

1. Considered SEPT 25 1980 1:00 P.M.
2. Name of Applicant SOUTH LINCOLN RURAL WATER SYSTEM
3. Post Office Address Box 193, CANTON 57034
4. Amount of Water Claimed NO ADD'L (2.0)
5. Source of Water Supply 650'; 515' OR 620' WELL
6. Water to be used for RWS
7. Acres to be irrigated — maximum
acre feet
8. Water to be diverted and used in LINCOLN County
about — miles of —
9. PROOF OF PUBLICATION Received (X) 12-19-80
Not Received —

APPLICATION

Approved 11-10-80
Subject to —
Not Approved —
Action deferred —

Priority — Date —
Received 8-8-80 Application Complete (yes) no — FEE N/A
Remarks —

Date Information and/or
fee or corrected Application received —
Period of Annual use CONTINUOUSLY

WATER QUALITY N/A Received yes — no — APPROVED/CONDITIONAL (Circle one)
WI-1 Description same as application yes — no — Remarks —

Disapproved — Returned —

Diversion Point —

Lands to be irrigated —

WELL
LOG

Remarks —

Driller — Licensed yes — no —

Depth —

MAP Map No. 3743-3 Map located in Water Right _____ Map file _____

Type of Map drawn Prepared by John Madden P.E.

+++++

REVIEWED This Application was reviewed within 30 days of date received, accepted as complete, Number assigned and written up for advertisement before the Board on Sept 25, 1980

Burt F. Jones
(Signed)

+++++

PROTESTS Letters/Petitions in File - yes _____ no _____ Remarks _____

REMARKS Date
F.F. & C Final Decision, including F.F. S C of Law were adopted _____
OF LAW, Date
FINAL Final Decision mailed to parties and/or parties notified that Final Decision
DECISIONS was adopted _____
ETC.

Remarks: _____

No. 4300-3AMap No. 3763-3 Water Division No. 3 Big Sioux River District
Above for Office Use 10170203

APPLICATION FOR PERMIT To Appropriate Water within the State of South Dakota

Check one of the following: Modification of Existing Permit No. 4300-3.

New ☐ Vested Right ☐ Future Use ☐Change in Diversion ☒ Additional Diversion ☐Change in Acreage ☐ Additional Acreage ☐1. Name of Applicant South Lincoln Rural Water System Phone No. 605-987-2533Post Office Address Box 193 Canton State South Dakota 57034
(Street, RR, or Box) (Town) (Zip Code)If a corporation show date and place of incorporation SLRWS - 12/21/762. Method of accomplishing work (contract, employment of others, or by direct labor) Employment of others3. Name of diversion work South Lincoln Rural Water System - Well Field No. 14. Amount of water claimed (cubic feet per second) 2.0 cfs (3 wells)5. Source of water supply Dakota Sandstone6. Location of point of diversion (1) Sec. 20, T98N, R50W; (2) Sec. 32, T98N, R50W;
(3) Sec. 36, T98N, R51W; or, SE $\frac{1}{4}$, Sec. 35, T98N, R50W; or West 100 acres,
T98N, R50W County Lincoln
SW $\frac{1}{4}$, Sec. 36, T98N, R50W; or, W $\frac{1}{2}$, SE $\frac{1}{4}$, Sec. 36,7. Annual period or periods during which water is to be used 12 months/year8. Use to be made of water, (irrigation, industrial, municipal, commercial, recreation, etc.) domestic9. For irrigation use, Total number of acres to be irrigated

List below each forty acre subdivision, or lot, or fraction thereof and show number of acres to be irrigated in each.

Land Description	No. Acres Irr.

Land Description	No. Acres Irr.

Attach sheet if more space is needed

10. Time required to complete construction of water supply system 4 years. Additional time required to complete application of water to the proposed beneficial use 1 years.11. Choice of county newspaper for publication of Notice of Intent to Appropriate Water Sioux Valley News
Canton, South Dakota

12. Principal Features of the Proposed Water Supply System.

A. Works proposed to divert water from its natural source.

Gravel Pack Wells

B. Works proposed to transport water to place of use.

Rural water system pipeline network.

C. Works proposed to apply water to beneficial use.

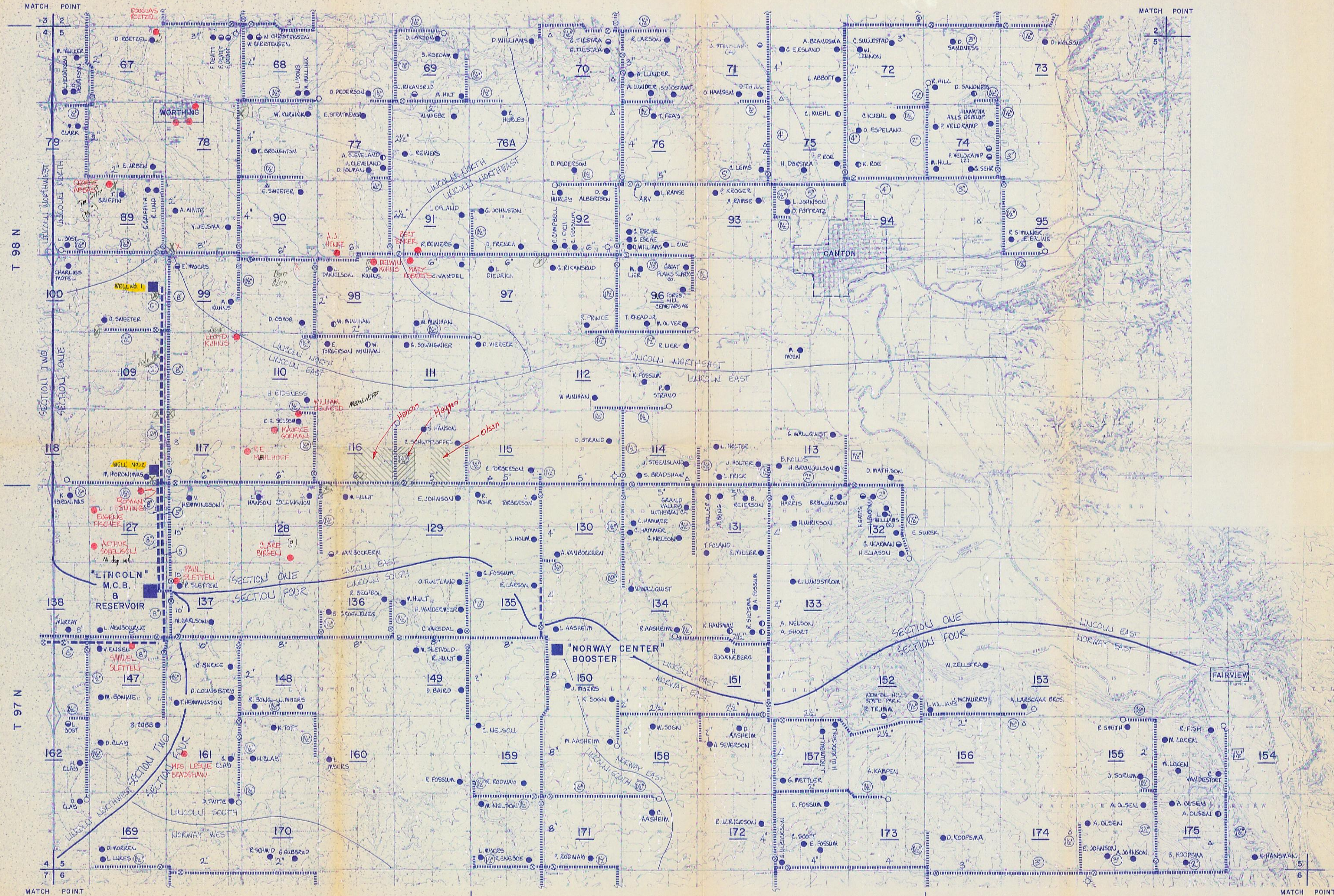
Individual farm/city distribution systems.

Estimated Total Cost \$ 8,125,000.00Attachments: Attach Form 2A if diversion from a well or dugout, or if storage of water, is proposed. Attach map.
(see instructions concerning preparation.)

STATE OF SOUTH DAKOTA)

County of Lincoln) ss.I, Clifford L. Appren the applicant, certify that I have read the foregoing application and have examined the attached map and that the matters therein stated are true and that I intend, and am able to complete the necessary constructionSigned Clifford L. Appren
3rd day of September, 1980
Clifford L. Appren
Notary Public (or other qualified officer)

Subscribed and sworn to before me this



R 48 W

WATER RIGHT APPLICATION APPROVAL

The Board of Water Management hereby approves Water Right Application No. 4300-3A

SOUTH LINCOLN RURAL WATER SYSTEM Box 193, CANTON
(Applicant) (Post Office Address)
SOUTH DAKOTA 57034
(State)

With the following qualifications.

See attachment # 2

Date of first receipt of application September 8, 19 80
Date of return to applicant for correction, amendments or changes required _____, 19____
Date of receipt of corrected application _____, 19____
Approved November 20, 19 80, Recorded in Book 21 Page 77A

WATER RIGHT PERMIT NO. 4300-3A

The Board of Water Management hereby grants and issues this Water Right Permit No. 4300-3A authorizing the construction of the water use system and the putting of water to beneficial use as stated in the Application and as qualified in the Water Right Application approval, subject, however, to the following limitations and conditions:

1. The date from which applicant may claim right is August 30, 19 77
2. The equivalent of at least one-fifth of the work above specified is to be completed on or before November 20, 19 82
3. The whole of said work is to be completed on or before November 20, 19 84
4. The limit of time from proof of beneficial use of water appropriated in accordance herewith is November 20, 19 85
5. The water appropriated shall be used for the purpose of Rural Water System Use

6. The prior right of all persons who, by compliance with the laws of the State of South Dakota, have acquired a right to the use of water must not be injuriously affected by this appropriation.

7. The amount of the appropriation herein granted shall not exceed No additional cubic feet per second; neither shall it exceed the capacity of the above described water supply system, nor shall it exceed the amount of water needed for ~~beneficial uses served, and if for irrigation purposes said appropriation must be limited to not more than 2 acre feet per acre per year and be limited to not more than one-seventieth (1/70) of one cubic foot of water per second of time for each acre of land to which water is actually and beneficially applied~~ used for rural water system use

for irrigation on or before November 20, 19 85; said water to be used during the following described annual period: continuously

Witness my hand this 22nd day of December, 19 80

THE BOARD OF WATER MANAGEMENT

By: John Hatch

Chief Engineer, Water Rights JOHN HATCH

Certificate of Construction Issued _____, 19____

Water License Issued _____, 19____

HURON DRILLING INC. DRILLERS LOG

#6 3500 SEP 12 '977

PAGE NO.

JCB NAME		LOCATION		DATE	RIG NO.	FOREMAN
Rural Water - Lincoln County		S.E. -32-98-50 Carrington, North Dak.		7/20/77	9	Tom Rathjen
DEPTH	TIME	REMARKS				
1	20	3-15' yellow clay				
2	40	15-20 blue clay cased with 2" plastic				
3	60	20-40 blue clay 80 ft. slotted @ bottom				
4	80	40-60 blue clay pumped 15 GPM				
5	100	60-77 sand W.H. 167				
6	120	77-80 blue clay				
7	140	80-100 blue clay				
8	180					
9	180	100-115 sandy				
10	200	115 - shale				
11	220	Hard Rock @ 165				
12	240					
13	260					
14	280					
15	300					
16	320	Green Horn @ 325				
17	340	325-360 sandy				
18	360					
19	380	380-390 streaked				
20	400	390-400 no good				
21	420	400-410 no good				
22	440	410-420 streaked				
23	460	425-440 good sand				
24	480	440-460 fair sand				
25	500	460-480 fair sand				
26	520	480-500 good sand				
27	540	500-520 good sand				
28	560	520-540 good sand				
29	580	540-550 good sand				
30	600	550-560 no good				
31	620	560-580 hard sand				
32	640					
33	660	T.D.	580-583 hard sand			
			583-600 good sand			
			600-610 good sand			
			610-620 - no good			
			620-640 good sand			
			640-650 good sand			

HURON DRILLING INC. DRILLERS LOG

PAGE NO.

South Lincoln Rural Water Assoc.

R. Hammer, Sheet #126

RH#1-SW-36-98-51

February 8, 79
DATE

12
RIG NO.

K. Onberg;
Jack Kuehl
FOREMAN

JOB NAME

LOCATION

REMARKS

Jt No.	DEPTH	TIME	LOCATION	DATE	RIG NO.	Jack Kuehl FOREMAN
				REMARKS		
1	20	8:35	AM 2-8-79 0-5	Top soil		
2	40	8:45	5-20	Yellow clay		
3	60	9:00	20-60	Blue clay		
4	80	9:45	60-70	Gravel		
5	100	10:05	70-80	Blue clay & gravel	1-sack Revert	
6	120	10:25	80-110	Blue clay		
7	140	11:15	110	Top Pierre Shale		
8	160	11:55	110-150	Shale		
9	180	12:20	150-160	Chalk		
10	200	1:10	160-260	Shale		
11	220	2:00	260-330	Shale with hardshells	1-Sack Bran @200 ft	
12	240	2:35	330-340	Sandy shale	Green Horn @ 300 ft	
13	260	3:25	340-360	Shale		
14	280	4:45	360-380	Sandy shale		
15	300	5:50	380-390	Fair sand		
16	320	6:20	390-445	Shale		
17	340	9:30	445-460	Fair to good sand		
18	360	10:00	460-465	Good sand		
19	380	10:45	465-475	Hard sand		
20	400	11:20	475-500	Good sand		
21	420	12:05	500-515	Fair to good sand (9 minutes)		
22	440	1:55	515-530	Rock		
23	460	2:15				
24	480	2:40				
25	500	2:51				
25	520	3:30				
26	530	TD				

TEST WELL BH #2
SOUTH LINCOLN RURAL WATER
NE-20-98-50

<u>DEPTH</u>	<u>DESCRIPTION</u>
0-3'	Top Soil
3-24'	Yellow Clay
24-100'	Blue Clay
100-144'	Sand & Gravel
144-372'	Shale
372-387'	Greenish
387-400'	Shale
400-416'	Sand
416-420'	Shale
420-434'	Sand Streaks
434-452'	Sand
452-480'	Tuff
480-514'	Streaked Sand
514-520'	Rock
520-552'	Good Sand
552-560'	Shale
560-592'	Shale with Streaks of Sand
592-600'	Fair Sand-Hard
600-620'	Fair Sand with Shale Streaks
620-640'	Mostly Shale

Total depth was 640' and completed 2/27/79. Static water level was reported as 167 feet.

12. Principal Features of the Proposed Water Supply System (continued)

D. Well Information

- (1) Drill Hole, Diameter 10-18 inches, Depth 650 feet
- (2) Casing, Type steel, Diameter 8-12 inches, Thickness 0.25 inch
(wood, concrete, steel, etc)
- (3) Screen, Type stainless steel, Diameter 5-10 inches, Length 100-125 feet
- (4) Gravel Pack, Thickness 3 inches, Length of gravel pack 200-250 feet

E. Dugout Information or Estimates

- (1) Surface dimensions, _____, Depth _____

F. Fill out for Either a Well or a Dugout.

(1) Water Bearing Materials. (Attach a copy of test well log)

Depth to top of water bearing material 425' / 465' / 480'

Depth to bottom of water bearing material 650' / 515' / 620'

Depth to water (ground surface to water level) 167' / 125' / 167'

(2) Distance to nearest existing household or livestock watering well. -Dakota Well

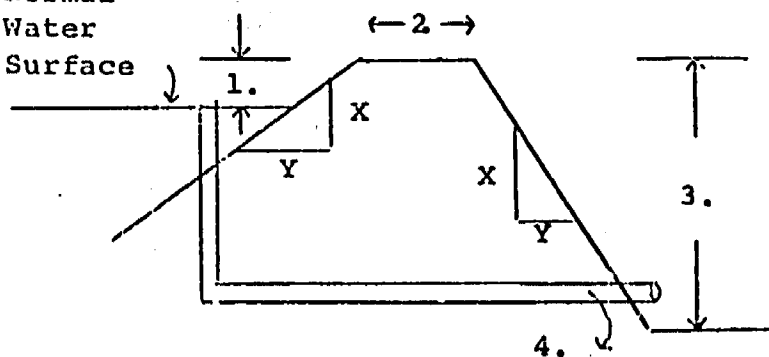
On same owner's property Approx. 2 1/2 miles

On property owned by others 1300 feet rds. (unless waived by well owner)

G. Water Storage Dams

If the proposed water use system contains one or more water storage dams, please show in the space below, the height, length, maximum water depth, surface area, drainage area, storage capacity, dam slope, dimensions, location and size of outlet works, of each storage dam. The location of each water storage dam should be shown on the water right map.

Normal
Water
Surface



1. Freeboard _____
2. Crest width _____
3. Height of Dam _____
4. Outlet dimensions:
 - Pipe diameter _____
 - Spillway width _____
- X & Y slope:
 - Upstream _____
 - Downstream _____
- Surface area of impoundment _____
- Drainage area above dam _____

Charles Hubbard
Signature of _____ licant

ATTACHMENT ON WATER PERMIT NO. 4300-3A
SOUTH LINCOLN RURAL WATER SYSTEM

The following supercedes the previous qualifications:

1. That the System be limited to an annual withdrawal of 455 acre-feet and that the total withdrawal be subject to review by the Board;
2. The System can be pumped with the two wells already completed, if annual withdrawal restrictions are limited to 304 acre feet until the 3rd well is developed and put on line (approved September 25, 1980 - Findings of Fact, Conclusions of Law approved November 20, 1980); spacing between wells must be at least 2½ miles;
3. That the rural water system wells approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The rural water system under this Permit shall control its withdrawals, to protect needed water supplies in adequate domestic wells or in wells having prior water rights;

Withdrawals will be restricted, if the aquifer head pressure declines 20 feet at designated measuring points during a four year period, beginning with the date the first water is pumped into distribution system. The head pressure decline to be determined by using an average of three of the seven proposed observation wells located at least two miles from one or more production wells. The lowest measurements, to be based upon an average of each observation well measurements taken over a three month period, will be used in determining head pressure decline;

4. If the aquifer head pressure does decline more than 20 feet in the four year period, or if observation well measurement data indicates the 20 foot head pressure decline level would be reached in the four year period, the rural water system upon order of the Board will have to change to a new source of water;

5. That no wells be located within 1,300 feet of existing Dakota Formation wells unless waived by the well owner;

6. That the Davis area well field be developed and therein be fully operational by November 1, 1981.

Priority for this Permit No. 4300-3A is established under Water Permit No. 4300-3.

ATTACHMENT #1

ATTACHMENT ON WATER PERMIT NO. 4300-3A
SOUTH LINCOLN RURAL WATER SYSTEM

This Permit is approved with the following qualifications:

1. That the System be limited to an annual withdrawal of 455 acre-feet and that the total withdrawal be subject to review by the Board;
2. That before any water is used, all proposed wells must be installed at least 2 1/2 miles apart, with all three wells ready for pumping prior to any use of water;
3. ~~That the system install one observation well into the upper layer of the Dakota formation about 200 feet from each production well to be used for monitoring drawdown near the production well.~~ *Change approved 7/9/81 FFCL 3/25/81*
4. That the rural water system wells approved under this permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The rural water system under this permit shall control its withdrawals, to protect needed water supplies in adequate domestic wells or in wells having prior water rights.

Withdrawals will be restricted, if the aquifer head pressure declines 20 feet at designated measuring points during a four year period, beginning with the date the first water is pumped into distribution system. The head pressure decline to be determined by using an average of three of the seven proposed observation wells located at least two miles from one or more production wells. The lowest measurements, to be based upon an average of each observation well measurements taken over a three month period, will be used in determining head pressure decline;
5. If the aquifer head pressure does decline more than 20 feet in the four year period, or if observation well measurement data indicates the 20 foot head pressure decline level would be reached in the four year period, the rural water system upon order of the Board will have to change to a new source of water;
6. That no wells be located within 1,300 feet of existing Dakota Formation wells unless waived by the well owner;
7. That the Davis area well field be developed and therein be fully operational by November 1, 1961.

Priority for this Permit No. 4300-3A is established under Water Permit No. 4300-3.

No. 4300-3A

Publish first publication, on or before September 11, 1980

NOTICE OF HEARING ON
APPLICATION TO APPROPRIATE WATER

Pierre, South Dakota 57501
September 8, 1980

Notice is hereby given that the South Lincoln Rural Water System whose post office address is Canton, South Dakota has made an application in accordance with the provisions of SDCL 46-1-1 thru 46-1-9, 46-1-14; 46-2-9 thru 46-2-11, 46-2-13; 46-5-1 thru 46-5-8; 46-5-10 thru 46-5-22, 46-5-31; 46-5-41; 46-6-3, 46-6-3.1, 46-6-5, 46-6-6.1, 46-6-10, 46-6-14 and Board Rules ARSD 52:01:01:01 thru 52:01:01:15, for a permit to change the location of Well #3, approved under Permit No. 4300-3, the point of diversion of which was to be located in the SW $\frac{1}{4}$ Section 36, T98N, R51W will be located in the SE $\frac{1}{4}$ Section 35, or W 100 acres of SW $\frac{1}{4}$ Section 36 or W $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 36, T98N, R50W. Said water to be used for the purpose of providing water supplies for the rural water system. No additional water is requested then has been previously authorized under Permit No. 4300-3.

The Rural Water System has also requested relief from the clause on Permit No. 4300-3 that all three wells be ready for pumping prior to the use of any water, and the clause stating that the Davis Well field be placed on-line prior to pumping from the Dakota Wells.

This Application No. 4300-3A will be considered by the Water Management Board at Meeting Room #1, Kneip Building, Church & Illinois Street, Pierre, SD upon the 25th day of September, 1980 at 1:00 p.m. The Board is authorized to make a determination on this application at the hearing. All interested persons may appear and be heard. Any person who may be affected by the Board decision who desires to present evidence or cross-examine witnesses according to SDCL 1-26 may notify the Board in writing prior to the hearing or orally at the hearing.

This hearing is an adversary proceeding. Any person has the right to be present or to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised at the hearing. Decisions of the Board may be appealed to the Courts as provided by law.

Any handicapped person wishing to attend this hearing can contact the Water Rights Division, DWRR, Joe Foss Building, Pierre, SD, prior to the hearing date for assistance to assure access to the hearing.

WATER MANAGEMENT BOARD

CURTIS F. JONES
Water Rights Specialist

BJ/gy

cc: South Lincoln Rural Water System, Canton, SD 57013

Affidavit of Publication

STATE OF SOUTH DAKOTA
COUNTY OF LINCOLN

ss:

Marie Beitzel

being first duly sworn on her oath says: that the Sioux Valley News is a legal weekly newspaper of general circulation as required by South Dakota Code of Nineteen Hundred Thirty-Nine, and any acts amendatory thereto, printed and published by the Sioux Valley News, Inc., in Canton, in said county and State, and has been such legal newspaper during the time hereinafter mentioned; that she is and during all of said time was bookkeeper of said newspaper and has personal knowledge of the facts stated in this affidavit; that the advertisement headed:

NOTICE OF HEARING ON APPLICATION TO APPROPRIATE WATER

a printed copy of which is hereto attached, was printed and published in said newspaper for TWO successive weeks upon the following dates, to-wit:

September 11, 18, 1980

that the full amount of the fees charged for publishing the same to-wit: the sum of \$23.98

inures solely to the benefit of the publishers of said newspaper; that no agreement or understanding for any division of this sum has been made with any other person; and that no part of said sum has been agreed to be paid to any person whomsoever.

Subscribed and sworn to before me this 18th day of September, 1980.

Vernon R. Thurston
Notary Public, South Dakota

(Seal)

NOTICE OF HEARING ON APPLICATION TO APPROPRIATE WATER

Pierre, South Dakota 57501
September 8, 1980

Notice is hereby given that the South Lincoln Rural Water System whose post office address is Canton, South Dakota has made an application in accordance with the provisions of SDCL 46-1-1 thru 46-1-9, 46-1-14; 46-2-9 thru 46-2-11, 46-2-13; 46-5-1 thru 46-5-8; 46-5-10 thru 46-5-22, 46-5-31; 46-5-41; 46-6-3, 46-6-3.1, 46-6-5, 46-6-6.1, 46-6-10, 46-6-14 and Board Rules ARSD 52-01:01:01 thru 52-01:01:13, for a permit to change the location of Well #3, approved under Permit No. 4300-3, the point of diversion of which was to be located in the SW 1/4 Section 36, T98N, R51W will be located in the SE 1/4 Section 35, or W 100 acres of SW 1/4 Section 35 or W 1/2 SE 1/4 of Section 36, T98N, R50W. Said water to be used for the purpose of providing water supplies for the rural water system. No additional water is requested - then - has been previously authorized under Permit No. 4300-3.

The Rural Water System has also requested relief from the clause on Permit No. 4300-3 that all three wells be ready for pumping prior to the use of any water, and the clause stating that the Davis Well field be placed on line prior to pumping from the Dakota Wells.

This Application No. 4300-3A will be considered by the Water Management Board at Meeting Room #1, Knapp Building, Church & Illinois Street, Pierre, SD upon the 25th day of September, 1980 at 1:00 p.m. The Board is authorized to make a determination on this application at the hearing. All interested persons may appear and be heard. Any person who may be affected by the Board decision who desires to present evidence or cross-examine witnesses according to SDCL 1-28 may notify the Board in writing prior to the hearing or orally at the hearing. This hearing is an adversary proceeding. Any person has the right to be present or to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised at the hearing. Decisions of the Board may be appealed to the Courts as provided by law.

Any handicapped person wishing to attend this hearing can contact the Water Rights Division DWR, Joe Foss Building, Pierre, SD, prior to the hearing date for assistance to assure access to the hearing.

Water Management Board
Burton F. Jones
Water Rights Specialist
(9-11; 18)

(77)





Joe Foss Building
Pierre, South Dakota 57501

Water Rights Division
605 773-3352

November 5, 1990

TO: Persons Interested in South Lincoln EWS Change in Diversion Point
FROM: John Hatch, Chief Engineer, Water Rights Division
SUBJECT: Reconsideration of Application No. 4300-3A

The Water Management Board will reconsider deferred Water Permit Application No. 4300-3A in Lincoln County at 10:45 a.m., November 20, 1990 at the Karl Mundt Library, Dakota State College, Madison SD.

This reconsideration hearing will be conducted in accordance with the provisions of SDCL 46-1-1 thru 46-1-9; 46-1-14; 46-2-9 thru 46-2-11; 46-2-13; 46-5-1 thru 46-5-8; 46-5-10 thru 46-5-22; 46-5-41; 46-6-3; 46-6-5; 46-6-6.1; 46-6-10; 46-6-3.1; 46-6-14 and Board Rules ARSD 52:01:01:01 thru 52:01:01:13.

This application was previously deferred by the Board until applicant firmed up a location for the requested change in diversion point; applicant has specified the well will be in the SE¹, Section 25, T98N, R50W. After reconsideration of the deferred application the Board can approve, conditionally approve, defer, or deny all or part of the Application.

This hearing is an adversary proceeding. Any person has the right to be present or to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised at the hearing. Decisions of the Board may be appealed to the Courts as provided by law.

You are also notified that SDCL 1-26 provides any interested party the opportunity to meet informally with the Water Rights Division Staff to discuss proposed recommendations by the staff to the Board prior to the scheduled hearing. If we do not hear from you, we will assure that the opportunity for an informal meeting is being waived and you wish to proceed directly to the hearing on the application before the Board.

Any handicapped person wishing to attend this hearing can contact the Water Rights Division, PWNR, Joe Foss Building, Pierre SD, prior to the hearing date for assistance to assure access to the hearing.

Very truly yours,

JOHN HATCH, Chief Engineer
Water Rights Division

JH:kw

Equal Opportunity Employer

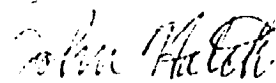
SOUTH DAKOTA Department of
Water & Natural Resources
Joe Foss Building
Pierre, South Dakota 57501
Water Rights Division
605 773-3352

November 7, 1980

TO: Persons Interested in South Lincoln RWS Change in Diversion Point
FROM: John Hatch, Chief Engineer, Water Rights Division
SUBJECT: Reconsideration of Application No. 4300-3A - Correction of Proposed Well Location Notice

The Notice of Hearing dated November 5, 1980 listed the proposed well location incorrectly as SE¹, Section 25, T98N, R50W. The correct location is SE¹, Section 35, T98N, R50W.

Very truly yours,


JOHN HATCH, Chief Engineer
Water Rights Division

JH:kw

Equal Opportunity Employer

STATE OF SOUTH DAKOTA)
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

IN RE: APPLICATION FOR PERMIT
4401-3 BY THE CITY OF WORTHING
AND SOUTH LINCOLN RURAL WATER
SYSTEM PERMIT NO. 4300-3A.

CIV. 81-103

BRIEF OF APPELLEE
CITY OF WORTHING

PRELIMINARY STATEMENT

This is an appeal pursuant to SDCL 1-26-30 of two administrative decisions made by the Water Management Board (Board) on January 29, 1981, at the Richard B. Kneip Building, Pierre, South Dakota. Subsequent to a full hearing on both permits, the Board granted water permit no. 4401-3 to the Town of Worthing (Worthing) and denied South Lincoln Rural Water System's (SLRWS) request for amendment from condition no. 7 of water permit no. 4300-3.

With the following additions, the City of Worthing does not dispute the procedural history as recorded in SLRWS's brief and as modified by the Board's brief, and will not duplicate that procedural history here.

ADDITIONS

I.

The Board first considered permit no. 4401-3 on May 24, 1979, at which time the Board deferred a decision thereon until the hearing involving the initial application of SLRWS was concluded.

II.

No one appeared in opposition to permit no. 4401-3 on May 24, 1979.

III.

That on January 29, 1981, on Motion of the City of Worthing, permit no. 4401-3 was amended from .8 c.f.s. and unlimited acre feet, to an additional .23 c.f.s. with an annual acre feet limitation of 65.

ISSUES

I.

IS SLRWS AN AGGRIEVED PARTY WITHIN THE MEANING OF SDCL

11.

WAS THE BOARD'S DECISION IN APPROVING WORTHING'S APPLICATION, BUT DENYING SLEWS'S REQUEST FOR RELIEF FROM QUALIFICATION NO. 7, EITHER ARBITRARY AND CAPRICIOUS OR CLEARLY ERRONEOUS?

SCOPE OF REVIEW

Worthing concurs with the Board's analysis of the proper scope of review in the instant case as contained in the Board's brief. More particularly, the City of Worthing concurs with the procedure outlined pursuant to SECL 1-26-1(2), and SDCL 1-26-50. It is apparent that SDCL 1-26-36 requires that the reviewing Court give great weight to the agency's findings made and inferences drawn on questions of fact. SDCL 1-26-36 clearly requires that the Board's decision must be upheld unless the decision was either "clearly erroneous in light of the entire evidence in the record" or "arbitrary or capricious or characterized by abusive discretion or clearly unwarranted exercise of discretion." SDCL 1-26-36(5), (6).

As correctly noted in the Board's brief, the South Dakota Supreme Court has clearly delineated the standard of review on many occasions in this type of case. There seems to be little disagreement among the parties to this action that an agency's

decision should be affirmed unless the reviewing Court is "left with a definite and firm conviction that a mistake has been committed." In Re Estate of Hobelsberger, 181 NW2d 455 (1970). See also In Re South Lincoln Rural Water System Application for Permit Number 4300-3, 295 NW2d 745 (South Dakota 1980); Frazier vs. Water Rights Commission, 294 NW2d 784 (South Dakota 1980); Basin Electric Power Cooperative vs. Payne, 298 NW2d 385 (South Dakota 1980).

ARGUMENT

1.

The first crucial issue in consideration of this appeal relates to the terminology contained in SDCL 1-26-30, which states in part

"A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by

a final decision in a contested case is entitled to judicial review under this chapter." (Emphasis added)

SLRWS is clearly not an aggrieved party in regard to the issuance of permit no. 4401-3. While SLRWS certainly has an "interest" in being relieved from qualification no. 7, it cannot, by way of the convoluted logic contained in its brief, obtain an interest in the permit issued to the City of Worthing. No action taken by the Board in issuing Worthing's junior permit can affect SLRWS. The Findings and Conclusions of Law in Worthing's permit clearly state (Conclusion no. 5):

That in the event senior water right holders or adequate domestic well owners are being interfered with or if the Dakota formation is declining to the degree necessary to take preventative action to stop the decline, the Town of Worthing will be required by law to be shut off from the Dakota formation to the extent of .23 c.f.s. prior to senior water right holders.

As noted in the Board's brief, Worthing remains a junior priority appropriator to SLRWS in regard to the additional .23 c.f.s. granted to the City. As a point of fact, SLRWS never contested, in any real sense, the granting of permit no. 4401-3. It was never claimed by SLRWS that adequate water was not available, that the amount requested by Worthing was not reasonable, that Worthing's additional withdrawal would be harmful to SLRWS, or that Worthing did not desperately need the requested water. The only contention which can be gleaned from the administrative

record and from SLRWS's brief in regard to permit no. 4401-3

1. SLRWS is distraught that Worthing is a member FODSA, which opposes lifting qualification no. 7 from SLRWS's permit. No legal or factual basis is ever asserted by SLRWS either denying Worthing's permit or requiring an alternate source qualification on that permit. All of the evidence introduced by the SLRWS indicates that no such alternate source is necessary. The apparent sole basis for the appeal of Worthing's permit is to provide SLRWS with a lever to espouse to this Court some ambiguous argument which (to quote SLRWS's brief) "borders on an equal protection issue." (Emphasis added) In another portion of its brief, SLRWS asserts that the finding of the Board that each applicant for a water permit utilizing the same source of water need not be treated in an identical manner "smacks of opening the door to capriciousness." An issue either exists or it doesn't. Apparently

the SLRWS realizes it is on such tenuous ground that it must qualify its arguments with phrases such as "smacks" and "borders." Assuming that SLRWS desires to assert such arguments to the Court, it knows perfectly well that evidence that subsequent users were not required to put in an alternate source would be admissible in furtherance of those claims without the necessity of appealing Worthing's permit.

Throughout these proceedings, SLRWS has been a juggernaut with its sole obvious goal to get qualification no. 7 lifted from its permit by any means. Failing in that, it apparently wishes to extract revenge upon the City of Worthing by, in effect, denying its permit with a similar alternate source qualification when there is no factual basis for the same. The SLRWS stated in its brief that FODSA's claims were "morally bankrupt." While Worthing hesitates to use such phraseology in its brief, it would submit that if any claim in these two cases is in such status, it is SLRWS's claim that it has any interest, pecuniary or otherwise, in the issuance of permit no. 4401-3 other than pure harassment. Absent a showing that SLRWS will in some way be injured by the issuance of permit no. 4401-3, it is not a proper party to appeal said permit since it is not a party aggrieved. There is not one scintilla of evidence anywhere in the record to indicate that SLRWS would be so injured.

Though the facts vary widely, it is an accepted general rule that an appellant must not only have an interest in the subject matter in controversy, but must be prejudiced or aggrieved by the decision from which it appeals. See, for example, In Re Johnson's Estate, 281 NW 113 (1933); Danforth vs. City of Yankton, 25 NW2d 50 (1946); Carlson vs. West River Oil Co., 64 NW2d 254 (1954); Olesen vs. Snyder, 249 NW2d 266 (1976); 59 AmJur 2d, Parties, § 26-30.

There has been no showing or even allegation by SLRWS that they have either the interest in the subject matter or requisite "standing" to appeal. Nothing this Court could do in regard to permit no. 4401-3 would grant "relief" to SLRWS. The only conceivable relief available to SLRWS is for this Court to remove

qualification no. 7 from their permit. Whether Worthing is denied a permit, required to put in an alternate source, or has its permit approved is of no consequence to SLRWS.

For the above reasons, the City of Worthing would urge that SLRWS's appeal to permit no. 4401-3 be dismissed as they are not a proper party in interest or "aggrieved party" within the meaning of SDCL 1-26-30. It is meaningful to note in this context that no attempt has (and Worthing would submit none will be) been made to appeal any subsequent permit other than this particular one.

II.

Assuming, for arguments sake, that SLRWS was, in some manner, an interested party in permit no. 4401-3, the decision of the Board to grant such permit was neither arbitrary and capricious nor clearly erroneous. SDCL 46-1-14 gives the Board the authority to subject any water permit to such terms, conditions, qualifications, restrictions, or limitations necessary to protect public interest.

SDCL 46-1-5 provides in part:

(1) "That the use of water for domestic purposes is the highest use of water, and takes precedence over all appropriative rights, if such use is exercised in a manner consistent with public interest as provided in SDCL 46-1-2;

(2) That the right of the State through its institutions, facilities and properties and a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses . . .".

The above statutes clearly evidence the intent of the legislature to protect and foster the use of water for domestic and municipal purposes above all other uses. The application of the City of Worthing clearly falls within these delineated guidelines. Herein lies the discretion of the Board to require such terms and conditions as will best safeguard the use of water for present and future users. The Worthing permit is clearly an appropriation of water for municipal and domestic purposes within this definition.

If permit no. 4401-3 is taken alone, as Worthing urges it must be, there is no evidence in the record that granting said permit was anything other than proper. At this point, Worthing would renew its objection to the consolidation of these cases on appeal and urge, as did the Board, that each case must be

considered separately. Again, all of the evidence presented to the Board indicated that water was available, was needed by Worthing and was requested in a reasonable amount. Neither counsel for SLRWS nor FODSA objected to the issuance of the permit, other than a generalized "yes and no" argument by counsel for SLRWS on January 29, 1981. SLRWS indicated they had no objection unless they were going to have to put in their alternate source, in which case Worthing ought also to have the same requirement. Worthing's permit, however, was decided prior to that of SLRWS when qualification no. 7 was still in question. No affirmative request was ever made by SLRWS for an alternate source for Worthing, their counsel stating that in effect there was enough water for everyone. Thus, there was no real objection, other than a retroactive one by SLRWS, after they found they were going to have to live with qualification no. 7 to which they had previously agreed. The apparent tactic of SLRWS was therefore to threaten the Board with an appeal of Worthing's permit should they not lift qualification no. 7 for SLRWS. There are further rational and reasonable factual distinctions, however, between the two permits even when considered in conjunction, upon which the Board could and did require an alternate source for SLRWS and not for Worthing. In this regard, the factual distinctions between the two users were aptly pointed out by the Board in its brief, which arguments the City of Worthing adopts mutatis mutandis. Most significant is the vast disparity in the amount of water involved and in the rate of withdrawal. The City of Worthing is authorized to withdraw a 65 acre feet per year at an additional .23 c.f.s., SLRWS, on the other hand, is entitled to 455 acre feet per year at 2 c.f.s. The potential effects on the well drawdown and potential aquifer impact between the two applications is apparent. Herein is where the logic contained in the brief of SLRWS fails.

Counsel for the SLRWS in his brief prayed that the Court either reverse the Board's determination on qualification no. 7 or reverse the Worthing decision and direct the Board to treat like withdrawals in a like manner. These are simply not like withdrawals.

and firm conviction that a mistake has been committed. In fact,
all of the evidence in the record would indicate to this Court
that very definitely a mistake has not been committed.

WHEREFORE, the City of Worthing respectfully prays that the
decision of the Board granting permit no. 4401-3 to the Town of
Worthing be sustained in its entirety.

Dated this 11th day of May, 1981.

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STATE OF SOUTH DAKOTA)
COUNTY OF HUGHES) SS.

1.1 CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

CIV.# 81-103
IN RE: APPLICATION FOR PERMIT * BRIEF OF APPELLEE
NO.4401-3 BY THE CITY OF WORTHING * FRIENDS OF THE DAKOTA
AND SOUTH LINCOLN RURAL WATER * SANDSTONE AQUIFER
SYSTEM PERMIT NO.4300-3A. * (FODSA)

INTRODUCTION

Appellee, Friends of the Dakota Sandstone Aquifer, believe that a number of preliminary points need to be made to put the issue in proper perspective:

The first issue relates to the point which Mr. Masten attempted to make at the bond hearing conducted on April 29, 1981, when he pointed out to the Court that there was a "sweet pocket" of water lying area from which the South Lincoln Rural Water System was attempting to extract water. That fact is important because later Mr. Masten attempts to point to the fact that somehow they are being treated differently than other rural water systems. It is Appellee, FODSA's, position that had they not selected the "sweet pocket" area, perhaps the issue would be the same as with other rural water systems. Also, there is no requirement that all appropriators be treated the same.

The second introductory point which must be made is that no matter how much Mr. Masten argues that there has been new information made available to the Board, the fact which remains irrefutable is that the new information which was presented to the Water Management Board in no way presents to the Board sufficient information upon which they could justify the elimination of the alternate source which the appellant seeks.

The critical scientific issues involved relate to:

- 1.] The quantity of extractable water available;
- 2.] The quality of the recharge to be drawn into the "sweet pocket".
- 3.] The over-all complexity of the geology of the "sweet pocket".

In the transcript of the January, 1981, hearing before the Water Management Board, at page 72, Derrie Iles, who is oft quoted by Mr. Masten in his brief, states as follows:

"And it's important to note here that when I say you can't correlate shale layers, that means you also can't correlate sand layers. What we are dealing with here is a very complex system of interbedded sands and shales. Probably in one way or another it is acting as one system, but we can't say that for sure; that it is or it isn't. The important thing to note, I guess, about this is --the physical make-up of the formation is that you cannot say that the Dakota formation is uniform over a large areal extent."

Also, Assad Barari of the South Dakota Geological Survey (SDGS) testified at the same hearing on January 29, 1981, at page 54 of the transcript that:

"Probably -- the more we have studied, the more we have found out the aquifer is complex and it does not give you the result within a three day's pump test. Normally we can do it. Normally we can run the pump test for three days and we can make the prediction; but in this area, we cannot."

The final thing which must be kept in perspective is the recent decision of the Supreme Court in the decision of Fraser v. Waconda Commission, Etc., 294 NW 2d 784. In that case, the Court said at page 788:

"It is clear that all people in this state have a property interest in the use of water. SDCL 46-1-1 and SDCL 46-1-3

SDCL 46-1-5(1) states that the use of water for domestic purposes is the highest use of water and takes precedence if such use is consistent with the public interest pursuant to SDCL 45-1-2. Although the Commission is no

longer required to regulate irrigation, to absolutely protect artesian pressure for domestic uses, reasonable domestic use must be assured before irrigation is allowed. SDCL 46-6-6.1. There is a "vested right" in the use of water for domestic purpose. [Emphasis supplied.]

Later in the case, at page 789, the Court goes on to say that the Water Management Board is encouraged to make full use of the State's waters; however "it does not mandate a total disregard of the rights of other appropriators".

ARGUMENT I.

THE WATER MANAGEMENT BOARD DID NOT HAVE SUFFICIENT INFORMATION RELATING TO THE POTENTIAL DECLINE IN WATER LEVELS TO JUSTIFY ELIMINATING THE REQUIREMENT THAT THE ALTERNATE SOURCE BE DEVELOPED.

As the Court is well aware, it has had this case before it on a previous occasion after this Appellee appealed the Water Management Board's decision to issue the permit. In the learned Court's previous decision, at page 12, the Court makes the following statement:

"The record shows that the Commission was very concerned with both the possible interference to existing wells and the rate of decline in the aquifer. Certainly the provisions of SDCL 46-6-3.1 and the facts of this case presented the Commission with a difficult problem in granting a permit without there being to be an annual recharge. The record reflects that they attempted to resolve the problem by placing conditions on the permit which would assure the safety of existing well owners by requiring that SLRWS not pump more than 455 acre feet annually (which is substantially less than they requested), that the pumping is to be monitored by the staff so that if it draws down the aquifer pressure or appears that it will draw down the pressure by twenty feet within four years, the Commission will immediately revoke the permit and that SLRWS must develop their alternate source of water under permit #4301-3 (Vermillion Aquifer), on line [Court's emphasis], so that the system's customers would immediately have water in the event this permit would later be revoked."

The trial court took cognizance of the restrictions placed on the permit, including the development of the alternate source, and ruled that the Board exercised proper discretion in making that decision. The trial court also recognized the Commission's problem with determining whether or not there was in fact, sufficient water in the area to support the Appellant. This has not changed.

One final point which should be made is that the trial court placed emphasis on the fact that the alternate system should be on line. One can only assume that the trial court intended to give emphasis to that fact. On appeal to the South Dakota Supreme Court, In the Matter of South Lincoln Rural Water System Application for Permit # 4300-3, 295 NW 2d 743, the Court in it's footnote, at page 745, took cognizance of the fact that there were restrictions placed upon the permit, including the restriction which is the subject of this appeal. The Court did so in making the same point and affirming the learned trial court's decision that the Board had acted properly by placing the restrictions upon the permit and did not, in fact, abuse their discretion.

The main point made by the Appellant is that there is a lot of water in the "sweet pocket".

First, Appellee, FODSA, will concede that there may be a lot of water in the "sweet pocket"; however, the point to be made is that simply because there may be a lot of water in the area, that does not mean that it is extractable. According to John Hatch in the report of the staff in December, 1978, at page 5, Mr. Hatch stated:

"Not all the water can necessarily be pumped out of storage, but the figures do show that there is a large quantity of water in storage"

An even more important fact is that even if there were extractable water, there is no evidence to indicate that there

will not be substantial drawdown once the system is pumping. That issue has already been dealt with by the Supreme Court, In the Matter of South Lincoln Rural Water System Application for Permit # 4300-3, 295 NW 2d 746:

"Appellants also challenge the showing of the proponents of the project that there are approximately 350,000 acre feet of water below the area of the proposed well field on the ground that this does not necessarily mean that such amount of water is available and unappropriated. They note the testimony of witness Assad Barrari of the South Dakota Geological Survey given on December 12, 1978, to the effect that there wasn't enough reliable data about the geology of the Dakota Sandstone aquifer to determine how much of this 350,000 acre feet is extractable. The message which emerges from the testimony of the experts is that the aquifer tests conducted could have produced more reliable data had more money and time been expended. There seems to be a consensus, however, that the aquifer contains sufficient water. The uncertainty seems to center on how much the proposed withdrawal would lower the pressure in the aquifer."

... is still true. Examination of the experts' testimony shows that there has been no new scientific or technical data to satisfy the concerns expressed by the Trial Court and the Supreme Court. Mr. Hasten's indication that there has been substantial testing done is akin to saying that because now we know that $2 + 2 = 4$, that we can split the atom.

Assad Barari of the South Dakota Geological Survey, on January 29, 1981, at the hearing of the Water Management Board, of the transcript, testified that:

"In the past we have testified the chances of having that much water over there is very high. The water is there. I have tried to go closest to the statements I have made already. The water is there. The chances are very, very high that much water is there; but we also testified we could not predict the drawdown. We said we cannot determine if you pump at so many gallons a minute, what will be the effect of it in such a distance."

No-one disputes that there is no data with which to predict draw-down; and on that basis, the Board was justified in refusing to withdraw the requirement that the Davis source be developed and on-line.

ARGUMENT 11.

THERE IS INSUFFICIENT DATA TO ESTABLISH THAT THE QUALITY OF THE WATER IN THE "SWEET POCKET" WILL NOT DETERIORATE DUE TO SOUTH LINCOLN RURAL WATER SYSTEM PUMPING.

The issue regarding the quality of the water in the "sweet pocket" is related to the issue regarding the layering effect in the formation. In the July, 1978, minutes of the Water Management Board meeting, at page 11, the following conversation was recorded:

"Mr. Varilek asked Mr. Barari if the Dakota Formation in the Worthing area is lowered with a large volume of pumping, would it be possible that the water by moving underground would pick up the minerals that are in the soil and if the quality of the water could change due to pumping at a greater rate?

Mr. Barari stated yes, if the layer which will be pumped is connected to another layer that is not of as good quality of water, the water quality could change. However, in the Dakota Formation you do not know how the layers are connected. Are there two or three layers? Are they separated by clay? Is the clay layer continuous? Generally speaking, if you have two aquifers that are connected together and you start pumping from one and lower the head extensively you will draw water from the other. Mr. Barari stated that this is possible in this area."

That issue has not changed either. There is still insufficient data upon which the Board might rely in arriving at a decision to eliminate the requirement that the alternate source be developed.

It then places a great reliance on the testimony of Ferric Iles of the South Dakota Geological Survey when he indicates to the Court that there has been much "2 + 2 testing". He fails to indicate, however, that such testing is still inconclusive regarding the issue of quality decline. Mr. Iles at page 66 of the January 29, 1981, transcript, lines 4-25, states:

Mr. Iles: "I have been in contact with the Iowa Geological Survey, and with the data that they have, they have determined that there is a trend of finding higher water levels in the upper Dakota, lower water levels in the deeper Dakota. This is

nothing conclusive. It's a trend they picked up on limited data. This data point that we have here east of Worthing would tend to support that.

This then would indicate perhaps there is no layering in the Dakota. But then this theory would fall apart if you look at other wells in the area which are also shallow, but do not necessarily exhibit that high of an elevation. I believe this well is in the upper Dakota, this well is in the upper Dakota, this one and this one, and then, of course, this one. And the one east of Worthing is the only one that is really an oddball. So here you can argue for layering, you can argue against layering using the same data. Inconclusive is the point.

Mr. Decker: An opinion, your opinion.

Mr. Iles: You can't tell with what we have."

So here again, the fact that there is more information in no way indicates that there can be any conclusions drawn. Even the Appellant's expert agreed that the evidence was inconclusive. The transcript of the January 29, 1981, Water Management Board hearing contains the following questions and answers at pages 110-111:

Mr. McFarland: "All right. Okay. So now it could be there may be three -- you would agree with Mr. Iles, I guess, that there could be three layers, there could be one, is that right?"

Mr. Aten: I agree with Mr. Iles.

Mr. McFarland: You are just not sure; you agree with Mr. Iles, that you are just not sure how many there are, right?

Mr. Aten: Well, it's reasonably certain that there isn't a three layer separation throughout the system.

Mr. McFarland: Okay. But there could be in parts?

Mr. Aten: Correct."

So after all of the new data which Mr. Hasten alludes to, there is still a serious question remaining as to the source of the recharge, the rate of the recharge, the quality of the recharge, and in fact, there has not even been evidence that there is in fact recharge, even though some experts are willing to speculate regarding that matter.

In short, there is no evidence to support Mr. Hasten's argument that there has been significant new scientific data provided to the Board which makes their decision not to remove the restriction arbitrary and capricious.

Perhaps the most telling testimony from the January, 1981, hearing is that of Derric Iles who did the testing upon which the Appellant relies. It is Mr. Iles statement on page 73 of that transcript, lines 6-16, that:

Mr. Iles: "...The important thing to note, I guess, about this is -- the physical makeup of the formation is that you cannot say that the Dakota formation is uniform over a large areal extent. The important things then to remember about what I have just presented, the new data, is that we now know the northern extent of the Dakota formation which we did not before. We know that the Dakota formation occurs over a larger area than we knew it previously did. We also know that there is a better quality water over a larger area than was originally thought."

What Mr. Iles was saying is that there is no new information other than the fact that they have identified the northern boundary and that the "sweet pocket" is larger than originally expected. On cross examination, on pages 76-78 of the transcript, Mr. Iles testified as follows in response to counsel's questions:

Mr. McFarland: "All right. The studies -- are you aware of the geology of the area to the south of the studies that have been done that go through the rest of this area?"

Q: No. No. We do not have any detailed information in southern Lincoln County.

Mr. McFarland: And would it be safe to say then you are not certain whether there are one or three layers in that area --

Mr. Iles: Correct.

Mr. McFarland: -- to the south?

Mr. Iles: I can't speak to the layering because I have no information.

Mr. McFarland: All right. And any estimate as to the quantity and quality of the water in that area would be related to the geology of the area, is that right?

Mr. Iles: Correct.

Mr. McFarland: Do you know whether or not pumping in the lower levels of the Dakota will affect wells in the upper layer?

Mr. Iles: We assume they will, but we cannot say that with any degree of certainty.

Mr. McFarland: And I believe that your studies indicated that there was -- were changes in the Dakota formation in the geology of it every -- at every three-mile interval, is that right?

Mr. Iles: Yes, some degree of change. Sometimes it was more severe than others. Sand units would become more shaley or completely disappear. It was quite variable.

Mr. McFarland: The Dakota formation generally does not have water of the quality of the area that we're speaking of here today, is that right?

That's -- I feel that is correct."

Subsequently, Mr. Masten himself elicited the following testimony as shown at page 78 of the transcript:

Mr. Masten: "Derric, if the water is moving, I guess it's generally southeast through the county, would that indicate that there may be a recharge area somewhere around that boundary?

Mr. Iles: Perhaps. But we have not been able to isolate the source of recharge or the quantity."

The record is clear that no new evidence was presented to the Water Management Board which would have allowed them to eliminate the requirement that the alternate source be developed. Contrary-wise, had the Board decided to eliminate the requirement, that decision would probably have been arbitrary and capricious. That is why the Board's conclusion No.5 is accurate. There is no evidence upon which the Board might rely in making a decision regarding the quantity of water and it's decline with added withdrawal by SLRWS, the potential decline in quality of water from

recharge, and even the basic geology of the area. Had Mr. Hasten been able to present conclusive evidence on those issues and had it stood unrefuted, then the Board's decision would have been arbitrary and capricious. There was no evidence presented at the January, 1981, hearing of the Water Management Board which required them to conclude that the evidence had been irrefutable to such a degree that a contrary decision would have been arbitrary and capricious.

ARGUMENT III.

THE WATER MANAGEMENT BOARD HAD EVERY RIGHT TO TAKE INTO CONSIDERATION THE AVAILABILITY OF MONEY TO BUILD THE ALTERNATE SOURCE.

The Appellant in it's brief indicates that the Board had no right to take into consideration the fact that monies were currently available for the development of the alternate source. It is difficult to understand how the Board was not supposed to take that into consideration when in fact, it was the Appellant System that brought such fact to the attention of the Board at the meeting of the Water Management Board on September 25, 1980. Page 21 of the Minutes of that meeting summarize the testimony of John Hadden, the engineer of SLRWS, who made the initial pitch for SLRWS to develop the requirement that the alternate source be developed and on-line:

"The action taken by the Board (SLRWS Board) was to enter into a change order with the pipeline contractor that deleted the Davis well line. It deleted an area known as section 3 of the project, basically the Chancellor area of the System. This includes 125 users. Part of the change order was a privilege of putting those components back into the project up to February 1st of next year. Concurrent with that effort, was an effort by FHA in which they ear-marked \$260,000 of the funds provided for the construction, specifically for construction of the Davis Well line. In the

conditions placed on the agreement of the water system, the water system may not use that money for anything other than construction of the Davis line, until the restriction for its development is removed. Mr. Hadden stated that if they did not have to build the Davis line, which has a total in-place cost including inspection and other miscellaneous features, about \$300,000, they would only need about 3/4 of a million dollars to finish the project."

At all times, the System was using the cost of a Davis well line as a reason for applying for a deletion of that restriction. Now they are complaining that the Board did, in fact, follow their wishes and take it into consideration. One can only speculate that had the Board decided in favor of the Appellant, that they would not now be complaining of that fact.

It is Appellee, FODSA's, position that the Board is justified in considering the fact that money is currently available for the project in arriving at their decision. SDCL 46-1-2 states that:

"It is hereby declared that the protection of the public interest in the development of the water resources of the state is of vital concern to the people of the state and that the state shall determine in what way the water of the state, both surface and underground, should be developed for the greatest public benefit."

The important language of course, is that the Board is empowered with the right to determine "in what way" the water of the state shall be developed. That legislative authorization gives a clear and broad discretion to the Board to properly develop all the water resources of the state. The Board also obtains further powers to consider the current availability of funding under SDCL 46-1-14. It states that:

"The board may issue any permit or license subject to such terms, conditions, restrictions, qualifications, quantifications or limitations on perpetuity consistent with this chapter which it considers necessary to protect the public interest and which are related to matters within the jurisdiction of the board. Water rights issued pursuant to this section may be amended by the board and priority shall be retained upon amendment. Upon amendment the board may alter terms, conditions, restrictions, qualifications or quantifications consistent with this chapter."

The Board obtains further authority under SDCL 46-6-5.1 (1), which states:

"For regulation of the use of large capacity wells in the degree necessary to maintain an adequate depth of water for reasonable domestic needs and for a prior appropriator at his point of diversion, in wells which meet minimum well construction standards."

The statute makes it clear that large capacity users like South Lincoln Rural Water System, can be treated differently to protect domestic users. Domestic purposes have priority and the Water Management Board must recognize that. According to SDCL 46-1-5(1):

"It is hereby declared that it is the established policy of this state.

(1) That the use of water for domestic purposes is the highest use of water, and takes precedence over all appropriative rights, if such use is exercised in a manner consistent with public interest as provided in § 46-1-2."

Basically what we are talking about here is a public policy argument. The Board does not have a crystal ball. It did not and does not have sufficient scientific data to make it clear that there was sufficient extractable water of sufficient quality recharge to insure that the existing users would be protected. It also was the concern of the Board that it protect the users of the System - Appellee, FODSA's interests.

CONCLUSION

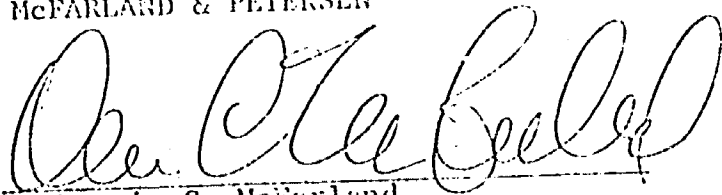
Appellee, Friends of the Dakota Sandstone Aquifer, incorporates all the arguments made by Appellee, Water Management Board, in its brief previously submitted to the Court, in all respects, and especially those matters which relate specifically to expert testimony offered at the various hearings on the issue.

For all the reasons previously urged, Appellee, Friends of the Dakota Sandstone Aquifer, urge that the Court affirm the decision of the Water Management Board.

APPELLEE, FRIENDS OF THE DAKOTA SANDSTONE AQUIFER, REQUESTS ORAL ARGUMENT.

Dated at Sioux Falls, South Dakota, this 12th day of May, 1981.

McFARLAND & PETERSEN

A handwritten signature in cursive script, appearing to read "Dennis C. McFarland", written over a horizontal line.

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STATE OF SOUTH DAKOTA)
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

IN RE: APPLICATION FOR PERMIT
NO. 4401-3 BY THE CITY OF WORTHING
AND SOUTH LINCOLN RURAL WATER
SYSTEM PERMIT NO. 4300-3A.

Civ. E 81-103

APPELLANT'S
REPLY
BRIEF

INTRODUCTION

Appellant, SLRWS, agrees with Appellee that a number of preliminary points ought to be made prior to engaging in the enterprise of sifting science fact from science fiction in the Appellees' Briefs.

First, with respect to the ballyhoo over the necessity of alternative source of supply: FODSA and the Board raised the spectre of a shutdown order from the Board at sometime within the experimental period of pumping which would require SLRWS users to cease withdrawals from the Dakota. This, they say, would leave one thousand or so users without water unless SLRWS is required to construct a Davis line.

FODSA and the Board seem to forget, however, that these one thousand SLRWS users have been drinking water for approximately three years without the system, probably will have a glass of water tomorrow, the day after that, and the day after that for the next one hundred years. The point is that SLRWS users rather clearly have existing and functioning alternate sources: The court might refer to the original permit proceeding and the user survey sheets which show some own deep wells in the Dakota (just like FODSA), some have cisterns, a substantial fraction are supplied by water abusers from Worthing and Canton, some pump from the Big Sioux, etc. If, for any reason, SLRWS would shut down,

those one thousand users might be temporarily inconvenienced, but they are certainly capable of subsisting tomorrow in the same manner they did yesterday. Unless FODSA can demonstrate that none of the SLRWS users have been drinking water in the past, we would respectfully suggest that the above observation meets the State's purported "irrefutability" standard.

We might further observe that the concern for the existence of an alternate source would be better founded if there existed subdivisions or new users who, "but for" the existence of the SLRWS source, would not have water. As the court will note from the record of the original proceeding, which, by stipulation is a part of the record herein, there are no such developer hook-ups. None.

The object of SLRWS is to supply running water, better quality water, cheaper water, and consolidate supply through a ~~central~~ common distribution system. In short, SLRWS is designed to remedy some of the short comings of the present chaotic system of water supply, not supplant it totally. In other words, SLRWS is not the exclusive source of water in its coverage area and never will be. The Board's decision, however, presumes that SLRWS is such an exclusive source and a possible shut down would cause a water crisis. That is "irrefutably" wrong.

As John Hadden testified at TR. 96-97, the Davis line is ~~not~~ as far as serving additional users in southern Turner and ~~Clay~~ Clay counties. One might therefore state the conclusion very simply: If SLRWS, SDGS, and the Water Rights Staff are correct, then the Davis line will not be needed and SLRWS users are saddled with a Three Hundred Eighty Four Thousand Dollar (\$384,000.00) white elephant. If, on the other hand, FODSA's dream comes true and the Worthing withdrawals were terminated, SLRWS users would be no worse off in the Davis construction interim than they are today.

The Board has ordered SHEL to take out a Three Hundred Eighty Four Thousand Dollar (\$384,000.00) insurance policy against a nonexistent risk. We submit that this is a gross waste of taxpayer money and ought to be stopped for that and all other reasons hereinafter set forth. PODSA has steered the Board in the wrong direction, and it is incumbent on this court as a repository of common sense, to direct the Board back to the real world.

1.

FACTUAL ISSUES

Appellee PODSA suggests that there are three "critical scientific" issues involved in this proceeding, to-wit:

1. The quantity of extractable water available;
2. The quality of the recharge to be drawn into the "sweet pocket";
3. The overall complexity of the geology of the "sweet pocket."

With respect to the first issue, it only exists in Mr. McFarland's imagination since no one, including his own expert seriously disputes the availability of a sufficient amount of water to meet all withdrawals from the aquifer in Lincoln County. See for example TR. 121:

Chairman Decker: Do you agree with the figure that was used for the rate of recharge?

Mr. Bessel: I heard two things. I heard that there was a thousand acre feet of underflow and that we didn't know where the recharge was coming from, and --

Decker: Do you agree with both of those?

Mr. Bessel: I agree we don't know where the recharge is coming from. And, I don't know if there is a thousand feet -- acre feet of water there. I am not arguing that there isn't a lot of water in the Dakota Sandstone.

Chairman Decker: Do you think that there is going to be, in terms of what we are talking about, sufficient time in the recharge cycle of this aquifer to allow whatever to happen, to allow a change, to get somebody to get out of the aquifer, set up another system? Do you feel that, for example, six months -- this six month period of time, that if a problem was identified at the outer limits somewhere of this aquifer, that, for example,

they could still pump and continue withdrawal and then in a six month period -- and then get out of the aquifer? Is that feasible at all?

Mr. Bessell: I think it would be feasible.

Chairman Decker: Without causing, you know, serious harm to the aquifer itself?

Mr. Bessell: Harm to the aquifer itself?

Chairman Decker: Yes.

Mr. Bessell: Yeah. That certainly is possible. It possibly could cause serious harm to area domestic wells, but there is going to be a lead time. I don't think any body knows what that will be. But it is not going to be overnight or a sudden happening.

That, we might add, was PODSA's own expert speaking.

PODSA's statement of the second issue is nonsensical when one reads the transcript, or to put it another way, his statement of the issue presumes the conclusion counsel desires, also known as circular reasoning. Had counsel listened closely to what the experts were saying, he would have heard something new and interesting at the January 29, 1981 meeting.

In the original percolation proceeding, Assad Barrari was questioned about the inferences which might logically be drawn from the existence of good quality water in the Lincoln County section of the Dakota aquifer. At the December 12, 1978 hearing, Mr. Barrari testified that the quality might indicate the presence of a recharge. At the January 29, 1981 hearing, Derric Hen, Barrari and Richard Allen testified about the significance of the existence of the hydraulic gradient which SEGS had discovered. Before we analyze the recent testimony some background might be helpful.

At the December 12, 1978 hearing, counsel for PODSA introduced a text by the Johnson Division, BOP, Inc., entitled Ground Water and Wells. At page 39, hydraulic gradient and the significance of a head pressure difference are discussed:

We have already said that flow from one point to another is always related to a difference in head between the two points. This difference is the head loss resulting from the frictional resistance that develops within the pores of the material when flow occurs. The hydraulic gradient is the head loss in feet of water per foot of travel through the material. Darcy's law shows that flow in a saturated sand varies directly with the hydraulic gradient. If the hydraulic gradient (head loss per foot of travel) is doubled, the rate of flow in a given sand is also doubled. This means that to double the rate of flow in a given sand requires doubling the hydraulic gradient.

The type of fluid flow described by Darcy's law is known as laminar flow. Water flowing in pipes can be laminar in character at low velocities, but more commonly takes place under conditions described as turbulent flow. In turbulent flow, the flow rate does not change in direct proportion with the hydraulic gradient -- doubling the hydraulic gradient may only increase the flow rate by about 1 1/2 times.

The slope of the water table or the slope of the piezometric surface is the hydraulic gradient under which ground water movement takes place. The total flow through any vertical section of an aquifer can be calculated if we know the thickness of the aquifer, its width, its average coefficient of permeability and the hydraulic gradient at the section in question. The flow, q , through each foot of width of the aquifer is:

$$q = Pmi$$

Where P is the average coefficient of permeability of the material from top to bottom of the aquifer, m is the thickness of the aquifer in feet and i is the hydraulic gradient.

The relationship between head loss and hydraulic gradient may be visualized thus:

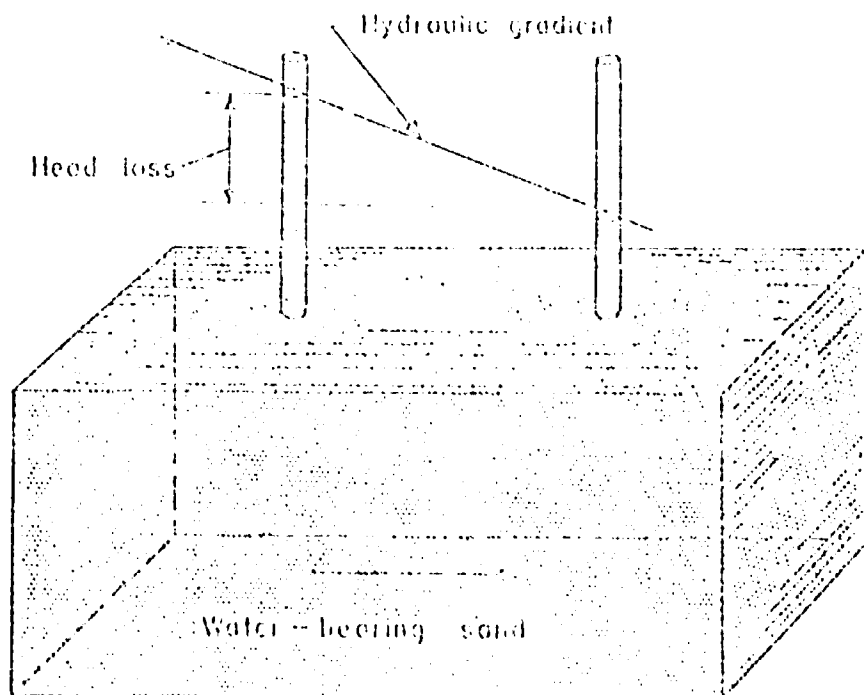


Figure 25. Head loss and hydraulic gradient must exist to cause flow of water through porous material. For a given material the flow is directly proportional to the hydraulic gradient. Gradient is the head loss between two points divided by the distance between the points.

In actual practice, one draws contours based on measurements and the flow, q , through each foot of width of the

aquifer can be computed as above. For example, the Johnson Division published this map:

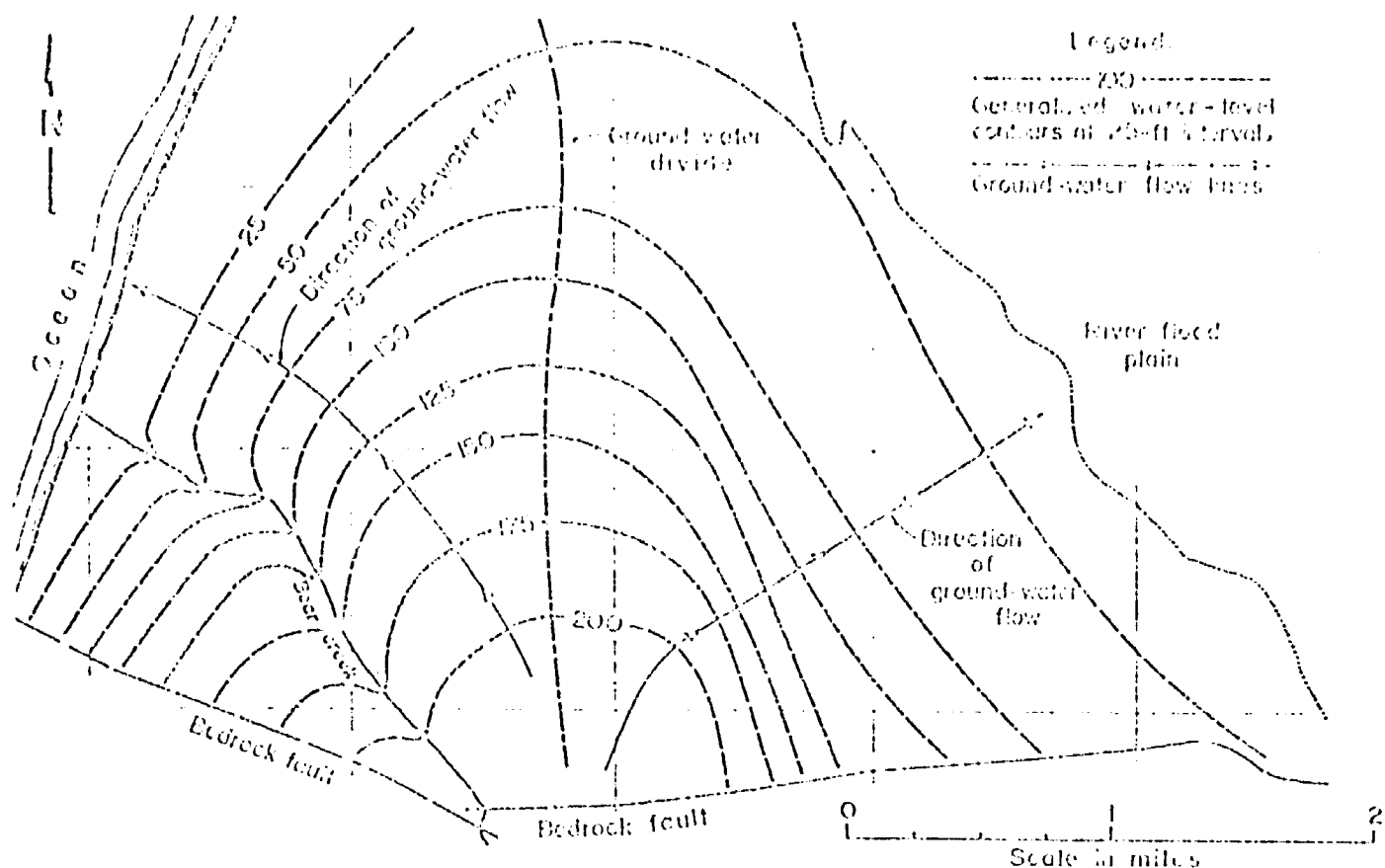


Figure 28. Water contour map showing elevation of the upper surface of the saturated zone. Ground-water flows down gradient at right angles to the contours as shown by the flow lines that have been sketched on the map.

Richard Aten testified as follows at the January 29th hearing:

I base that information on the recharge on the fact that we have, with the new data, particularly established that there is a substantial --- there is a slope on the water table. There is water moving. If there is water moving, it had to come from somewhere. There is better water quality there than prevails generally in the Dakota Aquifer, so the recharge relatively has to be closer by. And in addition, there has been very little water table decline.

... The amount of recharge is difficult to estimate, but as a rough minimum, I would estimate that there is a thousand acre feet a year that goes through the aquifer. While the numbers --- it's a qualitative thing, but in addition to the numbers, I think that the fact that Carton has operated for some forty plus years now pumping from it about the same amount that you are talking about for South Lincoln and hasn't --- there haven't been any complaints, to the best of my knowledge, either to water quality or water level effects from that operation. The water level is right in the center of the field. There is spotty data available there, but in the whole train from 1936 to '37 when well No. 2 was completed right up to complete, there is thirty seven feet of drawdown right in the center of the field, and there hasn't been a substantial water quality change with their wells or any complaints about water quality.

... And further, there is a natural safety gauge that you get with artesian aquifers where you get

you have -- you have a head pressure change, and that causes flow and the flow follows but very, very slowly. For the gradient that exists now or in the vicinity of, say, a distance of maybe a half a mile from the well fields, that rate of flow is in the order of a couple tenths of an inch a day. And so that you give you not only a lot of lead time, but a good basis to predict in advance when you are heading for trouble. TR. 105-107. (emphasis added)

Now if the court would care to compare the above cited portions of Mr. McFarland's textbook on ground water and wells with what Mr. Aten did, consider the following: TR. 111.

Mr. McFarland: Alright. How did you calculate the rate of recharge?

Mr. Aten: I didn't calculate recharge. I calculated underflow using the water level data and constructing a piezometric contour with piezometric map, with the water pressure surface.

Mr. McFarland: Do you know the source of the recharge?

Mr. Aten: No.

Mr. McFarland: Do you know the rate of the recharge?

Mr. Aten: It's -- it's at least a thousand acre feet a year in a line roughly from the well field northeast.

Mr. McFarland: How much of that recharge is available for withdrawal?

Aten: All of it.

Comparing the state of knowledge at the December 12, 1978 hearing which was used as a basis for the Supreme Court's opinion with the state of knowledge existent at the January 29, 1981 hearing, one finds that we have advanced from the speculation that there might be recharge based solely on the fact that there was good quality water, to knowledge of the existence of the recharge and the fact that that recharge is roughly one thousand acre feet per year flowing through the Dakota Aquifer. That, we respectfully submit, is "irrefutably" new data, a new conclusion and one which amply supports the State's and Water Rights Staff position.

Mr. McFarland makes a big play on the response to a question put to Mr. Derric Hest:

Mr. Masten: Derric, if the water is moving, I guess it is generally southeast through the County, would that

indicate that there may be a recharge area somewhere around that boundary?

Mr. Hies: Perhaps. But we have not been to isolate the source of the recharge or the quantity.

The question was if Mr. Hies knew where the source of the recharge was located, not whether the aquifer was being recharged. The point is that they know it is being recharged and on the order of a thousand acre feet per year, the exact location remains unknown. Even Mr. McFarland's hired gun admitted there was recharge, he simply didn't know the location either, TR. 121. He further admitted that even though the pump test might be less than optimum, the resulting T and storage coefficients were within the range one would expect, TR. 117. See also the comments of Board member Harnas, TR. 120.

Mr. McFarland writes at some length about "2 + 2 testing." Brief of Appellee FODSA, p.5 ff. We are somewhat puzzled about the meaning of this, although we assume that since none of our witnesses heard or used such a term, it must be something he invented as a criticism. In particular, the statement is made that "Mr. Hasten's indication that there has been substantial testing done is akin to saying that because we now know that $2+2=4$, that we can split the atom," id.

Perhaps that is true. If we know that $2+2=4$, then we know that we can write an equivalence relation on the field of positive integers, thereby inventing algebra. This can be easily generalized to the real number field $\mathbb{R}^n$. Since the binary operation on a field can be either multiplicative or additive, let us choose a multiplicative operator and write $E=mc^2$.

This, combined with another equivalence relation, $E=ma$ (Newton's Third Law of Motion) allows one to deduce quantum mechanics. If we take this information and do a crude measurement on the shape of the nuclear potential for U^{238} (analogous to the crude three day pump test) one discovers the famous double humped potential

(1)

(350,000) acre feet of good quality water in storage. At that time it was thought that the area covered one township. Now, the research indicates it covers at least five, implying the storage of one million seven hundred fifty thousand (1,750,000) acre feet, roughly speaking. While Mr. McFarland may see nothing new, it is also "irrefutable" fact that his "sweet pocket" has grown from Mrs. Stetten's farm, to one township, to nearly the entirety of Lincoln County since the December 12, 1978 hearing. We might note, in passing, that "sweet pocket" is not a term which any of the geologists, hydrologists or any agent employee or user of SLEWS invented. It was something that FODSA dreamed up and quite clearly does not fit the facts.

The last issue concerns the "complexity" of the Dakota Aquifer. That statement of the issue is something of a non-sequiter on the order of discovering that grass is green. In the original permit proceeding the drilling done prior to that indicated a layered structure for the aquifer -- intervening layer of water bearing sand and shale. One could therefore conceive of the aquifer as behaving like three disconnected units, which is a complex system.

Subsequent research indicates that the aquifer may only be "layered" in certain areas, and overall responds as a single unit. The models which the engineers and scientists used to predict drawdown are, as a result, not as accurate. This, however, does not mean that estimates cannot be made or ground water systems designed.

As Derric Hes testified in response to questions by Mr. McFarland, SDGS has completed testing. All of the field work which can be done, has been done. USGS was surprised at the density of data which have been developed and, Richard Aten testified that more work has been done on this patch of sandstone than any other piece of bedrock he has ever seen. The only other test which can be done is to actually run the SLEWS system. If

that we done FODSA would get the same information as it would from an aquifer. Such a procedure would also save a large quantity of water, money and time. This is what prompted Mr. Barnes and Chairman Decker to inquire why FODSA wouldn't just "back off."

Those inquiries brought forth the real heart of FODSA's claim -- that funding for the Davis line might not be available in the future. As the court can see, then, the real issue as far as FODSA (or the Board) is concerned is the future availability of funds in case the Davis line were ever needed, for whatever reason. The real issues are not scientific ones, FODSA's claim to the contrary notwithstanding. Three of the Board members stated on the record that they were convinced SRRWS proved its case with regard to the water. It was the money that concerned them.

11.

DAVIS FUNDING

The foregoing analysis of the "scientific issues" has come full circle to the matter of the availability of funds for the Davis pipeline. FODSA and the Board repeatedly came back to the "issue" of funding -- if, and the emphasis is on "if," the Davis line were ever required because of a shutdown order, would the funds be available to construct it? The Board's motive in making this inquiry was to protect the SRRWS users from having their water shut off.

As we pointed out in the Introduction, however, the Board asked the wrong question and quite naturally found the wrong solution. It is a fact that all users presently have a source of water supply quite independent of SRRWS. Further, many of the users are planning on water as only a backup to their own wells. If SRRWS fails flat on its face now, or at any time in the future, the users lose, at most, their hookup fee. The Federal Government gets the pipe. It plainly and simply is not now, nor has it ever been, a question of thousands of people finding themselves without water because of a head pressure decline.

The Board's concern for the well being of the FLEIS users as part of its determination of the public interest is, of course, laudable. We are not so confident of the motive in the case of FOLSA. This concern, however, is misplaced when it manifests itself as saddling the users with a three hundred eighty four thousand (\$384,000.00) dollar bill to pay at the expense of forty seven (47) other farmers who would also like good quality water for a reasonable price in order to protect a dozen or so well owners from, at best, a hypothetical problem. The decision of the Board, as a matter of common sense and law, must be reversed.

III.

THE "IRREFUTABLE" STANDARD

To put the matter rather mildly, this writer's jaw dropped a few inches upon reading the State's proposed (and adopted) Findings of Fact and Conclusion of Law. A quick rereading of SDCL 1-26 reveals that the Court should give "great weight" to agency findings and conclusions. However, there is nothing in the statute that indicates agency findings are conclusively presumed to be correct. Counsel has searched diligently for some mention by a court anywhere in this Nation of this burden of coming forth with "irrefutable" evidence. None has been found. We would respectfully suggest that this court not be the first to adopt such a standard as it totally usurps the power of judicial review. Furthermore, this is a flat error of law and mandates reversal and of the findings and conclusions.

FOLSA did accurately describe one aspect of this dispute. The Davis well line was a "deal" which was imposed on the parties. It had nothing in particular to do with fact or law. For that the SDCL and FLEIS drilling programs are complete, the data analyzed and conclusions drawn, it is appropriate to again look at the risks and benefits covered by the deal.

FOLSA claims that the only satisfactory method to obtain the data necessary to make drawdown predictions is to run an

aquifer test. As we have pointed out time and again this is a monument waste of water, time and money if it is done prior to putting the system into operation. Turning the Worthing pumps on will provide exactly that data when the system is complete. Now either (a) the drawdown will not exceed 20' based on this reliable information, or (b) it will. If (a) is true, then the Davis line is totally unnecessary. If (b) is true, then there are two more cases: (c) the 20' drawdown will be immediately exceeded or (d) it will not. If (c) is true, the solution to the problem is simply not to pump and bid out the Davis line. That will mean a delay for the South Lincoln users, but since they were not relying on SLEBS to begin with, no particular harm is done. If (d) is true, then there is more than adequate time to switch to the Davis field because it is a 20' projected drawdown sometime within four years. Each and every expert that testified, or has testified in these hearings, has stated that there is plenty of time to construct the Davis line if it was ever needed. The only comment which FODSA's expert has ever made with regard to the pump test is that he felt that an aquifer test was better than the three day pump test. An aquifer test is, more simply, a pump test that is run for a longer period of time and would be the exact result of turning on the system and running it. If he is so confident that this aquifer test he proposes will allow for reliable predictions of drawdown, then it is simply sensible to us why FODSA refuses to back-off, allow the system to be built and placed into operation and then take a look at the actual data as the system runs, before requiring construction of the Davis pipeline.

The above constitute what might be termed the near-term concerns with regard to the operation of the Worthing well field. The long-term concern expressed by FODSA is that the water quality will deteriorate. Again, over and over, the experts, including FODSA's own expert, emphasize that any deterioration in water

quality, if such occurred, would take place over a period of years, not days, weeks, or months. Furthermore the entire area is covered by a net of some thirty observation wells which are more than adequate to detect any decline in the quality of water in Lincoln County, and give ample warning of a potential problem.

IV.

CONCLUSION

The ultimate issue in this case is not one of scientific fact at all -- it is one of public policy combined with a legal question of substantial gravity. At the center of all of the environmental battles of the past decade one finds a single overriding issue: Who must bear the burden of uncertainty. If one reduced every environmental case for the last ten years, and probably longer, to a single issue, one would discover project opponents claiming the proponent should prove his action will not be. To the environment, while the proponents claim the opponents

prove that the proposed action will harm the environment. In law and in logic it is axiomatic that one cannot disprove a universal negative (i.e., "x" will never harm "y"). For that reason, although couched in different language, the Courts in all fifty states have placed the burden on the opponent's side. That is, until January 29, 1981.

In our opening brief, we suggested a balancing test which would at least permit a coherent discussion and analysis of the competing interests in the determination of the "public interest." Our analysis and that of SDGS and the Water Rights Staff of the Hydrology and the Geology of the Dakota Formation suggest that there is a vanishingly small probability that the 2nd guideline will be exceeded. FODSA says otherwise. The Board claims that the Davis line is to "protect" the SLRWS users as much as to "protect" FODSA. From what? SLRWS already has alternate sources. Three hundred eighty four thousand dollars is simply too much to pay for something that will never be used.

ATTORNEY
GENERAL

36 DD
80038

STATE OF SOUTH DAKOTA)
COUNTY OF HUGHES)

SS

JUN 28 1980

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

*
IN RE: APPLICATION FOR A PERMIT *
No. 4401-3 by the CITY OF *
WORTHING and SOUTH LINCOLN RURAL *
WATER SYSTEM PERMIT No. 4300-3A. *

MEMORANDUM DECISION

ACTION

This is an appeal from a final decision of the South Dakota Water Management Board which granted water permit No. 4401-3 to the City of Worthing, but denied South Lincoln Rural Water System's request for relief from a condition contained in water permit No. 4300-3A. This Court affirms the Water Board's decision.

PARTIES

The parties to this action consist of appellant, the South Lincoln Rural Water System, and appellees consisting of the Water Management Board (Board), the City of Worthing (Worthing), and the Friends of the Dakota Sandstone Aquifer (FODSA).

FACTS

On December 12, 1978 the Board granted Appellant's application for water permit No. 4300-3. This permit allowed Appellant to withdraw two cubic feet of water per second from the Dakota Sandstone formation subject to certain conditions and requirements. Although

FODSA appealed the Board's decision to grant the permit to both this Court and the Supreme Court, both Courts affirmed the Board's decision. In re South Lincoln Rural Water System Application for Permit No. 4300-3. 295 N.W.2d 743 (S.D. 1980).

On September 3, 1980 Appellant filed an application to modify permit No. 4300-3 with the Board. Appellant requested, among other things, that the Board delete condition number seven from the permit. This condition required that:

(7) The Davis area well field shall be developed and placed on line prior to pumping from any Dakota Formation wells.

On September 25, 1980 the Board held a hearing on Appellant's requested modification. At the hearing, the Board determined that construction and development of the Davis well field was necessary in order ~~to~~ insure the availability of "an immediate alternate source of water", and refused to delete the requirement. The Board amended the permit, however, to require that the alternate Davis line "be fully operational by November 1, 1981".

On January 29, 1981 the Board held another hearing which ultimately resulted in the final decision now on appeal. At the hearing, the Board considered the City of Worthing's request for water permit No. 4401-3. This permit allowed Worthing to withdraw .23 cubic feet of water per second from the Dakota formation without the requirement that the city develop an alternate water source. It was also at this hearing that Appellant again requested that the Board delete the requirement of an alternate water source (condition no. 7) from its permit.

After extensive testimony, the Board granted Worthing's permit No. 4401-3 and refused to delete the requirement of an alternate water source from Appellant's permit. Appellant filed a Notice of Appeal with this Court on March 25, 1981, and hearing thereon was held on April 29, 1981.

ISSUES

I.

WHETHER THE BOARD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE CLEARLY ERRONEOUS IN LIGHT OF THE ENTIRE EVIDENCE IN THE RECORD? No.

II.

WHETHER THE BOARD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE ARBITRARY AND CAPRICIOUS OR CHARACTERIZED BY ABUSIVE AND CLEARLY UNWARRANTED EXERCISE OF DISCRETION? No.

SCOPE OF REVIEW

This Court's review of administrative agency decisions is limited in scope by SDCL 1-26-35 and 1-26-36. SDCL 1-26-35 requires that the review conducted by the court be confined to the record of the agency. SDCL 1-26-36 mandates that the court give great weight to the agency's findings of fact and inferences therefrom. The court, in reviewing the decision, may not reverse unless substantial rights have been prejudiced by an agency decision which is ;

- (1) in violation of the Constitution or statute;
- (2) in excess of statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) clearly erroneous in light of the entire evidence in the record; or
- (6) arbitrary and capricious, abuse of discretion or clearly unwarranted exercise of discretion.

An agency's decision must be upheld unless the court is left with a definite and firm conviction that a mistake has been committed. Fraser v. Water Rights Commission of Department of Natural Resource Development, 294 N.W.2d 784, 788 (S.D. 1980); In Re Estate of Hobelsberger, 181 N.W.2d 455, 459 (S.D. 1970). In the case at bar, Appellant contends that the Board's decision was clearly erroneous in light of the entire evidence in the record and also arbitrary and capricious.

DECISION

I.

Appellant first contends that the Board's decision not to delete the requirement of an alternate source of water from its permit is clearly erroneous in light of the entire evidence in the record. More specifically, appellant argues that recent testing of the Dakota formation has revealed that there is substantially more water within the aquifer than the Board originally anticipated. Appellant contends that this fact alone should relieve it of the burden of developing the alternate water system and that the Board acted unreasonably in not removing the requirement from its permit.

This Court agrees with Appellant's assertion that there appears to be substantially more water in the Dakota formation than originally anticipated. All the experts who testified at the hearing generally agreed that the aquifer contained a significant amount of water. This is not the only factor which the Board considered, however, when it imposed the requirement of an alternate water system on Appellant's permit. The Board was very concerned about possible head pressure decline once Appellant began pumping water from the Dakota formation. This concern is evidenced by condition number five which the Board also placed on Appellant's permit. This condition requires that Appellant shut down its line and apparently switch to the alternate Davis line if the aquifer head pressure declines more than twenty feet in a four year period of time.

The expert testimony at the January 29 hearing did little to relieve the Board's concern over this matter. Assad Bassari, an expert from the South Dakota Geological Survey, testified that he could not predict either the amount of the drawdown or the effects of the drawdown upon the aquifer once Appellant began pumping water from the formation. The other experts testified in a similar manner concerning both drawdown and possible head pressure decline. Further, not one of the experts could predict within any degree of certainty the source of the recharge, the rate of the recharge, or the quality of the recharge water within the aquifer.

The Board, after hearing all of the testimony and considering all the evidence, determined that there was still insufficient data

to relieve Appellant of the requirement of an alternate water system. This Court must give great weight to the agency's findings of fact, SDCL 1-26-36, and will not substitute its judgment for that of the Board. The record clearly reflects that the Board could have reasonably found that there was insufficient data to warrant the elimination of the requirement that Appellant develop an alternate water source. Although this Court may not have reached the same decision as did the Board, it is not left with a definite and firm conviction that a mistake has been committed. Fraser v. Water Rights Commission of Department of Natural Resource Development, supra.

II.

Appellant next contends that the Board acted in an arbitrary and capricious manner by not requiring Worthing to develop an alternate water source and by not deleting a similar requirement from Appellant's permit. This Court does not agree.

There are significant differences within the two permits which would allow the Board to treat the applicants differently. Appellant's permit allows the withdrawal of 455 acre feet of water per year from the formation, while Worthing is limited to withdrawing 65 acre feet per year. The rate of withdrawal is also significantly different. Appellant is entitled to withdraw two cubic feet per second while Worthing is limited to .23 cubic feet per second. Furthermore, federal funding is currently available for development of Appellant's alternate water source, while Worthing does not enjoy such an advantage.

The Legislature has given the Board the authority to issue water permits subject to such terms, conditions, and requirements as it deems necessary to protect the public interest. SDCL 46-1-4. In exercising its discretion under this statute, the Board specifically determined that it was not feasible to require Worthing to develop an alternate water source because the city could not comply with such a requirement. This Court is not of the opinion that the Board is required to impose similar conditions and requirements upon water permits especially when the permits are significantly different. Based upon the record, the Board could have reasonably determined that the requirement of an alternate water system in Appellant's permit was necessary in order to protect the public interest, yet totally unwarranted in Worthing's permit. Again, this Court will not substitute its judgment for that of the Board.

CONCLUSION

The Board's decision to grant Worthing's water permit without the requirement of an alternate water source and its refusal to delete a similar requirement from Appellant's permit is not clearly erroneous in light of the entire evidence in the record, arbitrary and capricious, or an abuse of discretion. The decision must therefore be affirmed.

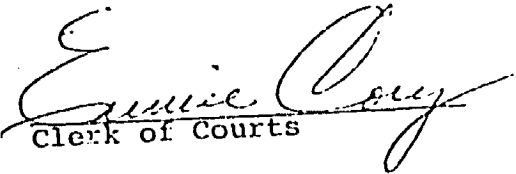
Counsel for the Board is directed to prepare an order consistent with this opinion.

Dated this 19th day of June, 1981.

BY THE COURT:


Robert A. Miller
Presiding Circuit Judge

ATTEST:


Clerk of Courts

(SEAL)

4300-3A

**SOUTH Dakota Department of
Water & Natural Resources**

Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501

Water Rights Division
605 773-3352

November 29, 1983

John Sievers, Manager
South Lincoln Rural Water
PO Box 155
Canton SD 57013

Dear Mr. Sievers:

This letter is in reference to the following Motion regarding Water Permits No. 4300-3 and 4300-3A adopted by the South Dakota Water Management Board April 15, 1983.

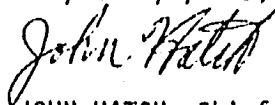
"That beginning today April 15, 1983, the four year period for determining the impact of the withdrawal from the Dakota Formation be stayed until water from the third well is being used in the South Lincoln Rural Water distribution system."

A sworn Memorandum of Substantial Completion was received by the Division of Water Rights October 24, 1983 which indicated that Well No. 3 was placed in use October 20, 1983.

Prior to April 15, 1983, one year, 10 months and 14 days of the four year head pressure decline monitoring period had been completed. Adding 47 days (16 days from April and 31 from May 1983) to October 19, 1983, the second year ends December 5, 1983 (12 days in October, 30 days in November and 5 days in December). The four year period for Permits No. 4300-3 and 4300-3A will now end December 5, 1985.

Please advise if there are any questions.

Very truly yours,



JOHN HATCH, Chief Engineer
Water Rights Division

JH:ks

cc: Curtis Gubrud
Wanda Sletten
Water Management Board

**SOUTH DAKOTA Department of
Water & Natural Resources**

Joe Foss Building
523 East Capitol
Pierre, South Dakota 57501

Water Rights Division
605 773-3352

December 1, 1983

RE: 4300-3

4300-3A

Harold Fischer, Chairman
Friends of Dakota Sandstone Aquifer
Rt 1, Box 58
Worthing SD 57077

Dear Mr. Fischer:

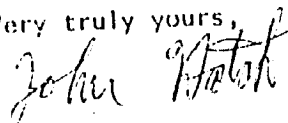
This will acknowledge your request that the Water Management Board clarify the acre feet limitation on the South Lincoln Rural Water (SLRW) Permits No. 4300-3 and 4300-3A. The Board Attorney, John Guhin presented your request to the Board November 30, 1983.

Mr. Guhin advised the Board that no action could be taken since SLRW had not been given either notice of your request nor an opportunity to be present. The Board directed that I advise you to follow the Petition for Declaratory Ruling process required by Board Rules 74:02:01:46 through 74:02:01:49 and SDCL 1-26-15.

I believe your request was based upon a telephone conversation between Wanda Sletten and myself November 23, 1983. I advised Mrs. Sletten that when I received written notification that SLRW had placed its third well on line October 20, 1983, it was my interpretation that the 455 acre foot annual withdrawal limitation was in effect.

As I interpret the qualifications to the two Water Permits, there is no basis for pro-rating the 455 acre foot limitation. Neither have I read in the Board minutes of any comment or discussion that pro-rating was intended nor was SLRW advised of such requirement.

Very truly yours,



JOHN HATCH, Chief Engineer
Water Rights Division

JH:ks

ATTACHMENT ON WATER PERMIT NO. 4300-3
SOUTH LINCOLN RURAL WATER SYSTEM

4300-3A

The following supercedes the previous qualifications:

1. That the System be limited to an annual withdrawal of 455 acre-feet and that the total withdrawal be subject to review by the Board;
 2. The System can be pumped with the two wells already completed, if annual withdrawal restrictions are limited to 304 acre feet until the 3rd well is developed and put on line (approved September 25, 1980 - Findings of Fact, Conclusions of Law approved November 20, 1980); spacing between wells must be at least 2½ miles;
 3. That the rural water system wells approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The rural water system under this Permit shall control its withdrawals, to protect needed water supplies in adequate domestic wells or in wells having prior water rights;
- Withdrawals will be restricted, if the aquifer head pressure declines 20 feet at designated measuring points during a four year period, beginning with the date the first water is pumped into distribution system. The head pressure decline will be determined by using an average of three of the seven proposed observation wells located at least two miles from one or more production wells. The lowest measurements, to be based upon an average of each observation well measurements taken over a three month period, will be used in determining head pressure decline;
4. If the aquifer head pressure does decline more than 20 feet in the four year period, or if observation well measurement data indicates the 20 foot head pressure decline level would be reached in the four year period, the rural water system operator of the Board will have to change to a new source of water;
 5. That no wells be located within 1,300 feet of existing Dakota Formation wells unless waived by the well owner;
 6. That the Davis area well field be developed and therein be fully operational by November 1, 1981.

ATTACHMENT #2

ATTACHMENT ON WATER PERMIT NO. 4300-3
SOUTH LINCOLN RURAL WATER SYSTEM

The following supercedes the previous qualifications:

1. That the System be limited to an annual withdrawal of 455 acre-feet and that the total withdrawal be subject to review by the Board;

* ~~2. The System can be pumped with the two wells already completed, if annual withdrawal restrictions are limited to 304 acre feet until the 3rd well is developed and put on line (approved September 25, 1980 Findings of Fact, Conclusions of Law approved November 20, 1980); spacing between wells must be at least 2 1/2 miles;~~

3. That the rural water system wells approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The rural water system under this Permit shall control its withdrawals, to protect the water supplies in alternate domestic wells or in wells having prior water rights;

~~4. Withdrawal will be restricted, if the aquifer head pressure declines 20 feet at designated measuring points during a four year period, beginning with the date the first water is pumped into distribution system. The head pressure decline to be determined by using an average of three of the seven proposed observation wells located at least two miles from one or more production wells. The lowest measurement, to be based upon an average of each observation well measurements taken over a three month period, will be used in determining head pressure decline;~~

~~5. If the aquifer head pressure does decline more than 20 feet in the four year period, or if observation well measurement data indicates the 20 foot head pressure decline level would be reached in the four year period, the rural water system upon order of the Board will have to change to a new source of water;~~

~~6. That no wells be located within 1,300 feet of existing Dakota Formation wells unless waived by the well owner;~~

~~7. That the Davis area well field be developed and therein be fully operational December 1, 1981.~~

* Overstrikes represent qualifications to No. 4300-3
4300-3A that will automatically terminate after
December 5, 1985 or that are no longer pertinent.

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

STATE CAPITOL
Pierre, South Dakota 57501-5090
Phone (605) 773-3215

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL

March 9, 1988



Mrs. Wanda J. Sletten
Rt. 2 Box 82
Beresford, South Dakota 57004

RE: South Lincoln Rural Water System

Dear Mrs. Sletten:

Thank you for your letter of March 3, 1988, concerning the above-noted rural water system. We have contacted Mr. John Hatch, Chief Engineer, Division of Water Rights, concerning your allegation that the rural water system is being operated without a license.

Mr. Hatch informs us that South Lincoln Rural Water System has approved permits, that an inspection was performed August 20, 1986, and the license fee of \$50.00 was received December 12, 1986. The Division of Water Rights has not yet issued the license because it knew at the time some changes were going to be made in the system. It appears to me, however, that South Lincoln Rural Water System has done what the statute requires and there is no violation.

Sincerely,

Roger A. Tellinghuisen

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL

RAT:pjh

cc: John Hatch ✓

 **Department of
Water & Natural Resources**

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

4300-3A

APR 25 1996

Charles Kuehl, Chairman
South Lincoln Rural Water System
PO Box 155
Canton SD 57013

Dear Mr. Kuehl:

Enclosed is Water License No. 4300-3B. This is the final water right document completing your process of obtaining a water right.

As long as you use the water beneficially, as stated in the Water License, the State Water Law provides that you have a continuing right to use the water.

The applicable portions of Water Permit Nos. 4300-3 and 4300-3A are incorporated into this Water License No. 4300-3B.

Very truly yours,


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

enclosures

CAMERA OPERATOR