

WATER PERMIT NO. 2294-2

Phone: 393-4165

Name of Applicant: City of Rapid City

Post Office Address: 300 6th St, Rapid City SD 57701

Amount of Water Claimed: 1.48 cfs Total Acres: 104

Source of Water Supply: Rapid Creek

Water to be used for: irrigation County: Pennington

About _____ miles _____ of _____

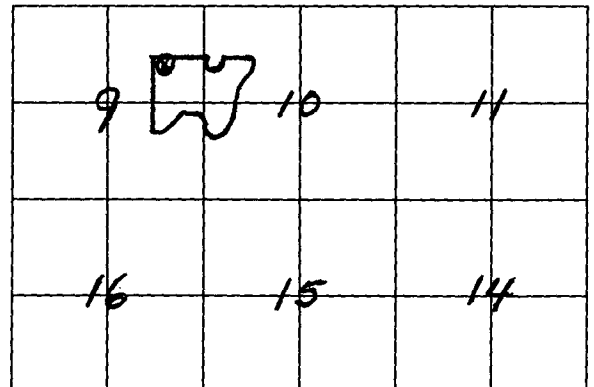
PRIORITY Date Received: 10-7-93 Fee: _____ Remarks: _____

Corrected Application Received: _____ Period of Annual Use: May 1 - Oct 31

WATER QUALITY APPROVAL RECEIVED: NA APPROVED/CONDITIONAL (Circle one)

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

Diversion Point: SE 1/4 NE 1/4 Sec 9-T1N-R7E



Land to be Irrigated: SE 1/4 NE 1/4, NE 1/4 SE 1/4

Sec 9; SW 1/4 NW 1/4, NW 1/4 SW 1/4 Sec 10;

all in T1N-R7E

Well Log: Driller: _____ Licensed YES _____ NO _____

Depth of Well: _____ REMARKS: _____

Type of Map: topo PREPARED BY: Mark D Rath Reviewed and the Number

Assigned on: 10-7-93 By: Karen Schlaak

FORM 2: Application for irrigation in South Dakota

(type or print)

MOR

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

No. 2294-2 Hydrologic Unit 10120110
Basin Upper Cheyenne
Newspaper Rapid City Journal, PO Box 450, RC
(office use only)



Application For Soil/Water Compatibility Permit And Permit To Appropriate Water

Type of Application: New X Vested Right Amendment/Correction to Permit No.
(check one) (Use predates Mar 2, 1955)

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

- Name of Applicant City of Rapid City Phone 393-4165
(check one) X Owner Tenant/lessee
Mailing Address 300 6th ST Rapid City State SD 57701
(Street, RR, or Box) (City) (Zip Code)
- Amount of water claimed 1.48 *CFS or **GPM ***AF Total Acreage 104
(*Cubic Feet per Second) (**Gallons per Minute) (***)Acre Feet -- storage capacity of dam/dugout if applicable)
- Source of water supply surface water, Rapid Creek
- Location of point of diversion (example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W) SE1/4 NE1/4 Section 9 T1N-R7E
- County or counties where water will be used Pennington
- Annual period during which water is to be used May 1 - October 31
- List below each forty acre subdivision, or lot, or fraction thereof and show number of acres to be irrigated in each.

(Attach sheet if more space is needed)

Land Description	Acres	Land Description	Acres
SE1/4 NE1/4 Sec 9 T1N-R7E	39 acres		
NE1/4 SE1/4 Sec 9 T1N-R7E	21 acres		
SW1/4 NW1/4 Sec 10 T1N-R7E	30 acres		
NW1/4 SW1/4 Sec 10 T1N-R7E	14 acres		

- Type of Irrigation: Gravity: Towline: Center Pivot: Gun: Other (Specify): Sprinkler
- Crops to be irrigated: Turf
- Give a description of the project. (Attach sheet if more space is needed)
Irrigation of Meadowbrook Golf Course

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

STATE OF SOUTH DAKOTA)

County of Pennington)^{SS}

I, Daniel L. Bjerke, the applicant, certify that I have read this application and examined the attached maps, that the water sample, if needed, has been taken by the required procedures and has not been adulterated or tampered with and is representative of the water to be used, and that the matters stated in this application are true and correct.

Signed Daniel L. Bjerke

Subscribed and sworn to before me this 5th day of October, 1993

My commission Expires 7/15/2000

Jacqueline M. Gentry
Notary Public

SOUTH DAKOTA

VESTED WATER RIGHT NO. 2294-2 FOR IRRIGATION

Date of Receipt of Claim October 7, 1993.

Date of Validation August 31, 1994.

The Water Management Board validated Vested Water Right Claim No. 2294-2 for irrigation purposes for City of Rapid City, 300 6th St, Rapid City SD 57701 with the following limitations, conditions and qualifications:

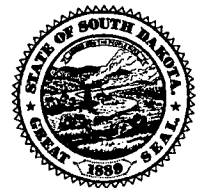
1. Vested Water Right No. 2294-2 validates the appropriation of 1.48 cubic feet of water per second (cfs) from Rapid Creek with an annual volume limitation not to exceed 312 acre-feet of water annually. The diversion point is located in the SE 1/4 NE 1/4 Section 9 to irrigate 104 acres located in the SE 1/4 NE 1/4, NE 1/4 SE 1/4 Section 9 and the SW 1/4 NW 1/4, NW 1/4 SW 1/4 Section 10; all in T1N-R7E. Water Permit No. 2276-2 increases the diversion rate by 0.23 cfs, adds 16 irrigated acres, and increases the annual volume limitation by 48 acre-feet of water annually (see Water Permit No. 2276-2).
2. The appropriation may not exceed the amount of water needed for beneficial use for irrigation. The appropriation may not exceed 3 acre feet per irrigated acre per year. The water is to be used during the following annual period: May 1 - October 31.
3. The priority date of the Vested Water Right is April 1, 1877.
4. The water use system has been constructed and water has been applied to beneficial use.
5. Water Rights obtained in compliance with the laws of the State of South Dakota must not be unlawfully impaired by this appropriation.

WATER MANAGEMENT BOARD

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

JUN 10 1997

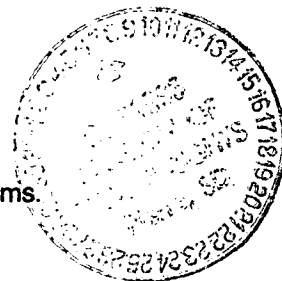
date



Affidavit of Water Use

No. _____

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) City of Rapid City
Mailing Address 300 Sixth Street, Rapid City, South Dakota 57701
(Street, RR or Box) (City) (State) (Zip Code)

A. Notice of Appropriation April 1, 1877 Date of Posting April 1, 1877 *Leedy Ditch
Date of Recording April 18, 1883 Recording Date April 18, 1883
B. Date of start of construction of water supply system April 1, 1877
C. Date that water was first applied to beneficial use April 1, 1877
D. Name of owner of original water supply system Jacob M. Leedy Leroy Kelsey
Philip Johncox Ellsworth Rice
E. Amount of water originally applied to beneficial use 1,600 Miners Inches
F. Present use of water - amount of water now being used 2.48 cfs*
Date that this water was first used April 1, 1877

G. *Chronological History of Water Use

Utilized by Leedy Ditch until January 14, 1957 when City of Rapid City transferred 1.48 cfs to Meadowbrook Golf Course for irrigation purposes. Diversion point for Meadowbrook Golf Course pump station was changed from Leedy Ditch to Rapid Creek. Leedy Ditch presently utilizes 1.00 cfs.

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 South Dakota)
County of Pennington) ss

I, Daniel L. Bjerke the applicant, certify that I have read the foregoing and that
(print or type)
the matters therein are true.

Signed

Subscribed and sworn to before me October 5 19 93

My commission Expires 11/12/2000

Notary Public

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.

City of Rapid City, 19 93

(Print name)

Daniel L. Bjerke, Public Works Director, 19 93

(Print name)



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

August 10, 1993

Dan Bjerke
City of Rapid City
300 6th St
Rapid City, SD 57701

Dear Mr. Bjerke:

This letter is in reference to the water permit applications the City has submitted. I am enclosing the reports for the Madison Formation applications for your review. If you have any comments concerning our proposals please contact either Eric Gronlund or myself.

I am also enclosing a vested water right claim application for Meadowbrook Golf Course. When reviewing the City's water permit application to make corrections to Meadowbrook's diversion rate and irrigated land, we found that the recognized vested water right for the golf course was never advertised nor validated. The procedure to clear this up is to have the City file a new vested right claim for the original vested right portion, proceed with the validation and then make corrections using the water permit application the City has already filed. The vested right and water permit applications can be advertised at the same time, with the changes proposed in the water permit application dependent upon the validation of the vested water right.

I am enclosing copies of the files from No. 0646-2, Leedy Ditch; and Nos. 0646-2A and 1998-2, Meadowbrook Gallery. The City will need to file an affidavit to support the claimed April 1, 1877 priority date. These files should help to support this claim.

Sincerely,

Mark D Rath
Natural Resources Engineer
Water Rights Division
(605) 773-3352

enclosures



CITY OF RAPID CITY

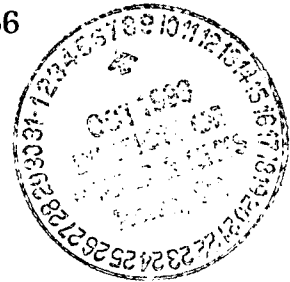
RAPID CITY, SOUTH DAKOTA 57701-2724

Public Works Department

300 Sixth Street

605-394-4165

FAX 605-394-6636



October 5, 1993

Mr. Mark Rath
South Dakota Department of
Environment and Natural Resources
Water Rights Division
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

RE: Leedy Ditch Vested Right Claim

Dear Mark:

Enclosed is one copy of an Application for Irrigation in South Dakota and two copies of an Affidavit of Water Use for the above-referenced irrigation ditch. I have also enclosed a copy of City of Rapid City Purchase Order Number 283867 in the amount of \$15.00 for the filing fee. A check for this amount will be issued at a later date.

Should you have any questions, feel free to contact this office.

Sincerely,

CITY OF RAPID CITY
Public Works Department

DANIEL L. BJERKE, P.E./L.S.
Public Works Director of
Design/Utilities

jmg

Enclosures



EQUAL HOUSING
OPPORTUNITY

EQUAL OPPORTUNITY EMPLOYER

2841, two miles north of Rapid City, S.D., was named for Stanley Oliver, a rancher living near
to gave the place the name.

SCS), 15 miles north of Rapid City, S.D., was named for Stanley Oliver, a rancher living near
to gave the place the name.

), eight miles north of Rapid City, S.D., was named for Stanley Oliver, a rancher living near
to gave the place the name.

), 10 miles south of Rapid City, S.D., was named for Stanley Oliver, a rancher living near
to gave the place the name.

), eight miles north of Rapid City, S.D., was named for Stanley Oliver, a rancher living near
to gave the place the name.

), 15 miles north of Rapid City, S.D., was named for Stanley Oliver, a rancher living near
to gave the place the name.

LAND (Brookings & Moody Cos., 200 acres, general), nine
miles northwest of Brookings, was originally named for Albert H.
Hill, general superintendent of the Pacific Wagon Road. In
1857, Samuel A. Medary, engineer of the Fort Ridgely and
Fergus Wagon Road, was in the vicinity of the lake and refers
to it as Lake Campbell. Medary surveyed the route across eastern
Dakota which is called the "Hobbs Trail."

LAKE (Campbell Co., 160 acres, TPA), three miles north-
west of Mound City, was named for Campbell County by the county
commissioners. (See Certificates.)

LAKE (Ziebach Co., 10 acres, TPA), 14 miles south of Du-
rham, was named for Charles H. Campbell, the landowner.

LAKE (Harding Co., 5 acres, SCS), 15 miles west of Camp
Rock, was named for the town. (See Post Offices.)

LAKE (Jackson Co., 2 acres, private), at Madoka, was so
named to coincide with the name of a cabin camp in Kadoka.

CANYON LAKE (Pennington Co., 42 acres, TPO), three miles southwest
of Rapid City, was so named because of its location in Rapid Can-
yon. (See Canyons.) The original dam, a crude affair of rocks
and cribs, was built in 1830 but was washed out by a flood in 1907.
The land was donated to Rapid City by Dr. R. J. Johnson in 1932,
with the stipulation that no motor boats would ever be permitted
to disturb the peace and quiet of the new lake to be created on
the property.

Since: SD State Names, 1941
with various notes

THANKS

UPPER RAPID

Is the name of one of the most important and attractive of the many additions to Rapid City. It comprises 1,600 acres of choice land adjoining the corporate limits on the west, and occupying the beautiful valley of Rapid river from hillside to hillside for a distance of two miles. Five hundred yards above this property is a group of five enormous springs whose waters form an important tributary of the river. These are the Cleghorn Springs, remarkable for their purity and volume.

The projected improvements for this addition embrace a dam across the river 716 feet long and 22 feet high, an electric motor line, a \$50,000 hotel, an electric light plant, a system of water works, bath houses and plunge baths, the straightening of the river channel, and other improvements for beautifying the grounds, such as the planting of shade trees, the construction of parks, and the laying out and grading of attractive boulevards and drives.

Some of the most important of these improvements have been completed. More than 2,000 shade trees were set out this spring. The motor line is graded for three-fourths of its length, and will be in operation by August 30. The lake has been supplied with handsome boats, and a boat-house of modern architecture, two stories high—the upper story being designed for a summer pavilion. The great dam was finished two months ago. The entire volume of the river passes over its top, yielding a water power whose value can hardly be calculated. The fall is 25 feet at the dam and can be increased to 75 feet by fluming the water for one mile.

Canyon Lake is the central feature and attraction of the Upper Rapid Addition. This is the largest body of water within a radius of 250 miles, and lies just in the mouth of the canyon.

Standing upon the proposed hotel site the vision sweeps over the Green valley unfolding to the north, and through the "Gap" the distant prairies almost delude the beholder into the belief that he is gazing upon the open sea. At your feet the crystal waters of the lake rest in unbroken calm, hemmed in on the

From Memo 1175

NO

For the
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South by a semi-circle of hills along whose brow an out-cropping marble reef recalls the embrasured battlements of olden castles, while to the west stretches the mighty canyon of Rapid river with its precipitous ridges of variegated sand-stone whose glowing colors blend with green sloping valleys, dark wooded heights and mountain summits in background. It is, in truth, a scene of enchanting loveliness—a landscape poem set to the music which the morning stars sang together at creation's dawn.

Rapid City has seven churches with resident pastors. Two other congregations, recently formed, are preparing to build churches. All of the churches are well attended and are in a flourishing condition. Rapid City has two daily and three weekly newspapers to keep its people well posted on local and general news.

W. O. TEMPLE.

Rapid City is the best lighted city of its size in the country. The streets are well lighted by arc electric lights and gas; the stores, offices and residences by arc or incandescent electric lights and by gas. All of the prominent secret societies have strong and active lodges in Rapid City. All of the churches have one or more church organizations. Up to the present time, however, the aid, or charitable, societies have not had much to do.

The United States Government has recognized Rapid City as the city of the Black Hills Country. Here the mail from the outside world for the various agricultural villages, mining camps and smaller towns is made up. The United States Signal Station for Western South Dakota is located here. The United States Land Office for all of the Black Hills Country, both agricultural and mineral, is located here. The Rapid City land district is not only the richest but also the largest in the United States and the office is located in the most central, most accessible and most important place in the district. Rapid City is sociable. In addition to the secret and church societies there are a large number of literary and social organizations.

Propose Renaming Of Canyon Lake And Park

A proposal to change the name of Canyon Lake and the adjacent city park was tossed into the squared circle at the recent meeting of Rapid City commissioners.

The new name suggested was Jackson Lake and Jackson park, in honor of Dr. Robert J. Jackson whose persistent efforts and generous gifts in land have done much to develop that area in the western portion of Rapid City.

There is a strong movement now afoot to pay tribute to Dr. Jackson by renaming the lake and the city park area after him. Many people who have lived in Rapid City a long time would like this done during his lifetime. Commissioner Earl Brockelsby told solons.

Gave Land

It was Dr. Jackson who donated the property on which Canyon Lake is now situated during the early WPA days when the dam was built to back up Rapid Creek. He also gave other lands and was a prime mover in efforts to create the adjacent recreational park.

As former mayor of Rapid City when it was a fledgling community, and for several terms a councilman, Dr. Jackson was one of the first to visualize the area as a residential district and recreational area. He has worked steadily for this development since that time.

Today Canyon Lake has become the major recreational site for the city, with picnic areas, playground, bathing beach, and fishing ground. Likewise, the area has seen the biggest single residential development in years, Brockelsby pointed out.

Born near Forrest, Ontario, Dr. Jackson came to Rapid City in 1893 after teaching school in Winnipeg. He set up practice here in that year as a general practitioner and surgeon, and later joined offices with Dr. N. T. Owen with whom he has been associated for the past 30 years.

Visit Scotland

This year he celebrated his 75th birthday. With Mrs. Jackson and his sister, who lives in Winnipeg, he is enroute to Strathaven, Scotland, for a month's vacation, his ancestral home.

During the first decade of the century, Dr. Jackson accumulated considerable land to the west of the city. He once owned the Cleghorn estate, and that property eastward to a point near the Canyon Lake dam site.

His holdings also included considerable property to the south on South hill where the first country club was located. At one time, he established a dairy, and present City Commissioner A. L. Haines was associated with him.

Besides his continuous interest in the development of Rapid City and a concern over its health and orderly growth, hundreds of friends throughout the county know him as a philanthropist and doctor who saw them through difficult times.

In presenting the idea to the city commission, Brockelsby asked that the matter be given careful consideration and pleaded for action in the near future.

RC Journal
1941

CLIFF AT EAST MAIN PARK

RECEIPT

413927

Division of Water Rights

South Dakota Department of Environment and Natural Resources

Pierre, _____, October 21, 19 93

RECEIVED OF City of Rapid City, 300 6th St, Rapid City, SD 57701

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

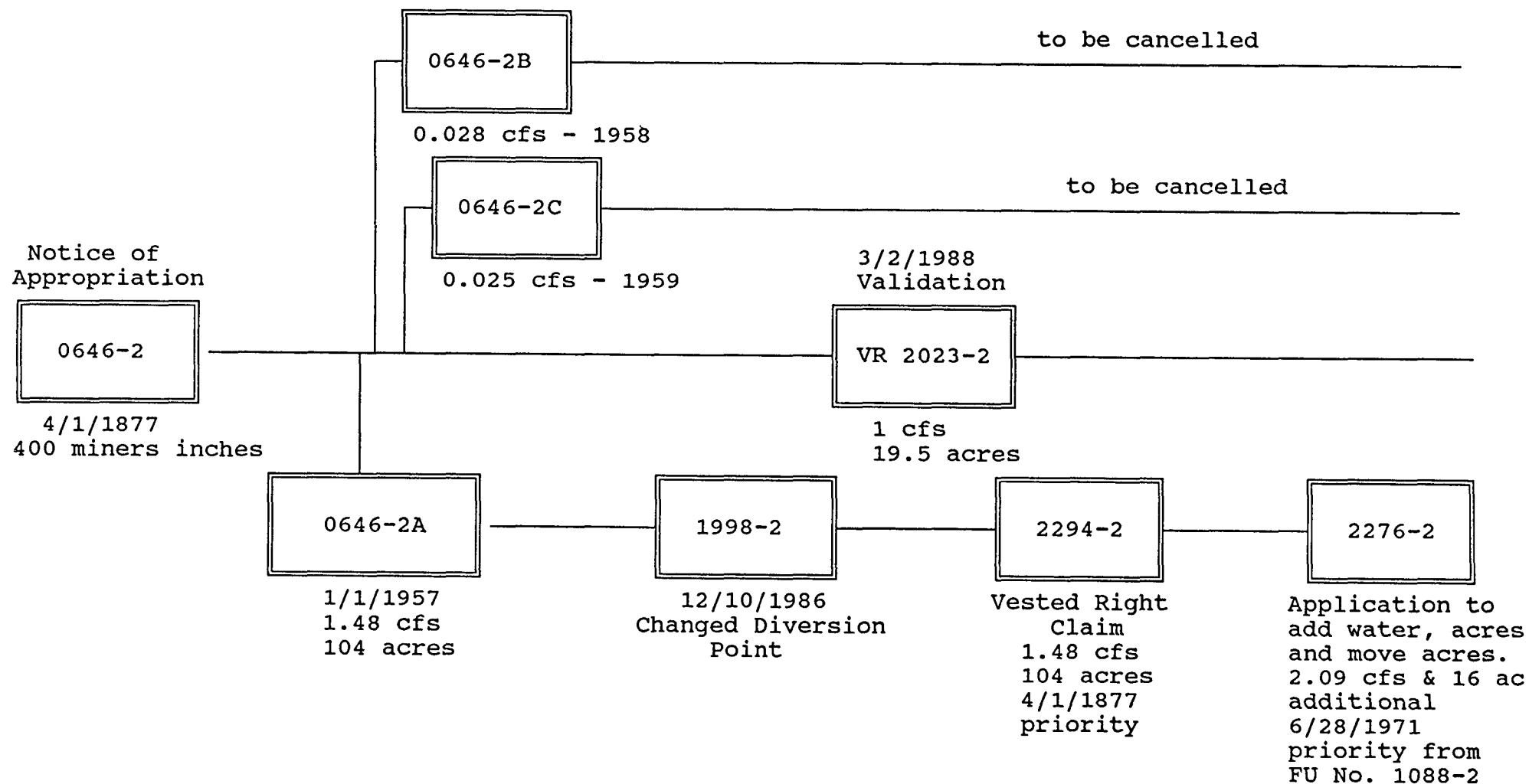
Fee for Application for Permit No. <u>2294-2</u> to Appropriate Water, to construct and to put water to beneficial use _____	15	00
Fee for Application for Permit No. _____ to Appropriate Water, for Future Use _____		
Fee to retain Future Use Permit No. _____ after period of seven years.		
Fee for Inspecting Constructed Works, confirming beneficial use and issuing Water License No. _____		
Fee for Filing Transfer Form _____		
Fee for Filing Extension Request _____		
Fee for _____		

(Any Other Work Provided by Law)	Total	15 00

By 
Chief Engineer

Division #3
FU 2276-2
VR 2294-2

City of Rapid City - Meadowbrook Golf Course



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

In The Matter of Application For
Vested Water Right Claim No.
2294-2 and Water Permit Application
No. 2276-2., City of Rapid City

Opposition of Marsh
Hereford Ranch Inc.,
Rapid Valley Water
Conservancy District

The Opponents allege:

I.

The only objection the opponents have to the application for Vested Water Right Claim No 2294-2 is the volume of three (3) acre feet. SDCL 46-5-6 limits the volume of water for irrigation to two (2) acre feet annually. On January 17, 1957, the Water Resources Commission approved Water Right No. 0646-2A. The opponents have no knowledge that the Commission approved any exception to the two (2) acre feet volume limitation contained in SDCL 46-5-6. Therefore, the Board ought not validate any vested claim exceeding the two (2) acre feet limitation, as no showing, using the criteria set forth in SDCL 46-5-6, has ever been made upon which an increase to three (3) acre feet is justified.

II.

In Water Permit Application No. 2276-2, the City proposes to: (a) increase the diversion rate from 1.48 cu. ft. per second, by 2.09 cu. ft. per second, to 3.57 cu. ft per second; increase the annual volume limitation by 48 acre feet; and change the location of the acres to be irrigated. SDCL 46-5-6 restricts the diversion rate to be allowed for irrigation to one (1) cfs per 70 acres regardless of the source of the water. The legislature has

determined that one (1) c.f.s is sufficient for irrigation and any amount over one (1) c.f.s is waste regardless of whether the source of the water is from a vested right or a reserved future use or a combination of both. It appears the engineers feel that by limiting the time during which the 3.57 c.f.s per second can be diverted to 11.5 hours there is a compliance with the statute. The statute does not allow, as proposed, a greater use in one second, if there is no use in the next second. For example, an irrigator could not, by not diverting from two o'clock to three o'clock, claim the right to divert two c.f.s from four o'clock to five o'clock. The City's application for an increased flow rate for irrigation, apparently using a combination of vested right water and reserved future use water, simply is not authorized by law. The flow rate must be limited as provided by SDCL 46-5-6.

The City is apparently requesting a permit to increase the volume allowed by SDCL 46-5-6 (two (2) acre feet) to three (3) acre feet for the 16 additional acres which it seeks to irrigate. The irrigation of this additional acreage cannot be considered as use of "vested right" water, because the vested right is for 104 acres. Moreover, there has been no showing of the factors required under SDCL 46-5-6 to increase the volume allowed for irrigation of this 16 acres even if the acreage is being irrigated by "reserved use" water.

III.

In Water Permit Application No. 2276-2, the City proposes to change the irrigated acres (104 acres) of Vested Water Right No. 0646-2A to be irrigated. See Table 1 of Report of Natural Resources Engineers, attached hereto and made a part hereof. The

permit should specifically designate which acres are being irrigated by Vested Right Water, and where there is a combination of Vested Right Water and Reserved Use Water on any given acreage, the proportion of each so that the records of Vested Right No. 0646-2A can clearly reflect the acreage being irrigated by the vested right. The permit should clearly state the acres being irrigated by the Vested Right and the acres being irrigated by the Reserved Use Water. The statutes authorize changing the acres to be irrigated under a Vested Right. See 46-5-30.4. The City is seeking an amendment, apparently under the authority of this section, changing the land to be irrigated under the Vested Right. While this statute permits such change upon application, the statute goes on, "An amendment of a water permit or right may not increase the rate of diversion or increase the volume of water to be appropriated under the original water permit or right." The amendment should describe the acres from which the right is taken and describe the acres to which the right is being transferred.

If this is not done, there is no way that inspection can determine if more acres than authorized by the right are being irrigated.

CONCLUSION

The validation of Vested Water Right No. 0646-2A should be approved provided that the validation specify with accuracy the irrigated acres not to exceed 104 acres and provided that the flow rate is limited to 1 cfs per 70 acres and provided that the volume is limited to two (2) acre feet annually.

The Permit Application No. 2276-2 should be denied to the extent that it requests an increase in the flow rate above that which is allowed by statute for the irrigation of seventy (70) acres. Also, as pointed out above, there should be a delineation of acres irrigated by the Vested Right and the volume allowed for irrigation of the 16 acres limited to two (2) acre feet annually.

Dated this 24 day of June, 1994.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

By:


JOSEPH M. BUTLER
Attorneys for Opponents
818 St. Joseph St.; P. O. Box 2670
Rapid City, SD 57709
(605) 343-1040

Report on Vested Water Right Claim No. 2294-2
and Water Permit Application No. 2276-2
City of Rapid City
November 15, 1993

Vested Water Right Claim No. 2294-2

The City of Rapid City, requests validation of Vested Water Right Claim No. 2294-2 for the irrigation of 104 acres with a diversion rate of 1.48 cubic feet of water per second (cfs) from the natural flows of Rapid Creek and an annual volume limitation of 312 acre feet (ac-ft). Irrigation was authorized by Recognized Vested Water Right No. 0646-2A having a priority date of April 1, 1877 for irrigation of Meadowbrook Golf Course. The diversion point is located in the SE1/4 NE1/4 of Section 9-T1N-R7E.

Review of the Vested Right Claim

Recognized Vested Water Right No. 0646-2A was originally associated with irrigation from Leedy Ditch. The original notice of water appropriation for this vested right claim was filed for record in Book E, Page 287 of the Location Certificates in Pennington County. The date of the recording was the 18th day of April 1883. The original claim for Leedy Ditch was for 1600 miners inches dating from April, 1877. In a lawsuit, Sickler vs. George Bennett, the court decreed 400 miners inches for the Leedy Ditch as reported by Lund (1942). The irrigation system was constructed in 1877 and water was first put to beneficial use in June 1881, water has been reported to be continuously used since that time (SDDENR, 1987).

On January 17, 1957, the Water Resources Commission approved the transfer of water rights of record for Water Right No. 0646-2A for the City of Rapid City. This action designated 1.48 cfs for the irrigation of 104 acres of Meadowbrook Golf Course to be separated from Water Right No. 0646-2, Leedy Ditch. On December 10, 1986, the Water Management Board approved Water Permit No. 1998-2 to change the point of diversion from the Leedy Ditch diversion point to a point on Rapid Creek located in the S1/2 NE1/4 of Section 9 T1N-R7E. A July 15, 1992, water permit inspection found the location of some of the irrigated land to have been changed and the addition of 16 irrigated acres. This requested change is discussed in a later section concerning Application No. 2276-2.

This vested right claim claims a priority date of April 1, 1877. This priority date would be the same as the priority date for Vested Water Right No. 2023-2, Leedy Ditch, and these would be the second oldest priority dates on Rapid Creek.

Application No. 2276-2

Application No. 2276-2, City of Rapid City, proposes to increase the authorized diversion rate by 2.09 cfs, add 16 irrigated

acres, increase the annual volume limitation by 48 ac-ft and change the location of other irrigated acres claimed by Vested Water Right Claim No. 2294-2 for Meadowbrook Golf Course. This application also requests that 0.01 cfs of the requested diversion rate increase be used as a flow through for a golf course pond at the No. 18 green. Vested Right Claim No. 2294-2 claims a priority date of April 1, 1877, and appropriates 1.48 (cfs) from Rapid Creek for irrigating 104 acres with an annual volume limitation of 312 ac-ft.

A July 15, 1992, inspection of Recognized Vested Water Right No. 0646-2A and Water Permit No. 1998-2 found that the golf course was capable of diverting water at a rate 2.09 cfs greater than the amount allowed. The inspection also found the irrigation of an additional 16 acres and a change in the location of other irrigated acres. Table (1) shows the location of the irrigated acreage associated with this application:

Table 1. Irrigated Acreage Associated with Meadowbrook Golf Course.

Location of Acreage All In T1N-R7E	Recognized Vested Water Right No. 0646-2A	Claimed by Vested Water Right Claim No. 2294-2	Requested by Water Permit Application No. 2276-2
SW1/4 NE1/4 S 9			24
NW1/4 SE1/4 S 9			10
NE1/4 SE1/4 S 9	21	21	7
NE1/4 SW1/4 S 9			6
SE1/4 NW1/4 S 9			5
SE1/4 NE1/4 S 9	39	39	33
NE1/4 NE1/4 S 9			9
NW1/4 NW1/4 S 10			8
NW1/4 SW1/4 S 10	14	14	8
SW1/4 NW1/4 S 10	30	30	10
TOTAL	104	104	120

Review of the Proposed Project

Application No. 2276-2 proposes to place to beneficial use an additional 2.09 cfs of water appropriated and reserved by Future Use Permit No. 1088-2 (June 28, 1971, priority date) from Rapid Creek. The total diversion rate for the irrigation of the 120 acres would be 3.57 cfs which is beyond the statutory limit of 1 cfs per 70 acres as specified in SDCL 46-5-6. The City of Rapid City would be limited in the amount of time they are allowed to pump from the creek during a 24 hour period. If approved, the total diversion rate allowed would be 3.57 cfs. At this diversion rate the City will have to limit the amount of pumping time to 11.5 hours each day. The annual volume of water limitation for the irrigation of the 120 acres would be 3 ac-ft per acre for a total of 360 ac-ft. A meter should be installed at the pump site to monitor withdrawals from the creek, so that the 360 ac-ft volume limitation will be adhered to.

Review of Existing Water Rights

There are 72 existing water rights/permits appropriating 259.19 cfs from Rapid Creek between Pactola Reservoir and the confluence with the Cheyenne River. There are 65 existing water rights/permits appropriating 247.85 cfs having priority dates junior to April 1, 1877, and located downstream from the claimed diversion point. There are 21 existing water rights/permits appropriating 80.12 cfs having priority dates that would be junior to June 28, 1971, and located downstream from the proposed diversion point. The availability of water for the portion of this application associated with the increase in the diversion rate and addition of 16 acres is through the City's utilization of the Deerfield and Pactola contracts with the US Bureau of Reclamation. Adverse effects caused by this application to existing water rights/permits are not expected.

Conclusions

1. Vested Water Right Claim No. 2294-2 requests validation for irrigation of 104 acres and a diversion rate of 1.48 cfs with a priority date of April 1, 1877.
2. Application No. 2276-2 proposes to increase the diversion rate, add acres and change the location of acres for Meadowbrook Golf Course as authorized by Recognized Vested Water Right No. 0646-2A and Water Permit No. 1998-2. The increase in the diversion rate would be 2.09 cfs, for a total diversion rate of 3.57 cfs. The number of acres irrigated would increase by 16 acres to a total of 120 acres.
3. Water for the proposal to increase the diversion rate and add acres has been reserved by Future Use Permit No. 1088-2, priority date of June 28, 1971.
4. If approved, the water remaining in reserve authorized by Future Use Permit No. 1088-2 should be reduced by 48 ac-ft.
5. Adverse effects on existing water rights are not expected.
6. If approved this permit should contain the following qualifications:

Unappropriated water associated with the June 28, 1971, priority date is available in Rapid Creek to reasonably satisfy this permit only through contract between the City of Rapid City and the Bureau of Reclamation for releases from Deerfield and Pactola Reservoirs.

Approval of Permit No. 2276-2 limits the number of hours of irrigation per day to a corresponding equivalent time period as if irrigating at a rate of 1.71 cfs for 120 acres. At a pumping rate of 3.57 cfs,

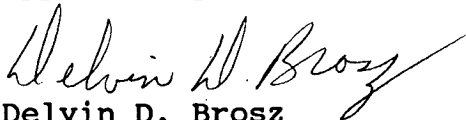
the pumping time may not exceed 11.5 hours per day.
The total amount of water applied shall not exceed 3
acre-feet per acre per year.

A meter shall be installed at the pump site to monitor
the volume of water pumped. The amount of water
diverted shall be reported to the Chief Engineer,
annually, on the irrigation water use questionnaire.



Mark D. Rath
Natural Resources Engineer III

Approved by,



Delvin D. Brosz
Natural Resources Engineer IV

References

1. Lund. 1942. Report on Water Filings on Rapid Creek for Irrigation Purposes. Raymond F. Lund, Office of the State Engineer, July 1942.
2. Wright Water Engineers, Inc. 1992. Engineering Report for Transfer of Stromer Property Portion of South Side Ditch Water Rights. Wright Water Engineers, Inc. Engineering Consultants, Denver, Colorado.
2. U.S. Bureau of Reclamation. 1990. Rapid Valley Water Management Study. U.S. Bureau of Reclamation, Belle Fourche Projects Office, Newell, South Dakota.
3. S.D. Department of Environment and Natural Resources. Division of Water Rights Records.

**

RECOMMENDATION OF CHIEF ENGINEER FOR VALIDATION OF VESTED WATER

RIGHT APPLICATION NO. 2294-2, City of Rapid City

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 Validation of Vested Water Right Application No. 2294-2, City of Rapid City, 300 6th Street, Rapid City, SD 57701.

The Chief Engineer is recommending DEFERRAL of Application No. 2294-2 to allow additional time to review the application.

See report on application for additional information.


for JOHN HATCH, Chief Engineer
December 6, 1993

REVISED RECOMMENDATION OF CHIEF ENGINEER FOR VALIDATION OF VESTED
RIGHT APPLICATION NO. 2294-2, City of Rapid City

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 Validation of Vested Water Right Application No. 2294-2, City of Rapid City, c/o Dan Bjerke, 300 6th Street, Rapid City, SD 57701.

The Chief Engineer is recommending VALIDATION of Application No. 2294-2 for 1.48 cfs because 1) water has been appropriated as described for irrigation use with a priority date of April 1, 1877, 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.

A handwritten signature in cursive script, appearing to read "John Hatch".

JOHN HATCH, Chief Engineer
December 20, 1993



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.

March 3, 1994

Dan Bjerke
City of Rapid City
300 6th Street
Rapid City, SD 57701

Dear Mr. Bjerke:

Vested Water Right Application No. 2294-2 and Water Permit Application Nos. 2271-2, 2272-2 and 2273-2, 2275-2 and 2276-2 for irrigation and municipal use have 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 Rapid City Journal printed at Rapid City, SD (Ph # 394-8300). For your information, a copy of the notice, the recommendations of the Chief Engineer and the reports on the applications 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 applications.

Sincerely,


Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

NOTE: If you plan to contest any part of the Chief Engineer's recommendations, 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 applications.



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

March 3, 1994

Rapid City Journal
PO Box 450
Rapid City, SD 57709-0450

ATTENTION: Legal Department

Enclosed is a Notice of Hearing on Vested Water Right Application No. 2294-2 and Water Permit Application Nos. 2271-2, 2272-2 and 2273-2, 2275-2 and 2276-2 to be published twice. Please publish the first notice on March 9, 1994, 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 City of Rapid City, 300 6th Street, Rapid City, SD 57701 (Ph # 393-4165).

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 applications until proof of publication has been received.

Sincerely,

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

FIRST TRANSMITTAL NOTICE

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

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

No. _____

Date _____

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

Name

Newspaper

Instruction to Newspaper - Publish first Notice on March 9, 1994, with the second publication 7 days later. The applicant is responsible for payment.

NOTICE OF HEARING To Validate
Vested Water Right Application No. 2294-2 and Application
Nos. 2271-2, 2272-2, 2273-2, 2275-2 and 2276-2 to Appropriate Water

Notice is given that the City of Rapid City, 300 6th St, Rapid City, SD 57701 has filed several applications. These applications were filed to bring several existing systems of the City, which were not developed as authorized by their associated water permits/rights, into compliance with water rights law. The vested water right claim, water permit applications, and chief engineer's recommendations are as follows:

Vested Right Claim No. 2294-2 requests validation of 1.48 cubic feet of water per second (cfs) from Rapid Creek and an annual volume limitation of 312 acre-feet. The diversion point is located in the SE 1/4 NE 1/4 Section 9 to irrigate 104 acres located in the SE 1/4 NE 1/4, NE 1/4 SE 1/4 Section 9 and the SW 1/4 NW 1/4, NW 1/4 SW 1/4 Section 10; all in T1N-R7E. Irrigation was authorized by Recognized Vested Water Right No. 0646-2A for Meadowbrook Golf Course. The water use has a claimed priority date of April 1, 1877. (Also see Water Permit Application No. 2276-2 below).

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends VALIDATION of Vested Water Right Application No. 2294-2 because 1) water has been appropriated as described for irrigation of 104 acres with a claimed priority date of April 1, 1877, 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.

Water Permit Application No. 2271-2 proposes to transfer the diversion authority for 2.23 cfs from one well (City Well No. 7 [which was not developed]) authorized by Water Permit No. 2125-2 to three wells (City Well Nos. 5, 6 and 9) which are authorized by Water Permit No. 2085-2. Water Permit No. 2125-2 authorized construction and placement to beneficial use 2.23 cfs (800 acre-feet of water annually) from one well (Madison Formation) located on the quarter section line of the NE 1/4 SW 1/4 and NW 1/4 SE 1/4 of Section 1-T1N-R7E reserved by Future Use Permit No. 2086-2. Water Permit No. 2085-2 appropriated 8.01 cfs from six Madison wells. An inspection of Permit No. 2085-2 found three wells developed and capable of producing 12.42 cfs located in the SE 1/4 NE 1/4 Section 32-T2N-R7E; SW 1/4 NW 1/4 Section 10-T1N-R7E and the NW 1/4 NW 1/4 Section 3-T1N-R7E. This application, if approved, would transfer the diversion authority from the one well authorized by Water Permit No. 2125-2 to the three wells developed under Water Permit No. 2085-2.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 2271-2 with qualifications because, 1) existing rights will not be unlawfully impaired, 2) it is a beneficial use of water, and 3) it is in the public interest.

Water Permit Application No. 2272-2 proposes to transfer the diversion authority for 0.44 cfs from one well (City Well No. 8) authorized by Water Permit No. 2124-2 to three wells (City Well Nos. 5, 6 and 9) which are authorized by Water Permit No. 2085-2. Water Permit No. 2124-2 appropriated 2.23 cfs from one well (Madison Formation) located in the NE 1/4 SE 1/4 Section 23-T2N-R7E. An inspection of Permit No. 2124-2 found the works capable of diverting 1.79 cfs. Water Permit No. 2085-2 appropriated 8.01 cfs from six Madison wells. An inspection of Permit No. 2085-2 found three wells developed and capable of producing 12.42 cfs located in the SE 1/4 NE 1/4 Section 32-T2N-R7E; SW 1/4 NW 1/4 Section 10-T1N-R7E and the NW 1/4 NW 1/4 Section 3-T1N-R7E. This application, if approved, would transfer the diversion authority for 0.44 cfs authorized by Water Permit No. 2124-2 to the three wells developed under Water Permit No. 2085-2.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 2272-2 with qualifications because, 1) existing rights will not be unlawfully impaired, 2) it is a beneficial use of water, and 3) it is in the public interest.

Water Permit Application No. 2273-2 proposes to increase the authorized diversion rate of 1.74 cfs (756 acre-feet of water annually) from the three wells developed under Water Permit No. 2085-2 by placing to beneficial use water reserved by Future Use Permit No. 2086-2. The three wells developed under Water Permit No. 2085-2 (previously described) are capable of diverting 12.42 cfs. Water Permit Application Nos. 2271-2 and 2272-2, combined, propose to transfer diversion authority for 2.67 cfs to the three wells authorized by Water Permit No. 2085-2. The increased diversion rate of 1.74 cfs (756 acre-feet of water annually) proposed by this application is the amount of water necessary to authorize additional pumping by the three wells authorized by Water Permit No. 2085-2, up to existing pumping capacity of 12.42 cfs.

Pursuant to SDCL 46-1-14 and 46-2A-20, the Chief Engineer is recommends APPROVAL of Application No. 2273-2 for a 20-year term because 1) although evidence is not available to justify issuing this permit without a 20-year term limitation, there is reasonable

probability that there is unappropriated water available for the applicant's proposed use, 2) the proposed diversion can be developed without unlawful impairment of existing rights, 3) the proposed use is a beneficial use, and 4) it is in the public interest.

Water Permit Application No. 2275-2 proposes to place to beneficial use 1.33 cfs (491 acre-feet of water annually) from one well authorized by Water Permit No. 2155-2. Water Permit No. 2155-2 authorizes construction and placement to beneficial use 2.67 cfs (1160 acre-feet of water annually) of water appropriated and reserved by Future Use Permit No. 2086-2 from one well (Madison Formation) located in the NW 1/4 SE 1/4 Section 27-T2N-R7E. An inspection of Permit No. 2155-2 found the well capable of producing 3.80 cfs. This application, if approved, would authorize the increase of 1.33 cfs in the diversion rate from this well to the existing diversion rate of 3.80 cfs from the well.

Pursuant to SDCL 46-1-14 and 46-2A-20, the Chief Engineer is recommends APPROVAL of Application No. 2275-2 for a 20-year term because 1) although evidence is not available to justify issuing this permit without a 20-year term limitation, there is reasonable probability that there is unappropriated water available for the applicant's proposed use, 2) the proposed diversion can be developed without unlawful impairment of existing rights, 3) the proposed use is a beneficial use, and 4) it is in the public interest.

Water Permit Application No. 2276-2 proposes to increase the authorized diversion rate by 2.09 cfs, add 16 irrigated acres, increase the annual volume limitation by 48 acre-feet and change the location of other irrigated acres claimed by Vested Right Claim No. 2294-2. Approval of this application is contingent on validation of Vested Right Claim No. 2294-2. This application, if approved, will authorize the change in location of the irrigated acreage and the irrigation of 16 additional acres located in portions of the SW 1/4 NE 1/4, N 1/2 SE 1/4, NE 1/4 SW 1/4, SE 1/4 NW 1/4, E 1/2 NE 1/4 Section 9; W 1/2 NW 1/4, NW 1/4 SW 1/4 Section 10; all in T1N-R7E. This application proposes to place to beneficial use an additional 2.09 cfs appropriated and reserved by Future Use Permit No. 1088-2 (June 28, 1971, priority date) from Rapid Creek. A diversion of 0.1 cfs of the requested diversion rate increase is to be used to provide flow through a golf course pond at the No. 18 green. This application also proposes to increase the annual volume limitation authorized by No. 2294-2 by 48 acre-feet for a total of 360 acre-feet.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 2276-2 with qualifications because, 1) existing rights will not be unlawfully impaired, 2) it is a beneficial use of water, and 3) it is in the public interest.

Any person interested in opposing or supporting these applications 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 recommendations. 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 March 28, 1994. 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 the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider these applications at 10:00 a.m., April 6, 1994, Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol, Pierre, SD. The Chief Engineer's recommendations are not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny these applications based on the facts presented at the public hearing. The April 6, 1994, 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 applications. The request for an automatic delay must be filed by March 28, 1994.

Any hearing will be an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by March 28, 1994, at the above Water Rights Division address to request copies of information pertaining to these applications, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

These application are made pursuant to SDCL 46-1-1 thru 46-1-10, 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 thru 46-2A-18, 46-2A-20, 46-2A-21; 46-5-1 thru 46-5-11, 46-5-13 thru 46-5-15, 46-5-24, 46-5-25, 46-5-30.2, 46-5-30.4, 46-5-31, 46-5-37, 46-5-37.1, 46-5-49; 46-6-1 thru 46-6-2, 46-6-3, 46-6-3.1, 46-6-6.1, 46-6-10, 46-6-13, 46-6-14, 46-6-26; and Board Rules ARSD 74:02:01:01 thru 74:02:01:15, 74:02:01:20 thru 74:02:01:22, 74:02:01:37 thru 74:02:01:37.02. Russell L. Stone, Acting Secretary, Department of Environment and Natural Resources.

PROOF OF PUBLICATION

STATE OF SOUTH DAKOTA)

County of Pennington) SSI, Helena M. Bauer

certify that the attached printed Notice was

taken from the Rapid City Journalprinted and published in Rapid CityCounty of Pennington and State ofSouth Dakota. The notice was published in
the newspaper on the following two dates:March 9, 1994March 16, 1994Cost of Printing: 29 9/16 inch @ 5.10Per inch run 2 times \$301.56

Helena M. Bauer
(Signature)

Bookkeeper

(Title)

March 16, 1994

(Date Signed)

March 9, 16 L436

NOTICE OF HEARING TO VALIDATE VESTED WATER RIGHT

APPLICATION NO. 2294-2
2272-2, 2273-2, 2275-2 AND 2274-2
TO APPROPRIATE WATER

Notice is given that the City of Rapid City, 300 6th St., Rapid City, SD 57701 has filed several applications. These applications were filed to bring several existing systems of the City, which were not developed as authorized by their associated water permits/rights, into compliance with water rights law. The vested water right claim, water permit applications, and chief engineer's recommendations are as follows:

Vested Right Claim No. 2294-2 requests validation of 1.48 cubic feet of water per second (cfs) from Rapid Creek and an annual volume limitation of 312 acre-feet. The diversion point is located in the SE¼ NE¼ Section 9, to irrigate 104 acres located in the SE¼ NE¼, NE¼ SE¼ Section 9 and the SW¼ NW¼, NW¼ SW¼ Section 10; all in T1N-R7E. Irrigation was authorized by Recognized Vested Water Right No. 0646-2A for Meadowbrook Golf Course. The water use has a claimed priority date of April 1, 1877. (Also see Water Permit Application No. 2276-2 below).

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends VALIDATION of Vested Water Right Application No. 2294-2 because 1) water has been appropriated as described for irrigation of 104 acres with a claimed priority date of April 1, 1877, 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.

Water Permit Application No. 2271-2 proposes to transfer the diversion authority for 2.23 cfs from one well (City Well No. 7 [which was not developed]) authorized by Water Permit No. 2125-2 to three wells (City Well Nos. 5, 6 and 9) which are authorized by Water Permit No. 2085-2. Water Permit No. 2125-2 authorized construction and placement to beneficial use 2.23 cfs (800 acre-feet of water annually) from one well (Madison Formation) located on the quarter section line of the NE¼ SW¼ and NW¼ SE¼ of Section 1-T1N-R7E reserved by Future Use Permit No. 2084-2. Water Permit No. 2085-2 appropriated 8.01 cfs from six Madison wells. An inspection of Permit No. 2085-2 found three wells developed and capable of producing 12.42 cfs located in the SE¼ NE¼ Section 32-T2N-R7E; SW¼ NW¼ Section 10-T1N-R7E and the NW¼ NW¼ Section 3-T1N-R7E. This application, if approved, would transfer the diversion authority from the one well authorized by Water Permit No. 2125-2 to the three wells developed under Water Permit No. 2085-2.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 2271-2 with qualifications because, 1) existing rights will not be unlawfully impaired, 2) it is a beneficial use of water, and 3) it is in the public interest.

Water Permit Application No. 2272-2 proposes to transfer the diversion authority for 0.44 cfs from one well (City Well No. 8) authorized by Water Permit No. 2124-2 to three wells (City Well Nos. 5, 6 and 9) which are authorized by Water Permit No. 2085-2. Water Permit No. 2124-2 appropriated 2.23 cfs from one well (Madison Formation) located in the NE¼ SE¼ Section 32-T2N-R7E. An inspection of Permit No. 2124-2 found the works capable of diverting 1.79 cfs. Water Permit No. 2085-2 appropriated 8.01 cfs from six Madison wells. An inspection of Permit No. 2085-2 found three wells developed and capable of producing 12.42 cfs located in the SE¼ NE¼ Section 32-T2N-R7E; SW¼ NW¼ Section 10-T1N-R7E and the NW¼ NW¼ Section 3-T1N-R7E. This application, if approved, would transfer the diversion authority for 0.44 cfs authorized by Water Permit No. 2124-2 to the three wells developed under Water Permit No. 2085-2.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 2272-2 with qualifications because, 1) existing rights will not be unlawfully impaired, 2) it is a beneficial use of water, and 3) it is in the public interest.

Water Permit Application No. 2273-2 proposes to increase the authorized diversion rate of 1.74 cfs (756 acre-feet of water annually) from the three wells developed under Water Permit No. 2085-2 by placing to beneficial use water reserved by Future Use Permit No. 2086-2. The three wells developed under Water Permit No. 2085-2 (previously described) are capable of diverting 12.42 cfs. Water Permit Application Nos. 2271-2 and 2272-2, combined, propose to transfer diversion authority for 2.67 cfs to the three wells authorized by Water Permit No. 2085-2. The increased diversion rate of 1.74 cfs (756 acre-feet of water annually) proposed by this application is the amount of water necessary to authorize additional pumping by the three wells authorized by Water Permit No. 2085-2, up to existing pumping capacity of 12.42 cfs.

Pursuant to SDCL 46-1-14 and 46-2A-20, the Chief Engineer recommends APPROVAL of Application No. 2273-2 for a 20-year term because 1) although evidence is not available to justify issuing this permit without a 20-year term limitation, there is reasonable probability that there is unappropriated water available for the applicant's proposed use, 2) the proposed diversion can be developed without unlawful impairment of existing rights, 3) the proposed use is a beneficial use, and 4) it is in the public interest.

Water Permit Application No. 2275-2 proposes to place to beneficial use 1.33 cfs (491 acre-feet of water annually) from one well authorized by Water Permit No. 2155-2. Water Permit No. 2155-2 authorizes construction and placement to beneficial use 2.67 cfs (1160 acre-feet of water annually) of water appropriated and reserved by Future Use Permit No. 2084-2 from one well (Madison Formation) located in the NW¼ SE¼ Section 27-T2N-R7E. An inspection of Permit No. 2155-2 found the well capable of producing 3.80 cfs. This application, if approved, would authorize the increase of 1.33 cfs in the diversion rate from this well to the existing diversion rate of 3.80 cfs from the well.

Pursuant to SDCL 46-1-14 and 46-2A-20, the Chief Engineer recommends APPROVAL of Application No. 2275-2 for a 20-year term because 1) although evidence is not available to justify issuing this permit without a 20-year limitation, there is reasonable probability that there is unappropriated water available for the applicant's proposed use, 2) the proposed diversion can be developed without unlawful impairment of existing rights, 3) the proposed use is a beneficial use, and 4) it is in the public interest.

Water Permit Application No. 2276-2 proposes to increase the authorized diversion rate by 2.09 cfs, add 16 irrigated acres, increase the annual volume limitation by 48 acre-feet and change the location of other irrigated acres claimed by Vested Right Claim No. 2294-2. Approval of this application is contingent on validation of Vested Right Claim No. 2294-2. This application, if approved, will authorize the change in location of the irrigated acreage and the irrigation of 16 additional acres located in portions of the SW¼ NE¼, N¼ SE¼, NE¼ SW¼, SE¼ NW¼, E¼ NE¼ Section 9; W¼ NW¼, NW¼ SW¼ Section 10; all in T1N-R7E. This application proposes to place to beneficial use an additional 2.09 cfs appropriated and reserved by Future Use Permit No. 1088-2 (June 28, 1971, priority date) from Rapid Creek. A diversion of 0.1 cfs of the requested diversion rate increase is to be used to provide flow through a golf course pond at the No. 18 green. This application also proposes to increase the annual volume limitation authorized by No. 2294-2 by 48 acre-feet for a total of 360 acre-feet.

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The Water Management Board will consider these applications at 10:00 a.m., April 6, 1994, Floyd Matthews Training Center, Joe Foss Building, 523 East Capitol, Pierre, S.D. The Chief Engineer's recommendation are not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny these applications based on the facts presented at the public hearing. The April 6, 1994, 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 applications. The request for an automatic delay must be filed by March 28, 1994.

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. Contract Eric Gronlund by March 28, 1994, at the above Water Rights Division address to request copies of information pertaining to these applications, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

These applications are made pursuant to SDCL 46-1-1 thru 46-1-10, 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 thru 46-2A-18, 46-2A-20, 46-2A-21; 46-5-1 thru 46-5-11, 46-5-13 thru 46-5-15, 46-5-24, 46-5-25, 46-5-30.2, 46-5-30.4, 46-5-31, 46-5-37, 46-5-37.1, 46-5-49; 46-6-1 thru 46-6-2, 46-6-3, 46-6-3.1, 46-6-6.1, 46-6-10, 46-6-13, 46-6-14, 46-6-26; and Board Rules ARSD 74:02:01:01 thru 74:02:01:15, 74:02:01:20 thru 74:02:01:22, 74:02:01:37 thru 74:02:01:37.02.

Russell L. Stone
Acting Secretary
Department of Environment
and Natural Resources



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

March 4, 1994

Jerry Marsh
Rapid Valley Water Conservancy District
HCR 36 Box 35
Caputa, SD 57725

Dear Mr. Marsh:

This letter is in reference to a vested water right claim and a water permit application the City of Rapid City has submitted and is scheduled to be brought before the Water Management Board on April 6, 1994. Both the vested water right claim and the water permit application are the result of a water permit inspection I made of Meadowbrook Golf Course. At the time I made the inspection I found the system was not constructed as permitted and subsequently I found the vested water right had never been validated. The procedure that is being followed concerning the separate vested right claim and application is similar to that which was used for the Elks Club golf course applications two years ago. I am enclosing a copy of the report and the Chief Engineer's recommendation. If you have any questions concerning these, feel free to contact me.

Sincerely,

Mark D. Rath
Natural Resources Engineer
Water Rights Division
(605) 773-3352

enclosures



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

March 4, 1994

Jerry Hammerquist
Rapid Valley Water Conservancy District
Box 26
Caputa, SD 57725

Dear Mr. Hammerquist:

This letter is in reference to a vested water right claim and a water permit application the City of Rapid City has submitted and is scheduled to be brought before the Water Management Board on April 6, 1994. Both the vested water right claim and the water permit application are the result of a water permit inspection I made of Meadowbrook Golf Course. At the time I made the inspection I found the system was not constructed as permitted and subsequently I found the vested water right had never been validated. The procedure that is being followed concerning the separate vested right claim and application is similar to that which was used for the Elks Club golf course applications two years ago. I am enclosing a copy of the report and the Chief Engineer's recommendation. If you have any questions concerning these, feel free to contact me.

Sincerely,

Mark D. Rath
Natural Resources Engineer
Water Rights Division
(605) 773-3352

enclosures



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

March 4, 1994

Dear :

Enclosed is a copy of the Notice of Hearing for Vested Water Right Application No. 2294-2 and Water Permit Application Nos. 2271-2, 2272-2, 2273-2, 2275-2 and 2276-2 for the City of Rapid City. The Notice of Hearing is scheduled to be published in the Rapid City Journal for two consecutive weeks beginning March 9, 1994.

A copy of the notice of hearing on the applications is being sent to you because of your previous interest in Rapid City's water permit applications.

If you have any questions or would like to request a copy of the report on any of the applications, please feel free to contact mark rath or myself at 773-3352.

Sincerely,

Eric Gronlund
Natural Resources Engineer III
Water Rights Division

enclosure

(Vested Water Right Application No. 2294-2)
(Water Permit Application Nos. 2271-2, 2272-2, 2273-2, 2275-2, 2276-2)

THE ATTACHED LETTER WAS SENT TO THE FOLLOWING:

Bruce Laymon, Project Manager
Bureau of Reclamation
P.O. Box 226
Newell, SD 57760

Harry Morris
116580 S. Buxton Rd.
Butte, MT 59750-9717

Rapid Valley Water Company, Inc.
Rt 2, Box 160
Rapid City, SD 57701

Keith Ham, President
St. Germain Ditch
HCR 36, Box 34
Caputa, SD 57725

Walter Jones, Secretary
Lone Tree Water Company
RR 2, Box 4970
Rapid City, SD 57701

Don Jundt
South Side Ditch
Rt 2, Box 4920A
Rapid City, SD 57701

Michael M. Hickey, Attorney
818 St. Joseph Street
P.O. Box 2670
Rapid City, SD 57709-2670

Charles Johnson
Hawthorne Ditch Company
1500 East 27th Street
Rapid City, SD 57701

David Lamb
RR 2, Box 223
Rapid City, SD 57701

Melvin Brassfield
Box 24
Caputa, SD 57725

A. Carl Ham
Ham Ranch, Inc.
HCR 36, Box 34
Caputa, SD 57725

Robert Dustman
Dustman Ranch Partnership
Box 53
Caputa, SD 57725

THE ATTACHED LETTER WAS SENT INTER-OFFICE TO THE FOLLOWING:

Tim Olson
Water Permits Coordinator
Department of Game, Fish & Parks
Joe Foss Building
Pierre, SD 57501

March 28, 1994

Chief Engineer
Water Rights Division
Foss Building
523 E. Capitol
Pierre, S. D. 57501



Dear Sir:

We are filing this petition in objection to the approval of the Validation of Vested Water Right Application 2294-2 permitting an annual volume limitation of 312 acre-feet of water with an 1887 priority. We believe that any increase in the volume of water over and above the 2 acre-feet per acre allowed under statute, should be drawn from Rapid City's Pactola account and not an increase in the 1877 priority.

We also object to provisions in Water Permit Application 2276-2, which proposes to increase the authorized diversion rate by 2.09 cubic feet per second to a total diversion rate of 3.57 cfs for a 120 acre permit. Statute in 46-5-6 clearly limits the diversion rate of irrigation water to 1 cfs for each 70 acres or the equivalent thereof.

We respectfully request that the Water Management Board hearings of the Applications be delayed to a later date.

Jerry Marsh
Marsh Hereford Ranch Inc.
HCR 36 BOX 35
Caputa, S. D. 57725

cc: Rapid City

JERRY HAMMERQUIST

Box 26
Caputa, SD 57725



March 28, 1994

Chief Engineer
Water Rights Division
Department of Environment & Natural Resources
Foss Building
523 E. Capitol
Pierre, SD 57501

Gentlemen:

The Rapid Valley Water Conservancy District wishes to petition Water Rights Division concerning Rapid City's application numbers 2294-2 and 2276-2. We oppose these applications for the reasons that one cubic foot per second per 70 acres and the two acre feet per acre limitation should be used.

We request a delay to inform our legal counsel, Joseph Butler, whose address is P.O. Box 2670, Rapid City, SD 57709 of this matter.

Sincerely,

Jerry Hammerquist
President
Rapid Valley Water Conservancy
District



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

March 30, 1994

NOTICE

TO: Daniel L. Bjerke
Public Works Director of Design/Utilities
City of Rapid City
300 Sixth Street
Rapid City, SD 57701-2724
and Parties of Record (see attached list)

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

SUBJECT: Automatic Delay of Hearing for Vested Water Right
Application No. 2294-2 and Water Permit Application No.
2276-2, City of Rapid City

Petitions in opposition to Vested Water Right Application No. 2294-2 and Water Permit Application No. 2276-2 have been filed with the Water Rights Division. The petitions also requested an automatic delay of the hearing. Therefore, the hearing on Application Nos. 2294-2 and 2276-2 is automatically delayed pursuant to SDCL 46-2A-4 and 46-2A-5 and will not be held on April 6, 1994.

The Water Management Board will still consider Application Nos. 2271-2, 2272-2, 2273-2 and 2275-2 at the April 6, 1994 beginning at 10:00 am at the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre, SD 57501. Petitions were not filed on these applications.

The Water Management Board will now consider Application Nos. 2294-2 and 2276-2 at their July 6 and 7, 1994 meeting. Future notice of the date, time and place of the hearing for Application Nos. 2294-2 and 2276-2 will be provided to the parties of record.

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

c: Diane Best, Assistant Attorney General
Joseph Butler, P.O. Box 2670, Rapid City, SD 57709

CERTIFICATION

I hereby certify that on March 30, 1994, I have personally deposited with the United States Mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated March 30, 1994, along with a copy of the Parties of Record List, regarding Automatic Delay of Hearing for Vested Water Right Application No. 2294-2 and Water Permit Application No. 2276-2, City of Rapid City, addressed as stated below:

Daniel L. Bjerke, Public Works Director of Design/Utilities, City of Rapid City, 300 Sixth Street, Rapid City, SD 57701-2724.

Jerry Hammerquist, President, Rapid Valley Water Conservancy Dist., Box 26, Caputa, SD 57725.

Jerry Marsh, Marsh Hereford Ranch, Inc., HCR 36, Box 35, Caputa, SD 57725.

Joseph Butler, P.O. Box 2670, Rapid City, SD 57709.

Copy Sent Inter-office to:

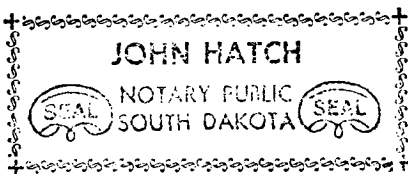
Diane Best, Assistant Attorney General, Capitol Building.

Cheryl F. Frost

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 4th day of April, 1994.



John Hatch
Notary Public

JOHN HATCH, Notary Public
My Commission Expires
April 1, 2001



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

May 12, 1994

NOTICE

TO: Daniel L. Bjerke,
Public Works Director of Design/Utilities
City of Rapid City
300 Sixth Street
Rapid City, SD 57701-2724
and Parties of Record (see attached list)

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

SUBJECT: Rescheduling Consideration of Vested Water Right Application No. 2294-2
and Water Permit Application No. 2276-2, City of Rapid City

The Water Management Board will consider Vested Water Right Application No. 2294-2 and Water Permit Application No. 2276-2 on June 28, 1994 at 1:30 pm in Gallery D, Ramkota Inn - Best Western, 920 West Sioux Ave., Pierre, SD. The actual time of the hearing may be later than 1:30 pm due to prior agenda items. The April 6, 1994 hearing on this application was automatically delayed by petitioners in opposition to the applications.

Applicable provisions of the Notice of Hearing published March 9 and 16, 1994 in the Rapid City Journal will still apply at this hearing. This hearing is an adversary proceeding. Any party of record has the right to be present or to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

Contact Eric Gronlund, by June 21, 1994 at (605) 773-3352 to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

c: Diane Best, Assistant Attorney General

CERTIFICATION

I hereby certify that on May 12, 1994, I have personally deposited with the United States Mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated May 12, 1994, regarding Rescheduling Consideration of Vested Water Right Application No. 2294-2 and Water Permit Application No. 2276-2, City of Rapid City, along with a copy of the Parties of Record List addressed as stated below and on the attached list:

Daniel L. Bjerke, Public Works Director of Design/Utilities, City of Rapid City, 300 Sixth Street, Rapid City, SD 57701-2724.

Copy Sent Inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.

Eric Gronlund
Eric Gronlund
Natural Resources Engineer III

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 13th day of May, 1994.



John Hatch
Notary Public
JOHN HATCH, Notary Public
My Commission Expires
April 1, 2001



July 1, 1994

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

NOTICE

TO: Dan Bjerke
City of Rapid City
300 6th Street
Rapid City, SD 57701-2724
(and Parties of Record)

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

SUBJECT: 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 to approve Water Permit Application No. 2276-2 and Vested Water Right Application No. 2294-2, City of Rapid City. The Board will consider the proposed Findings, Conclusions and Final Decision at 1:00 p.m., August 31, 1994, Floyd Matthew Training Center, 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 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 (names and addresses enclosed) by August 9, 1994. Written objections or comments in support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision, are to be mailed to each Board member, the Board attorney and all Parties of Record by August 19, 1994.

Oral arguments by parties filing written comments in opposition or support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision, may be made on August 31, 1994. The public hearing was completed June 28, 1994. No additional testimony will be received on August 31, 1994.

Enclosure

c: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General
Bob Jackson, Attorney, City of Rapid City, 300 6th St, Rapid
City, SD 57701

1.

I hereby certify that on July 1, 1994, I have personally deposited with the United States Mail at Pierre, South Dakota, First Class postage, prepaid envelopes containing a Notice dated July 1, 1994, regarding Preparation of Findings of Fact, Conclusions of Law and Final Decision (Water Permit Application No. 2276-2 and Vested Water Right Application No. 2294-2, City of Rapid City) addressed to:

Dan Bjerke
City of Rapid City
300 6th Street
Rapid City, SD 57701-2724
and Parties of Record (as shown on the attached list)

A copy of the Notice was sent to:

Bob Jackson, Attorney, City of Rapid City, 300 6th St, Rapid
City, SD 57701

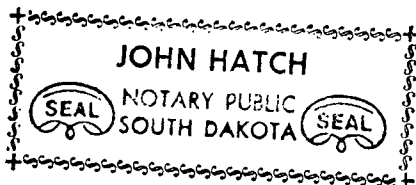
A copy of the Notice was sent by inter-office mail to:

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 5th day of July, 1994.



John Hatch
Notary Public
JOHN HATCH, Notary Public
My Commission Expires
April 1, 2001

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

August 5, 1994

MEMORANDUM

TO: Members of the Water Management Board, and all
interested parties

FROM: John P. Guhin, Deputy Attorney General *John P. Guhin*

RE: **Matter of Vested Water Right Claim No. 2294-2 and Water
Permit Application No. 2276-2; City of Rapid City**

Enclosed find a copy of proposed Findings of Fact, Conclusions of Law and Final Decision; and Certificate of Service in the above-referenced matter.

This is considered service by mail upon you as required by law.

JPG:do

Enc.

cc/enc: Water Management Board
Dan Bjerke
Bob Jackson
Jerry Marsh
Jerry Hammerquist
Joseph Butler
John Hatch ✓
Diane Best

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF VESTED WATER)	FINDINGS OF FACT,
RIGHT CLAIM NO. 2294-2 AND)	CONCLUSIONS OF LAW AND
WATER PERMIT APPLICATION NO.)	FINAL DECISION
2276-2; CITY OF RAPID CITY)	

FINDINGS OF FACT IN RELATION TO
VESTED WATER RIGHT CLAIM NO. 2294-2

1. The City of Rapid City requests validation of Vested Water Right Claim No. 2294-2 for the irrigation of 104 acres at the diversion rate of 1.48 cubic feet per second from the natural flows of Rapid Creek and an annual volume limitation of 312 acre feet.

2. The claim for water under this application arises from the Leedy Ditch irrigation system which was constructed in 1877 and a subsequent location certificate filed in Pennington County in 1883. The case of Sickler v. Bennett decreed 400 miner's inches for Leedy Ditch.

3. After establishment of the water right, it was split into several segments.

4. One segment of the right, for 1 c.f.s. and 19.5 acres was validated with an April 1, 1877, priority date by way of Vested Right No. 2023-2 on March 2, 1988.

5. The second portion of the original Leedy Ditch water right is that at issue here. That second portion was transferred to the City of Rapid City by way of Water Right No. 0646-2A on January 17, 1957, by way of Water Resource Commission approval. That action approved 1.48 c.f.s. for irrigation of 104 acres of the Meadowbrook Golf Course.

6. On December 10, 1986, the Water Management Board approved Water Permit No. 1998-2 to change the point of diversion for the water right at issue here from the Leedy Ditch diversion point to a point on Rapid Creek.

7. The vested right claim at issue here asserts a priority date of April 1, 1877, the same priority date previously approved for Vested Right No. 2023-2, which also originated in the Leedy Ditch irrigation right.

8. Evidence in the record, including that of the report of the Division, is to the effect that water has been continually used since the irrigation system was put into operation. There is no conflicting evidence in the record.

9. The volume of water available annually under this permit is three feet per acre annually.

CONCLUSIONS OF LAW
WITH REGARD TO VESTED WATER RIGHT CLAIM NO. 2294-2

1. The Board has jurisdiction of this matter.
2. This water has been appropriated as described for irrigation use with a priority date of April 1, 1887.
3. The use has been developed without unlawful impairment of existing rights.
4. The use to irrigate a golf course is a beneficial use.
5. The use is in the public interest in that it promotes recreation in the city of Rapid City.
6. The Board specifically rejects the assertion that SDCL 46-5-6 precludes the recognition of a vested right to apply

three acre feet of water under this vested right. First, the claimed right was developed at the rate of three acre feet of water per acre rate and the volume limitation was not in effect at the time of the development of the right. In particular, the three acre feet volume limitation did not appear in South Dakota law until 1957. See S.L. 1957, ch. 490, § 2. A two acre feet per acre limitation did not appear in South Dakota law until 1978. See S.L. 1978, ch. 308. The Board concludes that the legislature did not intend to apply either the two or three acre feet volume limitation to a water right which had been fully developed, had been recognized by court decree, and had originated prior to the passage of the 1957 and 1978 acts and prior to the passage of the critical 1907 South Dakota Water Act.

FINAL DECISION
AS TO VESTED WATER RIGHT CLAIM NO. 2294-2

The application for validation of Vested Water Right Claim No. 2294-2 is granted for the irrigation of the 104 acres identified in the application.

FINDINGS OF FACT
WITH RELATION TO WATER PERMIT APPLICATION NO. 2276-2

1. This is an application by the City of Rapid City to build upon the vested right claim No. 2294-2. The application proposes to place to beneficial use an additional 2.09 c.f.s. of water appropriated and reserved by Future Use Permit No. 1088-2 from Rapid Creek. This Future Use Permit has a priority date of June 28, 1971.

2. In particular, the city proposes to increase the diversion rate authorized by the vested right by an additional 2.09 c.f.s., to add 16 acres of land to be irrigated and to increase the annual volume limitation by 48 acre feet. The application also seeks to change the location of irrigated acres authorized by Vested Right No. 2294-2 in Meadowbrook Golf Course. In addition, the application requests that 0.01 c.f.s. of the requested diversion rate increase be used as a flow-through for a golf course pond on the No. 18 green.

3. The effect of approval of this application would be to increase the allowable diversion rate for the project from 1.48 cubic feet per second by 2.09 cubic feet per second to a total of 3.57 cubic feet per second.

4. SDCL 46-5-6 states that "the amount [of water] allowed shall not be in excess of the rate of one cubic feet of water per second for each seventy acres, or the equivalent thereof. . . ." The present application seeks one c.f.s. per 33.6 acres on an instantaneous basis. The daily pumping time will be restrained by the Final Decision to 11.5 hours per day. Thus, the application of water to the land will be at the rate of one c.f.s. per 70 acres on a daily basis or the same amount as allowed by SDCL 46-5-6.

5. The application, as noted, also seeks to add an additional 16 acres of irrigated land. In addition, it seeks to allow irrigation of those 16 acres at a rate of three acre feet per year. The increased acreage cannot, of course, be considered

part of the water right created in 1877 and therefore the strictures of SDCL 46-5-6 are applicable to it.

6. The Board finds that the application of three acre feet per year on a golf course is reasonable and allowable under SDCL 46-5-6.

7. While the opponents to the permit have made general allegations that the allowance of the 3.57 c.f.s. instantaneous diversion will be harmful to them they have not demonstrated this to be the case. The Board especially takes note of the fact that the diversion under this permit will take place during the evening and nighttime hours and that the diversion for irrigation systems most commonly takes place during the day. This should alleviate the potential of interference.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter.

2. SDCL 46-5-6 allows the Board to authorize the application of water at a rate in excess of one cubic feet per second for each 70 acres on an instantaneous basis if, and only if, the rate is not in excess of one cubic feet of water per second on a daily basis. The rate of water approved by this permit is at the statutorily allowable rate of one cubic feet per second for each 70 acres on a daily basis.

3. The Board has authority under SDCL 46-5-6 to grant a new permit to allow up to three c.f.s. for water to accommodate particular irrigation requirements and conditions. Those conditions have been met in this case.

4. The Board has today simultaneously validated 104 acres as covered by the additional water right and has also allowed the change in the location of those 104 acres. Nonetheless, only 104 acres are covered by the vested water right. The Final Permit issued to the applicant and the license issued to the applicant shall specify which 104 acres are covered by the vested water right. This will ensure an orderly shut-down in times of water shortage, should such occur.

FINAL DECISION

The Application for Water Right No. 2276-2 to increase the diversion rate, add acres and change the location of acres irrigated in Meadowbrook Golf Course is granted as qualified below.

1. The Chief Engineer shall ensure that the permits and licenses in this case contain accurate reference to the 104 acres which are covered by the vested right.

2. Unappropriated water associated with the June 28, 1971, priority date is available in Rapid Creek to reasonably satisfy this permit only through contract between the City of Rapid City and the Bureau of Reclamation for releases from Deerfield and Pactola Reservoirs.

3. Approval of Permit No. 2276-2 limits the number of hours of irrigation per day to a corresponding equivalent time period as if irrigating at a rate of 1.71 c.f.s. for 120 acres. At a pumping rate of 3.57 c.f.s., the pumping time may not exceed

11.5 hours per day. The total amount of water applied shall not exceed 3 acre feet per acre per year.

4. A meter shall be installed at the pump site to monitor the volume of water pumped. The amount of water diverted shall be reported to the Chief Engineer, annually, on the irrigation water use questionnaire.

Dated this ____ day of _____, 1994.

BY THE BOARD:

d-wmb7.jpg(deo)

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF VESTED WATER)
RIGHT CLAIM NO. 2294-2 AND) CERTIFICATE OF SERVICE
WATER PERMIT APPLICATION NO.)
2276-2; CITY OF RAPID CITY)

The undersigned hereby certifies that true and correct copies of proposed Findings of Fact, Conclusions of Law, and Final Decision of the Water Management Board in the above-captioned matter were served by first class United States mail, postage prepaid, on this 5th day of August, 1994, upon the following:

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

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

Marian Gunderson
811 W. Third
Yankton, SD 57078-3702

Joel Rickenbach
P.O. Box 97
Oelrichs, SD 57763-0097

Bernita Loucks
219 42nd Street
Rapid City, SD 57702-2123

Leo Holzbauer
R.R. 1, Box 170
Wagner, SD 57380-9681

Dwayne A. Rollag
320 Lincoln Ln S.
Brookings, SD 57006-2741

Dan Bjerke
300 6th Street
Rapid City, SD 57701

Bob Jackson
City Attorney
300 6th Street
Rapid City, SD 57701

Jerry Marsh
Marsh Hereford Ranch, Inc.
HCR 36, Box 35
Caputa, SD 57725

Jerry Hammerquist, President
Rapid Valley Water Cons. Dist.
Box 26
Caputa, SD 57725

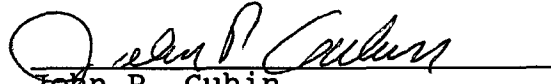
Joseph Butler
Attorney at Law
P.O. Box 2670
Rapid City, SD 57709

and sent by inter-office mail to:

John Hatch, Chief Engineer
Division of Water Rights
523 East Capitol
Pierre, SD 57501

and hand-delivered to:

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


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

d-wmb7.jpg(dco)

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF VESTED WATER) DIVISION RESPONSE TO
RIGHT CLAIM NO. 2294-2 AND) PROPOSED FINDINGS OF FACT,
WATER PERMIT APPLICATION NO.) CONCLUSIONS OF LAW AND
2276-2; CITY OF RAPID CITY) FINAL DECISION

COMES NOW the Division of Water Rights (hereinafter Division), and makes the following response in regard to the proposed Findings of Fact, Conclusions of Law and Final Decision in the above-entitled matter:

Division requests that the final two sentences of Finding of Fact 7 (page 5) (relating to water application 2276-2) be deleted from the Board's Findings of Fact and Conclusions of Law. Based on evidence presented by Division at hearing, it is Division's position that opponent's irrigation rights will not be interfered with regardless of the time of day of diversion by City of Rapid City. In other words, the daytime/nighttime distinction should not bear upon whether the application should be granted. Neither the application nor the ultimate grant of authority in this matter purports to strictly limit the timing for this water use application to evening and nighttime hours. Finding of Fact 7 appears to suggest that a limitation exists on timing for this application or for other irrigators and would be, therefore be inconsistent with the final decision in this matter and with the authority already granted to other irrigators.

Dated this 19th day of August, 1994.


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

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF VESTED WATER)
RIGHT CLAIM NO. 2294-2 AND) CERTIFICATE OF SERVICE
WATER PERMIT APPLICATION NO.)
2276-2; CITY OF RAPID CITY)

The undersigned hereby certifies that true and correct copies of Division's Response to Proposed Findings of Fact, Conclusions of Law, and Final Decision of the Water Management Board in the above-captioned matter were served by first class United States mail, postage prepaid, on this 19th day of August, 1994, upon the following:

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

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

Marian Gunderson
811 W. Third
Yankton, SD 57078-3702

Joel Rickenbach
P.O. Box 97
Oelrichs, SD 57763-0097

Bernita Loucks
219 42nd Street
Rapid City, SD 57702-2123

Leo Holzbauer
R.R. 1, Box 170
Wagner, SD 57380-9681

Dwayne A. Rollag
320 Lincoln Ln S.
Brookings, SD 57006-2741

Dan Bjerke
300 6th Street
Rapid City, SD 57701

Bob Jackson
City Attorney
300 6th Street
Rapid City, SD 57701

Jerry Marsh
Marsh Hereford Ranch, Inc.
HCR 36, Box 35
Caputa, SD 57725

Jerry Hammerquist, President
Rapid Valley Water Cons. Dist.
Box 26
Caputa, SD 57725

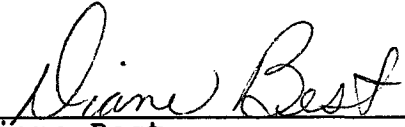
Joseph Butler
Attorney at Law
P.O. Box 2670
Rapid City, SD 57709

and sent by inter-office mail to:

John Hatch, Chief Engineer
Division of Water Rights
523 East Capitol
Pierre, SD 57501

and hand-delivered to:

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



Diane Best
Assistant Attorney General
Office of Attorney General
500 East Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215

d-wmb7.db(deo)

Bangs, McCullen, Butler, Foye & Simmons

Lawyers

818 St. Joe Street

Mailing Address P.O. Box 2670

Rapid City, South Dakota 57709-2670

605-343-1040

Telecopier 605-343-1503

Rodney W. Schlauger*

Daniel F. Duffy

Jeffrey G. Hurd

*Also admitted in Minnesota,
Nebraska and North Dakota

George A. Bangs, Of Counsel
W.A. McCullen (1943-1987)

Joseph M. Butler
Thomas H. Foye
Thomas E. Simmons
Ronald E. Clabaugh
Charles L. Riter
Allen G. Nelson
James P. Hurley
Michael M. Hickey
Mark F. Marshall
Terry L. Hofer
Patrick K. Duffy

MEMORANDUM

Recycled Paper



TO: Members of the Water Management Board, and all interested parties

FROM: Joseph Butler

DATE: August 10, 1994

RE: Matter of vested Water Right Claim No. 2294-2 and Water Permit Application No. 2276-2; City of Rapid City

Enclosed are Proposed Findings of Fact, Conclusions of Law, and Certificate of Service in connection with Water Permit Application No. 2276-2.

This is considered as service by mail upon you.

JMB/rp
Enclosure



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



IN THE MATTER OF VESTED WATER
RIGHT CLAIM NO. 2294-2 AND
WATER PERMIT APPLICATION NO.
2276-2; CITY OF RAPID CITY

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW

The opponents, Jerry Marsh, individually and as an officer, stockholder and director of Marsh Hereford Ranch, Inc., a corporation and on behalf of the Rapid Valley Water Conservancy District, and Jerry Hammerquist, individually and on behalf of the Rapid Valley Water Conservancy District, propose the following findings of fact and conclusions of law.

FINDINGS OF FACT
WITH RELATION TO WATER PERMIT APPLICATION NO. 2276-2

I.

The effect of the approval of this application would be to approve one c.f.s. per second for 33.6 acres.

II.

Opponents Marsh Hereford Ranch, Inc., a corporation and Jerry Hammerquist are the owners of irrigation water rights in the natural flows of Rapid Creek. If the permit is granted, the applicant can divert during any 11.5 hours in the day and there is no evidence in the record that irrigators on the creek irrigate only in the daytime.

III.

The natural flows in Rapid Creek will be less during the hours when the applicant diverts 1 c.f.s. for 33.6 acres than they would be if diversion were at the rate of 1 c.f.s. per second for 70 acres.

CONCLUSIONS OF LAW

I.

Water Permit Application No. 2276-2 should be denied to the extent that applicant's request exceeds the statutory limit of 1 c.f.s. per 70 acres. See SDCL 46-5-6. The statute does not contemplate that a permit could be issued which would allow more than 1 c.f.s. for 70 acres under any circumstances and it does not contemplate that a permittee can divert more than 1 c.f.s per 70

acres, even if he makes up for it by not diverting in the next second. That is in essence what the applicant is requesting.

Dated this _____ day of _____, 1994

BY THE BOARD

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

IN THE MATTER OF VESTED WATER
RIGHT CLAIM NO. 2294-2 AND
WATER PERMIT APPLICATION NO.
2276-2; CITY OF RAPID CITY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Proposed Findings of Fact, Conclusions of Law in the above-referenced matter were served by first class United States mail, postage prepaid on this 10th day of August, 1994, upon the following:

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

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

Marian Gunderson
811 W. Third
Yankton, SD 57078-3702

Joel Rickenbach
P.O. Box 97
Oelrichs, SD 57763-0097

Bernita Loucks
219 42nd Street
Rapid City, SD 57702-2123

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

Dwayne A. Rollag
320 Lincoln Ln. S.
Brookings, SD 57006-2741

Dan Bjerke
300 Sixth Street
Rapid City, SD 57701

Bob Jackson
City Attorney
300 Sixth Street
Rapid City, SD 57701

Jerry Marsh
Marsh Hereford Ranch, Inc.
HCR 36, Box 35
Caputa, SD 57725

Jerry Hammerquist, President
Rapid Valley Water Cons. Dist.
Box 26
Caputa, SD 57725

John P. Guhin
Office of Attorney General
500 East Capitol
Pierre, SD 57501-5070

which addresses are the last addresses of the addressees known to the subscriber.

Dated this 10th day of August, 1994.

Joseph M. Butler



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

August 29, 1994

MEMORANDUM

TO: Water Management Board

FROM: John P. Guhin, Deputy Attorney General 

RE: In the Matter of Vested Water Right Claim No. 2294-2
and Water Permit Application No. 2276-2; City of Rapid
City

1. The Division has recommended that the final two sentences of paragraph 7 on page 5 of the proposed Findings of Fact and Conclusions of Law be deleted. On re-examination of my notes and on re-examination of the report of the engineer on this controversy, I conclude that any evidence as to nighttime watering of the golf course was fleeting and should not be relied upon here. I therefore recommend that the final two sentences of paragraph 7 on page 5 be deleted.

2. I also recommend that the Conclusions of Law set out on pages 5-6 with regard to Water Permit Application No. 2276-1 be expanded by adding the following other conclusions:

- No. 5. There is a reasonable probability that there is unappropriated water available for the applicant's proposed use.
- No. 6. The proposed diversion can be developed without unlawful impairment of existing rights.
- No. 7. The proposed use on a golf course is a beneficial use.
- No. 8. The proposed use is in the public interest when qualified in the Final Decision.

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STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF VESTED WATER)	FINDINGS OF FACT,
RIGHT CLAIM NO. 2294-2 AND)	CONCLUSIONS OF LAW AND
WATER PERMIT APPLICATION NO.)	FINAL DECISION
2276-2; CITY OF RAPID CITY)	

FINDINGS OF FACT IN RELATION TO
VESTED WATER RIGHT CLAIM NO. 2294-2

1. The City of Rapid City requests validation of Vested Water Right Claim No. 2294-2 for the irrigation of 104 acres at the diversion rate of 1.48 cubic feet per second from the natural flows of Rapid Creek and an annual volume limitation of 312 acre feet.

2. The claim for water under this application arises from the Leedy Ditch irrigation system which was constructed in 1877 and a subsequent location certificate filed in Pennington County in 1883. The case of Sickler v. Bennett decreed 400 miner's inches for Leedy Ditch.

3. After establishment of the water right, it was split into several segments.

4. One segment of the right, for 1 c.f.s. and 19.5 acres was validated with an April 1, 1877, priority date by way of Vested Right No. 2023-2 on March 2, 1988.

5. The second portion of the original Leedy Ditch water right is that at issue here. That second portion was transferred to the City of Rapid City by way of Water Right No. 0646-2A on January 17, 1957, by way of Water Resource Commission approval. That action approved 1.48 c.f.s. for irrigation of 104 acres of the Meadowbrook Golf Course.

6. On December 10, 1986, the Water Management Board approved Water Permit No. 1998-2 to change the point of diversion for the water right at issue here from the Leedy Ditch diversion point to a point on Rapid Creek.

7. The vested right claim at issue here asserts a priority date of April 1, 1877, the same priority date previously approved for Vested Right No. 2023-2, which also originated in the Leedy Ditch irrigation right.

8. Evidence in the record, including that of the report of the Division, is to the effect that water has been continually used since the irrigation system was put into operation. There is no conflicting evidence in the record.

9. The volume of water available annually under this permit is three feet per acre annually.

CONCLUSIONS OF LAW
WITH REGARD TO VESTED WATER RIGHT CLAIM NO. 2294-2

1. The Board has jurisdiction of this matter.

2. This water has been appropriated as described for irrigation use with a priority date of April 1, 1887.

3. The use has been developed without unlawful impairment of existing rights.

4. The use to irrigate a golf course is a beneficial use.

5. The use is in the public interest in that it promotes recreation in the city of Rapid City.

6. The Board specifically rejects the assertion that SDCL 46-5-6 precludes the recognition of a vested right to apply

three acre feet of water under this vested right. First, the claimed right was developed at the rate of three acre feet of water per acre rate and the volume limitation was not in effect at the time of the development of the right. In particular, the three acre feet volume limitation did not appear in South Dakota law until 1957. See S.L. 1957, ch. 490, § 2. A two acre feet per acre limitation did not appear in South Dakota law until 1978. See S.L. 1978, ch. 308. The Board concludes that the legislature did not intend to apply either the two or three acre feet volume limitation to a water right which had been fully developed, had been recognized by court decree, and had originated prior to the passage of the 1957 and 1978 acts and prior to the passage of the critical 1907 South Dakota Water Act.

FINAL DECISION
AS TO VESTED WATER RIGHT CLAIM NO. 2294-2

The application for validation of Vested Water Right Claim No. 2294-2 is granted for the irrigation of the 104 acres identified in the application.

FINDINGS OF FACT
WITH RELATION TO WATER PERMIT APPLICATION NO. 2276-2

1. This is an application by the City of Rapid City to build upon the vested right claim No. 2294-2. The application proposes to place to beneficial use an additional 2.09 c.f.s. of water appropriated and reserved by Future Use Permit No. 1088-2 from Rapid Creek. This Future Use Permit has a priority date of June 28, 1971.

2. In particular, the city proposes to increase the diversion rate authorized by the vested right by an additional 2.09 c.f.s., to add 16 acres of land to be irrigated and to increase the annual volume limitation by 48 acre feet. The application also seeks to change the location of irrigated acres authorized by Vested Right No. 2294-2 in Meadowbrook Golf Course. In addition, the application requests that 0.01 c.f.s. of the requested diversion rate increase be used as a flow-through for a golf course pond on the No. 18 green.

3. The effect of approval of this application would be to increase the allowable diversion rate for the project from 1.48 cubic feet per second by 2.09 cubic feet per second to a total of 3.57 cubic feet per second.

4. SDCL 46-5-6 states that "the amount [of water] allowed shall not be in excess of the rate of one cubic feet of water per second for each seventy acres, or the equivalent thereof. . . ." The present application seeks one c.f.s. per 33.6 acres on an instantaneous basis. The daily pumping time will be restrained by the Final Decision to 11.5 hours per day. Thus, the application of water to the land will be at the rate of one c.f.s. per 70 acres on a daily basis or the same amount as allowed by SDCL 46-5-6.

5. The application, as noted, also seeks to add an additional 16 acres of irrigated land. In addition, it seeks to allow irrigation of those 16 acres at a rate of three acre feet per year. The increased acreage cannot, of course, be considered

part of the water right created in 1877 and therefore the strictures of SDCL 46-5-6 are applicable to it.

6. The Board finds that the application of three acre feet per year on a golf course is reasonable and allowable under SDCL 46-5-6.

7. While the opponents to the permit have made general allegations that the allowance of the 3.57 c.f.s. instantaneous diversion will be harmful to them they have not demonstrated this to be the case.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter.

2. SDCL 46-5-6 allows the Board to authorize the application of water at a rate in excess of one cubic feet per second for each 70 acres on an instantaneous basis if, and only if, the rate is not in excess of one cubic feet of water per second on a daily basis. The rate of water approved by this permit is at the statutorily allowable rate of one cubic feet per second for each 70 acres on a daily basis.

3. The Board has authority under SDCL 46-5-6 to grant a new permit to allow up to three c.f.s. for water to accommodate particular irrigation requirements and conditions. Those conditions have been met in this case.

4. The Board has today simultaneously validated 104 acres as covered by the additional water right and has also allowed the change in the location of those 104 acres. Nonetheless, only 104 acres are covered by the vested water

right. The Final Permit issued to the applicant and the license issued to the applicant shall specify which 104 acres are covered by the vested water right. This will ensure an orderly shut-down in times of water shortage, should such occur.

5. There is a reasonable probability that there is unappropriated water available for the applicant's proposed use.

6. The proposed diversion can be developed without unlawful impairment of existing rights.

7. The proposed use on a golf course is a beneficial use.

8. The proposed use is in the public interest when qualified in the Final Decision.

FINAL DECISION

The Application for Water Right No. 2276-2 to increase the diversion rate, add acres and change the location of acres irrigated in Meadowbrook Golf Course is granted as qualified below.

1. The Chief Engineer shall ensure that the permits and licenses in this case contain accurate reference to the 104 acres which are covered by the vested right.

2. Unappropriated water associated with the June 28, 1971, priority date is available in Rapid Creek to reasonably satisfy this permit only through contract between the City of Rapid City and the Bureau of Reclamation for releases from Deerfield and Pactola Reservoirs.

3. Approval of Permit No. 2276-2 limits the number of hours of irrigation per day to a corresponding equivalent time period as if irrigating at a rate of 1.71 c.f.s. for 120 acres. At a pumping rate of 3.57 c.f.s., the pumping time may not exceed 11.5 hours per day. The total amount of water applied shall not exceed 3 acre feet per acre per year.

4. A meter shall be installed at the pump site to monitor the volume of water pumped. The amount of water diverted shall be reported to the Chief Engineer, annually, on the irrigation water use questionnaire.

Dated this 9th day of September, 1994.

BY THE BOARD:

Dwayne Kelley

d-wmb7.jpg(deo)



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

September 12, 1994

NOTICE

TO: Dan Bjerke
City of Rapid City
300 6th Street
Rapid City, SD 57701-2724
(and Parties of Record)

FROM: John Hatch, Chief Engineer
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 approval of Water Permit Application No. 2276-2 and Vested Water Right Application No. 2294-2, City of Rapid City at the August 31, 1994, meeting.

A copy of the signed final Decision, Findings and Conclusions is enclosed for the applicant. Copies will be furnished to anyone else upon request. 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
Bob Jackson, Attorney, City of Rapid City, 300 6th St, Rapid City, SD 57701

CERTIFICATION

I hereby certify that on September 12, 1994, I have personally deposited with the United States Mail at Pierre, South Dakota, First Class postage, prepaid envelopes containing a Notice dated September 12, 1994, regarding Adoption of Findings of Fact, Conclusions of Law and Final Decision for approval of Water Permit Application No. 2276-2 and Vested Water Right Application No. 2294-2, City of Rapid City addressed to:

Dan Bjerke
City of Rapid City
300 6th Street
Rapid City, SD 57701-2724
and Parties of Record (as shown on the attached list)

A copy of the Notice was sent to:

Bob Jackson, Attorney, City of Rapid City, 300 6th St, Rapid City, SD 57701

A copy of the Notice was also sent by Inter-Office mail to:

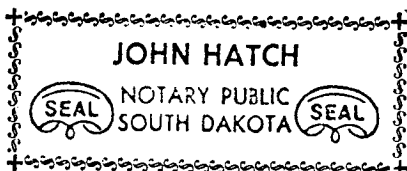
John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General

Jaci R Konop

JACI R. KONOP
Senior Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 13th day of September, 1994.



John Hatch
Notary Public

JOHN HATCH, Notary Public
My Commission Expires
April 1, 2001

Bangs, McCullen, Butler, Foye & Simmons

Lawyers

Joseph M. Butler
Thomas H. Foye
Thomas E. Simmons
Charles L. Riter
Allen G. Nelson
James P. Hurley
Michael M. Hickey
Mark F. Marshall
Terry L. Hofer
Patrick K. Duffy

818 St. Joe Street
Mailing Address P.O. Box 2670
Rapid City, South Dakota 57709-2670
605-343-1040

Telecopier 605-343-1503

October 4, 1994

Rodney W. Schlauger*
Daniel F. Duffy
Jeffrey G. Hurd
Veronica L. Bowen

*Also Admitted in Minnesota,
Nebraska and North Dakota

George A. Bangs, Of Counsel
W.A. McCullen (1943-1987)

Ms. Bonnie Fitzgerald
Clerk of Circuit Court
P.O. Box 230
Rapid City, SD 57709



Recycled Paper 

Re: Marsh Hereford Ranch, Inc., and Rapid Valley Water
Conservancy District v. State of South Dakota
Acting as the Water Management Board of the
Department of Environment and Natural Resources

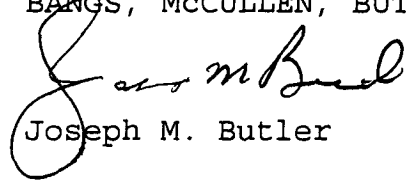
Dear Bonnie:

In regard to the above-referenced matter, please find
enclosed Appellant's Notice of Appeal.

By copy of this letter, a copy of this document has been
mailed to John P. Guhin, Deputy Attorney General; Diane Best,
Assistant Attorney General; Bob Jackson, City Attorney; Dan Bjerke,
City of Rapid City; Water Management Board; Dwayne Rollag, Water
Management Board Chairman; Francis Brink; Bernita Loucks; Marian
Gunderson; Rodney Freeman; Leo Holzbauer; and Joel Rickenbach.
This is intended as service by mail.

Sincerely,

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS


Joseph M. Butler

JMB:pkw

Enclosure

cc: John P. Guhin
Diane Best
Bob Jackson
Dan Bjerke
Water Management Board
Dwayne Rollag
Francis Brink
Bernita Loucks
Marian Gunderson
Rodney Freeman
Leo Holzbauer
Joel Rickenbach
Jerry Hammerquist
Jerry Marsh

STATE OF SOUTH DAKOTA)
 SS
PENNINGTON COUNTY)

IN THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
CIV. NO. _____

MARSH HEREFORD RANCH, INC.,)
and RAPID VALLEY WATER)
CONSERVANCY DISTRICT,)
)
 Appellants,)

vs.)

REVISED
NOTICE OF APPEAL

STATE OF SOUTH DAKOTA ACTING AS)
THE WATER MANAGEMENT BOARD OF THE)
DEPARTMENT OF ENVIRONMENT AND)
NATURAL RESOURCES,)
)
 Respondent.)

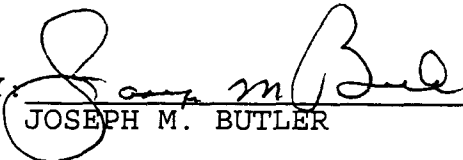
TO: RESPONDENT, THE STATE OF SOUTH DAKOTA ACTING AS THE WATER
MANAGEMENT BOARD OF THE DEPARTMENT OF ENVIRONMENT AND NATURAL
RESOURCES:

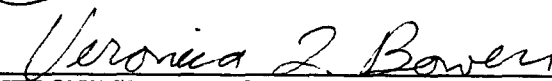
Please take notice that the above-named Appellants, pursuant
to SDCL §§ 1-26-30 through 1-26-37 hereby appeal to the Circuit
Court within and for the County of Pennington, State of South
Dakota, Seventh Judicial Circuit, from a decision of the South
Dakota Water Management Board of the Department of Natural
Resources, in re the matter of Application for Vested Water Right
Claim No. 2294-2 and Water Permit Application No. 2276-2, both
applications having been made by the City of Rapid City.

The final decision of the South Dakota Water Management Board
of the Department of Environment and Natural Resources was rendered
on September 9, 1994. Notice of that decision was served on
Appellants on September 13, 1994.

Dated this 4 day of October, 1994.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

BY: 
JOSEPH M. BUTLER

BY: 
VERONICA L. BOWEN
attorneys for
all above-named Appellants
818 St. Joseph Street; P.O. Box 2670
Rapid City, SD 57709

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of this legal document upon the persons herein next designated, all on the date below shown, by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to each said addressee, to wit:

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

Diane Best
Assistant Attorney General
Office of Attorney General
500 East Capitol
Pierre, SD 57501-5070

Bob Jackson
City Attorney
300 6th Street
Rapid City, SD 57701

Dan Bjerke
City of Rapid City
300 6th Street
Rapid City, SD 57701

Water Management Board
Department of Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

Dwayne Rollag
Chairman, Water Management Board
320 Lincoln Lane South
Brookings, SD 57006

Francis Brink
1214 S. Wells Street
Aberdeen, SD 57401

Bernita Loucks
219 42nd Street
Rapid City, SD 57702

Marian Gunderson
811 West 3rd
Yankton, SD 57078

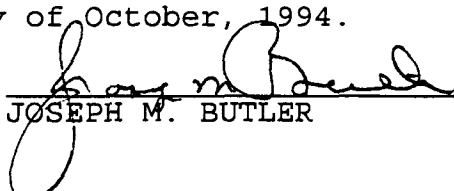
Rodney Freeman
P.O. Box 176
Huron, SD 57350

Leo Holzbauer
R.R. 1, Box 170
Waggoner, SD 57380-9681

Joel Rickenbach
P.O. Box 97
Oelrichs, SD 57763

which addresses are the last addresses of the addressees known to the subscriber.

Dated this 4 day of October, 1994.



JOSEPH M. BUTLER

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

October 6, 1994

Veronica L. Bowen
Bangs, McCullen, Butler,
Foye & Simmons
Attorneys at Law
P.O. Box 2670
Rapid City, SD 57709-2670

Re: Marsh Hereford Ranch, et al. v. State

Dear Ms. Bowen:

I received the revised Notice of Appeal on October 4, 1994. The Division of Water Rights will be preparing the certification and transmittal of the administrative record.

When the South Dakota Water Management Board made deliberations on the Findings of Fact and Conclusions of Law, board counsel Guhin referred to Findings offered by Marsh Hereford Ranch. Although at least one of your clients appears to have sent proposed Findings to the individual board members and those Findings were indeed considered by the board, I don't believe they were filed with the Division. Please provide a copy of the proposed Findings as well as any certificate of service. These matters will need to be included in the administrative agency's file in this matter.

Thank you in advance for your prompt consideration.

Sincerely,

A handwritten signature in cursive script that reads "Diane Best".

Diane Best
Assistant Attorney General

DB:do

cc: Mark Rath ✓

Bangs, McCullen, Butler, Foye & Simmons

Lawyers

Joseph M. Butler
Thomas H. Foye
Thomas E. Simmons
Charles L. Riter
Allen G. Nelson
James P. Hurley
Michael M. Hickey
Mark F. Marshall
Terry L. Hofer
Patrick K. Duffy

818 St. Joe Street
Mailing Address P.O. Box 2670
Rapid City, South Dakota 57709-2670
605-343-1040
Telecopier 605-343-1503

Rodney W. Schlauger*
Daniel F. Duffy
Jeffrey G. Hurd
Veronica L. Bowen

*Also Admitted in Minnesota,
Nebraska and North Dakota

George A. Bangs, Of Counsel
W.A. McCullen (1943-1987)

October 7, 1994

Attorney General
OCT 11 1994

Recycled Paper



Office of Attorney General
Diane Best
Assistant Attorney General
500 East Capitol
Pierre, SD 57501-5070

Re: Marsh Hereford Ranch, et al. v. State

Dear Ms. Best:

As requested in your letter of October 6, 1994, I am enclosing a copy of the proposed Findings of Fact and Conclusions of Law submitted by our clients to the Water Management Board during the administrative proceedings in the above-captioned case. Also enclosed is a copy of the Certificate of Service for the proposed findings and conclusions.

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

Sincerely,

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

Veronica L. Bowen

Veronica L. Bowen

VLB:pkw
enclosure
cc: Jerry Hammerquist
Jerry Marsh



Bangs, McCullen, Butler, Foye & Simmons

Lawyers

818 St. Joe Street
Mailing Address P.O. Box 2670
Rapid City, South Dakota 57709-2670
605-343-1040

Telecopier 605-343-1503

October 11, 1994

Rodney W. Schlauger*
Daniel F. Duffy
Jeffrey G. Hurd
Veronica L. Bowen

*Also Admitted in Minnesota,
Nebraska and North Dakota

Joseph M. Butler
Thomas H. Foye
Thomas E. Simmons
Charles L. Riter
Allen G. Nelson
James P. Hurley
Michael M. Hickey
Mark F. Marshall
Terry L. Hofer
Patrick K. Duffy

Ms. Bonnie Fitzgerald
Clerk of Circuit Court
P.O. Box 230
Rapid City, SD 57709



George A. Bangs, Of Counsel
W.A. McCullen (1943-1987)

Recycled Paper

Re: Marsh Hereford Ranch, Inc., and Rapid Valley Water
Conservancy District v. State of South Dakota Acting as the
Water Management Board of the Department of Environment and
Natural Resources

Dear Bonnie:

In regard to the above-referenced matter, please find enclosed
Appellant's Statement of Issues on Appeal.

By copy of this letter, a copy of this document has been mailed to
John P. Guhin, Deputy Attorney General; Diane Best, Assistant Attorney
General; Bob Jackson, City Attorney; Dan Bjerke, City of Rapid City;
Water Management Board; Dwayne Rollag, Water Management Board Chairman;
Francis Brink; Bernita Loucks; Marian Gunderson; Rodney Freeman; Leo
Holzbauer; and Joel Rickenbach. This is intended as service by mail.

Sincerely,

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

Joseph M. Butler
Joseph M. Butler

JMB: pkw
Enclosure

cc: John P. Guhin
Diane Best
Bob Jackson
Dan Bjerke
Water Management Board
Dwayne Rollag
Francis Brink
Bernita Loucks
Marian Gunderson
Rodney Freeman
Leo Holzbauer
Joel Rickenbach
Jerry Hammerquist
Jerry Marsh

STATE OF SOUTH DAKOTA)
 SS
PENNINGTON COUNTY)

IN THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
CIV. NO. _____

MARSH HEREFORD RANCH, INC.,)
and RAPID VALLEY WATER)
CONSERVANCY DISTRICT,)

Appellants,)

vs.)

STATE OF SOUTH DAKOTA ACTING AS)
THE WATER MANAGEMENT BOARD OF THE)
DEPARTMENT OF ENVIRONMENT AND)
NATURAL RESOURCES,)

Respondent.)

**STATEMENT OF ISSUES
ON APPEAL**

Appellants, the Marsh Hereford Ranch, Inc. and Rapid Valley Water Conservancy District, for their Statement of Issues on Appeal pursuant to SDCL § 1-26-31.4 submit the following:

I

Whether the Water Management Board erred in its interpretation of the flow limit of one cubic foot of water per second for seventy acres, which limit is set forth in SDCL § 46-5-6.

II

Whether the finding of the Water Management Board that the granting of the City of Rapid City's requests would not unlawfully impair existing rights is sufficient to provide meaningful judicial review under SDCL § 1-26-25.

III

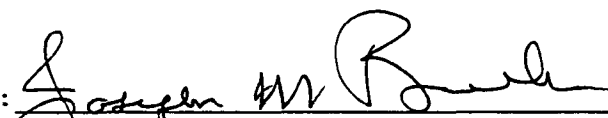
Whether the finding of the Water Management Board that the proposed purposes to which the City of Rapid City would put its requested water constitute a beneficial use is sufficient to provide meaningful judicial review under SDCL § 1-26-25.

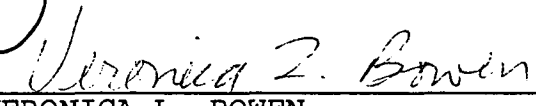
IV

Whether the finding of the Water Management Board that the granting of the City of Rapid City's requests would be in the public interest is sufficient to provide meaningful judicial review under SDCL § 1-26-25.

Dated this ____ day of October, 1994.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

BY: 
JOSEPH M. BUTLER

BY: 
VERONICA L. BOWEN
attorneys for
all above-named Appellants
818 St. Joseph Street; P.O. Box 2670
Rapid City, SD 57709

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of this legal document upon the persons herein next designated, all on the date below shown, by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to each said addressee, to wit:

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

Diane Best
Assistant Attorney General
Office of Attorney General
500 East Capitol
Pierre, SD 57501-5070

Bob Jackson
City Attorney
300 6th Street
Rapid City, SD 57701

Dan Bjerke
City of Rapid City
300 6th Street
Rapid City, SD 57701

Water Management Board
Department of Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

Dwayne Rollag
Chairman, Water Management Board
320 Lincoln Lane South
Brookings, SD 57006

Francis Brink
1214 S. Wells Street
Aberdeen, SD 57401

Bernita Loucks
219 42nd Street
Rapid City, SD 57702

Marian Gunderson
811 West 3rd
Yankton, SD 57078

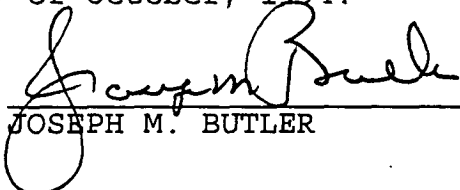
Rodney Freeman
P.O. Box 176
Huron, SD 57350

Leo Holzbauer
R.R. 1, Box 170
Waggoner, SD 57380-9681

Joel Rickenbach
P.O. Box 97
Oelrichs, SD 57763

which addresses are the last addresses of the addressees known to the subscriber.

Dated this 11th day of October, 1994.



JOSEPH M. BUTLER

Bangs, McCullen, Butler, Foye & Simmons

Lawyers

818 St. Joe Street

Mailing Address P.O. Box 2670

Rapid City, South Dakota 57709-2670

605-343-1040

Telecopier 605-343-1503

October 13, 1994

Rodney W. Schlauger*

Daniel F. Duffy

Jeffrey G. Hurd

Veronica L. Bowen

*Also Admitted in Minnesota,
Nebraska and North Dakota

George A. Bangs, Of Counsel
W.A. McCullen (1943-1987)

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Michael M. Hickey
Mark F. Marshall
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Patrick K. Duffy

Ms. Bonnie Fitzgerald
Clerk of Circuit Court
P.O. Box 230
Rapid City, SD 57709



Re: Marsh Hereford Ranch, Inc., and Rapid Valley Water
Conservancy District v. State of South Dakota Acting as the
Water Management Board of the Department of Environment and
Natural Resources

Dear Bonnie:

In regard to the above-referenced matter, enclosed is Appellant's
Order for Transcript of Proceedings.

By copy of this letter, a copy of this document has been mailed to
John P. Guhin, Deputy Attorney General; Diane Best, Assistant Attorney
General; Bob Jackson, City Attorney; Dan Bjerke, City of Rapid City;
Water Management Board; Dwayne Rollag, Water Management Board Chairman;
Francis Brink; Bernita Loucks; Marian Gunderson; Rodney Freeman; Leo
Holzbauer; Joel Rickenbach, and Capital Reporting. This is intended as
service by mail.

Sincerely,

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

Veronica L. Bowen for
Joseph M. Butler

JMB:pkw

Enclosure

cc: John P. Guhin

Diane Best

Bob Jackson

Dan Bjerke

Water Management Board

Dwayne Rollag

Francis Brink

Bernita Loucks

Marian Gunderson

Rodney Freeman

Leo Holzbauer

Joel Rickenbach

Jerry Hammerquist

Jerry Marsh

Capital Reporting

STATE OF SOUTH DAKOTA)
 SS
PENNINGTON COUNTY)

IN THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
CIV. NO. _____

MARSH HEREFORD RANCH, INC.,)
and RAPID VALLEY WATER)
CONSERVANCY DISTRICT,)

Appellants,)

vs.)

STATE OF SOUTH DAKOTA ACTING AS)
THE WATER MANAGEMENT BOARD OF THE)
DEPARTMENT OF ENVIRONMENT AND)
NATURAL RESOURCES,)

Respondent.)

**ORDER FOR TRANSCRIPT
OF PROCEEDINGS**

TO: CAPITAL REPORTING

The Marsh Hereford Ranch, Inc. and the Rapid Valley Conservancy District, Appellants, order transcripts of the hearing before the Water Management Board of the Department of Environment and Natural Resources in Pierre, South Dakota, on June 28, 1994, in the matter of Vested Water Right Claim No. 2294-2 and Water Permit Application No. 2276-2, which applications having been made by the City of Rapid City.

Notice is also given that the entire transcript shall be included as a portion of the record on appeal.

Dated this 11 day of October, 1994.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

BY: _____

JOSEPH M. BUTLER

BY: Veronica L. Bowen
VERONICA L. BOWEN
attorneys for
all above-named Appellants
818 St. Joseph Street; P.O. Box 2670
Rapid City, SD 57709

Received and acknowledged this 12th day of October,
1994. The transcripts should be completed and delivered by
Oct. 21, 1994.

Carla A. Bachand
Court Reporter

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of this legal document upon the persons herein next designated, all on the date below shown, by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to each said addressee, to wit:

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

Diane Best
Assistant Attorney General
Office of Attorney General
500 East Capitol
Pierre, SD 57501-5070

Bob Jackson
City Attorney
300 6th Street
Rapid City, SD 57701

Dan Bjerke
City of Rapid City
300 6th Street
Rapid City, SD 57701

Water Management Board
Department of Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

Dwayne Rollag
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320 Lincoln Lane South
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R.R. 1, Box 170
Waggoner, SD 57380-9681

Joel Rickenbach
P.O. Box 97
Oelrichs, SD 57763

Capital Reporting
P.O. Box 903
Pierre, SD 57501

which addresses are the last addresses of the addressees known to the subscriber.

Dated this 13th day of October, 1994.

Veronica L. Bowen
VERONICA L. BOWEN



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

October 26, 1994

Joseph Butler
Attorney at Law
PO Box 2670
Rapid City, SD 57709

Bob Jackson
City Attorney
300 6th Street
Rapid City, SD 57701

RE: In the Matter of Water Permit Application No. 2276-2 and
Vested Water Right Claim No. 2294-2, City of Rapid City

Dear Mr. Butler and Mr. Jackson:

Pursuant to SDCL 1-26-30 through 1-26-37, copies of the above-referenced files were sent to the Circuit Court, Seventh Judicial Circuit in Pennington County, State of South Dakota on October 26, 1994. Enclosed are the alphabetical and chronological indexes, and certifications for those files.

Sincerely,

Jaci R. Konop
Senior Secretary
Water Rights Division

Enc.

c: Jerry Marsh, Marsh Hereford Ranch, Inc., HCR 36 Box 35,
Caputa, SD 57725
Jerry Hammerquist, President, Rapid Valley Water Conservancy
District, Box 26, Caputa, SD 57725
Dan Bjerke, City of Rapid City, 300 6th Street,
Rapid City, SD 57701

STATE OF SOUTH DAKOTA)
 SS
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

IN THE MATTER OF WATER PERMIT) ALPHABETICAL
APPLICATION NO. 2276-2, CITY) INDEX
OF RAPID CITY)

<u>Entry</u>	<u>Document</u>	<u>Page</u>
1.	Application to Appropriate Water, Form 2, March 24, 1993	1-2
2.	Board Attorney's suggestions to Division's Response, August 29, 1994	40
3.	Division Response to Proposed Findings of Fact, Conclusions of Law and Final Decision, August 22, 1994, and certificate.	37-39
4.	Findings of Fact, Conclusions of Law and Final Decision, September 9, 1994	41-47
5.	Letter to Dan Bjerke from Eric Gronlund, March 3, 1994	12
6.	Letter to Dan Bjerke from Mark Rath, August 10, 1993	4
7.	Letter to Diane Best from Veronica L. Bowen, October 14, 1994	63
8.	Letter to Jerry Hammerquist from Mark Rath, March 4, 1994	15
9.	Letter to Jerry Marsh from Mark Rath, March 4, 1994	14
10.	Letter to John Hatch, Chief Engineer, from Jerry Hammerquist, March 30, 1994	20
11.	Letter to John Hatch, Chief Engineer, from Jerry Marsh, March 30, 1994	19
12.	Letter to Rapid City Journal from Eric Gronlund, March 3, 1994	13
13.	Letter to Veronica L. Bowen from Diane Best, October 7, 1994	54
14.	Maps	Separate

15.	Notice of Adoption of Findings of Fact, Conclusions of Law and Final Decision, September 12, 1994, and certification . . .	48-49
16.	Notice of Automatic Delay, March 30, 1994, and certification	21-22
17.	Notice of Preparation of Findings of Fact, Conclusions of Law and Final Decision, July 1, 1994, and certification	25-26
18.	Notice of Rescheduling Consideration, May 12, 1994, and certification	23-24
19.	Proof of Publication, March 17, 1994	18
20.	Proposed Findings of Fact, Conclusions of Law and Final Decision, August 8, 1994, and certificate	27-36
21.	Receipt for application fee, April 8, 1993	3
22.	Recommendation of the Chief Engineer, December 6, 1993	10
23.	Report on application, November 15, 1993	6-9
24.	Respondent's Proposed Findings of Fact, Conclusions of Law, October 14, 1994, and certificate	59-62
25.	Revised Notice of Appeal, October 5, 1994, and certification	50-53
26.	Revised recommendation of the Chief Engineer, December 20, 1993	11
27.	Shell letter w/attached interested parties from Eric Gronlund, March 4, 1994	16-17
28.	Soil/Water Compatibility Permit, October 28, 1993	5
29.	Statement of Issues on Appeal, October 12, 1994, and certification	55-58
30.	Transcript of June 28, 1994, Water Management Board meeting, with certificate, October 13, 1994, and Exhibits and Administrative Notice	Separate

STATE OF SOUTH DAKOTA)
 SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 2276-2, CITY)
OF RAPID CITY)

CHRONOLOGICAL
ORDER

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STATE OF SOUTH DAKOTA)
 : ss.
COUNTY OF PENNINGTON)

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 2276-2, CITY)
OF RAPID CITY)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

CERTIFICATION AND
TRANSMITTAL OF RECORD

I, Jaci Konop, Senior Secretary, Water Rights Division,
Department of Environment and Natural Resources, certify as
follows:

1. As Senior Secretary employed by the Water Rights
Division, Department of Environment and Natural Resources, I am
responsible for maintaining the formal agency file on all
applications to appropriate water which are subject to the
jurisdiction of the South Dakota Water Management Board.

2. Consistent with my responsibilities in the
Division of Water Rights, I have prepared a true and correct copy
of the agency record for Water Permit Application No. 2276-2.
The true and correct copy of this record is herewith transmitted
to the above-captioned reviewing court pursuant to SDCL 1-26-33.

3. In addition to the foregoing agency file, I am
herewith transmitting copies of the exhibits, administrative
notice and transcript in the above-captioned proceeding.

4. In addition, I have prepared a chronological and
alphabetical index of the agency record which is herewith
transmitted to the above-captioned reviewing court pursuant to

SDCL 1-26-33. A copy of the index submitted is also being sent to all parties of record on this date.

Dated this 26th day of October, 1994.

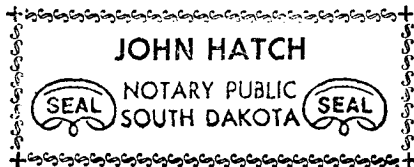
Jaci R Konop
Jaci Konop, Senior Secretary
Water Rights Division
Dept. of Environment
& Natural Resources

Subscribed and sworn to
before me this 26th day of
October, 1994

John Hatch
Notary Public

My Commission expires:
JOHN HATCH, Notary Public
My Commission Expires
April 1, 2001

SEAL



STATE OF SOUTH DAKOTA)
 SS
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

IN THE MATTER OF VESTED WATER) ALPHABETICAL
RIGHT CLAIM NO. 2294-2, CITY) INDEX
OF RAPID CITY)

<u>Entry</u>	<u>Document</u>	<u>Page</u>
1.	Affidavit of Water Use, Form 2B, October 7, 1993	4
2.	Application to Appropriate Water, Form 2, October 7, 1993	3
3.	Board Attorney's suggestions to Division's Response, August 29, 1994	40
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STATE OF SOUTH DAKOTA)
 SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

IN THE MATTER OF VESTED WATER)
RIGHT CLAIM NO. 2294-2, CITY)
OF RAPID CITY)

CHRONOLOGICAL
ORDER

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: ss.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
IN THE MATTER OF VESTED WATER	)	CERTIFICATION AND
RIGHT CLAIM NO. 2294-2, CITY	)	TRANSMITTAL OF RECORD
OF RAPID CITY	)	

I, Jaci Konop, Senior Secretary, Water Rights Division, Department of Environment and Natural Resources, certify as follows:

1. As Senior Secretary employed by the Water Rights Division, Department of Environment and Natural Resources, I am responsible for maintaining the formal agency file on all applications to appropriate water which are subject to the jurisdiction of the South Dakota Water Management Board.

2. Consistent with my responsibilities in the Division of Water Rights, I have prepared a true and correct copy of the agency record for Vested Water Right Claim No. 2294-2. The true and correct copy of this record is herewith transmitted to the above-captioned reviewing court pursuant to SDCL 1-26-33.

3. In addition to the foregoing agency file, I am herewith transmitting copies of the exhibits, administrative notice and transcript in the above-captioned proceeding.

4. In addition, I have prepared a chronological and alphabetical index of the agency record which is herewith transmitted to the above-captioned reviewing court pursuant to

SDCL 1-26-33. A copy of the index submitted is also being sent to all parties of record on this date.

Dated this 26th day of October, 1994.

Jaci R Konop
Jaci Konop, Senior Secretary
Water Rights Division
Dept. of Environment
& Natural Resources

Subscribed and sworn to
before me this 26th day of
October, 1994

John Hatch
Notary Public

My Commission expires:

JOHN HATCH, Notary Public
My Commission Expires
April 1, 2001

SEAL



Bangs, McCullen, Butler, Foye & Simmons

Lawyers

Joseph M. Butler
Thomas H. Foye
Thomas E. Simmons
Charles L. Riter
Allen G. Nelson
James P. Hurley
Michael M. Hickey
Mark F. Marshall
Terry L. Hofer
Patrick K. Duffy

818 St. Joe Street
Mailing Address P.O. Box 2670
Rapid City, South Dakota 57709-2670
605-343-1040

Telecopier 605-343-1503
November 3, 1994

Rodney W. Schlauger*
Daniel F. Duffy
Jeffrey G. Hurd
Veronica L. Bowen

*Also Admitted in Minnesota,
Nebraska and North Dakota

George A. Bangs, Of Counsel
W.A. McCullen (1943-1987)

Ms. Bonnie Fitzgerald
Clerk of Circuit Court
P.O. Box 230
Rapid City, SD 57709



Recycled Paper



Re: Marsh Hereford Ranch, Inc., and Rapid Valley Water
Conservancy District v. State of South Dakota Acting as the
Water Management Board of the Department of Environment and
Natural Resources

Dear Bonnie:

In regard to the above-referenced matter, enclosed is Appellant's
Brief.

By copy of this letter, a copy of this document has been mailed to
John P. Guhin, Deputy Attorney General; Diane Best, Assistant Attorney
General; Bob Jackson, City Attorney; Dan Bjerke, City of Rapid City;
Water Management Board; Dwayne Rollag, Water Management Board Chairman;
Francis Brink; Bernita Loucks; Marian Gunderson; Rodney Freeman; Leo
Holzbauer; and Joel Rickenbach. This is intended as service by mail.

Sincerely,

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

Veronica L. Bowen for
Joseph M. Butler

JMB:pkw

Enclosure

cc: John P. Guhin
Diane Best
Bob Jackson
Dan Bjerke
Water Management Board
Dwayne Rollag
Francis Brink
Bernita Loucks
Marian Gunderson
Rodney Freeman
Leo Holzbauer
Joel Rickenbach
Jerry Hammerquist
Jerry Marsh

STATE OF SOUTH DAKOTA)
 SS
PENNINGTON COUNTY)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

Court File No. C95-289

MARSH HEREFORD RANCH, INC. and
RAPID VALLEY WATER CONSERVANCY DISTRICT,

Appellants,

vs.

STATE OF SOUTH DAKOTA ACTING AS THE
WATER MANAGEMENT BOARD OF THE
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES,

Respondent.

APPEAL TO THE CIRCUIT COURT, SEVENTH JUDICIAL
CIRCUIT, PENNINGTON COUNTY, SOUTH DAKOTA,
FROM THE DECISION OF THE WATER MANAGEMENT
BOARD OF THE DEPARTMENT OF ENVIRONMENT AND
NATURAL RESOURCES GRANTING THE APPLICATION
OF THE CITY OF RAPID CITY REGARDING
VESTED WATER RIGHT CLAIM NO. 2294-2 AND
WATER PERMIT APPLICATION NO. 2276-2

THE HONORABLE MERTON B. TICE, JR., PRESIDING JUDGE

APPELLANT'S BRIEF

JOSEPH M. BUTLER
VERONICA L. BOWEN
Bangs, McCullen, Butler,
Foye & Simmons
818 St. Joseph St.; P.O. Box 2670
Rapid City, SD 57709
(605) 343-1040

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PRELIMINARY STATEMENT

Marsh Hereford Ranch, Inc. and Rapid Valley Water Conservancy District (Appellants) appeal from a decision of the Water Management Board of the Department of Environment and Natural Resources (Board) to grant applications made by the City of Rapid City (City) concerning Water Permit Application No. 2276-2 and Vested Right No. 2294-2. A hearing was held before the Board regarding the City's applications on June 28, 1994. The Board voted to grant the applications at the conclusion of that meeting. A written decision was issued by the Board on September 9, 1994. Appellants filed their Notice of Appeal on October 3, 1994, within the 30-day limit set forth by SDCL § 1-26-31, thus vesting this Court with jurisdiction over this appeal.

References to the transcript of the hearing before the Board will be designated as "Tr. ____." References to the Administrative Record concerning Water Permit Application No. 2276-2 will be designated as "Ar. ____." References to the Administrative Record concerning Vested Right No. 2294-2 will be designated as "Ar. V.R. ____."

FACTUAL BACKGROUND

On October 5, 1993, the City requested validation of its Vested Water Right Claim No. 2294-2 for the irrigation of 104 acres on Meadowbrook Golf Course. Ar. V.R. 3. The proposed validation requested a diversion rate of 1.48 cubic feet per second (c.f.s.) from the natural flows of Rapid Creek and an annual volume limitation of 312 acre-feet. Ar. V.R. 3.

On March 23, 1993, the City filed Water Permit Application No. 2276-2. Ar. 1. In this application, the City sought to expand its Vested Right Claim No. 2294-2 by making beneficial use of an additional 2.09 c.f.s. of water appropriated and reserved by Future Use Permit No. 1088-2 from Rapid Creek. Ar. 6-7. The City proposed to increase the acreage which it irrigated by an additional 16 acres located on the Meadowbrook Golf Course and the City sought to increase the annual volume limitation by 48 acre-feet. Id. In addition, the City sought to change the location of irrigated acres authorized by Vested Right No. 2294-2 and to use .01 c.f.s. of the requested diversion rate increase as a flow-through for a golf course pond on the number 18 green. Ar. 7.¹

On November 15, 1993, engineers within the Department of Environment and Natural Resources, Water Rights Division, recommended granting the City's applications. Ar. 6-9. Although the engineers acknowledged that granting the City's applications would result in the statutory diversion rate of 1 c.f.s per 70 acres being exceeded, the report recommended curing this problem by limiting the City to pumping for only 11.5 hours out of every 24 hours. Id. On December 6, 1993, John Hatch, the Chief Engineer of the Water Rights Division, Department of Natural Resources,

¹The application for Water Permit No. 2276-2 was filed prior to the application requesting validation of Vested Right No. 2294-2. It was only after the Board began investigating the City's water permit application seeking to expand the City's vested right that the Board discovered that the City's vested right had never been advertised or validated. Thus, after the Board made its discovery, it advised the City to also seek validation of its vested right. Ar. 4.

recommended deferral of the City's applications "to allow additional time to review the application[s]." Ar. 10. On December 20, 1993, the Chief Engineer reversed his position and recommended approval of the applications. Ar. 11.

After notice of the City's applications were published in the Rapid City Journal in March 1994, Ar. 18, the Appellants filed a Notice of Opposition to the Applications with the Board. Ar. 19-20. Appellants' written opposition objected to inter alia the granting of a diversion rate in excess of 1 c.f.s. per 70 acres as to either of the City's proposals. Id. A hearing was held on the matter on June 28, 1994, in Pierre, South Dakota. Tr. 1-2.

At that hearing, Appellants argued that the statutory diversion rate limitation of 1 c.f.s. per 70 acres should be observed by the Board in ruling on the City's applications. Tr. 8-9, 11-12. Appellants testified that they and other downstream appropriators have pumps which are affected by variations in the flow of Rapid Creek. Tr. 11. Appellants argued that the City should not be allowed to dramatically affect stream flows every 12 hours without attempting to ensure that "flows downstream will remain at some constant and predictable level." Tr. 11-12.

Mark Rath, a Natural Resources Engineer with the Department of Environment and Natural Resources, Water Rights Division, also testified. Mr. Rath explained that the genesis of the City's applications was an inspection which Mr. Rath conducted in the summer of 1992. Tr. 3. At the time of the inspection, the City was irrigating 16 acres more than they were allowed to irrigate

under their vested right and the City was diverting water at a greater rate than allowed under existing permits. Tr. 3. Therefore, Mr. Rath suggested that the City make an application for the increased number of acres and the greater diversion rate. Tr. 3-4. Mr. Rath acknowledged that the City's requested diversion rate would result in exceeding the 1 c.f.s per 70 acres allowed by statute, but informed the Board that by limiting the City to pumping only 11.5 hours out of every 24, the City's use would be brought into compliance with the statutory requirements. Tr. 4-5.

Diane Best of the Attorney General's office pointed out that the expression of the statutory diversion rate limitation is followed by the words "or the equivalent thereof." Tr. 15. Ms. Best suggested to the Board that this phrase gave the Board latitude to fix a particular diversion rate for a specific permit by reference to a daily average. Id.

Ron DuVall also testified at the hearing. Tr. 20-22. He informed the Board that, in considering granting a permit, the Board must consider "whether or not there's unlawful impairment to existing rights, and of course pumping at a greater rate is going to affect the stream flow downstream and that's something you need to take into account." Tr. 21.

Finally, Mr. [Joel] Rickenbach, a member of the Board, wondered whether permitting the City to alter the statutory diversion rate might not result in a downstream irrigator being deprived of water. Tr. 21. In response to Mr. Rickenbach's concern, Mr. DuVall responded that he could not guaranty that

altering the flow rate would not cause problems to other irrigators. Tr. 22.

The Board decided to grant the application made by the City, and asked its attorney to submit proposed Findings of Fact and Conclusions of Law. Tr. 23, Ar. 25. Appellants also submitted proposed Findings and Conclusions. Ar. 59-62. The Board ultimately adopted the amended Findings and Conclusions of its own attorney, which decision is memorialized in a written document dated September 9, 1994. Ar. 41-47.

The Board's written decision stated that the City is granted an annual volume of 3 acre-feet per year to be diverted at a rate of 3.57 c.f.s for 120 acres total. Ar. 43-46. Recognizing that the diversion rate allowed by the Board exceeded the statutory rate of 1 c.f.s. per 70 acres, the Board limited the City to pumping for only 11.5 hours per day. Ar. 47. Thus, if the City's diversions were averaged out over a 24-hour period, the diversion rate would not exceed 1 c.f.s. per 70 acres. Ar. 44-45. The Board interpreted SDCL § 46-5-6 to authorize such diversions. Ar. 45. The Board stated that although appellants had "made general allegations that the allowance of the 3.57 c.f.s. instantaneous diversion will be harmful to them they have not demonstrated this to be the case." Ar. 45.

Applicants filed this appeal of the Board's decision within thirty days after receipt of the Board's written decision. Ar. 51-53. See SDCL § 1-26-31.

ARGUMENT

A. Standard of Review

Appeals to the circuit court of decisions of an administrative agency are governed by SDCL §§ 1-26-36 and 1-26-37. Questions of law decided by the agency are reviewable de novo by the circuit court. Hendrix v. Graham Tire Co., 520 N.W.2d 876, 879 (S.D. 1994); In re State and City Sales Tax Liability of Quality Service Railcar Repair Corp., 437 N.W.2d 209, 210-11 (S.D. 1989); Permann v. Dept. of Labor, 411 N.W.2d 113, 115-17 (S.D. 1987). Questions of fact decided by the agency are subject to reversal only if clearly erroneous. Hendrix, 520 N.W.2d at 879; Quality Service Railcar Repair Corp., 437 N.W.2d at 211; Permann, 411 N.W.2d at 115-17.

Appellants request judicial review of decisions of the Board concerning both questions of law and questions of fact. Whether the Board properly interpreted the diversion rate limitation of SDCL § 46-5-6 raises a question of law. Whether the Board properly found that the City's proposals would not unlawfully impair existing rights, would be in the public interest, and would be for a beneficial use raises questions of fact.

B. The Board Erred in Interpreting the Diversion Rate Restriction Contained in SDCL § 46-5-6

South Dakota limits the amount of water available for appropriation for irrigation as follows:

In the issuance of permits to appropriate water for irrigation or in the adjudication of rights to the use of water for such purpose, the amount allowed shall not be in excess of the rate of one cubic foot of water per second for each seventy acres, or the equivalent thereof,

and the volume of water diverted for such use shall not exceed two acre-feet per acre, delivered on the land for a specified time each year. The water management board may allow a greater diversion where the method of irrigation stipulated in the permit or the type of soil to which the water is to be applied so requires except that in no case may the diversion be greater than three acre-feet per acre delivered to the land. The above rate of one cubic foot per second for each seventy acres shall not apply in cases of flood water at such times when the flow of the stream is much in excess of the total recorded and approved rights on the stream.

SDCL § 46-5-6 (emphasis supplied). The above statute sets forth two limits on appropriation permits for irrigation: (1) a limit on the total volume of water to be granted; and (2) a limit on the rate at which that water can be diverted from the stream. The standard of measurement for the total volume of water granted under an irrigation permit is the acre-foot. SDCL § 46-1-7.² The standard of measurement of the rate of flow of water is the cubic foot per second of time. Id. Therefore, under SDCL § 46-5-6, water rights granted under an irrigation permit cannot exceed a total volume of 3 acre-feet, to be diverted at a rate not to exceed 1 c.f.s. per 70 acres, "or the equivalent thereof," except in times of flood.

The permit which the Board granted to the City allows the City to exceed the statutory diversion rate by pumping at a rate of 3.57 c.f.s for 120 acres, or the equivalent of 2.08 c.f.s. for each 70 acres. Recognizing that the permit would allow the City to divert water at approximately twice the statutory diversion rate, the Board limited the City to pumping for 11.5 hours out of every 24-

²An acre-foot is the amount of water necessary to cover an acre of land to a depth of one foot. SDCL § 46-1-7.

hours. Appellants argue that this is an improper legal interpretation of SDCL § 46-5-6 by the Board. The Court reviews the legal interpretation of SDCL § 46-5-6 by the Board de novo. Hendrix, 520 N.W.2d at 879; In re State and City Sales Tax Liability of Quality Service Railcar Repair Corp., 437 N.W.2d at 210-11; Permann, 411 N.W.2d at 115-17.

The Board's imposition of a "daily average" gloss on an otherwise clear statute is unwarranted. In interpreting South Dakota statutes, "[w]ords used are to be understood in their ordinary sense. . . ." SDCL § 2-14-1. Section 46-5-6 sets forth a diversion rate limitation expressed in cubic feet per second. The legislature could easily have expressed a limitation in terms of each 24-hour period if it so wished, but it did not. Therefore, diversions under section 46-5-6 must adhere to the per second limitation. There is no ambiguity in the statute.

The Attorney General's office argued before the Board that the words "or the equivalent thereof" following the diversion rate limitation gave the Board discretion to grant permits with diversion rates based on a "daily average." Tr. 15. However, this argument must fail for at least two reasons. First, the phrase "or the equivalent thereof" clearly means that if one has 140 acres, one is entitled to 2 c.f.s. and if one has 210 acres, one is entitled to 3 c.f.s. In other words, "the equivalent thereof" merely means that the proportion of 1:70 may be extrapolated out to fit circumstances where the irrigator has acres of land either less than or greater than the stated 70 acres.

The Attorney General's proposed interpretation of the phrase "or the equivalent thereof" is untenable for yet another reason: it is devoid of standards. If the phrase, as the Attorney General's office argued, permits the Board to create a daily average for an irrigator's permit, why would it not also permit the Board to create an average for each 48 hours, 72 hours, a week, or a month? The answer is that there is nothing which would prevent such averaging under the Board's interpretation. An irrigator could conceivably "save up" all the water to which he is entitled for an entire season and use it all in August. As long as the average of the irrigator's diversions did not exceed 1 c.f.s. per 70 acres, this practice would be permissible under the Board's interpretation of SDCL § 46-5-6. Once the Board is allowed to depart from the standard of measurement for the rate of diversion--per second--there is no basis for limiting irrigators' practices.

Obviously, this would wreak havoc with the permitting system provided for under South Dakota law. If every irrigator "saved up" his allotted water until he decided to use it and then tried to divert several days' or weeks' or months' worth of water all at once, there would be insufficient stream flows to meet all the permits issued. Even more important, however, is the fact that it would become impossible to predict the stream flows at any given time.

In issuing each new permit, the Board is required to find that "there is a reasonable probability that unappropriated water is

available for the applicant's proposed use, [and] that the proposed diversion can be developed without unlawful impairment of existing rights. . . ." SDCL § 46-2A-9. The Board can make these findings only if the water appropriated under existing permits is being diverted at a predictable rate for predetermined volumes. Under the averaging approach used by the Board, stream flows would be impossible to anticipate. This lends support to the Appellants' argument that the South Dakota Legislature intended the diversion rate limitation of section 46-5-6 to be interpreted literally--as a per second limitation. Otherwise, it would be impossible for the Board to make its required findings under SDCL § 46-2A-9 when granting new permits. The legislature should not be presumed to have set forth a task for the Board which is incapable of being performed.

Appellants respectfully request that the Court reverse the Board's decision insofar as it interprets SDCL § 46-5-6 to allow for a "daily average."

C. The Board's findings that the City's proposals could be granted without unlawfully impairing existing rights, that the proposed use is beneficial, and that the proposed use is in the public interest are incapable of providing meaningful judicial review.

Before granting the City's permit to appropriate water, the Board was required to find 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. See also SDCL § 46-2A-7 (stating that the Board shall approve permits when the Board determines, based on the

evidence presented at the hearing, that the requirements for granting a permit have been met).

Decisions which constitute final agency actions require the agency to make findings of fact and conclusions of law. SDCL § 1-26-25. If the agency sets forth its findings of fact in statutory language, the findings "shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." Id. (emphasis supplied).

The written decision of the Board granting the City's applications contains findings of fact set forth in statutory language. Ar. 42, 26.³ That is, the findings contain the conclusory statements that granting the City's applications will not unlawfully impair existing rights, will be for a beneficial use, and will be in the public interest. Id. As such, the Board was required to set forth the underlying facts supporting these conclusions. See SDCL § 1-26-25. This the Board failed to do.

The September 9, 1994, decision of the Board does not recite what underlying facts it found to support its determination that the City's proposed uses would not unlawfully impair existing rights. In fact, there was no evidence of non-impairment presented at the hearing. The only evidence presented at all on this issue was to the contrary--that existing rights would be impaired.

³Actually, although the Board was required to make these findings, they are not located in the portion of the Board's decision entitled "Findings of Fact." Rather, these findings are located in the portion of the Board's decision entitled "Conclusions of Law." Regardless of how they are labeled, the Board's findings are deficient under SDCL § 1-26-25.

Appellants testified at the hearing before the Board that they and other downstream appropriators have pumps which are affected by variations in the flow of Rapid Creek. Tr. 11. Appellants argued that granting the City's application would dramatically affect stream flows to the detriment of themselves and other downstream users. Tr. 11-12. In addition, in response to a question from a Board member, Ron DuVall testified that he could not guaranty that altering the diversion rate would not cause problems for other irrigators. Tr. 22.

The Board dismissed this testimony as being a mere allegation of harm without proof. Ar. 45. However, the Board was required to do more than state which evidence it discredited. The Board was required to affirmatively state what underlying evidence it relied upon to find that there would be no impairment. Merely dismissing Appellants' evidence does not satisfy the requirements of SDCL § 1-26-25.

Similarly, the Board was required to find that the City's proposed uses were beneficial uses and were in the public interest. Although the Board issued conclusory findings to that effect, there is no recitation of the underlying facts upon which the Board relied to arrive at these conclusions. Ar. 42, 46.

The record before this Court does not differ materially from the record before the South Dakota Supreme Court in In re Application of SDDS, Inc., for a Solid Waste Permit, 472 N.W.2d 502 (S.D. 1991). In that case, an application was made to the Board of Minerals and Environment for a solid waste disposal permit. Id. at

504. By statute, the board was required to find in a contested case that granting a solid waste permit would be in the public interest. Id. at 512 (citing SDCL § 34A-6-1.13). The board, in its final decision, made the finding that "[g]ranting the Permit is in the public interest." Id.

The court stated that SDCL § 1-26-25 was intended to force agencies to do more than make a mere statement of a general conclusion in the statutory language. Id. (citing notes to the National Conference of Commissioners on Uniform State Laws, which had created the Model State Administrative Procedure Act from which SDCL § 1-26-25 was drawn). Rather, the statute was intended to force agencies to articulate the basic or underlying facts which led the agency to believe that the statutory requirement had been met. Id. (citing Saginaw Broadcasting Co. v. F.C.C., 96 F.2d 554 (D.C. Cir. 1938)). The SDDS court concluded that the board had not fulfilled its duty under SDCL § 1-26-25 and the case was remanded back to the agency for the entry of appropriate findings. Id. at 512-13. See also Lemke v. Rabenberg's Inc., 89 S.D. 386, 392, 233 N.W.2d 336, 339 (1975) (concluding that the failure of agency findings to indicate the underlying facts effectively forecloses judicial review).

The same result should obtain in the instant case. The Board has not articulated what basic or underlying facts it relied upon in finding that there would be no unlawful impairment of existing rights, that the proposed use would be beneficial, and that the proposed use would be in the public interest. See Ar. 41-47. This

Court must not "speculate or guess what portions of the [administrative] record were relied on by the Board in" making its findings. In re Application of SDDS, Inc., for a Solid Waste Permit, 472 N.W.2d at 513. The Board's findings are not sufficient to provide meaningful judicial review and the case must be reversed and remanded to the agency for further proceedings.

CONCLUSION

The Board has committed two errors which require reversal and remand back to the Board. First, the Board has erroneously interpreted the diversion rate restriction contained in SDCL § 46-5-6 by imposing a "daily average" gloss on the statute which is unwarranted and unworkable. Second, in violation of SDCL § 1-26-25, the Board failed to articulate the basic or underlying facts in support of its findings that granting the City's proposals would not unlawfully impair existing rights, would be a beneficial use, and would be in the public interest. Therefore, judicial review of these findings of the Board is foreclosed.

REQUEST FOR ORAL ARGUMENT

Appellants hereby request oral argument on all issues raised by this appeal. See SDCL § 1-26-33.5.

Dated this 3d day of November 1994.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

BY: Joseph M. Butler
JOSEPH M. BUTLER

BY: Veronica L. Bowen
VERONICA L. BOWEN
attorneys for
all above-named Appellants
818 St. Joseph Street; P.O. Box 2670
Rapid City, SD 57709

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of this legal document upon the persons herein next designated, all on the date below shown, by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to each said addressee, to wit:

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

Diane Best
Assistant Attorney General
Office of Attorney General
500 East Capitol
Pierre, SD 57501-5070

Bob Jackson
City Attorney
300 6th Street
Rapid City, SD 57701

Dan Bjerke
City of Rapid City
300 6th Street
Rapid City, SD 57701

Water Management Board
Department of Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

Dwayne Rollag
Chairman, Water Management Board
320 Lincoln Lane South
Brookings, SD 57006

Francis Brink
1214 S. Wells Street
Aberdeen, SD 57401

Bernita Loucks
219 42nd Street
Rapid City, SD 57702

Marian Gunderson
811 West 3d
Yankton, SD 57078

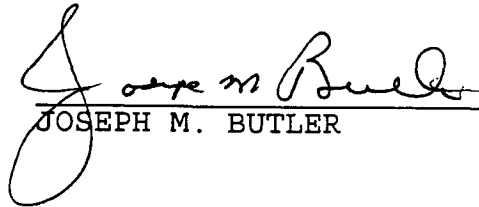
Rodney Freeman
P.O. Box 176
Huron, SD 57350

Leo Holzbauer
R.R. 1, Box 170
Waggoner, SD 57380-9681

Joel Rickenbach
P.O. Box 97
Oelrichs, SD 57763

which addresses are the last addresses of the addressees known to the subscriber.

Dated this 3rd day of November 1994.



JOSEPH M. BUTLER



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

November 22, 1994

Robert Jackson
City Attorney
City of Rapid City
300 6th Street
Rapid City, SD 57701



Re: Marsh Hereford Ranch, Inc., and Rapid Valley Water Conservancy District v. State of South Dakota acting as the Water Management Board of the Department of Environment and Natural Resources, (CIV. 95-289)

Dear Bob:

Enclosed find the original Joint Motion for Extension of Time and Order Approving Joint Motion in the above-referenced matter. If you find the Motion to be acceptable, please forward to Judge Tice for his signature and return a copy to me.

Thank you in advance for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Diane Best".

Diane Best
Assistant Attorney General

DB:mjj
Enclosures
cc: John E. Haak
John Hatch
Veronica Bowen and Joseph Butler

STATE OF SOUTH DAKOTA)
 : ss.
PENNINGTON COUNTY)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

MARSH HEREFORD RANCH, INC.,)
and RAPID VALLEY WATER)
CONSERVANCY DISTRICT,)
)
 Appellants,)

(CIV. 95-289)

v.

JOINT MOTION
FOR EXTENSION
OF TIME

STATE OF SOUTH DAKOTA ACTING)
AS THE WATER MANAGEMENT BOARD)
OF THE DEPARTMENT OF)
ENVIRONMENT AND NATURAL)
RESOURCES, and CITY OF)
RAPID CITY,)
)
 Respondents.)

COMES NOW, the Respondents/Appellees in the
above-entitled matter, by and through their respective attorneys,
and hereby move this Court, pursuant to SDCL 1-26-33.2, for
fifteen days additional time to file responsive briefs. The
basis of this request is as follows:

1. Under SDCL 1-26-33.2, an appellee is required to
serve its responsive brief within thirty days after the service
of the brief of Appellant unless "otherwise ordered by the
circuit court." This motion requests that the court grant the
fifteen days in addition to the thirty day period.

2. Counsel for Appellants Marsh Hereford Ranch, Inc.,
and Rapid Valley Water Conservancy District, have been contacted
and have agreed to the additional fifteen-day period. There are
no other parties to this appeal.

3. The fifteen-day period is being requested for additional time to research and draft the respective Appellate briefs.

Dated this ____ day of November, 1994.



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

Robert R. Jackson
City Attorney
City of Rapid City
300 6th Street
Rapid City, SD 57701

STATE OF SOUTH DAKOTA)
 : ss.
PENNINGTON COUNTY)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

MARSH HEREFORD RANCH, INC.,)
and RAPID VALLEY WATER)
CONSERVANCY DISTRICT,)
)
Appellants,)

v.)

ORDER APPROVING
JOINT MOTION

STATE OF SOUTH DAKOTA ACTING)
AS THE WATER MANAGEMENT BOARD)
OF THE DEPARTMENT OF)
ENVIRONMENT AND NATURAL)
RESOURCES and CITY OF)
RAPID CITY,)
)
Respondents.)

Respondents/Appellees having moved this Court for an extension of time to submit their briefs in the above-entitled matter, and the Court having considered the motion and finding good cause therein, it is

ORDERED that the Motion is granted. The time for filing of Appellees' briefs shall be extended for an additional fifteen days from the present due date.

Dated this ____ day of November, 1994.

BY THE COURT:

The Honorable Merton B. Tice Jr.
Circuit Court Judge

ATTEST:

Pennington Clerk of Court

By: _____
Deputy

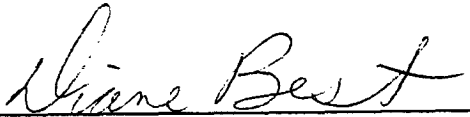
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Motion and Order for Extension of Time in the matter of Marsh Hereford Ranch, Inc., and Rapid Valley Water Conservancy District v. State of South Dakota Acting as the Water Management Board of the Department of Environment and Natural Resources, were served by United States mail, first class, postage prepaid upon:

Veronica Bowen and
Joseph Butler
Attorneys at Law
P.O. Box 2670
Rapid City, SD 57709

on this ____ day of November, 1994.



Diane Best
Assistant Attorney General

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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

December 16, 1994

Robert Jackson
City Attorney
300 6th Street
Rapid City, SD 57701

Joseph Butler
Veronica L. Bowen
P.O. Box 2670
Rapid City, SD 57709

Re: **Marsh Hereford Ranch et al. v. Water Management Board
et al.**

Enclosed find a copy of Brief of Appellee Department of
Environment and Natural Resources, Division of Water Rights
for the above-captioned matter. This is intended as service
by mail upon you.

Sincerely,

A handwritten signature in cursive script that reads "Diane Best".

Diane Best
Assistant Attorney General

DB:mas
enc.

cc/enc. John P. Guhin
John Hatch ✓

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

MARSH HEREFORD RANCH, INC.,)
and RAPID VALLEY WATER)
CONSERVANCY DISTRICT,)
)
 Appellants,)

v.)

STATE OF SOUTH DAKOTA ACTING)
AS THE WATER MANAGEMENT BOARD)
OF THE DEPARTMENT OF)
ENVIRONMENT AND NATURAL)
RESOURCES, and CITY OF)
RAPID CITY,)
)
 Appellees.)

BRIEF OF APPELLEE DEPARTMENT OF
ENVIRONMENT AND NATURAL RESOURCES,
DIVISION OF WATER RIGHTS

PRELIMINARY STATEMENT

In this brief the Appellants will either be referred to collectively as "Petitioners" or individually by name. Applicant/Appellee City of Rapid City will be referred to as "City." Appellee¹ South Dakota Department of Environment and Natural Resources, Water Rights Division, will be referred to as

¹Although the Appellants have captioned the South Dakota Water Management Board as the Respondent in this appeal, the Appellee is the Division. The Water Management Board is the citizen board which hears water proceedings in its quasi judicial capacity. As with any other quasi judicial or judicial body, the Board would not be a respondent in an appeal taken from its own actions. The Division is the investigative arm of the Department of Environment and Natural Resources and appears as an advocate before the Board. Since the Division and the City were the prevailing parties in the administrative contested case heard before the Board, the Division and the City are the appropriate Appellees.

the "Division." The South Dakota Water Management Board will be referred to as "Board."

There are two certified records in this appeal from a consolidated administrative proceeding. Documents found in the certified record of Water Permit No. 2276-2 will be identified as "AR," along with the appropriate page. Documents found in the certified record for Vested Water Right No. 2294-2 will be referred to as "Ar.V.R" with the appropriate number.

References to the transcript of the contested case proceeding held on June 28, 1994, will be designated as "TR," followed by the proper page number. Citations to Findings of Fact and Conclusions of Law refer to those adopted by the Water Management Board dated September 9, 1994.

The Exhibits used at hearing will be identified as "Exhibit," followed by the number or letter assigned at hearing.

JURISDICTIONAL STATEMENT

The Division accepts the Petitioners' assertion that jurisdiction is properly before this Court.

STATEMENT OF LEGAL ISSUES

I

WHETHER THE DIVERSION RATE RESTRICTION CONTAINED IN SDCL 46-5-6 ABSOLUTELY BARS THE BOARD FROM GRANTING A PERMIT OR VALIDATING A VESTED WATER RIGHT FOR A RATE OF MORE THAN ONE CFS FOR EACH SEVENTY ACRES?

II

WHETHER THE BOARD'S FINDINGS OF FACT ARE ADEQUATE TO SUPPORT GRANTING THE PERMIT AND VALIDATING THE VESTED RIGHT?

STATEMENT OF THE CASE

On March 23, 1993, the City filed an application for a new water permit to be used for irrigating Meadowbrook Golf Course in Rapid City. AR 1. The City sought to appropriate water at the rate of 2.09 cubic feet per second (hereinafter cfs). AR 1. The requested 2.09 cfs sought to use water from a future use permit already held by Rapid City. AR 1.²

On October 7, 1993, the City requested validation of a vested water right claim³ for irrigation of 104 acres, also on Meadowbrook Golf Course in Rapid City. Ar.V.R. 3. The proposed validation requested a diversion rate of 1.48 cfs from Rapid Creek for the 104 acres. Ar.V.R. 3.

The Division recommended that both applications be granted, with certain conditions. Notices of both applications were published in the Rapid City Journal in March 1994. AR 18, Ar.V.R. 18. Petitioners filed notices of opposition to both applications. AR 19-20; Ar.V.R. 19-20. Hearing was held on June 28, 1994, in Pierre, South Dakota. TR 1-2.

At the close of hearing, the Board made an oral decision granting City's applications (including the conditions proposed by the Division and one condition resulting from Petitioners' position). TR 23. Board counsel submitted proposed Findings of Fact and Conclusions of Law to the Board and served the parties with copies. AR 27-36, Ar.V.R. 27-36. Division

²The future use permit was obtained in 1971 pursuant to SDCL 46-5-38.

³The specific nature of vested right validations are discussed within the arguments pertaining to each issue.

filed its response to the proposed Findings of Fact and Conclusions of Law on August 19 and served it on all parties. AR 37, Ar.V.R. 37. Petitioners submitted proposed Findings and Conclusions to Board members, their counsel, and the City of Rapid City. AR 62, Ar.V.R. 62. Petitioners' proposed Findings of Fact and Conclusions of Law were not served upon the attorney for the Division and were not filed in the formal agency file, which was kept by the Division. AR 62, Ar.V.R. 62.⁴ Also, Petitioners filed no objections to the Board's proposed findings.

The Board adopted its final Findings of Fact and Conclusions of Law. That document was signed on September 9, 1994. AR 41-47, Ar.V.R. 41-47.

Petitioners appealed the Board's decision within thirty days. AR 51-53, Ar.V.R. 51-53.

STATEMENT OF FACTS

The City of Rapid City has historically used and continues to use water from Rapid Creek. In addition to natural flows, the City utilizes a service contract with the Bureau of Reclamation to obtain releases from the Deerfield and Pactola Reservoirs into Rapid Creek. TR 16, AR 8, Ar.V.R. 8.

Among its uses for Rapid Creek water, the City has irrigated Meadowbrook Golf Course, a municipally-owned, publicly-used golf course. TR 3. The municipal course was originally

⁴The Petitioners proposed Findings and Conclusions were only filed with the formal agency file in this matter after the Division asked that they be filed for purposes of the administrative record in this proceeding. AR 50, 63, Ar.V. 54, 59.

designed as a 9-hole course, but has been expanded to 18 holes.
TR 3.

Partly as a result of the expansion, the City filed an application for a new water permit (No. 2276-2). TR 3. While the new application was being processed by the Division, it was discovered that some of the historical water use for the golf course had not been filed with the Division. TR 4. A vested right application was filed (No. 2294-2).

ARGUMENT

Standard of review

This Court's standard for review of an administrative agency decision is codified at SDCL 1-26-36:

The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence in the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the

findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

Petitioners have the burden of showing that (1) their substantial rights were prejudiced and that (2) one of the six violations listed in SDCL 1-26-36 has occurred. Ashland v. South Dakota Department of Labor, 321 N.W.2d 103, 105 (S.D. 1982).

Neither Petitioners' Statement of Issues nor their brief have indicated what claims it is making under SDCL 1-26-36. Petitioners have failed to support their burden of showing that any of the six violations listed in SDCL 1-26-36 have occurred since it has not even asserted which violations it is claiming.

The Division recognizes that sometimes in administrative appeals, the remainder of the argument demonstrates which of the standards set forth in SDCL 1-26-36 is involved. In re Department of Labor, 323 N.W.2d 133 (S.D. 1982). In this case, however, Petitioners' contentions with regard to SDCL 1-26-36 are ambiguous and do not provide an adequate basis for appellate argument or review. On this basis Petitioners' appeal should be denied.

Assuming, for argument's sake, that the foregoing procedural argument does not prevail, additional argument is provided with regard to each issue. In each argument, the Division has guessed the Petitioners' intentions with regard to its claim under SDCL 1-26-36. Further discussion of the standard of review with regard to each of these issues is addressed therein.

I

THE DIVERSION RATE RESTRICTION CONTAINED IN SDCL 46-5-6 DOES NOT ABSOLUTELY PROHIBIT THE BOARD FROM GRANTING THE PERMIT OR VALIDATING VESTED WATER RIGHT FOR A RATE OF MORE THAN ONE CFS FOR EACH 70 ACRES.

Petitioners assert that the Board has erred in its interpretation of SDCL 46-5-6⁵

In the issuance of permits to appropriate water for irrigation or in the adjudication of rights to the use of water for such purpose, the amount allowed shall not be in excess of the rate of one cubic foot of water per second for each seventy acres, or the equivalent thereof, and the volume of water diverted for use shall not exceed two acre-feet per acre, delivered on the land for a specified time each year. The water management board may allow a greater diversion where the method of irrigation stipulated in the permit or the type of soil to which the water is to be applied so requires except that in no case may the diversion be greater than three acre-feet per acre delivered to the land. The above rate of one cubic foot per second for each seventy acres shall not apply in cases of flood water at such times when the flow of the stream is much in excess of the total recorded and approved rights on the stream. (Emphasis added.)

Petitioners' argument should be rejected for several reasons.

1. Any claim of prejudice to substantial rights has been waived.

First, substantial rights of the Petitioners have not been prejudiced. See Ashland, 321 N.W.2d at 105. In fact, the Water Management Board specifically considered the issue of

⁵Petitioners' claim challenges only the diversion rate requirement in SDCL 46-5-6 and not the acre foot limitation.

whether allowing a diversion rate of 3.57 cfs would be harmful to the opponents/appellants:

While the opponents to the permit have made general allegations that the allowance of the 3.57 c.f.s. instantaneous diversion will be harmful to them they have not demonstrated this to be the case.

Finding of Fact No. 7, p. 5.

Significantly, Petitioners filed no objection to this finding of fact. Petitioners have waived any claims of substantial prejudice.

2. The diversion rate restriction in SDCL 46-5-6 does not apply to the vested rights case. One of the applications involved in this proceeding is a vested right.

A number of appropriators, including the water rights predecessors of Rapid City (the Leedy Ditch Co.), Marsh Hereford Ranch, Inc., and the Rapid Valley Conservancy District have historically used and continue to use water from Rapid Creek in the Black Hills.⁶ Rapid City's claim dates from April 1877. The water was first put to beneficial use in June 1881. The 1877 appropriation was made according to the custom of the time. See Atchison v. Peterson, 87 Wall. 508 (1874). In 1881, the territorial legislature enacted provisions recognizing these customs. 1881 Session Law 142.

Since 1881, the water law in South Dakota has changed several times, each time affording existing appropriators the right to continue their historic use.

⁶The Leedy Ditch is among the earliest of the Rapid Creek vested water right holders. The Petitioners have later or "junior" claims.

Water permits and licenses were not required for surface water appropriations until 1907. The 1907 law recognized pre-existing rights, but did not require those prior users to register with the State.

In 1955, the legislature enacted a comprehensive water code. The 1955 code continued to recognize water use initiated before 1907. Along with other types of water uses, the pre-1907 water rights are considered "vested" under the 1955 statutes. SDCL 46-1-9 sets forth the various types of vested rights:

The term "vested rights" used in this title, unless the context otherwise clearly requires, means:

. . . .

(4) Rights granted before July 1, 1955, by court decree;

(5) Uses of water under diversions and applications of water prior to the passage of the 1907 water law and not subsequently abandoned or forfeited.

Although the 1955 law listed the various types of vested rights, it did not require vested right holders to confirm or seek validation of these claims with the state at that time.

The statute of concern in this appeal, SDCL 46-5-6, was first enacted in 1957. See Session Law 1957, ch. 490, § 2. The 1957 passage of SDCL 46-5-6 contains no language purporting to limit either the volume or diversion rate of water rights on a retroactive basis.⁷ Thus, limitations on appropriations which

⁷Apparently Petitioners believe that the 1957 law retroactively affected their own vested water rights by limiting both the diversion rate and volume. The Board has, however, refused to apply the 1957 statute retroactively.

did not exist at the initial time of appropriation were not applied to that appropriation. Consistent with this overall concern, the 1957 law pertaining to volume and diversion rate quantifications has been applied prospectively by the Board.

In 1986, the legislature enacted statutes requiring vested water right holders to register with the State and demonstrate the quantity of water that has been used on a continuous basis. See SDCL 46-5-49 and SDCL 46-2A-18. This procedure is the validation procedure. The priority date for water use is set at the earliest date from which the water was claimed, taking into account any situation where forfeiture may have occurred for nonuse (the forfeiture period is three years of continuing nonuse without excuse). See In re Cancellation of Stabio Ditch, 417 N.W.2d 391 (S.D. 1987).

The validation process, then, confirms historic water use, but does not take away water rights. Thus, the diversion rate claims made under the 1957 law, SDCL 46-5-6, cannot apply to limit Rapid City's vested water right.

Moreover, as a practical matter, the 1 cfs/70 AF diversion rate requirement in SDCL 46-5-6 does not impact the vested right anyway.⁸ The diversion rate for the vested right is 1.48 cfs for 104 acres (which is .0142307 cfs per acre or .996149 cfs per 70 acres). Since the diversion rate for the vested right does not exceed 1 cfs per 70 acres, the vested right should be affirmed under any analysis of SDCL 46-5-6.

⁸Petitioners' claim challenges only the diversion rate requirement in SDCL 46-5-6 and not the acre foot limitation.

3. The diversion rate restriction in SDCL 46-5-6 was properly applied to the new permit.

As addressed above, Petitioners have made no specific claim under SDCL 1-26-36 and the appeal should be denied.

For purposes of argument, however, Division presumes that Petitioners are making their claim under SDCL 1-26-36(1), SDCL 1-26-36(2) or SDCL 1-26-36(4). Interpretation of SDCL 46-5-6 is involved.

As addressed, the restriction in SDCL 46-5-6 can only be claimed with regard to the new permit which sought to appropriate 2.09 cfs for 120 acres (the 104 acres covered by the vested right plus an additional 16 acres). Under the Petitioners' analysis, the allowable cfs would be about .6 cfs in addition to the 1.48 cfs under the vested right) on a continual basis.

SDCL 46-5-6 provides that the proper diversion rate is 1 cfs per 70 acres "or the equivalent thereof." As asserted at hearing, the "equivalent thereof" allows for calculation of the total water which would be diverted per day under the 1 cfs/70 acres criteria. Then, that total may be met by allowing flexibility in pumping. Allowing the daily equivalent of 1 cfs/70 acres is a management tool.

It is important to recognize that the City will not be pumping water continuously. The cfs criteria is designed to address continuous pumping--twenty-four hours per day. Since City will only be pumping 11.5 hours per day, it should not be penalized in terms of total water claimed. If City had a

reservoir at this site, it could pump 24 hours per day from Rapid Creek into the reservoir at 1 cfs/70 acres. The diversion rate advocated by Petitioners could then be followed. Then the City could pump water out of its own reservoir at 11.5 hours per day at the rate needed by the City. In other words, if Petitioners prevail on this appeal utilizing this argument, they will not be foreclosing the City from ultimately using the same quantity of water for its golf course.

Contrary to Petitioners' assertions, the "daily gloss" on the 1 cfs/70 acre requirement would not "wreck havoc" on the State water appropriation system. As the Division testimony reveals, this method is not something new that was cooked up for the special benefit of the City. The testimony of Division witness Ron Duvall is that pumping at a rate of 1 cfs/70 acres on a daily basis has been allowed in the past for persons flood irrigating crops and for golf courses. TR 20. He further testified that allowing for this interpretation is important because, "[j]ust plain operationally, you almost have to allow for something like that or you can't adequately do the job." TR 20. Obviously, Petitioners have the benefit of this analysis too.

Petitioners have every right to protect their own water rights. Indeed, in this case, Board has protected those rights by ensuring that the 1 cfs/70 acre limitation is not exceeded on a daily basis. Moreover, even if the 1 cfs/70 acre restriction has been exceeded, the Board has authority to make such a decision. Under SDCL 46-5-6 the Board may "allow a greater

diversion where the method of irrigation stipulated in the permit or the type of soil to which the water is to be applied so requires," so long as the total acre feet is not more than 3 acre feet per acre. This clause allows for specific consideration of types of irrigation without limiting the rate of diversion whatsoever--so long as the volume of diversion does not exceed 3 acre feet per acre.⁹ Here, the testimony demonstrated that the method of irrigation (only 11.5 hours per day on a golf course) merited such a "greater diversion" in terms of rate. The 3 acre feet per acre limitation has not, of course, been exceeded.

In sum, the rate of diversion approved by the Board is not outside the 1 cfs/70 acre restriction contained in the first sentence of SDCL 46-5-6. Even if it were, the second sentence allows for deviation, in certain circumstances; this use meets those circumstances.

THE BOARD'S FINDINGS OF FACT ARE ADEQUATE TO
SUPPORT GRANTING THE PERMIT AND VALIDATING
THE VESTED RIGHT.

Petitioners argue that the Board's findings are inadequate. Petitioners' argument fails for several reasons.

1. The scope of this review is limited to whether the findings support the conclusions and order.

Petitioners have filed no objections before the administrative agency with regard to the sufficiency of the proposed findings of fact and conclusions of law. Moreover, although Petitioners proposed their own findings of fact and

⁹References to "greater diversion" appear to allow for either diversion rate or diversion volume or both to be considered by the Board in allowing for a deviation.

conclusion of law to the Board, those findings of fact and conclusions of law were never filed in the agency administrative record or served on Division counsel.

The filing of objections and findings of fact is part of the procedure for the Water Management Board. ARSD 74:02:01:13.01 provides that objections to proposed findings and alternative proposals may be submitted in writing and shall be mailed to the Board members and the parties not less than ten days before the next regularly scheduled Board meeting.

(Administrative Rule attached.) In addition, as directed by the Board, notice was issued by the Division that any written objections or comments were to be provided to all parties of record by August 19, 1994. The Division is clearly a party in this proceeding. The Petitioners did not provide the Division with any proposed findings of fact and conclusions of law.

Moreover, the findings of fact and conclusions of law which were submitted were not sent to the Division for filing in the agency file until October, after the notice of appeal was filed in the present proceeding. Finally, no objections were made by Petitioners.

Failure to object to findings of fact and conclusions of law narrows the scope of an appellate court's review. GMS, Inc. v. Deadwood Social Club, Inc., 333 N.W.2d 442, 443 (S.D. 1983); Muhlenkort v. Muhlenkort, 393 N.W.2d 292, 293 (S.D. 1986). The court's review on appeal in such a situation is "whether the findings of fact support the conclusions of law and judgment." GMS, 333 N.W.2d at 443. Consequently, "the facts are considered

conclusive and may not be challenged." Massey Ferguson Credit Corp. v. Bice, 450 N.W.2d 435, 444 (S.D. 1990)).

Consistent with the above, the South Dakota Supreme Court has held that objections not raised before administrative agencies are not preserved for appeal. In re Koch Exploration Company, 387 N.W.2d 530, 538 (S.D. 1986); In re South Dakota Water Management, 351 N.W.2d 119, 122 (S.D. 1984). The Division urges this Court to adopt the rule set forth in GMS and Muhlenkort and apply it to the scope of review in this proceeding.

Thus, the question is not whether substantial evidence exists to support the findings made or whether the underlying facts support the ultimate findings. Those questions are waived. The question here is whether the facts which were adopted support the conclusions of law which were adopted. Clearly they do.

Indeed, Petitioners fail to point to any finding of fact which is contrary to the conclusions. Petitioners' case relates to the adequacy of the findings of fact, a matter which is not part of the review in this proceeding.

2. No specific claim has been made under SDCL 1-26-36.

In order to prevail in their claim, Petitioners would need to show that (1) their substantial rights were prejudiced and that (2) one of the six violations listed in SDCL 1-26-36 has occurred. Ashland, 321 N.W.2d at 105.

As previously addressed in this brief, Petitioners had made no specific claims under SDCL 1-26-36 and the appeal should be denied. Petitioners have failed to support their burden of

showing that any of the six violations listed in SDCL 1-26-36 have occurred.

3. The agency findings of fact are proper. Assuming, for the sake of argument that Petitioners have properly preserved their substantive arguments for appeal and further assuming that SDCL 1-26-36(5) is claimed, the following argument applies.

Petitioners attack the Board's findings. In determining whether agency findings are sufficient, circuit courts are to give great weight to the findings made and inferences drawn by the agency involved.

SDCL 1-26-36; Matter of Midwest Motor Exp. Inc. Bismarck v. PUC, 431 N.W.2d 160, 162 (S.D. 1988). In other words, the circuit court is not required to make an independent review of the facts. Northwest Public Service v. Cities of Chamberlain, etc., 265 N.W.2d 867 (S.D. 1978).

In this case, Petitioners appear to claim that SDCL 1-26-36(5) applies and that the Board decision is clearly erroneous. Under SDCL 1-26-36(5), Petitioners would have the burden to prove that the Board's findings are clearly erroneous. Ashland, 321 N.W.2d at 105. The standard under SDCL 1-26-36(5) has been stated as follows:

A ruling or decision of an administrative agency is upheld unless the decision is clearly erroneous in light of its entire record, that is, we uphold the decision of the agency unless this court is left with a definite and firm conviction that a mistake has been committed.

In re Leo's Bus Service, 342 N.W.2d at 228 (S.D. 1984); Frazer v. Water Rights Commission, 294 N.W.2d 784 (S.D. 1980).

Petitioners contend that Board's findings are insufficient because, under Petitioners' analysis, they do not contain underlying facts supporting the findings as required by SDCL 1-26-25. Given the particular nature of this proceeding however, the findings are indeed sufficient.

Petitioners' claims focus on (a) impairment of existing water rights, (b) beneficial use, and (c) public interest.

a. Impairment of existing water rights.

At hearing Petitioners offered testimony that the proposed diversion rate would generally be harmful to them and also that Petitioners would be harmed if the Board interpreted SDCL 46-5-6 to allow for a diversion rate of more than 1 cfs/70 acres.

The Board considered and ruled on Petitioners' arguments regarding impairment. The Board made underlying findings of fact with regard to both of these diversion rate claims. Those findings are Findings 2-7. They describe the specific nature of the application being ruled upon (Finding 2), address the precise effect of the new permit on the allowed diversion rate (Finding 3), analyze the diversion rate in terms of daily pumping time (Finding 4), provide that the diversion rate restrictions are applicable to the new permit and discuss why it is to be distinguished from the vested right permit (Finding 5), address the acre-feet limitation in SDCL 46-5-6, and, finally, determine that Petitioners have not offered sufficient proof to support general allegations on impairment. Despite these numerous findings, Petitioners seem to argue that

the Board should have stated with more specificity what evidence it relied upon. Logically, proof of impairment to existing rights lies with those holding the existing rights.

Consequently, the Board's findings naturally reflect the amount of evidence presented by the Petitioners. The fact is, however, that Petitioners simply did not present a factual case as to impairment. Petitioners' argument focused on the interpretation of SDCL 46-5-6 and then made a general assertion regarding harmful impairment. Given the nature of evidence presented by Petitioners, the findings on impairment are clearly proper for the new permit.

Moreover, Petitioners' argument seems to assert that either the City or the Division was required to present specific evidence of possible impairment and then disprove it. There is no requirement in the water statutes that requires an applicant to prove the negative. The Board ruled correctly.

The foregoing applies to the new permit. With regard to the vested right, the findings reflect the historic dates of use (Findings 2-7, pages 1 and 2) and then conclude that "the use has been developed without unlawful impairment of existing rights." Conclusion 3, page 2. Since validation proceedings are designed to recognize historic use and confirm the initial date of appropriation, the only "existing rights" to be examined are those that are senior to the vested water holder involved. Here, the only preexisting water claimant from Rapid Creek did not intervene. Given the fact that the senior water right holder did

not even intervene, the finding regarding lack of impairment is adequate here.

b. Beneficial use.

The beneficial use conclusions are that "The use to irrigate a golf course is a beneficial use." Conclusion 4, p. 2. And, "The proposed use on a golf course is a beneficial use." Conclusion 7, p. 6.

These conclusions of law are appropriate. As a matter of law, irrigation is a beneficial use. See DeKay, et al. v. United States Fish and Wildlife Service, No. 18708, slip op. at 4 (December 7, 1994) (citing ARSD 74:03:04:01). Specific underlying facts would only be necessary in the event that a beneficial use was proposed that did not fall within the beneficial uses currently recognized by the foregoing law (or other water laws specifically listing beneficial uses such as domestic and general municipal uses).

The beneficial use conclusion needs no additional underlying findings in this case.

c. Public interest.

Finally, Petitioners contend that the public interest finding is unsupported by underlying factual findings. The findings on public interest are that "The use is in the public interest in that it promotes recreation in the city of Rapid City." Finding 5, p. 2 and "The proposed use is in the public interest when qualified in the Final Decision." Finding 6, p. 6. The qualifications in the final decision adopt Petitioners' proposal that the 104 acres covered by the vested

right be specified (Decision 1); Division's proposal that water for the new permit must be satisfied through contract with the Bureau of Reclamation (Decision 2); that pumping be limited to 11.5 hours per day (Decision 3); and that pumping be metered (Decision 4). Within these several determinations the Board found that the public interest had been met.

Moreover, it must be recognized that the facility involved is a publicly-used municipal golf course. Surely it can be concluded that using water for public recreational use is in the public interest. Additional underlying factual findings should not be necessary.

CONCLUSION

Based on the foregoing arguments and authorities, the Division urges this Court to affirm the Board's decision.

Dated this 11th day of December, 1994.



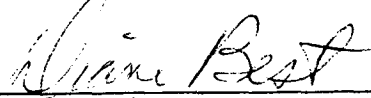
Diane Best
Assistant Attorney General
500 E. Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Brief of Appellee Department of Environment and Natural Resources, Division of Water Rights in the matter of Marsh Hereford Ranch, Inc., et al. v. State of South Dakota, et al., was served by United States mail, first class, postage prepaid, on this 16th day December, 1994, upon the following:

Robert Jackson
City Attorney
300 6th Street
Rapid City, SD 57701

Joseph Butler
Veronica L. Bowen
818 St. Joseph St
P.O. Box 2670
Rapid City, SD 57709



Diane Best
Assistant Attorney General

"Department of Environment and Natural Resources." The Legislative Research Council has implemented the change in this title.

ARTICLE 74:02

WATER RIGHTS

Chapter

- 74:02:01 General rules.
- 74:02:02 Flowing artesian wells, Repealed or transferred.
- 74:02:03 Public lake elevations, Repealed or transferred.
- 74:02:04 Well construction standards.
- 74:02:05 Regulation of groundwater use.
- 74:02:06 Administrative appeals, Repealed.
- 74:02:07 Permits to appropriate water, Transferred.
- 74:02:08 Safety of dams.
- 74:02:09 Chemigation.
- 74:02:10 Fences crossing navigable streams.

CHAPTER 74:02:01

GENERAL RULES

Section

- 74:02:01:01 Definitions.
- 74:02:01:01.01 Public recreation areas defined.
- 74:02:01:02 Water management board -- Annual meeting -- Quorum -- Seal.
- 74:02:01:03 Uses of water which require permits.
- 74:02:01:03.01 Adding connections to a water distribution system.
- 74:02:01:03.02 Certain water use systems not water distribution systems.
- 74:02:01:04 Repealed.
- 74:02:01:05 Criteria for establishing Missouri River irrigation rates.
- 74:02:01:05.01 Volume of Missouri River water applied to the land.
- 74:02:01:05.02 Registration of domestic wells.
- 74:02:01:05.03 Volume of water for nonirrigation water permit or right.
- 74:02:01:06 Applications for water permits furnished by chief engineer -- Method of completion -- Notarization and fee required.
- 74:02:01:07 Maps required with water permit applications.
- 74:02:01:07.01 Repealed.
- 74:02:01:08 Supplemental forms required when system includes wells, dugouts, or water storage dams.
- 74:02:01:08.01 Driller's log required.
- 74:02:01:09 Forms required showing soil-water compatibility approval of conservation commission for irrigation.
- 74:02:01:10 Numbering of applications.
- 74:02:01:11 and 74:02:01:12 Repealed.
- 74:02:01:12.01 Additional information for water permit application hearing.
- 74:02:01:12.02 Waiver of right to receive notice and other materials.

- 74:02:01:12.03 Delegation of authority to chief engineer to issue uncontested permits.
- 74:02:01:12.04 Deadline to file petitions.
- 74:02:01:12.05 Procedure to contest chief engineer's recommendation.
- 74:02:01:12.06 Published date of hearing.
- 74:02:01:13 Repealed.
- 74:02:01:13.01 Submission of proposed findings of fact, conclusions of law, and final decision -- Comments.
- 74:02:01:13.02 Signing of findings of fact, conclusions of law, and final decision -- Valid permit.
- 74:02:01:14 Approved applications to contain qualifications -- Authority to proceed with construction.
- 74:02:01:14.01 Correction of permits and amendment of permits or rights.
- 74:02:01:14.02 Mandatory requirement to submit irrigation questionnaire -- Exception.
- 74:02:01:15 Procedure for rejection of applications.
- 74:02:01:15.01 Repealed.
- 74:02:01:15.02 Applications to appropriate water in excess of 10,000 acre feet annually.
- 74:02:01:15.03 Procedures for applications to appropriate water in excess of 10,000 acre feet annually.
- 74:02:01:15.04 Board action on applications to appropriate water in excess of 10,000 acre feet annually.
- 74:02:01:15.05 Board action after legislative action.
- 74:02:01:16 Inspection reports of construction and application of water to be maintained.
- 74:02:01:16.01 Combining permits into one license.
- 74:02:01:17 to 74:02:01:19 Repealed.
- 74:02:01:20 Procedure for filing vested right claims.
- 74:02:01:20.01 Chief engineer's investigation of vested right claims.
- 74:02:01:21 Application procedure for vested right claim -- Validation of claim by board.
- 74:02:01:22 Issuance of water license for vested right claims.
- 74:02:01:23 Repealed.
- 74:02:01:24 Application procedure for entities to appropriate water for future use.
- 74:02:01:24.01 Future use applications and future use permits limited.
- 74:02:01:24.02 Submission of annual water use records.
- 74:02:01:25 Board to act on future use application by entity -- Authorized qualifications.
- 74:02:01:25.01 Future use permit review -- Recommendation and scheduling for review.
- 74:02:01:25.02 Notice of review of future use permit.
- 74:02:01:25.03 Publication of notice of future use permit review.
- 74:02:01:26 Repealed.
- 74:02:01:26.01 Reinstating amount of water not developed.
- 74:02:01:27 to 74:02:01:31 Repealed.
- 74:02:01:32 Applications for temporary permit -- Telephone requests.
- 74:02:01:33 Information required for temporary permits.
- 74:02:01:34 Chief engineer authorized to issue temporary permits.
- 74:02:01:34.01 Rescission of temporary permits by chief engineer.
- 74:02:01:34.02 Appeal of rescission of temporary permit to board.
- 74:02:01:35 Repealed.
- 74:02:01:36 Board authorized to cancel invalid water permits or rights.

- 74:02:01:37 Invalid water permit or right defined.
- 74:02:01:37.01 Legal excuse for nonuse of water.
- 74:02:01:37.02 Exceptions to nonuse of water.
- 74:02:01:38 Procedure for consideration of water permit or right cancellations -- Contents of notice.
- 74:02:01:39 Repealed.
- 74:02:01:40 Action by board -- Minutes to show reasons for cancellation.
- 74:02:01:40.01 Cancellation of irrigation location notice -- Retention as stock water location notice.
- 74:02:01:41 Holders to be notified of cancellation action -- Notice by publication.
- 74:02:01:42 Application for well driller license -- License representative to be designated.
- 74:02:01:42.01 Types of water use wells.
- 74:02:01:42.02 Requirements for all well driller license applications.
- 74:02:01:42.03 Documentation of experience required for new license applications.
- 74:02:01:42.04 Application requirements for renewal of a well driller license.
- 74:02:01:42.05 Deadline for renewal of license.
- 74:02:01:42.06 New license representative or licensing for additional well types.
- 74:02:01:42.07 License renewals after March 31, 1983.
- 74:02:01:43 Repealed.
- 74:02:01:43.01 Chief engineer authorized to delay issuance of license.
- 74:02:01:43.02 Board authorized to revoke license when unauthorized well types drilled.
- 74:02:01:44 Applications for filing location notices for dams.
- 74:02:01:45 Approval of location certificates -- Notice of denial.
- 74:02:01:46 Request to board for declaratory ruling -- Petition contents.
- 74:02:01:47 Timely consideration by board.
- 74:02:01:48 Petitioner to notify all affected persons.
- 74:02:01:49 Declaratory rulings -- Appeal.
- 74:02:01:50 Outlet elevation -- Inclusion in existing water rights or permits.
- 74:02:01:51 Request to determine high or low water mark -- Contents.
- 74:02:01:52 Publication of the notice to determine high or low water mark.

Code Commission Note: Former ch 74:02:07 previously regulated permits to appropriate water. It is deemed to have been superseded by this chapter which was amended on January 30, 1983.

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:

(1) "Reasonable domestic use," the use of 18 or less gallons of water per minute on an average daily basis as necessary for domestic purposes, with a maximum pumping capacity of 25 gallons per minute;

(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;

(3) "Stock watering," watering of animals as follows:

- (a) Domestic and other farm animals; and
- (b) Livestock in confinement feeding operations that do not exceed reasonable domestic use;

(4) "Commercial use," water use supplied from other than a common water distribution system to a business such as a truckstop; tourist attraction; eating, drinking, or lodging establishment; commercial campground; convenience store; implement business; salvage business; or any other business or to a livestock confinement feeding operation that exceeds reasonable domestic use;

(5) "Dugout," a man-made excavation below the ground surface that is used for storing water.

Source: SL 1975, ch 16, § 1; transferred from § 52:01:01:01, effective July 1, 1979; 9 SDR 96, effective January 30, 1983; 10 SDR 27, effective September 26, 1983; 13 SDR 49, effective October 27, 1986; 13 SDR 186, effective June 18, 1987; 13 SDR 129, 13 SDR 141, effective July 1, 1987; 15 SDR 158, effective April 23, 1989; 17 SDR 103, effective January 22, 1991.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-1-2, 46-1-6(4), 46-1-6(6), 46-1-6(12), 46-5-8.

74:02:01:01.01. Public recreation areas defined. "Public recreation areas," as used in SDCL 46-1-6(4), means campgrounds, parks, and recreation areas open to the public for which a fee is not charged and golf courses open to the public for which a fee is or is not charged.

Source: 15 SDR 158, effective April 23, 1989.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-1-6(4).

74:02:01:02. Water management board -- Annual meeting -- Quorum -- Seal. Annual meetings of the board for the election of officers for the ensuing year and the transaction of other business shall be held at the first regular meeting of each fiscal year. Four members of the board shall constitute a quorum for conducting business. The board shall have a seal which contains the words: "State Water Management Board - South Dakota - Official Seal."

Source: SL 1975, ch 16, § 1; transferred from § 52:01:01:02, effective July 1, 1979; 9 SDR 96, effective January 30, 1983; 10 SDR 27, effective September 26, 1983; 13 SDR 129, 13 SDR 141, effective July 1, 1987.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 1-40-17 to 1-40-19, 46-2-9, 46-4-8.

74:02:01:03. Uses of water which require permits. Water permits or water rights are required for all beneficial uses of water except vested right

claims, water distribution systems or other common distribution systems diverting 18 gallons per minute or less, and reasonable domestic use. A water permit or right is required for any water source to be pumped or a well allowed to flow in excess of reasonable domestic use. Commercial use, even less than 18 gallons per minute, requires a water permit.

A water permit is not required to construct a dam or dugout on either a dry draw as defined by SDCL 46-1-6(3) or a nonnavigable watercourse if it stores 25 acre-feet or less of water.

A water permit is required to construct a dam across a navigable watercourse for any purpose. A water permit is required to construct a dam or dugout on either a dry draw or nonnavigable watercourse if it stores more than 25 acre-feet of water.

Source: SL 1975, ch 16, § 1; transferred from § 52:01:01:03, effective July 1, 1979; 9 SDR 96, effective January 30, 1983; 10 SDR 27, effective September 26, 1983; 13 SDR 49, effective October 27, 1986; 13 SDR 129, 13 SDR 141, effective July 1, 1987; 15 SDR 158, effective April 23, 1989; 17 SDR 103, effective January 22, 1991.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-1-5, 46-1-6(4), 46-1-6(6), 46-1-6(12), 46-2-9, 46-2-11, 46-4-1, 46-4-1.1, 46-5-1, 46-5-1.1, 46-5-2, 46-5-3, 46-5-8, 46-5-9, 46-5-10.

74:02:01:03.01. Adding connections to a water distribution system. The addition of connections to a water distribution system does not require an application for a water permit if there is no increase in the authorized and developed diversion rate and the connections are within or contiguous to the service area of the system. A new water permit is required to connect a separate water distribution system, located within or outside of the system area, to the water distribution system.

Source: 13 SDR 49, effective October 27, 1986; 13 SDR 129, 13 SDR 141, effective July 1, 1987.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-1-6(19), 46-5-8.2, 46-5-9, 46-5-10.

74:02:01:03.02. Certain water use systems not water distribution systems. Commercial use, industrial use, and other water use systems supplied from other than a water distribution system which supply incidental domestic use water that does not exceed reasonable domestic use to residences of employees or owners are not water distribution systems as defined by SDCL 46-1-6(19).

Source: 15 SDR 158, effective April 23, 1989.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-1-6(19), 46-5-8.2.

74:02:01:04. Appropriation of irrigation water from the Missouri River not to exceed rate set by board. Repealed.

Source: 3 SDR 19, effective September 16, 1976; transferred from § 52:01:01:03.01, effective July 1, 1979; repealed, 9 SDR 96, effective

January 30, 1983.

74:02:01:05. Criteria for establishing Missouri River irrigation rates. When appropriating Missouri River water for irrigation, the amount shall be one cubic foot per second for each 70 acres; however, the board may approve additional amounts to make up for anticipated losses from evaporation, seepage, and other delivery system losses.

Source: 3 SDR 19, effective September 16, 1976; transferred from § 52:01:01:03.02, effective July 1, 1979; 9 SDR 96, effective January 30, 1983; 13 SDR 49, effective October 27, 1986; 13 SDR 129, 13 SDR 141, effective July 1, 1987.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-5-6, 46-5-6.1.

74:02:01:05.01. Volume of Missouri River water applied to the land. The amount of Missouri River water applied to the land shall be limited to two acre feet per acre annually at the point of field application. However, if the applicant presents data showing that the type of irrigation system to be used or the soil conditions warrant additional water, the board may allow up to three acre feet annually.

Source: 9 SDR 96, effective January 30, 1983; 13 SDR 49, effective October 27, 1986; 13 SDR 129, 13 SDR 141, effective July 1, 1987.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-5-6, 46-5-6.1.

74:02:01:05.02. Registration of domestic wells. Forms for registering domestic wells shall be furnished by the chief engineer upon request. The forms must be submitted to the chief engineer in duplicate and must be typewritten or legibly printed in permanent ink. Both copies must be signed by the applicant or his legal representative and the signature affirmed by a notary public. The required fee, a water quality analysis, and a well driller's report of the well construction signed by a licensed well driller must be submitted with the application. Registration of wells is limited to those wells that have been constructed in compliance with the adequate well requirements of chapter 74:02:04.

Source: 9 SDR 96, effective January 30, 1983; 10 SDR 27, effective September 26, 1983; 13 SDR 49, effective October 27, 1986; 13 SDR 129, 13 SDR 141, effective July 1, 1987; 15 SDR 158, effective April 23, 1989.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-2-3.1, 46-5-8.

74:02:01:05.03. Volume of water for nonirrigation water permit or right. The total annual volume of water withdrawn for a nonirrigation water permit or right is limited only by the authorized and developed diversion rate and not by the actual volume of water withdrawn annually. However, the board may limit the annual volume by qualification of the water permit or right. If the permit owner diverts less than the authorized diversion rate for a period of three years, the chief engineer may reduce the authorized diversion rate to the lower diversion rate.

Source: 13 SDR 49, effective October 27, 1986; 13 SDR 129, 13 SDR 141,

effective July 1, 1987.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-1-14, 46-2-9, 46-2-11, 46-5-13.

74:02:01:06. Applications for water permits furnished by chief engineer -- Method of completion -- Notarization and fee required. Application forms for water permits and instruction sheets shall be furnished by the chief engineer upon request. All completed forms submitted to the chief engineer must be typewritten or legibly printed in permanent ink. Supplements may be attached if there is not sufficient space on the printed forms. The applicant may confer with the chief engineer on questions concerning preparation of the application. All application forms must be signed by the applicant or his legal agent and the signature affirmed by a notary public. The fee required by SDCL 46-2-13 must be submitted with the application unless the applicant is a governmental entity. Fees from governmental entities may be submitted after an application, but must be submitted prior to issuance of the permit.

Source: SL 1975, ch 16, § 1; transferred from § 52:01:01:04, effective July 1, 1979; 9 SDR 96, effective January 30, 1983; 10 SDR 27, effective September 26, 1983; 13 SDR 49, effective October 27, 1986; 13 SDR 129, 13 SDR 141, effective July 1, 1987; 15 SDR 158, effective April 23, 1989.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-2-13, 46-5-10, 46-5-11, 46-6-3.

74:02:01:07. Maps required with water permit applications. In addition to the requirements of § 74:02:01:06, a map prepared by a South Dakota licensed land surveyor, a South Dakota registered professional engineer, or by a government employee who regularly prepares such maps as part of his employment shall be submitted as part of the application. All water permit maps shall be neat, legible, and meet the following requirements:

- (1) Not be smaller than 8 by 11 inches or larger than 24 by 35 inches;
- (2) Show the location of the diversion point in relation, by direction and distance, to a corner of a government surveyed section or quarter-section. The diversion point is the place where water is taken from a stream, well, pond, or other water supply;
- (3) For a proposed water diversion from a stream, show the stream location and name;
- (4) For a proposed water diversion from a reservoir, show the high-water line, the lands inundated and their owners, and the capacity of the reservoir at high water;
- (5) Clearly indicate the lands to be irrigated and give the names of the landowners; and
- (6) Have the section, township, and range or the subdivision, block, and lot properly notated so that the legal description for all land shown on the map can be clearly ascertained.

Source: SL 1975, ch 16, § 1; transferred from § 52:01:01:05, effective

July 1, 1979; 9 SDR 96, effective January 30, 1983; 10 SDR 27, effective September 26, 1983; 13 SDR 49, effective October 27, 1986; 13 SDR 129, 13 SDR 141, effective July 1, 1987.

General Authority: SDCL 46-2-5, 46-5-11.

Law Implemented: SDCL 46-5-11.

74:02:01:07.01. Changes in points of diversion allowable by chief engineer. Repealed.

Source: 9 SDR 96, effective January 30, 1983; repealed, 13 SDR 49, effective October 27, 1986.

74:02:01:08. Supplemental forms required when system includes wells, dugouts, or water storage dams. In addition to the requirements of § 74:02:01:06, when the proposed water use system includes wells, dugouts, or water storage dams, supplemental information on the depth and character of the groundwater, amount of storage and other pertinent data shall accompany the application for a water permit. Forms for reporting the necessary supplemental information will be supplied by the chief engineer upon request.

Source: SL 1975, ch 16, § 1; transferred from § 52:01:01:06, effective July 1, 1979; 9 SDR 96, effective January 30, 1983; 10 SDR 27, effective September 26, 1983; 13 SDR 129, 13 SDR 141, effective July 1, 1987.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-2-3.1, 46-5-11.

74:02:01:08.01. Driller's log required. When diversion is to be from a well, a log of the well or test hole signed by a licensed well driller shall be submitted to complete the application. For wells where it is not practical to drill test holes, an estimate of the depth of the well, proposed construction of the well, and formations encountered based on available geologic information shall accompany the application. An "as built" driller's report of well construction shall be sent to the chief engineer within 30 days after completion of the well.

Source: 9 SDR 96, effective January 30, 1983; 10 SDR 27, effective September 26, 1983; 13 SDR 129, 13 SDR 141, effective July 1, 1987.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-6-11.

74:02:01:09. Forms required showing soil-water compatibility approval of conservation commission for irrigation. In addition to the requirements of § 74:02:01:06, applications which propose the use of water for the purpose of irrigation must include the soil-water compatibility permit issued by the South Dakota department of agriculture or the conservation commission attesting to the suitability of the soils to endure irrigation with the proposed water supply. The soil-water compatibility permit must be received by the chief engineer prior to the hearing on the application by the board.

Source: SL 1975, ch 16, § 1; transferred from § 52:01:01:07, effective July 1, 1979; 9 SDR 96, effective January 30, 1983; 10 SDR 27, effective September 26, 1983; 13 SDR 49, effective October 27, 1986; 13 SDR 129, 13 SDR 141, effective July 1, 1987; 15 SDR 158, effective April 23, 1989.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-5-6.2.

74:02:01:10. Numbering of applications. Before the publication notice is prepared for the public hearing, an application received by the chief engineer shall be assigned a number which will be used in all official correspondence.

Source: SL 1975, ch 16, § 1; transferred from § 52:01:01:08, effective July 1, 1979; 9 SDR 96, effective January 30, 1983; 10 SDR 27, effective September 26, 1983; 13 SDR 49, effective October 27, 1986; 13 SDR 129, 13 SDR 141, effective July 1, 1987.

General Authority: SDCL 46-2-5, 46-5-11.

Law Implemented: SDCL 46-2-3.1, 46-2A-15.

74:02:01:11. Notice of hearing on application required -- Contents.
Repealed.

Source: SL 1975, ch 16, § 1; transferred from § 52:01:01:09, effective July 1, 1979; 9 SDR 96, effective January 30, 1983; repealed, 10 SDR 27, effective September 26, 1983.

74:02:01:12. Publication of notices -- Responsibility of applicants -- Costs. Repealed.

Source: SL 1975, ch 16, § 1; transferred from § 52:01:01:10, effective July 1, 1979; 9 SDR 96, effective January 30, 1983; repealed, 10 SDR 27, effective September 26, 1983.

74:02:01:12.01. Additional information for water permit application hearing. If a mining permit, discharge permit, or any other permit is required in addition to a water permit, pertinent information including conceptual design parameters relevant to the water permit and required for the other permits, must be available for the water permit application hearing if required by the board or chief engineer.

Source: 15 SDR 158, effective April 23, 1989.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-2-11, 46-5-11.

74:02:01:12.02. Waiver of right to receive notice and other materials. Any person filing a petition to participate in a hearing before the board who does not attend the hearing waives the right to receive further notices and other materials pertaining to the hearing, unless the petitioner makes a written request to the chief engineer to receive further notices and other materials.

Source: 17 SDR 40, effective September 19, 1990.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 1-26-18, 46-2-5.

74:02:01:12.03. Delegation of authority to chief engineer to issue uncontested permits. If no petition in opposition is filed pursuant to § 74:02:01:12.04, the chief engineer may issue permits on behalf of the

board pursuant to SDCL 46-1-16, 46-2-3.1, and 46-5-6.11. A permit may be issued no sooner than 20 days after the second publication required by SDCL 46-2A-4. Petitions filed in support of an application will not result in a hearing before the board; however, the petitioner will receive notice if a hearing is held before the board.

Source: 17 SDR 51, effective October 11, 1990.

General Authority: SDCL 46-1-16, 46-2-3.1, 46-2-5.

Law Implemented: SDCL 46-1-14, 46-1-16, 46-2-3.1, 46-2-9, 46-2-11, 46-2-17, 46-2A-4, 46-5-6.11, 46-6-26.

74:02:01:12.04. Deadline to file petitions. Petitions filed pursuant to SDCL 46-2A-4(4) to oppose or support an application must be served by first class mail or personally delivered to the chief engineer's office and the applicant. Mail must be postmarked or personal delivery must occur at least 10 days before the published date of hearing pursuant to SDCL 46-2A-4. If the tenth day is a Saturday, Sunday, or legal holiday, petitions must be postmarked or personally delivered to the chief engineer's office and the applicant by the next working day.

Source: 17 SDR 51, effective October 11, 1990.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-2A-4.

74:02:01:12.05. Procedure to contest chief engineer's recommendation. If the applicant for a permit contests the chief engineer's recommendation, the applicant must file a petition in accordance with SDCL 46-2A-4 to 46-2A-6, inclusive, and § 74:02:01:12.04.

Source: 17 SDR 51, effective October 11, 1990.

General Authority: SDCL 46-1-16, 46-2-3.1, 46-2-5.

Law Implemented: SDCL 46-1-16, 46-2A-4, 46-5-6.11.

74:02:01:12.06. Published date of hearing. For purposes of allowing the chief engineer to issue permits pursuant to SDCL 46-1-16 and 46-5-6.11 and to meet publication requirements, any day that is not a Saturday, Sunday, or legal holiday may be designated by the secretary of the department of environment and natural resources as a board meeting date. The published date of hearing for applications shall be at least 20 days after the second publication of the notice. The published notice shall include a statement that the hearing may be rescheduled if a petition opposing the application is received or the chief engineer's recommendation is contested.

Source: 17 SDR 51, effective October 11, 1990.

General Authority: SDCL 46-1-16, 46-2-3.1, 46-2-5.

Law Implemented: SDCL 1-40-18, 46-1-16, 46-2A-4, 46-2A-5, 46-5-6.11.

74:02:01:13. Authorized actions of board on water permit applications.
Repealed.

Source: SL 1975, ch 16, § 1; transferred from § 52:01:01:11, effective July 1, 1979; 9 SDR 96, effective January 30, 1983; repealed, 10 SDR 27, effective September 26, 1983.

74:02:01:13.01. Submission of proposed findings of fact, conclusions of law, and final decision -- Comments. The board may, in its discretion, direct either its attorney or the prevailing party to propose findings of fact, conclusions of law, and a final decision for its consideration. Unless otherwise directed by the board, the proposal shall be mailed to the board members and to the parties not less than 20 days before the next regularly scheduled board meeting. Objections to the proposal and alternative proposals may be submitted in writing and shall be mailed to the board members and the parties not less than 10 days before the meeting, unless otherwise directed.

Source: 9 SDR 96, effective January 30, 1983; 10 SDR 27, effective September 26, 1983; 13 SDR 49, effective October 27, 1986; 13 SDR 129, 13 SDR 141, effective July 1, 1987.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-2A-7.

74:02:01:13.02. Signing of findings of fact, conclusions of law, and final decision -- Valid permit. The permit is valid from the date findings of fact, conclusions of law, and a final decision are signed by the chairman, if required by the board, or the date the permit is signed by the chief engineer, whichever is sooner.

Source: 13 SDR 49, effective October 27, 1986; 13 SDR 129, 13 SDR 141, effective July 1, 1987.

General Authority: SDCL 46-2-5.

Law Implemented: SDCL 46-2A-7.

74:02:01:14. Approved applications to contain qualifications -- Authority to proceed with construction. Approved applications must contain all qualifications passed by the board, contain a statement indicating the priority date and the time limits within which construction must be completed and the water put to beneficial use, and be signed by the chief engineer. A copy of the permit shall be sent to the applicant. The permit constitutes authority for the applicant to proceed with the construction of the works and to apply the water to beneficial use as specified in the permit.

Source: SL 1975, ch 16, § 1; transferred from § 52:01:01:12, effective July 1, 1979; 9 SDR 96, effective January 30, 1983; 10 SDR 27, effective September 26, 1983; 13 SDR 49, effective October 27, 1986; 13 SDR 129, 13 SDR 141, effective July 1, 1987.

General Authority: SDCL 46-2-5, 46-5-11.

Law Implemented: SDCL 46-2A-7, 46-2A-9, 46-6-3.

74:02:01:14.01. Correction of permits and amendment of permits or rights. An application may be submitted after the authorized construction period on the original permit to correct an unlicensed permit and retain the original priority date under the following circumstances:

(1) The chief engineer was unable to complete an inspection before the date for application of the water to beneficial use pursuant to SDCL 46-5-30;

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF VESTED WATER)	FINDINGS OF FACT,
RIGHT CLAIM NO. 2294-2 AND)	CONCLUSIONS OF LAW AND
WATER PERMIT APPLICATION NO.)	FINAL DECISION
2276-2; CITY OF RAPID CITY)	

FINDINGS OF FACT IN RELATION TO
VESTED WATER RIGHT CLAIM NO. 2294-2

1. The City of Rapid City requests validation of Vested Water Right Claim No. 2294-2 for the irrigation of 104 acres at the diversion rate of 1.48 cubic feet per second from the natural flows of Rapid Creek and an annual volume limitation of 312 acre feet.

2. The claim for water under this application arises from the Leedy Ditch irrigation system which was constructed in 1877 and a subsequent location certificate filed in Pennington County in 1883. The case of Sickler v. Bennett decreed 400 miner's inches for Leedy Ditch.

3. After establishment of the water right, it was split into several segments.

4. One segment of the right, for 1 c.f.s. and 19.5 acres was validated with an April 1, 1877, priority date by way of Vested Right No. 2023-2 on March 2, 1988.

5. The second portion of the original Leedy Ditch water right is that at issue here. That second portion was transferred to the City of Rapid City by way of Water Right No. 0646-2A on January 17, 1957, by way of Water Resource Commission approval. That action approved 1.48 c.f.s. for irrigation of 104 acres of the Meadowbrook Golf Course.

6. On December 10, 1986, the Water Management Board approved Water Permit No. 1998-2 to change the point of diversion for the water right at issue here from the Leedy Ditch diversion point to a point on Rapid Creek.

7. The vested right claim at issue here asserts a priority date of April 1, 1877, the same priority date previously approved for Vested Right No. 2023-2, which also originated in the Leedy Ditch irrigation right.

8. Evidence in the record, including that of the report of the Division, is to the effect that water has been continually used since the irrigation system was put into operation. There is no conflicting evidence in the record.

9. The volume of water available annually under this permit is three feet per acre annually.

CONCLUSIONS OF LAW
WITH REGARD TO VESTED WATER RIGHT CLAIM NO. 2294-2

1. The Board has jurisdiction of this matter.
2. This water has been appropriated as described for irrigation use with a priority date of April 1, 1887.
3. The use has been developed without unlawful impairment of existing rights.
4. The use to irrigate a golf course is a beneficial use.
5. The use is in the public interest in that it promotes recreation in the city of Rapid City.
6. The Board specifically rejects the assertion that SDCL 46-5-6 precludes the recognition of a vested right to apply

three acre feet of water under this vested right. First, the claimed right was developed at the rate of three acre feet of water per acre rate and the volume limitation was not in effect at the time of the development of the right. In particular, the three acre feet volume limitation did not appear in South Dakota law until 1957. See S.L. 1957, ch. 490, § 2. A two acre feet per acre limitation did not appear in South Dakota law until 1978. See S.L. 1978, ch. 308. The Board concludes that the legislature did not intend to apply either the two or three acre feet volume limitation to a water right which had been fully developed, had been recognized by court decree, and had originated prior to the passage of the 1957 and 1978 acts and prior to the passage of the critical 1907 South Dakota Water Act.

FINAL DECISION
AS TO VESTED WATER RIGHT CLAIM NO. 2294-2

The application for validation of Vested Water Right Claim No. 2294-2 is granted for the irrigation of the 104 acres identified in the application.

FINDINGS OF FACT
WITH RELATION TO WATER PERMIT APPLICATION NO. 2276-2

1. This is an application by the City of Rapid City to build upon the vested right claim No. 2294-2. The application proposes to place to beneficial use an additional 2.09 c.f.s. of water appropriated and reserved by Future Use Permit No. 1088-2 from Rapid Creek. This Future Use Permit has a priority date of June 28, 1971.

2. In particular, the city proposes to increase the diversion rate authorized by the vested right by an additional 2.09 c.f.s., to add 16 acres of land to be irrigated and to increase the annual volume limitation by 48 acre feet. The application also seeks to change the location of irrigated acres authorized by Vested Right No. 2294-2 in Meadowbrook Golf Course. In addition, the application requests that 0.01 c.f.s. of the requested diversion rate increase be used as a flow-through for a golf course pond on the No. 18 green.

3. The effect of approval of this application would be to increase the allowable diversion rate for the project from 1.48 cubic feet per second by 2.09 cubic feet per second to a total of 3.57 cubic feet per second.

4. SDCL 46-5-6 states that "the amount [of water] allowed shall not be in excess of the rate of one cubic feet of water per second for each seventy acres, or the equivalent thereof. . . ." The present application seeks one c.f.s. per 33.6 acres on an instantaneous basis. The daily pumping time will be restrained by the Final Decision to 11.5 hours per day. Thus, the application of water to the land will be at the rate of one c.f.s. per 70 acres on a daily basis or the same amount as allowed by SDCL 46-5-6.

5. The application, as noted, also seeks to add an additional 16 acres of irrigated land. In addition, it seeks to allow irrigation of those 16 acres at a rate of three acre feet per year. The increased acreage cannot, of course, be considered

part of the water right created in 1877 and therefore the strictures of SDCL 46-5-6 are applicable to it.

6. The Board finds that the application of three acre feet per year on a golf course is reasonable and allowable under SDCL 46-5-6.

7. While the opponents to the permit have made general allegations that the allowance of the 3.57 c.f.s. instantaneous diversion will be harmful to them they have not demonstrated this to be the case.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter.

2. SDCL 46-5-6 allows the Board to authorize the application of water at a rate in excess of one cubic feet per second for each 70 acres on an instantaneous basis if, and only if, the rate is not in excess of one cubic feet of water per second on a daily basis. The rate of water approved by this permit is at the statutorily allowable rate of one cubic feet per second for each 70 acres on a daily basis.

3. The Board has authority under SDCL 46-5-6 to grant a new permit to allow up to three c.f.s. for water to accommodate particular irrigation requirements and conditions. Those conditions have been met in this case.

4. The Board has today simultaneously validated 104 acres as covered by the additional water right and has also allowed the change in the location of those 104 acres. Nonetheless, only 104 acres are covered by the vested water

right. The Final Permit issued to the applicant and the license issued to the applicant shall specify which 104 acres are covered by the vested water right. This will ensure an orderly shut-down in times of water shortage, should such occur.

5. There is a reasonable probability that there is unappropriated water available for the applicant's proposed use.

6. The proposed diversion can be developed without unlawful impairment of existing rights.

7. The proposed use on a golf course is a beneficial use.

8. The proposed use is in the public interest when qualified in the Final Decision.

FINAL DECISION

The Application for Water Right No. 2276-2 to increase the diversion rate, add acres and change the location of acres irrigated in Meadowbrook Golf Course is granted as qualified below.

1. The Chief Engineer shall ensure that the permits and licenses in this case contain accurate reference to the 104 acres which are covered by the vested right.

2. Unappropriated water associated with the June 28, 1971, priority date is available in Rapid Creek to reasonably satisfy this permit only through contract between the City of Rapid City and the Bureau of Reclamation for releases from Deerfield and Pactola Reservoirs.

3. Approval of Permit No. 2276-2 limits the number of hours of irrigation per day to a corresponding equivalent time period as if irrigating at a rate of 1.71 c.f.s. for 120 acres. At a pumping rate of 3.57 c.f.s., the pumping time may not exceed 11.5 hours per day. The total amount of water applied shall not exceed 3 acre feet per acre per year.

4. A meter shall be installed at the pump site to monitor the volume of water pumped. The amount of water diverted shall be reported to the Chief Engineer, annually, on the irrigation water use questionnaire.

Dated this 24th day of September, 1994.

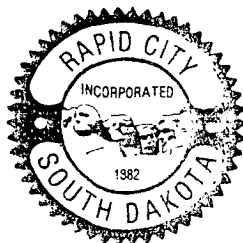
BY THE BOARD:

Dwayne Kelley

d-wmb7.jpg(deo)

Attorney General

122463
DEC 22 1994



City of Rapid City

RAPID CITY, SOUTH DAKOTA 57701

OFFICE OF THE CITY ATTORNEY

300 Sixth Street
Rapid City, South Dakota 57701
Telephone: 605-394-4140

December 21, 1994

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

Re: Marsh Hereford Ranch, Inc. & Rapid Valley Water Conservancy
District v. City of Rapid City, et al

Dear Diane:

I am enclosing a copy of Brief of Appellee City of Rapid City regarding the above matter. This is intended as service by mail upon you.

Very truly yours,

Robert R. Jackson
City Attorney

RRJ:map

Enclosure



EQUAL OPPORTUNITY EMPLOYER

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

MARSH HEREFORD RANCH, INC. and
RAPID VALLEY WATER CONSERVANCY
DISTRICT,

Appellants,

v.

STATE OF SOUTH DAKOTA ACTING AS THE
WATER MANAGEMENT BOARD OF THE
DEPARTMENT OF ENVIRONMENT AND NATURAL
RESOURCES, and CITY OF RAPID CITY,

Appellees.

BRIEF OF APPELLEE CITY OF RAPID CITY

PRELIMINARY STATEMENT

The City of Rapid City adopts the Preliminary Statement as set forth in the brief of Appellee, Department of Environment and Natural Resources, Division of Water Rights.

JURISDICTIONAL STATEMENT

The City of Rapid City adopts the Jurisdictional Statement as set forth in the brief of Appellee, Department of Environment and Natural Resources, Division of Water Rights.

STATEMENT OF LEGAL ISSUES

The City of Rapid City adopts the Statement of Legal Issues as set forth in the brief of Appellee, Department of Environment and Natural Resources, Division of Water Rights.

STATEMENT OF THE CASE

The City of Rapid City filed two applications with the Water Management Board relating to appropriation of water to irrigate the Meadowbrook

Golf Course in Rapid City. The City has irrigated the golf course under a water right with a priority date of April 1, 1887, allowing the irrigation of 104 acres with a diversion rate of 1.48 cubic feet per second (cfs) and an annual volume limitation of 312 acre-feet.

Application No. 2276-2, filed in March of 1993, sought, pursuant to reserved rights under Future Use Permit No. 1088-2, to increase the diversion rate, acreage, and annual volume limitation and to change the location of some of the acreage authorized for irrigation under that right. The application requested an increase in diversion rate of 2.09 cfs, the addition of 16 acres to be irrigated, and an increase in maximum annual volume of 48 acre-feet.

Application No. 2294-2, filed in October of 1993, requested validation of the existing water right for irrigation.

The South Dakota Department of Environment and Natural Resources, Division of Water Management, recommended approval of the applications, Petitioners filed notices of opposition to the applications, and a contested case hearing was held on June 28, 1994. At the close of the hearing the Board made an oral decision. Counsel for the Board prepared proposed Findings of Fact, Conclusions of Law, and Final Decision; the proposed findings were served upon all parties and their legal counsel by mail on August 5, 1994.

By letter dated August 10, 1994, Petitioners served their own proposed findings and conclusions regarding Application No. 2276-2. Their proposal did not make reference to Application No. 2294-2 and did not object to any of the findings or conclusions proposed by the Board. It also does not appear from the Certificate of Service that the Petitioners served their proposed findings and conclusions on the Division of Water Management.

Thereafter, on August 31, 1994, the Board approved the Findings of Fact, Conclusions of Law, and Final Decision as proposed by its counsel, with

one minor change which had been proposed and properly served on all parties by the Division of Water Management. The adopted findings and conclusions were signed on September 9, 1994, and served upon all parties.

On October 3, 1994, Petitioners filed a Notice of Appeal and on October 4, 1994, Petitioners filed a Revised Notice of Appeal.

STATEMENT OF THE FACTS

The City of Rapid City adopts the Statement of the Facts as set forth in the brief of Appellee, Department of Environment and Natural Resources, Division of Water Rights.

ARGUMENT

THE WATER MANAGEMENT BOARD WAS CORRECT IN ITS INTERPRETATION OF SDCL 46-5-6.

SDCL 46-5-6 provides:

In the issuance of permits to appropriate water for irrigation or in the adjudication of rights to the use of water for such purpose, the amount allowed shall not be in excess of the rate of one cubic foot of water per second for each seventy acres, or the equivalent thereof, and the volume of water diverted for use shall not exceed two acre-feet per acre, delivered on the land for a specified time each year. The water management board may allow a greater diversion where the method of irrigation stipulated in the permit or the type of soil to which the water is to be applied so requires except that in no case may the diversion be greater than three acre-feet per acre delivered to the land. The above rate of one cubic foot per second for each seventy acres shall not apply in cases of flood water at such times when the flow of the stream is much in excess of the total recorded and approved rights on the stream. (Emphasis supplied).

The statute clearly provides that the Board may allow a greater diversion where the method of irrigation stipulated in the permit requires. The method of irrigation stipulated in the permit, i.e., pumping limited to 11.5 hours per day, obviously requires an increase in the instantaneous diversion rate to allow the diversion of the allowable volume of water. (It

should be noted that the Appellants' Statement of Issues on Appeal only questions the interpretation of the diversion rate provisions; Appellants have not questioned the volume of water permitted).

Appellants assert that the Board erroneously imposed a "daily average gloss" on "an otherwise clear statute." The City would argue that the statute clearly does not provide for a maximum instantaneous diversion rate. The words used are "in excess of the rate one cubic foot of water per second for each seventy acres, or the equivalent thereof," The Legislature, if it had intended to impose a maximum instantaneous diversion rate, could easily have included the word "instantaneous." Instead, the Legislature provided for a maximum rate or the equivalent thereof, clearly allowing the interpretation of the limitation to be made by the Board consistent with the usual and customary practices in the area of irrigation.

As a practical matter, the process involved here is rather common. See the testimony of Ron Duvall at pages 20 to 22 of the hearing transcript.

Appellants attempt to argue against the interpretation by extending it to illogical extremes, unwarranted by the circumstances, and then argue that there are no standards to prevent a ridiculous result. But to reach the illogical extreme Appellants ignore the standards which are clearly implicit in the statute. The statute uses the phrase "or the equivalent thereof." A finding that allowing increased pumping for 11.5 hours per day may reasonably be found to be within the ordinary limits of standard irrigation practice; allowing diversion of an entire season's allotment within a matter of a few days obviously cannot be found to be within the ordinary limits of standard irrigation practice. The standards are there and the Board's interpretation is both reasonable and correct.

APPELLANTS HAVE ACCEPTED THE FINDINGS OF FACT BY FAILURE TO MAKE TIMELY OBJECTION.

Issues II, III, and IV as stated in Appellants' Statement of Issues on Appeal all question whether findings of the Board are sufficient to provide meaningful judicial review. Those issues are moot. (ARSD 74:02:01:13.01; GMS, Inc., v. Deadwood Social Club, Inc., 333 NW2d 442 (SD, 1983)).

Appellants did not object to the proposed Findings of Fact and, by their notice of appeal, have not raised questions as to whether the findings support the conclusions or whether the findings and conclusions support the final decision. They have merely questioned the sufficiency of the findings of fact without preserving the issue for appeal.

Nonetheless, the City would offer the following observations.

During the hearing and throughout the proceedings, the Appellants have offered no evidence of any substance to support their position. They have not questioned whether the use of the water to irrigate a golf course is a beneficial use of the water; the Board found that such use is a beneficial use. Appellants have not questioned whether the use of the water was in the public interest; the Board found that it was.

The only factual matter arguably raised by Appellants throughout the hearing process was the general allegation that downstream irrigators' pumps are affected by fluctuations in the creek flow. While it is certainly true that pump-irrigators would benefit from a steady flow of water in the creek, it does not necessarily follow that denial of the diversion rate sought by this permit would provide that steady flow. It is purely a matter of common sense that the 2.09 cfs sought by the City will have a negligible effect on the level of a stream carrying something on the order of 100 cfs and subject to natural variables of far greater impact. Weather conditions have profound effects on

the level of the stream. Rainfall will cause rapid increases in stream levels; bank storage and releases will affect stream levels. Diversions by other irrigators will vary dramatically between times of rainfall and times of hot, dry wind. Discharges from the City's wastewater treatment plant will cause variations.

Additionally, it is worthy of note that in reality the Appellants are objecting to variability of "free" water. In order to have water available to be diverted by the City during the 11.5 hours it is allowed to divert, the City will have to order water from Pactola at the diversion rate and maintain that level of flow 24 hours per day. The water which is ordered from Pactola that is not diverted by the City during its allowed diversion period becomes free water, in effect natural flow, available to downstream irrigators without the necessity of ordering, and paying for, the water. The net result is that the City is not taking water which would otherwise belong to the irrigators; the City is taking water which would not otherwise be in the creek and, for more than half of the day, is paying for and providing free water to the irrigators. We do not expect gratitude, but recognition of the fact does not seem too much to ask.

Appellants have not preserved the stated bases for appeal and, in any event, have not produced substantive evidence to controvert the findings and conclusions.

CONCLUSION

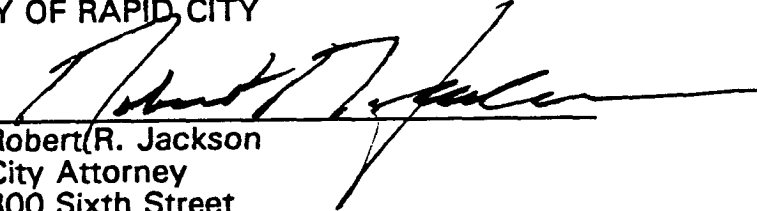
In summary, Appellants are incorrect in their over-technical reading of SDCL 46-5-6. The interpretation given that statute by the Board is reasonable, well considered, and within the proper scope of authority of the Board.

Appellants have not preserved for appeal their questions regarding sufficiency of the Findings of Fact. Neither have they adduced evidence sufficient to bring into question the findings of the Board.

The Appellants have not been injured by the granting of the applications and will not be injured by the denial of this appeal. The decision of the Board should be sustained and the appeal denied.

Dated this 20th day of December, 1994.

CITY OF RAPID CITY

By: 

Robert R. Jackson
City Attorney
300 Sixth Street
Rapid City, SD 57701
Telephone: (605) 394-4140

CERTIFICATE OF SERVICE

I, Robert R. Jackson, do hereby certify that on the 20TH day of December, 1994, I caused a copy of the foregoing Brief of Appellee City of Rapid City to be served upon the following:

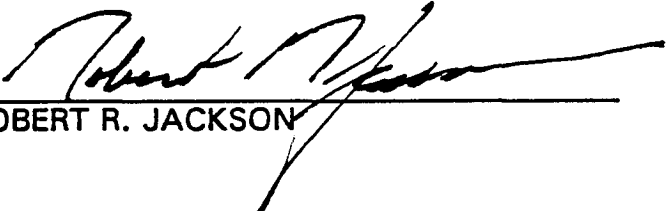
BY HAND DELIVERY:

Joseph M. Butler
Veronica Bowen
Attorneys at Law
818 St. Joseph Street
Rapid City, SD 57701

BY UNITED STATES MAIL:

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

by placing a copy of the same in envelopes securely sealed and addressed to the above-named addressees at the foregoing addresses, the same being the last known addresses of said addressees.



ROBERT R. JACKSON

Bangs, McCullen, Butler, Foye & Simmons

Lawyers

Joseph M. Butler
Thomas H. Foye
Thomas E. Simmons
Charles L. Riter
Allen G. Nelson
James P. Hurley
Michael M. Hickey
Mark F. Marshall
Terry L. Hofer
Patrick K. Duffy

818 St. Joe Street
Mailing Address P.O. Box 2670
Rapid City, South Dakota 57709-2670
605-343-1040
Telecopier 605-343-1503
December 22, 1994

Rodney W. Schlauger*
Daniel F. Duffy
Jeffrey G. Hurd
Veronica L. Bowen

—
*Also Admitted in Minnesota,
Nebraska and North Dakota

—
George A. Bangs, Of Counsel
W.A. McCullen (1943-1987)



Recycled Paper

Ms. Bonnie Fitzgerald
Clerk of Circuit Court
P.O. Box 230
Rapid City, SD 57709

Re: Marsh Hereford Ranch, Inc., and Rapid Valley Water
Conservancy District v. State of South Dakota Acting as the
Water Management Board of the Department of Environment and
Natural Resources

Dear Bonnie:

In regard to the above-referenced matter, enclosed is Appellant's
Reply Brief.

By copy of this letter, a copy of this document has been mailed to
John P. Guhin, Deputy Attorney General; Diane Best, Assistant Attorney
General; Bob Jackson, City Attorney; Dan Bjerke, City of Rapid City;
Water Management Board; Dwayne Rollag, Water Management Board Chairman;
Francis Brink; Bernita Loucks; Marian Gunderson; Rodney Freeman; Leo
Holzbauer; and Joel Rickenbach. This is intended as service by mail.

Sincerely,

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

Joseph M. Butler

JMB:pkw

Enclosure

cc: John P. Guhin
Diane Best
Bob Jackson
Dan Bjerke
Water Management Board
Dwayne Rollag
Francis Brink
Bernita Loucks
Marian Gunderson
Rodney Freeman
Leo Holzbauer
Joel Rickenbach
Jerry Hammerquist
Jerry Marsh



STATE OF SOUTH DAKOTA)
 SS
PENNINGTON COUNTY)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

Court File No. C95-289

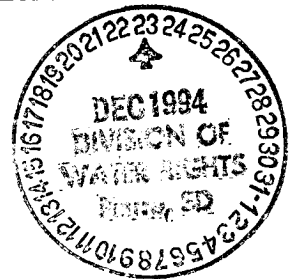
MARSH HEREFORD RANCH, INC. and
RAPID VALLEY WATER CONSERVANCY DISTRICT,

Appellants,

vs.

STATE OF SOUTH DAKOTA ACTING AS THE
WATER MANAGEMENT BOARD OF THE
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES,

Appellee.



APPEAL TO THE CIRCUIT COURT, SEVENTH JUDICIAL
CIRCUIT, PENNINGTON COUNTY, SOUTH DAKOTA,
FROM THE DECISION OF THE WATER MANAGEMENT
BOARD OF THE DEPARTMENT OF ENVIRONMENT AND
NATURAL RESOURCES GRANTING THE APPLICATION
OF THE CITY OF RAPID CITY REGARDING
VESTED WATER RIGHT CLAIM NO. 2294-2 AND
WATER PERMIT APPLICATION NO. 2276-2

THE HONORABLE MERTON B. TICE, JR., PRESIDING JUDGE

APPELLANTS' REPLY BRIEF

JOSEPH M. BUTLER
VERONICA L. BOWEN
Bangs, McCullen, Butler,
Foye & Simmons
818 St. Joseph St.; P.O. Box 2670
Rapid City, SD 57709
(605) 343-1040

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<u>City of Roswell v. Reynolds,</u> 86 N.M. 249, 522 P.2d 796 (1974)	19
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PRELIMINARY STATEMENT

Marsh Hereford Ranch, Inc. and Rapid Valley Water Conservancy District (Appellants), hereby offer the following Reply Brief in support of their appeal from a decision of the Water Management Board of the Department of Environment and Natural Resources (Board) to grant Water Permit Application No. 2276-2 submitted by the City of Rapid City (City). References to the transcript of the hearing before the Board will be designated as "Tr. ____." References to the Administrative Record concerning Water Permit Application No. 2276-2 will be designated as "Ar. ____."

Appellants note that the South Dakota Department of Environment and Natural Resources, Water Rights Division, has submitted a brief on behalf of the Board. Appellants do not object to this, although they do take issue with the Division's suggestion that it was improper to name the Board, rather than the Division, as Appellee. See Fraser v. Water Rights Comm'n., 294 N.W.2d 784, 789 (S.D. 1980) (naming the Water Rights Commission, the predecessor agency to the Board, as the appellee in an appeal from a decision of the Commission concerning a water permit application). Furthermore, Appellants note that the City which was not named as a party to this appeal and which has not sought the Court's permission to intervene, filed a brief in which it purports to respond as a named appellee. However, Appellants find it more constructive to treat the City's brief as an amicus cur brief and to address the arguments raised by the City rather than to risk

having unanswered questions in the Court's mind. Therefore, Appellants do not at this time formally move to have the City's brief stricken.¹ Unless specifically noted otherwise, Appellants refer to the City and the Division collectively as "Appellees."

FACTUAL BACKGROUND

Appellants' statement of the facts in its original brief in this matter remains applicable and Appellants do not take issue with the additional facts recited by Appellees in their brief. However, Appellants would like to emphasize the following facts.

The City did not present any affirmative evidence at the administrative hearing before the Board that granting its application would not impair existing rights, would be for beneficial purposes, and would be in the public interest. See generally, Tr.

Appellee's contention is true that Appellants did not serve the Division of Water Rights and its counsel with Appellants' proposed findings of fact and conclusions of law in the administrative proceedings below. However, Appellants did serve their proposed findings and conclusions on the Board, counsel for the Board, each individual member of the Board, and the City, which was the permit applicant. See A.R. 62. The Board did not adopt Appellants' proposed findings of fact and conclusions of law. Rather, the Board adopted the proposed findings and conclusions

¹Appellants have served the City and the Division, in addition to the Board, with copies of all documents connected with this appeal because Appellants recognize that these entities might be interested in the proceedings, though they are not named parties.

submitted by Appellees. Compare A.R. 59-62 (Appellants' proposed findings and conclusions) with A.R. 27-47 (the Board's Attorney's proposed findings and conclusions, the Division's suggestions thereto, and the final findings and conclusions adopted by the Board).

ARGUMENT

A. Standard of Review

Appeals to the circuit court of decisions of an administrative agency are governed by SDCL §§ 1-26-36 and 1-26-37. Questions of law and mixed questions of law and fact that were decided by the agency are reviewable de novo by the circuit court. DeKay v. United States Fish & Wildlife Service, No. 18708-a-RWS, slip op. at 2 (S.D. Dec. 7, 1994); Hendrix v. Graham Tire Co., 520 N.W.2d 876, 879 (S.D. 1994); In re State and City Sales Tax Liability of Quality Service Railcar Repair Corp., 437 N.W.2d 209, 210-11 (S.D. 1989); Permann v. Dept. of Labor, 411 N.W.2d 113, 115-17 (S.D. 1987). Questions of fact decided by the agency are subject to reversal only if clearly erroneous. DeKay, slip op. at 2; Hendrix, 520 N.W.2d at 879; Quality Service Railcar Repair Corp., 437 N.W.2d at 211; Permann, 411 N.W.2d at 115-17.

Appellants request judicial review of decisions of the Board concerning both questions of law and questions of fact. Whether the Board properly interpreted the diversion rate limitation of SDCL § 46-5-6 raises a question of law. Whether the Board properly found that the City's proposals would not unlawfully

impair existing rights, would be in the public interest, and would be for a beneficial use raises questions of fact.

B. Appellants Are Entitled to Judicial Review of the Decision of the Board

As a preliminary matter, Appellants address procedural issues which Appellees argue should bar the Court's consideration of the merits of Appellants' appeal. Appellees, in their brief, suggest that the Court should not review the merits of Appellants' arguments because Appellants have not preserved their right to appeal. Additionally, Appellees seem to suggest that Appellants do not have standing to present their arguments because of failure to comply with the standards of SDCL § 1-26-36. The Court should not adopt either of these arguments as both are unfounded, as demonstrated below.

1. Appellants Have Preserved Their Right to Appeal

Appellees suggest that, because Appellants failed to serve their proposed findings of fact and conclusions of law on the Division of Water Rights or its counsel and because Appellants failed to file objections to the findings and conclusions adopted by the Board, that Appellants have forfeited the right to object to findings of fact entered by the Board. This is incorrect.

It was an oversight on Appellants' part that their proposed findings and conclusions were not filed upon the Division. However, no prejudice to the Division has resulted. The entity making the administrative decision, the Board, was served with Appellants' proposed findings and conclusions and had the full benefit of the consideration thereof prior to making its final

decision. A.R. 59-62. Appellees do not suggest otherwise. See Brief of Appellee at 4 (admitting that Appellants served the Board with their proposed findings of fact and conclusions of law).

The Division occupied an adversarial role in the administrative proceedings below. Id. at 1 n.1. Inasmuch as the Board ultimately adopted the position advanced by the Division below, the Division was not prejudiced by not having received and responded to Appellants' proposed findings and conclusions. Failure to serve the Division with the administrative findings and conclusions proposed by Appellants should not serve as a bar to this Court's consideration of the merits of Appellants' appeal.

In addition to the issue discussed above, Appellees suggest that Appellants' failure to object to the Board's findings of fact and conclusions of law below should preclude consideration of the merits of Appellants' appeal by this Court. Again, Appellees are mistaken.

This is substantially the same argument raised by the permit applicant and rejected by the South Dakota Supreme Court in In re Application of SDDS, Inc., for a Solid Waste Permit, 472 N.W.2d 502 (S.D. 1991). In that case, the appellants had raised before the circuit court the issue of the adequacy of the agency's findings of fact under SDCL § 1-26-25. Id. at 512-13. The South Dakota Supreme Court held that, by filing their own proposed findings of fact and conclusions of law before the agency, the appellants had preserved for appeal the issue of the adequacy of the agency's findings pursuant to SDCL § 1-26-25. Id. at 514. Cf. Moody County v. Cable, 82 S.D. 537, 150 N.W.2d 193, 194-95 (1967)

(stating that, absent an appellant's proposing or requesting of findings of fact before the Circuit Court, the appellant could not argue that the evidence was insufficient to support the findings, but could argue that the findings did not support the conclusions of law and judgment of the court).

In the instant case, Appellants--like the appellants in SDDS--raise the issue of the adequacy of the agency's findings pursuant to SDCL § 1-26-25. Also--like the appellant in SDDS--Appellants herein filed their own proposed findings and conclusions with the agency. Therefore, SDDS requires the conclusion that Appellants herein have preserved for appeal the issue of the adequacy of the agency's findings of fact pursuant to SDCL § 1-26-25.

2. Appellants Have Standing to Present Their Issues

Appellees seem to suggest that Appellants have not demonstrated their standing to pursue the instant appeal because Appellants have not demonstrated that their substantial rights have been prejudiced and that a violation has occurred as required by SDCL § 1-26-36.² The statute relied upon by Appellees provides as follows:

The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or

²Appellees do not use the term "standing" in their briefs. However, Appellees' assertion that Appellants must demonstrate some injury to themselves as a result of the Board's decision as a prerequisite to judicial review is at the core of the standing doctrine. See Parsons v. S.D. Lottery Comm'n, 504 N.W.2d 593 (S.D. 1993) (discussing whether appellants had demonstrated sufficient injury to themselves to entitle them to appeal a decision of a South Dakota agency). The requirement of SDCL § 1-26-36 that appellants show that their substantial rights have been prejudiced is but a statutory embodiment of the standing doctrine.

remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence in the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

SDCL § 1-26-36 (emphasis added). The requirement of showing that "substantial rights of the appellant have been prejudiced" is required only when the Court is asked to "reverse or modify" the decision of the agency. See SDCL § 1-26-36. However, in this case, the Appellants seek only remand back to the agency so that it may (1) interpret the law correctly and (2) issue revised findings of fact in compliance with SDCL § 1-26-25. Appellants do not ask the Court to issue its own findings of fact or to modify the agency's order. Therefore, a showing that Appellants' "substantial rights . . . have been prejudiced" is not necessary.³

³The case cited by Appellees, Ashland v. Department of Labor, 321 N.W.2d 103 (S.D. 1982) (per curiam), is not to the contrary. Although the court did require the appellant in that case to demonstrate that his substantial rights had been prejudiced, the appellant was asking the court to reverse and modify the agency's decision. Id. at 105. As such, it was proper to require the appellant to make the "substantial rights" showing. See SDCL § 1-26-36.

However, to the extent such a requirement would be applicable in the instant case, Appellants can make such a demonstration. Appellants are downstream irrigators, some of whose pumping equipment is sensitive to the flow levels of the creek from which the City will be pumping. Tr. 11-12. Interference with the flow levels of the creek by allowing diversions in excess of the diversion rate limitation specified by SDCL § 46-5-6 would prejudice the substantial rights of Appellants. Furthermore, the agency decision is in violation of statutory provisions--namely the diversion rate limitation found in section 46-5-6. Therefore, Appellants' appeal is proper under SDCL § 1-26-36(1). See In re Appeal from the S.D. Dep't of Labor, 323 N.W.2d 133, 135 (S.D. 1982) (allowing judicial review of appeal of Department of Labor decision even though appellant had failed to specify which subsection of section 1-26-36 she relied upon).

C. Board Erred in Interpreting the Diversion Rate Restriction Contained in SDCL § 46-5-6

Although SDCL § 46-5-6 was cited in full in Appellants' initial brief, it is important enough to bear repeating at this juncture:

In the issuance of permits to appropriate water for irrigation or in the adjudication of rights to the use of water for such purpose, the amount allowed shall not be in excess of the rate of **one cubic foot of water per second for each seventy acres, or the equivalent thereof**, and the volume of water diverted for such use shall not exceed two acre-feet per acre, delivered on the land for a specified time each year. The water management board may allow a greater diversion where the method of irrigation stipulated in the permit or the type of soil to which the water is to be applied so requires except that in no case may the

diversion be greater than three acre-feet per acre delivered to the land. The above rate of one cubic foot per second for each seventy acres shall not apply in cases of flood water at such times when the flow of the stream is much in excess of the total recorded and approved rights on the stream.

SDCL § 46-5-6 (emphasis supplied).

As an initial matter, Appellants note that they are not challenging the Board's decision with regard to the City's application for validation of Vested Right No. 2294-2.⁴ Appellants agree that the diversion rate restrictions contained in SDCL § 46-5-6 cannot be applied to vested water rights existing prior to the time the limitation was enacted and that the City's vested right existed prior to the enactment of the diversion rate limit contained in section 46-5-6. Therefore, the Board's action with regard to the City's vested water right is not an issue in this appeal. The City's vested right concerns the right to irrigate 104 acres at a rate of 1.48 cubic feet per second (c.f.s.).⁵

However, the permit issued by the Board in connection with the City's Water Permit Application No. 2276-2 is subject to the diversion rate restriction contained in SDCL § 46-5-6. This permit adds 16 acres to those irrigated by the City with its Vested Right No. 2294-2 and adds .61 c.f.s. to the 1.48 diversion already

⁴This accords with the City's observation in its brief that the proposed findings of fact and conclusions of law submitted by Appellants to the Board concerned only Application No. 2276-2--the City's water permit application--and did not make reference to Application No. 2294-2--the City's vested rights validation request.

⁵Irrigation of 1.48 c.f.s. for 104 acres is the equivalent of .996149 c.f.s. for 70 acres. Such use is not in violation of SDCL § 46-5-6 in any event.

authorized by Vested Right No. 2294-2. A diversion rate of .61 c.f.s. per 16 acres is the equivalent of 2.67 c.f.s. per 70 acres.

In their initial brief, Appellants argued that the diversion rate limitation of 1 c.f.s. per 70 acres set forth in SDCL § 46-5-6 is not susceptible of the "daily averaging" interpretation which the Board used in granting the City's water permit. The Board's interpretation of SDCL § 46-5-6 is reviewed de novo by the Court. DeKay, slip op. at 2; Hendrix v. Graham Tire Co., 520 N.W.2d 876, 879 (S.D. 1994); In re State and City Sales Tax Liability of Quality Service Railcar Repair Corp., 437 N.W.2d 209, 210-11 (S.D. 1989); Permann v. Dept. of Labor, 411 N.W.2d 113, 115-17 (S.D. 1987).

Appellees advance several arguments in support of the Board's "daily averaging" interpretation. Upon examination, those arguments fail to withstand scrutiny.

Appellees state that averaging diversion rates over a 24-hour period is simply a "management tool" available to the Board which has been used by the Board in the past. Appellees cite no specific examples of past permits based on this interpretation.⁶ Furthermore, whether the daily averaging approach has been used in the past is irrelevant to issues posed by the instant litigation.

Appellees rely on the phrase "or the equivalent thereof" in section 46-5-6 as support for the daily averaging

⁶Ron DuVall testified at the hearing before the Board that this method had been used in the past, but DuVall could give no examples of specific permits. Tr. 20-21. Furthermore, DuVall also testified that he could not guaranty that the "daily averaging" approach would not prove detrimental to downstream users. Tr. 22.

interpretation. However, as explained in Appellants' initial brief, this argument must fail for at least two reasons. First, the phrase "or the equivalent thereof" clearly means that if one has 140 acres, one is entitled to 2 c.f.s. and if one has 210 acres, one is entitled to 3 c.f.s. In other words, "the equivalent thereof" merely means that the proportion of 1:70 may be extrapolated out to fit circumstances where the irrigator has acres of land either less than or greater than the stated 70 acres.

The Appellees' proposed interpretation of the phrase "or the equivalent thereof" is untenable for yet another reason: it is devoid of standards. If the phrase, as the Appellees argue, permits the Board to create a daily average for an irrigator's permit, why would it not also permit the Board to create an average for each 48 hours, 72 hours, a week, or a month? The answer is that there is nothing which would prevent such averaging under the Board's interpretation. An irrigator could conceivably "save up" all the water to which he is entitled for an entire season and use it all in August. As long as the average of the irrigator's diversions did not exceed 1 c.f.s. per 70 acres, this practice would be permissible under the Board's interpretation of SDCL § 46-5-6.

The City dismisses this argument as an extension of the Board's interpretation to "illogical extremes." However, it is nonetheless possible under the standardless interpretation advanced by the Board. Furthermore, even if one limited the Board's interpretation to a 24-hour average, an appropriator could save up

all the water which he is entitled to divert over the course of a day and divert it all in one hour. This practice, entirely possible under the Board's interpretation in this case, would wreak havok with the flow rates in the stream. Appellants' point on this issue is that once the Board is allowed to depart from the standard of measurement for the rate of diversion--per second--there is no basis for limiting irrigators' practices. Significantly, Appellees do not address this issue in their briefs.

Appellants argued in their initial brief that departing from the 1 c.f.s. per 70 acres limitation without the institution of some other definable standard would render the permitting system provided for under South Dakota law unworkable. If every irrigator "saved up" his allotted water until he decided to use it and then tried to divert several hours' or days' or weeks' worth of water all at once, there would be insufficient stream flows to meet all the permits issued. Even more important, however, is the fact that it would become impossible to predict the stream flows at any given time.

In issuing each new permit, the Board is required to find that "there is a reasonable probability that unappropriated water is available for the applicant's proposed use, [and] that the proposed diversion can be developed without unlawful impairment of existing rights. . . ." SDCL § 46-2A-9. The Board can make these findings only if the water appropriated under existing permits is being diverted at a predictable rate for predetermined volumes. Under the averaging approach used by the Board, stream flows would

be impossible to anticipate. This lends support to the Appellants' argument that the South Dakota Legislature intended the diversion rate limitation of section 46-5-6 to be interpreted literally--as a per second limitation. Otherwise, it would be impossible for the Board to make its required findings under SDCL § 46-2A-9 when granting new permits. The legislature should not be presumed to have set forth a task for the Board which is incapable of being performed.

Appellees attempt to counter this analysis by stating that the City could create a reservoir, pump into the reservoir at a rate of 1 c.f.s. per 70 acres for 24 hours a day, and then pump from the reservoir at a rate of 3.57 c.f.s. per 120 acres for 11.5 hours out of every day. Appellants express no opinion as to whether this would be permissible without complying with statutes regulating the construction and maintenance of water storage facilities. However, to the extent the City would be permitted to do this, it would be preferable to the present approach condoned by the Board. The true evil which Appellants object to in the Board's deviation from the 1 c.f.s. per 70 acres restriction is that it will interfere with the predictability of stream flows. Again, it is significant that Appellees do not address this issue in their brief.

The City seems to suggest that, even if the Board's interpretation of § 46-5-6 is erroneous, the Court should affirm the Board's decision anyway because the "2.09 c.f.s. sought by the City will have a negligible effect on the level of a stream

carrying something on the order of 100 c.f.s." Appellants dispute whether the effect of the City's permit will be "negligible," but even if it will be, the cumulative effect of the Board's erroneous interpretation in connection with issuing permits issued on Rapid Creek is not "negligible."

The City also argues that the net result of the granting of its permit is that there will be an increase in the natural flow of Rapid Creek during the hours when the City is not pumping, and that this increase will inure to Appellants' benefit. Whether this is true depends on whether the City orders water to be released from Pactola at a rate of 3.57 c.f.s per hour for 24 hours a day (the rate at which the City will pump when it is actually pumping), or at a rate of approximately 1 c.f.s. per hour for 24 hours a day (the rate at which the City will consume water when averaged out over the course of a day). Either way, this allegation has nothing to do with the issue raised by Appellants: whether the Board's "daily averaging" interpretation of section 46-5-6 is correct as a matter of law.

Finally, Appellees point to the phrase in section 46-5-6 that the Board can "allow a greater diversion where the method of irrigation stipulated in the permit or the type of soil to which the water is to be applied so requires" Appellees argue that this phrase is authority for the Board to exceed the diversion rate limitation if the method of irrigation so requires. Appellees then state that the testimony at the administrative hearing below

supported that the "method of irrigation" merited a "greater diversion."

The phrase relied upon by Appellees reads in full as follows: "The water management board may allow a greater diversion where the method of irrigation stipulated in the permit or the type of soil to which the water is to be applied so requires except that in no case may the diversion be greater than three acre-feet per acre delivered to the land." There are two restrictions contained in SDCL § 46-5-6. One is a limitation on the total volume available under an irrigation permit, expressed in acre-feet. The other limitation is a limit on the diversion rate at which water is taken from a stream, expressed in cubic feet per second. See SDCL §§ 46-1-7 and 46-5-6. Obviously, the phrase pointed to by Appellees when read in its full context refers to the total volume limitation, not to the diversion rate.⁷

However, even if the phrase were susceptible of the interpretation advanced by Appellees, there was no evidence submitted to the Board which would have supported a finding that the method of irrigation to be used by the City required the Board to exceed the diversion rate limitation. Even more significantly, the Board did not make a finding of fact that the method of

⁷Appellants do not challenge the Board's decision as to the volume of water granted to the City under its permit.

irrigation proposed by the City would require departure from the 1 c.f.s per 70 acres restriction. See A.R. 43-47.⁸

Based on the foregoing, Appellants respectfully request that the Court reverse the Board's decision insofar as it interprets SDCL § 46-5-6 to allow for a "daily average."

D. Board's Factual Findings are Inadequate

Appellees argue that the Board's findings of fact cannot be overturned unless they are clearly erroneous or unless the findings do not support the Board's conclusions of law and judgment. This argument presupposes that Appellants are attacking the merits of the Board's findings of fact. Appellees could not be more wrong.

Appellants' argument for reversal, as described in their initial brief in this matter, is that the Board's findings are inadequate as a matter of law and are therefore unreviewable. An agency's findings of fact are capable of judicial review only to the extent that the Court can ascertain on what those findings are based. South Dakota Codified Laws section 1-26-25 requires that if agencies set forth their findings of fact in statutory language, the findings "shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." See SDCL § 1-26-25 (emphasis supplied). This statute was intended to

⁸The Board did make a conclusion of law that "[t]he Board has authority under SDCL § 46-5-6 to grant a new permit to allow up to three c.f.s. [sic] for water to accommodate particular irrigation requirements and conditions. Those conditions have been met." A.R. 45 (Conclusion of Law No. 3). Despite the erroneous use of the "c.f.s." measurement, this conclusion appears to refer to the Board's ability to grant up to three acre-feet per acre per season. As stated in the initial brief, Appellants do not challenge the Board's granting of three acre-feet per acre per season to the City under the City's permit.

force agencies to articulate the basic or underlying facts which led the agency to believe that a particular statutory requirement has been met. In re Application of SDDS, Inc., for a Solid Waste Permit, 472 N.W.2d 502, 512 (S.D. 1991) (citing Saginaw Broadcasting Co. v. F.C.C., 96 F.2d 554 (D.C. Cir. 1938)).

Appellants are not arguing that the Board's findings of fact are clearly erroneous given the record, or that the findings do not support the Board's conclusions of law or its judgment. Rather, Appellants argue that the Board's findings are so deficient in stating the underlying facts upon which the Board relied to reach its conclusions that the findings are not capable of judicial review. With that argument clearly in mind, Appellants now turn to Appellees' contentions regarding the specific findings of the Board.

1. Board's Findings that the City's Permit Would Not Impair Existing Rights is Inadequate

Appellees suggest that "proof of impairment to existing rights lies with those holding the existing rights." Brief of Appellees at 18. Appellees then allege that Appellants failed to prove impairment at the administrative hearing and for that reason, the Board's conclusory statement that the City's permit could be granted without unlawfully impairing existing rights is appropriate. See A.R. 46 (Conclusion of Law No. 6).

The Board is allowed to issue a permit to appropriate water only if the proposed diversion can be developed without unlawful impairment of existing rights. SDCL § 46-2A-9. Section 46-2A-9 does not specifically set forth who has the burden of

proving that a proposed use will not impair existing rights, but reading section 46-2A-7 together with section 46-2A-9, a logical inference arises that it is the applicant for a water permit who bears the burden of proof. Section 46-2A-7 provides that if--based upon the evidence presented at the hearing--the Board determines that the requirements for an appropriation permit have not been met, or that the evidence is insufficient to support a determination, the Board must disapprove the application or defer it for further study. See SDCL § 46-2A-7.

There are, at times, water permit applications which meet with no resistance from opponents. Who then, in such unopposed cases, is to bear the burden of proof that the proposed use will not impair existing rights? It must be the applicant, because no other party would be involved to introduce such evidence and section 46-2A-7 says the Board must disapprove an application if there is insufficient evidence on one of the requirements for a permit. If the burden of proof rests with the applicant in unopposed cases, it must also rest with the applicant in opposed cases. No logical reason exists for shifting the burden of proof to the permit opponent in opposed cases. Indeed, other jurisdictions interpreting similar statutes place the burden of proving no impairment of existing rights on the applicant. See, e.g., Danielson v. Kerbs Ag., Inc., 646 P.2d 363, 374 (Colo. 1982) (en banc) (stating that where applicant sought to increase the number of acres irrigated, it was applicant's burden to prove that the use would not injure the rights of other users from the same

source); City of Roswell v. Reynolds, 86 N.M. 249, 522 P.2d 796, 801 (1974) (stating that the City-applicant had the burden of proving that granting its application for a permit would not impair the existing rights of others).

The September 9, 1994, decision of the Board does not recite what underlying facts it found to support its determination that the City's proposed uses would not unlawfully impair existing rights. In fact, the City did not present any evidence of non-impairment at the hearing. The only evidence presented at all on this issue was to the contrary--that existing rights would be impaired.

Appellants testified at the hearing before the Board that they and other downstream appropriators have pumps which are affected by variations in the flow of Rapid Creek. Tr. 11. Appellants argued that granting the City's application would dramatically affect stream flows to the detriment of themselves and other downstream users. Tr. 11-12. In addition, Ron DuVall testified that he could not guaranty that altering the diversion rate would not cause problems for other irrigators. Tr. 22.

The Board dismissed this testimony as being a mere allegation of harm without proof. Ar. 45. However, the Board was required to do more than state which evidence it discredited. The Board was required to affirmatively state what underlying evidence it relied upon to find that there would be no impairment. Merely dismissing Appellants' evidence does not satisfy the requirements

of SDCL § 1-26-25 nor does it support a finding that the requirements of SDCL § 46-2A-9 have been met.

2. Board's Finding that the Proposed Use Would be a Beneficial Use is Inadequate

A "beneficial use" is defined by statute as "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 interest of the public of this state in the best utilization of water supplies." SDCL § 46-1-6(3). The domestic use of water has been declared by the South Dakota Legislature as the "highest use of water," taking precedence over appropriative rights if domestic use is in the public interest. SDCL § 46-1-5(1); Fraser v. Water Rights Comm'n., 294 N.W.2d 784, 789 (S.D. 1980). In addition, whether a proposed use of water is a beneficial use requires consideration of whether the proposed use will result in waste and whether the method of the proposed use of the water is unreasonable. SDCL § 46-1-4. Therefore, irrigation is not categorically a "beneficial use." If such irrigation detrimentally affects a domestic use, if such irrigation is wasteful, or if the proposed use is unreasonable, then irrigation would not be a "beneficial use."

Appellees cite DeKay v. United States Fish & Wildlife Service, No. 18708-a-RWS, slip op. at 4 (S.D. Dec. 7, 1994), for the proposition that irrigation is per se a beneficial use. However, read carefully, DeKay does not stand for that proposition. In DeKay, the United States Fish and Wildlife Service (FWS) sought three water permits for use in connection with the LaCreek National Wildlife Refuge. Id. at 1. The Water Management Board (Board)

granted those permits and landowners from areas adjoining the refuge appealed. Id. at 1-2. One of the issues raised before the court was whether the use of water to grow aquatic plants and to provide bird habitat was a beneficial use. Id. at 3-4.

The court cited ARSD 74:03:04:01 ("All streams in South Dakota are assigned the beneficial uses of irrigation and wildlife propagation and stock watering.") (emphasis by the court), in support of its assertion that the use of water at the refuge was a beneficial use. Id. at 4. The court also concluded that the use of water at the refuge constituted "irrigation." Id. at 5-6. The court went on to point out that protecting migratory birds and their habitat is in the national interest, that FWS needed an uninterrupted use of water for its purposes, and that the irrigation for the purposes proposed by FWS was not incompatible with the soil type. Id. The court also recognized that the "beneficial use" concept is an evolving, fact-sensitive concept that changes as society changes the value it places on various uses of natural resources. Id. at 4 (quoting Rick A. Thompson, Statutory Recognition of Instream Flow Preservation: A Proposed Solution for Wyoming, 17 Land & Water L. Rev. 139, 143 (1982)).

In view of the fact that the DeKay court concluded that the use proposed by FWS constituted an irrigation use, the court need not have examined any other factors if irrigation were per se a beneficial use. That the court did examine these other factors lends support to Appellants' position that irrigation is not a per se beneficial use and that the Board was required to recite upon which facts it relied in concluding that the City's proposed use constituted a "beneficial use."

3. **Board's Finding that Issuing the Permit Would be in the Public Interest is Inadequate**

Appellees seem to suggest that the mere fact that the City will use this water for a public golf course satisfies the "public interest" requirement. However, while a public golf course is within the definition of a "public recreation area," see ARSD § 74:02:01.01, it does not necessarily follow that use of water for a public recreation area is always in the public interest. A finding that a proposed use is in the public interest requires the Board to consider whether the water is being developed for the greatest public benefit. SDCL § 46-1-2.

Under some circumstances, use of water for irrigating a golf course might constitute a use which will yield the greatest public benefit; under other circumstances, a golf course irrigation permit might not yield the greatest public benefit. Cf. Fraser v. Water Rights Comm'n., 294 N.W.2d 784, 789 (S.D. 1980) (finding a permit for irrigation not to be in the public interest). Merely reciting that the City's proposed use is for the irrigation of a golf course--without more--does not satisfy the "public interest" requirement of section 46-2A-9. Neither does the bald assertion that the proposed use is in the public interest satisfy the particularity requirements of section 1-26-25.

Based on the foregoing, the Board's findings relative to impairment of existing rights, beneficial use, and public interest are inadequate. The Court should remand this matter back to the Board for the entry of findings of fact which comply with SDCL § 1-26-25.

CONCLUSION

The Board committed two errors in the administrative proceedings below. First, the Board erroneously interpreted the diversion rate restriction contained in SDCL § 46-5-6 by imposing a "daily average" gloss on the statute which is unwarranted and unworkable. Second, in violation of SDCL § 1-26-25, the Board failed to articulate the basic or underlying facts in support of its findings that granting the City's proposals would not unlawfully impair existing rights, would be a beneficial use, and would be in the public interest. Therefore, judicial review of these findings of the Board is foreclosed.

The inadequacy of the record before this Court, particularly the conclusory nature of the Board's findings of fact, deprives the Court of any meaningful attempt to scrutinize the rationale behind the Board's granting of the City's permit. Therefore, Appellants ask the Court to remand this matter back to the Board with instructions to apply the correct interpretation of SDCL § 46-5-6 to the facts and to enter findings of fact in appropriate detail in accordance with SDCL § 1-26-25.

Dated this 22d day of December 1994.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

BY: Veronica L. Bowen
VERONICA L. BOWEN
attorneys for
all above-named Appellants
818 St. Joseph Street; P.O. Box 2670
Rapid City, SD 57709

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of this legal document upon the persons herein next designated, all on the date below shown, by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to each said addressee, to wit:

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

Diane Best
Assistant Attorney General
Office of Attorney General
500 East Capital
Pierre, SD 57501-5070

Bob Jackson
City Attorney
300 6th Street
Rapid City, SD 57701

Dan Bjerke
City of Rapid City
300 6th Street
Rapid City, SD 57701

Water Management Board
Department of Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

Dwayne Rollag
Chairman, Water Management Board
320 Lincoln Lane South
Brookings, SD 57006

Francis Brink
1214 S. Wells Street
Aberdeen, SD 57401

Bernita Loucks
219 42nd Street
Rapid City, SD 57702

Marian Gunderson
811 West 3d
Yankton, SD 57078

Rodney Freeman
P.O. Box 176
Huron, SD 57350

Leo Holzbauer
R.R. 1, Box 170
Waggoner, SD 57380-9681

Joel Rickenbach
P.O. Box 97
Oelrichs, SD 57763

which addresses are the last addresses of the addressees known to the subscriber.

Dated this 22d day of December 1994.


VERONICA L. BOWEN

Bangs, McCullen, Butler, Foye & Simmons

Lawyers

818 St. Joe Street

Mailing Address P.O. Box 2670

Rapid City, South Dakota 57709-2670

605-343-1040

Telecopier 605-343-1503

Joseph M. Butler
Thomas H. Foye
Thomas E. Simmons
Charles L. Riter
Allen G. Nelson
James P. Hurley
Michael M. Hickey
Mark F. Marshall
Terry L. Hofer
Patrick K. Duffy

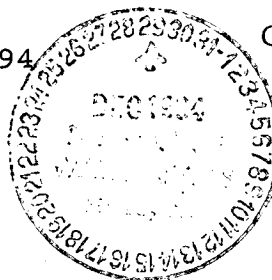
Rodney W. Schlauger*
Daniel F. Duffy
Jeffrey G. Hurd
Veronica L. Bowen

*Also Admitted in Minnesota,
Nebraska and North Dakota

December 28, 1994

George A. Bangs, Of Counsel
W.A. McCullen (1943-1987)

Ms. Bonnie Fitzgerald
Clerk of Circuit Court
P.O. Box 230
Rapid City, SD 57709



Recycled Paper 

Re: Marsh Hereford Ranch, Inc., and Rapid Valley Water
Conservancy District v. State of South Dakota Acting as the
Water Management Board of the Department of Environment and
Natural Resources

Dear Bonnie:

In regard to the above-referenced matter, enclosed is Appellants' Amended Reply Brief. Please note that the only change from Appellants' original Reply Brief is on pages nine and ten wherein I have corrected the figures representing the amount of water requested by the City of Rapid City in its Water Permit Application No. 2276-2.

By copy of this letter, a copy of this document has been mailed to John P. Guhin, Deputy Attorney General; Diane Best, Assistant Attorney General; Bob Jackson, City Attorney; Dan Bjerke, City of Rapid City; Water Management Board; Dwayne Rollag, Water Management Board Chairman; Francis Brink; Bernita Loucks; Marian Gunderson; Rodney Freeman; Leo Holzbauer; and Joel Rickenbach. This is intended as service by mail.

Sincerely,

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

Joseph M. Butler

JMB:pkw
Enclosure

cc: John P. Guhin
Bob Jackson
Water Management Board
Francis Brink
Marian Gunderson
Leo Holzbauer
Jerry Hammerquist

Diane Best
Dan Bjerke
Dwayne Rollag
Bernita Loucks
Rodney Freeman
Joel Rickenbach
Jerry Marsh

STATE OF SOUTH DAKOTA)
 SS
PENNINGTON COUNTY)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

Court File No. C95-289

MARSH HEREFORD RANCH, INC. and
RAPID VALLEY WATER CONSERVANCY DISTRICT,

Appellants,

vs.

STATE OF SOUTH DAKOTA ACTING AS THE
WATER MANAGEMENT BOARD OF THE
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES,

Appellee.

APPEAL TO THE CIRCUIT COURT, SEVENTH JUDICIAL
CIRCUIT, PENNINGTON COUNTY, SOUTH DAKOTA,
FROM THE DECISION OF THE WATER MANAGEMENT
BOARD OF THE DEPARTMENT OF ENVIRONMENT AND
NATURAL RESOURCES GRANTING THE APPLICATION
OF THE CITY OF RAPID CITY REGARDING
VESTED WATER RIGHT CLAIM NO. 2294-2 AND
WATER PERMIT APPLICATION NO. 2276-2

THE HONORABLE MERTON B. TICE, JR., PRESIDING JUDGE

APPELLANTS' AMENDED REPLY BRIEF

JOSEPH M. BUTLER
VERONICA L. BOWEN
Bangs, McCullen, Butler,
Foye & Simmons
818 St. Joseph St.; P.O. Box 2670
Rapid City, SD 57709
(605) 343-1040

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PRELIMINARY STATEMENT

Marsh Hereford Ranch, Inc. and Rapid Valley Water Conservancy District (Appellants), hereby offer the following Reply Brief in support of their appeal from a decision of the Water Management Board of the Department of Environment and Natural Resources (Board) to grant Water Permit Application No. 2276-2 submitted by the City of Rapid City (City). References to the transcript of the hearing before the Board will be designated as "Tr. ____." References to the Administrative Record concerning Water Permit Application No. 2276-2 will be designated as "Ar. ____."

Appellants note that the South Dakota Department of Environment and Natural Resources, Water Rights Division, has submitted a brief on behalf of the Board. Appellants do not object to this, although they do take issue with the Division's suggestion that it was improper to name the Board, rather than the Division, as Appellee. See Fraser v. Water Rights Comm'n., 294 N.W.2d 784, 789 (S.D. 1980) (naming the Water Rights Commission, the predecessor agency to the Board, as the appellee in an appeal from a decision of the Commission concerning a water permit application). Furthermore, Appellants note that the City which was not named as a party to this appeal and which has not sought the Court's permission to intervene, filed a brief in which it purports to respond as a named appellee. However, Appellants find it more constructive to treat the City's brief as an amicus cur brief and to address the arguments raised by the City rather than to risk

having unanswered questions in the Court's mind. Therefore, Appellants do not at this time formally move to have the City's brief stricken.¹ Unless specifically noted otherwise, Appellants refer to the City and the Division collectively as "Appellees."

FACTUAL BACKGROUND

Appellants' statement of the facts in its original brief in this matter remains applicable and Appellants do not take issue with the additional facts recited by Appellees in their brief. However, Appellants would like to emphasize the following facts.

The City did not present any affirmative evidence at the administrative hearing before the Board that granting its application would not impair existing rights, would be for beneficial purposes, and would be in the public interest. See generally, Tr.

Appellee's contention is true that Appellants did not serve the Division of Water Rights and its counsel with Appellants' proposed findings of fact and conclusions of law in the administrative proceedings below. However, Appellants did serve their proposed findings and conclusions on the Board, counsel for the Board, each individual member of the Board, and the City, which was the permit applicant. See A.R. 62. The Board did not adopt Appellants' proposed findings of fact and conclusions of law. Rather, the Board adopted the proposed findings and conclusions

¹Appellants have served the City and the Division, in addition to the Board, with copies of all documents connected with this appeal because Appellants recognize that these entities might be interested in the proceedings, though they are not named parties.

submitted by Appellees. Compare A.R. 59-62 (Appellants' proposed findings and conclusions) with A.R. 27-47 (the Board's Attorney's proposed findings and conclusions, the Division's suggestions thereto, and the final findings and conclusions adopted by the Board).

ARGUMENT

A. Standard of Review

Appeals to the circuit court of decisions of an administrative agency are governed by SDCL §§ 1-26-36 and 1-26-37. Questions of law and mixed questions of law and fact that were decided by the agency are reviewable de novo by the circuit court. DeKay v. United States Fish & Wildlife Service, No. 18708-a-RWS, slip op. at 2 (S.D. Dec. 7, 1994); Hendrix v. Graham Tire Co., 520 N.W.2d 876, 879 (S.D. 1994); In re State and City Sales Tax Liability of Quality Service Railcar Repair Corp., 437 N.W.2d 209, 210-11 (S.D. 1989); Permann v. Dept. of Labor, 411 N.W.2d 113, 115-17 (S.D. 1987). Questions of fact decided by the agency are subject to reversal only if clearly erroneous. DeKay, slip op. at 2; Hendrix, 520 N.W.2d at 879; Quality Service Railcar Repair Corp., 437 N.W.2d at 211; Permann, 411 N.W.2d at 115-17.

Appellants request judicial review of decisions of the Board concerning both questions of law and questions of fact. Whether the Board properly interpreted the diversion rate limitation of SDCL § 46-5-6 raises a question of law. Whether the Board properly found that the City's proposals would not unlawfully

impair existing rights, would be in the public interest, and would be for a beneficial use raises questions of fact.

B. Appellants Are Entitled to Judicial Review of the Decision of the Board

As a preliminary matter, Appellants address procedural issues which Appellees argue should bar the Court's consideration of the merits of Appellants' appeal. Appellees, in their brief, suggest that the Court should not review the merits of Appellants' arguments because Appellants have not preserved their right to appeal. Additionally, Appellees seem to suggest that Appellants do not have standing to present their arguments because of failure to comply with the standards of SDCL § 1-26-36. The Court should not adopt either of these arguments as both are unfounded, as demonstrated below.

1. Appellants Have Preserved Their Right to Appeal

Appellees suggest that, because Appellants failed to serve their proposed findings of fact and conclusions of law on the Division of Water Rights or its counsel and because Appellants failed to file objections to the findings and conclusions adopted by the Board, that Appellants have forfeited the right to object to findings of fact entered by the Board. This is incorrect.

It was an oversight on Appellants' part that their proposed findings and conclusions were not filed upon the Division. However, no prejudice to the Division has resulted. The entity making the administrative decision, the Board, was served with Appellants' proposed findings and conclusions and had the full benefit of the consideration thereof prior to making its final

decision. A.R. 59-62. Appellees do not suggest otherwise. See Brief of Appellee at 4 (admitting that Appellants served the Board with their proposed findings of fact and conclusions of law).

The Division occupied an adversarial role in the administrative proceedings below. Id. at 1 n.1. Inasmuch as the Board ultimately adopted the position advanced by the Division below, the Division was not prejudiced by not having received and responded to Appellants' proposed findings and conclusions. Failure to serve the Division with the administrative findings and conclusions proposed by Appellants should not serve as a bar to this Court's consideration of the merits of Appellants' appeal.

In addition to the issue discussed above, Appellees suggest that Appellants' failure to object to the Board's findings of fact and conclusions of law below should preclude consideration of the merits of Appellants' appeal by this Court. Again, Appellees are mistaken.

This is substantially the same argument raised by the permit applicant and rejected by the South Dakota Supreme Court in In re Application of SDDS, Inc., for a Solid Waste Permit, 472 N.W.2d 502 (S.D. 1991). In that case, the appellants had raised before the circuit court the issue of the adequacy of the agency's findings of fact under SDCL § 1-26-25. Id. at 512-13. The South Dakota Supreme Court held that, by filing their own proposed findings of fact and conclusions of law before the agency, the appellants had preserved for appeal the issue of the adequacy of the agency's findings pursuant to SDCL § 1-26-25. Id. at 514. Cf. Moody County v. Cable, 82 S.D. 537, 150 N.W.2d 193, 194-95 (1967)

(stating that, absent an appellant's proposing or requesting of findings of fact before the Circuit Court, the appellant could not argue that the evidence was insufficient to support the findings, but could argue that the findings did not support the conclusions of law and judgment of the court).

In the instant case, Appellants--like the appellants in SDDS--raise the issue of the adequacy of the agency's findings pursuant to SDCL § 1-26-25. Also--like the appellant in SDDS--Appellants herein filed their own proposed findings and conclusions with the agency. Therefore, SDDS requires the conclusion that Appellants herein have preserved for appeal the issue of the adequacy of the agency's findings of fact pursuant to SDCL § 1-26-25.

2. Appellants Have Standing to Present Their Issues

Appellees seem to suggest that Appellants have not demonstrated their standing to pursue the instant appeal because Appellants have not demonstrated that their substantial rights have been prejudiced and that a violation has occurred as required by SDCL § 1-26-36.² The statute relied upon by Appellees provides as follows:

The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or

²Appellees do not use the term "standing" in their briefs. However, Appellees' assertion that Appellants must demonstrate some injury to themselves as a result of the Board's decision as a prerequisite to judicial review is at the core of the standing doctrine. See Parsons v. S.D. Lottery Comm'n, 504 N.W.2d 593 (S.D. 1993) (discussing whether appellants had demonstrated sufficient injury to themselves to entitle them to appeal a decision of a South Dakota agency). The requirement of SDCL § 1-26-36 that appellants show that their substantial rights have been prejudiced is but a statutory embodiment of the standing doctrine.

remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence in the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

SDCL § 1-26-36 (emphasis added). The requirement of showing that "substantial rights of the appellant have been prejudiced" is required only when the Court is asked to "reverse or modify" the decision of the agency. See SDCL § 1-26-36. However, in this case, the Appellants seek only remand back to the agency so that it may (1) interpret the law correctly and (2) issue revised findings of fact in compliance with SDCL § 1-26-25. Appellants do not ask the Court to issue its own findings of fact or to modify the agency's order. Therefore, a showing that Appellants' "substantial rights . . . have been prejudiced" is not necessary.³

³The case cited by Appellees, Ashland v. Department of Labor, 321 N.W.2d 103 (S.D. 1982) (per curiam), is not to the contrary. Although the court did require the appellant in that case to demonstrate that his substantial rights had been prejudiced, the appellant was asking the court to reverse and modify the agency's decision. Id. at 105. As such, it was proper to require the appellant to make the "substantial rights" showing. See SDCL § 1-26-36.

However, to the extent such a requirement would be applicable in the instant case, Appellants can make such a demonstration. Appellants are downstream irrigators, some of whose pumping equipment is sensitive to the flow levels of the creek from which the City will be pumping. Tr. 11-12. Interference with the flow levels of the creek by allowing diversions in excess of the diversion rate limitation specified by SDCL § 46-5-6 would prejudice the substantial rights of Appellants. Furthermore, the agency decision is in violation of statutory provisions--namely the diversion rate limitation found in section 46-5-6. Therefore, Appellants' appeal is proper under SDCL § 1-26-36(1). See In re Appeal from the S.D. Dep't of Labor, 323 N.W.2d 133, 135 (S.D. 1982) (allowing judicial review of appeal of Department of Labor decision even though appellant had failed to specify which subsection of section 1-26-36 she relied upon).

C. Board Erred in Interpreting the Diversion Rate Restriction Contained in SDCL § 46-5-6

Although SDCL § 46-5-6 was cited in full in Appellants' initial brief, it is important enough to bear repeating at this juncture:

In the issuance of permits to appropriate water for irrigation or in the adjudication of rights to the use of water for such purpose, the amount allowed shall not be in excess of the rate of **one cubic foot of water per second for each seventy acres, or the equivalent thereof**, and the volume of water diverted for such use shall not exceed two acre-feet per acre, delivered on the land for a specified time each year. The water management board may allow a greater diversion where the method of irrigation stipulated in the permit or the type of soil to which the water is to be applied so requires except that in no case may the

diversion be greater than three acre-feet per acre delivered to the land. The above rate of one cubic foot per second for each seventy acres shall not apply in cases of flood water at such times when the flow of the stream is much in excess of the total recorded and approved rights on the stream.

SDCL § 46-5-6 (emphasis supplied).

As an initial matter, Appellants note that they are not challenging the Board's decision with regard to the City's application for validation of Vested Right No. 2294-2.⁴ Appellants agree that the diversion rate restrictions contained in SDCL § 46-5-6 cannot be applied to vested water rights existing prior to the time the limitation was enacted and that the City's vested right existed prior to the enactment of the diversion rate limit contained in section 46-5-6. Therefore, the Board's action with regard to the City's vested water right is not an issue in this appeal. The City's vested right concerns the right to irrigate 104 acres at a rate of 1.48 cubic feet per second (c.f.s.).⁵

However, the permit issued by the Board in connection with the City's Water Permit Application No. 2276-2 is subject to the diversion rate restriction contained in SDCL § 46-5-6. This permit adds 16 acres to those irrigated by the City with its Vested Right No. 2294-2 and adds 2.09 c.f.s. to the 1.48 diversion already

⁴This accords with the City's observation in its brief that the proposed findings of fact and conclusions of law submitted by Appellants to the Board concerned only Application No. 2276-2--the City's water permit application--and did not make reference to Application No. 2294-2--the City's vested rights validation request.

⁵Irrigation of 1.48 c.f.s. for 104 acres is the equivalent of .996149 c.f.s. for 70 acres. Such use is not in violation of SDCL § 46-5-6 in any event.

authorized by Vested Right No. 2294-2. A diversion rate of 2.09 c.f.s. per 16 acres is the equivalent of 9.1 c.f.s. per 70 acres.

In their initial brief, Appellants argued that the diversion rate limitation of 1 c.f.s. per 70 acres set forth in SDCL § 46-5-6 is not susceptible of the "daily averaging" interpretation which the Board used in granting the City's water permit. The Board's interpretation of SDCL § 46-5-6 is reviewed de novo by the Court. DeKay, slip op. at 2; Hendrix v. Graham Tire Co., 520 N.W.2d 876, 879 (S.D. 1994); In re State and City Sales Tax Liability of Quality Service Railcar Repair Corp., 437 N.W.2d 209, 210-11 (S.D. 1989); Permann v. Dept. of Labor, 411 N.W.2d 113, 115-17 (S.D. 1987).

Appellees advance several arguments in support of the Board's "daily averaging" interpretation. Upon examination, those arguments fail to withstand scrutiny.

Appellees state that averaging diversion rates over a 24-hour period is simply a "management tool" available to the Board which has been used by the Board in the past. Appellees cite no specific examples of past permits based on this interpretation.⁶ Furthermore, whether the daily averaging approach has been used in the past is irrelevant to issues posed by the instant litigation.

Appellees rely on the phrase "or the equivalent thereof" in section 46-5-6 as support for the daily averaging

⁶Ron DuVall testified at the hearing before the Board that this method had been used in the past, but DuVall could give no examples of specific permits. Tr. 20-21. Furthermore, DuVall also testified that he could not guaranty that the "daily averaging" approach would not prove detrimental to downstream users. Tr. 22.

interpretation. However, as explained in Appellants' initial brief, this argument must fail for at least two reasons. First, the phrase "or the equivalent thereof" clearly means that if one has 140 acres, one is entitled to 2 c.f.s. and if one has 210 acres, one is entitled to 3 c.f.s. In other words, "the equivalent thereof" merely means that the proportion of 1:70 may be extrapolated out to fit circumstances where the irrigator has acres of land either less than or greater than the stated 70 acres.

The Appellees' proposed interpretation of the phrase "or the equivalent thereof" is untenable for yet another reason: it is devoid of standards. If the phrase, as the Appellees argue, permits the Board to create a daily average for an irrigator's permit, why would it not also permit the Board to create an average for each 48 hours, 72 hours, a week, or a month? The answer is that there is nothing which would prevent such averaging under the Board's interpretation. An irrigator could conceivably "save up" all the water to which he is entitled for an entire season and use it all in August. As long as the average of the irrigator's diversions did not exceed 1 c.f.s. per 70 acres, this practice would be permissible under the Board's interpretation of SDCL § 46-5-6.

The City dismisses this argument as an extension of the Board's interpretation to "illogical extremes." However, it is nonetheless possible under the standardless interpretation advanced by the Board. Furthermore, even if one limited the Board's interpretation to a 24-hour average, an appropriator could save up

all the water which he is entitled to divert over the course of a day and divert it all in one hour. This practice, entirely possible under the Board's interpretation in this case, would wreak havok with the flow rates in the stream. Appellants' point on this issue is that once the Board is allowed to depart from the standard of measurement for the rate of diversion--per second--there is no basis for limiting irrigators' practices. Significantly, Appellees do not address this issue in their briefs.

Appellants argued in their initial brief that departing from the 1 c.f.s. per 70 acres limitation without the institution of some other definable standard would render the permitting system provided for under South Dakota law unworkable. If every irrigator "saved up" his allotted water until he decided to use it and then tried to divert several hours' or days' or weeks' worth of water all at once, there would be insufficient stream flows to meet all the permits issued. Even more important, however, is the fact that it would become impossible to predict the stream flows at any given time.

In issuing each new permit, the Board is required to find that "there is a reasonable probability that unappropriated water is available for the applicant's proposed use, [and] that the proposed diversion can be developed without unlawful impairment of existing rights. . . ." SDCL § 46-2A-9. The Board can make these findings only if the water appropriated under existing permits is being diverted at a predictable rate for predetermined volumes. Under the averaging approach used by the Board, stream flows would

be impossible to anticipate. This lends support to the Appellants' argument that the South Dakota Legislature intended the diversion rate limitation of section 46-5-6 to be interpreted literally--as a per second limitation. Otherwise, it would be impossible for the Board to make its required findings under SDCL § 46-2A-9 when granting new permits. The legislature should not be presumed to have set forth a task for the Board which is incapable of being performed.

Appellees attempt to counter this analysis by stating that the City could create a reservoir, pump into the reservoir at a rate of 1 c.f.s. per 70 acres for 24 hours a day, and then pump from the reservoir at a rate of 3.57 c.f.s. per 120 acres for 11.5 hours out of every day. Appellants express no opinion as to whether this would be permissible without complying with statutes regulating the construction and maintenance of water storage facilities. However, to the extent the City would be permitted to do this, it would be preferable to the present approach condoned by the Board. The true evil which Appellants object to in the Board's deviation from the 1 c.f.s. per 70 acres restriction is that it will interfere with the predictability of stream flows. Again, it is significant that Appellees do not address this issue in their brief.

The City seems to suggest that, even if the Board's interpretation of § 46-5-6 is erroneous, the Court should affirm the Board's decision anyway because the "2.09 c.f.s. sought by the City will have a negligible effect on the level of a stream

carrying something on the order of 100 c.f.s." Appellants dispute whether the effect of the City's permit will be "negligible," but even if it will be, the cumulative effect of the Board's erroneous interpretation in connection with issuing permits issued on Rapid Creek is not "negligible."

The City also argues that the net result of the granting of its permit is that there will be an increase in the natural flow of Rapid Creek during the hours when the City is not pumping, and that this increase will inure to Appellants' benefit. Whether this is true depends on whether the City orders water to be released from Pactola at a rate of 3.57 c.f.s per hour for 24 hours a day (the rate at which the City will pump when it is actually pumping), or at a rate of approximately 1 c.f.s. per hour for 24 hours a day (the rate at which the City will consume water when averaged out over the course of a day). Either way, this allegation has nothing to do with the issue raised by Appellants: whether the Board's "daily averaging" interpretation of section 46-5-6 is correct as a matter of law.

Finally, Appellees point to the phrase in section 46-5-6 that the Board can "allow a greater diversion where the method of irrigation stipulated in the permit or the type of soil to which the water is to be applied so requires" Appellees argue that this phrase is authority for the Board to exceed the diversion rate limitation if the method of irrigation so requires. Appellees then state that the testimony at the administrative hearing below

supported that the "method of irrigation" merited a "greater diversion."

The phrase relied upon by Appellees reads in full as follows: "The water management board may allow a greater diversion where the method of irrigation stipulated in the permit or the type of soil to which the water is to be applied so requires except that in no case may the diversion be greater than three acre-feet per acre delivered to the land." There are two restrictions contained in SDCL § 46-5-6. One is a limitation on the total volume available under an irrigation permit, expressed in acre-feet. The other limitation is a limit on the diversion rate at which water is taken from a stream, expressed in cubic feet per second. See SDCL §§ 46-1-7 and 46-5-6. Obviously, the phrase pointed to by Appellees when read in its full context refers to the total volume limitation, not to the diversion rate.⁷

However, even if the phrase were susceptible of the interpretation advanced by Appellees, there was no evidence submitted to the Board which would have supported a finding that the method of irrigation to be used by the City required the Board to exceed the diversion rate limitation. Even more significantly, the Board did not make a finding of fact that the method of

⁷Appellants do not challenge the Board's decision as to the volume of water granted to the City under its permit.

irrigation proposed by the City would require departure from the 1 c.f.s per 70 acres restriction. See A.R. 43-47.⁸

Based on the foregoing, Appellants respectfully request that the Court reverse the Board's decision insofar as it interprets SDCL § 46-5-6 to allow for a "daily average."

D. Board's Factual Findings are Inadequate

Appellees argue that the Board's findings of fact cannot be overturned unless they are clearly erroneous or unless the findings do not support the Board's conclusions of law and judgment. This argument presupposes that Appellants are attacking the merits of the Board's findings of fact. Appellees could not be more wrong.

Appellants' argument for reversal, as described in their initial brief in this matter, is that the Board's findings are inadequate as a matter of law and are therefore unreviewable. An agency's findings of fact are capable of judicial review only to the extent that the Court can ascertain on what those findings are based. South Dakota Codified Laws section 1-26-25 requires that if agencies set forth their findings of fact in statutory language, the findings "shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." See SDCL § 1-26-25 (emphasis supplied). This statute was intended to

⁸The Board did make a conclusion of law that "[t]he Board has authority under SDCL § 46-5-6 to grant a new permit to allow up to three c.f.s. [sic] for water to accommodate particular irrigation requirements and conditions. Those conditions have been met." A.R. 45 (Conclusion of Law No. 3). Despite the erroneous use of the "c.f.s." measurement, this conclusion appears to refer to the Board's ability to grant up to three acre-feet per acre per season. As stated in the initial brief, Appellants do not challenge the Board's granting of three acre-feet per acre per season to the City under the City's permit.

force agencies to articulate the basic or underlying facts which led the agency to believe that a particular statutory requirement has been met. In re Application of SDDS, Inc., for a Solid Waste Permit, 472 N.W.2d 502, 512 (S.D. 1991) (citing Saginaw Broadcasting Co. v. F.C.C., 96 F.2d 554 (D.C. Cir. 1938)).

Appellants are not arguing that the Board's findings of fact are clearly erroneous given the record, or that the findings do not support the Board's conclusions of law or its judgment. Rather, Appellants argue that the Board's findings are so deficient in stating the underlying facts upon which the Board relied to reach its conclusions that the findings are not capable of judicial review. With that argument clearly in mind, Appellants now turn to Appellees' contentions regarding the specific findings of the Board.

1. Board's Findings that the City's Permit Would Not Impair Existing Rights is Inadequate

Appellees suggest that "proof of impairment to existing rights lies with those holding the existing rights." Brief of Appellees at 18. Appellees then allege that Appellants failed to prove impairment at the administrative hearing and for that reason, the Board's conclusory statement that the City's permit could be granted without unlawfully impairing existing rights is appropriate. See A.R. 46 (Conclusion of Law No. 6).

The Board is allowed to issue a permit to appropriate water only if the proposed diversion can be developed without unlawful impairment of existing rights. SDCL § 46-2A-9. Section 46-2A-9 does not specifically set forth who has the burden of

proving that a proposed use will not impair existing rights, but reading section 46-2A-7 together with section 46-2A-9, a logical inference arises that it is the applicant for a water permit who bears the burden of proof. Section 46-2A-7 provides that if--based upon the evidence presented at the hearing--the Board determines that the requirements for an appropriation permit have not been met, or that the evidence is insufficient to support a determination, the Board must disapprove the application or defer it for further study. See SDCL § 46-2A-7.

There are, at times, water permit applications which meet with no resistance from opponents. Who then, in such unopposed cases, is to bear the burden of proof that the proposed use will not impair existing rights? It must be the applicant, because no other party would be involved to introduce such evidence and section 46-2A-7 says the Board must disapprove an application if there is insufficient evidence on one of the requirements for a permit. If the burden of proof rests with the applicant in unopposed cases, it must also rest with the applicant in opposed cases. No logical reason exists for shifting the burden of proof to the permit opponent in opposed cases. Indeed, other jurisdictions interpreting similar statutes place the burden of proving no impairment of existing rights on the applicant. See, e.g., Danielson v. Kerbs Ag., Inc., 646 P.2d 363, 374 (Colo. 1982) (en banc) (stating that where applicant sought to increase the number of acres irrigated, it was applicant's burden to prove that the use would not injure the rights of other users from the same

source); City of Roswell v. Reynolds, 86 N.M. 249, 522 P.2d 796, 801 (1974) (stating that the City-applicant had the burden of proving that granting its application for a permit would not impair the existing rights of others).

The September 9, 1994, decision of the Board does not recite what underlying facts it found to support its determination that the City's proposed uses would not unlawfully impair existing rights. In fact, the City did not present any evidence of non-impairment at the hearing. The only evidence presented at all on this issue was to the contrary--that existing rights would be impaired.

Appellants testified at the hearing before the Board that they and other downstream appropriators have pumps which are affected by variations in the flow of Rapid Creek. Tr. 11. Appellants argued that granting the City's application would dramatically affect stream flows to the detriment of themselves and other downstream users. Tr. 11-12. In addition, Ron DuVall testified that he could not guaranty that altering the diversion rate would not cause problems for other irrigators. Tr. 22.

The Board dismissed this testimony as being a mere allegation of harm without proof. Ar. 45. However, the Board was required to do more than state which evidence it discredited. The Board was required to affirmatively state what underlying evidence it relied upon to find that there would be no impairment. Merely dismissing Appellants' evidence does not satisfy the requirements

of SDCL § 1-26-25 nor does it support a finding that the requirements of SDCL § 46-2A-9 have been met.

2. Board's Finding that the Proposed Use Would be a Beneficial Use is Inadequate

A "beneficial use" is defined by statute as "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 interest of the public of this state in the best utilization of water supplies." SDCL § 46-1-6(3). The domestic use of water has been declared by the South Dakota Legislature as the "highest use of water," taking precedence over appropriative rights if domestic use is in the public interest. SDCL § 46-1-5(1); Fraser v. Water Rights Comm'n., 294 N.W.2d 784, 789 (S.D. 1980). In addition, whether a proposed use of water is a beneficial use requires consideration of whether the proposed use will result in waste and whether the method of the proposed use of the water is unreasonable. SDCL § 46-1-4. Therefore, irrigation is not categorically a "beneficial use." If such irrigation detrimentally affects a domestic use, if such irrigation is wasteful, or if the proposed use is unreasonable, then irrigation would not be a "beneficial use."

Appellees cite DeKay v. United States Fish & Wildlife Service, No. 18708-a-RWS, slip op. at 4 (S.D. Dec. 7, 1994), for the proposition that irrigation is per se a beneficial use. However, read carefully, DeKay does not stand for that proposition. In DeKay, the United States Fish and Wildlife Service (FWS) sought three water permits for use in connection with the LaCreek National Wildlife Refuge. Id. at 1. The Water Management Board (Board)

granted those permits and landowners from areas adjoining the refuge appealed. Id. at 1-2. One of the issues raised before the court was whether the use of water to grow aquatic plants and to provide bird habitat was a beneficial use. Id. at 3-4.

The court cited ARSD 74:03:04:01 ("All streams in South Dakota are assigned the beneficial uses of irrigation and wildlife propagation and stock watering.") (emphasis by the court), in support of its assertion that the use of water at the refuge was a beneficial use. Id. at 4. The court also concluded that the use of water at the refuge constituted "irrigation." Id. at 5-6. The court went on to point out that protecting migratory birds and their habitat is in the national interest, that FWS needed an uninterrupted use of water for its purposes, and that the irrigation for the purposes proposed by FWS was not incompatible with the soil type. Id. The court also recognized that the "beneficial use" concept is an evolving, fact-sensitive concept that changes as society changes the value it places on various uses of natural resources. Id. at 4 (quoting Rick A. Thompson, Statutory Recognition of Instream Flow Preservation: A Proposed Solution for Wyoming, 17 Land & Water L. Rev. 139, 143 (1982)).

In view of the fact that the DeKay court concluded that the use proposed by FWS constituted an irrigation use, the court need not have examined any other factors if irrigation were per se a beneficial use. That the court did examine these other factors lends support to Appellants' position that irrigation is not a per se beneficial use and that the Board was required to recite upon which facts it relied in concluding that the City's proposed use constituted a "beneficial use."

3. **Board's Finding that Issuing the Permit Would be in the Public Interest is Inadequate**

Appellees seem to suggest that the mere fact that the City will use this water for a public golf course satisfies the "public interest" requirement. However, while a public golf course is within the definition of a "public recreation area," see ARSD § 74:02:01.01, it does not necessarily follow that use of water for a public recreation area is always in the public interest. A finding that a proposed use is in the public interest requires the Board to consider whether the water is being developed for the greatest public benefit. SDCL § 46-1-2.

Under some circumstances, use of water for irrigating a golf course might constitute a use which will yield the greatest public benefit; under other circumstances, a golf course irrigation permit might not yield the greatest public benefit. Cf. Fraser v. Water Rights Comm'n., 294 N.W.2d 784, 789 (S.D. 1980) (finding a permit for irrigation not to be in the public interest). Merely reciting that the City's proposed use is for the irrigation of a golf course--without more--does not satisfy the "public interest" requirement of section 46-2A-9. Neither does the bald assertion that the proposed use is in the public interest satisfy the particularity requirements of section 1-26-25.

Based on the foregoing, the Board's findings relative to impairment of existing rights, beneficial use, and public interest are inadequate. The Court should remand this matter back to the Board for the entry of findings of fact which comply with SDCL § 1-26-25.

CONCLUSION

The Board committed two errors in the administrative proceedings below. First, the Board erroneously interpreted the diversion rate restriction contained in SDCL § 46-5-6 by imposing a "daily average" gloss on the statute which is unwarranted and unworkable. Second, in violation of SDCL § 1-26-25, the Board failed to articulate the basic or underlying facts in support of its findings that granting the City's proposals would not unlawfully impair existing rights, would be a beneficial use, and would be in the public interest. Therefore, judicial review of these findings of the Board is foreclosed.

The inadequacy of the record before this Court, particularly the conclusory nature of the Board's findings of fact, deprives the Court of any meaningful attempt to scrutinize the rationale behind the Board's granting of the City's permit. Therefore, Appellants ask the Court to remand this matter back to the Board with instructions to apply the correct interpretation of SDCL § 46-5-6 to the facts and to enter findings of fact in appropriate detail in accordance with SDCL § 1-26-25.

Dated this 28th day of December 1994.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

BY: Veronica L. Bowen
VERONICA L. BOWEN
attorneys for
all above-named Appellants
818 St. Joseph Street; P.O. Box 2670
Rapid City, SD 57709

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of this legal document upon the persons herein next designated, all on the date below shown, by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to each said addressee, to wit:

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

Diane Best
Assistant Attorney General
Office of Attorney General
500 East Capitol
Pierre, SD 57501-5070

Bob Jackson
City Attorney
300 6th Street
Rapid City, SD 57701

Dan Bjerke
City of Rapid City
300 6th Street
Rapid City, SD 57701

Water Management Board
Department of Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

Dwayne Rollag
Chairman, Water Management Board
320 Lincoln Lane South
Brookings, SD 57006

Francis Brink
1214 S. Wells Street
Aberdeen, SD 57401

Bernita Loucks
219 42nd Street
Rapid City, SD 57702

Marian Gunderson
811 West 3d
Yankton, SD 57078

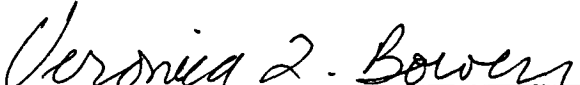
Rodney Freeman
P.O. Box 176
Huron, SD 57350

Leo Holzbauer
R.R. 1, Box 170
Waggoner, SD 57380-9681

Joel Rickenbach
P.O. Box 97
Oelrichs, SD 57763

which addresses are the last addresses of the addressees known to the subscriber.

Dated this 28th day of December 1994.


VERONICA L. BOWEN

Bangs, McCullen, Butler, Foye & Simmons

Lawyers

Joseph M. Butler
Thomas H. Foye
Thomas E. Simmons
Charles L. Riter
Allen G. Nelson
James P. Hurley
Michael M. Hickey
Mark F. Marshall
Terry L. Hofer
Patrick K. Duffy

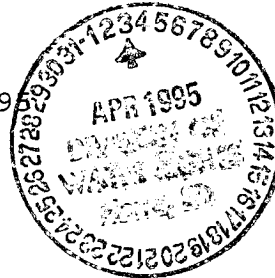
818 St. Joe Street
Mailing Address P.O. Box 2670
Rapid City, South Dakota 57709-2670
605-343-1040

Telecopier 605-343-1503

Rodney W. Schlauger*
Daniel F. Duffy
Jeffrey G. Hurd
Veronica L. Bowen

*Also Admitted in Minnesota,
Nebraska and North Dakota

March 31, 1995



George A. Bangs, Of Counsel
W.A. McCullen (1943-1987)

Recycled Paper 

Ms. Bonnie Fitzgerald
Clerk of Circuit Court
P.O. Box 230
Rapid City, SD 57709

Re: Marsh Hereford Ranch, Inc., and Rapid Valley Water
Conservancy District v. State of South Dakota Acting as the
Water Management Board of the Department of Environment and
Natural Resources

Dear Bonnie:

In regard to the above-referenced matter, enclosed is a Notice of
Entry of Order and a copy of the Court's March 29, 1995, Order.

By copy of this letter, a copy of these documents has been mailed
to John P. Guhin, Deputy Attorney General; Diane Best, Assistant
Attorney General; Bob Jackson, City Attorney; Dan Bjerke, City of Rapid
City; Water Management Board; Dwayne Rollag, Water Management Board
Chairman; Francis Brink; Bernita Loucks; Marian Gunderson; Rodney
Freeman; Leo Holzbauer; and Joel Rickenbach. This is intended as
service by mail.

Sincerely,

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

Veronica L. Bowen
Veronica L. Bowen

VLB:pkw
Enclosure
cc w/enc:

John P. Guhin
Bob Jackson
Water Management Board
Francis Brink
Marian Gunderson
Leo Holzbauer
Jerry Hammerquist

Diane Best
Dan Bjerke
Dwayne Rollag
Bernita Loucks
Rodney Freeman
Joel Rickenbach
Jerry Marsh

STATE OF SOUTH DAKOTA)
 SS
PENNINGTON COUNTY)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

Court File No. C95-289

MARSH HEREFORD RANCH, INC. and
RAPID VALLEY WATER CONSERVANCY DISTRICT,

Appellants,

vs.

STATE OF SOUTH DAKOTA ACTING AS THE
WATER MANAGEMENT BOARD OF THE
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES,

Appellee.

APPEAL TO THE CIRCUIT COURT, SEVENTH JUDICIAL
CIRCUIT, PENNINGTON COUNTY, SOUTH DAKOTA,
FROM THE DECISION OF THE WATER MANAGEMENT
BOARD OF THE DEPARTMENT OF ENVIRONMENT AND
NATURAL RESOURCES GRANTING THE APPLICATION
OF THE CITY OF RAPID CITY REGARDING
VESTED WATER RIGHT CLAIM NO. 2294-2 AND
WATER PERMIT APPLICATION NO. 2276-2

THE HONORABLE MERTON B. TICE, JR., PRESIDING JUDGE

NOTICE OF ENTRY OF ORDER

YOU ARE HEREBY notified that on the 29th day of March
1995, the Circuit Court of Pennington County, South Dakota, entered
an Order in the above-captioned action, reversing in part a
decision of the Water Management Board of the State of South Dakota
and amending a water permit issued by that board. A true and

correct copy of the Order is attached hereto and incorporated herein by reference.

Dated this 31st day of March 1995.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

By: Veronica L. Bowen
Veronica L. Bowen
Attorneys for Appellants
818 St. Joe St.; P.O. Box 2670
Rapid City, SD 57709
(605) 343-1040

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of this legal document upon the persons herein next designated, all on the date below shown, by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to each said addressee, to wit:

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

Diane Best
Assistant Attorney General
Office of Attorney General
500 East Capitol
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Rapid City, SD 57701

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P.O. Box 97
Oelrichs, SD 57763

which addresses are the last addresses of the addressees known to the subscriber.

Dated this 31st day of March 1995.


Veronica L. Bowen

STATE OF SOUTH DAKOTA)
 SS
PENNINGTON COUNTY)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

Court File No. C95-289

MARSH HEREFORD RANCH, INC. and
RAPID VALLEY WATER CONSERVANCY DISTRICT,

Appellants,

vs.

STATE OF SOUTH DAKOTA ACTING AS THE
WATER MANAGEMENT BOARD OF THE
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES,

Appellee.

APPEAL TO THE CIRCUIT COURT, SEVENTH JUDICIAL
CIRCUIT, PENNINGTON COUNTY, SOUTH DAKOTA,
FROM THE DECISION OF THE WATER MANAGEMENT
BOARD OF THE DEPARTMENT OF ENVIRONMENT AND
NATURAL RESOURCES GRANTING THE APPLICATION
OF THE CITY OF RAPID CITY REGARDING
VESTED WATER RIGHT CLAIM NO. 2294-2 AND
WATER PERMIT APPLICATION NO. 2276-2

THE HONORABLE MERTON B. TICE, JR., PRESIDING JUDGE

ORDER REVERSING AND AMENDING WATER PERMIT

This Court has been presented with Appellants' request to reverse or remand the decision of the South Dakota Water Board pursuant to SDCL § 1-26-36. This Court has reviewed the briefs submitted by all parties and has heard and considered the argument presented to the Court at a hearing held on March 17, 1995. The Court has determined that Appellants' request for reversal should

be granted, but that Appellants' request for remand should be denied. Good cause appearing, it is hereby

ORDERED, ADJUDGED AND DECREED that the decision of the Water Board on September 9, 1994, validating the City of Rapid City's Vested Water Right Claim No. 2294-2 for the irrigation of 104 acres on Meadowbrook Golf Course, with a diversion rate of 1.48 cubic feet per second (c.f.s.) from the natural flows of Rapid Creek, is affirmed in all respects; and it is further

ORDERED, ADJUDGED AND DECREED that the decision of the Water Board on September 9, 1994, granting the City of Rapid City's Water Permit Application No. 2276-2, is reversed insofar as it attempts to authorize the City to divert water from Rapid Creek at a rate in excess of the instantaneous statutory diversion rate of 1 c.f.s per 70 acres provided for in SDCL § 46-5-6; and it is further

ORDERED, ADJUDGED AND DECREED that Water Permit No. 2276-2 be and hereby is amended to provide for an instantaneous diversion of water from the natural flows of Rapid Creed at a rate no greater than 1 c.f.s. per 70 acres; and it is further

ORDERED, ADJUDGED AND DECREED that Water Permit No. 2276-2 be and hereby is amended by lifting the restriction that the City may only pump for 11 and 1/2 hours out of every 24 hours; and it is further

ORDERED, ADJUDGED AND DECREED that Water Permit No. 2276-2 is affirmed in all respects other than the diversion rate

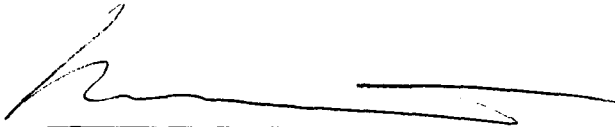
established therein and the limit on the number of hours the City may pump in a day; and it is further

ORDERED, ADJUDGED AND DECREED that the Appellants' request for remand is denied as the Court has determined that the findings of fact entered by the Water Board in support of its issuance of Water Permit No. 2276-2 meet the statutory requirements of SDCL § 1-26-25; and it is further

ORDERED, ADJUDGED AND DECREED that the Court has determined that the record demonstrates that Appellants are entitled to pursue this appeal of the decision of the Water Board pursuant to SDCL § 1-26-36 in that Appellants' substantial rights have been prejudiced because the administrative decision is in violation of statutory provisions.

Dated this 29 day of March 1995.

BY THE COURT:



THE HONORABLE MERTON B. TICE, JR.
PRESIDING JUDGE OF THE CIRCUIT COURT
7TH JUDICIAL CIRCUIT

ATTEST:

Deputy Bonnie Fitzgerald
CLERK OF COURTS
(SEAL)

Pennington County, SD.
FILED
IN THE CIRCUIT COURT
MAR 29 1995 BT

State of South Dakota } Seventh Judicial Circuit Court
County of Pennington }
I hereby Certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this 29 day of March, 1995
Bonnie Fitzgerald Deputy

Bangs, McCullen, Butler, Foye & Simmons

Lawyers

818 St. Joe Street

Mailing Address P.O. Box 2670

Rapid City, South Dakota 57709-2670

605-343-1040

Telecopier 605-343-1503

Rodney W. Schlauger*

Daniel F. Duffy

Jeffrey G. Hurd

Veronica L. Bowen

*Also Admitted in Minnesota,
Nebraska and North Dakota

George A. Bangs, Of Counsel
W.A. McCullen (1943-1987)

May 25, 1995

Clerk of Circuit Court
P.O. Box 230
Rapid City, SD 57709

Recycled Paper 

Re: Marsh Hereford Ranch, Inc., and Rapid Valley Water
Conservancy District v. State of South Dakota Acting as
the Water Management Board of the Department of
Environment and Natural Resources
Civil No. 95-289

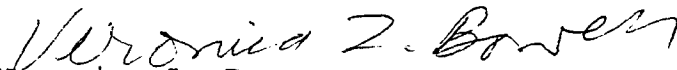
Dear Clerk:

In regard to the above-referenced matter, enclosed are the
originals of Appellants' Response in Opposition to Respondent
State of South Dakota's Motion to Vacate and Proposed Findings of
Fact, Conclusions of Law and Final Decision. Please file.

Courtesy copies have been furnished to Judge Tice, and
copies of these documents have been mailed to John P. Guhin,
Deputy Attorney General; Diane Best, Assistant Attorney General;
Bob Jackson, City Attorney; Dan Bjerke, City of Rapid City; Water
Management Board; Dwayne Rollag, Water Management Board Chairman;
Francis Brink; Bernita Loucks; Marian Gunderson; Rodney Freeman;
Leo Holzbauer; and Joel Rickenbach. This is intended as service
by mail.

Sincerely,

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS


Veronica L. Bowen

VLB:dae
Enclosures
cc w/enc:

John P. Guhin
Bob Jackson
Water Management Board ✓
Francis Brink
Marian Gunderson
Leo Holzbauer
Jerry Hammerquist

Diane Best
Dan Bjerke
Dwayne Rollag
Bernita Loucks
Rodney Freeman
Joel Rickenbach
Jerry Marsh

Bangs, McCullen, Butler, Foye & Simmons

Lawyers

818 St. Joe Street

Mailing Address P.O. Box 2670

Rapid City, South Dakota 57709-2670

605-343-1040

Telecopier 605-343-1503

Joseph M. Butler
Thomas H. Foye
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Charles L. Riter
Allen G. Nelson
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Daniel F. Duffy
Jeffrey G. Hurd
Veronica L. Bowen

*Also Admitted in Minnesota,
Nebraska and North Dakota

George A. Bangs, Of Counsel
W.A. McCullen (1943-1987)

May 25, 1995

Recycled Paper 

The Honorable Merton B. Tice, Jr.
Presiding Judge, 7th Judicial Circuit
Pennington County Courthouse
Rapid City, SD 57701

RE: Marsh Hereford Ranch, et al. v. State
Civ. No. C95-289

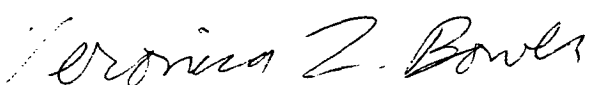
Dear Judge Tice:

I have enclosed for your review courtesy copies of Appellants' Response in Opposition to Respondent State of South Dakota's Motion to Vacate and Proposed Findings of Fact, Conclusions of Law and Final Decision in the above matter.

The originals have been filed with the Clerk of Courts and all parties have been served.

Sincerely,

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS


Veronica L. Bowen

VLB:dae

Enclosures

cc: Diane Best
Robert Jackson
John Guhin
Dan Bjerke
Water Management Board ✓
Dwayne Rollag
Clients

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

Civ. 95-289

APPELLANTS' RESPONSE
IN OPPOSITION TO RESPONDENT
STATE OF SOUTH DAKOTA'S
MOTION TO VACATE

Respondents.

Respondent the State of South Dakota (State) has moved to vacate the Court's Order dated March 29, 1995, pursuant to SDCL § 15-6-60(b)(1) and (6). Appellants oppose the State's motions on the grounds and for the reasons specified below.

Appellants brought this action for judicial review of a decision of the Water Management Board with respect to Permit No. 2276-2 issued to the City of Rapid City. Appellants raised two issues for review: (1) whether the Board had made a mistake of law in interpreting the diversion rate limitation contained in SDCL § 46-5-6, and (2) whether the factual findings made by the Board were sufficient under SDCL § 1-26-25.

Following a March 17, 1995, hearing, Appellants drew up a proposed Order and circulated it to both Respondents for their review. Appellants made several revisions to the proposed Order

on the basis of suggestions made by Respondents. Respondents then agreed to a final version of the proposed Order.

On March 29, 1995, the Court signed the proposed Order sent to it by Appellants and which had been approved by Respondents. The Order reversed and modified the Board's decision. The Court's March 29 Order did not disturb any of the findings of fact which had been entered by the Water Board at the administrative proceedings below. The Court specifically rejected Appellants' argument that the Board's findings were inadequate under SDCL § 1-26-25.

However, the Court accepted Appellants' argument that the Board had made a mistake of law interpreting SDCL § 46-5-6. In order to correct this mistake, the Court amended Permit No. 2276-2 so that diversions from the natural flows of Rapid Creek pursuant to the permit could not exceed the statutory rate of one cubic foot per second (c.f.s.) for every 70 acres. The Court also amended the permit by striking the language which limited the City to pumping 11.5 hours out of every 24-hour period.

The State's motion to vacate the Court's March 29 Order is based on two arguments. First, the State argues that a recent South Dakota Supreme Court case requires the Court to issue findings of fact. Second, the State argues that the Court should vacate its order to specifically determine, on the basis of the findings of fact and conclusions of law, whether the permit regulates "natural flows" or "purchased water" or both.

DISCUSSION

Respondent seeks relief pursuant to SDCL 15-6-60(b)(1) and 60(b)(6). That statute provides in pertinent part as follows:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

* * *

(6) [or for] Any other reason justifying relief from the operation of the judgment.

Relief under Rule 60(b) is extraordinary and may be granted only upon a showing of exceptional circumstances. Clarke v. Clarke, 423 N.W.2d 818, 820 (S.D. 1988). Furthermore, where a judgment was not entered by default but was a result of a party's "free deliberate choice," relief under Rule 60(b) is inappropriate. Klein v. Klein, 500 N.W.2d 236, 240 (S.D. 1993). It is Appellants' position that the State has not made a sufficient showing to justify Rule 60(b) relief.

A. Whether the Order Should be Vacated for Entry of Findings of Fact

The State relies on In re Trudy Schroeder v. Dep't. of Social Services, 529 N.W.2d 589 (1995), for its authority that this Court must enter findings of fact in the instant matter. The Schroeder decision does not mandate such a conclusion.

The Schroeder decision involved an appeal of an agency decision which found that Trudy Schroeder had not been insubordinate to her state employer and that just cause did not exist for the termination of her employment. Id. at 590. The circuit court reversed the agency's decision by holding that just

cause existed for Schroeder's termination and that the agency's finding of fact that Schroeder was not insubordinate was clearly erroneous. Id. at 590-91. The issue on appeal was whether the circuit court was required to make its own findings of fact after having overturned one of the agency findings. Id. at 591.

The Supreme Court noted that SDCL § 1-26-37 provides that 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." Id. (emphasis added by the Court). Because the circuit court reversed the agency findings, the Schroeder court held that it was error for the lower court not to have entered its own findings of fact. Id. at 592.

In the present controversy, the Court did not reverse any of the Water Board's findings of fact, but instead expressly affirmed them. Furthermore, although the Court did reverse the Water Board's conclusion of law as to the interpretation of SDCL § 46-5-6, the March 29 Order adequately contains a conclusion of law on this issue. As the Schroeder court noted, the purpose behind SDCL § 1-26-37 is to ensure that there will always be findings and conclusions of record for the Supreme Court to review. Id. at 591. That purpose is already accomplished in the present record compiled to date. In the event the Court disagrees with Appellants' analysis of the Schroeder decision and its application to this case, Appellants are submitting herewith proposed findings of fact and conclusions of law.

B. Whether the Order Contains a Mistake as to "Natural Flows"

Appellants note that, although the State had ample opportunity to review the proposed Order prior to the Court signing it on March 29, 1995, until its motion to vacate was filed, there was no suggestion from the State that a distinction should be drawn between "natural flows" and "purchased water." Furthermore, the State has offered no reason to excuse its prior silence on this matter. Under Rule 60(b), this showing cannot constitute exceptional circumstances sufficient to justify extraordinary relief.

Appellants further believe that the Order, as written, is correct. As an initial matter, Appellants take issue with the State's suggestion that Permit No. 2276-2 only applies to "purchased flows." The permit contains a statement that unappropriated waters are available to fulfill the permit only through purchased water, but does not restrict the City to pumping only purchased water. There is a simple explanation for the inclusion of the language apparently relied upon by the State.

The natural flows of Rapid Creek are overappropriated and have been for some time. In issuing a permit, the Water Board is required to find that there is sufficient unappropriated water available to satisfy the permit. SDCL § 46-2A-9. Therefore, new permits can issue only if the applicant has access to purchased water; hence the statement in the permit that purchased water is

available to the City through its contract with the Bureau of Reclamation.

However, if the natural flows of the creek are sufficient for the City to pump from, Permit No. 2276-2 does not require the City to purchase water before beginning pumping. Instead, the City is allowed to pump from the natural flows unless and until the natural flows are insufficient to meet all permit-holders' needs. Respondent the City of Rapid City has voiced a similar understanding of South Dakota water law in discussions with the undersigned.

In the event that the Court wishes to consider this newly-introduced issue of "natural flows" versus "purchased flows," it is Appellants' position that further briefing and even the introduction of evidence and testimony may be necessary to give the Court a complete record upon which to rule. Furthermore, this issue was never introduced before the agency below and, thus, the Court has no agency record upon which to rule. The posture and timing of the State's motion makes it most inappropriate for the Court to rule on these issues at this late juncture. This is a matter best left to subsequent proceedings before the Water Board.

CONCLUSION

The State has failed to make the requisite showing entitling it to extraordinary relief under SDCL § 15-6-60(b). Therefore, Appellants would request that the Court deny the State's Motion to Vacate.

Dated this 25th day of May, 1995.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS

BY: Veronica L. Bowen
VERONICA L. BOWEN and
JOSEPH M. BUTLER
Attorneys for all Appellants
818 St. Joseph Street; P.O. Box 2670
Rapid City, SD 57709
(605) 343-1040

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of Appellants' Opposition to Motion to Vacate and Appellants' Proposed Findings of Fact and Conclusions of Law upon the persons herein next designated, all on the date below shown, by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to each said addressee, to wit:

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

Diane Best
Assistant Attorney General
Office of Attorney General
500 East Capitol
Pierre, SD 57501-5070

Bob Jackson
City Attorney
300 6th Street
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Dan Bjerke
City of Rapid City
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Water Management Board
Department of Environment
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Oelrichs, SD 57763

which addresses are the last addresses of the addressees known to the subscriber.

Dated this 25th day of May 1995.

Veronica L. Bowen
VERONICA L. BOWEN

STATE OF SOUTH DAKOTA)
 SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

MARSH HEREFORD RANCH, INC.,)
and RAPID VALLEY WATER)
CONSERVANCY DISTRICT,)

Civ. 95-289

Appellants,)

STATE OF SOUTH DAKOTA ACTING)
AS THE WATER MANAGEMENT BOARD)
OF THE DEPARTMENT OF)
ENVIRONMENT AND NATURAL)
RESOURCES, and CITY OF)
RAPID CITY,)

PROPOSED
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
FINAL DECISION

Respondents.)

Marsh Hereford Ranch, Inc., and Rapid Valley Water Conservancy District appealed from a decision issued by the South Dakota Water Management Board concerning Water Permit No. 2276-2 issued to the City of Rapid City. Having considered the issues on appeal, this Court hereby makes the following findings of fact and conclusions of law.

VESTED WATER RIGHT CLAIM NO. 2294-2

Appellants did not challenge the decision of the Water Board with respect to Vested Water Right Claim No. 2294-2 held by the City of Rapid City. Accordingly, the Court makes no further findings of fact and conclusions of law as to the City's Vested Right, and rely upon those issued by the South Dakota Water Management Board in its decision.

PERMIT APPLICATION NO. 2276-2

FINDINGS OF FACT

I

In Permit Application No. 2276-2, the City of Rapid City filed an application with the Water Management Board which sought to "build upon" the Vested Right Claim No. 2294-2 (affirmed as stated above). Water Permit Application No. 2276-2 proposed to place to beneficial use an additional 2.09 cfs of water appropriated and reserved by future use Permit No. 1088-2 from Rapid Creek. This future-use permit has a priority date of June 28, 1971.

II

In particular, the City proposed to increase the diversion rate authorized by the vested right by an additional 2.09 cfs, to add 16 acres of land to be irrigated and to increase the annual volume limitation by 48 acre feet. This application also involved a request to change the location of irrigated acres authorized by Vested Right No. 2294-2 in Meadowbrook Golf Course. Thirdly, the application requested that .01 cfs of the requested diversion rate increase be used as a flow-through for a golf course pond on the No. 18 green.

III

Water Permit Application No. 2276-2 sought authority from the Water Management Board to pump water from Rapid Creek for use on the golf course. These Rapid Creek waters involve both natural flows from Rapid Creek when available, and purchased

water released from the Pactola Reservoir when necessary. Flows released from Pactola Reservoir are released pursuant to a contract called the "Pactola Deerfield Contract" which allows for releases of stored water from the Pactola Reservoir and requires the City of Rapid City to make payments to the Bureau of Reclamation for releases of stored water.

IV

The affect of the Water Board's approval of Water Permit No. 2276-2 was to increase the allowable diversion rate under the permit from 1.48 cfs by 2.09 cfs to a total of 3.57 cfs for a total of 120 acres.

V

SDCL § 46-5-6 states that "the amount [of water] allowed shall not be in excess of the rate of one cfs per second for each seventy acres, or the equivalent thereof . . . " Rapid City Application No. 2276-2 sought authority to pump the flows from Pactola at the rate of one cfs per 33.6 acres on an instantaneous basis, which was approximately twice the rate allowed by SDCL § 46-5-6. SDCL § 46-5-6 applies to natural flows.

VI

The Permit, as approved, also added an additional 16 acres of irrigated land. In addition, it would allow irrigation of those 16 acres at a rate of three acre feet per year. The increased acreage would not be considered part of the water right created in 1877 and, therefore, the strictures of SDCL § 46-5-6 are applicable to it.

VII

In this appeal, no party has argued that the application of three acre feet per year on a golf course is unreasonable or not allowable. Therefore, the Court does not decide whether the application of three acre feet per year on a golf course is reasonable and allowable under SDCL § 46-5-6.

VIII

Before the Water Board, Appellants made specific allegations of harm to them as a result of the Board's allowance of 3.57 cfs per 120 acres instantaneous diversion under the City's permit. Appellants are downstream appropriators who have pumps which are affected by variations in the flow of Rapid Creek. Allowing the City to irrigate under Water Permit No. 2276-2 as approved by the Water Board will detrimentally affect stream flows every 12 hours, making it impossible to ensure that flows downstream will remain at relatively constant and predictable levels. In considering granting a permit, the Water Board must consider whether granting the permit will unlawfully impair existing rights.

CONCLUSIONS OF LAW

I

This Court has jurisdiction of this administrative appeal pursuant to SDCL § 1-26-30.2. This Court's disposition of administrative appeals is governed by SDCL § 1-26-36.

II

SDCL § 46-5-6 limits the rate of diversion of water for irrigation purposes. Specifically, SDCL § 46-5-6 limits the

diversion of water to one cfs for each 70 acres. The diversion rate of water approved by the Water Board in Permit No. 2276-2 exceeds the statutorily allowable rate of one cfs for each 70 acres.

III

Application 2276-2 involves a "new" permit (as opposed to the validation of a vested water right) and is, therefore, subject to SDCL § 46-5-6. SDCL § 46-5-6 not been complied with in this case.

IV

The Water Board's findings of fact are sufficient under SDCL § 1-26-25. Furthermore, the Court concludes that such findings are not clearly erroneous.

V

The diversion rate established by the Water Board in Permit No. 2276-2 cannot be implemented without unlawful impairment of existing rights.

VI

The record demonstrates that Appellants are entitled to pursue this appeal of the decision of the Water Board pursuant to SDCL § 1-26-36 in that Appellants' substantial rights have been prejudiced because the administrative decision is in violation of statutory provisions.

FINAL DECISION

The decision of the Water Board in issuing Permit No. 2276-2 to the City of Rapid City is affirmed except as modified below:

1. The decision of the Water Board granting the City of

Rapid City's Water Permit Application No. 2276-2, is reversed insofar as it attempts to authorize the City to divert water from Rapid Creek at a rate in excess of the instantaneous statutory diversion rate of one cfs per 70 acres provided for in SDCL § 46-5-6.

2. Water Permit No. 2276-2 is hereby amended to provide for an instantaneous diversion of water from the natural flows of Rapid Creed at a rate no greater than one cfs per 70 acres.

3. Water Permit No. 2276-2 is hereby amended by lifting the restriction that the City may only pump for 11 and 1/2 hours out of every 24 hours.

4. Water Permit No. 2276-2 is affirmed in all respects other than the diversion rate established therein and the limit on the number of hours the City may pump in a day.

Dated this _____ day of _____ 1995.

BY THE COURT:

THE HONORABLE MERTON B. TICE, JR.
PRESIDING CIRCUIT COURT JUDGE

ATTEST:

_____, CLERK

By: _____
Deputy

(SEAL)

STATE OF SOUTH DAKOTA)
 SS
PENNINGTON COUNTY)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

Court File No. C95-289

MARSH HEREFORD RANCH, INC. and
RAPID VALLEY WATER CONSERVANCY DISTRICT,

Appellants,

vs.

STATE OF SOUTH DAKOTA ACTING AS THE
WATER MANAGEMENT BOARD OF THE
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES,

Appellee.

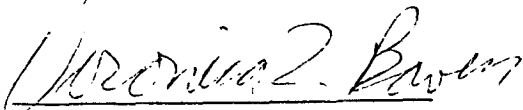
APPEAL TO THE CIRCUIT COURT, SEVENTH JUDICIAL
CIRCUIT, PENNINGTON COUNTY, SOUTH DAKOTA,
FROM THE DECISION OF THE WATER MANAGEMENT
BOARD OF THE DEPARTMENT OF ENVIRONMENT AND
NATURAL RESOURCES GRANTING THE APPLICATION
OF THE CITY OF RAPID CITY REGARDING
VESTED WATER RIGHT CLAIM NO. 2294-2 AND
WATER PERMIT APPLICATION NO. 2276-2

THE HONORABLE MERTON B. TICE, JR., PRESIDING JUDGE

STIPULATION TO DISMISS

Come now the parties, by and through their attorneys of record, and stipulate to the
dismissal of the above-entitled action for the reason that the issues involved are now
moot.

Dated this 25th day of Sept. ~~August~~, 1996.



JOSEPH M. BUTLER
VERONICA L. BOWEN
Bangs, McCullen, Butler,
Foye & Simmons
818 St. Joseph St.; P.O. Box 2670
Rapid City, SD 57709
(605) 343-1040



ROBERT R. JACKSON
City Attorney
City of Rapid City
300 6th Street
Rapid City, SD 57701
(605) 394-4140



DIANE BEST
Assistant Attorney General
Attorney General's Office
500 E. Capitol
Pierre, SD 57501



JUN 10 1997

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

Daniel L. Bjerke
Public Works Director of Engineering/Utilities
City of Rapid City
300 6th St
Rapid City SD 57701-2724

Dear Mr. Bjerke:

Enclosed are Water Permit Nos. 2234-2, 2276-2, 2316-2, 2317-2 and Vested Right No. 2294-2 issued to the City of Rapid City.

As long as the City uses the water beneficially, as stated in the various permits, State Water Laws provide that the City of Rapid City has a continuing right to use the water.

Very truly yours,

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

enclosures

STATE OF SOUTH DAKOTA

VESTED RIGHT WATER LICENSE NO. 2294-2 FOR IRRIGATION

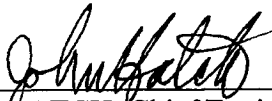
(1) The City of Rapid City, 300 6th St., Rapid City SD 57701 made Application No. 2294-2, for validation of a vested right claim to appropriate 1.48 cubic feet of water per second with an annual volume limitation not to exceed 312 acre-feet from Rapid Creek, Pennington County, South Dakota, for irrigation purposes. Vested Water Right No. 2294-2 was validated September 9, 1994 with a priority date of April 1, 1877. Construction of the described water supply system and application of water to beneficial use has been completed and complies with applicable provisions of South Dakota State Law.

(2) The vested right owner is entitled to divert 1.48 cubic feet of water per second for beneficial use. The location of the diversion point is 1350 feet south and 1300 feet east from the northeast corner of Section 9-T1N-R7E (SE 1/4 NE 1/4).

The location of the irrigated acreage is: **all in T1N-R7E**

Section 9	SE 1/4 NE 1/4	39 acres	Section 10	SW 1/4 NW 1/4	30 acres
	NE 1/4 SE 1/4	21 acres		NW 1/4 SW 1/4	14 acres
Total 104 acres					

(3) Pursuant to Section 46-5-30.1 the City of Rapid City, 300 6th St., Rapid City SD 57701 the holder and/or owner of Vested Water Right No. 2294-2 is issued a license to appropriate 1.48 cubic feet of water per second with an annual volume limitation not to exceed 312 acre-feet from Rapid Creek with a priority date of April 1, 1877 from the location specified in (2) of this license. The water is to be used for the purpose of irrigation. This license is subject to any limitations, conditions or qualifications listed in Vested Water Right No. 2294-2 and subject to South Dakota State Law.


JOHN HATCH, Chief Engineer
Water Rights Program
Department of Environment and Natural Resources

JUN 10 1997

date



STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

IN THE MATTER OF VESTED WATER	)	CHRONOLOGICAL
RIGHT CLAIM NO. 2294-2, CITY	)	ORDER
OF RAPID CITY	)	

<u>Entry</u>	<u>Document</u>	<u>Page</u>
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2.	Letter to Mark Rath from Daniel L. Bjerke, October 5, 1993	2
3.	Application to Appropriate Water, Form 2, October 7, 1993	3
4.	Affidavit of Water Use, Form 2B, October 7, 1993	4
5.	Maps, October 7, 1993	Separate
6.	Receipt for application fee, October 21, 1993	5
7.	Report on application, November 15, 1993	6-9
8.	Recommendation of the Chief Engineer, December 6, 1993	10
9.	Revised recommendation of the Chief Engineer, December 20, 1993	11
10.	Letter to Dan Bjerke from Eric Gronlund, March 3, 1994	12
11.	Letter to Rapid City Journal from Eric Gronlund, March 3, 1994	13
12.	Letter to Jerry Marsh from Mark Rath, March 4, 1994	14
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16.	Letter to John Hatch, Chief Engineer, from Jerry Marsh, March 30, 1994	19

17.	Letter to John Hatch, Chief Engineer, from Jerry Hammerquist, March 30, 1994	20
18.	Notice of Automatic Delay, March 30, 1994, and certification	21-22
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20.	Notice of Preparation of Findings of Fact, Conclusions of Law and Final Decision, July 1, 1994, and certification	25-26
21.	Proposed Findings of Fact, Conclusions of Law and Final Decision, August 8, 1994, and certificate	27-36
22.	Division Response to Proposed Findings of Fact, Conclusions of Law and Final Decision, August 22, 1994, and certificate	37-39
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25.	Notice of Adoption of Findings of Fact, Conclusions of Law and Final Decision, September 12, 1994, and certification	48-49
26.	Letter to Veronica L. Bowen from Diane Best, October 7, 1994	50
27.	Revised Notice of Appeal, October 5, 1994, and certification	51-54
28.	Statement of Issues on Appeal, October 12, 1994, and certification	55-58
29.	Transcript of June 28, 1994, Water Management Board meeting, with certificate, October 13, 1994, and Exhibits and Administrative Notice	Separate
30.	Respondent's Proposed Findings of Fact, Conclusions of Law, October 14, 1994, and certificate	59-62
31.	Letter to Diane Best from Veronica L. Bowen, October 14, 1994	63

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
IN THE MATTER OF VESTED WATER	)	ALPHABETICAL
RIGHT CLAIM NO. 2294-2, CITY	)	INDEX
OF RAPID CITY	)	

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Vested Water Right No. 2294-2
Upper Cheyenne River - Water District

Other permit/license(s) associated with project: 1998-2, & 2276-2

Report Of Examination Of Works

On, September 9, 1998, I made a thorough examination of the water use system constructed by the City of Rapid City of 300 6th Street, Rapid City holder of Permit No. 2276-2, bearing the priority of June 28, 1971 authorizing the diversion of 0.23 cu. ft. per second waters and not to exceed 48 acre-feet of water annually also the diversion rate of 0.1 cubic feet of water per second non-consumptive use for a flow through pond. Also Recognized Vested Water Right No. 1998-2 and Vested Water Right No. 2294-2 bearing the priority of April 1, 1877 authorizing the diversion of 1.48 cu. ft. per second of the waters and not to exceed 312 acre-feet of water annually of surface water (Rapid Creek) for irrigation purposes, in Pennington County.

I have to report on the conditions of the same as follows:

A. Works used to divert the water:

A 665 gallon per minute pump from Rapid Creek

Note: The flow through diversion to a pond was never constructed

B. Works used to transport water to place of use:

Various sizes of pipes a sealed regulating pond and two 650 gpm pumps and a 250 gpm pump.

C. Works used to apply water to beneficial use:

Pop-up sprinklers

The system is in the following condition excellent. The point of diversion is located from the NE corner of Section 9 T1N-R7E: 1210 ft W and 1400 ft S. The works are capable of diverting and conveying to the place of use 1.48 cu. ft. per second of water and a 360 annual acre-feet limitation of water which is to be used for irrigation of Meadowbrook Golf Course. Water has been put to beneficial use to the maximum extent as follows:

Land irrigated under the April 1, 1877 priority date:

<u>In Section 9 T1N-R7E:</u>	<u>SE1/4 NW1/4 – 5ac</u>	<u>NE1/4 NE1/4 – 9ac</u>
<u>SE1/4 NE1/4 – 33ac</u>	<u>SW1/4 NE1/4 – 24ac</u>	<u>NW1/4 SE1/4 – 10ac</u>
<u>NE1/4 SE1/4 – 7ac</u>	<u>NW1/4 SW1/4 – 6ac</u>	

<u>In Section 10 T1N-R7E:</u>	<u>SW1/4 NW1/4 – 10ac</u>	<u>For a total of 104 acres</u>
-------------------------------	---------------------------	---------------------------------

Land irrigated under the June 28, 1971 priority date:

In Section 10 T1N-R7E:

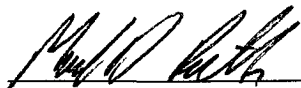
NW1/4 NW1/4 – 8ac NW1/4 SW1/4 – 8ac

For a total of 16 acres

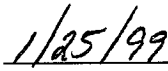
comprising a total of 120 acres of land and the license should be issued for 1.48 cfs and 312 acre-feet of water annually having a priority date of April 1, 1877 and 48 acre-feet of water annually having a priority date of June 28, 1971.

Applicable permit qualifications have been complied with: yes

Exceptions to compliance are: none



Mark D. Rath
Natural Resources Engineer
DENR, Water Rights Program



Date

REPORT ON INSPECTION OF VESTED WATER RIGHT NO. 2294-2

DATE OF INSPECTION: September 9, 1998

Other permit/license(s) associated with the project: 1998-2 & 2276-2

Contact Person & Address: John Wagner, 300 6th St Rapid City SD

DIVERSION POINT LEGAL LOCATION: from the NE corner of Section 9 T1N-R7E: 1210 ft W and 1400 ft S

WATER SUPPLY Source: surface water, Rapid Creek

Pump\ Motor: for Rapid Creek diversion

- | | |
|--------------------------------------|------------------------------------|
| 1) Pump Make <u>American Turbine</u> | 2) Pump Model <u>12H120</u> |
| 3) Capacity <u>665</u> GPM | 4) Motor Make <u>US Motor</u> |
| 5) Motor Model No. <u>254TPH</u> | 6) Horsepower rating <u>7.5</u> hp |

Pump\ Motor: #1 from small regulating pond

- | | |
|---------------------------------|----------------------------------|
| 1) Pump Make <u>Simmons</u> | 2) Pump Model <u>?</u> |
| 3) Capacity <u>650</u> GPM | 4) Motor Make <u>US Motor</u> |
| 5) Motor Model No. <u>364TP</u> | 6) Horsepower rating <u>?</u> hp |

Pump\ Motor: #2 from small regulating pond

- | | |
|---------------------------------|----------------------------------|
| 1) Pump Make <u>Simmons</u> | 2) Pump Model <u>?</u> |
| 3) Capacity <u>650</u> GPM | 4) Motor Make <u>US Motor</u> |
| 5) Motor Model No. <u>364TP</u> | 6) Horsepower rating <u>?</u> hp |

Pump\ Motor: #3 from small regulating pond

- | | |
|-----------------------------|----------------------------------|
| 1) Pump Make <u>Simmons</u> | 2) Pump Model <u>?</u> |
| 3) Capacity <u>250</u> GPM | 4) Motor Make <u>US Motor</u> |
| 5) Motor Model No. <u>?</u> | 6) Horsepower rating <u>?</u> hp |

SYSTEM TYPE:

Pop-up sprinklers

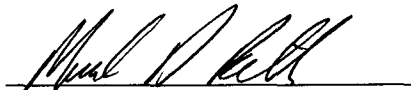
CHEMIGATION:

- 1) Does chemigate no

PERMIT QUALIFICATIONS AND REGULATIONS:

- 1) Special qualifications to permit being abided by yes
- 2) All structures, wells and lands on map yes
- 3) Irrigation Questionnaires checked to determine if permit owner started irrigation by the end of construction period yes

COMMENTS: The City pumps from Rapid Creek into a small regulating pond which allows them to pump from the pond onto the golf course a a greater rate than 1 cfs per 70 acres. The Water Management Board's ruling on Water Permit No. 2276-2 was originally over turned by 7th Circuit Court. This led to a change in SDCL 46-5-6 allowing for the WMB to issue a permit allowing for a greater than 1 cfs per 70 acres diversion rate. Further action associated with the appeal was dropped by agreement of all parties since it was moot because of the statutory change described above.



Mark D. Rath
Natural Resources Engineer
DENR, Water Rights Program

1/25/99
Date

STATE OF SOUTH DAKOTA

REISSUED WATER RIGHT LICENSE NO. 2294-2

(1) The City of Rapid City, 300 6th St, Rapid City, SD 57701 was issued Water License No. 2294-2, based on validation of a vested right claim to appropriate 1.48 cubic feet of water per second (cfs) from Rapid Creek, Pennington County, South Dakota, for irrigation purposes. Vested Water Right No. 2294-2 was validated September 9, 1994, with a priority date of April 1, 1877 (established by Water Right Filing No. 0646-2A). Construction of the described water supply system and application of water to beneficial use has been completed and complies with applicable provisions of South Dakota State Law.

The irrigation system for Meadowbrook Golf Course involves the following Water Permits/Rights:

- Water Right Filing No. 0646-2A, with a priority date of April 1, 1877, authorizes diversion of 1.48 cfs from Rapid Creek to irrigate 104 acres;
- Water Permit No. 1998-2, with a priority date of April 1, 1877 authorized a change in the point of diversion for Water Right Filing No. 0646-2A to irrigate the same acreage described in the filing. No. 1998-2 did not allow for an increase in the existing diversion rate;
- Vested Water Right No. 2294-2, with a priority date of April 1, 1877, validated the appropriation of 1.48 cfs from Rapid Creek with an annual volume limitation not to exceed 312 acre-feet of water;
- Water Permit No. 2276-2, with a priority date of June 28, 1971 (established by Future Use No. 1088-2), authorized an increase in the diversion rate of 0.23 cfs, increased the annual volume limitation by 48 acre-feet, added 16 acres and changed the location of the irrigated acres authorized by No. 2294-2.

The above permits, rights and filing all cover the same water use system. The applicable portions of Water Right Filing No. 0646-2A and Water Permit Nos. 1998-2 and 2276-2 are being incorporated into this reissued license No. 2294-2. Priority dates for the acres irrigated are described below. The license is issued for a total of 360 acre-feet annually with a priority date of April 1, 1877 for 312 acre-feet and June 28, 1971 for 48 acre-feet annually.

(2) The city is entitled to divert 1.48 cubic feet of water per second for beneficial use. The location of the diversion point is: 1,210'W and 1,400'S of the NE corner of Section 9, T1N, R7E (SE ¼ NE ¼).

The location of the irrigated acreage is:

Section 9, T1N, R7E	SE ¼ NE ¼	33 acres	April 1, 1877 priority date
	SW ¼ NE ¼	24 acres	"
	NE ¼ NE ¼	9 acres	"
	SE ¼ NW ¼	5 acres	"
	NW ¼ SE ¼	10 acres	"
	NE ¼ SE ¼	7 acres	"
	NW ¼ SW ¼	6 acres	"
Section 10, T1N, R7E	SW ¼ NW ¼	10 acres	April 1, 1877 priority date
	NW ¼ NW ¼	8 acres	June 28, 1971 priority date
	NW ¼ SW ¼	8 acres	June 28, 1971 priority date
	Total	120 acres	

continued

page 2

REISSUED WATER LICENSE NO. 2294-2

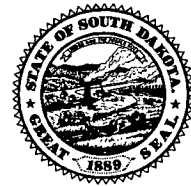
(3) Pursuant to Section 46-5-30.1 the City of Rapid City, 300 6th St, Rapid City, SD 57701 the holder(s) and/or owner(s) of Incorporated Water Right No. 2294-2 is issued a license to appropriate 1.48 cubic feet of water per second with 360 acre-feet of water annually from Rapid Creek with priority dates of April 1, 1877 (104 acres and 312 acre-feet annually) and June 28, 1971 (16 acres and 48 acre-feet annually) from the location specified in (2) of this license. The water is to be used for the purpose of irrigating Meadowbrook Golf Course. This license is subject to any limitations, conditions or qualifications listed in Incorporated Water Right No. 2294-2 and subject to South Dakota State Law.



JOHN HATCH, Chief Engineer
Water Rights Program
Department of Environment and Natural Resources

AUG 5 1999

date





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

AUG 5 1999

Daniel Bjerke
City of Rapid City
300 6th St
Rapid City, SD 57701

Dear Mr. Bjerke:

Enclosed is your Reissued Water Right License No. 2294-2. The original water license has been reissued to include the applicable portions of Water Right Filing No. 0646-2A and Water Permit Nos. 1998-2 and 2276-2. This was done to consolidate all the permits/rights pertaining to irrigation of the Meadowbrook Golf Course.

As long as you beneficially use the water as described in Water License No. 2294-2, South Dakota Water Laws provide that you have a continuing right to the use of the water.

If you have any questions concerning the enclosed license, please contact Mark Rath with our program at (605) 773-3352.

Very truly yours,

JOHN HATCH, Chief Engineer
Water Rights Program

enclosure

