 p.347). At the same time this was occurring on Hines' property, the Heath property had water backing out of the channel of Lake Creek and flooding the Heath property because the Refuge had so much water impounded in the Refuge. (TR2 p.348). Hines testified that while there was enough water in May of 1985, gradually Lake Creek got lower and lower until from June through July until the first of September there was no water flowing in it at all. (TR2 p.349). As a result of the Refuge's impoundment of the great quantities of water during the summer of 1985, Hines had to end up moving his cattle off the leased pasture. (TR2 p.348). Stock watering is a domestic use. SDCL 46-1-6(4). As such, it takes precedence over appropriative rights. SDCL 46-1-5. And yet in the present case, it was the stock watering that became subservient to the Refuge's use of the water, which is inconsistent and contrary to the policy established by the South Dakota Legislature as found in SDCL 46-1-5.

Because the USFWS' utilization of the water has affected the quality and the quantity of the water, this issue should be resolved by denying the Application.

C. Water Right Claim No. 1927-2 is not a beneficial use of water when the USFWS' use of water has resulted in flooding private land adjoining the Refuge owned by the USFWS.

The USFWS argues that the beneficial use is determined by whether the use of the water is reasonable and useful and beneficial to the appropriator. This argument neglects to read the entire definition of "beneficial use" found at SDCL 46-1-6(6), which reads:

> "Beneficial Use" Any use of water within or outside the state, that is reasonable and useful and beneficial to the appropriator and at the same time is consistent with the interests of the public of this state and the best utilization of water supplies; (emphasis added)

Thus, the definition of "beneficial use" requires a two-pronged test to be used to make a determination, if indeed, the use of water constitutes a beneficial use. In summary, that two-pronged test is:

(1) That the use of the water is reasonable and useful and beneficial to the appropriator; and

(2) That the use is consistent with the interests of the public and the best utilization of water supplies.

Petitioners contend that even under the first prong of the definition of "beneficial use" the Application must fail.

The Applicant argues in the Prehearing Brief that appropriator of the water determines whether its use of the water is beneficial and that the Petitioners attempts to tell the USFWS that its use of Lake Creek is not beneficial must be disregarded. However, in the documents the USFWS provided to the Petitioners through the discovery process

reveal that they're not increasing duck production on the Refuge. Total duck production for the years 1983 through 1990 reveal the following:

YEAR:	TOTAL DUCK PRODUCTION:
1983	12,915
1984	6,770
1985	6,419
1986	3,519
1987	2,886
1988	2,510
1989	1,259
1990	1,360

Clearly, these records reflect the USFWS's consumption of additional quantities of water are not going to add to duck production. In fact, when the USFWS acquired the Brown Ranch in 1971, their duck production was only 4,638. Rolf Kraft blames the decrease of ducks on the carp population. (TR1 pp.191-192). But as far back as 1971, the USFWS recognized the USFWS would probably never eradicate carp from the Refuge but that good barriers would help control the population. (TR1 p.192). Evidently those barriers have only helped to flood adjoining private property, and not control the carp.

The use of water is not reasonable and useful and beneficial when that use causes flooding of adjoining private lands. It stands to reason that if the USFWS's utilization of water results in flooding of adjoining private lands that they are using more water than they need. Our Court, in the past, has focused attention on the matter of efficient utilization of water so as to take into consideration if there is an unwarranted waste of water. Cook v. Evans, 185 N.W. 262, 265 (S.D. 1921), modified on other grounds, 186 N.W. 571, (S.D. 1922).

Furthermore, the Legislature has provided that no appropriation of water in excess of the reasonable needs of the appropriators may be allowed. SDCL 46-5-5. A South Dakota riparian is limited by the concept of "reasonable use", he can claim only water which he can use for a beneficial purpose. Redwater Land and Canal Company v. Reed, 128 N.W. 702 (S.D. 1910). In this case, the lands are subirrigated and do not need to be irrigated. It is logical to conclude that the USFWS is claiming more water than it can use when it floods adjoining private land.

Furthermore, it is interesting that the USFWS application states that it wishes to use the water to flood irrigate the Brown Ranch and that this irrigation will occur during the irrigation season. However, the "irrigation" occurs on the Brown Ranch from February through as late as August of each year and that this is not the "irrigation season" in Bennett County. Furthermore, the evidence will demonstrate that the soil content on the Brown Ranch is not suitable to flood irrigation. A soil survey map shows that the predominant soil on the Brown Ranch are Lamo (La), Loup (Lo), Dunday (Du). (TR3 p.641). According to Simonson, a range management specialist formerly with the Soil Conservation Service, these soils are not suitable for surface irrigation, as contemplated by the USFWS. (TR3, p.642). Quite clearly, it would appear that the USFWS is attempting to use the guise of irrigation to create wetland habitat. (TR1 p.197).

The second prong of the test is determination of whether the use is consistent with the interests of the public and the best utilization of water supplies.

Our Legislature has recognized that because of the prevailing conditions in South Dakota, our water resources must be put to the

fullest extent of the beneficial use of which they are capable. The USFWS is creating marginal conditions even to support wildlife and waterfowl by their utilization of the water resources. Furthermore, they have approximately 9,300 acres available as part of the original Refuge to create slough-like conditions for waterfowl to exist in. If the evidence establishes that there is no need to irrigate in order to provide sufficient forage for wildlife and waterfowl, then an inference can be drawn that the USFWS wants to spread water over the land under the guise of irrigation to create slough-like conditions for waterfowl. However, they have approximately 9,300 acres in the original Refuge boundaries that contain adequate slough-like conditions to meet the needs of waterfowl. Our State also gives domestic use of water precedence over appropriative rights. SDCL 46-1-5. Petitioners urged the Water Management Board, based upon consideration of the circumstances and facts present in this case, to determine that it is not a beneficial use to allow water to be appropriated for cultivating food for wildlife and waterfowl as was done in Lake Shore Duck Club v. Lakeview Duck Club, 166 P. 309 (UT 1917). The Board rejected this position.

Furthermore, the adoption of such a rule would be consistent with the proposed amendments to the general rules adopted by the Department of Water and Natural Resources, Division of Water Rights, and the definition for "stock watering" found at ARSD 74:02:01:01 as reworded to strike "buffalo, deer, elk, antelope and other wild animals that are managed for the public by a governmental agency" from that definition of stock watering of animals.

Consequently, this issue should be resolved by denying the Application and reversing the decision of the Water Management Board.

D. Water Right Claim No. 1927-2 is not in the public interest when it seeks to appropriate water for wildlife and waterfowl habitat and forage that results in flooding adjoining landowners.

Petitioners contend that the standard for determining what is in the public interest is set forth in SDCL 46-1-4, which provides in pertinent part:

> It is hereby declared that because of conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of division of water.

The evidence demonstrates that the USFWS' utilization of water results in flooding of adjoining landowners and constitutes a waste of water. As a consequence, Petitioners contend Application No. 1927-2 is not in the interests of the public.

The USFWS strongly disagreed with any contention they are committing waste, but Petitioners contend that not only do their practices indicate they have no intention of irrigating the land, but even the words of the representative of the USFWS reveal their intent is to spread water out over the land to create sloughs for waterfowl. That in 1984, in connection with Application No. 1921-2, the representative of the USFWS stated that they let the water flow over the land when the dam is full to create a larger slough for the "little

duckies". (Exhibit P). The Petitioners recognize these statements were not made in connection with Application No. 1927-2, but when considered along with all the evidence concerning Application Nos. 2191-2 and 1921-2, the evidence demonstrates there is no need to irrigate the lands in question under Application No. 1927-2 and that the Application is being used as a subterfuge in order to create sloughs for waterfowl. (TR3 p.642). Rolf Kraft, the manger of the USFWS LaCreek National Wildlife Refuge, admitted as much in his testimony. (TR1 p.188).

The South Dakota administrative rules for the definition of irrigation is that the term applied in SDCL 46-1-6, 46-1-9 and 46-6-1 is as follows:

> (2) "Irrigation," the artificial application of water for the purpose of supplying sufficient moisture for plant growth. Disposal of contaminated water is not considered to be irrigation unless other water is used along with the contaminated water;

ARSD 75:02:01:01(2), Exhibit "O".

Mr. Kraft also testified as the manager of the Refuge that he wishes to apply water out of Lake Creek from 1/2 inch to maybe 1 foot in depth to create impoundments that will create wetlands. (TR1 p.197). And that they will be applying water in January through December 31st of each year to irrigate aquatic plants, however none of those aquatic plants include the native grasses that are indigenous to this pasture. (TR3, p.787). The Petitioners contend the primary purpose is to impound the water for the protection of the ducks.

Because the Application to appropriate the water does not support a practice of irrigation as defined by ARSD 74:02:01:01 but

does support the contention that the water is being wasted, then it is not in the public interest to grant the Application. This issue should be resolved by denying the Application.

E. Water Right Claim No. 1927-2 Should be Denied when the Diversions Placed on Lake Creek Result in the Flooding of Adjoining Land.

SDCL 46-5-2 provides:

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

The South Dakota Supreme Court has held that where there is a seepage of water onto land because of an increased water level in the river due to a dam and interference with the drainage off an adjoining landowner's land, that the dam owner constitutes a flooding within the meaning of SDCL 46-5-2 (former SDC 61.0101). Willadsen v. Crawford, 60 N.W.2d 692 (S.D. 1953). Not only did the diversions on Lake Creek by the Applicant result in the flooding of adjoining private land, but also flooded out a county road belonging to Bennett County, which flooding persisted until such time as the USFWS dredged Lake Creek on its side of the county road. (TR2 pp.357-360).

This issue should be resolved by determining that the diversions constitute flooding adjoining private land and, consequently, the Application should be denied and the Board's decision reversed.

The Board erred as a matter of law, pursuant to SDCL 46-5-2, when it granted Water Right Claim No. 1927-2, and for this reason the Board's decision on Water Right Claim No. 1927-2 should be reversed.

II.

THE WATER MANAGEMENT BOARD ERRED IN GRANTING WATER PERMIT APPLICATION NO. 2191-2.

A. Granting Water Permit Application No. 2191-2 impairs the rights of others and is not a beneficial use of water nor in the public interest.

The arguments advanced in parts I.B,C,D and E apply to Water Permit Application No. 2191-2. Since these issues have been addressed above, they will not be repeated, but Petitioners will rely upon the arguments previously advanced in I.B,C,D and E as reasons for denying Application No. 2191-2.

B. Application No. 2191-2 is a reservation of the future use of water to which the USFWS is not entitled.

Rolf Kraft, at his deposition on May 21, 1992, stated that the USFWS wanted a water right on the springs to protect the amount of water that is coming out of the springs an that the reason the USFWS decided they wanted that water right is that a number of years ago, there was some discussion that some private interests were wanting to use water out of the Oglala Aquifer and transport the water to Texas, and the USFWS's concern was that if water mining reduced the amount of water in the sandhills, it might reduce the water table in the sandhills to the point it might impact the Refuge's springs, and without a water right the USFWS wouldn't have much recourse in that regard. Kraft Deposition, pages 181-182. Furthermore, Kraft testified at the hearing that, for the time being, it was his intention to let the springs flow as they may without any development.

Clearly, if the underlying reason for seeking a water right on the springs is to protect subsequent development of that water by a third party, then the USFWS is conceding that it does not need the water for irrigation purposes, which is the purpose of Application No. 2191-2. South Dakota law does recognize that certain entities may obtain a permit to appropriate water for future use, however the United States of America is not one of those entities which is entitled to reserve water for contemplated future needs. SDCL 45-5-38. For this reason Application No. 2191-2 should have been denied by the Board, and therefore the Board's decision should be reversed.

III.

THE WATER MANAGEMENT BOARD ERRED IN GRANTING WATER PERMIT APPLICATION NO. 1921-2

A. USFWS has not met its burden for amending a permit to sever and transfer irrigation rights to different land.

SDCL 46-5-2 governs, in pertinent part, those situations in which an amendment of water permit is required for severance and transfer. It provides:

> All water used in this state for irrigation purposes shall remain appurtenant to the land upon which it is used. However, if for any reason it should become impracticable to use all or any part of the water beneficially or economically for irrigation of any land to which the right of its use is appurtenant, all or any part of the right may be severed from the land and simultaneously transferred and become appurtenant to other land without losing priority of right previously established, subject to existing rights, upon approval of an application for an amended permit. No increase in total acres irrigated may be allowed under this section.

Consequently, the water rights for irrigation may not be transferred to different land unless it becomes impractical to use all

or part of the water, beneficially or economically, for irrigation, then the right may be severed from the land without loss of priority if there is no detriment to existing rights. In the instant case, the Applicant has made no showing as to why it is impractical to use all the water beneficially or economically for irrigation on the land to which it is appurtenant. There is some indication in the permit that the existing dam has fallen into disrepair. But the Applicant has not demonstrated why that dam cannot be repaired to continue its use under the existing Water Permit, particularly if it was of earthen construction. Jack Ritts testified, at the hearing, as a witness for the USFWS that other earthen dams on the Brown Ranch had washed out and they had been rebuilt. (TR2-319). Furthermore, SDCL 46-5-34 requires that the original irrigation permit would have to be used on land that is appurtenant to the land for which the original irrigation permit is granted. Otherwise, it cannot retain its priority. In the instant case, it is clear that the water will be used to irrigate land that is not appurtenant to the property described in the original Water Permit. See page 1 of Application No. 1921-2 (R-1-8). Application No. 1921-2 is for a water right to irrigate USFWS land in the North Half Section 25, the Southeast Quarter of Section 24, and the East Half of Section 19; however, property belonging to Brett Heath, the West Half of Section 19, lies between the sections of property USFWS is seeking Water Permit No. 1921-2 on.

Clearly, since the property owned by Brett Heath falls between the land for which the original water permit was used to irrigate and the land that the Refuge now wishes to irrigate in the East Half of Section 19, there is no pertinency as required by SDCL

46-5-2. Therefore, the Refuge had the burden to establish that it was beneficially impracticable or economically impractical to use the permit to irrigate the land which the original permit was granted for. The Petitioners contend this requirement of economic impracticability or beneficial impracticability was not established. The only testimony offered was Rolf Kraft, Refuge manager, in which he testified that it would appear it would cost $750,000.00 to rebuild the dam, but there was no documentation to support this estimate. In fact, it appears that the Refuge went ahead and relocated the dam further downstream and did so without obtaining the permission of the Water Management Board. (TR3 pp.829-830). While it may have been beneficial for the Refuge to move the dam downstream, the Refuge did so without first obtaining the permission of the Water Management Board so any evidence as to it being beneficially impractical to use the old site was apparently based on the fact that they have now invested money in the new site which is downstream from where the old permit existed. Because the USFWS offered no credible evidence on this point, the permit should be denied for this reason and the decision of the Board to grant the Application should be reversed.

B. - <u>It is not in the public interest and a beneficial use to allow an existing Water Permit to be severed from the land and simultaneously transferred and become appurtenant to other land without losing priority of right when the practices of the USFWS and the representations made by their representatives indicate the water is to be used to create a slough for waterfowl</u>

It is clear from SDCL 46-2A-12 that when an application is made for approval of the severance of irrigation water to be used for irrigation of other land, the application must continue to use the

water for irrigation purposes. When an appropriator changes from irrigation to another use, the Commission cancels the first permit and issues another; thus, the old priority date is lost and a new priority acquired on the date the new permit is issued. In the instant case, the evidence demonstrated that the land which Applicant wishes to have the water permit transferred to will be used to create a slough for waterfowl, (Exhibit P), not irrigation which was the purpose of the original permit. If the use is being changed, application for a new permit is necessary. Consequently, this issue should be resolved by denying the Application and reversing the Board's decision.

CONCLUSION

For the foregoing reasons, the Findings of Fact and Conclusions of Law and Final Decision entered by the Water Management Board on January 7, 1993, should be reversed and an Order entered directing the Water Management Board to deny Application Nos. 1927-2, 2191-2 and 1921-2.

Respectfully submitted.

FARRELL, FARRELL & GINSBACH

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the Petitioners/Appellants' Brief in the Matter of

Water Right Claim No. 1927-2, Water Permit Application No. 1921-2, and Water Permit Application No. 2191-2 upon the following named individuals, all on the date below shown, by depositing the same in the an envelope securely sealed and with first class postage thereon fully prepaid addressed to the last known addresses of the addressees, namely:

John R. Kunz
Office of the Regional Solicitor
P. O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225

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

John P. Guhin
Deputy Attorney General
500 East Capitol Ave.
Pierre, SD 57501-5070

on the 3rd day of May, 1993.

PATRICK M. GINSBACH

Water Rights Division - DENR
Conversation File Documentation

NAME OF PERSON OR FILE: Lacreek National Wildlife Refuge Files

ADDRESS: COUNTY: Bennett

DATE: August 16, 1993 TELEPHONE:

RE: Complaint from Lawrence Kocer (685-1115 - Shop or 685-6610)

COMMENTS:

Mr. Kocer called this office at 1:00 pm on 8/16/93 to talk to the Chief Engineer to request time before the Board at the September 1 & 2, 1993 meeting. Since John Hatch, the Chief Engineer, was not in the office I took the call. Mr. Kocer stated that he had talked to Chairman Rollag and was directed to this office. Mr. Kocer stated that the Refuge was flooding a 40 acre hay meadow of his and he wanted time before the Board at their upcoming meeting to discuss this with the Board. First, I stated that requests of this nature must be in writing to which Mr. Kocer responded that Chairman Rollag stated all he'd have to do is contact our office and we'd put him on the agenda. Additionally, I expressed concerns that administrative procedures would prohibit us from scheduling a hearing on a contested case with less than twenty days notice to all parties and that since the Lacreek case is on appeal, the Board may not be able to hear additional testimony. I stated that I would check on these issues and get back to him in the afternoon.

At 3:20 pm, I called Mr. Kocer back and got Del Brosz on the line. I explained that according to SDCL 1-26-16 in a contested case all parties shall me afforded an opportunity for hearing after reasonable notice. Generally reasonable notice is 20 days and since the Board meeting was only 15 days away the matter could not be brought before the Board at the Sept. 1, 1993 meeting. The matter is also on appeal to the circuit court and we are unsure whether the Board could take any action. Mr. Kocer stated that all he wanted to do was formally register a complaint with the Board and not provide testimony. I tried to explain that the USFWS must have an opportunity to be present and the if he wanted formally register a complaint, he could write to the Chief Engineer.

Del Brosz asked Mr. Kocer what he wanted the Board to do. Mr. Kocer stated to stop the flooding that is occurring on his 40 acre hay meadow. Mr. Kocer stated that the a swather got stuck the other week in the meadow. The USFWS made a cut through a dike to relieve flooding on Brett Heath's property. Mr. Kocer believed the cut was made in the wrong location and now prohibits the siphon that drains his hay meadow from operating properly since the siphon is now under water from Lake Creek. Mr. Kocer believes the USFWS was purposely flooding his property so that the land would be declared a wetland. Mr. Brosz stated that Rolf Kraft had called last week to explain that a problem existed and that he had done some surveying but wasn't able to determine the best solution. Mr. Kraft has enlisted the assistance of USFWS engineers in Aberdeen to come out and do some surveying and come up with an engineered solution to the problem that currently existed. Mr. Kraft had indicated that the crew would be out the Last week in August or first week in September to do surveying. Mr. Kocer stated that the area landowners could come up with a solution in a half a day, but that Mr. Kraft won't listen or implement the landowners ideas. Mr. Kocer stated that there is an old structure that has been covered by sand which needs to be found and made operational once again. We tried to explain that Mr. Kraft has to have approval from his supervisors on expenditure of funds and for this reason is trying to come up with a engineered solution to the problem to get it done right the first time. Mr. Kocer expounded on how in the mean time his hay meadow is flooded and he wanted the Board to provide him relief.

Mr. Kocer requested that Mr. Brosz come down and do a site inspection and then require the USFWS to correct the problem. Mr. Brosz stated that everyone agrees there is a problem, and the USFWS is taking steps to correct the problem. Mr. Brosz did not see what benefit it would do for him to come down when both parties agree that a problem exists and the USFWS is taking steps to find a solution. Mr. Kocer was adamant about someone from the Division of Water Rights coming down to the site, and require the USFWS to immediately stop the flooding by implementing the landowners proposed solution.

Mr. Kocer was obviously frustrated with the problems that were occurring. It was also obvious that there were other gentlemen in the background with Mr. Kocer that were also frustrated. Throughout the conversation, Mr. Kocer made numerous accusations that we were showing favoritism towards USFWS and that USFWS's goal is to put the landowners out of business.

The conversation ended at approximately 4:15 pm

Mr. Brosz called USFWS in Denver to contact Bob Green, Mr. Green was out of town but they were going to give him a message to call Mr. Brosz the next morning.

Mr. Green called Tuesday morning to state that Mr. Kocer had called the Denver office and a meeting had been held to discuss the issue. USFWS was going to drop the elevation of Pool 7 by one foot to see if that would correct the problem. If that did not work they planned to construct a berm between the siphon outlet and Lake Creek in hopes that this would allow the siphon to work. The USFWS still planned to have the survey crew go to Lacreek in order to find a permanent solution to the problem.

File in Permit or other file as necessary. Use to document conversations and what the other party was told; why action or decision was made.

NAME: Eric Gladbach

GREAT FACES. GREAT PLACES.

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3181

August 24, 1993

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Dear Mr. Kocer:

I am writing to follow-up on your August 16, 1993 telephone conversation with Division of Water Rights staff. You advised that the corrective action taken by the United States Fish and Wildlife Service (USFWS) at Lacreek National Wildlife Refuge to decrease the potential of flooding on Brett Heath's property is causing flooding to your hay meadow. Specifically, that the location of the ditch constructed to direct Lake Creek into Pool No. 7 has caused the siphon to fail to operate. Rolf Kraft contacted this office August 9th to state that this problem existed and that the USFWS intended to complete an engineering survey to determine the best possible solution.

You requested time at the September 1, 1993 Water Management Board meeting to bring your complaint to the Board. The Board's previous decision resulting from the hearing last summer is now on appeal in Circuit Court. If you are requesting time to ask the Board to rehear the same issue, I do not believe the Board would have the authority to consider the matter.

If, however, you are asking that the Board issue an order enforcing the conditions on the permits and water rights now held by USFWS, then the Board possibly could hear the request. In such case, a written request must be filed with this office specifically indicating the enforcement action requested. State law does not allow scheduling of a hearing unless all parties are given reasonable notice to appear at the hearing. This gives all parties an opportunity to consult with their attorney and decide whether they believe if the Board has jurisdiction on the request, to prepare for the hearing and determine whether to oppose the request. There was not a reasonable period of time to notice your request for the September 1, 1993 meeting.

Since your August 16, 1993 telephone request and telephone calls to USFWS's Denver office, the USFWS has agreed to:

1) Drop the water elevation in Pool No. 7 by one foot;

2) If this does not remedy the situation, USFWS intends to construct a berm between the siphon outlet and Lake Creek in an attempt to make the siphon function properly; and

3) Conduct an engineering survey of the area in order to design a permanent solution.

The USFWS has shown a willingness and desire to address your concerns. Please understand that we must continue to follow the procedures set forth in state statutes.

Please feel free to contact this office if you have any questions.

Very truly yours,

John Hatch, Chief Engineer
Division of Water Rights
605 773-3352

cy: Senator Roger Porch
Dwayne Rollag, Chairman, Water Management Board
Diane Best, Assistant Attorney General
Jane Farrell, Farrell, Farrell & Ginsbach
John Kunz, Office of the Regional Solicitor
Bob Green, USFWS
Rolf Kraft, USFWS

1927-2

JAN

CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

HUGHES COUNTY COURTHOUSE
P.O.BOX 1112
PIERRE, SOUTH DAKOTA 57501
(605) 773-3711

STEVEN L. ZINTER
CIRCUIT JUDGE

COURT REPORTER:
CONNIE HECKENLAIBLE
(605) 773-5382

January 5, 1994

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Pierre, SD 57501

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Hot Springs, SD 57747

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RE: Wendell DeKay, et al. v United States Fish & Wildlife Service and Water Rights Division, State of SD
Bennett County Civ. 93-4

Dear Counsel:

Enclosed is the Court's Memorandum Decision. Because SDCL 1-26-36 requires the entry of findings of fact and conclusions of law when an administrative decision is reversed, the Memorandum Decision constitutes this Court's findings and conclusions with respect to Application No. 1927-2. Because there is no such requirement when a decision is affirmed, I do not intend to enter findings and conclusions on the remaining two applications.

Landowners, FWS and the Division may submit their own proposed findings of fact, conclusions of law or objections in accordance with Rule 52 on this Court's reversal in Application No. 1927-2. At the conclusion of the statutory time, the Board should submit a conforming judgment.

Sincerely,

Steven L. Zinter
Circuit Court Judge

SLZ/ch

CC: Clerk of Courts

Enclosure

STATE OF SOUTH DAKOTA) SS COUNTY OF BENNETT)		IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
IN RE: WATER RIGHT CLAIM NO. 1927-2; WATER PERMIT APPLICATION NO. 1921-2; AND WATER PERMIT APPLICATION NO. 2192-2		CIV. NO. 93-4
WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, AND LAWRENCE KOCER, Petitioners/Appellants, -vs- UNITED STATES FISH AND WILDLIFE SERVICE, Applicant/Appellee, and WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA, Appellee.		MEMORANDUM DECISION

Wendell Dekay, Charles Emley, Brett Heath, Raymond Kocer and Lawrence Kocer (collectively referred to as the "Landowners") appeal from decisions made by the South Dakota Water Management Board (Board) in three water rights applications filed by the United States Fish and Wildlife Service (FWS). The Board's decision on Application No. 1927-2 is reversed. The Board's decisions on Application Nos. 1921-2 and 2192-2 are affirmed.

This dispute arises out of three applications for water right permits to use water on the LaCreek National Wildlife Refuge in Bennett County. The refuge was established in 1935. It contains deep pools, shallow water, marshlands, wetlands and various types of vegetation. It is used as a wildlife refuge and breeding ground for migratory waterfowl and other wildlife.

In 1971 the refuge was expanded when FWS purchased 6,665 acres of privately owned property known as the "Brown Ranch." The Brown Ranch property was contiguous to the refuge. It is used to provide shallow water habitat for wildlife propagation and to compliment other wildlife uses on the original refuge.

FWS sought three permits to use water on the old Brown Ranch. Application No. 1927-2 was a request to vest a prior claimed right to 10 c.f.s. of water from four diversion points on Lake Creek. Application No. 2192-2 was a request for a new water right to the natural flow of water from six springs near Lake Creek. Application No. 1921-2 was a request to change the point of diversion and some of the land irrigated from Cedar Creek under an existing permit.

Landowners each own or lease property which is contiguous to or near the refuge. Although they raised numerous legal arguments against the applications, most of the Landowners' objections relate to problems they have had with FWS' management practices and use of water on the refuge. Landowners' primary

complaint concerns flooding of their land.[1] Landowners contend that past flooding has drowned the natural grasses which were used for commercial hay production and livestock. Landowners contend that the natural grasses have been replaced by commercially unuseful marsh type vegetation including slough grass, buck brush, cattails, marsh grass, foxtail, barley, smart weed, sedges and rushes. Landowners' also contend that on one occasion there was a shortage of water in one area although the owner of that property is not a party in this proceeding. One other Landowner, Wendell Dekay, alleges that the quality of the water allegedly discharged by FWS onto his property has been diminished by the propagation of carp.

After two days of testimony, the Board granted all three applications with one modification and on the condition that FWS' use of water could not flood or impair the Landowners' property. Landowners appeal.

I
APPLICATION NO. 1927-2

The prior owners of the Brown Ranch had engaged in some irrigation although the time, place and amount of water used is in dispute. In Application 1927-2, FWS sought to obtain a

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[1]The record reflects that the flooding has been caused partly by FWS' management and use of the water on the refuge, and partly by natural causes such as precipitation and high water tables in the area.

"vested right"[2] to Brown's prior water usage. Specifically, FWS sought a vested water right to 10 c.f.s. of water from four identified points of diversion on Lake Creek. Because FWS contended that the water had been continuously used for irrigation since 1937, it also sought to establish a vested priority date of 1937.

Although the Board found that the water had not been continuously used since 1937, it did find that 10 c.f.s. of water had "been continuously appropriated for irrigation use since January 1, 1951." Finding of Fact XLIV (erroneously denominated as a Conclusion of Law). Based upon that finding, the Board granted a vested water right to 10 c.f.s. of water from the four points of diversion with a priority date of 1951. Landowners contend the Board erred in four respects. This Court need only address Landowners' contention that the Board's decision was clearly erroneous.

Landowners contend that the Board was clearly erroneous in finding that there was a continuous appropriation since 1951 for irrigation use of 10 c.f.s. of water from the four diversion points. Although Landowners concede that some water was used for irrigation at some point in the past, they contend that

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[2]A "vested water right" is "[t]he right of a riparian owner to continue to use water actually applied to any beneficial use on March 2, 1955, or within three years immediately prior to that date to the extent of the existing beneficial use made of the water." SDCL 46-1-9(1) (emphasis added).

there is no substantial evidence in the record: (1) that the use occurred from all four requested points of diversion; (2) that 10 c.f.s. of water was continuously used for irrigation; (3) that the use was continuous since 1951 or for the three years prior to March 2, 1955; and, (4) that the use was continuous from 1955 to 1978.

This Court's standard of review is limited when the dispute involves a contention that findings of fact are clearly erroneous. Under SDCL 1-26-36, the question is not whether there is evidence in the record which could support the appealing party's proposed facts. The proper scope of review is to determine whether there is any substantial evidence to support the findings that are made by the Board. In Re SDDS, Inc., 472 N.W.2d 502, 507 (S.D. 1991). Moreover, courts may not second guess the Board on the credibility of witnesses or on disputed facts. Courts must give deference to the fact finder and great weight to its choices between conflicting inferences and findings. Id. SDCL 1-26-36.

In this case this Court has not addressed the credibility of witnesses or weighed conflicting evidence because the only testimony supporting the Board's finding of a "continuous use [of 10 c.f.s. of water] for irrigation since 1951" came from Jack Ritts. Ritts, an employee of FWS, was employed on the Brown Ranch at times from 1951 to 1953 and again in 1962. Although irrigation was one of Ritts' ranch responsibilities, he did not provide substantial evidence that 10 c.f.s. of water was

continuously used from the four diversion points since 1951. Ritts' testimony fails in several respects.

First, Ritts did not testify that there was a continuous use of water for irrigation since January 1, 1951. Ritts initially testified that he only worked on the Brown Ranch in April of 1951 and "four or five times" in the 50's and 60's. However, he later testified that he could not specifically remember if he started working on Brown Ranch in the fall of 1951 or the fall of 1952, and he could not remember the next time he worked there except in 1963. In any event, Ritts never established in what year or years any irrigation occurred. Ritts certainly did not establish that water was continuously used for irrigation since January 1, 1951 or for the three years prior to March 2, 1955.

Ritts also failed to establish that water was continuously used from the four identified points of diversion. On the occasions he was at the ranch, he only recalled irrigating from one 30-inch tube at diversion point number 1. Ritts never testified that any irrigation ever occurred from diversion points 2, 3 and 4.

Ritts also provided no evidence as to the amount of water that was "continuously" used for irrigation. He not only failed to establish that 10 c.f.s. of water was used in the past, but his testimony reflects that the application sought more water than had been previously used on the Brown Ranch. Ritts testified that in 1978, after the Brown Ranch had been acquired

by FWS, they (FWS) opened up the ditches to make "more potholes." When read in context, this testimony clearly indicates that FWS sought a vested right to use more water than had been used in the 1950's when the Brown Ranch was operated as a commercial enterprise. Ritts' testimony is quite short and does not provide any evidence, let alone substantial evidence, that 10 c.f.s. of water was continually appropriated from the four diversion points since 1951 or for the three years preceding March 2, 1955.

The only other evidence in the record concerning this issue came from Eva Mae Linebrink (Brown's wife), Joyce Tocdek (Brown's daughter), and Frank Buckles (a lessee of the Brown Ranch from 1969 to 1971). Those witnesses testified that there was no irrigation on the ranch from 1949 to 1977. Although FWS argues that this Court must give great weight to the Board's contrary finding because the Board found that Ritts' "description . . . of the manner of irrigation gives his testimony credibility outweighing that testimony to the contrary," FWS' argument is misplaced. FWS' argument is misplaced because Ritts was the only witness who provided any evidence supporting the Board's continuous appropriation finding. Because that evidence is insufficient even standing alone, no weighing of conflicting evidence was necessary by the Board or this Court.

The Board's Finding of Fact XLIV that 10 c.f.s. of water "[had] been continuously appropriated for irrigation use since

January 1, 1951" is not supported by any substantial evidence in the record. Because it is the only finding supporting the Board's decision to grant the vested right, the Board's decision on Application No. 1927-2 is reversed. In light of the reversal on this point, the Court does not reach Landowners other objections to this Application.

II
APPLICATION NO. 2191-2

In this Application FWS sought a new permit to use water from six springs on the Brown Ranch. FWS intended to use the springs' natural flow without any development to create waterfowl habitat. They sought the water right to assure a continued flow of the springs if the water table dropped due to use by others.

1. Future Use

Landowners contend that because the purpose of this permit was to protect the natural flow of the springs against future diminution by others, the Application sought a prohibited future reservation of water. Although FWS agrees that it is not one of the entities entitled to appropriate water for future uses under SDCL 46-5-38, it contends that its proposed use of the natural flow of the water to create a wildlife refuge is not a "future use." This Court agrees.

In its Application, FWS specifically stated that it sought the water right for "waterfowl propagation and enhancement of wildlife habitat, and flood irrigation." In granting the permit, the Board found:

> The water is to be used to create 235 acres of marshes, sloughs, and wet meadows, either through the natural flow of the springs, or through small dams and control structures, for waterfowl propagation and enhancement of wildlife habitat.

Finding of Fact LI.

> Each of the six springs at issue provides a distinct benefit to wildlife by forming pools for the growth of aquatic plants which themselves provide a habitat for aquatic insects. The springs also provide water for the growth of cover for younger and older wildlife.

Finding of Fact LIII.

These findings clearly reflect that the springs' natural flow was intended for current use to create marshes, ponds, vegetation and aquatic insects which were necessary for a waterfowl and wildlife refuge. Although FWS did not intend to divert water by artificial means for commercial irrigation, it was not saving the water right for a future use. It sought the water to create, protect and expand the refuge.[3] Because those

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[3]Based upon the deposition of Mr. Kraft, Landowners contend that FWS seeks this water permit for future use. However, Landowners' counsel's cross-examination of Kraft clearly demonstrates that notwithstanding Kraft's deposition testimony, FWS did not intend to "mine water." When cross-examined about the issue at the hearing, Kraft specifically stated "we <u>are using the water</u> that naturally comes out of the springs. If (Footnote Continued)

uses are current and beneficial,[4] the permit was not granted for an impermissible future use.

2. Impairment of Others' Rights

SDCL 46-2A-9 prohibits the issuance of a permit that impairs existing rights. Landowners contend that FWS' use of the water from the six springs will impair the Landowners' rights because it will impair the quality of the water reaching the Dekay property and the quantity of the water reaching property owned by Mr. Hines. Landowners' contentions are, however, without factual merit.

The permit granted in this Application only allowed the continuation of the existing natural flow of the springs. Because this permit would not change existing natural conditions, it could not change (impair) DeKay's water quality.

(Footnote Continued)
that water flow diminished that would impact how we use our water. That's my belief, one gets a water right to protect." Hearing Transcript Page 201 (emphasis added). When cross-examined about his prior deposition testimony which could be interpreted to mean that they had no plans to "use" the water, Kraft clarified that prior testimony only meant that FWS had no plans to make "improvements" or "diversions." Id. at 202.

[4] See Paragraph 3, infra at page 11. See also In re General Adjudication of all Rights to use Water in Big Horn River System, 835 P.2d 273, 279 (Wyo. 1992); Idaho Dep't of Parks v. Idaho Dep't of Water Administration, 530 P.2d 924, 928 (Idaho 1974); State v. Morros, 766 P.2d 263, 267 (Nev. 1988); and McClellan v. Jantzen, 547 P.2d 494, 496 (Ariz. Ct. App. 1976).

Landowners' contention concerning the quantity of water reaching Mr. Hines' property is without merit for the same reason. Even assuming that the impairment of the Landowners' substantial rights may arise from the impairment of rights of a non-party[5] such as Mr. Hines, this permit could not change the quantity of water Hines receives because there will be no diversion from the usual and natural flow of the springs.

Finally, it must be noted that Landowners have not cited any evidence in the record which shows any correlation between the springs' flow and water quantity on the Hines property or water quality on the Dekay property. The proliferation of carp arose out of pool 10 which is in a different location on the refuge and Landowners have not demonstrated that the quantity of Hines' water is influenced by the springs. Because Landowners have not cited any evidence in their briefs relating these water problems to the water from the six springs, they have not preserved this argument for appeal.

3. Beneficial Use

SDCL 46-2A-9 also prohibits the issuance of a water right that is not for a beneficial use. Landowners contend that FWS'

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[5]An administrative decision may only be reviewed it if affects a party's substantial rights. See SDCL 1-26-36.

proposed use under this application would not constitute a "beneficial use." A beneficial use is defined as:

> [A]ny use of water within or outside the state, that is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interests of the public of this state in the best utilization of water supplies[.]

SDCL 46-1-6(6). This definition requires a two-part analysis.

A. Reasonable, Useful, and Beneficial Use to the Appropriator

Landowners first argue that there will be no reasonable, useful and beneficial use of the water from the six springs under the first prong of SDCL 46-1-6(6) because duck numbers declined on the refuge between 1983 and 1990. There is, however, substantial evidence in the record that this refuge provides prime habitat for ducks. In addition, the refuge provides habitat for a nationally significant population of trumpeter swans, and for Canada geese, snow geese, blue geese, cranes, and other wildlife. Propagation of all these species is reasonable, useful and beneficial to FWS and the public.

Furthermore, although duck populations did decline on this refuge for seven years, it does not follow that the creation of additional habitat will not be beneficial. The record reflects that duck numbers have declined in this flyway for reasons unrelated to this refuge. Simply stated, a decline in duck numbers at this refuge over a seven-year period is not proof that the creation of additional habitat is not a beneficial use.

Landowners also argue that the proposed use will not be reasonable, useful, or beneficial because the area is already sub-irrigated by a high water table. Although the area may be sub-irrigated, the record reflects that natural precipitation is not dependable. The record also reflects that dependable water is necessary to assist native grasses in dry seasons, to provide for the continuous growth of aquatic plants and insects, and to provide necessary habitat during the critical developmental periods of various species of wildlife. Therefore, even though sub-irrigation may occur, FWS established that it is reasonable, necessary and beneficial to have the uninterrupted use of water on the refuge property throughout the critical times of the year.

Landowners finally argue that because of the type of soil in the area, the land is not suitable for traditional commercial irrigation. Landowners contend that there can be no beneficial use because water used for a wildlife refuge is not "irrigation" and only "irrigation" is a beneficial use. The Board, however, concluded that FWS'

> use of the water constitute[s] the beneficial use in that it does in fact promote migratory birds and wildlife through the creation of areas which are biologically appropriate for such uses. The Board finds the existence of a beneficial use even though the crops are not harvested by human beings but are utilized by migratory birds and wildlife.

Finding of Fact XLVI. This Court agrees with the Board for two reasons.

First, contrary to Landowner's contention, the beneficial use arising from "irrigation" is not limited to raising traditional cash crops. "Irrigation" is broadly defined as the provision of moisture to any "plant growth." ARSD 74:02:01:01(2). Because "irrigation" is not limited to cash crops, and because FWS' use will provide moisture to various types of plants necessary for a refuge, its use is "irrigation."

Second, even if the use of water for plants on a wildlife refuge is not "irrigation", it is beneficial. ARSD 74:03:04:01 provides that all "streams in South Dakota are assigned the beneficial uses of irrigation and wildlife propagation and stock watering" (emphasis added). Thus, even if the use of water for aquatic plant growth and resultant wildlife propagation is not "irrigation", it is a beneficial use because both irrigation and wildlife propagation are defined as beneficial uses in this state.[6] The Board correctly concluded that FWS' proposed use was beneficial, whether for wildlife propagation or irrigation.

B. Public Interest and Best Utilization of Water Supplies

Landowners next contend that FWS' proposed use of water from these springs is not a "beneficial use" under the second prong of SDCL 46-1-6(6). Landowners allege the proposed use is

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[6]Because of ARSD 74:03:04:01, Landowners' cases from other jurisdictions are distinguishable.

not consistent with the interests of the public and the best utilization of water supplies. Landowners specifically contend that this permit is not in the public interest because FWS' past use of water has caused flooding of Landowners' adjoining land. This contention is misplaced for two reasons.

First, Landowners have no basis to raise this objection because the Board protected the public interest against flooding. SDCL 46-1-14 provides in part:

> The water management board may issue any permit or license subject to terms, conditions, restrictions, qualifications, quantifications or limitations on perpetuity consistent with this chapter which it considers necessary to protect the public interest and which are related to matters within the jurisdiction of the board. . . . (emphasis added)

This statute gives the Board the power to grant a permit subject to conditions and restrictions that are necessary to protect the public interest.

In this case the Board specifically found that the past flooding of adjoining land by FWS mandated that "strict qualifications" regarding flooding be imposed to "assure" that the permit would be in the public interest. The specific restriction imposed by the Board provides:

> The application for Water Permit No. 2191-2 is granted with the following qualification:
>
> > Use of water authorized by this permit may not impair the use of any lands adjoining the LaCreek National Wildlife Refuge including, but not limited to, flooding or specific alteration of plant species directly attributable to water use under this permit. Flooding of adjoining

land may occur if a written flood easement is obtained from the property owner or owners.

Finding of Fact LXIV. By imposing this restriction, the Board clearly considered and protected the public interest from flooding adjoining lands. Landowners have no basis to raise this objection.

Landowners' public interest argument is also misplaced because Landowners have failed to demonstrate that this permit, for the use of the natural flow of six springs, would change or cause any flooding that did not occur naturally. As the Board noted, "[t]he water, at present, provides essentially the same kinds of habitat that the applicant desires to create." Finding of Fact LV (emphasis added). The Board also found that there was nothing in the record to indicate that FWS' development of the natural flow would damage Landowners. Id. These findings are fully supported by the evidence and Landowners have not cited any evidence showing that FWS' use of the natural flow will change any natural flooding of any property. Landowners have no factual[7] or legal basis to contend that this permit will

[7]It should also be noted that in their briefs, FWS and the Division of Water Rights have addressed each individual Landowner's property claim concerning flooding from this permit. That evidence establishes that no change in the natural condition of each property would occur by the granting of this permit to the natural flow of the springs.

change or impair naturally occurring conditions. The Board's decision on this permit is affirmed.

III
PERMIT NO. 1921-2

In this permit, the Board amended FWS' existing Water Permit No. 265-2 by changing some of the land which was irrigated and by changing the point of diversion. Landowners first contend that this permit should not have been granted because FWS failed to demonstrate that it was "impractical" to divert water from the initial point of diversion as required by SDCL 46-5-34. However, FWS demonstrated, and the Board found, that the initial point of diversion washed out and that it would cost in excess of $750,000 to rebuild the washed out dam. This finding is supported by the record and it supports the Board's finding of "impracticability."

Landowners also argue that SDCL 46-5-34 only allows an amendment if the new land is appurtenant to the old land or the source of water. Landowners appear to argue that "appurtenancy" means the new land must be contiguous to property described in the original water permit. See Landowners' brief at page 50. Landowners misconstrue the statute.

SDCL 46-5-34 merely provides that a water right which is appurtenant to a particular piece of property may be transferred to and become appurtenant to another piece of property if it

becomes impractical to use the water beneficially or economically for irrigation on the original property. This statute imposes no requirement that the original and the new property be contiguous.

Landowners finally point out that SDCL 46-5-34 only allows transfers for irrigation purposes. Landowners argue that FWS' creation of aquatic vegetation and wildlife habitat is not irrigation within the meaning of this statute. However, as was discussed, supra at page 13, FWS' application of the water to stimulate the growth of aquatic plants is "irrigation" under ARSD 74:02:01:01(2).

Because FWS established that it was economically impractical to rebuild the original diversion site, they satisfied the impracticability requirement.[8] The Board's decision on this permit is affirmed.

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[8]This Court's review of the administrative record reflects that FWS proposed to irrigate some of the same land under this application as they did under permit No. 265-2. This type of amendment is not mentioned in SDCL 46-5-34. The record also fails to show why a change in the diversion point makes it impractical to irrigate the original property. Such a showing may be required under SDCL 46-5-34. Landowners have not, however, raised these arguments. Because these arguments have not been raised, this Court deems them waived.

Dated this 5th day of January, 1994.

BY THE COURT:

Steven L. Zinter
Circuit Court Judge

ATTEST:

_____
Clerk of Courts

_____
Deputy
(SEAL)

CC: Mikal Hanson, Esq.
Diane Best, Esq.
Jane M. Farrell, Esq.
Patrick Ginsbach, Esq.



DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181

December 9, 1994

Water Management Board:

Enclosed is a copy of the South Dakota Supreme Court decision in the matter of Water Permit Application Nos. 1921-2 and 2191-2. The Court affirmed the Board's decision to grant these water permits to the United States Fish and Wildlife Service at the Lacreek National Wildlife Refuge in Bennett County.

I also want to make you aware of uncertainties in funding to conduct scheduled Board activities for 1995. The Water Rights Division can not make scheduling commitments until legislative appropriations for operation of the Division are secured. Currently, the Board has set its 1995 meeting schedule (March 8 and 9 first regular Board Meeting) and Mr. Freeman, acting in his capacity as Prehearing Chairman in Homestake Mining Company's vested water right applications and Richard Fort's declaratory ruling request, has set the week of February 27, 1995, for the Board hearing on these issues. These Board meetings are all dependent on the 1995 Legislature appropriating funds for the continued operation of DENR including the Water Rights Division.

I will keep you informed of developments in funding that impact the Board. Please call me, if you have questions.

Very truly yours,

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

enclosure

c: Robert Roberts, Secretary, DENR
Steve Pirner

#18708-a-RWS

AUTHORIZED PRESS RELEASE
DATE: DEC 0 9 1994
Attorney General
DEC - 8 1994

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

IN RE: WATER RIGHT CLAIM NO. 1927-2; WATER PERMIT APPLICATION NO. 1921-2; AND WATER PERMIT APPLICATION NO. 2192-2

WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, AND LAWRENCE KOCER, Petitioners and Appellants,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, Applicant and Appellee,

and

WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA, Appellee.

* * * *

APPEAL FROM THE CIRCUIT COURT OF

THE SIXTH JUDICIAL CIRCUIT

BENNETT COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE STEVEN ZINTER
Judge

* * * *

ARGUED, OCTOBER 18, 1994

OPINION FILED DEC 0 7 1994

JANE M. FARRELL and
PATRICK M. GINSBACH of
Farrell, Farrell and Ginsbach
Hot Springs, South Dakota

Attorneys for appellants.

MIKAL G. HANSON
Assistant United States Attorney
Pierre, South Dakota

and

JOHN R. KUNZ
U.S. Dept. of Interior
Office of the Solicitor, U.S.
Denver, CO

Attorneys for applicant and appellee.

MARK BARNETT
Attorney General

DIANE BEST
Assistant Attorney General
Pierre, South Dakota

Attorneys for appellee, State.

#18708

SABERS, Justice

Landowners appeal circuit court's decision affirming Water Board's grant of water use permits to United States Fish and Wildlife Service in LaCreek National Wildlife Refuge. We affirm.

FACTS

The United States Fish and Wildlife Service (FWS) owns and operates the LaCreek National Wildlife Refuge (Refuge) in Bennett County, South Dakota. The Refuge was established by Presidential Order in 1935. In September of 1971, FWS purchased 6,665 acres of land known as the "Brown Ranch" which was contiguous to the Refuge. The Brown Ranch land is used for shallow water habitat for migratory waterfowl.

FWS applied for three water right permits to the South Dakota Water Management Board (Board).

> 1. The First, No. 1927-2, was a request to vest a prior claimed right to 10 cubic feet per second of water from four diversion points on Lake Creek.
>
> 2. The Second, No. 2191-2, was for a new water right to the natural flow of water from six springs near Lake Creek. FWS did not plan any development of the springs; the application was to assure the continued flow of the springs if the flow decreased due to use by others. This water was to be used to maintain 235 acres of marshes, sloughs, and wet meadows for wildlife habitat.
>
> 3. The Third, No. 1921-2, was to change the point of diversion and some of the land irrigated from Cedar Creek under an existing permit. A dam authorized as the diversion point was breached and no longer functioning. FWS sought to amend its permit to use another dam approximately one-half mile away as the diversion point.

Board granted FWS the three permits on the condition that FWS' use of water did not flood or impair the surrounding Landowners' property. Landowners appealed the Board's decision to the circuit court, which found that Landowners' main complaint was the flooding of

their land by FWS' use of its permits. This flooding allegedly caused the drowning of natural grasses used for commercial hay production and livestock and replaced it with commercially non-viable marsh-type vegetation. Landowner Wendell DeKay alleges the quality of water discharged onto his property has diminished as a result of the increased carp population in FWS' sloughs.

The circuit court reversed the First permit because insufficient evidence existed that Brown Ranch had been using 10 c.f.s. of water from the diversion points, but affirmed Board's grant of the Second and Third permits. Landowners appeal the circuit court's ruling on the Second and Third permits.

Landowners appeal the Board's findings of fact which we review under the clearly erroneous standard. The decision is to be upheld unless the reviewing Court is left with a definite and firm conviction that a mistake has been committed. Fraser v. Water Rights Commission, 294 N.W.2d 784 (S.D. 1980). Mixed questions of fact and law are reviewed for error without deference. Permann v. Dept. of Labor, Unemp. Ins. Div., 411 N.W.2d 113, 119 (S.D. 1987).

THE SECOND PERMIT

A. Future use

FWS sought the right to the continued natural flow of six springs if the water table dropped due to conditions or use by others. Landowners argue that the Second permit would improperly reserve a future use by protecting against future diminution. Under SDCL 46-5-38, only a few enumerated agencies may reserve future water rights. FWS concedes that it is not one of the statutorily enumerated agencies. The springs' natural flow was intended for current use to maintain 235 acres of marshes and other waterfowl habitat. Although FWS did not

intend to divert any of the natural flow,[1] the court found that the use was current and that the permit was not granted for an impermissible future use. Landowners have not shown this to be error.

B. Impairment of Rights

SDCL 46-2A-9 governs water right permits:

> 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.

Landowners contend that the Second permit would impair the quality of water flowing to DeKay's property and the quantity of water reaching Hines' property. The court found that the permit would not change existing natural conditions and that it would not impair the quality of water reaching DeKay's property or the quantity of water reaching Hines' property. Landowners have failed to show that the finding was erroneous.

C. Beneficial Use

SDCL 46-2A-9 also requires that the permit constitute a "beneficial use." Under SDCL 46-1-6(3), a "beneficial use" is:

> any use of water within or outside the state, that is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interests of the public of this state in the best utilization of water supplies[.]

A two-part analysis is required to determine "beneficial use." First, the use must be "reasonable, useful, and beneficial to

---

1. Refuge Manager Rolf Kraft testified "we [FWS] are using the water that naturally comes out of the springs. If that water flow diminished that would impact how we use our water." FWS sought the permit to protect and maintain its current water right.

the appropriator." SDCL 46-1-6(3). Landowners argue that because duck production declined on the refuge from 1983 to 1990,[2] the use for waterfowl habitat is no longer a beneficial use for the Refuge. The court found that the habitat provides for a "nationally significant population of trumpeter swans, and for Canada geese, snow geese, blue geese, cranes, and other wildlife." The court concluded that "[p]ropagation of all these species is reasonable, useful and beneficial to FWS and the public."

Landowners cite Lake Shore Duck Club v. Lake View Duck Club, 166 P. 309 (Utah 1917), for the proposition that appropriating water for cultivating food for wildlife and waterfowl is not a beneficial use. However, the weight of authority indicates that "beneficial use is an evolving concept, and a concept that can be expanded to reflect changes in society's recognition of the value of new uses of our resources." Rick A. Thompson, Statutory Recognition of Instream Flow Preservation: A Proposed Solution for Wyoming, 17 Land & Water L.Rev. 139, 143 (1982). Appropriation of water for waterfowl habitat and other wildlife is a beneficial use. ARSD 74:03:04:01 ("All streams in South Dakota are assigned the beneficial uses of irrigation and wildlife propagation and stock watering.") (emphasis added); State v. Morros, 766 P.2d 263, 268 (Nev. 1988). The protection of migratory birds and their habitat is in the "national interest." North Dakota v.

---

2. FWS' figures indicate that duck production on the Refuge declined from 12,915 in 1983 to 1,360 in 1990. Rolf Kraft, Refuge manager, blames part of this decrease on the rising carp population which is muddying the water, making it less suited for aquatic plant growth. However, the Board and the circuit court agreed that this decrease was not indigenous to the LaCreek Refuge and duck production has declined across the nation.

United States, 460 U.S. 300, 309, 103 S.Ct. 1095, 1101, 75 L.Ed.2d 77 (1983). A series of treaties signed by the United States starting in 1916 "obligates the United States to preserve and protect migratory birds through the regulation of hunting, the establishment of refuges, and the protection of bird habitats." 460 U.S. at 309-10, 103 S.Ct. at 1101, 75 L.Ed.2d 77. It was not error to conclude that maintenance and protection of waterfowl habitat was a beneficial use by FWS.

Landowners also contend that the proposed use will not be reasonable, useful, or beneficial because the area is already sub-irrigated by a high water table. The court found that natural precipitation is not dependable and that dependable water is required to provide for continuous growth of aquatic plants and insects, and to provide habitat needed for critical periods of wildlife development. The court concluded that FWS established that it is reasonable, necessary, and beneficial for FWS to have uninterrupted use of water. Landowners have not shown this to be error.

Landowners also argue that the land is not suitable for traditional commercial irrigation because of the type of soil in the area. They argue that no beneficial use exists because water used for a wildlife refuge is not "irrigation" and only "irrigation" constitutes a beneficial use. The Board found and the court agreed that a beneficial use existed even though the crops are not harvested by human beings but by migratory birds and wildlife.

The court held that a beneficial use from irrigation is not limited to raising traditional cash crops. Under ARSD 74:02:01:01(4), "irrigation" is providing moisture for <u>any</u> "plant growth." The court concluded that even if it were not an "irrigation" use, it is a beneficial use. Under ARSD 74:03:04:01, the use of water for aquatic

plant growth for wildlife propagation is a beneficial use whether or not it constitutes "irrigation."

Secondly, SDCL 46-1-6(3) requires that the use must be in the public interest to be deemed a "beneficial use." Landowners contend that the permit is not in the public interest because FWS' past use of water has caused flooding of their land. The court found that the Board provided for the public interest. Board granted the permit subject to qualification. Under SDCL 46-1-14, the Board may issue any permit or license "subject to terms, conditions, restrictions, qualifications, quantifications or limitations [] which it considers necessary to protect the public interest[.]" Board issued the Second permit with the following qualification:

> Use of water authorized by this permit may not impair the use of any lands adjoining the LaCreek National Wildlife Refuge including, but not limited to, flooding or specific alteration of plant species directly attributable to water use under this permit. Flooding of adjoining land may occur if a written flood easement is obtained from the property owner or owners.

Board's Finding of Fact LXIV.

The court concluded that Landowners' public interest argument was misplaced because they failed to show that the Second permit would change or cause any flooding that did not occur naturally. Landowners have not shown this to be error.

THE THIRD PERMIT

Under SDCL 46-5-34, amendment of a water permit is allowed when "it should become impracticable to use all or any part of the water beneficially or economically for irrigation of any land to which the right of its use is appurtenant[.]" Landowners claim that FWS made no showing that appropriation from the old dam, the initial diversion

point, was impracticable. They claim that the breach of the old dam is not a sufficient showing of impracticability. FWS presented evidence that the costs of constructing a new dam at the same diversion point would be $750,000. The Board found and the court affirmed that use of this original diversion point would be made "impracticable" by the necessity that a new dam be built. Landowners have not shown that amendment of the permit to allow a new diversion point was improper.

Landowners also argue that a permit may be amended only if the new land is appurtenant to the old land or the water source. Landowners appear to argue that "appurtenancy" requires that the new land must be contiguous to the property in the original permit. SDCL 46-5-34 provides:

> All water used in this state for irrigation purposes shall remain appurtenant to the land upon which it is used. However, if for any reason it should become impracticable to use all or any part of the water beneficially or economically for irrigation of any land to which the right of its use is appurtenant, all or any part of the right may be severed from the land and simultaneously transferred and become appurtenant to other land without losing priority of right previously established, subject to existing rights, upon approval of an application for an amended permit. No increase in total acres irrigated may be allowed under this section.

Id. (emphasis added). The court correctly concluded the statute imposes no requirements that the original and the new property be contiguous.

Landowners contend that use of water under the Third permit would impermissibly amend an "irrigation" use into a non-irrigation use. According to SDCL 46-5-34 and 46-5-34.1, when an application is made for severance of irrigation water to be used for irrigation of other land, the applicant must continue to use the water for irrigation

purposes. If an applicant changes from irrigation to another use, the first permit is canceled and another one is issued, forfeiting the original priority date and acquiring a new priority date as of the time of issuance of the new permit. Therefore, if it is not an "irrigation" use, FWS would lose its priority to the water under the Third permit. In this respect, landowners claim that SDCL 46-5-34 only allows transfers for irrigation purposes and that FWS' use is not "irrigation" under SDCL 46-5-34. The Board found that the use of the water under the Third permit would provide habitat for waterfowl, including sloughs and marshlands with plant growth essential for waterfowl survival and propagation. Under ARSD 74:02:01:01(4), the use remains for "irrigation" by providing moisture for plant growth. The court affirmed the Board on this point and no error is shown.

We affirm.

MILLER, Chief Justice, and WUEST, AMUNDSON and KONENKAMP, Justices, concur.

GREAT FACES. GREAT PLACES.

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181

January 11, 1995

Water Management Board:

A copy of the South Dakota Supreme Court decision in the matter of United States Fish and Wildlife Service's Water Permit Application Nos. 1921-2 and 2191-2 for Lacreek National Wildlife Refuge was sent to you during December. The South Dakota Supreme Court has since issued an order authorizing modification of the December 7, 1994 opinion (#18708). A copy of this order and the amended pages to their decision are enclosed.

The order deletes a portion of the last paragraph (pages 7 and 8) of the December 7, 1994, opinion. The deleted portion is clearly stated in the Court's January 6, 1995, order.

The Court's modification does not change their original opinion to affirm the Board's decision to grant these water permits to the United States Fish and Wildlife Service at the Lacreek National Wildlife Refuge in Bennett County.

Please call me, if you have questions.

Very truly yours,

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

enclosure

Attorney General
122925
JAN - 6 1995

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

IN RE: WATER RIGHT CLAIM NO. 1927-2; WATER PERMIT APPLICATION NO. 1921-2; AND WATER PERMIT APPLICATION NO. 2192-2	ORDER AUTHORIZING MODIFICATION OF OPINION #18708
WENDELL DEKAY, CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, AND LAWRENCE KOCER, Petitioners and Appellants,	
vs.	
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant and Appellee,	
and	
WATER RIGHTS DIVISION, STATE OF SOUTH DAKOTA, Appellee.	

The Court having determined that the opinion issued in the above-entitled matter on December 7, 1994, should be modified for purposes of clarification, now, therefore, it is

ORDERED that the following language as appears on the last three lines of page seven and the first eight lines of page 8 of the official opinion be and it is hereby deleted:

> According to SDCL 46-5-34 and 46-5-34.1, when an application is made for severance of irrigation water to be used for irrigation of other land, the applicant must continue to use the water for irrigation purposes. If an applicant changes from irrigation to another use, the first permit is canceled and another one is issued, forfeiting the original priority date and acquiring a new priority date as of the time of

issuance of the new permit. Therefore, if it is not an "irrigation" use, FWS would lose its priority to the water under the Third permit. In this respect, landowners claim that SDCL 46-5-34 only allows transfers for irrigation purposes and that FWS' use is not "irrigation" under SDCL 46-5-34.

DATED at Pierre, South Dakota, this 6th day of January, 1995.

BY THE COURT:

Robert A. Miller, Chief Justice

ATTEST:

Clerk of the ~~Supreme~~ Court
(SEAL)

PARTICIPATING: Chief Justice Robert A. Miller and Justices George W. Wuest, Richard W. Sabers, Robert A. Amundson and John K. Konenkamp.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JAN 0 6 1995

Clerk

point, was impracticable. They claim that the breach of the old dam is not a sufficient showing of impracticability. FWS presented evidence that the costs of constructing a new dam at the same diversion point would be $750,000. The Board found and the court affirmed that use of this original diversion point would be made "impracticable" by the necessity that a new dam be built. Landowners have not shown that amendment of the permit to allow a new diversion point was improper.

Landowners also argue that a permit may be amended only if the new land is appurtenant to the old land or the water source. Landowners appear to argue that "appurtenancy" requires that the new land must be contiguous to the property in the original permit. SDCL 46-5-34 provides:

> All water used in this state for irrigation purposes shall remain appurtenant to the land upon which it is used. However, if for any reason it should become impracticable to use all or any part of the water beneficially or economically for irrigation of any land to which the right of its use is appurtenant, all or any part of the right may be severed from the land and simultaneously transferred and become appurtenant to other land without losing priority of right previously established, subject to existing rights, upon approval of an application for an amended permit. No increase in total acres irrigated may be allowed under this section.

Id. (emphasis added). The court correctly concluded the statute imposes no requirements that the original and the new property be contiguous.

Landowners contend that use of water under the Third permit would impermissibly amend an "irrigation" use into a non-irrigation use. The Board found that the use of the water under the Third permit would provide habitat for waterfowl, including sloughs and marshlands with plant growth essential for waterfowl survival and propagation.

Under ARSD 74:02:01:01(4), the use remains for "irrigation" by providing moisture for plant growth. The court affirmed the Board on this point and no error is shown.

We affirm.

MILLER, Chief Justice, and WUEST, AMUNDSON and KONENKAMP, Justices, concur.

-LETTERS TO THE EDITOR-

Landowners Answer Letter From U.S. Fish, Wildlife Service

Dear Editor,

In response to the letter published in last week's issue of the Booster from Robert G. Green, P.E., Regional Hydrologist of the U.S. Fish and Wildlife Service, we wish to explain our position:

The basis for our position was that we had aerial photographs that demonstrated that large portions of the Brett Heath property and the Lawrence Kocer property were under water as a result of the water management practices of the Refuge, The soil conservationist was able to establish that Raymond Kocer's alfalfa was consistently flooded out and that as a result he lost productivity due to the persistent flooding and the inability to harvest on a timely basis.

We also believe we established that the church ground leased by Charles Emley has been damaged as a result of the Refuge's impounding of water which causes flooding onto the chruch ground and that the Refuge's obstructions on the flow of Elm Creek has caused sediment to build up in that creek, resulting in the creek backing up out of its channel onto Emley's property that borders Elm Creek.

Wendell DeKay presented evidence as to the quality of the water that's being discharged from the Refuge into Lake Creek as it passes through his property, and Ken Hines testifed that when he had land under lease on Lake Creek below the Refuge and there was insufficient water flowing through Lake Creek to water his cattle, and yet the Refuge was backing up water onto the Brett Heath property at the same time and not allowing water to be released through the Refuge.

The reason we did not believe the Refuge needed the water for duck production is that the Refuge's own records show there has been a decline in duck production. In 1983, the total duck production on the Refuge was 12,915. In 1990, the total duck production was 1,360.

"limited" as Mr. Green proposes in his letter.

We welcome the Refuge's desire to try to draft a plan to eliminate the problems we have that are caused by the Refuge. However, as of November 11, 1992, neither we, our lawyers, nor the experts we have hired have had an opportunity to see this plan although we have been told the letter is in the mail.

It seems interesting to note that the Refuge shared their draft plan with John Hatch, Chief Engineer for the divison of Water Rights, on October 21, 1992, and yet apparently hasn't felt any need to share it with us until just before the meeting scheduled for November 18th.

We appreciate the opportunity to use this space to let you, the residents of Bennett County, know what it's like to have the United States government as a neighbor.

Sincerely,

Charles Emley
Brett Heath
Lawrence Kocer
Raymond Kocer

We believe these records reflect the Refuge's consumption of additional quantities of water is not going to add to duck production. Mr. Kraft blamed the duck production numbers on the carp population in the Refuge waters, but as far back as 1971, the Refuge recognized they would probably never eliminate carp from the Refuge. Furthermore, the Brown family who owned the ranch acquired by the Refuge, testified that there was no need to irrigate this land because it was sub-irrigated and as a result of the sub-irrigation, provided good moisture for growing native grasses.

At the conclusion of the hearing, the board members went out and viewed the operations of the Refuge and our land that was affected by those operations. They then reconvened and they all seemed to be in agreement that our land was being flooded and damaged as a result of the Refuge practices.

On divided votes, they agreed to grant the Refuge's permits, but we think the statements made by Bernita Loucks, a member of the Water Management Board, best sum up our position. Mrs. Loucks stated that she had heard people testify who are hurting as a result of the Refuge's practices and having no where to go and that our laws are to protect people from flooding, and yet the property owners had to hire lawyers to try to get this flooding ended. While the board granted the applications on split votes, it seemed to be unanimous that the granting of the permits were all with qualifications to control the use of water and prohibit the flooding of adjoining land.

Mr. Green seems to take exception to your article containing his remarks about the necessity to move the fence. He admits in his letter to you that the plug at the end of the ditch which I believe was causing the problem could be bypassed without crossing the fence. He says in his letter to you that he made this comment before the July hearing in Martin to try to avoid the need to cross the Heath property.

He now says that it makes more sense to move that fence to give the Refuge greater access to their property to limit the flooding on the Heath property and as required by the conditions attached to the water permit. The conditions imposed by the Water Management Board did not require the Refuge to go onto property to END flooding on private property.

It is our recollection that the Water Management Board was very specific that flooding of private property by the Refuge had to be put to an end, not

Commission Declines Action on Section Line Dispute between Refuge and B.C. Landowner

The Bennett County Commission, during its regular meeting on Tuesday, November 17, toured the Lacreek National Wildlife Refuge and land near it where U.S. Fish and Wildlife Service officials are presently planning to make changes in irrigation practices to comply with the restrictions placed upon a water rights permit the Service received last summer.

The water rights were granted to the federal government agency by the South Dakota Water Management Board in July after a hearing in Martin, at which objections by five landowners were aired. The board decided to allow the Refuge the water rights, but to require protection of adjacent property from flooding.

The Water Management Board's decision is expected to be available in its final form by early December. U.S. Fish and Wildlife Service officials are meeting with the landowners and their representatives in Martin today, Wednesday, November 18, to review a draft of the Service's plan for exercising its water rights while protecting private property.

Following the tour of the land on Tuesday, the commission discussed two items: the proposed movement of a quarter-mile length of fence between Brett Heath's and federally owned property to the center of the section line, a distance of approximately 33 feet; and the possible use by the Service of a county road ditch to divert runoff along land west of the Refuge.

The commission voted 3-2 not to allow the Service to use county road ditches for such a purpose, chiefly because commissioners fear damage will be done to the road bed. Commissioners Ray Kocer, Fred Crittenden and Bob Harris voted not to allow the use, while Jimmie O'Neill and Jim Slattery voted not to disallow it.

There was disagreement, however, about the county's proper role in the federal government's proposal to move the fence. This was complicated by the fact that Kocer is one of the five landowners objecting to the Service's water rights application.

Harris argued that the commission should not be taking sides in an argument involving the use of section lines, which he said should be governed by law, not by commission action. Slattery agreed, stating the commission shouldn't get involved in this dispute when there have been "too many other section line matters we've left up to the parties involved."

Although Kocer moved for the commission to state that the fence should be left where it is, he later withdrew the motion.

Also in attendance during Tuesday's tour were Heath, state Sen. Roger Porch, refuge manager Rolf Kraft, and county highway superintendent Louis Nollett.

The landowners involved in the water rights dispute are Heath, Ray Kocer, Lawrence Kocer, Charles Emley and Wendell DeKay.

PIERRE SD 57501

ITY BOOSTER II

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Two Sections

Wednesday, November 25, 1992
Volume XLIII Number 26

EAT OF BENNETT COUNTY, SOUTH DAKOTA (USPS 050-300) Official Newspaper of the City of Martin and County of Bennett

ıern Edge of Snow n Hits Bennett County

County area was on the f an early winter snow ved from the Rockies o, Kansas and Oklaho- t of this week.

rfall was received here Sunday night accom- 30 mph winds Monday ht and still blowing but esday. Light snow was y morning, but was before very late in the e of two to four inches

strict 3-1 schools were :30 p.m. Monday, but r schedule Tuesday. Black Hills received o eight inches of snow by Monday evening and Terry Peak had received a foot or more. However, the rest of western South Dakota got only a light dusting by Monday evening.

The snow was not predicted to hit eastern South Dakota. The outlook for Thanksgiving travel is good.

On Thanksgiving Day, South Dakota weather is predicted to be dry, with low temperatures in the teens and highs in the 20s.

Friday is predicted to be slightly warmer in western South Dakota with highs in the 30s and lower 40s. Highs on Saturday are expected to be in the 40s or high 30s, but there is a chance of rain or snow in western and central South Dakota.

-und Moved to Local Control

und, an economic de- nization located at ate a major step in its t Sunday, December hnson Hotel in Rapid

ive years, the Lakota a project of First Na- nt Institution of Fal- a nine-member board kota Fund, which has er under the Oglala Area Foundation, Ms. Foundation, South Dakota Community Foundation, Norwest Banks South Dakota, N.A., Campaign for Human Development, and Bush Foundation, as well as other organizations, have been major supporters of the Lakota Fund.

"We will always be a loan fund focusing on human and business development. We have succeeded as a project of First Nations, and look forward to success as a locally controlled operation," Meeks said.

Refuge to Halt Irrigation During Three-Year Study

The landowners and government agencies involved in a water rights decision handed down last July by the South Dakota Water Management Board attended an informal meeting in Martin on Wednesday, November 18. The meeting was held in order to "get any issues that need to be addressed out in the open," said Bob Green, regional hydrologist for the U.S. Fish and Wildlife Service, Denver, Colo.

The five-hour session was a momentous occasion.

Around the table sat the major players in a long-standing dispute between two generations of local ranchers and a succession of refuge managers about Lacreek National Wildlife Refuge's irrigation practices. Some of these folks have been together before – on opposite sides of the fence glaring at one another – on either side of a hearing room aisle listening to testimony against each other – but Wednesday's gathering was motivated by a new set of circumstances.

On the one side, the U.S. Fish and Wildlife Service must ensure the protection of private property because the state water board's July decision stipulates that the Refuge's irrigating cannot cause flooding on adjacent land. Any such flooding may result in the suspension of the water rights granted to the federal government, according to John Hatch, South Dakota Division of Water Rights, Pierre.

On the other side, the landowners must safeguard the opportunity they've created to force a solution to a problem perceived for years as being beyond their control. The ranchers' opposition to the government's application for water rights – rights bureaucrats thought the feds already possessed – rights the Refuge has been using (illegally, according to the ranchers) for 20 years – has caught the attention of the U.S. Fish and Wildlife Service in a big way.

"The conditions are there. That's the law now, and we're going to comply," said Green on Wednesday. "We will not unlawfully flood your land."

In fact, the conditions placed on the water rights have already resulted in the halting of irrigation out of Lake Creek for three years so the Service can study the area's vegetation, waterway sedimentation and water table. A draft plan of that study was the main topic at Wednesday's meeting.

The study is designed to determine what the plant life and water levels are like when there are no diversions out of Lake Creek and Cedar Creek, the draft states. This should provide a basis for determining, once irrigation is resumed, whether the Refuge's water use is impairing adjoining lands.

Then, if landowners make claims of damage being done, the study's data will show "whether it's a result of Refuge irrigation practices or whether

(continued on page 2)

Chili Supper is Friday, Nov. 27

The Martin Commercial Club Customer Appreciation Chili Supper

tree.

A number of special Christmas

Class of 1983 to Plan for Reunion

BANKR. CHAMBERS 605 224 9020 12/01/92 09:24

(Continued from page 1)

it's a result of a natural occurrence," said Cheryl Williss, chief of the Service's water rights office in Denver.

The Refuge's and the landowners' inability in the past to make that determination appears to be at the root of their disagreement.

During Wednesday's hearing, for instance, the ranchers said that many of their complaints in the past had not gotten beyond local refuge managers and up to the regional office. Replied Rolf Kraft, the manager for the past 14 years, "Since I've been here, outside of Heath's property, usually the complaints from you other guys followed a significant rainfall event."

It is being proposed to prove the roles of rainfall versus irrigation, but the nature of the three-year study itself was called into question by the landowners.

"I know that it can't be tested in three years," said Brett Heath. "The damage has been done over the past 20 or 30 years."

The Refuge's stopping diversions out of the creeks won't in and of itself return the water table levels to normal, according to Dennie Simonson, Sturgis, a former Soil Conservation Service official who is acting as a consultant for the landowners.

"You have diverted a perennial stream and put obstructions in it," said Simonson, referring to Pools 2 and 3 on the Refuge. In order for the study to be valid, he argued, "you would have to take out all of the obstructions in Lake Creek."

"You have to be willing to do what needs to be done," Simonson said. "If you're not going to eliminate Pools 2 and 3, then you're not going to eliminate the problem . . . You've developed a structure that's caused the problem."

"We're not going to eliminate Pools 2 and 3," replied Green, "I can tell you that right now."

Simonson's – and everyone's – statements about the effects of obstructions in the creeks are based on assumptions, said Green.

"I know that you have an opinion: so do I," he told Simonson. "What I'm trying to do is lay down a procedure to identify the problem in a quantitative fashion."

The study will provide data that will enable the measurement of actual effects, Green said.

While he recognized limitations inherent in the three-year study, Green emphasized the importance of the water table data collected while irrigation there are claims of damage," he said.

"Without pushing water, we're going to measure it [the water table]," he explained. Then, after irrigation resumes, "we'll go out and measure it and, if it's up, then we'll stop diverting."

The Service's managing the study – which might later be used to support the government's use of water and to defend the feds against claims of damage – was also questioned.

"Three years from now you're going to push water and flood me, and then claim it [my land] was like that during the study," said Ray Kocer.

Replied Green, "If I were sitting in your chair, I'd be just as suspicious as you are . . . I understand that the Fish and Wildlife Service has to earn your trust."

He assured the ranchers that the Service is going to do everything possible to obtain unbiased data.

"Most of the data that we gather will be raw data that will be available to everybody," he said.

The data will be used as part of an engineering study to develop a long-range plan for the Refuge's water use, said Green. He noted that public input will be considered during its development, and the plan itself will become a matter of public record.

The South Dakota Division of Water Rights, said Hatch, is satisfied that the three-year study will provide a means by which the division can determine whether the federal government complies with the conditions placed upon the water rights granted to the Fish and Wildlife Service. He called the study "the best we can do right now."

"There's nothing perfect in this water business," Hatch said. "It's not fair, but it's the system we have, and we do our best to make it work."

There were a few signs during Wednesday's meeting that, in some small ways, the opposing sides are beginning to work together.

Concerning what has been an emotionally heated argument about the proposed relocation of a fence between the Refuge and the Heath property, a compromise was suggested and taken under advisement by both parties.

those on both sides of the issue [illegible] huddled around a map and discussed what might be done with an inlet structure, with the dredging of sediment. From a distance, it looked like cooperation.

But the situation is rank with tension and enmity.

The landowners are bitter about it requiring expensive legal action to get their own government to remedy a wrong-doing.

The Service and the ranchers operate for two different – often opposing – purposes: the one to cultivate wildlife and the other to raise livestock.

The arguments involved go to the core of the larger and often confrontational issue of public versus private use of land and water.

At one point during the meeting, Lawrence Kocer made the request that is fundamental to any resolution of the situation: "We want a good neighbor policy."

Later on, Maury Wright, the Service's deputy associate manager of refuges for the four-state zone that includes South Dakota, replied on behalf of the federal government: "We're committed to being good neighbors."

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DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181

MAR 2 9 1995

Ralph Morganweck, Regional Engineer
U.S. Fish & Wildlife Service
Denver Federal Center
PO Box 25486
Denver, CO 80225

Dear Mr. Morganweck:

Enclosed are Water Permit Nos. 1921-2 and 2191-2 authorizing your water diversion systems and beneficial use of the water, not exceeding the limits as specified in the Water Permits.

The final inspection has been completed on these Permits, and we are ready to issue the Water Licenses. Statutes require we charge $50 per Permit ($100) for the inspection and issuance of the final papers. Upon receipt of this amount the Water Licenses will be sent to you.

Very truly yours,

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

enclosures

c: Cheryl Williss, U.S. Fish and Wildlife Service, Denver Federal Center, PO Box 25486, Denver, CO 80225

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Mountain-Prairie Region

IN REPLY REFER TO:

BA WTR
WR SD
Mail Stop 60189

MAILING ADDRESS:
Post Office Box 25486
Denver Federal Center
Denver, Colorado 80225

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228

APR 1995
DIVISION OF WATER RESOURCES
PIERR, SD

APR 07 1995

John Hatch, Chief Engineer
Department of Environment and
Natural Resources
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

Dear Mr. Hatch:

In response to your letter of March 29, enclosed is a Money Order in the amount of $100 to cover inspection fees and issuance of Water Licenses for Water Permit Nos. 1921-2 and 2191-2, Lacreek National Wildlife Refuge.

If you have questions or require further information, please contact me at (303) 236-5321.

Sincerely,

Ginger Price

Ginger Price
Water Rights Specialist

Enclosure

RECEIPT

414459

Division of Water Rights

South Dakota Department of Environment and Natural Resources

Pierre, April 13, 19 95

RECEIVED OF US Fish & Wildlife Service, PO Box 25486, Denver Federal Center, Denver, CO 80225-0486

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

Fee for Application for Permit No. _____ to Appropriate Water, to construct and to put water to beneficial use _____		
Fee for Application for Permit No. _____ to Appropriate Water, for Future Use _____		
Fee to retain Future Use Permit No. _____ after period of seven years.		
Fee for Inspecting Constructed Works, confirming beneficial use and issuing Water License No. 2191-2	50	00
Fee for Filing Transfer Form _____		
Fee for Filing Extension Request _____		
Fee for _____		
_____		
_____		
_____		
(Any Other Work Provided by Law) **Total**	50	00

By John Hatch /gm
Chief Engineer

Form 12

Permit No. 2191-2

White River - Water District

Report Of Examination Of Works And/Or Application of Water To Beneficial Use

TO: Chief Engineer, Water Rights Program, DENR, Foss Bldg., Pierre, SD 57501

On, **August 14, 1990**, Rassool Ahadi made a thorough examination of the water use system constructed by **US Fish and Wildlife Service** of **P O Box 25486, Denver, CO 80225** holder of Permit No. **2191-2**, bearing the priority of **August 7, 1991** authorizing the diversion of **4.44** cu. ft. per second and **1444.7** acre-feet annually of the waters of **six springs** for **creating 235 acres of marshes, sloughs and wet meadows** in **Bennett** County.

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

A. Works used to divert the water:
Small dams and control structures

B. Works used to transport water to place of use:
Small control structures and ditches

C. Works used to apply water to beneficial use:
Uncontrolled flooding - water spreading

The system is in the following condition **good**. The point of diversion is located **see Attachment # 1**. The works are capable of diverting and conveying to the place of use **4.44** cu. ft. per second of water and **1,444.7** acre-feet annually of water which is to be used for **creating marshes, sloughs, and wet meadows**. Water has been put to beneficial use to the maximum extent as follows: **See Attachment # 1**
comprising a total of **235** acres of land and the license should be issued for **4.44** cfs and **1,444.7** acre-feet annually.

Applicable permit qualifications have been complied with: **Y**

Exceptions to compliance are: **None**

Delvin D. Brosz 6-19-96

Delvin D. Brosz, PE — Date
Natural Resources Engineer
DENR, Water Rights Program

Attachment #1 to Application for Permit to Appropriate Water - SPRINGS
U.S. Fish and Wildlife Service - Lacreek NWR



Question No. 4 - Location Point(s) of Diversion

SPRING	Points of Diversion	Nature of Diversion
ALL T36N, R37W, BENNETT COUNTY		
A -	NW1/4 NW1/4 NW1/4 Sec. 27	Natural Spring/Marsh Conditions - No Improvements
B -	NW1/4 NW1/4 NE1/4 Sec. 27	Natural Spring into Pond - Existing Dam with stoplog structure.
C -	SW1/4 SW1/4 NW1/4 Sec. 26	Natural Spring into "Hatchery Pond" - Existing Dam - Deteriorated Raceways/Fish Hatchery works with a "morning glory" spill structure. Service replaced a culvert with stoplog and riprapped to prevent erosion of dam bank. Pre-existing ditches located below Spring C.
D -	SW1/4 SE1/4 NE1/4 Sec. 26	Natural Spring, No Improvements. Pre-existing ditch below.
E -	SW1/4 SE1/4 NW1/4 Sec. 25	Natural Spring. Flows into a small marsh then 300-400 yards to Pond with Dam and Stoplog Structure. Free flows over spillway and continues on natural course.
T36N, R36W, BENNETT COUNTY		
F -	SE1/4 SW1/4 NW1/4 Sec. 30	Natural Spring, No Improvements.

Question No. 5 - Counties, Place of Use

SPRING	PLACE OF USE	NO. OF ACRES
All on Service-Owned Lands, T36N, R37W, Bennett County		
A & B -	W1/2 SW1/4, S1/2 SE1/4 Sec. 22	40
C & D -	SW1/4 SW1/4, SE1/4 SE1/4 Sec. 23 and N1/2 Sec. 26	100
E -	E1/2 SW1/4 Sec. 24 and NE1/4 NW1/4 Sec. 25	75
T36N, R36W, Bennett County (Spring Originates on Service lands, with marsh extending onto inholding.)		
F -	W1/2 NW1/4 Sec. 30	20
	TOTAL	235

REPORT ON INSPECTION OF PERMIT NO. 2191-2

DATE OF INSPECTION: August 14, 1990 by Rassool Ahadi

Other permit(s) associated with the project: _

Contact Person & Address: **Rolf Kraft, Lacreek National Wildlife Refuge, HWC 3, Box 14, Martin, SD 57551**

DIVERSION POINT LEGAL LOCATION: See Attachment #1

WATER SUPPLY Source: **six springs**

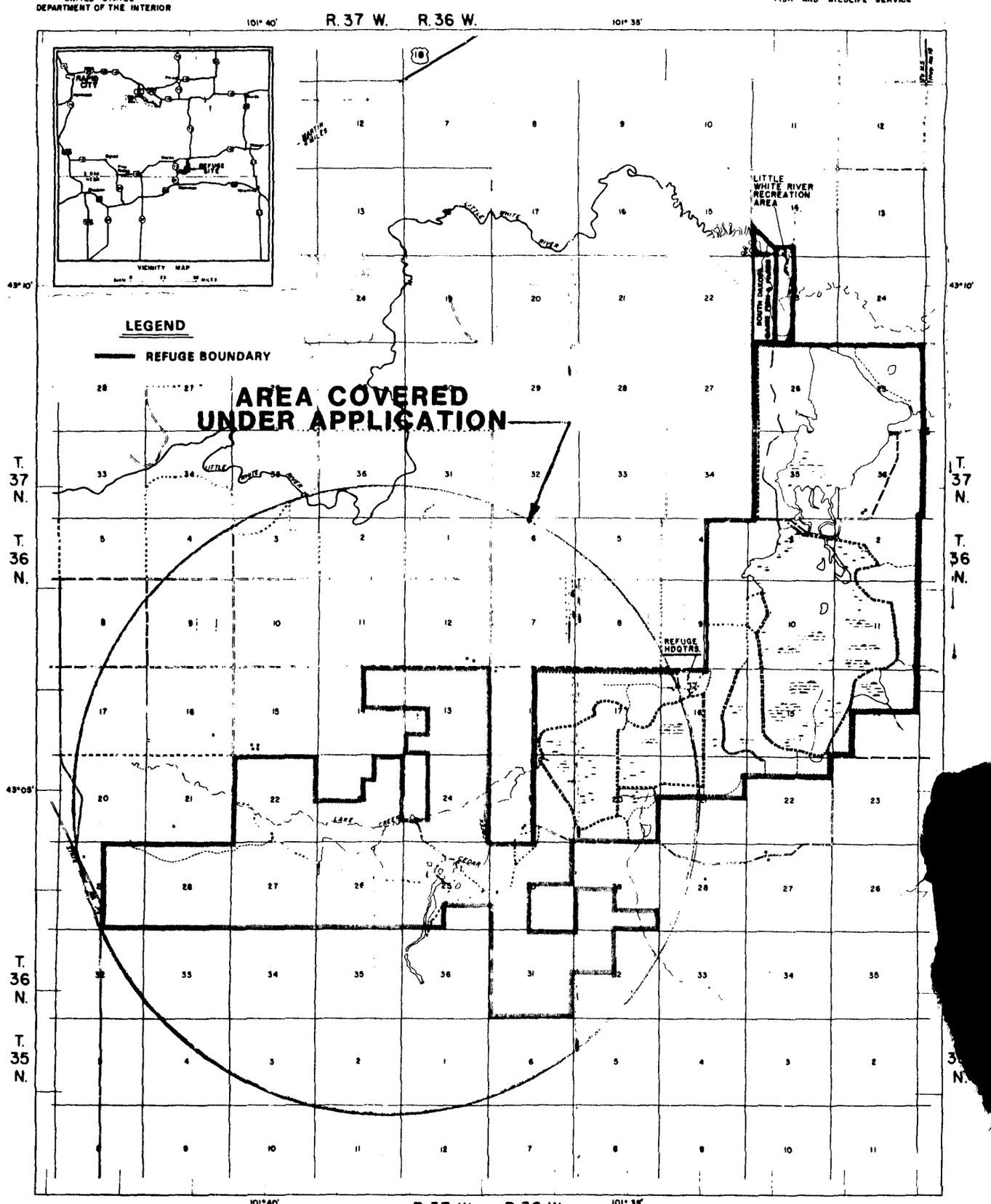
PERMIT QUALIFICATIONS AND REGULATIONS:

1) Special qualifications to permit being abided by **Y**
2) All structures, wells and lands on map **Y**
3) Irrigation Questionnaires checked to determine if permit owner started irrigation by the end of construction period **N/A**

LA CREEK NATIONAL WILDLIFE REFUGE
BENNETT COUNTY, SOUTH DAKOTA

UNITED STATES
DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE



COMPILED IN THE DIVISION OF REALTY
FROM AERIAL PHOTOGRAPHS, COUNTY MAPS
AND SURVEYS BY THE B.L.M.

DENVER COLORADO
REVISED: NOVEMBER 1983

NOVEMBER 1967

SIXTH PRINCIPAL MERIDIAN

0 ½ 1 1½ 2 3 MILES

MEAN DECLINATION 1965

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
ENGINEERING

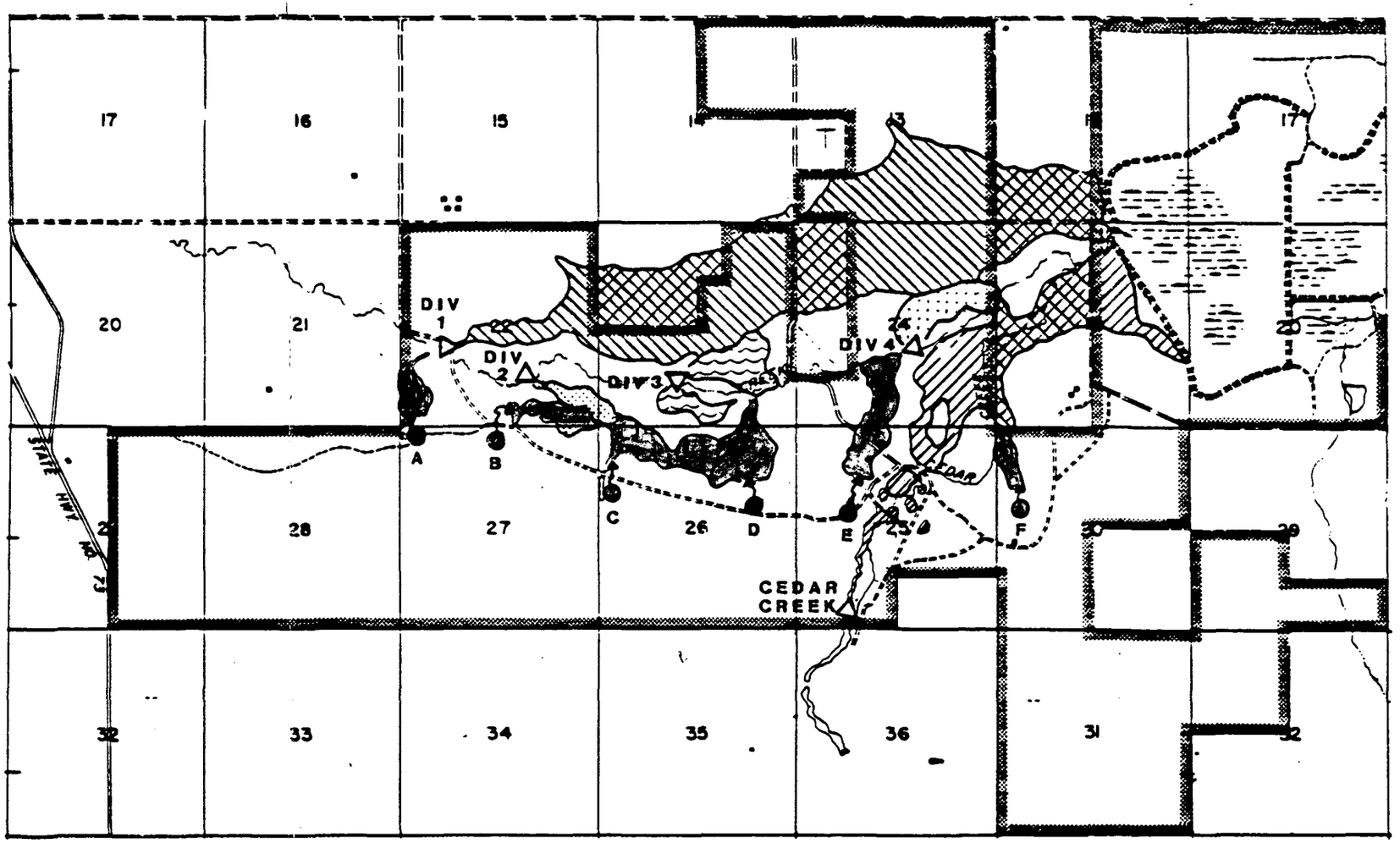
LA CREEK
NATIONAL WILDLIFE REFUGE
BENNETT COUNTY, SOUTH DAKOTA

WATER RIGHTS FILING MAP

DESIGNED	DRAWN	CHECKED	DATE	DENVER, COLO.
RG	RG		6-84	

DRAWING NO. 6R-SD-176-WR-P-5.0 SHEET 2 OF 2

2191-2



LEGEND

- REFUGE BOUNDARY
- POINT OF DIVERSION
- SPRING

AREAS IRRIGATED

LAKE CREEK
- DIVERSION 1
- DIVERSION 2
- DIVERSION 3
- DIVERSION 4

- CEDAR CREEK

SPRINGS
- A
- B
- C
- D
- E
- F

- PRIVATE LANDS IRRIGATED—NOT PART OF APPLICATION

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF BENNETT)

Inspected by Rassool Ahmed
Natural Res. Engineer
8-20-90

I, KENNETH C. ROZAS, OF DENVER, COLORADO, DO HEREBY CERTIFY THAT THIS MAP WAS PREPARED FROM NOTES AND INFORMATION OBTAINED FROM AN ACTUAL SURVEY AND THAT IT CORRECTLY REPRESENTS THE FACILITIES FOR THE ACCOMPANYING APPLICATION.

Kenneth Regan
REGIONAL ENGINEER

R. 37 W. R. 36 W.

SIXTH PRINCIPAL MERIDIAN

TRUE NORTH / MAGNETIC N 12°

0 2640 5280 7920 10560 FEET
0 1/2 1 1 1/2 2 MILES

VR # 1926-2 ~~2191~~-2

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
ENGINEERING

LA CREEK
NATIONAL WILDLIFE REFUGE
BENNETT COUNTY, SOUTH DAKOTA

WATER RIGHTS FILING MAP

DESIGNED	DRAWN	CHECKED	DATE	
R6	R6		6-84	DENVER, COLO.

DRAWING NO. 6R-SD-176-WR-P-5.0 SHEET 2 OF 2

STATE OF SOUTH DAKOTA
WATER LICENSE NO. 2191-2

(1) US Fish & Wildlife Service of Denver Federal Center, PO Box 25486, Denver, CO 80225 made Application No. 2191-2, August 7, 1991 for a water permit to appropriate 4.44 cubic feet of water per second (1444.7 acre feet of water annually) from six springs, Bennett County, South Dakota for creating 235 acres of marshes, sloughs and wet meadows for waterfowl propagation and enhancement of wildlife habitat. Permit No. 2191-2, with a priority date of August 7, 1991 was approved December 2, 1992 and issued to the applicant for diversion of water with construction of the described water supply system completed and the application to beneficial use of said water completed.

(2) It is certified that the applicant has complied with the provisions of South Dakota State Law relating to completion of the construction of the water supply system and is entitled to divert 4.44 cubic feet of water per second (1,444.7 acre feet annually) for beneficial use. The location of the six springs are as follows:

T36N, R37W:	NW¼ NW¼ NW¼	Section 27	**T36N, R36W**	SE¼ SW¼ NW¼	Section 30
	NW¼ NW¼ NE¼	Section 27			
	SW¼ SW¼ NW¼	Section 26			
	SW¼ SE¼ NE¼	Section 26			
	SW¼ SE¼ NW¼	Section 25			

3) The applicant has complied with the provisions of South Dakota State Law relating to the application of water to beneficial use to irrigate the following **235 acres:**

T36N, R37W	
W½ SW¼ and S½ SE¼ Section 22	40 acres
SW¼ SW¼ and SE¼ SE¼ Section 23 and N½ Section 26	100 acres
E½ SW¼ Section 24 and NE¼ NW¼ Section 25	75 acres
T36N, R36W	
W½ NW¼ Section 30	20 acres

(4) Pursuant to South Dakota Water Law 46-5-30.1 the US Fish & Wildlife Service of Denver Federal Center, PO Box 25486, Denver, CO 80225 the holder and/or owner of Water Permit No. 2191-2 is issued a license to appropriate water, the right to use 4.44 cubic feet of water per second (1444.7 acre feet annually) from six springs with a priority date of August 7, 1991 from locations specified in (2) of this license. The water to be conducted to and upon lands specified in (3) of this license for the purpose of creating 235 acres of marshes, sloughs and wet meadows for waterfowl propagation and enhancement of wildlife habitat. This license is subject to any limitations or qualifications listed in Water Permit No. 2191-2 and subject to South Dakota State Law.

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

JUN 2 0 1996
date

GREAT FACES. GREAT PLACES.

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181

JUN 2 0 1996

William A. Godby, Regional Engineer
US Fish & Wildlife Service
Denver Federal Center
P.O. Box 25486
Denver, CO 80225

RE: Water License Nos. 1921-2 and 2191-2, LaCreek Wildlife Refuge.

Dear Mr. Godby:

Enclosed are Water License Nos. 1921-2 and 2191-2 and Receipt Nos. 414458 and 414459 for $50.00 each which was assessed for an investigation and issuance of the licenses. Water License Nos. 1921-2 and 2191-2 are the final documents which completes the process of obtaining a water right.

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

Very truly yours,

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

gm
enclosures

NOTE: The applicable portions of Water Permit No. 265-2 have been incorporated into this Water License No. 1921-2.