

No. 1634-3
 Water Division No. 3 JAMES RIVER District
 (Blanks to be Filled by the Engineer for the W. R. C.)

STATE WATER RESOURCES COMM.
 PIERRE, SOUTH DAKOTA

VESTED RIGHT APPLICATION FOR PERMIT

To appropriate Water within the State of South Dakota

(NOTE—Draw a line through items not applicable.)

1. Name of applicant South Dakota Department of Game, Fish and Parks
 Postoffice address Pierre, County Hughes, State South Dakota

- 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 COTTONWOOD LAKE - Spink County
 As required to fill lake to outlet level - approximately 4350
 3. Amount of water claimed acre feet per year cubic feet per second
 4. Source of water supply Local drainage and Medicine creek
 5. Location of point of diversion Salt Creek NE 1/4 5-115-65 into Turtle Creek, Lake Redfield
and James River on bank County.
 6. Annual period or periods during which water is to be used continuously
 7. To be used for:

- I. Irrigation or domestic use: Gravity, overhead sprinkling or combination system?

- (a) Number of acres to be irrigated acres.

- (b) Legal subdivisions to be irrigated

(NOTE—A list of lands to be irrigated, giving each subdivision and fraction with acreage thereof, should be written here, or may be appended as a part of this application. Same must also be shown on accompanying map.)

- (c) Statement as to domestic use (giving location, etc.) To the ordinary high water mark

of inundated portion of Sec. 4, 5, 7, 8, 17 & 18-116-64

II. Stockwatering, mining, milling, power, fish culture, fire protection and public recreation:

- (a) Nature of use Public recreational uses
 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.

8. Estimated cost of work:

(a) Head Gates, \$.....

(b) Pumping plant, \$.....

(c) Fluming, \$.....

(d) Canalearth, \$.....

Rock, \$.....

(e) Other structures \$.....

Total, \$.....

9. Description of diversion works:

I. Nature of works: (Reservoir, dam, ditch, flume, pumping plant, etc.)

II. Dimensions of works.

(a) Dam: Height 6 feet; length at bottom 1/4 mile feet; length at top feet; thickness at bottom 36 feet; thickness at top 24 feet; slope at front water face; slope at back face material used in construction earthen dam

(b) Reservoir: Capacity when filled 4350 acre feet. Surface area at highwater mark 1450 acres.

DEPTH AT OUTLET-FEET	SURFACE AREA AT EACH DEPTH AT OUTLET-ACRES	ACRE-FOOT CAPACITY

(c)* Head gate: Width feet, height feet;

Material

(d) Canal: Total length miles.

LOCATION BELOW HEADGATE	DEPTH	BOTTOM WIDTH	WIDTH AT WATER-LINE	GRAD. 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 - not applicable

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 ~~XXXXXXXXXX~~ not applicable

STATE OF SOUTH DAKOTA

County of Hughes ss.

I, R. A. Hodgins, 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

Subscribed and sworn to before me this 9/1st

day of SEP, 1943
Edmund M. Conell
Notary Public (or other qualified officer)

Remarks by State Water Resources Commission:

"VESTED RIGHT" CLAIMED

STATE OF SOUTH DAKOTA

County of HUGHES

ss.

Pierre, South Dakota, DECEMBER 13, 1968

This is to certify that the foregoing application was received by the Commission at 2:30 o'clock

P.m. upon the 21ST day of OCTOBER, 1968

State Water Resources Commission

By:

Dustin Lane
for Chief Engineer, Executive Officer

Number of permit 1634-3

Date of first receipt of application OCTOBER 21, 1968

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 1936, 19____

Approved DECEMBER 13 1968, Recorded in Book 10 Page 297

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 COMPLETED ~~to be completed on or before~~

2nd. The whole of said work is ~~to be~~ completed on or before

3rd. The limit of time for proof of beneficial use of water appropriated in accordance herewith is

COMPLETED
4th. The water appropriated shall be used for the purpose of PUBLIC RECREATION

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 4350 ACRE FEET ANNUALLY ~~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 twentieth (1/20) of one cubic foot of water per second of time for each acre of land to which water is actually~~ USED FOR PUBLIC RECREATION ~~was~~

and beneficially applied for irrigation on or before JUNE 30, 1955; said water to be used during the following described annual period:

CONTINUOUSLY

Witness my hand this 13TH day of DECEMBER, 1968

State Water Resources Commission

By:

Chief Engineer, Executive Officer

Certificate of Construction issued DECEMBER 13, 1968

Water License issued DECEMBER 13, 1968

Permit No. 1634-3

Water Division No. 3 JAMES RIVER Water District

Certificate of Completion of Works

TO ALL WHOM IT MAY CONCERN:

This is to Certify, That the Department of Game, Fish and Parks

of Piorro, County of Hughes, and State of South Dakota, the holder of Vested Right Permit No. 1634-3, issued upon Application No. 1634-3, bearing date of priority of 1936, authorizing the diversion of 4350 acre feet annually ~~xxxx~~ of the waters of local drainage and Medicine Creek

County of Spink, State of South Dakota, at a point in the NE 1/4 NE 1/4, Section 5, T115N, R65W

for public recreation purposes, has 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 ~~xxxx~~ satisfactory xxxx for diverting and conveying to the place of intended use 4350 acre feet annually ~~xxxx~~ xxxx of water; and that the ~~xxxx~~ use of said water are described as follows, to-wit:

to be used for public recreation purposes.

Witness my hand this 13th day of December A. D. 1968

State Water Resources Commission

By:

J. W. GRIMES
Chief Engineer, Executive Office

STATE OF SOUTH DAKOTA

WATER LICENSE No. 1634-3

WHEREAS, On the 21st day of October A. D. 1968
the Department of Game, Fish and Parks

of Pierre County of Hughes and State of
South Dakota, duly made application (No. 1634-3) to us for a Vested Right
cubic feet per second of the waters of local drainage and Medicine Creek
County of Spink, State of South Dakota, for public recreation
purposes; and

WHEREAS, On the 13th day of December A. D. 1968
Vested Right Permit No. 1634-3 was issued to said applicant, recognizing
completion of the works of diversion therein described, and for the application to beneficial use of said
water, and,

WHEREAS, On the 21st day of October A. D. 1968
the holder of said permit duly made proof of completion of adequate works for the diversion of 4350 acre
feet annually of said waters, as evidenced by our Certificate No. 1634-3
dated December 13, 1968 confirming the completion of works of sufficient capacity for
diverting and conveying to the place of intended use 4350 acre feet annually
priority of 1936 and,

WHEREAS, On the 21st day of October A. D. 1968
proof was duly made of the application to beneficial use of 4350 acre feet annually
to be stored and used in place for public recreation

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 the Department of Game, Fish and Parks
 of Pierre the holder and owner of said permit No. 1634-3
 a water right, dating from 1936 to the use of 4350 acre feet
~~XXXXXX~~ of the waters of local watershed and Snake Creek
 in the County of Spink and State of South Dakota, or so much thereof as may be
 necessary for the purposes hereinbelow mentioned, to be diverted at a point in the NE 1/4 NE 1/4,
Section 5, T115N, R65W
 and ~~XXXXXX~~ stored in place

for the purpose of public recreation, subject to any limitations listed
in the Permit to Appropriate Water, and

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 13th day of December A. D. Nineteen
 Hundred and sixty-eight

State Water Resources Commission

By:

J.W. GRIMES
 Chief Engineer, Executive Officer

STATE OF SOUTH DAKOTA

Water License No. _____

To _____

Source of Supply _____

County _____

Am't _____ c. f. s.

Point of Diversion _____

Place of Use _____

Purpose _____

Date of Priority _____

Re _____

In Book _____ of _____ Page _____

DATE MICROFILMED

CASE FILE NO.

Location No.

Water Division No. Water District

Proof of Application of Water to Beneficial Use

PETITION OF HOLDER

Ques. 1. State your name, residence, occupation and postoffice address.

Ans. South Dakota Department of Game, Fish and Parks
Cottonwood Lake - Spink County

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.

Ques. 3. State date of posting and date of recording notice of appropriation.

Ans.

Ques. 4. State source of water supply and give exact location of point of diversion.

Ans. Salt Creek NE 1/4 NE 1/4 5-115-65 into Turtle Creek, Lake Redfield and James River

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. Earth Dam - approximately 1/4 mile long, 6 feet high
Impoundment of 1450 acres at dam site

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 irrigated with said water.)

Ans. Fish and wildlife propagation, conservation and recreation

Ques. 7. If for other than irrigation purpose, state how applied, amount of horse power generated, etc.

Ans. Used in place in lake or reservoir

Ques. 8. What is the minimum amount of water required for the use specified above?

Ans. As required to fill lake to outlet level - approximately 4350 acre feet per year

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.

Ques. 10. State when, how, in what amount and to what extent, the water diverted under above mentioned permit has been used.

Ans. ~~Been in use ever since 1936 when it was constructed. Used by the~~
~~public for the uses specified except for that amount lost by evaporation and seepage~~

(Sign) *RA Hodgins*

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 *Pierson*, County of *Hughes*

State of South Dakota, on this *21st* day of *Oct* A. D. 19*68*
Edmund M. Cantel } Witnesses.

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.

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 -----

UNITED STATES DEPARTMENT OF AGRICULTURE

SOIL CONSERVATION SERVICE

P. O. Box 1357, Huron, South Dakota 57350

January 15, 1975

Mr. Vern Butler
Secretary, Department of Natural
Resources Development
Office Building No. 2
Pierre, South Dakota 57501

Dear Mr. Butler:

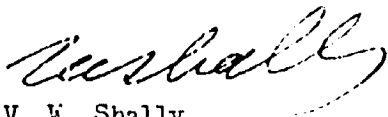
The Spink County Conservation District has requested that we investigate ways in which to stabilize or improve the level of Cottonwood Lake. One of the alternatives is the diversion of Turtle Creek into the lake. The lake has a normal surface area of about 1,700 acres; therefore we assume a minimum diversion of 3,400 to 4,000 acre-feet would be needed to stabilize Cottonwood Lake during the dry cycles.

In the James River Basin Study we estimated the average annual yield for Turtle Creek to be 19.4 acre-feet per square mile, or 18,582 acre-feet for the 963-acre drainage area of Turtle Creek. However, the 80 percent chance runoff is only 1,746 acre-feet. Therefore, the diversion of the entire flow from the 80 percent chance runoff would raise the lake about a foot and stop nearly all flow from Turtle Creek from entering the James River. The 50 percent chance runoff is 6,933 acre-feet.

Before we devote many man-hours to this alternative we would like to know if the Department of Natural Resources Development would grant a water right for a diversion of this magnitude out of the Turtle Creek Basin.

We thank you for any guidance and counsel you could give us on this proposal.

Sincerely,



V. W. Shally
State Conservationist

RECEIVED

JAN 17 1975



January 27, 1975

Mr. V. W. Shally
State Conservationist
Soil Conservation Service
P. O. Box 1357
Huron, South Dakota 57350

Dear Mr. Shally:

Reference is made to your letter of January 15, 1975, regarding the possibility of obtaining a water right to divert sufficient water from Turtle Creek to stabilize Cottonwood Lake during dry cycles.

While no commitment can be made before the Water Rights Commission makes a determination, after a public hearing, the following are factors to be considered:

Existing water right and domestic use would preclude little, if any, diversions during the summer months. However, when Turtle Creek has substantial flows, such flows do normally occur during the spring months.

There is a diversion system to direct Turtle Creek flows into Twin Lakes. This water right authorizes the diversion of up to 4500 acre feet of water annually. The Department of Game, Fish, and Parks reports this system is being used.

The City of Redfield has a water right entitling it to use up to 1568 acre feet annually to maintain lake levels in Redfield Lake. All, or a portion, of this water is used in Redfield Lake each year.

Mr. V. W. Shally
January 27, 1975
Page 2

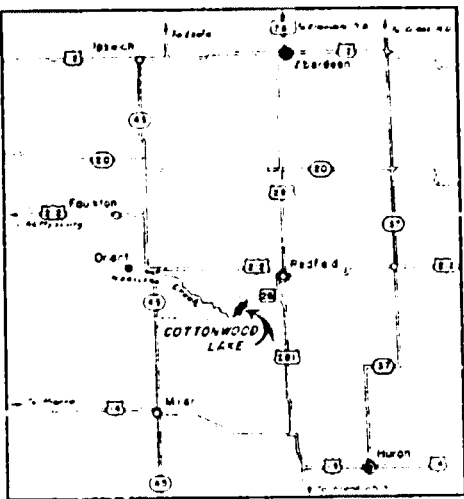
Thus, any water right issued would have to be for water that would otherwise overflow Redfield Lake spillway during the spring season. Thus, the evaluation to be made is whether a diversion system operating under a water right containing the indicated qualifications would be economically practical.

Another consideration might be to divert water out of the Faulkton Canal into Medicine Creek to flow into Cottonwood Lake. This scheme will depend upon completion of the first stage Oahe Unit.

Very truly yours,

Vern W. Butler
Secretary

VWB:yjl



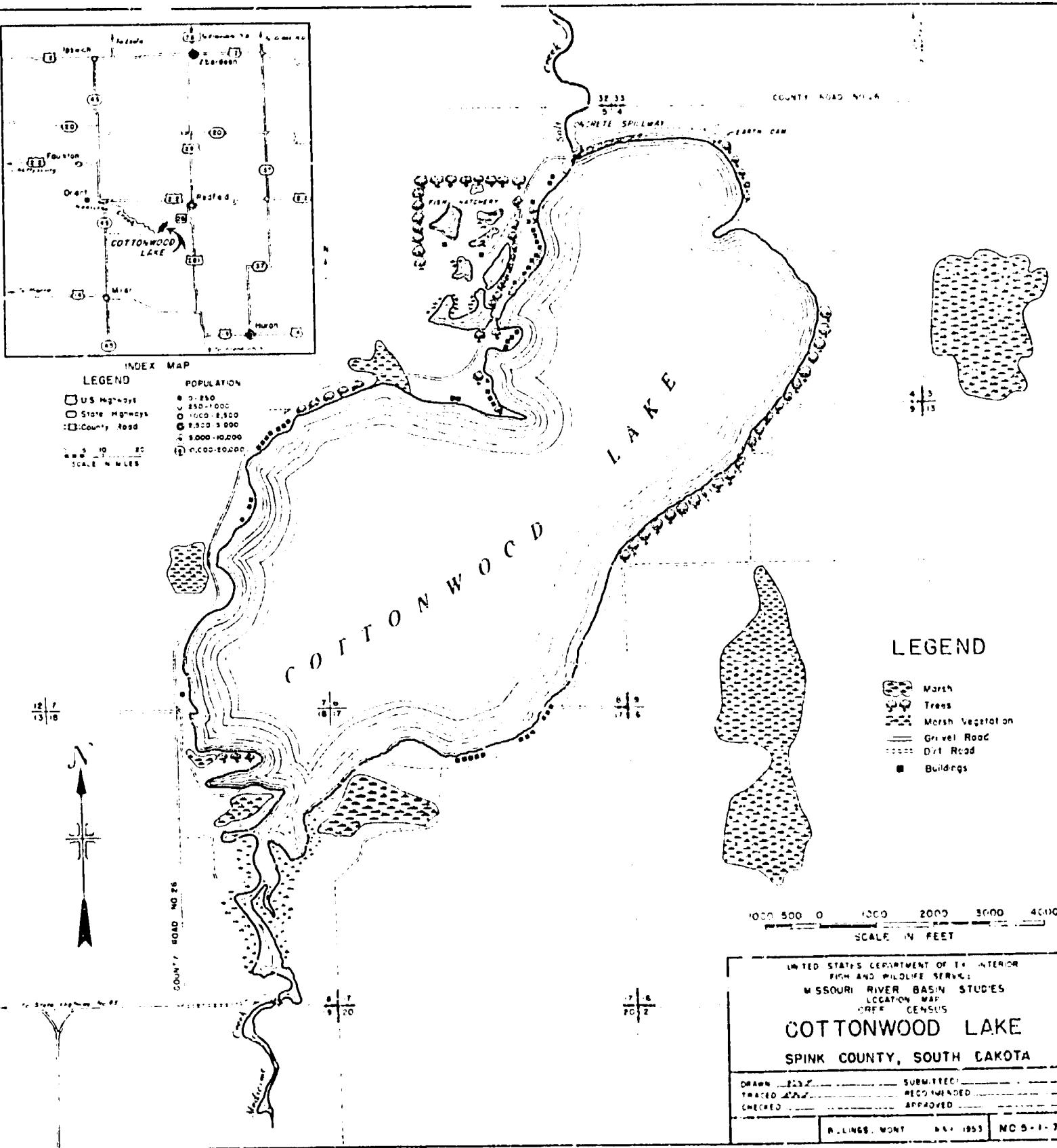
INDEX MAP

LEGEND

- US Highways
- State Highways
- County Road

- POPULATION
- 0-250
 - 250-1,000
 - 1,000-5,000
 - 5,000-10,000
 - 10,000-20,000

SCALE IN MILES



LEGEND

- Marsh
- Trass
- Marsh Vegetation
- Gravel Road
- Dirt Road
- Buildings

SCALE IN FEET

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
MISSOURI RIVER BASIN STUDIES
LOCATION MAP
CENSUS

COTTONWOOD LAKE
SPINK COUNTY, SOUTH DAKOTA

DRAWN	SUBMITTED
TRACED	RECOMMENDED
CHECKED	APPROVED
R. LINES, MONT. MAY 1953 NC 5-1-7	

1434-3



Department of Water & Natural Resources

Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501-3181

September 21, 1988

Richard Beringson, Secretary
Department of Game, Fish and Parks
Anderson Building
445 E Capitol
Pierre SD 57501

Dear Mr. Beringson:

I am writing to notify you that pursuant to the Notice of Intent to Validate Vested Water Right Claims dated June 20, 1988 that I intend to oppose validation of all Department of Game, Fish and Parks Vested Water Right Claims for lakes for the following reasons:

1. Until the outlet elevation for each lake is surveyed and the outlet elevation is set by the Water Management Board.
2. To allow the Vested Water Right Claim to be amended, if necessary, as follows:
 - a) Include the outlet elevation;
 - b) To correct the amount of water claimed;
 - c) To add the qualification that a vested claim is subject where necessary to installation of a concrete outlet structure to assure retention of the outlet as the established elevation; and
 - d) To add any amendments and qualifications necessary to clarify a Vested Right Claim.

Also, that I intend to oppose validation of all Department of Game, Fish and Parks Vested Water Right Claims for dams to allow the Vested Water Right Claim to be amended, if necessary, as follows:

1. To include the spillway elevation;
2. To correct the amount of water claimed; and
3. To add any amendments and qualifications necessary to clarify a Vested Right Claim.

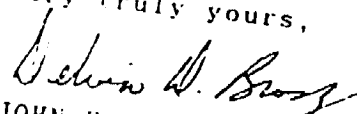


September 21, 1988
Richard Beringson, Secretary
Page 2

We will be working with your staff on these validations. We have already discussed setting outlet elevations before validating claims for lakes. Although the work necessary to complete the validation process will take several years to complete, the results should be of benefit to the public and to your Department. As the work is completed to validate each claim, the claim will be presented to the Water Management Board for validation.

Please advise if you have any questions.

Very truly yours,


for JOHN HATCH, Chief Engineer
Water Rights Division
605 773-3352

cc: Ron Koith, Department of Game, Fish and Parks

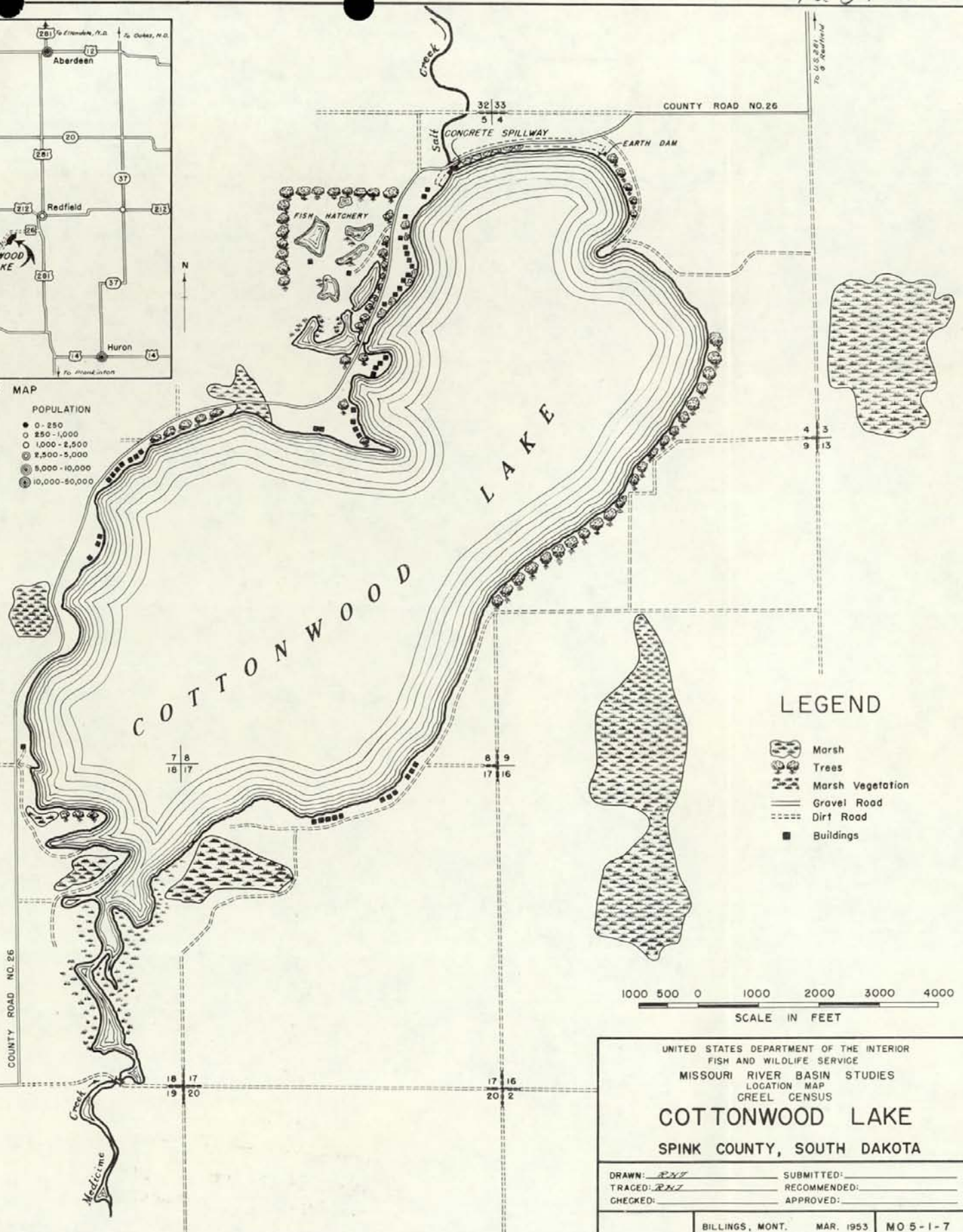
1634-3

1634-3



INDEX MAP
LEGEND
U.S. Highways
State Highways
County Road
SCALE IN MILES
0 5 10 20

POPULATION
0 - 250
250 - 1,000
1,000 - 2,500
2,500 - 5,000
5,000 - 10,000
10,000 - 50,000



LEGEND
Marsh
Trees
Marsh Vegetation
Gravel Road
Dirt Road
Buildings

1000 500 0 1000 2000 3000 4000
SCALE IN FEET

UNITED STATES DEPARTMENT OF THE INTERIOR FISH AND WILDLIFE SERVICE MISSOURI RIVER BASIN STUDIES LOCATION MAP CREEL CENSUS	
COTTONWOOD LAKE	
SPINK COUNTY, SOUTH DAKOTA	
DRAWN: <u>RNT</u>	SUBMITTED: _____
TRACED: <u>RNT</u>	RECOMMENDED: _____
CHECKED: _____	APPROVED: _____
BILLINGS, MONT. MAR. 1953 MO 5-1-7	

1634-3



Carnegie Library
5 East 5th Avenue
Redfield, SD 57469

Telephone: 605-472-4555
Fax: 605-472-4559
E-Mail: carnegie2@hotmail.com

Facsimile Transmission

To: S. Dak Department of Environment and Natural Resources Fax No.: _____

Department/Company Environment and

Date: 05/26/2021

From: Robert J Roeder

Department: SD DC

No of Pages including
the cover sheet: 7

Message (if any):

Section 402 Clean Water Act Violation
Request for High Water mark designation
for Cottonwood Lake Spink County
Robert J Roeder 05/26/2021

Note to Facsimile Operator: Please deliver this facsimile transmission to the above address. If you did not receive all of the pages in good condition, please advise by calling (605)472-4555 at your earliest convenience.



**DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 E. CAPITOL AVE
PIERRE SD 57501-3182
danr.sd.gov

April 7, 2022

NOTICE OF HEARING

TO: Robert Roeber Cottonwood Lake Area Property Owners
309 East 6th Avenue (see attached list dated April 6, 2022)
Redfield SD 57469

Ann Mines Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

David McVey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

FROM: Eric Gronlund, Chief Engineer *Eric Gronlund*
SD DANR, Water Rights Program

SUBJECT: Notice of Hearing to Consider Chief Engineer's Motion to Dismiss Petition

A petition has been filed by Robert Roeber pursuant to South Dakota Codified Law (SDCL) 43-17-28 and Administrative Rules of South Dakota (ARSD) 74:02:01:51 requesting the Water Management Board to set an Ordinary High Water Mark (OHWM) on Cottonwood Lake located approximately nine miles southwest of Redfield SD in Spink County. In response to receipt of the petition, the Chief Engineer of the Department of Agriculture and Natural Resources, Water Rights Program, has filed a motion to dismiss Mr. Roeber's petition (see enclosed "Chief Engineer's Motion to Dismiss" dated March 29, 2022).

The Water Management Board will conduct a hearing to consider the Chief Engineer's Motion to Dismiss Mr. Roeber's petition at 10:00 AM (Central Time), on Wednesday, May 4, 2022, at the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre SD. This hearing concerns only the motion to dismiss. If the motion is not granted by the Board, a later hearing will be scheduled to consider establishing an OHWM in a manner consistent with SDCL ch. 43-17. The time of hearing is an estimate and may be delayed due to prior items on the agenda. Notice will be provided if there is a change in the time or date of the hearing. If you are an affected party and want to participate remotely, connection information is available at <https://boardsandcommissions.sd.gov/Meetings.aspx?BoardID=106> or a livestream of the hearing is available at <https://www.sd.net>.

The hearing is an adversary proceeding and any party has the right to be present at the hearing and may be represented by legal counsel. These and other due process rights will be forfeited if they are not exercised at the hearing. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

Enclosed is a copy Mr. Roeber's petition and the Chief Engineer's motion to dismiss the petition. State law directs the Chief Engineer to provide Water Management Board members with a copy of all pleadings including the above items. The information being provided to you is also being sent to the Board members in advance of the hearing. Notices, orders, and other pleadings filed in this matter are posted on DANR's contested case page at <https://danr.sd.gov/public/ContestedCase.aspx>.

Contact Ron Duvall at the above Chief Engineer's address to request a copy of the petition or motion to dismiss. Notice is given to individuals with disabilities that this hearing is being held in a physically accessible place. Please notify the Department of Agriculture and Natural Resources at least 48 hours before the hearing if you have a disability for which special arrangements must be made at the hearing. The telephone number for making arrangements is (605) 773-3352.

Under SDCL 1-26-17(7) notices must state that "if the amount in controversy exceeds \$2,500.00 or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request to the agency no later than ten days after service of a notice of hearing issued pursuant to SDCL 1-26-17." This is a Notice of Hearing, service is being provided by direct mail to you, and the applicable date to give notice to the Chief Engineer is April 18, 2022. However, since this particular matter is a motion to dismiss and not a monetary controversy in excess of \$2,500.00 or termination of a property right, the Chief Engineer disputes the applicability of this provision and maintains that the hearing must be conducted by the Board.

As applicable, the following provides the legal authority and jurisdiction under which the hearing will be held and the particular statutes and rules pertaining to this application: SDCL 1-26-16 thru 1-26-28; SDCL 43-17-24.1, 43-17-28, 46-2-9; and Board Rule ARSD 74:02:01:51.

Questions regarding the hearing process may be directed to Ron Duvall, Water Rights Program at (605) 773-3352 or ron.duvall@state.sd.us.

Cottonwood Lake Area Property Owners

April 7, 2022

First name	Last name	Address	City state zip
Joshua	Schieffer	1000 Cottonwood Lane	Redfield SD 57469
Jerry J & James L Walker	Olmueiller	1001 Thompson Beach Road	Redfield SD 57469-7022
Nancy M	Byrum, Martha Grantor Trust	1006 Cottonwood Lane	Redfield SD 57469
Karen M & Robert	Valentine	1012 Lake Drive	Redfield SD 57469-7019
Susan	Stephenson	1016 E Third Street	Redfield SD 57469-1135
James R & Kristine L	Muellerberg	1016 W Second Street	Redfield SD 57469-1510
Richard & Dawn	Mattson	1017 SD Hwy 26	Redfield SD 57469-7025
Joshua & Shannon	Oakley	1017 Thompson Beach Road	Redfield SD 57469-7022
Jerry B & Janet	Stahl, Sharon L Living Trust	1041 SD Hwy 26	Redfield SD 57469-7025
	Johnson	1042 Cottonwood Lane	Redfield SD 57469-7027
	E & S Family Trust	10426 E Cedar Waxwing Court	Sun Lakes AZ 85248-7738
	Eaton	1075 SD Hwy 26	Redfield SD 57469
	Nelson, Reta Rose L/E Nelson 4d Trust	1110 N Harth Avenue Apt 5	Madison SD 57042-1072
	Carla C Revocable Living Trust Agreem	1124 W Sixth Street	Redfield SD 57469-2032
	Schade, George M Rev Liv Tr Agrmt & Schade, Carla C Rev	1124 W Sixth Street	Redfield SD 57469-2032
Jacqueline J & Joeleen A Lahm	Olson	1125 Whispering Pines	Billings MT 59101-7134
Laura C & Olson, Jacqueline J & Lahm, Joeleen A	Radtke	1125 Whispering Pines	Billings MT 59101-7134
Derek & Brenda	Merkel	11766 364th Avenue	Leola SD 57456-7203
Kyle & Sandra	Roberts	11868 Grouse Street NW	Coon Rapids MN 55448-1950
	Masat, Judy Family Trust	120 E 13th Avenue	Redfield SD 57469-1645
	Klt Cottonwood LLC	120 Orion Avenue	Pierre SD 57501-5665
	Wagner, Ron Trust 2020 & Joyce Trust 2020	1220 Oakwood Lane	Aberdeen SD 57401-4084
	Cottonwood Ranch LLC	12244 Greer Avenue NW	Maple Lake MN 55358-2204
	Betten	1257 SD Hwy 26	Redfield SD 57469-7008
Michael & Dawn Roth	Full	1305 SD Hwy 26	Redfield SD 57469-7013
Olivia	Wagner	1355 SD Hwy 26	Redfield SD 57469-7013
Brian	Ohm	1369 SD Hwy 26	Redfield SD 57469-7013
Ronald R & June M	Abeln	1373 SD Hwy 26	Redfield SD 57469-7007
Claude & Barbara	Patterson, Norma L Revocable Trust	1381 SD Hwy 26	Redfield SD 57469-7013
	Vogt	1383 SD Hwy 26	Redfield SD 57469-7013
Mark L	Leinen	1416 E Third Street	Redfield SD 57469-1903
Carol Ann Etal	Fordin	1425 E First Street	Redfield SD 57469-1919
Delbert E & Janelle J	Brown	1447 SD Hwy 26	Redfield SD 57469-7016
Lylic & Mardelle	Ford	1505 N Park View Place	Miller SD 57362-1802
Shon & Jessie	Mccooy, William E Etal % Schwab, Ginny	1519 N Harrison	Aberdeen SD 57401-1543
Brian & Virginia	Bain	1604 Carrington Avenue	Gillette WY 82718-7652
George	Rahn	16693 404th Avenue	Doland SD 57436-6305
Darin & Jessica	Devoynk	16711 396th Avenue	Frankfort SD 57440-6206
Edward & Cathy	Fricks	16835 395th Avenue	Frankfort SD 57440-6203
Casey & Malinda	Fey	16911 US Hwy 281	Ashton SD 57424-6101
Kevin	Siebrecht	17168 388th Avenue	Redfield SD 57469-6612
Mark & Pamela	Edgar	17314 368th Avenue	Rockham SD 57470-5312
Carisa	Giblin	17396 374th Avenue	Redfield SD 57469-6526
Francis & Carol	Esner	17409 393rd Avenue	Redfield SD 57469-6721
Darvin L	Dickhaut	17417 Railroad Street	Redfield SD 57469-6601
John P	Blackburn	175 Lakeview Terrace	Yankton SD 57078-6752
Landon	Schade	17691 371st Avenue	Zell SD 57469-5306
Randall & Stephanie	Waldner	17738 384th Avenue	Redfield SD 57469-7107
Tyson	Nuhsbaumer	17781 370th Avenue	Zell SD 57469-5304
Sherry	Binger	17843 377th Avenue	Redfield SD 57469-7005
Rex H & Sherry	Binger	17843 377th Avenue	Redfield SD 57469-7005
	Lake Township	17843 377th Avenue	Redfield SD 57469-7005
Daryl & Connie	Roos	18272 US Hwy 281	Tulare SD 57476-7100
Richard	Dorsev	1866 Sansa Drive	Mechanicsburg PA 17055-7535
Casev	Stoner	18704 385th Street	Tulare SD 57476-7605
Richard L/E	Bottum	18755 375th Avenue	Tulare SD 57476-7506
Dean & Holly	Bottum	18771 373rd Avenue	Tulare SD 57476-6105
Holly	Bottum	18771 373rd Avenue	Tulare SD 57476-6105
Rodney A & Mary K	Wagner	18970 SD Hwy 45	Miller SD 57362-6007
Gary & Julie	Wagner	19321 SD Hwy 45	Miller SD 57362-6011
Mary	Clegg % Kellogg, Kevin & Sandra	19620 366th Ave	Saint Lawrence SD 57373-6511
Kevin E & Sandra K	Kellogg	19620 366th Avenue	St Lawrence SD 57373-6511
	Schnitzer, Nancy Rev Liv Tr	2005 Wildridge Drive	Tallahassee FL 32303-7337
Ricky	Avery	203 W Fifth Street	Redfield SD 57469-1021
Kelly & Amber	Siebrecht	206 E 13th Avenue	Redfield SD 57469-1647
	Spink County	210 E Seventh Avenue	Redfield SD 57469-1299
Karen Lee	Buhl	211 Nelson Drive	Pierre SD 57501-4806
	Jones, Wilma D Etal	212 N Broadway	Miller SD 57362-1414
	Christman Family Lake Cottage Trust	2205 Berrywood Lane	Bloomington IL 61704-2449
	Christman, Melvin Etal. % Alaca Christman	236 N Jarida Ave	Tabor SD 57063-2011
	Klt Cottonwood LLC	2400 Carriage Court	Sioux Falls SD 57108-5203
Randall L & Vickie R	Anderson	2921 Oxford Court	Pierre SD 57501
	Ria Farms LLC	2921 Oxford Court	Pierre SD 57501-5638
Ruben Jr & Carmen L	Lapp	3009 Meadow Drive	Redfield SD 57469-1406
William & Brooke	Jones	303 W Eighth Avenue	Miller SD 57362-1656
Brian W & Tyann R	Jones	303 W First Avenue	Miller SD 57362-1306
Tim & Deborah M Dugan	Baxter	3040 Park Lane	Redfield SD 57469-1448
Robert D	Isaacson	305 E Second Street	Redfield SD 57469-1223
	S & S Cottonwood LLC	36413 183rd Street	Rockham SD 57470-5701
Mark & Terice	Ketelhut	36661 188th Street	St Lawrence SD 57373-6109
Gerald F & Sally L	Nuhsbaumer	37351 178th Street	Redfield SD 57469-5314
Richard M & Judy K	Wagner	37380 184th Street	Tulare SD 57476-5702

Cottonwood Lake Area Property Owners

April 7, 2022

First name	Last name	Address	City state zip
Judy K	Wagner	37380 184th Street	Tulare SD 57476-5702
	L Schultz LLC	37524 187th Street	Tulare SD 57476-7508
	Schultz, Wade B Trust	37524 187th Street	Tulare SD 57476-7508
	Appel, Roger L & Barbara E Living Trt Agreement	37640 178th Street	Redfield SD 57469-7006
Cassie & Tatum Zens	Binger	37848 181st Street	Tulare SD 57476-7012
Peri & Joyce	Marlow	38455 10th Ave W	Redfield SD 57469
Judyth J	Leroy & Virginia Living Rev Trust	38457 US Hwy 212	Redfield SD 57469-6630
Linda	Brandner-Woehl	38546 175th Street	Redfield SD 57469
Brett & Robin K	Tomsha	38631 180th Street	Tulare SD 57476-7108
	Jens	38663 182nd Street	Tulare SD 57476-7113
	Osborn Family Revocable Living Trust	38916 171st Street	Redfield SD 57469-6711
	Frankenstein, Ronald & Anita Trustees	39198 180th Street	Redfield SD 57469-7222
	Bindenagel, Arden & Deanna Living Trust	39586 176th Street	Frankfort SD 57440-6709
	Blackwell	406 Vista Drive	Miller SD 57362-1810
Kevin & Kimberly	Haring	409 Sunrise Cir	Garretson SD 57030-2093
Madelyn & Lyle	Rude	421 E First Street	Redfield SD 57469-1215
Resze	Cieberg	440 W Rushmore	Spearfish SD 57783-1322
Leroy	Kv 2020 Trust	4547 Crestview Drive	Huron SD 57350-6559
	Vermeulen	4903 Nonanna Street	Rapid City SD 57703-8921
T R & Amy A	Whetsel	509 E Sixth Street	Miller SD 57362-1124
Virgil Alan	Binger	5105 S Arden	Sioux Falls SD 57108-5150
Susan L	SD Game & Fish Dept Hbt Sec	523 E Capitol Avenue	Pierre SD 57501-318
	Morrow, Thomas R Revocable Trust	5950 84th Lane	Loretto MN 55357-8742
Kent & Lori & Joel & Susan	Grode	608 N Grand Avenue	Pierre SD 57501-1722
Donna D	Thomas	610 E Second Street	Redfield SD 57469-1228
Brett D & Jessica A	Spencer	612 Kathryn Avenue	Rapid City SD 57701
Gordon W	Muellerberg	622 E Seventh Avenue	Redfield SD 57469-1346
Lance & Kent	Schade	650 W 12th Avenue	Redfield SD 57469-1615
Charles R	Groft	714 W First Street	Redfield SD 57469-1108
Craig P & Pamela J Oesirae, Derick, & Dexter	Van Zee	718 E Second Avenue	Miller SD 57362-1108
William	Esser	721 E Sixth Street	Redfield SD 57469
Thomas	Gallup	721 E Third Street	Redfield SD 57469-1304
Mark, Allen & Mary Kaye	Holm	7501 E Palomino Road	Sioux Falls SD 57110-625
Michael	Eaton	76735 Bay Drive	Bloomington MN 55438
Kevin & Lindsay	Haider	770 Section Line Road	Wolsey SD 57384-6801
Michael & Beverly	Rogers	803 W Fifth Street	Redfield SD 57469-2019
	Rogers, Michael & Beverly Revocable Trust	803 W Fifth Street	Redfield SD 57469-2019
	Schurch, Kevin & Maxine Living Revocable Trust	809 Wedgewood W	Beresford SD 57004-2028
Michael, Marty And Colin	Pfister	8367 N Rude Street	Hayden ID 83835-8257
	Siedling, Robbi Rev Living Trust	8519 W Brynner Court	Sioux Falls SD 57107-8512
Raymond Lee & Brandon Dale	Whitley	910 E First Street	Redfield SD 57469-1102
Bruce	Johnson	925 E Eighth Avenue	Redfield SD 57469-1821
Patrick & Julie	Jungwirth	927 E Second Street	Redfield SD 57469-1130
Jeremiah William & Sara Jean	Kimlicka	932 E Second Street	Redfield SD 57469-1131
	Muellerberg, Mark & Sheila Living Trust	998 Cottonwood Lane	Redfield SD 57469-7000
	Muellerberg, Sheila Survivor's Trust & Mark & Bau, Delores Trustee	998 Cottonwood Lane	Redfield SD 57469-7000
Scott & Shell	Domke	PO Box 144	Truman MN 56088-0144
	Rude, Arien W Decedent's Trust	PO Box 17	Redfield SD 57469-0017
	Gross, Mark Remainder Interest Trust	PO Box 190	Redfield SD 57469-0190
Kenneth & Carinna	Fehlman	PO Box 203	Tulare SD 57476-0203
CH	Wendt % Moore, Gary	PO Box 234	Ashton SD 57424-0234
Gary E	Moore	PO Box 24	Redfield SD 57469-0024
Shane & Kristy Evans, Shawn & Toni	Wright	PO Box 24	Redfield SD 57469-0024
	Gordon, Larry & Beverly Family Trust	PO Box 282	Ashton SD 57424-0282
Chris P & Rhonda R/T	Nielsen	PO Box 68	Hitchcock SD 57348-0068
		PO Box 694	Tee SD 57064-0694

CERTIFICATION

The undersigned hereby certifies under the penalty of perjury that a true and correct copy of a Notice of Hearing dated April 7, 2022, concerning a petition to set an OHWM on Cottonwood Lake in Spink County filed by Robert Roeber (petition also enclosed) and the Chief Engineer's motion to dismiss the petition dated March 29, 2022, was served upon 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 on April 7, 2022.

Robert Roeber
309 East 6th Avenue
Redfield SD 57469

Cottonwood Lake Area Property Owners
(see attached list dated April 7, 2022)

Above also Sent Inter-office to:

Ann Mines Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

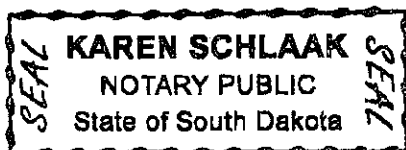
David McVey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501


Vickie Maberry
Water Rights Program, DANR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 7th day of April, 2022.


Karen Schlaak
Notary Public
My Commission expires April 1, 2025



STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
Fax (605) 773-4106
TTY (605) 773-6585
<http://atg.sd.gov/>

JASON R. RAVNSBORG
ATTORNEY GENERAL

RECEIVED

MAR 29 2022

FOR HUMAN RIGHTS
PROGRAM

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

March 29, 2022

Timothy Bjork, Chairman
DANR – Water Management Board
Joe Foss Building
523 East Capitol Avenue
Pierre, SD 57501

Re: *In the Matter of the Roeber Petition for Determination of Ordinary High
Water Mark of Cottonwood Lake in Spink County*

Dear Chairman Bjork:

Enclosed please find a copy of the Chief Engineer's Motion to Dismiss and
Certificate of Service in the above-entitled matter.

Respectfully,

A handwritten signature in cursive script, reading "Ann F. Mines Bailey".

Ann F. Mines Bailey
Assistant Attorney General

AFM/mn

Enclosures

By hand-delivery

cc w/encs: Robert Roeber (by U.S. mail)

Ron Duvall (by hand-delivery)

David McVey (by hand-delivery)

RECEIVED

MAR 29 2022

WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF THE ROEBER	)	
PETITION FOR DETERMINATION OF	)	CHIEF ENGINEER'S
ORDINARY HIGH WATER MARK OF	)	MOTION
COTTONWOOD LAKE IN SPINK	)	TO DISMISS
COUNTY	)	

Pending before the Board is a petition by Mr. Robert Roeber¹ requesting the Board to set an ordinary high water mark (OHWM) on Cottonwood Lake in Spink County.

South Dakota Codified Law, section 43-17-21 provides as follows:

The Water Management Board shall establish, pursuant to § 43-17-28 and in accordance with the contested case provisions of chapter 1-26, the ordinary high water mark and install benchmarks and may establish the ordinary low water mark on public lakes which are used for public purposes including, but not limited to boating, fishing, swimming, hunting, skating, picnicking, and similar recreational pursuits. The board may rescind and redetermine the ordinary high water mark and ordinary low water mark, in accordance with the contested case provisions of chapter 1-26, should significant natural changes occur in these levels as determined by the board.

The term "public lake" is not defined in statute or rule. However, upon reviewing the statutory scheme and pertinent caselaw, it becomes clear that the term "public lakes" is referring to meandered bodies of water. This is logical given that the purpose of setting an OHWM is to determine the rights of

¹ Mr. Roeber is an owner of land riparian to Cottonwood Lake in Spink County.

riparian landowners. See *SD Wildlife Federation v. Water Management Bd.*, 382 N.W.2d 26, 30 (S.D. 1986).

A meandered body of water is one which was given meander lines during the United States government's survey of lands in the 1800s. When a body of water was determined to meet certain qualifications, it was meandered on the survey and title of the bed of the water body was given to the State upon grant of statehood and admission into the union. In contrast, a nonmeandered body of water is one that did not meet the requirements to be meandered at the time of survey. As a result, the title of the beds of those nonmeandered bodies of water were available for public settlement. See *Parks v. Cooper*, 676 N.W.2d 823, 825, 831 (S.D. 2004).

In *South Dakota Wildlife Federation v. Water Management Bd.*, 382 N.W.2d 26, 30 (S.D. 1986), the South Dakota Supreme Court, after making reference to SDCL §§ 43-17-20 through 43-17-26,² stated,

The adjacent, riparian or upland owner takes to the edge of public lakes at the ordinary low water mark. See SDCL 43-17-2; *Anderson v. Ray*, 37 S.D. 17, 24, 156 N.W. 591, 593 (1916); *Flisrand v. Madson*, 35 S.D. 457, 470, 152 N.W. 796, 801 (1915). The riparian owner's title, however, is absolute only to the extent of the OHWM. As to the intervening shore between the ordinary high and ordinary low water marks, the riparian owner's title is qualified or limited by and subject to the public's right of access and use for navigating, boating, fishing, fowling and like public purposes. *Flisrand*, 152 N.W. at 801. See also, *State ex rel. Clark v. Deisch*, 38 S.D. 560, 564, 162 N.W. 365, 366 (1917). Thus, the riparian owner may not interfere with or prevent the public's use or lawful access. The State of South Dakota, on the other hand, owns the bed of the lake or that portion below the low

² These statutes were enacted in 1978 and are substantively similar to the statutes currently in force.

water mark. *Hillebrand v. Knapp*, 65 S.D. 414, 418, 274 N.W. 821, 822 (1937).

See also *Matter of Determination of OHWM and Outlet Elevation for Beaver Lake*, 466 N.W.2d 163 (S.D. 1991). The reference to the State's ownership of the land below the OLWM indicates that the Court defined "public lake" as a meandered body of water. As a result, given that "public lake" necessarily means a meandered body of water, the Board's authority to set an OHWM extends only to meandered bodies of water and not to nonmeandered bodies of water.³

The body of water at question in this petition, Cottonwood Lake located in Spink County, is a nonmeandered body of water. At the time the United States government conducted its survey in 1882, the survey instructions required the surveyor to draw meander lines around "all lakes, bayous, and deep ponds, which may serve as public highways of commerce. Shallow lakes or ponds, readily to be drained or likely to dry up, are not to be meandered. Lakes, bayous, and ponds lying entirely within a section are not to be meandered." *Instructions of the Commissioner of the General Land Office to the Surveyors General of the United States Relative to the Survey of the Public Lands and Private Land Claims*, May 3, 1881, found at <https://www.blm.gov/sites/blm.gov/files/histrect.pdf>, p. 528. The surveyor's notes on Amended Plat of Cottonwood Lake, dated December 13, 1883, shows that a determination was made to not draw meander lines around Cottonwood Lake, but rather to "protract the lines of survey over it by imaginary lines." As

³ Additionally, it requires that the reference to "public lake" in SDCL § 43-17-28 be defined as meandered body, resulting in the conclusion that Mr. Roeber is not a proper person to request determination of an OHWM.

a result, the entirety of the bed of Cottonwood Lake did not pass to the State upon statehood but rather was open to settlement. In fact, the majority of the lakebed, with the exception of the east half of Section 8 and the southwest quarter of Section 4, was transferred to private parties through federal patents.

This is important because it means that the State does not have ownership of the entirety of the bed of Cottonwood Lake below the OLWM. Thus, determination of the OHWM and OLWM has no meaning. A riparian landowner of Cottonwood Lake owns whatever his patent or deed set forth. There is no public easement to use the land between the OHWM and the OLWM of Cottonwood Lake.⁴ Accordingly, the reading of "public lake" to mean meandered body of water divests the Board of jurisdiction to set an OHWM on Cottonwood Lake in Spink County.

Additionally, a review of water rights law and procedures further affirms that the Board's jurisdiction to set OHWMs extends only to meandered bodies of water. Until 1982, rules existed that clarified that the Water Management Board and its predecessor, the Water Rights Commission, would set OHWMs and OLWMs only on meandered waters and then only when it would be in the public interest. See ARSD §§ 74:02:03:02 (repealed) and 74:02:03:03 (repealed). Those rules were apparently repealed because it was believed that

⁴ Rather, under the current law with regard to nonmeandered bodies of water, the public has only the right to use the water and may not use the bed without permission of the landowner. See SDCL §§ 41-23-15 and 41-23-18.

the statutes encompassed those rules and established the same procedure.⁵ This history lends further support for the concept that there is no authority to set OHWMs and OLWMs on nonmeandered bodies of water.

Given that the term "public lake" as used in ch. 43-17 refers to meandered bodies of water, Mr. Roeber does not satisfy the requirements of SDCL § 43-17-28. South Dakota Codified Law, section 43-17-28 provides in pertinent part as follows:

The Water Management Board shall determine any ordinary high or low water mark upon receiving a written request from an owner or lessee of real property riparian to a public lake, from twenty-five electors of the state or from a person seeking to develop, with approval by the Department of Game, Fish and Parks, the bed of a public lake for wildlife management purposes.

Though Mr. Roeber is a riparian owner to Cottonwood Lake, Cottonwood Lake is not a "public lake" as understood by this chapter.

Finally, the Board should dismiss the petition as it fails to meet the requirements of ARSD § 74:02:01:51, which provides as follows:

Persons, as specified in SDCL 43-17-28, submitting a request to determine an ordinary high or low water mark shall provide the following information:

- (1) The authority by which the request is presented;
- (2) The name of the person, agency, or group submitting the request;
- (3) The name and location of the lake;
- (4) The requested action and reasons for the action; and
- (5) The signature of the person or the authorization of the group or agency making the request.

⁵ The minutes from the meeting at which the Water Management Board approved the repeal of these rules provide that Mr. Hatch, the Chief Engineer at the time, "stated that the purposes of the amendments is to delete sections that are already in the Ordinary High Water Mark Statutes. The remaining sections are already established procedure."

The petition presented by Mr. Roeber does not provide the authority of the request presented or the reasons for the requested action. The entirety of the petition reads as follows: "Request for High Water mark designation for Cottonwood Lake Spink County." Accordingly, the Chief Engineer requests that the Board dismiss the petition for the establishment of an OHWM on Cottonwood Lake in Spink County for lack of jurisdiction.

Dated this 29th day of March 2022.



Ann F. Mines Bailey
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
*Counsel for Chief Engineer and Water
Rights Program*

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

IN THE MATTER OF THE ROEBER	)	
PETITION FOR DETERMINATION OF	)	CERTIFICATE OF SERVICE
ORDINARY HIGH WATER MARK OF	)	
COTTONWOOD LAKE IN SPINK	)	
COUNTY	)	

The undersigned hereby certifies that true and correct copies of the Chief Engineer's Motion to Dismiss, in the above matter, were served by U.S. mail, first class, postage prepaid, upon the following on this 29th day of March 2022:

Robert Roeber
309 East 6th Avenue
Redfield, SD 57469

And on the same date the original was hand-delivered to Ron Duvall, DANR – Water Management Board, Joe Foss Building, 523 East Capitol Avenue, Pierre, SD 57501; a copy was hand-delivered to Timothy Bjork, Chairman, DANR – Water Management Board, Joe Foss Building, 523 East Capitol Avenue, Pierre, SD 57501; and a copy was hand-delivered to David McVey, Assistant Attorney General, Counsel for Water Management Board, Office of the Attorney General, 1302 East Highway 14, Suite 1, Pierre, SD 57501-8501.


Ann F. Mines Bailey
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
*Counsel for Chief Engineer and Water
Rights Program*

and, with the shape of the aquifer where those domestic wells are at a much higher elevation than the irrigation wells, those domestic wells could potentially be seeing an impact much sooner than the wells that are at a lower elevation.

Ms. Kilts stated that based on the information the Water Rights Program currently has, she cannot say with reasonable probability that that unlawful impairment will not occur should this application be granted.

Mr. Larson asked if the deferral could be shorter than two years. Ms. Kilts answered that it will depend on what we see once the new observation wells are installed and the Water Rights Program starts monitoring the water levels to see what happens when the irrigators start pumping. It could take longer than two years or it could be shorter; it will depend on what happens once data is available.

Motion by Comes, seconded by Larson, to defer Water Permit Application No. 8579-3, Brett Guthmiller, for up to two years. A roll call vote was taken, and the motion carried unanimously.

Ms. Mines Bailey, on behalf of the Water Rights Program, waived Findings of Fact and Conclusions of Law.

CONSIDER CHIEF ENGINEER'S MOTION TO DISMISS ROBERT ROEBER PETITION TO ESTABLISH ORDINARY HIGH WATER MARK ON COTTONWOOD LAKE IN SPINK COUNTY: Ms. Mines Bailey stated that in reviewing the statutes and pertinent caselaw, it became clear that the Water Management Board's authority regarding setting an ordinary high water mark extends to meandered bodies of water and not to nonmeandered bodies of water.

The petition submitted by Mr. Roeber is a request to set the ordinary high water mark for Cottonwood Lake in Spink County. Cottonwood Lake is considered a Section 8 lake under the nonmeandered water law, so it is currently open to the public. However, in reviewing SDCL 43-17-21, which authorizes the board to set ordinary high water marks, and SDCL 43-17-28, which provides the method by which someone can petition the board for an ordinary high water mark, it becomes clear that public water is defined as a meandered water, because the purpose of setting an ordinary high water mark or an ordinary low water mark is to determine public use access rights.

Most often in the case of a meandered body of water, it is the state that owns the bed of the water body, and the riparian landowner owns to the ordinary low water mark, but it is subject to an easement for the public use between the ordinary high water mark and the ordinary low water mark. The purpose of setting the ordinary high and ordinary low water marks is to determine where that public easement is. In a nonmeandered body of water, the lakebed is privately owned for the most part. In this instance, the state owns certain small parcels of Cottonwood Lake; however, the majority of Cottonwood Lake was open for public settlement, and the vast majority of it is owned by private individuals. In this case, there is no public easement between the ordinary high and ordinary low water marks. The use of those lands and that water is governed by a specific chapter in South Dakota law.

Water Management Board
May 4, 2022, Meeting Minutes

Ms. Mines Bailey stated that after reviewing SDCL 43-17-28, it became clear to her that the board's authority extends to meandered bodies of water and not nonmeandered bodies of water. In SDCL 43-17-28, which is the means by which one can petition the board, if you define public lake as a meandered body of water, Mr. Roeber would not be the proper person to come before the Water Management Board to make this request because Cottonwood Lake is a nonmeandered body of water. Moreover, the rules that the Water Management Board has promulgated setting out what a petition for an ordinary high water mark should contain does have certain requirements. This particular petition is merely one sentence requesting an ordinary high water mark, and the petition is signed, but it fails to provide authority or the reasons for the requested action.

At one point in time, the only way the Water Management Board or its predecessor would entertain a motion for an ordinary high water mark is if it was demonstrated to be in the public interest. If the board were to entertain that type of an argument, then South Dakota law has already governed the public use of Cottonwood Lake. It is specifically mentioned in the nonmeandered waters chapter of South Dakota law, and a determination of an ordinary high water mark in this instance would not be of great value; therefore, not in the public interest.

Ms. Mines Bailey asked the board to dismiss this petition for a lack of jurisdiction.

Robert Roeber was administered the oath by the court reporter.

Mr. Roeber requested that he be allowed to distribute copies of exhibits. Ms. Mines Bailey stated that she objected to the exhibits because this is not an evidentiary hearing; it is a hearing on the Water Management Board's jurisdiction; just the motion to dismiss, which is a question of law. Ms. Mines Bailey said she does not believe evidence is necessary, and she has not seen the exhibits.

Hearing Chairman Freeman agreed with Ms. Mines Bailey and the board's counsel that this is not the type of hearing where the board accepts any evidence. The question on dismissing the petition is simply a matter of law before the board, so at this time accepting exhibits would be inappropriate.

Mr. Roeber stated he is asking for a reasonable accommodation to present the exhibits. He said the issue is that the department came out in 2002 and gave a range for a high water mark from 1318 to 1314. The lake association needs to know the high water mark for shoreline stabilization and how high the septic tanks are set, and the lots. This is also needed for some of their Section 319 applications for the Clean Water Act. Mr. Roeber said he is asking for a reasonable accommodation here. The exhibits include pictures from 2004 when Lynn Beck with the Water Rights Program conducted a site visit. In 2011 the lake association applied for a Section 319 grant. Mr. Roeber said he has some damage on his shoreline for which he submitted an application in May. It has been a year since he submitted the petition. It went to the Attorney General's Office, the Secretary of State's Office and the Department of Agriculture and Natural Resources' office. Mr. Roeber said he is trying to offer an explanation on why an ordinary high water mark is needed at Cottonwood Lake. The Cottonwood Lake Association is in a debate at this time to raise the level of the lake for fishing, etc. and a high water mark needs to be

Water Management Board
May 4, 2022, Meeting Minutes

established so the association knows what the elevation is. The properties and septic systems need to be in compliance with the Clean Water Act, and some people would like to establish camping spots. The flood plain maps have changed twice in the last 10 to 15 years, and the association needs to establish the high water mark so it knows where to build. The association is also going through the James River Water Development District to get a 401 and 405 Permits, and the application asks for how much fill to put below or above the high water mark. Mr. Roeber said the water board had people at the lake in 2002, but now there are barriers to what can be done. The association has been waiting for years, and every day they are waiting Mr. Roeber can't do his shoreline repair work from the damage. He said regarding the James River, Rocky Knippling is applying for a Section 319 grant and the James River will also need a high water mark established.

Mr. Roeber said the association could hire an engineer to set the high water mark, but technically it should come through the Water Management Board.

Hearing Chairman Freeman said Mr. Roeber is welcome to leave the information with the Water Rights Program.

Ms. Mines Bailey stated based on the interpretation of South Dakota Supreme Court of the pertinent statutes, a public lake is properly defined as a meandered body of water. If the Water Management Board agrees, that would mean the board has been divested of jurisdiction to set an ordinary high water mark on a nonmeandered body of water.

In response to questions from board members, Ms. Mines Bailey stated that without having reviewed the specifics of the Clean Water Act or any of the Section 319 grant applications that Mr. Roeber referred to, she believes that a private landowner in this situation would be able to make those decisions without the determination of an ordinary high water mark. She does not believe the board has the authority for the reasons set out in her brief. Perhaps something could be done by the legislature to provide such authority to some board or entity. At the time of surveying the lake in the 1800's, the belief was that this lake would dry up or be drained. Ms. Mines Bailey said she believes that there is no authority for the Water Management Board to set an ordinary high water mark on this lake and she does not believe that it would be in anyone's interest to set an ordinary high water mark. Ms. Mines Bailey said she believes that the landowners around the lake are free to do with their land what they so please within the confines of the law. Ms. Mines Bailey said she has not looked at the nonmeandered statutes specifically with that question in mind, but she does not believe there is anything there that would prohibit them taking some action with their land. For drainage they may run into a federal issue with the Corps of Engineers if it's considered a wetland or some sort of wetland mitigation requirement, but she believes they are free to use their land in whatever way the other aspects of the law permit.

Mr. Roeber said the Corps of Engineers requires 401 and 404 Permits for any digging in the water. In order to complete an application for those permits, he needs to know how much fill he is going to put below the high water mark, so it mitigates with what he is going to remove. With the flooding in 1997, there were so many people applying for permits that the Corps of Engineers allowed people to get permits. Stephanie Herseth had a water forum and the head of the Corps

of Engineers from the Omaha District spoke. At that time, permits were required and then that aspect was waived because of the number of permit applications being submitted due to the erosion damage to the shorelines and the sediment going into the lake. Mr. Roeber said the lake association is trying to lower the sediment going into the lake, but every day that nothing is done and the wind is blowing, it is eroding more land into the lake.

Mr. Roeber said he has sent information to an environmental attorney from Chicago. The lake association is looking for pro bono representation. He has also sent information to some senators, and he has filed an issue with the Eighth Circuit Court on this because of a 1997 Supreme Court ruling on property rights.

Motion by Larson, seconded by Comes, to grant the motion to dismiss the petition for the establishment of an ordinary high water mark on Cottonwood Lake in Spink County for lack of jurisdiction. A roll call vote was taken, and the motion carried unanimously.

Ms. Mines Bailey will prepare an Order consistent with the board's ruling on the motion to dismiss the petition.

CONSIDER APPLICATION NO. 2840-2, RAPID VALLEY SANITARY DISTRICT – WATER SERVICE, TO RESERVE WATER FOR FUTURE USE: Hearing Chairman Freeman requested appearances.

Ann Mines Bailey, Assistant Attorney General, appeared on behalf of the chief engineer.

Talbot Wieczorek, attorney from Rapid City, appeared on behalf of Rapid Valley Sanitary District.

Ms. Mines Bailey offered Exhibit 1, the administrative file which includes the application, the report and chief engineer's recommendation, and the petition bringing this matter to a contested case. Hearing Chairman Freeman admitted the exhibit into the record.

Ms. Mines Bailey called Mark Rath who had been administered the oath earlier in the meeting.

Mr. Rath testified that he is an engineer with the DANR Water Rights Program. He has worked for the department for 32 years. He is the lead surface water engineer responsible for water rights issues with lakes and streams.

Mr. Rath did the technical review for Future Use Permit Application No. 2840-2, and he prepared a report on the application.

Future Use Permit Application No. 2840-2 proposes to reserve for a future use water permit to appropriate 6,050 acre-feet of water (ac-ft) annually from the Missouri River. The Missouri River diversion would be located on the Oahe reservoir reach between the Cheyenne River confluence and Oahe dam in Haakon and Stanley counties, respectively.

SDCL 46-2A-10 and 46-5-38.1 set out the criteria and conditions under which a future use