Reissued Water Permit No. 2300-2

Followed by: Administrative Record for No. 2300-2 in numeric order as listed on the Chronological Index.

Remainder of documents are in chronological order.

SOUTH DAKOTA
REISSUED WATER PERMIT NO. 2300-2

Date of first receipt of application February 1, 1994.

The Water Management Board approved Water Permit Application No. 2300-2 on February 25, 1998 for U.S. Fish and Wildlife Service (USFWS), PO Box 25486, Denver Federal Center, Denver CO 80225 authorizing the construction of the water use system and the placing of water to beneficial use subject to the following limitations, conditions and qualifications:

1. Water Permit No. 2300-2 authorizes a stoplog structure on Lake Creek located in the NW ¼ SE ¼ Section 24-T36N-R37W.

2. The water appropriated shall be used for the purpose of preventing carp from traveling upstream of the structure for the beneficial use of protecting the state-threatened Pearl Dace.

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

4. The date from which applicant may claim right is February 1, 1994.

5. Qualification Nos. 3 and 4 were amended by the Board on December 14, 2000.

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

QUALIFICATIONS

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

2. Permit No. 2300-2 authorizes storage of 0.75 acre-foot of water by constructing a new stoplog structure which replaces the existing structure (known as Diversion No. 4). The purpose of the structure is to prevent carp from traveling upstream. This will protect the state threatened Pearl Dace, whose habitat is upstream of the stoplog structure.

3. The storage level of Diversion No. 4A may not be in excess of 3036.23 feet mean sea level and the structure must be designed to pass a 25-year event.

4. The Service is required to remove the silt in the area behind the carp guard which is defined by the present day rip rap area, twice in each calendar year, at intervals not less than three months.

5. The Service is required to remove Diversion No. 4 in its entirety within a reasonable time after construction of Diversion No. 4A.

WATER MANAGEMENT BOARD

By: Garland Erbele AUG 29 2002

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

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

AUG 2 9 2002

U.S. Fish and Wildlife Service (USFWS)
% Cheryl Williss
PO Box 25486
Denver Federal Center
Denver CO 80225

Dear Ms. Williss:

Enclosed is Reissued Water Permit No. 2300-2 authorizing the diversion structure No. 4A. The water permit has been reissued to reflect the amended Qualifications Nos. 3 and 4, not exceeding the limits as specified in the Water Permit.

If you have any questions on the reissuance of this water permit, please contact Eric Gronlund at (605) 773-3352.

Sincerely,

Garland Erbele

Garland Erbele, Chief Engineer
Water Rights Program

enclosures

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL COURT
		(Civ. No. 2001-29)
IN THE MATTER OF	)	
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	: SS	
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		(Civ. No. 2001-29)
IN THE MATTER OF U.S. FISH AND WILDLIFE SERVICES REQUEST TO AMENDMENT TO WATER PERMIT NO. 2300-2	))))	ALPHABETICAL INDEX

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41.	November 4, 1994	Letter to Rodney Freeman from Diane Best transmitting motion for scheduling order	64
44.	November 21, 1994	Letter to Rodney Freeman from Diane Best withdrawing request for scheduling order	70
137.	November 12, 1999	Letter to Susan Williams, Bennett County Auditor, from Eric Gronlund acknowledging receipt of letter	419
59.	June 14, 1996	Letter to Terry Terrell, USFWS from John Hatch	107 – 108
70.	October 29, 1996	Letter to Terry Terrell, USFWS, from Eric Gronlund on publishing notice on amended application	138
75.	December 11, 1996	Letter to Terry Terrell, USFWS, from Eric Gronlund sending out notice of hearing again	148
123.	June 17, 1998	Letter to USFWS from John Hatch transmitting issued Water Permit No. 2300-2	395
154.	October 4, 2000	Letter to Water Rights from Linda Coe, USFWS transmitting completion of works form	500
14.	May 9, 1994	Letter to Wilbur Ladd, Jr., USFWS from Eric Gronlund regarding publishing notice of hearing	19

Entry	Date	Document	Pages
91.	April 21, 1997	List of Witnesses and Exhibits filed by Division	235 – 239
4.	January 24, 1994	Map	4
51.	March 1, 1996	Memo to Board from Diane Best transmitting motion for scheduling order	87 – 91
114.	November 5, 1997	Memo to John Hatch from John Guhin delaying consideration of findings until February 25-26, 1998	299
158.	November 22, 2000	Memorandum from John Guhin to Board and Interested Parties	520 – 521
145.	June 13, 2000	Memorandum to Maury Wright, Refuges Supervisor from Rolf Kraft, Lacreek Refuge Manager	436 – 437
126.	April 30, 1999	Minutes excerpt from April 27, 1999 Bennett County Commission meeting (fax copy)	399 – 400
40.	October 21, 1994	Motion by Bennett County Weed Board to Intervene	57 – 63
81.	February 20, 1997	Motion filed by USFWS to exclude evidence concern weed control and eradication (including draft order)	161 – 173
82.	February 21, 1997	Motion filed by USFWS to limit evidence pertaining to relevant issue pertaining to Diversion No. 4 (including draft order)	174 - 182
95.	May 16, 1997	Motion for continuance or resetting of hearing date filed by John Kunz, USFWS attorney	246 - 251
42.	November 4, 1994	Motion of Divisions for a Scheduling Order and Order	65 – 68
104.	July 8, 1997	Motion to amend application filed by John Kunz, USFWS attorney	280 – 287
68.	October 29, 1996	Notice and USFWS amendment to Application No. 2300-2 and scheduling hearing	131 – 134
71.	November 13, 1996	Notice canceling December 5, 1996 hearing because notice did not get published	139 – 141

Entry	Date	Document	Pages
79.	February 12, 1997	Notice informing parties of automatic delay of March 5, 1997, hearing before the Water Management Board	155 – 157
50.	February 23, 1996	Notice limiting March 7, 1996 hearing to scheduling order and motion to intervene	84 – 86
163.	December 19, 2000	Notice of adoption of findings of fact, conclusions of law and final decision	560 – 561
164.	January 18, 2001	Notice of Appeal	562 – 579
54.	March 25, 1996	Notice of appearance and substitution of counsel filed by Thomas Lloyd	98 – 99
20.	June 17, 1994	Notice of automatic delay of June 29, 1994 hearing on Application No. 2300-2	32 – 34
155.	October 4, 2000	Notice of completion of works and application of water to beneficial use completed by USFWS	501
63.	June 26, 1996	Notice of continuance of Application No. 2300-2 including June 7th stipulation	115 – 120
29.	August 22, 1994	Notice of continuance of August 31, 1994 hearing (attached stipulation)	47 – 51
94.	May 8, 1997	Notice of continuance of hearing on Application No. 2300-2 to June 16, 1997	240 – 245
84.	February 21, 1997	Notice of motion hearing filed by Diane Best	194
53.	March 8, 1996	Notice of procedural scheduling order	92 – 97
64.	July 11, 1996	Notice of revised procedural schedule including Division's revised scheduling order and signed order	121 – 125
96.	May 19, 1997	Notice of setting of telephonic conference to hear motion filed by John Kunz, USFWS attorney	252 – 254
97.	May 23, 1997	Notice of Special meeting on Application No. 2300-2	255 – 259
103.	June 30, 1997	Notice of special meeting on Application No. 2300-2	276 – 279

Entry	Date	Document	Pages
122.	March 11, 1998	Notice on Adoption of findings of fact, conclusions of law and final decision	391 – 394
110.	August 4, 1997	Notice on preparation of findings of fact, conclusions of law and final decision	289 – 292
156.	October 17, 2000	Notice on preparation of findings of fact, conclusions of law and final decision	502 – 505
23.	July 29, 1994	Notice rescheduling a September 1, 1994, hearing on Application No. 2300-2	38 – 39
113.	August 19, 1997	Notice rescheduling consideration of findings	295 – 298
115.	November 7, 1997	Notice rescheduling consideration of findings	300 – 303
74.	December 11, 1996	Notice rescheduling to a March 5, 1997 hearing	146 – 147
146.	June 16, 2000	Notice scheduling a July 12, 2000 hearing	438 – 440
140.	December 23, 1999	Notice scheduling a March 1 and 2, 2000,hearing before Board on USFWS's and Bennett County's requests	422 – 424
49.	January 31, 1996	Notice scheduling a March 7, 1996 hearing before the Water Management Board	80 – 83
149.	August 2, 2000	Notice scheduling a September 28, 2000 hearing before the Water Management Board (includes enclosure of previous stipulation)	458 – 464
88.	March 10, 1997	Notice scheduling hearing on Application No. 2300-2 for April 30, 1997	207 – 210
141.	January 26, 2000	Notice scheduling March 1, 2000 hearing	425 – 427
19.	June 17, 1994	Objections to Recommendation of Chief Engineer filed by Patrick Ginsbach	30 – 31
21.	June 24, 1994	Petition filed by Bennett County supporting petition to oppose Application No. 2300-2	35 – 36

Entry	Date	Document	Pages
18.	June 15, 1994	Petition requesting delay of hearing on Application No. 2300-2 filed by Patrick Ginsbach	27 – 29
17.	June 14, 1994	Petition to Oppose Application No. 2300-2 filed by Patrick Ginsbach on behalf of landowners	23 – 26
116.	January 26, 1998	Proposed Findings of Fact, Conclusions of Law and Final Decision prepared by Board's Attorney	304 – 328
157.	November 15, 2000	Proposed findings of fact, conclusions of law and final decision prepared by John Guhin, Board's attorney	506 – 519
6.	February 1, 1994	Receipt of Application filing fee	8
12.	April 1, 1994	Recommendation of Chief Engineer for Water Permit Application No. 2300-2	17
11.	March 9, 1994	Report on Water Permit Application No. 2300-2	13 – 16
78.	January 30, 1997	Request for automatic extension of hearing date filed by USFWS	153 – 154
67.	October 28, 1996	Revised Recommendation of Chief Engineer	130
48.	January 29, 1996	Revised recommendation of Chief Engineer on Water Permit Application No. 2300-2	79
66.	October 25, 1996	Revised Supplemental Report on Water Permit Application No. 2300-2 prepared by Del Brosz	129
165.	January 18, 2001	State of Issues on Appeal	580 – 582
152.	September 18, 2000	State responses to question of USFWS (is attachment to letter to Kunz and Parties)	469 – 499
58.	June 7, 1996	Stipulation and motion for continuance of July 10-12, 1996 hearing before the Water Management Board	105 – 106
27.	August 8, 1994	Stipulation and request for continuance of hearing date	43 – 44
147.	July 19, 2000	Stipulation delaying July 12th hearing until September 28, 2000 (signed by all parties)	441 – 456

Entry	Date	Document	Pages
31.	September 13, 1994	Subpoena duces tecum of Gary Nies of Bennett Cty Weed Board by the USFWS	54 – 55
30.	September 13, 1994	Subpoena duces tecum of representative of Bennett Cty Commission by the USFWS	52 – 53
3.	January 24, 1994	Supplemental Information to Application	3
47.	January 24, 1996	Supplemental report on Water Permit Application No. 2300-2	78
52.	March 7, 1996	Transcript of hearing before Board on motion for intervention and scheduling order	Separate
142.	March 1, 2000	Transcript of March 1, 2000 hearing before Water Management Board	Separate
105.	July 28, 1997	Transcript of Water Management Board hearing	Separate
107.	July 28, 1997	Transcript of Water Management Board hearing from July 28, 1997 (volume 6)	Separate
108.	July 29, 1997	Transcript of Water Management Board hearing from July 29, 1997 (volume 7)	Separate
109.	July 30, 1997	Transcript of Water Management Board hearing from July 30, 1997 (volume 8)	Separate
100.	June 16, 1997	Transcript of Water Management Board hearing from June 16, 1997	Separate
101.	June 17, 1997	Transcript of Water Management Board hearing from June 17, 1997	Separate
102.	June 18, 1997	Transcript of Water Management Board hearing from June 18, 1997	Separate
153.	September 28, 2000	Transcript of Water Management Board hearing from September 28 and 29, 2000	Separate
93.	April 30, 1997	Transcript of Water Management Board hearing on April 30 and May 1, 1997 (volumes 1 & 2)	Separate

Entry	Date	Document	Pages
160.	November 27, 2000	USFWS's response to proposed finding of fact, conclusions of law and final decision	524 – 539
124.	June 17, 1998	Water Permit No. 2300-2 (issued)	396 – 397

WATER PERMIT APPLICATION NO. 2300-2, U. S. FISH AND WILDLIFE SERVICE
EXHIBIT LIST (from all hearings on Permit No. 2300-2)

Exhibit No.	Description	Received
DENR – 1 (1A)	Application file (original & file for amendment)	X
DENR-2	Quadrangle Map	X
DENR-3	Revised Recommendation	X
DENR-4	Mark Rath work background	X
FWS-1	Topographic Map	X
FWS-2a	Overlay of Monitoring Well Location	X
FWS-2b	Location of current & Proposed Diversion #4	X
FWS-3	New Diversion #4 (page 1)	X
FWS-3a	New Diversion #4 (page 2)	X
FWS-3b	New Diversion #4 (page 3)	X
FWS-3c	New Diversion #4 (page 4)	X
FWS-4	1904 –register of deed	X
FWS-4a	Composite Map of Ex. No. FWS-4	X
FWS-5a	Graph – Well 1-H & 1-ref	X
FWS-5B	Graph – well 2-H & 2-ref	X
FWS-5c	Graph – Well 6-LK, 6B-LK & 6-ref	X
FWS-5d-1	Graph – Div. 4 – Well 3B and Creek Elev.	X
FWS-5d-6	Graph – Div. 4 – well and Creek Elev.	X
FWS-5e	Graph – Div. 1 Well Series	X
FWS-8a	Mylar overlay	X
FWS-8b	Aerial photo of Refuge - 1937	X
FWS-8c	Aerial photo of Refuge – 1954	X
FWS-8d	Aerial photo of Refuge - 1961	X
FWS-8e	Aerial photo of Refuge – 1980	X
FWS-8f	Letter from Linda McDonald showing reference for Ex. 8e	X
FWS-9-1	Photo Board (admitted photo nos. a,b,c,d,e,f,g,h)	X
FWS-9-11	Photo Board (admitted photo nos. a,b,c,d)	X
FWS-9-13	Photo Board – 4/17/93 Aerial Photos (admitted Nos. a & b)	X
FWS-9-21	Photo Board (admitted photo nos. a,b,c,d,e)	X
FWS-9-22	Photo Board (all admitted into evidence)	X
FWS-9-25	Photo Bard (admitted photo nos. a,b,c,d,e,g,,h,i)	X
FWS-9-26	Photo Board (admitted photo nos. a,b,c)	X
FWS – 10	Cooperative weed agreement	X
FWS-11	Weed control plan	X
FWS-11A	Letter from Rep. Johnson from Krsnak	X
FWS-12	Refuge 1995 stream survey report	X
FWS-12a	Nebraska document on 3 state threatened/endangered species	X
FWS-13a	Minutes of Game, Fish & Parks Commission action	X
FWS-15	Techniques for establishing alfalfa in SD (excerpt used)	X
FWS-21	Darcy's Formula	X

FWS-22	Map (showing distances)	X
FWS-24	Bennett County Booster article (6/4/97)	X
FWS-26	Hussman drawing	X
FWS-28	Soil survey (excerpt May 1971)	X
FWS-29	Soil Survey(excerpt) May 1971 – Loup soil	X
FWS-30	Soil Survey (excerpt) May 1971 – Gannett soil	X
FWS-31	Rainfall frequencies for NOAA-NWS	X
FWS-32	Alfalfa seed production (booklet)	X
FWS-35	Photo of clean-out behind structure	Not admitted
FWS-36	Picture of Diversion No. 4A	X
FWS-37	Monthly report of gauge readings and weather	X
FWS-38	Report by Niobrara Valley consultants	X
FWS-39	Elevation Summary – Lacreek NWR	X
FWS-40	Letter to Garland Erbele from Cheryl Williss	X
FWS-41	Diversion 4A Well Locations	X
FWS-42	Graph of Water levels and Ground Surface Elevation Adjacent to and Downstream of Diversion 4A – 1998- 2000	X
RAY-1 (index)	Index of documents	X
RAY-1	January 25, 1993 letter to Senator Daschle	X
RAY-1A	Letter to Farrell from Hatch (12/8/92)	X
RAY-1B	Letter to Kunz from Ginsbach (12/10/92)	X
RAY-1C	Memo to file from Brosz (5/13/93)	X
RAY-1D	Letter to R. Kocer from hatch (6/6/93)	X
RAY-1E	Memo to file from Gronlund (8/16/93)	X
RAY-1F	Letter from Hatch from R. Kocer (3/26/94)	Rejected
RAY-1G	Letter to R. Kocer from Hatch (4/4/94)	Rejected
RAY-1H	Letter to Hatch from R. Kocer (4/10/94)	X
RAY-1I	Memo to file from Ahadi (4/20/94)	X
RAY-1J	Letter to Hatch from R. Kocer (5/29/96)	X
RAY-1K	Letter from Harold Freouf	Rejected
RAY-1L	Letter from William Porch	Rejected
RAY-1M	Memo to Kocer filed from Pat Ginsbach	X
RAY-4A	Well reading graph – 3CREF	X
RAY-4B	Well reading graph – 3A-IN	X
RAY-4C	Diversion No. 4 gauge readings	X
RAY-4D	Well reading graph – 3AREF	X
RAY-4E	Well reading graph – 3AREF	X
RAY-4F	Well reading graph – 3CFEF	X
RAY-7A	Photo board – water on L. Kocer (front/back)	X
RAY-7B	Photo board – water on Heath (front/back)	X
RAY-7C	Photo board – water plugging Lake Creek (font/back)	X
RAY-7D	Nine Photo Boards (70 pictures)	X
RAY- 8	Newspaper article (11/25/92)	X

RAY-10	Photo	X
RAY-11	Photo	X
RAY-12	Fragile Legacy – Endangered, Threatened & Rare Animals	X
RAY-13	Photos (received 4 photos with Rotenone barrel – rejected other 6 photos)	X
RAY-13A	Photos (received 4 photos on left page and one on top right)	X
RAY-14	Two Photo Boards (13 pictures – front/back)	X
RAY-15	Photo Board (4 pictures)	X
RAY-16	Letter to R. Kocer from Porch	Rejected
RAY-17	Photo – closeup of fencepost w/washout (6/14/97)	X
RAY-18	Photo – fencepost in picture	X
RAY-19	Photo-culvert in fore ground	X
RAY-20	USFWS monitoring records	X
RAY-21	Monitoring well elevations	X
RAY-22	Monitoring well information	X
RAY-23	Photo of structure	X
RAY-24	Photos above and below Diversion No. 4A	X
RAY-25	Photo of structure full of sand	X
RAY-26	Photos (6) of eroding banks 4/12/2000	X
RAY-27	Photos (6) 4/12/2000	X
RAY-28	Photos (6) 4/12/2000	X
RAY-29	Photo (6) – aerial photos taken 9/26/2000	X
Heath-A	Photo (Deposition Ex. No. 25)	X
Heath-B	Photo (Deposition Ex. No. 17)	X
Heath-C	Photo (Deposition Ex. No. 18)	X
Heath-D	Photo (Deposition Ex. No. 19)	X
Heath-D-1(1)	Soil Profile (page 1)	X
Heath-D-1(2)	Soil Profile (page 2)	X
Heath-D-2	Soil Map	X
Heath-E	Photo (Deposition Ex. No. 20)	X
Heath-F	Photo (Deposition Ex. No. 21)	X
Heath-G	Photo (Deposition Ex. No. 22)	X
Heath-H	Photo (Deposition Ex. No. 23)	X
Heath-I	Photo (Deposition Ex. No. 24)	X
Heath-R	Photo (Deposition Ex. No. 9)	X
Heath –U	Rough fish control plan	X
Heath-W	Tom Beck letter	X
Heath-Y	June 15, 1993, Memo to file on 1993 fisheries meeting	X
Heath-Z	Video (surface water piping)	X
Heath –CC	Preliminary design (site plan)	X
Heath-DD	Map	X
Heath-GG	January 5, 1997 Photos (color copies on 11X17 sheet)	X
Heath-JJ	April 7, 1997 Photos (color copies on 11X17 sheet)	X

Heath-PP	Map of original water right filing map	X
Heath-QQ	Wetland range site – Gannett Soil (highlighted section)	X
Heath-RR	Corps of Engineers – Joint Notice of Permit Pending (7/18/96)	X
Heath–SS	Corps of Engineers – Joint Notice of Permit Pending (5/24/95)	X
Heath-TT	Corps of Engineers – Notice of Permits Issued, Denied, Suspended or Withdrawn – September 1996	X
Heath-UU	Photo 8/99	X
Heath-WW	Aerial Photo	X
Heath – J-3	Photo	X
Heath-98	Photo (4/27/99)	X
Heath-99	Photo (4/27/99)	X
Heath-100	Photo (4/27/99)	X
Heath-101	Photo (4/27/99)	X
Heath-102	Photo (4/27/99)	X
Heath-103	Photo (4/27/99)	X
Heath-104	Photo (4/27/99)	X
Heath-105	Photo (4/27/99)	X
Heath-106	Photo (4/27/99)	X
BC-2	Photo of pool – 2 (7/28/93)	X
BC-3	Photo – standing on dike (7/28/93)	X
BC-4	Panoramic Photo	X
BC-5	Photo – SW corner of Belski meadow (7/28/93)	X
BC-6	3 Photo panoramic of thistle (7/28/93)	X
BC-7	Panoramic Photo (7/28/93)	X
BC-9	Panoramic Photo – headquarter in distance	X
BC-10	Panoramic Photo – headquarter in distance	X
BC-11	Panoramic Photo – county road between Heath & L. Kocer property (7/28/93)	X
BC-13	Photo (1993)	X
BC-15	Photo – Sow Thistle (1993)	X
BC-19	Photo – Canadian Thistle (1995)	X
BC-24	Photo NW corner of refuge (7/19/94)	X
BC-26	Photo – grazed thistle (1994)	X
BC-28	Photo (no copy on file)	rejected
BC-30	Letter to Wayne Stancill	X
BC-33	Natural Heritage database reports	X
BC-38	Letter to Greenough from Wright (5/20?94)	X
BC-41	Stocking Nos. in Lake Creek	X
BC-55	Draft plan	X
BC-56	Photo – thistle seed at maturity	X
BC-69	Video	X
BC-72	Photo – Diversion #4 (6/14/97)	X
BC-73	Photo – Div. #4 & Canadian Thistle (6/14/97)	X
BC-74	Photo – standing on dike @ Div. #4 (6/14/97)	X

BC-75	Photo – 300 ft downstream of div. #4 (6/14/97)	X
BC-81	Photo – NE of Div. #1 – leafy spurge (6/14/97)	X
BC-82	Photo – leafy spurge (6/14/97)	X
BC-83	Photo at Div. # 1 (6/14/97)	X
BC-84	Photo – SW of headquarter (6/5/97)	X
BC-86	Photo – Canadian Thistle @ Pelican Island	X
BC-87	Photo (6/5/97)	X
BC-91	Photo (double Photo) 6/7/97	X
BC-92	Photo 7/27/97	X
BC-93	Photo 7/27/97	X
BC-94	Photo 7/26/97	X
BC-95	Photo 7/26/97	X
BC-96	Photo 7/26/97	X
BC-97	Photo 7/26/97	X
BC-98	Video	X
BC-99	Video	X

Rec. 3/14/01 01-29

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

March 14, 2001

Mary L. Erickson
Hughes Co. Clerk of Court
PO Box 1238
Pierre SD 57501

Re: Transmittal of Record in the Matter of United States Fish and Wildlife Service's Amendment of Water Permit No. 2300-2 before the Water Management Board (Hughes County Civ. No. 2001-29)

Dear Clerk:

Consistent with SDCL 1-26-33, I am transmitting the agency record for the above entitled matters to the Sixth Judicial Circuit Court in Hughes County. The following is enclosed:

1. agency record (including exhibits)
2. transmittal of record
3. chronological index
4. alphabetical index
5. list of exhibits

Sincerely,

Eric Gronlund

Eric Gronlund
Water Rights Program
(605) 773-3352

enclosures

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
	)	(2001-29)
IN THE MATTER OF U.S. FISH AND WILDLIFE SERVICE'S AMENDMENT OF WATER PERMIT NO. 2300-2	)	TRANSMITTAL OF RECORD

I, Eric S. Gronlund, Natural Resource Engineer, Water Rights Program, Department of Environment and Natural Resources, certify as follows:

1. As a Natural Resource Engineer employed by the Water Rights Program, Department of Environment and Natural Resources, I am responsible for maintaining the formal agency file on all matters which are subject to the jurisdiction of the South Dakota Water Management Board.

2. Consistent with my responsibilities in the Water Rights Program, I have kept the agency record in the matter of Water Permit No. 2300-2. The record is herewith transmitted to the above-captioned reviewing court pursuant to SDCL 1-26-33.

3. In addition, I have prepared a chronological and alphabetical index of the agency record and a list of exhibits which are herewith transmitted to the above-captions reviewing court pursuant to SDCL 1-26-33. A copy of the indexes is also being sent to the parties of record on this date.

Dated this 14th day of March, 2001.

Eric S. Gronlund

Eric S. Gronlund, Natural Resource Engineer
Water Rights Program
Dept. of Environment & Natural Resources

Subscribed and sworn to before me this
14th day of March, 2001

Karen Schlaak
Notary Public

KAREN SCHLAAK, Notary Public
My Commission Expires
April 1, 2003

My commission expires: _____

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Mountain-Prairie Region

IN REPLY REFER TO:

BA EN
WR SD
Mail Stop 60190

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

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228

FEB 1994
DIVISION OF
WATER RIGHTS
Pierre, SD

JAN 24 1994

JAN 1994
RECEIVED
DENR
Point Source
Control Program

Mr. John Hatch
Department of Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

Dear Mr. Hatch:

Enclosed please find the following documents pertaining to Lake Creek diversions on the Lacreek National Wildlife Refuge in Bennett County:

1) Application for Soil/Water Compatibility Permit and Permit to Appropriate Water (with attachment);

2) Money Order in the amount of $450 to cover filing fees;

3) Filing Map No. 6R-SD-169-WR-P-27.0; and

4) Copy of Soil/Water Compatibility Report dated September 13, 1984, covering subject lands

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

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

Sincerely,

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

Enclosures (4)

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

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

No. 2300-2 Hydrologic Unit 10140203
Basin White River
Newspaper Bennett Co. Booster II
(office use only)

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

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

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

1. Name of Applicant UNITED STATES OF AMERICA Fish and Wildlife Service Phone (303) 236-5321
   Mailing Address P.O. Box 25486, Denver Federal Center, Denver State Colorado 80225
   (Street, RR, or Box) (City) (Zip Code)
2. Amount of water claimed ~~[illegible]~~ *CFS or ___ **GPM 0.75 ***AF Total Acreage ~~650~~
   (*Cubic Feet per Second) (**Gallons per Minute) (***Acre Feet – storage capacity of dam/dugout if applicable)
3. Source of water supply Lake Creek
4. Location of point of diversion (example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W) ~~Div #1 NW SW Section 22; Div #3 SE SW Section 23; Div #4 NE SW Section 24 T36N R37W;~~ 6th P.M.
   Div #4A NW¼SE¼ Section 24 T36N R37W County Bennett
5. County or counties where water will be used Bennett
6. Annual period during which water is to be used February 1 - November 1
7. 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) (SEE ATTACHED)

Land Description	Acres	Land Description	Acres

8. Type of Irrigation: Gravity: X Towline: ___ Center Pivot: ___ Gun: ___ Other (Specify): ___
9. Crops to be irrigated: SEE ATTACHED
10. Give a description of the project. (Attach sheet if more space is needed)

SEE ATTACHED

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~~ COLORADO)
County of Jefferson)ss

I, Wilbur N. Ladd, Jr., 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 [signature] ACTING REGIONAL DIRECTOR

Subscribed and sworn to before me this 24th day of January 1994

Susan E. Craddock
Notary Public
My Commission Expires Aug. 5, 1997

7-92

2

NO LONGER APPLICABLE ESS

Attachment to
Application for Soil/Water Compatibility Permit
and Permit to Appropriate Water

No. 7 - Each forty acre subdivision, or fraction thereof and number of acres to be irrigated in each:

TOTAL of 650 acres - All located in T36N, R37W

DIVERSION #1 - 530 acres

35 acres	S1/2 SW NE, N1/2 SE, NE SW Sec. 22
145 acres	NE, N1/2 S1/2 Sec. 23
140 acres	N1/2 NE, N1/2 S1/2 NE, NE NW, N1/2 SE NW Sec. 24
210 acres	S1/2 Sec. 13

DIVERSION #3 - 70 acres

70 acres	SE, SE SW Sec. 23

DIVERSION #4 - 50 acres

50 acres	S1/2 NE, NW SE Sec. 24

No. 9 - Crops to be Irrigated:

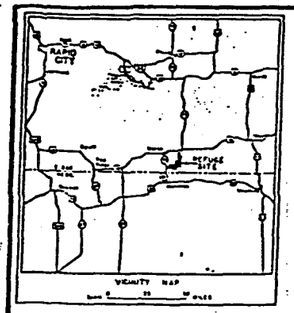
Water will be applied via gravity flow flood irrigation to meadow grasses and various types of plants and aquatic vegetation necessary for waterfowl and wildlife propagation on the refuge.

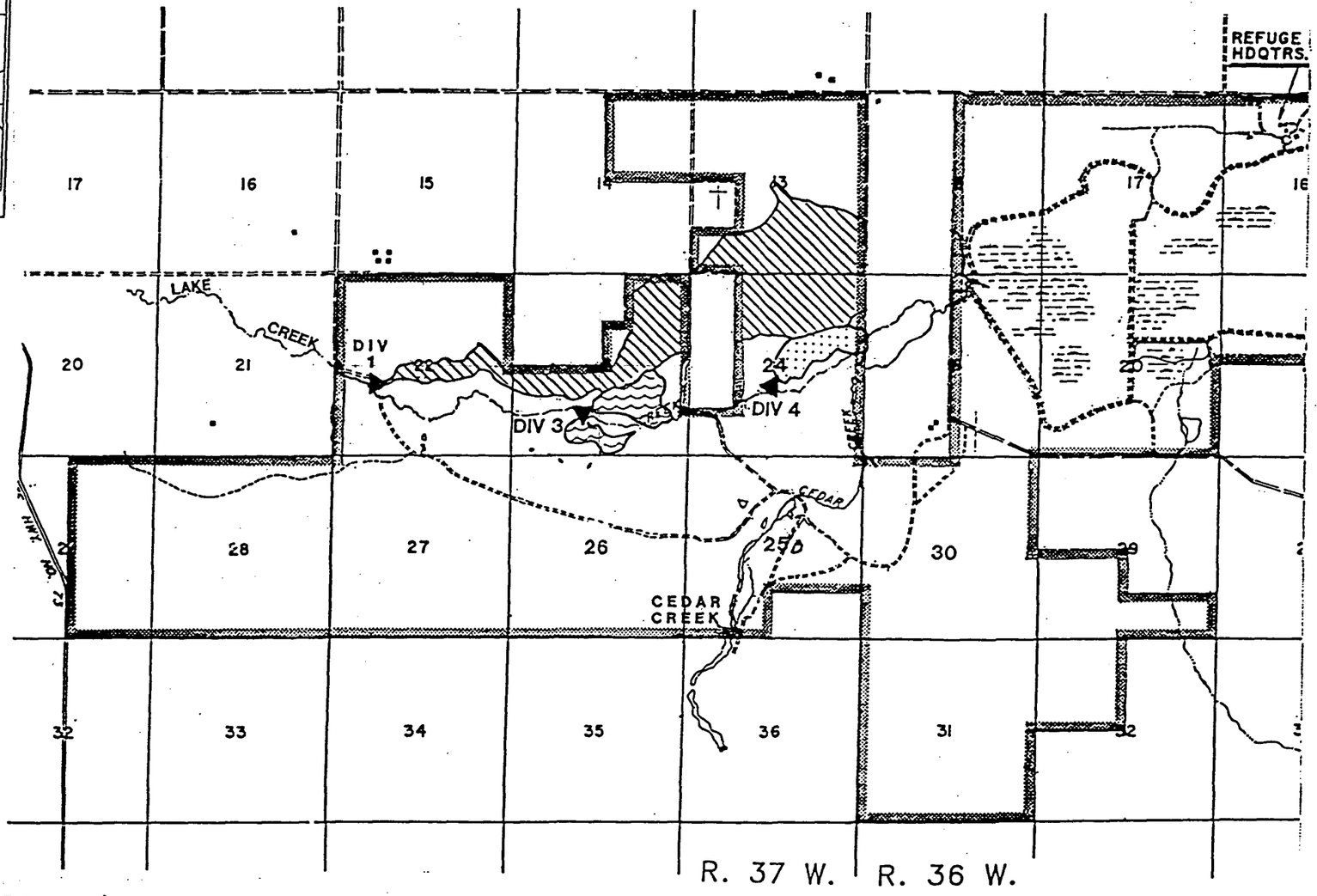
No. 10 - Give a description of the project:

Diversion dams #1, #3 and #4 are currently operational but **NOT** diverting water.

Approximately 1 acre-foot of water is presently impounded at Diversion #4. Stoplogs are in place to prevent carp from traveling upstream from Refuge pools to protect the State Endangered Pearl Dace, State Threatened Plains Topminnow and Northern Red-Bellied Dace.

A 3-year study is currently being conducted to determine, in part, the best alternatives for preventing water from entering private lands. All necessary construction will be completed prior to diversion of water.





LEGEND

▲ POINT OF DIVERSION

REFUGE BOUNDARY

AREAS IRRIGATED
LAKE CREEK

DIVERSION 1

DIVERSION 3

DIVERSION 4

STATE OF COLRADO)
) SS
COUNTY OF JEFFERSON)

I, WILLIAM A. GODBY, OF DENVER, COLORADO, DO HEREBY CERTIFY THAT THIS MAP WAS PREPARED FROM NOTES AND INFORMATION OBTAINED FROM AN ACTUAL SURVEY AND THAT IT CORRECTLY REPRESENTS THE FACILITIES FOR THE ACCOMPANYING APPLICATION.

William A Godby

REGIONAL ENGINEER

SIXTH PRINCIPAL MERIDIAN

0 2640 5280 7920 10560 FEET

0 1/2 1 1 1/2 2 MILES

12° TRUE NORTH / MAGNETIC N.

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
REGION 6 ENGINEERING - DENVER, COLORADO

LACREEK
NATIONAL WILDLIFE REFUGE
BENNETT COUNTY SOUTH DAKOTA

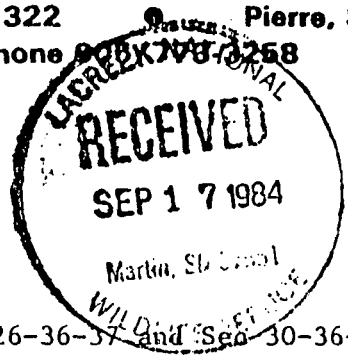
WATER RIGHTS FILING MAP

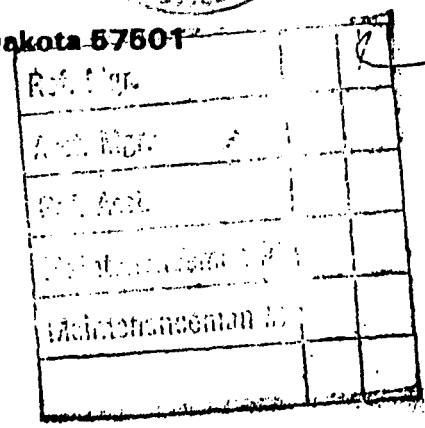
DESIGNED: GC	DRAWN: BB	CHECKED: CW	DATE: 1-94	DENVER, COLO
DRAWING No. 6R-SD-169-WR-P-27.0				SHEET 1 OF 1

2300-2

South Dakota Department of Agriculture

DIVISION OF CONSERVATION
Anderson Building, Room 322 Pierre, South Dakota 57501
Phone 605/773-3258





September 13, 1984

Refuge Manager
Lacreek National Wildlife Refuge
Star Route 3, Box 14
Martin, SD 57551

RE: Portions of Sec's 22,23,24,25,26-36-37 and Sec 30-36-36

This in reference to your WI#1 Soil/Water Compatibility application form for the above mentioned legal description.

At this time we have conditionally approved your WI#1 form. Your application is conditional as the water or soil or both are considered marginal for irrigation development. However, with a high level of water and land management, the risks risks are minimal.

The Division of Water Rights has been notified and received a copy of your conditionally approved application. Please be advised that the Water Management Board will make the final determination on your application for the right to appropriate water.

The following conditions have been added to your application. If these limits of salt and sodium buildup in the soil are exceeded, or soil restrictions are not followed, the State Conservation Commission may request suspension of your water right. However, the primary purpose of imposing these conditions upon your application is to call you attention to the necessity of avoiding salt and sodium buildup beyond these levels. As you reach or exceed these levels land and crop damage begins to occur. We urge you to begin a system of monitoring the salt and sodium conditions in your soil so that you may take action on your own if the buildup approaches these levels. In relation to the overall costs of installing and maintaining an irrigation system, the cost of monitoring soil conditions will be insignificant.

CONDITIONS:

SALT:	Maximum allowable salt buildup in soil profile:	3000 micromhos/cm
SODIUM:	Maximum allowable buildup in soil profile:	8% sodium saturation
SOIL RESTRICTIONS:	As noted on management form	

If you desire assistance in establishing a monitoring system, you may obtain assistance from a variety of places including this office, the Water Quality Laboratory at South Dakota State University, your extension agent or your local conservation district.

Sincerely,

Irrigation Program Administrator

cf

5

Department of Agriculture
WI#1
3/82

SOIL/WATER COMPATIBILITY PERMIT APPLICATION FORM

Division of Conservation

Office Use Only
410

WR#

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

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

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

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

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

1. WELL LOCATION SPRINGS (6)

   Depth Unknown

2. SURFACE WATER SOURCE AND DIVERSION LOCATION: _____

   Diversion Location SEE ATTACHMENT #1

Legal Description	Acres	Legal Description	Acres
SEE ATTACHMENT #2			

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

   LEGAL DESCRIPTION: S½NW¼, S½NE¼ and N½SE¼ SEC. 25, T36N R37W; N½NW¼SW¼ and S½NW¼ SEC. 30 T36N R36W (Application to Amend Submitted)

Department of Agriculture
WIH1
3/82

SOIL/WATER COMPATIBILITY PERMIT APPLICATION FORM

Division of Conservation

Office Use Only

WR#

OWNERS NAME: Dept. of Interior, U.S. Fish & Wildlife Service

OWNERS ADDRESS: P.O.Box 25486, DFC
Denver, CO 80225

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

TENANT'S NAME AND ADDRESS: HOHE Refuge Manager, Lacreak National Wildlife Refuge
Star Route 3, Box M, Martin, SD 57551 Ph. 605/685/6508

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

1. WELL LOCATION

Depth

2. SURFACE WATER SOURCE AND DIVERSION LOCATION: LAKE CREEK - 4 POINTS OF DIVERSION

Diversion Location T. 36N R.37W, 6TH P.M. AS LISTED BELOW

Legal Description	Acres	Legal Description	Acres
DIV.#1 - NE¼NW¼SW¼ SEC. 22	550	LOCATED IN SECTIONS 13, 22, 23 and 24	//
DIV.#2 - SE¼NW¼SE¼ SEC. 22	20	LOCATED IN SECTIONS 22 and 23	//
DIV.#3 - NE¼SE¼SW¼ SEC. 23	70	LOCATED IN SECTION 23	//
DIV.#4 - SW¼NW¼SE¼ SEC. 24	60	LOCATED IN SECTION 24	//

3. SHOW ANY PORTION OF LAND THAT PRESENTLY HOLDS AN IRRIGATION PERMIT: YEAR OBTAINED 1933
S½NW¼, S½NE¼ and N½SE¼ SEC. 25, T36N R37W;

LEGAL DESCRIPTION: NW¼NW¼SW¼ and S½NE¼ SEC. 30, T36N R36W (Application to Amend Submitted)

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

RECEIPT

414023

Division of Water Rights

South Dakota Department of Environment and Natural Resources

Pierre, February 1, 19 94

RECEIVED OF US Fish & Wildlife Service, PO Box 25486, Denver Federal Center, Denver, CO 80225

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

Fee for Application for Permit No. 2300-2 to Appropriate Water, to construct and to put water to beneficial use	450	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**	450	00

By John Hatch
Chief Engineer

8

FROM: Stukel, James

TO: Gronlund, Eric

DATE: 02-02-94
TIME: 13:36

CC:
SUBJECT: Application for US F&WS, La Creek Refuge
PRIORITY: R
ATTACHMENTS:

Eric,

In reviewing the application for the US F&WS, La Creek Wildlife Refuge, Bennette, we have found that the all the areas in question are cover under an existing Soil/Water Compatibility Permit. Permit number 4017 covers the lands and the three points of diversion.

Jim Stukel

==========

Water Rights Division - DENR
Conversation File Documentation

NAME OF PERSON OR FILE: USFWS Water Permit Application No. 2300-2

ADDRESS: COUNTY:

DATE: February 3, 1994 TELEPHONE: 303 236-5321

RE: Amount of water claimed by application

COMMENTS:

I called Ginger Chesy regarding the amount of water claimed for Application No. 2300-2. They amended the application to 660 acres of total irrigation but did not change the amount of water claimed to reflect the statutory limit. I asked Ms. Chesy if USFWS want the amount of water claimed to be the statutory limit. She said that USFWS did want the amount of water claimed on the application to be statutory limit. At her direction I have amended the application from 9.29 cfs to 9.43 cfs.

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

NAME: Eric Grandlund

FARRELL, FARRELL & GINSBACH
LAWYERS
441 NORTH RIVER STREET
HOT SPRINGS, SOUTH DAKOTA 57747
PHONE: (605) 745-5161
FAX: (605) 745-3154

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

Beverly J. Irwin
Certified Legal Assistant

March 1, 1994

Rashool Ahadi
Water Rights Divison
500 East Capitol Ave.
Pierre,, SD 57501

Re: Application for Water Right filed by U.S. Fish and Wildlife Service on Lake Creek

Dear Mr. Ahadi:

I spoke with Diane Best on Monday, February 28, 1994, and she informed me that the U.S. Fish and Wildlife Service had filed a new application for a water permit on Lake Creek. I have met with Raymond Kocer, Brett Heath and Charles Emley, and it is my understanding that they wish to contest this new application. Could you please send me a copy of the new application along with any attachments.

Yours truly,

Patrick M. Ginsbach

PATRICK M. GINSBACH

PMG/bji

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

March 3, 1994

Patrick M. Ginsbach
441 North River Avenue
Hot Springs, SD 57747-1499

Dear Mr. Ginsbach:

Per your request in your letter dated March 1, 1994, enclosed is a copy of the file for Water Permit Application No. 2300-2, United States Fish and Wildlife Service (USFWS). As you will notice, the original application shows that 650 acres are proposed to be irrigated. After comparing the map for Water Permit Application No. 2300-2 with the one for Vested Water Right Application No. 1927-2, we concluded that the acreage should be adjusted to 660 acres. We contacted USFWS and they amended the application to 660 acres. This is reflected on the "Amended Attachment to Application for Soil/Water Compatibility Permit and Permit to Appropriate Water" (copy enclosed).

A copy of the report, the Chief Engineer's recommendation, and the notice will be sent to you as soon as they are available.

If you have any questions, please do not hesitate to contact Eric Gronlund or myself at (605) 773-3352.

Sincerely,

MRAhadi

M. Rassool Ahadi
Natural Resources Engineer
Water Rights Division

enclosures

c: Diane Best, Assistant Attorney General

12

Report on Water Permit Application No. 2300-2
United States Fish and Wildlife Service
March 9, 1994

Background

Water Permit Application No. 2300-2 requests appropriation of 9.43 cubic feet of water per second (cfs) from Lake Creek. Water will be diverted through three existing diversion points located in the NW1/4 SW1/4 Section 22; SE1/4 SW1/4 Section 23; and the NE1/4 SW1/4 Section 24, all in T36N-R37W in Bennett County. Water will be used on LaCreek National Wildlife Refuge to irrigate 660 acres located in portions of the S1/2 Section 13; S1/2 NE1/4, N1/2 SE1/4, NE1/4 SW1/4, SE1/4 NW1/4, Section 22; NE1/4, S1/2 Section 23; and the N1/2, NW1/4 SE1/4 Section 24, all in T36N-R37W. The application is also for impoundment of 1.0 acre foot of water. Stoplogs are used at the diversion point located in the NE1/4 SW1/4 Section 24, T36N-R37W, to prevent carp from traveling upstream. This will protect the State Endangered Pearl Dace, State Threatened Plains Topminnow, and Northern Red-Bellied Dace whose habitat is upstream from the stoplogs.

Discussion

At the July 22, 23, and 24, 1992, Water Management Board hearing, the Board validated Vested Water Right Application No. 1927-2. The application was filed by the United States Fish and Wildlife Service (USFWS) for validation of a vested water right to divert 10.0 cfs from Lake Creek for irrigation of 700 acres. The Sixth Judicial Circuit Court overturned the Board's decision on the grounds that the USFWS did not prove that water had been continuously used since 1935 (priority date claimed by the applicant) nor since 1951 (priority date recommended by the Chief Engineer). Consequently, USFWS filed Water Permit Application No. 2300-2. Five landowners, adjacent to the Refuge, opposed Vested Water Right Application No. 1927-2 on the grounds that diversions by the applicant were flooding their property. At the July 1992 hearing, the Water Management Board also concluded that due to the high water table the ground is easily saturated by major precipitation events regardless of the activities of the applicant.

USFWS is conducting a three year study to determine if diversions by USFWS cause flooding of adjacent land or if the flooding is a natural phenomenon which would occur with or without diversions by the applicant. The study is also designed to determine if shallow groundwater fluctuates naturally or if the fluctuations are due to diversions by the applicant. The applicant will not divert water from Lake Creek until the three year study is concluded.

The application also requests approval to impound 1.0 acre foot of water. Impoundment is achieved by using stoplogs at the diversion point located in the NE1/4 SW1/4 Section 24, T36N-R37W. The stoplogs protect the State Endangered Pearl Dace, State Threatened Plains Topminnow, Northern Red-Bellied Dace, and their habitat by

preventing carp from travelling upstream.

Water will be used for irrigation of meadow grasses and various types of plants and aquatic vegetation for wildlife and waterfowl propagation. ARSD 74:02:01:01(2) defines "irrigation" as "the artificial application of water for the purpose of supplying sufficient moisture for plant growth....". In the past, the Water Management Board has recognized use of water to provide refuge and breeding grounds for migratory birds and wildlife as a beneficial use of water.

On September 13, 1984, the Conservation Commission conditionally approved the Soil/Water Compatibility Application for the acreage listed in USFWS Vested Water Right Application No. 1927-2. Jim Stukel, Department of Agriculture, Division of Conservation, reaffirmed that the acreage and the water source listed in Water Right Application No. 2300-2 are covered under an existing Soil/Water Compatibility permit (file documentation in a February 2, 1994 E-Mail to Eric Gronlund, Division of Water Rights).

Lake Creek joins the Little White River in the NE1/4 Section 17, T37N-R35W.

Review of Existing Water Rights/Permits

US Withdrawal Nos. 2-2 and 3-2 and Water Permit No. 2147-2, USFWS are for diversions from the Little White River and impoundment of water from Lake Creek and its tributaries. The ponds are located downstream of the diversion points for Water Permit Application No. 2300-2. There are no water rights/permits on Lake Creek downstream from LaCreek National Wildlife Refuge. There are no water permits/rights on the Little White River in Bennett County, below the confluence of Lake Creek and the Little White River. There are 8 water rights/permits on the Little White River, in Mellett County, for a total diversion rate of 14.49 cfs.

Flow records for the USGS gauging station near Rosebud, starting in May 1943, show a maximum daily flow of 1810 cfs on May 17, 1944, and a minimum daily flow of 10 cfs on January 4, 1949 and February 20, 1955. The records also show that 10% of the time the flow exceeds 236 cfs and 90% of the time the flow exceeds 87 cfs. Flow records from the USGS gauging station below the Town of White River show a maximum daily flow of 13,700 cfs on June 12, 1967, and a minimum daily flow of 7.0 cfs on July 31, 1952. The records show that 10% of the time the flow exceeds 211 cfs and 90% of the time the flow exceeds 78 cfs.

Water Right No. 2213-2, Ronald Vincent, authorizes use of 240 cfs from the Little White River for power generation, with a priority date of November 15, 1925. The hydroplant is located just west of the Town of White River.

Fred Schwarz, previous owner of the Little White River hydroplant, brought a lawsuit against the United States in the District Court

of the United States concerning water use under Water Right No. 253-2 (now 2213-2) and US Withdrawal Nos. 2-2 and 3-2. On November 2, 1938, a Stipulation and Agreement for Settlement was negotiated and filed in the Court. This agreement resulted in dismissal of the lawsuit and provisions for the United States to make sufficient releases of water to maintain a minimum daily production at the hydroplant.

In an Agreement, dated April 21, 1939, the United States was relieved from its obligation under the November 2, 1938 Stipulation and Agreement. On May 27, 1940, in a Deed to Water Rights, a portion of Water Right No. 253-2 was sold to USFWS. The portion sold consisted of "...any and all of the waters covered by Water License No. 253-2 that are flowing in the South Fork of White River, sometimes known as Little White River, above its confluence with Lake Creek or that are flowing in Lake Creek above said party of the third part's dam, known as Dam No. 10, situated on Lake Creek in Section 25, T37N-R36W, Sixth Principal Meridian."

Flow records from USGS gauging stations show that there is sufficient water available for downstream senior water rights/permits on the Little White River.

Conclusions

1. Irrigation of plants for the purpose of wildlife propagation is a beneficial use of water and is defined as irrigation.

2. Opposition to Vested Water Right Application No. 1927-2 was due to flooding of adjacent property.

3. Water is available from Lake Creek for this application.

4. Due to the shallow groundwater in the area, flooding occurs during heavy precipitation.

5. Storage or diversion of water must not cause flooding of adjacent property without an easement.

6. If the USFWS study shows that flooding of adjacent property is due to the applicant's irrigation system, diversions must cease and the irrigation system must be modified to prevent flooding.

7. Water Permit Application No. 2300-2 should be approved with the following qualifications:

    A) Water must be by-passed for downstream domestic water use.

B) The timing and the quantity of water diverted must be controlled so that flooding of adjacent property will not occur.

M. Rassool Ahadi
Natural Resources Engineer III

Approved By:

Delvin D. Brosz, P.E.
Natural Resources Engineer IV

References

1. Schaal, T., **Revised Report on Vested Water Right Claim No. 2213-2, Ronald Vincent, April 14, 1992,** Water Rights Division, Department of Environment and Natural Resources, Pierre, South Dakota.

2. **Water Rights Division Files,** 1994, Department of Environment and Natural resources, Pierre, South Dakota.

RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT
APPLICATION NO. 2300-2, United States Fish and Wildlife Service

Pursuant to SDCL 46-2A-2, the following is the recommendation of the Chief Engineer, Water Rights Division, Department of Environment and Natural Resources concerning Water Permit Application No. 2300-2, United States Fish and Wildlife Service, c/o Wilbur N. Ladd, Jr., Acting Regional Director, PO Box 25486, Denver Federal Center, Denver, CO 80225.

The Chief Engineer is recommending APPROVAL of Application No. 2300-2 because 1) there is reasonable probability that there is unappropriated water available for the applicant's proposed use, 2) the proposed diversion can be developed without unlawful impairment of existing rights, 3) the proposed use is a beneficial use and 4) in the public interest with the following qualifications:

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

2. Permit No. 2300-2 authorizes storage of 1.0 acre-foot of water utilizing a stoplog structure for the purpose of preventing carp from traveling upstream. This will protect the State Endangered Pearl Dace, State Threatened Plains Topminnow, and Northern Red-Bellied Dace whose habitat is upstream from the stoplog structure.

3. Low flows as needed for downstream domestic use, including livestock water and prior water rights must be by-passed.

See report on application for additional information.

for JOHN HATCH, Chief Engineer
April 1, 1994

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

May 9, 1994

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Charles Emley
Box 673
Martin, SD 57551

Arliss Dekay
Box 31
Tuthill, SD 57574

Dear Interested Parties:

Please find enclosed a copy of the report, recommendation and notice of hearing on Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service. The notice of hearing is scheduled to be published on May 18 and 25, 1994 in the Bennett County Booster II.

The notice schedules a hearing before the Water Management Board for June 29, 1994 beginning at 8:30 am in the Lake Francis Room, Ramkota Inn Best Western, 920 West Sioux Ave., Pierre, SD. Petitions to intervene in this hearing must be submitted by June 17, 1994.

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

Sincerely,

Eric Gronlund

Eric Gronlund
Water Rights Division
605 773-3352

enclosures

c: Patrick Ginsbach, 441 North River Ave., Hot Springs, SD 57747-1499

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.

May 9, 1994

Wilbur N. Ladd, Jr., ARD
U.S. Fish and Wildlife Service
PO Box 25486
Denver Federal Center
Denver, CO 80225

Dear Mr. Ladd:

Water Permit Application No. 2300-2 for irrigation use has been examined and found to comply with the South Dakota Water Laws and applicable rules. A notice of hearing has been sent to the Publisher of the Bennett Co. Booster II printed at Martin, SD (Ph # 685-6866). For your information, a copy of the notice, the recommendation of the Chief Engineer and a report on the application are enclosed. Please review the notice prior to publication and notify this office, if you have any corrections or questions.

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

Sincerely,

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

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

c: Diane Best, Assistant Attorney General
Patrick Ginsbach, 441 North River Ave., Hot Springs, SD 57747-1499
Tom Young, BIA, 115 4th Avenue SE, Aberdeen, SD 57401
Tim Olson, Water Permits Coordinator, GF&P, Joe Foss Bldg., Pierre, SD 57501
Gary Sokolow, Bennett Co. States Attorney, PO Box 628, Martin, SD 57551
Mikal Hanson, U.S. District Attorney, 225 S. Pierre, St., Pierre, SD 57501

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

May 9, 1994

Bennett Co. Booster II
Box 610
Martin, SD 57551-0610

ATTENTION: Legal Department

Enclosed is a Notice of Hearing on Application No. 2300-2 to be published twice. Please publish the first notice on May 18, 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 U.S. Fish and Wildlife Service, Denver Federal Center, PO Box 25486, Denver, CO 80225 (Ph # 303-236-5321).

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

Please be sure the SECOND publication is returned IMMEDIATELY with the enclosed Proof of Publication form. DO NOT WAIT until the end of the month or the billing cycle. No action may be taken on the permit application until proof of publication has been received.

Sincerely,

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

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

FIRST TRANSMITTAL NOTICE

No._____

Date_____

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

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 May 18, 1994, with the second publication 7 days later. The applicant is responsible for payment.

NOTICE OF HEARING on Application No. 2300-2 to Appropriate Water

Notice is given that U.S. Fish and Wildlife Service, PO Box 25486, Denver Federal Center, Denver, CO 80225 has filed an application for a water permit to appropriate 9.43 cubic feet of water per second from three diversion points along Lake Creek located in the NW 1/4 SW 1/4 Section 22; SE 1/4 SW 1/4 Section 23 and the NE 1/4 SW 1/4 Section 24; all in T36N-R37W to irrigate 660 acres. The irrigated acreage is to be located in portions of the S 1/2 Section 13; S 1/2 NE 1/4, N 1/2 SE 1/4, NE 1/4 SW 1/4, SE 1/4 NW 1/4, Section 22; NE 1/4, S 1/2 Section 23 and the N 1/2, NW 1/4 SE 1/4 Section 24; all in T36N-R37W. This application is also to authorize impounding 1.0 acre-foot of water using stoplogs at the diversion point located in the NE 1/4 SW 1/4 Section 24-T36N-R37W. The purpose of the stoplog structure is to protect the State Endangered Pearl Dace, State Threatened Plains Topminnow and Northern Red-Bellied Dace by preventing carp from traveling upstream from the LaCreek National Wildlife Refuge pools.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 2300-2 because 1) unappropriated water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Division, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by June 17, 1994. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 8:30 a.m., June 29, 1994, Lake Francis room, Ramkota Inn Best Western, 920 West Sioux Avenue, Pierre, SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny this application based on the facts presented at the public hearing. The June 29, 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 application. The request for an automatic delay must be filed by June 17, 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 June 17, 1994, at the above Water Rights Division address to request copies of information pertaining to this application, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

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

Form 8

DK

PROOF OF PUBLICATION

STATE OF SOUTH DAKOTA)
) ss
County of Bennett)

I, D. R. Lewis

certify that the attached printed Notice was

taken from the Bennett County Booster II

printed and published in Martin

County of Bennett and State of South Dakota. The notice was published in the newspaper on the following two dates:

May 18, 1994

May 25, 1994

Cost of Printing: $60.97

D. R. Lewis
(Signature)

Publisher
(Title)

May 26, 1994
(Date Signed)

NOTICE OF HEARING
on Application No. 2300-2 to Appropriate Water

Notice is given that U. S. Fish and Wildlife Service, PO Box 25486, Denver Federal Center, Denver, CO 80225 has filed an application for a water permit to appropriate 9.43 cubic feet of water per second from three diversion points along Lake Creek located in the NW1/4 SW1/4 Section 22; SE1/4 SW1/4 Section 23 and the NE1/4 SW1/4 Section 24; all in T36N-R37W to irrigate 660 acres. The irrigated acreage is to be located in portions of the S1/2 Section 13; S1/2 NE1/4, N1/2 SE1/4, NE1/4 SW1/4, SE1/4 NW1/4, Section 22; NE1/4, S1/2 Section 23 and the N1/2, NW1/4 SE1/4 Section 24; all in T36N-R37W. This application is also to authorize impounding 1.0 acre-foot of water using stoplogs at the diversion point located in the NE1/4 SW1/4 Section 24 T36N-R37W. The purpose of the stoplog structure is to protect the State Endangered Pearl Dace, State Threatened Plains Topminnow and Northern Red-Bellied Dace by preventing carp from traveling upstream from the LaCreek National Wildlife Refuge pools.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 2300-2 because 1) unappropriated water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Division, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by June 17, 1994. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 8:30 a.m., June 29, 1994, Lake Francis room, Ramkota Inn Best Western, 920 West Sioux Avenue, Pierre, SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny this application based on the facts presented at the public hearing. The June 29, 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 application. The request for an automatic delay must be filed by June 17, 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 June 17, 1994, at the above Water Rights Division address to request copies of information pertaining to this application, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

This application is made pursuant to SDCL 46-1-1 thru 46-1-9, 46-1-12 thru 46-1-16, 46-2-3.1, 46-2-9, 46-2-11, 46-2-13, 46-2-17; 46-2A-1 thru 46-2A-10, 46-2A-12, 46-2A-14, 46-2A-15, 46-2A-20, 46-2A-21; 46-5-1 thru 46-5-11, 46-5-13 thru 46-5-15, 46-5-24, 46-5-25, 46-5-30.2, 46-5-30.4, 46-5-31; and Board Rules ARSD 74:02:01:01 thru 74:02:01:15. Russell L. Stone, Acting Secretary, Department of Environment and Natural Resources.
21-51

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STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

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

Petitioners,

v.

PETITION TO OPPOSE
APPLICATION 2300-2

UNITED STATES FISH & WILDLIFE SERVICE,

Applicant.

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

I.

THAT Petitioners are all landowners residing within Bennett County, South Dakota, and are affected by the Application of the United States Fish & Wildlife Service to appropriate water, Application No. 2300-2.

II.

THAT Petitioners oppose the Application of the United States Fish & Wildlife Service for the following reasons:

a. That the use, if developed, would unlawfully impair the existing rights of the Petitioners and that the use would damage privately owned crop ground, develop saline problems, and impair the use of water by the Petitioners;

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

the land, in the manner in which the practice is exercised by the United States Fish & Wildlife Service, a beneficial use of the water;

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

d. That the water which the United States Fish & Wildlife Service seeks to have appropriated in Application No. 2300-2 for irrigation is in fact a reservation of a future use of water to which the United States Fish & Wildlife Service is not entitled and therefore it should be denied.

III.

THAT Petitioners, in addition to themselves testifying, expect to call approximately five other witnesses, most of whom are residents of Bennett County, South Dakota, including the owners and users of the land which is the subject of Application No. 2300-2 prior to its acquisition by the United States Fish & Wildlife Service. Furthermore, the time set for the hearing on this Application would work an undue hardship upon the Petitioners in that all of them are in the farming and ranching business and the hearing comes at a crucial time in their operation. For that reason, Petitioners respectfully request the Water Management Board to continue the proceedings scheduled for June 29, 1994, or, in the alternative would request that the Water Management Board would appoint a hearing examiner to take testimony and make recommendations to the Water Management Board concerning the United States Fish & Wildlife Service Application No. 2300-2. That the Petitioner's attorneys have spoken to John Kunz, Regional Solicitor for the United States

Fish & Wildlife Service, and Mr. Kunz has indicated he has no opposition to a continuance of the hearing set for June 29, 1994.

WHEREFORE, Petitioners respectfully request the Water Management Board deny Application No. 2300-2 and grant such other and further relief as the Water Management Board deems just and equitable.

Dated this 13 day of June, 1994.

FARRELL, FARRELL & GINSBACH

JANE M. FARRELL

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

CERTIFICATE OF SERVICE

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

John Hatch, Chief Engineer
Department of Water and Natural Resources
Water Rights Division
523 East Capitol Ave.
Pierre, SD 57501

Wilbur M. Ladd, Jr.
ARD U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

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

John Kunz
U.S. Department of the Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

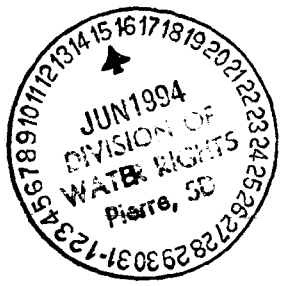
Bureau of Indian Affairs
Tom Young
115 4th Ave. S.E.
Aberdeen, SD 57401

Gary Sokolow
Bennett County States Attorney
P.O. Box 628
Martin, SD 57551

Mikal Hanson
U.S. District Attorney
225 S. Pierre St.
Pierre, SD 57501

on the 13 day of June, 1994.

PATRICK M. GINSBACH



STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

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

Petitioners,

v.

UNITED STATES FISH & WILDLIFE SERVICE,

Applicant.

PETITION REQUESTING DELAY OF HEARING ON APPLICATION 2300-2

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

I.

THAT Petitioners are all landowners residing within Bennett County, South Dakota, and are affected by the Application of the United States Fish & Wildlife Service to appropriate water, Application No. 2300-2.

II.

THAT the Petition to appropriate water, Application No. 2300-2 is scheduled to be heard on June 29, 1994.

III.

THAT Petitioners, in addition to themselves testifying, expect to call approximately five other witnesses, most of whom are residents of Bennett County, South Dakota, including the owners and users of the land which is the subject of Application No. 2300-2 prior to its acquisition by the United States Fish & Wildlife Service. Furthermore, the time set for the hearing on this Application would work an undue hardship upon the Petitioners in that all of them are in the farming and ranching business and the hearing comes at a

27

crucial time in their operation. For that reason, Petitioners respectfully request the Water Management Board to continue the proceedings scheduled for June 29, 1994, or, in the alternative would request that the Water Management Board would appoint a hearing examiner to take testimony and make recommendations to the Water Management Board concerning the United States Fish & Wildlife Service Application No. 2300-2.

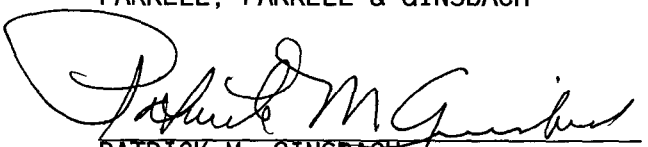
IV.

THAT the Petitioners understand that the Regional Solicitor for the United States Fish & Wildlife Service has no opposition to continuance of the hearing set for June 29, 1994.

WHEREFORE, Petitioners respectfully request the Water Management Board to continue the hearing on Application No. 2300-2, and/or, in the alternative, appoint a hearing examiner and continue the proceedings for the hearing examiner to take testimony.

Dated this 14th day of June, 1994.

FARRELL, FARRELL & GINSBACH



PATRICK M. GINSBACH
Lawyers for Petitioners
441 N. River Street
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

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

John Hatch, Chief Engineer
Department of Water and Natural Resources

Water Rights Division
523 East Capitol Ave.
Pierre, SD 57501

Wilbur M. Ladd, Jr.
ARD U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

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

John Kunz
U.S. Department of the Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Bureau of Indian Affairs
Tom Young
115 4th Ave. S.E.
Aberdeen, SD 57401

Gary Sokolow
Bennett County States Attorney
P.O. Box 628
Martin, SD 57551

Mikal Hanson
U.S. District Attorney
225 S. Pierre St.
Pierre, SD 57501

on the 14th day of June, 1994.

PATRICK M. GINSBACH

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

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

Petitioners,

v.

UNITED STATES FISH & WILDLIFE SERVICE,

Applicant.

OBJECTIONS TO
RECOMMENDATIONS OF
CHIEF ENGINEER

COME NOW CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER and LAWRENCE KOCER, by and through their lawyers of record, Farrell, Farrell & Ginsbach, and object to the recommendations of the Chief Engineer on Application No. 2300-2 made by the United States Fish & Wildlife Service to appropriate water. The objections are based upon the inability of the conditions and restrictions on the permit to adequately afford protection to the adjoining landowners to prohibit flooding and the development of noxious weeds as a result of the water management practices and the weed control practices of the United States Fish & Wildlife Service. That the conditions further are not in the public interest nor do they adequately provide for the beneficial use of the water and for the further reason that the conditions will not prevent the unlawful impairment of existing rights of the objectors in that the conditions will not prevent the damage to privately owned crop ground nor prevent the development of saline problems nor prevent the flooding on objectors' property.

Dated this 16th day of June, 1994.

FARRELL, FARRELL & GINSBACH

PATRICK M. GINSBACH
Lawyers for the Objectors
441 N. River St.
Hot Springs, SD 57747
(6050 745-5161

CERTIFICATE OF SERVICE

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

John Hatch, Chief Engineer
Department of Water and Natural Resources
Water Rights Division
523 East Capitol Ave.
Pierre, SD 57501

Wilbur M. Ladd, Jr.
ARD U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

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

John Kunz
U.S. Department of the Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Bureau of Indian Affairs
Tom Young
115 4th Ave. S.E.
Aberdeen, SD 57401

Gary Sokolow
Bennett County States Attorney
P.O. Box 628
Martin, SD 57551

Mikel Hanson
U.S. District Attorney
225 S. Pierre St.
Pierre, SD 57501

on the 16 day of June, 1994.

Patrick M. Ginsbach

PATRICK M. GINSBACH

GREAT FACES. GREAT PLACES.

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

June 17, 1994

NOTICE

TO: Wilbur M. Ladd, Jr.
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225
and Parties of Record (see attached list)

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

SUBJECT: Automatic Delay of Hearing for Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service

A petition in opposition to Water Permit Application No. 2300-2 has been filed by Patrick Ginsbach, attorney representing Charles Emley, Brett Heath, Raymond Kocer and Lawrence Kocer. The petition also requested an automatic delay of the hearing. Therefore, the hearing on Application No. 2300-2 is automatically delayed pursuant to SDCL 46-2A-4 and 46-2A-5 and will not be held on June 29, 1994.

The Water Management Board will now consider Application No. 2300-2 at the August 31 and September 1, 1994, meeting. Future notice of the date, time and place of the hearing will be provided to all parties of record.

Please contact Diane Best, Assistant Attorney General at (605) 773-3215, if you have any questions.

c: Diane Best, Assistant Attorney General
Tom Young, Bureau of Indian Affairs, 115 4th Ave. S.E, Aberdeen, SD 57401
Gary Sokolow, Bennett County States Attorney, P.O. Box 628, Martin, SD 57551
Ginger Price, USFWS

Parties of Record List
Water Permit Application No. 2300-2
U.S. Fish & Wildlife Service

Applicant

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

Attorneys for Applicant

John Kunz
U.S. Department of the Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Mikel Hanson
U.S. District Attorney
225 S. Pierre St.
Pierre, SD 57501

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorneys for Petitioners
Jane M. Farrell and Patrick M. Ginsbach
Farrell, Farrell & Ginsbach
441 N. River St.
Hot Springs, SD 57747

CERTIFICATION

I hereby certify that on June 17, 1994, I have personally deposited with the United States Mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated June 17, 1994, along with a copy of the Parties of Record List, regarding Automatic Delay of Hearing for Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service, addressed as stated below and on the attached list:

Tom Young
Bureau of Indian Affairs
115 4th Ave. SE
Aberdeen, SD 57401

Gary Sokolow
Bennett County States Attorney
P.O. Box 628
Martin, SD 57551

Ginger Price
USFWS
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Copy Sent Inter-office to:

Diane Best
Assistant Attorney General
Capitol Building

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

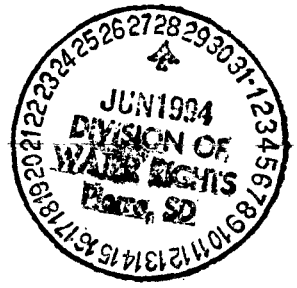
Sworn to, before me, this 20th day of June, 1994.

JOHN HATCH
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

Notary Public

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

BENNETT COUNTY STATE'S ATTORNEY
P.O. Box 628 • 605 685-6986
Martin, South Dakota 57551



June 24, 1994

Mr. John Hatch,
Chief Engineer
Dept. of Water and Natural Resources
Water Rights Division
523 E. Capitol Ave.
Pierre, SD 57501

RE: Emily Heath, et. al. v. U.S. Fish & Wildlife Service
Appropriations application #2300-2

Dear Mr. Hatch:

Bennett County through its Board of County Commissioners wishes to express its concern over the possible granting of water appropriation application #2300-2. The Bennett County Board of County Commissioners supports the petition to oppose the Application.

This is so mainly for the reason that the county is concerned that flood ditches which run parallel to several county roads in the area may be flooded if the application is approved. Such flooding may cause damage to county maintained roads.

The county expends considerable time and effort to maintain and insure that these roads are in proper condition and the county could face potential liability should these roads not be properly maintained. Bennett County's financial resources to maintain such roads is somewhat limited and the county feels that it should not be put in the position by the Fish and Wildlife Service to expend additional monies repairing roads should additional flooding occur due to the approval of application #2300-2.

Yours very truly,

Gary A. Sokolow,
Bennett County State's Attorney

GAS/bjs

CERTIFICATE OF SERVICE

I, Gary A. Sokolow, hereby certify that on the 27 day of June, 1994, I caused to be mailed by first class mail, postage prepaid, from Martin, South Dakota, a true and correct copy of the foregoing legal document to the following named persons at their last known post office addresses as follows:

✓ John Hatch, Chief Engineer
Dept. of Water & Natural Resources
Water Rights Division
523 East Capitol Ave.
Pierre, SD 57501

Wilbur M. Ladd, Jr.
ARD US Fish & Wildlife Service
P.O Box 25486
Denver Federal Center
Denver, CO 80225

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

John Kunz
US Dept. of the Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Bureau of Indian Affairs
Tom Young
115 - 4th Ave. S.E.
Aberdeen, SD 57401

Mike Hanson,
US District Attorney
225 S. Pierre, St.
Pierre, SD 57501

Mr. Patrick M. Ginsbach,
Lawyers for the Objectors
441 N. River St.
Hot Springs, SD 57747

Gary A. Sokolow,
Bennett County State's Attorney

Eric Grondund

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

July 13, 1994

JUL 1994 DIVISION OF WATER RIGHTS Pierre, SD

Gary A. Sokolow
Bennett County State's Attorney
P.O. Box 628
Martin, SD 57551

Re: **Emley, et al. v. U.S. Fish & Wildlife Service**

Dear Mr. Sokolow:

The Division has received your correspondence of June 24, 1994, in the above-referenced matter. According to the newspaper notice in this matter, petitions were required to be filed by June 17, 1994, in order to intervene. Thus, Bennett County is not automatically a party of record in this matter.

If you wish to file a petition for late filed intervention, a request for hearing will need to be filed with the Chief Engineer and notice provided to all parties. Then the Water Management Board would hear the motion. I am enclosing the June 17, 1994, notice to all parties which sets the hearing for the Board's August 31, and September 1, meeting. In the event that you wish to move to intervene before that time, the Board is also meeting on July 26, 1994.

In the meantime, the Division of Water Rights will include you on a list of interested parties for sending out public notices. Since Bennett County is not a party of record at this time, I expect that you will not be receiving prehearing motions if there are any. If you have any questions about this procedure please feel free to contact me.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB:clr
Enc.

a:\c-ltr65.db

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

July 29, 1994

NOTICE

TO: Wilbur M. Ladd, Jr.
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225
and Parties of Record (see attached list)

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

SUBJECT: Rescheduling of Hearing for Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service

The Water Management Board will consider Water Permit Application No. 2300-2 on September 1, 1994 at 9:00 am in the Conference Room, Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre, SD 57501. The actual time of the hearing may be later than 9:00 am due to prior agenda items. The June 29, 1994 hearing on this application was automatically delayed by petitioners in opposition to the application.

Applicable provisions of the Notice of Hearing published May 18 and 25, 1994, in the Bennett County Booster II 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 an attorney. 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 August 22, 1994 at 773-3352 to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired. Hearing procedural questions can be directed to Diane Best, Assistant Attorney General at 773-3215.

c: Diane Best, Assistant Attorney General
Tom Young, Bureau of Indian Affairs, 115 4th Ave. S.E, Aberdeen, SD 57401
Gary Sokolow, Bennett County States Attorney, P.O. Box 628, Martin, SD 57551
Ginger Price, USFWS

CERTIFICATION

I hereby certify that on July 29, 1994, I have personally deposited with the United States Mail at Pierre, South Dakota, First Class postage, prepaid envelopes containing a Notice dated July 29, 1994, regarding Rescheduling of Hearing for Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service addressed to:

Wilbur M. Ladd, Jr.
U.S. Fish and Wildlife Service
PO Box 25486
Denver Federal Center
Denver, CO 80225
and Parties of Record (as shown on the attached list)

A copy of the Notice was sent to:

Tom Young, Bureau of Indian Affairs, 115 4th Ave SE, Aberdeen, SD 57401
Gary Sokolow, Bennett Co. States Attorney, PO Box 628, Martin, SD 57551
Ginger Price, U.S. Fish and Wildlife Service, PO Box 25486, Denver Federal Center, Denver, CO 80225

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

Diane Best, Assistant Attorney General

Jaci R Konop

JACI R. KONOP
Senior Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 29th day of July, 1994.

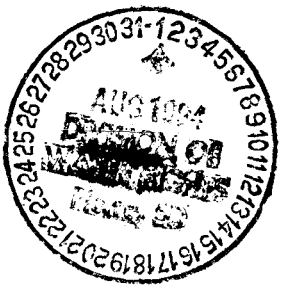
Karen Schlaak

Notary Public

KAREN SCHLAAK
NOTARY PUBLIC
SOUTH DAKOTA

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

July 29, 1994



Mr. John Hatch, Chief Engineer
Water Rights Division
Dept. of Environment & Natural Resources
Foss Bldg., 523 E. Capitol
Pierre, SD 57501-3181

Dear Mr. Hatch:

This letter concerns the application for additional water permits by LaCreek National Wildlife Refuge in Bennett County.

At a meeting of the County Weedboard on July 5, a resolution was passed to strongly oppose their application for additional water permits, because weed control is not being carried out to the satisfaction of the board.

On an inspection tour of the Refuge, made on July 13 by the Weedboard, Refuge personnel, area landowners and others, they were shown various weed control efforts. However, large areas that we knew of with heavy infestations were omitted. True, the Refuge has done more weed spraying than in the past, but there is still sizeable acreages of Canada thistle.

Large impondments of water, with fluctuating water levels is conducive to noxious weed infestations. This is also the situation on wet meadows where water levels can be varied; plus it limits the use of some of the more effective chemicals, when water can be backed up onto these lands.

For these reasons, the board feels they are within their rights, in supporting area landowners in recommending additional water permits not be issued.

Very truly yours,

Gary Nies

Gary Nies
Secretary, Bennett Co. Weedboard

GN/mvt
Copy to: Patrick Ginsbach
Attorney at Law
441 N. River St.
Hot Springs, SD 57747

F

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 4, 1994

Gary Nies
Secretary, Bennett Co. Weedboard
P.O. Box M
Courthouse
Martin, SD 57551

Re: **Water right application for LaCreek National Wildlife Refuge**

Dear Mr. Nies:

The Division of Water Rights has received your correspondence of July 29, 1994, in the above-referenced matter. According to the newspaper notice in this matter, petitions were required to be filed by June 17, 1994, in order to intervene. Thus, the County Weedboard is not automatically a party of record in this matter.

If you wish to file a petition for late filed intervention, a request for hearing will need to be filed with the chief engineer and notice provided to all parties. Then the Water Management Board would hear the motion. I am enclosing the June 17, 1994, Notice to all parties which sets the hearing for the Water Management Board's August 31 and September 1 meeting. This Notice includes a list of all parties to this proceeding.

In addition, this is also to advise you that the Bennett County Commission also filed for intervention. The County Commission's petition was dated June 24, 1994. Thus, they are in the same position as the Weedboard. I am enclosing a copy of the letter that I sent to the County Commission. Also, I expect that you will want to coordinate with the County Commission since you are both represented by the state's attorney.

In the meantime, the Division of Water Rights will include both the Weedboard and the County Commission on a list of interested persons for sending out public notices. Since neither Bennett County nor the Weedboard is a party of record at this time, I expect that you will not be receiving pre-hearing motions (if there are any) unless the parties mail them to you as a matter of courtesy.

If you have any questions about this procedure, you need to contact either the state's attorney or myself.

Sincerely,

Diane Best
Assistant Attorney General

DB:mjj
Enclosure

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 4, 1994

John Kunz
U.S. Department of the Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Jane M. Farrell and Patrick M. Ginsbach
Farrell, Farrell & Ginsbach
441 N. River St.
Hot Springs, SD 57747

Re: **Water right application for LaCreek National Wildlife Refuge**

Dear Jane, Pat and John:

Enclosed are copies of correspondence that I have sent to Bennett County and the Bennett County Weedboard regarding late filed requests to intervene.

Also, I received a telephone call this morning from John Kunz indicating a desire to continue this matter. Please advise me on whether the parties desire a continuance or whether a hearing date will be requested for a continuance motion.

Sincerely,

Diane Best
Assistant Attorney General

DB:mjj
Enclosure

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	**APPLICATION NO. 2300-2** **STIPULATION AND REQUEST FOR CONTINUANCE OF HEARING DATE**

COME NOW the parties to the captioned proceeding, and hereby stipulate and request that the currently scheduled hearing date of September 1, 1994, be continued until the Board's next regularly scheduled meeting on November 30, or December 1, 1994, or until such other time as the Chief Engineer deems proper.

DATED this 8th day of August, 1994.

JOHN R. KUNZ, Esq.
Counsel for Applicant
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225
(303) 231-5353

DIANE BEST, ESQ.
Assistant Attorney General
Counsel for the Chief Engineer
500 East Capitol Avenue
Pierre, SD 57501
(605) 773-3215

PATRICK M. GINSBACH, ESQ.
Counsel for Petitioners
Farrell, Farrell, and Ginsbach
441 North River Street
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 1994, true and correct copies of the foregoing Stipulation and Request for Continuance of Hearing Date were mailed postage pre-paid in the United States Mail to:

John P. Guhin, Esq.
Deputy Attorney General
Counsel for the Water Management Board
500 East Capitol Ave.
Pierre, SD 57501-5070

Mary Anne Atencio

44

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

AUG 1994
DIVISION OF
WATER RIGHTS
Pierre, SD

August 19, 1994

John Hatch, Chief Engineer
Division of Water Rights
Foss Building
Pierre, SD 57501

Re: **Emley et al. v. United States Fish and Wildlife Service (Application No. 2300-2)**

Dear John:

Enclosed for filing is a Stipulation and Request for Continuance of Hearing Date in the above-referenced matter.

It is my belief that all unresolved issues relating to the advisability of using diversion structures on Lake Creek should be resolved in the upcoming hearing despite the delay. For example, an issue apparently exists with regard to whether the FWS structure at Diversion 4 on Lake Creek is appropriately being used to prevent carp from going upstream and whether such use is required or appropriate in light of the State Endangered Species Act. The delay of hearing date in Application No. 2300-2 would, I believe, delay consideration of issues pertaining to Diversion No. 4. Likewise, other issues pertaining to FWS use of Lake Creek should be considered at hearing on Application No. 2300-2.

The parties are requesting hearing at the November 30 or December 1, 1994, Board meeting or at such other time as you deem proper. In discussing this issue with Mr. Ginsbach and Mr. Kunz, it is my understanding that the parties are hopeful that the hearing will take place on or before the November/December scheduled Board meeting. I would hope that we can honor that request. Both parties have been advised, however, that the State of South Dakota cannot guarantee water rights' hearings or any water rights' activities beyond November 18, 1994, due to funding considerations.

The parties to this proceeding are being provided with a copy of this letter. Additionally, the Bennett County State's Attorney,

counsel for the Bennett County Commission and the Bennett County Weed Board is also being provided with a copy of this letter.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB:mjj
Enclosure
cc: John Kunz
Patrick Ginsbach
Gary Sokolow

GREAT FACES. GREAT PLACES.

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

August 22, 1994

NOTICE

TO: Wilbur M. Ladd, Jr.
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225
and Parties of Record (see attached list)

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

SUBJECT: Continuance of Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service

The parties of record have stipulated to a continuance of Water Permit Application No. 2300-2. A copy of the stipulation is enclosed. Therefore, the Water Management Board hearing on Application No. 2300-2 is continued and will not be held on August 31, 1994.

The hearing on Application No. 2300-2 will be scheduled for a future Water Management Board meeting. The next regularly scheduled Board meeting is November 30, 1994, and December 1, 1994. Future notice of the exact date, time and place of the hearing for Application No. 2300-2 will be provided to all parties of record.

Please contact Eric Gronlund at (605) 773-3352 or Diane Best, Assistant Attorney General at (605) 773-3215, if you have any questions.

enclosure

c: Diane Best, Assistant Attorney General
Tom Young, Bureau of Indian Affairs, 115 4th Ave. S.E, Aberdeen, SD 57401
Gary Sokolow, Bennett County States Attorney, P.O. Box 628, Martin, SD 57551
Gary Nies, Bennett County Weed Board
Ginger Price, USFWS

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	**APPLICATION NO. 2300-2** **STIPULATION AND REQUEST FOR CONTINUANCE OF HEARING DATE**

COME NOW the parties to the captioned proceeding, and hereby stipulate and request that the currently scheduled hearing date of September 1, 1994, be continued until the Board's next regularly scheduled meeting on November 30, or December 1, 1994, or until such other time as the Chief Engineer deems proper.

DATED this 8th day of August, 1994.

JOHN R. KUNZ, Esq.
Counsel for Applicant
P.O. Box 25087, D-105
Denver Federal Center
Denver, CO 80225
(303) 231-5353

DIANE BEST, ESQ.
Assistant Attorney General
Counsel for the Chief Engineer
500 East Capitol Avenue
Pierre, SD 57501
(605) 773-3215

PATRICK M. GINSBACH, ESQ.
Counsel for Petitioners
Farrell, Farrell, and Ginsbach
441 North River Street
Hot Springs, SD 57747
(605) 745-5161

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 1994, true and correct copies of the foregoing Stipulation and Request for Continuance of Hearing Date were mailed postage pre-paid in the United States Mail to:

John P. Guhin, Esq.
Deputy Attorney General
Counsel for the Water Management Board
500 East Capitol Ave.
Pierre, SD 57501-5070

Mary Anne Attenucci

Parties of Record List
Water Permit Application No. 2300-2
U.S. Fish & Wildlife Service

Applicant

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

Attorneys for Applicant

John Kunz
U.S. Department of the Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Mikel Hanson
U.S. District Attorney
225 S. Pierre St.
Pierre, SD 57501

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorneys for Petitioners
Jane M. Farrell and Patrick M. Ginsbach
Farrell, Farrell & Ginsbach
441 N. River St.
Hot Springs, SD 57747

CERTIFICATION

I hereby certify that on August 22, 1994, I have personally deposited with the United States Mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated August 22, 1994, along with a copy of the Stipulation and Request for Continuance of Hearing Date, and a copy of the Parties of Record List, regarding Continuance of Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service, addressed as stated below and on the attached list:

Wilbur M. Ladd, Jr., U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

Tom Young, Bureau of Indian Affairs, 115 4th Ave. SE, Aberdeen, SD 57401.

Gary Sokolow, Bennett County States Attorney, P.O. Box 628, Martin, SD 57551.

Gary Nies, Bennett county Weed Board, Box M Courthouse, Martin, SD 57551.

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

Copy Sent Inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 25th day of August, 1994.

JOHN HATCH
NOTARY PUBLIC
SOUTH DAKOTA
SEAL SEAL

John Hatch
Notary Public

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

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners,	)	APPLICATION NO. 2300-2
v.	)	SUBPOENA DUCES TECUM
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	

TO: GARY A. SOKOLOW, ESQ., COUNSEL FOR BENNETT COUNTY COMMISSIONERS, BENNETT COUNTY COURTHOUSE, P.O. BOX 628, MARTIN, SD 57551

GARY A. SOKOLOW, pursuant to S.D. CODIFIED LAWS ANN. §§ 15-6-30(b) (Suppl. 1993) and 1-26-19.2 (1985), YOU OR A DESIGNATED REPRESENTATIVE OF THE BENNETT COUNTY COMMISSIONERS ARE (IS) HEREBY COMMANDED to appear at 4:00 P.M. on Wednesday, September 2, 1994, at the conference room of the Crossroads Inn, Martin, SD, then and there to have your deposition taken as a witness in the captioned action on behalf of the Petitioners, Charles Emley, Brett Heath, Raymond Kocer, and Lawrence Kocer. You are further commanded to bring to this deposition:

1. Any and all documents in either your or your counsel's possession, custody, or control concerning which you might testify at the hearing in the captioned matter.

2. Any and all notes or other materials made by you to aid you concerning which you might testify at the hearing in the captioned matter.

3. Any and all documents or materials relied upon by you in forming the opinions expressed in your June 24, 1994, objection to the captioned application.

4. Any and all professional reports, studies, or correspondence concerning which you might testify at the hearing in the captioned matter, or upon which you relied in forming your objection to the captioned application.

5. Any and all photographs, maps, or other exhibits either in your or your counsel's possession concerning which you might testify at the hearing in the captioned matter.

For purposes of this subpoena duces tecum, the term, *documents*, is defined as any document, writing, *etc.*, as such term is more particularly described in S.D. CODIFIED LAWS ANN. § 15-6-34(a) (1984).

DATED this 12th day of September, 1994.

Mikal Hanson, Esq.
Assistant United States Attorney
225 South Pierre Street
Pierre, SD 57501
(605) 224-5402

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 1994, true and correct copies of the foregoing subpoena duces tecum were mailed postage prepaid in the United States Mail to:

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

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

John Hatch, Chief Engineer
Dept. of Water & Natural Resources
Water Rights Division
523 East Capitol Avenue
Pierre, SD 57501

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners,	)	APPLICATION NO. 2300-2
v.	)	SUBPOENA DUCES TECUM
UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	

TO: GARY NIES, BENNETT COUNTY WEED BOARD, BENNETT COUNTY COURTHOUSE, BOX M, MARTIN, SD 57551:

GARY NIES, pursuant to S.D. CODIFIED LAWS ANN. §§ 15-6-30(b) (Suppl. 1993) and 1-26-19.2 (1985), YOU ARE HEREBY COMMANDED to appear at 1:30 P.M. on Wednesday, September 21, 1994, at the conference room of the Crossroads Inn, Martin, SD, then and there to have your deposition taken as a witness in the captioned action on behalf of the Petitioners, Charles Emley, Brett Heath, Raymond Kocer, and Lawrence Kocer. You are further commanded to bring to this deposition:

1. Any and all documents in either your or your counsel's possession, custody, or control concerning which you might testify at the hearing in the captioned matter.

2. Any and all notes or other materials made by you to aid you concerning which you might testify at the hearing in the captioned matter.

3. Any and all documents or materials relied upon by you in forming the opinions expressed in your July 29, 1994, objection to the captioned application.

4. Any and all professional reports, studies, or correspondence concerning which you might testify at the hearing in the captioned matter, or upon which you relied in forming your objection to the captioned application.

5. Any and all photographs, maps, or other exhibits either in your or your counsel's possession concerning which you might testify at the hearing in the captioned matter.

For purposes of this subpoena duces tecum, the term, *documents*, is defined as any document, writing, *etc.*, as such term is more particularly described in S.D. CODIFIED LAWS ANN. § 15-6-34(a) (1984).

DATED this 12th day of September, 1994.

Mikal Hanson, Esq.
Assistant United States Attorney
225 South Pierre Street
Pierre, SD 57501
(605) 224-5402

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 1994, true and correct copies of the foregoing subpoena duces tecum were mailed postage prepaid in the United States Mail to:

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

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

John Hatch, Chief Engineer
Dept. of Water & Natural Resources
Water Rights Division
523 East Capitol Avenue
Pierre, SD 57501

BENNETT COUNTY STATES ATTORNEY
Gary Sokolow
P.O. Box 950
Martin, SD 57551
(605) 685-6986

October 21, 1994

John Guhin
Attorney for the Water Management Board
500 East Capitol Ave.
Pierre, SD 57501

Re: Emley, et al v. U.S. Fish & Wildlife Service

Dear John:

Enclosed please find an original and copy of Bennett County and the Bennett County Weed Board's Motion to Intervene in these proceedings. Attached thereto is a proposed Petition which we would intend to file with the Water Management Board if our Motion is granted. We had previously filed a letter of objection, but an issue has been raised as to whether or not it was timely, so to address that matter the Bennett County Commission and the Bennett County Weed Board has instructed me to go ahead and file a formal Motion to Intervene.

By way of this letter, I have provided copies of the Motion and attachments to Mr. Kunz, Ms. Best, Mr. Ginsbach and Mr. Hatch.

Please let me know how you wish to handle the hearing on this Motion.

Sincerely,

GARY SOKOLOW
Bennett County States Attorney

Enclosure

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

CHARLES EMLEY, BRETT HEATH,
RAYMOND KOCER and LAWRENCE KOCER,

Petitioners,

v.

MOTION BY BENNETT COUNTY
WEED BOARD TO INTERVENE

UNITED STATES FISH & WILDLIFE SERVICE,

Applicant.

COMES NOW Bennett County, a political subdivision of the State of South Dakota, and the Bennett County Weed Board, an agency of the Bennett County Commission, by and through the Bennett County States Attorney's office, and moves the Water Management Board for an Order allowing Bennett County and the Bennett County Weed Board to intervene in the above-entitled contested case pursuant to SDCL 1-26-17.1.

The grounds and reasons for this Motion are as follows:

1. That Bennett County, acting by and through the Bennett County Weed Board, has been plagued with the weed control problem in the area of the property owned by the Applicant, United States Fish & Wildlife Service, within Bennett County, which weed control problem has arisen because of the water utilization practices of the United States Fish & Wildlife Service; and

2. That Bennett County and the Bennett County Weed Board has estimated it would cost approximately $50,000.00 to attempt to eradicate the weed problem which have developed on property owned by the Applicant, United States Fish & Wildlife Service, and that the Applicant has been unwilling to accomodate Bennett County or the Bennett County Weed Board in attempting to resolve this issue; and

3. That while State law allows Bennett County and the Bennett County

Weed Board to go ahead and employ the necessary labor and purchase the necessary materials in order to eradicate the weed problem and then assess that cost back to the landowner, a challenge has been raised by the United States Fish & Wildlife Service that Bennett County and the Bennett County Weed Board do not have the authority to charge the United States Fish & Wildlife Service for the costs of eradicating the weeds on U.S. Fish & Wildlife Service property; and

4. That the Applicant has made application for additional water rights to divert water out of Lake Creek which will further create additional weed control problems on the Refuge property and on surrounding properties, and that Bennett County believes because the water rights law allows the Water Management Board to condition any water rights permits granted that Bennett County wishes to intervene in this matter to explain the problems that have been caused by the water utilization practices of the U.S. Fish & Wildlife Service as it relates to weed control and to urge upon the Water Management Board to deny the application or, in the alternative, to condition the application in such a manner as to assure the weed control problem is addressed by the United States Fish & Wildlife Service.

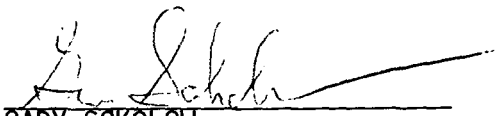
That attached hereto as Exhibit "A" is a proposed Petition signed by the Bennett County States Attorney which would be the pleading Bennett County would file if it were allowed to intervene in these proceedings.

5. That Bennett County realizes that some discovery has taken place and is agreeable that if it is allowed to intervene that it will accept the existing discovery that has taken place thus far and will make itself available to participate in any future proceedings based upon the time schedule interposed either by the Water Management Board or upon the time

schedule the Water Management Board allows the other parties to determine.

Dated this 25 day of October, 1994.

BENNETT COUNTY and
BENNETT COUNTY WEED BOARD



GARY SOKOLOW
Bennett County States Attorney
P.O. Box 950
Martin, SD 57551
(605) 685-6986

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing Motion to Intervene was served upon the persons herein next designated, all on the date below shown, by enclosing the same in an envelope securely sealed and with first class postage thereon fully prepaid, addressed to the last known address of the addressee, to wit:

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

John R. Kunz
U.S. Department of the Interior
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

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

John Guhin
Attorney for Water Management Board
500 East Capitol Ave.
Pierre, SD 57501

John Hatch, Chief Engineer
Department of Water and Natural Resources
Water Rights Division
523 East Capitol Ave.
Pierre, SD 57501

on the 25 day of October, 1994.

GARY SOKOLOW

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

CHARLES EMLEY, BRETT HEATH,
RAYMOND KOCER and LAWRENCE KOCER,

Petitioners,

BENNETT COUNTY, SOUTH DAKOTA and
BENNETT COUNTY WEED BOARD,

Intervenors,

v.

UNITED STATES FISH & WILDLIFE SERVICE,

Applicant.

INTERENORS' PETITION
TO OPPOSE WATER RIGHT
APPLICATION NO. 2300-2

COMES NOW Bennett County, a political subdivision of the State of South Dakota, and the Bennett County Weed Board, an agency of the Bennett County Commission, by and through the Bennett County States Attorney's office, and for their Petition to Oppose Application No. 2300-2 states and alleges as follows:

I.

THAT Petitioner Bennett County, South Dakota, is a political subdivision of the State of South Dakota, and that Petitioner Bennett County Weed Board is an agency of Bennett County, South Dakota, and that both Petitioners are affected by Application No. 2300-2 of the United States Fish & Wildlife Service to appropriate water on the LaCreek Refuge located in Bennett County, South Dakota.

II.

THAT Petitioners oppose Application No. 2300-2 of the United States Fish & Wildlife Service for the following reasons:

A. That the United States Fish & Wildlife Service has a noxious weed problem on the LaCreek Refuge, which has in turn created a noxious weed

EXHIBIT A

problem on adjoining public and private lands, and that this noxious weed problem is in part due to the water management practices of the United States fish & Wildlife Service.

B. That controlling the noxious weed problem on public lands has been costly to the Petitioners.

C. That the United States Fish & Wildlife Service has not been cooperative with the Petitioner Bennett County Weed Board in attempting to eradicate the weed problem, and has challenged the right of the Petitioners to eradicate the weeds on the Refuge property, and that allowing the noxious weed problem to continue to exist on the Refuge property is not in the best interests of the public, therefore Petitioners believe that the use of the water on the LaCreek Refuge is not in the best interests of the public.

D. That use of the water on LaCreek Refuge, when it is allowed to create a noxious weed problem, is not a beneficial use of the water.

E. That Application No. 2300-2 seeks to reserve a future use of water, to which the United States Fish & Wildlife Service is not entitled, and therefore the Application should be denied.

III.

THAT Petitioners expect to call the members of the Bennett County Weed Board to testify, as well as members of the Bennett County Commission, concerning the noxious weed problem and the lack of cooperation in this matter by the United States Fish & Wildlife Service.

IV.

THAT Petitioners would be willing to accomodate the time frame set in this matter for the convenience of the parties.

WHEREFORE, Petitioners respectfully request the Water Management Board to deny Application No. 2300-2 and to grant such other and further relief as

the Water Management Board deems just and equitable in the premises.

Dated this _____ day of October, 1994.

BENNETT COUNTY and
BENNETT COUNTY WEED BOARD

GARY SOKOLOW
Bennett County States Attorney
P.O. Box 950
Martin, SD 57551
(605) 685-6986

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

November 4, 1994

Rodney Freeman
Hearing Chairman
South Dakota Water Management Board
P.O. Box 176
Huron, SD 57350-0176

Re: **In the Matter of United States Fish and Wildlife Service Application No. 2300-1 (Lake Creek)**

Dear Mr. Freeman:

Enclosed is the Division's Motion and Order for scheduling order in the above-entitled matter. I will initiate the teleconference. If you or any party wishes a court reporter to be in attendance, please notify me and I will have one here in Pierre.

Sincerely,

Diane Best
Assistant Attorney General

DB:nan
Enclosure
cc: Gary Sokolow
Patrick Ginsbach
John R. Kunz
John Guhin

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF UNITED STATES FISH AND WILDLIFE SERVICE APPLICATION NO. 2300-1 (LAKE CREEK)	))))	DIVISION'S MOTION FOR SCHEDULING ORDER AND ORDER

The Department of Environment and Natural Resources, Division of Water Rights (hereinafter Division), hereby moves the hearing chairman for the following procedural scheduling order in the above-referenced matter:

1. That a prehearing teleconference be held on November 28, 1994, at 2 p.m. for the purpose of (a) hearing any pending motions to intervene, (b) hearing argument on this proposed Scheduling Order, and (c) hearing any other initial motions filed by the parties.

2. That all parties provide a list of their witnesses and a tentative list of proposed exhibits to each opposing party and the hearing chairman by January 18, 1995.

3. That all parties complete any discovery desired by January 18, 1995, except as otherwise ordered upon good cause shown. This discovery schedule contemplates a period of no longer than twenty days for responding to interrogatories or requests for production of documents. In order that documents may be provided and interrogatories answered by the January 18, 1995, discovery deadline, request would need to be made sufficiently in advance to accommodate the 20-day period.

4. That final lists of exhibits intended to be introduced at the hearing be exchanged by all parties on or before February 8, 1995.

by the Sou

considered

respective

set forth

n-pld5.db

5. That all motions (including motions for admission of previously filed exhibits or testimony) be filed with the hearing chairman by February 8, 1995, and that responses be filed by February 22.

6. That by February 22, the parties file a list of testimony or exhibits that have been stipulated to by the parties.

7. That a final prehearing conference on any outstanding motions (if there are any) be held on March 1, 1995, by teleconference.

8. That hearing in the above-entitled matter begin at 1:30 p.m. (or as soon thereafter as the Water Management Board is able to hear the matter) on March 8, 1995, at the Matthews Training Center in Pierre, South Dakota.

9. That for purposes of scheduling in the above-entitled matter, any dates pertaining to the submission of documents pertain to the filing (mailing by first class mail) of the documents.

Dated this 4th day of November, 1994.

Diane Best

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

Counsel for Division of Water Rights

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Division's Motion and Order for scheduling order **In the Matter of United States Fish and Wildlife Service Application No. 2300-1 (Lake Creek)**, was served by United States mail, first class, postage prepaid upon:

Gary A. Sokolow
Attorney at Law
P.O. Box 626
Martin, SD 57551

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

John R. Kunz
U.S. Dept. of Interior
Office of Solicitor
P.O. Box 25007 (D-105)
Denver Federal Center
Denver, CO 80225

by interoffice mail upon:

John Hatch
Division of Environment and Natural Resources
Foss Building
Pierre, SD 57501

and hand-delivered upon:

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

on this 4th day of November, 1994.

Diane Best
Assistant Attorney General

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

NOV 1994
DIVISION OF
WATER RIGHTS
Pierre, SD

November 16, 1994

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

Re: **Water Right Application No. 2300-1 (Lake Creek)**

Dear Pat:

The scheduled prehearing teleconference is set for 2 p.m. CST.

Sincerely,

Diane Best
Assistant Attorney General

DB:clr
cc: Gary A. Sokolow
John P. Guhin
John Hatch ✓
John R. Kunz, Solicitor's Office

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Notch

STATE OF SOUTH DAKOTA

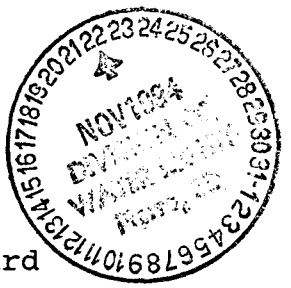
OFFICE OF ATTORNEY GENERAL

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

MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

November 21, 1994



Rodney Freeman
Hearing Chairman
South Dakota Water Management Board
P.O. Box 176
Huron, SD 57350-0176

Re: **In the Matter of United States Fish and Wildlife Service Application No. 2300-1 (Lake Creek)**

Dear Mr. Freeman:

I am pleased to advise you that the parties have entered into settlement negotiations in the above-entitled matter and have requested that a scheduling order not be issued at the current time. Therefore, I am withdrawing my request for a scheduling order.

The only other matter that was to be considered at the November 28, 1994, teleconference was the request to intervene that had previously been filed by Bennett County and the Bennett County Weed Board. Based on my conversations with the various parties, it appears that there is no opposition to this intervention. I have spoken with the Bennett County State's Attorney and he is not requesting a formal order in this matter since all parties are in agreement with the intervention.

Based on the foregoing, I am no longer requesting hearing on November 28, 1994. All parties are being advised by copy of this letter. Arrangements for the teleconference have been cancelled.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB:nan
cc: Pat Ginsbach
John Kuntz
Gary Sokolow
Mike Hanson

70

Attorney General
126110
MAR 24 1995

United States Department of the Interior

TELE. (303) 231-5353
FAX (303) 231-5363

OFFICE OF THE SOLICITOR
Rocky Mountain Region
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225

MAR 1995
DIVISION OF
WATER RIGHTS
Pierre, SD

March 20, 1995

FWS.RM.0929

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

Re: LaCreek Water Rights Application No. 2300-2

Dear Diane:

I wanted to bring you up to date on the progress being made with regard to the LaCreek National Wildlife Refuge's pending application for water permit no. 2300-2, and the United States Fish and Wildlife Service's (FWS) involvement with the Coordinated Resource Management (CRM) process.

Participating in the process are representatives of FWS, the Bennett County Commissioners and Weed Board, the Cooperative Extension Service, the South Dakota Departments of Agriculture and Environment and Natural Resources, the Division of Water Rights, and the neighboring landowners. South Dakota's Wetlands Coordinator, Clark Johnson, has addressed the group, and representatives from Senator Daschle's and Congressman Johnson's offices have attended. Expertise has been provided by the Corps of Engineers, the Natural Resources Conservation Service (formerly Soil Conservation Service), and South Dakota's Department of Game, Fish, and Parks.

Meetings have been held on November 21, November 29-30, and December 21-22, 1994, and on January 25-26, and February 28-March 1, 1995. A meeting to discuss only weeds was held on February 16, 1995. The final regularly scheduled meeting is March 29-30, 1995. Other meetings will continue on a less frequent and as needed basis during the ongoing study period.

It appears that all parties have been working diligently toward a resolution of the conflict that has besieged them for these many years. FWS is investigating alternative water management methods to ensure that no private lands will be impacted, and draft plans covering a wide range of management options were presented to the group at the last meeting. Also, the area continues to be studied with a topographic survey scheduled to be completed

within the next few months, and additional groundwater monitoring wells to be installed this spring. All problem areas are being examined to determine the best possible solutions that will accommodate all concerned parties.

Because Application No. 2300-2 is still pending with the Department of Environment and Natural Resources, FWS is preparing a request to amend Application No. 2300-2. This amendment will withdraw the irrigation portion of the existing application, and will request that Diversion Structure Nos. 1 and 4 be covered under a limited storage permit only. FWS will discuss this amendment with the group at the March 29-30 CRM meeting. Shortly after this meeting, FWS plans on finalizing this amendment and filing it with the Division. From our telephone conversation, I understand that, even if the amendment is not opposed, Mr. Hatch may still want to schedule some sort of a hearing before the Board. I further understand that the earliest possible hearing date would be July 6-7, 1995, in Pierre, and that, as hearing details develop, you will keep me apprised. I do not know what the feelings of the landowners might be, but FWS has informed me (and I concur) that the July 6-7 date would be most inconvenient. If possible, I would, therefore, request a later date.

While the parties continue to strive to reach a mutually agreeable resolution, I will keep you informed concerning the progress of the CRM proceedings. In the interim, if you have any questions, or if I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

John R. Kunz

John R. Kunz
Attorney

cc: Patrick M. Ginsbach, Esq.
Farrell, Farrell and Ginsbach
441 North River Street
Hot Springs, SD 57747

Ginger Price, Region 6, FWS

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Mountain-Prairie Region

IN REPLY REFER TO:

BA WTR
SD WR
Mail Stop 60189

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

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228

JUN 1995
DIVISION OF
WATER RIGHTS
Pierre, SD

MAY 31 1995

Mr. John Hatch
Department of Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

Dear Mr. Hatch:

In an attempt to improve the Fish and Wildlife Service's (Service) relationship with the neighboring community, and to avoid further costly litigation, Service personnel have actively participated in the Coordinated Resource Management (CRM) process with neighboring landowners and community representatives in the Martin area. All parties have worked diligently toward resolution of the conflict over the Lacreek National Wildlife Refuge's (NWR) water management practices and, I believe, have come to a better understanding of the problems facing one another.

In this effort, the Service is investigating alternative water management methods to ensure that no private lands will be impacted and plans to extend the hydrology/biology study of the area for an additional 3 years in hopes of gathering data to assist in the development of water management alternatives. A topographic survey has been completed and additional ground water monitoring wells will be installed this spring.

To protect the State endangered Pearl Dace, and the threatened Plains Topminnow and Northern Red-Bellied Dace, Diversion Dam No. 4 is being maintained by approximately 4 feet of stoplogs in place to prevent the movement of carp upstream from Refuge pools. This results in the impoundment of approximately 1 acre-foot of water.

A meeting is scheduled within the next month with Service and State fishery biologists and interested neighboring landowners to discuss alternative measures that may be utilized. I, therefore, request that any action regarding Diversion No. 4 under Application No. 2300-2 be deferred until such time that a viable alternative carp control barrier is determined or a satisfactory solution to the problem is agreed upon. Your office will be notified immediately upon resolution of this matter.

Diversion Dam No. 1 is currently operational but is not being utilized. Because it was somewhat higher than the creek channel, Lake Creek was diverted around the structure, thereby returning Lake Creek to its original channel elevation and eliminating impoundment of water at this site. A 48-inch culvert will be installed before October 1, 1995.

I request that you amend pending Application for Water Permit No. 2300-2 as follows:

2. Amount of Water Claimed:

   DELETE 9.43 cfs, 660 acres irrigated. Defer action on 1 Acre-Foot storage at Diversion No. 4.

4. Location of point of diversion:

   DELETE Diversion Nos. 1 and 3.

6. Annual period during which water is to be used:

   Defer action. The Service will AMEND period of use to January 1 through December 31, if the decision is made to retain Diversion No. 4.

7. Acreage to be irrigated:

   DELETE in its entirety.

8. Type of irrigation:

   DELETE in its entirety.

9. Crops to be irrigated:

   DELETE in its entirety.

Upon completion of the study and when a modified water management plan is in place, the Service will submit all required applications to cover any water use.

Also, at the May 18-19, 1995, CRM meeting in Martin, South Dakota, the legality of a structure was questioned. The site was field inspected by the group, which included Del Broz of your staff.

The structure in question is a low level dam across the natural drainage channel and a ditch that alters the point at which spring flows enter Lake Creek. This was done so that these spring flows would enter Lake Creek upstream of the parshall flume, and thus be included in Refuge inflow measurements, instead of at the natural confluence located a short distance below the flume. The dam was constructed in 1981, the same year that the flume was installed.

The dam/ditch has no known impact on any neighboring landowners. However, some individuals are concerned about potential siltation problems that the dam might cause, and believe that the Service is illegally diverting these flows.

The Service does not believe that this is an illegal diversion because it only facilitates the measurement of this water. The point at which the spring flows enter Lake Creek has been moved approximately 900 feet with no intervening users between the two sites. The Service, under U.S. Withdrawal No. 2-2, has the legal right to use up to 23,710 acre-feet of the waters of Lake Creek and its tributaries in pools on the old Refuge. Accurate measurement of the inflow enables the Service to document its use of water. As well, we plan to develop a water budget model using this historic data.

I have enclosed a map delineating the area in question and would appreciate an opinion as to the legality of this structure at your earliest convenience.

Please extend my thanks to Del Broz and Rasool Ahadi of your staff for their participation in the CRM process this past 6 months.

Thank you for your assistance with this matter. Should you have any questions or require further information, please contact Ginger Price of our Water Resources Division at (303) 236-5321.

Sincerely,

Terry Terrell

TERRY T. TERRELL

DEPUTY Regional Director

Enclosure

cc: Mr. Clifford McDonnell
c/o Mr. Dale Mcdonnell
Crossroads Inn
Box 970
Martin, South Dakota 57551

Mr. Brett Heath
HWC 3, Box 19
Martin, South Dakota 57551

Bennett County Commissioners
and Weed Board
Box M
Martin, South Dakota 57551

Mr. Raymond Kocer
P.O. Box 388
Martin, South Dakota 57551

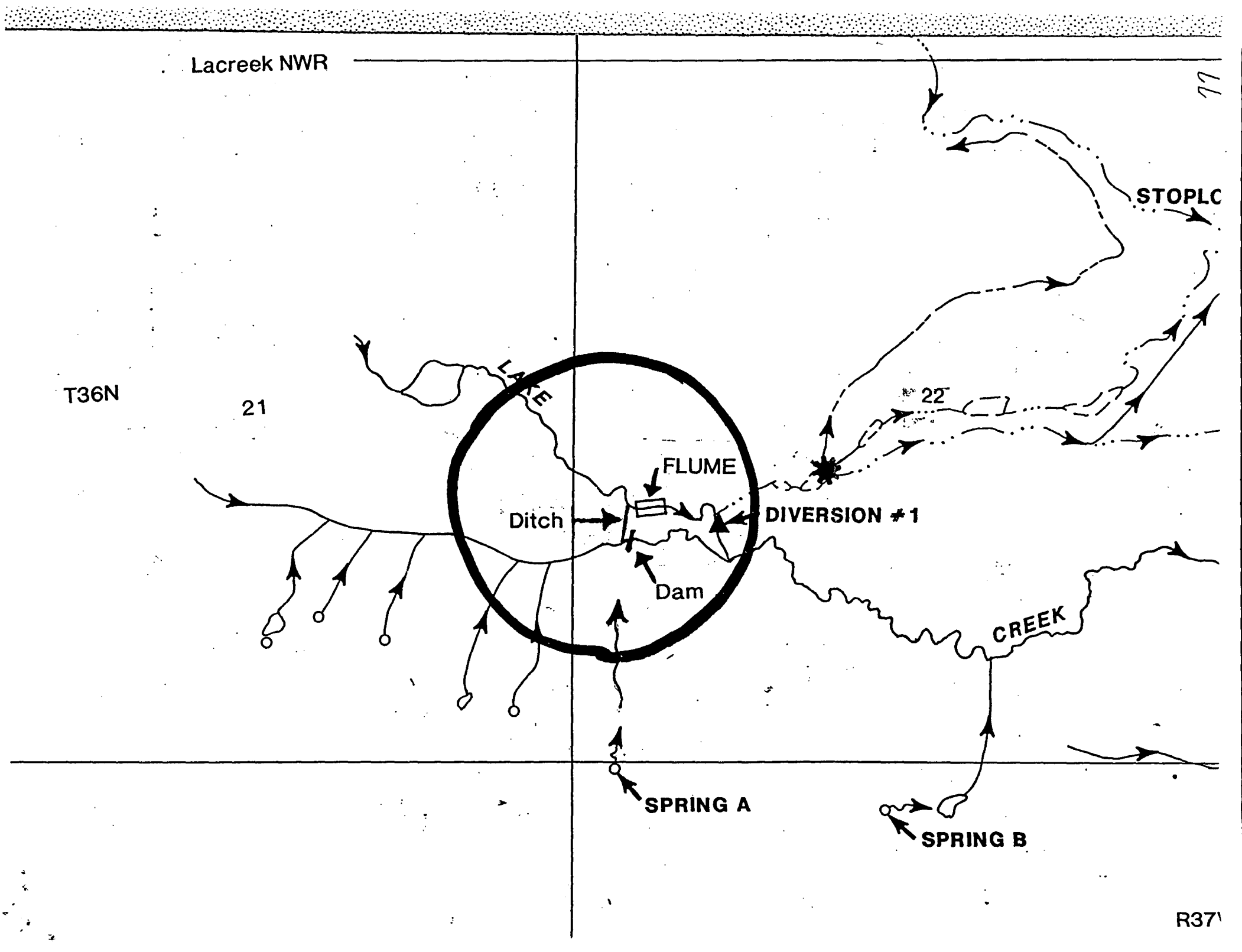
Mr. Lawrence Kocer
P.O. Box 156
Martin, South Dakota 57551

Mr. Charles Emley
P.O. Box 673
Martin, South Dakota 57551

Mrs. Joy Heath
HWC 3, Box 19
Martin, South Dakota 57551

Ms. Beth E. Walz
Midwest Mediation
P.O. Box 1001
Sioux Falls, South Dakota 57105

Patrick Ginsbach, Esq.
Farrell, Farrell, and Ginsbach
441 N. River St.
Hot Springs, South Dakota 57747


Lacreek NWR
T36N
21
22
LAKE
FLUME
Ditch
DIVERSION #1
Dam
CREEK
STOPLC
SPRING A
SPRING B
R37

SUPPLEMENTAL REPORT ON
WATER PERMIT APPLICATION NO. 2300-2
UNITED STATES FISH AND WILDLIFE SERVICE
JANUARY 24, 1996

Background

The U.S. Fish and Wildlife Service amended Water Permit Application No. 2300-2 deleting the irrigation portion of the application. Diversion structures (Nos. 1 and 3) located in the NW 1/4 SW 1/4, Section 22 and SE 1/4 SW 1/4, Section 23; all in T36N-R37W are also deleted. Retained in the amended application is a stoplog structure located in the NE 1/4 SW 1/4, Section 24, T36N-R37W.

Discussion

The amended application requests approval of a small dam located in the channel of Lake Creek. The dam is known as structure No. 4 on LaCreek National Wildlife Refuge and stores approximately one acre-foot of water. The purpose of the structure is to protect the state endangered Pearl Dace and the state threatened Plains Topminnow and Northern Red-bellied Dace. Approximately 4 feet of stoplogs are placed in the outlet of the structure to prevent movement of carp upstream from Refuge pools.

Conclusions

1. Approval of amended Water Permit Application No. 2300-2 will not affect other existing water rights.

2. Storage of water behind the structure must not cause flooding of neighboring landowner property.

Delvin D. Brosz, PE
Natural Resources Engineer IV

Revised Again

REVISED RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT APPLICATION NO. 2300-2, United States Fish and Wildlife Service

Pursuant to SDCL 46-2A-2, the following is the revised recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Water Permit Application No. 2300-2, United States Fish and Wildlife Service, PO Box 25486, Denver Federal Center, Denver, CO 80225

The Chief Engineer is recommending APPROVAL of Application No. 2300-2 because 1) there is reasonable probability that there is unappropriated water available for the applicant's proposed use, 2) the proposed diversion has been developed without unlawful impairment of existing rights, 3) the proposed use is a beneficial use and 4) in the public interest with the following qualifications:

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

2. Permit No. 2300-2 authorizes storage of 1.0 acre-foot of water utilizing an existing stoplog structure for the purpose of preventing carp from traveling upstream. This will protect the State Endangered Pearl Dace, State Threatened Plains Topminnow, and Northern Red-Bellied Dace whose habitat is upstream from the stoplog structure.

3. Low flows as needed for downstream domestic use, including livestock water and prior water rights must be by-passed.

See report on application for additional information.

JOHN HATCH, Chief Engineer
January 29, 1996

GREAT FACES. GREAT PLACES.

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

January 31, 1996

NOTICE

TO: Terry T.Terrell, Deputy Regional Director
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver, CO 80225
and Parties of Record (see attached list)

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

SUBJECT: Scheduling of Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service, Lacreek National Wildlife Refuge

Water Permit Application No. 2300-2 was continued August 22, 1994, to provide parties an opportunity to resolve conflict on the Refuge water management practices through the Consolidated Resource Management (CRM) process. It is my understanding that the CRM process has concluded. Counsel for parties of record requested that the application be scheduled for hearing before the Water Management Board.

The Board will now consider Application No. 2300-2 on March 7, 1996, at 8:30 am (CST), Conference Room, Floyd Matthew Training Center, Foss Building, 523 East Capitol Ave., Pierre, SD. The agenda time is an estimate and may be delayed due to prior agenda items.

The U.S. Fish and Wildlife Service amended the application deleting the irrigation component of the application. The Board's consideration of Application No. 2300-2 will be for the one acre foot storage structure at Diversion No. 4 for an annual period of use of January 1 through December 31. Enclosed is a copy of the supplemental report and revised recommendation on Water Permit Application No. 2300-2.

Applicable provisions of the Notice of Hearing published May 18 and 25, 1994, in the Bennett County Booster II will apply at this hearing. This hearing is an adversary proceeding. Any party of record has the right to be present and represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

Please contact Eric Gronlund at (605) 773-3352 or Diane Best, Assistant Attorney General at (605) 773-3215, if you have any questions.

enclosures

c: Diane Best, Assistant Attorney General
Paul Bengford, Bennett County States Attorney
Gary Nies, Bennett County Weed Board
Ginger Price, USFWS
Tim Olson, G,F&P Water Permit Coordinator
Tom Young, Bureau of Indian Affairs

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorneys for Applicant

John Kunz
U.S. Department of the Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Mikal Hanson
U.S. District Attorney
225 S. Pierre St.
Pierre, SD 57501

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorneys for Petitioners

Jane M. Farrell and Patrick M. Ginsbach
Farrell, Farrell & Ginsbach
441 N. River St.
Hot Springs, SD 57747

CERTIFICATION

I hereby certify that on January 31, 1996, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated January 31, 1996, along with a copy of the Parties of Record List, Supplemental Report and Revised Recommendation of Chief Engineer, regarding Scheduling of Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service, Lacreek National Wildlife Refuge, addressed as stated below, and on the attached list:

Paul Bengford, Bennett County States Attorney, P.O. Box 628, Martin, SD 57551.

Gary Nies, Bennett County Weed Board, Box M, Courthouse, Martin, SD 57551.

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

Tom Young, Bureau of Indian Affairs, 115 4th Ave. SE, Aberdeen, SD 57401.

Copies of the above described Notice and enclosures were sent inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.

Tim Olson, Department of Game, Fish & Parks, Joe Foss Building.

Cheryl F. Frost

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 1st day of February, 1996

JOHN HATCH
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA

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

February 23, 1996

NOTICE

TO: Terry T. Terrell, Deputy Regional Director
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver, CO 80225
and Parties of Record (see attached list)

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

SUBJECT: Scheduling Order and Motion for Intervention for Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service

Water Permit Application No. 2300-2 was scheduled for hearing before the Water Management Board on March 7, 1996. Counsel for parties of record agreed that the March 7, 1996, appearance before the Board be limited to establishing a scheduling order and hearing a motion for intervention filed by Bennett County.

The Board will consider the scheduling order and motion for intervention on March 7, 1996, at 9:00 AM (CST), Conference Room, Floyd Matthew Training Center, Foss Building, 523 East Capitol Ave., Pierre, SD.

Please contact Eric Gronlund at (605) 773-3352 or Diane Best, Assistant Attorney General at (605) 773-3352, if you have any questions.

c: Diane Best, Assistant Attorney General
Paul Bengford, Bennett County States Attorney
Gary Nies, Bennett County Weed Board
Ginger Price, USFWS
Tim Olson, G,F&P Water Permit Coordinator
Tom Young, Bureau of Indian Affairs

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorneys for Applicant

John Kunz
U.S. Department of the Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Mikal Hanson
U.S. District Attorney
225 S. Pierre St.
Pierre, SD 57501

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorneys for Petitioners

Jane M. Farrell and Patrick M. Ginsbach
Farrell, Farrell & Ginsbach
441 N. River St.
Hot Springs, SD 57747

CERTIFICATION

I hereby certify that on February 23, 1996, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated February 23, 1996, along with a copy of the Parties of Record list, regarding Scheduling Order and Motion for Intervention for Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service, addressed as stated below, and on the attached Parties of Record list:

Paul Bengford, Bennett County States Attorney, P.O. Box 628, Martin, SD 57551.

Gary Nies, Bennett County Weed Board, Box M, Courthouse, Martin, SD 57551.

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

Tom Young, Bureau of Indian Affairs, 115 4th Ave. SE, Aberdeen, SD 57401.

A copy of the above described Notice and Parties of Record list were sent inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.

Tim Olson, Water Permits Coordinator, Department of Game, Fish & Parks, Joe Foss Building.

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 27th day of February, 1996

JOHN HATCH
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

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

MAR 1996
WATER RIGHTS
PROGRAM
Pierre, SD

March 1, 1996

MEMORANDUM

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

FROM: Diane Best, Assistant Attorney General DB

RE: **Matter of United States Fish and Wildlife Service Application No. 2300-2 (Lake Creek)**

Enclosed is a proposed Scheduling Order in the above-referenced matter. Please note that the parties are asking for the matter to be heard on July 10 and 11. It is expected that this hearing will last at least two days.

DB:nan
Enclosure

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF UNITED STATES FISH AND WILDLIFE SERVICE APPLICATION NO. 2300-2 (LAKE CREEK)	))))	DIVISION'S MOTION FOR SCHEDULING ORDER AND PROPOSED ORDER

The Department of Environment and Natural Resources, Division of Environmental Regulation (hereinafter Division), hereby requests the following procedural scheduling order in the above-referenced matter:

1. That all parties complete any discovery desired by May 15, 1996, except as otherwise ordered upon good cause shown. This discovery schedule contemplates a period of no longer than twenty days for responding to interrogatories or requests for production of documents. In order that documents may be provided and interrogatories answered by the May 15, 1996, discovery deadline, request would need to be made sufficiently in advance to accommodate the 20-day period.

2. That lists of exhibits intended to be introduced at the hearing be exchanged by all parties on or before June 10, 1996.

3. That a prehearing brief be filed by the applicant on June 1, 1996. Responsive briefs are to be filed on June 15, 1996. If the applicant chooses to file an answering brief, the due date is June 30, 1996.

4. That all motions (including motions for admission of exhibits or testimony previously filed or entered into evidence in Vested Right Claim No. 1927-2) be filed by June 10, 1996, and that responses be filed by June 20, 1996.

5. That by June 30, 1996, the parties file a list of testimony or exhibits (if any) that have been stipulated to by the parties.

6. That a final prehearing conference on any outstanding motions (if there are any) be held on June 29, 1996, by teleconference before Prehearing Chairman Rodney Freeman.

7. That hearing in the above-entitled matter begin on July 10, 1996, at the Matthews Training Center in Pierre, South Dakota. The time is tentatively set for 1:30 p.m.

8. That any dates pertaining to the submission of documents pertain to the filing (mailing by first class mail) of the documents. All original documents are to be filed with the Division, with copies to be mailed to Prehearing Chairman Freeman.

Dated this 1st day of March, 1996.

Diane Best

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

Counsel for Division of Water Rights

ORDER

Having considered the procedural motion filed and the positions of the respective parties, the Board hereby

ORDERS that the above Scheduling Order is adopted as set forth in the Division's motion, and

FURTHER ORDERS that Rodney Freeman is appointed as Prehearing Chairman for this proceeding.

Dated this _____ day of _____, 1996.

_____
Dwayne Rollag, Chairman
South Dakota Water Management Board

n-pld6.db

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Division's Motion and Proposed Order for scheduling order **In the Matter of United States Fish and Wildlife Service Application No. 2300-2 (Lake Creek)**, was served by United States mail, first class, postage prepaid upon:

Paul Bengford
Attorney at Law
P.O. Box 626
Martin, SD 57551

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

Francis E. Brink
1214 S. Wells St.
Aberdeen, SD 57401

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

Marian Gunderson
811 W. 3rd
Yankton, SD 57078

Leo Holzbauer
RR 1 Box 170
Wagner, SD 57380

John R. Kunz
U.S. Dept. of Interior
Office of Solicitor
P.O. Box 25007 (D-105)
Denver Federal Center
Denver, CO 80225

Bernita Loucks
219 42nd St.
Rapid City, SD 57702

Dwayne Rollag
320 Lincoln Lane S.
Brookings, SD 57006

Joel Rickenbach
Box 97
Oelrichs, SD 57763

Mikal Hanson
U.S. Attorney's Office
225 S. Pierre St., #326
Pierre, SD 57501

by interoffice mail upon:

John Hatch
Division of Environment
and Natural Resources
Foss Building
523 E. Capitol Ave.
Pierre, SD 57501-3182

and hand-delivered to:

John P. Guhin
Deputy Attorney General
Capitol Building
500 E. Capitol Ave.
Pierre, SD 57501-5070

on this 1st day of March, 1996.

Diane Best
Assistant Attorney General

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

March 8, 1996

NOTICE

TO: Terry T. Terrell, Deputy Regional Director
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver, CO 80225
and Parties of Record (see attached list)

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

SUBJECT: Procedural Scheduling Order for Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service

On March 7, 1996, the Water Management Board entered an order adopting a procedural scheduling order and appointing a prehearing chairman in the matter of Water Permit Application No. 2300-2. Enclosed is a copy of the scheduling order and the Board order. The Board also granted Bennett County's motion to intervene in the hearing.

The Board hearing on Application No. 2300-2 will be held in Pierre on July 10 and 11, 1996. Future notice will be provided to all parties on the exact time and location of the hearing.

Please contact Eric Gronlund at (605) 773-3352 or Diane Best, Assistant Attorney General at (605) 773-3352, if you have any questions.

c: Diane Best, Assistant Attorney General
Paul Bengford, Bennett County States Attorney
Gary Nies, Bennett County Weed Board
Ginger Price, USFWS
Tim Olson, G,F&P Water Permit Coordinator
Tom Young, Bureau of Indian Affairs

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF UNITED STATES FISH AND WILDLIFE SERVICE APPLICATION NO. 2300-2 (LAKE CREEK)	))))	DIVISION'S MOTION FOR SCHEDULING ORDER AND PROPOSED ORDER

The Department of Environment and Natural Resources, Division of Environmental Regulation (hereinafter Division), hereby requests the following procedural scheduling order in the above-referenced matter:

1. That all parties complete any discovery desired by May 15, 1996, except as otherwise ordered upon good cause shown. This discovery schedule contemplates a period of no longer than twenty days for responding to interrogatories or requests for production of documents. In order that documents may be provided and interrogatories answered by the May 15, 1996, discovery deadline, request would need to be made sufficiently in advance to accommodate the 20-day period.

2. That lists of exhibits intended to be introduced at the hearing be exchanged by all parties on or before June 10, 1996.

3. That a prehearing brief be filed by the applicant on June 1, 1996. Responsive briefs are to be filed on June 15, 1996. If the applicant chooses to file an answering brief, the due date is June 30, 1996.

4. That all motions (including motions for admission of exhibits or testimony previously filed or entered into evidence in Vested Right Claim No. 1927-2) be filed by June 10, 1996, and that responses be filed by June 20, 1996.

5. That by June 30, 1996, the parties file a list of testimony or exhibits (if any) that have been stipulated to by the parties.

6. That a final prehearing conference on any outstanding motions (if there are any) be held on June 29, 1996, by teleconference before Prehearing Chairman Rodney Freeman.

7. That hearing in the above-entitled matter begin on July 10, 1996, at the Matthews Training Center in Pierre, South Dakota. The time is tentatively set for 1:30 p.m.

8. That any dates pertaining to the submission of documents pertain to the filing (mailing by first class mail) of the documents. All original documents are to be filed with the Division, with copies to be mailed to Prehearing Chairman Freeman.

Dated this 1st day of March, 1996.

Diane Best

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

Counsel for Division of Water Rights

ORDER

Having considered the procedural motion filed and the positions of the respective parties, the Board hereby

ORDERS that the above Scheduling Order is adopted as set forth in the Division's motion, and

FURTHER ORDERS that Rodney Freeman is appointed as Prehearing Chairman for this proceeding.

Dated this 7th day of March, 1996.

Dwayne Rollag, Chairman
South Dakota Water Management Board

n-pld6.db

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PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorneys for Applicant

John Kunz
U.S. Department of the Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Mikal Hanson
U.S. District Attorney
225 S. Pierre St.
Pierre, SD 57501

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorneys for Petitioners

Jane M. Farrell and Patrick M. Ginsbach
Farrell, Farrell & Ginsbach
441 N. River St.
Hot Springs, SD 57747

CERTIFICATION

I hereby certify that on March 8, 1996, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated March 8, 1996, along with a copy of the Scheduling Order and the Board Order, and a copy of the Parties of Record list, regarding Procedural Scheduling Order for Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service, addressed as stated below, and on the attached Parties of Record list:

Paul Bengford, Bennett County States Attorney, P.O. Box 628, Martin, SD 57551.

Gary Nies, Bennett County Weed Board, Box M, Courthouse, Martin, SD 57551.

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

Tom Young, Bureau of Indian Affairs, 115 4th Ave. SE, Aberdeen, SD 57401.

A copy of the above described Notice and attachments were sent inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.

Tim Olson, Water Permits Coordinator, Department of Game, Fish & Parks, Joe Foss Building.

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 11th day of March, 1996

JOHN HATCH
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

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

MAR 1996
WATER RIGHTS
PROGRAM
Pierre, SD

BEFORE THE STATE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF UNITED STATES FISH AND WILDLIFE SERVICE APPLICATION No. 2300-2 (LAKE CREEK)	NOTICE OF APPEARANCE AND SUBSTITUTION OF COUNSEL

TO: ALL INTERESTED PARTIES:

PLEASE TAKE NOTICE that in addition to Mr. John Kunz, United States Department of Interior, who will continue to represent the United States of America, the undersigned counsel is to be substituted for Mikal Hanson as additional counsel for the United States and that he also represents the United States of America in the above administrative matter. Service of all matters should continue to be made upon Mr. John Kunz as previously accomplished by the parties and in addition thereto upon said undersigned counsel in substitution for Mikal Hanson.

The undersigned counsel requests notice by copy of all matters in the manner prescribed for service on parties.

Dated this 25th day of March, 1996.

KAREN E. SCHREIER
United States Attorney

Thomas A. Lloyd

THOMAS A. LLOYD
Assistant United States Attorney
337 Federal Building
225 South Pierre Street
Pierre, SD 57501
(605) 224-5402

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 1996, true and correct copies of the foregoing Notice of Appearance and Substitution of Counsel were mailed postage prepaid in the United States mail to:

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

Patrick M. Ginsbach
Attorney at Law
441 N. River Street
Hot Springs, SD 57747

Paul Bengford
Attorney at Law
P.O. Box 626
Martin, SD 57551

John P. Guhin
Deputy Attorney General
500 E. Capitol
Pierre, SD 57501

THOMAS A. LLOYD
Assistant United States Attorney

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U.S. Department of Justice

United States Attorney
District of South Dakota

Rec. 3/28/96

337 Federal Building & U.S. Courthouse *605/224-5402*
225 South Pierre Street
Pierre, South Dakota 57501-2489 *FAX 605/224-8305*

March 27, 1996

Mary L. Erickson
Hughes County Clerk of Courts
P.O. Box 1112
Pierre, SD 57501

RE: In the Matter of United States Fish and Wildlife Service Application No. 2300-2 (Lake Creek)

Dear Ms. Erickson:

Please find enclosed for filing the original Notice of Appearance and Substitution of Counsel in the above-entitled case.

Thank you.

Sincerely,

KAREN E. SCHREIER
United States Attorney

Thomas A. Lloyd

THOMAS A. LLOYD
Assistant United States Attorney

TAL/kf
Enclosure

Attn: Cheryl Frost

The Notice of Appearance and Substitution of Counsel was sent to our office in error. I contacted Mr. Lloyd and he asked if I would send this directly to your office.

Sharon McEntaffer
Deputy Clerk of Courts
Hughes County

United States Department of the Interior

OFFICE OF THE SOLICITOR
Rocky Mountain Region
P.O. Box 25007, D-105
Denver Federal Center
Denver, CO 80225

TELE. (303) 231-5353
FAX (303) 231-5363
John Kunz Ext. 339

NEW ADDRESS (EFFECTIVE IMMEDIATELY)
755 Parfet Street, Suite 151
Lakewood, CO 80215

June 7, 1996

FWS.RM.0929

Via Facsimile

(Express Mail)
Patrick M. Ginsbach, Esq.
FARRELL, FARRELL & GINSBACH
441 North River Street
Hot Springs, SD 57747

(Regular Mail)
Paul Bengford, Esq.
P.O. Box 628
Martin, SD 57551

(Regular Mail)
Diane Best, Esq.
Assistant Attorney General
Capitol Building
500 E. Capitol
Pierre, SD 57501-5070

Re: Water Permit Application No. 2300-2 Before the State Water Management Board

Dear Pat, Paul, and Diane:

Just a quick explanatory note. Yesterday, I sent to Pat via overnight mail a Stipulation and Motion continuing the hearing date from July 10-12 to December 4-5. However, after talking to Diane today, I learned that one of her witnesses would not be available in December. Accordingly, it was necessary to change the stipulation. Realizing that none of us will have had sufficient opportunity to consult with our clients, and hoping to prevent the sort of problem that I experienced with Diane, I have now changed the stipulation to read that the hearing date will be "indefinitely continued to some mutually agreeable future date." For your information and review, I have enclosed a complete copy

of the stipulation. I hope and trust that this will be acceptable to all of you.

As with the first stipulation, I have today overnighted a copy of the amended stipulation to Pat. Let me ask that, with respect to the amended stipulation, we follow the same procedure outlined in my June 6, 1996, letter.

As always, thank you all for your consideration and attention. Please contact me if you have any questions, or if I can be of any further assistance.

Sincerely,

John R. Kunz
Attorney

Enclosure (Amended Stipulation and Motion for Continuance of Hearing)

cc: Ginger Price, Region 6, FWS

Tom Lloyd, Esq.
337 Federal Building & U.S. Courthouse, 225 South Pierre Street, Pierre, SD 57501-2489

(All cc's w/encl.)

1st Faxed 6/24/96

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant.	)	**APPLICATION NO. 2300-2 (Lake Creek)**
BENNETT COUNTY & BENNETT COUNTY WEED BOARD, Intervenors.	)	

STIPULATION AND MOTION FOR CONTINUANCE OF HEARING DATE

COME NOW the parties to the captioned action and hereby jointly stipulate that they do not object to the July 10-12, 1996, hearing in the captioned case being indefinitely continued to some mutually agreeable future date. Based on this stipulation, the parties hereby so move the Board to indefinitely continue the hearing of the captioned case from July 10-12, 1996, to some mutually agreeable future date.

The above stipulation and motion are based on the grounds that the parties have been diligently devoting all of their efforts to attempt to settle the subject case. Accordingly, the parties have not been able to adequately and meaningfully prepare for the July 10-12 hearing. Additionally, the settlement

negotiations between the parties are continuing, and the parties desire more time to attempt to successfully negotiate a mutually beneficial settlement.

Wherefore, for the above reasons, and based on the stipulation of the parties, the parties move the Board to continue the hearing of the subject case from July 10-12, 1996, to some mutually agreeable future date.

DATED this 7th day of June, 1996.

JOHN R. KUNZ, ESQ.
Counsel for Applicant
755 Parfet Street, Suite 151
Lakewood, CO 80215
(303) 231-5353 (Ext. 339)
(303) 231-5363 (Fax)

PATRICK M. GINSBACH, ESQ.
Counsel for Petitioners
Farrell, Farrell, and Ginsbach
441 North River Street
Hot Springs, SD 57747
(605) 745-5161

PAUL M. BENGFORD, ESQ.
Counsel for Intervenors
Bennett County States Attorney
P.O. Box 626
Martin, SD 57551

Diane Best, Esq.
Assistant Attorney General
Counsel for Div. of Water Rights
500 E. Capitol
Pierre, SD 57501-5070

GREAT FACES. GREAT PLACES.

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

June 14, 1995

Terry T. Terrell, Deputy Regional Director
United States Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Dear Mr. Terrell:

I am writing in response to Fish and Wildlife Service's request for amendments to Water Permit Application No. 2300-2 and the issue raised concerning the alteration of a drainage channel. A continuance of Water Permit Application No. 2300-2 was granted based on a stipulation between parties last August. Application No. 2300-2 is amended as requested to delete diversion Nos. 1 and 3 and the irrigation component of the application and amend the period of use to year round.

It is my understanding that the Consolidated Resource Management (CRM) process is ongoing. A CRM meeting is planned to discuss diversion structure No. 4 and possible carp barrier measures. The Service is currently maintaining structure No. 4 to protect State endangered and threatened species. The Service requests any action regarding this structure be deferred until an alternative carp control barrier is in place or another solution is agreed upon. I remain committed to allowing the CRM process time to address and resolve conflicts on the Refuge's water management practices. However, if the structure is going to remain in place, a hearing before the Water Management Board will need to be scheduled for a future Board meeting.

Finally, the question was raised on the permissibility of a small structure across a natural drainage channel that was constructed in 1981. This structure alters the point at which the spring flows enter Lake Creek by approximately 900 feet. The purpose of the structure is to direct flow through a flume to provide an accurate measurement of Lake Creek flows entering the old portion of the Refuge. This diversion is part of the Service's refuge management under its existing U.S. Water Withdrawal No. 2-2. This structure, as described, does not require any specific water permit under South Dakota water rights law.

Thank you for providing me an update of the efforts to resolve conflicts over Lacreek National Wildlife Refuge's water management practices. I commend all parties on their willingness to address many tough issues in the protection of the natural resources of South Dakota.

Very truly yours,

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

c: Diane Best, Assistant Attorney General
Dale McDonnell
Brett Heath
Bennett County Commissioners
Bennett County Weed Board
Raymond Kocer
Lawrence Kocer
Charles Emley
Joy Heath
Beth E. Walz, Midwest Mediation
Patrick Ginsbach, Attorney

STATE OF SOUTH DAKOTA

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

MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

June 24, 1996

Paul Bengford
Bennett County State's Attorney
P.O. Box 628
Martin, SD 57551

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

John Kunz
Office of the Solicitor
755 Parfeit Street, Suite 151
Lakewood, CO 80215

Tom Lloyd
Attorney at Law
337 Federal Building & U.S. Courthouse
225 South Pierre Street
Pierre, SD 57501-2489

Re: **Water Permit Application No. 2300-2**

Gentlemen:

I spoke with Pat Ginsbach and John Kunz this morning regarding rescheduling the hearing in the above-referenced matter. Future Water Management Board meetings are planned for October 3-4, December 4-5, and March 5-6. We discussed the issue of which of these dates would be feasible for the LaCreek hearing.

I learned that the Petitioner landowners and the Fish and Wildlife Service are earnestly negotiating settlement and would not be in a position to proceed to hearing until December, given the fact that prehearing motions and briefs would need to be filed in the August/September time frame. Extending the hearing time until March is problematic from the Petitioner landowner's point of view, given the spring calving season. Thus, from the perspective of the Fish and Wildlife Service and the Petitioner landowners, it appears that the December board meeting is the

only time frame really available for providing testimony. As I indicated during our conversation, Water Right's witness, Del Brosz, does have a conflict which would preclude his presence on December 4, 1996. After speaking with the Division of Water Rights this morning, I learned that efforts could be made to accommodate Del's presence on December 5, 1996. Therefore, the Division of Water Rights would agree to have this hearing during the first week of December. Please note that hearing would begin on Thursday morning, rather than Wednesday morning. I am assuming that the parties will also need to present testimony on Friday, December 6.

Given the foregoing considerations, I have prepared a proposed procedural schedule for presentation to the Water Management Board at its regular meeting on July 10, 1996. Enclosed is a draft. Please advise me immediately if some of these dates will be unacceptable and I will attempt to change the dates before filing of the motion.

Thank you in advance for your prompt response.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB:do
Enc.
word/ltr18.db

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF UNITED STATES FISH AND WILDLIFE SERVICE APPLICATION NO. 2300-2 (LAKE CREEK)	))))	DIVISION'S MOTION FOR REVISED SCHEDULING ORDER AND PROPOSED ORDER

The Department of Environment and Natural Resources, Division of Environmental Regulation (hereinafter Division), hereby requests the following revised procedural scheduling order in the above-referenced matter:

1. That all parties complete any discovery desired by October 4, 1996, except as otherwise ordered upon good cause shown, or as agreed to among the parties. This discovery schedule contemplates a period of no longer than twenty days for responding to interrogatories or requests for production of documents. In order that documents may be provided and interrogatories answered by the discovery deadline, requests would need to be made sufficiently in advance to accommodate the 20-day period.

2. That lists of exhibits intended to be introduced at the hearing be exchanged by all parties on or before October 25, 1996.

3. That a prehearing brief be filed by the applicant on October 18, 1996. Responsive briefs are to be filed on or before November 1,1996. If the applicant chooses to file an answering brief, the due date is November 15,1996.

4. That all motions (including motions for admission of exhibits or testimony previously filed or entered into evidence in Vested Right Claim No. 1927-2) be filed by Octobber 25, 1996, and that responses be filed by November 8,1996.

5. That by November 15, 1996 the parties file a list of testimony or exhibits (if any) that have been stipulated to by the parties.

///

6. That a final prehearing conference on any outstanding motions (if there are any) be held on November 15, 1996, by teleconference before Prehearing Chairman Rodney Freeman.

7. That hearing in the above-entitled matter begin on December 5, 1996, at the Matthews Training Center in Pierre, South Dakota. The time is tentatively set for 8:30 a.m.

8. That any dates pertaining to the submission of documents pertain to the filing (mailing by first class mail) of the documents. All original documents are to be filed with the Division, with copies to be mailed to Prehearing Chairman Freeman.

Dated this _____ day of June, 1996.

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

Counsel for the Water Rights Program

ORDER

Having considered the procedural motion filed and the positions of the respective parties, the Board hereby

ORDERS that the above revised Scheduling Order is adopted as set forth in the Division's motion,

Dated this _____ day of _____, 1996.

_____

Dwayne Rollag, Chairman
South Dakota Water Management Board

Attorney General
JUN 26 1996

BENNETT COUNTY STATE'S ATTORNEY
P.O. Box 628 • 605 685-6986
Martin, South Dakota 57551

June 24, 1996

Diane Best, Esq.
Assistant Attorney General
Counsel for Div. of Water Rights
500 E. Capitol
Pierre, SD 57501-5070

Re: USFWS LaCreek Refuge water right Application No. 2300-2
Stipulation

Dear Diane:

We have attached the original Stipulation and Motion for Continuance of Hearing Date in the above matter. Would you please sign the same if it meets with your approval and deliver it to the Water Management Board. Additionally, we would appreciate it if you would send a copy of the Stipulation with all of the signatures to Mr. Kunz, Mr. Ginsbach, and our office.

Thank you for your consideration.

Sincerely,

Paul M. Bengford

Paul M. Bengford
Bennett County State's Attorney

PB\mp

Enc.

wpwin\best.ltr

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

June 26, 1996

NOTICE

TO: Terry T. Terrell, Deputy Regional Director
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver, CO 80225
and Parties of Record (see attached list)

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

SUBJECT: Continuance of Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service

The parties of record have stipulated to a continuance of the July 10 and 11, 1996, Water Management Board hearing on Water Permit Application No. 2300-2. Enclosed is a copy of the stipulation. Therefore, the evidentiary hearing on Application No. 2300-2 is continued and will not be held on July 10 and 11, 1996.

A revised scheduling order will be brought before the Water Management Board on July 10, 1996. A copy of the Division's Motion for a Revised Scheduling Order and Proposed Order is enclosed. The Board will consider this motion at 9:00 am on July 10, 1996 in the Conference Room, Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre, SD.

The revised scheduling order proposes a December 5, 1996, evidentiary hearing on Application No. 2300-2. Future notice of the exact date, time and place of the hearing for Application No. 2300-2 will be provided to all parties of record.

Please contact Eric Gronlund at (605) 773-3352 or Diane Best, Assistant Attorney General at (605) 773-3352, if you have any questions.

c: Diane Best, Assistant Attorney General
Gary Nies, Bennett County Weed Board
Ginger Price, USFWS
Tim Olson, G,F&P Water Permit Coordinator
Tom Young, Bureau of Indian Affairs

enclosure

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorneys for Applicant

John Kunz
U.S. Department of the Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorneys for Petitioners

Jane M. Farrell and Patrick M. Ginsbach
Farrell, Farrell & Ginsbach
441 N. River St.
Hot Springs, SD 57747

Attorney for Bennett County

Paul Bengford, States Attorney
P.O. Box 688
Martin, SD 57551

CERTIFICATION

I hereby certify that on June 26, 1996, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated June 26, 1996, along with a copy of the Parties of Record List, Division's Motion for Revised Scheduling Order and Proposed Order, and a copy of the Stipulation and Motion for Continuance of Hearing Date, regarding Continuance of Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service, addressed as stated below, and on the attached Parties of Record List:

Gary Nies, Bennett county Weed Board, Box M, Courthouse, Martin, SD 57551.

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

Tom Young, Bureau of Indian Affairs, 115 4th Ave. SE, Aberdeen, SD 57401.

A copy of the above described Notice and attachments were sent Inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.

Tim Olson, Water Permits Coordinator, Department of GF&P, Joe Foss Building.

Cheryl F. Frost

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 27th day of June, 1996

JOHN HATCH
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA

John Hatch

Notary Public

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

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF UNITED STATES FISH AND WILDLIFE SERVICE APPLICATION NO. 2300-2 (LAKE CREEK)	))))	DIVISION'S MOTION FOR REVISED SCHEDULING ORDER AND PROPOSED ORDER

The Department of Environment and Natural Resources, Division of Environmental Regulation (hereinafter Division), hereby requests the following revised procedural scheduling order in the above-referenced matter:

1. That all parties complete any discovery desired by October 4, 1996, except as otherwise ordered upon good cause shown, or as agreed to among the parties. This discovery schedule contemplates a period of no longer than twenty days for responding to interrogatories or requests for production of documents. In order that documents may be provided and interrogatories answered by the discovery deadline, requests would need to be made sufficiently in advance to accommodate the 20-day period.

2. That lists of exhibits intended to be introduced at the hearing be exchanged by all parties on or before October 25, 1996, except as otherwise ordered upon good cause shown or as agreed to among the parties.

3. That a prehearing brief be filed by the applicant on October 18, 1996. Responsive briefs are to be filed on or before November 1,1996. If the applicant chooses to file an answering brief, the due date is November 15,1996.

4. That all motions (including motions for admission of exhibits or testimony previously filed or entered into evidence in Vested Right Claim No. 1927-2) be filed by Octobber 25, 1996, and that responses be filed by November 8,1996, except as otherwise ordered upon good cause shown.

5. That by November 15, 1996 the parties file a list of testimony or exhibits (if any) that have been stipulated to by the parties except as otherwise ordered upon good cause shown.

6. That a final prehearing conference on any outstanding motions (if there are any) be held on November 15, 1996, by teleconference before Prehearing Chairman Rodney Freeman.

7. That hearing in the above-entitled matter begin on December 5, 1996, at the Matthews Training Center in Pierre, South Dakota. The time is tentatively set for 8:30 a.m.

8. That any dates pertaining to the submission of documents pertain to the filing (mailing by first class mail) of the documents. All original documents are to be filed with the Division, with copies to be mailed to Prehearing Chairman Freeman.

Dated this 26th day of June, 1996.

Diane Best

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

Counsel for the Water Rights Program

ORDER

Having considered the procedural motion filed and the positions of the respective parties, the Board hereby

ORDERS that the above revised Scheduling Order is adopted as set forth in the Division's motion,

Dated this _____ day of _____, 1996.

_____

Dwayne Rollag, Chairman
South Dakota Water Management Board

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

July 11, 1996

NOTICE

TO: Terry T. Terrell, Deputy Regional Director
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver, CO 80225
and Parties of Record (see attached list)

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

SUBJECT: Revised Procedural Scheduling Order for Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service

On July 10, 1996, the Water Management enter an order adopting a revised procedural scheduling order in the matter of Water Permit Application No. 2300-2. Enclosed is a copy of the revised scheduling order and the Board order.

The Board hearing on Application No. 2300-2 will be held in Pierre on December 5, 1996. Future notice will be provided on the exact time and location of the hearing.

Please contact Diane Best, Assistant Attorney General at (605) 773-3215, if you have any questions.

c: Diane Best, Assistant Attorney General
Gary Nies, Bennett County Weed Board
Ginger Price, USFWS
Tim Olson, G,F&P Water Permit Coordinator
Tom Young, Bureau of Indian Affairs

enclosure

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorneys for Applicant

John Kunz
U.S. Department of the Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorneys for Petitioners

Jane M. Farrell and Patrick M. Ginsbach
Farrell, Farrell & Ginsbach
441 N. River St.
Hot Springs, SD 57747

Attorney for Bennett County

Paul Bengford, States Attorney
P.O. Box 688
Martin, SD 57551

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF UNITED STATES FISH AND WILDLIFE SERVICE APPLICATION NO. 2300-2 (LAKE CREEK)	))))	DIVISION'S MOTION FOR REVISED SCHEDULING ORDER AND PROPOSED ORDER

The Department of Environment and Natural Resources, Division of Environmental Regulation (hereinafter Division), hereby requests the following revised procedural scheduling order in the above-referenced matter:

1. That all parties complete any discovery desired by October 4, 1996, except as otherwise ordered upon good cause shown, or as agreed to among the parties. This discovery schedule contemplates a period of no longer than twenty days for responding to interrogatories or requests for production of documents. In order that documents may be provided and interrogatories answered by the discovery deadline, requests would need to be made sufficiently in advance to accommodate the 20-day period.

2. That lists of exhibits intended to be introduced at the hearing be exchanged by all parties on or before October 25, 1996, except as otherwise ordered upon good cause shown or as agreed to among the parties.

3. That a prehearing brief be filed by the applicant on October 18, 1996. Responsive briefs are to be filed on or before November 1,1996. If the applicant chooses to file an answering brief, the due date is November 15,1996.

4. That all motions (including motions for admission of exhibits or testimony previously filed or entered into evidence in Vested Right Claim No. 1927-2) be filed by Octobber 25, 1996, and that responses be filed by November 8,1996, except as otherwise ordered upon good cause shown.

5. That by November 15, 1996 the parties file a list of testimony or exhibits (if any) that have been stipulated to by the parties except as otherwise ordered upon good cause shown.

6. That a final prehearing conference on any outstanding motions (if there are any) be held on November 15, 1996, by teleconference before Prehearing Chairman Rodney Freeman.

7. That hearing in the above-entitled matter begin on December 5, 1996, at the Matthews Training Center in Pierre, South Dakota. The time is tentatively set for 8:30 a.m.

8. That any dates pertaining to the submission of documents pertain to the filing (mailing by first class mail) of the documents. All original documents are to be filed with the Division, with copies to be mailed to Prehearing Chairman Freeman.

Dated this 26th day of June, 1996.

Diane Best

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

Counsel for the Water Rights Program

ORDER

Having considered the procedural motion filed and the positions of the respective parties, the Board hereby

ORDERS that the above revised Scheduling Order is adopted as set forth in the Division's motion.

Dated this 10th day of July, 1996.

Dwayne Rollag, Chairman
South Dakota Water Management Board

CERTIFICATION

I hereby certify that on July 12, 1996, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated July 11, 1996, along with a copy of the Division's Motion for Revised Scheduling Order and Proposed Order, and a copy of the Parties of Record list, regarding Revised Procedural Scheduling Order for Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service, addressed as stated below, and on the attached list:

Gary Nies, Bennett County Weed Board, Box M, Courthouse, Martin, SD 57551.

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

Tom Young, Bureau of Indian Affairs, 115 4th Ave. SE, Aberdeen, SD 57401.

A copy of the above described Notice and attachments were sent Inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.

Tim Olson, Water Permits Coordinator, Department of GF&P, Joe Foss Building.

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 16th day of July, 1996

JOHN HATCH
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA

Notary Public

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

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Mountain-Prairie Region

IN REPLY REFER TO:

BA WTR
SD WR
Mail Stop 60189

MAILING ADDRESS:
Post Office Box 25486
Denver Federal Center
Denver, Colorado 80225-0486

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228-1807

OCT 1996
WATER RIGHTS
PROGRAM
Pierre, SD

Mr. John Hatch
Department of Environment
and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

OCT 2 4 1996

Dear Mr. Hatch:

I am pleased to advise you that the Fish and Wildlife Service and neighboring landowners of the Lacreek National Wildlife Refuge have reached a tentative agreement with regard to their objections to our pending Application No. 2300-2. Upon signature by all parties, a copy of the agreement will be forwarded to your office.

Because a part of that agreement is the construction and relocation of a new structure at "Diversion No. 4", I request that our application be amended (this letter will therefore constitute our Second Amended Application) to reflect the new location of Diversion No. 4 in the NW1/4 SE1/4 Section 24, T36N R37W, 6th P.M. instead of the NE1/4 SW1/4 of said Section, Township, and Range. The water permit the Service is seeking should also permit the following described temporary construction activities. During construction of this new structure on Lake Creek, the Refuge will clean out the north-south ditch (formerly known as the Brown Ditch) located downstream and south of Diversion No. 4, and temporarily divert and channelize water from Lake Creek to connect to said ditch. This ditch will then contain the water and re-introduce it to the existing Lake Creek channel downstream of the construction area. The planned bypass channel shall be constructed with a 10-foot bottom width and be 4-feet deep. The sideslopes shall be at 1-1/2 to 1. The material excavated shall be used to provide a cutoff dike both upstream and downstream of the new Diversion No. 4 structure. These cutoff dikes shall be removed and replaced in the excavation area for the bypass channel once construction of Diversion No. 4 is complete. I have enclosed a map of the subject area as well as a copy of the design of the new structure for your information and review.

Diversion No. 4 is being maintained to protect State threatened and endangered fish species by preventing the movement of carp upstream from Refuge pools and will impound 1 acre-foot of water from January 1 through December 31 annually.

Because this amendment will necessitate readvertisement of the Notice of Hearing, if possible during the short time frame that we are working with, please advise this office of the newspaper selected, prior to publication, so that the necessary documents can be forwarded to them.

Thank you for all your assistance in this matter.

Sincerely,

Cheryl C. Williss
Chief, Division of Water Resources

Enclosures

cc: Patrick Ginsbach, Esq.
Farrell, Farrell & Ginsbach
441 North River Street
Hot Springs, SD 57747

Brett Heath
HWC 3, Box 19
Martin, SD 57551

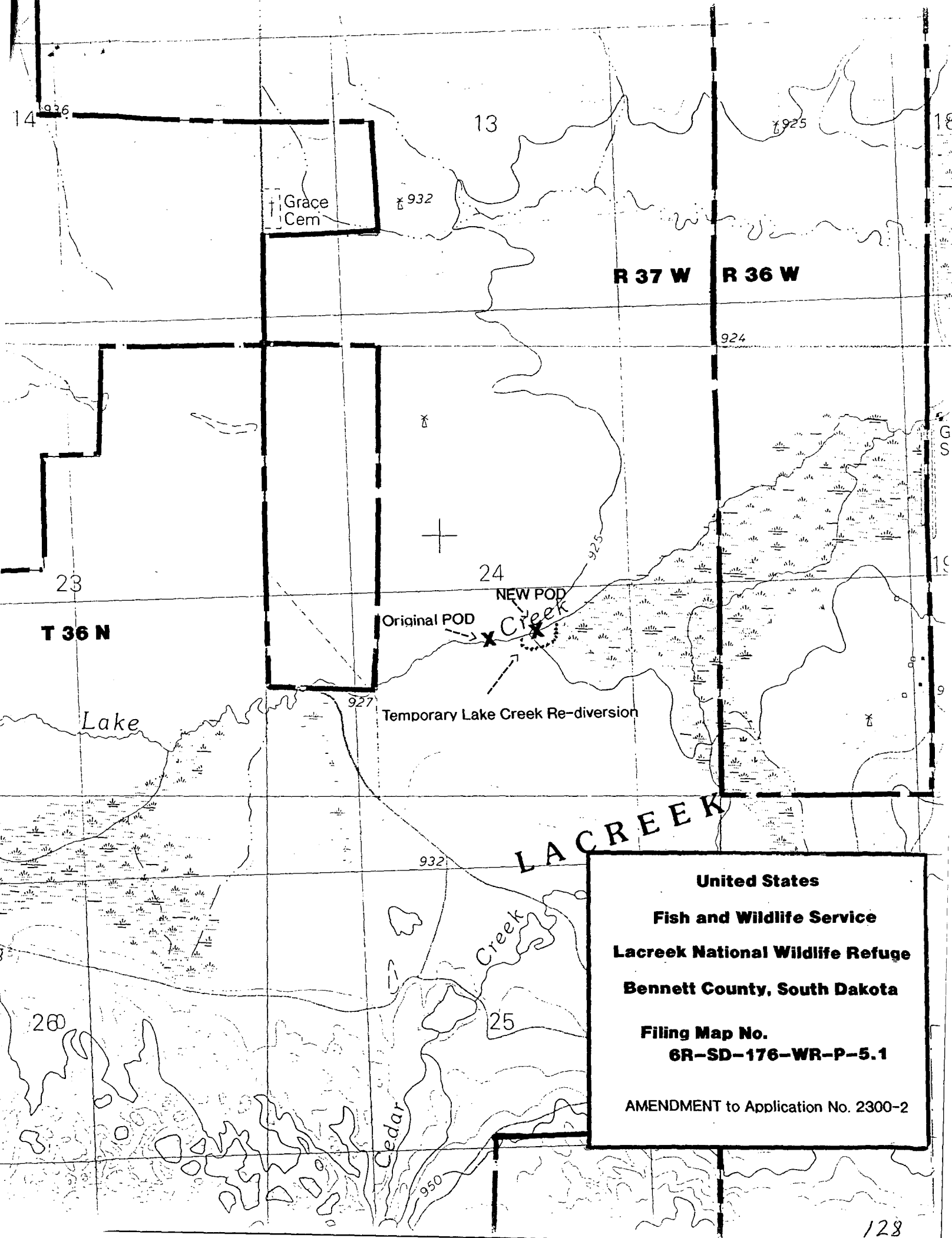
Lawrence Kocer
P.O. Box 156
Martin, SD 57551

John Kunz
Regional Solicitor's Office
755 Parfet, Suite 151
Lakewood, CO 80215

Charles Emley
P.O. Box 673
Martin, SD 57551

Raymond Kocer
P.O. Box 388
Martin, SD 57551

Paul Bengford, Esq.
P.O. Box 626
Martin, SD 57551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Cedar
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United States
Fish and Wildlife Service
Lacreek National Wildlife Refuge
Bennett County, South Dakota
Filing Map No.
6R-SD-176-WR-P-5.1
AMENDMENT to Application No. 2300-2

REVISED SUPPLEMENTAL REPORT ON
WATER PERMIT APPLICATION NO. 2300-2
UNITED STATES FISH AND WILDLIFE SERVICE
OCTOBER 25, 1996

Background

The U.S. Fish and Wildlife Service (USFWS) amended Water Permit Application No. 2300-2 deleting the irrigation portion of the application. Diversion structures (Nos. 1 and 3) located in the NW 1/4 SW 1/4, Section 22 and SE 1/4 SW 1/4, Section 23; all in T36N-R37W are also deleted. Retained in the amended application is a stoplog structure located in the NE 1/4 SW 1/4, Section 24, T36N-R37W.

The USFWS requested a second amendment to reflect a proposed new location of the stoplog structure. A new stoplog structure is proposed for location in the NW 1/4 SE 1/4 Section 24, T36N-R37W. This will replace the existing stoplog structure.

Discussion

The amended application requests approval of a small dam located in the channel of Lake Creek. The dam is known as structure No. 4 on LaCreek National Wildlife Refuge and stores approximately one acre-foot of water. The purpose of the structure is to protect the state endangered Pearl Dace and the state threatened Plains Topminnow and Northern Red-bellied Dace.

Conclusions

1. Approval of amended Water Permit Application No. 2300-2 will not affect other existing water rights.

2. Storage of water behind the structure must not cause flooding of neighboring landowner property.

Delvin D. Brosz, PE
Natural Resources Engineer IV

REVISED RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT APPLICATION NO. 2300-2, United States Fish and Wildlife Service

Pursuant to SDCL 46-2A-2, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Water Permit Application No. 2300-2, United States Fish and Wildlife Service, c/o Cheryl Williss, PO Box 25486, Denver Federal Center, Denver, CO 80225

The Chief Engineer is recommending APPROVAL of Application No. 2300-2 because 1) there is reasonable probability that there is unappropriated water available for the applicant's proposed use, 2) the proposed diversion can be developed without unlawful impairment of existing rights, 3) the proposed use is a beneficial use and 4) in the public interest with the following qualifications:

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

2. Permit No. 2300-2 authorizes storage of 1.0 acre-foot of water by constructing a new stoplog structure which replaces the existing structure (known as Diversion No. 4). The purpose of the structure is to prevent carp from traveling upstream. This will protect the State Endangered Pearl Dace, State Threatened Plains Topminnow and Northern Red-Bellied Dace whose habitat is upstream of the stoplog structure.

3. Low flows as needed for downstream domestic use, including livestock water and prior water rights must be by-passed.

See report on application for additional information.

JOHN HATCH, Chief Engineer
October 28, 1996

NOTE: This is the second revised recommendation for Application No. 2300-2. This recommendation is for the construction and relocation of a new stoplog structure It shall also be noted that the Chief Engineer acknowledges the temporary construction activities set forth in a letter from Cheryl Williss, USFWS, dated October 24, 1996. The USFWS must obtain any necessary Corp of Engineer's 404 permit and 401 water quality certification for the construction activity.

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

October 29, 1996

NOTICE

TO: Terry T. Terrell, Deputy Regional Director
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver, CO 80225
and Parties of Record (see attached list)

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

SUBJECT: U.S. Fish and Wildlife Service Amendment to Water Permit Application No. 2300-2, LaCreek National Wildlife Refuge and Hearing Schedule Before Water Management Board

The U. S. Fish and Wildlife Service has submitted a second amendment to Water Permit Application No. 2300-2. The amendment proposes to change the location of the dam known as Diversion No. 4 on LaCreek National Wildlife Refuge. The original notice of hearing for Application No. 2300-2 was published May 18 and 25, 1994 in the Bennett Co. Booster II. Enclosed is a copy of the amended notice of hearing to be published November 6 and 13, 1996, in the newspaper.

The Water Management Board will consider Application No. 2300-2 at 8:30 am, December 5, 1996 in the Conference Room, Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre, SD.

Please contact Diane Best, Assistant Attorney General at (605) 773-3215, if you have any questions.

c: Diane Best, Assistant Attorney General
Gary Nies, Bennett County Weed Board
Ginger Price, USFWS
Tim Olson, G,F&P Water Permit Coordinator
Tom Young, Bureau of Indian Affairs

enclosure

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorneys for Applicant

John Kunz
U.S. Department of the Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorneys for Petitioners

Jane M. Farrell and Patrick M. Ginsbach
Farrell, Farrell & Ginsbach
441 N. River St.
Hot Springs, SD 57747

Attorney for Bennett County

Paul Bengford, States Attorney
P.O. Box 688
Martin, SD 57551

Instruction to Newspaper - Publish first Notice on November 6, 1996 with the second publication 7 days later. The applicant is responsible for payment.

NOTICE OF HEARING on Amended Application No. 2300-2 to Appropriate Water

Notice is given that the U. S. Fish and Wildlife Service, PO Box 25486, Denver Federal Center, Denver, CO 80225 has filed an amendment to Water Permit Application No. 2300-2, LaCreek National Wildlife Refuge. The amendment to the application proposes to authorize and relocate an existing stoplog structure on Lake Creek.

Application No. 2300-2 was published May 18 and 25, 1994 in the Bennett County Booster II. The application originally requested an appropriation of 9.43 cubic feet of water per second from three diversion points along Lake Creek to irrigate 660 acres. The application also proposed to authorize impoundment of 1.0 acre feet of water at an existing stoplog structure (known at Diversion No. 4) on Lake Creek located in the NE1/4 SW1/4 Section 24, T36N, R37W. The purpose of the stoplog structure is to protect the State Endangered Pearl Dace, State Threatened Plains Topminnow and Northern Red-Bellied Dace by preventing carp from traveling upstream from the LaCreek National Wildlife Refuge pools.

In 1995, the U. S. Fish and Wildlife Service (USFWS) amended the pending application by removing the irrigation component. The USFWS has requested a second amendment to reflect a proposed new location of the stoplog structure. The location of the new stoplog structure proposed by Application No. 2300-2 is to be located in the NW1/4 SE1/4 Section 24, T36N, R37W.

In addition to Application No. 2300-2, this publication serves as notice of temporary construction activities associated with diverting Lake Creek around the construction site. During construction of this new structure on Lake Creek, the USFWS will clean out the north-south ditch (formerly known as the Brown Ditch) located downstream and south of Diversion No. 4 and temporarily divert and channelize water from Lake Creek to connect to said ditch. This ditch will contain the water and re-introduce it to the Lake Creek channel downstream of the construction area. Upon completing construction of the stoplog structure, Lake Creek flow path will be returned to normal

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 2300-2 because 1) unappropriated water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by November 25, 1996. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained. Petitioners to the original notice of hearing published May 18 and 25, 1994, in the Bennett County Booster II need not file another petition. These petitioners retain their party status and may present testimony at the hearing.

The Water Management Board will consider the application at 8:30 am, on December 5, 1996, in the Conference Room, Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre, SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny the application based on the facts presented at the public hearing. The hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by Novmeber 25, 1996.

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 November 25, 1996, at the above Water Rights Program address to request copies of information pertaining to the application, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

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

CERTIFICATION

I hereby certify that on October 29, 1996, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated October 29, 1996, along with a copy of the Parties or Record list and a copy of the Notice of Publication, regarding U.S. Fish and Wildlife Service Amendment to Water Permit Application No. 2300-2, LaCreek National Wildlife Refuge and Hearing Schedule Before Water Management Board, addressed as stated below, and on the attached Parties of Record list:

Gary Nies, Bennett county Weed Board, Box M. Courthouse, Martin, SD 57551.

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

Tom Young, Bureau of Indian Affairs, 115 4th Ave. SE, Aberdeen, SD 57401.

A copy of the above described Notice and attachments were sent inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.

Tim Olson, Water Permits Coordinator, Department of Game, Fish & Parks, Joe Foss Building.

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 1st day of November, 1996

JOHN HATCH
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA

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

October 29, 1996

Bennett Co. Booster II
Box 610
Martin, SD 57551-0610

ATTENTION: Legal Department

Enclosed is a amended Notice of Hearing on Application No. 2300-2 to be published twice. Please publish the first notice on November 6, 1996, 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 U.S. Fish and Wildlife Service, c/o Cheryl Williss, PO Box 25486, Denver, CO 80225 (Ph # 303 236-5321).

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

Please be sure the SECOND publication is returned IMMEDIATELY with the enclosed Proof of Publication form. DO NOT WAIT until the end of the month or the billing cycle. No action may be taken on the permit application until proof of publication has been received.

Sincerely,

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

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

FIRST TRANSMITTAL NOTICE

No. 2300-2

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

Date_____

We are in receipt of your letter of October 29, 1996 enclosing Notice of Hearing to Appropriate Water by Application No. 2300-2 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 November 6, 1996 with the second publication 7 days later. The applicant is responsible for payment.

NOTICE OF HEARING on Amended Application No. 2300-2 to Appropriate Water

Notice is given that the U. S. Fish and Wildlife Service, PO Box 25486, Denver Federal Center, Denver, CO 80225 has filed an amendment to Water Permit Application No. 2300-2, LaCreek National Wildlife Refuge. The amendment to the application proposes to authorize and relocate an existing stoplog structure on Lake Creek.

Application No. 2300-2 was published May 18 and 25, 1994 in the Bennett County Booster II. The application originally requested an appropriation of 9.43 cubic feet of water per second from three diversion points along Lake Creek to irrigate 660 acres. The application also proposed to authorize impoundment of 1.0 acre feet of water at an existing stoplog structure (known at Diversion No. 4) on Lake Creek located in the NE1/4 SW1/4 Section 24, T36N, R37W. The purpose of the stoplog structure is to protect the State Endangered Pearl Dace, State Threatened Plains Topminnow and Northern Red-Bellied Dace by preventing carp from traveling upstream from the LaCreek National Wildlife Refuge pools.

In 1995, the U. S. Fish and Wildlife Service (USFWS) amended the pending application by removing the irrigation component. The USFWS has requested a second amendment to reflect a proposed new location of the stoplog structure. The location of the new stoplog structure proposed by Application No. 2300-2 is to be located in the NW1/4 SE1/4 Section 24, T36N, R37W.

In addition to Application No. 2300-2, this publication serves as notice of temporary construction activities associated with diverting Lake Creek around the construction site. During construction of this new structure on Lake Creek, the USFWS will clean out the north-south ditch (formerly known as the Brown Ditch) located downstream and south of Diversion No. 4 and temporarily divert and channelize water from Lake Creek to connect to said ditch. This ditch will contain the water and re-introduce it to the Lake Creek channel downstream of the construction area. Upon completing construction of the stoplog structure, Lake Creek flow path will be returned to normal

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 2300-2 because 1) unappropriated water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by November 25, 1996. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained. Petitioners to the original notice of hearing published May 18 and 25, 1994, in the Bennett County Booster II need not file another petition. These petitioners retain their party status and may present testimony at the hearing.

The Water Management Board will consider the application at 8:30 am, on December 5, 1996, in the Conference Room, Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre, SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny the application based on the facts presented at the public hearing. The hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by Novmeber 25, 1996.

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 November 25, 1996, at the above Water Rights Program address to request copies of information pertaining to the application, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

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

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.

October 29, 1996

Terry T. Terrell, Deputy Regional Director
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver, CO 80225

Dear Terrell:

Second amended Water Permit Application No. 2300-2 has been examined and found to comply with the South Dakota Water Laws and applicable rules. A notice of hearing has been sent to the Publisher of the Bennett County Booster II printed at Martin, SD (Address - Box 610, Martin, SD 57551-0610 / Ph # 605 685-6866). For your information, a copy of the notice, the recommendation of the Chief Engineer and a report on the application are enclosed. Please review the notice prior to publication and notify this office, if you have any corrections or questions.

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

Sincerely,

Eric Gronlund /ks

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

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

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

November 13, 1996

NOTICE

TO: Terry T. Terrell, Deputy Regional Director
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver, CO 80225
and Parties of Record (see attached list)

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

SUBJECT: Cancellation of December 5, 1996, Hearing on Amended Water Permit Application No. 2300-2 before the Water Management Board

Amended Water Permit Application No. 2300-2 filed by the U. S. Fish and Wildlife Service was to be public noticed scheduling a hearing before the Water Management Board on December 5, 1996. However, the Bennett County Booster II failed to receive timely authorization to publish the notice. Since the notice of hearing was not published, the amended application will not be considered by the Board on December 5, 1996.

Application No. 2300-2 will now be scheduled for the March 5 and 6, 1997, Water Management Board meeting. Future notice will be provided to all parties of record.

Please contact Eric Gronlund, Water Rights Program (605) 773-3352 or Diane Best, Assistant Attorney General at (605) 773-3215, if you have any questions.

c: Diane Best, Assistant Attorney General
Bennett County Weed Board
Ginger Price, USFWS
Tim Olson, G,F&P Water Permit Coordinator
Tom Young, Bureau of Indian Affairs

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorneys for Applicant

John Kunz
U.S. Department of the Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorneys for Petitioners

Jane M. Farrell and Patrick M. Ginsbach
Farrell, Farrell & Ginsbach
441 N. River St.
Hot Springs, SD 57747

Attorney for Bennett County

Paul Bengford, States Attorney
P.O. Box 688
Martin, SD 57551

CERTIFICATION

I hereby certify that on November 13, 1996, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated November 13, 1996, along with a copy of the Parties of Record List, regarding Cancellation of December 5, 1996, Hearing on Amended Water Permit Application No. 2300-2 before the Water Management Board, addressed as stated below, and on the attached Parties of Record list:

Bennett county Weed Board, Box M. Courthouse, Martin, SD 57551.

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

Tom Young, Bureau of Indian Affairs, 115 4th Ave. SE, Aberdeen, SD 57401.

A copy of the above described Notice and attachment were sent inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.

Tim Olson, Water Permits Coordinator, Department of Game, Fish & Parks, Joe Foss Building.

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 14th day of November, 1996

JOHN HATCH
NOTARY PUBLIC
SEAL SOUTH DAKOTA SEAL

Notary Public

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

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Mountain-Prairie Region

IN REPLY REFER TO:
BA WTR
WR SD
Mail Stop 60189

MAILING ADDRESS:
Post Office Box 25486
Denver Federal Center
Denver, Colorado 80225-0486

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228-1807

NOV 1996
WATER RIGHTS
PROGRAM
Pierre, SD

NOV 2 2 1996

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

Dear Mr. Hatch:

This letter is in response to your memorandum of November 13 concerning cancellation of the December 5 Hearing on Amended Water Permit Application No. 2300-2 before the Water Management Board.

Because of the short time frame involved, on October 29 Eric Gronlund, of your Water Rights Program staff, faxed the Service a copy of the Notice of Hearing to be published in the Bennett County Booster II beginning November 6, 1996. Also on October 29, the required Advertising Order with a note attached that the newspaper must receive approval prior to publication was hand-carried to the Service Contracting office for processing.

On November 5, an individual in the Service's Contracting office faxed the Advertising Order to the newspaper and spoke with an individual in the BOOSTER office. Service personnel assumed that these actions were sufficient to ensure publication.

It is unfortunate that the hearing will be delayed until March 1997. However, I did want you to be aware that the Service made every attempt to provide this authorization in a timely manner.

Sincerely,

Cheryl C. Williss

Cheryl C. Williss
Chief, Division of Water Resources

cc: See Attached List

cc: Bennett County Booster II
P.O. Box 610
Martin, SD 57551

John Kunz
Office of the Solicitor
Rocky Mountain Region
755 Parfet, Suite 151
Lakewood, CO 80215

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Patrick M. Ginsbach
Farrell, Farrell & Ginsbach
441 N. River St.
Hot Springs, SD 57747

Charles Emley
Box 673
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Bennett County

BOOSTER

Dale and Mary Lewis Box 610 Martin, South Dakota 57551 502 2nd Street

Phone 605-685-6866
Fax 605-685-6535

November 26, 1996

John Hatch, Chief Engineer
Department of Environment and
Natural Resources
Joe Foss Building
523 East Capitol
Pierre SD 57501-3181

Dear Mr. Hatch:

After receiving a copy of Ms. Cheryl Williss' letter to you regarding cancellation of the December 5 Hearing on Amended Water Permit Application No. 2300-2, I checked our file to confirm the date on which we received authority from the Fish and Wildlife Service to publish the Notice of Hearing.

An individual from the Service's Contracting office faxed the Advertising Order to the Bennett County Booster on Wednesday, November 6, not Tuesday, November 5, as Ms. Williss' letter states. This individual called first to get our fax number. I recall asking her why the Fish and Wildlife had waited from 10/24/96, the date on the public voucher, until 10:30 a.m. on November 6 to send approval for publication. She said she did not know, that the order had just been given to her.

The Bennett County Booster is a weekly paper, published on Wednesday. Legal notices are in the second section of the paper which is printed late on Tuesday afternoon. By 11 a.m. Wednesday our pages are almost completely made up and ready for dark room processing.

I would take exception to Ms. Williss' statement that "the Service made every attempt to provide this authorization in a timely manner." Note for yourself "11/06/96 WED 10:35 FAX" on the attached copy of the Public Voucher for Advertising.

Sincerely,

Mary Lewis

Mary Lewis

cc: John Kunz, Office of the Solicitor, Rocky Mountain Region
Brett Heath, HC 3, Box 20, Martin SD 57551
Patrick M. Ginsbach, 441 N. River Street, Hot Springs SD 57747
Charles Emley, Box 673, Martin SD 57551
Raymond Kocer, Box 388, Martin SD 57551
Lawrence Kocer, Box 156, Martin SD 57551

Attn: Dale

PUBLIC VOUCHER FOR ADVERTISING

	For Agency Use Only
DEPARTMENT OR ESTABLISHMENT, BUREAU OR OFFICE Dept. of the Interior, Fish and Wildlife Service	VOUCHER NUMBER
PLACE VOUCHER PREPARED / DATE PREPARED: 10/24/96	SCHEDULE NUMBER
NAME OF PUBLICATION: Bennett County Booster NAME OF PUBLISHER OR REPRESENTATIVE	PAID BY
ADDRESS (*Street, room number, city, State, and ZIP code*) P.O. Box 610 Martin, SD 57551	

CHARGES

TYPEFACE (*size of type*) — POINT PER (*inch, square, word, or folio*)

Line Rates

	NUMBER OR LINES (*Indicate counted or space*)	COST PER LINE	TOTAL COST
FIRST INSERTION		$	$
ADDITIONAL INSERTIONS GIVE NUMBER ▶			
TOTAL			$

	NUMBER OF UNITS (*Indicate inch, square, word, folio*)	COST PER UNIT	TOTAL COST
FIRST INSERTION		$	$
ADDITIONAL INSERTIONS GIVE NUMBER ▶			
TOTAL			$

ach one copy of advertisement (*including upper and lower rules*) to each y of voucher here. If copy is not available sign the following affidavit.

TOTAL LINE RATES AND OTHER RATES	
LESS DISCOUNT AT %	
BALANCE DUE	$
VERIFIED (*Initials*)	

AFFIDAVIT

represents a true billing for the attached advertising order, with specifications and copy, which has been completed.

ATURE OF PUBLISHER OR REPRESENTATIVE

DATE

FOR AGENCY USE ONLY

RTISEMENT PUBLISHED IN	DATE PUBLISHED

ify that the advertisement described above appeared in the named publication and that this account is correct and eligible for ent.

TURE AND TITLE OF CERTIFYING OFFICER	DATE
TURE AND TITLE OF AUTHORIZING OFFICER	DATE
ACCOUNTING CLASSIFICATION	PAID BY CHECK NUMBER

ie ability to certify and authority to approve are combined in one person enter "N/A" (*not applicable*) here.

★ U.S. GPO: 1974—555-044

14

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

December 11, 1996

TO: Parties of Record in the Matter of Water Permit Application No. 2300-2
(see attached list)

FROM: Eric Gronlund
Water Rights Program
(605) 773-3352

SUBJECT: Notice of Hearing for U.S. Fish and Wildlife Service's Water Permit Application No. 2300-2, LaCreek National Wildlife Refuge

The notice of hearing for amended Water Permit Application No. 2300-2 is now scheduled to be published in the Bennett County Booster on January 8 and 15, 1997. The amendment proposes to change the location of the dam known as Diversion No. 4 on the LaCreek National Wildlife Refuge. Enclosed is a copy of the amended notice of hearing.

The Water Management Board will consider Application No. 2300-2 at 1:00 pm, March 5, 1997, in the Conference Room, Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre, SD. The agenda time is an estimate and may be delayed due to prior agenda items.

Please contact Diane Best, Assistant Attorney General at (605) 773-3215 or myself, if you have any questions.

c: Diane Best, Assistant Attorney General
Bennett County Weed Board
Ginger Price, USFWS
Tim Olson, G,F&P Water Permit Coordinator
Tom Young, Bureau of Indian Affairs

enclosure

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell; Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorneys for Applicant

John Kunz
U.S. Department of the Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorneys for Petitioners

Jane M. Farrell and Patrick M. Ginsbach
Farrell, Farrell & Ginsbach
441 N. River St.
Hot Springs, SD 57747

Attorney for Bennett County

Paul Bengford, States Attorney
P.O. Box 688
Martin, SD 57551

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

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

December 11, 1996

Terry T. Terrell, Deputy Regional Director
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver, CO 80225

Dear Mr. Terrell:

Second amended Water Permit Application No. 2300-2 has been examined and found to comply with the South Dakota Water Laws and applicable rules. A notice of hearing has been sent to the Publisher of the Bennett County Booster printed at Martin, SD (Address - Box 610, Martin, SD 57551-0610 (Ph # 605 685-6866). The notice of hearing is scheduled to be published on January 8 and 15, 1997. Since the holiday season is upon us, I am sending the notice at this time to allow ample time to contact the newspaper and authorize publication.

For your information, a copy of the notice is enclosed. Please review the notice prior to publication and notify this office, if you have any corrections or questions.

Be sure to contact the above newspaper to authorize publication of your Notice of Hearing and to arrange for payment. The publisher has been instructed to publish your notice once each week for two consecutive weeks. The newspaper has been instructed to send us the Proof of Publication.

Sincerely,

Eric Gronlund

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

c: Ginger Price, USFWS

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

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

December 11, 1996

Bennett Co. Booster
Box 610
Martin, SD 57551-0610

ATTENTION: Mary Lewis

Enclosed is a amended Notice of Hearing on Application No. 2300-2 to be published twice. Please publish the first notice on January 8, 1997, with the second publication 7 days later. Since the holiday season is upon us, I am sending the notice at this time to allow the U.S. Fish and Wildlife Service ample time to contact the Booster and authorize publication.

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 U.S. Fish and Wildlife Service, c/o Cheryl Williss, PO Box 25486, Denver, CO 80225 (Ph # 303 236-5321).

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

Please be sure the SECOND publication is returned IMMEDIATELY with the enclosed Proof of Publication form. DO NOT WAIT until the end of the month or the billing cycle. No action may be taken on the permit application until proof of publication has been received.

Sincerely,

Eric Gronlund

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

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

FIRST TRANSMITTAL NOTICE

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

No. 2300-2

Date_____

We are in receipt of your letter of December 11, 1996 enclosing Notice of Hearing to Appropriate Water by Application No. 2300-2 which was first published in our issue of the BENNETT COUNTY BOOSTER. ENCLOSED IS A COPY OF THIS FIRST PUBLICATION.

_____

Name Newspaper

Instruction to Newspaper - Publish first Notice on January 8, 1997 with the second publication 7 days later. The applicant is responsible for payment.

NOTICE OF HEARING on Amended Application No. 2300-2 to Appropriate Water

Notice is given that the U. S. Fish and Wildlife Service, PO Box 25486, Denver Federal Center, Denver, CO 80225 has filed an amendment to Water Permit Application No. 2300-2. The amendment to the application proposes to authorize and relocate an existing stoplog structure on Lake Creek.

Application No. 2300-2 was published May 18 and 25, 1994 in the Bennett County Booster. The application originally requested an appropriation of 9.43 cubic feet of water per second from three diversion points along Lake Creek to irrigate 660 acres. The application also proposed to authorize impoundment of 1.0 acre feet of water at an existing stoplog structure (known at Diversion No. 4) on Lake Creek located in the NE1/4 SW1/4 Section 24, T36N, R37W. The purpose of the stoplog structure is to protect the State Endangered Pearl Dace, State Threatened Plains Topminnow and Northern Red-Bellied Dace by preventing carp from traveling upstream from the LaCreek National Wildlife Refuge pools.

In 1995, the U. S. Fish and Wildlife Service (USFWS) amended the pending application by removing the irrigation component. The USFWS has requested a second amendment to reflect a proposed new location of the stoplog structure. The location of the new stoplog structure proposed by Application No. 2300-2 is to be located in the NW1/4 SE1/4 Section 24, T36N, R37W.

In addition to Application No. 2300-2, this publication serves as notice of temporary construction activities associated with diverting Lake Creek around the construction site. During construction of this new structure on Lake Creek, the USFWS will clean out the north-south ditch (formerly known as the Brown Ditch) located downstream and south of Diversion No. 4 and temporarily divert and channelize water from Lake Creek to connect to said ditch. This ditch will contain the water and re-introduce it to the Lake Creek channel downstream of the construction area. Upon completing construction of the stoplog structure, Lake Creek flow path will be returned to normal.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 2300-2 because 1) unappropriated water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by February 21, 1997. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained. Petitioners to the original notice of hearing published May 18 and 25, 1994, in the Bennett County Booster need not file another petition. These petitioners retain their party status and may present testimony at the hearing.

The Water Management Board will consider the application at 1:00 pm, on March 5, 1997, in the Conference Room, Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre, SD. The agenda time is an estimate and may be delayed due to prior agenda items. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny the application based on the facts presented at the public hearing. The hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by February 21, 1997.

The hearing will be an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by February 21, 1997, at the above Water Rights Program address to request copies of information pertaining to the application, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

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

Form 8

JAN 1997 WATER RIGHTS PROGRAM Pierre, SD

PROOF OF PUBLICATION

STATE OF SOUTH DAKOTA)
) SS
County of Bennett)

I, Dale R. Lewis

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

printed and published in Martin

County of Bennett and state of South Dakota. The notice was published in the newspaper on the following two dates:

January 8, 1997

January 15, 1997

Cost of Printing $84.78

(Signature)

Editor/Publisher
(Title)

January 15, 1997
(Date Signed)

Subscribed and sworn to before me this 15th day of January, 1997.

Notary Public, County of Bennett, South Dakota

MARY LEWIS NOTARY PUBLIC SOUTH DAKOTA SEAL

My commission expires June 27, 2002.

NOTICE OF HEARING

NOTICE OF HEARING on Amended Application No. 2300-2 to Appropriate Water

Notice is given that the U. S. Fish and Wildlife Service, PO Box 25486, Denver Federal Center, Denver, CO 80225 has filed an amendment to Water Permit Application No. 2300-2. The amendment to the application proposes to authorize and relocate an existing stoplog structure on Lake Creek.

Application No. 2300-2 was published May 18 and 25, 1994, in the Bennett County Booster. The application originally requested an appropriation of 9.43 cubic feet of water per second from three diversion points along Lake Creek to irrigate 660 acres. The application also proposed to authorize impoundment of 1.0 acre feet of water at an existing stoplog structure (known at Diversion No. 4) on Lake Creek located in the NE1/4SW1/4 Section 24, T36N, R37W. The purpose of the stoplog structure is to protect the State Endangered Pearl Dace, State Threatened Plains Topminnow and Northern Red-Bellied Dace by preventing carp from traveling upstream from the LaCreek National Wildlife Refuge pools.

In 1995, the U. S. Fish and Wildlife Service (USFWS) amended the pending application by removing the irrigation component. The USFWS has requested a second amendment to reflect a proposed new location of the stoplog structure. The location of the new stoplog structure proposed by Application No. 2300-2 is to be located in the NW1/4SE1/4 Section 24, T36N, R37W.

In addition to Application No. 2300-2, this publication serves as notice of temporary construction activities associated with diverting Lake Creek around the construction site. During construction of this new structure on Lake Creek, the USFWS will clean out the north-south ditch (formerly known as the Brown Ditch) located downstream and south of Diversion No. 4 and temporarily divert and channelize water from Lake Creek to connect to said ditch. This ditch will contain the water and re-introduce it to the Lake Creek channel downstream of the construction area. Upon completing construction of the stoplog structure, Lake Creek flow path will be returned to normal.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 2300-2 because 1) unappropriated water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E. Capitol, Pierre, SD 57501 (605-773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by February 21, 1997. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained. Petitioners to the original notice of hearing published May 18 and 25, 1994, in the Bennett County Booster need not file another petition. These petitioners retain their party status and may present testimony at the hearing.

The Water Management Board will consider the application at 1:00 p.m., on March 5, 1997, in the Conference Room, Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre, S.D. The agenda time is an estimate and may be delayed due to prior agenda items. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny the application based on the facts presented at the public hearing. The hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by February 21, 1997.

The hearing will be an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by February 21, 1997, at the above Water Rights Program address to request copies of information pertaining to the application, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

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

2TC-31

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant. --- BENNETT COUNTY, and BENNETT COUNTY WEED BOARD, Intervenors.	**APPLICATION NO. 2300-2** **REQUEST FOR AUTOMATIC EXTENSION OF HEARING DATE**

COMES NOW the Applicant, United States Fish and Wildlife Service, and pursuant to S.D. CODIFIED LAWS ANN. §§ 46-2A-4(9) and 46-2A-5, hereby requests an automatic extension of the hearing of the captioned matter currently set for 1:00 P.M. on March 5, 1997.

DATED this 30th day of January, 1997.

John R. Kunz

JOHN R. KUNZ, Esq.
Counsel for Applicant
755 Parfet Street, Suite 151
Lakewood, CO 80215
(303) 231-5353 (Ext. 339)
(303) 231-5363 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 1997, true and correct copies of the foregoing **REQUEST FOR AUTOMATIC EXTENSION OF HEARING DATE** were mailed postage pre-paid in the United States Mail to:

John Hatch
Chief Engineer
Department of Environment and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

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

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

Paul Bengford, Esq.
Bennett County States Attorney
P.O. Box 628
Martin, SD 57551

Tom Lloyd, Esq.
Assistant U.S. Attorney
337 Federal Bldg.
225 South Pierre
Pierre, SD 57501-2489

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC, Box 20
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Sherry Flows

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

February 12, 1997

NOTICE

TO: Terry T. Terrell, Deputy Regional Director
U. S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225
Parties of Record (see attached list)

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

SUBJECT: Automatic Delay of U.S. Fish and Wildlife Service's Amended Water Permit Application No. 2300-2, LaCreek National Wildlife Refuge

The U.S. Fish and Wildlife Service has requested an automatic delay of the March 5, 1997, hearing before the Water Management Board on amended Application No. 2300-2. Therefore, the evidentiary hearing on amended Application No. 2300-2 is automatically delayed pursuant to SDCL 46-2A-4 and 46-2A-5 and will not be held on March 5, 1997.

The Board will consider prehearing motions including a scheduling order on March 6, 1997, at 8:30 AM (CST), in the Conference Room, Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre, SD. Prehearing motions are to be filed with all parties by February 21, 1997. The March 6, 1997, appearance before the Board will be limited to consideration of prehearing motions.

The evidentiary hearing before the Water Management Board on Application No. 2300-2 is now tentatively scheduled for the April 29, 30 and May 1, 1997, Board meeting in Pierre, SD. Future notice of the exact time, date and location of the hearing will be provided to all parties of record.

Please contact Diane Best, Assistant Attorney General at (605) 773-3215 or myself, if you have any questions.

c: Diane Best, Assistant Attorney General
Bennett County Weed Board
Ginger Price, USFWS
Rolf Kraft, Lacreek National Wildlife Refuge
Tim Olson, G,F&P Water Permit Coordinator
Tom Young, Bureau of Indian Affairs

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorney for Applicant

John Kunz
U.S. Department of Interior
Office of the Solicitor
Rocky Mountain Region
P.O. Box 25007
Denver Federal Center
Denver, CO 80225

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorney for Bennett County

Paul Bengford, States Attorney
P.O. Box 688
Martin, SD 57551

CERTIFICATION

I hereby certify that on February 12, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated February 12, 1997, along with a copy of the Parties of Record List, regarding Automatic Delay of U.S. Fish and Wildlife Service's Amended Water Permit Application No. 2300-2, LaCreek National Wildlife Refuge, addressed as stated below, and on the attached Parties of Record list:

Terry T. Terrell, Deputy Regional Director, U.S. Fish & Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

Bennett County Weed Board, Box M, Courthouse, Martin, SD 57551.

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

Rolf Kraft, Lacreek National Wildlife Refuge, HC 5, Box 114, Martin, SD 57551.

Tom Young, Bureau of Indian Affairs, 115 4th Ave. SE, Aberdeen, SD 57401.

Copies of the above described Notice & Parties of Record List was sent inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.

Tim Olson, Water Permits Coordinator, Department of Game, Fish & Parks, Joe Foss Building.

Eric S. Gronlund
Natural Resources Engineer III

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 13th day of February, 1997

Karen Schlaak
Notary Public

KAREN SCHLAAK
NOTARY PUBLIC
SEAL SOUTH DAKOTA

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

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STATE OF SOUTH DAKOTA

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

MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

FEB 1997
WATER RIGHTS
PROGRAM
Pierre, SD

February 20, 1997

Mr. Raymond Kocer
Box 388
Martin, SD 57551-0388

Re: **Lake Creek National Wildlife Refuge**

Dear Mr. Kocer:

This letter confirms our telephone conversation of February 18, 1997, regarding water management practices at the LaCreek National Wildlife Refuge.

As I indicated during this telephone conversation, I am filing two motions in the pending proceeding regarding Fish and Wildlife Service Application No. 2300-2 (one-acre foot impoundment for protection of endangered species). One of the motions is a procedural scheduling motion. As I indicated, this motion is intended to require that the parties provide lists of exhibits and witnesses to all other parties on or before April 21. Additionally, I am asking that any party seeking to introduce exhibits (other than voluminous exhibits or large maps) extend the courtesy of providing a copy of each exhibit to all parties before the start of hearing (unless the parties involved already have a copy of the exhibit). Additionally, the motion sets forth other procedural dates relating to the time for filing briefs and the time for hearing.

The second motion relates to the scope of the upcoming hearing. You and I discussed this issue at length. It is my understanding that you intend to provide testimony regarding overall water management (or mismanagement) on the refuge and intend, specifically, to address Fish and Wildlife Services' practices with regard to the diversions or former diversions on Lake Creek known as Diversion 1 and Diversion 3. It seems to me that if you are alleging that Fish and Wildlife Services is involved in the illegal use of water, you have a right to present such allegations to the South Dakota Water Management Board. The

appropriate method of doing so is to initiate a separate proceeding, though. The upcoming hearing regarding Application 2300-2 involves only the one-acre foot impoundment for endangered species near the location formerly known as Diversion 4 on Lake Creek. The clear scope of hearing in this matter relates to this one-acre foot impoundment. I don't believe that other evidence would be relevant. Moreover, even if the South Dakota Water Management Board heard evidence regarding overall water management practices on the refuge at this upcoming hearing, the only action it can take as a result of this hearing is to grant or deny Permit Application No. 2300-2. As we discussed, I will be presenting a motion on this issue at the March 6, 1997, motion hearing. It is my understanding that you will be attending the motion hearing and will be taking the position that the Water Board should be hearing all evidence regarding all water management practices on the refuge within the context of Water Permit Application No. 2300-2. Of course, the final decision is up to the Board.

Again, I strongly believe that any complaints regarding illegal use of water on the refuge (other than those relating to Diversion 4) would be most appropriately heard in a separate water rights proceeding. We discussed the possibility that you may want to initiate a declaratory ruling proceeding before the Water Management Board regarding the complaints you have previously filed in this matter. According to my records, you filed written complaints with John Hatch on March 29, 1994; April 11, 1994; and May 1996. During our conversation, I thought you mentioned an additional complaint from January 1997. According to Division records, however, the last complaint that you filed is the May 1996 complaint. If it is your intention to request a declaratory ruling proceeding on these or any other complaints, I ask that you confirm this in writing. If you confirm that you intend to initiate a declaratory ruling proceeding and indicate, specifically, the nature of the illegal use, the Department would be in a position to prepare a notice of publication for you. As the person initiating such a declaratory ruling, you would be responsible for authorizing publication and paying for the publication. You would also be responsible for presenting witnesses in support of your allegations and would have the burden of proving your case.

Based on our telephone conversation, it is my understanding that you do not wish to pursue the declaratory ruling route at the present time and intend, instead, to seek permission from the Water Management Board to present your evidence within the context of the pending hearing regarding Permit No. 2300-2. If your understanding of this situation is different, please let me

know. Also, if you change your mind, I would like to know as soon as possible.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB:nan
cc: Paul Bengford
John R. Kunz
Tom Lloyd
Charles Emley
Lawrence Kocer
Brett Heath
John Hatch

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant. --- BENNETT COUNTY, and BENNETT COUNTY WEED BOARD, Intervenors.	**APPLICATION NO. 2300-2** **MOTION TO EXCLUDE EVIDENCE CONCERNING WEED CONTROL AND ERADICATION**

COMES NOW the Applicant, the United States Fish and Wildlife Service (FWS), and hereby moves the Board to exclude from the hearing that will be conducted on April 29, 30, and May 1, 1997, any and all testimony, evidence, or allegations that either the Petitioners, Bennett County, or the Bennett County Weed Board (hereafter collectively referred to as "Bennett County") may attempt to adduce concerning: (1) the presence of noxious weeds at FWS's LaCreek National Wildlife Refuge (Refuge); (2) FWS's purported failure to control or otherwise eradicate these weeds; (3) the purported effects that these weeds may have on the Petitioners or Bennett County; and/or (4) as it relates to the water permit which FWS is seeking in the captioned matter, any and all other issues generally pertaining to FWS's control

and eradication of noxious weeds on the Refuge. 1/ The specific grounds for this motion are as follows.

In its Motion to Intervene, Bennett County basically alleges four controlling "weed" issues: **(A)** Bennett County ". . . has been plagued with the [sic] weed control problem in the area of the property owned by the Applicant, [FWS]" (Motion at 1); **(B)** This purported weed control problem ". . . has arisen because of the water utilization practices of [FWS]" (*id.*); **(C)** FWS has been ". . . unwilling to accommodate [Bennett County] in attempting to resolve this issue" (*id.*); and **(D)** That it would cost Bennett County ". . . approximately $50,000.00 to attempt to eradicate the weed problem which have [sic] developed on property owned by the Applicant, [FWS]." *Id.*

At the hearing of the captioned matter, regardless of whether Bennett County attempts to adduce evidence concerning the specific issues outlined above, or whether it seeks to adduce evidence concerning different but related "weed" issues, for the following reasons, such evidence and issues are completely irrelevant to and non-probative of FWS's water rights application currently pending before the Board.

1/ Until discovery in this case is complete, FWS will not know for certain whether the Petitioners and/or Bennett County will attempt to adduce at the hearing evidence pertaining to the presence of noxious weeds on the Refuge. However, based on preliminary information, and Bennett County's October 25, 1994, Motion to Intervene, FWS is assuming that the Petitioners and/or Bennett County will attempt to raise such issues. Based on this assumption, FWS is bringing the instant motion.

On February 16, 1995, representatives of the Bennett County Weed and Pest Board, the South Dakota Department of Agriculture, and FWS executed a "Cooperative Agreement Between Bennett County Weed and Pest Board and U.S. Fish and Wildlife Service (LaCreek Wildlife Refuge) Little White/LaCreek Noxious Weed Management Area" (Cooperative Agreement). A copy of the Cooperative Agreement is attached hereto and labeled as Exhibit Applicant-1.

The Cooperative Agreement expressly provides that:

> This agreement is made and entered into by the . . . parties to establish guidelines for cooperative and mutual control of noxious weeds in the Little White/LaCreek Noxious Weed Management Area. Each signatory agency agrees to cooperate with the other under the provisions provided herein and when possible eradicate noxious weeds in the Little White/LaCreek Noxious Weed Management Area.

Cooperative Agreement at 1.

The Cooperative Agreement further denotes the following responsibilities of the parties:

> The U.S. FISH AND WILDLIFE SERVICE, (LaCreek Wildlife Refuge) will present an integrated weed and pest management plan to Bennett County Weed and Pest Board for review and mutual approval. Federal and State laws direct that government land managing agencies are required to do no more or no less than the surrounding landowners.
>
> The BENNETT COUNTY WEED AND PEST BOARD will establish, administer, and enforce a noxious weed control program within the County and agreed to Weed Management Area, that is all inclusive and will not discriminate against any of the parties involved.

Cooperative Agreement at 1.

Pursuant to the above-described responsibilities, on or about May 28, 1996, FWS prepared and submitted to the Bennett County Weed and Pest Board a "Five-Year Noxious Weed Control Plan; 1996-2000" (Plan). 2/ On June 28, 1996, the Bennett County Weed and Pest Board approved the Plan.

The Cooperative Agreement further specifies that it:

> . . . shall remain in effect until the project is satisfactorily completed and results are evident. This agreement maybe [sic] reviewed, revised, or amended by mutual agreement of the parties. Should any modification(s) of the agreement be required by any party, at any time, both parties will meet and upon written agreement, the modification(s) will be incorporated into the agreement.

Cooperative Agreement at 1-2.

Lastly, the Cooperative Agreement states that the costs for controlling noxious weed infestations shall be the responsibility of and borne by individual landowners. *See* Cooperative Agreement at 2.

Bennett County has never challenged the validity or efficacy of the Cooperative Agreement or the Plan, nor has it ever claimed that these two documents have been revised or amended. Accordingly, as evinced by the express terms of these documents, if there ever was a dispute between Bennett County and FWS concerning noxious weeds at the Refuge, this dispute has been

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2/ As of the writing of this motion, a copy of the Plan was not available to attach as an exhibit to the motion. However, either at the March 6, 1997, hearing of this motion or sometime prior thereto, FWS will provide copies of the Plan to the Board and the parties.

completely and fully resolved. And, per the express terms of the Cooperative Agreement (and completely contrary to the allegations which Bennett County made in its Motion to Intervene), the eradication and control of these noxious weeds will not cost Bennett County one dime (let alone $50,000.00).

For the above reasons, assuming that Bennett County attempts to raise various "weed" issues at the hearing of the captioned matter, such an attempt is completely irrelevant to FWS's water permit application, and otherwise wholly disingenuous and devoid of any merit.

As compelling as the above arguments are, there is an equally compelling argument which should lead the Board to unhesitatingly grant the instant motion. Pursuant to S.D. CODIFIED LAWS ANN. § 46-2-9, the Board has exclusive jurisdiction over and ". . . general supervision of the *waters* of the state . . . ." (Emphasis added). *See also Romey v. Landers*, 392 N.W.2d 415, 418 (S.D. 1986) (*reh'g denied*) (the Board is authorized to regulate and control the development, conservation, and allocation of the right to South Dakota's waters).

Conversely, S.D. CODIFIED LAWS ANN. §§ 38-22-1.1 establishes (under the direction and supervision of the South Dakota Department of Agriculture) a State Weed and Pest Control Commission. This Commission has exclusive jurisdiction over the ". . . prevention, suppression, control and eradication of weeds and pests in South Dakota." S.D. CODIFIED LAWS ANN. § 38-22-7. Moreover, South Dakota's Legislature has given the State Weed and

Pest Control Commission some 14 pages of statutes telling it how it should discharge its responsibilities. *See* S.D. CODIFIED LAWS ANN. §§ 38-22-1.1 *et seq.*

For the above reasons, even assuming (*arguendo*) that there is in fact some dispute between Bennett County and FWS concerning the control and eradication of noxious weeds on the Refuge (which FWS vigorously disputes), this dispute is properly *not* a matter for the Board to consider; rather this dispute properly belongs before the State Weed and Pest Control Commission. When FWS's application comes on for hearing before the Board, there will be an abundance of substantive issues to occupy the parties' and the Board's attention; the Board does not need to and should not consider irrelevant and extraneous "weed" issues. The Board should not allow this *water* proceeding (over which it has exclusive jurisdiction) to be turned into a *weed* proceeding (over which it arguably has no jurisdiction).

FWS recognizes that, in discharging its statutory obligations, the Board has a responsibility pursuant to S.D. CODIFIED LAWS ANN. § 46-2A-9 to consider and protect the rights of others and the public interest. FWS further understands that the Board cannot take lightly its duty to faithfully discharge its statutory obligations. On the other hand, principles of administrative economy and fundamental fairness mandate that, if "weed" issues have no factual or legal merit, and are wholly irrelevant and disingenuous, FWS and the Board should not be forced to expend valuable time and resources hearing such issues.

For precisely the same reasons as those more fully set forth above, the Petitioners should likewise be precluded from adducing at the hearing of the captioned matter any "weed" evidence. If the Petitioners have legitimate concerns pertaining to FWS's control and eradication of noxious weeds on the Refuge (and indeed, if FWS likewise has such concerns pertaining to the *Petitioners* control and eradication of noxious weeds on *their* property), for the above reasons, such concerns should be brought before the State Weed and Pest Control Commission, and *not* before this Board.

By strongly making this motion and vigorously contesting the introduction of "weed" evidence at the hearing of the captioned matter, FWS does not wish to convey (either expressly or impliedly) the impression that it is "afraid" of such evidence or related issues. To the contrary, FWS feels that it has (both factually and legally) a very strong "weed" position. However, as alluded to more fully above, the hearing of the captioned matter will already be long and complicated enough; it should not be necessary to further lengthen and complicate it with irrelevant, extraneous, and meritless evidence and issues.

In sum, if "weed" evidence is excluded from the hearing of the captioned matter, this will not deprive either Bennett County or the Petitioners of a forum to air any legitimate grievances that they might have. It will, however, compel them to properly bring such grievances before the appropriate forum. Additionally, it will require the Petitioners and Bennett County

to narrowly focus on relevant issues that should properly be considered by the Board.

For the foregoing reasons, FWS hereby respectfully moves the Board to enter an order (in the form attached) excluding from the hearing that will be conducted before the Board on April 29, 30, and May 1, 1997, any and all testimony, evidence, or allegations that either the Petitioners or Bennett County may attempt to adduce concerning: (1) the presence of noxious weeds at FWS's LaCreek National Wildlife Refuge (Refuge); (2) FWS's purported failure to control or otherwise eradicate these weeds; (3) the purported effects that these weeds may have on the Petitioners or Bennett County; and/or (4) as it relates to the water permit which FWS is seeking in the captioned matter, any and all other issues generally pertaining to FWS's control and eradication of noxious weeds on the Refuge.

DATED this 20th day of February, 1997.

John R. Kunz

JOHN R. KUNZ, Esq.
Counsel for Applicant
755 Parfet Street, Suite 151
Lakewood, CO 80215
(303) 231-5353 (Ext. 339)
(303) 231-5363 (Fax)

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant. --- BENNETT COUNTY, and BENNETT COUNTY WEED BOARD, Intervenors.	**APPLICATION NO. 2300-2** **ORDER GRANTING FWS'S MOTION TO EXCLUDE EVIDENCE CONCERNING WEED CONTROL AND ERADICATION**

This matter having come before the Board upon FWS's February 20, 1997, Motion to Exclude Evidence Concerning Weed Control and Eradication (Motion);

The Board having fully considered the Motion, and having heard on March 6, 1997, the parties' arguments concerning the same;

The Board now being fully advised in the premises and with good cause appearing therefor, hereby grants the Motion and ORDERS, ADJUDGES, AND DECREES that, at the hearing of the captioned matter to be conducted on April 29, 30, and May 1, 1997, any and all testimony, evidence, or allegations that either the Petitioners, Bennett County, or the Bennett County Weed Board may attempt to adduce concerning the following issues shall be

excluded from the hearing: (1) the presence of noxious weeds at FWS's LaCreek National Wildlife Refuge (Refuge); (2) FWS's purported failure to control or otherwise eradicate these weeds; (3) the purported effects that these weeds may have on the Petitioners or Bennett County; and/or (4) as it relates to the water permit which FWS is seeking in the captioned matter, any and all other issues generally pertaining to FWS's control and eradication of noxious weeds on the Refuge.

DATED this ____ day of _____, 1997.

_____
Chairman
South Dakota Water Management Board

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 1997, true and correct copies of the foregoing **MOTION TO EXCLUDE EVIDENCE CONCERNING WEED CONTROL AND ERADICATION** were mailed postage pre-paid in the United States Mail to:

John Hatch
Chief Engineer
Department of Environment and
Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

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

Paul Bengford, Esq.
Bennett County States Attorney
P.O. Box 628
Martin, SD 57551

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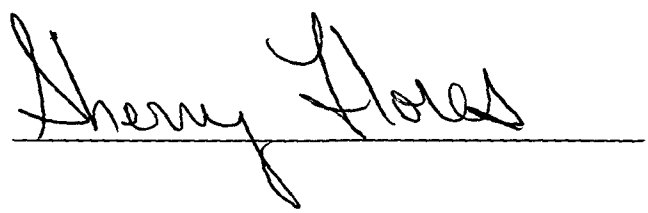
Joel Rickenbach
P.O. Box 97
Oelrichs, SD 57763-0097

Leo Holzbauer
RR 1, Box 170
Wagner, SD 57380

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



B.1

COOPERATIVE AGREEMENT BETWEEN

BENNETT COUNTY WEED AND PEST BOARD
and
UNITED STATES FISH & WILDLIFE SERVICE
(LACREEK WILDLIFE REFUGE)
LITTLE WHITE/LaCREEK NOXIOUS WEED MANAGEMENT AREA

PURPOSE:

This agreement is made and entered into by the above named parties to establish guidelines for cooperative and mutual control of noxious weeds in the Little White/LaCreek Noxious Weed Management Area. Each signatory agency agrees to cooperate with the other under the provisions provided herein and when possible eradicate noxious weeds in the LITTLE WHITE/LACREEK Noxious Weed Management Area.

AUTHORITY:

"Federal Noxious Weed Act of 1974, 7 U.S.C. Sec. 2801 et seq. as amended by Section 1453 of the Food, Agriculture, Conservation and Trade Act of 1990, 7 U.S.C. Sec. 2814;", the Act of October 17, 1968, 43 U.S.C. Sec. 1241 et seq. and 7 U.S.C. Sec. 1428 and P.L.93-629 Section 15 directs Federal Agencies to enter into cooperative agreements with State agencies to coordinate the management of undesirable plant species on Federal land.

South Dakota Codified Law (SDCL 38 - 22), and the Quarantine Law (SDCL 38 - 24A), directs the County Weed and Pest Board and the Weed and Pest program in the South Dakota Department of Agriculture with administering and directing noxious weed control in South Dakota.

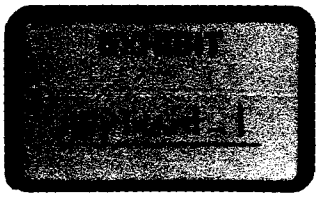
RESPONSIBILITIES:

The U.S. FISH AND WILDLIFE SERVICE, (LaCreek Wildlife Refuge) will present an integrated weed and pest management plan to the Bennett County Weed and Pest Board for review and mutual approval. Federal and State laws direct that government land managing agencies are required to do no more or no less than the surrounding landowners.

The BENNETT COUNTY WEED AND PEST BOARD will establish, administer, and enforce a noxious weed control program within the County and agreed to Weed Management Area, that is all inclusive and will not discriminate against any of the parties involved.

TERMS OF AGREEMENT:

This cooperative agreement shall commence immediately after the signatures of both parties to this agreement and shall remain in effect until the project is satisfactorily completed and results



are evident. This agreement may be reviewed, revised, or amended by mutual agreement of the parties. Should [illegible] of the agreement be required by [illegible] at any time, both parties will meet and upon written agreement, the modifications [illegible] be incorporated into the agreement.

APPROPRIATIONS:

This agreement will obligate property owners to expend necessary funds to control noxious weed infestations. Responsibility for implementation and cost of noxious weed control is the responsibility of the landowner, which is spelled out in the South Dakota Codified Law (SDCL 38 - 22) Weed and Pest Statutes.

Although legal responsibility is spelled out in statute, other funds may be available from the County Weed and Pest board, County Commissioners could authorize additional funds, grants may be available from the South Dakota Weed and Pest Commission, or other State and/or Federal agencies. These funds could support mapping, coordination of the project, education, etc.

No members of, or delegate to Congress, or resident commissioner shall be admitted to any share or part of this agreement, or to benefit to arise therefrom, but this restriction shall not be construed to extend beyond this agreement of made in cooperation or company for its general benefit.

Both parties shall not discriminate against any employee or applicant for employment because of race, color, religion, or national origin. Both parties will comply with the requirements to take affirmative action in the employment and advancement of all their employees.

IN WITNESS THEREOF, the parties hereto have executed this agreement of the last day written below.

Raymond Greenough
Chairman-Bennett County
Weed and Pest Board

2/16/95
Date

U.S. Fish & Wildlife Service
LaCreek Wildlife Refuge

2/16/95
Date

Donald Fletcher Vice Chair
South Dakota Department Of Agriculture

2/16/95
Date

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant. BENNETT COUNTY, and BENNETT COUNTY WEED BOARD, Intervenors.	**APPLICATION NO. 2300-2** **MOTION TO LIMIT EVIDENCE TO RELEVANT ISSUES PERTAINING TO DIVERSION NO. 4**

COMES NOW the Applicant, the United States Fish and Wildlife Service (FWS), and with respect to the hearing of the captioned proceeding that will be conducted on April 29, 30, and May 1, 1997, hereby moves the Board to limit any and all testimony, evidence, or allegations that the Petitioners or Bennett County/the Bennett County Weed Board (hereafter collectively referred to as "Bennett County") may attempt to adduce, solely to relevant issues pertaining to FWS's current application to impound one acre-foot of water at Diversion No. 4. The specific grounds for this motion follow.

As the Board no doubt well knows, the Petitioners and FWS have had a rather long-standing dispute concerning FWS's use of water on the LaCreek National Wildlife Refuge (Refuge). One facet of this dispute ultimately culminated on January 7, 1993

(after a three-day hearing on July 22, 23, and 24, 1992) when in Case Nos. 1927-2, 2191-2, and 1921-2, the Board issued a Final Decision granting FWS a water permit for six springs (Springs), and changing the point of diversion and irrigated lands for an existing water permit. 1/

As part of the above-described hearing process, the Board considered a broad spectrum of issues and evidence including (but not necessarily limited to): (1) FWS's management of pools on the eastern part of the Refuge; (2) FWS's diversion and irrigation practices pertaining to Diversion No. 1; (3) FWS's diversion and irrigation practices pertaining to Cedar Creek; (4) various issues pertaining to the Springs and Elm Creek; and (5) what effect (if any) the foregoing practices and issues had on the Petitioners' adjoining lands.

When (on January 24, 1994) FWS initially filed its application in the instant case, it sought to divert from Diversion Nos. 1, 2, and 4, 9.29 cfs of water to irrigate 650 acres of FWS lands.

FWS later amended its application (on February 2, 1994) to indicate that it was seeking to divert from Diversion Nos. 1, 2, and 4, *9.43* cfs of water to irrigate *660* acres of FWS lands.

Subsequently (on May 31, 1995), FWS again amended its application to indicate that it was no longer seeking to divert

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1/ The Board's decision in this matter was ultimately affirmed by the South Dakota Supreme Court in *DeKay et al. v. U.S. Fish and Wildlife Service*, 524 N.W.2d 855 (S.D. 1994), *reh'g denied* (1995).

any water from Diversion Nos. 1, 2, and 4, and that it was no longer seeking to irrigate *any* FWS lands. Instead, to protect South Dakota threatened and endangered fish species, the only permitted use which FWS sought was to impound one acre-foot of water at Diversion No. 4.

On October 24, 1996, FWS further amended its application to: (1) change the location of Diversion No. 4 to a point downstream of its original location; and (2) describe and seek a permit for various temporary construction activities associated with the building of the "new" Diversion No. 4.

For approximately 13 months (from November 16, 1994, to December 13, 1995), FWS, the Petitioners, and Bennett County participated in a Coordinated Resource Management (CRM) process designed to discuss not only FWS's application in the instant proceeding, but also a myriad of issues pertaining to the long-standing disputes between FWS and the Petitioners, *i.e.*, FWS's water management practices, and the effects (if any) that such practices were having on the Petitioners' adjoining lands. 2/

Although the above background is not necessarily relevant to the instant proceeding, it is completely relevant to the thrust of the instant motion. More specifically, as pointed

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2/ Generally speaking, the CRM process is a voluntary conflict management and resolution process. Public participation is encouraged, and the goal is to mediate and resolve conflicts by unanimous consent. As a result of the CRM process, any agreements reached (even though they may be written), are not legal documents, and are not legally binding.

out above, for literally a period of years, FWS, the Petitioners, and to a lesser extent, Bennett County, have been engaged in various disputes, hearings, litigation, and non-binding arbitration pertaining to FWS's water management practices on the Refuge. Notwithstanding, FWS's current application before the Board (as amended) seeks *only* to impound one acre-foot of water at Diversion No. 4; no other diversion structures, water sources, or water management practices are involved, nor does the application seek to divert water or irrigate any FWS lands.

For the above reasons, at the hearing of the captioned matter, FWS feels it entirely appropriate for the Board to limit the evidence solely to relevant issues pertaining to FWS's current application to impound one acre-foot of water at Diversion No. 4. Stated differently, FWS strongly believes that it would not be appropriate for: (1) the Board to conduct a re-hearing of the issues that have already been considered in Case Nos. 1927-2, 2191-2, or 1921-2; (2) the parties to re-hash the myriad of issues that they have already discussed during the CRM process; or (3) the parties to recount and reiterate the many disputes that they have had over the years.

Of course, to the extent that any of the above matters or issues might have a *direct* bearing on or specific relevance to FWS's current application to impound one acre-foot of water at Diversion No. 4, the Board should properly consider such matters and issues. In other words, it is entirely reasonable for FWS to expect that, at the hearing of the captioned matter, it will be

required to present a case and meet a burden of proof concerning its application to impound one acre-foot of water at Diversion No. 4. It is equally reasonable for FWS to expect that it will have to prepare to rebut evidence and issues that the Petitioners or Bennett County might raise which legitimately and directly pertain to FWS's application to impound one acre-foot of water at Diversion No. 4. However, it is wholly unreasonable (and indeed fundamentally unfair) for FWS to expect that it will have to anticipate and prepare to rebut literally *every* issue (regardless of whether it has any relevancy to FWS's current application) that the Petitioners or Bennett County might choose to raise.

Judicial economy, justice, and fundamental fairness demand that the hearing be limited solely to those issues which are properly before the Board. Indeed, it is in the best interests of not only FWS, but the Board as well, to ensure that the hearing is managed and conducted in a manner consistent with the instant motion. If this does not happen, the result will be inefficiency, uncertainty, unfairness, and most likely a less than orderly and possibly even chaotic proceeding.

It is true that, if FWS conducts discovery (which it plans to do), it should generally be aware of all of the issues which the Petitioners or Bennett County may attempt to raise at the hearing. Arguably, FWS should then be prepared to deal with any and all of these issues. However, discovery might be incomplete or inaccurate, or there might be disputes with regard to the same. Notwithstanding, this sort of reasoning completely

belies the real point; the real point is that FWS and the Board *should not have to* expend valuable time and resources dealing with and otherwise considering issues which do not have any bearing on or relevancy to the *one* issue now squarely before the Board--FWS's application to impound one acre-foot of water at Diversion No. 4.

For the above reasons, at the hearing of the captioned proceeding that will be conducted on April 29, 30, and May 1, 1997, FWS respectfully moves the Board to enter an order (in the form attached hereto) limiting any and all testimony, evidence, or allegations that the Petitioners or Bennett County may attempt to adduce, solely to relevant issues pertaining to FWS's current application to impound one acre-foot of water at Diversion No. 4.

DATED this 21st day of February, 1997.

JOHN R. KUNZ, Esq.
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(303) 231-5353 (Ext. 339)
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BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant. --- BENNETT COUNTY, and BENNETT COUNTY WEED BOARD, Intervenors.	**APPLICATION NO. 2300-2** **ORDER GRANTING FWS'S MOTION TO LIMIT EVIDENCE TO RELEVANT ISSUES PERTAINING TO DIVERSION NO. 4**

This matter having come before the Board upon FWS's February 21, 1997, Motion to Limit Evidence to Relevant Issues Pertaining to Diversion No. 4 (Motion);

The Board having fully considered the Motion, and having heard on March 6, 1997, the parties' arguments concerning the same;

The Board now being fully advised in the premises and with good cause appearing therefor, hereby grants the Motion and ORDERS, ADJUDGES, AND DECREES that, at the hearing of the captioned matter to be conducted on April 29, 30, and May 1, 1997, any and all testimony, evidence, or allegations that the Petitioners, Bennett County, or the Bennett County Weed Board may attempt to adduce, shall be limited solely to relevant issues

pertaining to FWS's current application to impound one acre-foot of water at Diversion No. 4.

DATED this ____ day of _____, 1997.

_____
Chairman
South Dakota Water Management Board

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 1997, true and correct copies of the foregoing **MOTION TO LIMIT EVIDENCE TO RELEVANT ISSUES PERTAINING TO DIVERSION NO. 4** were mailed postage pre-paid in the United States Mail to:

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Sherry Howes

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF UNITED STATES FISH AND WILDLIFE SERVICE APPLICATION NO 2300-2 (LAKE CREEK)	DIVISION'S EVIDENTIARY MOTION

The Department of Environment and Natural Resources, Division of Environmental Regulation (hereinafter Division), hereby makes the following evidentiary motion pursuant to SDCL 1-26-19:

1992 PROCEEDINGS

1. On July 22 through 24, 1992, the Board heard testimony and received evidence regarding three water rights applications concerning the LaCreek Wildlife Refuge. The three Fish and Wildlife Service (FWS) applications were:

> Application No. 1927-2. This application was a request for validation of a riparian vested right (pre-1955 priority date) for 10 cfs from 4 diversion points on Lake Creek within the wildlife refuge.
>
> Application No. 2191-2. This application was for a new water right to the natural flow of water from six springs.
>
> Application No. 1921-2. This application sought to amend an existing water permit by changing the point of diversion along Cedar Creek.

This Board granted the three applications so long as the use of water did not flood or impair the surrounding landowners property.

2. Subsequently, the Sixth Circuit Court reversed the validation in application 1927-2, finding that the FWS had not provided substantial evidence that the claimed 10 cfs of water

from Lake Creek had been "continuously used" since before 1955, as required by statutes pertaining to validation of historic vested water rights. The circuit court's decision was not appealed. Thus, FWS had no historic vested right in this water use. Use of water from any of the four diversions at Lake Creek required filing and approval of a new application for a new water permit from Lake Creek.

3. FWS subsequently filed the currently pending application for a new substantially smaller water permit from Lake Creek (1 acre foot). This pending water rights application seeks authority only with respect to an impoundment on Lake Creek near diversion No. 4, and does not seek authority to divert, impound, or otherwise appropriate water from other diversions on Lake Creek.

4. As listed above, two other water rights applications (1921-2 and 2191-2) were heard by this Board in 1992. Both were affirmed on appeal. The South Dakota Supreme Court decision is attached. These matters have been finally determined. The FWS has authority to use water from six springs pursuant to Permit No. 2191 and from Cedar Creek pursuant to Permit No. 1921-2. The currently pending matter does not involve those two water permits.

5. The Division asks that testimony in the above-entitled matter be confined to testimony regarding the proposed one acre-foot impoundment on Lake Creek and Diversion 4 (and not the issues relating to the Springs, Cedar Creek, or diversions 1 or 3 on Lake Creek).

OTHER WATER USES

6. FWS holds authority to use water in the eastern part of the refuge known as the "old portion" of the refuge. This part of the refuge was developed in the 1930's. FWS maintains several deep pools in this area. Management of these deep pools should not be an issue in the pending water permit application. The pending application involves an impoundment at Lake Creek in the Brown ranch portion of the refuge which lies to the west of the old portion of the refuge.

7. The Division ask that hearing in this matter be confined to the issue of whether the FWS is entitled to impound one acre foot of water from Lake Creek for the purpose set forth in the application (protection of endangered species), rather than testimony regarding management of these deep pools.

8. Cedar Creek and Elm Creek flow through the refuge. The proposed application concerns Lake Creek only. Evidence regarding those water sources are not relevant to the pending Lake Creek case.

ARGUMENT

As set forth, there are various water sources on the refuge that involve various types of water management issues. Based on the depositions of landowner intervenors Raymond Kocer, Lawrence Kocer, Charles Emley, and Brett Heath, it is apparent that they intend to present evidence to the Board regarding these several different water sources and water management issues. Since the above entitled proceeding applies only to an application for

impounding one acre foot of water on Lake Creek near Diversion 4, the scope of the proceeding is confined to granting or denying that application. Any testimony or other evidence on any water management issues must result in a determination with respect to the pending application. The scope of this proceeding does not include enforcement of complaints regarding matter management on the refuge and is irrelevant (unless it involves Diversion 4).

On the other hand, there is no doubt that intervenors R. Kocer, L. Kocer, Heath, and Emley are entitled to bring an legitimate water management complaint to this Board for resolution. The appropriate method of bringing such issues to this Board is through the declaratory ruling process. In this way, these landowners would be entitled to present their case and ask for the appropriate remedies. To bring such complaints within the context of the present case could, however, only result in frustration for these landowners. Even if evidence regarding water management practices was aired, no remedy would be available other than denial of a permit for one acre foot. Instead, under a declaratory ruling proceeding, landowners would presumably be requesting a declaration of illegal use.

Rather than allowing a general airing of water management concerns, the Division asks that the pending proceeding in application 2300-2 be confined to testimony and other evidence

directly relating to the proposed impoundment on Lake Creek and on Diversion 4.

Dated this 21st day of February, 1997.

Diane Best

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

pld212.db(mas)

In re WATER RIGHT CLAIM NO. 1927-2; Water Permit Application No. 1921-2; and Water Permit Application No. 2192-2.

Wendell DeKAY, Charles Emley, Brett Heath, Raymond Kocer, and Lawrence Kocer, Petitioners and Appellants,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, Applicant and Appellee,

and

Water Rights Division, State of South Dakota, Appellee.

No. 18708.

Supreme Court of South Dakota.

Argued Oct. 18, 1994.

Decided Dec. 7, 1994.

Rehearing Denied Jan. 6, 1995.

Landowners appealed from decision of water management board granting water rights permits to United States Fish and Wildlife Service (FWS) in connection with wildlife refuge. The Sixth Judicial Circuit Court, Bennett County, Steven Zinter, J., affirmed, and landowners appealed. The Supreme Court, Sabers, J., held that: (1) permit for new water right to natural flow of water from six springs was not granted for impermissible future use; (2) that permit was "beneficial use"; (3) landowners failed to show that amendment of water rights permit to allow new diversion point was improper; and (4) statute allowing for amendment of water permit imposes no requirement that original and new property be contiguous.

Affirmed.

1. Administrative Law and Procedure ⇐785

Waters and Water Courses ⇐133

Water management board's findings of fact are reviewed under clearly erroneous standard; decision is to be upheld unless reviewing court is left with definite and firm conviction that mistake has been committed.

2. Administrative Law and Procedure ⇐781

Waters and Water Courses ⇐133

Mixed questions of fact and law are reviewed for error without deference on review of decision of water management board.

3. Waters and Water Courses ⇐132

Permit granted by water management board to United States Fish and Wildlife Service (FWS) for new water right to natural flow of water from six springs was not granted for impermissible future use; FWS sought permit to protect and maintain its current water right. SDCL 46-5-38.

4. Waters and Water Courses ⇐132

Maintenance and protection of water fowl habitat was "beneficial use" by United States Fish and Wildlife Service (FWS), for purposes of statutory requirement that water rights permit constitute beneficial use. SDCL 46-1-6(3), 46-2A-9.

See publication Words and Phrases for other judicial constructions and definitions.

5. Waters and Water Courses ⇐132

United States Fish and Wildlife Service (FWS) established that it was reasonable, necessary and beneficial for FWS to have uninterrupted source of water, for purposes of statutory requirement that permit for right to natural flow of water from springs constitute "beneficial use," even though area was allegedly already subirrigated by high water table; trial court found that natural precipitation was not dependable and that dependable water was required to provide for continuous growth of aquatic plants and insects, and to provide habitat needed for critical periods of wildlife development. SDCL 46-1-6(3), 46-2A-9.

6. Waters and Water Courses ⇐132

Fact that water use for wildlife refuge was not "irrigation" did not preclude deter-

mination that "beneficial use" existed, as statutorily required for permit for water right to natural flow from springs; use of water for aquatic plant growth for wildlife propagation was beneficial use whether or not it constituted "irrigation." SDCL 46–1–6(3), 46–2A–9; S.D.Admin.R. 74:02:01:01(4), 74:03:04:01.

7. Waters and Water Courses ⇐133

Landowners opposing granting of permit to United States Fish and Wildlife Service (FWS) for water right to water flow from springs for wildlife refuge failed to show that permit was not in public interest, for purposes of statutory requirement that permit constitute "beneficial use," even though FWS' past use of water had allegedly caused flooding of landowner's property; permit was granted subject to qualification that use of water not impair use of adjoining lands, including flooding. SDCL 46–1–6(3), 46–1–14, 46–2A–9.

8. Waters and Water Courses ⇐145

Landowners failed to show that amendment of water rights permit to allow new diversion point was improper, despite claim that breach of old dam at initial diversion point was not sufficient showing that original diversion point was "impracticable" within meaning of statute providing for permit amendment; there was evidence that costs of constructing new dam at same diversion point would be $750,000. SDCL 46–5–34.

See publication Words and Phrases for other judicial constructions and definitions.

9. Waters and Water Courses ⇐145

Statute providing for amendment of water permit if it becomes impracticable to use all or portion of water beneficially or economically for irrigation of any land to which right of its use is "appurtenant" imposes no requirement that original and new property be contiguous. SDCL 46–5–34.

See publication Words and Phrases for other judicial constructions and definitions.

10. Waters and Water Courses ⇐145

Use of water under water rights permit changing point of diversion and some of land irrigated from creek under existing permit would not impermissibly amend "irrigation" use into nonirrigation use; use would provide habitat for waterfowl, including sloughs and marshlands with plant growth essential for waterfowl survival and propagation and, thus, use remained for "irrigation" by providing moisture for plant growth. S.D.Admin. R. 74:02:01:01(4).

See publication Words and Phrases for other judicial constructions and definitions.

Jane M. Farrell and Patrick M. Ginsbach of Farrell, Farrell and Ginsbach, Hot Springs, for appellants.

Mikal G. Hanson, Asst. U.S. Atty., Pierre, and John R. Kunz, U.S. Dept. of Interior, Office of the Solicitor, U.S., Denver, CO, for applicant and appellee.

Mark Barnett, Atty. Gen., Diane Best, Asst. Atty. Gen., Pierre, for appellee, State.

SABERS, Justice.

Landowners appeal circuit court's decision affirming Water Board's grant of water use permits to United States Fish and Wildlife Service in LaCreek National Wildlife Refuge. We affirm.

FACTS

The United States Fish and Wildlife Service (FWS) owns and operates the LaCreek National Wildlife Refuge (Refuge) in Bennett County, South Dakota. The Refuge was established by Presidential Order in 1935. In September of 1971, FWS purchased 6,665 acres of land known as the "Brown Ranch" which was contiguous to the Refuge. The Brown Ranch land is used for shallow water habitat for migratory waterfowl.

FWS applied for three water right permits to the South Dakota Water Management Board (Board).

1. The First, No. 1927–2, was a request to vest a prior claimed right to 10 cubic

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3. The Third, No. 1921–
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. Farrell and Patrick M. Ginsbach
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or appellants.

. Hanson, Asst. U.S. Atty., Pierre,
R. Kunz, U.S. Dept. of Interior,
the Solicitor, U.S., Denver, CO, for
and appellee.

Barnett, Atty. Gen., Diane Best,
y. Gen., Pierre, for appellee, State.

RS, Justice.

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South Dakota Water Management
(Board).

The First, No. 1927–2, was a request
est a prior claimed right to 10 cubic

feet per second of water from four diversion points on Lake Creek.

2. The Second, No. 2191–2, was for a new water right to the natural flow of water from six springs near Lake Creek. FWS did not plan any development of the springs; the application was to assure the continued flow of the springs if the flow decreased due to use by others. This water was to be used to maintain 235 acres of marshes, sloughs, and wet meadows for wildlife habitat.

3. The Third, No. 1921–2, was to change the point of diversion and some of the land irrigated from Cedar Creek under an existing permit. A dam authorized as the diversion point was breached and no longer functioning. FWS sought to amend its permit to use another dam approximately one-half mile away as the diversion point.

Board granted FWS the three permits on the condition that FWS' use of water did not flood or impair the surrounding Landowners' property. Landowners appealed the Board's decision to the circuit court, which found that Landowners' main complaint was the flooding of their land by FWS' use of its permits. This flooding allegedly caused the drowning of natural grasses used for commercial hay production and livestock and replaced it with commercially non-viable marsh-type vegetation. Landowner Wendell DeKay alleges the quality of water discharged onto his property has diminished as a result of the increased carp population in FWS' sloughs.

The circuit court reversed the First permit because insufficient evidence existed that Brown Ranch had been using 10 c.f.s. of water from the diversion points, but affirmed Board's grant of the Second and Third permits. Landowners appeal the circuit court's ruling on the Second and Third permits.

[1, 2] Landowners appeal the Board's findings of fact which we review under the clearly erroneous standard. The decision is to be upheld unless the reviewing Court is left with a definite and firm conviction that a mistake has been committed. *Fraser v. Water Rights Commission*, 294 N.W.2d 784 (S.D.1980). Mixed questions of fact and law are reviewed for error without deference. *Permann v. Dept. of Labor, Unemp. Ins. Div.*, 411 N.W.2d 113, 119 (S.D.1987).

THE SECOND PERMIT

A. Future use

[3] FWS sought the right to the continued natural flow of six springs if the water table dropped due to conditions or use by others. Landowners argue that the Second permit would improperly reserve a future use by protecting against future diminution. Under SDCL 46–5–38, only a few enumerated agencies may reserve future water rights. FWS concedes that it is not one of the statutorily enumerated agencies. The springs' natural flow was intended for current use to maintain 235 acres of marshes and other waterfowl habitat. Although FWS did not intend to divert any of the natural flow,[1] the court found that the use was current and that the permit was not granted for an impermissible future use. Landowners have not shown this to be error.

B. Impairment of Rights

SDCL 46–2A–9 governs water right permits:

> A permit to appropriate water may be issued only if there is reasonable probability that there is unappropriated water available for the applicant's proposed use, that the proposed diversion can be developed without unlawful impairment of existing rights and that the proposed use is a beneficial use and in the public interest.

Landowners contend that the Second permit would impair the quality of water flowing to DeKay's property and the quantity of

1. Refuge Manager Rolf Kralt testified "we [FWS] are using the water that naturally comes out of the springs. If that water flow diminished that would impact how we use our water." FWS sought the permit to protect and maintain its current water right.

water reaching Hines' property. The court found that the permit would not change existing natural conditions and that it would not impair the quality of water reaching DeKay's property or the quantity of water reaching Hines' property. Landowners have failed to show that the finding was erroneous.

C. Beneficial Use

SDCL 46–2A–9 also requires that the permit constitute a "beneficial use." Under SDCL 46–1–6(3), a "beneficial use" is:

> any use of water within or outside the state, that is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interests of the public of this state in the best utilization of water supplies[.]

[4] A two-part analysis is required to determine "beneficial use." First, the use must be "reasonable, useful, and beneficial to the appropriator." SDCL 46–1–6(3). Landowners argue that because duck production declined on the refuge from 1983 to 1990,[2] the use for waterfowl habitat is no longer a beneficial use for the Refuge. The court found that the habitat provides for a "nationally significant population of trumpeter swans, and for Canada geese, snow geese, blue geese, cranes, and other wildlife." The court concluded that "[p]ropagation of all these species is reasonable, useful and beneficial to FWS and the public."

Landowners cite *Lake Shore Duck Club v. Lake View Duck Club*, 50 Utah 76, 166 P. 309 (1917), for the proposition that appropriating water for cultivating food for wildlife and waterfowl is not a beneficial use. However, the weight of authority indicates that "beneficial use is an evolving concept, and a concept that can be expanded to reflect changes in society's recognition of the value of new uses of our resources." Rick A. Thompson, *Statutory Recognition of Instream Flow Preservation: A Proposed Solution for Wyoming*, 17 Land & Water L.Rev. 139, 143 (1982). Appropriation of water for waterfowl habitat and other wildlife is a beneficial use. ARSD 74:03:04:01 ("All streams in South Dakota are assigned the *beneficial uses* of irrigation and *wildlife propagation* and stock watering.") (emphasis added); *State v. Morros*, 104 Nev. 709, 766 P.2d 263, 268 (1988). The protection of migratory birds and their habitat is in the "national interest." *North Dakota v. United States*, 460 U.S. 300, 309, 103 S.Ct. 1095, 1101, 75 L.Ed.2d 77 (1983). A series of treaties signed by the United States starting in 1916 "obligates the United States to preserve and protect migratory birds through the regulation of hunting, the establishment of refuges, and the protection of bird habitats." 460 U.S. at 309–10, 103 S.Ct. at 1101, 75 L.Ed.2d 77. It was not error to conclude that maintenance and protection of waterfowl habitat was a beneficial use by FWS.

[5] Landowners also contend that the proposed use will not be reasonable, useful, or beneficial because the area is already subirrigated by a high water table. The court found that natural precipitation is not dependable and that dependable water is required to provide for continuous growth of aquatic plants and insects, and to provide habitat needed for critical periods of wildlife development. The court concluded that FWS established that it is reasonable, necessary, and beneficial for FWS to have uninterrupted use of water. Landowners have not shown this to be error.

[6] Landowners also argue that the land is not suitable for traditional commercial irrigation because of the type of soil in the area. They argue that no beneficial use exists because water used for a wildlife refuge is not "irrigation" and only "irrigation" constitutes a beneficial use. The Board found and the court agreed that a beneficial use existed even though the crops are not harvested by

2. FWS' figures indicate that duck production on the Refuge declined from 12,915 in 1983 to 1,360 in 1990. Rolf Kraft, Refuge manager, blames part of this decrease on the rising carp population which is muddying the water, making it less suited for aquatic plant growth. However, the Board and the circuit court agreed that this decrease was not indigenous to the LaCreek Refuge and duck production has declined across the nation.

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Board's Finding of Fact LX

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THE THIRD PER

[8] Under SDCL 46–5–34,
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d Solution for Wyoming, 17 L.Rev. 139, 143 (1982). Ap- vater for waterfowl habitat e is a beneficial use. ARSD streams in South Dakota are *eficial uses* of irrigation and *tion* and stock watering.") 3); *State v. Morros*, 104 Nev. 3, 268 (1988). The protection ds and their habitat is in the st." *North Dakota v. United* S. 300, 309, 103 S.Ct. 1095, 2d 77 (1983). A series of by the United States starting tes the United States to pre- ect migratory birds through of hunting, the establishment the protection of bird habi- at 309-10, 103 S.Ct. at 1101, It was not error to conclude ce and protection of waterfowl beneficial use by FWS.

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quatic plant growth. However, the the circuit court agreed that this s not indigenous to the LaCreek Ref- k production has declined across the

human beings but by migratory birds and wildlife.

The court held that a beneficial use from irrigation is not limited to raising traditional cash crops. Under ARSD 74:02:01:01(4), "irrigation" is providing moisture for *any* "plant growth." The court concluded that even if it were not an "irrigation" use, it is a beneficial use. Under ARSD 74:03:04:01, the use of water for aquatic plant growth for wildlife propagation is a beneficial use whether or not it constitutes "irrigation."

[7] Secondly, SDCL 46-1-6(3) requires that the use must be in the public interest to be deemed a "beneficial use." Landowners contend that the permit is not in the public interest because FWS' past use of water has caused flooding of their land. The court found that the Board provided for the public interest. Board granted the permit subject to qualification. Under SDCL 46-1-14, the Board may issue any permit or license "subject to terms, conditions, restrictions, qualifications, quantifications or limitations [] which it considers necessary to protect the public interest[.]" Board issued the Second permit with the following qualification:

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

Board's Finding of Fact LXIV.

The court concluded that Landowners' public interest argument was misplaced because they failed to show that the Second permit would change or cause any flooding that did not occur naturally. Landowners have not shown this to be error.

THE THIRD PERMIT

[8] Under SDCL 46-5-34, amendment of a water permit is allowed when "it should become impracticable to use all or any part of the water beneficially or economically for irrigation of any land to which the right of its use is appurtenant[.]" Landowners claim that FWS made no showing that appropriation from the old dam, the initial diversion point, was impracticable. They claim that the breach of the old dam is not a sufficient showing of impracticability. FWS presented evidence that the costs of constructing a new dam at the same diversion point would be $750,000. The Board found and the court affirmed that use of this original diversion point would be made "impracticable" by the necessity that a new dam be built. Landowners have not shown that amendment of the permit to allow a new diversion point was improper.

[9] Landowners also argue that a permit may be amended only if the new land is appurtenant to the old land or the water source. Landowners appear to argue that "appurtenancy" requires that the new land must be contiguous to the property in the original permit. SDCL 46-5-34 provides:

> All water used in this state for irrigation purposes shall remain appurtenant to the land upon which it is used. However, if for any reason it should become *impracticable to use all or any part of the water beneficially or economically for irrigation of any land to which the right of its use is appurtenant*, all or any part of the right may be severed from the land and simultaneously transferred and *become appurtenant* to other land without losing priority of right previously established, subject to existing rights, upon approval of an application for an amended permit. No increase in total acres irrigated may be allowed under this section.

Id. (emphasis added). The court correctly concluded the statute imposes no requirements that the original and the new property be contiguous.

[10] Landowners contend that use of water under the Third permit would impermissibly amend an "irrigation" use into a non-irrigation use. The Board found that the use

of the water under the Third permit would provide habitat for waterfowl, including sloughs and marshlands with plant growth essential for waterfowl survival and propagation. Under ARSD 74:02:01:01(4), the use remains for "irrigation" by providing moisture for plant growth. The court affirmed the Board on this point and no error is shown.

We affirm.

MILLER, C.J., and WUEST, AMUNDSON and KONENKAMP, JJ., concur.

Dennis MITCHELL, Petitioner and Appellant,

v.

Joe CLASS, Warden of the South Dakota State Penitentiary, and Dan Jacobson, Chairman of the South Dakota Board of Pardons and Paroles, Appellees.

No. 18650.

Supreme Court of South Dakota.

Considered on Briefs Oct. 19, 1994.

Decided Dec. 7, 1994.

After defendant's second-degree rape conviction was upheld on direct appeal, 491 N.W.2d 438, defendant petitioned for writ of habeas corpus. The Fifth Judicial Circuit Court, Roberts County, Larry H. Lovrien, J., denied petition, and defendant appealed. The Supreme Court, Sabers, J., held that: (1) defense counsel's failure to call defendant as witness in his case in chief was tactical error and was not ineffective assistance; (2) defense counsel's failure to ask for trial judge's removal was not ineffective assistance; (3) trial counsel's failure to object to alleged instances of prosecutorial misconduct was not ineffective assistance; and (4) counsel's alleged failure to adequately investigate and call two possible witnesses for impeachment was not ineffective assistance.

Affirmed.

1. Criminal Law ⇐641.13(6)

Defense counsel's failure to call defendant as witness during his case in chief was tactical error and was not ineffective assistance in rape prosecution; although counsel's decision precluded defendant from offering testimony to refute all six counts of rape, counsel believed that defendant would not have made a good witness and used other noninterested witnesses to impeach victim's testimony. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐641.13(2.1)

Defense counsel's failure to seek removal of judge who had prosecuted defendant on felony bad check count and revoked defendant's probation a short time later was not ineffective assistance in rape prosecution; judge could have disqualified himself if he believed that he could not provide defendant a fair and impartial trial, and judge had ruled in defendant's favor on almost every pretrial motion. U.S.C.A. Const.Amend. 6; SDCL 16-2 App., Code of Jud.Conduct, Canon 3, subd. C(1)(a).

3. Criminal Law ⇐641.13(2.1)

Defense counsel's failure to adequately object to prosecutor's statement during closing argument in rape prosecution, that if defense witnesses had known of any "dirt" concerning victim they would have testified about it during trial, was not ineffective as-

sistance of counsel, alth
rape shield ruling allowe
victim's sexual history; d
not pursue matter any fu
court's emphatic refusal to
and made motion for mi
deliberations. U.S.C.A. C

4. Criminal Law ⇐641.1

Defense counsel's failu
prosecutor argued that def
man" was not ineffective a
prosecution, where counsel
al on basis of statement af
tions began, and there was
ord to support prosecu
U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐641.13

Defense counsel's failur
prosecutor argued that stat
emotion was not ineffective a
prosecution, where stateme
response to defendant's
state's case was based on e
U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐641.13

Defense counsel's failur
prosecutor argued that pre
dant's youngest daughter
showed defendant was not
his daughters was not ineff
in rape prosecution; trial co
ed to younger daughter or
sions to highlight that defend
man, and prosecutor merel
that argument. U.S.C.A. C

7. Criminal Law ⇐1030(1)

"Plain error" is one whi
obvious and substantive. SI

8. Criminal Law ⇐641.13(

Trial counsel's alleged
quately investigate and call t
nesses for impeachment was
assistance in rape prosecuti
lieved that witnesses would
helpful because of negative r
side of family. U.S.C.A. C

193

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF UNITED STATES FISH AND WILDLIFE SERVICE APPLICATION NO 2300-2	NOTICE OF MOTION HEARING

TO: ALL PARTIES IN THE ABOVE-ENTITLED PROCEEDING:

NOTICE is hereby given that hearing on the Division's Motion for Scheduling Order and on Division's Evidentiary Motion will be held at 8:30 a.m., March 6, 1997, in the Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol, Pierre, SD.

Dated this 21st day of February, 1997.

Diane Best

Diane Best
Assistant Attorney General
500 East Capitol
Pierre, SD 57501-5070
Telephone (605) 773-3215
Counsel for Division of
Environmental Regulation

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF UNITED STATES FISH AND WILDLIFE SERVICE APPLICATION NO 2300-2 (LAKE CREEK)	DIVISION'S FOURTH MOTION FOR SCHEDULING ORDER AND PROPOSED ORDER

The Department of Environment and Natural Resources, Division of Environmental Regulation (hereinafter Division), hereby requests the following procedural scheduling order in the above-referenced matter:

1. That all parties complete any discovery desired by March 14, 1997, except as otherwise ordered upon good cause shown.

2. That lists of exhibits and witnesses (other than rebuttal witnesses and exhibits) be exchanged by all parties on or before April 21, 1997. To the extent possible, the Division asks that the parties stipulate to the admission of exhibits (including maps) by April 25, 1997.

3. That if the Applicant intends to file a prehearing brief, the brief be filed on or before March 21, 1997. Responsive briefs are to be filed on April 11, 1997. If the applicant chooses to file an answering brief, the due date is April 25, 1997.

4. That hearing be set in the above-entitled matter on April 29 or 30, 1997, at the Matthews Training Center in Pierre, South Dakota. The time is tentatively set for 8:30 a.m. on April 30, 1997.

5. That any party seeking to introduce exhibits at hearing provide a copy of each exhibit to all parties before the

start of the hearing (other than large maps or voluminous exhibits). That voluminous exhibits and large maps be made available for viewing by the parties in advance of the hearing.

6. That any dates pertaining to the submission of documents pertain to the filing (mailing by first class mail) of the documents. All original documents are to be filed with the Division, with copies to be mailed to the Board.

Dated this 21st day of February, 1997.

Diane Best

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

Counsel for Division of
Environmental Regulation

ORDER

Having considered the procedural motion filed and the positions of the respective parties, the Board hereby

ORDERS that the above Scheduling Order is adopted as set forth in the Division's motion.

Dated this _____ day of March, 1997.

_____
Dwayne Rollag, Chairman
South Dakota Water Management Board

pld213.db(mas)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Division's Motion for Scheduling Order and Proposed Order, Division's Evidentiary Motion, and Notice of Motion Hearing **In the Matter of United States Fish and Wildlife Service Application No. 2300-2 (Lake Creek)**, was served by United States mail, first class, postage prepaid upon:

Paul Bengford
Attorney at Law
P.O. Box 626
Martin, SD 57551

Tom Lloyd Esq.
337 Federal Bldg.
225 S. Pierre St.
Pierre, SD 57501-2489

Francis E. Brink
1214 S. Wells St.
Aberdeen, SD 57401

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

Marian Gunderson
811 W. 3rd
Yankton, SD 57078

Leo Holzbauer
RR 1 Box 170
Wagner, SD 57380

Raymond Kocer
Box 388
Martin, SD 57551

John R. Kunz
U.S. Dept. of Interior
Office of Solicitor
755 Parfet St., Ste 151
Lakewood, CO 80215

Bernita Loucks
219 42nd St.
Rapid City, SD 57702

Dwayne Rollag
320 Lincoln Lane S.
Brookings, SD 57006

Joel Rickenbach
Box 97
Oelrichs, SD 57763

Charles Emley
Box 673
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Brett Heath
HWC, Box 20
Martin, SD 57551

by interoffice mail upon:

John Hatch
Division of Environment
and Natural Resources
523 E. Capitol Ave.
Pierre, SD 57501-3182

and hand-delivered to:

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

on this 21st day of February, 1997.

Diane Best

Diane Best
Assistant Attorney General

Testimony of Lawrence Kocer at March 6th hearing

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

March 3, 1997

Dear Board Members,

In September of 1971 the US Dept. of Interior purchased the Brown Ranch portion of the Lacreek National Wildlife Refuge, which consists of 6,665 acres , for $666,524.00. This property generated $5,938.00 taxes for Bennett County when it was privately owned by the Brown's, excluding improvements. In 1997 this property is now valued at $1,253,125.00 and if privately owned would generate $21,984.00 with improvements. These facts and figures courtesy of Tom Nelson, Bennett County Director of Equalization.

See exhibit A.

Monies (shared revenue) received from FWS by Bennett County in the past, which includes the original LaCreek Refuge that consists of approximately 9600 acres and the Brown portion of 6665 acre are: 1992 -$22,442; 1993 - $20,460; 1994 -$19,513; 1995 - $19,513; 1996 - $18,147.

During the early 1980's Diversions 1,2,3, and 4 were constructed under the supervision of Rolf Kraft. A partial flume and Diversion 1 were constructed north of the main channel of Lake Creek(LaCreek), then the channel was moved by dredging, to flow through the flume and Diversion. Diversion 2 was built in the Lake Creek (LaCreek) channel, however it washed out and was abandoned. Diversions 3 and 4 were also constructed in the Lake Creek (LaCreek) channel above the creek bed. So, when there is any substantial run off from rain (1" - 2") or snow melt they divert water and flood the adjacent land owners.

Formal complaints in writing were sent to the Department of Environment and Natural resources by Raymond Kocer on March 26,1994, April 10,1994, and May 29, 1996. On November 30,1992, Jane Farrell registered a complaint in the name of Charles Emley with 5 pictures of diversion 4 flooding.
Phone complaints were placed by Raymond Kocer on May 7 and May 13, 1993 and on March 24,1994. By Lawrence Kocer on August 16, 1993.

The plans for the new Diversion 4, which is proposed to go in down stream approximately

400 feet from the present Diversion 4, will lessen the impact on Raymond Kocers meadow (Belsky's) the church land and the Rolfe meadows. If a 3.5 foot head is maintained at the proposed new Diversion 4 there will be piping and cause flooding on Brett Heath and Lawrence Kocer meadows. The blue prints for the proposed new Diversion 4 show that 9 foot of risers or stop logs can be placed in it, which will cause wide spread flooding on the Brett Heath and Lawrence Kocer meadows and on the county road; plus highly impact Raymond Kocers Belsky meadow and the church and Rolfe meadows.

This is of great concern to us, the petitioners, because Rolf Kraft has said on numerous occasions in conversation with the Fish and Wildlife Service (FWS) personal and the land owners "When we start to irrigate out of the Diversions". What Rolf Kraft calls irrigating we the land owners consider flooding.

We have been told in our negotiations with FWS by Cheryl Willis, that FWS has given in to us the land owners and we haven't given back anything in return. We don't feel that we have taken anything that we can return! What can we give back? We have not taken anything.

On the other hand, the FWS have acquired water rights on the springs, have illegally constructed dams or diversions on a live stream without proper authority, and have caused wide spread and erratic flooding on adjacent land owners.

The FWS claim that the purpose of Diversion 4 is for a carp barrier to protect the threatened species (Pearl Dace and Northern Red Belly Dace).
Where was the FWS concern for the threatened species when they:

1. Placed Rotone in Lake Creek (LaCreek) 1/2 mile up stream from the refuge boarder in 1981 and 1989 from Diversion 1. (Mr. Kraft said in the presents of Charles Emley; Raymond Kocer, and Del Brosz; that Tom Beck, SD Conservation officer, introduced the species in 1981 or 1982.)

2. Planted Brown Trout, a predaceous fish, in Lake Creek (LaCreek) above the diversions in 1982. (In 1981 - 150 adults and 1500 catchable; 1982 - 1500 catchable and 3075 catchable; and in 1983 - 2000 catchable brown trout)

3. When they irrigated out of Lake Creek (LaCreek) in 1990. (When we asked Mr Kraft what happens to the threatened species when they go out into the irrigated areas and the water dries up? His reply was "It's their tough luck").

We the petitioners feel the Canada Thistle problem should be addressed in the issue of Application No. 2300-2 because of the wide spread flooding, FWS can't use the proper chemicals (Round-up, 2,4,D, Banvel, Tordon, Curtail and Stinger) on the wetlands and the potholes they create, to control this noxious weed.

Dr. Ray Moore, past head of the Bio Stress Lab at SDSU in Brookings ,SD, was the vocational ag teacher in Martin, SD from 1951 through 1956. He was also hired as Bennett County Weed Supervisor and Certified seed field inspector. In the summer of 1952, Dr. Moore had 60 - 70 VoAg students whose projects he visited, plus numerous certified seed plots throughout the county. Because of his widespread travels in the county he was asked by the Bennett County Weed Board to plot any Canada Thistle patches he may observe. He reported that the only infestation of Canada Thistle was on the LaCreek Wildlife Refuge.

All of the above information has been presented to this board to show that the flooding is not an isolated problem, but that many other problems exist and the FWS doen't have the interest of the land owners at heart now or in the past.

We the petitioners and adjacent land owners hereby make a motion to reject Application No. 2300-2.

Lawrence Kocer Raymond Kocer

Charles Emley Brett Heath

Director of Equalization
Bennett County
Box 426
Martin, SD 57551

Phone
605 685-6991

March 3, 1997

I have been asked by Lawrence Kocer to give my opinion of market value and taxes to be paid for 1970 and 1997 for a ranch known as the Cedar Creek Ranch prior to 1970. This ranch was sold to the United States Government (book 14 of deeds page 347) in September 1971 and consequently taken off the local assessment rolls that year.

Market value for 1971 cannot be fully determined without doing extensive research, of which I have not taken the time to do. Market value is defined as the usual cash selling price without any pressure to either the buyer or seller. The cash selling price for this property in 1971 was $ 666,524.00 dollars. Without any other information and assuming this sale was an arms length sale one could determine this to be somewhat close to the actual market value as determined in 1971.
The taxes paid in 1970 was $5,938.00 on 6,665 acres and any improvements.

Market value for 1997 is determined by what similar like property is selling for the current period . Other sales indicate a value for meadow land to be $225.00 dollars an acre. Sandhills pasture to be $125. 00 dollars an acre. the information provided to me by Lawrence is this ranch consisted of approximately 4,000 acres of meadow and marsh and balance being sandhills grass.

4,000 * 225.00 =	$900,000.00
2,665 * 125.00 =	$333,125.00
Improvements estimated	$20,000.00
Total value	$ 1,253.125.00
Estimated taxes for 1997 on value indicated	$21,484.00
Improvements	$500.00.00
Total 1997 taxes	$21,984.00

(note) I have not physically viewed the property in recent years.

Tom Nelson CAA Tom Nelson
Bennett County Director of Equalization

testimony of Raymond Kocer
@March 6th hearing

Dear Board Members:

We the land owners believe the board should hear testimonies on all the issues concerning the water management and endangered species on LaCreek Refuge. I am going to touch on a few problems I had in the last few years. At the end I will address diversion #4 to show the problem that deals with the whole valley not just the little portion they refer to as diversion #4.

In 1984 when FWS Applied for a water right there soil water compatibility test came back conditionally approved and I Quote "your application is conditional as the water or soil or both are considered marginal for irrigation development. The following conditions have been added to your application. If these limits of salt and sodium buildup in the soil are exceeded or soil restrictions are not followed the state conservation commission may request suspension of your water right. eat. (Refer to Document #1).

November 18, 1992 a meeting was held in the Blackpipe Banks basement to review the FWS draft study plan. An agreement was reached between landowners and Morrey Wright and Dale Henry both with the Denver office of FWS. La Creek was to be dug straight into Pool 7 and all the stop logs would be pulled out of diversion #4. The landowners knew now the study plan would relate to the original LaCreek bed of LaCreek. Not diversion #1 being App 3 ft Above the creek bed. diversion #3 being app. 2 ft above creek bed and diversion#4.being app 2 ft. above creek bed with 4 ft. of boards making the water table 6ft. above original creek bed. At this same meeting Charlie Emily indicated that 40 acres south of church property was being flooded "Weldon Rolf Property".

November 30. 1992 Jane Farrell sent a complaint with pictures taken on November 18, to John Hatch on Charlies, flooding due to stop logs in diversion #4. (Document #2).

December 8, 1992 John Hatch answered Jane's letter saying Mr. Kraft stated that no

water was being diverted at #4 and no diversion took place on Nov. 18. Mr Kraft removed one stop log from #4 and would like to keep remaining stop logs in to prevent carp from moving upstream. (Document #3).

December 10. 1992 Charlie Emley got a call from Bob Green with FWS that Rolf Kraft discovered an endangered species"Speckled Dace Fish" in LaCreek .

Eileen Stukel with the endangered species diversion of the Game, Fish and Parks Dept. said the speckled Dace had never been found in SD. and was from Nevada and Oregon. She verified this with the chief of the fisheries division for the Game Fish and Park's Dept. she said the only endangered species she was aware of in Bennett 'County was in Elm Creek the Plains Top Minnow. (Document #4).

May 7, 1992 telephone call to Del Brosz complaining flooding from water management. Charlie Emley and I found Boards in a culvert that was diverting water east of the church meadow. (Document #5).

August 16, 1993 Lawrence Kocer called Del Brosz about siphon running back wards. Mr Brosz would not come out because the water right was under appeal (document #6).

My written complaints to Mr. Hatch on March 26, 1994 and April 10, 1994 are referring to structures built before a water right was obtained, Diversion #1 was built in 1981. (Document #7).

May 20, 1996 I visited with Mr. Kraft on site by Bretts' stack yard I asked where the water came from and if he could fix the problem. Mr. Kraft replied I don't know what I was talking about and I didn't understand what was going on under the ground. Kraft said the water we were looking at was influenced by the high water table by the cemetery. One mile east. This is the same excuse Kraft used when I Complained March and April of 1994. {I didn't understand and the high water table caused my problem}.

After FWS dug LaCreek around diversion #1 and filled in a couple of dams east of

Belsky's meadow my problem is not as bad as it once was.

By May 29, 1996 complaint addresses the whole water problem of diversion # 1 partial flume, diversion #3 and diversion #4 by the way FWS installed a new flume in the summer of 1996 at a cost of $22,000.00 (twenty-two thousand dollars) out of the original channel same location as the washed out flume after I complained to Mr. Hatch. I have two people to testify that FWS changed the LaCreek Channel, Carl Johnson and Harold Freouf. (Document #8).

January 5, 1997 LaCreek flooded on Brett's meadow. Krafts New ditch not working.

January 7, 1997 I called Morrey Wright and took pictures of flooding also sent them to Denver.

January 10, 1997 I sent three plans to Denver from States attorney office. January 13, 1997 I called Morrey Wright about water on Brett's South east corner since early winter, something not right to cause flooding. February 23,1997 Diversion #4 diverting. FWS people want's us to agree on a new Diversion #4. I have trouble with this because 1)They can put boards in structure to Irrigate. 2)The elevation of the 3 ft. 8 inches of boards in the strutter is the same as Lawrence meadow. 3) A training dike approximately 775 long built of sand is very similar to the problem east of Belsky's that FWS destroyed. 4) FWS people were not concerned about the Pearl Dace, Northern Red Bellied Dace and Plains Top Minnow when the Refuge was irrigating. 5) When FWS rotoned LaCreek 1981 and 1989. 6) The Canadian Thistle problem on the whole LaCreek Refuge.

Thank You for your time and consideration.

Raymond Kocer

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

March 10, 1997

NOTICE

TO: Terry T. Terrell, Deputy Regional Director
U. S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225
Parties of Record (see attached list)

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

SUBJECT: Scheduling of Hearing on U.S. Fish and Wildlife Service's Amended Water Permit Application No. 2300-2, LaCreek National Wildlife Refuge

The Water Management Board met on March 6, 1997 to consider motions and establish a procedural schedule in preparation for the April 30, 1997, hearing on Water Permit Application No. 2300-2. Enclosed is a copy of scheduling dates that were established by the Board.

The Board considered the Division and U.S. Fish and Wildlife Service motions to limit evidence in the proceeding as a combined motion. The motion was granted to the extent that testimony and other evidence be limited to matters relevant to the pending proceeding. However, specific evidence will be considered to determine relevance at the time of hearing. In separate action, the Board denied U.S. Fish and Wildlife Service's motion to exclude evidence concerning weed control and eradication. The denial of this motion does not mean all evidence regarding weed control and eradication is relevant

The hearing before the Water Management Board on Application No. 2300-2 is scheduled to begin at 8:30 AM (CST), April 30, 1997, in the Conference Room, Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre, SD. The agenda time is an estimate and may be delayed due to prior agenda items. The hearing may continue to May 1, 1997, if necessary.

Please contact Diane Best, Assistant Attorney General at (605) 773-3215 or myself, if you have any questions.

c: Diane Best, Assistant Attorney General
Bennett County Weed Board
Ginger Price, USFWS
Rolf Kraft, Lacreek National Wildlife Refuge
Tim Olson, G,F&P Water Permit Coordinator

PROCEDURAL SCHEDULE FOR WATER PERMIT APPLICATION NO. 2300-2
UNITED STATES FISH AND WILDLIFE SERVICE

DATE	
March 14, 1997	Parties complete discovery except as otherwise ordered upon good cause shown
March 21, 1997	Applicant files prehearing brief (if applicant intends to file)
April 8, 1997	Telephonic motion hearing (if necessary)
April 11, 1997	Responsive briefs
April 21, 1997	Exchange of lists of exhibits and witnesses by all parties
April 25, 1997	Parties stipulate to the admission of exhibits (to extent possible)
April 25, 1997	Applicant's answering brief (if applicant chooses to file)
April 30, 1997	Evidentiary hearing begins at 8:30 AM

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorney for Applicant

John Kunz
U.S. Department of Interior
Office of the Solicitor
755 Parfet St., Ste. 151
Lakewood, CO 80215

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorney for Bennett County

Paul Bengford, States Attorney
P.O. Box 688
Martin, SD 57551

CERTIFICATION

I hereby certify that on March 10, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated March 10, 1997, along with a copy of the Parties of Record list, and a copy of the procedural schedule, regarding Scheduling of Hearing on U.S. Fish and Wildlife Service's Amended Water Permit Application No. 2300-2, LaCreek National Wildlife Service, addressed as stated below, and on the attached Parties of Record List:

Terry T. Terrell, Deputy Regional Director, U.S. Fish & Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

Bennett County Weed Board, Box M, Courthouse, Martin, SD 57551.

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

Rolf Kraft, Lacreek National Wildlife Refuge, HC 5, Box 114, Martin, SD 57551.

A copy of the above described Notice and attachments were sent inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.

Tim Olson, Water Permits Coordinator, Department of Game, Fish & Parks, Joe Foss Building.

Cheryl F. Frost

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 11th day of March, 1997

Karen Schlaak

Notary Public

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

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant. --- BENNETT COUNTY, and BENNETT COUNTY WEED BOARD, Intervenors.	**APPLICATION NO. 2300-2**

APPLICANT'S FIRST SET OF INTERROGATORIES AND FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO PETITIONERS

COMES NOW the Applicant, the United States Fish and Wildlife Service (FWS), and pursuant to S.D. CODIFIED LAWS ANN. §§ 1-26-19.2, 15-6-33, and 15-6-34, and the order entered by the Board on March 6, 1997, hereby submits the following interrogatories and requests for production of documents.

INSTRUCTIONS

1. Each interrogatory or objection thereto must be answered separately and fully in writing under oath, and signed by the person making the answer or the objection.

2. Answers to the interrogatories must be given no later than thirty (30) days after service of the same. Documents produced in response to the requests for production of documents shall likewise be produced at the office of the undersigned no later than thirty (30) days after service of the same.

3. In responding to these discovery requests, you must provide information that is known or available to you, your investigators, employees, agents, or any and all other persons having knowledge of the matters referred to in the interrogato-

ries. Further, in responding to these discovery requests, you must make a diligent investigation of all records, documents, materials in your possession or control, or otherwise available to you. If after making such investigation, you cannot fully answer or respond to a given interrogatory or request for production of documents, answer or respond to the fullest extent possible, and specify: (A) The reason(s) for your inability to fully answer or respond; and (B) The investigative steps that you undertook to answer or respond to the extent that you did.

4. In responding to these discovery requests, if you object to any such request, separately state with regard to each such objection, the precise objection made, a detailed description of the specific facts and circumstances which you contend support your objection, and specific references to any legal authority supporting your objection. If you object on the grounds of any privilege: (A) Identify precisely the privilege you are asserting; and (B) State the facts and circumstances which you contend support your claim of privilege. If your assertion of privilege pertains to a document, state the following: (A) A description of the type of document; (B) The document's date; (C) The identity of the author and name of any other person who may have assisted in preparing it; (D) The identity of all persons who have received a copy thereof; and (E) The identity of the person(s) now having possession, custody, or control or the original document or any copy thereof. Any ground for objection not specifically and timely stated will be deemed to be waived.

5. These discovery requests are continuing in nature. If at any time after you respond to these discovery requests you become aware of additional responsive information, you must immediately supplement your responses. A failure to so amend or supplement your responses shall be deemed as a knowing concealment of material information, and shall subject you to appropriate sanction.

DEFINITIONS

When used in these discovery requests, the following definitions shall apply.

1. The words "you", "your," or "yours" shall mean Charles Emley, Brett Heath, Lawrence Kocer, and/or Raymond Kocer, either individually or collectively.

2. The words "person" or "persons" shall mean any natural person, corporation, partnership, proprietorship, association, organization, or other entity.

3. The words "document," "documents," "records," or "material" shall mean the originals or copies of any written, recorded, computerized or graphic matter, however produced or reproduced, including but not necessarily limited to: all letters, telegrams, facsimiles, correspondence, reports, memoranda, agreements, contracts, recordings, or records of telephone conversations or of meetings or conferences, intra-office communications, inter-office communications, work papers, notes, computerized data, computer files, maps, pictures, photographs, video tapes, computer print-outs, computer disks or tapes, or any other recorded materials or writings.

4. When used in reference to a natural person, the words "identify," "identity," or "identification" shall (unless the context indicates otherwise) mean to state his or her full name, present or last-known employment or personal address, and occupation. When used in reference to any other person, *i.e.* a corporation, partnership, organization, association, *etc.*), the words "identify," "identity," or "identification" shall mean to state the full name thereof and the present or last-known business address. When used in reference to a document or documentation, the words "identify," "identity," or "identification" shall mean to state its date, author, recipient, and type of document, or if this information is not available, some other means of identifying the same, and in all cases, the present location and name of the custodian of the document. As an alternative to this identification procedure, you may instead produce the original or a copy of the document. All documents so produced shall be produced as they are kept in the usual course of business, and shall be organized and labeled to correspond with each specific interrogatory or request for production of documents.

5. "The Board" shall mean the South Dakota Water Management Board.

6. "Permit" shall mean the water permit which FWS is currently seeking in the captioned proceeding.

INTERROGATORIES

INTERROGATORY NO. 1: State *with specificity* each claim, fact, and/or inference upon which you base your contention that the Board should not grant the Permit.

INTERROGATORY NO. 2: Assuming that you contend that there is not a reasonable probability that unappropriated water is available for FWS's proposed use, state *with specificity* each claim, fact, and/or inference upon which you base this contention.

INTERROGATORY NO. 3: Assuming that you contend that the granting of the Permit will unlawfully impair the existing rights of others: **(A)** State *with specificity* each claim, fact, and/or inference upon which you base this contention; **(B)** Identify each person whose existing rights will be unlawfully impaired; and **(C)** Describe *with specificity* the nature of the existing rights that will be unlawfully impaired.

INTERROGATORY NO. 4: Assuming that you contend that FWS's use of water under the Permit will not be a beneficial use, state *with specificity* each claim, fact, and/or inference upon which you base this contention.

INTERROGATORY NO. 5: Assuming that you contend that the granting of the Permit will not be in the public interest, state *with specificity* each claim, fact, and/or inference upon which you base this contention.

INTERROGATORY NO. 6: Identify each and every witness that you intend to call to support any or all of the above contentions.

INTERROGATORY NO. 7: With respect to each witness identified in the response to Interrogatory No. 6, state *with specificity* the substance of the testimony which he or she is expected to give. Additionally, with respect to each expert witness which you intend to call: **(A)** Give a brief summary of his or her qualifications which you contend qualify him or her to render expert testimony; and **(B)** State *with specificity* the substance of any opinions which you expect him or her to render, and the facts, or scientific evidence or data which you contend will support such opinions.

INTERROGATORY NO. 8: Identify each and every person that provided information for or otherwise assisted with the responses to these interrogatories, requests for production of documents, and/or requests for admissions.

FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 1: Produce or otherwise provide to FWS each and every document that you might have referred to (or did refer to) in answering the above interrogatories.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 2: Produce or otherwise provide to FWS each and every document upon which the witnesses identified in Interrogatory No. 6 will rely to support

their expected testimony.

DATED this 11th day of March, 1997.

JOHN R. KUNZ, Esq.
Counsel for Applicant
755 Parfet Street, Suite 151
Lakewood, CO 80215
(303) 231-5353 (Ext. 339)
(303) 231-5363 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 1997, true and correct copies of the foregoing **FIRST SET OF INTERROGATORIES AND FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO PETITIONERS** was mailed to:

John Hatch
Chief Engineer
Department of Environment and
Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181
(U.S. Mail, postage prepaid)

Diane Best, Esq.
Asst. Attorney General
500 East Capitol Ave.
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Tom Lloyd, Esq.
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337 Federal Bldg.
225 South Pierre
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Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC, Box 20
Martin, SD 57551

Lawrence Kocer
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Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

(Messrs. Emley, Heath, and Lawrence and Raymond Kocer, each Certified Mail, return receipt requested)

Thomas J. Ford

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant. --- BENNETT COUNTY, and BENNETT COUNTY WEED BOARD, Intervenors.	**APPLICATION NO. 2300-2**

APPLICANT'S FIRST SET OF INTERROGATORIES, FIRST REQUEST FOR PRODUCTION OF DOCUMENTS, AND FIRST REQUEST FOR ADMISSIONS TO BENNETT COUNTY AND BENNETT COUNTY WEED AND PEST BOARD

COMES NOW the Applicant, the United States Fish and Wildlife Service (FWS), and pursuant to S.D. CODIFIED LAWS ANN. §§ 1-26-19.2, 15-6-33, 15-6-34, and 15-6-36, and the order entered by the Board on March 6, 1997, hereby submits the following interrogatories, requests for production of documents, and requests for admission.

INSTRUCTIONS

1. Each interrogatory must be answered separately and fully in writing under oath, and signed by the person making the answers. Objections, however, to any interrogatories must be signed by your attorney. Written answers or objections to the requests for admission may be signed by either you or your attorney.

2. Answers to the interrogatories must be given no later than thirty (30) days after service of the same. Documents produced in response to the requests for production of documents shall likewise be produced at the office of the undersigned no later than thirty (30) days after service of the same. Matters

pertaining to the requests for admission shall be deemed to be admitted unless, within thirty (30) days after service of the same, you send to the undersigned a written answer or objection.

3. In responding to these discovery requests, you must provide information that is known or available to you, your investigators, employees, agents, or any and all other persons having knowledge of the matters referred to in the interrogatories. Further, in responding to these discovery requests, you must make a diligent investigation of all records, documents, materials in your possession or control, or otherwise available to you. If after making such investigation, you cannot fully answer or respond to a given interrogatory or request for production of documents, answer or respond to the fullest extent possible, and specify: (A) The reason(s) for your inability to fully answer or respond; and (B) The investigative steps that you undertook to answer or respond to the extent that you did.

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supplement your responses shall be deemed as a knowing concealment of material information, and shall subject you to appropriate sanction.

DEFINITIONS

When used in these discovery requests, the following definitions shall apply.

1. The words "you", "your," "yours," or "yourself" shall mean Bennett County, the Bennett County Commission or any individual member thereof, the Bennett County Weed and Pest Board or any individual member thereof, or legal counsel for any of the previously listed entities or individuals.

2. The words "person" or "persons" shall mean any natural person, corporation, partnership, proprietorship, association, organization, or other entity.

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REQUEST FOR PRODUCTION OF DOCUMENTS NO. 2: Produce or otherwise provide to FWS each and every document upon which the witnesses identified in Interrogatory No. 6 will rely to support their expected testimony.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 3: Produce or otherwise provide to FWS a County Resolution, minutes, and/or other appropriate document which authorizes you to participate in the captioned proceeding, employ legal counsel, and/or otherwise expend County funds to contest the Permit.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 4: For the period from 1992 to the present, identify, and produce or provide to FWS each and every document that now exists or once existed pertaining to "weed" inspections, site visits, and/or investigations that you (either by yourself or in conjunction with the South Dakota State Weed and Pest Commission) conducted at FWS' LaCreek National Wildlife Refuge.

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1: Admit or deny that the document entitled "5 Year Noxious Weed Control Plan 1996-2000, Lacreek National Wildlife Refuge, Martin, SD, in cooperation with the Bennett County Weed Board" (a copy of which is attached hereto) is a genuine document.

REQUEST FOR ADMISSION NO. 2: Admit or deny that the document referred to in Request for Admission No. 1 is legally binding on you.

REQUEST FOR ADMISSION NO. 3: Admit or deny that the document entitled "Cooperative Agreement Between Bennett County Weed and Pest Board and United States Fish and Wildlife Service (LaCreek Wildlife Refuge) Little White/LaCreek Noxious Weed

Management Area" (a copy of which is attached hereto) is a genuine document.

REQUEST FOR ADMISSION NO. 4: Admit or deny that the document referred to in Request for Admission No. 3 is legally binding on you.

DATED this 11th day of March, 1997.

JOHN R. KUNZ, Esq.
Counsel for Applicant
755 Parfet Street, Suite 151
Lakewood, CO 80215
(303) 231-5353 (Ext. 339)
(303) 231-5363 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 1997, a true and correct copy of the foregoing **FIRST SET OF INTERROGATORIES, FIRST REQUEST FOR PRODUCTION OF DOCUMENTS, AND FIRST REQUEST FOR ADMISSIONS TO BENNETT COUNTY AND BENNETT COUNTY WEED AND PEST BOARD** was mailed to:

John Hatch
Chief Engineer
Department of Environment and
Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181
(U.S. Mail, postage prepaid)

Diane Best, Esq.
Asst. Attorney General
500 East Capitol Ave.
Pierre, SD 57501-5070
(U.S. Mail, postage prepaid)

Paul Bengford, Esq.
Bennett County States Attorney
P.O. Box 628
Martin, SD 57551
(Certified Mail, return receipt requested)

Tom Lloyd, Esq.
Assistant U.S. Attorney
337 Federal Bldg.
225 South Pierre
Pierre, SD 57501-2489
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Sherry Hoes

LACREEK
RECEIVED
JUL 5 1996
Martin, SD 57548
WILDLIFE

5 YEAR NOXIOUS WEED CONTROL PLAN
1996-2000

Lacreek National Wildlife Refuge
Martin, SD.

in cooperation with the

Bennett County Weed Board

Submitted by _____ Date 5-28-96
Refuge Manager

Concurrence by Gary C. Nies Date 6-28-96
Bennett County Weed Board

NOXIOUS WEED CONTROL PLAN
Lacreek National Wildlife Refuge
Martin, South Dakota
03/12/96

INTRODUCTION:

This plan outlines noxious weed control techniques that have been applied in the past and will be applied over the next five years (1996-2000) to reduce and maintain noxious weed infestations at acceptable levels. Total elimination is not possible. The goal is to reduce the total infestation to less than 100 acres. This will allow any significant spreading to be treated in any given year to contain the problem. The refuge is not committed to any particular method or technique to control noxious weeds, and all reasonable chemical, cultural, mechanical, or biological alternatives will be explored and tested, as appropriate. Experiments must be confined to test sites until proven effective. Noxious weed control in some form is expected to continue annually into the foreseeable future.

BACKGROUND:

Canada thistle (Cirsium arvense) is the primary noxious weed on the refuge and its control continues to be a major effort at Lacreek. The plant is a deep-rooted perennial that is very difficult to control. Prior to 1982, the refuge was continuing the traditional method of thistle control that amounted to mowing of selected patches by grazing permittees and sporadic use of 2-4D. Canada thistle is a deep-rooted perennial that spreads by wind blown seed and rhizomes. It responds to mowing, by sending up additional shoots, like any other rhizomatous plant. 2-4D is an agricultural chemical designed specifically to knock down broadleaf weeds in grain crops to reduce weed seeds in the harvest. It will not kill deep-rooted perennials in one application. It simply wilts the above ground portion, leaving the root to resprout in the fall and following spring. Under this management, the thistle infestation on the refuge expanded to approximately 1200 acres of major and isolated small patches.

Canada thistle is a state-listed noxious weed and the political climate indicated that the refuge was losing local public support and needed to address its noxious weed responsibilities. With an infestation of 1200 acres of spots and patches in 1982, it was apparent that mechanical means such as mowing and farming were perpetuating the problem, not solving it and 2-4D alone was not effective. Biological controls were still in early research and not available. The only means available that could control and reduce the size of this infestation, was the use of herbicides. In 1983, the refuge researched all the data that could be found from area and regional office sources, State Weed Specialists, and private industry. This research indicated an array of herbicides. The refuge manager selected those herbicides considered the most effective, but with the least environmental hazard, based on the information available at the time.

Contacts were made with the RO and FWS Research to initiate study of the environmental fates of the most popular refuge-used chemicals. This was needed since label information from the chemical companies addressed only the agricultural consequences of misuse, and not the impacts on wildlife. Toxicity information from the Weed Science Society and Service Handbooks indicated a low order of toxicity for Tordon, Banvel, Roundup, and 2-4D, and these herbicides were selected for performance trials on test plots established on the refuge in 1983. The results of these trials guided the planning of an initial assault on thistles in 1984, while monitoring the 1983 test plots for long term control. A test plot for Tordon and Tordon/2-4D, set up in 1984, still shows the effectiveness of Tordon. The trials indicated that progress could be made with a methodical full-scale effort.

A major Canada thistle control plan went into effect in 1985, when 468 acres were treated. Tordon alone is expensive, but effective for heavy infestations where the grass understory is to be saved. 2-4D alone is not effective, but with Tordon in a tank mix, it proved very effective for scattered plants in grass. The effort continued through 1987, with the infestation reduced an estimated 70%. Naturally, the easiest to control areas are cleaned up first, and the last 10% will probably never be eliminated. The objective of the control effort is to reduce the infestation to the point that all major increases can be treated in any given year to stay on top of the problem, and never allow the infestation to exceed approximately 100 acres, total.

The control effort was dealt a critical blow in 1988, when environmental concerns developed in the Regional Office, and most of the effective chemicals, including Tordon and Roundup, were targeted as environmentally hazardous by the Pesticide Review Committee, and denied for refuge use. Many heated exchanges and unsupported extreme positions flowed back and forth through the mails, computers, and telephone lines, resulting in appeals to higher authority. The Pesticide Review Committee did achieve its purpose, however, by eliminating the use of chemicals on those stations where the need could not be supported, and modifying plans on other stations where biological soundness needed review. The appeal process allowed project leaders with strong convictions and sound programs to negotiate a settlement. Tordon, in particular, was on the hit list because of its persistence if it gets into ground water. In the case of Lacreek, Tordon was given up in 1988 in order to use Roundup. The major problem was that Roundup is non-selective and kills on contact with green foliage. Tordon, on the other hand is selective for forbs, and used properly, allows the grass to survive. Numerous small patches of thistle that could have been sprayed quickly with Tordon, now had to be precisely excised with Roundup to save the surrounding grass.

The work became very time consuming, and was concentrated on the larger patches allowing the smaller patches to seed and spread. Small touchup sites on previously treated areas were ignored. In 1988 we lost ground. This occurred because all the work planned was not accomplished and 1988 had good growing conditions for Canada thistle.

Good progress was made in 1989, including combination spring Roundup/ fall tillage to reduce thistles in farm fields, HRM grazing on minor infestations, and an experimental release of 500 stem-mining weevils (Ceutorhynchus litura) in Unit 5N-1. Unit 5N-1 was chosen because it is isolated from most other units, and the prevailing wind blows most of the seed into the open water of Pool 5 where germination potential was reduced.

Two refuge spray units were used to treat Canada thistle. A boom sprayer was used on the large accessible patches and a hand sprayer was used on the dikes. Also, a 50 gallon hand spray unit mounted on a small ATV trailer was used in areas inaccessible by truck. Some areas of the refuge showed vigorous stands and those areas were sprayed first. Most of the spray work in 1989 provided good results, except the wick. We made two passes, once in each direction, but the kill was not good. Perhaps the plants were drought stressed even though they appeared robust at the time of application. The target species must be healthy and growing vigorously for best results with Roundup.

The use of herbicides on the refuge will decline as we gain control, but total elimination of herbicides, like thistles, is not a reality if continued control remains an objective.

From 1990-1992 we had good control of the Canada thistle on the refuge. The years of 1993 and 1994 were wet years in this part of South Dakota. Good growing conditions, combined with many rainy and windy days that did not allow spraying, allowed the Canada thistle to expand on the refuge.

In 1994 we concentrated on the east side of the refuge. All Canada thistle on the east side (approximately 4 miles) was sprayed from the boundary fence to the marsh. Heavy infestations not sprayed in the spring were mowed and fall sprayed. The cross-refuge road and the road up the west side of pool 10 was also sprayed. Farm fields were sprayed as needed. In 1994 biological control agents were released in the low areas of Pool 8. These areas cannot be sprayed chemically due to soil types and soft ground.

In 1994 we had complaints from neighbors regarding Canada thistle in Units LCN-6b, LCN-6a, LCN-5a and LCN-4b. We ground sprayed these areas in 1994. Due to rough terrain, we contracted for aerial spraying in 1995. These areas will be aerially sprayed in 1996 as well. Soil types in these units (primarily Lo, Du, Ga) are not labeled for Tordon or Transline, so 2-4D will be used to prevent seed production.

Biological control agents were released in the south portion of Unit LCN-5a near Lake Creek in 1994. Due to this and the gannet soil types near the creek, this part of Unit LCN-5a will not be sprayed. The south portion of unit LCN-6a is also gannet soils and will not be sprayed.

In March of 1995, a Coordinated Resource Management meeting was held with the neighboring landowners to address their concerns of thistle on the refuge. A plan was developed by the State of South Dakota and signed by the County Weed Board and Lacreek Refuge to control weeds in a Little White River/Lacreek Weed Management Area. The area encompasses Lacreek Refuge and surrounding private land.

Two releases (200 individuals per release) of leaf defoliating beetles (Cassida rubiginosa) were delivered in June of 1995. These beetles will work in conjunction with the stem-mining and seed head weevils. The LWR Recreation Area, and the road on the north side of Pool 10 were mowed before the thistle went to seed in the spring. These areas were sprayed with Transline in the fall.

OBJECTIVE:

To reduce the refuge Canada thistle infestation to approximately 100 acres over the next five years using the most effective means with the least environmental hazard.

STRATEGIES:

1. Mechanical - Mechanical tillage using chisel sweeps will continue to be used in conjunction with Roundup in farm fields. The Roundup is used to kill mature plants in the spring prior to tillage for spring crops. The chisel sweep is used to undercut new thistle plants in the fall before they can develop rhizomes. Disk tillage for crop planting without prior herbicide application to kill thistles is not recommended because the disk will cut and spread thistle roots and rhizomes and each root/rhizome segment can develop into a new thistle plant, spreading the infestation. Mowing by itself is ineffective for thistle control and will only be used in conjunction with haying operations or in emergencies to prevent seed production in selected sensitive areas. Mowing in conjunction with fall spraying can be very effective. This will be used to extend our available spraying days and to compare success of spring vs. fall spraying.

2. Cultural - Short-duration livestock grazing, guided by the principles of holistic resource management, will be used to suppress Canada thistle during the rosette stage in the spring. Holistic grazing can improve grass vigor and increase grass competition. Multiple grazing rotations during any one season in this semi-arid region is not advisable for perennial weed control. Typical late summer drought conditions suppress grass regrowth, while the deep-rooted perennial weeds continue to enjoy access to the aquifer.

   The use of dense crops such as sudan grass and millet will continue to be used in conjunction with herbicide applications and mechanical tillage. These tall dense crops suppress thistle by competition, allelopathic interference, and shading.

   Prescribed fire is used to improve grassland and marsh vigor and reduce mulch on selected sites. It is not effective for thistle control and will not be used other than to burn bales containing thistle left in the field from haying operations.

3. Biological - The stem-mining weevils (Ceutorhynchus litura) introduced on the refuge in 1989 to control Canada thistle will continue to be monitored. Observations in 1990 indicated a 30 - 40% reduction in thistle seed production. Expansion of the stem-mining weevils was monitored and by 1995 some areas are achieving a 90%+ reduction in viable seed production. Dead or dying flowering stems of thistle can be split to confirm evidence of stem-mining and presence of stem-mining weevil larvae. Seed head weevils (Larinus planus) were released on the Refuge in 1993. They will also be monitored. We appear to

have had two good years of survival and reproduction. These two species working in the same areas appear to have a greater impact than one species alone.

In 1995 we purchased 400 defoliating beetles (Cassida rubiginosa) to work in conjunction with the stem-mining and seed head weevils. These were released, in two releases of 200 beetles each. Additional biological controls will be reviewed as they become available.

4. Chemical - Tordon is the most effective herbicide for Canada thistle. It has provided the longest sustained reduction, and will preserve surrounding grasses when applied according to label recommendations. It will be used to reduce Canada thistle in grasslands wherever label precautions permit. The primary concern is ground water contamination, and precautions will be taken. Such precautions include: mixing all solutions on a dry upland site away from wetlands, drainages, or wells, using only pressurized water to prevent back siphoning, and pouring all container rinsate into the sprayer tank. Tordon will not be used on porous sandy soils where ground water is known to be less than 10 feet from the surface. Proper application minimizes the amount of Tordon solution that makes contact with the ground and avoids soil contamination.

Roundup will be used to kill deep-rooted thistle plants in farm fields, dense patches in grasslands where no grass understory exists, and in tree plantings and shelterbelts to avoid injury to the trees. Farm field applications will be made in the spring prior to, or following the first tillage, while the thistle rosettes are vigorous. The fields are then planted to dense competitive crops such as millet, sorghum, or sudan grass, followed by chisel-sweeping in the fall immediately following harvest. The use of Roundup in grasslands and trees is very time consuming, because care is needed to avoid the surrounding grass and trees. With careful application, Roundup is very successful.

Transline was first used in 1994. This chemical is recommended by South Dakota Game Fish and Parks. They have used Transline with good success in tree belts. Transline does not kill the grass understory and can be sprayed near trees. Transline will be applied according to label directions.

Rodeo contains glyphosate like Roundup, but is formulated for use over water. Rodeo will be used on Canada thistle patches in close association with water, wet meadows, dikes, ditch banks, marsh edges, etc. Care to avoid the water with overspray will be taken.

2-4D is requested for use by farming permittees. This is not an annual use, and is only permitted under unusual conditions. If the conditions are right, penny cress, a wild mustard, will grow in small grain crops in profusion reducing yield by 50% or more, if not controlled. These grain crop annual weed infestations don't happen very often and they cannot be

predicted months in advance. The use of 2-4D will not be permitted unless the infestation indicates significant crop loss.

NOXIOUS WEED CONTROL PLAN 1996-2000

With the above history and alternative strategies documented, Lacreek Refuge plans to implement the following weed control plan for the next 5 years.

OLD REFUGE:
The entire east side (4 miles) will be sprayed from the boundary fence to the edge of the marsh as required.

Unit 5S-1 will be sprayed from the boundary trail to the fence. From the boundary trail north to the water of Pool 9 and Pool 5 will be left for biological control agents. If the weevils are not neutralizing the flower buds, the heavy patches will be sprayed.

The cross-refuge road and the road up the west side of Pool 10 will be sprayed. Depending on time constraints these areas may be spring or fall sprayed.

The farm fields LCN-4D, 10SE-1, 10NE-1 and 11-3 will be sprayed with roundup by the permittee. The force-account farm fields (9NW-3 and 5N-1) will be sprayed, if needed, with roundup by refuge personnel.

The headquarters area will be spot sprayed. There are some scattered plants found in this area each year, that we spray with a 4-wheeler spray unit every year. The auto tour route will be sprayed up on top of the road shoulders. Biological control agents were released in the low areas in 1994 so these areas will not be sprayed.

Unit 10NW-2 and 10SW-3 are farm fields currently in alfalfa. These units will be hayed prior to seed production. These units also had a good population of stem mining weevils in 1994.

In wet, or hard to access areas biological control will be used. Biological control will be used on the dike roads since these areas are labor intensive for the acres covered. Units 2-1, 2-2, 3-1, 5N-1, 5, 6N-1, 9NW-1, 9NW-2 and 10SW-1 will be left for biological control. There are good populations of stem mining and seed head weevils in all of these areas except 10SW-1. This unit is on the south end of Pool 10 and is a low, marshy area. Efforts will be made to introduce weevils and beetles to this area as soon as possible.

LWRRA will be spring mowed and fall sprayed with transline.

BROWN RANCH:
In 1994 we had complaints from neighbors regarding Canada thistle in Units LCN-6b, LCN-6a, LCN-5a and LCN-4b. We ground sprayed these areas in 1994. Due to rough terrain we contracted for aerial spraying in 1995. These areas will be aerially sprayed in 1996 as well. Soil types in these units (primarily Lo, Du, Ga) are not labeled for Tordon or Transline so 2-4D will be used to prevent seed production.

As our biological control agents reproduce and increase in numbers we expect to be able to slowly reduce, though not eliminate, the amount of chemical spraying done on the refuge. This is the long-term goal at this point. We realize that this will take time and we need to continue to aggressively control noxious weeds on Lacreek NWR. We plan to work towards this goal in the next five years. Each year, and at the end of the five years covered in this plan, we will evaluate our progress with this goal in mind. With a recently signed Little White/Lacreek Weed Control Plan we are anticipating more cooperation with neighboring landowners and the Bennett County Weed Board to reduce infestations of Canada thistle within the boundaries of the Weed Management Area defined in the plan.

REFUGE-WIDE:
Due to good success with releases of biological control agents on Lacreek NWR we are planning to purchase 600 Cassida rubiginosa, or leaf defoliating beetles, to release in three locations in 1996. This release supplements a 1995 release of these insects. We will purchase more of these beetles on a yearly basis until it appears the population is self-sufficient. These releases will be targeted for low, marshy areas or permeable soil areas that cannot be sprayed effectively due to soil types or terrain. The release sites targeted for 1996 are Units: 10SW-1, 2-2 and LCS-2b. The release of the defoliating beetle will supplement releases of stem mining (Ceutorhynchus litura) and flowerhead weevils (Larinus planus) that have been successful at reducing the flowering of Canada thistle on the refuge.

Units LCN-2F, LCN-2e (N1/2), LCS-5, LCN-7a, LCN-4a, LCS-7, LCS-6, LCS-4, LCS-5, LCS-2a, LCS-3, LCS-2c, LCS-2b on the Brown Ranch and units 4E, 4W, 1-1, 1-2, 1-3, 9NW-2, 10NW-1 and 10SW-2 on the old refuge will all be monitored for Canada thistle. At this time no large infestations are known in these areas. If a large or dense infestation is discovered, we will spray or mow the affected portion of the unit. Time may not permit all of these areas being treated 1996. As we gain control in our target areas described above, emphasis will be shifted to expand the area under aggressive treatment.

COOPERATIVE AGREEMENT BETWEEN

BENNETT COUNTY WEED AND PEST BOARD
and
UNITED STATES FISH & WILDLIFE SERVICE
(LACREEK WILDLIFE REFUGE)
LITTLE WHITE/LaCREEK NOXIOUS WEED MANAGEMENT AREA

PURPOSE:

This agreement is made and entered into by the above named parties to establish guidelines for cooperative and mutual control of noxious weeds in the Little White/LaCreek Noxious Weed Management Area. Each signatory agency agrees to cooperate with the other under the provisions provided herein and when possible eradicate noxious weeds in the LITTLE WHITE/LACREEK Noxious Weed Management Area.

AUTHORITY:

"Federal Noxious Weed Act of 1974, 7 U.S.C. Sec. 2801 et seq. as amended by Section 1453 of the Food, Agriculture, Conservation and Trade Act of 1990, 7 U.S.C. Sec. 2814;", the Act of October 17, 1968, 43 U.S.C. Sec. 1241 et seq. and 7 U.S.C. Sec. 1428 and P.L.93-629 Section 15 directs Federal Agencies to enter into cooperative agreements with State agencies to coordinate the management of undesirable plant species on Federal land.

South Dakota Codified Law (SDCL 38 - 22), and the Quarantine Law (SDCL 38 - 24A), directs the County Weed and Pest Board and the Weed and Pest program in the South Dakota Department of Agriculture with administering and directing noxious weed control in South Dakota.

RESPONSIBILITIES:

The U.S. FISH AND WILDLIFE SERVICE, (LaCreek Wildlife Refuge) will present an integrated weed and pest management plan to the Bennett County Weed and Pest Board for review and mutual approval. Federal and State laws direct that government land managing agencies are required to do no more or no less than the surrounding landowners.

The BENNETT COUNTY WEED AND PEST BOARD will establish, administer, and enforce a noxious weed control program within the County and agreed to Weed Management Area, that is all inclusive and will not discriminate against any of the parties involved.

TERMS OF AGREEMENT:

This cooperative agreement shall commence immediately after the signatures of both parties to this agreement and shall remain in effect until the project is satisfactorily completed and results

EXHIBIT
Applicant 1

[redacted]

APPROPRIATIONS:

This agreement will obligate property owners to expend necessary funds to control noxious weed infestations. Responsibility for implementation and cost of noxious weed control is the responsibility of the landowner, which is spelled out in the South Dakota Codified Law (SDCL 38 - 22) Weed and Pest Statutes.

Although legal responsibility is spelled out in statute, other funds may be available from the County Weed and Pest board, County Commissioners could authorize additional funds, grants may be available from the South Dakota Weed and Pest Commission, or other State and/or Federal agencies. These funds could support mapping, coordination of the project, education, etc.

No members of, or delegate to Congress, or resident commissioner shall be admitted to any share or part of this agreement, or to benefit to arise therefrom, but this restriction shall not be construed to extend beyond this agreement of made in cooperation or company for its general benefit.

Both parties shall not discriminate against any employee or applicant for employment because of race, color, religion, or national origin. Both parties will comply with the requirements to take affirmative action in the employment and advancement of all their employees.

IN WITNESS THEREOF, the parties hereto have executed this agreement of the last day written below.

Raymond Greenough
Chairman-Bennett County
Weed and Pest Board

2/16/95
Date

U.S. Fish & Wildlife Service
LaCreek Wildlife Refuge

2/16/95
Date

Donald Fletcher Director
South Dakota Department Of Agriculture

2/16/95
Date

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF UNITED STATES FISH AND WILDLIFE SERVICE APPLICATION NO. 2300-2 (LAKE CREEK)	))))	LIST OF WITNESSES AND EXHIBITS

Pursuant to the scheduling requirements of the South Dakota Water Management Board, the Department of Environment and Natural Resources hereby submits its list of witnesses and exhibits in the above-entitled matter.

1. Witnesses.

The DENR expects to call two witnesses:

Delvin Brosz, DENR Natural Resources Engineer, will testify regarding the DENR's review of the proposed application, including on-site observations.

John Hatch, Chief Engineer, may testify regarding the DENR's recommendation and general position in this matter as well as any DENR water policy.

The DENR may also call witnesses in order to rebut any specific testimony offered by other parties in this proceeding.

2. Exhibits.

The DENR intends to present the following two exhibits:

Attached is Area Map For Application No. 2300-2. This map has been reduced and printed in black and white for distribution to the parties. A larger color version of the same map will be introduced into evidence at hearing.

The DENR will also present the agency file in this matter which includes the application, amended application, motions, publications, DENR report and chief engineer's recommendation. This file will be available for review by the parties at any time in advance of hearing in this proceeding.

The DENR asks that the parties stipulate to the admission of these exhibits in advance of hearing. Also, other exhibits may be presented at hearing in order to rebut specific observations made by other parties in the proceeding.

Dated this 21st day of April, 1997.

Diane Best

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

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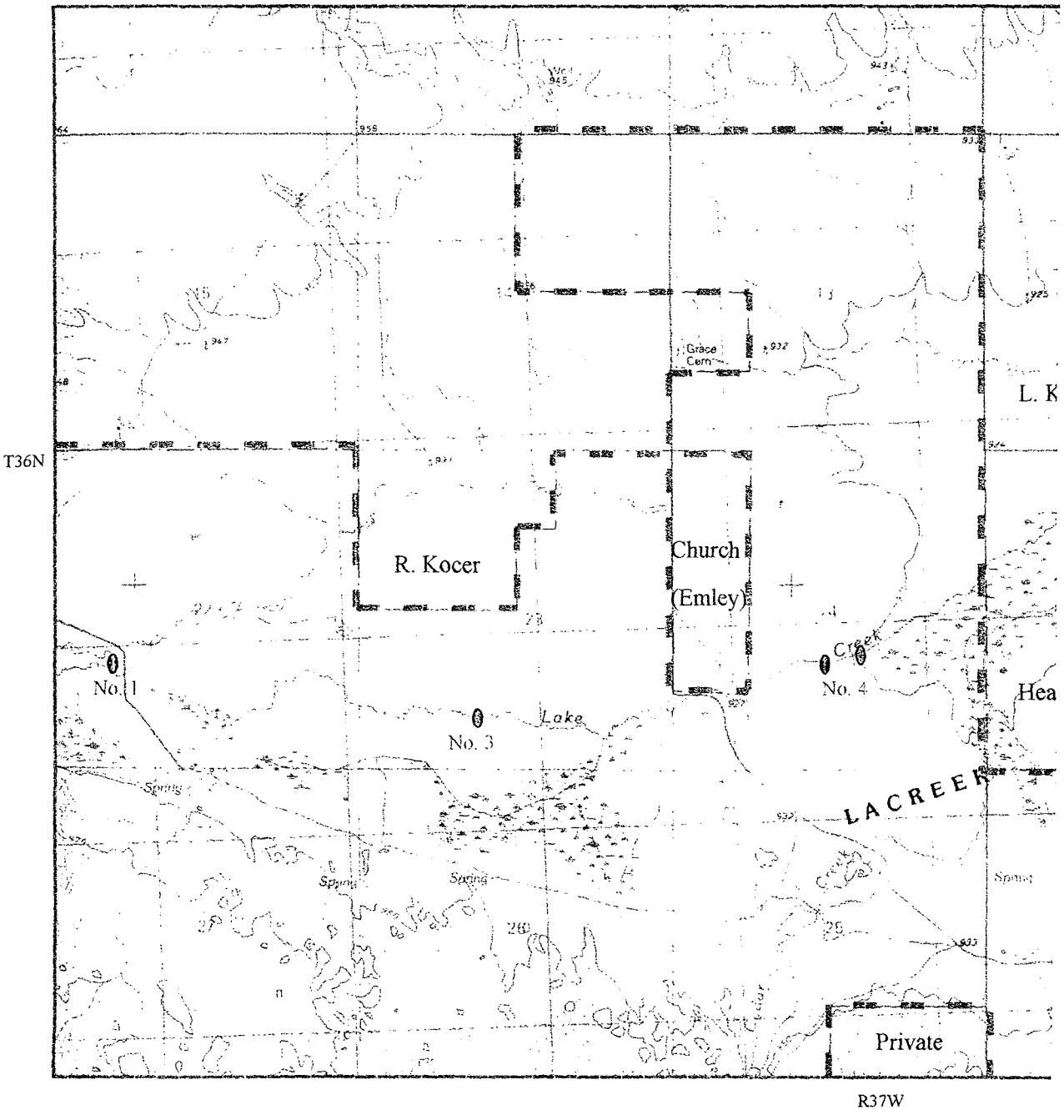
Area Map For Applicati



CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of List of Witnesses and Exhibits in the matter of In the Matter of United States Fish and Wildlife Service Application No. 2300-2 (Lake Creek), was served by United States mail, first class, postage prepaid upon the following on this 21st day of April, 1997:

Paul Bengford
Attorney at Law
P.O. Box 626
Martin, SD 57551

John R. Kunz
U.S. Dept. of Interior
Office of Solicitor
755 Parfet St., Ste. 151
Lakewood, CO 80215
(303) 231-5363 (Fax)

Tom Lloyd, Esq.
337 Federal Bldg.
225 S. Pierre St.
Pierre, SD 57501-2489

Charles Emley
P.O. Box 673
Martin, SD 57551

Raymond Kocer
P.O. Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Brett Heath
HWC, Box 20
Martin, SD 57551

by interoffice mail upon:

John Hatch
Division of Environment and
Natural Resources
523 E. Capitol Ave.
Pierre, SD 57501-3182

Diane Best
Assistant Attorney General

c:\work\word\c-pld106.db(clr)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of List of Witnesses and Exhibits in the matter of In the Matter of United States Fish and Wildlife Service Application No. 2300-2 (Lake Creek), was served by United States mail, first class, postage prepaid upon:

Paul Bengford
Attorney at Law
P.O. Box 626
Martin, SD 57551

on this 23rd day of April, 1997:

Diane Best
Assistant Attorney General

c:\work\word\c-pld106.db(clr)

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

May 8, 1997

NOTICE

TO: Terry T. Terrell, Deputy Regional Director
U. S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225
Parties of Record (see attached list)

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

SUBJECT: Continuation of Hearing on U.S. Fish and Wildlife Service's Amended Water Permit Application No. 2300-2, LaCreek National Wildlife Refuge

The Water Management Board met on April 30 and May 1, 1997, to consider Water Permit Application No. 2300-2. The hearing did not conclude on May 1, 1997. The Board set a special meeting for June 16 and 17, 1997, to complete hearing testimony on Application No. 2300-2. **The special meeting will begin at 8:30 AM, June 16, 1997, in the Kneip Room at the Governor's Inn, 700 W Sioux Avenue, Pierre, SD.** Enclosed is an agenda for this special meeting.

The Board directed that parties desiring to submit a brief shall file it with the Board and all parties by June 6, 1997. Reponse briefs shall be filed by June 11, 1997.

Enclosed is a table of exhibits that were admitted into evidence during the hearing held last week.

Please contact Diane Best, Assistant Attorney General at (605) 773-3215 if you have any questions.

enclosures

c: Diane Best, Assistant Attorney General
Bennett County Weed Board
Ginger Price, USFWS
Rolf Kraft, Lacreek National Wildlife Refuge

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorney for Applicant

John Kunz
U.S. Department of Interior
Office of the Solicitor
755 Parfet St., Ste. 151
Lakewood, CO 80215

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorney for Bennett County

Paul Bengford, States Attorney
P.O. Box 688
Martin, SD 57551

AGENDA
WATER MANAGEMENT BOARD

June 16 and 17, 1997

Kneip Room
Governor's Inn
700 W. Sioux Ave., Pierre, SD

June 16, 1997

8:30 am Call to Order

Continuation of Hearing on Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service (Lacreek National Wildlife Refuge)

NOTE: The meeting will continue on June 17, 1997, as necesssary to hear testimony. The Board will recess and adjourn as appropriate.

Adjourn

WATER PERMIT APPLICATION NO. 2300-2, U.S. FISH AND WILDLIFE SERVICE
EXHIBITS ADMITTED INTO EVIDENCE DURING THE HEARING HELD APRIL 29 & MAY 30, 1997

DENR

Exhibit No.	Description	Offered	Received
DENR-1	Application File	X	X
DENR-2	Quadrangle Map	X	X

US Fish and Wildlife Service

Exhibit No.	Description	Offered	Received
USFWS-1	Topographic Map	X	X
USFWS-2b	Location of Current Div. 4 & Proposed Diversion # 4 with Bypass works	X	X
USFWS-3	New Diversion #4 Design (Page 1)	X	X
USFWS-3a	New Diversion #4 Design (Page 2)	X	X
USFWS-3b	New Diversion #4 Design (Page 3)	X	X
USFWS-3c	New Diversion #4 Design (Page 4)	X	X
USFWS-12	Refuge 1995 Stream Survey Report	X	X
USFWS-12a	Nebraska Document on 3 state threatened/endangered species	X	X
USFWS-13a	Minutes of Game, Fish & Parks Commission Action	X	X

Dennie Simonson

Exhibit No.	Description	Offered	Received
D-1(1)	Soil Profile (page 1)	X	X
D-1(2)	Soil Profile (page 2)	X	X
D-2	Soil Map	X	X

Raymond Kocer

Exhibit No.	Description	Offered	Received
RAY-1	Folder of Documents *	X	X
RAY-12	Fragile Legacy - Endangered, Threatened & Rare Animals of South Dakota	X	X

* Raymond Kocer's Exhibit No. 1 entaileld a folder of documents. The only document within Ray-1 admitted into evidence was a letter to Senator Tom Daschle from Ralph Morgenwek

Brett Heath

Exhibit No.	Description	Offered	Received
Heath-A	Photo (Deposition Ex. No. 25)	X	X
Heath-B	Photo (Deposition Ex. No. 17)	X	X
Heath-C	Photo (Deposition Ex. No. 18)	X	X
Heath-D	Photo (Deposition Ex. No. 19)	X	X
Heath-E	Photo (Deposition Ex. No. 20)	X	X
Heath-F	Photo (Deposition Ex. No. 21)	X	X
Heath-G	Photo (Deposition Ex. No. 22)	X	X
Heath-H	Photo (Deposition Ex. No. 23)	X	X
Heath-I	Photo (Deposition Ex. No. 24)	X	X
Heath-R	Photo (Deposition Ex. No. 9)	X	X
Heath-U	Rough Fish Control Plan	X	X **
Heath-W	Tom Beck Letter	X	X
Heath-Y	June 15, 1993, Memo to file on 1993 Fisheries Meeting	X	X **
Heath-Z	Video (surface water piping)	X	X ***
Heath-CC	Preliminary Design (site plan)	X	X
Heath-DD	Map	X	X
Heath-GG	January 5, 1997 Photos (color copies on 11x 17 sheet)	X	X
Heath-JJ	April 7, 1997 Photos (color copies on 11x 17 sheet)	X	X

** - subject to relevance

*** - released to Mr. Heath for copying

Bennett County

Exhibit No.	Description	Offered	Received
BT-30	Letter of Wayne Stancill	X	X
BT-33	Natural Heritage Database Reports	X	X
BT-41	Stocking Nos. in Lake Creek	X	X
BC-55	Draft Plan	X	X

CERTIFICATION

I hereby certify that on May 8, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated May 8, 1997, along with a copy of the Parties of Record list, a copy of the Agenda for the June 16 and 17, 1997, Water Management Board Meeting, and a copy of the table of exhibits that were admitted into evidence during the Water Management Board Meeting held on April 30 and May 1, 1997, regarding Continuation of Hearing on U.S. Fish and Wildlife Service's Amended Water Permit Application No. 2300-2, LaCreek National Wildlife Refuge, addressed as stated below, and on the attached Parties of Record list:

Terry T. Terrell, Deputy Regional Director, U.S. Fish & Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

Bennett County Weed Board, Box M, Courthouse, Martin, SD 57551.

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

Rolf Kraft, Lacreek National Wildlife Refuge, HC 5, Box 114, Martin, SD 57551.

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

Diane Best, Assistant Attorney General, Capitol Building.

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 15th day of May, 1997

Karen Schlaak
Notary Public

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

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

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant. --- BENNETT COUNTY, and BENNETT COUNTY WEED BOARD, Intervenors.	**APPLICATION NO. 2300-2** **MOTION FOR CONTINUANCE OR RESETTING OF HEARING DATE**

COMES NOW the Applicant, the United States Fish and Wildlife Service (FWS), and hereby moves the Board to continue or reset the hearing of the captioned matter from June 16 and 17, 1997, to the next regularly scheduled meeting of the Board, or such other specially designated time as the Board deems appropriate, where the parties will have available to them at least 3 consecutive hearing days. The specific grounds for this motion are as follows.

1. At the conclusion of the hearing on May 1, 1997, the Board and the parties discussed various dates for re-convening the hearing.

2. After much consideration, the Board and the parties mutually decided that, in light of how long the hearing had already taken, and considering the amount of testimony and

evidence yet to be adduced, it was advisable and prudent to re-set the hearing for at least a three-day period.

3. Consequently, the Board and the parties mutually agreed to re-set the hearing for June 16, June 17, and if necessary, June 19, 1997. 1/

4. In a May 8, 1997, notice, the Chief Engineer formally re-set the hearing for June 16 and June 17, 1997. Upon inquiry concerning this notice and the fact that the third hearing day had apparently been inadvertently omitted, FWS learned that, because of a South Dakota Bar Association convention scheduled to begin on June 18, 1997, it was impossible to set the hearing for the third day on June 19, 1997. 2/

5. FWS does not dispute the fact that it is impossible to set the hearing for the third day on June 19, 1997. However, based on what has already transpired at the hearing, and in the best professional judgment of the undersigned, it will *not* be possible to complete the hearing in only two days. This is especially so if the parties are to be given any reasonable amounts of time in closing arguments to sum up the complex factual testimony and legal involved in the case.

1/ Because of a conflict with one party's schedule, the Board and the parties mutually agreed that the hearing could not and would not be held on June 18, 1997.

2/ As FWS understands it, the principal difficulty in setting the hearing for the third day on June 19, 1997, is the unavailability of lodging for Board members and the parties resulting from the convening of the South Dakota Bar convention.

6. If the Board and the parties go ahead and attempt to conduct the hearing on June 16 and 17, and are not able to complete the same, the only option will be to again re-convene the hearing at some later date. Although it cannot necessarily speak for the other parties, FWS submits that this will not be a favorable option. Additionally, as the Board can well imagine, to have one hearing conducted on three disparate occasions makes the task extremely difficult for not only the parties, but the Board as well. 3/

7. For the above reasons, FWS hereby respectfully moves the Board to re-set the hearing of the captioned matter from June 16 and 17, 1997, to the next regularly scheduled meeting of the Board, or such other specially designated time as the Board deems appropriate, where the parties will have available to them at least 3 consecutive hearing days. 4/

8. FWS has not had an opportunity to fully discuss this matter with the other parties. Accordingly, FWS further requests that, if necessary or appropriate, at a time mutually agreeable to the parties and the Hearing Chairman (either Ms.

3/ Alternatively, if a decision is made to attempt to conduct the hearing in only two days, the parties might well be "forced" into completing their cases in a limited period of time which will not only be fundamentally unfair, but likely prejudicial to the parties' rights to thoroughly present their cases and enjoy a full and complete hearing of the same.

4/ In this regard, FWS notes that, because of previously scheduled conflicts, key personnel and/or witnesses will not be available during the following dates: June 30-July 4, 1997; July 10-14, 1997; August 16-25, 1997; and August 29-September 1, 1997.

Gunderson or Mr. Freeman), a telephonic conference be held to further discuss this motion.

DATED this 16th day of May, 1997.

JOHN R. KUNZ, Esq.
Counsel for Applicant
755 Parfet Street, Suite 151
Lakewood, CO 80215
(303) 231-5353 (Ext. 339)
(303) 231-5363 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 1997, true and correct copies of the foregoing **MOTION FOR CONTINUANCE OR RESETTING OF HEARING DATE** were mailed postage pre-paid in the United States Mail to:

John Hatch
Chief Engineer
Department of Environment and
Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

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

Paul Bengford, Esq.
Bennett County States Attorney
P.O. Box 628
Martin, SD 57551

Tom Lloyd, Esq.
Assistant U.S. Attorney
337 Federal Bldg.
225 South Pierre
Pierre, SD 57501-2489

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC, Box 20
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

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

Marian Gunderson
811 West Third
Yankton, SD 57078-3702

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

Dwayne A. Rollag
320 Lincoln Lane South
Brookings, SD 57006-2741

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

Leo Holzbauer
RR 1, Box 170
Wagner, SD 57380

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

John Guhin, Esq.
Deputy Attorney General
500 East Capitol Ave.
Pierre, SD 57501-50570

Sherry Flores

250

bcc: Ginger Price, Region 6, USFWS
Rolf Kraft, LaCreek National Wildlife Refuge, USFWS
Wayne Stancill, Great Plains Fish and Wildlife Management Assistance Office, 420 S. Garfield Ave., Suite 400, Pierre, SD 57501-5408
Bill Pearson, USFWS Ecological Services, 1500 E. Capitol Ave., Bismarck, ND 58501

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant. --- BENNETT COUNTY, and BENNETT COUNTY WEED BOARD, Intervenors.	**APPLICATION NO. 2300-2** **NOTICE OF SETTING OF TELEPHONIC CONFERENCE TO HEAR MOTION**

PLEASE TAKE NOTICE that, on Wednesday, May 28, 1997, at 9:00 A.M (Central Standard Time), Rodney Freeman, Jr. will hear via a telephonic conference, the Fish and Wildlife Service's motion to continue or re-set the hearing of the captioned matter from June 16 and 17, 1997, to the next regularly scheduled meeting of the Board, or such other specially designated time as the Board deems appropriate, where the parties will have available to them at least 3 consecutive hearing days.

The undersigned will initiate the telephone conference. All parties or their counsel should immediately notify the undersigned of the telephone numbers where they can be reached

for purposes of this telephone conference.

DATED this 19th day of May, 1997.

JOHN R. KUNZ, Esq.
Counsel for Applicant, FWS
755 Parfet Street, Suite 151
Lakewood, CO 80215
(303) 231-5353 (Ext. 339)
(303) 231-5363 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 1997, true and correct copies of the foregoing **NOTICE OF SETTING OF TELEPHONIC CONFERENCE TO HEAR MOTION** were mailed postage pre-paid in the United States Mail to:

John Hatch
Chief Engineer
Department of Environment and
Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

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

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GREAT FACES. GREAT PLACES.

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

May 23, 1997

NOTICE

TO: Terry T. Terrell, Deputy Regional Director
U. S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225
Parties of Record (see attached list)

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

SUBJECT: Special Meeting on U.S. Fish and Wildlife Service's Amended Water Permit Application No. 2300-2, LaCreek National Wildlife Refuge

On May 8, 1997, a notice was sent to parties of record scheduling a special meeting for June 16 and 17, 1997, to continue the hearing on Application No. 2300-2. The U. S. Fish and Wildlife Service filed a motion for continuance or resetting of hearing date requesting at least 3 consecutive hearing days.

The hearing was scheduled for two days because one party had a conflict on June 18, 1997, and the SD Bar convention is to be held in Pierre at this time. Upon conferring with the party who had a conflict and further investigating lodging and meeting facilities, it is now possible to conduct the hearing on June 16, 17, and 18, 1997. Although a telephonic hearing had been contemplated for May 28th to hear the USFWS motion and some parties were contacted, a telephonic hearing is no longer necessary and will not be held.

The special meeting will begin at 8:30 AM (CDT), June 16, 1997, in the Kneip Room at the Governor's Inn, 700 West Sioux Avenue, Pierre, SD. The hearing will continue on June 17th at the Governor's Inn and then move to the Floyd Matthew Training Center for the final day of the hearing on June 18, 1997. Enclosed is an amended agenda for this special meeting.

When the meeting adjourned on May 1st, there was discussion regarding Board member Rodney Freeman's participation in the remainder of the hearing. Mr. Freeman attended the first day but was unable to attend during the second day of testimony on Application No. 2300-2. Mr. Freeman will be provided a copy of the transcript of the April 30 and May 1, 1997, hearing for his review prior to the June 16th hearing date. Any party objecting to Mr. Freeman's participation in the hearing will need to bring a motion to that effect. It is the responsibility of the party bringing such a motion to initiate a telephonic conference and provide sufficient notice to other parties.

Please contact Diane Best, Assistant Attorney General at (605) 773-3215 if you have any questions.

enclosures

c: Diane Best, Assistant Attorney General
Bennett County Weed Board
Ginger Price, USFWS
Rolf Kraft, Lacreek National Wildlife Refuge
Rodney Freeman

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorney for Applicant

John Kunz
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Petitioners

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Brett Heath
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Raymond Kocer
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Attorney for Bennett County

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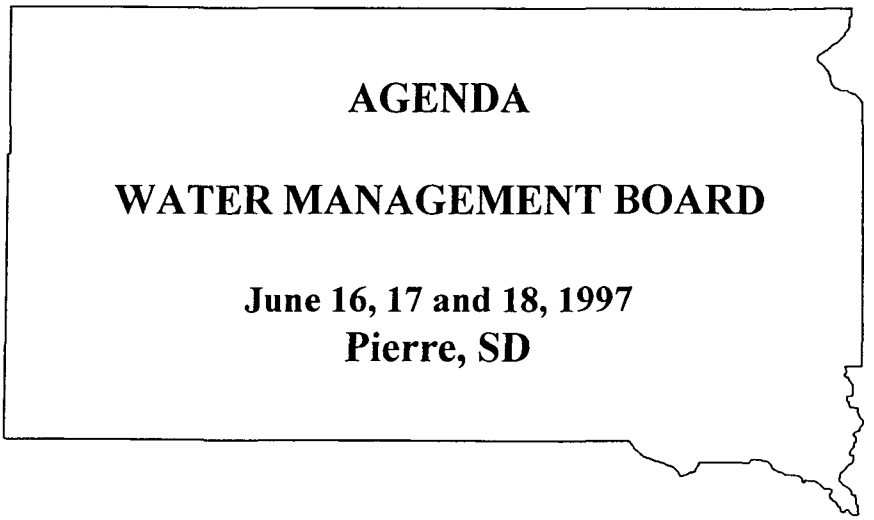

AGENDA

WATER MANAGEMENT BOARD

June 16, 17 and 18, 1997
Pierre, SD

June 16, 1997

8:30 am Call to Order in the Kneip Room, Governor's 700 W. Sioux Ave., Pierre

Continuation of Hearing on Water Permit Application No. 2300-2, U.S. Fish and Wildlife Service (Lacreek National Wildlife Refuge)

NOTE: **The meeting will continue on June 17, 1997, at the Governor's Inn and on June 18, 1997, at the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave. as necesssary to hear testimony. The Board will recess and adjourn as appropriate.**

Adjourn

CERTIFICATION

I hereby certify that on May 23, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated May 23, 1997, along with a copy of the Parties of Record List, and a copy of the Agenda for the June 16 and 17, 1997, Water Management Board Meeting, regarding Special Meeting on U.S. Fish and Wildlife Service's Amended Water Permit Application No. 2300-2, LaCreek National Wildlife Refuge, addressed as stated below, and on the attached Parties of Record List:

Bennett County Weed Board, Box M, Courthouse, Martin, SD 57551.

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

Rolf Kraft, Lacreek National Wildlife Refuge, HC 5, Box 114, Martin, SD 57551.

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

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

Diane Best, Assistant Attorney General, Capitol Building.

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 29th day of May, 1997

Karen Schlaak
Notary Public

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

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

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF UNITED STATES FISH AND WILDLIFE SERVICE APPLICATION NO. 2300-2 (LAKE CREEK)	))))	DIVISION'S MEMORANDUM OF LAW

The Department of Environment and Natural Resources, Division of Environmental Services (hereinafter Division), hereby files its Memorandum of Law in the above-entitled matter.

1. Proof required.

The sole issue in the above-entitled case is whether an application for a new water permit should be granted. The application, filed by United States Fish and Wildlife Service (hereinafter FWS), seeks authorization to store one acre foot of water on Lake Creek at a location identified as Diversion 4A. Pursuant to SDCL 46-2A-9, there is a four-part test for determining whether to grant the water permit:

(a) Whether there is a reasonable probability that there is unappropriated water available for the applicant's proposed use;

(b) Whether the proposed diversion can be developed without unlawful impairment of existing rights;

(c) Whether the proposed use is a beneficial use; and

(d) Whether the use is in the public interest.

As applicant, the FWS is responsible for demonstrating by a preponderance of the evidence that it can meet the four-part criteria. In Re Zar, 434 N.W.2d 598, 602 (S.D. 1989). A "preponderance of the evidence" is evidence which, when weighed

with that opposed to it, is more convincing, and shows the greater probability of truth. In water rights proceedings, a heavier burden such as "beyond a reasonable doubt" or "clear and convincing" is not required.

Since this matter involves an FWS application, FWS is required to meet the burden of proof with respect to the specific application, and no more. FWS is not required to "prove up" the four-part test with regard to any other water right or water use. Complaints, questions, or issues pertaining to other water permits or other uses are not required to be proved or disproved by FWS.

While there are several water resources on the Refuge (three creeks, several springs, and several man-made pools), this proceeding is not an adjudication of all the various water rights on the Refuge. Likewise, this proceeding is not a "report card" of the various FWS activities on the Refuge. This proceeding is limited to the question of whether Application No. 2300-2 (Diversion No. 4A on Lake Creek) should be granted.

2. Evidence on other water issues.

It has become apparent during discovery, motion hearings, and the initial portion of this hearing that intervenors Lawrence Kocer, Raymond Kocer, Heath, Emley, and Bennett County intend to produce evidence regarding other water resources on the LaCreek Refuge.

The intervenors apparently intend to demonstrate that the FWS is irresponsible with respect to overall refuge management. In doing so, intervenors have either raised or are likely to raise several specific points of contention between FWS and the intervenors. Some issues have limited relevance; others are completely irrelevant.

a. Existing Diversion No. 4.

Testimony has been presented regarding Diversion 4 already. Although not directly at issue in this case, Diversion 4 has a relationship to the permit requested.

FWS has, for a period of years, utilized Diversion No. 4 on Lake Creek. Indeed, FWS applied for validation of a vested water right for this diversion (among others) several years ago. Although this Board originally validated the vested water right for this location (among others), the Circuit Court reversed the Board in 1994. The Circuit Court held that FWS had not proven the years of historical use required for vested status The court didn't consider other aspects of this application and reversed on the historical use question only. Since FWS was relying on a vested water right, the court's reversal means that FWS does not have a right to use water from Diversion No. 4.

During the pendency of the court case, however, the FWS had initiated a study to analyze flooding complaints. As part of this study, the FWS had already removed stoplogs from Diversion 4 in Lake Creek and discontinued the irrigation component of its use. At that time FWS left four feet of stoplogs in place at

this location in order to prevent Carp from traveling upstream, thereby protecting a state threatened species. TR 56.

The study was ongoing and Diversion No. 4 was impounding approximately one acre foot of water when the circuit court decision was issued. An obvious issue existed. If FWS discontinued the water use at Diversion 4, it would comply with South Dakota water law, but would be in violation of South Dakota law pertaining to protection of threatened species. On the other hand, if it continued to protect threatened species by leaving Diversion No. 4 in place, it would be using water without a vested right, or other permit, or license. Either way, a State Natural Resources law would be implicated.

FWS has continued to maintain the structure at Diversion No. 4 for the purpose of preventing Carp from traveling upstream. Also, on the heels of the state court case (within 30 days), FWS applied for a new permit to divert water from Diversion No. 4 (among other diversions).

Last fall, however, the FWS amended its request for a water permit for the carp barrier. Now, instead of locating the carp barrier at the old Diversion No. 4, it will discontinue its use at Diversion No. 4.

The pending proposal is to build a new carp barrier at Diversion No. 4A, a location downstream from Diversion No. 4. TR 241. At this site, Lake Creek has a nine-foot deep channel. TR 269. Thus, the four foot deep carp barrier will be placed in a nine foot channel. TR 278.

The present application seeks authority only for the proposed Diversion 4A at the new site. The present application does not seek approval for a new permit at the old Diversion No. 4 or seek a ruling with respect to Diversion No. 4 in any manner.

As stated, testimony has already been presented regarding both Diversion Nos. 4 and 4A. Brett Heath has asserted that operation of the current Diversion No. 4 causes flooding on his property. Mr. Heath's position is that if Diversion No. 4 is causing flooding now, the situation will be no different when Diversion No. 4 is completely shut down and the new Diversion 4A is utilized downstream. Serious questions exist as to whether Diversion No. 4 could be the cause of flooding on the Heath property given the small amount of water impounded, the gradient involved, and the distance to the Heath property.

Moreover, testimony has already been presented that FWS proposes to install the new structure at Diversion No. 4A in order to try to satisfy previous complaints from area landowners the regarding the old Diversion No. 4. SPECIFICALLY, THE NEW STRUCTURE WILL BE LOCATED APPROXIMATELY 400 FEET DOWNSTREAM FROM THE OLD STRUCTURE. THE TOP OF THIS STRUCTURE WILL BE 4.5 FEET LOWER IN ELEVATION THAN THE TOP OF THE OLD DIVERSION 4 STRUCTURE. TR 291.

THE NEW FOUR FOOT STRUCTURE WILL BE PLACED IN A NINE FOOT CHANNEL. THEREFORE, THE SURFACE WATER ELEVATION OF THE IMPOUNDMENT BEHIND THE NEW STRUCTURE WILL BE APPROXIMATELY FIVE

FEET LOWER THAN THE SURROUNDING LAND SURFACE. The new structure is designed to handle a 25-year flood flow of the creek which will minimize concerns of flooding private property. TR 242. Surface water flooding is not expected to impair use of property at this location.

Likewise, this proposal is not likely to cause ground water seepage or lateral ground water movement to the Heath or other property. The reason is that the difference in elevation between the water surface upstream and downstream of the structure would be approximately four feet. Any localized increase in groundwater levels from the impoundment will move downstream and back into the stream channel. Simply put, water runs downstream, rather than laterally.

Given the foregoing, the location and design of Diversion 4A is an effort by FWS to resolve landowner claims of surface water flooding or ground water movement previously associated with the old Diversion 4. Thus, the claims of Heath and other landowners that Diversion 4 has caused flooding in the past would not necessarily show that the new Diversion 4A will cause flooding in the future.

As seen, the history, location, and management of Diversion No. 4 is not a matter directly to be adjudicated in this proceeding but does provide some background on the present application.

b. Discontinued Diversion Nos. 1 and 3.

In the past, FWS used Diversion Nos. 1, 3 and 4 from Lake Creek. FWS applied for validation of a vested water right for these LaCreek diversions several years ago. This Board validated the water right for the LaCreek Diversions in 1992. At the same hearing the Board also approved two water permits for other sources on the refuge. In 1994, the Circuit Court reversed the Board's decision on only the Lake Creek Diversion and held that FWS did not have a valid vested water right for these diversions because continuous use since 1955 was not shown.

In the meantime, however, the FWS discontinued using Diversion Nos. 1 and 3 in 1993 as part of its ongoing study regarding water management practices on the refuge. TR 56. The FWS has not used Diversion No. 1 or Diversion No. 3 since before the Court issued its decision. Although FWS originally sought to renew use of Diversion Nos. 1 and 3, and filed an application accordingly, it has since withdrawn this request. Consequently, the FWS does not have and is not seeking water rights with respect to Diversion Nos. 1 and 3. The Division has inspected to verify that these diversions are not being used.

It is expected, however, that Intervenor Raymond Kocer will assert that Diversion No. 1 caused flooding on his Belski Meadow either before FWS discontinued utilizing Diversion No. 1 or that the diversion was otherwise improperly used.

With respect to Diversion No. 3, it is expected that Lawrence Kocer, Raymond Kocer, and Charles Emley will testify

that they have, in the past, experienced flooding as a result of the FWS use of Diversion No. 3 or that this diversion was otherwise improperly used.

Testimony regarding Diversion Nos. 1 and 3 on Lake Creek has no direct bearing on the question of whether the Board should grant a completely different water permit for proposed Diversion No. 4A, downstream on Lake Creek. Indeed, the diversions were discontinued in 1993, over four years ago.

Although the Intervenors, principally Raymond Kocer, would like to present a "report card" of the FWS management, the scope of this proceeding is not for this "report card" purpose.

Intervenors will undoubtedly assert that introduction of "report card" evidence on Diversion Nos. 1 and 3 is admissible to show that the FWS is generally irresponsible. This evidence is not relevant and the DENR will be objecting pursuant to SDCL §§ 1-26-19, 19-12-2, and 19-12-5. In particular, SDCL §§ 19-12-2 and 19-12-5 provide:

> SDCL 19-12-2. All relevant evidence is admissible, except as otherwise provided by Constitution or statute or by chapters 19-9 to 19-18, inclusive, or by other rules promulgated by the Supreme Court of this state. Evidence which is not relevant is not admissible.
>
> SDCL 19-12-5. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Diversion No. 4A is the sole issue in this case. Evidence regarding upstream diversions that were discontinued over four years ago is simply irrelevant.

3. Pool Seven and Associated Claims.

It is expected that Intervenors Raymond Kocer and Lawrence Kocer will testify regarding a pending dispute with the refuge regarding water flowing from Lake Creek into a deep pool (Pool Seven) on the east side of the refuge. Pool Seven is downstream from proposed Diversion 4A and is authorized by a long-standing water right. The Intervenors are concerned with the manner in which water is being diverted from Lake Creek into Pool Seven. This is an independent complaint involving analysis of the elevation of Pool Seven, the operation of a newly constructed channel from Lake Creek to Pool Seven, the operation of an inverted siphon on Lawrence Kocer's property, and the operation of a newly constructed berm on the Brett Heath property.

This issue has no direct bearing on the issue of whether a permit should be granted for Proposed Diversion No. 4A. It is expected, however, that Intervenors intend to present evidence regarding this situation in order to demonstrate that the FWS is generally irresponsible and should not be entitled to the water permit for Diversion No. 4A. DENR will be objecting on the basis of relevance. Also, evidence on this question could consume the hearing time and completely confuse the issues in this case.

Moreover, if the Intervenors need to seek relief from the Board with respect to the Pool Seven situation, they will need to file a request for declaratory ruling regarding that specific situation. The currently pending matter involves only Diversion No. 4A. A declaratory ruling would more appropriately address the situation involving Pool Seven. The DENR has repeatedly suggested that a separate declaratory ruling proceeding is the method of adjudicating this and other water flooding disputes. (March 6, 1997, Motion Hearing.) If and when the Intervenors file a petition for declaratory relief, the Pool Seven situation should be addressed.

4. Weeds.

Intervenors, principally Bennett County, will assert that the refuge has a weed infestation problem. Further, it is expected that Bennett County will assert that the weed infestation on the refuge contributes to the infestations on neighboring landowners property. The pending proceeding does not involve an overall review of the propriety of locating a waterfowl refuge next to farm and ranch land. That decision was made by the United States Fish and Wildlife Service in the 1930's when the refuge was initiated. The sole purpose for this case is to determine whether an impoundment of up to one acre foot should be allowed on Lake Creek at Proposed Diversion No. 4A. Thus, issues pertaining to weed control must necessarily pertain to the propriety of the proposed Diversion at No. 4A. In other words, the issue with respect to weeds is WHETHER THIS ONE ACRE FOOT

IMPOUNDMENT OF WATER WILL CONTRIBUTE TO WEED INFESTATION PROBLEMS OR CAUSE ADDITIONAL NEW WEED INFESTATION PROBLEMS. Although it is expected that evidence will be presented generally regarding weed infestations, the DENR asks that the Board carefully consider this weed issue in terms of the size of the water impoundment. How many additional weeds would be caused by a one acre foot impoundment? Additionally, the Division asks that any possible testimony regarding the detrimental effect of weeds arising from this one acre foot impoundment be carefully weighed along with the entirety of the evidence in this proceeding.

5. Chief Engineer's Recommendation.

The Chief Engineer has recommended approval of the one acre foot proposal for Diversion No. 4A. If, at any time, the FWS intends to utilize this diversion point to store more water, the FWS will need to apply for a new permit. Although the Chief Engineer originally proposed approval of this permit for protection of the state Endangered Pearl Dace, and state-threatened Plain Topminnow, and Northern Red-Bellied Dace, changes were subsequently made to the State Endangered and Threatened Species lists. Consequently, the FWS proposal now pertains only to the Pearl Dace, which is currently on the State Threatened Species' Lists. The Chief Engineer's recommendation has been changed accordingly.

Also, during the initial two days of hearing in this matter, a question arose regarding the volume of the proposed impoundment. Specifically, FWS requested authority to store one

acre foot of water. The Chief Engineer recommended approval. Then, at hearing, FWS Engineer Husman testified that the structure, as currently designed, will likely be no greater than .5 acre feet. The Chief Engineer has not revised his recommendation downward to accommodate the smaller size of the dam.

Typically, a water permit application involves a request for volume large enough to accommodate necessary or reasonable changes made during construction. If a permit is issued and the structure is built, the Chief Engineer is responsible for conducting an inspection and issuing a license. The Chief Engineer is required to issue a license for no more than the authorized permit issued by this Board, but may (and often does) license facilities for less than the permit based on the project, as built. This process allows for a license for the water as actually used, rather than as proposed.

If the request in this case was for a water permit significantly greater than the proposal and larger than any necessary or reasonable changes during construction, the Chief Engineer may be in a position to change his recommendation accordingly. Here, the difference in water quantity is .5 acre feet, an extremely small quantity of water. The .5 acre feet is considerably less than most stock dams. By way of comparison,

the Capitol Lake is 65 times larger than the total proposed one acre-foot impoundment. TR 15.

Dated this 2nd day of June, 1997.

Diane Best

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

n-pld21.db(word)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Division's Memorandum of Law in **In the Matter of United States Fish and Wildlife Service Application No. 2300-2 (Lake Creek)** was served by United States mail, first class, postage prepaid upon:

Paul Bengford
Bennett County State's Attorney
P.O. Box 628
Martin, SD 57551

Tom Lloyd, Esq.
Assistant U.S. Attorney
337 Federal Bldg.
225 South Pierre
Pierre, SD 57501

Brett Heath
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Charles Emley
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Lawrence Kocer
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Yankton, SD 57078-3702

Bernita Loucks
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Dwayne A. Rollag
320 Lincoln Lane South
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Joel Rickenbach
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Leo Holzbauer
RR 1, Box 170
Wagner, SD 57380

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

John Kunz
U.S. Deptartment of Interior
Office of Solicitor
755 Parfet St., Ste. 151
Lakewood, CO 80215

on this 2nd day of June, 1997.

Diane Best
Assistant Attorney General

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant. BENNETT COUNTY, and BENNETT COUNTY WEED BOARD, Intervenors.	**APPLICATION NO. 2300-2** **CONCURRENCE WITH AND ADOPTION OF DIVISION'S MEMORANDUM OF LAW**

COMES NOW the Applicant, the United States Fish and Wildlife Service (FWS), and hereby concurs with and adopts, verbatim, the June 2, 1997, Division's Memorandum of Law on file herein.

DATED this 6th day of June, 1997.

John R. Kunz

JOHN R. KUNZ, Esq.
Counsel for Applicant
755 Parfet Street, Suite 151
Lakewood, CO 80215
(303) 231-5353 (Ext. 339)
(303) 231-5363 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 1997, true and correct copies of the foregoing **CONCURRENCE WITH AND ADOPTION OF DIVISION'S MEMORANDUM OF LAW** were mailed postage pre-paid in the United States Mail to:

John Hatch
Chief Engineer
Department of Environment and Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

Diane Best, Esq.
Asst. Attorney General
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Pierre, SD 57501-5070

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Sherry Hoes

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

June 30, 1997

NOTICE

TO: Terry T. Terrell, Deputy Regional Director
U. S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225
Parties of Record (see attached list)

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

SUBJECT: Special Meeting on U.S. Fish and Wildlife Service's Amended Water Permit Application No. 2300-2, LaCreek National Wildlife Refuge

The Water Management Board will continue the hearing on Application No. 2300-2 at 8:30 AM (CDT), July 28, 1997, in the Conference Room at the South Dakota Education Association's Building, 411 East Capitol Ave., Pierre, SD. The hearing will continue on July 29 and 30th as necessary to conclude testimony.

The SD Education Association's building is located along Capitol Avenue west of the Joe Foss Building where previous meetings were held. Parking should be available in the Junior High School parking lot at the intersection of Capitol and Nicollet Avenue.

Please contact Diane Best, Assistant Attorney General at (605) 773-3215 if you have any questions.

enclosures

c: Diane Best, Assistant Attorney General
Bennett County Weed Board
Ginger Price, USFWS
Rolf Kraft, Lacreek National Wildlife Refuge

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

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Attorney for Applicant

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Attorney for Bennett County

Paul Bengford, States Attorney
P.O. Box 688
Martin, SD 57551

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
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Attorney for Applicant

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Lawrence Kocer
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Martin, SD 57551

Attorney for Bennett County

Paul Bengford, States Attorney
P.O. Box 688
Martin, SD 57551

CERTIFICATION

I hereby certify that on June 30, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated June 30, 1997, along with a copy of the Parties of Record list, regarding Special Meeting on U.S. Fish and Wildlife Service's Amended Water Permit Application No. 2300-2, LaCreek National Wildlife Refuge, addressed as stated below, and on the attached Parties of Record list:

Bennett county Weed Board, Box M, Courthouse, Martin, SD 57551.

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

Rolf Kraft, Lacreek National Wildlife Refuge, HC 5, Box 114, Martin, SD 57551.

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

Diane Best, Assistant Attorney General, Capitol Building.

Cheryl F. Frost
Secretary

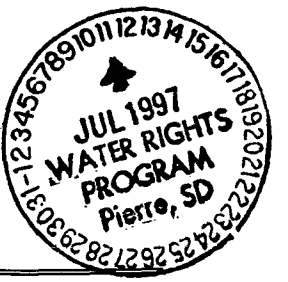
STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 1st day of July, 1997

Karen Schlaak
Notary Public

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

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



BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant. BENNETT COUNTY, and BENNETT COUNTY WEED BOARD, Intervenors.	**APPLICATION NO. 2300-2** **MOTION TO AMEND APPLICATION**

The applicant, the United States Fish and Wildlife Service ("FWS"), hereby moves the Board to allow it (FWS) to now amend its permit application to change its point of diversion from "Diversion No. 4A" to "Diversion No. 4." The specific grounds for this motion are as follows:

The procedural background of the subject case can be briefly summarized as follows: (1) on or about January 24, 1994, FWS applied to the Board for a permit seeking to irrigate out of so-called Diversion Nos. 1, 3, and 4; (2) on February 2, 1994, FWS amended this application changing the acreage of the land to be irrigated; (3) on or about May 31, 1995, FWS again amended this application to indicate that it no longer desired to effect any irrigation out of Diversion Nos. 1, 3, and 4; rather, the only permit FWS sought was to maintain a 4-foot "stop log" carp

barrier in Diversion No. 4 1/; and (4) on or about October 24, 1996, FWS finally amended this application to change the location of the carp barrier from Diversion 4 to Diversion No. 4A. With respect to both Diversion Nos. 4 and 4A, in maintaining the carp barrier, FWS would impound less than one acre-foot of water.

FWS' initial decision to move the carp barrier from Diversion No. 4 to Diversion No. 4A was made for at least two reasons: (1) to situate the structure at a location providing enough stream bank to accommodate a 25-year flood event structure; and (2) concomitantly, to alleviate perceptions, concerns, and allegations that Diversion No. 4 was causing some flooding from its existing location. *See* testimony of Ernest Husmann, hearing transcript at 241-242.

FWS has estimated that the cost of installing a new structure at Diversion No. 4A will be in the range of $25,000.00 to $100,000.00. *See* testimony of Ernest Husmann, hearing transcript at 251.

At those portions of the hearing which have been conducted so far, the following additional facts have become evident: (1) the Landowners (particularly Mr. Raymond Kocer) are extremely critical of the estimated cost of Diversion No.

1/ As FWS has alleged at the hearing of the subject case, the purpose of this carp barrier is to prevent carp from swimming upstream (west) of the barrier, and destroying prime habitat for a South Dakota threatened fish species--the Pearl Dace.

4A 2/; (2) witnesses for Bennett County opine that, from a "weed" standpoint, Diversion No. 4A will be worse than Diversion No. 4 3/; and (3) Mr. Charles Emley indicates that he will not give FWS access across the property he leases from an Indian allottee to facilitate the construction of Diversion No. 4A. 4/

Alternate access is a possibility, but this alternative would likely mean that haul distances for heavy equipment and construction materials would be increased. Additionally, if FWS were forced to utilize some alternative access, this would mean that FWS would have to construct an access road. This would obviously (and likely significantly) increase the over-all cost of constructing Diversion No. 4A.

For the above reasons (many of which were not readily apparent until after the last "round" of hearing on June 16-18, 1997), rather than constructing a whole new structure at Diversion No. 4A, FWS now deems it more reasonable and prudent to maintain the existing carp barrier at Diversion No. 4. More

---

2/ Unfortunately, the transcript for that portion of the hearing conducted on June 16-18 is not yet available; consequently, a precise reference to the record is not possible. However, for purposes of this motion, FWS has attempted to objectively and accurately state its understanding of the record.

3/ *See* note 2 above.

4/ *See* note 2 above. FWS realizes that it would also need to obtain an access right of way from the fee owner of the subject property. However, it is virtually certain that the fee owner would not unilaterally grant FWS such a right of way without first consulting his lessee--Mr. Emley. Moreover, preliminary information suggests that, in any event, the fee owner would likely not give FWS right of way access across the subject property.

specifically, as alluded to above, this alternative would obviously be much less expensive, and would also not worsen or exacerbate any purported "weed" problems.

As previously stated, the proposed change would not entail FWS appropriating any additional water; regardless of whether the permit is for Diversion No. 4 or Diversion No. 4A, the amount of water which FWS would impound is approximately one acre-foot. Additionally, if the subject motion is granted, as part of the water permit for Diversion No. 4, so that the existing structure will be capable of accommodating a 25-year flood event, FWS will modify the structure to include an emergency spillway.

For the following reasons, FWS submits that the granting of this motion would not cause prejudice to any party:

First, pursuant to S.D. CODIFIED LAWS ANN. § 46-2A-4, notices of hearing have been previously published for *both* Diversion Nos. 4 and 4A.

Second, the Landowners and Bennett County have been the only parties that have appeared and objected to either Diversion Nos. 4 or 4A.

Third, as the Board well knows, the hearing of the subject matter to date has inextricably involved both Diversion Nos. 4 and 4A. Indeed, in presenting their individual cases, *all* of the parties have taken known data from Diversion No. 4 to analogize what the possible effects of Diversion No. 4A might be. Consequently, none of the parties can now argue that the granting

of the subject motion would be prejudicial, or that it would otherwise deprive them of a full and fair opportunity to be heard. Stated differently, the subject proceedings to date have clearly afforded the parties an opportunity to be heard as to not only Diversion No. 4A, but Diversion No. 4 as well. In sum, if the Board were to deny the subject motion, and if at the end of the instant proceeding FWS were to file either a new permit application for Diversion No. 4, or an application seeking to amend any permit that the Board might grant for Diversion No. 4A (changing the point of diversion from Diversion No. 4A to Diversion No. 4), what evidence could any of the parties conceivably adduce that already has not been fully and completely considered? The answer is obvious; it is incomprehensible that anything new could be added to what has already been *exhaustively* considered for *both* Diversion Nos. 4 and 4A.

Fourth, in addition to the powers expressly conferred upon the Board, the Board also has such implied powers as are reasonably necessary to effectuate its express powers. *See In re Application No. 5189-3 to Extend Time*, 467 N.W.2d 907, 911 (S.D. 1991) (*reh'g denied*), *citing*, *Spies Realty Co. v. State Dept. of Social Services*, 321 N.W.2d 924, 926 (S.D. 1982). Additionally, in construing its obligations under a statutory grant of authority, this Board may exercise some degree of discretion. *See In re Application No. 5189-3 supra.*, 467 N.W.2d at 911, *citing*, *In re Application of Kohlman*, 263 N.W.2d 674 (S.D. 1978).

Pursuant to S.D. CODIFIED LAWS ANN. § 46-2-9, this Board unquestionably has express statutory jurisdiction and authority over the ". . . waters of the state, including measurement, appropriation and distribution thereof . . . ." *See also Romey v. Landers*, 392 N.W.2d 415, 418 (S.D. 1986) (*reh'g denied*) (the Water Management Board is authorized to regulate and control the development, conservation, and allocation of the right to South Dakota's waters), *citing*, S.D. CODIFIED LAWS ANN. ch. 46-1; S.D. CODIFIED LAWS ANN. § 46-2-9; S.D. CODIFIED LAWS ANN. § 46-2-11; *In re South Dakota Water Management Bd.*, 351 N.W.2d 119 (S.D. 1984); and *In re South Lincoln Rural Water System*, 294 N.W.2d 743 (S.D. 1980).

Applying the above principles to the subject case and the motion now before the Board, it seems obvious that the Board's express authority to regulate and control the State's waters gives it reasonably necessary implied power and discretion to effectuate such express authority by granting the subject motion.

In conclusion, the Board's granting of the subject motion will not result in any prejudice to any party; nor, will it deprive the parties of any due process. Indeed, given the conduct of the proceedings thus far, it seems to make little sense for the Board to deny the subject motion and thus "compel" the Board and the parties to again "reinvent the wheel" in some subsequent and separate proceeding.

Obviously, the parties need time to respond to this motion. Consequently, FWS requests that this motion be fully raised and argued when the Board and the parties re-convene on July 28, 1997.

WHEREFORE, for the above reasons, FWS hereby respectfully moves the Board to allow it (FWS) to now amend its permit application to change its point of diversion from Diversion 4A to Diversion 4.

DATED this 8th day of July, 1997.

JOHN R. KUNZ, Esq.
Counsel for Applicant
755 Parfet Street, Suite 151
Lakewood, CO 80215
(303) 231-5353 (Ext. 339)
(303) 231-5363 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 1997, true and correct copies of the foregoing **MOTION TO AMEND APPLICATION** were mailed postage pre-paid in the United States Mail to:

John Hatch
Chief Engineer
Department of Environment and
Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181
(Original)

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

Paul Bengford, Esq.
Bennett County States Attorney
P.O. Box 628
Martin, SD 57551

Tom Lloyd, Esq.
Assistant U.S. Attorney
337 Federal Bldg.
225 South Pierre
Pierre, SD 57501-2489

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC, Box 20
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

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

Marian Gunderson
811 West Third
Yankton, SD 57078-3702

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

Dwayne A. Rollag
320 Lincoln Lane South
Brookings, SD 57006-2741

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

Leo Holzbauer
RR 1, Box 170
Wagner, SD 57380

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

John Guhin, Esq.
Deputy Attorney General
500 East Capitol Ave.
Pierre, SD 57501-50570

Sherry Hores

287

Leadership for a better South Dakota!

FRANK J. KLOUCEK

District #19 State Senate
Bon Homme - Hutchinson - Douglas
RR 1, Box 56
Scotland, South Dakota 57059
605/583-4468

DENR Water Board Rodney Freeman Chair.
Pierre SoPak 57501

July 28, 1997

TO Whom it May Concern: All Water Board members

Please consider this a letter of support for Lake Creek National Wildlife Refugee neighbor landowners in this hearing.

I feel they are accurately presenting their case and are deserving of a favorable decision by the board.

Thank You Very Much!

Senator Frank

Paid for by Kloucek for Senate Committee, Arvene Wallem, Treas. RR 1, Tabor, SD 57063

GREAT FACES. GREAT PLACES.

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

August 4, 1997

NOTICE

TO: Terry T. Terrell, Deputy Regional Director
U. S. Fish & Wildlife Service
P. O. Box 25486
Denver Federal Center
Denver, CO 80225
and Parties of Record (see attached list)

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

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

The Water Management Board directed John Guhin, the Board's attorney, to prepare proposed Findings of Fact, Conclusions of Law and a Final Decision on Water Permit Application No. 2300-2 at Lacreek National Wildlife Refuge. The Board will consider the proposed Findings, Conclusions and Final Decision at 1:00 PM (CDT) on October 1, 1997, in the Conference Room, Floyd Matthew Training Center, 523 E. Capitol Ave., Pierre, SD 57501.

The Board requested that a copy of the proposed Findings, Conclusions and Final Decision be mailed to each Board member and Parties of Record (name and addresses enclosed) by September 10, 1997. 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 September 22, 1997.

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 October 1, 1997. The public hearing was completed July 30, 1997. No additional testimony will be received on October 1, 1997.

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

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorney for Applicant

John Kunz
U.S. Department of Interior
Office of the Solicitor
755 Parfet St., Ste. 151
Lakewood, CO 80215

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorney for Bennett County

Paul Bengford, States Attorney
P.O. Box 688
Martin, SD 57551

WATER MANAGEMENT BOARD MEMBERS

Dwayne A. Rollag - Chairman
320 Lincoln Lane South
Brookings, SD 57006-2741

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

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

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

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

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

Joel Rickenbach
Box 97
Oelrichs, SD 57763-0097

BOARD ATTORNEY

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

WATER RIGHTS PROGRAM

Department of environment and
Natural Resources

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

STAFF ATTORNEY

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

CERTIFICATION

I hereby certify that on August 4, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated August 4, 1997, along with a copy of the Parties of Record list, and a copy the names and addresses of the Water Management Board Members, regarding Preparation of Findings of Fact, Conclusions of Law and Final Decision on Water Permit Application No. 2300-2 at Lacreek National Wildlife Refuge, addressed as stated below and on the attached Parties of Record list:

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

John Guhin, Deputy Attorney General, Capitol Building.

Diane Best, Assistant Attorney General, Capitol Building.

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 5th day of August, 1997

Karen Schlaak
Notary Public

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

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

GREAT FACES. GREAT PLACES.

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

August 13, 1997

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Dear Mr. Heath:

Please find a copy of Bennett County's Exhibit No. 69 from the hearing on USFWS's Water Permit Application No. 2300-2. I hope you will find this reproduction satisfactory. If not, let me know and I'll try again.

Sincerely,

Eric

Eric Gronlund
Water Rights Program
(605) 773-3352

enclosure

STATE OF SOUTH DAKOTA

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

MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

AUG 1997
WATER RIGHTS
PROGRAM
Pierre, SD

August 14, 1997

John Hatch, Chief Engineer
Water Rights Program
Department of Environment &
Natural Resources
Foss Bldg.
Pierre, SD 57501-3181

Re: **Findings of Fact, Conclusions of Law and Final Decision on Water Permit Application No. 2300-2 at Lacreek National Wildlife Refuge**

Dear Mr. Hatch:

I have received information that the transcript of the above-entitled matter has been ordered but will not, in all likelihood, be prepared prior to September 10, 1997, when the proposed Findings of Fact, Conclusions of Law and Final Decision are due.

I have consulted with the Hearing Chairman, Mr. Rod Freeman, and he has directed that the proposed Findings in this matter will be prepared before and be considered at the December 1997 Water Management Board instead of the October 1, 1997, meeting of the Water Management Board.

Mr. Freeman further advises that if any party believes his position to be prejudiced and wishes to file a motion in the matter, he should do so forthwith; it will then be considered.

Could you please arrange to have this letter served on the parties in the above-entitled matter and the members of the Water Management Board, together with an appropriate Notice.

Thank you for your assistance.

Sincerely yours,

John P. Guhin
Deputy Attorney General

JPG/dh

GREAT FACES. GREAT PLACES.

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

August 19, 1997

NOTICE

TO: Terry T. Terrell, Deputy Regional Director
U. S. Fish & Wildlife Service
P. O. Box 25486
Denver Federal Center
Denver, CO 80225
and Parties of Record (see attached list)

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

SUBJECT: Rescheduling of Consideration of Findings of Fact, Conclusions of Law and Final Decision for Water Permit Application No. 2300-2

Hearing Chairman Rodney Freeman has directed that the proposed Findings for Water Permit Application No. 2300-2 be considered at the December meeting instead of the October 1, 1997, meeting of the Water Management Board. Enclosed is a letter from John Guhin, the Board's attorney, requesting that I provide notice rescheduling consideration of proposed Finding for the December meeting.

The Board will now consider the proposed Findings, Conclusions and Final Decision at 1:00 PM (CDT) on December 3, 1997, in the Conference Room, Floyd Matthew Training Center, 523 E. Capitol Ave., Pierre, SD 57501.

Proposed Findings, Conclusions and Final Decision prepared by the John Guhin, the Board's attorney, will now be mailed to each Board member and Parties of Record (name and addresses enclosed) by November 13, 1997. 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 November 24, 1997.

Oral arguments by parties filing written comments in opposition or support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision may be made on December 3, 1997. The public hearing was completed July 30, 1997. No additional testimony will be received on December 3, 1997.

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

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorney for Applicant

John Kunz
U.S. Department of Interior
Office of the Solicitor
755 Parfet St., Ste. 151
Lakewood, CO 80215

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorney for Bennett County

Paul Bengford, States Attorney
P.O. Box 688
Martin, SD 57551

STATE OF SOUTH DAKOTA

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

MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

AUG 1997
WATER RIGHTS
PROGRAM
Pierre, SD

August 14, 1997

John Hatch, Chief Engineer
Water Rights Program
Department of Environment &
Natural Resources
Foss Bldg.
Pierre, SD 57501-3181

Re: **Findings of Fact, Conclusions of Law and Final Decision on Water Permit Application No. 2300-2 at Lacreek National Wildlife Refuge**

Dear Mr. Hatch:

I have received information that the transcript of the above-entitled matter has been ordered but will not, in all likelihood, be prepared prior to September 10, 1997, when the proposed Findings of Fact, Conclusions of Law and Final Decision are due.

I have consulted with the Hearing Chairman, Mr. Rod Freeman, and he has directed that the proposed Findings in this matter will be prepared before and be considered at the December 1997 Water Management Board instead of the October 1, 1997, meeting of the Water Management Board.

Mr. Freeman further advises that if any party believes his position to be prejudiced and wishes to file a motion in the matter, he should do so forthwith; it will then be considered.

Could you please arrange to have this letter served on the parties in the above-entitled matter and the members of the Water Management Board, together with an appropriate Notice.

Thank you for your assistance.

Sincerely yours,

John P. Guhin
Deputy Attorney General

JPG/dh

CERTIFICATION

I hereby certify that on August 19, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated August 19, 1997, regarding Rescheduling of Consideration of Findings of Fact, Conclusions of Law and Final Decision for Water Permit Application No. 2300-2, addressed as stated below, and on the attached Parties of Record list. Also sent with the above described Notice was a copy of the Parties of Record list, and a copy of John Guhin's request that Findings of Fact, be delayed until the December Water management Board Meeting:

Terry T. Terrell, Deputy Regional Director, U.S. Fish & Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

Francis E. Brink, 1241 S. Wells St., Aberdeen, SD 57401-7351.

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

Marian Gunderson, 811 W. 3rd Street, Yankton, SD 57078-3702.

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

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

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

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

A copy of the above described Notice and attachments was sent inter-office to:

John Guhin, Deputy Attorney General, Capitol Building.

Diane Best, Assistant Attorney General, Capitol Building.

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 20th day of August, 1997

Karen Schlaak
Notary Public

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

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

STATE OF SOUTH DAKOTA

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

MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

NOV 1997
WATER RIGHTS
PROGRAM
Pierre, SD

November 5, 1997

MEMORANDUM

TO: John Hatch, Department of Environment and Natural Resources

FROM: John P. Guhin, Deputy Attorney General

RE: **In the Matter of the Application for Permit No. 2300-2, LaCreek National Wildlife Refuge**

Mr. Rod Freeman, Hearing Chairman in the above-entitled matter, has requested that I inform you that he has delayed consideration of the Findings of Fact, Conclusions of Law, and Final Decision in the above-entitled matter until the February 25-26, 1998, Board meeting in view of a number of scheduling difficulties.

Mr. Freeman has also determined that it would be appropriate to provide additional time for input after the board attorney's proposed decision is circulated, given the length of the transcript and the complexity of the issues. Therefore, Mr. Freeman has set the following schedule--board attorney's proposals to be mailed by January 26, 1998, and any responses to be mailed by February 16, 1998.

Mr. Freeman requests that you issue a revised order to set forth this direction.

JPG:nan

GREAT FACES. GREAT PLACES.

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

November 7, 1997

NOTICE

TO: Terry T. Terrell, Deputy Regional Director
U. S. Fish & Wildlife Service
P. O. Box 25486
Denver Federal Center
Denver, CO 80225
and Parties of Record (see attached list)

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

SUBJECT: Rescheduling of Consideration of Findings of Fact, Conclusions of Law and Final Decision for Water Permit Application No. 2300-2, USFWS - Lacreek National Wildlife Refuge

Hearing Chairman Rodney Freeman has directed that consideration of the Findings of Fact, Conclusions of Law and Final Decision in the above entitled matter be delayed due to a number of scheduling difficulties. Therefore, the Water Management Board will not consider the proposed finding on December 3, 1997.

The Board will now consider the proposed Findings, Conclusions and Final Decision at 1:00 PM (CST) on February 25, 1998, in the Conference Room, Floyd Matthew Training Center, 523 E. Capitol Ave., Pierre, SD 57501.

Mr. Freeman has also established the following schedule. The Board attorney's proposal is to be mailed to all parties by January 26, 1998, and any responses are to be mailed to each Board member, the Board attorney, DENR (see attached list) and all parties of record by February 16, 1998.

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 February 25, 1998. The public hearing was completed July 30, 1997. No additional testimony will be received on February 25, 1998.

c: Water Management Board members
John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General
Ginger Price, USFWS

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorney for Applicant

John Kunz
U.S. Department of Interior
Office of the Solicitor
755 Parfet St., Ste. 151
Lakewood, CO 80215

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorney for Bennett County

Paul Bengford, States Attorney
P.O. Box 688
Martin, SD 57551

WATER MANAGEMENT BOARD MEMBERS

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STAFF ATTORNEY

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CERTIFICATION

I hereby certify that on November 7, 1997, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated November 7, 1997, along with a copy of the Parties of Record List and a copy of the Water Management Board Members' names and addresses, regarding Rescheduling of Consideration of Findings of Fact, Conclusions of Law and Final Decision for Water Permit Application No. 2300-2, USFWS - Lacreek National Wildlife Refuge, addressed as stated below, and on the attached Parties of Record list:

Terry T. Terrell, Deputy Regional Director, U.S. Fish & Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

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

Water Management Board Member's (see attached list).

A copy of the above described Notice and attachments was sent inter-office to:

John Guhin, Deputy Attorney General, Capitol Building.

Diane Best, Assistant Attorney General, Capitol Building.

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 10th day of November, 1997

Karen Schlaak
Notary Public

KAREN SCHLAAK
NOTARY PUBLIC
SEAL
SOUTH DAKOTA

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

STATE OF SOUTH DAKOTA

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MARK W. BARNETT
ATTORNEY GENERAL

LAWRENCE E. LONG
CHIEF DEPUTY ATTORNEY GENERAL

JAN 1998
WATER RIGHTS
PROGRAM
Pierre, SD

January 26, 1998

MEMORANDUM

TO: Members of the Water Management Board and Parties (Service List attached)

FROM: John P. Guhin, Deputy Attorney General

RE: **Proposed Findings of Fact, Conclusions of Law and Final Decision to Water Permit Application No. 2300-2, USFWS - LaCreek National Wildlife Refuge**

I am herewith enclosing proposed Findings of Fact, Conclusions of Law, and Final Decision in accordance with the November 7, 1997, Notice of the Chief Engineer.

JPG:nan
Enclosure

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN RE APPLICATION FOR WATER PERMIT NO. 2300-2; U.S. FISH AND WILDLIFE SERVICE (LACREEK NATIONAL WILDLIFE REFUGE)	)))))	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION

FINDINGS OF FACT

1. This is an application by the U.S. Fish and Wildlife Service to divert one acre-foot of water. The purpose of the application is to allow the U.S. Fish and Wildlife Service to construct a four-foot barrier to prevent carp from entering a stream area utilized by a state-threatened species, the Pearl Dace.

2. The history on the application is of some relevance. On January 7, 1993, after a protracted hearing, this Board granted Vested Water Right Permit No. 1927-2 to vest a prior claimed right to 10 cfs of water from four diversion points on LaCreek. One of these diversion points was Diversion No. 4. Subsequently, the circuit court on January 5, 1994, found that the Board has erred in finding continuous appropriation of water and reversed the grant of Vested Right Application No. 1927-2. The South Dakota Supreme Court on December 7, 1994, affirmed the decision of the circuit court.

3. After the reversal of the grant of the vested right by the circuit court, the U.S. Fish and Wildlife Service (Service) submitted an application for new permits for three structures which eventually covered the same area that the vested water right claim had covered.

4. The persons who were involved in the litigation with regard to the vested rights and the persons who are involved in the present application are essentially the same.

5. At approximately the same time as the new application was submitted, the U.S. Fish and Wildlife Service became concerned with the survival of the Pearl Dace which, in 1992, was classified as an endangered species by the South Dakota Commission of Game, Fish and Parks. The Pearl Dace was present in Lake Creek in areas upstream of Diversion No. 4, and in certain other places in the Refuge.

6. The U.S. Fish and Wildlife Service ultimately, at the request of the landowners, deleted the irrigation portions of each of the applications. The application was also amended to retain Structure No. 4 for the purpose of protecting the Pearl Dace, which was then classified as endangered, and two other species which were regarded as endangered.

7. After continued discussions with the landowners, the application was amended a second time. Diversion No. 4 was proposed to be moved downstream approximately 400 feet. The proposed new structure is designated Diversion No. 4A. It was also redesigned to better handle the flood flows.

8. A permit to appropriate water may be issued by the Board if there is a reasonable probability that there is unappropriated water available for the applicant's proposed use, that the proposed diversion can be developed without unlawful impairment to existing rights, that the proposed use is a

beneficial use and that the proposed use is in the public interest.

Unappropriated Water Available.

9. Based upon the uncontradicted testimony as to the great volume of water available in the Lake Creek area, the Board finds that there is ample unappropriated water available for this application.

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

10. The landowners have asserted that the proposed application cannot be developed without impairing their rights. The Board rejects this claim.

11. The amount of water at issue is only one acre-feet. In comparison, Capitol Lake is approximately sixty-five times larger. Moreover, the Board finds, based upon the testimony of county witness Bob Bolzer, that one acre-foot is smaller than a typical stock dam.

12. The landowners and the county suggest two methods by which the grant of this permit will invade the rights of the landowners. First, the landowners suggest that water will travel underground or be "piped" through a sandy lens from Diversion No. 4A to their property. This will, they argue, cause the land to be saturated, will make it more difficult to control Canadian thistle, and will promote the growth of undesirable grasses and weeds in place of more desirable grasses and weeds.

13. The Board finds that the evidence demonstrates that it is highly improbable that the impoundment of one acre-

foot of water or less at Diversion No. 4A will result in the piping of some of that water to the property of any of the landowners. The lands owned by the landowners in question are from one-half to three-quarters of a mile from Diversion No. 4A. The testimony of Denny Simonson that piping will occur over these distances is rejected by the Board. Simonson's theory was that piping is presently occurring from Diversion No. 4 to the landowners' property and that the same sort of piping will occur from Diversion No. 4A. Mr. Simonson testified that the four foot of head pressure causes water to move laterally through the sandy lens at a rate of ten inches per hour and that it has infiltrated fully one-half or three-quarters of a mile onto the property of the landowners.

14. Mr. Simonson's analysis is incorrect in at least two areas. First, the Board finds, based upon the testimony of Megan Johnson, that water will not move laterally through sand at ten inches per hour. The ten-inch-per-hour movement is the maximum downward movement, not the lateral movement, through the soil type in question. Moreover, the range for movement in a downward direction is 8/10" per hour to 10" per hour (Simonson's figures are the maximum level for downward movement).

15. The Board finds, based upon the testimony of Megan Johnson, that the lateral movement of water should be determined by the operation of Darcy's law, which calculates the movement of water from standard hydraulic conductivity figures, the measure of the sand layer, and the distance to the landowner's property. See USF&W Ex. 22. Darcy's law calculations were performed for

the worst possible scenario (for the applicant), i.e. the maximum hydraulic conductivity figure was utilized and, moreover, it was assumed that all of the water escaping the pool would flow into the soil and none would return to the impoundment of the stream (a quite unlikely case). Megan Johnson convincingly demonstrated that to move water from Diversion No. 4 to the landowner's property, as they claim is occurring, the ground near the impoundment to the land of the landowner should have to be saturated in a triangular shape of about 262 acres. If not all of the land was saturated, then the groundwater would tend to flow away from, and not toward, the landowner's property.

16. Utilizing the worst possible case assumptions, Darcy's law indicates that .0036 acre-feet per day would move into the saturated area (this amounts to 1,183 gallons per day). This volume of water would raise the water table of the area only .00013 feet per day or 1/100,000 of a foot. However, even that measure misstates the effect on the water table. This is because the evaporation rate greatly exceeds the amount of water which would enter into the saturated area. This is true even with regard to underground water, especially that connected to the plant life overhead, as it is likely in this case.

17. The Board further finds that the Simonson theory is premised upon the thesis that the soils of the landowners are already so saturated on a regular basis that additional water cannot be absorbed into them. However, the testimony of the landowners showed that well readings dropped very quickly after rainfall events. The very speedy drop in well readings after

rainfall events indicates that the land is not as saturated as the landowners contend.

18. Second, The landowners also appear to contend that the proposed diversion cannot be developed without unlawful impairment of existing rights because overland flooding now occurs, or has occurred in the past, as a result of U.S. Fish and Wildlife activities at Diversion Nos. 1, 3, and 4.

19. As to Diversion No. 1, however, the U.S. Fish and Wildlife removed the stop logs in 1994. Moreover, the Service has placed a plug in a ditch to eliminate the perception that the ditch would carry water from Diversion No. 1 to the landowners. The diversion has not received additional complaints since Diversion No. 1 was breached, and the landowners agreed at hearing that Diversion No. 1 no longer caused problems.

20. The Board finds that there is insufficient evidence to determine that Diversion No. 3 causes problems to the landowners at the present. First, it is undisputed that the diversion works have actually been removed from Diversion No. 3; this process was protracted and required a backhoe to remove the final logs. Second, the capacity of the culvert at Diversion No. 3 is for approximately a five-year precipitation event. The culvert is apparently maintained so there is a crossing at this point for cattle, hunters, and to accommodate the needs of the Service. Therefore, it appears that, when the precipitation exceeds the five-year event, water will escape from the stream at the culvert. However, uncontradicted testimony also indicated that there were other places on the stream between old Diversion

Nos. 1 and 4, where the channel capacity was insufficient to handle a five-year rain event. Thus, regardless of whether Diversion No. 3 has any capacity to "divert," however that term is defined, it would only be "diverting" at a time when other parts of the channel were overflowing.

21. Third, the Board has considered the evidence of Del Brosz, an expert who testified on behalf of the Division, who testified that the topography map showed stream channels coming from the uplands to the north of the refuge onto private property and further that sandhills from the south draining toward Lake Creek. Essentially Brosz testified that the water occasionally on Mr. Kocer's property was a naturally occurring condition which could not be attributed to Diversion No. 3 or any other diversion. Fourth, the Board has considered the evidence of the landowners, including Mr. Kocer, as to the water on property utilized by him and has considered photographic evidence showing water on his property.

22. After carefully weighing the evidence, the Board finds that the evidence is insufficient to support the claim that Diversion No. 3, as it is presently situated, adds any appreciable amount of water onto Mr. Kocer's land and that such water as is found on the property is due to the natural condition of the area, including the fact that the channel itself is insufficient to handle large rainfall events. The Board relies on the topography of the area, the naturally occurring water in the area (as found below), the natural overflow of the creek and

the failure of the landowners to firmly tie the water on their land to Diversion No. 3.

23. The Board credits the testimony of Rolf Kraft as to the movement of water from Diversion No. 4. Kraft testified that water which came on Mr. Lawrence Kocer's property came from the west and not from Diversion No. 4 in most situations. This is substantiated by testimony as to the topography of the area and by photographs which show that water from Diversion No. 4 does not flow onto Kocer's property but is intercepted by a county road ditch. The Service admitted that water from other parts of the refuge does flow onto Kocer's property. Water will, however, occasionally travel from Diversion No. 4 onto Mr. Heath's property in a major rainfall event. The Service has attempted to stop this flow of water with a plug but the plug has in the past occasionally failed. The Board concluded that any water from Diversion No. 4 which makes it to Kocer's property is found only in unusual situations and does not demonstrate any negligence or misconduct on the part of the Service; moreover, given the great amount of water in the area, it is virtually impossible for water not to flow, in some cases, from one landowner to another.

24. The Board also discounts to a substantial degree complaints as to water on the Heath property in view of testimony, maps and photographs produced by witness Pearson who was qualified to interpret aerial maps. Pearson's testimony demonstrated that a substantial portion of the Heath property constituted a marsh or wetland at the time of a 1903 map, a 1937

photo. The Refuge was not created until 1935. The same characteristics are shown in a 1954 photo. The creek flowing through the Heath property was straightened sometime in the late 1950's and the land began to dry out as shown by photos in 1961 and 1980. However, the lands of a dried out wetland, however, lose the capacity to hold water. Thus to some extent, the straightening of the creek itself promotes flooding in some circumstances.

25. The Board also finds that the entire area is characterized by high water table generally and that water flows to the area from both the north and the south. Many of the complaints of the landowners flow from the natural topography of the area.

26. The Board also finds that Diversion No. 4 must be entirely removed within a reasonable time of the construction of Diversion No. 4A. Any problems with Diversion No. 4A will, therefore, be eliminated.

27. The issue of whether Diversion Nos. 1, 3, and 4 at present flood is, in any event, only of marginal relevance to the issue of whether the proposed diversion, Diversion No. 4A, can be developed without unlawful impairment of existing rights. In this regard, the Board is unpersuaded that the past actions of the Service make it unlikely that the Service will construct or operate Diversion No. 4A in such a way as to intentionally flood or negligently flood their neighbors. In fact, the recent actions of the Service indicate that it has adopted a policy of accommodation to its neighbors: Diversion No. 1 clearly no

longer diverts; an earthen plug was also placed by the Service in a ditch to avoid water running into a ditch from Diversion No. 1 and so reaching the landowners. Diversion No. 3 has been removed. The Service has attempted to plug a breach to keep water flowing to Heath's property possibly from Diversion No. 4 and form runoff. A troublesome siphon which goes underneath Lake Creek was remodeled and a new ditch added to the benefit of Lawrence Kocer. Pool number 2 was drained to the apparent benefit of the landowners in recent years.

28. Turning directly to Diversion No. 4A, the Board finds that it can, in fact, be developed without unlawful impairment of existing rights. First, Diversion No. 4A will not accomplish "piping" of water underground to the detriment of the landowners, as demonstrated by the study discussed above of the water at Diversion No. 4.

29. Second, Diversion No. 4A will impound less than one acre-foot of water, a relatively small amount of water.

30. Third, the Board finds that Diversion No. 4A is unlikely to cause overland flooding to the detriment of the landowners because of its design and placement, which are superior to existing Diversion No. 4. Diversion No. 4A will be built to accommodate a 25-year flood; in addition, it will have in place a training dike to handle flows even in excess of a 25-year flood. The Board finds that these are reasonable precautions to protect the landowners.

31. In addition, Diversion No. 4A will be constructed with a storage level of 3034.1 msl; this level is substantially

below the level of Diversion No. 4 and thus there is much less chance that Diversion No. 4A will operate to the detriment of the landowners than Diversion No. 4 is alleged to have operated.

32. Moreover, the Board finds that a qualification of the permit with regard to silt buildup will further protect the landowners. The Board will require silt removal if silt buildup exceeds 50% of the level of the carp barrier.

33. Finally, the Board finds that should Diversion No. 4A ever flood and should the training dike be unable to hold the flows, the creek will have overflowed its banks at other locations. The Board finds that it is unlikely that the diversion will contribute in any but a de minimus way to any flooding which might occur on the landowners' property.

The Proposed Use Is a Beneficial Use.

34. The proposed use of the diversion is to set up a barrier to prevent carp from moving from the main body of the refuge in a westerly direction past new Diversion No. 4A into an area occupied by Pearl Dace.

35. The Pearl Dace was originally classified by the Game, Fish and Parks Commission, pursuant to SDCL ch. 34A-8 and after notice and hearing, as an "endangered" species under South Dakota law. It has now been reclassified by the Game, Fish and Parks Commission under the same authority as a "threatened" species.

36. Under SDCL 34A-8-1(3), a "threatened" species is "any species which is likely to become an endangered species

within the foreseeable future throughout all or a significant portion of its range."

37. The United States has not classified the Pearl Dace as a threatened or endangered species nationally.

38. Although the United States has not classified the Pearl Dace as a threatened or endangered species nationally, the State of South Dakota, through its statutes and administrative provisions, has determined that it is important to maintain biological diversity within the state of South Dakota. Therefore, the State of South Dakota has deemed it appropriate as a matter of public policy to classify certain species as threatened or endangered species on a statewide basis even though they may not be threatened or endangered on a nationwide basis.

39. SDCL 34A-8-6 directs the Departments of Game, Fish and Parks and Agriculture to "perform those acts necessary for the conservation, management, protection, restoration and propagation of . . . threatened species."

40. The Pearl Dace exists in the area of LaCreek Wildlife Refuge as a relatively discontinuous population; in other words, the local population is not well connected with other populations of Pearl Dace.

41. The Board credits the testimony of expert Stancill that there are presently sustainable populations of Pearl Dace upstream (or west) from present Diversion No. 4 and proposed Diversion No. 4A. A sustainable population is indicated by the presence of fish from each of the age classifications. Pearl Dace live for three years so the presence of one-year-old, two-

year-old, and three-year-old fish indicates the existence of a sustainable population. Sustainable populations of Pearl Dace were found in the upstream area in 1993, 1994, and 1995.

42. The Board finds that the diversion proposed by the U.S. Fish and Wildlife Service will protect the Pearl Dace consistent with the public policy enunciated in SDCL ch. 34A-8.

43. The U.S. Fish and Wildlife proposes to construct a four-foot barrier to prevent carp from migrating westward into the area inhabited by the Pearl Dace. The evidence indicates that carp can jump a considerable distance over barriers but that a four-foot barrier will be sufficient to prevent carp from entering the area.

44. The Board finds that, although the carp and the Pearl Dace do not, at all times of the year, seek to inhabit the same sorts of water, carp could begin to move into the area inhabited by the Pearl Dace as early as spring and could stay as late as August. There is, therefore, a substantial time in which the carp could affect the habitat of the Pearl Dace in an adverse fashion.

45. It is, moreover, likely that carp will enter the area sought to be protected if the barrier is not in place. Carp prefer shallow flooded vegetation for spawning. Carp expel eggs over shallow aquatic vegetation and males then swim over the top and lay milk upon the eggs. At that point, they are fertilized and hatch. Fry then move out into somewhat deeper water.

46. The Board therefore finds that, lacking a four-foot barrier, it is likely that carp would enter the area

inhabited by the Pearl Dace. Carp can, according to expert Stancill, move across a fairly shallow amount of water, probably 3 to 4 inches.

47. Carp do not predate upon Pearl Dace. The danger to Pearl Dace lies in the fact that the carp are bottom feeders which feed by rooting in the bottom of a creek or stream for vegetation. This feeding behavior raises the sediment, changes the clarity of water by making it more turbid, and causes the water to become more warm.

48. The cause and effect relationship is that the silt raised by the feeding of the carp makes the water cloudy and more turbid and sunlight cannot penetrate. The aquatic vegetation declines which in turn causes the oxygen levels of water to decline. Moreover, the turbidity of the water causes it to become warmer.

49. The resulting situation is very detrimental to the viability of Pearl Dace which thrive in clear water.

50. Expert testimony credited by the Board indicates that there is very little appropriate habitat for the Pearl Dace not only in South Dakota but in the surrounding states.

51. The Board further finds that allowing even two carp, a male and female, to enter the area inhabited by the Pearl Dace could eventually lead to degradation of the habitat of the Pearl Dace and affect their viability.

The Proposed Use Will Be in the Public Interest.

52. Landowners and the county oppose the application because, they contend, the grant would not be in the public

interest. This attack appears to be mainly concentrated upon the past activities of the U.S. Fish and Wildlife Service. The U.S. Fish and Wildlife has not, as the Board's prior decision established, in the past been consistently conscientious with regard to limiting of flooding on landowners' lands.

53. The Board also finds, however, that the U.S. Fish and Wildlife Service's recent actions have gone a substantial way to alleviate the overland flooding problems of the landowners as set out in more detail above. The Board has also found above that the landowners' claim of underground "piping" of water is unfounded.

54. Landowners also complain that the U.S. Fish and Wildlife Service's actions in the past, and in the present, have caused weeds and particularly Canadian thistle to appear on their properties. Landowners argue that in their view the U.S. Fish and Wildlife Service has not adequately dealt with this problem, and that the permit should therefore not be granted in the public interest.

55. Landowners have failed to demonstrate, however, that the grant of <u>this</u> permit will in any way affect the Canadian thistle problem either on the U.S. Fish and Wildlife Service property or upon the landowners' or any county property. Thus, the claim should be rejected on this ground alone. More detailed analysis provides additional reasons to reject this public interest claim.

56. Canadian Thistle was apparently brought to this county in wheat shipments.

57. At some point which is unclear in history, Canadian thistle invaded the La Creek Wildlife Refuge.

58. The Board finds that the Service has undertaken very significant, if sometimes uneven, steps to deal with the Canadian thistle problem.

59. First, the Board finds that the Service has embarked on an integrated weed management program, and that any other sort of program is likely to fail. An integrated program utilizes chemical, biological, mechanical and cultural controls, including grazing. The Service demonstrated that it utilizes each of these methods in controlling thistle

60. Second, the Board finds that the Service's use of biological controls constitutes an innovative, effective and practical component of its thistle control program.

61. Biological control has been instituted by the introduction of several types of weevil which affect the viability of the thistle. The weevil were originally imported from Europe where the weevil had also been utilized in the control of thistle.

62. The Service introduced the first weevils in 1989. The first weevil introduced was the stem mining weevil. This small weevil, measuring approximately a quarter of an inch long, attacks the stem and upper root crown of the plant. This weevil lays its eggs inside the stem of the plant. On the hatching of the eggs, the larval burrow into the stem and eat the thistle from the inside out. This typically eliminates the seed production from the thistle which is the critical first step in controlling the thistle.

63. This weevil is probably the most effective of the weevils in controlling the thistle.

64. The weevils are a significant investment, and cost in excess of $1.00 each.

65. The Service released 500 of this weevil in 1989 and an additional 1,000 in 1995.

66. The Board credits the testimony of Clarke Dirks, who has significant experience in controlling noxious weeks for the U.S. Fish and Wildlife Service and who is now stationed at LaCreek Wildlife Refuge, that this weevil is now widespread throughout the Refuge.

67. Several other weevils have been utilized by the Service on the Refuge. One thousand of the defoliated beetle were released in 1995; this weevil eats the leaves of the thistle, which stresses the plant. The gall fly attacks the stem midway up the plant; 300 of this species were released in 1993. The action stops most of the nutrients from proceeding to the seed head, which eliminates or limits the seed production. The gall fly is considered to be established on the refuge. The Service has also released 300 of a particular kind of seed head weevil in 1993 and 300 more in 1994. These eat the seed head from the inside out.

68. In addition to these introduced species, the Service has become aware of and utilizes in its planning another kind of seed head weevil which was not brought onto the Refuge by the Service, but found its way there naturally. The weevil eats the growing seeds. This weevil is so abundant that the Service has been able to export 5,000 of the species to other refuges in South

Dakota to deal with thistle. In addition, the Service has worked with three Bennett County landowners to deal with their thistle problems by utilizing this weevil.

69. The effects of the Service's thistle control program are quite positive. The Board credits the testimony of Rolf Kredit and of Clarke Dirks in this respect. Kraft testified that he conducted a survey or inventory in 1982 which demonstrated that 1,200 acres were infested with thistle. Kraft's numbers reflected his analysis of the percent of a particular field as to which the canopy cover was thistle. Kraft testified that after testing various chemical on test plots to determine their efficacy and utilizing that information in the refuge with chemical application, the acreage infested was 300 to 400 acres by 1986. In 1988, however, the Service effectively banned the use of several chemicals and the chemical control problem suffered and the program lost ground.

70. Kraft testified, and the Board credits the testimony, that he was involved in the successful effort to gain permission to use chemicals which had been effective previously in the thistle control effort, including Tordon.

71. Kraft also presented persuasive photographic evidence that a field which was badly infested in 1983 was virtually free of thistle 12 years later. More impressively, Kraft presented such evidence which showed that a field infested in 1993 was vitally free of thistle by 1997 and that thistle in another area was dealt with effectively in a year or two.

72. The effectiveness of the program is bolstered by the testimony of Claude Dirks that, of the area which was biologically treated, (i.e. the main body of the Refuge), 80-85% of the thistle were affected and 90% of those thistle did not produce seed in 1996.

73. In addition, the testimony strongly indicated that the area which was not biologically treated, i.e. the areas around the border of the refuge, were in fact generally chemically treated and that this treatment in recent years has been markedly more effective.

74. The Board thus finds that the Service has had in place a determined effort to deal with the thistle problems and that it has made very substantial progress in so doing.

75. The Board also rejects the claim that the permit at issue here should not be granted because it will be necessary to disturb dirt at the site of the new Diversion No. 4A and because when dirt is disturbed, thistle might grow. The Service has shown itself capable of and willing to deal with any minor infestations which might develop at the site of Diversion No. 4A.

76. Finally, as to this issue, the Board examines the fact that the U.S. Fish and Wildlife Service initially opposed, on sovereign immunity grounds, state and county authority to control thistle on the refuge. The Board finds that this opposition is of little or no relevance here, because the Service has reversed its position as to jurisdiction of the local and state units of government. In addition, the Service has shown its willingness to cooperate by signing, with the Bennett County

Weed Control Board, what may have been the first interagency memorandum of understanding on weed control in the nation, and the Service has promulgated a five-year weed plan which was signed onto by the Board.

Amount of Water.

77. The applicant has requested 1.0 acre of water. That amount of water is readily available, as noted above, but the applicant has asserted only that about .5 acre-feet of water will ever be impounded behind the fish screen. The Board takes notice of its consistent practice in allowing applicants to be granted permits in excess of the actual proposed use because engineering difficulties may develop which result in larger amounts of water being used or impounded. The Board determines, based on its past practices, that grant of a permit of .75 acre-feet of water is sufficient to deal with any such difficulties.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and of this matter.

2. The Board concludes that the construction of a .75 acre-foot impoundment by the U.S. Fish and Wildlife Service does not constitute a major federal action significantly affecting the quality of the human environment. The Board therefore finds that the United States is not in violation of federal law for failing to prepare an environmental impact statement.

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

4. The proposed Diversion No. 4A can be developed without an unlawful impairment of existing rights of the landowner to be free from underground or surface flooding.

5. The Board concludes, as set forth in more detail above, that Diversion No. 4A can and will be constructed to avoid flooding or damage to the adjoining landowners. In this regard, the Board notes that it has supplied additional protections to the landowners in Qualification 2 of the Final Decision. The Board also concludes that the past actions of the Service do not indicate that Diversion No. 4A will be constructed and operated as to harm the adjacent landowners.

6. The proposed use of the diversion as a carp barrier is a beneficial use because it will effectively protect a state "threatened" species.

7. The proposed use is in the public interest. The Board particularly concludes that protection of a threatened species defined under the laws of the State of South Dakota is within the public interest. The Board rejects the claim of the landowners that, merely because there are other means potentially available to protect the threatened species that this particular means of protecting the threatened species is not within the public interest. Moreover, in weighing the factors relevant to the public interest, the Board finds that the opponents of the new permit have not shown that this new permit will adversely affect them in any way in terms of flooding, thistle, or otherwise; the Board has weighed this fact against the fact that

the carp barrier will significantly protect the Pearl Dace which has been defined as a threatened species under South Dakota law.

FINAL DECISION

The application for Water Permit No. 2300-2 is granted subject to the following conditions:

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

2. Permit No. 2300-2 authorizes storage of .75 acre-foot of water by constructing a new stoplog structure which replaces the existing structure (known as Diversion No. 4). The purpose of the structure is to prevent carp from traveling upstream. This will protect the state threatened Pearl Dace, whose habitat is upstream of the stoplog structure.

3. The storage level of Diversion No. 4A may not be in excess of 3034.1 msl and the structure must be designed to pass a 25-year precipitation event without raising the pool more than four feet.

4. The Service is required to remove the silt if the buildup exceeds 50% of the height of the carp guard.

5. The Service is required to remove Diversion No. 4 in its entirety within a reasonable time after construction of Diversion No. 4A.

Dated this _____ day of _____, 1998.

BY THE BOARD:

_____

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STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN RE APPLICATION FOR WATER PERMIT NO. 2300-2; U.S. FISH AND WILDLIFE SERVICE (LACREEK NATIONAL WILDLIFE REFUGE)	)))))	DENR'S RESPONSE TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION

COMES NOW, the Department of Environment and Natural Resources, Water Rights Program (DENR) and requests the following changes to the proposed Findings of Fact, in the above-entitled matter:

FINDINGS OF FACT

1. In Finding of Fact 1, line 2, the DENR asks that the word "divert" be substituted with "store."

2. In Finding of Fact 2, the DENR asks that the words "on LaCreek" (line 5) be substituted with "from Lake Creek." Further, the DENR asks that the final sentence of paragraph 2 be deleted and substituted with the following:

> Further appeals were not made on Vested Right Application No. 1927-2. However, the South Dakota Supreme Court, on December 7, 1994, affirmed the decision of the circuit court with respect to other issues that were appealed (not pertaining to Lake Creek).

3. In Finding of Fact 3, the DENR requests three changes. The words "circuit court" should be inserted between the words "the" and "reversal" on line 1. Further the words "of the grant of the vested right by the circuit court" should be deleted. Finally, on line 4, the word "eventually" should be substituted with the word "substantially."

4. Finding of Fact 4 describes the parties in this matter. The DENR asks that this finding be substituted with the following language, which is more specific:

Four Petitioner/Intervenors who were involved in the litigation with regard to the vested right claim are also involved in the present application (Lawrence Kocer, Raymond Kocer, Brett Heath and Charles Emley). Additionally, the Bennett County Commission intervened in the present application.

5. Finding of Fact 5 should be amended to reflect that the pearl dace was classified as an endangered species in 1978. (Transcript page 105). Further, the DENR suggests that the following sentence be added "Subsequently, the pearl dace, which is a minnow, was reclassified as a threatened species in 1996." (Transcript page 105).

6. The DENR proposes that Finding of Fact 6 be amended by deleting the words "each of the applications" on line 3 and substituting "the application insofar as Diversion 4 is concerned." Further, the DENR proposes that an additional sentence be added at the end of Finding of Fact 6: "The portions of the application applying to Diversions 1 and 3 were deleted altogether." Further, the word "endangered" on line 6 should be substituted with "threatened."

7. On Finding of Fact 12, the DENR suggests that the word "sandy" (line 4) be changed to the word "sand."

8. Finding of Fact 13, page 4, should be changed by using the words "moved laterally" rather than "infiltrated" in the last sentence.

9. The name of the USFWS witness referred to in Finding of Fact 14, 15, is spelled "Johnston."

10. In Finding of Fact 15, the DENR asks that the word "from" on line 4 be substituted with "based on volume of water." Further, the DENR asks that the words "the measure of the sand layer"

be substituted with the words "head differential." (Transcript page 1355-1364). Finally, with respect to Finding of Fact 15, the DENR asks that line 4, page 5, be changed by deleting the words "the impoundment of" and by inserting the word "channel" after the word "stream." (Transcript page 1389, 1413).

11. Finding of Fact 16 should be revised by utilizing the numerical reference .000013. (Transcript page 1364, 1365). In other words, it appears that a typographical error resulted in the omission of a 0. Further, the word "it" should be deleted from the final line of Finding of Fact 16 for grammatical reasons.

12. Finding of Fact 19 should be revised by deleting the words "removed the stop logs" and substituting the words "discontinued any diversion by closing a screw gate." (Transcript page 57).

13. In Finding of Fact 20, the second sentence should use the words "stop logs" rather than "diversion works."

14. Finding of Fact 21, line 5, should use the word "drain" rather than "draining."

15. In order to avoid any uncertainty as to the meaning of Finding of Fact 22, the DENR proposes that a period be inserted on line 4 after the word "land." Then, the DENR proposes that the words "The Board further finds" be inserted before the word "that" on line 4.

16. In Finding of Fact 23, line 12 should be changed by using the words "drainage ditch" rather than "plug."

17. In Finding of Fact 24, the word "and" should inserted between references to a 1903 map and a 1937 photograph.

18. Finding of Fact 26 discusses the effect of the removal of Diversion no. 4. Reference on the second line should be made to Diversion 4, rather than 4A.

19. The second sentence of Finding of Fact 27 should be amended by deleting the letters "un" from either "unpersuaded" or "unlikely." It is believed that this change would clarify the intent of the Board's ruling. Further, this Finding should be changed on page 10, line 4 by inserting the words "in a drainage ditch" between "breach" and "to keep."

20. Finding of Fact 40 should be amended by deleting the word "discontinuous" and inserting the word "disjunctive." (Transcript page 104).

21. For clarity, Finding of Fact 63 should refer specifically to the stem mining weevil.

22. Finding of Fact 67 should be amended by deleting the words "particular kind" from line 9 and inserting the word "variety". On the same line, a parenthetical reference should be made to include the word "Larinus planus" after the words "seed head weevil." (Transcript page 1647.) This reference is intended to distinguish between this seed head weevil and the different type of seed head weevil referenced in Finding of Fact 68.

23. In Finding of Fact 68, line 3, a parenthetical reference should be made to the type of seed head weevil involved (rhinocyllus conicus). (Transcript page 1643.)

24. Finding of Fact 69 should reflect that the spelling of the refuge manager's last name is "Kraft."

25. Finding of Fact 72 should reflect that Mr. Dirks' first name is Clarke.

26. The very end of Finding of Fact 76 (page 20) should be amended by inserting the words "Bennett County Weed Control" before the word "Board."

27. Finding of Fact 77 should be changed by substituting the words "fish screen" with "structure No. 4A."

Dated this 9th day of February, 1998.

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

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of DENR's Response to Findings of Fact, Conclusions of Law, and Final Decision in the matter of In re Application For Water Permit No. 2300-21; U.S. Fish and Wildlife Service (LaCreek National Wildlife Refuge), was served by United States mail, first class, postage prepaid upon the following on this 9th day of February, 1998.

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Assistant Attorney General

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BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

CHARLES EMLEY, BRETT HEATH, RAYMOND KOCER, and LAWRENCE KOCER, Petitioners, v. UNITED STATES FISH AND WILDLIFE SERVICE, Applicant. --- BENNETT COUNTY, and BENNETT COUNTY WEED BOARD, Intervenors.	**APPLICATION NO. 2300-2** **APPLICANT'S RESPONSE TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION**

Pursuant to the Chief Engineer's November 7, 1997, Notice, the Applicant, the United States Fish and Wildlife Service ("FWS"), hereby responds to the Board's proposed Findings of Fact, Conclusions of Law, and Final Decision as follows:

CONCERNING THE PROPOSED FINDINGS OF FACT

1. Re Paragraph 1, page 1: On the second line of this paragraph, the word "divert" should be changed to "store" or "impound."

2. Re Paragraph 2, page 1:

A. On the fifth line of this paragraph, the word "LaCreek," should be changed to "Lake Creek."

B. On the seventh line of this paragraph, the word "has" should be changed to "had."

C. As currently written, the last two sentences of this paragraph are arguably ambiguous. More specifically, the language in these sentences might be understood to mean the following: The Circuit Court reversed the Board's granting of Vested Right Application No. 1927-2, and the South Dakota Supreme Court subsequently affirmed this reversal. This did not happen. The procedural history of the previous case will show that the Landowners appealed a majority of the Circuit Court's decision to the Supreme Court; however, FWS never appealed to the Supreme Court that portion of the Circuit Court's decision pertaining to FWS' claimed vested water right. Therefore, the Supreme Court only affirmed part of the Circuit Court's decision. To alleviate any potential confusion, FWS proposes that the last sentence of this paragraph be re-worded as follows: "FWS did not appeal the Circuit Court's reversal of the grant of Vested Right Application No. 1927-2 to the South Dakota Supreme Court. However, on December 7, 1994, the Supreme Court affirmed all other aspects of the Circuit Court's decision on appeal before it."

3. Re Paragraph 3, page 1: On the third line of this paragraph, to more accurately characterize these proceedings, the words "application for new permits" should be changed to "application for a new permit."

4. Re Paragraph 11, page 3: In the first and second sentences of this paragraph, the reference to "one acre-feet" should be changed to "one-acre foot."

5. Re Paragraph 14, page 4: On the third line of this paragraph, "Johnson" should be changed to "Johnston."

6. Re Paragraph 15, pages 4-5:

A. To more accurately characterize the record, FWS suggests that the first sentence of this paragraph (page 4) be re-written as follows: "The Board finds, based upon the testimony of Megan Johnston, that the lateral movement of water should be determined by the application of Darcy's law, which uses hydraulic conductivity, the head differential, and the flow area to calculate the volume of water which will move from Point A to Point B." Transcript at 1356-1360.

B. As noted in the immediately preceding paragraph, on the second line of this paragraph (page 4), "Johnson" should be changed to "Johnston."

C. On the fifth line of this paragraph (page 4), "landowner's" should be changed to "landowners'."

D. On the tenth line of this paragraph (page 5), the words, "the impoundment of the stream," should be changed to "the stream channel" or "Lake Creek." Transcript at 1389.

E. On the eleventh line of this paragraph (page 5), "Johnson" should be changed to "Johnston."

F. On the twelfth and seventeenth lines of this paragraph (page 5), "landowner's" should be changed to "landowners'."

G. On the fifteenth line of this paragraph (page 5), for the sake of clarity, the words, "saturated in a triangular shape of about 262 acres" should be changed to "saturated in a triangular shaped area of about 262 acres."

7. Re Paragraph 16, page 5: On the fifth line of this paragraph, to correct what is probably an inadvertent typographical error, the reference to ".00013 feet per day" should be changed to ".000013 feet per day." Transcript at 1364-1365.

8. Re Paragraph 18, page 6: On the first line of this paragraph, the word "The" should not be capitalized.

9. Re Paragraph 19, page 6: To more accurately characterize the record, FWS suggests that the first sentence of this paragraph be re-written as follows: "As to Diversion No. 1, however, the U.S. Fish and Wildlife Service ceased any and all diversions by closing (sometime after the summer of 1992) a screw gate located in Diversion No. 1. Transcript at 56-57.

10. Re Paragraph 20, page 6: On the fourth line of this paragraph, for the sake of clarity, instead of saying that the

"diversion works" have been removed from Diversion No. 3, it is more accurate to state that the "stop logs" have been removed from this structure.

11. Re Paragraph 21, page 7:

A. On the seventh line of this paragraph, for the sake of clarity, the reference to "Mr. Kocer's property" should more specifically be to "Messrs. Lawrence or Raymond Kocer's property."

B. On the tenth line of this paragraph, for the sake of clarity, the reference to "Mr. Kocer" should more specifically be to "Mr. Raymond Kocer."

12. Re Paragraph 22, page 7: On the fourth line of this paragraph, for the sake of clarity, the reference to "Mr. Kocer's land" should more specifically be to "Messrs. Lawrence or Raymond Kocer's land."

13. Re Paragraph 23, page 8: On the seventh, ninth, and fourteenth lines of this paragraph, for the sake of clarity, the references to "Kocer's property" should more specifically be to "Lawrence Kocer's property."

14. Re Paragraph 24, pages 8-9:

A. On the fourth line of this paragraph, to more accurately characterize the record, FWS asks that the words "photography and" be inserted between the words "aerial" and "maps."

B. On the sixth and seventh lines of this paragraph, to more accurately characterize the record, the words "a 1903 map, a 1937 photo" should be changed to "a 1904 map, and a 1937 aerial photo." FWS Exhibit 4 and Transcript at 1256.

C. To more accurately characterize the record, FWS asks that the sentence beginning on the eighth line of this paragraph (page 9) be re-written as follows: "A short segment of Lake Creek on the West 1/2 of the Heath property was straightened sometime in the 1950's." Transcript at 1289-1290. To further clarify this particular finding, FWS also asks that the following sentence be added immediately after the one discussed above: "Additionally, sometime prior to 1980, the entire length of the Lake Creek channel across the Heath property was straightened." Transcript at 1295.

D. On the eleventh line of this paragraph (page 9), for the sake of clarity, the words "dried out wetland" should be changed to "drained wetland." Transcript at 1293-1297. Additionally, on this same line, the second "however" (the one following the word "wetland,") should be deleted.

15. Re Paragraph 25, page 9: On the fourth line of this paragraph, for the sake of clarity, the word "flow from" should be changed to "result from."

16. Re Paragraph 26, page 9: On the third line of this paragraph, to correct what appears to be an inadvertent error, the reference to "Diversion No. 4A" should be changed to "Diversion No. 4."

17. Re Paragraph 27, pages 9-10:

A. On the thirteenth and fourteenth lines of this paragraph (page 10) for the sake of clarity, the sentence "Diversion No. 3 has been removed." should be changed to read as follows: "The stoplogs/boards in Diversion No. 3 have been removed."

B. To more accurately characterize the record, FWS suggests that the sentence beginning on the fourteenth line of this paragraph (page 10) be re-written as follows: "The Service has attempted to plug a breach along a drainage ditch to keep water from flowing on to Heath's property possibly from Diversion No. 4 and from runoff." Transcript at 1473-1475.

C. On the sixteenth and seventeenth lines of this paragraph, to more accurately characterize the record, the words "A troublesome siphon which goes underneath Lake Creek . . ." should be changed to read "A troublesome siphon which was impacted by Lake Creek . . . ." Transcript at 1485-1487.

18. Re Paragraph 45, page 13: On the fifth line of this paragraph, the word "milk" should be changed to "milt."

19. Re Paragraph 57, page 16:

A. On the second line of this paragraph, for consistency, the word "thistle" should be capitalized.

B. On the second line of this paragraph, the word "La Creek" should be changed to "LaCreek."

20. Re Paragraph 58, page 16: On the third line of this paragraph, for consistency, the word "thistle" should be capitalized.

21. Re Paragraph 62, page 16: On the sixth line of this paragraph, the word "larval" should be changed to "larva."

22. Re Paragraph 67, page 17:

A. On the first line of this paragraph, for the sake of clarity, the word "weevils" should be changed to "insects."

B. On the second line of this paragraph, to more accurately characterize the record, the words "defoliated beetle" should be changed to "defoilating beetle."

C. On the third line of this paragraph, for the sake of clarity, the word "weevil" should be changed to "beetle."

D. On the eighth line of this paragraph, for consistency, the word "refuge" should be capitalized.

23. Re Paragraph 69, page 18:

A. On the third line of the paragraph, the name, "Rolf Kredit" should be changed to "Rolf Kraft."

B. On the ninth line of this paragraph, for consistency, the word "refuge" should be capitalized.

24. Re Paragraph 71, page 18: On the fifth line of this paragraph, to correct what appears to be an inadvertent error, the word "vitally" should be changed to "virtually."

25. Re Paragraph 72, page 19: On the second line of this paragraph, the name "Claude Dirks" should be changed to "Clarke Dirks."

26. Re Paragraph 76, page 19: The second sentence of this paragraph states that the Service has reversed its position concerning the "weed" jurisdiction of local and State units of government. The record will show that this is technically not correct. The Service has not necessarily "reversed" its position; rather, the Service has clarified its position by stating on the record that, if the provisions of an applicable Federal statute (43 U.S.C. § 1241) are met (the subsequently referenced interagency memorandum of understanding is part of one such condition), the Service will recognize the State's authority to enter onto Federal lands and destroy noxious plants growing thereon. Consequently, FWS feels that the subject sentence should be re-worded as follows: "The Board finds that this opposition is of little or no relevance here, because the Service has clarified that, if certain Federal statutory provisions are met, it will recognize the State's authority to enter onto Federal lands and destroy noxious plants growing thereon."

27. Re: Paragraph 76, page 20: On the last line of this paragraph, for the sake of clarity, the reference to "the Board" should more specifically be to "the County Weed Board."

28. Re: Paragraph 77, page 20:

A. On the first line of this paragraph, the reference to "1.0 acre of water" should be changed to "1.0 acre-foot of water."

B. On the third line of this paragraph, the reference to ".5 acre-feet of water" should be changed to ".5 acre-foot of water."

C. On the fourth line of this paragraph, for the sake of clarity, the words "fish screen" should be changed to "carp barrier."

D. On the ninth and tenth lines of this paragraph, the reference to ".75 acre-feet of water" should be changed to ".75 acre-foot of water."

CONCERNING THE PROPOSED CONCLUSIONS OF LAW

1. Re Paragraph 2, page 20: FWS obviously does not question the Board's authority to adjudicate the subject water permit. However, under the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321 et seq.) and its implementing regulations (40 C.F.R. §§ 1500 et seq.), FWS does question whether the Board has jurisdiction or authority to conclude that: (A) the construction of Diversion No. 4A is not a major Federal action significantly affecting the quality of the human environment; and (B) the United States is not in violation of Federal law for failing to prepare an environmental impact statement. Notwithstanding, FWS fully recognizes that the subject conclusion of law is necessary to address an argument made by Bennett County at the hearing. Given the above, and further given FWS' strong desire to avoid any such jurisdictional issues, FWS asks that this conclusion of law be re-written as follows:

> The Board rejects and otherwise deems irrelevant Bennett County's argument raised at the hearing that the construction of a .75 acre-foot impoundment by the U.S. Fish and Wildlife Service constitutes a major Federal action significantly affecting the quality of the human environment. Likewise, the Board also rejects and deems irrelevant Bennett County's argument that the Fish and

Wildlife Service has violated Federal law because it failed to prepare an environmental impact statement."

2. Re Paragraph 4, page 21: On the third line of this paragraph, the word "landowner" should be changed to "landowners."

3. Re Paragraph 5, page 21: On the fifth line of this paragraph, FWS believes that the reference to "Qualification 2" should more specifically be to "Qualifications 3 and 4."

DATED this 13th day of February, 1998.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 1998, true and correct copies of the foregoing **APPLICANT'S RESPONSE TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** were mailed postage pre-paid in the United States Mail to:

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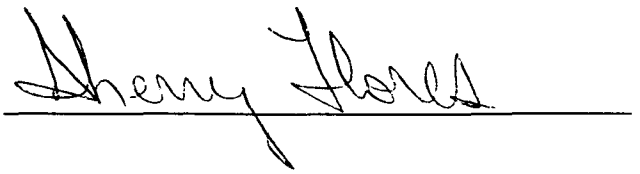

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February 16, 1998

MEMORANDUM

TO: Members of the Water Management Board and Parties (Service List attached)

FROM: Bennett County Landowners and Bennett County Weed Board members

RE: Answer to Proposed Findings of Fact, Conclusions of Law and Final Decision to Water Permit Application No. 2300-2, USFWS - LaCreek National Wildlife Refuge

IN RE APPLICATION FOR WATER PERMIT NO. 2300-2; U.S. FISH AND WILDLIFE SERVICE (LACREEK NATIONAL WILDLIFE SERVICE)	)))))	LANDOWNERS' AND BENNETT COUNTY'S RESPONSE TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION

We, the landowners and Bennett County Weed Board members, object to the majority of the items contained in the Findings of Fact, Conclusions of Law, and Final Decision rendered by members of the Water Management Board. We request the following changes to the proposed Findings of Fact, in the above-entitled matter:

FINDINGS OF FACT

1. Change 'one acre-foot' to ".75 acre-foot." In line 4, change 'four-foot barrier' to read "three-foot, eight-inch barrier with four inches of water going over the barrier, making a maximum of four feet". After the word'Dace' in line 5, add ", and the carp that are already above Diversion 4."

7. On line 4, change 'Diversion No. 4A' to read "Structure 4A". (Note: any reference hereafter to Diversion No. 4A should be changed to read "Structure 4A")

10. The landowners did provide adequate and credible evidence that the proposed application WILL impair their rights.

11. Delete in its entirety.

12. Line 8 - delete the words 'and weeds'.

13. Line 6 on page 4: delete the word 'theory', replace with "analysis". See attached Exhibit NN, which justifies Mr. Simonson's analysis, and disputes portions of Megan Johnson's testimony with regard to items 14, 15, and 16.

17. In line 1, change 'theory' to "analysis". The last sentence should be changed to read, "The very speedy drop in well readings after rainfall events is due to the fact that U.S. Fish and Wildlife had reduced flooding the land six years previously in order to conduct a survey study."

20. No documented evidence. Delete lines 10-13 on page 6, after the word 'Service', and lines 1-5 on page 7.

21. On line 9, after the word 'diversion.', insert the sentence "When Diversion 1 was breached, the majority of the flooding ceased on Raymond Kocer's land."

22. On line 4, after the word 'land', add "but will divert water to church property." Delete lines 5-9 on page 7 starting with the words 'and that' on line 4. On page 8, delete lines 1 and 2.

23. Disagree in its entirety!

24. On page 9, line 1, after the word 'photo.', insert the following: "It was pointed out to the Board that Mr. Pearson's testimony in 1992 was false. He testified from looking at aerial photos that diversions 1 through 4 were in LaCreek in the 1930's. Later, Mr. Kraft testified that he put those diversions in LaCreek in the 1980's; therefore, Mr. Pearson's testimony should be thrown out in its entirety." In line 4, page 9, delete '1950's' and insert "late 1970's"; at the end of that line, delete the words 'in 1961', and the

beginning with the word 'However'.

25. On line 5, after the word 'area', insert "due to man-made ditches."

27. Delete all of item 27 on page 9 and through line 6 on page 10, ending with 'runoff.'

28. Delete; disagree in its entirety. This study is flawed; no scientific data exists to substantiate these contentions.

32. (Refer to Final Decision #4).

33. Delete - pure speculation.

34. Following the word 'Dace.' in line 4, insert: "This is not a beneficial use; carp are already present above Diversion 4, as indicated by undisputed testimony by Charles Emley."

36. On page 12, line 2; insert after '..range.', "This is not the normal range for the Pearl Dace, only a peripheral area where a few specimens are found."

40. In line 2, after the word 'population', insert "due to mismanagement of the U.S. Fish and Wildlife Service;".

41. After the word '1995' in line 3 on page 13, add: ", due to the fact that they were transplanted to this location in the 1970's."

43. With regard to size of barrier (lines 2 and 5), refer to Finding of Fact #1.

44-50. Delete; based on pure conjecture.

51. See Item 34.

52-53. Why were the landowners and the County testifying

in front of the Water Board for twelve days if nos. 52 and 53 are true?

55. Testimony by Gary Nies showed that raising the water table, as proposed Structure 4 will do, will enhance the growth and spread of Canadian Thistle. It therefore follows that granting this permit will adversely affect the Canadian Thistle problem.

56-57. Items 56 and 57 are erroneous, as evidenced by the testimony of Dr. Ray Moore. During the research Dr. Moore conducted county-wide in the early 1950's, the only Canadian Thistle he found was on the LaCreek Refuge.

58-76. The Bennett County Weed Board rejects items 58 through 76 in their entirety. All statements made are pure fabrication and are not consistent with submitted documented evidence. All the evidence we submitted was arbitrarily left out and was not considered relevant by the Water Board. Current, uncontested, and irrefutable evidence was presented in the form of videos and photos taken in 1997 and prior years showing widespread manifestation of Canadian Thistle throughout the Refuge. Also, the testimony from Dr. Ray Moore and Gary Nies, which substantiated our contentions, was discounted and not considered.

IN RE APPLICATION FOR WATER PERMIT NO. 2300-2; U.S. FISH AND WILDLIFE SERVICE (LACREEK NATIONAL WILDLIFE REFUGE)	)))))	LANDOWNERS' AND BENNETT COUNTY'S RESPONSE TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION

The Landowners and Bennett County Weed Board present the following changes to the FINAL DECISION:

1. Amend to read as follows: in line one, change the word 'may' to 'will'. In line four, between the words 'species' and 'directly', insert "or establishment of conditions favorable to the development of wetlands".

2. After the words '(known as Diversion 4)', in line 3, insert: "When Diversion 4A is constructed, and before the channel is rerouted to the south, the existing silt must be dredged out of the channel to a minimum distance of 400' upstream. In conjunction to this requirement, the north/south ditch must be cleaned out to ensure that waters diverted to the south at the time of construction of Diversion 4A return to LaCreek." In line six, following the word'structure.', add the following sentence: "When carp are found above new Diversion 4A, or the state-threatened Pearl Dace is removed from the threatened list, Diversion 4A will be removed in its entirety."

4. Following the word 'guard.' in line two, add the following: "In order to protect the publics' interest in maintaining the original, natural creek channel, the ecosystem, and all other environmental factors which presently exist, an elevation benchmark needs to be established at the carp guard site.

This benchmark will be used to develop a profile of LaCreek stream and stream banks. In developing this profile, permanent weir gauges will be installed in the existing creek channel directly above Diversion 4A, prior to construction. The first weir gauge will be installed in the existing creek channel, 25' upstream of the face of the carp guard, and thereafter in increments of 400', up to and including 1625', for a total of five weir gauges."

5. After 'entirety' on line 2, page 23, and before the word 'within', insert 'and reclaim the surrounding area to its original state'.

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HILLSLOPE MATERIALS AND PROCESSES

Second Edition

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11 Water in Soils and Hillslope Hydrology

Hillslopes with a soil cover undergo a great variety of weathering, soil formation, soil erosion, mass wasting, and deposition processes. The energy for these processes is that of gravity and received solar radiation and the agent for change is, almost invariably, water. The action of water and ways in which its action is modified by vegetation, soils, slope angle, and surface relief are thus the focal points of studies of slope processes.

Water in soils

The physical properties of water result from its asymmetrical arrangement of hydrogen and oxygen atoms (Fig. 2.3) and its resulting dipolar molecules. The importance of these properties for the action of water as a solvent (Fig. 8.10a), as a contributor to cohesion through the attraction of water molecules to each other (Figs. 2.3, 5.1) and to adsorption (also called adhesion) through the bonding of water molecules to surfaces of solids (Figs. 3.12, 5.1) have been discussed in earlier chapters. The development of positive and negative pore-water pressures has also been discussed (Fig. 5.11).

The movement and retention of water in soil is influenced by cohesion and adhesion acting to create surface tension and capillarity.

Surface tension and capillarity

Surface tension is a phenomenon developed at liquid–air interfaces and results from the greater cohesive attraction of water molecules for each other than for the air (Fig. 11.1a). The net effect is that water molecules close to the interface have a higher energy than those in the bulk of the water and an inward force at the water surface causes the water to behave as if it were part of a stretched elastic membrane. This surface tension is greater in water than in most other liquids. It is an important property in the phenomena of capillarity and water retention in soils.

Capillarity is commonly observed in the 'wick effect' in which water moves up the wick against gravity or up a narrow tube which has been dipped into water. If a series of tubes of increasing diameter is dipped into water the greatest rise will occur in the tube of least diameter (Fig. 11.1b). This phenomenon of capillarity is due to the adhesion of water to the walls of the tube, creating a meniscus (Fig. 11.1c), and to the cohesion of water molecules to each other. Water will continue to rise in the tube until the weight of water in the tube counterbalances the cohesive and adhesive forces.

The height (h_c) of rise in a capillary tube is inversely proportional to the internal tube radius (r) and weight of the water ($\rho_w \cdot g$) and directly proportional to the surface tension (T):

$$h_c = \frac{2T}{r \cdot \rho_w \cdot g} \qquad (11.1)$$

As the unit weight of water is a constant, this equation approximates, when h_c and r are expressed in centimetres, to:

$$h_c \approx \frac{0.15}{r} \qquad (11.2)$$

The rise is greatest in a tube with the smallest radius of curvature of the meniscus.

The phenomenon of capillarity explains both the effect of suction, or negative pore-water pressures, in a moist, but unsaturated, soil (see Figs. 5.5, 5.11) and the capacity of fine-grained soils to hold water in micropores while coarse-grained and macroporous soils drain freely. Soil, however,

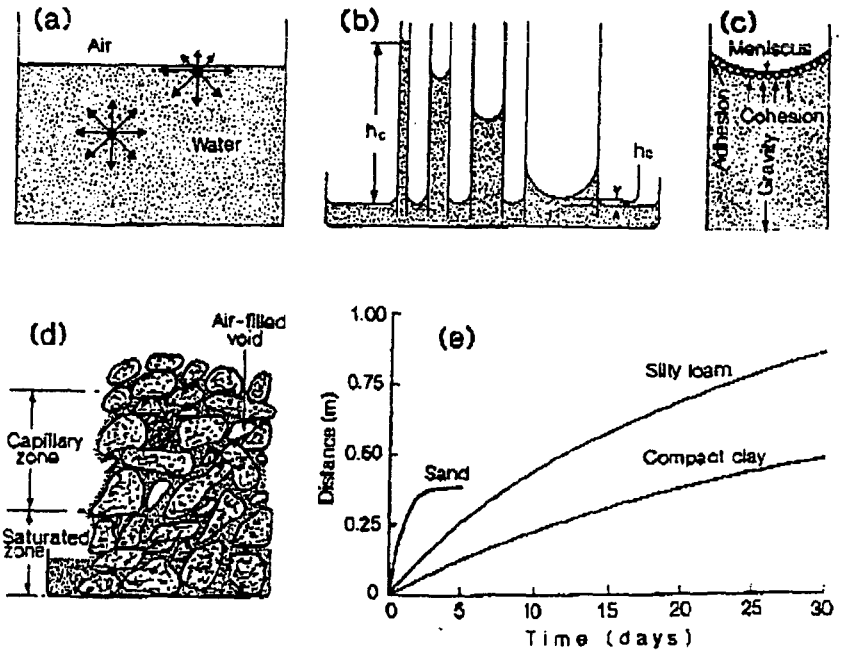

FIG. 11.1. (a) Forces acting on a water molecule within the body of the fluid are equal in all directions as each molecule is attracted equally by neighbouring water molecules. A molecule at the water surface is attracted more strongly to neighbouring water molecules than to those of the air. Consequently, there is a net downward force on surface molecules of water, creating surface tension. (b) Capillary rise is greatest in the narrow tube, in which the radius of curvature of the meniscus is least. (c) Forces acting between the wall of a tube and water molecules create adhesion, and the mutual attraction of water molecules creates cohesion. (d) Irregularities in pore sizes and distributions create irregular boundaries of the capillary. (e) The rate and height of capillary rise above a saturated zone depends upon soil pore size. (Based on Brady 1990.)

does not behave as a set of capillary tubes. Its channels are tortuous, variable in diameter, contain entrapped air and are discontinuous. The rate of movement of capillary water is therefore variable and often slow (Fig. 11.1e). The rate of capillary rise from a water-table is greatest in coarse-grained soils, but the maximum height attained is greatest in medium-grained silts and loams over periods of a few weeks. If many months are available, the greatest rise will occur in dense clays (Table 11.1). In soils, capillary movements occur in all directions, not just vertically.

Soil-water potential

The retention and movement of water in soils is governed by the energy available. That energy may be potential, kinetic, or electrical. The term 'free energy' may be used to indicate the summation of all available forms of energy to do work. The free-energy level in a substance is then a general measure of the tendency of that substance to change. All substances tend to move from a state of higher to one of lower free energy. In soils this trend is commonly recognized as a tendency for water to move from wet to drier zones. If the *differences* in energy level between two contiguous zones are known, it is possible to predict the direction of water movement.

For practical purposes in soil science, the differences in energy levels between one site and another are more important than the absolute free-energy levels. This is perhaps best understood by reference to a hydro-electricity generating plant: water in a reservoir above a power station has a potential energy which is proportional to the difference between the height of the water surface of the reservoir and the height of the turbines. It is not the absolute height of the reservoir and

TABLE 11.1. *Typical height of capillary rise above a water-table given unlimited time*

Soil	Pore radius (mm)	Capillary height (mm)
Coarse gravel	0.4	0.038
Coarse sand	0.05	0.3
Fine sand	0.02	0.7
Silt	0.001	1500
Clay	0.0005	3000

Source: Fetter (1980), *Applied Hydrogeology* (Columbus, Ohio: Merrill).

TABLE 11.2. *Matric potential in common units for selected soil-water conditions*

Condition	Matric potential			
	(kPa)	(m)	(bar)	pF
Saturation	-10^{-1}	-10^{-2}	-10^{-3}	0.0
Field capacity	-10	-1	-10^{-1}	2.0
Wilting point	-1.5×10^{3}	-1.5×10^{2}	-1.5×10	4.2
Air dry	-10^{5}	-10^{4}	-10^{3}	6.0

Source: Marshall and Holmes (1988), *Soil Physics* (2nd edn.) (Cambridge University Press).

turbines above a datum level which is of concern. In soils the potential energy, known as the soil-water potential (ψ), has four major components:

$$\psi = \psi_g + \psi_m + \psi_p + \psi_o, \qquad (11.3)$$

where ψ_g is the gravitational potential resulting from the elevation of a point of interest above another point of interest in the soil ($\psi_g = gh$); ψ_m is the matric potential of the soil matrix (i.e. solids) due to adsorption and capillarity; ψ_p is the pressure potential developed as a result of the pressure head due to the pressure of water in the saturated zone above a point of interest (in an unsaturated soil $\psi_p = 0$, and in saturated soil it has a positive value); and ψ_o is the osmotic potential due to the attraction of ions, in solutions, for water. Osmotic forces tend to reduce the free energy of water in a solution as 'pure water' is drawn towards the ions in that solution. Osmotic potential does not greatly affect water movement in non-saline soils, but it is extremely important in water uptake by plants.

A common means of expressing soil-water potential is in terms of the height (in metres) of a unit water column whose weight just equals the potential under consideration. Alternatively it may be expressed in terms of standard atmospheric pressure at sea-level and, in the SI system, in kPa, (10 metre column of water ~ 1 bar ~ 1 atmosphere ~100 kPa). In unsaturated soils the work done in transferring water from one point to another is against a suction and values are therefore negative. The term pF, meaning the logarithm to the base 10 of the suction expressed in cm, also remains in use. The matric potential for important soil-water conditions is given in Table 11.2 (Fig. 11.2a).

Soil-water content and tension

The *amount of water* in a soil is commonly measured as a mass or volume of water within a mass or volume of soil solids. The simplest procedure is to collect a soil core in the field, with a coring tube of known volume and mass; the core is weighed and then dried in an oven at 100–110 °C for a standard time, and then weighed again. The water lost by the soil represents the soil moisture in the moist sample. This is known as the gravimetric method.

Various methods exist for indirect measurements in the field. The resistance method is based on the recognition that certain porous materials, such as gypsum, nylon, and fibreglass, have an electrical resistance which is related to their water-content. Blocks of these materials can be placed in the soil over long periods and their absorbed water content, which is in equilibrium with the soil-water content, read from an attached meter or data-logger as required. Neutron moisture probes contain a source of fast neutrons and a slow neutron detector. The probe is lowered into the soil through an access tube. The emitted fast neutrons collide with the hydrogen atoms of water and lose part of their energy. These slowed neutrons are measured with a detector tube and a scalar. The reading is related to moisture content.

The *tension* or suction with which water is held in soils is an expression of soil-water potential (ψ) except that it may be expressed in positive rather than negative terms. Field tensiometers are tubes with a porous cup at the lower end. The tube is filled with water and the tension recorded results from the drawing of water through the cup into the soil.

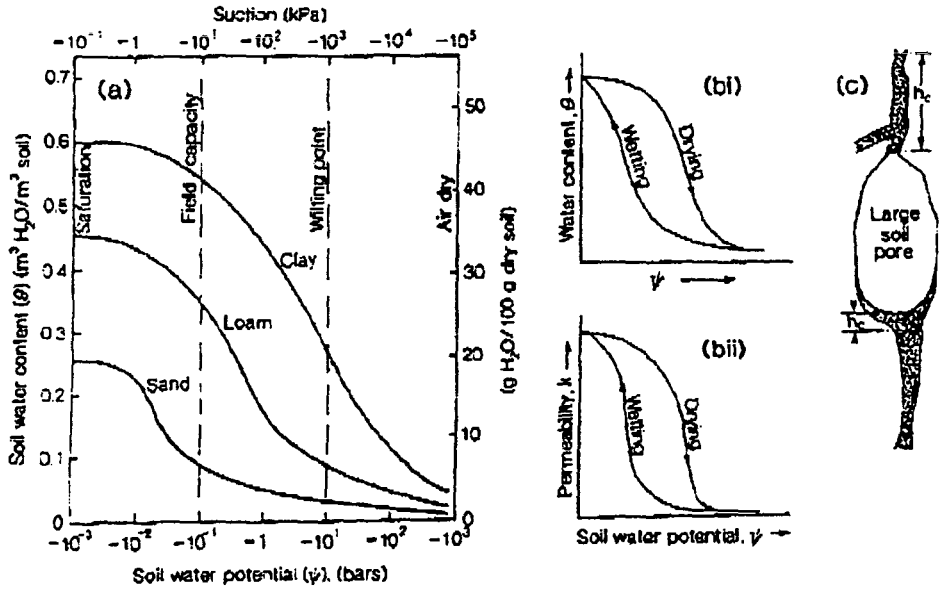

FIG. 11.2. (a) Soilwater potentials for soils of different textures derived from slowly drying saturated soils. Whatever the texture, the field capacity, defined as the moisture content of a freely drained soil which has not lost water by evaporation or to plants, and the wilting point of plants, are best defined in terms of soilwater potential, as they differ in water-content for different soils (based on Brady 1990). (b) Hysteresis effects on (i) water-content, and (ii) permeability. (c) Variation in pore diameter causes variations in height of capillary rise on the wetting curve: note that the upper pore is drawing its water from a narrow lateral pore, not from the large pore below it.

As the water-content (θ) of the soil decreases, the matric tension increases (Fig. 11.2a). The re-wetting curve, however, does not follow the drying curve; the drying soil has a higher water-content than the wetting soil at the same suction. This hysteresis effect is commonly explained by the fact that soil pores are variable in diameter with many containing voids larger than their openings. The so-called ink-bottle effect is illustrated in Fig. 11.2c. It is shown in Fig. 11.1b that capillary rise in a wide tube is small and much higher in a narrow tube. As water-content declines, the meniscus in a large tube will fall rapidly to a level which is adjusted to the radius of the meniscus, and will be held against gravity in a narrow part of a pore where the radius of curvature of the meniscus is smaller. Where water is re-wetting a soil it cannot rise through a wide pore by capillarity; the rise is delayed until the water is forced into the wide pore by hydraulic pressure. The need for hydraulic pressure delays the re-wetting in contrast with the relatively unimpeded drainage possible during drying.

A rather similar effect occurs at the boundary between soil layers of different pore diameter and particle size: water will not move by capillarity alone from a fine-grained microporous soil into a coarse-grained macroporous soil; an hydraulic pressure is required to induce such flow and in unsaturated conditions this is usually unavailable and the texture boundary forms a barrier to soil-water flow.

Soil-water movement

Three types of water movement occur in soil pores: saturated flow, unsaturated flow, and vapour movement. Vapour movement is of little importance for geomorphic processes and will not be discussed further.

The flow of liquid water is due to a gradient in the total water potential (ψ) from one soil zone to

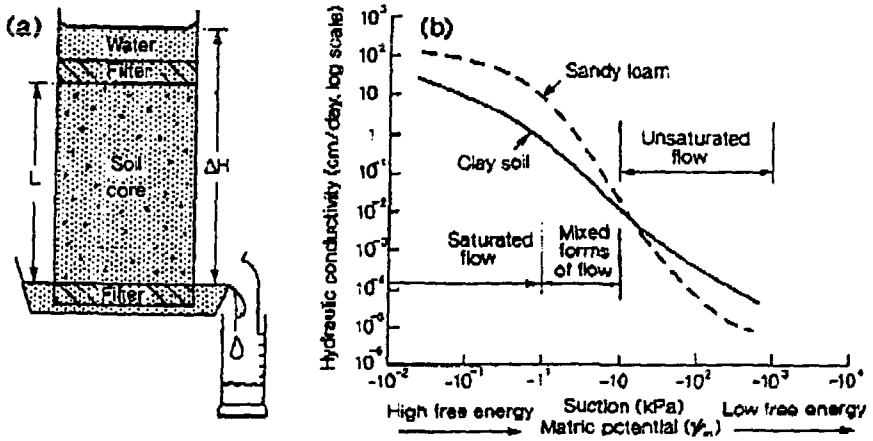

FIG. 11.3. (a) Definition of hydraulic gradient. The arrangement shown here represents the principles used in the design of a simple permeameter. (b) A generalized relationship between matric potential and hydraulic conductivity for two soils (note the logarithmic scales). Saturated flow occurs at near zero potential and unsaturated flow at potentials (suctions) of tens to hundreds of kPa. Because of variations of pore size in most soils, saturated and unsaturated flow may occur at the same time over a narrow range of average potential. (Based, in part, on Brady 1990.)

another. The direction of flow is from a zone of higher potential to a zone of lower potential.

Saturated flow takes place where the soil pores are completely filled with water. Saturation is common in the lower horizons of poorly drained soils, in portions of well-drained soils above stratified clays, and in the upper horizons of most soils during or immediately after heavy rain.

The flow of water under saturated conditions is determined by the hydraulic gradient and the hydraulic conductivity of the soil. The hydraulic gradient (i) is indicated in Fig. 11.3a as:

i = head loss/drainage path length, or $\Delta H/L$.

Hydraulic conductivity is a measure of the ease with which soil pores permit water movement through the soil. In saturated soils, hydraulic conductivity (k) is equivalent to permeability and k is called the coefficient of permeability (Table 11.3). The coefficient of permeability is the rate of flow of water per unit area of soil when under a unit hydraulic gradient; its dimensions are those of velocity (m/s).

If Q is the quantity of flow passing through an area A in time t (with units of m³/s), then the average velocity v is given by Darcy's law:

$$v = \frac{Q}{A}, \quad \text{or,} \quad v = ki.$$

or

$$Q = Aki,$$

or

$$k = \frac{Q}{Ai} = \frac{Q}{A \cdot \Delta H/L}, \tag{11.4}$$

then, for saturated soils:

$$k = \frac{QL}{A \cdot \Delta H}. \tag{11.5}$$

In the absence of a hydraulic-pressure gradient the flow would be substantially less. The presence of a pressure gradient allows saturated flow to occur horizontally and upwards, as well as downwards.

It has been shown that in clay soils of very low permeability, Darcy's law is not strictly applicable because of adsorption effects. None the less it is used for most practical purposes.

The permeability of a soil varies with effective pressure and void ratio and will be influenced by soil stratification. In many soils, permeability is greater in a horizontal direction through one soil horizon than it is in a vertical direction through several horizons, which may vary in texture and structure.

A commonly accepted approximation is that

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TABLE 11.3. *Coefficient of permeability* (k, m/s)

Gravels	$>1 \times 10^{-2}$
Coarse sands	1×10^{-3} to 1×10^{-2}
Fine sands	1×10^{-7} to 1×10^{-5}
Silts	1×10^{-9} to 1×10^{-7}
Clays	1×10^{-9} to 1×10^{-11}

void ratio is linearly related to the logarithm of the coefficient of permeability. The total flow rate (q) in soil pores is proportional to the fourth-power of the pore radius:

$$q = \left(\frac{\pi r^4}{8\eta}\right)(\rho_w g \cdot \Delta H/L), \qquad (11.6)$$

where η is the kinematic viscosity and ρ_w is the density of water. Thus the size of pores has a very large effect on soil hydraulic conductivity. For example, the flow rate through a pore 1 mm in radius is equivalent to that in 10 000 pores of radius 0.1 mm, for the same hydraulic gradient, even though 100 pores of radius 0.1 mm have the same total cross-sectional area as a 1 mm pore. The macropores clearly account for most saturated flow in soils. Open granular structures in soils are far more conducive to flow than compact platy structures and earthworm and termite burrows form relatively large channels. Straight pores aligned parallel to the direction of flow are also more conducive to flow than tortuous channels and those aligned across the direction of flow.

Unsaturated flow is normal for most soils for most of the time. It is characterized by a lack of hydraulic gradient, absence of water in large soil pores, and the presence of water in small pores where it is held by adhesion and cohesion as adsorbed and capillary water. In an unsaturated soil, therefore, it is the matric potential (ψ_m) gradient from one zone to another which acts as the driving force for water movement. Flow is through the films of adsorbed water and through capillary pores. As water tends to seek an equilibrium, it flows from a zone of high potential to a zone of lower potential, but very slowly.

For any particular soil there is a relationship between the hydraulic conductivity and the matric potential (Fig. 11.3b). Near saturation the conductivity is high, but as the potential decreases the size of the pores which are filled with water decreases, thereby reducing the conductivity. Hydraulic conductivity is therefore a function of both water-content and matric potential.

Sandy soils have high conductivities near saturation because of their large pores. Near the air-dry state they have very low conductivities because they lack fine pores. Clays near saturation have lower hydraulic conductivity than sands but higher conductivities when unsaturated.

A modified form of Darcy's law can be applied to unsaturated soils (see standard texts on soil physics such as Marshall and Holmes 1988; Hillel 1971): permeability measurements are best done in the field where there is less chance of modifying soil structure and compaction in the testing process. Frequent monitoring of changes in soil-water content by neutron probe, and water potential by tensiometers, during drainage is a useful method. In general, the higher is the initial water-content of a soil, the greater is the potential and the more rapid is the water movement from wetter to drier zones. This point is of great importance for an understanding of infiltration (see below).

Hillslopes in the hydrological cycle

Water reaches the ground by falling from clouds as rain, snow, hail, or by the condensation of dew and fog—these forms of water are collectively called precipitation. Some of the falling precipitation may directly hit soil or rock or fall into the streams, but in a humid region much hits the vegetation and is intercepted. Part of the intercepted water is evaporated back into the atmosphere, both during and after rainstorms, but in prolonged or intensive rain some water falls between the plants, or drips from the leaves to the ground, some flows down the plant stems, and some may be absorbed by the plants. Of the water which reaches the ground part may flow off directly into the streams but, except on frozen or bare rock surfaces, most of the surface water infiltrates into the soil or is temporarily ponded in depressions on the surface. The water which infiltrates into the soil first fills the voids in the soil and, if the soil is very impermeable, any excess water must flow off the soil surface—as overland flow—but, if the properties of the soil profile permit, subsurface water may be taken up by plants, or may flow laterally as throughflow, or may move down vertically to become part of the

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN RE APPLICATION FOR WATER PERMIT NO. 2300-2; U.S. FISH AND WILDLIFE SERVICE (LACREEK NATIONAL WILDLIFE REFUGE)	)))))	BOARD ATTORNEY'S SUGGESTIONS WITH REGARD TO DENR'S RESPONSE AND WITH REGARD TO APPLICANT'S RESPONSE

This Memorandum sets forth the Board Attorney's suggested replies to the responses of the Department of Environment and Natural Resources and the Applicant with regard to the proposed Findings of Fact, Conclusions of Law, and Final Decision.

A. Board Attorney's Suggested Reply to DENR's Response.

1. Accept DENR's paragraph numbers 1-9, 11, 13-18, 20-23, 25-26.

2. Reject DENR's suggestions in paragraph numbers 10, 12, 24, and 27. The basis for the rejection, in each case, is the proposed acceptance of similar changes of the U.S. Fish and Wildlife Service.

3. With regard to DENR paragraph number 19, the following is suggested. First, the second sentence of Finding No. 27 should be amended by deleting the letters "un" from the word "unpersuaded." In addition, the suggestion made in the last sentence of DENR paragraph number 19 should be rejected. The reason for this rejection is a similar proposal made by U.S. Fish and Wildlife Service.

B. Board Attorney's Suggested Reply To U.S. Fish and Wildlife Response Regarding Findings of Fact.

1. U.S. Fish and Wildlife Service proposals made in paragraph numbers 1, 2A, 2C, 5, 7, 10, 16, 25, and 27 should be rejected on the grounds that they are covered by proposed changes as suggested by the Department of Environment and Natural Resources.

2. Board Attorney suggests the acceptance of the following U.S. Fish and Wildlife proposals: 2B, 3, 4, 8, 9, 11-15, 17-24, 28.

3. Board Attorney suggests acceptance of the U.S. Fish and Wildlife paragraph number 6. Furthermore, with regard to proposal at paragraph number 6D, the Board Attorney

suggests that the words "the impoundment of the stream," should be changed to "the stream channel."

4. With regard to U.S. Fish and Wildlife Service paragraph number 26, the Board Attorney suggests the following. At paragraph number 76, after the second sentence, insert the following: "In particular, the Service has recognized the State's authority to enter onto federal lands and destroy noxious plants growing thereon, if federal statutory provisions set out at 43 U.S.C. § 1241 are met."

   Additionally, with regard to the remainder of the suggestions made by the U.S. Fish and Wildlife Service in its paragraph number 26, the Board Attorney notes his perception that the Service has in fact "reversed its position."

C. Board Attorney's Suggested Reply to U.S. Fish And Wildlife Services Proposals Regarding Conclusions of Law.

1. In U.S. Fish and Wildlife Service paragraph number 1 regarding proposed Conclusions of Law, the Service questions whether the Board has jurisdiction or authority to decide whether the construction of diversion 4A is a major federal action significantly affecting the quality of the environment and whether the United States is in violation of federal law. Article VI of the United States Constitution states that the "laws of the United States . . . shall be the supreme law of the land; and judges in every state shall be bound thereby . . . ." The state courts commonly enforce federal law. No reason has been offered to support the thesis that the Board does not have jurisdiction of this question; in fact, the Board in water quality matters regularly applies various federal laws and submitted regulations. At the same time, the Board recognizes that its common functions do not involve determining whether an environmental impact statement should be submitted. In this case, however, there does not appear to be any pending federal or state litigation or any other action or reason giving rise to a need for the Board to defer to a court.

   The Board Attorney thus suggests rejecting paragraph number 1 of U.S. Fish and Wildlife Service proposal concerning the "Proposed Conclusions of Law."

2. The Board Attorney suggests acceptance of U.S. Fish and Wildlife Services paragraph numbers 2 and 3 regarding "Proposed Conclusions of Law."

Dated this 24th day of February, 1998.

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STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN RE APPLICATION FOR WATER PERMIT NO. 2300-2; U.S. FISH AND WILDLIFE SERVICE (LACREEK NATIONAL WILDLIFE REFUGE)	)))))	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION

FINDINGS OF FACT

1. This is an application by the U.S. Fish and Wildlife Service to store one acre-foot of water. The purpose of the application is to allow the U.S. Fish and Wildlife Service to construct a four-foot barrier to prevent carp from entering a stream area utilized by a state-threatened species, the Pearl Dace.

2. The history on the application is of some relevance. On January 7, 1993, after a protracted hearing, this Board granted Vested Water Right Permit No. 1927-2 to vest a prior claimed right to 10 cfs of water from four diversion points from Lake Creek. One of these diversion points was Diversion No. 4. Subsequently, the circuit court on January 5, 1994, found that the Board had erred in finding continuous appropriation of water and reversed the grant of Vested Right Application No. 1927-2. Further appeals were not made on Vested Right Application No. 1927-2. However, the South Dakota Supreme Court, on December 7, 1994, affirmed the decision of the circuit court with respect to other issues that were appealed (not pertaining to Lake Creek).

3. After the circuit court reversal, the U.S. Fish and Wildlife Service (Service) submitted an application for a new

permit for three structures which substantially covered the same area that the vested water right claim had covered.

4. Four Petitioner/Intervenors who were involved in the litigation with regard to the vested right claim are also involved in the present application (Lawrence Kocer, Raymond Kocer, Brett Heath, and Charles Emley). Additionally, the Bennett County Commission intervened in the present application.

5. At approximately the same time as the new application was submitted, the U.S. Fish and Wildlife Service became concerned with the survival of the Pearl Dace which, in 1978, was classified as an endangered species by the South Dakota Commission of Game, Fish and Parks. The Pearl Dace was present in Lake Creek in areas upstream of Diversion No. 4, and in certain other places in the Refuge. Subsequently, the Pearl Dace, which is a minnow, was reclassified as a threatened species in 1996.

6. The U.S. Fish and Wildlife Service ultimately, at the request of the landowners, deleted the irrigation portions of the application insofar as Diversion No. 4 is concerned. The application was also amended to retain Structure No. 4 for the purpose of protecting the Pearl Dace, which was then classified as endangered, and two other species which were regarded as threatened. The portions of the application applying to Diversion Nos. 1 and 3 were deleted altogether.

7. After continued discussions with the landowners, the application was amended a second time. Diversion No. 4 was proposed to be moved downstream approximately 400 feet. The

proposed new structure is designated Diversion No. 4A. It was also redesigned to better handle the flood flows.

8. A permit to appropriate water may be issued by the Board if there is a reasonable probability that there is unappropriated water available for the applicant's proposed use, that the proposed diversion can be developed without unlawful impairment to existing rights, that the proposed use is a beneficial use and that the proposed use is in the public interest.

Unappropriated Water Available.

9. Based upon the uncontradicted testimony as to the great volume of water available in the Lake Creek area, the Board finds that there is ample unappropriated water available for this application.

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

10. The landowners have asserted that the proposed application cannot be developed without impairing their rights. The Board rejects this claim.

11. The amount of water at issue is only one acre-feet. In comparison, Capitol Lake is approximately sixty-five times larger. Moreover, the Board finds, based upon the testimony of county witness Bob Bolzer, that one acre-foot is smaller than a typical stock dam.

12. The landowners and the county suggest two methods by which the grant of this permit will invade the rights of the landowners. First, the landowners suggest that water will travel

underground or be "piped" through a sand lens from Diversion No. 4A to their property. This will, they argue, cause the land to be saturated, will make it more difficult to control Canadian thistle, and will promote the growth of undesirable grasses and weeds in place of more desirable grasses.

13. The Board finds that the evidence demonstrates that it is highly improbable that the impoundment of one acre-foot of water or less at Diversion No. 4A will result in the piping of some of that water to the property of any of the landowners. The lands owned by the landowners in question are from one-half to three-quarters of a mile from Diversion No. 4A. The testimony of Denny Simonson that piping will occur over these distances is rejected by the Board. Simonson's theory was that piping is presently occurring from Diversion No. 4 to the landowners' property and that the same sort of piping will occur from Diversion No. 4A. Mr. Simonson testified that the four foot of head pressure causes water to move laterally through the sand lens at a rate of ten inches per hour and that it has moved laterally fully one-half or three-quarters of a mile onto the property of the landowners.

14. Mr. Simonson's analysis is incorrect in at least two areas. First, the Board finds, based upon the testimony of Megan Johnston, that water will not move <u>laterally</u> through sand at ten inches per hour. The ten-inch-per-hour movement is the maximum <u>downward</u> movement, not the <u>lateral</u> movement, through the soil type in question. Moreover, the range for movement in a

downward direction is 8/10" per hour to 10" per hour (Simonson's figures are the maximum level for downward movement).

15. The Board finds, based upon the testimony of Megan Johnston, that the lateral movement of water should be determined by the operation of Darcy's law, which uses hydraulic conductivity, the head differential, and the flow area to calculate the volume of water which will move from Point A to Point B. See USF&W Ex. 22. Darcy's law calculations were performed for the worst possible scenario (for the applicant), i.e. the maximum hydraulic conductivity figure was utilized and, moreover, it was assumed that all of the water escaping the pool would flow into the soil and none would return to the stream channel (a quite unlikely case). Megan Johnston convincingly demonstrated that to move water from Diversion No. 4 to the landowners' property, as they claim is occurring, the ground near the impoundment to the land of the landowner should have to be saturated in a triangular-shaped area of about 262 acres. If not all of the land was saturated, then the groundwater would tend to flow away from, and not toward, the landowners' property.

16. Utilizing the worst possible case assumptions, Darcy's law indicates that .0036 acre-feet per day would move into the saturated area (this amounts to 1,183 gallons per day). This volume of water would raise the water table of the area only .000013 feet per day or 1/100,000 of a foot. However, even that measure misstates the effect on the water table. This is because the evaporation rate greatly exceeds the amount of water which would enter into the saturated area. This is true even with

regard to underground water, especially that connected to the plant life overhead, as is likely in this case.

17. The Board further finds that the Simonson theory is premised upon the thesis that the soils of the landowners are already so saturated on a regular basis that additional water cannot be absorbed into them. However, the testimony of the landowners showed that well readings dropped very quickly after rainfall events. The very speedy drop in well readings after rainfall events indicates that the land is not as saturated as the landowners contend.

18. Second, the landowners also appear to contend that the proposed diversion cannot be developed without unlawful impairment of existing rights because overland flooding now occurs, or has occurred in the past, as a result of U.S. Fish and Wildlife activities at Diversion Nos. 1, 3, and 4.

19. As to Diversion No. 1, however, the U.S. Fish and Wildlife ceased any and all new diversions by closing (sometime after the summer of 1992) a screw gate located in Diversion No. 1. Moreover, the Service has placed a plug in a ditch to eliminate the perception that the ditch would carry water from Diversion No. 1 to the landowners. The diversion has not received additional complaints since Diversion No. 1 was breached, and the landowners agreed at hearing that Diversion No. 1 no longer caused problems.

20. The Board finds that there is insufficient evidence to determine that Diversion No. 3 causes problems to the landowners at the present. First, it is undisputed that the

stoplogs have actually been removed from Diversion No. 3; this process was protracted and required a backhoe to remove the final logs. Second, the capacity of the culvert at Diversion No. 3 is for approximately a five-year precipitation event. The culvert is apparently maintained so there is a crossing at this point for cattle, hunters, and to accommodate the needs of the Service. Therefore, it appears that, when the precipitation exceeds the five-year event, water will escape from the stream at the culvert. However, uncontradicted testimony also indicated that there were other places on the stream between old Diversion Nos. 1 and 4, where the channel capacity was insufficient to handle a five-year rain event. Thus, regardless of whether Diversion No. 3 has any capacity to "divert," however that term is defined, it would only be "diverting" at a time when other parts of the channel were overflowing.

21. Third, the Board has considered the evidence of Del Brosz, an expert who testified on behalf of the Division, who testified that the topography map showed stream channels coming from the uplands to the north of the refuge onto private property and further that sandhills from the south drain toward Lake Creek. Essentially Brosz testified that the water occasionally on Messrs. Lawrence or Raymond Kocer's property was a naturally occurring condition which could not be attributed to Diversion No. 3 or any other diversion. Fourth, the Board has considered the evidence of the landowners, including Mr. Raymond Kocer, as to the water on property utilized by him and has considered photographic evidence showing water on his property.

22. After carefully weighing the evidence, the Board finds that the evidence is insufficient to support the claim that Diversion No. 3, as it is presently situated, adds any appreciable amount of water onto Messrs. Lawrence or Raymond Kocer's land. The Board further finds that such water as is found on the property is due to the natural condition of the area, including the fact that the channel itself is insufficient to handle large rainfall events. The Board relies on the topography of the area, the naturally occurring water in the area (as found below), the natural overflow of the creek and the failure of the landowners to firmly tie the water on their land to Diversion No. 3.

23. The Board credits the testimony of Rolf Kraft as to the movement of water from Diversion No. 4. Kraft testified that water which came on Mr. Lawrence Kocer's property came from the west and not from Diversion No. 4 in most situations. This is substantiated by testimony as to the topography of the area and by photographs which show that water from Diversion No. 4 does not flow onto Lawrence Kocer's property but is intercepted by a county road ditch. The Service admitted that water from other parts of the refuge does flow onto Lawrence Kocer's property. Water will, however, occasionally travel from Diversion No. 4 onto Mr. Heath's property in a major rainfall event. The Service has attempted to stop this flow of water with a drainage ditch but the drainage ditch has in the past occasionally failed. The Board concluded that any water from Diversion No. 4 which makes it to Lawrence Kocer's property is

found only in unusual situations and does not demonstrate any negligence or misconduct on the part of the Service; moreover, given the great amount of water in the area, it is virtually impossible for water not to flow, in some cases, from one landowner to another.

24. The Board also discounts to a substantial degree complaints as to water on the Heath property in view of testimony, maps and photographs produced by witness Pearson who was qualified to interpret aerial photography and maps. Pearson's testimony demonstrated that a substantial portion of the Heath property constituted a marsh or wetland at the time of a 1904 map and a 1937 aerial photo. The Refuge was not created until 1935. The same characteristics are shown in a 1954 photo. A short segment of Lake Creek on the West 1/2 of the Heath property was straightened out sometime in the 1950's. Additionally, sometime prior to 1980, the entire length of the Lake Creek channel across the Heath property was straightened. However, the lands of a drained wetland lose the capacity to hold water. Thus to some extent, the straightening of the creek itself promotes flooding in some circumstances.

25. The Board also finds that the entire area is characterized by high water table generally and that water flows to the area from both the north and the south. Many of the complaints of the landowners result from the natural topography of the area.

26. The Board also finds that Diversion No. 4 must be entirely removed within a reasonable time of the construction of

Diversion No. 4A. Any problems with Diversion No. 4 will, therefore, be eliminated.

27. The issue of whether Diversion Nos. 1, 3, and 4 at present flood is, in any event, only of marginal relevance to the issue of whether the proposed diversion, Diversion No. 4A, can be developed without unlawful impairment of existing rights. In this regard, the Board is persuaded that the past actions of the Service make it unlikely that the Service will construct or operate Diversion No. 4A in such a way as to intentionally flood or negligently flood their neighbors. In fact, the recent actions of the Service indicate that it has adopted a policy of accommodation to its neighbors: Diversion No. 1 clearly no longer diverts; an earthen plug was also placed by the Service in a ditch to avoid water running into a ditch from Diversion No. 1 and so reaching the landowners. The stoplogs/boards in Diversion No. 3 have been removed. The Service has attempted to plug a breach along a drainage ditch to keep water flowing to Heath's property possibly from Diversion No. 4 and form runoff. A troublesome siphon which was impacted by Lake Creek was remodeled and a new ditch added to the benefit of Lawrence Kocer. Pool number 2 was drained to the apparent benefit of the landowners in recent years.

28. Turning directly to Diversion No. 4A, the Board finds that it can, in fact, be developed without unlawful impairment of existing rights. First, Diversion No. 4A will not accomplish "piping" of water underground to the detriment of the

landowners, as demonstrated by the study discussed above of the water at Diversion No. 4.

29. Second, Diversion No. 4A will impound less than one acre-foot of water, a relatively small amount of water.

30. Third, the Board finds that Diversion No. 4A is unlikely to cause overland flooding to the detriment of the landowners because of its design and placement, which are superior to existing Diversion No. 4. Diversion No. 4A will be built to accommodate a 25-year flood; in addition, it will have in place a training dike to handle flows even in excess of a 25-year flood. The Board finds that these are reasonable precautions to protect the landowners.

31. In addition, Diversion No. 4A will be constructed with a storage level of 3034.1 msl; this level is substantially below the level of Diversion No. 4 and thus there is much less chance that Diversion No. 4A will operate to the detriment of the landowners than Diversion No. 4 is alleged to have operated.

32. Moreover, the Board finds that a qualification of the permit with regard to silt buildup will further protect the landowners. The Board will require silt removal if silt buildup exceeds 50% of the level of the carp barrier.

33. Finally, the Board finds that should Diversion No. 4A ever flood and should the training dike be unable to hold the flows, the creek will have overflowed its banks at other locations. The Board finds that it is unlikely that the diversion will contribute in any but a de minimus way to any

flooding which might occur on the landowners' property.

The Proposed Use Is a Beneficial Use.

34. The proposed use of the diversion is to set up a barrier to prevent carp from moving from the main body of the refuge in a westerly direction past new Diversion No. 4A into an area occupied by Pearl Dace.

35. The Pearl Dace was originally classified by the Game, Fish and Parks Commission, pursuant to SDCL ch. 34A-8 and after notice and hearing, as an "endangered" species under South Dakota law. It has now been reclassified by the Game, Fish and Parks Commission under the same authority as a "threatened" species.

36. Under SDCL 34A-8-1(3), a "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."

37. The United States has not classified the Pearl Dace as a threatened or endangered species nationally.

38. Although the United States has not classified the Pearl Dace as a threatened or endangered species nationally, the State of South Dakota, through its statutes and administrative provisions, has determined that it is important to maintain biological diversity within the state of South Dakota. Therefore, the State of South Dakota has deemed it appropriate as a matter of public policy to classify certain species as threatened or endangered species on a statewide basis even though they may not be threatened or endangered on a nationwide basis.

39. SDCL 34A-8-6 directs the Departments of Game, Fish and Parks and Agriculture to "perform those acts necessary for the conservation, management, protection, restoration and propagation of . . . threatened species."

40. The Pearl Dace exists in the area of LaCreek Wildlife Refuge as a relatively disjunctive population; in other words, the local population is not well connected with other populations of Pearl Dace.

41. The Board credits the testimony of expert Stancill that there are presently sustainable populations of Pearl Dace upstream (or west) from present Diversion No. 4 and proposed Diversion No. 4A. A sustainable population is indicated by the presence of fish from each of the age classifications. Pearl Dace live for three years so the presence of one-year-old, two-year-old, and three-year-old fish indicates the existence of a sustainable population. Sustainable populations of Pearl Dace were found in the upstream area in 1993, 1994, and 1995.

42. The Board finds that the diversion proposed by the U.S. Fish and Wildlife Service will protect the Pearl Dace consistent with the public policy enunciated in SDCL ch. 34A-8.

43. The U.S. Fish and Wildlife proposes to construct a four-foot barrier to prevent carp from migrating westward into the area inhabited by the Pearl Dace. The evidence indicates that carp can jump a considerable distance over barriers but that a four-foot barrier will be sufficient to prevent carp from entering the area.

44. The Board finds that, although the carp and the Pearl Dace do not, at all times of the year, seek to inhabit the same sorts of water, carp could begin to move into the area inhabited by the Pearl Dace as early as spring and could stay as late as August. There is, therefore, a substantial time in which the carp could affect the habitat of the Pearl Dace in an adverse fashion.

45. It is, moreover, likely that carp will enter the area sought to be protected if the barrier is not in place. Carp prefer shallow flooded vegetation for spawning. Carp expel eggs over shallow aquatic vegetation and males then swim over the top and lay milt upon the eggs. At that point, they are fertilized and hatch. Fry then move out into somewhat deeper water.

46. The Board therefore finds that, lacking a four-foot barrier, it is likely that carp would enter the area inhabited by the Pearl Dace. Carp can, according to expert Stancill, move across a fairly shallow amount of water, probably 3 to 4 inches.

47. Carp do not predate upon Pearl Dace. The danger to Pearl Dace lies in the fact that the carp are bottom feeders which feed by rooting in the bottom of a creek or stream for vegetation. This feeding behavior raises the sediment, changes the clarity of water by making it more turbid, and causes the water to become more warm.

48. The cause and effect relationship is that the silt raised by the feeding of the carp makes the water cloudy and more turbid and sunlight cannot penetrate. The aquatic vegetation

declines which in turn causes the oxygen levels of water to decline. Moreover, the turbidity of the water causes it to become warmer.

49. The resulting situation is very detrimental to the viability of Pearl Dace which thrive in clear water.

50. Expert testimony credited by the Board indicates that there is very little appropriate habitat for the Pearl Dace not only in South Dakota but in the surrounding states.

51. The Board further finds that allowing even two carp, a male and female, to enter the area inhabited by the Pearl Dace could eventually lead to degradation of the habitat of the Pearl Dace and affect their viability.

The Proposed Use Will Be in the Public Interest.

52. Landowners and the county oppose the application because, they contend, the grant would not be in the public interest. This attack appears to be mainly concentrated upon the past activities of the U.S. Fish and Wildlife Service. The U.S. Fish and Wildlife has not, as the Board's prior decision established, in the past been consistently conscientious with regard to limiting of flooding on landowners' lands.

53. The Board also finds, however, that the U.S. Fish and Wildlife Service's recent actions have gone a substantial way to alleviate the overland flooding problems of the landowners as set out in more detail above. The Board has also found above that the landowners' claim of underground "piping" of water is unfounded.

54. Landowners also complain that the U.S. Fish and Wildlife Service's actions in the past, and in the present, have caused weeds and particularly Canadian thistle to appear on their properties. Landowners argue that in their view the U.S. Fish and Wildlife Service has not adequately dealt with this problem, and that the permit should therefore not be granted in the public interest.

55. Landowners have failed to demonstrate, however, that the grant of this permit will in any way affect the Canadian thistle problem either on the U.S. Fish and Wildlife Service property or upon the landowners' or any county property. Thus, the claim should be rejected on this ground alone. More detailed analysis provides additional reasons to reject this public interest claim.

56. Canadian Thistle was apparently brought to this county in wheat shipments.

57. At some point which is unclear in history, Canadian Thistle invaded the LaCreek Wildlife Refuge.

58. The Board finds that the Service has undertaken very significant, if sometimes uneven, steps to deal with the Canadian Thistle problem.

59. First, the Board finds that the Service has embarked on an integrated weed management program, and that any other sort of program is likely to fail. An integrated program utilizes chemical, biological, mechanical and cultural controls, including grazing. The Service demonstrated that it utilizes each of these methods in controlling thistle

60. Second, the Board finds that the Service's use of biological controls constitutes an innovative, effective and practical component of its thistle control program.

61. Biological control has been instituted by the introduction of several types of weevil which affect the viability of the thistle. The weevil were originally imported from Europe where the weevil had also been utilized in the control of thistle.

62. The Service introduced the first weevils in 1989. The first weevil introduced was the stem mining weevil. This small weevil, measuring approximately a quarter of an inch long, attacks the stem and upper root crown of the plant. This weevil lays its eggs inside the stem of the plant. On the hatching of the eggs, the larva burrow into the stem and eat the thistle from the inside out. This typically eliminates the seed production from the thistle which is the critical first step in controlling the thistle.

63. This stem-mining weevil is probably the most effective of the weevils in controlling the thistle.

64. The weevils are a significant investment, and cost in excess of $1.00 each.

65. The Service released 500 of this weevil in 1989 and an additional 1,000 in 1995.

66. The Board credits the testimony of Clarke Dirks, who has significant experience in controlling noxious weeks for the U.S. Fish and Wildlife Service and who is now stationed at LaCreek Wildlife Refuge, that this weevil is now widespread throughout the Refuge.

67. Several other insects have been utilized by the Service on the Refuge. One thousand of the defoliating beetle were released in 1995; this beetle eats the leaves of the thistle, which stresses the plant. The gall fly attacks the stem midway up the plant; 300 of this species were released in 1993. The action stops most of the nutrients from proceeding to the seed head, which eliminates or limits the seed production. The gall fly is considered to be established on the Refuge. The Service has also released 300 of a variety of seed head weevil (larinus planus) in 1993 and 300 more in 1994. These eat the seed head from the inside out.

68. In addition to these introduced species, the Service has become aware of and utilizes in its planning another kind of seed head weevil (rhinocyllus conicus) which was not brought onto the Refuge by the Service, but found its way there naturally. The weevil eats the growing seeds. This weevil is so abundant that the Service has been able to export 5,000 of the species to other refuges in South Dakota to deal with thistle. In addition, the Service has worked with three Bennett County landowners to deal with their thistle problems by utilizing this weevil.

69. The effects of the Service's thistle control program are quite positive. The Board credits the testimony of Rolf Kraft and of Clarke Dirks in this respect. Kraft testified that he conducted a survey or inventory in 1982 which demonstrated that 1,200 acres were infested with thistle. Kraft's numbers reflected his analysis of the percent of a particular field as to

which the canopy cover was thistle. Kraft testified that after testing various chemical on test plots to determine their efficacy and utilizing that information in the Refuge with chemical application, the acreage infested was 300 to 400 acres by 1986. In 1988, however, the Service effectively banned the use of several chemicals and the chemical control problem suffered and the program lost ground.

70. Kraft testified, and the Board credits the testimony, that he was involved in the successful effort to gain permission to use chemicals which had been effective previously in the thistle control effort, including Tordon.

71. Kraft also presented persuasive photographic evidence that a field which was badly infested in 1983 was virtually free of thistle 12 years later. More impressively, Kraft presented such evidence which showed that a field infested in 1993 was virtually free of thistle by 1997 and that thistle in another area was dealt with effectively in a year or two.

72. The effectiveness of the program is bolstered by the testimony of Clarke Dirks that, of the area which was biologically treated, (i.e. the main body of the Refuge), 80-85% of the thistle were affected and 90% of those thistle did not produce seed in 1996.

73. In addition, the testimony strongly indicated that the area which was not biologically treated, i.e. the areas around the border of the refuge, were in fact generally chemically treated and that this treatment in recent years has been markedly more effective.

74. The Board thus finds that the Service has had in place a determined effort to deal with the thistle problems and that it has made very substantial progress in so doing.

75. The Board also rejects the claim that the permit at issue here should not be granted because it will be necessary to disturb dirt at the site of the new Diversion No. 4A and because when dirt is disturbed, thistle might grow. The Service has shown itself capable of and willing to deal with any minor infestations which might develop at the site of Diversion No. 4A.

76. Finally, as to this issue, the Board examines the fact that the U.S. Fish and Wildlife Service initially opposed, on sovereign immunity grounds, state and county authority to control thistle on the refuge. The Board finds that this opposition is of little or no relevance here, because the Service has reversed its position as to jurisdiction of the local and state units of government. In particular, the Service has recognized the State's authority to enter onto federal lands and destroy noxious plants growing thereon, if federal statutory provisions set out at 43 U.S.C. § 1241 are met. In addition, the Service has shown its willingness to cooperate by signing, with the Bennett County Weed Control Board, what may have been the first interagency memorandum of understanding on weed control in the nation, and the Service has promulgated a five-year weed plan which was signed onto by the Bennett County Weed Control Board.

Amount of Water.

77. The applicant has requested 1.0 acre-foot of water. That amount of water is readily available, as noted

above, but the applicant has asserted only that about .5 acre-foot of water will ever be impounded behind the carp barrier. The Board takes notice of its consistent practice in allowing applicants to be granted permits in excess of the actual proposed use because engineering difficulties may develop which result in larger amounts of water being used or impounded. The Board determines, based on its past practices, that grant of a permit of .75 acre-foot of water is sufficient to deal with any such difficulties.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and of this matter.

2. The Board concludes that the construction of a .75 acre-foot impoundment by the U.S. Fish and Wildlife Service does not constitute a major federal action significantly affecting the quality of the human environment. The Board therefore finds that the United States is not in violation of federal law for failing to prepare an environmental impact statement.

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

4. The proposed Diversion No. 4A can be developed without an unlawful impairment of existing rights of the landowner's to be free from underground or surface flooding.

5. The Board concludes, as set forth in more detail above, that Diversion No. 4A can and will be constructed to avoid flooding or damage to the adjoining landowners. In this regard,

the Board notes that it has supplied additional protections to the landowners in Qualifications 3 and 4 of the Final Decision. The Board also concludes that the past actions of the Service do not indicate that Diversion No. 4A will be constructed and operated as to harm the adjacent landowners.

6. The proposed use of the diversion as a carp barrier is a beneficial use because it will effectively protect a state "threatened" species.

7. The proposed use is in the public interest. The Board particularly concludes that protection of a threatened species defined under the laws of the State of South Dakota is within the public interest. The Board rejects the claim of the landowners that, merely because there are other means potentially available to protect the threatened species that this particular means of protecting the threatened species is not within the public interest. Moreover, in weighing the factors relevant to the public interest, the Board finds that the opponents of the new permit have not shown that this new permit will adversely affect them in any way in terms of flooding, thistle, or otherwise; the Board has weighed this fact against the fact that the carp barrier will significantly protect the Pearl Dace which has been defined as a threatened species under South Dakota law.

FINAL DECISION

The application for Water Permit No. 2300-2 is granted subject to the following conditions:

1. Use of water authorized by the permit may not impair the use of any lands adjoining the LaCreek National

Wildlife Refuge including, but not limited to, flooding or specific alterations of plant species directly attributable to water use under this permit. Flooding of adjoining land may occur if a written flood easement is obtained from the property owner or owners.

2. Permit No. 2300-2 authorizes storage of .75 acre-foot of water by constructing a new stoplog structure which replaces the existing structure (known as Diversion No. 4). The purpose of the structure is to prevent carp from traveling upstream. This will protect the state threatened Pearl Dace, whose habitat is upstream of the stoplog structure.

3. The storage level of Diversion No. 4A may not be in excess of 3034.1 msl and the structure must be designed to pass a 25-year precipitation event without raising the pool more than four feet.

4. The Service is required to remove the silt if the buildup exceeds 50% of the height of the carp guard.

5. The Service is required to remove Diversion No. 4 in its entirety within a reasonable time after construction of Diversion No. 4A.

Dated this 5th day of March, 1998.

BY THE BOARD:

Francis E. Bink

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

March 11, 1998

NOTICE

TO: Terry T. Terrell, Deputy Regional Director
U. S. Fish & Wildlife Service
P. O. Box 25486
Denver Federal Center
Denver, CO 80225
and Parties of Record (see attached list)

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

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

This is to notify you that the Final Decision, including Findings of Fact and Conclusions of Law, were adopted February 25, 1998, by the Water Management Board on U. S. Fish and Wildlife Service's Water Permit No. 2300-2 at Lacreek National Wildlife Refuge. The Board adopted the findings incorporating the Board Attorney's suggestions with regard to DENR and landowner responses to the proposed findings. A copy of the signed Findings of Fact, Conclusions of Law and Final Decisions are enclosed.

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

enclosure

c: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General
Ginger Price, USFWS

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

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Attorney for Bennett County

Paul Bengford, States Attorney
P.O. Box 688
Martin, SD 57551

CERTIFICATION

I hereby certify that on March 11, 1998, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated March 11, 1998, along with a copy of the Parties of Record List and a copy of the Findings of Fact, Conclusions of Law, and Final Decision on U.S. Fish and Wildlife Service's Water Permit No. 2300-2 at Lacreek National Wildlife Refuge, regarding Adoption of Findings of Fact, Conclusions of Law and Final Decision, addressed as stated below, and on the attached Parties of Record List:

Terry T. Terrell, Deputy Regional Director, U.S. Fish & Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

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

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

John Guhin, Deputy Attorney General, Capitol Building.

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 12th day of March, 1998

Karen Schlaak

Notary Public

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

KAREN SCHLAAK
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA

PARTIES OF RECORD LIST
WATER PERMIT APPLICATION NO. 2300-2
U.S. FISH & WILDLIFE SERVICE

Applicant

Terry T. Terrell, Deputy Regional Director
U.S. Fish & Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Attorney for Applicant

John Kunz
U.S. Department of Interior
Office of the Solicitor
755 Parfet St., Ste. 151
Lakewood, CO 80215

Petitioners

Charles Emley
Box 673
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

Attorney for Bennett County

Paul Bengford, States Attorney
P.O. Box 688
Martin, SD 57551

GREAT FACES. GREAT PLACES.

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

JUN 17 1998

U.S. Fish and Wildlife Service
Terry T. Terrell, Deputy Regional Director
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Dear Mr. Terrell:

Enclosed is Water Permit No. 2300-2 authorizing construction of your water diversion system and beneficial use of the water, not exceeding the limits as specified in the Water Permit.

This permit also authorizes temporary construction activities associated with diverting Lake Creek around the construction site.

Also enclosed is Form 10, Notice of Completion of Works and Application of Water to Beneficial Use, which you are to complete and submit to the Chief Engineer when you have completed the system and/or have put the water to beneficial use. An inspection can then be scheduled so that the Water License may be issued, thus completing your acquisition of a Water Right.

Very truly yours,

JOHN HATCH, Chief Engineer
Water Rights Program
(605) 773-3352

enclosures

SOUTH DAKOTA
WATER PERMIT NO. 2300-2

Date of first receipt of application February 1, 1994.

The Water Management Board approved Water Permit Application No. 2300-2 on February 25, 1998 for U.S. Fish and Wildlife Service (USFWS), PO Box 25486, Denver Federal Center, Denver CO 80225 authorizing the construction of the water use system and the placing of water to beneficial use subject to the following limitations, conditions and qualifications:

1. Water Permit No. 2300-2 authorizes a stoplog structure on Lake Creek located in the NW ¼ SE ¼ Section 24-T36N-R37W.

   This permit also authorizes temporary construction activities associated with diverting Lake Creek around the construction site. During construction of the stoplog structure on Lake Creek, the USFWS will clean out the north-south ditch (formerly known as Brown Ditch) located downstream and south of Diversion No. 4 and temporarily divert and channelize water from Lake Creek to connect to said ditch. This ditch will contain the Creek channel downstream of the construction area. Upon completing construction of the stoplog structure, Lake Creek flow path will be returned to normal.

2. The water appropriated shall be used for the purpose of preventing carp from traveling upstream of the structure for the beneficial use of protecting the state-threatened Pearl Dace.

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

4. The date from which applicant may claim right is February 1, 1994.

5. One-fifth of the construction is to be completed on or before August 25, 2000.

6. All construction is to be completed on or before February 25, 2003.

7. Water is to be put to beneficial use on or before February 25, 2007.

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

QUALIFICATIONS

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

2. Permit No. 2300-2 authorizes storage of 0.75 acre-foot of water by constructing a new stoplog structure which replaces the existing structure (known as Diversion No. 4). The purpose of the structure is to prevent carp from traveling upstream. This will protect the state threatened Pearl Dace, whose habitat is upstream of the stoplog structure.

(continued)

3. The storage level of Diversion No. 4A may not be in excess of 3034.1 fmsl and the structure must be designed to pass a 25-year precipitation event without raising the pool more than four feet.

4. The Service is required to remove the silt if the buildup exceeds 50% of the height of the carp guard.

5. The Service is required to remove Diversion No. 4 in its entirety within a reasonable time after construction of Diversion No. 4A.

WATER MANAGEMENT BOARD

By: John Hatch

JUN 17 1998

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

File No. 2300-2

Water Rights Program -- File Documentation

NAME: LaCreek National Wildlife Refuge

ADDRESS: Martin, SD

DATE: April 18, 1999 **COUNTY:** Bennett **TELEPHONE:** 605-685-6508

RE: New carp barrier structure – Water Permit No. 2300-2

COMMENTS:

Rolf Kraft, manager of the LaCreek Wildlife Refuge, called and stated according to last weeks minutes of the Bennett County Commission (published in the Bennett County Booster), the commission was going to contact the head of the Water Management Board. This contact was going to be in response to the Chief Engineer's May 3, 1999 letter. The commission was not happy with the Chief Engineer's letter.

Silt behind the carp barrier structure is within one foot of the top of the structure. Mr. Kraft believes that this is about as high as it will get. Construction of the structure was completed the end of February. At the present time wet conditions prevent the moving of equipment to the site to remove the silt. Mr. Kraft has contacted a contractor that has the necessary equipment. The contractor will be able to remove the silt in about two to three weeks. Hopefully at that time the wet conditions will have dried to allow the transport of equipment to the site.

Charles Emley gave permission to the contractor that built the structure to cross the Church property for access to the site. Mr. Emley died two days ago. Mr. Kraft requested permission from Raymond Kocer to cross the Church property with equipment for the silt removal. Mr. Kocer is planning to lease the Church property and did not give permission.

The water level behind the new carp barrier is approximately 3 feet lower than behind the old barrier. Mr. Kraft is wondering how often he will have to remove silt from behind the carp barrier. He believes it will take some time for the stream channel to stabilize.

Delvin D. Brosz, PE
Natural Resources Engineer
Water Rights Program

BENNETT COUNTY
office of
COUNTY COMMISSIONERS
PO Box 460
Martin, South Dakota 57551

Taken from the minutes of the regular April 27, 1999 Bennett County Board of Commissioners meeting.

Raymond and Lawrence Kocer and Brett Heath, land owners, met with the Board to report the Lacreek Refuge was not complying with the guidelines for the water permit #2300-2 for Diversion #4. The land owners explained the Refuge has not cleaned the silt from Diversion #4, causing some water to back up. Keeping the sand cleared out had been part of the agreement. The Commissioners agreed the whole process has not taken care of what the Refuge stated it needed to save the state endangered species from carp and they had not complied with the water permit.

Ronald Riggs made a motion to request water permit #2300-2 be rescinded because of non-compliance with the terms of the permit by Lacreek Wildlife Refuge to keep silt cleared from Diversion #4. Tim Juhnke seconded.

All Voted Aye
Motion Carried

ATTEST:

Susan Williams
Bennett County Auditor

FROM : BENNETT COUNTY

FACSIMILE

DATE: April 30, 1999 **TIME:** 11:30 AM

ATTENTION: Eric

COMPANY/FIRM:

CITY AND STATE/ZIP:

TELECOPY: 605-773-4068

FROM: Bennett County

MAILING ADDRESS: Box 460

CITY AND STATE/ZIP: Martin SD 57551

RETURN TELECOPY: (605)685-6311

NUMBER OF COPIES TRANSMITTED INCLUDING THIS SHEET: 2

Contact person for Bennett County:
Tim Juhnke
Ronald Riggs

Gronlund, Eric

From: Gronlund, Eric
Sent: Friday, April 30, 1999 2:17 PM
To: Hatch, John; Brosz, Del; Best, Diane
Cc: Rath, Mark; Shafer, Jeff; Duvall, Ron
Subject: Lacreek !!!

At 10:30 AM on Friday (4/30/99) I received a call from a gentleman regarding Water Permit No. 2300-2. This is the permit for a 1 ac-ft impoundment on Lake Creek to serve as a carp barrier. He did not give his name but I presumed he was a Bennett County Commissioner.

He stated that the Bennett County Commission passed a resolution on 4/27/99 demanding that WP No. 2300-2 be rescinded because Lacreek NWR was is violation of the permit. He stated that the structure was completely silted in and the permit requires that the silt be remove if the buildup exceeds 50% of the height of the structure (Qualification No. 4). He wanted a water rights staff person to get in a vehicle immediately and drive down there to verify the situation. He said they also have pictures that clearly show the siltation. I asked that he fax the resolution to me with his name and number so we could get ahold of him. He said he would fax it but he was busy calving so he put other people down as contact names. I also stated the soonest we could send a staff person down there on Monday. I said I would first want to get ahold of Rolf Kraft and hear his side of the story. I then got told that they sat through 12 days of hearings on the water permit where they said this structure won't work, but the permit was issued anyway. But they were told if there was a problem to call Pierre and we'd be there.

I received a copy taken from the minutes where they made the motion to request rescission. A copy is setting on your chair (Diane - I faxed it to you). The fax lists Commissioners Tim Juhnke & Ronald Riggs as contacts.

I talked to Ron and he thought the best course of action is to get ahold of Rolf Kraft to get his side of the story. Ron also did not think it was necessary to run down there Friday afternoon.

Rolf Kraft returned my call. He explained that the new structure is in place and that the old upstream structure was removed approximately one month ago. He believes that there is erosion at the site of the old structure as the stream re-establishes it's grade and this has caused siltation behind the new structure. He said he didn't know if it was 50% silted in but that it has silted in more quickly than he expected. He also said the ground is currently too wet to get machinery in to excavate what has silted in. I asked if it was reasonable to assume that when the ground dried out enough to get machinery in there that the Refuge would clean out the silt. He responded that he supposed so. Mr. Kraft then went on to say that the amount of silt behind the structure does not cause water to back up since it is an overflow structure intended soley to stop carp from moving upstream. I said I understood the hydraulics of the structure but that removing the siltation was a condition of the water permit that USFWS agreed to.

Mr. Kraft also stated that since the old structure was removed the creek is approximately 3 - 4 feet lower but there has been no change in the water table in the nearby meadows where landowners complained the old structure was artificially heightening the water table that then floods their meadows.

We will need to discuss this Monday morning.

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

May 3, 1999

Bennett County Commissioners
c/o Susan Williams, County Auditor
P O Box 460
Martin, SD 57551

Bennett County Commissioners:

I am writing in response to the Commission's motion, made and passed on April 27, 1999, to request that Water Permit No. 2300-2, held by U. S. Fish and Wildlife Service be rescinded. An excerpt of the Commission minutes was faxed to me on Friday, April 30th.

A qualification to the water right permit (copy enclosed) requires the U.S. Fish and Wildlife Service to remove the silt from behind a new stoplog structure (carp barrier) in the Lake Creek channel, if the buildup exceeds 50 percent of the height of the carp barrier. We contacted Rolf Kraft, Refuge Manager, immediately upon receiving a copy of the Commission's action. Mr. Kraft explained that following construction of the new carp guard structure, the old stoplog structure No. 4 was removed approximately one month ago. The old structure was located approximately ¼ mile upstream of the new structure. The new structure is 3 to 4 feet lower in elevation than the old No. 4 structure and stores less than 0.75 acre feet of water (245,000 gallons) within the Lake Creek channel. When the old No. 4 structure was removed, flow of water in Lake Creek eroded and moved silt deposits from the old structure No. 4 location down to the new structure. Once the old site has stabilized, there should be less accumulation of silt at the new structure.

Mr. Kraft has advised that the refuge will remove the silt from behind the new structure as soon as the area dries enough to allow heavy equipment to be moved in. Removal of the silt from behind the new stoplog structure is a requirement of Permit No. 2300-2 and we intend to enforce compliance with all conditions on the permit. However, from a hydraulic perspective, whether the new overflow stoplog structure stores up to 245,000 gallons of water or silt, the elevation of the water behind the structure will not change.

I noticed from the excerpt of the minutes that the U.S. Fish and Wildlife Service did not participate in your April 27th meeting. I believe it would have been proper and beneficial for the Commission to have invited and given Mr. Kraft an opportunity to explain what happened and how the refuge as a Bennett County landowner plans to handle the siltation that occurred.

Since this siltation problem is a result of completion of project construction activities, I see no reason to take further action on this complaint. The refuge intends to remove this silt in the near future. The refuge will however, need to monitor the new structure for new siltation problems.

Very truly yours,

John Hatch, Chief Engineer
Water Rights Program
(605) 773-3352

enclosure

c: Rolf Kraft, Lacreek NWR
Cheryl Williss, USFWS
Pamela K. Ireland, Bennett County States Attorney
Diane Best, Assistant Attorney General

SOUTH DAKOTA
WATER PERMIT NO. 2300-2

Date of first receipt of application February 1, 1994.

The Water Management Board approved Water Permit Application No. 2300-2 on February 25, 1998 for U.S. Fish and Wildlife Service (USFWS), PO Box 25486, Denver Federal Center, Denver CO 80225 authorizing the construction of the water use system and the placing of water to beneficial use subject to the following limitations, conditions and qualifications:

1. Water Permit No. 2300-2 authorizes a stoplog structure on Lake Creek located in the NW ¼ SE ¼ Section 24-T36N-R37W.

   This permit also authorizes temporary construction activities associated with diverting Lake Creek around the construction site. During construction of the stoplog structure on Lake Creek, the USFWS will clean out the north-south ditch (formerly known as Brown Ditch) located downstream and south of Diversion No. 4 and temporarily divert and channelize water from Lake Creek to connect to said ditch. This ditch will contain the Creek channel downstream of the construction area. Upon completing construction of the stoplog structure, Lake Creek flow path will be returned to normal.

2. The water appropriated shall be used for the purpose of preventing carp from traveling upstream of the structure for the beneficial use of protecting the state-threatened Pearl Dace.

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

4. The date from which applicant may claim right is February 1, 1994.

5. One-fifth of the construction is to be completed on or before August 25, 2000.

6. All construction is to be completed on or before February 25, 2003.

7. Water is to be put to beneficial use on or before February 25, 2007.

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

QUALIFICATIONS

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

2. Permit No. 2300-2 authorizes storage of 0.75 acre-foot of water by constructing a new stoplog structure which replaces the existing structure (known as Diversion No. 4). The purpose of the structure is to prevent carp from traveling upstream. This will protect the state threatened Pearl Dace, whose habitat is upstream of the stoplog structure.

(continued)

3. The storage level of Diversion No. 4A may not be in excess of 3034.1 fmsl and the structure must be designed to pass a 25-year precipitation event without raising the pool more than four feet.

4. The Service is required to remove the silt if the buildup exceeds 50% of the height of the carp guard.

5. The Service is required to remove Diversion No. 4 in its entirety within a reasonable time after construction of Diversion No. 4A.

WATER MANAGEMENT BOARD

By: John W Hatch

JUN 17 1998

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

Gronlund, Eric

From: Gronlund, Eric
Sent: Tuesday, May 04, 1999 3:48 PM
To: Hatch, John; Brosz, Del; Best, Diane
Cc: Rath, Mark; Shafer, Jeff
Subject: Call from Tim Juhnke, Bennett County Commissioner

Mr. Juhnke called and stated they got the Chief Engineer's letter and reviewed it at their Commission meeting. They wanted to know why no Water Right staff person came to look at the situation. I explained that as soon as we received the excerpt of the minutes, I contacted Rolf Kraft and got his explanation of what occurred. That explanation was plausible and is included in the Chief Engineer's letter. Mr. Kraft stated they would remove the siltation that has occurred when the ground is dry enough to get equipment to the area. He stated that a relative of a Commission member on the east end of the refuge was just in cleaning out a similar area and it was plenty dry. I stated that Mr. Kraft stated they would remove the siltation when dry enough to get in the area and I could not necessarily compare the two situations.

He said the siltation was causing water to spread out and cause flooding. I told him that was simply not true - that this is an overflow structure and whether it's impounding water or silt behind the structure, water does not back up the channel or spread out because of silt - the water simply flows over the structure

He went on to say the state should be siding with the landowners and not the federal government. I explained the Water Rights Program administers the waters of the state in accordance with state law and that the refuge was also a landowner. That led to his statement that they don't pay taxes. I stated they do make payments in lieu of taxes but Mr. Juhnke stated that was not equal to taxes. I said I did not know the tax structure.

He stated again that they sat thru 12 days of hearings to get flood relief and haven't received any compensation. He indicated that some of Heath's property has been under water for years. I stated compensation to individual landowners was never a type of relief that the Water Management Board could have required. If an individual landowner was looking for monetary compensation that they would have to bring a civil action.

Mr. Juhnke went on to say that they pay my salary and I should represent the landowners interests and not that of the federal government. I stated our job is to fairly administer the water rights law. I stated we will enforce the conditions set by the WMB on the water permit. The refuge explained what occured, agreed to remove the silt and comply with the qualification. We see no reason to take further action at this point. I stated that I believe the proper way for the Commission to have handled this would have been to give Mr. Kraft an opportunity to come before the Commission to discuss this matter.

Mr. Juhnke and I went around in circles on the various issues discussed above. Finally, Mr. Juhnke informed me our conversation was at an end and he hung up.

TRANSMITTAL OF INFORMATION VIA FACSIMILE MACHINE

DATE: 5/18/99

NO. OF PAGES: TRANSMITTAL SHEET + 1

TO: Del Brosz 773-4068
SD DENR Water Rights
Pierre, SD

FROM: Diane Granlund, DC
NRCS
Martin, SD

IF THERE ARE PROBLEMS WITH THIS TRANSMISSION,

CALL: 685-1239 ext. 3

COMMENTS: Ralf Kraft called + asked me to fax the minutes of the B.C Commission meeting for 5/4/99.

Bennett County Commissioners' Proceedings

Tuesday, May 4, 1999
Martin, South Dakota

The Bennett County Board of Commissioners met in regular session, Tuesday, May 4, 1999, in the Commissioners meeting room.

The meeting was called to order at 9:30 a.m. by Chairman, Ed Risse, with a full Board present.

Others present: Louis Nollett, Highway Superintendent; Bill Kuchans, area resident; Martin Leeper, Sheriff; Pamela Ireland, States Attorney.

The minutes of the April 27, 1999, Board of Equalization meeting were approved with a motion by Dale McDonnell and seconded by Gary Nies. All voted aye, motion carried.

The minutes of the regular April 27, 1999, meeting were approved with the correction that Dale McDonnell reported the cemetery gate was damaged not Tim Juhnke. Tim Juhnke made the motion to approve and Dale McDonnell seconded. All voted aye, motion carried.

APRIL REPORTS

Register of Deeds, $1,045.00; Clerk of Courts, $2,743.50.

The following report of my examination of the cash and cash items in the hands of the County Treasurer is hereby submitted.

Balance on hand, County	$527,564.90
Balance on hand, Medical Facilities	12,340.42
Restricted Funds	89,683.15
Bennett County Medical Insurance	56,216.44
Savings Accounts	723,398.87
Cash and Checks	213,957.78
Stockmens Bank Error	480.06
NSF Checks	62.68
TOTAL	1,623,704.30

ATTEST:
Susan Williams
Auditor

HIGHWAY DEPARTMENT

Louis Nollett, Highway Superintendent, met with the Commissioners. There was discussion concerning the repair to the cemetery gate. The Board directed Mr. Nollett to repair the gate.

The Commissioners discussed with Mr. Nollett their concerns with the public relations between the highway department and the local tax payers.

There was discussion about the Tuthill road. The highway superintendent explained how the road had been bladed and the reasons. The Commissioners stated they want roads crowned so water will run off.

The Board requested the Eli road be taken care of. Mr. Nollett stated the department plans on working on the road, but parts of it are too wet at this time.

HISLE ROAD

There was discussion concerning the Hisle road intersection. The state had proposed plans for changing the intersection and the board reviewed the plans and discussed different options. I then contact the state to discuss the

NEW HIRE

Mr. Nollett requested Irvin Moffitt be hired as temporary highway laborer for the summer. Tim Juhnke made the motion to hire Irvin Moffitt after school is out at $7.50 hourly as temporary highway employee. Ronald Riggs seconded. All voted aye, motion carried.

PRIVATE USE OF HIGHWAY EQUIPMENT

A question was brought to the Commissioners concerning the use of county highway equipment on evenings and weekend for private use. The Board was not aware of the situation and will contact the highway superintendent for information.

WATER PERMIT #2300-2

The Commissioners discussed a letter received from the South Dakota Department of Environment and Natural Resources in response to the April 27, 1999, request to rescind water permit # 2300.2. Ronald Riggs requested the county contact the head of the Water Management Board.

ALCOHOLIC BEVERAGE LICENSE HEARING

A hearing to consider applications for alcoholic beverages licenses for the year July 1, 1999, to June 30, 2000, was held at 10:30 a.m.

Martin Leeper, Sheriff, reported to the Board he did not feel there was any reason to deny renewal of the licenses. Tim Juhnke questioned Mr. Leeper about incidents at Swett. Mr. Leeper stated there were the usual types of problems with bars, but nothing that should cause denial of a license.

Tim Juhnke made a motion to approve the malt beverage license for Paulette and Daniel Fanning, Chances R Vetal, S.D. Gary Nies seconded. All voted aye, motion carried.

Dale McDonnell made a motion to approve the malt beverage license renewal for Denise Benson, L & D Swett Tavern, Swett, S.D. Ronald Riggs seconded. All voted aye, motion carried.

TRAFFIC STOPPED FOR MARCH

Some of the Commissioners reported traffic had been stopped in the middle of the intersection of Highway 18 and 73 for a march and ceremony. Traffic had been stopped for an extended period of time. It was felt by the Commissioners that this was not very safe and the ceremony could have been held in another area off the highway. The sheriff had been contacted concerning the march, but felt the situation had been handled appropriately.

EXECUTIVE SESSION

Dale McDonnell made a motion to go into executive session at 10:55 a.m. with the States Attorney to consider possible litigation. Seconded by Ronald Riggs. All voted aye, motion carried.

FAIR BOARD MEETING

Ed Risse reported on the fair board meeting. He explained the fair board had discussed the proposed weigh station on the fair grounds. The fair board was willing to allow the state to build a permanent weigh station, but felt a street light should be placed at the exhibit building and that the fair board should have some negotiating power.

CLOSE

There being not further business to come before the Board, Tim Juhnke made a motion to adjourn, with a second by Gary Nies. All voted aye, motion carried.

The next meeting will be Tuesday, May 18, 1999, at 9:30 a.m. in the Commissioners meeting room.

BOARD OF BENNETT COUNTY COMMISSION
Ed Risse, Chairman

ATTEST:
Susan Williams

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Lacreek National Wildlife Refuge
HC 5 Box 114
Martin, South Dakota 57551-9410
605/685-6508

June 22, 1999

John Hatch, Chief Engineer
Department of Environment and Natural Resources
523 East Capitol
Pierre, South Dakota 57501

Dear Mr. Hatch;

This is to advise that the accumulated sediment in the impoundment at Diversion 4a (Water Permit 2300-2) was removed on June 21, 1999 and stockpiled on the stream bank. The spoil will be removed after the sand has had a chance to drain. Removal of the sediment made no discernible change in the water elevation in the stream.

Elevations were taken following the clean-out, using a laser level to establish benchmarks for future reference. The top of the grating in the southwest corner of the Diversion 4a concrete water control structure was used as the benchmark. Using 15.0 feet as the benchmark, the following describes elevations following the clean-out: The surface of the water at Diversion 4a was 10.15 feet, while the surface of the water in the stream, and the bottom of the stream channel, at the former location of Diversion 4 is now 11.06 feet and 9.0 feet, respectively. The elevation of the original high water mark at the, now drained, Diversion 4 pond is 13.5 feet.

The current stream surface is ~2.5 below the original pond elevation, and the bottom of the stream, where old Diversion 4 was removed, is ~4.5 feet below the original pond surface elevation. This is consistent with the old four foot stop log structure and ~6 inches of water flowing over the old structure stop logs. This demonstrates that the current stream bed at this location is reasonably close to its original elevation.

Rolf H. Kraft
Refuge Manager

CC: FWS Water Rights
Maury Wright
Div4sedi.699.M32

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Mountain-Prairie Region

BA WTR
WR SD
Mail Stop 60189

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

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228

OCT 19 1999

OCT 1999
WATER RIGHTS
PROGRAM
Pierre, SD

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

Dear Mr. Hatch:

I am writing to request the removal of condition #4 from Permit No. 2300-2 for the Diversion 4a structure on Lacreek National Wildlife Refuge. This condition requires the Fish and Wildlife Service to remove silt if the buildup exceeds 50% of the height of the carp guard. Our experience this summer confirms the testimony provided by Ernest Husmann at the hearing before the Water Management Board that the sediment in the Diversion 4a impoundment has no significant impact on the stream elevation at the old Diversion 4 location.

Refuge Manager Rolf Kraft has advised us that the impoundment behind the structure refills with sand in about 2 weeks after dredging. Compliance with the permit condition will require removal about once a week.

Elevations were taken on June 21, using a laser level to establish bench marks for future reference. The top of the grating in the southwest corner of the structure was used as the bench mark, established as 15.0 feet. Following the clean-out, the surface of the water at Diversion 4a was 10.15 feet, while the surface of the water in the stream, and the bottom of the stream channel, at the former location of Diversion 4 was 11.06 feet and 9.0 feet, respectively. The elevation of the original high water mark at the, now drained, Diversion 4 pond is 13.5 feet and will remain constant.

The stream surface at old Diversion 4 was ~2.5 feet below the original pond elevation, and the bottom of the stream, where the old Diversion 4 culvert was removed, is ~4.5 feet below the original pond surface elevation. This is consistent with the old four-foot stoplog structure and ~6 inches of water flowing over the old structure stoplogs. This demonstrates that the stream bed at this location is reasonably close to its original elevation.

Elevations were taken again on July 29, with the impoundment full of sediment to its maximum elevation. Using the same bench mark, the surface of the water at Diversion 4a was 10.42 feet, probably resulting from some debris on the structure that would be removed within a day or two, while the surface of the water in the stream, and the bottom of the stream channel at the former location of Diversion 4 was 11.00 feet and 9.1 feet, respectively. The elevation of the original high water mark at the, now drained, Diversion 4 pond remains at 13.5 feet.

The above elevations demonstrate that the surface elevation of the water in the stream, and the bottom of the stream bed, at the old Diversion 4 structure remain the same regardless of the sediment level in the Diversion 4a impoundment.

The amount of silt which accumulates is not significant. The total removal in June amounted to about 40 cubic yards, meaning that removal when the sediment amounts to 50% of capacity will be about 20 cubic yards once a week. However, the logistics and costs of weekly dredging are extremely significant. The mobilization, demobilization, loading, transport, and grading of removed sand requires about one man day per 20 cubic yards. The work must be done with an excavator to protect the rip-rap. The Refuge borrowed an excavator and operator from Fort Niobrara Refuge in Nebraska. Even though the actual dredging takes only 2-3 hours, mobilization (loading, transport, unloading, and walking the excavator to the site) and demobilization takes about 6-8 hours each way. Fort Niobrara cannot provide excavator services for 2 days out of every week, or even once a month, on a continuing basis. We can probably get the Fort Niobrara excavator once or twice a year. If weekly dredging is required, Lacreek Refuge will need to acquire an excavator that will remain on site ($100,000), and the labor requirement will be one man day every week. Also, the spoil must be removed from the site and placed somewhere. We cannot utilize this volume of material on the Refuge, nor do we have a site that will not present an unaesthetic appearance to members of the public who visit. Disposal will soon become a difficult problem.

The Refuge plans to dredge the Diversion 4a impoundment and confirm the relative elevations during the first week in November. The registered surveyor from our Aberdeen office will establish elevations prior to the work, and again after the dredging is completed. We invite you and/or members of your staff to observe these activities. Please coordinate with Mr. Kraft.

SDCL 46-2A-12 provides that a permit can be amended if the amendment does not unlawfully impair existing rights and is for a beneficial use and in the public interest. We are prepared to put on evidence that dredging the silt does not change the elevation of the water impounded behind Diversion 4a or at the site of the old Diversion 4, and therefore, there is no physical or monetary impact on the adjacent landowners. Obviously, the expense and labor are unwarranted for an

activity with no benefit. We ask that you review this information and recommend to the Board that removal of condition #4 is appropriate. Please call me at 303/236-5321, ext. 223, if you need additional information to process this request.

Sincerely,

Cheryl C. Williss
Chief, Water Resources Division

cc: Bennett County Commissioners
Box M
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
P.O. Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

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

October 26, 1999

Cheryl C. Williss
U.S. Fish and Wildlife Service
P. O. Box 25486
Denver Federal Center
Denver CO 80225

Dear Ms. Williss:

I am in receipt of the U. S. Fish and Wildlife Service request to remove qualification No. 4 from Water Right Permit No. 2300-2. This qualification requires the Service to remove the silt if the buildup behind Diversion No. 4A at Lacreek National Wildlife Refuge exceeds 50 % of the height of the carp guard.

Mark Rath, Water Right Program engineer will coordinate with Rolf Kraft and you so he may be present when dredging and surveying occurs at the Diversion 4A impoundment. This activity is planned for the first part of November.

I do not intend to schedule this request for a hearing before the Water Management Board on December 1, 1999. Notice will be provided to parties of record scheduling a hearing on the Service's request for the March 1 and2, 2000, Board meeting.

Contact Mark Rath at (605) 773-3352 if you have any questions.

Very truly yours,

John Hatch, Chief Engineer
Water Rights Program
(605) 773-3352

c: Diane Best, Assistant Attorney General

November 3, 1999

MEMO

To: File

From: Mark D Rath MDR

Subject: La Creek National Wildlife Refuge's clean out of Diversion No. 4.

On Tuesday November 2, 1999 I was on site while US Fish and Wildlife Service (USFWS) personnel at La Creek Refuge cleaned out Diversion No. 4. Prior to the clean out a private surveyor shot water surface elevations at the structure and upstream at the old structure site. A power shovel was used to clean out the sand that had silted in. Approximately 1 hour after the clean out was completed, the surveyors shot surface water elevations again. The surveyor's found no difference in water levels.

Nov 2, 1999 Structure 4A LaCreek Refuge

BENNETT COUNTY
office of
COUNTY COMMISSIONERS
PO Box 460
Martin, South Dakota 57551

November 3, 1999
John Hatch, Chief Engineer
Department of Environment and Natural Resources
Foss Building, 523 E Captiol
Pierre SD 57501-3181

Dear Mr. Hatch:

The Bennett County Board of Commissioners unanimously oppose the removal of condition #4 from Permit No. 2300-2. On April 27, 1999, the Board voted to request the South Dakota Water Management Board rescind and terminate U.S. Fish and Wildlife Service Water Permit No. 2300-2 because of silting resulting in noncompliance with the terms of condition #4 of the permit. Notification of this action was faxed to you on April 30, 1999.

The County Commissioners recently received a letter from the U.S. Fish and Wildlife Service stating they now want to amend Water Permit No. 2300-2 by removing condition #4. The Bennett County Board of Commissioners are opposed to this amendment, and are again requesting that Water Permit No. 2300-2 be repealed in its entirety.

The County Commissioners request a public hearing be held concerning Water Permit No. 2300-2 and that the members of the Water Management Board and the Commissioners be kept informed of this situation. If there is to be a hearing pertaining to any of these matters, the Bennett County Board of Commissioners request that they be notified and be allowed to attend and testify.

Sincerely,

Susan Williams

Susan Williams
Bennett County Auditor

cc: Water Management Board Chairman

NIOBRARA VALLEY CONSULTANTS LLC

411 North Main
P.O. Box 50
Valentine, NE 69201
402-376-2691
Fax 402-376-2692

November 5, 1999

U.S. Fish and Wildlife Service
Contracting and General Services(M/S 60181)
P.O. Box 25486, Denver Federal Center
Denver Colorado 80225
ATT: Karl Lautzenheiser

Re: Order No. 601810p055
Survey services at LaCreek NW
Bennett County, South Dakota

Dear Karl,

Enclosed herewith are the drawings and elevations which we recently acquired. Thank you for contacting this office to complete this work. If we can be of any further assistance on this or any future project please don't hesitate to correspond.

Sincerely,

Lloyd C. Smith RLS

cc: file

RECEIVED
NOV 12 1999
DENVER

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

November 12, 1999

Susan Williams
Bennett County Auditor
PO Box 460
Martin SD 57551

Dear Ms. Williams:

I am in receipt of your letter on behalf of the Bennett County Board of Commissioners opposing the removal of qualification No. 4 from U.S. Fish and Wildlife Service's Water Right Permit No. 2300-2. Bennett County will be provided notice when a hearing is scheduled before the Water Management Board. I anticipate this hearing will be scheduled for the Board meeting to be held March 1 and 2, 2000.

Sincerely,

Eric Gronlund

Eric Gronlund
Water Rights Program
(605) 773-3352

United States Department of the Interior

FISH AND WILDLIFE SERVICE

Mountain-Prairie Region

IN REPLY REFER TO:
BA WTR
WR SD
Mail Stop 60189

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

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228

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

NOV 15 1999

NOV 1999 WATER RIGHTS PROGRAM Pierre, SD

Dear Mr. Hatch:

Please find enclosed a copy of the transmittal letter and drawing received from the surveyor hired by the Fish and Wildlife Service to complete a pre- and post-dredging survey of Diversion 4A and the site of Diversion 4.

Please call me at 303/236-5321, ext. 223, if you have any questions about this information.

Sincerely,

Cheryl C. Williss

Cheryl C. Williss
Chief, Water Resources Division

cc: Bennett County Commissioners
Box M
Martin, SD 57551

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer
P.O. Box 388
Martin, SD 57551

Lawrence Kocer
P.O. Box 156
Martin, SD 57551

NOV 1999
WATER RIGHTS
PROGRAM
Pierre, SD

11-16-99

Dear Mr. Hatch.

I am writing To oppose The removal of condition #4 from Permit NO. 2300-2 for Diversion 4A.

Please keep me informed on furture developments.

Please recommend To the Board To leave As is.

Yours Truly

Raymond J Kocer

Mr. Raymond J. Kocer
P.O. Box 388
Martin, SD 57551-0388

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

December 23, 1999

NOTICE

TO:

Cheryl Williss, Chief
Water Resources Division
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Susan Williams
Bennett County Auditor
P.O. Box 460
Martin SD 57551

Raymond Kocer
P.O. Box 388
Martin SD 57551-0388

Brett Heath
HWC 3, Box 20
Martin SD 57551

Lawrence Kocer
P.O. Box 156
Martin SD 57551

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

SUBJECT: Notice of Hearing on Water Permit No. 2300-2, U.S. Fish and Wildlife Service

Water Permit No. 2300-2 was approved by the Water Management Board on February 25, 1998, authorizing a stoplog structure on Lake Creek located in the NW ¼ SE ¼ Section 24, T36N, R37W. The Board placed Qualification No. 4 on the water permit requiring the U. S. Fish and Wildlife Service to remove the silt if the buildup exceeds 50 % of the height of the carp guard. The U. S. Fish and Wildlife Service has requested removal of Qualification No. 4.

The Bennett County Board of Commissioners and Raymond Kocer have submitted letters opposing the removal of this qualification. Also, the Board of Commissioners has requested that the Water Management Board rescind and terminate Water Permit No. 2300-2.

Qualification No. 4 was placed on Water Permit No. 2300-2 following the Water Management Board's discussion prior to approving the water right permit. The Bennett County States Attorney, Paul Bengford, in his closing statement suggested that if the Board approved the permit that "... we would request that the silt be cleaned out at least once a year from the impoundment that is backed up." The Board then crafted a qualification to require removal of the silt if the build-up exceeds 50 % of the height of the structure.

The Water Management Board will conduct a hearing on this matter at their meeting on March 1 and 2, 2000 in the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre SD. Future notice will be provided of the exact date and time of the hearing.

The Chief Engineer recommends AMENDING Qualification No. 4 on Water Permit No 2300-2 and taking NO ACTION on the Bennett County Board of Commissioners request to rescind and terminate Water Permit No. 2300-2. Qualification No. 4 is proposed to be amended as follows:

> The Service is required to remove accumulated sediment from behind the carp guard structure located in the NW ¼ SE ¼ Section 24, T36N, R37W on or before November 1st of each calendar year.

This recommendation is based on the following:

1. Mark Rath, Water Rights staff engineer, conducted an investigation of sedimentation behind the structure before, during and after dredging took place.

2. The natural sediment transport in Lake Creek is beyond the quantities anticipated at the time the original qualification was formulated.

3. The sediment behind the structure does not have a adverse impact on water levels in Lake Creek. The amount of sediment behind the structure does not impact the creek's hydraulic characteristics of water flow over the structure or area inundated by back water effects.

4. The removal of sediment once a year provides an opportunity to examine the structure for maintenance purposes.

5. The water right permit is not subject to abandonment or forfeiture under SDCL 46-5-37 through 37.1.

6. The USFWS has made a reasonable effort to clean out the silt and comply with this qualification. USFWS's intentions to clean out the silt have been complicated by wet conditions, equipment availability and the frequency of clean-out. Delays encountered in compliance with the qualification do not warrant suspension or cancellation of Water Permit No. 2300-2.

If you have any questions, please contact Diane Best, Assistant Attorney General at (605) 773-3215 or Eric Gronlund, Water Rights Program at (605) 773-3352.

c: Diane Best, Assistant Attorney General
Rolf Kraft, Manager, Lacreek National Wildlife Refuge

CERTIFICATION

I hereby certify that on December 23, 1999, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated December 23, 1999, regarding Notice of Hearing on Water Permit No. 2300-2, U.S. Fish and Wildlife Service, addressed as stated below:

Cheryl Williss, Chief, Water Resources division, U.S. Fish & Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

Susan Williams, Bennett County Auditor, P.O. Box 460, Martin, SD 57551.

Raymond Kocer, P.O. Box 388, Martin, SD 57551-0388.

Brett Heath, HWC 3, Box 20, Martin, SD 57551.

Lawrence Kocer, P.O. Box 156, Martin, SD 57551.

Rolf Kraft, Manager, Lacreek National Wildlife Refuge, HC 5, Box 114, Martin, SD 57551-9410.

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

Diane Best, Assistant Attorney General, Capitol Building.

Eric Gronlund
Natural Resources Engineer

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 27th day of December, 1999

Karen Schlaak
Notary Public

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

KAREN SCHLAAK
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA

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

January 26, 2000

NOTICE

TO:

Cheryl Williss, Chief
Water Resources Division
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Susan Williams
Bennett County Auditor
P.O. Box 460
Martin SD 57551

Raymond Kocer
P.O. Box 388
Martin SD 57551-0388

Brett Heath
HWC 3, Box 20
Martin SD 57551

Lawrence Kocer
P.O. Box 156
Martin SD 57551

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

SUBJECT: Scheduling of Hearing on Water Permit No. 2300-2, U.S. Fish and Wildlife Service

On March 1st, the Water Management Board will consider U. S. Fish and Wildlife Service's request to amend a qualification to Water Permit No. 2300-2 and Bennett County's request to rescind and terminate Water Permit No. 2300-2. The hearing is scheduled to begin at 2:30 PM, March 1, 2000, in the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre SD. The agenda time is an estimate and may be delayed due to prior agenda items. It is anticipated that the hearing will continue on the morning of March 2nd so anyone intending to attend the hearing should plan accordingly.

Water Permit No. 2300-2 authorized a structure located in the NW ¼ SE ¼ Section 24, T36N, R37W to prevent carp from moving upstream on Lake Creek. In approving the permit, the Water Management Board placed a qualification requiring removal of silt if the buildup behind the structure exceeds 50% of the height of the carp guard. The U. S. Fish and Wildlife Service has requested removal of this qualification. Bennett County and Raymond Kocer have filed opposing removal of the qualification and Bennett County has further request that the water permit be rescinded.

(continued)

A notice was sent to parties on December 23, 1999, explaining the Chief Engineer's recommendation in this matter. The Chief Engineer recommends the qualification be amended to require that accumulated sediment behind the structure must be removed on or before November 1st of each calendar year. The Chief Engineer further recommends that the Board take no action on the Bennett County Board of Commissioners request to rescind and terminate Water Permit No. 2300-2.

If you have any questions, please contact Diane Best, Assistant Attorney General at (605) 773-3215 or Eric Gronlund, Water Rights Program at (605) 773-3352.

c: Diane Best, Assistant Attorney General
John Kunz, U.S. Department of Interior, Offic of the Solicitor, 755 Parfet St., Ste. 151, Lakewood CO 80215
Rolf Kraft, Manager, Lacreek National Wildlife Refuge, HC 5, Box 114, Martin SD 57551

CERTIFICATION

I hereby certify that on January 26, 2000, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated January 26, 2000, regarding Scheduling of Hearing on Water Permit No. 2300-2, U.S. Fish and Wildlife Service, addressed as stated below:

Cheryl Williss, Chief, Water Resources Division, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

Susan Williams, Bennett County Auditor, P.O. Box 460, Martin, SD 57551.

Raymond Kocer, P.O. Box 388, Martin, SD 57551-0388.

Brett Heath, HWC 3, Box 20, Martin, SD 57551.

Lawrence Kocer, P.O. Box 156, Martin, SD 57551.

John Kunz, U.S. Department of Interior, Office of the Solicitor, 755 Parfet St., Ste., 151, Lakewood, CO 80215.

Rolf Kraft, Manager, Lacreek National Wildlife Refuge, HC 5, Box 114, Martin, SD 57551.

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

Diane Best, Assistant Attorney General, Capitol Building.

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

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

Karen Schlaak
Notary Public

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

KAREN SCHLAAK, Notary Public
My Commission Expires
April 1, 2004

427

STATE OF SOUTH DAKOTA

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

MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

MAR 2000
WATER RIGHTS
PROGRAM
Pierre, SD

March 7, 2000

John Kunz
U.S. Department of Interior
Office of the Solicitor
755 Parfet Street, Ste. 151
Lakewood, CO 80215

Raymond Kocer
Box 388
Martin, SD 57551-0388

Pam Ireland
Bennett County State's Attorney
P.O. Box 688
Martin, SD 57551-0688

Brett Heath
HWC 3, Box 20
Martin, SD 57551

Bennett County Commissioners
c/o Susan Williams
P.O. Box 460
Martin, SD 57551-0460

Re: Water Permit No. 2300-2

Parties of Record:

Enclosed is a copy of the transcript from the South Dakota Water Management Board Meeting held on March 1, 2000.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB:nan
Enclosure
bcc/enc: Garland Erbele

1/2 M LATH E GRONLUND 6/7/00 π 90°F SUNNY WIND 10 MPH

	BS	FS	IH	ELEV
BM #1	4 55		3045 33	3040 78
Top of 4A Weir		9 10		3036 23
H_2O @ 4A Weir		8 65		3036 68
H_2O @ 1		8 60		3036 73
H_2O @ 2		8 38		3036 95
H_2O @ 3		8 34		3036 99
H_2O @ 4		8 11		3037 22
H_2O @ 5		7 93		3037 40
TP1	5 82	4 33	3046 82	3041 00
H_2O @ 6		9 12		3037 70
H_2O @ 7		8 70		3038 12
Bottom @ 6		10 08		3036 74
Bottom @ 7		10 41		3036 41

FLOW MEASUREMENTS

	VELOCITY FT/S	DEPTH	BOTTOM ELEVATION
10yr DS of 4A @ 1A	2 28	1. 30	
V @ 1	2 11	1 60	3035 13
V @ 2	1 07	1 50	3035 45
V @ 3	2 10	1 20	3035 79
V @ 4	2 10	1 90	3035 32
V @ 5	1 28	1 40	3036 00
V @ 6	1 66	0 96	3036 74
V @ 7	2 10	1 70	3036 41
V @ Bridge DS [illegible]	1 80	1 30	
Invert DS of 4A			3031 61

430

X CHASE [illegible] STRUCTURE [illegible] NE CORNER

WEIR AT [illegible] STRUCTURE

WATER LEVEL AT WEIR

WATER LEVEL AT SITE 1

WATER LEVEL AT SITE 2

WATER LEVEL AT SITE 3

WATER LEVEL AT SITE 4

WATER LEVEL AT SITE 5

TEMPORARY [illegible]

WATER LEVEL AT SITE 6

WATER LEVEL AT SITE 7

BOTTOM LEVEL AT SITE 6

BOTTOM LEVEL AT SITE 7

WATER VELOCITY DOWNSTREAM FROM STRUCTURE No 9A

WATER VELOCITY AND BOTTOM ELEVATION AT SITE 1

WATER VELOCITY AND BOTTOM ELEVATION AT SITE 2

WATER VELOCITY AND BOTTOM [illegible] AT SITE [illegible]

WATER VELOCITY AND BOTTOM [illegible] AT SITE [illegible]

WATER VELOCITY AND BOTTOM ELEVATION AT SITE [illegible]

WATER VELOCITY AND BOTTOM ELEVATION AT SITE 6

WATER VELOCITY AND BOTTOM ELEVATION AT SITE 7

WATER VELOCITY AT POINT [illegible] SIDT 36N [illegible] 376

ELEVATION of DOWNSTREAM EXIT CULVERT & No 9A

LACREE NATIONAL
WILD LIFE REFUGE
STRUCTURE No. 4A

6126100
M RATH
G ELLECE

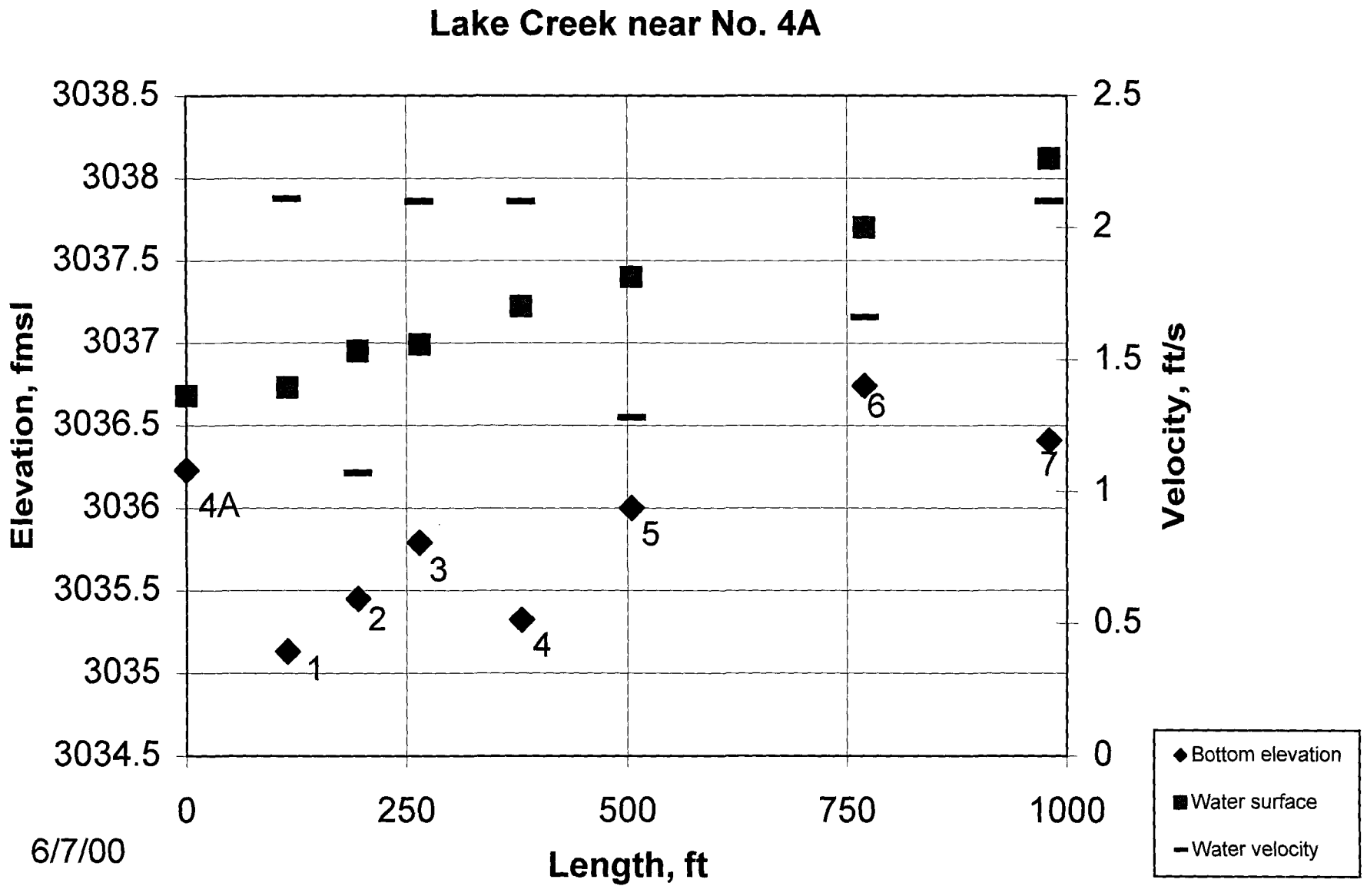
	BS	FS	IH	ELEV	
BM #1	5 64		3046 41	3040 18	X-CHISELED IN NE CORNER NO 4A
4A WEIR		10 19		3036 23	
4A WEIR TOP of SLAB		4 00	3036 23	3032 23	MEASURED DOWN WING FROM WEIR

Notes Concerning June 7, 2000 Site Survey near Structure No. 4A Lacreek National Wildlife Refuge

The attached graph and map contains water surface and creek bottom elevations in feet mean sea level (fmsl) and water velocities in feet per second (ft/s) at points along Lake Creek upstream for approximately 1000 feet from structure No. 4A. Bottom elevations were taken at the deepest part of the channel at specific locations along the creek (see attached map). Water velocities were obtained using a flow meter with the measurements made at the same location as the measurement for the bottom and water surface elevations. The velocity at each location constitutes of a single velocity measurement in the deepest part of the creek and at a point 60% above the bottom to the surface of the water. Additional velocity measurements not shown on the graph were taken 30 feet downstream from Structure No. 4A and another just below the county bridge over Lake Creek 1/2 mile east of Highway 73. The velocity below No. 4A was 2.28 ft/s and the one below the county bridge was 1.8 ft/s. While taking the flow measurement below the county bridge, we observed sediment being moved by the current.

Location	Approximate Distance from No. 4A, ft	Bottom Elevation, fmsl	Water Surface Elevation, fmsl	Water Velocity, ft/s
No. 4A	0	3036.23 (weir)	3036.68	NA
1	115	3035.13	3036.73	2.11
2	195	3035.45	3036.95	1.07
3	265	3035.79	3036.99	2.10
4	380	3035.32	3037.22	2.10
5	505	3036.00	3037.40	1.28
6	770	3036.74	3037.70	1.66
7	980	3036.41	3038.12	2.10

Old Structure 4
New Structure 4A
300 0 300 600 900 1200 1500 1800 2100 feet
N


Lake Creek near No. 4A
3038.5
3038
3037.5
3037
3036.5
3036
3035.5
3035
3034.5
Elevation, fmsl
2.5
2
1.5
1
0.5
0
Velocity, ft/s
0
250
500
750
1000
Length, ft
4A
1
2
3
4
5
6
7
Bottom elevation
Water surface
Water velocity
6/7/00

UNITED STATES GOVERNMENT

MEMORANDUM

DATE: June 13, 2000
REPLY TO: Div4sedi.600.M32
ATTN OF: Refuge Manager
Lacreek NWR
Martin, South Dakota

SUBJECT: Diversion 4a, Clean Out

TO: Maury Wright, Refuges Supervisor
Denver, CO

This letter documents conditions of Lake Creek and the Diversion 4 area for the spring of 2000.

Diversion #4a was dredged out on January 24, 2000 by O'Bryan Construction. At the March 1, 2000 water rights hearing it was agreed that the refuge would dredge twice before the next scheduled hearing on July 11-12, 2000. To prevent habitat damage it was agreed to wait until the route into the Diversion #4a site had dried sufficiently to prevent rutting and sod destruction. The access to the site was under water most of the spring. The site was visited on April 14, 2000 after several weeks of minimal precipitation. The site was drying out and would be ready in a few days. As I was planning to make dredging arrangements, the refuge received a significant precipitation event of 1.47 inches on April 18, 2000, with another 0.16 inches the next day. Precipitation received amounted to .73 inches and .64 inches, on April 23 and 29, respectively. Precipitation for May amounted to 4.41 inches. The site was too wet during May, but beginning to dry towards the end of the month. The site was inspected again on June 2,2000 and was dry enough to work. Contacts with Crescent Lake and Fort Niobrara Refuges revealed that their excavators were not available. A call and voice mail were left with a local private vendor, O'Bryan Construction on June 2, 2000. Contact was made on Monday, June 5, 2000, and the work was completed on June 8, 2000. Laser level readings were made on June 5, 2000 (see Table 1). The readings taken before and after the dredgings and over the course of a year reveal that the elevation of the stream at the old Diversion 4 site have varied only 0.06 inches, although spring runoff and significant rainfall events probably did temporarily vary the elevation more.

Table 1. Survey elevations at Diversion 4a and the site of old Diversion 4, since removed, on Lacreek National Wildlife Refuge. *

Survey Date	Bench ** Mark @ ▒ X▒	Water Elev Div 4a	Water Elev Div 4 Site	Creek Bottom
6-21-99	3040.78	3036.53	3037.44	3035.38
7-29-99	3040.78	3036.71	3037.38	3035.48
11-2-99***	3040.78	3036.66	3037.44	3035.58
6-5-00	3040.78	3036.62	3037.38	3035,08

* Surveys conducted by Rolf H. Kraft using a laser level. The original high water mark at old Diversion 4 remains constant at 3039.88 msl. Surface water north of Div #4a, but impounded by the training dike, was at an elevation of 3038.92 msl.
** Bench mark established by Niobrara Valley Consultants.
*** Survey conducted by Niobrara Valley Consultants.
All elevations corrected to mean sea level as established by Niobrara Valley Consultants.

The surveys reveal that the sediment accumulation behind Diversion 4a does not impact the stream elevation at old Diversion 4 and, therefore, has no impact environmentally nor economically on the petitioners. Mark Rath, Water Rights, South Dakota DENR, was on site June 7, 2000 and took his own survey. He found a site of bare stream bottom without accumulated sand about 300 feet upstream of old diversion 4. The stream bottom elevation at this location was the same as the weir elevation on Diversion 4a. I'll get a full report from Mark Rath.

Another dredging is planned for the week of June 26, 2000.

Rolf H. Kraft

CC: Cheryl Williss
Ernie Husmann

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

June 16, 2000

NOTICE

TO:

Cheryl Williss, Chief
Water Resources Division
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Susan Williams
Bennett County Auditor
P.O. Box 460
Martin SD 57551

Raymond Kocer
P.O. Box 388
Martin SD 57551-0388

Brett Heath
HWC 3, Box 20
Martin SD 57551

Lawrence Kocer
P.O. Box 156
Martin SD 57551

FROM: Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Scheduling of Hearing on Water Permit No. 2300-2, U.S. Fish and Wildlife Service

The Water Management Board will consider U. S. Fish and Wildlife Service's request to amend a qualification to Water Permit No. 2300-2 and Bennett County's request to rescind and terminate Water Permit No. 2300-2 on July 12, 2000. The hearing is scheduled to begin at 11:00 AM, July 12, 2000, in the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre SD. The agenda time is an estimate and may be delayed due to prior agenda items. The hearing may continue on the morning of July 13th to hear all testimony. Parties intending to attend the hearing should plan accordingly.

Water Permit No. 2300-2 authorized a structure located in the NW ¼ SE ¼ Section 24, T36N, R37W to prevent carp from moving upstream on Lake Creek. In approving the permit, the Water Management Board placed a qualification requiring removal of silt if the buildup behind the structure exceeds 50% of the height of the carp guard. The U. S. Fish and Wildlife Service has requested removal of this qualification. Bennett County and Raymond Kocer have filed opposing removal of the qualification and Bennett County has further request that the water permit be rescinded.

(continued)

If you have any questions on the scheduled hearing, please contact Diane Best, Assistant Attorney General at (605) 773-3215 or Eric Gronlund, Water Rights Program at (605) 773-3352.

c: Diane Best, Assistant Attorney General
Pamela K. Ireland, PO Box 628, Martin, SD 57551
John Kunz, U.S. Department of Interior, Office of the Solicitor, 755 Parfet St., Ste. 151, Lakewood CO 80215
Rolf Kraft, Manager, Lacreek National Wildlife Refuge, HC 5, Box 114, Martin SD 57551
Ronald Riggs, Bennett County Commissioner, Box 487, Allen, SD 57714
Tim Juhnke, Bennett County Commissioner, HWC 3, Martin, SD 57551

CERTIFICATION

I hereby certify that on June 16, 2000, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated June 16, 2000, regarding Scheduling of Hearing on Water Permit No. 2300-2, U.S. Fish and Wildlife Service, addressed as stated below:

Cheryl Williss, Chief, Water Resources Division, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, CO 80225.

Susan Williams, Bennett County Auditor, P.O. Box 460, Martin, SD 57551.

Raymond Kocer, P.O. Box 388, Martin, SD 57551-0388.

Brett Heath, HWC 3, Box 20, Martin, SD 57551.

Lawrence Kocer, P.O. Box 156, Martin, SD 57551.

Pamela K. Ireland, P.O. Box 628, Martin, SD 57551.

John Kunz, U.S. Department of Interior, Office of the Solicitor, 755 Parfet St., Ste. 151, Lakewood, CO 80215.

Rolf Kraft, Manager, Lacreek National Wildlife Refuge, HC 5, Box 114, Martin, SD 57551.

Ronald Riggs, Bennett County Commissioner, Box 487, Allen, SD 57714.

Tim Juhnke, Bennett County Commissioner, HWC 3, Martin, SD 57551.

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

Diane Best, Assistant Attorney General, Capitol Building.

Karen Schlaak

Karen Schlaak
Natural Resources Scientist

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 20th day of June, 2000

My commission expires
09/06/2004

Patty R. Bruckner
Notary Public

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF UNITED STATES FISH AND WILDLIFE SERVICE APPLICATION NO. 2300-2 (LAKE CREEK)	))))	STIPULATION

COME NOW, the parties in the above-entitled matter and hereby agree as follows:

1. That hearing in the above-entitled matter be delayed from July 12, 2000, to September 28, 2000. The parties understand and agree that no party will raise such delay as an issue against any other party at hearing.

2. That in the time period before September 28, 2000, Fish and Wildlife Service will make a good-faith effort to perform cleanout activities in the LaCreek channel at least once. This agreement extends and supplements the interim management agreement agreed upon by the parties on March 1, 2000. (Transcript attached).

3. The parties agree that so long as a good-faith effort is made to perform cleanout activities on at least one occasion before September 28, 2000, that the parties will not assert that Fish and Wildlife Service violated the condition of Water Permit 2300-2 pertaining to cleaning out the creek during this period.

4. By signature below, the parties agree this issue may be presented to the South Dakota Water Management Board on July 12, 2000. The parties agree that no further notice or hearing is required, and that an order may be entered that would approve the Stipulation, continue the hearing to September 28, 2000, and approve the interim management plan as addressed above.

Dated this 19th day of July, 2000.

John R. Kunz

John Kunz
U.S. Department of Interior
Office of the Solicitor
755 Parfet Street; Ste. 151
Lakewood, CO 80215

Dated this 3d day of July, 2000.

Pamela K. Ireland

Pam Ireland, Attorney at Law
Counsel for Bennett County
Post Office Box 313
Kadoka, SD 57543

Dated this 5th day of July, 2000.

Raymond Kocer

Raymond Kocer
Post Office Box 388
Martin, SD 57551-0388

Dated this 11 day of July, 2000

Lawrence Kocer

Lawrence Kocer
Post Office Box 156
Martin, SD 57551-0156

Dated this 5 day of July, 2000.

Brett Heath

Brett Heath
HWC 3, Box 20
Martin, SD 57551-0020

Dated this 10th day of July, 2000.

Diane Best

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

ORDER

The parties, having submitted a written Stipulation proposing to continue hearing in the above-referenced matter, and to extend and supplement the current interim management plan (by including a good-faith effort by Fish and Wildlife Service to engage in one additional cleanout before hearing), it is therefore

ORDERED that the Stipulation between the parties is approved and

FURTHER ORDERED that hearing will be held before the South Dakota Water Management Board at its regularly scheduled December meeting (now set for September 27-28, 2000) with the specific time and place to be established by the Chief Engineer, and it is

FURTHER ORDERED that the Interim Management Plan described herein is extended until the time of hearing and that said plan is hereby supplemented by adding the condition that Fish and

Wildlife Service must undertake good-faith efforts to complete at least one additional cleanout by the time of hearing.

Dated this 12th day of July, 2000.

Francis E. Brink

Francis Brink, Chairman
South Dakota Water Management Board

stipulation.db fish and wildlife service
(mjj)

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

In Matter of the Amendment to Water Permit 2300-2, Lacreek Wildlife Refuge,	HEARING

PROCEEDINGS: March 1, 2000
Matthews Training Center
523 E. Capitol
Pierre, South Dakota

BOARD MEMBERS PRESENT: Mr. Francis E. Brink, Chairman
Mr. Rodney Freeman
Mr. Dwayne A. Rollag
Mr. Leo Holzbauer

APPEARANCES:

Representing the Water Management Board: MR. JOHN GUHIN
Asst. Attorney General
500 East Capitol
Pierre, South Dakota 57501

Representing the State Division of Water Rights: MS. DIANE BEST
Asst. Attorney General
500 East Capitol
Pierre, South Dakota 57501

Representing the U.S. Fish & Wildlife Service: MR. JOHN KUNZ
U.S. Department of Interior
Office of the Solicitor
755 Parfet Street; Ste. 151
Lakewood, Colorado 80215

Also Present: Nearby landowners and other interested parties

ORIGINAL

Wednesday, March 1, 2000

MR. KUNZ: Yes, John Kunz for Fish and Wildlife Service. As sometimes happens in these things, we have some last ditch settlement negotiations under way. Ms. Best and Mr. Erbele are talking with the landowners as we speak, and Ms. Best asked if you would kindly indulge us to give us a little time to see if we can iron this out.

CHAIRMAN BRINK: Would the rest of the afternoon and part of the evening take care of that.

MR. KUNZ: I think that would be plenty sufficient; but hopefully 10, 15 minutes, whatever.

CHAIRMAN BRINK: Oh, that soon.

MR. KUNZ: We've been talking since 1:00, so hopefully we can get something -- I guess what I would request is that you guys take a break for 15 minutes or so, half hour, and then we can come and get you if we need be.

CHAIRMAN BRINK: So granted, we'll recess until 3:30. Check with us at 3:30.

(A recess was taken at this time.)

MS. BEST: At this time we would ask that the -- we've discussed a couple things, obviously, out in the hall -- more than a couple things, but at this time what we would like to do is ask the board to continue this meeting to allow for additional time for settlement negotiations.

The subject at today's hearing, though, involved

a situation where a permit condition was put on Fish and Wildlife Service's permit at Lacreek Wildlife Refuge for diversion 4A, and that condition was put on in 1997. It was a condition drafted by the board that would allow -- or would require, whenever the siltation behind the structure was more than half full, it would require a cleanout. And I'm probably not articulating the exact condition very well, but it's this cleanout condition that has proved to be a problem.

The structure was constructed in February 1999 and has been in place for a year. It's been a problem. Without going into a lot of evidence on what we would do in a future hearing, the parties are prepared to ask the board to continue its hearing until July. But in the meantime, we want to make a record on what we want to do about that cleanout condition between now and July.

And that's where we're at, sort of an interim management plan. It would not be binding on any party after the board meets in July. I mean if we go to hearing in July, whatever we're talking about for management here, we'll kind of explain how we see it fitting together as we call a couple witnesses. But we're looking at about a half hour of your time right now to make a record on that issue on this interim management plan. But we're not guaranteeing that we have it settled, but we would like the time to go back out there and spend the time on that.

The first thing I would have to tell you is the time we have agreed on is July, so that I guess puts you all on the position of scheduling it for July, if you're willing, but it would be for the regular board meeting.

CHAIRMAN BRINK: Are you talking about the board being onsite at Lacreek in July or --

MS. BEST: I had assumed that we would be here in Pierre.

CHAIRMAN BRINK: Okay. So you're asking two things then, do you want this board to take an action on a postponement or extension?

MS. BEST: What I would -- I guess I was just asking if there was any questions about the July meeting date, and if there aren't any, I will call Mark Rath and he'll explain more specifically about what the division's intentions would be with regard to this interim situation, and then the other parties would have an opportunity -- we're each intending on talking for about five or ten minutes on what our understanding is on this interim, how we want to treat this condition or qualification on the permit until we get to July to see if we can do that; if that would be acceptable to the board.

CHAIRMAN BRINK: Let's do it.

MS. BEST: I would call Mark Rath. Mark, the parties understand that -- and I believe the parties

understand that for purposes of this motion hearing we're not going to go into issues about expert qualifications or introduce exhibits, but simply that we're going to explain what we intend the management plan on that. So I'll let Mark explain what his understanding of what we intend to do, and the other parties will do the same.

MR. RATH: Okay. The issue at hand has to do with the cleanout of the structure 4A at Lacreek Wildlife Refuge. In the interim, and that being the period between now and the July Water Management Board hearing, what the parties have agreed to is that given the correct conditions for the service to go out and do the cleanout, they are going to make a good faith effort to clean out twice. And that will be cleaning out the sediment behind the carp structure, structure 4A.

What they would be looking at doing is cleaning out to a depth of four to five feet back to the first oxbow, which is about 150 to 180 feet, approximately. In the meantime, and this is where -- that's what the agreement is between the parties.

And in the meantime what water rights program staff intend to do is meet at the refuge with the service and the landowners to discuss setting up some sort of maintenance agreement concerning the sediment and sediment cleanout, specific to the number of times in a given year that the

structure is to be cleaned out, the depth that the sediment -- to the depth that it will be cleaned out to, and the distance back from the structure that the sediment will be cleaned out.

What I intend to do is sometime in May or June be onsite with representatives from the service and the landowners and try to work out an agreement so that when we come back to the board in July we have an agreement worked out considering this qualification. Any questions?

CHAIRMAN BRINK: The cleanout, what's it supposed to be doing? I know what it was intended to do, but is that just to show good faith or --

MR. RATH: At this time to meet -- the realization that there is quite a bit of sedimentation that occurs behind the structure, a lot of sediment is deposited behind the structure and the question becomes within that period of time would there be five, ten violations of the qualification of not cleaning it out when it reaches that 50 percent mark.

Essentially what the parties have agreed to is the good faith effort to clean it out twice before that period of time, at which time the landowners won't be, essentially, saying you didn't meet the qualification there and that Fish and Wildlife make a good faith effort to do the cleanout.

CHAIRMAN BRINK: Any other questions here for

mark? Where do we go from here?

MS. BEST: I think we need to have Rolf or Ray talk as well.

MR. KUNZ: I will speak for us. I just want to clarify a few things that Mr. Rath said, and I think we are in agreement. When he characterized the agreement as a good faith effort to clean out twice, I think we need to kind of refine that, you know, the things that we discussed. Well, let's suppose we have a record dry spring, which right here looks like that's a possibility. That would theoretically mean that the service would have to go out there bi-weekly, literally, or whenever that sediment rose to that fifty percent level.

The understanding was that even in conditions such as that there would only be a requirement for us to go out twice between now and the July hearing, correct? So then the other question would be, well, suppose it isn't that dry, then when do you go out? And then there's an agreement that there's a good faith effort to go out twice between now and the July hearing.

Mr. Kraft and the landowners agreed that sort of a benchmark test that they could utilize is whether they could drive a pickup truck on the ground in question. And if the pickup truck did not make ruts, then they could agree that it would be dry enough for an excavator to get in there and do

the project.

On the other hand if the pickup truck made ruts, Mr. Kraft's position is it would be too wet. And I think these gentlemen agreed that what they would do is actually get together on the ground when the landowners, for example, felt that it was dry enough to get something out there, or Mr. -- That they would contact Mr. Kraft and say, okay, it's dry enough. They would go out, take a look, hopefully they could agree with each other. If they could not, then Mr. Rath agreed to go out and mediate the situation.

MR. FREEMAN: What size pickup?

MR. KUNZ: I believe your standard half-ton pickup.

MR. FREEMAN: Your standard four-by-four, ten ton truck?

MS. BEST: This was discussed.

MR. FREEMAN: It's a good thing that it was.

MR. KUNZ: Just your standard half-ton, three-quarter ton pickup.

MR. HOLZBAUER: Full of cattle?

MR. KUNZ: No, nor cinder blocks. I think just -- I'll say this and then I'll shut up. Mr. Brink addressed the question, well, what is the purpose of the qualification in the first place. I think the intent behind the original qualification was to insure that the accumulation of sediment

behind the structure does not somehow injure the landowners, and that is a question of law. In fact, if we go to hearing we'll hear extensive evidence concerning whether that accumulation of sediment does or does not hurt the landowners.

Obviously the Service's position is, and will be if we go to a hearing that it makes not one bit of difference. Now I know these gentlemen disagree with that, and that's certainly their prerogative and we're not arguing here; I'm just stating our position. So any other questions that I could answer, I would be happy to.

CHAIRMAN BRINK: Well, it sounds like we're going to be asked very shortly to extend to July this hearing.

MR. KUNZ: I believe that's what it would be. The intent would be to try through the mediation of Mr. Rath, through him working on the ground with the landowners and with the Service to try and reach to an accommodation that would define how much, how far back -- how deep you take out the sediment, how far back you take out the sediment, how often you take out the sediment. It's necessary to get into the ground to do that, that's why we're asking for the extension until July.

If we could not reach that sort of agreement between now and July, then unfortunately we would be back before you in July on at least the Service's motion to have

the condition removed entirely, and I'm assuming at that same point in time probably the landowners' motion to rescind the permit entirely for purported violations of the permit. Once again, I'm speaking for them and I don't mean to do that, but that's where we would be in July if we couldn't reach the accommodation.

CHAIRMAN BRINK: Okay. That's my understanding then that everyone here today --

MS. BEST: I think either Brett or Ray, somebody was -- if you could, yeah.

MR. KOCER: Board members, Raymond Kocer here, landowner. I guess what we're trying to find, asking for this extension, is we're going to get a chance to have the state come out and take a look. We had a few people admit that they were not on the site. This will give us time to get your people out there to look and see what is there. I thank you and I recommend that we do get a little more time to throw rocks at each other probably.

CHAIRMAN BRINK: That answers my question. It sounds like everyone here wants to go to extension.

MS. BEST: I think we need to have Bennett County's agreement on the record.

The record should reflect that Ron Riggs is nodding his head in agreement.

CHAIRMAN BRINK: Bennett County is in agreement?

MR. RIGGS: Yes.

CHAIRMAN BRINK: And the division is in agreement?

MS. BEST: Oh, yes.

CHAIRMAN BRINK: Is there a motion?

MR. FREEMAN: I'll move to continue the matter until July, until our regular scheduled July meeting.

CHAIRMAN BRINK: Do we know when that will be?

MR. FREEMAN: Yeah, we have that down.

MR. GRONLUND: July 11th and 12th.

MR. GUHIN: Are the parties looking for approval of the interim management agreement or is not?

CHAIRMAN BRINK: Was the two time cleanout the interim management agreement, the sum total of it?

MS. BEST: Yes, we would ask for board approval of this informal agreement.

MR. FREEMAN: Then I would include that in my motion.

MR. HOLZBAUER: And I would second that.

CHAIRMAN BRINK: I suppose we better get the size of the pickup.

MR. FREEMAN: It's in the record.

CHAIRMAN BRINK: Any other discussion?

MS. BEST: Nothing further.

CHAIRMAN BRINK: All those in favor of the motion

STATE OF SOUTH DAKOTA)
) CERTIFICATE
COUNTY OF HUGHES)

I, Lynne M. Ormesher, Registered Professional Reporter, hereby certify that the foregoing pages 1 through 12, inclusive, are a true and correct transcript of my stenotype notes.

Dated at Pierre, South Dakota, this 6th day of March, 1993.

Lynne M. Ormesher, RPR

Attorney General
206914
JUL 24 2000

United States Department of the Interior

OFFICE OF THE SOLICITOR
Rocky Mountain Region
755 Parfet Street, Suite 151
Lakewood, CO 80215
TELE. (303) 231-5353
FAX (303) 231-5363

July 20, 2000

VIA FEDERAL EXPRESS

FWS.RM.1396

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

Re: FWS'S Motion to Amend Water Permit No. 2300-2

Dear Diane:

Well, it's a bit late (sorry, I just got it), but I have executed and enclosed the Stipulation delaying the hearing of the subject matter until September 28, 2000. I note that, with respect to your signature, you still need to date the same.

Thank you very much for drafting the Stipulation, and for presenting the matter to the Board at the July meeting.

Please do not hesitate to contact me if you have any questions, or if I can be of any further assistance.

Sincerely,

John R. Kunz

John R. Kunz
Attorney

Enclosure

cc: Cheryl Willis, Region 6, USFWS
Rolf Kraft, Refuge Manager, LaCreek National Wildlife Refuge (South Dakota)

(All cc's w/encl.)

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

August 2, 2000

NOTICE

TO:

Cheryl Williss, Chief
Water Resources Division
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Susan Williams
Bennett County Auditor
P.O. Box 460
Martin SD 57551

Raymond Kocer
P.O. Box 388
Martin SD 57551-0388

Brett Heath
HWC 3, Box 20
Martin SD 57551

Lawrence Kocer
P.O. Box 156
Martin SD 57551

FROM: Garland Erbele, Chief Engineer
Water Rights Program

Garland Erbele

SUBJECT: Scheduling of Hearing on Water Permit No. 2300-2, U.S. Fish and Wildlife Service

The Water Management Board will consider U. S. Fish and Wildlife Service's request to amend a qualification to Water Permit No. 2300-2 and Bennett County's request to rescind and terminate Water Permit No. 2300-2 on September 28, 2000. The hearing is scheduled to begin at 10:00 AM, September 28, 2000, in the Angostura Room, Radisson Hotel, 445 Mt. Rushmore Road, Rapid City SD. The agenda time is an estimate and may be delayed due to prior agenda items. The hearing may continue on the morning of September 29, 2000 to hear all testimony. Parties intending to attend the hearing should plan accordingly.

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

Water Permit No. 2300-2 authorized a structure located in the NW ¼ SE ¼ Section 24, T36N, R37W to prevent carp from moving upstream on Lake Creek. In approving the permit, the Water Management Board placed a qualification requiring removal of silt if the buildup behind the structure exceeds 50% of the height of the carp guard. The U. S. Fish and Wildlife Service has requested removal of this qualification. Bennett County and Raymond Kocer have filed opposing removal of the qualification and Bennett County has further requested that the water permit be rescinded.

Enclosed is a copy of the stipulation signed by all parties agreeing to continue the hearing until the September 28th Board meeting.

If you have any questions on the scheduled hearing, please contact Diane Best, Assistant Attorney General at (605) 773-3215 or Eric Gronlund, Water Rights Program at (605) 773-3352.

enclosure

c: Diane Best, Assistant Attorney General
Pamela K. Ireland, PO Box 628, Martin, SD 57551
John Kunz, U.S. Department of Interior, Office of the Solicitor, 755 Parfet St., Ste. 151, Lakewood CO 80215
Rolf Kraft, Manager, Lacreek National Wildlife Refuge, HC 5, Box 114, Martin SD 57551
Ronald Riggs, Bennett County Commissioner, Box 487, Allen, SD 57714
Tim Juhnke, Bennett County Commissioner, HWC 3, Martin, SD 57551

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

IN THE MATTER OF UNITED STATES FISH AND WILDLIFE SERVICE APPLICATION NO. 2300-2 (LAKE CREEK)	))))	STIPULATION

COME NOW, the parties in the above-entitled matter and hereby agree as follows:

1. That hearing in the above-entitled matter be delayed from July 12, 2000, to September 28, 2000. The parties understand and agree that no party will raise such delay as an issue against any other party at hearing.

2. That in the time period before September 28, 2000, Fish and Wildlife Service will make a good-faith effort to perform cleanout activities in the LaCreek channel at least once. This agreement extends and supplements the interim management agreement agreed upon by the parties on March 1, 2000. (Transcript attached).

3. The parties agree that so long as a good-faith effort is made to perform cleanout activities on at least one occasion before September 28, 2000, that the parties will not assert that Fish and Wildlife Service violated the condition of Water Permit 2300-2 pertaining to cleaning out the creek during this period.

4. By signature below, the parties agree this issue may be presented to the South Dakota Water Management Board on July 12, 2000. The parties agree that no further notice or hearing is required, and that an order may be entered that would approve the Stipulation, continue the hearing to September 28, 2000, and approve the interim management plan as addressed above.

Dated this 19th day of July, 2000.

John R. Kunz

John Kunz
U.S. Department of Interior
Office of the Solicitor
755 Parfet Street; Ste. 151
Lakewood, CO 80215

Dated this 31 day of July, 2000.

Pamela K. Ireland

Pam Ireland, Attorney at Law
Counsel for Bennett County
Post Office Box 313
Kadoka, SD 57543

Dated this 5th day of July, 2000.

Raymond Kocer

Raymond Kocer
Post Office Box 388
Martin, SD 57551-0388

Dated this 11 day of July, 2000

Lawrence Kocer

Lawrence Kocer
Post Office Box 156
Martin, SD 57551-0156

Dated this 5 day of July, 2000.

Brett Heath

Brett Heath
HWC 3, Box 20
Martin, SD 57551-0020

Dated this 10th day of July, 2000.

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

ORDER

The parties, having submitted a written Stipulation proposing to continue hearing in the above-referenced matter, and to extend and supplement the current interim management plan (by including a good-faith effort by Fish and Wildlife Service to engage in one additional cleanout before hearing), it is therefore

ORDERED that the Stipulation between the parties is approved and

FURTHER ORDERED that hearing will be held before the South Dakota Water Management Board at its regularly scheduled December meeting (now set for September 27-28, 2000) with the specific time and place to be established by the Chief Engineer, and it is

FURTHER ORDERED that the Interim Management Plan described herein is extended until the time of hearing and that said plan is hereby supplemented by adding the condition that Fish and

Wildlife Service must undertake good-faith efforts to complete at least one additional cleanout by the time of hearing.

Dated this 12th day of July, 2000.

Francis E. Brink

Francis Brink, Chairman
South Dakota Water Management Board

stipulation.db fish and wildlife service
(mjj)

CERTIFICATION

I hereby certify that on August 2, 2000, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated August 2, 2000, along with a copy of the Stipulation, regarding Scheduling of Hearing on Water Permit No. 2300-2, U.S. Fish and Wildlife Service, addressed as stated below:

Cheryl Williss, Chief
Water Resources Division
U.S. Fish & Wildlife Service
Denver Federal Center
Denver, CO 80225

Susan Williams
Bennett County Auditor
P.O. Box 460
Martin, SD 57551

Raymond Kocer
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John Kunz
U.S. Department of Interior
Office of the Solicitor
755 Parfet St., Ste. 151
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Rolf Kraft, Manager
Lacreek Ntl. Wildlife Refuge
HC 5, Box 114
Martin, SD 57551

Ronald Riggs
Bennett County Commissioner
Box 487
Allen, SD 57714

Tim Juhnke
Bennett County Commissioner
HWC 3
Martin, SD 57551

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

Diane Best, Assistant Attorney General, Capitol Building.

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 3rd day of August, 2000

Karen Schlaak
Notary Public

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

KAREN SCHLAAK, Notary Public
My Commission Expires
April 1, 20[illegible]

STATE OF SOUTH DAKOTA

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

MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

SEP 2000
WATER RIGHTS
PROGRAM
Pierre, SD

September 18, 2000

John R. Kunz
US Department of the Interior
Office of the Solicitor
Rocky Mountain Region
577 Parfet Street, Suite 151
Lakewood, CO 80215

Re: **Fish and Wildlife Service Motion to Amend Water Permit #2300-2**

Dear Mr. Kunz:

On August 18, 2000, you asked the Department of Environment and Natural Resources for information regarding the DENR's handling of other structures or impoundments. This letter is intended to respond to your request. Each of your requests is set forth in bold print, followed by the DENR's response.

1. **A list of any and all other structures or impoundments on Lake Creek, including their locations, and the amounts of water impounded by each such structure.**

Attached is a chart listing all state issued water permits and licenses on Lake Creek. In addition, you will find documents pertaining to each of the three water rights on Lake Creek that are not held by the US Fish and Wildlife Service.

A. The application and license for vested right 573-2, is enclosed. According to the application, the irrigation included plugs, tubes, and dams. This water right was granted pursuant to SDCL 46-2A-16 and SDCL 46-2A-17. Other documents pertaining to this vested water right are located in the Division of Water Rights files. If you would like further documents from this file or access to this file, please let me know.

B. Enclosed is the application for a water permit for the Todd Ranch. This application is also a vested right. I am also enclosing a Water License issued in 1962 for this vested right. Further, this vested right was also subject to the provisions of SDCL 46-2A-16 and SDCL 46-2A-17. Accordingly,

a second license was issued in 1992. A copy of that license is enclosed and was issued in the name of Todd Hoyt. Again, other documents are contained in the DENR file. If you would like access to these documents, we can make arrangements accordingly.

C. Enclosed is the application for permit filed by Carl L. Johnson. This is also a vested water claim. A copy of the initial license, issued in 1992, is enclosed. Although the microfilm photocopy of the drawings are not real clear, it is apparent that there are dams included within this irrigation right. The subsequent vested right license for this water right was issued in 1992 and is also enclosed. Again, this water right was validated under SDCL 46-2A-16 and SDCL 46-2A-17. There are also additional documents in the DENR file on this matter.

2. **List any and all permits for such structures on Lake Creek for which the Chief Engineer has recommended or mandated as a permit condition that areas upstream from the structures be dredged on an annual or other basis.**

The Chief Engineer has neither recommended nor mandated a permit condition regarding dredging on an annual or other basis for the permits on Lake Creek (other than permit No. 2300-2).

3. **A list of any and all permits for such structures on Lake Creek for which the Chief Engineer has recommended or mandated as a permit condition that some sort of maintenance be conducted on an annual or other basis.**

The Chief Engineer has neither recommended nor mandated any specific maintenance schedule for the permits listed on Lake Creek (other than permit No. 2300-2). Each of these permits would be subject to the provisions of SDCL ch. 46-7-3 through SDCL 46-7-5.3.

4. **A list of any and all structures on creeks, rivers, or streams other than Lake Creek for which the Chief Engineer has recommended or mandated as a permit condition that: (a) areas upstream from the structures be dredged on an annual or other basis; and/or (b) some sort of maintenance be conducted on an annual or other basis.**

The DENR files contain several thousand vested water rights, water permits, flood control permits, and dam safety files. It would be unduly burdensome to review each of the water files in order to determine which specific water files include conditions regarding dredging or maintenance. However, some general observations can be made.

1. Dredging is not required on an annual basis for any permitted structure. However, structures are subject to maintenance requirement, including dredging when necessary.

2. Flood control permits, issued under SDCL 46-2A-11 and SDCL 46-5-47 contain operation and maintenance requirements. Examples of flood control permits are attached.

3. Existing water rights are subject to maintenance requirements. Upon inspection, maintenance requirements are identified and explained to water permit holders. When water permit holders do not comply with informal attempts to resolve the matter, the Chief Engineer issues a notice to complete repairs or make other improvements. Examples of these written notices are attached. In the event that the written request from the Chief Engineer does not result in compliance, enforcement efforts are undertaken through the South Dakota Water Management Board. The documents provided regarding the Lone Tree Ditch Company are examples only. These situations have occurred many times in the past and the water rights files contain several examples.

4. Specific rules apply to safety of dams (25 feet or more). ARSD 74:02:08. Plans and specifications for new dams must be submitted to the DENR. The DENR conducts periodic inspections. The DENR maintains files for each of the hundreds of dams for which it exercises regulatory authority. Most of these files contain documents pertaining to maintenance and improvements. In the event that the dam owner does not comply with the maintenance or improvement requirements requested by the DENR, further action is taken before the South Dakota Water Management Board or the courts. I have not included an example of any of these dam maintenance situations. In the event, however, that you wish to review these files please let me know. I will make arrangements for you to conduct such review.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB:js
cc:
Pam Ireland
Brett Heath
Raymond Kocer
Lawrence Kocer

bcc: Garland Erbele
j-ltr84.db John Kunz

STATE OF SOUTH DAKOTA

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

MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

September 18, 2000

Pam Ireland
Bennett Co States Atty
PO Box 688
Martin SD 57551-0688

Brett Heath
HWC 3 Box 20
Martin SD 57551

Raymond Kocer
PO Box 388
Martin SD 57551-0388

Lawrence Kocer
PO Box 156
Martin SD 57551-0156

RE: **Fish and Wildlife Service Motion to Amend Water Permit #2300-2**

Enclosed find the State responses to several questions of Fish and Wildlife Service. In August, John Kunz posed several questions to me regarding the upcoming hearing. I am providing you with copies to the DENR's responses. As you can see from the questions and responses, the Fish and Wildlife Service apparently intends to show that it was singled out for unique and burdensome regulatory treatment.

As you are aware, the DENR will take the position that, given the circumstances of this case, unique treatment is warranted. Further, the dredging is not unduly burdensome.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB:js
j-ltr85.db

bcc: Garland Erbele

Lake Creek Water Permits and Licenses

573-2	Micheel Bros.	Sec 23 36N-38W	Irrigation	5.87 cfs	411.2 acres	9/1/1950	Bennett
767-2	Carl L Johnson	Sec 20 36N-37W	Irrigation	2.51 cfs	176 acres	1/1/1898	Bennett
768-2	Harry and Sara Todd	Sec 20 36N-37W	Irrigation	1.47 cfs	103 acres	1/1/1898	Bennett
US2-2	USFWS	Sec 25 37N-36W	Fish & Wildlife Production	0.00 cfs	0.00 acres	10/16/1934	Bennett
US3-2	USFWS	Sec 25 37N-36W	Fish & Wildlife Production	0.00 cfs	0.00 acres	12/13/1935	Bennett
2147-2	USFWS	Sec 11 36N-36W	Fish & Wildlife Production	0.00 cfs	0.00 acres	11/1/1990	Bennett
2300-2	USFWS	Sec 24	Other	0.00 cfs	0.00 acres	2/1/1994	Bennett

Form 2—Application for Permit to Appropriate Water—Original

No. 573-2

Water Division No. 2 Little White River District

(Blanks to be Filled by the Engineer for the S. R. C.)

Vested Right

FEB 9 1960 8:00 A.M.

STATE WATER RESOURCES COMM.

APPLICATION FOR PERMIT

To Appropriate Water within the State of South Dakota

(NOTE—Draw a line through items not applicable.)

1. Name of applicant Carl A. Michael

Postoffice address Merriman, County Bennett, State Nebtaska

I. If a corporation

(a) Name of same

(b) Date and place of incorporation

(c) Amount of capital stock

(d) Amount paid in

(e) Names and addresses of directors

(NOTE—A certified copy of articles of incorporation must accompany the application.)

II. Method of accomplishing the work and financial resources of the applicant:

(a) Method of accomplishing work (Whether by contract, employment of others, or by direct labor)

Already Accomplished

~~(b) Cash on hand, $~~ ~~(c) Treasury stock, $~~

~~(d) Bonds to be issued, $~~ ~~(e) Other resources, $~~

2. Name of diversion work C.A. Michael Irrigation Project number 1

3. Amount of water claimed ~~6.06~~ ok 6.06 maximum allowable cubic feet per second or 1697.6 Acre Feet

4. Source of water supply Springs and surface runoff from local watersheds

5. Location of point of diversion See attached sheet #1

on both banks Bennett County.

6. Annual period or periods during which water is to be used Any time flow occurs during annual period.

7. To be used for:

I. Irrigation or domestic use: Gravity, overhead sprinkling or combination system? Irrigation, Gravity

(a) Number of acres to be irrigated 424.4 acres.

(b) Legal subdivisions to be irrigated See attached sheet #2

(NOTE—A list of lands to be irrigated, giving each subdivision and fraction with acreage thereof, should be written here, or may be appended as a part of this application. Same must also be shown in accompanying map.)

(c) Statement as to domestic use (giving location, etc.)

II. Stockwatering, mining, milling, power, fish culture, fire protection and public recreation:

(a) Nature of use Name any of the above uses claimed

(b) Amount of power to be generated horse power.

Amount claimed for engine cooling

(c) Location of plant

(d) Method of developing power

(e) Point where water will be returned to stream

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ORIGINAL RECORD AND WAS MICROFILMED IN THE REGULAR COURSE OF BUSINESS ACCORDING TO THE PROVISIONS OF SECTION 28.1-27.1 OF THE SOUTH DAKOTA LAW. IT IS FURTHER CERTIFIED THAT THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS WAS CARRIED ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR REPRODUCTIONS. REDUCTION 25:1 ROLL NO. 13 DATE MICROFILMED 3-11-91

8. Estimated cost of work:

(a) ~~Head Gates, $~~ (b) ~~Pumping plant, $~~

(c) ~~Fluming, $~~ (d) ~~Canal earth, $~~ ~~Rock, $~~

(e) Other structures Plugs and tubes $3000.00 ~~Total, $~~

9. Description of diversion works:

I. Nature of works: (Reservoir, dam, ditch, flume, pumping plant, etc.)

Plugs access channels located within the irrigable area hold up water causing overflow and subirrigation.

II. Dimensions of works:

~~(a) Dam: Height feet; length at bottom feet; length at top feet; thickness at bottom feet; thickness at top feet; slope at front water face ; slope at back face material used in construction~~

~~(b) Reservoir: Capacity when filled acre feet. Surface area at highwater mark acres.~~

DEPTH AT OUTLET-FEET	SURFACE AREA AT EACH FEET DEPTH AT OUTLET—ACRES	ACRE-FEET CAPACITY

~~(c) Head gate: Width feet; height feet; Material~~

~~(d) Canal: Total length miles.~~

LOCATION BELOW HEADGATE	DEPTH	BOTTOM WIDTH	WIDTH AT WATER-LINE	GRADE PER MILE
At Mile	feet	feet	feet	feet
At Mile	feet	feet	feet	feet
At Mile	feet	feet	feet	feet
At Mile	feet	feet	feet	feet
At Mile	feet	feet	feet	feet
At Mile	feet	feet	feet	feet

(Give dimensions where reductions in size are made.)

10. Time required for completion of work already completed.

11. Time required for complete application of water to the proposed beneficial use being applied.

12. ~~Choice of newspaper for publication of notice of intention to appropriate~~

STATE OF SOUTH DAKOTA }
County of Bennett } ss.

I, Carl A. Michael, being first duly sworn on my oath depose and say: That my relation to the above described undertaking is that of owner, that I have read the above foregoing statement, examined the map accompanying the same, and that I know of my own personal knowledge that the matters therein stated and shown are true.

Signed Carl A. Michael

Subscribed and sworn to before me this 30th day of January 1960

[signature]
Notary Public (or other qualified officer.)

*Each diversion must have a headgate or measuring device.

471

REPRODUCTIONS. REDUCTION 25% ROLL NO. 23 3-19-80 Alexander Palmer CAMERA OPERATOR

Remarks by State Water Resources Commission:

"Vested Right Claimed". Under South Dakota Water Laws, Chapter 43a, Sections 61.0102 (7)(e) & 61.0106 recognizes the "vested right claim" since the water was used during the 3-year period prior to July 1, 1955. A record of this right is hereby made in the office of the Water Resources Commission; however, the priority use of water by the "vested right claimant" is junior to other water right holdings on Lake Creek, and the use of water is limited by the water needs of such prior water right holdings.

STATE OF SOUTH DAKOTA
County of Hughes } ss.

Pierre, South Dakota, April 1, 1960

This is to certify that the foregoing application was received by the Commission at 9:00 o'clock A m. upon the 2nd day of February, 1960

State Water Resources Commission
By: [signature]
Chief Engineer, Executive Officer

Number of permit 573-2

Date of first receipt of application February 2, 1960

Date of return to applicant for correction, amendments or changes required as follows: —, 19

Date of receipt of corrected application —, 19

Date from which applicant may claim right September, 1950

Approved April 1, 1960, Recorded in Book 5 Page 333

This is to certify that we have examined the foregoing application for a permit to appropriate water of the State of South Dakota, and we hereby grant the same as stated herein, subject, however, to the following limitations and conditions:

1st. The equivalent of at least one-fifth of the work above specified is ~~to be~~ completed ~~on or before~~ , ~~19~~

2nd. The whole of said work is ~~to be~~ completed ~~on or before~~ , ~~19~~

3rd. The limit of time for proof of beneficial use of water appropriated in accordance herewith is Completed, ~~19~~

4th. The water appropriated shall be used for the purpose of irrigation

5th. The prior right of all persons who, by compliance with the laws of the State of South Dakota, have acquired a right to the use of water must not be injuriously affected by this appropriation.

6th. The amount of the appropriation herein granted shall not exceed 6.05 cubic feet per second; neither shall it exceed the capacity of the above described system of diversion works, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of the best husbandry; and further, said appropriation must be limited to not more than one-seventieth (1/70) of one cubic foot of water per second of time for each acre of land to which water ~~is~~ was actually and beneficially applied for irrigation on or before June 30, 1955; said water to be used during the following described annual period:

whenever available during irrigation season

Witness my hand this 1st day of April, 1960

State Water Resources Commission
By: [signature]
Chief Engineer, Executive Officer

Certificate of Construction Issued April 1, 1960

LAW 1-27-4, IT IS FURTHER CERTIFIED THAT THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS WAS IN A MANNER AND ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT HIGROPHOTOGRAPHIC REPRODUCTIONS. REDUCTION 25:1 ROLL NO. 13 3-19-82 DATE MICROFILMED [signature] OPERATOR

SOUTH DAKOTA

VESTED WATER RIGHT NO. 573-2 FOR IRRIGATION

Date of Receipt of Claim February 2, 1960.

Date of Validation March 4, 1992.

The Water Management Board validated Vested Water Right Claim No. 573-2 for irrigation purposes for Micheel Bros., HC 61, Box 10, Merriman NE 69218 with the following limitations, conditions and qualifications:

1. Vested Water Right No. 573-2 appropriates 5.87 cubic feet of water of water from Lake Creek and dry draws to irrigate 411.2 acres. The points of diversion are located between the SW 1/4 SW 1/4 Section 23 and the SE 1/4 SW 1/4 Section 24; all in T36N-R38W. The land irrigated is located in the S 1/2 Section 23; N 1/2 NW 1/4, N 1/2 NE 1/4 Section 26; SW 1/4 Section 24; all in T36N-R38W.

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. Water is to be used during the following annual period: January 1 - December 31.

3. The priority date of the Vested Water Right is September 1, 1950.

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 may not be unlawfully impaired by this appropriation.

QUALIFICATION

The priority use of water by the vested right claimant is junior to other water right holdings on Lake creek, and the use of water is limited by the water needs of such prior water right holdings.

WATER MANAGEMENT BOARD

By: [signature] Chief Engineer

MAY 12 1992
date

Division of Water Rights
Dept. of Environment and Natural Resources

AND ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROPHOTOGRAPHIC REPRODUCTIONS. REDUCTION 25:1 ROLL NO. 11-24 7-1-92 DATE MICROFILMED [signature] CAMERA OPERATOR

Form 8—Application for Permit to Appropriate Water—Original

RECEIVED
MAY 13 1982
STATE WATER RESOURCES COMM.
PIERRE, SOUTH DAKOTA

No. 168-

Water Division No. 2 White River District
(Blanks to be Filled by the Engineer for the W. R. C.)

APPLICATION FOR PERMIT

To Appropriate Water within the State of South Dakota

(NOTE—Draw a line through items not applicable.)

1. Name of applicant Harlan C. Todd & Nellie G. Todd

Postoffice address Martin, County Bennett, State So. Dak.

I. If a corporation

(a) Name of same

(b) Date and place of incorporation

(c) Amount of capital stock

(d) Amount paid in

(e) Names and addresses of directors

(NOTE—A certified copy of articles of incorporation must accompany the application.)

II. Method of accomplishing the work and financial resources of the applicant:

(a) Method of accomplishing work (Whether by contract, employment of others, or by direct labor)

Completed

(b) Cash on hand, $ (c) Treasury stock, $

(d) Bonds to be issued, $ (e) Other resources, $

2. Name of diversion work Ruff Ditch

3. Amount of water claimed 1.7 cubic feet per second

4. Source of water supply Lake Creek & tributaries

5. Location of point of diversion S61PW1000' from the NE corner, Sec. 20, T36N, R37W; [illegible] on Left bank Bennett County.

6. Annual period or periods during which water is to be used April to November

7. To be used for:

I. Irrigation or domestic use: Gravity, overhead sprinkling or combination system? Gravity

(a) Number of acres to be irrigated 119.[illegible] acres.

(b) Legal subdivisions to be irrigated See back page for description.

(NOTE—A list of lands to be irrigated, giving each subdivision and fraction with acreage thereof, should be written here, or may be appended as a part of this application. Same must also be shown on accompanying map.)

(c) Statement as to domestic use (giving location, etc.) SE¼ SE¼ 31 acres Sec. 17

NE¼ SE¼ 2 acres Sec. 20

II. Stockwatering, mining, milling, power, fish culture, fire protection and public recreation:

(a) Nature of use
Name any of the above uses claimed

(b) Amount of power to be generated horse power.

Amount claimed for engine cooling

(c) Location of plant

(d) Method of developing power

(e) Point where water will be returned to stream

V/R

ORIGINAL RECORD AND NOT MICROFILMED IN THE REGULAR COURSE OF BUSINESS ACCORDING TO THE PROVISIONS OF SOUTH DAKOTA COMPILED LAW 1-27-4. IT IS FURTHER CERTIFIED THAT THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORD WAS IN A [illegible] AND ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROPHOTOGRAPHIC REPRODUCTIONS. REDUCTION 25:1 ROLL NO. 14 3-22-82
DATE MICROFILMED

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8. Estimated cost of work:

(a) Head Gates, $..... (b) Pumping plant, $.....

(c) Fluming, $..... (d) Canal-earth, $..... Rock, $.....

(e) Other structures .....$..... Total, $.....

9. Description of diversion works:

I. Nature of works: (Reservoir, dam, ditch, flume, pumping plant, etc.)

Ditches and small dikes plus storage dam.

II. Dimensions of works.

(a) Dam: Height 20' feet; length at bottom 300 feet; length at top 600 feet; thickness at bottom ..... feet; thickness at top 12 feet; slope at front water face 3:1; slope at back face 2:1 material used in construction compacted earth & clay

(b) Reservoir: Capacity when filled 50 acre feet. Surface area at highwater mark 7.9 acres.

DEPTH AT OUTLET-FEET	SURFACE AREA AT EACH ..... FEET DEPTH AT OUTLET—ACRES	ACRE-FEET CAPACITY

(c)* Head gate: Width ..... feet; height ..... feet; Material .....

(d) Canal: Total length ..... miles.

LOCATION BELOW HEADGATE	DEPTH	BOTTOM WIDTH	WIDTH AT WATER-LINE	GRADE PER MILE
At ..... Mile	..... feet	..... feet	..... feet	..... feet
At ..... Mile	..... feet	..... feet	..... feet	..... feet
At ..... Mile	..... feet	..... feet	..... feet	..... feet
At ..... Mile	..... feet	..... feet	..... feet	..... feet
At ..... Mile	..... feet	..... feet	..... feet	..... feet
At ..... Mile	..... feet	..... feet	..... feet	..... feet

(Give dimensions where reductions in size are made.)

10. Time required for completion of work Completed years.

11. Time required for complete application of water to the proposed beneficial use completeyears

12. Choice of newspaper for publication of notice of intention to appropriate .....

Not applicable

STATE OF SOUTH DAKOTA }
County of Bennett } ss.

I, Harlan C. Todd, being first duly sworn on my oath depose and say: That my relation to the above described undertaking is that of owner, that I have read the above foregoing statement, examined the map accompanying the same, and that I know of my own personal knowledge that the matters therein stated and shown are true.

Signed Harlan C. Todd

Subscribed and sworn to before me this 24th day of May 1962

Mamie B. Long
Notary Public (or other qualified officer.)

*Each diversion must have a headgate or measuring device.

ROLL NO. 14 3-22-85 THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROPHOTOGRAPHY

Remarks by State Water Resources Commission:

"VESTED RIGHT" CLAIMED

THIS PERMIT RECOGNIZES YOUR "VESTED RIGHT" CLAIM AS PROVIDED IN STATE LAW, WITH THE PRIORITY INDICATED BASED ON AFFIDAVITS ~~[illegible]~~ SUBMITTED WITH THE PERMIT

STATE OF SOUTH DAKOTA
County of HUGHES } ss.

Pierre, South Dakota, MAY 31, 1962

This is to certify that the foregoing application was received by the Commission at 10:15 o'clock a.m. upon the 25TH day of MAY, 1962

State Water Resources Commission

By: Burton L. Jones
for Chief Engineer, Executive Officer

Number of permit 768-2

Date of first receipt of application MAY 25, 1962

Date of return to applicant for correction, amendments or changes required as follows: —, 19

Date of receipt of corrected application —, 19

Date from which applicant may claim right ~~[illegible]~~ ~~[illegible]~~ 1898, ~~[illegible]~~

Approved MAY 31, 1962, Recorded in Book 7 Page 119

This is to certify that we have examined the foregoing application for a permit to appropriate water of the State of South Dakota, and we hereby grant the same as stated herein, subject, however, to the following limitations and conditions:

1st. The equivalent of at least one-fifth of the work above specified is ~~to be~~ completed ~~on or before~~ , ~~19~~

2nd. The whole of said work is ~~to be~~ completed ~~on or before~~ , ~~19~~

3rd. The limit of time for proof of beneficial use of water appropriated in accordance herewith is COMPLETED, ~~19~~

4th. The water appropriated shall be used for the purpose of IRRIGATION

5th. The prior right of all persons who, by compliance with the laws of the State of South Dakota, have acquired a right to the use of water must not be injuriously affected by this appropriation.

6th. The amount of the appropriation herein granted shall not exceed 1.7 cubic feet per second; neither shall it exceed the capacity of the above described system of diversion works, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of the best husbandry; and further, said appropriation must be limited to not more than one-seventieth (1/70) of one cubic foot of water per second of time for each acre of land to which water ~~is~~ actually and beneficially applied for irrigation on or before JUNE 30, 1955; said water to be used during the following described annual period:

APRIL TO NOVEMBER

Witness my hand this 31ST day of ~~[illegible]~~ MAY, 1962

State Water Resources Commission

By: [signature]
Chief Engineer, Executive Officer

Certificate of Construction issued MAY 31, 1962

Water License issued MAY 31, 1962

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REPRODUCTIONS. ... THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROPHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS WAS IN A ... REDUCTION 25:1 ROLL NO 14 3-22-82 DATE MICROFILMED

Remarks by the Applicant:

7. To be used for:

I.

(b) Legal subdivisions to be irrigated.

$SE\frac{1}{4}$ $SW\frac{1}{4}$--10 acres; $SW\frac{1}{4}$ $SE\frac{1}{4}$--24.0 acres; $SW\frac{1}{4}$ $SW\frac{1}{4}$--8 acres

$SE\frac{1}{4}$ $SE\frac{1}{4}$--26 acres; $E\frac{1}{2}$ $SE\frac{1}{4}$--18.4 acres Sec. 16, T36N, R37W

$SE\frac{1}{4}$ $SE\frac{1}{4}$--31 acres- Sec. 17; $NE\frac{1}{4}$ $SE\frac{1}{4}$--2 acres-Sec. 20.

STATE OF SOUTH DAKOTA - BUREAU OF ADMINISTRATION - OFFICE OF RECORDS MANAGEMENT - CERTIFICATE OF AUTHENTICITY
THIS IS TO CERTIFY THAT THE MICROPHOTOGRAPHIC IMAGE APPEARING ON THIS SLIDE OF MICROFILM IS AN ACCURATE REPRODUCTION OF THE ORIGINAL RECORD AND WAS MICROFILMED IN THE REGULAR COURSE OF BUSINESS ACCORDING TO THE PROVISIONS OF SOUTH DAKOTA COMPILED LAW 1-2/-4. IT IS FURTHER CERTIFIED THAT THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS WAS IN AND ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROPHOTOGRAPHIC REPRODUCTIONS. REDUCTION 25:1 ROLL NO. 14 1-22-82 [illegible]

Form No. 24.

STATE OF SOUTH DAKOTA

WATER LICENSE No. 768-2

WHEREAS, On the 25th day of May A. D. 19 62

Harlen C. and Nellie G. Ford

of Martin County of Bennett and State of South Dakota duly made application (No 768-2) to us for a Vested Right permit to use 1.7 cubic feet per second of the waters of Lake Creek and tributaries

County of Bennett, State of South Dakota, for irrigation purposes; and

WHEREAS, On the 31st day of May A. D. 19 62

Vested Right Permit No. 768-2 was issued to said applicant for the diversion of said water, and providing for the completion of the works of diversion therein described on or before the xxxxxxxxxxx recognizing day of xxxxx A. D. 19 xxxxx and for the application to beneficial use of said water on or before the xxxxxxxxxxx day of xxxxx A. D. 19 xxxxx and,

WHEREAS, On the 25th day of May A. D. 19 62 the holder of said permit duly made proof of the completion of adequate works for the diversion of 1.7 cubic feet per second of said waters, as evidenced by our Certificate No. 768-2 dated May 31, 1962 confirming the completion of works of sufficient capacity for diverting and conveying to the place of intended use 1.7 cubic feet per second of water, with date of priority of 1898 and xxx and,

WHEREAS, On the 25th day of May A. D. 19 62 proof was duly made of the application to beneficial use of 1.7 cubic feet per second of said water; for irrigation of 119.4 acres in portions of Section 16, 17 and 20, T96N, R37W

REPRODUCTIONS, REDUCTION 25:1 ROLL NO 74 3-22-82 DATE MICROFILMED

NOW, THEREFORE, By the virtue of the authority vested in us by the laws of the State of South Dakota,

We hereby grant and confirm to Harian C. and Nellie G. Todd

of Martin the holder and owner of said permit No. Vested Right 768-2

a water right, dating from 1898 to the use of 1.7

cubic feet per second of the waters of Lake Creek and tributaries

in the County of Bennett and State of South Dakota, or so much thereof as may be

necessray for the purposes hereinbelow mentioned, to be diverted at a point S61° W 1000' from the NE corner, and a point N4° W 1420' from the SE corner Section 20, T36N, R37W

and conducted to and upon Sections portions of 16, 17 and 20, T36N, R37W, more specifically described in the Certificate of Completion of Works

for the purpose of irrigation

subject, however to the laws of the State of South Dakota applicable to a license for the use of the waters of the State, and subject, also to the local or community customs, rules and regulations which have been or may be adopted from time to time by a majority of the users from a common source of supply, canal or lateral from which such water may be taken, when such rules and regulations have for their object the economical use of such water.

WITNESS, My hand and seal of our office at Pierre, South Dakota, this 31st day of May A. D. Nineteen Hundred and sixty-two

State Water Resources Commission

By:

Chief Engineer, Executive Officer
J..W. GRIMES

STATE OF SOUTH DAKOTA

Water License No.

To

Source of supply County

Amt c.f.s.

Point of Diversion

Place of Use

Purpose

Date of Priority

Recorded

In Book of Page

AND ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROPHOTOGRAPHIC REPRODUCTIONS. REDUCTION 25:1 ROLL NO. 14 3-22-82 DATE MICROFILMED

Form No. 20.

Permit No. 768-2

Water Division No. 2 White River Water District

Certificate of Completion of Works

TO ALL WHOM IT MAY CONCERN:

This is to Certify, That Harlan C. and Nellie G. Todd

of Martin, County of Bennett, and State of South Dakota, the holder of Vested Right Permit No. 768-2 issued upon Application No. 768-2 bearing date of priority of 1898, authorizing the diversion of 1.7 cu. ft. per second of the waters of Lake Creek and tributaries County of Bennett, State of South Dakota, at a point S61° W 1060' from the NE corner, Sec.20, T36N, R37W; and a point N 4° W 1420' from the SE corner, Sec.20, T36N, R37W for irrigation purposes, have fully complied with the provisions of the laws of the State of South Dakota relating to proof of completion of the works of diversion set out and described in said Permit; that said works are recognized as satisfactory for diverting and conveying to the place of intended use 1.7 cu. ft. per second of water; and that the lands proposed to be irrigated by the use of said water are described as follows, to-wit: All in T36N, R37W

Section 16	SE¼ SW¼	10.0	acres
	SW¼ SE¼	24.0	"
	SW¼ SW¼	8.0	"
	SE¼ SE¼	26.0	"
	F¼ SE¼	15.4	"
Section 17	SE¼ SE¼	31.0	"
Section 20	NE¼ SE¼	2.0	"
		119.4	"

Witness my hand this 31st day of May A. D. 1962

State Water Resources Commission

By:

Chief Engineer, Executive Officer
J. W. GRIMES

480

AND ON MICROFILM WHICH MEET THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS HAS IN A REPRODUCTIONS. REDUCTION 25:1 ROLL NO. 14 3-22-82 DATE MICROFILMED

STATE OF SOUTH DAKOTA

VESTED RIGHT WATER LICENSE NO. 768-2 FOR IRRIGATION

(1) Todd Hoyt of 650 Ember Lane, Lahabra, CA 90631 made Appl[illegible]tion No. 768-2, May 25, 1962 for a vested right claim to appropriate 1.7 cubic feet of water per second from Lake Creek and tributaries, Bennett County, South Dakota for irrigation purposes. Vested Water Right No. 768-2 was validated December 4, 1991 with a priority date of January 1, 1898. 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 applicant is entitled to divert 1.47 cubic feet of water per second for beneficial use. The location of the diversion point is 725'W and 400'S of the NE corner of Section 20, T36N, R37W (NE 1/4 NE 1/4)

The location of the irrigated acreage is:

T36N, R37W Section 16	SE 1/4 SW 1/4	12 Acres
	SW 1/4 SW 1/4	5 Acres
	SW 1/4 SE 1/4	24 Acres
	NE 1/4 SE 1/4	18 Acres
	SE 1/4 SE 1/4	13 Acres
Section 17	SE 1/4 SE 1/4	31 Acres
	Total----------	103 Acres

(3) Pursuant to Section 46-5-30.1 Todd Hoyt of 650 Ember Lane, Lahabra, CA 90631 the holder(s) and/or owner(s) of Vested Water Right No. 768-2 is issued a license to appropriate 1.47 cubic feet of water per second from Lake Creek and tributaries with a priority date of January 1, 1898 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. 768-2 and subject to South Dakota State Law.

JOHN HATCH, Chief Engineer
Water Rights Division
Department of Environment and
Natural Resources

FEB 27 1992

THIS IS TO CERTIFY THAT THE MICROGRAPHIC IMAGE APPEARING ON THIS SLIDE OF MICROFILM IS AN ACCURATE REPRODUCTION OF THE ORIGINAL RECORD AND WAS MICROFILMED IN THE REGULAR COURSE OF BUSINESS ACCORDING TO THE PROVISIONS OF SECTION 1-27-4 OF THE SOUTH DAKOTA CODIFIED LAWS. IT IS FURTHER CERTIFIED THAT THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS WAS IN A MANNER AND ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF ADMINISTRATIVE RULES OF SOUTH DAKOTA 10.04:01 AND 10.04:02 FOR MICROGRAPHIC REPRODUCTIONS.

REDUCTION RATIO 25:1
ROLL NUMBER 11-23
DATE MICROFILMED 4-22-92
CAMERA OPERATOR SIGNATURE Jan R. Kongo

Form 3—Application for Permit to Appropriate Water—Original

RECEIVED
MAY 14 1962
8:11 am
STATE WATER RESOURCES COMM.
PIERRE, SOUTH DAKOTA

No. 767-2

Water Division No. 2 WHITE RIVER District
(Blanks to be Filled by the Engineer for the W. R. C.)

APPLICATION FOR PERMIT

To Appropriate Water within the State of South Dakota

(NOTE—Draw a line through items not applicable.)

1. Name of applicant ~~R. H. & R. M. Johnson~~ Carl I. Johnson

Postoffice address Martin, County Bennett, State S. Dak.

I. If a corporation

(a) Name of same

(b) Date and place of incorporation

(c) Amount of capital stock

(d) Amount paid in

(e) Names and addresses of directors

(NOTE—A certified copy of articles of incorporation must accompany the application.)

II. Method of accomplishing the work and financial resources of the applicant:

(a) Method of accomplishing work (Whether by contract, employment of others, or by direct labor)

(b) Cash on hand, $ (c) Treasury stock, $

(d) Bonds to be issued, $ (e) Other resources, $

2. Name of diversion work Ruff Ditch

3. Amount of water claimed 2.59 cubic feet per second

4. Source of water supply Lake Creek and tributaries

5. Location of point of diversion S 61° W 1,000' from the NE¼, Sec.20, T36N, R37W; N 40° E, 2,400' from SW Corner Sec.21, T36N, R37W on left bank Bennett County.

6. Annual period or periods during which water is to be used April to November

7. To be used for:

I. Irrigation or domestic use: Gravity, overhead sprinkling or combination system? gravity

(a) Number of acres to be irrigated 180 acres.

(b) Legal subdivisions to be irrigated (see back)

(NOTE—A list of lands to be irrigated, giving each subdivision and fraction with acreage thereof, should be written here, or may be appended as a part of this application. Same must also be shown on accompanying map.)

(c) Statement as to domestic use (giving location, etc.)

II. Stockwatering, mining, milling, power, fish culture, fire protection and public recreation:

(a) Nature of use [illegible]
Name any of the above uses claimed

(b) Amount of power to be generated horse power.

Amount claimed for engine cooling

(c) Location of plant

(d) Method of developing power

(e) Point where water will be returned to stream

REPRODUCTIONS: REDUCTION 25:1 ROLL NO. 14 3-22-82 DATE MICROFILMED

482

8. Estimated cost of work:

(a) Head Gates, $_____ (b) Pumping plant, $_____

(c) Fluming, $_____ (d) Canal-earth, $_____ Rock, $_____

(e) Other structures _____ $_____ Total, $_____

9. Description of diversion works:

I. Nature of works: (Reservoir, dam, ditch, flume, pumping plant, etc.)

Approx. 2½ miles ditches - series of small dikes impound water for domestic use and irrigation of adjacent meadows.

II. Dimensions of works.

(a) Dam: Height _____ feet; length at bottom _____ feet; length at top _____ feet; thickness at bottom _____ feet; thickness at top _____ feet; slope at front water face _____; slope at back face _____ material used in construction _____

(b) Reservoir: Capacity when filled _____ acre feet. Surface area at highwater mark _____ acres.

DEPTH AT OUTLET-FEET	SURFACE AREA AT EACH ____ FEET DEPTH AT OUTLET—ACRES	ACRE-FEET CAPACITY

(c)* Head gate: Width _____ feet; height _____ feet; Material _____

(d) Canal: Total length _____ miles.

LOCATION BELOW HEADGATE	DEPTH	BOTTOM WIDTH	WIDTH AT WATER-LINE	GRADE PER MILE
At ____ Mile	____ feet	____ feet	____ feet	____ feet
At ____ Mile	____ feet	____ feet	____ feet	____ feet
At ____ Mile	____ feet	____ feet	____ feet	____ feet
At ____ Mile	____ feet	____ feet	____ feet	____ feet
At ____ Mile	____ feet	____ feet	____ feet	____ feet
At ____ Mile	____ feet	____ feet	____ feet	____ feet

(Give dimensions where reductions in size are made.)

10. Time required for completion of work completed ~~YEARS~~

11. Time required for complete application of water to the proposed beneficial use completed ~~years.~~

12. Choice of newspaper for publication of notice of intention to appropriate Not applicable

STATE OF SOUTH DAKOTA)
) ss.
County of _____)

I, Rainer M. Johnson, being first duly sworn on my oath depose and say: That my relation to the above described undertaking is that of owner, that I have read the above foregoing statement, examined the map accompanying the same, and that I know of my own personal knowledge that the matters therein stated and shown are true.

Signed Rainer M. Johnson

Subscribed and sworn to before me this 7 day of May 19 62.

Maude B. Long
Notary Public (or other qualified officer.)

*Each diversion must have a headgate or measuring device.

ORIGINAL RECORD AND WAS PHOTOGRAPHED IN THE REGULAR COURSE OF BUSINESS ACCORDING TO THE PROVISIONS OF SOUTH DAKOTA COMPILED LAW 1-27-4. I FURTHER CERTIFIED THAT THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS WAS IN AND ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROFILM. REDUCTION 25:1 ROLL NO 14 3-22-82 DATE MICROFILMED

Remarks by State Water Resources Commission:

"VESTED RIGHT CLAIMED"

THIS PERMIT RECOGNIZES YOUR "VESTED RIGHT" CLAIM AS PROVIDED IN STATE LAW, WITH THE PRIORITY INDICATED BASED ON AFFIDAVITS SUBMITTED WITH THE APPLICATION.

STATE OF SOUTH DAKOTA
County of HUGHES } ss.

Pierre, South Dakota, MAY 31, 1962

This is to certify that the foregoing application was received by the Commission at 8:10 o'clock a.m. upon the 14TH day of MAY, 1962.

State Water Resources Commission

By: Burton J. Lowe
for Chief Engineer, Executive Officer

Number of permit 767-2

Date of first receipt of application MAY 14, 1962

Date of return to applicant for correction, amendments or changes required as follows: —, 19

Date of receipt of corrected application —, 19

Date from which applicant may claim right 1898, ~~19~~

Approved MAY 31, 1962, Recorded in Book 7 Page 118

This is to certify that we have examined the foregoing application for a permit to appropriate water of the State of South Dakota, and we hereby grant the same as stated herein, subject, however, to the following limitations and conditions:

1st. The equivalent of at least one-fifth of the work above specified is ~~to be~~ completed ~~on or before~~ , ~~19~~

2nd. The whole of said work is ~~to be~~ completed ~~on or before~~ , ~~19~~

3rd. The limit of time for proof of beneficial use of water appropriated in accordance herewith is COMPLETED, ~~19~~

4th. The water appropriated shall be used for the purpose of IRRIGATION

5th. The prior right of all persons who, by compliance with the laws of the State of South Dakota, have acquired a right to the use of water must not be injuriously affected by this appropriation.

6th. The amount of the appropriation herein granted shall not exceed 2.59 cubic feet per second; neither shall it exceed the capacity of the above described system of diversion works, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of the best husbandry; and further, said appropriation must be limited to not more than one-seventieth (1/70) of one cubic foot of water per second of time for each acre of land to which water ~~is~~ shall actually and beneficially applied for irrigation on or before JUNE 30, 1955; said water to be used during the following described annual period:

APRIL TO NOVEMBER

Witness my hand this 31ST day of MAY, 1962.

State Water Resources Commission

By: [signature]
Chief Engineer, Executive Officer

Certificate of Construction Issued MAY 31, 1962

Water License issued MAY 31, 1962

ORIGINAL RECORD HAS BEEN FILMED IN THE REGULAR COURSE OF BUSINESS ACCORDING TO THE PROVISIONS OF SOUTH DAKOTA COMPILED LAW 1-27-4. IT IS FURTHER CERTIFIED THAT THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS WAS IN AND ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR REPRODUCTIONS. REDUCTION 25:1 ROLL NO. 14
DATE MICROFILMED 3-22-82
MICROPHOTOGRAPHIC

Remarks by the Applicant:

R. M. JOHNSON

SE¼ NE¼	34	acres
NE¼ NE¼	29	"
NW¼ NE¼	26	"
SW¼ NE¼	21	"
SE¼ NW¼	3	"
NE¼ NW¼	17	"
	130	"

R. H. JOHNSON

NW¼ SW¼	6	acres
SW¼ NW¼	25	"
SE¼ NW¼	19	"
	50	"

STATE OF SOUTH DAKOTA - BUREAU OF ADMINISTRATION - OFFICE OF RECORDS MANAGEMENT - CERTIFICATE OF AUTHENTICITY
THIS IS TO CERTIFY THAT THE MICROPHOTOGRAPHIC IMAGE APPEARING ON THIS SLIDE OF MICROFILM IS AN ACCURATE REPRODUCTION OF
ORIGINAL RECORD AND WAS MICROFILMED IN THE REGULAR COURSE OF BUSINESS ACCORDING TO THE PROVISIONS OF SOUTH DAKOTA CAP
AW 1-27-4. IT IS FURTHER CERTIFIED THAT THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS WAS IN A
AND ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROPHOTOGRAPHIC
REPRODUCTIONS. REDUCTION 25:1 ROLL NO. 14 3-22-82
DATE MICROFILMED

Form No. 16.

STATE OF SOUTH DAKOTA

WATER LICENSE No. 767-2

WHEREAS, On the 14th day of May A. D. 1962

R. H. and R. M. Johnson

of Martin County of Bennett and State of South Dakota duly made application (No. 767-2) to us for a vested right permit to use 2.59 cubic feet per second of the waters of Lake Creek and tributaries County of Bennett, State of South Dakota, for irrigation and fish culture purposes; and

WHEREAS, On the 31st day of May A. D. 1962 recognizing the Vested Right / Permit No. 767-2 was issued to said applicant for the diversion of said water, and completion of the works of diversion therein described and application to beneficial use of said water and,

WHEREAS, On the 14th day of May A. D. 1962 the holder of said permit duly made proof of the completion of adequate works for the diversion of 2.59 cubic feet per second of said waters, as evidenced by our Certificate No. 767-2 dated May 31, 1962 confirming the completion of works of sufficient capacity for diverting and conveying to the place of intended use 2.59 cubic feet per second of water, with date of priority of 1898 and,

WHEREAS, On the 14th day of May A. D. 1962 proof was duly made of the application to beneficial use of 2.59 cubic feet per second of said water; for irrigation on 180 acres in the W½ and NE¼, Section 21, T36N, R37W

ORIGINAL RECORD AND WAS MICROFILMED IN THE REGULAR COURSE OF BUSINESS ACCORDING TO THE PROVISIONS OF SOUTH DAKOTA COMPILED LAW 1-27-1.1. IT IS FURTHER CERTIFIED THAT THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS WAS IN AND ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROPHOTOGRAPHIC REPRODUCTIONS. REDUCTION 25:1 ROLL NO. 74 3-22-82 DATE MICROFILMED

NOW, THEREFORE, By the virtue of the authority vested in us by the laws of the State of South Dakota,

We hereby grant and confirm to R. H. and R. M. Johnson

of Martin the holders and owners of said/permit No. Vested Right 767-2

a water right, dating from 1898 to the use of 2.59

cubic feet per second of the waters of Lake Creek and tributaries

in the County of Bennett and State of South Dakota, or so much thereof as may be

necessray for the purposes hereinbelow mentioned, to be diverted at a point in the NE¼ NE¼, Sec. 20, and a point in the NW¼ SW¼, Section 21, T36N, R37W

and conducted to and upon portions of the W½ and NE¼ Section 21, T36N, R37W, more specifically described in the Certificate of Completion of Works

for the purposes of irrigation and fish culture

subject, however, to the laws of the State of South Dakota applicable to a license for the use of the waters of the State, and subject, also to the local or community customs, rules and regulations which have been or may be adopted from time to time by a majority of the users from a common source of supply, canal or lateral from which such water may be taken, when such rules and regulations have for their object the economical use of such water.

WITNESS, My hand and seal of our office at Pierre, South Dakota,

this 31st day of May A. D. Nineteen

Hundred and sixty-two

State Water Resources Commission

By:

Chief Engineer, Executive Officer
J. W. GRIMES

STATE OF SOUTH DAKOTA

Water License No.

No.

Source of Supply County

Amt. c.f.s.

Point of Diversion

Place of Use

Purpose

Date of Priority

Recorded

in Book of Page

MADE ON MICROFILM WHICH MEET THE REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROFILM REPRODUCTIONS. REDUCTION 25:1 ROLL NO. 74 3-22-22 DATE MICROFILMED

Form No. 20.

Permit No. 767-2

Water Division No. 2 White River Water District

Certificate of Completion of Works

TO ALL WHOM IT MAY CONCERN:

This is to Certify, That R. H. and R. M. Johnson

of Martin, County of Bennett, and State of South Dakota, the holder of Vested Right Permit No. 767-2, issued upon Application No. 767-2, bearing date of priority of 1898, authorizing the diversion of 2.59 cu. ft. per second of the waters of Lake Creek and tributaries County of Bennett, State of South Dakota, at a point S61° W, 1000' from the NE corner Section 20, T36N, R37W & a point N40° E 2400' from the SW corner, Sec. 21, T36N, R37W for irrigation purposes, have fully complied with the provisions of the laws of the State of South Dakota relating to proof of completion of the works of diversion set out and described in said Permit; that said works are recognized as satisfactory for diverting and conveying to the place of intended use 2.59 cu. ft. per second of water; and that the lands proposed to be irrigated by the use of said water are described as follows, to wit: all in Section 21, T36N, R37W

SE¼ NE¼	34	acres
NE¼ NE¼	29	"
NW¼ NE¼	26	"
SW¼ NE¼	21	"
SE¼ NW¼	3	"
NE¼ NW¼	17	"
NW¼ SW¼	6	"
SW¼ NW¼	25	"
SE¼ NW¼	19	"
	180	"

Witness my hand this 31st day of May A. D. 62

State Water Resources Commission

By:

Chief Engineer, Executive Officer
J. W. GRIMES

REPRODUCTIONS: REDUCTION 25:1 ROLL NO. 44 3-22-82 DATE MICROFILMED

488

FORM NO. 24.

Location No.

Water Division No. ..... Water District

RECEIVED
MAY 14 1962
STATE WATER RESOURCES COMM.
PIERRE, SOUTH DAKOTA

Proof of Application of Water to Beneficial Use

PETITION OF HOLDER

Ques. 1. State your name, residence, occupation and postoffice address.

Ans. R.H. and R.M. JOHNSON

Ques. 2. If acting in behalf of a corporation, state its name, principal place of business (if a foreign corporation, give name and postoffice of statutory agent,) your position with reference to same, and your authority for appearing in its behalf.

Ans. not applicable

Ques. 3. State date of posting and date of recording notice of appropriation.

Ans. Until recently it was supposed by the applicant that this was recorded at Pierre, but no record of it could be found.

Ques. 4. State source of water supply and give exact location of point of diversion.

Ans. Lake Creek and tributaries see application

Ques. 5. Describe your works of diversion giving length and height of each dam and state amount of water they are capable of conveying from point of diversion to place of use, and give name of canal or ditch or other works by which water is conducted to such place of use, and date of completion of same.

Ans. Water is diverted from Lake Creek through the Ruff (Rolfe) Ditch and from the tributaries by a series of small dikes for impounding water fro domestic use and irrigation of adjacent hay meadows.

Ques. 6. State for what purpose water is used and describe place of use. (If for irrigation, name each subdivision in which used, and number of acres in each subdivision that have ACTUALLY been irriated with said water.)

Ans. The ditch was constructed in the 1890's for irrigation, and has been used by the original owners and his children since its construction for irrigation of the lands described in the application.

Ques. 7. If for other than irrigation purpose, state how applied, amount of horse power generated, etc.

Ans. domestic and trout hatchery operation

Ques. 8. What is the minimum amount of water required for the use specified above?

Ans. 2.00 cfs

Ques 9. If you are not the person or representative of the corporation to whom above mentioned permit was originally issued, please state how ownership was acquired by present holder.

Ans. Original owner was the father of Mrs. R.H. Johnson

LAW 1-27-4, IT IS FURTHER CERTIFIED THAT THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS IS IN ACCORDANCE WITH THE PROVISIONS OF SOUTH DAKOTA COMPILED AND ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROPHOTOGRAPHIC REPRODUCTIONS. REDUCTION 25:1 ROLL NO. 74 3-22-82 DATE MICROFILMED

Ques. 10. State when, how, in what amount and to what extent, the water diverted under above mentioned permit has been used.

Ans The ditch was originally constructed by Arthur Rolfe (Ruff) for irrigation purposes in 1898. The series of small dams was constructed in 1895 for irrigation. The system has been operated continually since that time, and the lands shown on the map accompanying the application indicates the extent of the present system.

(Sign) Pierce M. Johnson

I hereby certify that the foregoing testimony was read to the above subscriber before its signing, that I believe him to be the person he represents himself to be, and that said testimony was subscribed and sworn to before me, at my office in Martin, County of Bennett

State of South Dakota, on this tenth day of May A. D. 1962

Betty L. Johnson
R. H. Johnson } Witnesses.

Mamie B. Long
Notary Public

I, the undersigned, do hereby certify that I am a duly qualified elector residing in the immediate vicinity of the diversion works designated in the foregoing testimony, that I have no interest in the works, water or land above described, that I have read the foregoing testimony and that I know of my own personal knowledge that the matters therein stated are true.

[illegible signature]
Martin, S. Dak.

Location No.

PROOF OF APPLICATION OF WATER TO BENEFICIAL USE

PETITION OF HOLDER

Amount of Water ..... c. f. s.

Source

County

Purpose

Place of Use

Date of recording

Received and filed

THIS IS TO CERTIFY THAT THE [illegible] ORIGINAL RECORD AND WAS MICROFILMED IN THE REGULAR COURSE OF BUSINESS ACCORDING TO THE PROVISIONS OF SOUTH DAKOTA COMPILED LAW 1-27-4. IT IS FURTHER CERTIFIED THAT THE PHOTOGRAPHIC PROCESS USED FOR MICROFILMING OF THE ABOVE RECORDS WAS IN A [illegible] AND ON MICROFILM WHICH MEET THE RECOMMENDED REQUIREMENTS OF THE NATIONAL BUREAU OF STANDARDS FOR PERMANENT MICROPHOTOGRAPHIC REPRODUCTIONS. REDUCTION 25:1 ROLL NO 14 3-22-82 [illegible]
DATE MICROFILMED

STATE OF SOUTH DAKOTA

VESTED RIGHT WATER LICENSE NO. 767-2 FOR IRRIGATION

(1) Carl L. Johnson of Martin, SD 57551 made Application No. 767-2, May 14, 1962 for validation of a vested right claim to appropriate 2.59 cubic feet of water per second from Lake Creek and tributaries, Bennett County, South Dakota for irrigation purposes. Vested Water Right No. 767-2 was validated March 4, 1992 with a priority date of January 1, 1898. 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.

A May 23, 1989, inspection of the water use system found the number of acres being irrigated had been reduced from 180 to 176. The diversion rate was reduced upon validation, from 2.59 cfs to 2.51 cfs to correspond with the acreage.

(2) The applicant is entitled to divert 2.51 cubic feet of water per second for beneficial use. The location of the diversion points are at points in the NE 1/4 NE 1/4 Section 20 and NW 1/4 SW 1/4 Section 21, T36N, R37W.

The location of the irrigated acreage is:

T36N, R37W Section 21	NW 1/4 SW 1/4	6 Acres
	SW 1/4 NW 1/4	25 Acres
	SE 1/4 NW 1/4	21 Acres
	NE 1/4 NW 1/4	17 Acres
	NW 1/4 NE 1/4	26 Acres
	NE 1/4 NE 1/4	29 Acres
	SE 1/4 NE 1/4	34 Acres
	SW 1/4 NE 1/4	18 Acres
	Total----------	176 Acres

(3) Pursuant to Section 46-5-30.1 Carl L. Johnson of Martin, SD 57551 the holder(s) and/or owner(s) of Vested Water Right No. 767-2 is issued a license to appropriate 2.51 cubic feet of water per second from Lake Creek and tributaries with a priority date of January 1, 1898 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. 767-2 and subject to South Dakota State Law.

John Hatch

JOHN HATCH, Chief Engineer
Water Rights Division
Department of Environment and
Natural Resources

MAY 12 1992

REPRODUCTIONS. REDUCTION 25:1 ROLL NO. 11-24 DATE MICROFILMED 7-1-92 CAMERA OPERATOR

FLOOD CONTROL PERMIT No. FC-4

The Water Management Board hereby approves Flood Control Permit No. FC-4, Brant Lake Improvement Association, 3560 Gateway #303, Sioux Falls, South Dakota 57106 to widen the Brant Lake outlet by 30 feet (outlet elevation 1597.8 ft. msl.) and lower 30 feet of the existing outlet 6 inches. Approval of the permit does not increase the likelihood or severity of downstream flood damages, does not impair existing water rights or endanger human life or property. The permit authorizes construction of the proposed project to reduce lake shoreline flood damages with the following qualifications:

1. Prior to work under this permit downstream restrictions to flow in the Skunk Creek channel between the Brant Lake Outlet and the east side of the road on the Section 23 and 24 section line, T105N, R51W will be removed and/or road culvert capacities be increased where necessary to pass at least an additional 300 cubic feet per second (cfs) or a total of 950 cfs. Any "Dry wash" or lowered roadway installed in lieu of additional culvert capacity shall be maintained to provide the design flow capacity.

2. The outlet structure shall be widened by 30 feet and 30 feet of the existing portion of the structure lowered six inches.

3. That the outlet construction, future outlet maintenance and repair will be the responsibility of the Brant Lake Improvement Association.

4. That the ordinary high water mark (High WM) elevation 1598.3 feet. msl. may not be affected by this Flood Control Permit and that the Board may review this permit if it appears that the High WM is being affected or a new High WM is being formed above or below the established High WM.

Date of first receipt of application November 6, 1985.

Approved December 10, 1986.

1. The date from which the applicant may claim right is November 6, 1985.

2. The whole of said work is to be completed on or before December 10, 1991.

3. The project shall be used for the purpose of flood control on Brant Lake.

4. The prior water rights of all persons who, by compliance with the laws of the State of South Dakota, have acquired a right to the use of the water must not be unlawfully impaired by this flood control project

WATER MANAGEMENT BOARD

John Hoch

Chief Engineer, Water Rights Division
Dept. of Water and Natural Resources

FEB 17 1987

FLOOD CONTROL PERMIT NO. FC-5

The Water Management Board hereby approves Flood Control Permit No. FC-5, Lake Poinsett Area Development Association, c/o Virgil Herriott, Lake Norden, South Dakota 57248 to construct a gated control structure on the Lake Poinsett outlet.

Approval of the permit does not increase the likelihood or severity of downstream flood damages, does not impair existing water rights or endanger human life or property. The permit authorizes construction of the proposed project to reduce flood damage, bank erosion and nutrient loading the lake with the following qualifications

1. That the gated structure may be closed only during times when water is backed up from the Big Sioux River and may flow into the lake over the outlet.

2. That the gates may not be used to raise the water level in Lake Poinsett. The gates must remain open when the water level elevation of the lake is higher than the water level downstream of the outlet.

3. That the ordinary high water mark (High WM) elevation 1651.5 feet msl may not be affected by this Flood Control Permit and that the Board may review this permit if it appears that the High WM is being affected or a new High WM is being formed above or below the established High WM.

4. That the construction of the control structure, future maintenance and repair, and gate operation are the responsibility of the Lake Poinsett Area Development Association.

5. That the gates must be capable of being locked in position so unauthorized persons may not operate or tamper with the gates.

Date of first receipt of application August 22, 1986

Approved March 4, 1987

1. The date from which the applicant may claim right is August 22, 1986

2. The whole of said work is to be completed on or before March 4, 1992.

3. The project shall be used for the purpose of flood control on Lake Poinsett

4. The prior water rights of all persons who, by compliance with the laws of the State of South Dakota, have acquired a right to the use of the water must not be unlawfully impaired by this flood control project.

WATER MANAGEMENT BOARD

John Hatch

Chief Engineer, Water Rights Division
Dept. of Water and Natural Resources

APR 30 1987

FLOOD CONTROL PERMIT NO. FC-6

The Water Management Board hereby approves Flood Control Permit No. FC-6, Lake Poinsett Area Development Association, c/o Virgil Herriott, Lake Norden, South Dakota 57248 to add an extension to the existing gates located in the Boswell Ditch in the SW 1/4 SW 1/4 Section 30, T114N, R51W.

Approval of the permit does not increase the likelihood of severity of downstream flood damages, does not impair existing water rights or endanger human life or property. The permit authorized construction of the proposed project to reduce flood damage, bank erosion and nutrient loading to Dry Lake and Lake Poinsett with the following qualifications:

1. That the extension height shall be restricted to 16.5 inches to provide a minimum of one foot of freeboard on the wingwalls.

2. That the construction of the extension and its future maintenance and repair are the responsibility of the Lake Poinsett Area Development Association.

3. That approval of the work must be obtained from the Department of Game, Fish and Parks, the owner of the structure.

Date of first receipt of application October 29, 1986.

Approved May 6, 1987.

1. The date from which the applicant may claim right is October 29, 1986.

2. The whole of said work is to be completed on or before May 6, 1992.

3. The project shall be used for the purpose of flood control on Lake Poinsett and Dry Lake.

4. The prior water rights of all persons who, by compliance with the laws of the State of South Dakota, have acquired a right to use the water must not be unlawfully impaired by this flood control project.

WATER MANAGEMENT BOARD

John Katch

Chief Engineer
Water Rights Division
Department of Water and
Natural Resources

AUG 19 1987

495

SOUTH DAKOTA
FLOOD CONTROL PERMIT NO. FC-19

Date of first receipt of application July 15, 1996.

The Water Management Board approved Flood Control Permit No. FC-19 on October 3, 1996 for Lake Pelica Water District, c/o Alan Schultz, Chairman, 4404 20th Ave SW, Watertown SD 57201 authorizing the constructio of the water use system and the placing of water to beneficial use subject to the following limitations, conditions an qualifications:

1. Flood Control Permit No. FC-19 authorizes construction of a diversion weir located in the inlet/outlet channel t Lake Pelican in the NW 1/4 NW 1/4 Section 6-T116N-R52W. The weir will control sediment loading to Pelica Lake from the Big Sioux River. The weir will have an overflow elevation of 1712.25 feet above mean sea leve (fmsl) and contain a fish passage weir with a flow elevation of 1707.75 fmsl. Flow into the lake will be limite when the Big Sioux River is flowing at less than 1,600 cubic feet of water per second (cfs). When Big Sio River flows are greater than 1,600 cfs, the rate at which water flows into Lake Pelican and downstream in the Bi Sioux River will not change.

2. Approval of the permit does not increase the likelihood or severity of downstream flood damages, does not impa existing rights or endanger human life or property. The permit authorizes construction of a diversion weir t control the sediment load to Pelican Lake from the Big Sioux River.

3. The date from which applicant may claim right is July 16, 1996.

4. All construction is to be completed on or before October 3, 2001.

QUALIFICATIONS

1. That the construction, future maintenance and repair of the Lake Pelican weir structure is the responsibility of th Lake Pelican Water District.

2. The prior water rights of all persons who, by compliance with the laws of the State of South Dakota, have acquire a right to use the water may not be unlawfully impaired by this flood control permit.

3. That the Water Management Board is retaining jurisdiction of Flood Control Permit No. FC-19 in the event tha additional information shows the weir causes adverse upstream or downstream impacts.

WATER MANAGEMENT BOARD

By: _____ DEC 26 1996

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

SOUTH DAKOTA
FLOOD CONTROL PERMIT NO. FC-23

Date of first receipt of application February 26, 1997.

The Water Management Board approved Flood Control Permit No. FC-23 on April 29, 1997 for the South Dakota Department of Game, Fish and Parks, 523 E Capitol, Pierre SD 57501 authorizing the construction of the water use system and the placing of water to beneficial use subject to the following limitations, conditions and qualifications:

1. Flood Control Permit No. FC-23 authorizes construction of a outlet structure for Lake Oliver in Deuel County. The outlet structure is to be operated to allow Lake Oliver waters to be held above the established outlet elevation under specific operating criteria. The purpose of the permit is allow seasonal storage of water on private land and Deuel County land around Lake Oliver to address potential water quality concerns by restricting Lake Oliver water from entering Lake Cochrane during months when algae blooms may occur.

   The Water Management Board has determined that the Lake Oliver outlet is 1683.6 feet mean sea level (fmsl) at a point located in the NW 1/4 Section 4-T114N-R47W near Fire Location No. 162.

2. This flood control permit will not increase the likelihood or severity of flood damages downstream, necessary easements have been obtained for seasonal storage of water on private land and Deuel County land around Lake Oliver, the project will not endanger human life or property, the project will not impair existing water rights, and it is in the public interest because seasonal storage of water, above the outlet elevation 1,683.6 fmsl, through operation of the outlet structure will restrict Lake Oliver water from flowing into Lake Cochrane during months when algae blooms may occur, and under specific operating criteria will have a positive affect on Lake Cochrane water quality.

3. The date from which applicant may claim right is February 26, 1997.

4. All construction is to be completed on or before April 29, 2002.

QUALIFICATIONS

1. Flood Control Permit No. FC-23 is subject to operation of the control structure as follows:

   October 16 through June 14 - the control structure will remain open to lower the Lake Oliver water level to the established outlet elevation of 1,683.6 fmsl.

   June 15 through October 15 - the control structure will be closed and Lake Oliver water will be stored up to an elevation of 1,685.0 fmsl.

   When the elevation of 1,685.0 fmsl is reached, water will spill uncontrolled over the weir. If a precipitation event occurs during June 15 through October 15 that causes flow over the wier to reach an elevation of 1,685.3 fmsl, the control structure will be opened until Lake Oliver attains an elevation of 1,684.3 fmsl.

(continued)

2. The South Dakota Department of Game, Fish and Parks is responsible for operation and maintenance of the control structure.

WATER MANAGEMENT BOARD

By: John Hatch

JUN 1 1 1997
date

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

2038-2

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

March 12, 1993

NOTICE

TO: Dale Gossard
Lone Tree Ditch Company
Rt 2 Box 5040
Rapid City, SD 57701

FROM: JOHN HATCH, CHIEF ENGINEER
Water Rights Division
(605) 773-3352

SUBJECT: Request for Continued Sealing and Maintenance of Rapid Valley Irrigation Ditches.

Pursuant to SDCL 46-1-4, 46-2-17 and 46-7-3, I am contacting the Lone Tree Ditch Company to remind the Ditch owners of the need to continue with irrigation ditch and lateral maintenance. The Water Management Board is concerned with water loss from and the maintenance of Rapid Valley Ditches. Targeted areas include: repair and sealing of identified high seepage areas within the ditch, small tree and brush removal, and ditch channel cleaning and shaping.

I am requesting that Lone Tree Ditch Company submit, to the Division of Water Rights by August 1, 1993, a list of repairs and improvements performed on the ditch since August 1, 1992.

If you have any questions, please contact Mark Rath or Del Brosz, Division of Water Rights, 523 E Capitol Ave, Pierre, SD 57501. Phone (605) 773-3352.

cy: Rapid Valley Water Conservancy District
US Bureau of Reclamation

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Mountain-Prairie Region

IN REPLY REFER TO:
BA WTR
WR SD
Mail Stop 60189

MAILING ADDRESS:
Post Office Box 25486
Denver Federal Center
Denver, Colorado 80225-0486

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228-1807

OCT 0 4 2000

Water Rights Division
Department of Environment and
Natural Resources
523 East Capitol
Pierre, South Dakota 57501-3181

Dear Sir or Madam:

The Fish and Wildlife Service completed construction and put water to beneficial use on February 16, 1999, under Water Permit No. 2300-2, located at Lacreek National Wildlife Refuge in Bennett County. Enclosed is *Notice of Completion of Works and Application of Water to Beneficial Use*. Please advise when the inspection has been completed and we will forward the $50 water license fee.

If you have questions or require further information, please contact me at (303) 236-5321 extension 227.

Sincerely,

Linda Coe
Water Rights Specialist

Enclosure

This is your future. Don't leave it blank. - *Support the 2000 Census.*

520

Form 10

NOTICE OF COMPLETION OF WORKS AND APPLICATION OF WATER TO BENEFICIAL USE

Date October 4, 2000

TO: Water Rights Program, DENR
523 E. Capitol
Pierre, SD 57501-3181

FROM: Cheryl C. Williss, Agent
U.S. Fish and Wildlife Service (name)
P.O. Box 25486, Denver Federal Center (address)

Denver, (city) CO (state) 80225 (zip) (303) 236-5321 (phone)

I have completed the construction of the water diversion system and I have put the water to beneficial use to the maximum extent it is going to be used. I have not exceeded the amounts specified in Water Permit No. 2300-2.

Water Permit No. 2300-2 states that the diversion system is to be constructed by February 25, 2003 (date), and that the water is put to beneficial use by February 25, 2007 (date).

The diversion system was completed on February 16, 1999 (date).

Applying the water to beneficial use was completed on February 16, 1999 (date).

You may schedule an investigation so that the Water License may be issued.

Cheryl C. Williss
(signature)
Cheryl C. Williss, Agent

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

October 17, 2000

NOTICE

TO:

Cheryl Williss, Chief
Water Resources Division
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Pamela Ireland, States Attorney
PO Box 628
Martin, SD 57551

Raymond Kocer
P.O. Box 388
Martin SD 57551-0388

Brett Heath
HWC 3, Box 20
Martin SD 57551

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

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

The Water Management Board directed John Guhin, the Board's attorney, to prepare proposed Findings of Fact, Conclusions of Law and a Final Decision in the matter of U. S. Fish and Wildlife Service's request to amend a qualification to Water Permit No. 2300-2 and Bennett County's request to rescind and terminate Water Permit No. 2300-2 at the Lacreek National Wildlife Refuge in Bennett County. The Board will consider the proposed Findings, Conclusions and Final Decision at 1:00 PM on December 6, 2000 in the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Ave., Pierre, SD.

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

Oral arguments by parties filing written comments in opposition or support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision may be made on December 6, 2000. The public hearing was completed September 29, 2000. No additional testimony will be received on December 6, 2000.

Enclosure

c: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General
John Kunz, U.S. Department of Interior, Office of the Solicitor, 755 Parfet St., Ste. 151, Lakewood CO 80215
Rolf Kraft, Manager, Lacreek National Wildlife Refuge, HC 5, Box 114, Martin SD 57551
Ronald Riggs, Bennett County Commissioner, Box 487, Allen, SD 57714
Tim Juhnke, Bennett County Commissioner, HWC 3, Martin, SD 57551

WATER MANAGEMENT BOARD MEMBERS

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

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

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

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

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

Dwayne Rollag
320 Lincoln Lane S
Brookings SD 57006-2741

BOARD ATTORNEY

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

WATER RIGHTS PROGRAM

Department of Environment and
Natural Resources

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

STAFF ATTORNEY

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

CERTIFICATION

I hereby certify that on October 17, 2000, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated October 17, 2000, regarding preparation of Findings in the matter of U. S. Fish and Wildlife Service's request to amend a qualification to Water Permit No. 2300-2 and Bennett County's request to rescind and terminate Water Permit No. 2300-2 at the Lacreek National Wildlife Refuge in Bennett County, addressed as stated below:

Cheryl Williss, Chief
Water Resources Division
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Pamela Ireland
Bennett County States Attorney
P.O. Box 628
Martin SD 57551

Raymond Kocer
P.O. Box 388
Martin SD 57551-0388

Brett Heath
HWC 3, Box 20
Martin SD 57551

John Kunz
U.S. Department of Interior
Office of the Solicitor
755 Parfet St., Ste. 151
Lakewood CO 80215

Rolf Kraft, Manager
Lacreek National Wildlife Refuge
HC 5, Box 114
Martin, SD 57551

Ronald Riggs
Bennett County Commissioner
Box 487
Allen, SD 57714

Tim Juhnke
Bennett County Commissioner
HWC 3
Martin, SD 57551

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

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

Eric S. Gronlund
Natural Resources Engineer
Water Right Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

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

Karen Schlaak
Notary Public

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

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

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE REQUESTSD TO AMEND OR RESCIND WATER PERMIT NO. 2300-2; UNITED STATES FISH AND WILDLIFE SERVICE (LACREEK NATIONAL WILDLIFE REFUGE)	FINDINGS OF FACT, CONCLUSIONS OF LAW, and FINAL DECISION

FINDINGS OF FACT

1. This decision addresses the requests of the U.S. Fish and Wildlife Service (Service) to amend Water Permit No. 2300-2. The Service requests the removal of Qualification No. 4 to that permit. Qualification No. 4 requires the Service to remove silt if the buildup of silt exceeds fifty percent of the height of the carp guard at Diversion No. 4A. The Service in addition requests that Qualification No. 3 be amended to allow it to establish a storage level of 3036.23 feet mean sea level (fmsl) at Diversion 4A. This decision also addresses the request of nearby landowners, and of Bennett County, to rescind, in its entirety, Water Permit No. 2300-2.

2. The background of this matter is set out in detail in the Board decision in the case entitled "In Re Application for Water Permit No. 2300-2; U.S. Fish and Wildlife Service (LaCreek National Wildlife Refuge)" (March 5, 1998) (hereinafter 1998 Decision). The 1998 Decision is herewith incorporated insofar as it is not inconsistent with the Findings, Conclusion and Final Decision issued today.

3. The background of Diversion No. 4A is relevant to understanding the present controversy. The Service originally attempted to establish a vested right to irrigate by way of

former Diversion No. 4. This Board granted the vested right but the circuit court reversed and no further appeal was bought. Thereafter, the Service instituted an application for a new permit for old Diversion No. 4. Subsequently, the Service deleted the irrigation portions of the application, moved the location downstream approximately four hundred feet and designated the new structure as Diversion No. 4A. The Service asserted, as a basis upon which its application for Diversion No. 4A should be granted, that the diversion would enhance the possibility of the survival of the pearl dace which had been classified as an endangered species by the South Dakota Commission of Game, Fish and Parks in 1978.

4. The Board, in its 1998 Decision, found that the Service had established that Diversion No. 4A would protect the pearl dace if it were constructed with a four foot barrier to prevent carp from migrating westward in Lake Creek to the area inhabited by pearl dace. To protect the surrounding landowners, the 1998 Decision qualified the permit granted to the Service such that it authorized the storage of .75 acre foot of water instead of an acre foot of water as requested by the Service. In addition, pursuant to Qualification No. 3, the storage level of Diversion No. 4A was required to be not "in excess of 3034.1 feet mean sea level" and the Service was required under Qualification No. 4, to remove the silt which was foreseen to accumulate behind the diversion structure if the buildup exceeded "fifty percent of the height of the carp guard."

Amendment to Qualification No. 3.

5. As noted above, the Service now requests that Qualification No. 3 be amended such that the storage level of Diversion No. 4A is authorized to be not in excess of 3036.23 rather than the present requirement of 3034.1 feet mean sea level.

6. Pursuant to SDCL 46-2A-12, an amendment to an existing permit may be granted if the change does not unlawfully impair existing rights, is for a beneficial use and is in the public interest.

The Amendment of Qualification No. 3 does not unlawfully impair the existing rights of the surrounding landowners or Bennett County.

7. The Board first considers whether the Amendment of Qualification No. 3 would unlawfully impair any existing rights of the landowners or Bennett County, the opponents to the Amendment. The opponents first argue that their existing rights will be impaired because the Service obligated itself to construct Diversion No. 4A so as not to have a storage level in excess of 3034.1 fmsl. Despite this, the opponents submit, the Service constructed Diversion No. 4A with a storage level of 3036.23 fmsl.

8. The Service admits that it has constructed Diversion No. 4A at 3036.23 fmsl in violation of permit Qualification No. 3.

9. The Service testified, and presented documentary evidence to support its testimony, that the elevation of the carp guard was originally proposed, and ultimately set, at 3034.1 fmsl, instead of 3036.23 fmsl because of a drafting error on one

of the plans. The plan should have shown an invert elevation at the bottom of the creek of 3032.1 fmsl, but instead showed an elevation of 3030.1 fmsl. The engineer in charge of building the carp guard was not cognizant of the permit qualification that the storage level could not be in excess of 3034.1 fmsl. The engineer was aware of his obligation to build a carp guard four feet high to prevent the carp from jumping over the carp guard. Therefore, the carp guard was built from the actual bottom of the creek at 3032.1 with approximately four feet of boards to 3036.23 fmsl.

10. The Service acknowledges that it should have informed the Chief Engineer of the discrepancy at an earlier date than it did inform the Chief Engineer.

11. To establish that the proposed change unlawfully impairs an existing right of the landowners of the county, the landowners of the county must demonstrate, at a minimum, that some real interest of theirs will be adversely affected. The opponents contend that because there is a two foot difference between the height of the water at 3034.1 fmsl, as established by the 1998 decision, and 3036.23 fmsl, which the amendment proposes, there will be less bank available to handle the flow during high water periods. According to the testimony of Mr. Husmann, who was accepted as an expert by the Board, the structure now in place at 3036.23 feet mean sea level provides approximately 3.4 feet above the water surface to the top of the channel at its lowest point. This is, however, at only one point. That low point is found on the south side of the channel.

If water reaches that level, it will go out and around the end of the dike and back into Lake Creek and stay on Service property. The landowners' property is on the north side of the creek, and would not be affected by this high level of the water.

12. In addition, the uncontradicted evidence was that a twenty-five year flood would be handled by the existing structure proposed to be "legalized" by the present proposed amendment. The Board finds that, as configured and requested, the amendment in qualification No. 3 would protect the landowners from flooding.

13. The opponents moreover assert that their legal interests will be harmed because the increased amount of water behind the structure will cause ground water levels to rise. The evidence strongly refutes this contention. In particular the Board has reviewed the testimony developed from shallow ground water monitoring wells known as piezometers. Measurements have been recorded in the area since 1994 and a graph of the measurements was presented to the Board. The clear trend of the data is that water level rises and falls in response to immediate climatic conditions. A study of the piezometer data indicates that it was simply not affected by the creation of Diversion No. 4A. Because the data was not affected, it is clear that Diversion No. 4A did not affect ground water tables with regard to the landowners' property.

14. Landowners further contend that the height of Diversion No. 4A as constructed invades their legal rights because it has caused increased sedimentation and erosion downstream. The Board

has examined the evidence proffered by the opponents. Clearly there is erosion and sedimentation in Lake Creek. However, the Board finds that better explanation for the erosion and sedimentation is simply the nature of Lake Creek. Lake Creek will continue to erode and will continue to carry sediment because of its natural properties. Moreover, the Board credits the testimony of the Service experts that once Diversion No. 4A is filled with sediment, the sediment will move in the stream just as it would if the diversion were not there at all.

15. The opponents also contend that the Service has negligently allowed the Canadian thistle population to thrive and, in that way, harm them. The Board has carefully examined that evidence, and the video submitted by the opponents in that regard.

16. The Board finds that the opponents have failed to demonstrate that the grant of this amendment will in any way affect the Canadian thistle problem either on U.S. Fish and Wildlife Service property or on the landowners or county property. The claims can be rejected on this ground alone.

17. The opponents appear to have raised the thistle claim at this juncture to attack the credibility of the Service or to demonstrate that it will not faithfully carry out the conditions of the permit. The Board finds, however, that the evidence is that the Service has continued to pursue the Canadian thistle challenge and indeed, just last year, received increased funding for the project. The Board is unable to find that the Service's approach to the Canadian thistle problem should somehow be

factually associated with the grant of this particular amendment or that it undermines its confidence that the Service will carry out the conditions of the permit or any amendment.

18. The evidence indicates that the grant of the amendment with regard to the change in the height of the structure will not unlawfully impair existing rights.

The Amendment of the permit to increase the structure height is for a beneficial use.

19. The Board now turns to consideration of whether the amendment to the height of the structure is for a beneficial use. The Board has previously found that providing for a four-foot carp guard is a beneficial use and abides by that finding.

20. If the structure is built from the lowest point of the channel, it must reach 3036.23 fmsl. Therefore, a structure height of 3036.23 fmsl provides for a beneficial use.

The Amendment of Qualification No. 3 to increase the structure height is in the public interest.

21. The Board now considers the question of whether the grant of the Amendment is in the public interest. In this case, the determination involves a weighing of diverse factors. Weighing against the grant of the amendment is the fact that the Service constructed the structure in violation of the qualification to the permit and afterwards maintained it in violation of the qualification. Furthermore, the Service did not promptly report the mistake it had made; the Board is uncertain as to whether this indicates that the Service is not properly monitoring its own activities or whether the Service deliberately did not inform the Chief Engineer--either alternative weighs

against the Service and the grant of the amendment. The Board finds that the public interest would be, to some degree, served by denying the permit as a means of vindicating its authority to enforce compliance with the conditions of its permits.

22. There are, however, other factors which weigh in favor of the permit and outweigh the public interest consideration identified above. First, it is necessary to keep the permit in place to preserve the threatened species--the pearl dace. Second, forcing the Service to dig two feet into the channel to establish a new channel bed so that the carp guard could be set at 3030.1 fmsl appears to be a waste of the taxpayer's money. The Board has found that the increased height, although in violation of the permit, does not pose a significant threat of harm to the landowners or to the county. In this case, the real benefits of preserving the carp guard in place as it is today and not forcing the useless expenditure of taxpayer money outweigh any public interest benefit from forcing the removal of the carp barrier or alternative of compelling an expensive, and essentially unneeded, reconstruction of the carp barrier.

Amendment to Qualification No. 4 of the 1998 Decision.

23. The U.S. Fish and Wildlife Service has also requested that the Board amend Qualification No. 4. Qualification No. 4 provides that the Service is required to remove silt behind Diversion No. 4A if the buildup exceeds fifty-percent of the weight of the carp guard.

24. Between June 21, 1999, and September 1, 2000, Diversion No. 4A was cleaned out six times.

25. The evidence demonstrates that, to clean out Diversion No. 4A, it is necessary to bring an excavator to the diversion. The excavator's bucket takes about three-quarters of a yard of sediment from the impoundment and places it beside the impoundment.

26. The use of the excavator causes problems because, to perform the operation, it must maneuver on the side of the structure. Even though care is taken, the machine will tear up grass and sod and disturb the soil. In addition, sandpiles will be created which cover up the grass.

27. The evidence, which is essentially uncontradicted, indicates that the diversion will fill up with sand every two to four weeks.

Modification of Qualification No. 4 will not unlawfully impair the existing rights of the surrounding landowners or the county.

28. The Board has examined the question of whether failure to remove the silt from Diversion No. 4A causes damage to the landowners by backing up water or silt on their property or somehow otherwise harming them. The Board credits the evidence of Ms. Johnston that the silt does not back up more than 800 feet. The Board is unable to ascertain any effect of the silt or water on the landowners.

29. The Board has also examined the question of whether dredging or the failure to dredge has any effect on the groundwater level. The Board again credits the piezometer tests done under the supervision of Ms. Johnston and finds that there is no effect on the water level from dredging. The reason is apparent--the structure is too small to affect in any significant

way the ground water table at any significant distance from the structure.

30. The Board has also considered whether the modification of the Qualification will increase erosion to the detriment of the landowners and finds, to the contrary, that it will decrease erosion to their benefit. The Board credits the testimony of Ms. Johnston that, when sediment is removed from the water, and the water continues downstream, its erosive energy is increased. If the Qualification is not modified, the water will, therefore, erode material that would not normally be eroded. On the other hand, if the Service is not required to clean out the impoundment on a frequent basis, the water will proceed downstream carrying the silt but it will be less erosive because it has less erosive energy. This will benefit the interest the landowners have in limiting erosion. The Board thus finds that modification of Qualification No. 4 to provide for dredging at a rate of only twice a year at three month intervals will not unlawfully impair the existing rights of the opponents and, in fact, will be to their benefit.

Modification of Qualification No. 4 is for a beneficial use.

31. The Board concludes that modification of Qualification No. 4 is for a beneficial use. The beneficial use which underlies the permit, of course, is the protection of the pearl dace. The modification of Qualification No. 4, by decreasing the erosion which would be caused by more frequent dredging, and by decreasing the impact on the land surrounding the impoundment, is also for the beneficial use of enhancing Lake Creek.

Modification of Qualification No. 4 is in the public interest.

32. The Board finds that the modification of Qualification No. 4 to provide for two dredgings annually at Diversion No. 4 at intervals of not less than three months is in the public interest. In making this determination, the Board has considered the claims of the opponents that less frequent dredging would somehow harm them and has rejected those claims. Conversely, it has accepted the testimony that indicates that the ecology of the stream channel would be enhanced by less frequent dredging. The Board concludes that modification of Qualification No. 4 is in the public interest.

33. The opponents have requested that this Board rescind Permit No. 2300-2. The Board has, however, determined above that it is in the public interest to amend the Qualifications of Permit No. 2300-2 and that it is, moreover, imperative that Permit No. 2300-2 be maintained to preserve the population of pearl dace in Lake Creek. The Board has also considered the clear violation of the permit by the Service but finds that the weight of that violation is insufficient to overcome the public interest and public benefit in maintaining the Permit in place. Therefore, the Board determines not to suspend or to "rescind" the Permit, assuming, for the sake of this paragraph, that it had the latter power.

CONCLUSIONS OF LAW

1. The Board had jurisdiction of these matters.

2. The Board concludes that adequate notice has been given to all affected parties of the matters considered herein, despite

the fact that the proposal to amend the qualification regarding the height of the structure had not been advertised. The Board concludes that all parties interested in the matter have in fact received actual notice and have waived any requirement of further notice.

3. The Board concludes that the amendments to the qualification relating to the height of the structure and to the dredging qualification, as set forth below, will not unlawfully impair any existing rights of the opponent. The Board concludes, as set forth in detail above, that the opponents have failed to produce evidence of any actual harm which will occur as a result of the amendments; moreover, the proponents of the amendments have produced affirmative evidence that there will be no unlawful impairment with regard to flooding or sedimentation, or erosion.

4. The proposed amendments to Qualifications Nos. 3 and 4 are for a beneficial use. The underlying beneficial use is the protection of the pearl dace.

5. The proposed amendments are in the public interest. The Board has carefully weighed above the factors which favor and which disfavor the public interest with regard to each of the amendments. The Board again concludes that taken individually, and as a whole, the amendments are in the public interest and their benefits far outweigh any potential detriments.

6. The Board concludes that the permit should not be rescinded. The Board notes, furthermore, that a question exists as to whether it could rescind the permit pursuant to SDCL 46-1-12 which provides only for a suspension after a first

violation. Even granting the Board the authority to rescind or cancel the permit, the Board concludes that it would be inappropriate to do so. The permit serves a important public interest in that it protects the pearl dace. The failure of the Service to promptly report its violation of the permit is not to its credit but does not demand, in this case, that the permit be rescinded. The public interest in the continuance of the permit is, in this case, stronger than its interest in recission. For the same reason, the Board determines not to suspend the permit under SDCL 46-1-12.

FINAL DECISION

1. The requests for amendment of the Qualifications to Water Permit No. 2300-2 are granted subject to the following conditions:

a. Qualification No. 3 is amended to read:

The storage level of Diversion No. 4A may not be in excess of 3036.23 feet mean sea level and the structure must be designed to pass a 25-year precipitation of that without raising the pool more than four feet.

b. Qualification No. 4 is modified to read:

The Service is required to remove the silt twice in each calendar year, at intervals not less than three months.

2. The request to rescind or suspend Water Permit No. 2300-2 is denied.

Dated this _____ day of _____, 2000.

BY THE BOARD

_____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of proposed Findings of Fact, Conclusions of Law and Final Decision in the matter of In the Matter of the Requests to Amend or Rescind Water Permit No. 2300-2; United States Fish and Wildlife Service (LaCreek National Wildlife Refuge) were served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Pierre, South Dakota, on this 15th day of November, 2000:

Cheryl Williss, Chief
Water Resources Division
U.S. Fish & Wildlife Service
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Denver Federal Center
Denver, CO 80225

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Martin, SD 57551-0388

Lawrence Kocer
P.O. Box 156
Martin, SD 57551-0156

Diane Best
Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
(hand delivered)

Susan Williams
Bennett County Auditor
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j-findings.jpg Wtr Pmt 2300-2

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MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

NOV 2000
WATER RIGHTS
PROGRAM
Pierre, SD

November 22, 2000

MEMORANDUM

TO: Members of the Water Management Board and Interested Parties

FROM: John P. Guhin, Deputy Attorney General

RE: In the Matter of the Request to Amend or Rescind Water Permit No. 2300-2; one day extension of time.

The attorney for Bennett County, Pam Ireland, has requested a one-day extension of time with regard to Bennett County's response to the proposed Findings and Conclusions and Final Decision mailed by the Board attorney on November 15, 2000.

The reason for the request is that the Board attorney's proposals were inadvertently not sent to all of the attorneys
The Board Chairman has directed me to inform Ms. Ireland that she may have up to, and including, Tuesday, November 28, 2000, to mail her response to each Board member and the parties of record.

The Board Chairman further notes that any objections to the grant of this extension of time may be made to the Board at its December 6, 2000, hearing.

Please see the October 17, 2000, Notice of the Chief Engineer for further information.

JPG:js

j-memo13.mbm

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Memorandum titled "In the Matter of the Request to Amend or Rescind Water Permit No. 2300-2; one day extension of time" were served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Pierre, South Dakota, on this 22nd day of November, 2000:

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John Kunz
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Garland Erbele, Chief Engineer
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Leo Holzbauer
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November 27, 2000

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Re: In the Matter of the Request to Amend or Rescind Water Permit No. 2300-2

The South Dakota Department of Environment and Natural Resources has reviewed the proposed Findings of Fact, Conclusions of Law, and Final Decision in the above-referenced matter. The DENR is not proposing any material changes to the proposed document.

There appear to be two typographical errors. Finding of Fact No. 3 (fifth line) should use the word "brought." Finding of Fact No. 23 (fifth line) should use the word "height" in referring to the carp guard.

More significantly, I would like to thank the South Dakota Water Management Board and the parties for the courtesy shown to the DENR and myself during the recent hearings. There is no doubt that this issue was a highly contested dispute involving both factual and legal disputes. The parties clearly and succinctly presented their grievance to the Board without engaging in unduly acrimonious argument or repetitive evidentiary objections.

Sincerely,

Diane Best
Assistant Attorney General

DB:nan

BEFORE THE WATER MANAGEMENT BOARD
STATE OF SOUTH DAKOTA

NOV 2000
WATER RIGHTS
PROGRAM
Pierre, SD

IN THE MATTER OF UNITED STATES FISH & WILDLIFE SERVICE APPLICATION NO. 2300-2 (LAKE CREEK)	)APPLICANT'S RESPONSE TO)PROPOSED FINDINGS OF FACT,)CONCLUSIONS OF LAW, AND)FINAL DECISION))

Pursuant to the Chief Engineer's October 17, 2000, Notice, the Applicant, the United States Fish and Wildlife Service ("FWS"), hereby responds to the Board's proposed Findings of Fact, Conclusions of Law, and Final Decision as follows:

CONCERNING THE PROPOSED FINDINGS OF FACT

1. Re: Paragraph 3, pages 2-3: For the sake of clarity, FWS asserts that the third sentence of this paragraph should be rewritten as follows: "This Board granted the vested right but the circuit court reversed and no further appeal was ~~bought~~ brought."

2. Re: Paragraph 3, pages 2-3: To more accurately reflect the record, FWS asserts that the last sentence of this paragraph should be rewritten as follows: "The Service asserted, as a basis upon which its application for Diversion No. 4A should be granted, that the diversion would enhance the possibility of the survival of the pearl dace which had been classified as ~~an endangered~~ a threatened species by the South Dakota Commission of

Game, Fish and Parks in 1978." See Finding of Fact No. 35 in the 1998 Decision.

3. Re: Paragraph 4, page 2: To more accurately reflect the record, FWS asserts that the first sentence of this paragraph should be rewritten as follows: "The Board, in its 1998 Decision, found that the Service had established that Diversion No. 4A would protect the pearl dace and their habitat if ~~it~~ the diversion were constructed with a four foot barrier to prevent carp from migrating westward in Lake Creek to the area inhabited by pearl dace." See Findings of Fact No. 44, 47, 48, 49, 50, and 51 in the 1998 Decision.

4. Re: Paragraph 11, page 4: For the sake of clarity, FWS asserts that the first sentence of this paragraph should be rewritten as follows: "To establish that the proposed change unlawfully impairs an existing right of the landowners ~~of~~ or the county, the landowners ~~of~~ or the county must demonstrate, at a minimum, that some real interest of theirs will be adversely affected."

5. Re: Paragraph 13, page 5: To more accurately reflect the record, FWS asserts that the 5th sentence of this paragraph should be rewritten as follows: "The clear trend of the data is that the ground water level rises and falls in response to immediate climatic conditions and seasonal changes." See Transcript at pp.133-34 & 137-38.

6. Re: Paragraph 13, page 5: For the sake of clarity, FWS asserts that the sixth sentence of this paragraph should be rewritten as follows: "A study of the piezometer data indicates that ~~it~~ groundwater levels adjacent to Diversion No. 4A ~~was~~ were simply not affected by the creation of Diversion No. 4A."

7. Re: Paragraph 17, pages 6-7: For the sake of clarity, FWS asserts that the second sentence of this paragraph should be rewritten as follows: "The Board finds, however, that the evidence is that the Service has continued to pursue the Canadian thistle challenge and indeed, just last year, received increased funding for ~~the project~~ weed control."

8. Re: Paragraph 21, pages 7-8: For the sake of clarity, FWS asserts that the last sentence of this paragraph should be rewritten as follows: "The Board finds that the public interest would be, to some degree, served by denying the ~~permit~~ Amendment as a means of vindicating its authority to enforce compliance with the conditions of its permits."

9. Re: Paragraph 22, page 8: For the sake of clarity, FWS asserts that the first sentence of this paragraph should be rewritten as follows: "There are, however, other factors which weigh in favor of the ~~permit~~ Amendment and outweigh the public interest consideration identified above."

10. Re: Paragraph 22, page 8: To more accurately reflect the record, FWS asserts that the second sentence of this para-

graph should be rewritten as follows: "First, it is necessary to keep the permit in place to preserve the threatened species--the pearl dace and their habitat." See Findings of Fact No. 44, 47, 48, 49, 50, and 51 in the 1998 Decision.

11. Re: Paragraph 22, page 8: For the sake of clarity, FWS asserts that the third sentence of this paragraph should be rewritten as follows: "Second, forcing the Service to dig two feet into the channel to establish a new channel bed so that the bottom of the carp guard could be set at 3030.1 fmsl appears to be a waste of the taxpayer's money."

12. Re: Paragraph 23, page 8: For the sake of clarity, FWS asserts that the second sentence of this paragraph should be rewritten as follows: "Qualification No. 4 provides that the Service is required to remove silt behind Diversion No. 4A if the buildup exceeds fifty-percent of the ~~weight~~ height of the carp guard."

13. Re: Paragraph 26, page 9: To more accurately reflect the record, FWS asserts that the following sentence should be added after the last sentence of this paragraph: "Lastly, even though the impoundment might be full of sediment, due to climatic conditions, there are times when it is simply not feasible for the Service to get an excavator to the site." See, for example, Transcript at pp. 15-16.

14. Re: Paragraph 30, page 10: For the sake of clarity, FWS asserts that the third sentence of this paragraph should be rewritten as follows: "If the Qualification is not modified, each time the impoundment is cleaned out, the water will, therefore, erode material that would not normally be eroded."

15. Re: Paragraph 30, page 10: To more accurately reflect the record, FWS asserts that the last sentence of this paragraph should be rewritten as follows: "The Board thus finds that modification of Qualification No. 4 to provide for dredging at a rate of only twice a year at no less than three month intervals will not unlawfully impair the existing rights of opponents and, in fact, will be to their benefit."

16. Re: Paragraph 31, page 10: To more accurately reflect the record, FWS asserts that the second sentence of this paragraph should be rewritten as follows: "The beneficial use which underlies the permit, of course, is the protection of the pearl dace and their habitat." See Findings of Fact No. 44, 47, 48, 49, 50, and 51 in the 1998 Decision.

17. Re: Paragraph 33, page 11: To more accurately reflect the record, FWS asserts that the second sentence of this paragraph should be rewritten as follows: "The Board has, however, determined above that it is in the public interest to amend the Qualifications of Permit No. 2300-2 and that it is, moreover, imperative that Permit No. 2300-2 be maintained to preserve the

population and habitat of pearl dace in Lake Creek." See Findings of Fact No. 44, 47, 48, 49, 50, and 51 in the 1998 Decision.

CONCERNING THE PROPOSED CONCLUSIONS OF LAW

1. Re: Paragraph 3, page 12: For the sake of clarity, FWS asserts that the first sentence of this paragraph should be rewritten as follows: "The Board concludes that the amendments to the qualification relating to the height of the structure and to the dredging qualification, as set forth below, will not unlawfully impair any existing rights of the ~~opponent~~ opponents."

2. Re: Paragraph 4, page 12: To more accurately reflect the record, FWS asserts that the second sentence of this paragraph should be rewritten as follows: "The underlying beneficial use is the protection of the pearl dace and their habitat." See Findings of Fact No. 44, 47, 48, 49, 50, and 51 in the 1998 Decision.

3. Re: Paragraph 6, pages 12-13: For the sake of clarity, and to more accurately reflect the record, FWS asserts that the fourth sentence of this paragraph should be rewritten as follows: "The permit serves ~~a~~ an important public interest in that it protects the pearl dace and their habitat." See Findings of Fact No. 44, 47, 48, 49, 50, and 51 in the 1998 Decision.

CONCERNING THE PROPOSED FINAL DECISION

1. Re: Paragraph 1.a., page 13: For the sake of clarity, and to more accurately reflect the record, FWS asserts that the sentence following the colon in paragraph 1.a. should be rewritten as follows: "The storage level of Diversion No. 4A may not be in excess of 3036.23 feet mean sea level and the structure must be designed to pass a 25-year ~~precipitation of that~~ event." ~~without raising the pool more than four feet.~~ See, for example, Transcript at 293.

FWS proposes to delete the "without raising the pool more than four feet" language for the following reasons. FWS believes and hereby asserts that this language is ambiguous and vague, and that it creates a virtually meaningless condition which is essentially impossible for FWS to obey. For example, with respect to this language, the following questions can be asked: FWS is constrained from "raising the pool more than 4 feet" from what? The invert of the channel? The bottom of the 4-foot carp guard? The elevation of the pool when sediment is present? The elevation of the pool when sediment is not present?

The above questions notwithstanding, and most importantly, FWS believes and hereby asserts that the subject language is simply not supported by the record. More particularly, the only portion of the Board's deliberation which is arguably related to the subject language reads as follows:

MR. FREEMAN: Mr. Chairman, I would move that we amend qualification number three to change the elevation that's described at 3034.1 to instead be 3036.23.

MS. LOUCKS: I'll second that on the basis of the Department's testimony, that they have been out and they have researched this and I have to make my decision on experts.

CHAIRMAN BRINK: You're going to leave the four feet flood pool alone?

MS. LOUCKS: That was the Department's recommendation when they were out there.

CHAIRMAN BRINK: That's when they had two more feet of freeboard to play with. Your motion is you want to leave the four foot raise?

MR. FREEMAN: What four foot are we talking about? There's no other four foot in any of the qualifications.

CHAIRMAN BRINK: Not raise the 25-year flood pool more than four feet? Right now we've heard testimony --

MR. FREEMAN: Well, I don't know.

CHAIRMAN BRINK: It would be contained on their own property.

MR. FREEMAN: I'm going to stick with what I remember which is 3036.23.

CHAIRMAN BRINK: Any discussion? We have a motion on modifying the qualification to permit number -- change the weir elevation. All those in favor of the motion signify by saying aye. Opposed the same.

* * *

MS. GUNDERSON: I think we better have a roll call. I haven't made up my mind yet in favor of the motion.

MS. BINEGAR: Gunderson.

MS. GUNDERSON: I'll vote aye.

MS. BINEGAR: Rollag.

MR. ROLLAG: No.

MS. BINEGAR: Freeman.

MR. FREEMAN: Aye.

MS. BINEGAR: Loucks.

MS. LOUCKS: Aye.

MS. BINEGAR: Holzbauer.

MR. HOLZBAUER: Nay.

MS. BINEGAR: And Brink.

CHAIRMAN BRINK: Aye. Okay.

Transcript at 302-304 (emphasis added). A copy of this portion of the transcript has been attached hereto as Exhibit "A."

In other words, although there had been some discussion concerning a "four foot flood pool," or a "four foot raise," Mr. Freeman specifically declined to add language to his motion concerning the same; rather Mr. Freeman "stuck with" his original motion before the Board which was simply to change the elevation in qualification number three from 3034.1 to 3036.23.

For the above reasons, FWS asserts that the above paragraph should be rewritten as proposed above.

2. Re: Paragraph 1.b., page 13: FWS believes that, with respect to this part of the Final Decision, certain critical information concerning the area of silt to be removed was inadvertently omitted. More particularly, the transcript shows that the following dialogue took place:

CHAIRMAN BRINK: So we have a motion to remove [the silt] for the first 100 feet from the structure has died. Someone more comfortable with the riprap area?

MR. FREEMAN: Well, I certainly would be, if we're going to have the requirement.

CHAIRMAN BRINK: We need to have some limits on the dredging area just --

MR. FREEMAN: I sure don't want fifty percent to stay there. I think its unreasonable. Its untenable and it defeats the purpose. If the majority of the Board would feel more comfortable with once a year, I could certainly go along if we defined it to the riprap. I feel more comfortable doing that.

* * *

MR. FREEMAN: How about twice a year, could we swing enough votes for twice a year? * * *

CHAIRMAN BRINK: Twice a year the riprap area.

MR. FREEMAN: I would so move. We require the Service to do it two times per year at--to remove the silt in the area of the carp guard that's encompassed in the present day riprap area.

CHAIRMAN BRINK: Twice a year at intervals not less than three months?

MR. FREEMAN: Right.

CHAIRMAN BRINK: Not November 1st and November 2nd, at intervals not less than three months apart.

MR. FREEMAN: Yep.

MR. HOLZBAUER: Three months, okay.

CHAIRMAN BRINK: Was there a second?

MS. LOUCKS: Second.

CHAIRMAN BRINK: Okay. Now we have a motion and a second.

MR. FREEMAN: We didn't listen to anybody. All those in favor of the motion signify by say aye. Opposed the same.

MR. HOLZBAUER: Motion carries. Finding, Mr. Guhin?

Transcript at pp. 312-14 (emphasis added). A copy of this portion of the transcript is attached hereto as Exhibit "B."

In other words, the motion before the Board (which ultimately carried) was to remove the silt behind the structure twice a year (at intervals of not less than three months) in the present day riprap area. For the above reasons, FWS asserts that the above paragraph should be rewritten as follows: "The Service is required to remove the silt in the area behind the carp guard which is defined by the present day riprap area twice in each calendar year, at intervals not less than three months."

DATED this 27th day of November, 2000.

JOHN R. KUNZ, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2000, true and correct copies of the foregoing **APPLICANT'S RESPONSE TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** were mailed via FEDERAL EXPRESS to:

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John Guhin, Esq.
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500 East Capitol Ave.
Pierre, SD 57501-50570

I hereby further certify that on this 27th day of November, 2000, true and correct copies of the foregoing **APPLICANT'S RESPONSE TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION** were mailed postage pre-paid in the United States Mail to:

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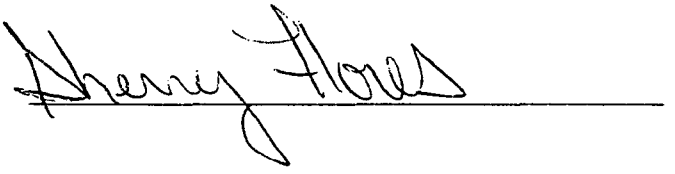

Page 301

into the creek.
CHAIRMAN BRINK: Okay.
MR. FREEMAN: So I think we have that covered and again, Duane, believe me, I love to make people pay for mistakes. That's how I make a living. But I don't see making them pay for a mistake unless it accomplishes something that's not already being accomplished. We don't -- what we have got is a possibility of some flooding and silt and raising water table because of that two foot difference. I understand that, and we have a qualification that addresses it. And Mr. Kraft knows this Board is very serious about it, because we've been hollering that qualification since 1992.
CHAIRMAN BRINK: I don't doubt your explanation of the training dike. I would like to see it again, if it's possible for one second. Is it permissible for the reporter to --
MR. FREEMAN: No, she would have to read it back. Can you get Ms. Johnston's rebuttal testimony?
MR. KUNZ: Mr. Husmann.
MR. FREEMAN: I thought Ms. Johnston said it.
CHAIRMAN BRINK: Does someone else recall that same thing, that if we have flooding it's not going to affect the adjacent land?
MS. GUNDERSON: Yes, I recall it was going to be to the south side. The landowners are on the north side; that

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the bank it high enough to protect them.
MR. FREEMAN: In response to I believe Ms. Ireland's questions, and he very clearly said it was going to flow to the south. It will hit two hills there and that pushes it right back into the stream.
MR. HOLZBAUER: Can we --
CHAIRMAN BRINK: I don't want to review it if other Board members picked up on it.
MR. HOLZBAUER: Can we allow that to be out-of-bank flow? Can we allow that natural thing?
CHAIRMAN BRINK: It's on their land.
MR. HOLZBAUER: Nothing wrong with it?
MR. FREEMAN: We're saying they can't impair -- our qualification is it may not impair the use of any lands adjoining the National Wildlife Refuge, including but not limited to flooding or specific alteration of plant species. So I mean if they want to flood their own land, I guess to a certain extent that's their business, to some extent it is.
CHAIRMAN BRINK: This Board isn't rubber-stamped.
MR. FREEMAN: I'm going to break it down into two parts. My first part, I would move that we change qualification number three --
(Off the record discussion.)
MR. FREEMAN: Mr. Chairman, I would move that we amend qualification number three to change the elevation

Page 303

that's described at 3034.1 to instead be 3036.23.
MS. LOUCKS: I'll second that on the basis of the Department's testimony, that they have been out and they have researched this and I have to make my decision on experts.
CHAIRMAN BRINK: You're going to leave the four feet flood pool alone?
MS. LOUCKS: That was the Department's recommendation when they were out there.
CHAIRMAN BRINK: That's when they had two more feet of freeboard to play with. Your motion is you want to leave the four foot raise?
MR. FREEMAN: What four foot are we talking about? There's no other four foot in any of the qualifications.
CHAIRMAN BRINK: Not raise the 25-year flood pool more than four feet? Right now we've heard testimony --
MR. FREEMAN: Well, I don't know.
CHAIRMAN BRINK: It would be contained on their own property.
MR. FREEMAN: I'm going to stick with what I remember which is 3036.23.
CHAIRMAN BRINK: Any discussion? We have a motion on modifying the qualification to permit number -- change the weir elevation. All those in favor of the motion signify by saying aye. Opposed the same.

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MR. ROLLAG: No.
MR. HOLZBAUER: Aye.
MS. GUNDERSON: I think we better have roll call. I haven't made up my mind yet in favor of the motion.
MS. BINEGAR: Gunderson.
MS. GUNDERSON: I'll vote aye.
MS. BINEGAR: Rollag.
MR. ROLLAG: No.
MS. BINEGAR: Freeman.
MR. FREEMAN: Aye.
MS. BINEGAR: Loucks.
MS. LOUCKS: Aye.
MS. BINEGAR: Holzbauer.
MR. HOLZBAUER: Nay.
MS. BINEGAR: And Brink.
CHAIRMAN BRINK: Aye. Okay.
MR. FREEMAN: Well, regarding the sediment accumulation, I think I understand what the Division is recommending. I think that's an exercise in futility. I really do. Either we ought to do it when it fills up, or not do it at all. And if it causes the water table -- personally I tend to agree that common sense tells you if you let it silt in like that, it's going to affect the water table.
But again, I feel comfortable removing it because we got qualification number one, and if they mess up

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CHAIRMAN BRINK: I think it was something like 40 or 60 feet, or something like that.

MR. ROLLAG: I think I heard someone say no one is in favor of this motion, so I'm going to vote in favor of it.

MR. FREEMAN: Well, I would say that -- or I would suggest, Bernita, maybe you could consider your motion being that they remove it once a year on or before November 1st, in the area of the carp guard and riprap maybe.

CHAIRMAN BRINK: I would like to add 100 foot back. Put a distance on it, 100 feet back from the weir.

MS. LOUCKS: That's fine with me.

CHAIRMAN BRINK: All accumulated silt for 100 feet back? That's a lot of silt.

MR. FREEMAN: You know, all they got to do guys is have the backhoe out there on November 1st, remove the silt and then leave it there overnight and remove the silt on November 2nd. They have just done the on or before November 1st of each year.

CHAIRMAN BRINK: Or leave it on the bank and it will all be back in the creek in six months anyway. Is your motion qualified, Bernita, as far as --

MS. LOUCKS: 100 foot back.

CHAIRMAN BRINK: Was there a second to that?

MR. FREEMAN: Anybody remember how far the riprap

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goes?

MR. HOLZBAUER: 60 feet.

MR. FREEMAN: Wasn't there testimony that it tears up the streambed to take that heavy piece of equipment and go back where there isn't riprap?

CHAIRMAN BRINK: 40 to 60 feet.

MR. FREEMAN: That's why I'm saying riprap. You can take that machine to the river bank and you're going to -- we're going to defeat our purpose.

MR. HOLZBAUER: I heard in somewhere the requirement that a dragline be used, not an excavator, a dragline be used; that's the words I heard Mr. Heath say.

MR. FREEMAN: Well, I'm sure you can get people in there with shovels cleaning it out and not do any damage either, but you have to be cost practical. I think -- I mean where do you get a dragline in there.

MR. HOLZBAUER: They drag lakes that are just as accessible as this excavator.

MR. FREEMAN: Well, I hate to start telling them how they have to do it.

CHAIRMAN BRINK: I like 100 feet. We're still in the wide part of the channel velocity. What's the motion? We have it at 100 feet?

MR. FREEMAN: That's what Bernita said.

CHAIRMAN BRINK: Do we have a second?

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MR. HOLZBAUER: No.

CHAIRMAN BRINK: Motion dies for lack of second.

MR. FREEMAN: I'll make a second. We ought to vote on it. We can go for a lesser amount or something here.

CHAIRMAN BRINK: All those in favor of the motion signify by saying aye.

MR. FREEMAN: No, I withdraw. I'm so used to going along with you guys.

CHAIRMAN BRINK: Opposed?

MR. HOLZBAUER: Aye.

MR. FREEMAN: Aye.

CHAIRMAN BRINK: Chair rules defeat of the motion. Is there a substitute motion?

MR. ROLLAG: If we take no action the qualification will stand as it is.

MS. GUNDERSON: There we go.

CHAIRMAN BRINK: If we don't remove it, it has to be removed?

MR. ROLLAG: What I'm saying is we shouldn't probably -- we should probably take some action.

MR. FREEMAN: Yep.

CHAIRMAN BRINK: I'm sorry, did we remove four.

MR. FREEMAN: No, we haven't removed it yet.

CHAIRMAN BRINK: We changed three but left four alone.

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MR. FREEMAN: So far my motion to remove it in its entirety was defeated.

CHAIRMAN BRINK: So we have a motion to remove it for the first 100 feet from the structure has died. Someone more comfortable with the riprap area.

MR. FREEMAN: Well, I certainly would be, if we're going to have the requirement.

CHAIRMAN BRINK: We need to have some limits on the dredging area just --

MR. FREEMAN: I sure don't want the fifty percent to stay in there. I think it's unreasonable. It's untenable and it defeats the purpose. If the majority of the Board would feel more comfortable with once a year, I could certainly go along if we defined it to the riprap. I feel more comfortable doing that.

MR. HOLZBAUER: My thought on this whole issue, and that's why I voted against the first motion, is the fact that if this weir was lowered at two foot, I let her flow, I would never dredge anything. But since we never lowered it two feet, we raised it back up two feet, now we're silting in and I have a problem.

MR. FREEMAN: We didn't raise it. We left it exactly as it is. The only thing we did was change the number because of a drafting mistake. We didn't raise or change anything out there, that I can see.

EXHIBIT "B"

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CHAIRMAN BRINK: We did.
MR. HOLZBAUER: That's my feeling.
MR. FREEMAN: But it would still silt in if you were two foot lower, it will.
MR. HOLZBAUER: It's two feet lower.
MR. FREEMAN: Two feet less silt.
MR. HOLZBAUER: Lower the creek bottom, that's where I'm at, two feet lower of water table.
MR. FREEMAN: How about twice a year, could we swing enough votes for twice a year? I mean I want to get out of here.
CHAIRMAN BRINK: Twice a year the riprap area.
MR. FREEMAN: I would so move. We require the Service to do it two times per year at -- to remove the silt in the area of the carp guard that's encompassed in the present day riprap area.
CHAIRMAN BRINK: Twice a year at intervals not less than three months?
MR. FREEMAN: Right.
CHAIRMAN BRINK: Not November 1st and November 2nd, at intervals not less than three months apart.
MR. FREEMAN: Yep.
MR. HOLZBAUER: Three months, okay.
CHAIRMAN BRINK: Was there a second?
MS. LOUCKS: Second.

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CHAIRMAN BRINK: Okay. Now we have a motion and a second.
MR. FREEMAN: We didn't listen to anybody. All those in favor of the motion signify by saying aye.
Opposed the same.
MR. HOLZBAUER: Motion carries. Findings, Mr. Guhin?
MR. GUHIN: Yes.
CHAIRMAN BRINK: Thank you group, it's been.
MS. LOUCKS: Better get a report on the pearl dace.
MS. GUNDERSON: Mr. Chairman, I would like to make a statement, and I don't know what it's worth, but I see here on all sides a certain perhaps lack of respect for the deep pain that some people are feeling, and I would like to see some healing, if that's possible. It's been a long, tough time. We've all felt it. And I just would recommend that somehow or another we could find a way to respect the fact that we don't like thistles in somebody's yard, and we might help them get rid of them. We don't like water tables that change, and we need to be good neighbors.
MR. ROLLAG: Good point.
MS. GUNDERSON: End of statement.
CHAIRMAN BRINK: We are adjourned.
(Whereupon, the proceedings were adjourned.)

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STATE OF SOUTH DAKOTA)
) CERTIFICATE
COUNTY OF HUGHES)

I, Lynne M. Ormesher, Registered Professional Reporter, hereby certify that the foregoing pages 1 through 314, inclusive, are a true and correct transcript of my stenotype notes.

Dated at Pierre, South Dakota, this 31st day of October, 2000.

Lynne M. Ormesher, RPR

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE REQUESTS TO AMEND OR RESCIND WATER PERMIT NO. 2300-2; UNITED STATES FISH AND WILD LIFE SERVICE (LACREEK NATIONAL WILDLIFE REFUGE)	))))))	PROPOSED FINDING OF FACT, CONCLUSIONS OF LAW, and FINAL DECISION

FINDINGS OF FACT

1. The U.S. Fish and Wildlife Service (Service) requests to amend Water Permit No. 2300-2. In its request, the Service asks removal of Qualifications No. 4 which requires removal of silt when the build up exceeds fifty percent of the height of the carp guard and to amend Qualification No. 3 to allow establishment of storage level of 3036.23 feet mean sea level at Diversion 4A. Landowners and Bennett County request Water Permit No. 2300-2 to be rescinded in its entirety.

2. The 1998 Decision is herewith incorporated insofar as it is not inconsistent with the Findings and Conclusions and Final Decision issued today.

3. The Service based its application for Diversion 4A upon the contention that said diversion would enhance the possibility of survival of the pearl dace minnow which had been classified as an endangered species by the South Dakota Commission of Game, Fish and Parks in 1978, and later reclassified as a threatened species. No impact study as required by the Endangered Species Act has been conducted by the Service before making its request for the permit for Diversion No. 4A.

4. The Board, in its 1998 Decision, found that Diversion No. 4A should be constructed with a four foot barrier to prevent carp from migrating upstream in Lake Creek to the area

inhabited by the pearl dace minnow and it further found that to protect the surrounding landowners, the permit authorized the storage of .75 acre foot of water in stead of an acre foot of water as had been requested by the Service. The storage level of Diversion No. 4A was required not to be in excess of 3034.1 feet mean sea level and the Service as further required to remove the silt which accumulated behind the diversion structure with said buildup exceeded fifty percent of the height of the carp guard.

5. Service admits it has constructed Diversion No. 4A at 3036.23 fmsl in violation of permit qualification No. 3. and that said violation was known to the Service for a substantial length of time before it informed the Chief Engineer of said discrepancy.

6. Service admits it has not complied with the removal of the silt buildup when it exceeded fifty percent of the height of the carp guard.

7. SDCL 46-2A-12, allows an amendment to an existing permit if the change does not unlawfully impair existing rights, is for a beneficial use and is in the public interest.

8. The landowners demonstrated through their testimony and exhibits that their interests were and will continue to be adversely affected by the failure of the Service to comply with the original water permit qualifications. The failure of the Service to construct Diversion No. 4A in compliance with the original Board decision has allowed a build up of silt in the area surrounding Diversion No. 4A, causing backup of silt further west of the Diversion and causing erosion of the original Lake Creek channel which results in the build up of silt downstream as well as further erosion. Said buildup and erosion will result in flooding of the landowners adjoining property thereby reducing or denying production on the land and decreasing its value. Further, the height of the water at 3034.1 fsml as required in the 1998 decision, if amended to 3036.23 fsml, results in less bank available to handle the flow of water during periods of high

water, thus allowing flooding of the landowners property at the area of Diversion No. 4A as well as on down Lake Creek. Said flooding will occur on both landowner, Ray Kocer and Brett Heath, as well as a Bennett County Road. Amendment to qualification No. 3 will not protect the landowners from flooding.

9. The nature of Lake Creek is to erode vertically because of the soil conditions and the fast moving water which naturally averts the silt from accumulating in the Creek. The requested amendment to Diversion No. 4A causes horizontal eroding of Lake Creek, slows the flow of the water and causes a greater build up of silt and a widening of the creek bed which is unnatural.

10. Landowners will be further harmed by the increased water level behind Diversion No. 4A which causes ground levels to rise which in turn causes seepage of water from under the ground of the landowners property making it impossible to raise a crop due to the standing water and overgrowth of weeds and undesirable vegetation.

11. It is not in the public interest to allow the granting of the amendment when the Service admits it constructed the original structure in violation of qualifications to the permit, and blatantly disobeyed the removal of the silt when it reached the level set forth as a qualification for holding the permit.

12. The any beneficial use for the protection of the pearl dace minnow is outweighed by the impact of the erosion to Lake Creek and the harm to the adjoining landowners.

13. The clear violation of the permit by the Service overcomes the public interest and public benefit in maintaining the permit.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of these matters.

2. The Board concludes that adequate notice has been given to all affected parties .

3. The Board concludes that the amendments to the qualification relating to the height of the structure will unlawfully impair any existing right of the opponent, and that there is sufficient evidence of actual harm which will occur as a result of said amendments in the form of erosion, flooding and sedimentation.

4. The proposed amendments to qualifications Nos. 3 and 4 do not raise to a level of a beneficial use for the protection of the pearl dace minnow.

5. The proposed amendments are not in the public interest.

6. The Board concludes that the permit should be rescinded.

Dated this ____ day of _____, 2000.

BY THE BOARD

_____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the proposed Findings of Fact and Conclusions of Law in the matter of In the Matter of the Requests to Amend or Rescind Water Permit No. 2300-2; United States Fish and Wildlife Service (LaCreek National Wildlife Refuge) were served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Allen, South Dakota , on this 28th day of November, 2000:

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STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE REQUESTS TO AMEND OR RESCIND WATER PERMIT NO. 2300-2; UNITED STATES FISH AND WILDLIFE SERVICE (LACREEK NATIONAL WILDLIFE REFUGE)	)))))	FINDINGS OF FACT, CONCLUSIONS OF LAW, and FINAL DECISION

FINDINGS OF FACT

1. This decision addresses the requests of the U.S. Fish and Wildlife Service (Service) to amend Water Permit No. 2300-2. The Service requests the removal of Qualification No. 4 to that permit. Qualification No. 4 requires the Service to remove silt if the buildup of silt exceeds fifty percent of the height of the carp guard at Diversion No. 4A. The Service in addition requests that Qualification No. 3 be amended to allow it to establish a storage level of 3036.23 feet mean sea level (fmsl) at Diversion 4A. This decision also addresses the request of nearby landowners, and of Bennett County, to rescind, in its entirety, Water Permit No. 2300-2.

2. The background of this matter is set out in detail in the Board decision in the case entitled "In Re Application for Water Permit No. 2300-2; U.S. Fish and Wildlife Service (LaCreek National Wildlife Refuge)" (March 5, 1998) (hereinafter 1998 Decision). The 1998 Decision is herewith incorporated insofar as it is not inconsistent with the Findings, Conclusion and Final Decision issued today.

3. The background of Diversion No. 4A is relevant to understanding the present controversy. The Service originally attempted to establish a vested right to irrigate by way of

former Diversion No. 4. This Board granted the vested right but the circuit court reversed and no further appeal was brought. Thereafter, the Service instituted an application for a new permit for old Diversion No. 4. Subsequently, the Service deleted the irrigation portions of the application, moved the location downstream approximately four hundred feet and designated the new structure as Diversion No. 4A. The Service asserted, as a basis upon which its application for Diversion No. 4A should be granted, that the diversion would enhance the possibility of the survival of the pearl dace which had been classified as a threatened species by the South Dakota Commission of Game, Fish and Parks in 1978.

4. The Board, in its 1998 Decision, found that the Service had established that Diversion No. 4A would protect the pearl dace and their habitat if the diversion were constructed with a four foot barrier to prevent carp from migrating westward in Lake Creek to the area inhabited by pearl dace. To protect the surrounding landowners, the 1998 Decision qualified the permit granted to the Service such that it authorized the storage of .75 acre foot of water instead of an acre foot of water as requested by the Service. In addition, pursuant to Qualification No. 3, the storage level of Diversion No. 4A was required to be not "in excess of 3034.1 feet mean sea level" and the Service was required under Qualification No. 4, to remove the silt which was foreseen to accumulate behind the diversion structure if the buildup exceeded "fifty percent of the height of the carp guard." Amendment to Qualification No. 3.

5. As noted above, the Service now requests that Qualification No. 3 be amended such that the storage level of Diversion No. 4A is authorized to be not in excess of 3036.23 rather than the present requirement of 3034.1 feet mean sea level.

6. Pursuant to SDCL 46-2A-12, an amendment to an existing permit may be granted if the change does not unlawfully impair existing rights, is for a beneficial use and is in the public interest.

The Amendment of Qualification No. 3 does not unlawfully impair the existing rights of the surrounding landowners or Bennett County.

7. The Board first considers whether the Amendment of Qualification No. 3 would unlawfully impair any existing rights of the landowners or Bennett County, the opponents to the Amendment. The opponents first argue that their existing rights will be impaired because the Service obligated itself to construct Diversion No. 4A so as not to have a storage level in excess of 3034.1 fmsl. Despite this, the opponents submit, the Service constructed Diversion No. 4A with a storage level of 3036.23 fmsl.

8. The Service admits that it has constructed Diversion No. 4A at 3036.23 fmsl in violation of permit Qualification No. 3.

9. The Service testified, and presented documentary evidence to support its testimony, that the elevation of the carp guard was originally proposed, and ultimately set, at 3034.1 fmsl, instead of 3036.23 fmsl because of a drafting error on one

of the plans. The plan should have shown an invert elevation at the bottom of the creek of 3032.1 fmsl, but instead showed an elevation of 3030.1 fmsl. The engineer in charge of building the carp guard was not cognizant of the permit qualification that the storage level could not be in excess of 3034.1 fmsl. The engineer was aware of his obligation to build a carp guard four feet high to prevent the carp from jumping over the carp guard. Therefore, the carp guard was built from the actual bottom of the creek at 3032.1 with approximately four feet of boards to 3036.23 fmsl.

10. The Service acknowledges that it should have informed the Chief Engineer of the discrepancy at an earlier date than it did inform the Chief Engineer.

11. To establish that the proposed change unlawfully impairs an existing right of the landowners or the county, the landowners or the county must demonstrate, at a minimum, that some real interest of theirs will be adversely affected. The opponents contend that because there is a two foot difference between the height of the water at 3034.1 fmsl, as established by the 1998 decision, and 3036.23 fmsl, which the amendment proposes, there will be less bank available to handle the flow during high water periods. According to the testimony of Mr. Husmann, who was accepted as an expert by the Board, the structure now in place at 3036.23 feet mean sea level provides approximately 3.4 feet above the water surface to the top of the channel at its lowest point. This is, however, at only one point. That low point is found on the south side of the channel.

If the water reaches that level, it will go out and around the end of the dike and back into Lake Creek and stay on Service property. In the immediate area of impoundment the landowners' property is on the north side of the creek, and would not be affected by this high level of the water.

12. In addition, the uncontradicted evidence was that a twenty-five year flood would be handled by the existing structure proposed to be "legalized" by the present proposed amendment. The Board finds that, as configured and requested, the amendment in qualification No. 3 would protect the landowners from flooding.

13. The opponents moreover assert that their legal interests will be harmed because the increased amount of water behind the structure will cause ground water levels to rise. The evidence strongly refutes this contention. In particular the Board has reviewed the testimony developed from shallow ground water monitoring wells known as piezometers. Measurements have been recorded in the area since 1994 and a graph of the measurements was presented to the Board. The clear trend of the data is that the groundwater level rises and falls in response to immediate climatic and seasonal conditions. A study of the piezometer data indicates that groundwater levels adjacent to Diversion 4A were simply not affected by the creation of Diversion No. 4A. Because the data was not affected, it is clear that Diversion No. 4A did not affect ground water tables with regard to the landowners' property.

14. Landowners further contend that the height of Diversion No. 4A as constructed invades their legal rights because it has caused increased sedimentation and erosion downstream. The Board has examined the evidence proffered by the opponents. Clearly there is erosion and sedimentation in Lake Creek. However, the Board finds that better explanation for the erosion and sedimentation is simply the nature of Lake Creek. Lake Creek will continue to erode and will continue to carry sediment because of its natural properties. Moreover, the Board credits the testimony of the Service experts that once Diversion No. 4A is filled with sediment, the sediment will move in the stream just as it would if the diversion were not there at all.

15. The opponents also contend that the Service has negligently allowed the Canadian thistle population to thrive and, in that way, harm them. The Board has carefully examined that evidence, and the video submitted by the opponents in that regard.

16. The Board finds that the opponents have failed to demonstrate that the grant of this amendment will in any way affect the Canadian thistle problem either on U.S. Fish and Wildlife Service property or on the landowners or county property. The claims can be rejected on this ground alone.

17. The opponents appear to have raised the thistle claim at this juncture to attack the credibility of the Service or to demonstrate that it will not faithfully carry out the conditions of the permit. The Board finds, however, that the evidence is that the Service has continued to pursue the Canadian thistle

challenge and indeed, just last year, received increased funding for weed control. The Board is unable to find that the Service's approach to the Canadian thistle problem should somehow be factually associated with the grant of this particular amendment or that it undermines its confidence that the Service will carry out the conditions of the permit or any amendment.

18. The evidence indicates that the grant of the amendment with regard to the change in the height of the structure will not unlawfully impair existing rights.

The Amendment of the permit to increase the structure height is for a beneficial use.

19. The Board now turns to consideration of whether the amendment to the height of the structure is for a beneficial use. The Board has previously found that providing for a four-foot carp guard is a beneficial use and abides by that finding.

20. If the structure is built from the lowest point of the channel, it must reach 3036.23 fmsl. Therefore, a structure height of 3036.23 fmsl provides for a beneficial use.

The Amendment of Qualification No. 3 to increase the structure height is in the public interest.

21. The Board now considers the question of whether the grant of the Amendment is in the public interest. In this case, the determination involves a weighing of diverse factors. Weighing against the grant of the amendment is the fact that the Service constructed the structure in violation of the qualification to the permit and afterwards maintained it in violation of the qualification. Furthermore, the Service did not promptly report the mistake it had made; the Board is uncertain

as to whether this indicates that the Service is not properly monitoring its own activities or whether the Service deliberately did not inform the Chief Engineer--either alternative weighs against the Service and the grant of the amendment. The Board finds that the public interest would be, to some degree, served by denying the Amendment as a means of vindicating its authority to enforce compliance with the conditions of its permits.

22. There are, however, other factors which weigh in favor of the Amendment and outweigh the public interest consideration identified above. First, it is necessary to keep the permit in place to preserve the threatened species--the pearl dace and their habitat. Second, forcing the Service to dig two feet into the channel to establish a new channel bed so that the bottom of the carp guard could be set at 3030.1 fmsl appears to be a waste of the taxpayer's money. The Board has found that the increased height, although in violation of the permit, does not pose a significant threat of harm to the landowners or to the county. In this case, the real benefits of preserving the carp guard in place as it is today and not forcing the useless expenditure of taxpayer money outweigh any public interest benefit from forcing the removal of the carp barrier or alternative of compelling an expensive, and essentially unneeded, reconstruction of the carp barrier.

Amendment to Qualification No. 4 of the 1998 Decision.

23. The U.S. Fish and Wildlife Service has also requested that the Board amend Qualification No. 4. Qualification No. 4 provides that the Service is required to remove silt behind

Diversion No. 4A if the buildup exceeds fifty-percent of the height of the carp guard.

24. Between June 21, 1999, and September 1, 2000, Diversion No. 4A was cleaned out six times.

25. The evidence demonstrates that, to clean out Diversion No. 4A, it is necessary to bring an excavator to the diversion. The excavator's bucket takes about three-quarters of a yard of sediment from the impoundment and places it beside the impoundment.

26. The use of the excavator causes problems because, to perform the operation, it must maneuver on the side of the structure. Even though care is taken, the machine will tear up grass and sod and disturb the soil. In addition, sandpiles will be created which cover up the grass. Lastly, even though the impoundment might be full of sediment, due to climatic conditions, there are time when it is simply not feasible for the Service to get an excavator to the site.

27. The evidence, which is essentially uncontradicted, indicates that the diversion will fill up with sand every two to four weeks.

Modification of Qualification No. 4 will not unlawfully impair the existing rights of the surrounding landowners or the county.

28. The Board has examined the question of whether failure to remove the silt from Diversion No. 4A causes damage to the landowners by backing up water or silt on their property or somehow otherwise harming them. The Board credits the evidence of Ms. Johnston that the silt does not back up more than 800

feet. The Board is unable to ascertain any effect of the silt or water on the landowners.

29. The Board has also examined the question of whether dredging or the failure to dredge has any effect on the groundwater level. The Board again credits the piezometer tests done under the supervision of Ms. Johnston and finds that there is no effect on the water level from dredging. The reason is apparent--the structure is too small to affect in any significant way the ground water table at any significant distance from the structure.

30. The Board has also considered whether the modification of the Qualification will increase erosion to the detriment of the landowners and finds, to the contrary, that it will decrease erosion to their benefit. The Board credits the testimony of Ms. Johnston that, when sediment is removed from the water, and the water continues downstream, its erosive energy is increased. If the Qualification is not modified, each time the impoundment is not cleaned out, the water will, therefore, erode material that would not normally be eroded. On the other hand, if the Service is not required to clean out the impoundment on a frequent basis, the water will proceed downstream carrying the silt but it will be less erosive because it has less erosive energy. This will benefit the interest the landowners have in limiting erosion. The Board thus finds that modification of Qualification No. 4 to provide for dredging at a rate of only twice a year at no less than three month intervals will not

unlawfully impair the existing rights of the opponents and, in fact, will be to their benefit.

Modification of Qualification No. 4 is for a beneficial use.

31. The Board concludes that modification of Qualification No. 4 is for a beneficial use. The beneficial use which underlies the permit, of course, is the protection of the pearl dace and their habitat. The modification of Qualification No. 4, by decreasing the erosion which would be caused by more frequent dredging, and by decreasing the impact on the land surrounding the impoundment, is also for the beneficial use of enhancing Lake Creek.

Modification of Qualification No. 4 is in the public interest.

32. The Board finds that the modification of Qualification No. 4 to provide for two dredgings annually at Diversion No. 4 at intervals of not less than three months is in the public interest. In making this determination, the Board has considered the claims of the opponents that less frequent dredging would somehow harm them and has rejected those claims. Conversely, it has accepted the testimony that indicates that the ecology of the stream channel would be enhanced by less frequent dredging. The Board concludes that modification of Qualification No. 4 is in the public interest.

33. The opponents have requested that this Board rescind Permit No. 2300-2. The Board has, however, determined above that it is in the public interest to amend the Qualifications of Permit No. 2300-2 and that it is, moreover, imperative that Permit No. 2300-2 be maintained to preserve the population and

habitat of pearl dace in Lake Creek. The Board has also considered the clear violation of the permit by the Service but finds that the weight of that violation is insufficient to overcome the public interest and public benefit in maintaining the Permit in place. Therefore, the Board determines not to suspend or to "rescind" the Permit, assuming, for the sake of this paragraph, that it had the latter power.

CONCLUSIONS OF LAW

1. The Board had jurisdiction of these matters.

2. The Board concludes that adequate notice has been given to all affected parties of the matters considered herein, despite the fact that the proposal to amend the qualification regarding the height of the structure had not been advertised. The Board concludes that all parties interested in the matter have in fact received actual notice and have waived any requirement of further notice.

3. The Board concludes that the amendments to the qualification relating to the height of the structure and to the dredging qualification, as set forth below, will not unlawfully impair any existing rights of the opponents. The Board concludes, as set forth in detail above, that the opponents have failed to produce evidence of any actual harm which will occur as a result of the amendments; moreover, the proponents of the amendments have produced affirmative evidence that there will be no unlawful impairment with regard to flooding or sedimentation, or erosion.

4. The proposed amendments to Qualifications Nos. 3 and 4 are for a beneficial use. The underlying beneficial use is the protection of the pearl dace and their habitat.

5. The proposed amendments are in the public interest. The Board has carefully weighed above the factors which favor and which disfavor the public interest with regard to each of the amendments. The Board again concludes that taken individually, and as a whole, the amendments are in the public interest and their benefits far outweigh any potential detriments.

6. The Board concludes that the permit should not be rescinded. The Board notes, furthermore, that a question exists as to whether it could rescind the permit pursuant to SDCL 46-1-12 which provides only for a suspension after a first violation. Even granting the Board the authority to rescind or cancel the permit, the Board concludes that it would be inappropriate to do so. The permit serves an important public interest in that it protects the pearl dace and their habitat. The failure of the Service to promptly report its violation of the permit is not to its credit but does not demand, in this case, that the permit be rescinded. The public interest in the continuance of the permit is, in this case, stronger than its interest in recission. For the same reason, the Board determines not to suspend the permit under SDCL 46-1-12.

FINAL DECISION

1. The requests for amendment of the Qualifications to Water Permit No. 2300-2 are granted subject to the following conditions:

a. Qualification No. 3 is amended to read:

The storage level of Diversion No. 4A may not be in excess of 3036.23 feet mean sea level and the structure must be designed to pass a 25-year event.

b. Qualification No. 4 is modified to read:

The Service is required to remove the silt in the area behind the carp guard which is defined by the present day rip rap area, twice in each calendar year, at intervals not less than three months.

2. The request to rescind or suspend Water Permit No. 2300-2 is denied.

Dated this 14 day of December, 2000.

BY THE BOARD

Francis E Bruch

j-findings.jpg Wtr Pmt 2300-2

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

December 19, 2000

NOTICE

TO:
Cheryl Williss, Chief
Water Resources Division
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Pamela Ireland, States Attorney
PO Box 628
Martin, SD 57551

Raymond Kocer
P.O. Box 388
Martin SD 57551-0388

Brett Heath
HWC 3, Box 20
Martin SD 57551

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

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

This is to notify you that the Final Decision, including Findings of Fact and Conclusions of Law, were adopted December 6, 2000, by the Water Management Board in the matter of U. S. Fish and Wildlife Service's request to amend qualifications to Water Permit No. 2300-2 and Bennett County's request to rescind and terminate Water Permit No. 2300-2 at the Lacreek National Wildlife Refuge in Bennett County. A copy of the signed Findings of Fact, Conclusions of Law and Final Decision is enclosed.

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

Enclosure

c: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General
John Kunz, U.S. Department of Interior, Office of the Solicitor, 755 Parfet St., Ste. 151, Lakewood CO 80215
Rolf Kraft, Manager, Lacreek National Wildlife Refuge, HC 5, Box 114, Martin SD 57551
Ronald Riggs, Bennett County Commissioner, Box 487, Allen, SD 57714
Tim Juhnke, Bennett County Commissioner, HWC 3, Martin, SD 57551

CERTIFICATION

I hereby certify that on December 19, 2000 , I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated December 19, 2000 regarding adoption of Findings in the matter of Water Permit No. 2300-2 addressed as stated below:

Cheryl Williss, Chief
Water Resources Division
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Pamela Ireland
Bennett County States Attorney
P.O. Box 628
Martin, SD 57551

Raymond Kocer
P.O. Box 388
Martin, SD 57551-0388

Brett Heath
HWC 3, Box 20
Martin, SD 57551

John Kunz
U.S. Department of Interior
Office of the Solicitor
755 Parfet St., Ste. 151
Lakewood, CO 80215

Rolf Kraft, Manager
Lacreek National Wildlife Refuge
HC 5, Box 114
Martin, SD 57551

Ronald Riggs
Bennett County Commissioner
Box 487
Allen, SD 57714

Tim Juhnke
Bennett County Commissioner
HWC 3
Martin, SD 57551

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

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

Eric Gronlund
Natural Resource Engineer
Water Right Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

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

Karen Schlaak
Notary Public

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

KAREN SCHLAAK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

* *

IN RE: UNITED STATES FISH & WILDLIFE SERVICE'S AMENDMENT OF WATER PERMIT 2300-2 BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD

CIV. NO. 2001-29

UNITED STATES FISH & WILDLIFE SERVICE,

Applicant/Appellant

vs.

BRETT HEATH & RAYMOND KOCER

Objectors/Appellees, and

BENNETT COUNTY, SOUTH DAKOTA

Objector/Appellee, and

WATER MANAGEMENT BOARD, SOUTH DAKOTA

Appellee, and

DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, WATER RIGHTS PROGRAM, SOUTH DAKOTA

Appellee.

NOTICE OF APPEAL

* *

TO: BRETT HEATH; RAYMOND KOCER; BENNETT COUNTY, STATE OF SOUTH DAKOTA; WATER MANAGEMENT BOARD, STATE OF SOUTH DAKOTA; AND DEPARTMENT OF NATURAL RESOURCES, WATER RIGHTS PROGRAM, STATE OF SOUTH DAKOTA:

YOU ARE HEREBY NOTIFIED that the United States Fish and Wildlife Service ("FWS") is appealing to the Sixth Judicial

Circuit Court in Hughes County, South Dakota, the South Dakota State Water Management Board's December 14, 2000, Findings of Fact, Conclusions of Law, and Final Decision. Notice of this decision was served on FWS and all parties on December 19, 2000. Copies of this notice and decision are attached hereto as Exhibits "A" and "B," and by this reference incorporated herein.

DATED this 18th day of January, 2001.

UNITED STATES ATTORNEY
DISTRICT OF SOUTH DAKOTA
TED L. MCBRIDE

BY: Cheryl Schrempp DeVries
225 S. Pierre Street, Suite 337
Pierre, SD 57501
(605) 224-5402

John R. Kunz, Esq.
Office of the Solicitor
Rocky Mountain Region
755 Parfet Street, Suite 151
Lakewood, CO 80215
(303) 231-5353, Ext. 339

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 2001, true and correct copies of the foregoing NOTICE OF APPEAL were mailed via U.S. First Class Mail, postage prepaid to:

Brett Heath, *Pro Se*
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer, *Pro Se*
P.O. Box 388
Martin, SD 57551-0388

Pamela Ireland, Esq.
States Attorney, Bennett County, SD
Counsel for Bennett County
P.O. Box 628
Martin, SD 57551

John P. Guhin, Esq.
Deputy Attorney General
Counsel for the Water Management Board
500 E. Capitol Avenue
Pierre, SD 57501-5070

Diane Best, Esq.
Assistant Attorney General
Counsel for DENR, Water Rights Program
500 East Capitol Avenue
Pierre, SD 57501-5070

Cheryl Schrempp Dubois

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

RECEIVED
DEC 2 . 2000
OFFICE OF THE REGIONAL SOLICITOR
DENVER, COLORADO

December 19, 2000

NOTICE

TO: Cheryl Williss, Chief
Water Resources Division
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Pamela Ireland, States Attorney
PO Box 628
Martin, SD 57551

Raymond Kocer
P.O. Box 388
Martin SD 57551-0388

Brett Heath
HWC 3, Box 20
Martin SD 57551

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

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

This is to notify you that the Final Decision, including Findings of Fact and Conclusions of Law, were adopted December 6, 2000, by the Water Management Board in the matter of U. S. Fish and Wildlife Service's request to amend qualifications to Water Permit No. 2300-2 and Bennett County's request to rescind and terminate Water Permit No. 2300-2 at the Lacreek National Wildlife Refuge in Bennett County. A copy of the signed Findings of Fact, Conclusions of Law and Final Decision is enclosed.

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

Enclosure

c: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General
John Kunz, U.S. Department of Interior, Office of the Solicitor, 755 Parfet St., Ste. 151, Lakewood CO 80215
Rolf Kraft, Manager, Lacreek National Wildlife Refuge, HC 5, Box 114, Martin SD 57551
Ronald Riggs, Bennett County Commissioner, Box 487, Allen, SD 57714
Tim Juhnke, Bennett County Commissioner, HWC 3, Martin, SD 57551

EXIBIT "A"

RECEIVED
DEC 2 1 2000
OFFICE OF THE REGIONAL SOLICITOR
DENVER, COLORADO

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE REQUESTS TO AMEND OR RESCIND WATER PERMIT NO. 2300-2; UNITED STATES FISH AND WILDLIFE SERVICE (LACREEK NATIONAL WILDLIFE REFUGE)	)))))	FINDINGS OF FACT, CONCLUSIONS OF LAW, and FINAL DECISION

FINDINGS OF FACT

1. This decision addresses the requests of the U.S. Fish and Wildlife Service (Service) to amend Water Permit No. 2300-2. The Service requests the removal of Qualification No. 4 to that permit. Qualification No. 4 requires the Service to remove silt if the buildup of silt exceeds fifty percent of the height of the carp guard at Diversion No. 4A. The Service in addition requests that Qualification No. 3 be amended to allow it to establish a storage level of 3036.23 feet mean sea level (fmsl) at Diversion 4A. This decision also addresses the request of nearby landowners, and of Bennett County, to rescind, in its entirety, Water Permit No. 2300-2.

2. The background of this matter is set out in detail in the Board decision in the case entitled "In Re Application for Water Permit No. 2300-2; U.S. Fish and Wildlife Service (LaCreek National Wildlife Refuge)" (March 5, 1998) (hereinafter 1998 Decision). The 1998 Decision is herewith incorporated insofar as it is not inconsistent with the Findings, Conclusion and Final Decision issued today.

3. The background of Diversion No. 4A is relevant to understanding the present controversy. The Service originally attempted to establish a vested right to irrigate by way of

EXHIBIT "B"

former Diversion No. 4. This Board granted the vested right but the circuit court reversed and no further appeal was brought. Thereafter, the Service instituted an application for a new permit for old Diversion No. 4. Subsequently, the Service deleted the irrigation portions of the application, moved the location downstream approximately four hundred feet and designated the new structure as Diversion No. 4A. The Service asserted, as a basis upon which its application for Diversion No. 4A should be granted, that the diversion would enhance the possibility of the survival of the pearl dace which had been classified as a threatened species by the South Dakota Commission of Game, Fish and Parks in 1978.

4. The Board, in its 1998 Decision, found that the Service had established that Diversion No. 4A would protect the pearl dace and their habitat if the diversion were constructed with a four foot barrier to prevent carp from migrating westward in Lake Creek to the area inhabited by pearl dace. To protect the surrounding landowners, the 1998 Decision qualified the permit granted to the Service such that it authorized the storage of .75 acre foot of water instead of an acre foot of water as requested by the Service. In addition, pursuant to Qualification No. 3, the storage level of Diversion No. 4A was required to be not "in excess of 3034.1 feet mean sea level" and the Service was required under Qualification No. 4, to remove the silt which was foreseen to accumulate behind the diversion structure if the buildup exceeded "fifty percent of the height of the carp guard." Amendment to Qualification No. 3.

5. As noted above, the Service now requests that Qualification No. 3 be amended such that the storage level of Diversion No. 4A is authorized to be not in excess of 3036.23 rather than the present requirement of 3034.1 feet mean sea level.

6. Pursuant to SDCL 46-2A-12, an amendment to an existing permit may be granted if the change does not unlawfully impair existing rights, is for a beneficial use and is in the public interest.

The Amendment of Qualification No. 3 does not unlawfully impair the existing rights of the surrounding landowners or Bennett County.

7. The Board first considers whether the Amendment of Qualification No. 3 would unlawfully impair any existing rights of the landowners or Bennett County, the opponents to the Amendment. The opponents first argue that their existing rights will be impaired because the Service obligated itself to construct Diversion No. 4A so as not to have a storage level in excess of 3034.1 fmsl. Despite this, the opponents submit, the Service constructed Diversion No. 4A with a storage level of 3036.23 fmsl.

8. The Service admits that it has constructed Diversion No. 4A at 3036.23 fmsl in violation of permit Qualification No. 3.

9. The Service testified, and presented documentary evidence to support its testimony, that the elevation of the carp guard was originally proposed, and ultimately set, at 3034.1 fmsl, instead of 3036.23 fmsl because of a drafting error on one

of the plans. The plan should have shown an invert elevation at the bottom of the creek of 3032.1 fmsl., but instead showed an elevation of 3030.1 fmsl. The engineer in charge of building the carp guard was not cognizant of the permit qualification that the storage level could not be in excess of 3034.1 fmsl. The engineer was aware of his obligation to build a carp guard four feet high to prevent the carp from jumping over the carp guard. Therefore, the carp guard was built from the actual bottom of the creek at 3032.1 with approximately four feet of boards to 3036.23 fmsl.

10. The Service acknowledges that it should have informed the Chief Engineer of the discrepancy at an earlier date than it did inform the Chief Engineer.

11. To establish that the proposed change unlawfully impairs an existing right of the landowners or the county, the landowners or the county must demonstrate, at a minimum, that some real interest of theirs will be adversely affected. The opponents contend that because there is a two foot difference between the height of the water at 3034.1 fmsl, as established by the 1998 decision, and 3036.23 fmsl, which the amendment proposes, there will be less bank available to handle the flow during high water periods. According to the testimony of Mr. Husmann, who was accepted as an expert by the Board, the structure now in place at 3036.23 feet mean sea level provides approximately 3.4 feet above the water surface to the top of the channel at its lowest point. This is, however, at only one point. That low point is found on the south side of the channel.

If the water reaches that level, it will go out and around the end of the dike and back into Lake Creek and stay on Service property. In the immediate area of impoundment the landowners' property is on the north side of the creek, and would not be affected by this high level of the water.

12. In addition, the uncontradicted evidence was that a twenty-five year flood would be handled by the existing structure proposed to be "legalized" by the present proposed amendment. The Board finds that, as configured and requested, the amendment in qualification No. 3 would protect the landowners from flooding.

13. The opponents moreover assert that their legal interests will be harmed because the increased amount of water behind the structure will cause ground water levels to rise. The evidence strongly refutes this contention. In particular the Board has reviewed the testimony developed from shallow ground water monitoring wells known as piezometers. Measurements have been recorded in the area since 1994 and a graph of the measurements was presented to the Board. The clear trend of the data is that the groundwater level rises and falls in response to immediate climatic and seasonal conditions. A study of the piezometer data indicates that groundwater levels adjacent to Diversion 4A were simply not affected by the creation of Diversion No. 4A. Because the data was not affected, it is clear that Diversion No. 4A did not affect ground water tables with regard to the landowners' property.

14. Landowners further contend that the height of Diversion No. 4A as constructed invades their legal rights because it has caused increased sedimentation and erosion downstream. The Board has examined the evidence proffered by the opponents. Clearly there is erosion and sedimentation in Lake Creek. However, the Board finds that better explanation for the erosion and sedimentation is simply the nature of Lake Creek. Lake Creek will continue to erode and will continue to carry sediment because of its natural properties. Moreover, the Board credits the testimony of the Service experts that once Diversion No. 4A is filled with sediment, the sediment will move in the stream just as it would if the diversion were not there at all.

15. The opponents also contend that the Service has negligently allowed the Canadian thistle population to thrive and, in that way, harm them. The Board has carefully examined that evidence, and the video submitted by the opponents in that regard.

16. The Board finds that the opponents have failed to demonstrate that the grant of this amendment will in any way affect the Canadian thistle problem either on U.S. Fish and Wildlife Service property or on the landowners or county property. The claims can be rejected on this ground alone.

17. The opponents appear to have raised the thistle claim at this juncture to attack the credibility of the Service or to demonstrate that it will not faithfully carry out the conditions of the permit. The Board finds, however, that the evidence is that the Service has continued to pursue the Canadian thistle

challenge and indeed, just last year, received increased funding for weed control. The Board is unable to find that the Service's approach to the Canadian thistle problem should somehow be factually associated with the grant of this particular amendment or that it undermines its confidence that the Service will carry out the conditions of the permit or any amendment.

18. The evidence indicates that the grant of the amendment with regard to the change in the height of the structure will not unlawfully impair existing rights.

The Amendment of the permit to increase the structure height is for a beneficial use.

19. The Board now turns to consideration of whether the amendment to the height of the structure is for a beneficial use. The Board has previously found that providing for a four-foot carp guard is a beneficial use and abides by that finding.

20. If the structure is built from the lowest point of the channel, it must reach 3036.23 fmsl. Therefore, a structure height of 3036.23 fmsl provides for a beneficial use.

The Amendment of Qualification No. 3 to increase the structure height is in the public interest.

21. The Board now considers the question of whether the grant of the Amendment is in the public interest. In this case, the determination involves a weighing of diverse factors. Weighing against the grant of the amendment is the fact that the Service constructed the structure in violation of the qualification to the permit and afterwards maintained it in violation of the qualification. Furthermore, the Service did not promptly report the mistake it had made; the Board is uncertain

as to whether this indicates that the Service is not properly monitoring its own activities or whether the Service deliberately did not inform the Chief Engineer--either alternative weighs against the Service and the grant of the amendment. The Board finds that the public interest would be, to some degree, served by denying the Amendment as a means of vindicating its authority to enforce compliance with the conditions of its permits.

22. There are, however, other factors which weigh in favor of the Amendment and outweigh the public interest consideration identified above. First, it is necessary to keep the permit in place to preserve the threatened species--the pearl dace and their habitat. Second, forcing the Service to dig two feet into the channel to establish a new channel bed so that the bottom of the carp guard could be set at 3030.1 fmsl appears to be a waste of the taxpayer's money. The Board has found that the increased height, although in violation of the permit, does not pose a significant threat of harm to the landowners or to the county. In this case, the real benefits of preserving the carp guard in place as it is today and not forcing the useless expenditure of taxpayer money outweigh any public interest benefit from forcing the removal of the carp barrier or alternative of compelling an expensive, and essentially unneeded, reconstruction of the carp barrier.

Amendment to Qualification No. 4 of the 1998 Decision.

23. The U.S. Fish and Wildlife Service has also requested that the Board amend Qualification No. 4. Qualification No. 4 provides that the Service is required to remove silt behind

Diversion No. 4A if the buildup exceeds fifty-percent of the height of the carp guard.

24. Between June 21, 1999, and September 1, 2000, Diversion No. 4A was cleaned out six times.

25. The evidence demonstrates that, to clean out Diversion No. 4A, it is necessary to bring an excavator to the diversion. The excavator's bucket takes about three-quarters of a yard of sediment from the impoundment and places it beside the impoundment.

26. The use of the excavator causes problems because, to perform the operation, it must maneuver on the side of the structure. Even though care is taken, the machine will tear up grass and sod and disturb the soil. In addition, sandpiles will be created which cover up the grass. Lastly, even though the impoundment might be full of sediment, due to climatic conditions, there are time when it is simply not feasible for the Service to get an excavator to the site.

27. The evidence, which is essentially uncontradicted, indicates that the diversion will fill up with sand every two to four weeks.

Modification of Qualification No. 4 will not unlawfully impair the existing rights of the surrounding landowners or the county.

28. The Board has examined the question of whether failure to remove the silt from Diversion No. 4A causes damage to the landowners by backing up water or silt on their property or somehow otherwise harming them. The Board credits the evidence of Ms. Johnston that the silt does not back up more than 800

feet. The Board is unable to ascertain any effect of the silt or water on the landowners.

29. The Board has also examined the question of whether dredging or the failure to dredge has any effect on the groundwater level. The Board again credits the piezometer tests done under the supervision of Ms. Johnston and finds that there is no effect on the water level from dredging. The reason is apparent--the structure is too small to affect in any significant way the ground water table at any significant distance from the structure.

30. The Board has also considered whether the modification of the Qualification will increase erosion to the detriment of the landowners and finds, to the contrary, that it will decrease erosion to their benefit. The Board credits the testimony of Ms. Johnston that, when sediment is removed from the water, and the water continues downstream, its erosive energy is increased. If the Qualification is not modified, each time the impoundment is not cleaned out, the water will, therefore, erode material that would not normally be eroded. On the other hand, if the Service is not required to clean out the impoundment on a frequent basis, the water will proceed downstream carrying the silt but it will be less erosive because it has less erosive energy. This will benefit the interest the landowners have in limiting erosion. The Board thus finds that modification of Qualification No. 4 to provide for dredging at a rate of only twice a year at no less than three month intervals will not

unlawfully impair the existing rights of the opponents and, in fact, will be to their benefit.

Modification of Qualification No. 4 is for a beneficial use.

31. The Board concludes that modification of Qualification No. 4 is for a beneficial use. The beneficial use which underlies the permit, of course, is the protection of the pearl dace and their habitat. The modification of Qualification No. 4, by decreasing the erosion which would be caused by more frequent dredging, and by decreasing the impact on the land surrounding the impoundment, is also for the beneficial use of enhancing Lake Creek.

Modification of Qualification No. 4 is in the public interest.

32. The Board finds that the modification of Qualification No. 4 to provide for two dredgings annually at Diversion No. 4 at intervals of not less than three months is in the public interest. In making this determination, the Board has considered the claims of the opponents that less frequent dredging would somehow harm them and has rejected those claims. Conversely, it has accepted the testimony that indicates that the ecology of the stream channel would be enhanced by less frequent dredging. The Board concludes that modification of Qualification No. 4 is in the public interest.

33. The opponents have requested that this Board rescind Permit No. 2300-2. The Board has, however, determined above that it is in the public interest to amend the Qualifications of Permit No. 2300-2 and that it is, moreover, imperative that Permit No. 2300-2 be maintained to preserve the population and

habitat of pearl dace in Lake Creek. The Board has also considered the clear violation of the permit by the Service but finds that the weight of that violation is insufficient to overcome the public interest and public benefit in maintaining the Permit in place. Therefore, the Board determines not to suspend or to "rescind" the Permit, assuming, for the sake of this paragraph, that it had the latter power.

CONCLUSIONS OF LAW

1. The Board had jurisdiction of these matters.

2. The Board concludes that adequate notice has been given to all affected parties of the matters considered herein, despite the fact that the proposal to amend the qualification regarding the height of the structure had not been advertised. The Board concludes that all parties interested in the matter have in fact received actual notice and have waived any requirement of further notice.

3. The Board concludes that the amendments to the qualification relating to the height of the structure and to the dredging qualification, as set forth below, will not unlawfully impair any existing rights of the opponents. The Board concludes, as set forth in detail above, that the opponents have failed to produce evidence of any actual harm which will occur as a result of the amendments; moreover, the proponents of the amendments have produced affirmative evidence that there will be no unlawful impairment with regard to flooding or sedimentation, or erosion.

4. The proposed amendments to Qualifications Nos. 3 and 4 are for a beneficial use. The underlying beneficial use is the protection of the pearl dace and their habitat.

5. The proposed amendments are in the public interest. The Board has carefully weighed above the factors which favor and which disfavor the public interest with regard to each of the amendments. The Board again concludes that taken individually, and as a whole, the amendments are in the public interest and their benefits far outweigh any potential detriments.

6. The Board concludes that the permit should not be rescinded. The Board notes, furthermore, that a question exists as to whether it could rescind the permit pursuant to SDCL 46-1-12 which provides only for a suspension after a first violation. Even granting the Board the authority to rescind or cancel the permit, the Board concludes that it would be inappropriate to do so. The permit serves an important public interest in that it protects the pearl dace and their habitat. The failure of the Service to promptly report its violation of the permit is not to its credit but does not demand, in this case, that the permit be rescinded. The public interest in the continuance of the permit is, in this case, stronger than its interest in recission. For the same reason, the Board determines not to suspend the permit under SDCL 46-1-12.

FINAL DECISION

1. The requests for amendment of the Qualifications to Water Permit No. 2300-2 are granted subject to the following conditions:

a. Qualification No. 3 is amended to read:

The storage level of Diversion No. 4A may not be in excess of 3036.23 feet mean sea level and the structure must be designed to pass a 25-year event.

b. Qualification No. 4 is modified to read:

The Service is required to remove the silt in the area behind the carp guard which is defined by the present day rip rap area, twice in each calendar year, at intervals not less than three months.

2. The request to rescind or suspend Water Permit No. 2300-2 is denied.

Dated this 14 day of December, 2000.

BY THE BOARD

Francis E Bruich

j-findings.jpg Wtr Pmt 2300-2

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

* *

IN RE: UNITED STATES FISH & WILDLIFE SERVICE'S AMENDMENT OF WATER PERMIT 2300-2 BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD

CIV. NO. 2001-29

UNITED STATES FISH & WILDLIFE SERVICE,

Applicant/Appellant

vs.

BRETT HEATH & RAYMOND KOCER

Objectors/Appellees, and

BENNETT COUNTY, SOUTH DAKOTA

Objector/Appellee, and

WATER MANAGEMENT BOARD, SOUTH DAKOTA

Appellee, and

DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, WATER RIGHTS PROGRAM, SOUTH DAKOTA

Appellee.

STATEMENT OF ISSUES ON APPEAL

* *

Pursuant to S.D. Codified Laws §1-26-31.4, Appellant, the U.S. Fish and Wildlife Service ("FWS"), hereby submits to the Court the following statement of the issues it intends to present on the appeal of the captioned matter.

1. Whether the South Dakota Water Management Board's December 14, 2000, Final Decision wherein the Board required FWS to remove silt behind Diversion No. 4A twice in each calendar year (at intervals not less than three months) was clearly erroneous in light of the entire evidence in the record.

2. Whether the South Dakota Water Management Board's December 14, 2000, Final Decision wherein the Board required FWS to remove silt behind Diversion No. 4A twice in each calendar year (at intervals not less than three months) was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

FWS is not requesting an oral argument of the subject appeal.

DATED this 18th day of January, 2001.

UNITED STATES ATTORNEY
DISTRICT OF SOUTH DAKOTA
TED L. MCBRIDE

BY: Cheryl Schrempp DuPris

Cheryl Schrempp DuPris
225 S. Pierre Street, Suite 337
Pierre, SD 57501
(605) 224-5402

John R. Kunz

John R. Kunz, Esq.
Office of the Solicitor
Rocky Mountain Region
755 Parfet Street, Suite 151
Lakewood, CO 80215
(303) 231-5353, Ext. 339

581

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2001, true and correct copies of the foregoing STATEMENT OF ISSUES ON APPEAL were mailed via U.S. First Class Mail, postage prepaid to:

Brett Heath, *Pro Se*
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer, *Pro Se*
P.O. Box 388
Martin, SD 57551-0388

Pamela Ireland, Esq.
States Attorney, Bennett County, SD
Counsel for Bennett County
P.O. Box 628
Martin, SD 57551

John P. Guhin, Esq.
Deputy Attorney General
Counsel for the Water Management Board
500 E. Capitol Avenue
Pierre, SD 57501-5070

Diane Best, Esq.
Assistant Attorney General
Counsel for DENR, Water Rights Program
500 East Capitol Avenue
Pierre, SD 57501-5070

Cheryl Schrempp Dekiss

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

March 14, 2001

NOTICE

TO:

Cheryl Williss, Chief
Water Resources Division
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Pamela Ireland, States Attorney
PO Box 628
Martin, SD 57551

Raymond Kocer
P.O. Box 388
Martin SD 57551-0388

Brett Heath
HWC 3, Box 20
Martin SD 57551

John Kunz
U.S. Department of Interior
Office of the Solicitor
755 Parfet St., Ste. 151
Lakewood CO 80215

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

SUBJECT: Transmittal of Agency File in the Matter of U.S. Fish and Wildlife Service's Amendment of water Permit No. 2300-2 (Hughes County Civ. No. 2001-29)

Consistent with SDCL 1-26-33, the agency record for the above entitled matters has been transmitted to the Sixth Judicial Circuit Court in Hughes County. A chronological and alphabetical index of the agency record and a list of exhibits has also been transmitted to the court. A copy of each index is enclosed.

Enclosure

c: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General
Rolf Kraft, Manager, Lacreek National Wildlife Refuge, HC 5, Box 114, Martin SD 57551
Ronald Riggs, Bennett County Commissioner, Box 487, Allen, SD 57714
Tim Juhnke, Bennett County Commissioner, HWC 3, Martin, SD 57551

CERTIFICATION

I hereby certify that on March 14, 2001, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated March 14, 2001, regarding transmittal of the record in the matter of U. S. Fish and Wildlife Service's request to amend a qualification to Water Permit No. 2300-2, addressed as stated below:

Cheryl Williss, Chief
Water Resources Division
U.S. Fish and Wildlife Service
P.O. Box 25486
Denver Federal Center
Denver, CO 80225

Pamela Ireland
Bennett County States Attorney
P.O. Box 628
Martin SD 57551

Raymond Kocer
P.O. Box 388
Martin SD 57551-0388

Brett Heath
HWC 3, Box 20
Martin SD 57551

John Kunz
U.S. Department of Interior
Office of the Solicitor
755 Parfet St., Ste. 151
Lakewood CO 80215

Rolf Kraft, Manager
Lacreek National Wildlife Refuge
HC 5, Box 114
Martin, SD 57551

Ronald Riggs
Bennett County Commissioner
Box 487
Allen, SD 57714

Tim Juhnke
Bennett County Commissioner
HWC 3
Martin, SD 57551

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

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

Eric S. Gronlund
Natural Resources Engineer
Water Right Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 15th day of March, 2001.

Karen Schlaak
Karen Schlaak
Notary Public

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

KAREN SCHLAAK
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA

CHERYL WILLISS, CHIEF
WATER RESOURCES DIVISION
US FISH & WILDLIFE SERVICE
PO BOX 25486
DENVER FEDERAL CENTER
DENVER CO 80225

TIM JUHNKE
BENNETT COUNTY COMMISSIONER
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MARTIN SD 57551

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ROLF KRAFT MANAGER
LACREEK NATIONAL WILDLFE REFUGE
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BENNETT COUNTY COMMISSIONER
BOX 487
ALLEN, SD 57714

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STATE OF SOUTH DAKOTA)
: SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL COURT

(Civ. No. 2001-29)

IN THE MATTER OF)
U.S. FISH AND WILDLIFE SERVICES)
REQUEST TO AMENDMENT TO)
WATER PERMIT NO. 2300-2)

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90.	March 11, 1997	Applicant's first set of interrogatories and first request for production of documents to Bennett County and Bennett County Weed and Pest Board	217 – 234
118.	February 13, 1998	Applicant's response to Findings of Fact, Conclusions of Law and Final Decision	336 – 349
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120.	February 24, 1998	Board Attorney's suggestions with regard to DENR's response and with regard to applicant's response to proposed findings	365 – 367
99.	June 6, 1997	Concurrence with and adoption of Division's memorandum of law filed by John Kunz	274 – 275
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Entry	Date	Document	Pages
36.	September 22, 1994	Deposition of Brett Heath	Separate
34.	September 21, 1994	Deposition of Charles Emley	Separate
33.	September 21, 1994	Deposition of Dale McDonnell	Separate
38.	September 23, 1994	Deposition of Dennie Simonson	Separate
32.	September 21, 1994	Deposition of Gary Nies	Separate
35.	September 21, 1994	Deposition of Lawrence Kocer	Separate
37.	September 22, 1994	Deposition of Raymond Kocer	Separate
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98.	June 2, 1997	Division's Memorandum of Law	260 – 273
56.	June, 1996	Drawings of diversion structure (2 sheets)	101 – 102
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127.	April 30, 1999	E-mail from Eric Gronlund documenting telephone conversation	401
7.	February 2, 1994	E-mail from James Stukel to Eric Gronlund regarding Soil/Water Compatibility Permit	9
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87.	March 6, 1997	Letter form of testimony given by Raymond Kocer at March 6, 1997 hearing	204 – 206
5.	January 24, 1994	Letter from 9/13/84 from James Stukel regarding Soil/Water Application	5 – 7
73.	November 26, 1996	Letter from Bennett Co. Booster II on why notice did not get published	144 – 145
72.	November 22, 1996	Letter from Cheryl Williss explaining why notice was not published	142 – 143
65.	October 24, 1996	Letter from Cheryl Williss, USFWS, to John Hatch regarding tentative agreement	126 – 128
159.	November 27, 2000	Letter from Diane Best to Board and Interested Parties regarding proposed findings	522 – 523
28.	August 19, 1994	Letter from Diane Best to Chief Engineer transmitting stipulation for continuance of hearing	45 – 46

Entry	Date	Document	Pages
25.	August 4, 1994	Letter from Diane Best to Gary Nies responding to his letter	41
26.	August 4, 1994	Letter from Diane Best to John Kunz and attorneys in opposition regarding late filed request to intervene	42
24.	July 29, 1994	Letter from Gary Nies, Bennett Cty Weed Board to Chief Engineer	40
39.	October 21, 1994	Letter from Gary Sokolow to John Guhin transmitting Bennett Cty Weed Board motion to intervene	56
45.	March 20, 1995	Letter from John Kunz, USFWS attorney to Diane Best on progress	71 –72
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9.	March 1, 1994	Letter from Patrick Ginsbach to Rassool Ahadi requesting a copy of USFWS application	11
62.	June 24, 1996	Letter from Paul Bengford transmitting original stipulation and motion for continuance of hearing	114
10.	March 3, 1994	Letter from Rassool Ahadi to Patrick Ginsbach sending requested information	12
106.	July 28, 1997	Letter from State Senator Frank Kloucek	288
135.	November 3, 1999	Letter from Susan Williams, Bennett County Auditor, opposing removal of qualification No. 4 and requesting repeal of Permit No. 2300-2	416
1.	January 24, 1994	Letter from Wilbur Ladd, Jr. to John Hatch transmitting application	1
60.	June 24, 1996	Letter to attorneys for parties from Diane Best regarding procedural schedule	109 – 110
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Entry	Date	Document	Pages
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76.	December 11, 1996	Letter to Bennett Co. Booster II sending out notice of hearing for publication (includes notice of hearing)	149 – 151
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111.	August 13, 1997	Letter to Brett Heath from Eric Gronlund on Bennett Cty Exhibit No. 69	293
133.	October 26, 1999	Letter to Cheryl Williss, USFWS from John Hatch acknowledging receipt of USFWS request	413
148.	July 20, 2000	Letter to Diane Best from John Kunz transmitting stipulation delay the hearing	457
22.	July 13, 1994	Letter to Gary Sokolow, Bennett Cty States Attorney from Diane Best regarding late filed intervention	37
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70.	October 29, 1996	Letter to Terry Terrell, USFWS, from Eric Gronlund on publishing notice on amended application	138
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123.	June 17, 1998	Letter to USFWS from John Hatch transmitting issued Water Permit No. 2300-2	395
154.	October 4, 2000	Letter to Water Rights from Linda Coe, USFWS transmitting completion of works form	500
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82.	February 21, 1997	Motion filed by USFWS to limit evidence pertaining to relevant issue pertaining to Diversion No. 4 (including draft order)	174 - 182
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110.	August 4, 1997	Notice on preparation of findings of fact, conclusions of law and final decision	289 – 292
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23.	July 29, 1994	Notice rescheduling a September 1, 1994, hearing on Application No. 2300-2	38 – 39
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115.	November 7, 1997	Notice rescheduling consideration of findings	300 – 303
74.	December 11, 1996	Notice rescheduling to a March 5, 1997 hearing	146 – 147
146.	June 16, 2000	Notice scheduling a July 12, 2000 hearing	438 – 440
140.	December 23, 1999	Notice scheduling a March 1 and 2, 2000,hearing before Board on USFWS's and Bennett County's requests	422 – 424
49.	January 31, 1996	Notice scheduling a March 7, 1996 hearing before the Water Management Board	80 – 83
149.	August 2, 2000	Notice scheduling a September 28, 2000 hearing before the Water Management Board (includes enclosure of previous stipulation)	458 – 464
88.	March 10, 1997	Notice scheduling hearing on Application No. 2300-2 for April 30, 1997	207 – 210
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19.	June 17, 1994	Objections to Recommendation of Chief Engineer filed by Patrick Ginsbach	30 – 31
21.	June 24, 1994	Petition filed by Bennett County supporting petition to oppose Application No. 2300-2	35 – 36

Entry	Date	Document	Pages
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17.	June 14, 1994	Petition to Oppose Application No. 2300-2 filed by Patrick Ginsbach on behalf of landowners	23 – 26
116.	January 26, 1998	Proposed Findings of Fact, Conclusions of Law and Final Decision prepared by Board's Attorney	304 – 328
157.	November 15, 2000	Proposed findings of fact, conclusions of law and final decision prepared by John Guhin, Board's attorney	506 – 519
6.	February 1, 1994	Receipt of Application filing fee	8
12.	April 1, 1994	Recommendation of Chief Engineer for Water Permit Application No. 2300-2	17
11.	March 9, 1994	Report on Water Permit Application No. 2300-2	13 – 16
78.	January 30, 1997	Request for automatic extension of hearing date filed by USFWS	153 – 154
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48.	January 29, 1996	Revised recommendation of Chief Engineer on Water Permit Application No. 2300-2	79
66.	October 25, 1996	Revised Supplemental Report on Water Permit Application No. 2300-2 prepared by Del Brosz	129
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152.	September 18, 2000	State responses to question of USFWS (is attachment to letter to Kunz and Parties)	469 – 499
58.	June 7, 1996	Stipulation and motion for continuance of July 10-12, 1996 hearing before the Water Management Board	105 – 106
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Entry	Date	Document	Pages
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30.	September 13, 1994	Subpoena duces tecum of representative of Bennett Cty Commission by the USFWS	52 – 53
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47.	January 24, 1996	Supplemental report on Water Permit Application No. 2300-2	78
52.	March 7, 1996	Transcript of hearing before Board on motion for intervention and scheduling order	Separate
142.	March 1, 2000	Transcript of March 1, 2000 hearing before Water Management Board	Separate
105.	July 28, 1997	Transcript of Water Management Board hearing	Separate
107.	July 28, 1997	Transcript of Water Management Board hearing from July 28, 1997 (volume 6)	Separate
108.	July 29, 1997	Transcript of Water Management Board hearing from July 29, 1997 (volume 7)	Separate
109.	July 30, 1997	Transcript of Water Management Board hearing from July 30, 1997 (volume 8)	Separate
100.	June 16, 1997	Transcript of Water Management Board hearing from June 16, 1997	Separate
101.	June 17, 1997	Transcript of Water Management Board hearing from June 17, 1997	Separate
102.	June 18, 1997	Transcript of Water Management Board hearing from June 18, 1997	Separate
153.	September 28, 2000	Transcript of Water Management Board hearing from September 28 and 29, 2000	Separate
93.	April 30, 1997	Transcript of Water Management Board hearing on April 30 and May 1, 1997 (volumes 1 & 2)	Separate

Entry	Date	Document	Pages
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124.	June 17, 1998	Water Permit No. 2300-2 (issued)	396 – 397

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL COURT

(Civ. No. 2001-29)

IN THE MATTER OF)
U.S. FISH AND WILDLIFE SERVICES)
REQUEST TO AMENDMENT TO)
WATER PERMIT NO. 2300-2)

CHRONOLOGICAL INDEX

Entry	Date	Document	Pages
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3.	January 24, 1994	Supplemental Information to Application	3
4.	January 24, 1994	Map	4
5.	January 24, 1994	Letter from 9/13/84 from James Stukel regarding Soil/Water Application	5 – 7
6.	February 1, 1994	Receipt of Application filing fee	8
7.	February 2, 1994	E-mail from James Stukel to Eric Gronlund regarding Soil/Water Compatibility Permit	9
8.	February 3, 1994	File Documentation of conversation between Ginger Chesy and Eric Gronlund	10
9.	March 1, 1994	Letter from Patrick Ginsbach to Rassool Ahadi requesting a copy of USFWS application	11
10.	March 3, 1994	Letter from Rassool Ahadi to Patrick Ginsbach sending requested information	12
11.	March 9, 1994	Report on Water Permit Application No. 2300-2	13 – 16
12.	April 1, 1994	Recommendation of Chief Engineer for Water Permit Application No. 2300-2	17
13.	May 9, 1994	Letter to interested parties from Eric Gronlund sending information on pending application	18

Entry	Date	Document	Pages
14.	May 9, 1994	Letter to Wilbur Ladd, Jr., USFWS from Eric Gronlund regarding publishing notice of hearing	19
15.	May 9, 1994	Letter to Bennett Co. Booster II from Eric Gronlund along with notice of hearing for publication	20 – 21
16.	May 27, 1994	Affidavit of Publication published May 18 and 25, 1994	22
17.	June 14, 1994	Petition to Oppose Application No. 2300-2 filed by Patrick Ginsbach on behalf of landowners	23 – 26
18.	June 15, 1994	Petition requesting delay of hearing on Application No. 2300-2 filed by Patrick Ginsbach	27 – 29
19.	June 17, 1994	Objections to Recommendation of Chief Engineer filed by Patrick Ginsbach	30 – 31
20.	June 17, 1994	Notice of automatic delay of June 29, 1994 hearing on Application No. 2300-2	32 – 34
21.	June 24, 1994	Petition filed by Bennett County supporting petition to oppose Application No. 2300-2	35 – 36
22.	July 13, 1994	Letter to Gary Sokolow, Bennett Cty States Attorney from Diane Best regarding late filed intervention	37
23.	July 29, 1994	Notice rescheduling a September 1, 1994, hearing on Application No. 2300-2	38 – 39
24.	July 29, 1994	Letter from Gary Nies, Bennett Cty Weed Board to Chief Engineer	40
25.	August 4, 1994	Letter from Diane Best to Gary Nies responding to his letter	41
26.	August 4, 1994	Letter from Diane Best to John Kunz and attorneys in opposition regarding late filed request to intervene	42
27.	August 8, 1994	Stipulation and request for continuance of hearing date	43 – 44

Entry	Date	Document	Pages
28.	August 19, 1994	Letter from Diane Best to Chief Engineer transmitting stipulation for continuance of hearing	45 – 46
29.	August 22, 1994	Notice of continuance of August 31, 1994 hearing (attached stipulation)	47 – 51
30.	September 13, 1994	Subpoena duces tecum of representative of Bennett Cty Commission by the USFWS	52 – 53
31.	September 13, 1994	Subpoena duces tecum of Gary Nies of Bennett Cty Weed Board by the USFWS	54 – 55
32.	September 21, 1994	Deposition of Gary Nies	Separate
33.	September 21, 1994	Deposition of Dale McDonnell	Separate
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38.	September 23, 1994	Deposition of Dennie Simonson	Separate
39.	October 21, 1994	Letter from Gary Sokolow to John Guhin transmitting Bennett Cty Weed Board motion to intervene	56
40.	October 21, 1994	Motion by Bennett County Weed Board to Intervene	57 – 63
41.	November 4, 1994	Letter to Rodney Freeman from Diane Best transmitting motion for scheduling order	64
42.	November 4, 1994	Motion of Divisions for a Scheduling Order and Order	65 – 68
43.	November 16, 1994	Letter to Patrick Ginsbach from Diane Best on prehearing teleconference	69
44.	November 21, 1994	Letter to Rodney Freeman from Diane Best withdrawing request for scheduling order	70

Entry	Date	Document	Pages
45.	March 20, 1995	Letter from John Kunz, USFWS attorney to Diane Best on progress	71 –72
46.	May 31, 1995	Letter to John Hatch from Terry Terrell, USFWS amending Application No. 2300-2	73 – 77
47.	January 24, 1996	Supplemental report on Water Permit Application No. 2300-2	78
48.	January 29, 1996	Revised recommendation of Chief Engineer on Water Permit Application No. 2300-2	79
49.	January 31, 1996	Notice scheduling a March 7, 1996 hearing before the Water Management Board	80 – 83
50.	February 23, 1996	Notice limiting March 7, 1996 hearing to scheduling order and motion to intervene	84 – 86
51.	March 1, 1996	Memo to Board from Diane Best transmitting motion for scheduling order	87 – 91
52.	March 7, 1996	Transcript of hearing before Board on motion for intervention and scheduling order	Separate
53.	March 8, 1996	Notice of procedural scheduling order	92 – 97
54.	March 25, 1996	Notice of appearance and substitution of counsel filed by Thomas Lloyd	98 – 99
55.	March 27, 1996	Letter to Mary Erickson, Clerk of Courts from Thomas Lloyd transmitting notice of appearance	100
56.	June, 1996	Drawings of diversion structure (2 sheets)	101 – 102
57.	June 7, 1996	Letter to attorneys for parties from John Kunz transmitting stipulation and motion continuing hearing	103 - 104
58.	June 7, 1996	Stipulation and motion for continuance of July 10-12, 1996 hearing before the Water Management Board	105 – 106
59.	June 14, 1996	Letter to Terry Terrell, USFWS from John Hatch	107 – 108

Entry	Date	Document	Pages
60.	June 24, 1996	Letter to attorneys for parties from Diane Best regarding procedural schedule	109 – 110
61.	June 24, 1996	Division's draft motion for revised scheduling order and proposed order	111 – 113
62.	June 24, 1996	Letter from Paul Bengford transmitting original stipulation and motion for continuance of hearing	114
63.	June 26, 1996	Notice of continuance of Application No. 2300-2 including June 7th stipulation	115 – 120
64.	July 11, 1996	Notice of revised procedural schedule including Division's revised scheduling order and signed order	121 – 125
65.	October 24, 1996	Letter from Cheryl Williss, USFWS, to John Hatch regarding tentative agreement	126 – 128
66.	October 25, 1996	Revised Supplemental Report on Water Permit Application No. 2300-2 prepared by Del Brosz	129
67.	October 28, 1996	Revised Recommendation of Chief Engineer	130
68.	October 29, 1996	Notice and USFWS amendment to Application No. 2300-2 and scheduling hearing	131 – 134
69.	October 29, 1996	Letter to Bennett Co. Booster II from Eric Gronlund on publishing notice of hearing (notice included)	135 – 137
70.	October 29, 1996	Letter to Terry Terrell, USFWS, from Eric Gronlund on publishing notice on amended application	138
71.	November 13, 1996	Notice canceling December 5, 1996 hearing because notice did not get published	139 – 141
72.	November 22, 1996	Letter from Cheryl Williss explaining why notice was not published	142 – 143
73.	November 26, 1996	Letter from Bennett Co. Booster II on why notice did not get published	144 – 145
74.	December 11, 1996	Notice rescheduling to a March 5, 1997 hearing	146 – 147

Entry	Date	Document	Pages
75.	December 11, 1996	Letter to Terry Terrell, USFWS, from Eric Gronlund sending out notice of hearing again	148
76.	December 11, 1996	Letter to Bennett Co. Booster II sending out notice of hearing for publication (includes notice of hearing)	149 – 151
77.	January 17, 1997	Affidavit of publication of the notice of hearing published January 8 and 15, 1997	152
78.	January 30, 1997	Request for automatic extension of hearing date filed by USFWS	153 – 154
79.	February 12, 1997	Notice informing parties of automatic delay of March 5, 1997, hearing before the Water Management Board	155 – 157
80.	February 20, 1997	Letter to Raymond Kocer from Diane Best	158 – 160
81.	February 20, 1997	Motion filed by USFWS to exclude evidence concern weed control and eradication (including draft order)	161 – 173
82.	February 21, 1997	Motion filed by USFWS to limit evidence pertaining to relevant issue pertaining to Diversion No. 4 (including draft order)	174 - 182
83.	February 21, 1997	Division's Evidentiary Motion	183 – 193
84.	February 21, 1997	Notice of motion hearing filed by Diane Best	194
85.	February 21, 1997	Division's fourth motion for scheduling order and proposed order	195 – 199
86.	March 3, 1997	Letter form of testimony given by Lawrence Kocer at March 6, 1997 hearing	200 – 203
87.	March 6, 1997	Letter form of testimony given by Raymond Kocer at March 6, 1997 hearing	204 – 206
88.	March 10, 1997	Notice scheduling hearing on Application No. 2300-2 for April 30, 1997	207 – 210
89.	March 11, 1997	Applicant's first set of interrogatories and first request for production of documents to petitioners	211 – 216

Entry	Date	Document	Pages
90.	March 11, 1997	Applicant's first set of interrogatories and first request for production of documents to Bennett County and Bennett County Weed and Pest Board	217 – 234
91.	April 21, 1997	List of Witnesses and Exhibits filed by Division	235 – 239
92.	April 21, 1997	Bennett County's answers to USFW's interrogatories	Separate
93.	April 30, 1997	Transcript of Water Management Board hearing on April 30 and May 1, 1997 (volumes 1 & 2)	Separate
94.	May 8, 1997	Notice of continuance of hearing on Application No. 2300-2 to June 16, 1997	240 – 245
95.	May 16, 1997	Motion for continuance or resetting of hearing date filed by John Kunz, USFWS attorney	246 - 251
96.	May 19, 1997	Notice of setting of telephonic conference to hear motion filed by John Kunz, USFWS attorney	252 – 254
97.	May 23, 1997	Notice of Special meeting on Application No. 2300-2	255 – 259
98.	June 2, 1997	Division's Memorandum of Law	260 – 273
99.	June 6, 1997	Concurrence with and adoption of Division's memorandum of law filed by John Kunz	274 – 275
100.	June 16, 1997	Transcript of Water Management Board hearing from June 16, 1997	Separate
101.	June 17, 1997	Transcript of Water Management Board hearing from June 17, 1997	Separate
102.	June 18, 1997	Transcript of Water Management Board hearing from June 18, 1997	Separate
103.	June 30, 1997	Notice of special meeting on Application No. 2300-2	276 – 279
104.	July 8, 1997	Motion to amend application filed by John Kunz, USFWS attorney	280 – 287
105.	July 28, 1997	Transcript of Water Management Board hearing	Separate

Entry	Date	Document	Pages
106.	July 28, 1997	Letter from State Senator Frank Kloucek	288
107.	July 28, 1997	Transcript of Water Management Board hearing from July 28, 1997 (volume 6)	Separate
108.	July 29, 1997	Transcript of Water Management Board hearing from July 29, 1997 (volume 7)	Separate
109.	July 30, 1997	Transcript of Water Management Board hearing from July 30, 1997 (volume 8)	Separate
110.	August 4, 1997	Notice on preparation of findings of fact, conclusions of law and final decision	289 – 292
111.	August 13, 1997	Letter to Brett Heath from Eric Gronlund on Bennett Cty Exhibit No. 69	293
112.	August 14, 1997	Letter to John Hatch from John Guhin on timing of preparing findings	294
113.	August 19, 1997	Notice rescheduling consideration of findings	295 – 298
114.	November 5, 1997	Memo to John Hatch from John Guhin delaying consideration of findings until February 25-26, 1998	299
115.	November 7, 1997	Notice rescheduling consideration of findings	300 – 303
116.	January 26, 1998	Proposed Findings of Fact, Conclusions of Law and Final Decision prepared by Board's Attorney	304 – 328
117.	February 9, 1998	DENR's response to Findings of Fact, Conclusions of Law and Final Decision	329 – 335
118.	February 13, 1998	Applicant's response to Findings of Fact, Conclusions of Law and Final Decision	336 – 349
119.	February 16, 1998	Landowners' and Bennett County's response to findings of fact, conclusions of law and final decision	350 – 364
120.	February 24, 1998	Board Attorney's suggestions with regard to DENR's response and with regard to applicant's response to proposed findings	365 – 367

Entry	Date	Document	Pages
121.	March 5, 1998	Findings of Fact, Conclusions of Law and Final Decision on Application No. 2300-2 (signed)	368 - 390
122.	March 11, 1998	Notice on Adoption of findings of fact, conclusions of law and final decision	391 – 394
123.	June 17, 1998	Letter to USFWS from John Hatch transmitting issued Water Permit No. 2300-2	395
124.	June 17, 1998	Water Permit No. 2300-2 (issued)	396 – 397
125.	April 18, 1999	File documentation between Rolf Kraft and Del Brosz (date of April 18th appears erroneous)	398
126.	April 30, 1999	Minutes excerpt from April 27, 1999 Bennett County Commission meeting (fax copy)	399 – 400
127.	April 30, 1999	E-mail from Eric Gronlund documenting telephone conversation	401
128.	May 3, 1999	Letter to Bennett County Commission from John Hatch, Chief Engineer	402 – 405
129.	May 4, 1999	E-mail documenting conversation between Eric Gronlund and Tim Juhnke	406
130.	May 18, 1999	Faxed transmittal to Del Brosz from Diane Gronlund, NRCS on published minutes of Bennett County Commission proceedings from May 4, 1999	407 – 408
131.	June 22, 1999	Letter to John Hatch from Rolf Kraft, USFWS regarding sediment clean-out	409
132.	October 19, 1999	Letter to John Hatch from Cheryl Williss, USFWS requesting removal of Qualification No. 4 from Permit No. 2300-2	410 – 412
133.	October 26, 1999	Letter to Cheryl Williss, USFWS from John Hatch acknowledging receipt of USFWS request	413
134.	November 3, 1999	File Documentation of Mark Rath's site investigation during clean out	414 – 415

Entry	Date	Document	Pages
135.	November 3, 1999	Letter from Susan Williams, Bennett County Auditor, opposing removal of qualification No. 4 and requesting repeal of Permit No. 2300-2	416
136.	November 5, 1999	Letter from Lloyd Smith, Niobrara Valley Consultants, to USFWS of drawings and elevations (including drawing)	417 – 418
137.	November 12, 1999	Letter to Susan Williams, Bennett County Auditor, from Eric Gronlund acknowledging receipt of letter	419
138.	November 15, 1999	Letter to John Hatch from Cheryl Williss, USFWS transmitting surveyor drawing	420
139.	November 16, 1999	Letter to John Hatch from Raymond Kocer opposing removal of condition No. 4 on Permit No. 2300-2	421
140.	December 23, 1999	Notice scheduling a March 1 and 2, 2000,hearing before Board on USFWS's and Bennett County's requests	422 – 424
141.	January 26, 2000	Notice scheduling March 1, 2000 hearing	425 – 427
142.	March 1, 2000	Transcript of March 1, 2000 hearing before Water Management Board	Separate
143.	March 7, 2000	Letter to parties from Diane Best transmitting copy of transcript of March 1, 2000 hearing	428
144.	June 7, 2000	Diversion No. 4A Investigation by Mark Rath and Eric Gronlund	429 – 435
145.	June 13, 2000	Memorandum to Maury Wright, Refuges Supervisor from Rolf Kraft, Lacreek Refuge Manager	436 – 437
146.	June 16, 2000	Notice scheduling a July 12, 2000 hearing	438 – 440
147.	July 19, 2000	Stipulation delaying July 12th hearing until September 28, 2000 (signed by all parties)	441 – 456
148.	July 20, 2000	Letter to Diane Best from John Kunz transmitting stipulation delay the hearing	457

Entry	Date	Document	Pages
149.	August 2, 2000	Notice scheduling a September 28, 2000 hearing before the Water Management Board (includes enclosure of previous stipulation)	458 – 464
150.	September 18, 2000	Letter to Kunz from Diane Best	465 – 467
151.	September 18, 2000	Letter to Parties from Diane Best	468
152.	September 18, 2000	State responses to question of USFWS (is attachment to letter to Kunz and Parties)	469 – 499
153.	September 28, 2000	Transcript of Water Management Board hearing from September 28 and 29, 2000	Separate
154.	October 4, 2000	Letter to Water Rights from Linda Coe, USFWS transmitting completion of works form	500
155.	October 4, 2000	Notice of completion of works and application of water to beneficial use completed by USFWS	501
156.	October 17, 2000	Notice on preparation of findings of fact, conclusions of law and final decision	502 – 505
157.	November 15, 2000	Proposed findings of fact, conclusions of law and final decision prepared by John Guhin, Board's attorney	506 – 519
158.	November 22, 2000	Memorandum from John Guhin to Board and Interested Parties	520 – 521
159.	November 27, 2000	Letter from Diane Best to Board and Interested Parties regarding proposed findings	522 – 523
160.	November 27, 2000	USFWS's response to proposed finding of fact, conclusions of law and final decision	524 – 539
161.	November 30, 2000	Bennett County's proposed finding of fact, conclusions of law and final decision	540 – 545
162.	December 14, 2000	Findings of fact, conclusions of law and final decision (signed by Board Chairman)	546 – 559
163.	December 19, 2000	Notice of adoption of findings of fact, conclusions of law and final decision	560 – 561

Entry	Date	Document	Pages
164.	January 18, 2001	Notice of Appeal	562 – 579
165.	January 18, 2001	State of Issues on Appeal	580 – 582

WATER PERMIT APPLICATION NO. 2300-2, U. S. FISH AND WILDLIFE SERVICE
EXHIBIT LIST (from all hearings on Permit No. 2300-2)

Exhibit No.	Description	Received
DENR – 1 (1A)	Application file (original & file for amendment)	X
DENR-2	Quadrangle Map	X
DENR-3	Revised Recommendation	X
DENR-4	Mark Rath work background	X
FWS-1	Topographic Map	X
FWS-2a	Overlay of Monitoring Well Location	X
FWS-2b	Location of current & Proposed Diversion #4	X
FWS-3	New Diversion #4 (page 1)	X
FWS-3a	New Diversion #4 (page 2)	X
FWS-3b	New Diversion #4 (page 3)	X
FWS-3c	New Diversion #4 (page 4)	X
FWS-4	1904 –register of deed	X
FWS-4a	Composite Map of Ex. No. FWS-4	X
FWS-5a	Graph – Well 1-H & 1-ref	X
FWS-5B	Graph – well 2-H & 2-ref	X
FWS-5c	Graph – Well 6-LK, 6B-LK & 6-ref	X
FWS-5d-1	Graph – Div. 4 – Well 3B and Creek Elev.	X
FWS-5d-6	Graph – Div. 4 – well and Creek Elev.	X
FWS-5e	Graph – Div. 1 Well Series	X
FWS-8a	Mylar overlay	X
FWS-8b	Aerial photo of Refuge - 1937	X
FWS-8c	Aerial photo of Refuge – 1954	X
FWS-8d	Aerial photo of Refuge - 1961	X
FWS-8e	Aerial photo of Refuge – 1980	X
FWS-8f	Letter from Linda McDonald showing reference for Ex. 8e	X
FWS-9-1	Photo Board (admitted photo nos. a,b,c,d,e,f,g,h)	X
FWS-9-11	Photo Board (admitted photo nos. a,b,c,d)	X
FWS-9-13	Photo Board – 4/17/93 Aerial Photos (admitted Nos. a & b)	X
FWS-9-21	Photo Board (admitted photo nos. a,b,c,d,e)	X
FWS-9-22	Photo Board (all admitted into evidence)	X
FWS-9-25	Photo Bard (admitted photo nos. a,b,c,d,e,g,,h,i)	X
FWS-9-26	Photo Board (admitted photo nos. a,b,c)	X
FWS – 10	Cooperative weed agreement	X
FWS-11	Weed control plan	X
FWS-11A	Letter from Rep. Johnson from Krsnak	X
FWS-12	Refuge 1995 stream survey report	X
FWS-12a	Nebraska document on 3 state threatened/endangered species	X
FWS-13a	Minutes of Game, Fish & Parks Commission action	X
FWS-15	Techniques for establishing alfalfa in SD (excerpt used)	X
FWS-21	Darcy's Formula	X

FWS-22	Map (showing distances)	X
FWS-24	Bennett County Booster article (6/4/97)	X
FWS-26	Hussman drawing	X
FWS-28	Soil survey (excerpt May 1971)	X
FWS-29	Soil Survey(excerpt) May 1971 – Loup soil	X
FWS-30	Soil Survey (excerpt) May 1971 – Gannett soil	X
FWS-31	Rainfall frequencies for NOAA-NWS	X
FWS-32	Alfalfa seed production (booklet)	X
FWS-35	Photo of clean-out behind structure	Not admitted
FWS-36	Picture of Diversion No. 4A	X
FWS-37	Monthly report of gauge readings and weather	X
FWS-38	Report by Niobrara Valley consultants	X
FWS-39	Elevation Summary – Lacreek NWR	X
FWS-40	Letter to Garland Erbele from Cheryl Williss	X
FWS-41	Diversion 4A Well Locations	X
FWS-42	Graph of Water levels and Ground Surface Elevation Adjacent to and Downstream of Diversion 4A – 1998- 2000	X
RAY-1 (index)	Index of documents	X
RAY-1	January 25, 1993 letter to Senator Daschle	X
RAY-1A	Letter to Farrell from Hatch (12/8/92)	X
RAY-1B	Letter to Kunz from Ginsbach (12/10/92)	X
RAY-1C	Memo to file from Brosz (5/13/93)	X
RAY-1D	Letter to R. Kocer from hatch (6/6/93)	X
RAY-1E	Memo to file from Gronlund (8/16/93)	X
RAY-1F	Letter from Hatch from R. Kocer (3/26/94)	Rejected
RAY-1G	Letter to R. Kocer from Hatch (4/4/94)	Rejected
RAY-1H	Letter to Hatch from R. Kocer (4/10/94)	X
RAY-1I	Memo to file from Ahadi (4/20/94)	X
RAY-1J	Letter to Hatch from R. Kocer (5/29/96)	X
RAY-1K	Letter from Harold Freouf	Rejected
RAY-1L	Letter from William Porch	Rejected
RAY-1M	Memo to Kocer filed from Pat Ginsbach	X
RAY-4A	Well reading graph – 3CREF	X
RAY-4B	Well reading graph – 3A-IN	X
RAY-4C	Diversion No. 4 gauge readings	X
RAY-4D	Well reading graph – 3AREF	X
RAY-4E	Well reading graph – 3AREF	X
RAY-4F	Well reading graph – 3CFEF	X
RAY-7A	Photo board – water on L. Kocer (front/back)	X
RAY-7B	Photo board – water on Heath (front/back)	X
RAY-7C	Photo board – water plugging Lake Creek (font/back)	X
RAY-7D	Nine Photo Boards (70 pictures)	X
RAY- 8	Newspaper article (11/25/92)	X

RAY-10	Photo	X
RAY-11	Photo	X
RAY-12	Fragile Legacy – Endangered, Threatened & Rare Animals	X
RAY-13	Photos (received 4 photos with Rotenone barrel – rejected other 6 photos)	X
RAY-13A	Photos (received 4 photos on left page and one on top right)	X
RAY-14	Two Photo Boards (13 pictures – front/back)	X
RAY-15	Photo Board (4 pictures)	X
RAY-16	Letter to R. Kocer from Porch	Rejected
RAY-17	Photo – closeup of fencepost w/washout (6/14/97)	X
RAY-18	Photo – fencepost in picture	X
RAY-19	Photo-culvert in fore ground	X
RAY-20	USFWS monitoring records	X
RAY-21	Monitoring well elevations	X
RAY-22	Monitoring well information	X
RAY-23	Photo of structure	X
RAY-24	Photos above and below Diversion No. 4A	X
RAY-25	Photo of structure full of sand	X
RAY-26	Photos (6) of eroding banks 4/12/2000	X
RAY-27	Photos (6) 4/12/2000	X
RAY-28	Photos (6) 4/12/2000	X
RAY-29	Photo (6) – aerial photos taken 9/26/2000	X
Heath-A	Photo (Deposition Ex. No. 25)	X
Heath-B	Photo (Deposition Ex. No. 17)	X
Heath-C	Photo (Deposition Ex. No. 18)	X
Heath-D	Photo (Deposition Ex. No. 19)	X
Heath-D-1(1)	Soil Profile (page 1)	X
Heath-D-1(2)	Soil Profile (page 2)	X
Heath-D-2	Soil Map	X
Heath-E	Photo (Deposition Ex. No. 20)	X
Heath-F	Photo (Deposition Ex. No. 21)	X
Heath-G	Photo (Deposition Ex. No. 22)	X
Heath-H	Photo (Deposition Ex. No. 23)	X
Heath-I	Photo (Deposition Ex. No. 24)	X
Heath-R	Photo (Deposition Ex. No. 9)	X
Heath –U	Rough fish control plan	X
Heath-W	Tom Beck letter	X
Heath-Y	June 15, 1993, Memo to file on 1993 fisheries meeting	X
Heath-Z	Video (surface water piping)	X
Heath –CC	Preliminary design (site plan)	X
Heath-DD	Map	X
Heath-GG	January 5, 1997 Photos (color copies on 11X17 sheet)	X
Heath-JJ	April 7, 1997 Photos (color copies on 11X17 sheet)	X

Heath-PP	Map of original water right filing map	X
Heath-QQ	Wetland range site – Gannett Soil (highlighted section)	X
Heath-RR	Corps of Engineers – Joint Notice of Permit Pending (7/18/96)	X
Heath–SS	Corps of Engineers – Joint Notice of Permit Pending (5/24/95)	X
Heath-TT	Corps of Engineers – Notice of Permits Issued, Denied, Suspended or Withdrawn – September 1996	X
Heath-UU	Photo 8/99	X
Heath-WW	Aerial Photo	X
Heath – J-3	Photo	X
Heath-98	Photo (4/27/99)	X
Heath-99	Photo (4/27/99)	X
Heath-100	Photo (4/27/99)	X
Heath-101	Photo (4/27/99)	X
Heath-102	Photo (4/27/99)	X
Heath-103	Photo (4/27/99)	X
Heath-104	Photo (4/27/99)	X
Heath-105	Photo (4/27/99)	X
Heath-106	Photo (4/27/99)	X
BC-2	Photo of pool – 2 (7/28/93)	X
BC-3	Photo – standing on dike (7/28/93)	X
BC-4	Panoramic Photo	X
BC-5	Photo – SW corner of Belski meadow (7/28/93)	X
BC-6	3 Photo panoramic of thistle (7/28/93)	X
BC-7	Panoramic Photo (7/28/93)	X
BC-9	Panoramic Photo – headquarter in distance	X
BC-10	Panoramic Photo – headquarter in distance	X
BC-11	Panoramic Photo – county road between Heath & L. Kocer property (7/28/93)	X
BC-13	Photo (1993)	X
BC-15	Photo – Sow Thistle (1993)	X
BC-19	Photo – Canadian Thistle (1995)	X
BC-24	Photo NW corner of refuge (7/19/94)	X
BC-26	Photo – grazed thistle (1994)	X
BC-28	Photo (no copy on file)	rejected
BC-30	Letter to Wayne Stancill	X
BC-33	Natural Heritage database reports	X
BC-38	Letter to Greenough from Wright (5/20?94)	X
BC-41	Stocking Nos. in Lake Creek	X
BC-55	Draft plan	X
BC-56	Photo – thistle seed at maturity	X
BC-69	Video	X
BC-72	Photo – Diversion #4 (6/14/97)	X
BC-73	Photo – Div. #4 & Canadian Thistle (6/14/97)	X
BC-74	Photo – standing on dike @ Div. #4 (6/14/97)	X

BC-75	Photo – 300 ft downstream of div. #4 (6/14/97)	X
BC-81	Photo – NE of Div. #1 – leafy spurge (6/14/97)	X
BC-82	Photo – leafy spurge (6/14/97)	X
BC-83	Photo at Div. # 1 (6/14/97)	X
BC-84	Photo – SW of headquarter (6/5/97)	X
BC-86	Photo – Canadian Thistle @ Pelican Island	X
BC-87	Photo (6/5/97)	X
BC-91	Photo (double Photo) 6/7/97	X
BC-92	Photo 7/27/97	X
BC-93	Photo 7/27/97	X
BC-94	Photo 7/26/97	X
BC-95	Photo 7/26/97	X
BC-96	Photo 7/26/97	X
BC-97	Photo 7/26/97	X
BC-98	Video	X
BC-99	Video	X

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) ss.	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

* *

IN RE: UNITED STATES FISH & WILDLIFE SERVICE'S AMENDMENT OF WATER PERMIT 2300-2 BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD	)	CIV. NO. 2001-29
UNITED STATES FISH & WILDLIFE SERVICE, Applicant/Appellant vs. BRETT HEATH & RAYMOND KOCER Objectors/Appellees, and BENNETT COUNTY, SOUTH DAKOTA Objector/Appellee, and WATER MANAGEMENT BOARD, SOUTH DAKOTA Appellee, and DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, WATER RIGHTS PROGRAM, SOUTH DAKOTA Appellee.	)	BRIEF OF APPELLANT, UNITED STATES FISH & WILDLIFE SERVICE

MAY 2001
WATER RIGHTS PROGRAM
Pierre, SD

* *

Pursuant to S.D. CODIFIED LAWS §§1-26-33.2 & 1-26-33.3, and the February 12, 2001, Order of the Court, Appellant, the U.S. Fish and Wildlife Service ("FWS"), hereby submits to the Court the following appellate brief.

I. JURISDICTIONAL STATEMENT

On December 14, 2000, the South Dakota Water Management Board ("Board") issued its written Findings of Fact, Conclusions of Law, and Final Decision (hereafter, the "the Decision Document"). 1/ Notice of the Decision Document was served on the parties on December 19, 2000. As detailed below, FWS now appeals a bi-annual dredging requirement imposed by the Board in the "Final Decision" portion of the Decision Document. FWS filed its Notice of Appeal in this case on or before January 18, 2001.

II. STATEMENT OF LEGAL ISSUE ON APPEAL

1. Was the portion of the Decision Document wherein the Board required FWS to remove silt behind so-called Diversion No. 4A twice in each calendar year (at intervals of not less than three months) clearly erroneous in light of the entire evidence in the record? 2/

1/ For easy reference, a copy of the Decision Document is located in the Appendix to this brief.

2/ In the January 18, 2001, Statement of Issues on Appeal which FWS filed with the Court, FWS also framed the following issue: "Whether the South Dakota Water Management Board's December 14, 2000, Final Decision wherein the Board required FWS to remove silt behind Diversion No. 4A twice in each calendar year (at intervals not less than three months) was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

While preparing this brief, FWS discovered a recent South Dakota Supreme Court decision discussing the standard of review

(continued...)

III. STATEMENT OF THE CASE

On January 24, 1994, for the benefit of its LaCreek National Wildlife Refuge, FWS submitted to the Chief Engineer, Water Rights Division, Department of Environment & Natural Resources (hereafter, "the Chief Engineer") an application seeking to appropriate water from three structures (so-called Diversion Nos. 1, 3, and 4) on Lake Creek, Bennett County, SD. See Record Entry

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2/(...continued)
for appeals of administrative cases. U.S. West Communications, Inc. v. AT & T Communications of the Midwest, et al., 618 N.W.2d 847 (S.D. 2000) dealt with an appeal to the South Dakota Supreme Court of a Public Utilities Commission decision. In the U.S. West case, the appellant urged that the proper standard of review was the "abuse of discretion" standard (see S.D. CODIFIED LAWS §1-26-36). However, the Supreme Court noted that, "We do not use the abuse of discretion standard in these instances. In Sopko v. C & R Transfer Co., Inc., 1998 SD 8, ¶ 6, 575 N.W.2d 225, 228, we clarified that proper standard of review in administrative appeals is the clearly erroneous standard." U.S. West Communications, Inc., supra, 618 N.W.2d at 851 (n. 10).

Although the Supreme Court did not elaborate as to what kind of specific cases constitute "these instances," additional research reveals that, in least two other cases involving administrative appeals from the Water Management Board, the South Dakota Supreme Court has used the "clearly erroneous" standard of review. See In the Matter of the Decision of the State of South Dakota Water Management Board Approving Water Permit No. 1791-2, 351 N.W.2d 119, 122 (S.D. 1984) and South Dakota Wildlife Federation v. Water Management Board, 382 N.W.2d 26, 29 (S.D. 1986).

For the above reasons, it seems apparent that, in the subject case, the "clearly erroneous" standard is the proper standard of review. Accordingly, contrary to what FWS indicated in its January 18, 2001, Statement of Issues on Appeal, the sole issue for adjudication in this case is the one framed above.

No. 1. 3/ The Chief Engineer docketed the above matter as Application No. 2300-2. See Record Entry No. 11.

Because it was evident that opposition to Application No. 2300-2 existed, the Chief Engineer published notice that the matter would be heard by the Board. See Record Entry No. 16.

FWS subsequently amended Application No. 2300-2 in two respects: (1) it dropped its request to appropriate water from Diversion Nos. 1 and 3 (thus leaving Diversion No. 4 as the sole appropriation point); and (2) it proposed to move the location of Diversion No. 4 approximately 400 feet downstream from its then existing location to a new location point subsequently identified as "Diversion No. 4A." See Record Entry Nos. 46 & 65.

After further administrative proceedings, in a March 5, 1998, Findings of Fact, Conclusions of Law, and Final Decision 4/, the Board issued to FWS Water Permit No. 2300-2 (hereafter, "the Permit"). See Record Entry No. 121. The Permit authorized FWS to impound up to .75 acre-feet of water behind Diversion No. 4A for the purpose of protecting a South Dakota State Threatened fish species--the Pearl Dace. See Record Entry

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3/ The referenced "Record Entry" refers to the Entry Number identified by the Agency in the Chronological Index which the Agency filed with the Court. FWS will continue to use this identifier throughout the remainder of this brief.

4/ For easy reference, a copy of this document is located in the Appendix to this brief.

No. 121. 5/

When it issued the Permit to FWS, the Board conditioned the Permit as follows: "[FWS] is required to remove the silt [behind Diversion No. 4A] if the buildup exceeds 50% of the height of the carp guard [structure]." Id., ¶ 4, p. 23. This condition will hereafter be referred to as "the Dredging Requirement."

When it soon became evident to FWS that: (1) the silt buildup behind Diversion No. 4A would reach the 50% level approximately every 2-4 weeks; and (2) dredging would not accomplish any useful purpose, FWS wrote a letter to the Chief Engineer (with copies to the other parties) requesting that the Dredging Requirement be removed from the Permit. See Record Entry No. 132.

FWS's request to remove the Dredging Requirement from the Permit was opposed by Bennett County, and two local landowners--Raymond Kocer and Brett Heath, and the matter was noticed up for a hearing before the Board. See Record Entry Nos. 140 & 141. 6/

5/ At this point, it should be noted that, the primary purpose of Diversion No. 4A was *not* to impound water behind the structure (as would likely be the case with most dams). Rather, the primary purpose of Diversion No. 4A was to install a 4-foot "stop log" barrier in Lake Creek which would prevent carp from migrating upstream into portions of Lake Creek which constitute prime habitat for the Pearl Dace. See Finding of Fact Nos. 34, 43 & 46, pp. 12-14, Record Entry No. 121. Thus, the impoundment of up to .75 acre-feet of water behind the structure is merely incidental to the above-stated primary purpose.

6/ Indeed, Bennett County not only opposed FWS' request to (continued...)

On September 28-29, 2000, the Board heard testimony from all of the parties concerning FWS's request to remove the Dredging Requirement, and on December 14, 2000, the Board issued the Decision Document. See Record Entry No. 162. In the "Final Decision" portion of the Decision Document, instead of removing the Dredging Requirement from the Permit, the Board required FWS to dredge behind Diversion No. 4A at least twice in each calendar year. See id., ¶ 1.b., p. 14. It is this bi-annual dredging requirement which FWS now appeals to this Court.

IV. GENERAL STATEMENT OF FACTS RELEVANT TO THE GROUNDS URGED FOR REVERSAL

At the September 28-29, 2000, hearing of the subject matter, Bennett County, Raymond Kocer, and Brett Heath (hereafter collectively referred to as "the Objectors") argued two main points. First, that, unless FWS dredged the silt behind Diversion No. 4A, silt and surface water would back up onto their property and harm them. See, for example, testimony of Tim Juhnke **7/**, Transcript at 189-191 **8/**; testimony of Ronald Riggs **9/**, Transcript at 194-

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6/(...continued)
remove the Dredging Requirement, but also asked the Board to completely rescind the Permit. See Record Entry No. 135.

7/ Mr. Juhnke is (or was at the time) a Bennett County Commissioner.

8/ The transcript of the September 28-29, 2000, hearing before the Board is Record Entry No. 153. Hereafter, FWS will (continued...)

195; testimony of Raymond Kocer, Transcript at 216-217; and testimony of Brett Heath, Transcript at 236 & 240.

And, second, that, unless FWS dredged the silt behind Diversion No. 4A, this would cause increased erosion of Lake Creek which would in turn adversely affect the Objectors. See, for example, testimony of Mr. Juhnke, Transcript at 190; testimony of Mr. Kocer, Transcript at 216-217 & 222; and testimony of Mr. Heath, Transcript at 240.

Additionally, although Objectors did not dwell on this issue in their direct testimony, as part of its case, FWS presented evidence to rebut a possible argument that, unless FWS dredged behind Diversion No. 4A, this would cause adjacent groundwater levels to rise (which would in turn harm the Objectors).

As will be discussed in more detail below, in the Decision Document, the Board completely discounted the Objectors' arguments, and instead specifically credited FWS' evidence pertaining to the above issues. See, for example, Finding of Fact Nos. 28, 29 & 30, pp. 9-11 of the Decision Document. Nevertheless, the Board denied FWS' request to remove the Dredging Requirement from the Permit, and instead imposed a condition mandating that FWS dredge behind Diversion No. 4A twice in each calendar year. FWS

8/ (...continued)
directly refer to this Record Entry as "the Transcript."

9/ Mr. Riggs is (or was at the time) a Bennett County Commissioner.

strongly believes and hereby asserts that, in light of the entire evidence in the record and the Board's own findings, the imposition of this bi-annual dredging requirement was clearly erroneous. For this reason, FWS urges this Court to award the relief requested herein.

V. ARGUMENT

A. Concerning Objectors' Argument That, Unless FWS Dredges The Silt Behind Diversion No. 4A, Silt And Surface Water Will Back Up Onto Their Property And Harm Them.

At the hearing of the subject case, as generally discussed above, Objectors argued that, unless FWS dredged the silt behind diversion No. 4A, silt and surface water would back up onto their property and harm them.

More specifically, with respect to the purported backing up of silt onto Objectors' property, Mr. Juhnke opined that sediment had already built up more than one mile upstream of Diversion No. 4A. See Transcript at 182 & 191. Mr. Kocer testified that, "Diversion 4-A is full of sand. My next series of pictures are going to follow the sand buildup back on to the Rolfe 40 acres, probably right at a half mile back." Transcript at 216. 10/ Lastly, Mr. Heath generally testified that sand "deltas" had built up behind Diversion No. 4A, and that, "[i]f dredging . . .

10/ Although not expressly stated, Mr. Juhnke's and Mr. Kocer's testimony implied that, if FWS stopped dredging behind Diversion No. 4A, the silting problems would only get worse.

isn't maintained, you create a problem with the creek filling it [sic] up full of sand." Transcript at 236.

With respect to the alleged backing up of surface water behind Diversion No. 4A onto Objectors' property, Mr. Juhnke generally testified that Diversion No. 4A causes Lake Creek to slow down, which in turn drops sediment and causes surface water to back up. See Transcript at 183-84. Mr. Riggs generally testified that, after Diversion No. 4A had been built, there was ". . . a lot of backup water and flooding [on] the neighbors' land." Transcript at 194. **11/**

At the hearing, several expert witnesses disagreed with and otherwise refuted the Objectors' contentions. First, with respect to the backing up of silt, Megan Estep-Johnston **12/** testified that, based upon her personal observation; measurements of the slope of Lake Creek; and mathematical calculations, the maximum distance that sediment could back up behind Diversion No. 4A "would be approximately 800 feet." Transcript at 259 & 260-61.

11/ Although not expressly stated, Mr. Juhnke's and Mr. Riggs' testimony implied that, if FWS stopped dredging behind Diversion No. 4A, the alleged backing up of surface water would only get worse.

12/ The Board qualified Ms. Johnston (a FWS witness) as an expert in the areas of hydrology, soil physics, and soil science. See Transcript at 130.

Second, Mark Rath **13/** testified that, based on his personal observations, the sediment behind Diversion No. 4A had only built up approximately 100 feet. See Transcript at 257.

Third, with respect to the purported backing up of surface water, Lloyd Smith **14/** offered uncontested testimony that: (1) before FWS dredged the silt behind Diversion No. 4A, the surface elevation of the pond behind the structure was measured at 3036.66 feet (see Transcript at 67-68); and (2) after FWS dredged the silt behind the structure and enough time had passed to allow everything to return to "normal" (approximately 2 hours), the surface elevation of the pond was measured at 3036.68 feet. See Transcript at 68. In other words, the difference in the surface elevation of the pond both before and after dredging was virtually negligible.

Fourth, Ms. Johnston corroborated Mr. Smith's testimony by stating that, with respect to the elevation of the surface water behind Diversion No. 4A, it simply would not matter if FWS dredged the silt or not. See Transcript at 138. More specifically, Ms. Johnston testified that it would not matter whether the area behind Diversion No. 4A was filled with silt or with

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13/ The Board qualified Mr. Rath (a witness for the Department of Environment & Natural Resources) as an expert in water engineering. See Transcript at 244.

14/ The Board qualified Mr. Smith (a FWS witness) as a licensed professional land surveyor, and an expert in surveying. See Transcript at 64.

water; either way, once the area behind the structure was indeed filled (whether by water or silt), the resulting surface elevation would still be the same. See id. **15/**

And, fifth, when asked whether he agreed with the following statement, Mr. Rath replied "Yes:" "The sediment behind the structure [Diversion No. 4A] does not have an adverse impact on water levels in Lake Creek. The amount of sediment behind the structure does not impact the creek's hydraulic characteristics of water flowing over the structure or area inundated by back water effects." See Transcript at 256.

With respect to the above issues, in the Decision Document, the Board specifically found the following:

> The Board has examined the question of whether failure to remove the silt from Diversion No. 4A causes damage to the [Objectors] by backing up water or silt on their property or somehow otherwise harming them. The Board credits the evidence of Ms. Johnston that the silt does not back up more than 800 feet. The Board is unable to ascertain any effect of the silt or water on the [Objectors.]

15/ There is a very practical explanation for this conclusion. Recall from note 5 supra, that the primary purpose of Diversion No. 4A was to install a 4-foot "stop log" barrier in Lake Creek which would prevent carp from migrating upstream. This naturally created a "dam" in Lake Creek behind which FWS was authorized to impound up to .75 acre-feet of water.

Diversion No. 4A is designed so that, once the water behind the structure reaches a certain elevation (dictated by the 4-foot height of the boards in the structure), the water will run over the top of the boards, go through an arched culvert, and continue on downstream. Obviously, the structure will operate in this same fashion regardless of whether the area behind the structure is filled with water, silt, or some combination thereof.

Finding of Fact No. 28, pp. 9-10 of the Decision Document.

In other words, completely consistent with the testimony of three expert witnesses (most of which was uncontested), the Board explicitly and unqualifiedly found that FWS' "failure to remove the silt from Diversion No. 4A" would not (either through the backing up of silt or surface water) have any effect on or cause any damage to Objectors' property.

Indeed, in addition to determining that a failure to remove the silt behind Diversion No. 4A would not have any effect on the Objectors, in a separate finding, the Board concluded that the dredging process in general was actually *harmful* to the surrounding environment: "Even though care is taken, the [dredging] machine will tear up grass and sod and disturb the soil. In addition, sandpiles will be created which cover up the grass." Finding of Fact No. 26, p. 9 of the Decision Document.

Inexplicably, after considerable deliberation (see, generally, Transcript at 298-314), and despite the above findings, the Board still denied FWS' request that the Dredging Requirement be removed from the Permit, and instead imposed the bi-annual dredging requirement. **16/**

16/ Interestingly, at least one member of the Board completely understood FWS' position and expressed that dredging would be an ". . . exercise in futility. * * * Either we ought to do it [dredge] when it fills up, or not do it at all." Transcript at 304. Similarly, this same Board member voiced the following: "I'm saying we ought to just throw [the dredging (continued...)

S.D. Codified Laws § 1-26-36 states that:

> 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: * * * (5) Clearly erroneous in light of the entire evidence in the record **17/**

The South Dakota Supreme Court has elaborated on the "clearly erroneous" standard of review as follows:

> Our standard of review, delineated in SDCL 1-26-36, requires us to give great weight to the findings and inferences made by the [agency] on factual questions. [Internal citations omitted.] We examine agency findings in the same manner as the circuit court to decide whether they were clearly erroneous in light of all the evidence. [Internal citation omitted.] If after careful review of the entire record we are definitely and firmly convinced a mistake has been committed, only then will we reverse. [Internal citations omitted.]

Sopko v. C & R Transfer Co., Inc., 575 N.W.2d 225, 228 (S.D. 1998). **18/**

Applying the above legal principles to the instant case, FWS obviously does not dispute that this Court should give great

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16/(...continued)
requirement] out. I don't think we should require [FWS] to remove sediment at all. They are smart enough to manage that facility, smart enough to inspect that facility, and if they let it go to pot and it causes damage to somebody's property, they are going to be responsible for that." Transcript at 305.

17/ As discussed in more detail in note 2 above, the "clearly erroneous" standard is the proper standard of review for this case.

18/ Accord Johnson v. Albertson's, 610 N.W.2d 449, 453 (S.D. 2000).

weight and deference to the Board's findings concerning the factual question of whether FWS' failure to dredge behind Diversion No. 4A will cause silt or surface water to back up onto the Objectors' property. Indeed, as outlined in detail above, the evidence in the record completely supports (and FWS wholly agrees with) the Board's specific findings that: (1) silt will not back up more than 800 feet behind Diversion No. 4A; (2) the backing up of this silt will not adversely affect the Objectors; and (3) the backing up of surface water (if any) will not have any effect on the Objectors.

However, FWS entirely disagrees with the portion of the Decision Document wherein the Board required FWS to dredge behind Diversion No. 4A at least twice in each calendar year. This is particularly so since the evidence in the record and the Board's own findings convincingly state that: (1) even if FWS "[fails] to remove the silt from Diversion No. 4A," this will not result in any adverse effects (due to the backing up of silt or surface water) on Objectors' property; and (2) that the dredging process in general is actually harmful to the surrounding environment.

For the above reasons, FWS strongly believes and urges this Court to find that, "after a careful review of the entire record," it (the Court) must "definitely and firmly [be] convinced [that] a mistake has been committed." This Court should, therefore, grant the relief requested herein.

B. Concerning Objectors' Argument That, Unless FWS Dredges The Silt Behind Diversion No. 4A, This Will Cause Increased Erosion Of Lake Creek Which Will In Turn Harm Them.

As generally stated above, Objectors argued at the hearing that, unless FWS dredged the silt behind Diversion No. 4A, this would cause increased erosion of Lake Creek which would in turn harm them.

More particularly, Mr. Juhnke testified that the water behind Diversion No. 4A ". . . made it easier to cut the banks as [Lake Creek] makes it through the oxbow and through the corners . . . . " Transcript at 177. Mr. Juhnke also stated that, "[a]nytime you put an impoundment in it's going to cause more erosion because you're raising the water." Transcript at 190. **19/** Additionally, Mr. Kocer introduced pictures into evidence purportedly showing the "creek bank eroding full of sand" (Transcript at 216), and "erosion of the bank." Transcript at 217. **20/** Lastly, Mr. Heath testified: (1) about ". . . siltation building up in [Lake Creek] and going back up the creek, eroding the banks" (Transcript at 236); and (2) that, "if the dredging process isn't maintained, it's going to erode the banks that much further." Transcript at 240.

19/ Although not expressly stated, Mr. Juhnke's testimony implied that, if FWS stopped dredging behind Diversion No. 4A, the purported erosion problem would only get worse.

20/ Although not expressly stated, Mr. Kocer's testimony implied that, if FWS stopped dredging behind Diversion No. 4A, the purported erosion problem would only get worse.

To refute the above arguments, Ms. Johnston opined that dredging behind Diversion No. 4A would actually *increase* (rather than decrease) erosion of Lake Creek. See Transcript at 143-149. Ms. Johnston's stated rationale for this conclusion was that, each time the sediment behind Diversion No. 4A is dredged, the water behind the structure no longer carries sediment; the water is thus "clean," and has more erosive energy than it would have had if it were carrying sediment. See Transcript at 143. The result of such "clean" water going over the top of Diversion No. 4A and downstream is: (1) "down cutting [of] the creek channel below the structure, which eventually results in bank destabilization" (id.); and (2) the "[erosion] of material that it [sic] wouldn't normally have eroded." Transcript at 149.

On the other hand, if the area behind Diversion No. 4A is *not* dredged, the water that goes over the top of the structure is transporting sediment and thus has less erosive energy. See Transcript at 143-44. The result is less erosion downstream. See Transcript at 143.

Concerning the above issue, the Board unequivocally found the following:

> The Board has also considered whether the modification of the Qualification [*i.e.*, FWS' request that the Dredging Requirement be removed from the Permit] will increase erosion to the detriment of the [Objectors] and finds, to the contrary, that it will decrease erosion to their benefit. The Board credits the testimony of Ms. Johnston that, when sediment is removed from the water, and the water continues downstream, its

> erosive energy is increased. If the Qualification is not modified, each time the impoundment is not [sic] 21/ cleaned out, the water will, therefore, erode material that would not normally be eroded. On the other hand, if [FWS] is not required to clean out the impoundment on a frequent basis, the water will proceed downstream carrying the silt but it will be less erosive because it has less erosive energy. This will benefit the interest the [Objectors] have in limiting erosion.

Finding of Fact No. 30, pp. 10-11 of the Decision Document.

Moreover, as previously discussed, the Board found that the dredging process in general was actually harmful to the surrounding environment. See ¶ V.A. of this brief, and Finding of Fact No. 26, p. 9 of the Decision Document.

Applying the previously enumerated legal principles to the above matter, FWS once again obviously does not dispute the fact that this Court should give great deference to the Board's factual findings pertaining to the above issue. Indeed, the evidence in the record entirely supports (and FWS completely agrees with) these findings.

However, FWS utterly disagrees with the portion of the Decision Document wherein the Board requires FWS to dredge behind Diversion No. 4A at least twice in each calendar year. This is

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21/ Given the context of this finding as a whole, and specifically considering the Board's language in the sentence immediately following the insertion point of this note, it is readily apparent that the Board did not intend to put the word, "not," in this sentence. Accordingly, this sentence should read: "If the Qualification is not modified, each time the impoundment is cleaned out, the water will, therefore, erode material that would not normally be eroded."

particularly so since the evidence in the record and the Board's own findings plainly demonstrate that: (1) dredging will increase (rather than decrease) erosion of Lake Creek; (2) dredging will be a detriment (rather than a benefit) to the Objectors; and (3) dredging is generally harmful to the environment.

For the above reasons, "in light of the entire evidence in the record" and the Board's own findings, the Board's requirement that FWS dredge behind Diversion No. 4A at least twice in each calendar year is clearly erroneous. Moreover, for the above reasons, after a careful review of the record, this Court should be convinced that the Board has committed a mistake. Consequently, this Court should award FWS the relief requested herein.

C. Concerning The Possibility That, Unless FWS Dredges Behind Diversion No. 4A, Adjacent Groundwater Levels Will Rise To The Detriment Of The Objectors.

As generally stated above, anticipating a possible argument that FWS' failure to dredge the silt behind Diversion No. 4A would cause adjacent groundwater tables to rise (which would in turn adversely affect the Objectors), FWS adduced undisputed evidence at the hearing showing that, regardless of whether the area behind Diversion No. 4A was completely full of sediment or completely devoid of the same, adjacent groundwater elevations would not be affected one way or another. See, for example, testimony of Megan Estep-Johnston, Transcript at 130-138 & 142.

In other words, it simply would not matter whether FWS dredged behind Diversion No. 4A or not.

More particularly, Ms. Johnston testified that FWS had installed numerous piezometers (shallow groundwater monitoring wells) near Diversion No. 4A. See Transcript at 130-131. With only a couple of minor breaks, FWS continuously has been reading the data from these piezometers since 1994. See Transcript at 131-32. This data clearly shows that the groundwater level adjacent to Diversion No. 4A generally "begin[s] rising in the winter after the plants have stopped evapotranspiring, reaching a peak usually in late spring, and then it declines over the summer and reaches a low usually in September, late August or September." Transcript at 133-34. **22/** Ms. Johnston also testified that this same cyclical pattern has existed throughout the entire study period. See Transcript at 136-37. **23/** Ms. Johnston therefore concluded that it simply did not matter whether FWS dredged or did not dredge the silt behind Diversion No. 4A--either way, groundwater levels adjacent to the structure would

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22/ The noted exceptions to this cyclical "pattern" were isolated increases in groundwater levels due to specific and identifiable precipitation events. See Transcript at 134-36.

23/ To support a potential argument that a lack of dredging behind Diversion No. 4A would cause adjacent groundwater levels to rise, the data from the piezometers would have to show increases in the groundwater levels which: (1) directly correlate with periods of non-dredging; and (2) are not attributable to any identifiable precipitation events. The data simply does not show any such increases.

remain the same and would only fluctuate due to seasonal changes or precipitation events. See Transcript at 142.

With respect to the above issue, the Board specifically credited Ms. Johnston's testimony and stated that:

> The Board has also examined the question of whether dredging or the failure to dredge has any effect on the groundwater level. The Board again credits the piezometer tests done under the supervision of Ms. Johnston and finds that there is no effect on the water level from dredging. The reason is apparent--[Diversion No. 4A] is too small to affect in any significant way the ground water table at any significant distance from the structure.

Finding of Fact No. 29, p. 10 of the Decision Document.

Moreover, we must remember the Board's finding that the dredging process in general is actually harmful to the surrounding environment.

Applying the previously discussed legal principles to the above matters, to reiterate, FWS obviously does not dispute the fact that this Court should give great weight to the above findings of the Board. In truth, it is readily apparent that the above findings are completely consistent with and supported by the undisputed evidence in the record.

However, FWS cannot agree with the Board's requirement that FWS dredge behind Diversion No. 4A at least twice in each calendar year. The reason is obvious; in spite of the fact that the Board specifically found that: (1) "there is no effect on the [ground] water level from dredging;" and (2) dredging in general

is actually harmful to the surrounding environment, the Board still imposed the bi-annual dredging requirement.

Plainly, in light of the entire evidence in the record and the Board's own findings, FWS strongly believes and hereby urges this Court to find that: (1) the bi-annual dredging requirement is clearly erroneous; and (2) in mandating this requirement, the Board obviously committed a mistake. For these reasons, FWS urges this Court to award FWS the relief requested herein.

VI. CONCLUSION AND REQUEST FOR RELIEF

For all of the above reasons, it is evident that, in requiring FWS to dredge behind Diversion No. 4A at least twice in each calendar year, the Board committed a mistake. Stated differently, in light of the entire evidence in the record and the Board's own findings concerning the various issues, it is obvious that the Board's imposition of the bi-annual dredging requirement was clearly erroneous.

Consequently, FWS respectfully asks this Court to: (1) reverse the portion of the Decision Document requiring FWS to dredge behind Diversion No. 4A at least twice in each calendar year; and (2) remand the matter to the Board for further appropriate action consistent with the evidence in the record and the Board's own findings; namely, that the Board remove the bi-annual dredging requirement from the Permit.

REQUEST FOR ORAL ARGUMENT

FWS does not request oral argument of the subject appeal.

DATED this 14th day of May, 2001.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2001, true and correct copies of the foregoing BRIEF OF APPELLANT, UNITED STATES FISH & WILDLIFE SERVICE were mailed via U.S. First Class Mail, postage prepaid to:

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APPENDIX

1. The Board's March 15, 1998, Findings of Fact, Conclusions of Law, and Final Decision.

2. The Board's December 14, 2000, Findings of Fact, Conclusions of Law, and Final Decision.

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN RE APPLICATION FOR WATER PERMIT NO. 2300-2; U.S. FISH AND WILDLIFE SERVICE (LACREEK NATIONAL WILDLIFE REFUGE)	)))))	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION

3/5/98

FINDINGS OF FACT

1. This is an application by the U.S. Fish and Wildlife Service to store one acre-foot of water. The purpose of the application is to allow the U.S. Fish and Wildlife Service to construct a four-foot barrier to prevent carp from entering a stream area utilized by a state-threatened species, the Pearl Dace.

2. The history on the application is of some relevance. On January 7, 1993, after a protracted hearing, this Board granted Vested Water Right Permit No. 1927-2 to vest a prior claimed right to 10 cfs of water from four diversion points from Lake Creek. One of these diversion points was Diversion No. 4. Subsequently, the circuit court on January 5, 1994, found that the Board had erred in finding continuous appropriation of water and reversed the grant of Vested Right Application No. 1927-2. Further appeals were not made on Vested Right Application No. 1927-2. However, the South Dakota Supreme Court, on December 7, 1994, affirmed the decision of the circuit court with respect to other issues that were appealed (not pertaining to Lake Creek).

3. After the circuit court reversal, the U.S. Fish and Wildlife Service (Service) submitted an application for a new

permit for three structures which substantially covered the same area that the vested water right claim had covered.

4. Four Petitioner/Intervenors who were involved in the litigation with regard to the vested right claim are also involved in the present application (Lawrence Kocer, Raymond Kocer, Brett Heath, and Charles Emley). Additionally, the Bennett County Commission intervened in the present application.

5. At approximately the same time as the new application was submitted, the U.S. Fish and Wildlife Service became concerned with the survival of the Pearl Dace which, in 1978, was classified as an endangered species by the South Dakota Commission of Game, Fish and Parks. The Pearl Dace was present in Lake Creek in areas upstream of Diversion No. 4, and in certain other places in the Refuge. Subsequently, the Pearl Dace, which is a minnow, was reclassified as a threatened species in 1996.

6. The U.S. Fish and Wildlife Service ultimately, at the request of the landowners, deleted the irrigation portions of the application insofar as Diversion No. 4 is concerned. The application was also amended to retain Structure No. 4 for the purpose of protecting the Pearl Dace, which was then classified as endangered, and two other species which were regarded as threatened. The portions of the application applying to Diversion Nos. 1 and 3 were deleted altogether.

7. After continued discussions with the landowners, the application was amended a second time. Diversion No. 4 was proposed to be moved downstream approximately 400 feet. The

proposed new structure is designated Diversion No. 4A. It was also redesigned to better handle the flood flows.

8. A permit to appropriate water may be issued by the Board if there is a reasonable probability that there is unappropriated water available for the applicant's proposed use, that the proposed diversion can be developed without unlawful impairment to existing rights, that the proposed use is a beneficial use and that the proposed use is in the public interest.

Unappropriated Water Available.

9. Based upon the uncontradicted testimony as to the great volume of water available in the Lake Creek area, the Board finds that there is ample unappropriated water available for this application.

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

10. The landowners have asserted that the proposed application cannot be developed without impairing their rights. The Board rejects this claim.

11. The amount of water at issue is only one acre-feet. In comparison, Capitol Lake is approximately sixty-five times larger. Moreover, the Board finds, based upon the testimony of county witness Bob Bolzer, that one acre-foot is smaller than a typical stock dam.

12. The landowners and the county suggest two methods by which the grant of this permit will invade the rights of the landowners. First, the landowners suggest that water will travel

underground or be "piped" through a sand lens from Diversion No. 4A to their property. This will, they argue, cause the land to be saturated, will make it more difficult to control Canadian thistle, and will promote the growth of undesirable grasses and weeds in place of more desirable grasses.

13. The Board finds that the evidence demonstrates that it is highly improbable that the impoundment of one acre-foot of water or less at Diversion No. 4A will result in the piping of some of that water to the property of any of the landowners. The lands owned by the landowners in question are from one-half to three-quarters of a mile from Diversion No. 4A. The testimony of Denny Simonson that piping will occur over these distances is rejected by the Board. Simonson's theory was that piping is presently occurring from Diversion No. 4 to the landowners' property and that the same sort of piping will occur from Diversion No. 4A. Mr. Simonson testified that the four foot of head pressure causes water to move laterally through the sand lens at a rate of ten inches per hour and that it has moved laterally fully one-half or three-quarters of a mile onto the property of the landowners.

14. Mr. Simonson's analysis is incorrect in at least two areas. First, the Board finds, based upon the testimony of Megan Johnston, that water will not move <u>laterally</u> through sand at ten inches per hour. The ten-inch-per-hour movement is the maximum <u>downward</u> movement, not the <u>lateral</u> movement, through the soil type in question. Moreover, the range for movement in a

downward direction is 8/10" per hour to 10" per hour (Simonson's figures are the maximum level for downward movement).

15. The Board finds, based upon the testimony of Megan Johnston, that the lateral movement of water should be determined by the operation of Darcy's law, which uses hydraulic conductivity, the head differential, and the flow area to calculate the volume of water which will move from Point A to Point B. See USF&W Ex. 22. Darcy's law calculations were performed for the worst possible scenario (for the applicant), i.e. the maximum hydraulic conductivity figure was utilized and, moreover, it was assumed that all of the water escaping the pool would flow into the soil and none would return to the stream channel (a quite unlikely case). Megan Johnston convincingly demonstrated that to move water from Diversion No. 4 to the landowners' property, as they claim is occurring, the ground near the impoundment to the land of the landowner should have to be saturated in a triangular-shaped area of about 262 acres. If not all of the land was saturated, then the groundwater would tend to flow away from, and not toward, the landowners' property.

16. Utilizing the worst possible case assumptions, Darcy's law indicates that .0036 acre-feet per day would move into the saturated area (this amounts to 1,183 gallons per day). This volume of water would raise the water table of the area only .000013 feet per day or 1/100,000 of a foot. However, even that measure misstates the effect on the water table. This is because the evaporation rate greatly exceeds the amount of water which would enter into the saturated area. This is true even with

regard to underground water, especially that connected to the plant life overhead, as is likely in this case.

17. The Board further finds that the Simonson theory is premised upon the thesis that the soils of the landowners are already so saturated on a regular basis that additional water cannot be absorbed into them. However, the testimony of the landowners showed that well readings dropped very quickly after rainfall events. The very speedy drop in well readings after rainfall events indicates that the land is not as saturated as the landowners contend.

18. Second, the landowners also appear to contend that the proposed diversion cannot be developed without unlawful impairment of existing rights because overland flooding now occurs, or has occurred in the past, as a result of U.S. Fish and Wildlife activities at Diversion Nos. 1, 3, and 4.

19. As to Diversion No. 1, however, the U.S. Fish and Wildlife ceased any and all new diversions by closing (sometime after the summer of 1992) a screw gate located in Diversion No. 1. Moreover, the Service has placed a plug in a ditch to eliminate the perception that the ditch would carry water from Diversion No. 1 to the landowners. The diversion has not received additional complaints since Diversion No. 1 was breached, and the landowners agreed at hearing that Diversion No. 1 no longer caused problems.

20. The Board finds that there is insufficient evidence to determine that Diversion No. 3 causes problems to the landowners at the present. First, it is undisputed that the

stoplogs have actually been removed from Diversion No. 3; this process was protracted and required a backhoe to remove the final logs. Second, the capacity of the culvert at Diversion No. 3 is for approximately a five-year precipitation event. The culvert is apparently maintained so there is a crossing at this point for cattle, hunters, and to accommodate the needs of the Service. Therefore, it appears that, when the precipitation exceeds the five-year event, water will escape from the stream at the culvert. However, uncontradicted testimony also indicated that there were other places on the stream between old Diversion Nos. 1 and 4, where the channel capacity was insufficient to handle a five-year rain event. Thus, regardless of whether Diversion No. 3 has any capacity to "divert," however that term is defined, it would only be "diverting" at a time when other parts of the channel were overflowing.

21. Third, the Board has considered the evidence of Del Brosz, an expert who testified on behalf of the Division, who testified that the topography map showed stream channels coming from the uplands to the north of the refuge onto private property and further that sandhills from the south drain toward Lake Creek. Essentially Brosz testified that the water occasionally on Messrs. Lawrence or Raymond Kocer's property was a naturally occurring condition which could not be attributed to Diversion No. 3 or any other diversion. Fourth, the Board has considered the evidence of the landowners, including Mr. Raymond Kocer, as to the water on property utilized by him and has considered photographic evidence showing water on his property.

22. After carefully weighing the evidence, the Board finds that the evidence is insufficient to support the claim that Diversion No. 3, as it is presently situated, adds any appreciable amount of water onto Messrs. Lawrence or Raymond Kocer's land. The Board further finds that such water as is found on the property is due to the natural condition of the area, including the fact that the channel itself is insufficient to handle large rainfall events. The Board relies on the topography of the area, the naturally occurring water in the area (as found below), the natural overflow of the creek and the failure of the landowners to firmly tie the water on their land to Diversion No. 3.

23. The Board credits the testimony of Rolf Kraft as to the movement of water from Diversion No. 4. Kraft testified that water which came on Mr. Lawrence Kocer's property came from the west and not from Diversion No. 4 in most situations. This is substantiated by testimony as to the topography of the area and by photographs which show that water from Diversion No. 4 does not flow onto Lawrence Kocer's property but is intercepted by a county road ditch. The Service admitted that water from other parts of the refuge does flow onto Lawrence Kocer's property. Water will, however, occasionally travel from Diversion No. 4 onto Mr. Heath's property in a major rainfall event. The Service has attempted to stop this flow of water with a drainage ditch but the drainage ditch has in the past occasionally failed. The Board concluded that any water from Diversion No. 4 which makes it to Lawrence Kocer's property is

found only in unusual situations and does not demonstrate any negligence or misconduct on the part of the Service; moreover, given the great amount of water in the area, it is virtually impossible for water not to flow, in some cases, from one landowner to another.

24. The Board also discounts to a substantial degree complaints as to water on the Heath property in view of testimony, maps and photographs produced by witness Pearson who was qualified to interpret aerial photography and maps. Pearson's testimony demonstrated that a substantial portion of the Heath property constituted a marsh or wetland at the time of a 1904 map and a 1937 aerial photo. The Refuge was not created until 1935. The same characteristics are shown in a 1954 photo. A short segment of Lake Creek on the West 1/2 of the Heath property was straightened out sometime in the 1950's. Additionally, sometime prior to 1980, the entire length of the Lake Creek channel across the Heath property was straightened. However, the lands of a drained wetland lose the capacity to hold water. Thus to some extent, the straightening of the creek itself promotes flooding in some circumstances.

25. The Board also finds that the entire area is characterized by high water table generally and that water flows to the area from both the north and the south. Many of the complaints of the landowners result from the natural topography of the area.

26. The Board also finds that Diversion No. 4 must be entirely removed within a reasonable time of the construction of

Diversion No. 4A. Any problems with Diversion No. 4 will, therefore, be eliminated.

27. The issue of whether Diversion Nos. 1, 3, and 4 at present flood is, in any event, only of marginal relevance to the issue of whether the proposed diversion, Diversion No. 4A, can be developed without unlawful impairment of existing rights. In this regard, the Board is persuaded that the past actions of the Service make it unlikely that the Service will construct or operate Diversion No. 4A in such a way as to intentionally flood or negligently flood their neighbors. In fact, the recent actions of the Service indicate that it has adopted a policy of accommodation to its neighbors: Diversion No. 1 clearly no longer diverts; an earthen plug was also placed by the Service in a ditch to avoid water running into a ditch from Diversion No. 1 and so reaching the landowners. The stoplogs/boards in Diversion No. 3 have been removed. The Service has attempted to plug a breach along a drainage ditch to keep water flowing to Heath's property possibly from Diversion No. 4 and form runoff. A troublesome siphon which was impacted by Lake Creek was remodeled and a new ditch added to the benefit of Lawrence Kocer. Pool number 2 was drained to the apparent benefit of the landowners in recent years.

28. Turning directly to Diversion No. 4A, the Board finds that it can, in fact, be developed without unlawful impairment of existing rights. First, Diversion No. 4A will not accomplish "piping" of water underground to the detriment of the

landowners, as demonstrated by the study discussed above of the water at Diversion No. 4.

29. Second, Diversion No. 4A will impound less than one acre-foot of water, a relatively small amount of water.

30. Third, the Board finds that Diversion No. 4A is unlikely to cause overland flooding to the detriment of the landowners because of its design and placement, which are superior to existing Diversion No. 4. Diversion No. 4A will be built to accommodate a 25-year flood; in addition, it will have in place a training dike to handle flows even in excess of a 25-year flood. The Board finds that these are reasonable precautions to protect the landowners.

31. In addition, Diversion No. 4A will be constructed with a storage level of 3034.1 msl; this level is substantially below the level of Diversion No. 4 and thus there is much less chance that Diversion No. 4A will operate to the detriment of the landowners than Diversion No. 4 is alleged to have operated.

32. Moreover, the Board finds that a qualification of the permit with regard to silt buildup will further protect the landowners. The Board will require silt removal if silt buildup exceeds 50% of the level of the carp barrier.

33. Finally, the Board finds that should Diversion No. 4A ever flood and should the training dike be unable to hold the flows, the creek will have overflowed its banks at other locations. The Board finds that it is unlikely that the diversion will contribute in any but a de minimus way to any

flooding which might occur on the landowners' property.

The Proposed Use Is a Beneficial Use.

34. The proposed use of the diversion is to set up a barrier to prevent carp from moving from the main body of the refuge in a westerly direction past new Diversion No. 4A into an area occupied by Pearl Dace.

35. The Pearl Dace was originally classified by the Game, Fish and Parks Commission, pursuant to SDCL ch. 34A-8 and after notice and hearing, as an "endangered" species under South Dakota law. It has now been reclassified by the Game, Fish and Parks Commission under the same authority as a "threatened" species.

36. Under SDCL 34A-8-1(3), a "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."

37. The United States has not classified the Pearl Dace as a threatened or endangered species nationally.

38. Although the United States has not classified the Pearl Dace as a threatened or endangered species nationally, the State of South Dakota, through its statutes and administrative provisions, has determined that it is important to maintain biological diversity within the state of South Dakota. Therefore, the State of South Dakota has deemed it appropriate as a matter of public policy to classify certain species as threatened or endangered species on a statewide basis even though they may not be threatened or endangered on a nationwide basis.

39. SDCL 34A-8-6 directs the Departments of Game, Fish and Parks and Agriculture to "perform those acts necessary for the conservation, management, protection, restoration and propagation of . . . threatened species."

40. The Pearl Dace exists in the area of LaCreek Wildlife Refuge as a relatively disjunctive population; in other words, the local population is not well connected with other populations of Pearl Dace.

41. The Board credits the testimony of expert Stancill that there are presently sustainable populations of Pearl Dace upstream (or west) from present Diversion No. 4 and proposed Diversion No. 4A. A sustainable population is indicated by the presence of fish from each of the age classifications. Pearl Dace live for three years so the presence of one-year-old, two-year-old, and three-year-old fish indicates the existence of a sustainable population. Sustainable populations of Pearl Dace were found in the upstream area in 1993, 1994, and 1995.

42. The Board finds that the diversion proposed by the U.S. Fish and Wildlife Service will protect the Pearl Dace consistent with the public policy enunciated in SDCL ch. 34A-8.

43. The U.S. Fish and Wildlife proposes to construct a four-foot barrier to prevent carp from migrating westward into the area inhabited by the Pearl Dace. The evidence indicates that carp can jump a considerable distance over barriers but that a four-foot barrier will be sufficient to prevent carp from entering the area.

44. The Board finds that, although the carp and the Pearl Dace do not, at all times of the year, seek to inhabit the same sorts of water, carp could begin to move into the area inhabited by the Pearl Dace as early as spring and could stay as late as August. There is, therefore, a substantial time in which the carp could affect the habitat of the Pearl Dace in an adverse fashion.

45. It is, moreover, likely that carp will enter the area sought to be protected if the barrier is not in place. Carp prefer shallow flooded vegetation for spawning. Carp expel eggs over shallow aquatic vegetation and males then swim over the top and lay milt upon the eggs. At that point, they are fertilized and hatch. Fry then move out into somewhat deeper water.

46. The Board therefore finds that, lacking a four-foot barrier, it is likely that carp would enter the area inhabited by the Pearl Dace. Carp can, according to expert Stancill, move across a fairly shallow amount of water, probably 3 to 4 inches.

47. Carp do not predate upon Pearl Dace. The danger to Pearl Dace lies in the fact that the carp are bottom feeders which feed by rooting in the bottom of a creek or stream for vegetation. This feeding behavior raises the sediment, changes the clarity of water by making it more turbid, and causes the water to become more warm.

48. The cause and effect relationship is that the silt raised by the feeding of the carp makes the water cloudy and more turbid and sunlight cannot penetrate. The aquatic vegetation

declines which in turn causes the oxygen levels of water to decline. Moreover, the turbidity of the water causes it to become warmer.

49. The resulting situation is very detrimental to the viability of Pearl Dace which thrive in clear water.

50. Expert testimony credited by the Board indicates that there is very little appropriate habitat for the Pearl Dace not only in South Dakota but in the surrounding states.

51. The Board further finds that allowing even two carp, a male and female, to enter the area inhabited by the Pearl Dace could eventually lead to degradation of the habitat of the Pearl Dace and affect their viability.

The Proposed Use Will Be in the Public Interest.

52. Landowners and the county oppose the application because, they contend, the grant would not be in the public interest. This attack appears to be mainly concentrated upon the past activities of the U.S. Fish and Wildlife Service. The U.S. Fish and Wildlife has not, as the Board's prior decision established, in the past been consistently conscientious with regard to limiting of flooding on landowners' lands.

53. The Board also finds, however, that the U.S. Fish and Wildlife Service's recent actions have gone a substantial way to alleviate the overland flooding problems of the landowners as set out in more detail above. The Board has also found above that the landowners' claim of underground "piping" of water is unfounded.

54. Landowners also complain that the U.S. Fish and Wildlife Service's actions in the past, and in the present, have caused weeds and particularly Canadian thistle to appear on their properties. Landowners argue that in their view the U.S. Fish and Wildlife Service has not adequately dealt with this problem, and that the permit should therefore not be granted in the public interest.

55. Landowners have failed to demonstrate, however, that the grant of this permit will in any way affect the Canadian thistle problem either on the U.S. Fish and Wildlife Service property or upon the landowners' or any county property. Thus, the claim should be rejected on this ground alone. More detailed analysis provides additional reasons to reject this public interest claim.

56. Canadian Thistle was apparently brought to this county in wheat shipments.

57. At some point which is unclear in history, Canadian Thistle invaded the LaCreek Wildlife Refuge.

58. The Board finds that the Service has undertaken very significant, if sometimes uneven, steps to deal with the Canadian Thistle problem.

59. First, the Board finds that the Service has embarked on an integrated weed management program, and that any other sort of program is likely to fail. An integrated program utilizes chemical, biological, mechanical and cultural controls, including grazing. The Service demonstrated that it utilizes each of these methods in controlling thistle

60. Second, the Board finds that the Service's use of biological controls constitutes an innovative, effective and practical component of its thistle control program.

61. Biological control has been instituted by the introduction of several types of weevil which affect the viability of the thistle. The weevil were originally imported from Europe where the weevil had also been utilized in the control of thistle.

62. The Service introduced the first weevils in 1989. The first weevil introduced was the stem mining weevil. This small weevil, measuring approximately a quarter of an inch long, attacks the stem and upper root crown of the plant. This weevil lays its eggs inside the stem of the plant. On the hatching of the eggs, the larva burrow into the stem and eat the thistle from the inside out. This typically eliminates the seed production from the thistle which is the critical first step in controlling the thistle.

63. This stem-mining weevil is probably the most effective of the weevils in controlling the thistle.

64. The weevils are a significant investment, and cost in excess of $1.00 each.

65. The Service released 500 of this weevil in 1989 and an additional 1,000 in 1995.

66. The Board credits the testimony of Clarke Dirks, who has significant experience in controlling noxious weeks for the U.S. Fish and Wildlife Service and who is now stationed at LaCreek Wildlife Refuge, that this weevil is now widespread throughout the Refuge.

67. Several other insects have been utilized by the Service on the Refuge. One thousand of the defoliating beetle were released in 1995; this beetle eats the leaves of the thistle, which stresses the plant. The gall fly attacks the stem midway up the plant; 300 of this species were released in 1993. The action stops most of the nutrients from proceeding to the seed head, which eliminates or limits the seed production. The gall fly is considered to be established on the Refuge. The Service has also released 300 of a variety of seed head weevil (larinus planus) in 1993 and 300 more in 1994. These eat the seed head from the inside out.

68. In addition to these introduced species, the Service has become aware of and utilizes in its planning another kind of seed head weevil (rhinocyllus conicus) which was not brought onto the Refuge by the Service, but found its way there naturally. The weevil eats the growing seeds. This weevil is so abundant that the Service has been able to export 5,000 of the species to other refuges in South Dakota to deal with thistle. In addition, the Service has worked with three Bennett County landowners to deal with their thistle problems by utilizing this weevil.

69. The effects of the Service's thistle control program are quite positive. The Board credits the testimony of Rolf Kraft and of Clarke Dirks in this respect. Kraft testified that he conducted a survey or inventory in 1982 which demonstrated that 1,200 acres were infested with thistle. Kraft's numbers reflected his analysis of the percent of a particular field as to

which the canopy cover was thistle. Kraft testified that after testing various chemical on test plots to determine their efficacy and utilizing that information in the Refuge with chemical application, the acreage infested was 300 to 400 acres by 1986. In 1988, however, the Service effectively banned the use of several chemicals and the chemical control problem suffered and the program lost ground.

70. Kraft testified, and the Board credits the testimony, that he was involved in the successful effort to gain permission to use chemicals which had been effective previously in the thistle control effort, including Tordon.

71. Kraft also presented persuasive photographic evidence that a field which was badly infested in 1983 was virtually free of thistle 12 years later. More impressively, Kraft presented such evidence which showed that a field infested in 1993 was virtually free of thistle by 1997 and that thistle in another area was dealt with effectively in a year or two.

72. The effectiveness of the program is bolstered by the testimony of Clarke Dirks that, of the area which was biologically treated, (i.e. the main body of the Refuge), 80-85% of the thistle were affected and 90% of those thistle did not produce seed in 1996.

73. In addition, the testimony strongly indicated that the area which was not biologically treated, i.e. the areas around the border of the refuge, were in fact generally chemically treated and that this treatment in recent years has been markedly more effective.

74. The Board thus finds that the Service has had in place a determined effort to deal with the thistle problems and that it has made very substantial progress in so doing.

75. The Board also rejects the claim that the permit at issue here should not be granted because it will be necessary to disturb dirt at the site of the new Diversion No. 4A and because when dirt is disturbed, thistle might grow. The Service has shown itself capable of and willing to deal with any minor infestations which might develop at the site of Diversion No. 4A.

76. Finally, as to this issue, the Board examines the fact that the U.S. Fish and Wildlife Service initially opposed, on sovereign immunity grounds, state and county authority to control thistle on the refuge. The Board finds that this opposition is of little or no relevance here, because the Service has reversed its position as to jurisdiction of the local and state units of government. In particular, the Service has recognized the State's authority to enter onto federal lands and destroy noxious plants growing thereon, if federal statutory provisions set out at 43 U.S.C. § 1241 are met. In addition, the Service has shown its willingness to cooperate by signing, with the Bennett County Weed Control Board, what may have been the first interagency memorandum of understanding on weed control in the nation, and the Service has promulgated a five-year weed plan which was signed onto by the Bennett County Weed Control Board.

Amount of Water.

77. The applicant has requested 1.0 acre-foot of water. That amount of water is readily available, as noted

above, but the applicant has asserted only that about .5 acre-foot of water will ever be impounded behind the carp barrier. The Board takes notice of its consistent practice in allowing applicants to be granted permits in excess of the actual proposed use because engineering difficulties may develop which result in larger amounts of water being used or impounded. The Board determines, based on its past practices, that grant of a permit of .75 acre-foot of water is sufficient to deal with any such difficulties.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and of this matter.

2. The Board concludes that the construction of a .75 acre-foot impoundment by the U.S. Fish and Wildlife Service does not constitute a major federal action significantly affecting the quality of the human environment. The Board therefore finds that the United States is not in violation of federal law for failing to prepare an environmental impact statement.

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

4. The proposed Diversion No. 4A can be developed without an unlawful impairment of existing rights of the landowner's to be free from underground or surface flooding.

5. The Board concludes, as set forth in more detail above, that Diversion No. 4A can and will be constructed to avoid flooding or damage to the adjoining landowners. In this regard,

the Board notes that it has supplied additional protections to the landowners in Qualifications 3 and 4 of the Final Decision. The Board also concludes that the past actions of the Service do not indicate that Diversion No. 4A will be constructed and operated as to harm the adjacent landowners.

6. The proposed use of the diversion as a carp barrier is a beneficial use because it will effectively protect a state "threatened" species.

7. The proposed use is in the public interest. The Board particularly concludes that protection of a threatened species defined under the laws of the State of South Dakota is within the public interest. The Board rejects the claim of the landowners that, merely because there are other means potentially available to protect the threatened species that this particular means of protecting the threatened species is not within the public interest. Moreover, in weighing the factors relevant to the public interest, the Board finds that the opponents of the new permit have not shown that this new permit will adversely affect them in any way in terms of flooding, thistle, or otherwise; the Board has weighed this fact against the fact that the carp barrier will significantly protect the Pearl Dace which has been defined as a threatened species under South Dakota law.

FINAL DECISION

The application for Water Permit No. 2300-2 is granted subject to the following conditions:

1. Use of water authorized by the permit may not impair the use of any lands adjoining the LaCreek National

Wildlife Refuge including, but not limited to, flooding or specific alterations of plant species directly attributable to water use under this permit. Flooding of adjoining land may occur if a written flood easement is obtained from the property owner or owners.

2. Permit No. 2300-2 authorizes storage of .75 acre-foot of water by constructing a new stoplog structure which replaces the existing structure (known as Diversion No. 4). The purpose of the structure is to prevent carp from traveling upstream. This will protect the state threatened Pearl Dace, whose habitat is upstream of the stoplog structure.

3. The storage level of Diversion No. 4A may not be in excess of 3034.1 msl and the structure must be designed to pass a 25-year precipitation event without raising the pool more than four feet.

4. The Service is required to remove the silt if the buildup exceeds 50% of the height of the carp guard.

5. The Service is required to remove Diversion No. 4 in its entirety within a reasonable time after construction of Diversion No. 4A.

Dated this 5th day of March, 1998.

BY THE BOARD:

Francis E. Burk

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STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

RECEIVED
DEC 21 2000
OFFICE OF THE REGIONAL SOLICITOR
DENVER, COLORADO

IN THE MATTER OF THE REQUESTS TO AMEND OR RESCIND WATER PERMIT NO. 2300-2; UNITED STATES FISH AND WILDLIFE SERVICE (LACREEK NATIONAL WILDLIFE REFUGE)	)))))	FINDINGS OF FACT, CONCLUSIONS OF LAW, and FINAL DECISION

12/14/2000

FINDINGS OF FACT

1. This decision addresses the requests of the U.S. Fish and Wildlife Service (Service) to amend Water Permit No. 2300-2. The Service requests the removal of Qualification No. 4 to that permit. Qualification No. 4 requires the Service to remove silt if the buildup of silt exceeds fifty percent of the height of the carp guard at Diversion No. 4A. The Service in addition requests that Qualification No. 3 be amended to allow it to establish a storage level of 3036.23 feet mean sea level (fmsl) at Diversion 4A. This decision also addresses the request of nearby landowners, and of Bennett County, to rescind, in its entirety, Water Permit No. 2300-2.

2. The background of this matter is set out in detail in the Board decision in the case entitled "In Re Application for Water Permit No. 2300-2; U.S. Fish and Wildlife Service (LaCreek National Wildlife Refuge)" (March 5, 1998) (hereinafter 1998 Decision). The 1998 Decision is herewith incorporated insofar as it is not inconsistent with the Findings, Conclusion and Final Decision issued today.

3. The background of Diversion No. 4A is relevant to understanding the present controversy. The Service originally attempted to establish a vested right to irrigate by way of

former Diversion No. 4. This Board granted the vested right but the circuit court reversed and no further appeal was brought. Thereafter, the Service instituted an application for a new permit for old Diversion No. 4. Subsequently, the Service deleted the irrigation portions of the application, moved the location downstream approximately four hundred feet and designated the new structure as Diversion No. 4A. The Service asserted, as a basis upon which its application for Diversion No. 4A should be granted, that the diversion would enhance the possibility of the survival of the pearl dace which had been classified as a threatened species by the South Dakota Commission of Game, Fish and Parks in 1978.

4. The Board, in its 1998 Decision, found that the Service had established that Diversion No. 4A would protect the pearl dace and their habitat if the diversion were constructed with a four foot barrier to prevent carp from migrating westward in Lake Creek to the area inhabited by pearl dace. To protect the surrounding landowners, the 1998 Decision qualified the permit granted to the Service such that it authorized the storage of .75 acre foot of water instead of an acre foot of water as requested by the Service. In addition, pursuant to Qualification No. 3, the storage level of Diversion No. 4A was required to be not "in excess of 3034.1 feet mean sea level" and the Service was required under Qualification No. 4, to remove the silt which was foreseen to accumulate behind the diversion structure if the buildup exceeded "fifty percent of the height of the carp guard." Amendment to Qualification No. 3.

5. As noted above, the Service now requests that Qualification No. 3 be amended such that the storage level of Diversion No. 4A is authorized to be not in excess of 3036.23 rather than the present requirement of 3034.1 feet mean sea level.

6. Pursuant to SDCL 46-2A-12, an amendment to an existing permit may be granted if the change does not unlawfully impair existing rights, is for a beneficial use and is in the public interest.

The Amendment of Qualification No. 3 does not unlawfully impair the existing rights of the surrounding landowners or Bennett County.

7. The Board first considers whether the Amendment of Qualification No. 3 would unlawfully impair any existing rights of the landowners or Bennett County, the opponents to the Amendment. The opponents first argue that their existing rights will be impaired because the Service obligated itself to construct Diversion No. 4A so as not to have a storage level in excess of 3034.1 fmsl. Despite this, the opponents submit, the Service constructed Diversion No. 4A with a storage level of 3036.23 fmsl.

8. The Service admits that it has constructed Diversion No. 4A at 3036.23 fmsl in violation of permit Qualification No. 3.

9. The Service testified, and presented documentary evidence to support its testimony, that the elevation of the carp guard was originally proposed, and ultimately set, at 3034.1 fmsl, instead of 3036.23 fmsl because of a drafting error on one

of the plans. The plan should have shown an invert elevation at the bottom of the creek of 3032.1 fmsl, but instead showed an elevation of 3030.1 fmsl. The engineer in charge of building the carp guard was not cognizant of the permit qualification that the storage level could not be in excess of 3034.1 fmsl. The engineer was aware of his obligation to build a carp guard four feet high to prevent the carp from jumping over the carp guard. Therefore, the carp guard was built from the actual bottom of the creek at 3032.1 with approximately four feet of boards to 3036.23 fmsl.

10. The Service acknowledges that it should have informed the Chief Engineer of the discrepancy at an earlier date than it did inform the Chief Engineer.

11. To establish that the proposed change unlawfully impairs an existing right of the landowners or the county, the landowners or the county must demonstrate, at a minimum, that some real interest of theirs will be adversely affected. The opponents contend that because there is a two foot difference between the height of the water at 3034.1 fmsl, as established by the 1998 decision, and 3036.23 fmsl, which the amendment proposes, there will be less bank available to handle the flow during high water periods. According to the testimony of Mr. Husmann, who was accepted as an expert by the Board, the structure now in place at 3036.23 feet mean sea level provides approximately 3.4 feet above the water surface to the top of the channel at its lowest point. This is, however, at only one point. That low point is found on the south side of the channel.

If the water reaches that level, it will go out and around the end of the dike and back into Lake Creek and stay on Service property. In the immediate area of impoundment the landowners' property is on the north side of the creek, and would not be affected by this high level of the water.

12. In addition, the uncontradicted evidence was that a twenty-five year flood would be handled by the existing structure proposed to be "legalized" by the present proposed amendment. The Board finds that, as configured and requested, the amendment in qualification No. 3 would protect the landowners from flooding.

13. The opponents moreover assert that their legal interests will be harmed because the increased amount of water behind the structure will cause ground water levels to rise. The evidence strongly refutes this contention. In particular the Board has reviewed the testimony developed from shallow ground water monitoring wells known as piezometers. Measurements have been recorded in the area since 1994 and a graph of the measurements was presented to the Board. The clear trend of the data is that the groundwater level rises and falls in response to immediate climatic and seasonal conditions. A study of the piezometer data indicates that groundwater levels adjacent to Diversion 4A were simply not affected by the creation of Diversion No. 4A. Because the data was not affected, it is clear that Diversion No. 4A did not affect ground water tables with regard to the landowners' property.

14. Landowners further contend that the height of Diversion No. 4A as constructed invades their legal rights because it has caused increased sedimentation and erosion downstream. The Board has examined the evidence proffered by the opponents. Clearly there is erosion and sedimentation in Lake Creek. However, the Board finds that better explanation for the erosion and sedimentation is simply the nature of Lake Creek. Lake Creek will continue to erode and will continue to carry sediment because of its natural properties. Moreover, the Board credits the testimony of the Service experts that once Diversion No. 4A is filled with sediment, the sediment will move in the stream just as it would if the diversion were not there at all.

15. The opponents also contend that the Service has negligently allowed the Canadian thistle population to thrive and, in that way, harm them. The Board has carefully examined that evidence, and the video submitted by the opponents in that regard.

16. The Board finds that the opponents have failed to demonstrate that the grant of this amendment will in any way affect the Canadian thistle problem either on U.S. Fish and Wildlife Service property or on the landowners or county property. The claims can be rejected on this ground alone.

17. The opponents appear to have raised the thistle claim at this juncture to attack the credibility of the Service or to demonstrate that it will not faithfully carry out the conditions of the permit. The Board finds, however, that the evidence is that the Service has continued to pursue the Canadian thistle

challenge and indeed, just last year, received increased funding for weed control. The Board is unable to find that the Service's approach to the Canadian thistle problem should somehow be factually associated with the grant of this particular amendment or that it undermines its confidence that the Service will carry out the conditions of the permit or any amendment.

18. The evidence indicates that the grant of the amendment with regard to the change in the height of the structure will not unlawfully impair existing rights.

The Amendment of the permit to increase the structure height is for a beneficial use.

19. The Board now turns to consideration of whether the amendment to the height of the structure is for a beneficial use. The Board has previously found that providing for a four-foot carp guard is a beneficial use and abides by that finding.

20. If the structure is built from the lowest point of the channel, it must reach 3036.23 fmsl. Therefore, a structure height of 3036.23 fmsl provides for a beneficial use.

The Amendment of Qualification No. 3 to increase the structure height is in the public interest.

21. The Board now considers the question of whether the grant of the Amendment is in the public interest. In this case, the determination involves a weighing of diverse factors. Weighing against the grant of the amendment is the fact that the Service constructed the structure in violation of the qualification to the permit and afterwards maintained it in violation of the qualification. Furthermore, the Service did not promptly report the mistake it had made; the Board is uncertain

as to whether this indicates that the Service is not properly monitoring its own activities or whether the Service deliberately did not inform the Chief Engineer--either alternative weighs against the Service and the grant of the amendment. The Board finds that the public interest would be, to some degree, served by denying the Amendment as a means of vindicating its authority to enforce compliance with the conditions of its permits.

22. There are, however, other factors which weigh in favor of the Amendment and outweigh the public interest consideration identified above. First, it is necessary to keep the permit in place to preserve the threatened species--the pearl dace and their habitat. Second, forcing the Service to dig two feet into the channel to establish a new channel bed so that the bottom of the carp guard could be set at 3030.1 fmsl appears to be a waste of the taxpayer's money. The Board has found that the increased height, although in violation of the permit, does not pose a significant threat of harm to the landowners or to the county. In this case, the real benefits of preserving the carp guard in place as it is today and not forcing the useless expenditure of taxpayer money outweigh any public interest benefit from forcing the removal of the carp barrier or alternative of compelling an expensive, and essentially unneeded, reconstruction of the carp barrier.

Amendment to Qualification No. 4 of the 1998 Decision.

23. The U.S. Fish and Wildlife Service has also requested that the Board amend Qualification No. 4. Qualification No. 4 provides that the Service is required to remove silt behind

Diversion No. 4A if the buildup exceeds fifty-percent of the height of the carp guard.

24. Between June 21, 1999, and September 1, 2000, Diversion No. 4A was cleaned out six times.

25. The evidence demonstrates that, to clean out Diversion No. 4A, it is necessary to bring an excavator to the diversion. The excavator's bucket takes about three-quarters of a yard of sediment from the impoundment and places it beside the impoundment.

26. The use of the excavator causes problems because, to perform the operation, it must maneuver on the side of the structure. Even though care is taken, the machine will tear up grass and sod and disturb the soil. In addition, sandpiles will be created which cover up the grass. Lastly, even though the impoundment might be full of sediment, due to climatic conditions, there are time when it is simply not feasible for the Service to get an excavator to the site.

27. The evidence, which is essentially uncontradicted, indicates that the diversion will fill up with sand every two to four weeks.

Modification of Qualification No. 4 will not unlawfully impair the existing rights of the surrounding landowners or the county.

28. The Board has examined the question of whether failure to remove the silt from Diversion No. 4A causes damage to the landowners by backing up water or silt on their property or somehow otherwise harming them. The Board credits the evidence of Ms. Johnston that the silt does not back up more than 800

feet. The Board is unable to ascertain any effect of the silt or water on the landowners.

29. The Board has also examined the question of whether dredging or the failure to dredge has any effect on the groundwater level. The Board again credits the piezometer tests done under the supervision of Ms. Johnston and finds that there is no effect on the water level from dredging. The reason is apparent--the structure is too small to affect in any significant way the ground water table at any significant distance from the structure.

30. The Board has also considered whether the modification of the Qualification will increase erosion to the detriment of the landowners and finds, to the contrary, that it will decrease erosion to their benefit. The Board credits the testimony of Ms. Johnston that, when sediment is removed from the water, and the water continues downstream, its erosive energy is increased. If the Qualification is not modified, each time the impoundment is not cleaned out, the water will, therefore, erode material that would not normally be eroded. On the other hand, if the Service is not required to clean out the impoundment on a frequent basis, the water will proceed downstream carrying the silt but it will be less erosive because it has less erosive energy. This will benefit the interest the landowners have in limiting erosion. The Board thus finds that modification of Qualification No. 4 to provide for dredging at a rate of only twice a year at no less than three month intervals will not

unlawfully impair the existing rights of the opponents and, in fact, will be to their benefit.

Modification of Qualification No. 4 is for a beneficial use.

31. The Board concludes that modification of Qualification No. 4 is for a beneficial use. The beneficial use which underlies the permit, of course, is the protection of the pearl dace and their habitat. The modification of Qualification No. 4, by decreasing the erosion which would be caused by more frequent dredging, and by decreasing the impact on the land surrounding the impoundment, is also for the beneficial use of enhancing Lake Creek.

Modification of Qualification No. 4 is in the public interest.

32. The Board finds that the modification of Qualification No. 4 to provide for two dredgings annually at Diversion No. 4 at intervals of not less than three months is in the public interest. In making this determination, the Board has considered the claims of the opponents that less frequent dredging would somehow harm them and has rejected those claims. Conversely, it has accepted the testimony that indicates that the ecology of the stream channel would be enhanced by less frequent dredging. The Board concludes that modification of Qualification No. 4 is in the public interest.

33. The opponents have requested that this Board rescind Permit No. 2300-2. The Board has, however, determined above that it is in the public interest to amend the Qualifications of Permit No. 2300-2 and that it is, moreover, imperative that Permit No. 2300-2 be maintained to preserve the population and

habitat of pearl dace in Lake Creek. The Board has also considered the clear violation of the permit by the Service but finds that the weight of that violation is insufficient to overcome the public interest and public benefit in maintaining the Permit in place. Therefore, the Board determines not to suspend or to "rescind" the Permit, assuming, for the sake of this paragraph, that it had the latter power.

CONCLUSIONS OF LAW

1. The Board had jurisdiction of these matters.

2. The Board concludes that adequate notice has been given to all affected parties of the matters considered herein, despite the fact that the proposal to amend the qualification regarding the height of the structure had not been advertised. The Board concludes that all parties interested in the matter have in fact received actual notice and have waived any requirement of further notice.

3. The Board concludes that the amendments to the qualification relating to the height of the structure and to the dredging qualification, as set forth below, will not unlawfully impair any existing rights of the opponents. The Board concludes, as set forth in detail above, that the opponents have failed to produce evidence of any actual harm which will occur as a result of the amendments; moreover, the proponents of the amendments have produced affirmative evidence that there will be no unlawful impairment with regard to flooding or sedimentation, or erosion.

4. The proposed amendments to Qualifications Nos. 3 and 4 are for a beneficial use. The underlying beneficial use is the protection of the pearl dace and their habitat.

5. The proposed amendments are in the public interest. The Board has carefully weighed above the factors which favor and which disfavor the public interest with regard to each of the amendments. The Board again concludes that taken individually, and as a whole, the amendments are in the public interest and their benefits far outweigh any potential detriments.

6. The Board concludes that the permit should not be rescinded. The Board notes, furthermore, that a question exists as to whether it could rescind the permit pursuant to SDCL 46-1-12 which provides only for a suspension after a first violation. Even granting the Board the authority to rescind or cancel the permit, the Board concludes that it would be inappropriate to do so. The permit serves an important public interest in that it protects the pearl dace and their habitat. The failure of the Service to promptly report its violation of the permit is not to its credit but does not demand, in this case, that the permit be rescinded. The public interest in the continuance of the permit is, in this case, stronger than its interest in recission. For the same reason, the Board determines not to suspend the permit under SDCL 46-1-12.

FINAL DECISION

1. The requests for amendment of the Qualifications to Water Permit No. 2300-2 are granted subject to the following conditions:

a. Qualification No. 3 is amended to read:

The storage level of Diversion No. 4A may not be in excess of 3036.23 feet mean sea level and the structure must be designed to pass a 25-year event.

b. Qualification No. 4 is modified to read:

The Service is required to remove the silt in the area behind the carp guard which is defined by the present day rip rap area, twice in each calendar year, at intervals not less than three months.

2. The request to rescind or suspend Water Permit No. 2300-2 is denied.

Dated this 14 day of December, 2000.

BY THE BOARD

Francis E Bruch

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July 20, 2001

Eric - for the file. DBest

Hon. Steven L. Zinter
Circuit Court Judge
PO Box 1238
Pierre, SD 57501-1238

Re: In re: United States Fish and Wildlife et al. v. Brett Heath and Raymond Kocer, et al.
Civ. No. 2001-29

Dear Judge Zinter:

Enclosed please find the original Brief of Appellees, Bennett County, South Dakota, and Brett Heath and Raymond Kocer in the above-entitled matter.

By copy of this letter, service is intended upon counsel of record.

Sincerely yours,

Pam Ireland

Pamela K. Ireland
Bennett County States Attorney

PKI:sf

cc/enc: Diane Best, Cheryl Schrempp DuPris, Ted L. McBride, John R. Kunz
Mary Erickson, Clerk

STATE OF SOUTH DAKOTA)ss COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
IN RE: UNITED STATE FISH & WILDLIFE SERVICES'S AMENDMENT OF WATER PERMIT NO. 2300-2 BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD, UNITED STATES FISH & WILDLIFE SERVICE, Applicant/Appellant, v. BRETT HEATH & RAYMOND KOCER, Objectors/Appellees, and BENNETT COUNTY, SOUTH DAKOTA, Objector,/Appellee, and WATER MANAGEMENT BOARD, SOUTH DAKOTA, Appellee, and DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, WATER RIGHTS PROGRAM, SOUTH DAKOTA, Appellee.	)	CIV NO 2001-29 BRIEF OF APPELLEES BENNETT COUNTY, SOUTH DAKOTA BRETT HEATH & RAYMOND KOCER

PRELIMINARY STATEMENT

This Brief is filed on behalf of the Appellees, Bennett County, South Dakota, and Brett Heath and Raymond Kocer, parties before the Board.

The United States Fish and Wildlife Service (FWS) is the Appellant herein. Bennett

County intervened and participated through its states attorney. Brett Heath and Raymond Kocer are adjoining landowners who intervened and participated pro se.

JURISDICTIONAL STATEMENT

Bennett County, South Dakota, and the landowners, Brett Heath and Raymond Kocer, agree that jurisdiction is properly before this Court. The Board's final decision was issued on December 19, 2000. Pursuant to SDCL 1-26-31, the appeal was filed January 18, 2001.

ISSUE

WHETHER FWS SHOULD BE REQUIRED TO CLEAN OUT THE SILT BEHIND THE DAM TWICE YEARLY

The Board denied the FWS request to remove this requirement from the permit.

STATEMENT OF THE CASE

Bennett County, South Dakota, and the landowners, Brett Heath and Raymond Kocer, do not take exception to the statement of the case as presented by FWS and the supplemental information provided by DENR regarding the long history of this matter.

Further Bennett County, South Dakota, and the landowners, Brett Heath and Raymond Kocer, join in the motion by DENR to supplement the record.

The sole issue on appeal is whether FWS should be required to clean out the silt behind the dam, twice yearly, as determined by the Board.

STANDARD OF REVIEW

Bennett County, South Dakota, and the landowners, Brett Heath and Raymond Kocer, agree with FWS and DENR that this matter is a question of fact and that the standard of review as set forth by the DENR and its supporting case law is the proper standard.

ARGUMENT

Bennett County, South Dakota, and the landowners, Brett Heath and Raymond Kocer, adopt the argument made by DENR, along with its authorities. Reintegration would be time consuming and redundant.

Bennett County, South Dakota, and the landowners, Brett Heath and Raymond Kocer, believe that the Board's decision should be affirmed.

CONCLUSION

Bennett County, South Dakota, and the landowners, Brett Heath and Raymond Kocer, urges the Court to affirm the Board's decision in this matter.

Dated this 20th of July, 2001.

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Appellee, Landowner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Brief of Appellee, Bennett County, South Dakota, and Appellees, Brett Heath, Landowner and Raymond Kocer, Landowner, were served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Kadoka, South Dakota, on this 20th day of July, 2001.

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) ss.	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

* *

IN RE: UNITED STATES FISH & WILDLIFE SERVICE'S AMENDMENT OF WATER PERMIT 2300-2 BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD	)	CIV. NO. 2001-29
UNITED STATES FISH & WILDLIFE SERVICE, Applicant/Appellant vs. BRETT HEATH & RAYMOND KOCER Objectors/Appellees, and BENNETT COUNTY, SOUTH DAKOTA Objector/Appellee, and WATER MANAGEMENT BOARD, SOUTH DAKOTA Appellee, and DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, WATER RIGHTS PROGRAM, SOUTH DAKOTA Appellee.	)	REPLY BRIEF OF APPELLANT, UNITED STATES FISH & WILDLIFE SERVICE

* *

Pursuant to S.D. CODIFIED LAWS §§1-26-33.2 and various Orders of the Court, Appellant, the U.S. Fish and Wildlife Service ("FWS"), hereby submits to the Court the following Reply Brief.

In the Appellate Brief which FWS filed with the Court on or about May 14, 2001, FWS argued that the portion of the South Dakota Water Management Board's ("Board") December 19, 2000, Final Decision wherein the Board ordered FWS to bi-annually dredge behind Diversion No. 4A was clearly erroneous in light of the entire evidence in the record.

On or about July 5, 2001, Appellee, the South Dakota Department of Environment and Natural Resources, Water Rights Program ("DENR") filed with the Court its brief contending that the Final Decision should be affirmed. 1/

For the following reasons, FWS asserts that the arguments made in DENR's brief are erroneous, misplaced, and otherwise completely irrelevant to the issue under consideration in this appeal.

First, after briefly referring to "long-time siltation problems" on FWS's LaCreek National Wildlife Refuge ("the Refuge"), DENR notes that, in the 1998 water permit which the Board granted to FWS, the Board imposed a condition requiring FWS to remove the silt behind Diversion No. 4A whenever the silt buildup exceeded 50% of the height of the structure (hereafter referred

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1/ On or about July 20, 2001, Appellees, Bennett County, Brett Heath, and Lawrence Kocer filed a brief adopting the arguments made in DENR's brief.

to as "the 50% Condition"). See DENR's brief at 9. 2/

DENR makes much of the fact that FWS did not appeal the imposition of the 50% Condition, but instead (only six months after Diversion No. 4A was constructed) requested a hearing before the Board asking that the condition be removed from the permit. See id. DENR suggests that, for the following reasons, it was somehow disingenuous for FWS to not appeal the imposition of the 50% Condition: (1) the Refuge Manager was well-acquainted with the sandy soils in the area long before the permit was ever issued (see id.); and (2) because it had dredged in other areas of the Refuge, FWS knew the effects of dredging (see DENR's brief at 10).

For the following reasons, FWS completely disagrees. Although this fact is not directly supported by any citation to the record, after careful consideration, FWS deliberately chose to not appeal the 50% Condition because it wanted to "put the matter to rest," and get on with the business at hand. Moreover, although Refuge management might have been aware of the sandy soils in the area, it was not until several months after Diversion No. 4A was constructed that FWS fully realized that the

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2/ Recall that, after the September 28-29, 2000, hearing, the Board changed this condition to mandate that, at least twice in each calendar year, FWS dredge the silt behind Diversion No. 4A. See the "Final Decision" portion of the Board's December 14, 2000, Findings of Fact, Conclusions of Law, and Final Decision, a copy of which is attached to FWS' Appellate Brief.

impoundment behind the structure would completely "sand in" approximately every 2-4 weeks. Only then did FWS have a complete understanding of the problematic nature of the 50% Condition.

Additionally, although it is true that FWS had dredged "in other areas at the Refuge," at any given location, such dredging had never occurred more frequently than once a year. Therefore, when FWS decided to not appeal the imposition of the 50% Condition, at that time, the Refuge Manager did not "know" the effects of dredging, or that it would be necessary to dredge behind Diversion No. 4A every 2-4 weeks.

The above discussion notwithstanding, even assuming, *arguendo,* that FWS had done something untoward by not appealing the 50% Condition, this has absolutely nothing to do with the question of whether, in light of the entire evidence in the record, the Board's Final Decision was clearly erroneous. FWS strongly believes that the underlying record convincingly shows that, in rendering a final decision which directly contradicted its own findings, the Board clearly erred. For these reasons, DENR's argument is irrelevant and without merit, and it must fail.

Second, DENR claims that the bi-annual dredging requirement at issue in this case is in fact not costly or burdensome because the requirement does not: (1) "dictate the manner and method of moving the spoils;" and (2) require that the spoil be removed

from the banks of Lake Creek. See DENR's brief at 10. Therefore, DENR argues that the requirement should continue to remain in the permit.

DENR once again misses the point. As explained in more detail above, the issue under appeal in this case has nothing to do with whether dredging is or is not costly or burdensome. Indeed, when it issued its Findings of Fact, Conclusions of Law, and Final Decision, the Board did not even make a finding concerning cost or any potential burden that dredging might impose on FWS. On the other hand, as explained in more detail in FWS' Appellate Brief, the Board *did* make 3 specific findings which are directly opposite to the Board's imposition of the bi-annual dredging requirement. The Board's Final Decision was, therefore, clearly erroneous, and it should be reversed and remanded.

Third, DENR claims that there is a "positive reason" for keeping the bi-annual dredging requirement in the permit. See DENR's brief at 12. More particularly, DENR asserts that, if Diversion No. 4A is to remain in place, "the dam really should be maintained." Id.

When considered in the proper context, the above claim is wholly specious. Diversion No. 4A only impounds some .75 acre-feet of water, and is only 4 feet high. Additionally, it is located entirely on Refuge property. Moreover, other than S. D. CODIFIED LAWS § 46-7-3 which requires that all "owner[s] of any

works for the storage, diversion or carriage of water or for the application of water to beneficial use, including wells, shall keep the works in good repair at all times," there is absolutely no statutory or regulatory requirement that a dam of this size be "maintained" at all. 3/ Indeed, on September 18, 2000, while responding to an informal discovery request propounded by FWS, DENR informed FWS of the following: (1) with respect to Lake Creek, not counting FWS' water permit, there are 3 other water permits on the creek; and (2) none of these water permits has a condition mandating that (at any time) the owners of the structures dredge the areas upstream from the structures.

For the above reasons, this argument too is without merit and it must fail.

Fourth, after stating that, "FWS failed to comply with the [50% Condition] from the very beginning," DENR states that "it appears that FWS never has intended to comply with the [50% Condition.]" DENR's brief at 12-13.

The above assertion very expressly accuses FWS of acting in bad faith, and deliberately disregarding the requirements of the

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3/ Obviously, common sense dictates that FWS should perform *some* routine maintenance on Diversion No. 4A (as well as other structures on the Refuge). In keeping with the requirements of S. D. CODIFIED LAWS § 46-7-3, FWS adduced uncontradicted testimony at the September 28-29, 2000, hearing stating that, at least *35 times a year*, FWS personnel do regularly inspect and as necessary maintain Diversion No. 4A and other structures on the Refuge. See Transcript at 163-64.

50% Condition. Once again, even assuming, *arguendo*, that there is some truth to the above allegation (which FWS vigorously denies), this has absolutely no bearing on the question of whether, in light of the entire evidence in the record, the Board's Final Decision was clearly erroneous. Therefore, DENR's argument is once again misplaced and irrelevant, and it should be disregarded.

The above discussion notwithstanding, FWS feels that it must still briefly address the above allegation. Although it is true that there were times when the buildup of silt behind Diversion No. 4A exceeded 50% of the height of the structure, in virtually every single instance, mitigating or extenuating circumstances existed which prevented FWS from timely completing the dredging. For example, the Refuge Manager testified that Diversion No. 4A was completed on February 16, 1999. Transcript at 13. The Refuge Manager further testified that he first noticed the impoundment behind the structure was full of sand on April 13, 1999. See id. However, because the site "was so wet that we couldn't get heavy equipment out there," FWS was unable to do any dredging at that time. See Transcript at 15. 4/ It was not until June 21, 1999, that the Refuge Manager felt the ground was

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4/ FWS' concern was that, because of the wet conditions, the heavy equipment (excavator) needed to do the dredging would either get bogged down or "tear up a lot of ground and wreck that dike . . . ." Transcript at 16.

dry enough to get an excavator to the site to dredge the silt. See transcript at 16. 5/

The above facts were not lost on the Board. As the Board stated, "the evidence demonstrates that, to clean out Diversion No. 4A it is necessary to bring an excavator to the diversion." December 14, 2000, Findings of Fact, Conclusions of Law, and Final Decision, Finding No. 25. The Board further found that, "even though the impoundment might be full of sediment, due to climatic conditions, there are times when it is simply not feasible for [FWS] to get an excavator to the site." Id., Finding No. 26.

With respect to the above allegation, it is also significant to note that, although the Board had statutory authority enabling it to rescind FWS' permit for failing to comply with the 50% Condition, the Board did not exercise such authority and rescind the permit. See transcript at 292-93. For all of the above reasons, DENR's argument must be disregarded.

Fifth, although DENR acknowledges that dredging behind Diversion No. 4A is not required for any hydrologic reason, it nonetheless contends that "previous refuge flooding" is indica-

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5/ DENR suggests that, rather than an excavator, the Refuge should have used some other kind of equipment that would have done less damage to the ground. See DENR's brief at 11. Yet, the Refuge Manager's uncontradicted testimony at the hearing was that the *only* equipment he could use to accomplish the dredging was an excavator. See transcript at 15.

tive of a "management problem." DENR's brief at 13. DENR insinuates that the purported existence of this so-called management problem means that, without the imposition of the bi-annual dredging requirement, FWS cannot be "trusted" to properly maintain Diversion No. 4A.

In this regard, it is true that the Board has in the past found that FWS has not been "consistently conscientious with regard to its use of water within the refuge." See 1993 Findings of Fact LVII and LXXII and DENR's brief at 13. However, it is also true that, since 1993, FWS has been operating under the following "strict qualification" (referred to on page 13 of DENR's brief):

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

1993 Findings of Fact L, LXIV, & LXXVIII.

The Board has made it *very* clear that, if FWS ever violates the above qualification, the Board *will* rescind FWS' water permit. See, for example, Board Member Freeman's statement that, if FWS ever changes the water table, FWS will be "in big trouble." Transcript at 299. When asked what he meant by this statement, Mr. Freeman replied that the Board would "rescind the permit." Id.

The simple fact is that, although Bennett County, Mr. Heath, and Mr. Kocer have many times tried to show that FWS has violated the above condition, they have never been able to successfully do so. Moreover, DENR's investigations have not shown that FWS has ever violated the condition. Accordingly, it is now disingenuous for DENR to allege that some sort of a flooding or "management problem" exists on the Refuge which warrants that the bi-annual dredging requirement remain in place.

And, Sixth, DENR refers to several other "issues" which purportedly show that the Refuge's "diligence in adequately maintaining" Diversion No. 4A is suspect. See DENR's brief at 15-16. For this reason, DENR once again insinuates that, without the imposition of the bi-annual dredging requirement, FWS will not properly maintain Diversion No. 4A. More specifically, DENR discusses: (1) the so-called "two-foot planning error" pertaining to the construction of Diversion No. 4A (see DENR's brief at 14-16); and (2) the fact that, in the subject case, the Refuge Manager allegedly "took a different position regarding the Lake Creek diversions" than he took in previous hearings. See DENR's brief at 16.

With respect to the first issue, FWS admits that it made an error. Mistakes happen, and FWS is not proud of the fact that this one occurred. However, merely because FWS committed this error, this does not mean that FWS will not properly maintain

Diversion No. 4A as necessary. Indeed, as discussed in more detail above, FWS does quite often inspect and maintain Diversion No. 4A. Moreover, to make an oft-repeated point, the above discussion is really irrelevant to the issue under consideration in this case. Irrespective of whether FWS did or did not commit this error, the record clearly and unequivocally demonstrates that the Board imposed the bi-annual dredging requirement in direct contradiction to the evidence in the record and its own findings. Therefore, the Board's Final Decision must be reversed and remanded.

With respect to the second issue, FWS vehemently denies DENR's assertion that the Refuge Manager "changed his position." Although this matter is really not worthy of further discussion, suffice it say that the record speaks for itself; when considered as a whole and in context, the record clearly shows that the Refuge Manager did not "change his position." In the end, DENR's assertion must be recognized for what it really is: an unfounded and unnecessary personal attack against the Refuge Manager and his integrity which, for the reasons explained in more detail above, has absolutely nothing to do with the issue now being appealed. This assertion should, therefore, be completely disregarded.

In conclusion, DENR's brief is nothing more than a host of superficial allegations designed to cast dispersion on FWS.

However, none of these allegations has any real merit, and all of them have absolutely no bearing or relevance to the issue currently under appeal. For the reasons more fully set forth in its Appellate Brief, FWS firmly believes that the underlying record clearly and convincingly shows that the Board's imposition of the bi-annual dredging requirement was directly opposite to its own findings. In light of the entire evidence in the record, the Board's Final Decision is, therefore, clearly erroneous, and it must be reversed and remanded.

DATED this 14th day of August, 2001.

UNITED STATES ATTORNEY
DISTRICT OF SOUTH DAKOTA
MICHELLE G. TAPKEN

BY: Cheryl Schrempp DuPris

Cheryl Schrempp DuPris, Esq.
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John R. Kunz, Esq.
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Rocky Mountain Region
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Lakewood, CO 80215
(303) 231-5353, Ext. 339

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August 2001, true and correct copies of the foregoing REPLY BRIEF OF APPELLANT, UNITED STATES FISH & WILDLIFE SERVICE were mailed via U.S. First Class Mail, postage prepaid to:

Brett Heath, *Pro Se*
HWC 3, Box 20
Martin, SD 57551

Raymond Kocer, *Pro Se*
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Martin, SD 57551-0388

Pamela Ireland, Esq.
States Attorney, Bennett County, SD
Counsel for Bennett County
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John P. Guhin, Esq.
Deputy Attorney General
Counsel for the Water Management Board
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Diane Best, Esq.
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Counsel for DENR, Water Rights Program
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Cheryl Schrempp DuPris

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MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

RECEIVED
APR 29 2002
WATER RIGHTS
PROGRAM

April 26, 2002

The Honorable Lori S. Wilbur
Circuit Court Judge
P.O. Box 758
Fort Pierre, SD 57532-0758

Re: United States Fish & Wildlife Service's Amendment of Water Permit No. 2300-2 Before the South Dakota Water Management Board (Civ. No. 2001-29)

Dear Judge Wilbur:

In response to your Memorandum Decision dated April 15, 2002, I am enclosing (a) a proposed Order Supplementing Record and (b) Judgment of Affirmance. If you find these documents to be acceptable, please return the signed documents to me for service on the parties. Service of these documents is being made upon the parties of record.

Sincerely,

Diane Best
Assistant Attorney General

DB/jmm

Enclosures

cc w/enc: Cheryl Schrempp DuPris
John R. Kunz, Esq.
Brett Heath
Pamela Ireland, Esq.
Raymond Kocer
John P. Guhin
Eric Gronlund ✓

STATE OF SOUTH DAKOTA : SS. COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
IN RE: UNITED STATES FISH & WILDLIFE SERVICE'S AMENDMENT OF WATER PERMIT NO. 2300-2 BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD, UNITED STATES FISH & WILDLIFE SERVICE, Applicant/Appellant, v. BRETT HEATH & RAYMOND KOCER, Objectors/Appellees, and BENNETT COUNTY, SOUTH DAKOTA, Appellee, and DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, WATER RIGHTS PROGRAM, SOUTH DAKOTA, Appellee.	)	Civ. No. 2001-29 JUDGMENT OF AFFIRMANCE

On December 14, 2000, the South Dakota Water Management Board entered its Findings of Fact, Conclusions of Law and Final Decision In Re: United States Fish & Wildlife Service's Amendment of Water Permit No. 2300-2. On December 19, 2000, the Water Management Board issued its Notice of Decision. On January 18, 2001, the United States Fish & Wildlife Service filed its Notice of Appeal challenging the Water Management Board's Findings of Fact, Conclusions of Law and Final Decision. Briefs were filed pursuant to SDCL 1-26-33.3 and SDCL 1-26-33.4. None of the parties requested oral argument. This Court considered the arguments in light of the administrative record and issued a Memorandum Decision on April 15, 2002, which Memorandum Decision

is hereby incorporated by reference. Based on the rationale set forth in the Memorandum Decision, it is hereby ordered and ADJUDGED that the Findings of Fact, Conclusions of Law and Final Decision of the South Dakota Water Management Board are hereby AFFIRMED pursuant to SDCL 1-26-36.

Dated this _____ day of April, 2002.

BY THE COURT:

_____
Lori S. Wilbur
Circuit Court Judge

ATTEST:

_____
Clerk of Court

By: _____
Deputy

(SEAL)

pld.db (Judgment of Affirmance U.S. Fish & Wildlife Service)(jmm)

CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT
PO Box 758
Fort Pierre, South Dakota 57532-0758
(605) 223-7777
Fax: (605) 223-7738

01-29 RB

Chambers of:
Lori S. Wilbur
Circuit Judge

Lori J. Grode
Court Reporter
(605) 223-7737

April 15, 2002

Ms. Cheryl Schrempp DuPris
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Mr. Raymond Kocer
P.O. Box 388
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Mr. Brett Heath
HWC 3, Box 20
Martin, SD 57551

RE: United States Fish & Wildlife Service's amendment of Water Permit 2300-2 before the South Dakota Water Management Board

South Dakota Water Management Board (Board) denied United States Fish & Wildlife Services's (FWS) request to amend Water Permit No. 2300-2 by removing a dredging requirement and imposed a requirement that FWS dredge the area in question twice annually. The South Dakota Department of Environment and Natural Resources, (DENR), Water Rights Program and its Chief Engineer appeared as a party before the Board and recommended the dredging requirement be reduced to one time per year. The Board's decision is affirmed.

The facts are set out in both FWS's &DENR's briefs. The essential facts are that FWS obtained Water Permit No. 2300-2 in March 1998. The permit authorized FWS to impound up to .75 acre-feet of water behind Diversion No. 4A at the LaCreek Refuge in Bennett County, South Dakota, for the purpose of protecting a South Dakota threatened fish species, the Pearl Dace minnow. A condition of the permit issued in 1998 was that FWS was required to remove the silt behind Diversion No. 4A if the buildup exceeded 50% of the height of the carp guard structure. After the permit was granted and the diversion was constructed, FWS discovered compliance with the dredging requirement imposed by the permit would have required dredging every two to four weeks. Six months after the permit was issued FWS asked to have the dredging requirement removed from the permit.

Bennett County and the landowners sought to have the permit revoked because FWS did not comply with the dredging requirement. DENR asked the Board to reduce the dredging requirement to one time annually. The Board denied FWS's request to remove the dredging requirement and amended the dredging requirement to twice yearly.

FWS appeals contending the Board's decision was clearly erroneous in light of the entire evidence in the record.

STANDARD OF REVIEW

Pursuant to 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 reviewing court is bound to give great weight to the agency or hearing examiner on factual questions. Goebel v. Warner Transp., 2000 SD 79, 612 NW2d 18.

This Court's standard of review is limited when the dispute involves a contention that findings of fact are clearly erroneous. Under SDCL 1-26-36, the question is not whether there is

evidence in the record which could support the appealing party's proposed facts. The proper scope of review is to determine whether there is any substantial evidence to support the findings that are made by the Board. *In Re* SDDS, Inc., 472 NW2d 502, 507 (SD 1991). *See also* Abild v. Gateway 2000, Inc., 1996 SD 50, 547 NW2d 556. Moreover, courts may not second guess the Board on the credibility of witnesses or on disputed facts. Courts must give deference to the fact finder and great weight to its choices between conflicting inferences and findings. *Id.* SDCL 1-26-36.

The Board's findings are not to be overturned unless this court is "left with a definite and firm conviction that a mistake has been made." Petersen v. Hinky Dinky, 515 NW2d 226, 231 (SD 1994).

DECISION

The Board has a long history of hearings related to LaCreek Refuge dating back to the 80's. The Board considered FWS's request for water permit applications in 1993. In 1994, FWS applied for a new permit application which resulted in the 1998 decision imposing the dredging requirement at issue presently. The Board is well versed in the hydrology, siltation, flooding and FWS management issues which exist in the LaCreek Refuge.

In 1998 the Board made a finding that a qualification of the permit with regard to silt buildup *will further protect the landowners*. The Board, in its 1998 decision, made findings regarding both the high water table in the entire refuge area and the precautions necessary to protect the landowners from flooding. The Board's decision in December 2000 imposing the twice annual dredging requirement incorporates its 1998 decision insofar as it is not inconsistent with the current decision.

Based on the 1998 findings as well as the findings made by the Board in December 2000, it appears no mistake has been made requiring findings to be overturned.

The Board originally decided precautions were necessary in granting the permit for Diversion 4A to protect surrounding landowners from flooding. Their decision was based on the topography of the area and the history of FWS's management. When read together the findings in the previous decisions by the Board regarding the issuance of this permit indicate the Board's intent to maintain some protection for the landowners from potential flooding whether the flooding is caused by nature or FWS. The Board's decision requiring dredging twice a year is not clearly erroneous. Therefore, the Board's decision is affirmed.

DENR's motion to supplement the record is granted as no opposition to the request was raised by any party.

Counsel for DENR should prepare an appropriate order.

Sincerely,

Lori S. Wilbur

LSW:lg

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.
FILED
APR 15 2002
Christal L. Espeland CLERK
By_____Deputy

STATE OF SOUTH DAKOTA : SS. COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
IN RE: UNITED STATES FISH & WILDLIFE SERVICE'S AMENDMENT OF WATER PERMIT NO. 2300-2 BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD, UNITED STATES FISH & WILDLIFE SERVICE, Applicant/Appellant, v. BRETT HEATH & RAYMOND KOCER, Objectors/Appellees, and BENNETT COUNTY, SOUTH DAKOTA, Appellee, and DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, WATER RIGHTS PROGRAM, SOUTH DAKOTA, Appellee.	)	Civ. No. 2001-29 ORDER SUPPLEMENTING RECORD

The South Dakota Department of Environment and Natural Resources, Water Rights Program, has moved to supplement the administrative record by including two additional documents which were referred to and relied upon by the South Dakota Water Management Board in its administrative proceeding. The two documents are:

(a) January 7, 1993, Findings of Fact and Conclusions of Law issued by the South Dakota Water Management Board In the Matter of the Application of the United States Fish & Wildlife Service for Vested Water Right No. 1927-2; Water Permit Application of No. 1921-2 to Change the Location of Land and Diversion Point Authorized Under Water Permit No. 265-2; and Water Permit Application No. 2191-2, and

(b) January 5, 1994, Memorandum Decision In Re: Water Right Claim No. 1927-2; Water Permit Application No. 1921-2; and Water Permit Application No. 2192-2 (Hughes County Civ. No. 93-4).

None of the parties in this proceeding have objected to including these matters within the record. Further, the Court notes that these documents were handed out to the Board at hearing and were considered by the Board in its decision-making process. For these reasons, this Court hereby ORDERS that the foregoing documents be included within the administrative record in this proceeding.

Dated this _____ day of _____, 2002.

BY THE COURT:

_____
Lori S. Wilbur
Circuit Court Judge

ATTEST:

_____
Clerk of Court

By: _____
Deputy

(SEAL)

pld.db (Order Supplementing Record U.S. Fish & Wildlife Service)(jmm)

STATE OF SOUTH DAKOTA : SS. COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
IN RE: UNITED STATES FISH & WILDLIFE SERVICE'S AMENDMENT OF WATER PERMIT NO. 2300-2 BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD, UNITED STATES FISH & WILDLIFE SERVICE, Applicant/Appellant, v. BRETT HEATH & RAYMOND KOCER, Objectors/Appellees, and BENNETT COUNTY, SOUTH DAKOTA, Appellee, and DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, WATER RIGHTS PROGRAM, SOUTH DAKOTA, Appellee.	)	Civ. No. 2001-29 CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the proposed Judgment of Affirmance and proposed Order Supplementing Record in the matter of In Re: United States Fish & Wildlife Service's Amendment of Water Permit No. 2300-2 Before the South Dakota Water Management Board, United States Fish & Wildlife Service v. Brett Heath, Raymond Kocer, Bennett County and Department of Environment and Natural Resources, Water Rights Program were served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Pierre, South Dakota, on this 26th day of April, 2002:

Cheryl Schrempp DuPris
225 South Pierre Street, Suite 337
Pierre, South Dakota 57501

John R. Kunz, Esq.
755 Parfet Street, Suite 151
Lakewood, Colorado 80215

Brett Heath
HWC 3, Box 20
Martin, South Dakota 57551

Pamela Ireland, Esq.
Post Office Box 628
Martin, South Dakota 57551

Raymond Kocer
Post Office Box 388
Martin, South Dakota 57551

and by interoffice mail to:

Eric Gronlund
Department of Environment and Natural Resources
Foss Building
523 East Capitol Avenue
Pierre, South Dakota 57501

and by hand delivery to:

John P. Guhin
Deputy Attorney General &
Counsel for the Board of Water Management
500 East Capitol Avenue
Pierre, South Dakota 57501

Diane Best

Diane Best
Assistant Attorney General
Counsel for DENR Water Rights Program
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215

pld.db (Cert of Service U.S. Fish & Wildlife)(jmm)

STATE OF SOUTH DAKOTA

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MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

May 7, 2002

RECEIVED
MAY 0 8 2002
WATER RIGHTS PROGRAM

Christal L. Espeland
Hughes County Clerk of Court
P.O. Box 1238
Pierre, SD 57501-1238

Re: United States Fish & Wildlife Service's Amendment of Water Permit No. 2300-2 Before the South Dakota Water Management Board (Civ. No. 2001-29)

Dear Clerk Espeland:

Enclosed for filing is the original Notice of Entry of Order Supplementing Record and the original Notice of Entry of Judgment of Affirmance in the above-entitled case. I have also enclosed the Certificate of Service for both documents.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB/jmm

Enclosures

cc w/enc: Cheryl Schrempp DuPris
John R. Kunz, Esq.
Brett Heath
Pamela Ireland, Esq.
Raymond Kocer
John P. Guhin
Eric Gronlund, DENR

STATE OF SOUTH DAKOTA) : SS.		IN CIRCUIT COURT
COUNTY OF HUGHES)		SIXTH JUDICIAL CIRCUIT
IN RE: UNITED STATES FISH & WILDLIFE SERVICE'S AMENDMENT OF WATER PERMIT NO. 2300-2 BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD,		Civ. No. 2001-29
UNITED STATES FISH & WILDLIFE SERVICE, Applicant/Appellant,		
v.		NOTICE OF ENTRY OF ORDER SUPPLEMENTING RECORD
BRETT HEATH & RAYMOND KOCER, Objectors/Appellees, and		
BENNETT COUNTY, SOUTH DAKOTA, Appellee, and		
DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, WATER RIGHTS PROGRAM, SOUTH DAKOTA, Appellee.		

GREETINGS FROM THE SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, WATER RIGHTS PROGRAM, TO: CHERYL SHREMPP DUPRIS, ATTORNEY FOR APPELLANT, 225 SOUTH PIERRE STREET, SUITE 337, PIERRE, SOUTH DAKOTA 57501; JOHN R. KUNZ, ATTORNEY FOR APPELLANT, 755 PARFET STREET, SUITE 151, LAKEWOOD, COLORADO 80215; JOHN P. GUHIN, DEPUTY ATTORNEY GENERAL AND COUNSEL FOR THE BOARD OF WATER MANAGEMENT, 500 EAST CAPITOL AVENUE, PIERRE, SOUTH DAKOTA 57501; BRETT HEATH, PRO SE, HWC 3, BOX 20, MARTIN, SOUTH DAKOTA 57551; RAYMOND KOCER, PRO SE, POST OFFICE BOX 388, MARTIN, SOUTH DAKOTA 57551; and PAMELA IRELAND, ATTORNEY FOR APPELLEE BENNETT COUNTY, POST OFFICE BOX 628, MARTIN, SOUTH DAKOTA 57551:

You and each of you will hereby take notice that on the 2nd day of May, 2002, the Court entered its Order Supplementing Record in the above-entitled matter. Said Order Supplementing Record was filed on May 2, 2002, with the Hughes County Clerk of Courts. A true, correct and complete copy of the Order Supplementing Record is hereon annexed and herewith served upon

you and made a part of this Notice the same as if fully and completely set forth herein.

Dated this 14th day of May, 2002 at Pierre, South Dakota.

Diane Best

Diane Best
Assistant Attorney General
Counsel for DENR Water Rights Program
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215

pld.db (Notice of Entry of Order Supplementing Record U.S. Fish & Wildlife)(jmm)

STATE OF SOUTH DAKOTA : SS. COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
IN RE: UNITED STATES FISH & WILDLIFE SERVICE'S AMENDMENT OF WATER PERMIT NO. 2300-2 BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD, UNITED STATES FISH & WILDLIFE SERVICE, Applicant/Appellant, v. BRETT HEATH & RAYMOND KOCER, Objectors/Appellees, and BENNETT COUNTY, SOUTH DAKOTA, Appellee, and DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, WATER RIGHTS PROGRAM, SOUTH DAKOTA, Appellee.	)	Civ. No. 2001-29 ORDER SUPPLEMENTING RECORD

The South Dakota Department of Environment and Natural Resources, Water Rights Program, has moved to supplement the administrative record by including two additional documents which were referred to and relied upon by the South Dakota Water Management Board in its administrative proceeding. The two documents are:

(a) January 7, 1993, Findings of Fact and Conclusions of Law issued by the South Dakota Water Management Board <u>In the Matter of the Application of the United States Fish & Wildlife Service for Vested Water Right No. 1927-2; Water Permit Application of No. 1921-2 to Change the Location of Land and Diversion Point Authorized Under Water Permit No. 265-2; and Water Permit Application No. 2191-2</u>, and

(b) January 5, 1994, Memorandum Decision In Re: Water Right Claim No. 1927-2; Water Permit Application No. 1921-2; and Water Permit Application No. 2192-2 (Hughes County Civ. No. 93-4).

None of the parties in this proceeding have objected to including these matters within the record. Further, the Court notes that these documents were handed out to the Board at hearing and were considered by the Board in its decision-making process. For these reasons, this Court hereby ORDERS that the foregoing documents be included within the administrative record in this proceeding.

Dated this 2 day of May, 2002.

BY THE COURT:

Lori S. Wilbur
Circuit Court Judge

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.
FILED
MAY 02 2002
Christal L. Espeland CLERK
By _____ Deputy

ATTEST:
Christal L. Espeland
Clerk of Court
By: Sharon McEntaffer
Deputy
(SEAL)

pld.db (Order Supplementing Record U.S. Fish & Wildlife Service) (jmm)

STATE OF SOUTH DAKOTA : SS. COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
IN RE: UNITED STATES FISH & WILDLIFE SERVICE'S AMENDMENT OF WATER PERMIT NO. 2300-2 BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD, UNITED STATES FISH & WILDLIFE SERVICE, Applicant/Appellant, v. BRETT HEATH & RAYMOND KOCER, Objectors/Appellees, and BENNETT COUNTY, SOUTH DAKOTA, Appellee, and DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, WATER RIGHTS PROGRAM, SOUTH DAKOTA, Appellee.	)	Civ. No. 2001-29 NOTICE OF ENTRY OF JUDGMENT OF AFFIRMANCE

GREETINGS FROM THE SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, WATER RIGHTS PROGRAM, TO: CHERYL SHREMPP DUPRIS, ATTORNEY FOR APPELLANT, 225 SOUTH PIERRE STREET, SUITE 337, PIERRE, SOUTH DAKOTA 57501; JOHN R. KUNZ, ATTORNEY FOR APPELLANT, 755 PARFET STREET, SUITE 151, LAKEWOOD, COLORADO 80215; JOHN P. GUHIN, DEPUTY ATTORNEY GENERAL AND COUNSEL FOR THE BOARD OF WATER MANAGEMENT, 500 EAST CAPITOL AVENUE, PIERRE, SOUTH DAKOTA 57501; BRETT HEATH, PRO SE, HWC 3, BOX 20, MARTIN, SOUTH DAKOTA 57551; RAYMOND KOCER, PRO SE, POST OFFICE BOX 388, MARTIN, SOUTH DAKOTA 57551; and PAMELA IRELAND, ATTORNEY FOR APPELLEE BENNETT COUNTY, POST OFFICE BOX 628, MARTIN, SOUTH DAKOTA 57551:

You and each of you will hereby take notice that on the 2nd day of May, 2002, the Court entered its Judgment of Affirmance in the above-entitled matter. Said Judgment of Affirmance was filed on May 2, 2002, with the Hughes County Clerk of Courts. A true, correct and complete copy of the Judgment of Affirmance and the Court's April 15, 2002, Memorandum are hereon annexed and

herewith served upon you and made a part of this Notice the same as if fully and completely set forth herein.

Dated this 7th day of May, 2002 at Pierre, South Dakota.

Diane Best

Diane Best
Assistant Attorney General
Counsel for DENR Water Rights Program
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215

pld.db (Notice of Entry of Judgment of Affirmance U.S. Fish & Wildlife Service's Amendment)(jmm)

STATE OF SOUTH DAKOTA : SS. COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
IN RE: UNITED STATES FISH & WILDLIFE SERVICE'S AMENDMENT OF WATER PERMIT NO. 2300-2 BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD, UNITED STATES FISH & WILDLIFE SERVICE, Applicant/Appellant, v. BRETT HEATH & RAYMOND KOCER, Objectors/Appellees, and BENNETT COUNTY, SOUTH DAKOTA, Appellee, and DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, WATER RIGHTS PROGRAM, SOUTH DAKOTA, Appellee.	)	Civ. No. 2001-29 JUDGMENT OF AFFIRMANCE

On December 14, 2000, the South Dakota Water Management Board entered its Findings of Fact, Conclusions of Law and Final Decision In Re: United States Fish & Wildlife Service's Amendment of Water Permit No. 2300-2. On December 19, 2000, the Water Management Board issued its Notice of Decision. On January 18, 2001, the United States Fish & Wildlife Service filed its Notice of Appeal challenging the Water Management Board's Findings of Fact, Conclusions of Law and Final Decision. Briefs were filed pursuant to SDCL 1-26-33.3 and SDCL 1-26-33.4. None of the parties requested oral argument. This Court considered the arguments in light of the administrative record and issued a Memorandum Decision on April 15, 2002, which Memorandum Decision

is hereby incorporated by reference. Based on the rationale set forth in the Memorandum Decision, it is hereby ordered and ADJUDGED that the Findings of Fact, Conclusions of Law and Final Decision of the South Dakota Water Management Board are hereby AFFIRMED pursuant to SDCL 1-26-36.

Dated this 2 day of ~~April~~ May, 2002.

BY THE COURT:

Lori S. Wilbur
Circuit Court Judge

ATTEST:

Christal L. Espeland
Clerk of Court

By: Shaun McEstaffer
Deputy

(SEAL)

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.
FILED
MAY 02 2002
Christal L. Espeland CLERK
By _____ Deputy

pld.db (Judgment of Affirmance U.S. Fish & Wildlife Service)(jmm)

CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

PO Box 758
Fort Pierre, South Dakota 57532-0758
(605) 223-7777
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01-29 RB

Chambers of:
Lori S. Wilbur
Circuit Judge

Lori J. Grode
Court Reporter
(605) 223-7737

April 15, 2002

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Ms. Diane Best
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Mr. Raymond Kocer
P.O. Box 388
Martin, SD 57551

Mr. Brett Heath
HWC 3, Box 20
Martin, SD 57551

RE: United States Fish & Wildlife Service's amendment of Water Permit 2300-2 before the South Dakota Water Management Board

South Dakota Water Management Board (Board) denied United States Fish & Wildlife Services's (FWS) request to amend Water Permit No. 2300-2 by removing a dredging requirement and imposed a requirement that FWS dredge the area in question twice annually. The South Dakota Department of Environment and Natural Resources, (DENR), Water Rights Program and its Chief Engineer appeared as a party before the Board and recommended the dredging requirement be reduced to one time per year. The Board's decision is affirmed.

The facts are set out in both FWS's &DENR's briefs. The essential facts are that FWS obtained Water Permit No. 2300-2 in March 1998. The permit authorized FWS to impound up to .75 acre-feet of water behind Diversion No. 4A at the LaCreek Refuge in Bennett County, South Dakota, for the purpose of protecting a South Dakota threatened fish species, the Pearl Dace minnow. A condition of the permit issued in 1998 was that FWS was required to remove the silt behind Diversion No. 4A if the buildup exceeded 50% of the height of the carp guard structure. After the permit was granted and the diversion was constructed, FWS discovered compliance with the dredging requirement imposed by the permit would have required dredging every two to four weeks. Six months after the permit was issued FWS asked to have the dredging requirement removed from the permit.

Bennett County and the landowners sought to have the permit revoked because FWS did not comply with the dredging requirement. DENR asked the Board to reduce the dredging requirement to one time annually. The Board denied FWS's request to remove the dredging requirement and amended the dredging requirement to twice yearly.

FWS appeals contending the Board's decision was clearly erroneous in light of the entire evidence in the record.

STANDARD OF REVIEW

Pursuant to 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 reviewing court is bound to give great weight to the agency or hearing examiner on factual questions. Goebel v. Warner Transp., 2000 SD 79, 612 NW2d 18.

This Court's standard of review is limited when the dispute involves a contention that findings of fact are clearly erroneous. Under SDCL 1-26-36, the question is not whether there is

evidence in the record which could support the appealing party's proposed facts. The proper scope of review is to determine whether there is any substantial evidence to support the findings that are made by the Board. *In Re* SDDS, Inc., 472 NW2d 502, 507 (SD 1991). *See also* Abild v. Gateway 2000, Inc., 1996 SD 50, 547 NW2d 556. Moreover, courts may not second guess the Board on the credibility of witnesses or on disputed facts. Courts must give deference to the fact finder and great weight to its choices between conflicting inferences and findings. *Id.* SDCL 1-26-36.

The Board's findings are not to be overturned unless this court is "left with a definite and firm conviction that a mistake has been made." Petersen v. Hinky Dinky, 515 NW2d 226, 231 (SD 1994).

DECISION

The Board has a long history of hearings related to LaCreek Refuge dating back to the 80's. The Board considered FWS's request for water permit applications in 1993. In 1994, FWS applied for a new permit application which resulted in the 1998 decision imposing the dredging requirement at issue presently. The Board is well versed in the hydrology, siltation, flooding and FWS management issues which exist in the LaCreek Refuge.

In 1998 the Board made a finding that a qualification of the permit with regard to silt buildup *will further protect the landowners*. The Board, in its 1998 decision, made findings regarding both the high water table in the entire refuge area and the precautions necessary to protect the landowners from flooding. The Board's decision in December 2000 imposing the twice annual dredging requirement incorporates its 1998 decision insofar as it is not inconsistent with the current decision.

Based on the 1998 findings as well as the findings made by the Board in December 2000, it appears no mistake has been made requiring findings to be overturned.

The Board originally decided precautions were necessary in granting the permit for Diversion 4A to protect surrounding landowners from flooding. Their decision was based on the topography of the area and the history of FWS's management. When read together the findings in the previous decisions by the Board regarding the issuance of this permit indicate the Board's intent to maintain some protection for the landowners from potential flooding whether the flooding is caused by nature or FWS. The Board's decision requiring dredging twice a year is not clearly erroneous. Therefore, the Board's decision is affirmed.

DENR's motion to supplement the record is granted as no opposition to the request was raised by any party.

Counsel for DENR should prepare an appropriate order.

Sincerely,

Lori S. Wilbur

LSW:lg

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.
FILED
APR 15 2002
Christal L. Espeland CLERK
By_____Deputy

STATE OF SOUTH DAKOTA : SS. COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
IN RE: UNITED STATES FISH & WILDLIFE SERVICE'S AMENDMENT OF WATER PERMIT NO. 2300-2 BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD, UNITED STATES FISH & WILDLIFE SERVICE, Applicant/Appellant, v. BRETT HEATH & RAYMOND KOCER, Objectors/Appellees, and BENNETT COUNTY, SOUTH DAKOTA, Appellee, and DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES, WATER RIGHTS PROGRAM, SOUTH DAKOTA, Appellee.	)	Civ. No. 2001-29 CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Notice of Entry of Judgment of Affirmance and Notice of Entry of Order Supplementing Record in the matter of In Re: United States Fish & Wildlife Service's Amendment of Water Permit No. 2300-2 Before the South Dakota Water Management Board, United States Fish & Wildlife Service v. Brett Heath, Raymond Kocer, Bennett County and Department of Environment and Natural Resources, Water Rights Program were served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said

envelopes in the United States mail, at Pierre, South Dakota, on this 7th day of May, 2002:

Cheryl Schrempp DuPris
225 South Pierre Street, Suite 337
Pierre, South Dakota 57501

John R. Kunz, Esq.
755 Parfet Street, Suite 151
Lakewood, Colorado 80215

Brett Heath
HWC 3, Box 20
Martin, South Dakota 57551

Pamela Ireland, Esq.
Post Office Box 628
Martin, South Dakota 57551

Raymond Kocer
Post Office Box 388
Martin, South Dakota 57551

and by interoffice mail to:

Eric Gronlund
Department of Environment and Natural Resources
Foss Building
523 East Capitol Avenue
Pierre, South Dakota 57501

and by hand delivery to:

John P. Guhin
Deputy Attorney General &
Counsel for the Board of Water Management
500 East Capitol Avenue
Pierre, South Dakota 57501

Diane Best

Diane Best
Assistant Attorney General
Counsel for DENR Water Rights Program
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215

pld.db (Cert of Service U.S. Fish & Wildlife)(jmm)

2300-2

UNITED STATES GOVERNMENT

MEMORANDUM

DATE: November 1, 2004
REPLY TO: Div4aOct.04.wpd
ATTN OF: Refuge Manager
Lacreek NWR
Martin, South Dakota

SUBJECT: Diversion 4a Cleanout

TO: Cheryl Williss, WTR
Rod Krey, RW

This is to advise that Diversion 4a was dredged out on Wednesday October 20, 2004 by Monte Shaul, Crescent Lake NWR in compliance with Qualification No. 4 of Water Permit No. 2300-2 dated December 14, 2000. The dredging was confined to the rip-rapped area immediately upstream of the Div 4a structure.

Tom Koerner
Refuge Manager

2300-2

Water Rights Program - DENR
Conversation File Documentation

NAME OF PERSON OR FILE: Brett Heath

ADDRESS: COUNTY: Bennett County

DATE: October 25, 2005 TELEPHONE:

RE: Discussion about Lacreek operations with Mr. Heath

COMMENTS:

I stopped by Brett Heath's place to conduct a licensing investigation of Water Permit No. 2132-2 and to take measurements of the sedimentation/flooding issue that Mr. Heath claims is caused by Lacreek National Wildlife Refuge. We talked at the bridge over Lake Creek north of his place for about 45 minutes.

He appreciates our work to monitor the Lake Creek sedimentation on his place. I asked how things were going with the refuge. He indicated that since Pool No. 7 has been drawn down he hasn't had any problems. He said they have had 22 ½ inches of rain this year and the hay meadow is producing record tonnage. He indicated that the less desirable plants such as sedges have diminished and the desirable hay grass such as Timothy is re-establishing. Further bolstering his claim he pointed out a plant he calls "red top" that is flourishing and stated that plant does not exist if there's too much moisture or flooding.

Mr. Heath continues to believe the refuge is out to get control of his land through which Lake Creek passes. I asked about the new refuge manager and he indicated he hasn't had much involvement with him. But once they refill Pool 7 again that he's sure the old problems with reoccur.

Mr. Heath would like the following done.

- Another control point downstream towards Pool 7. His contention is that's where sediments will first be deposited when Pool 7 is closed. This sedimentation will possibly increase the water surface elevation prior to showing increased sedimentation at the two control points (BM 1 & BM 2) on his property. I told Mr. Heath that I would talk to Mark Rath about his request.

- Mr. Heath would like the staff gauge on the bridge tied into the BM that we use as part of the study. They use this staff gauge as their "barometer" of what's occurring. I told him that I did not think that would be any problem. However, since the water level is currently below the bottom of the gauge a new gauge may need to be installed. Again, I tolm him I would talk to Mark to see if that's something we can do next spring.

- Finally, he would like some vegetation transects taken in his hay meadow. He'd be willing to participate in the expense. Mr. Heath stated that the condition of the permit states that there can not be specific alteration of plant species directly attributable to water use under Permit No. 2300-2. His thought is these transects would show if plant species are altered in the future. DENR does not have the expertise to conduct vegetation analysis. Also the condition he refers to is on Permit No. 2300-2 (carp barrier) and is not a condition to the Refuge's water right for the large pools.

NAME: Eric Greenhead

2300-2

Water Rights Program - DENR
Conversation File Documentation

NAME OF PERSON OR FILE: Water Permit No. 2300-2, US Fish and Wildlife Service

ADDRESS: COUNTY: Bennett

DATE: November 4, 2005 TELEPHONE:

COMMENTS:

Cheryl Williss and myself had a conversation regarding the keeper of records documenting silt removal behind Structure No. 4A in compliance with Qualification No. 4 on Water Permit No. 2300-2. After consulting with Mark Rath we determined that USFWS can keep the documentation. The records shall be made available to the Water Rights Program upon request

NAME: Eric Trudnowski

Form 12

Permit No. 2300-2

White River - Water District

Report Of Examination Of Works And/Or Application of Water To Beneficial Use

TO: Chief Engineer, Water Rights Program, DENR, Foss Bldg., Pierre, SD 57501

I have this day, **October 25, 2005**, made a thorough examination of the water use system constructed by **US Fish and Wildlife Service, PO Box 25486, Denver Federal Center, Denver CO 80225** holder of Permit No. **2300-2**, bearing the priority of **February 1, 1994** authorizing a **stoplog structure on Lake Creek** and impoundment of **0.75 acre feet of water** for **preventing carp from traveling upstream of the structure**, in **Bennett** County.

I have to report on the conditions of the same as follows:

A. Works used to impound water:

A stoplog structure is in place on Lake Creek.

B. Works used to transport water to place of use:

none

C. Works used to apply water to beneficial use:

Water flows over the stoplogs and concrete sill in a drop inlet manner, then passes through a arch CMP pipe approximately 60 feet prior to discharging into the natural creek channel. The stoplog structure provides a 4 feet elevation barrier to prevent carp from traveling upstream.

The system is in the following condition **excellent**. The structure is located **approximately 1,860 feet north and 2,420 feet west of the SE corner. (NW ¼ SE 1/4) Section 24, T36N, R37W (Lat/Lon 43.079887 W-101.622469**. The works are capable of providing a 4 foot carp barrier in Lake Creek.

The license should be issued for the **stop log structure** and storage of up to **0.75 acre feet of water***.

* this is an estimate of capacity. The actual amount of water impounded is variable depending on the amount of sediment behind the structure.

Applicable permit qualifications have been complied with: Yes
Exceptions to compliance are: none
Date Report Completed: **November 4, 2005**

Eric Gronlund
Natural Resources Engineer
DENR, Water Rights Program

FIELD INVESTIGATION REPORT FOR PERMIT NO. 2300-2

DATE OF INVESTIGATION:	**October 25, 2005**
NAME & ADDRESS OF INVESTIGATION CONTACT/ RELATIONSHIP TO PERMIT HOLDER, IF APPLICABLE	**US Fish and Wildlife Service PO Box 25486 Denver Federal Center Denver CO 80225**
CONTACT	**Cheryl Williss**

DIVERSION POINT LEGAL LOCATION: **approximately 1,860 feet north and 2,420 feet west of the SE corner. (NW ¼ SE 1/4) Section 24, T36N, R37W (Lat/Lon 43.079887 W-101.622469**

DAM INFORMATION: dam is located on Lake Creek

1) Height to crest **approximately 10** feet
2) Height to primary spillway (stoplog) **4** feet
3) Height to secondary spillway
4) Crest width **approx. 25** feet
5) Crest length **effective width of approximately 50 ft while entire length is approx. 390 feet**
6) Spillway length **N/A** feet
7) Spillway width **N/A** feet
8) Approx. storage **0.75 *** ac-ft
9) Approx. storage to crest **estimated at less than 2.0** ac-ft
10) Date completed: **February 16, 1999**

* At the time of the licensing investigation the impoundment behind the structure appeared full of sediment. The actual water impounded when there is sedimentation is less than the 0.75 ac-ft. The storage to crest is an estimate.

CHEMIGATION EQUIPMENT: not applicable

PERMIT QUALIFICATIONS:

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 **not applicable**

Comments: The licensing investigation did not include any determination of the structures impairment to any lands adjoining the Refuge such as specific alterations of plant species attributable to water use under the permit as set forth in Qualification No. 1

The records show that since 1999, the silt accumulations behind the structure has been cleaned out twice each year in compliance with Condition No. 4 on the reissued water permit.

I did not view any evidence that the original Diversion No. 4 was still in place.

Based on a top of dike elevation of 3,041.0 I took the following surveyed elevations. The BM I used was the top of the concrete dike in the most northeast corner of the structure.

	Elevation	Comment
BM	3,041.0	As provide on plans
Stoplog sill	3,035.97	Slightly skewed because rod could not be held vertical because of catwalk
Upstream H_2O	3,036.71	
Downstream H_2O	3,032.28	
Downstream Top of Culvert	3,036.12	
Downstream Culvert Invert	3,031.52	

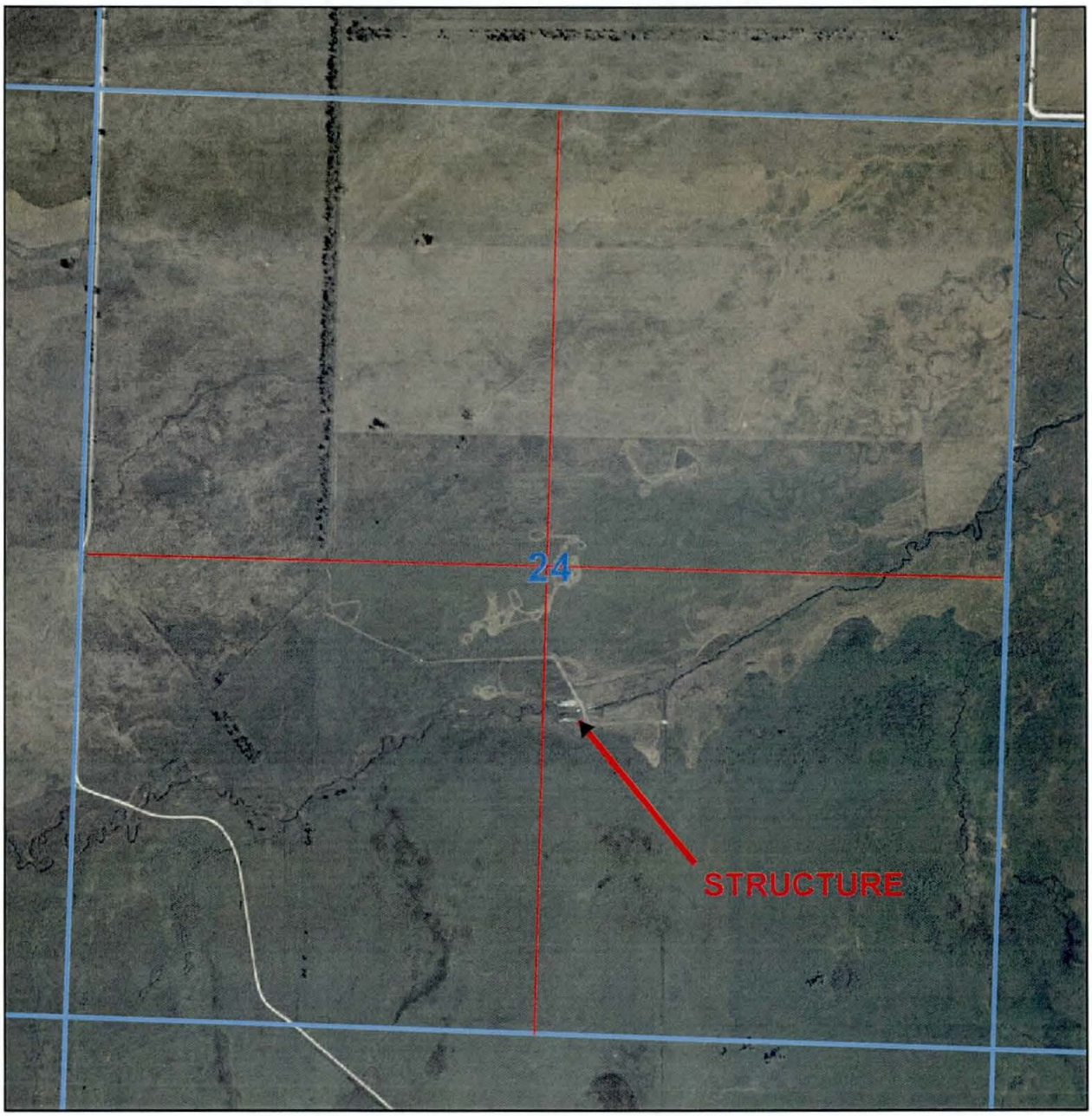
This was a survey conducted by myself using a laser level. It is not intended to be a professional survey. What is does serve to provide is that the storage level (sill & stoplog elevation) does not exceed 3,036.23 feet mean sea level in compliance with qualification No. 3.

At the time of the licensing investigation, there was a spoil pile on the northern edge of the impoundment which is presumed to be sediment removed from a prior silt removal.

Carp Barrier Stoplog Control Structure looking downstream towards the east

Structure looking upstream toward the west

Water Permit No. 2300-2, US Fish and Wildlife Service



Structure is located approximately, 1,860 feet north and 2,420 feet west of the SE corner (NW 1/4 SE 1/4) of Section 24, T36N, R37W

N

Eric Gronlund
Water Rights Program, DENR
Licensing Investigation - October 25, 2005

DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

November 7, 2005

2300-2

Cheryl C Willis
US Fish & Wildlife Service
PO Box 25486
Denver Federal Center
Denver CO 80225-0486

Dear Ms. Willis:

On October 25, 2005 the investigation of the water use system, including the extent of application of water to beneficial use, as developed under Water Permit No. 2300-2, was completed by Eric Gronlund, a staff engineer with our program. Water Permit No. 2300-2 authorizes a stoplog structure on Lake Creek located in the NW ¼ SE ¼ Section 24-T36N-R37W in Bennett County. The final water right document, the water license, can now be issued.

State law requires that we charge a $50.00 fee for the investigation and issuance of the water license. Enclosed is an invoice. We are assuming the fee will be paid via electronic transfer of funds. Upon receipt of the $50.00 fee, we will complete processing the water license.

The licensed water right will be similar to a property right that can not be lost as long as the water use continues and you abide by the permit requirements.

If you have any questions regarding the water permit, investigation of the water use system or payment of the fee, please contact Genny McMath with our program at (605) 773-3352.

Sincerely,

Karen Schlaak

Karen Schlaak
Water Rights Program
(605) 773-3352

DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

****
INVOICE
****

Invoice No. 20411-2300-2

Cheryl C Williss
US Fish & Wildlife Service
PO Box 25486
Denver Federal Center
Denver CO 80225-0486

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investigation and issurance of water license No. 2300-2	$50.00

PLEASE PAY THIS AMOUNT: **$50.00**

Glenda Marks
Secretary
Water Rights Program
(605) 773-3352

Schlaak, Karen

From: Verhelst, Sandy
Sent: Friday, March 03, 2006 11:02 AM
To: Schlaak, Karen
Cc: Marks, Glenda
Subject: We got paid.

3/3/2006	FWS TREAS 312 MISC PAY 030306 466000364141600 RMT*IV*20411-2300-2 **	50.00

ORDER FOR SUPPLIES OR SERVICES
SCHEDULE - CONTINUATION

IMPORTANT: Mark all packages and papers with contract and/or order numbers.

DATE OF ORDER	CONTRACT NO.	ORDER NO.
12/05/2005		601816P074

ITEM NO. (a)	SUPPLIES OR SERVICES (b)	QUANTITY ORDERED (c)	UNIT (d)	UNIT PRICE (e)	AMOUNT (f)	QUANTITY ACCEPTED (g)
0001	Investigation and issuance of Water License No. 2300-2 for LaCreek NWR Tax ID #46-6000364 DUNS 103607672 Payment via EFT *Delivery Date* 11/30/2005 Reference Requisition: WT060007	1.00	Fee	50.000	50.00	

TOTAL CARRIED FORWARD TO 1ST PAGE (ITEM 17i) ⇒ $50.00

RECEIPT

WATER RIGHTS PROGRAM

South Dakota Department of Environment and Natural Resources

Date March 7, 2006

RECEIVED OF US Fish & Wildlife Service, PO Box 25486, Denver Federal Center, Denver CO

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

Fee for Application for Permit No. _____ to Appropriate Water, to construct and to put water to beneficial use		
Fee for Application for Permit No. _____ to Appropriate Water for Future use		
Fee to retain Future Use Permit No. _____ after period of seven years.		
Fee for Inspecting Constructed Works, confirming beneficial use and issuing Water License No. 2300-2 (Payment was an electronic transfer)	50	00
Fee for Filing Transfer Form _____		
Fee for _____		
Fee for Issuing New Well Driller's License No. _____ for C.Y. _____		
Fee for Renewal of Well Driller's License No _____ for C.Y. _____		
Fee for Issuing Well Pump Installer's License No. _____ for C.Y. _____		
Fee for Renewal of Well Pump Installer's License No. _____ for C.Y. _____		
(Any Other Work Provided by Law) TOTAL	50.00	

No. 02345

By Garland Erbele
Chief Engineer

KS

STATE OF SOUTH DAKOTA

WATER LICENSE NO. 2300-2

(1) U.S. Fish & Wildlife Service, PO Box 25486, Denver Federal Center, Denver CO 80225 made Application No. 2300-2, February 1, 1994 for a water permit to construct a stoplog structure to impound 0.75 acre feet of water from Lake Creek, Bennett County, South Dakota to prevent carp from traveling upstream of structure and therefore protecting the state threatened Pearl Dace. Permit No. 2300-2, with a priority date of February 1, 1994 was approved February 25, 1998 and issued to the applicant for diversion of water with construction of the described water supply system to be completed on or before February 25, 2003 and for the application to beneficial use of water on or before February 25, 2007.

(2) The water supply system has been completed and water applied to beneficial use in accordance with South Dakota State Law. Pursuant to South Dakota Codified Law 46-5-30.1, the holder and/or owner of Water Right No. 2300-2 is issued a license, bearing a priority date of February 1, 1994, to impound 0.75 acre feet of water for protecting the state threatened Pearl Dace.

The location of the stoplog structure is approximately 1,860 feet north and 2,420 feet west of the southeast corner Section 24-T36N-R37W (NW ¼ SE ¼).

(3) This license is subject to South Dakota Water Law, any limitations or conditions listed in Water Permit No. 2300-2, including the following now applicable qualifications:

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

2. Permit No. 2300-2 authorizes storage of 0.75 acre-foot of water by constructing a new stoplog structure which replaces the existing structure (known as Diversion No. 4). The purposes of the structure is to prevent carp from traveling upstream. This will protect the state threatened Pearl Dace, whose habitat is upstream of the stoplog structure.

3. The storage level of Diversion No. 4A may not be in excess of 3036.23 feet mean sea level and the structure must be designed to pass a 25-year event.

4. The Service is required to remove the silt in the area behind the carp guard which is defined by the present day rip rap area, twice each calendar year, at intervals not less than three months.

5. The Service is required to remove Diversion No. 4 in its entirety within a reasonable time after construction of Diversion No. 4A.

Garland Erbele

APR 07 2006

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

date

DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

APR 07 2006

2300-2

Cheryl C Willis
US Fish & Wildlife Service
PO Box 25486
Denver Federal Center
Denver CO 80225-0486

Dear Ms. Willis:

Enclosed is Water License No. 2300-2. This is the final water right document completing your process of obtaining a Water Right. Enclosed is Receipt No. 02345 in the amount of $50.00 which you paid for the investigation and issuance of the Water License.

As long as you use the water beneficially, as stated in the Water License, State Water Laws provide that you have a continuing right to use the water.

Sincerely,

Garland Erbele

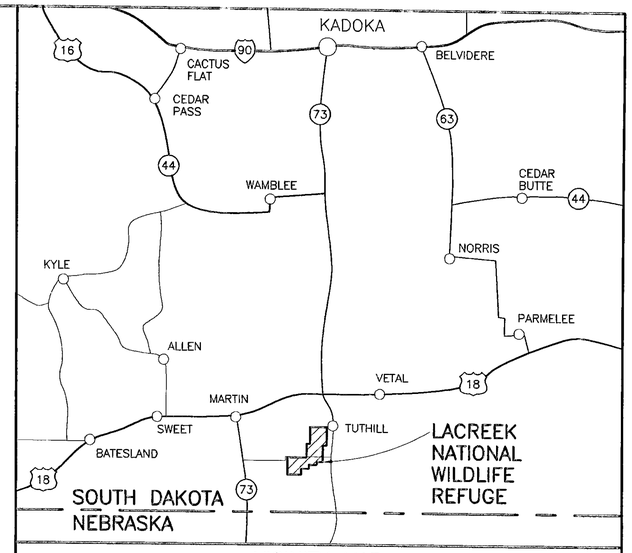
Garland Erbele, Chief Engineer
Water Rights Program
(605) 773-3352

enclosures

U.S. FISH & WILDLIFE SERVICE

LACREEK NATIONAL WILDLIFE REFUGE

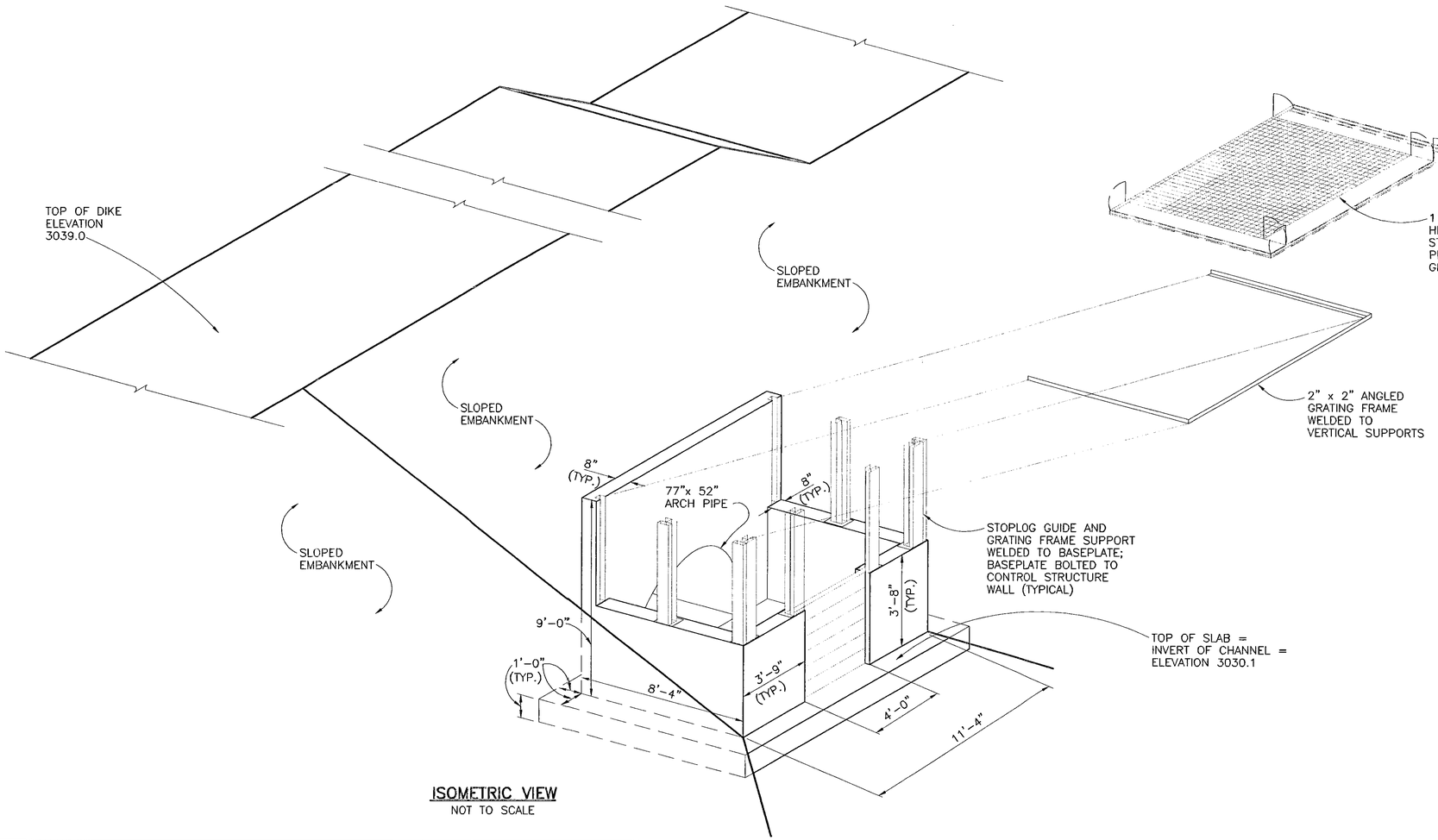
DIVERSION #4



VICINITY MAP
NO SCALE

DRAWING INDEX

SHEET NO.	TITLE
SHEET 1 OF 1	ISOMETRIC VIEW



ISOMETRIC VIEW
NOT TO SCALE

V-CVR-1

NOTE TO BIDDERS:

ANY PRINT ACCOMPANYING THIS INVITATION TO BID MAY BE A REDUCED REPRODUCTION OF THE WORKING DRAWINGS. IF LINE BELOW DOES NOT MEASURE SIX INCHES IN LENGTH, THE INDICATED SCALES ARE TO BE ADJUSTED ACCORDINGLY.

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
REGION 6 ENGINEERING – DENVER, COLORADO

SUBMITTED REGIONAL ENGINEER — DATE 10/23/96	LACREEK NATIONAL WILDLIFE REFUGE
RECOMMENDED DATE	BENNETT COUNTY — SOUTH DAKOTA
APPROVED ASS'T. REGIONAL DIR. — DATE 10/23/96	DIVERSION #4
	ISOMETRIC VIEW
	DESIGNED: E. HUSMANN — DRAWN: J. TOFT — CHECKED: E. HUSMANN
	DATE: 9/96 — DRAWING No. 6R-UT-169-67.0 — SHEET 1 OF 2