

VESTED RIGHT PERMIT NO. 6173-3

Name of Applicant: David G Aesoph

Address: 17433 341st Ave, Highmore SD 57345

Phone: 605 852-2119

Amount of Water Claimed: 70 AF

Total Acres: NA

Source of Water Supply: runoff

Water to be used for: recreation, fish & wildlife propagation and livestock

County: Hand

Type of Waste Disposal System:

Location: approximately 25 miles northeast of Highmore

PRIORITY Date Received: 1-11-2000

Fee: \$15

Corrected Application Received:: 1-28-2000

Period of Annual Use: January 1 – December 31

Remarks: Claimed priority date of 1950

Diversion Point: W ½ NW ¼ Sec 19-T116N-R70W

Water Impounded: W ½ NW ¼, NE ¼ NW ¼
Sec 19 and S ½ SW ¼ Sec 18; all in
T116N-R70W

Depth of Well:

Well Driller: : NA

Remarks:

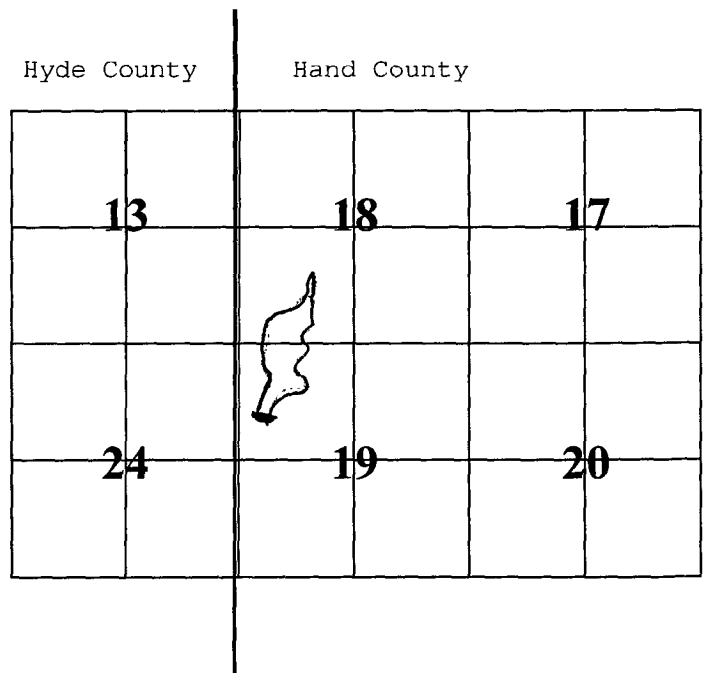
Type of Map: topo

Prepared by: Ron Duvall

Reviewed and the Number Assigned on: 1-28-2000

By: Karen Schlaak

Notice of Hearing - date to intervene: _____



**SOUTH DAKOTA
REISSUED
VESTED WATER RIGHT NO. 6173-3**

Date of Receipt of Claim January 11, 2000.

Date of Validation September 27, 2000.

On December 4, 2002, the Water Management Board amended Vested Water Right No. 6173-3 for Paul Meyers, 39012 128th St, Aberdeen SD 57401 with the following limitations, conditions and qualifications:

1. Vested Water Right No. 6173-3 authorizes impoundment of 42 acre-feet of water from runoff in a dam located in the W ½ NW ¼ Section 19 with water impounded in portions of the NW ¼ Section 19 and SW ¼ Section 18; all in T116N-R70W.
2. The appropriated water is used for fish & wildlife propagation, recreational and livestock use and may not exceed the amount of water needed for beneficial use.
3. The water is to be used during the following annual period: January 1 – December 31.
4. The priority date of the Vested Water Right is January 1, 1950.
5. The water use system has been constructed and water has been applied to beneficial use.
6. Water Rights obtained in compliance with the laws of the State of South Dakota must not be unlawfully impaired by this appropriation.

QUALIFICATIONS

1. Vested Water Right No. 6173-3 authorizes a dam with a storage capacity at the spillway of 42 acre-feet of water and sufficient water annually to maintain the water level to 1950 spillway overflow elevation.
2. The spillway overflow elevation shall be maintained at an elevation of 1863.66 feet mean sea level (see Certificate of Survey dated October 4, 2002).
3. The Chief Engineer or his authorized staff shall be allowed to enter upon the lands where the dam is located for the purpose of inspecting the dam and surveying to verify the spillway overflow elevation. The Chief Engineer shall make a reasonable attempt to notify the owner or possessor of the property prior to entry upon the land.

WATER MANAGEMENT BOARD

By: Garland Erbele

Garland Erbele, Chief Engineer
Water Rights Division
Department of Environment and Natural Resources

MAR 13 2003

date



STATE OF SOUTH DAKOTA

VESTED RIGHT WATER LICENSE NO. 6173-3

(1) David G Aesoph, Highmore SD made Application No. 6173-3, January 11, 2000 for validation of a vested water claim to impound 42 acre feet of water from runoff, Hand County, South Dakota for fish and wildlife propagation, recreation and livestock watering purposes. Vested Water Right No. 6173-3, with a priority date of January 1, 1950 was validated September 27, 2000.

An inspection completed on September 17, 2002, found that the lowered spillway elevation and resultant water levels were consistent with the requirements specified on the vested right. On December 4, 2002, the Water Management Board amended Vested Water Right No. 6173-3.

On December 4, 2002, Vested Water Right No. 6173-3 was transferred to Paul Meyers, 39012 128th St, Aberdeen SD 57401.

(2) The water supply system has been completed and water applied to beneficial use in accordance with South Dakota State Law. Pursuant to South Dakota Codified Law 46-5-30.1, the holder and/or owner of Vested Water Right No. 6173-3 is issued a license, bearing a priority date of January 1, 1950, to impound 42 acre feet of water.

The location of the storage dam (spillway) is 1,375 feet south and 700 feet east from the northwest corner of Section 19-T116N-R70W – Lot 2 (SW ¼ NW ¼)

(3) This license is subject to South Dakota Water Law, any limitations or conditions listed in Vested Water Right No. 6173-3, including the following now applicable qualifications:

- Vested Water Right No. 6173-3 authorizes a dam with a storage capacity at the spillway of 42 acre-feet of water and sufficient water annually to maintain the water level to 1950 spillway overflow elevation.
- The spillway overflow elevation shall be maintained at an elevation of 1863.66 feet mean sea level (see Certificate of Survey dated October 4, 2002).
- The Chief Engineer or his authorized staff shall be allowed to enter upon the lands where the dam is located for the purpose of inspecting the dam and surveying to verify the spillway overflow elevation. The Chief Engineer shall make a reasonable attempt to notify the owner or possessor of the property prior to entry upon the land.

Garland Erbele

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

MAR 13 2003

date



SOUTH DAKOTA
VESTED WATER RIGHT NO. 6173-3

Date of Receipt of Claim January 11, 2000.

Date of Validation September 27, 2000.

The Water Management Board validated Vested Water Right No. 6173-3 for David G Aesoph, 17433 341st Ave, Highmore SD 57345 with the following limitations, conditions and qualifications:

1. Vested Water Right No. 6173-3 authorizes impoundment of 42 acre-feet of water from runoff in a dam located in the W ½ NW ¼ Section 19 with water impounded in portions of the NW ¼ Section 19 and SW ¼ Section 18; all in T116N-R70W.
2. The appropriated water is used for fish & wildlife propagation, recreational and livestock use and may not exceed the amount of water needed for beneficial use.
3. The water is to be used during the following annual period: January 1 – December 31.
4. The priority date of the Vested Water Right is January 1, 1950.
5. The water use system has been constructed and water has been applied to beneficial use.
6. Water Rights obtained in compliance with the laws of the State of South Dakota must not be unlawfully impaired by this appropriation.

QUALIFICATIONS

1. Vested Water Right No. 6173-3 authorizes a dam with a storage capacity at the spillway of 42 acre feet of water and sufficient water annually to maintain the water level to the 1950 spillway overflow elevation.
2. The spillway overflow elevation shall be lowered and maintained at an elevation which will not allow the permanent storage capacity of the impoundment to exceed 42 acre feet of water or inundate trees along either the sides or across the neck of the dam at the location denoted as a black line on the 1950 topographical map attached to the DENR Report.
3. A permanent benchmark shall be established near the dam to allow the lowered spillway elevation to be referenced. The location of the permanent benchmark shall be identified on a map by direction and distance from a corner of a government surveyed section or quarter section. This map shall be no smaller than 8 by 11 inches and be prepared by a South Dakota licensed land surveyor, a South Dakota registered professional engineer, or a government employee who regularly prepares maps as part of their employment.
4. Plans and specifications shall be prepared by an engineer in accordance with the safety of dams requirements and submitted to the Water Rights Program for approval prior to beginning work to lower the spillway. The plans and specifications shall be submitted within 30 days of the date Vested Water Right No. 6173-3 is issued.

(continued)

5. Construction to lower the spillway elevation shall commence within 30 days after receiving Water Rights Program approval of plans and specifications provided runoff conditions allow the work to be performed safely.
6. The lowering of the dam's water level shall be completed without causing damage to downstream property.
7. The lowered spillway overflow elevation shall be surveyed in reference to the permanent benchmark and a copy of the survey notes provided to the Water Rights Program.
8. The Chief Engineer or his authorized staff shall be allowed to enter upon the lands where the dam is located for the purpose of inspecting the dam and surveying to verify the spillway overflow elevation. The Chief Engineer shall make a reasonable attempt to notify the owner or possessor of the property prior to entry upon the land.

WATER MANAGEMENT BOARD

By: Garland Erbele
Garland Erbele, Chief Engineer
Water Rights Division
Department of Environment and Natural Resources

JAN 02 2001

date



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

Mail to:
Water Rights Program
Joe Foss Building
523 E. Capitol
Pierre, SD 57501-3181
(605) 773-3352

(office use only)
No. 6173-3 Hydrologic Unit 10160009
Basin James River
Newspaper The Miller Press



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

Check use(s) of water:

☐ Municipal ☐ Suburban Housing ☒ Recreational ☐ Institutional
☐ Rural Water System ☐ Commercial ☒ Fish & Wildlife ☐ Geothermal Heat
☐ Domestic (over 18 gpm) ☐ Industrial ☒ Other stock watering (domestic)

Type of Application: New ☒ Vested Right (Use predates Mar 2, 1955) ☐ Future Use Reservation

(check one) ☐ Place to Beneficial Use Water Reserved by Future Use Permit No. _____

☐ Amendment/Correction to Permit No. _____

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

1. Name of Applicant David G. Heslop Phone 605-852-2119
(check one) ☐ Owner ☐ Tenant/lessee
Mailing Address 17433 301st Ave Highmore State S.D. 57345
(Street, RR, or Box) (Zip Code)

X 2. Amount of water claimed ☐ *CFS or ☒ **GPM 42 ~~70~~ ~~7~~ ***AF
(*Cubic Feet per Second) (**Gallons per Minute) (***)Acre Feet - storage capacity of dam/dugout or annual use if applicable)

3. Source of water supply run off (Aquifer in Dugout on Sec-18-116)

4. Location of point of diversion (example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W) W1/2 NW1/4 - 19-116-70
Water impounded: W1/2 NW1/4, NE1/4 NW1/4 Sec 19; S1/2 SW1/4 Sec 18;
all in T116N-R70W County HAND

5. County or counties where water will be used HAND

6. Annual period during which water is to be used JAN-1 - Dec-31

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

stock watering dam + recreation + fish + wildlife

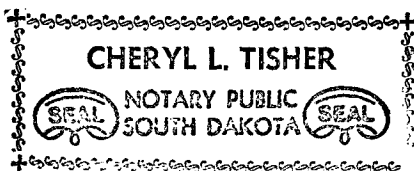
STATE OF SOUTH DAKOTA)
County of Faulk) SS

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

I, Cheryl L Tisher, the applicant, certify that I have read this application, have examined the attached map and that the matters stated are true and that I intend, and am able to complete the necessary construction.

X Signed Cheryl L. Tisher

Subscribed and sworn to before me this 12th day of Nov. 19 99



Cheryl L. Tisher
Notary Public

My Commission Expires Feb. 10, 2003

Supplemental Information

(type or print in ink)

give Jo Kelly
2174

1. Well Information - Proposed Construction

- a) Drill Hole Diameter _____ Depth _____
- b) Casing Type _____ Diameter _____ Thickness _____
- c) Screen Type _____ Diameter _____ Thickness _____
- d) Gravel Pack _____ Length of Gravel Pack _____
- e) Depth to Top of Water Bearing Material _____
- f) Depth to Water (ground surface to water level) _____
- g) Distance to nearest existing domestic well:
- On applicants property _____ On property owned by others _____

2. Wastewater Disposal System Information

- a) Type of System (i.e. septic tank, drain field) _____
- b) System Capacity (gallons) _____ Year Constructed 1989
- c) Connected to the City of _____ Sanitary System _____

3. Dugout Information

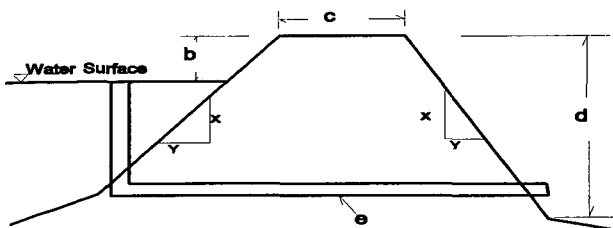
- a) Surface Dimensions _____ Depth _____
- b) Depth to water (ground surface to water level) _____

4. Water Storage Dams

If the proposed water use system contains one or more storage dams, please furnish the information requested below for each dam. The locations of the dams need to be shown on the map submitted with the application.

- a) If a private engineering firm or government agency was involved in the design of this dam, please give their name and address:

F.S.A. - NRCS
Highmore SD 57345



- b) Freeboard 13.5
- c) Crest Width 12
Crest Length _____
- d) Height 17.5
- e) Primary Outlet Capacity _____
If pipe, diameter 24"
- f) Secondary Spillway Capacity _____
Spillway Width _____
- g) X & Y Slope _____
Upstream _____
Downstream _____

- h) Surface Area of Impoundment 20A?
- i) Storage 10? Acre Feet ✓
- j) Drainage Area Above Dam 900 Acres ✓



Affidavit of Water Use

Form 2B
(Type or Print in Ink)

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

~~7-15-99~~ 10-13-99
Date 1-13-99

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

Name of Applicant (Same as Form 2) David G. Aesoph

Mailing Address 17433 341st Highway 50 57345
(Street, RR or Box) (City) (State) (Zip Code)

A. Notice of Appropriation _____ Date of Posting _____

Date of Recording _____ Recording Date _____

B. Date of start of construction of water supply system Based on 1950 Topo map

C. Date that water was first applied to beneficial use 1950 - 1989

D. Name of owner of original water supply system David G. Aesoph

E. Amount of water originally applied to beneficial use 70 Acsft ?

F. Present use of water - amount of water now being used Livestock - ~~21 Acsft~~ 21 Acsft ?

Date that this water was first used 1989 and before

G. Chronological History of Water Use

The dam had always been There
since at least 1950 - washed out approx 1985-86
(or damaged) still held water
I repaired the dam in 1989

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

State of South Dakota)

County of Faulk)

I, David G Aesoph
(print or type)

the applicant, certify that I have read the foregoing and that the matters therein are true.



Signed David G. Aesoph

Subscribed and sworn to before me Cheryl L. Tisher, 19 99

Cheryl L. Tisher
Notary Public
My Commission Expires Feb. 10, 2003

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

David G. Aesoph, 19 99
(Print Name)

David G. Aesoph, 19 99
(Print Name)

RECEIPT

Water Rights Program

South Dakota Department of Environment and Natural Resources

N2 416367

Pierre, _____ January 28, 2000

RECEIVED OF Siegel, Barnett & Schutz, L.L.P. (David Aesoph), 500 Capitol Bldg., P.O. Box 490,
the following amount in fees for services rendered as provided for by law: Aberdeen, SD 57402-0490

Fee for Application for Permit No. <u>U.R. 6173-3</u> to Appropriate Water, to construct and to put water to beneficial use _____	15	00
Fee for Application for Permit No. _____ to Appropriate Water, for Future Use _____		
Fee to retain Future Use Permit No. _____ after period of seven years.		
Fee for Inspecting Constructed Works, confirming beneficial use and issuing Water License No. _____		
Fee for Filing Transfer Form _____		
Fee for Filing Extension Request _____		
Fee for _____		

(Any Other Work Provided by Law)	Total	15 00

By Maureen E. Beale (C)
Chief Engineer

Report on Vested Water Right Claim No. 6173-3, David G. Aesoph

Vested Right Claim No. 6173-3 has been filed by David G. Aesoph to impound 70 acre feet of runoff water in an existing dam located in the W½NW¼ section 19 with water impounded in portions of the NW¼ section 19 and SW¼ section 18; all in T116N-R70W. The water is for fish and wildlife propagation, recreational use, and livestock watering. A priority date of 1950 is claimed for the water use.

Background

On August 25, 1999, Don Weiss contacted the Water Rights Program regarding flooding of a portion of his property located in the SW¼ section 18-T116N-R70W. During the investigation of the complaint, it was found that a dam located on property owned by David Aesoph in the NW¼ section 19-T116N-R70W was impounding water on to the Weiss property. A search of the water right files did not find either a location notice or water right on file for the Aesoph dam. The nearest Location Notice No. 26065 was filed in 1962 by Joseph Hynek for a site approximately one quarter mile north of the dam site. It appears from aerial photos that there is a dugout located at the site which is now inundated by the Aesoph dam.

After reviewing a US Geological Survey topographic map, it was found that the dam on Mr. Aesoph's property has been in existence since at least 1950. The dam shown on the 1950 topographic map was impounding water over the section line on to about two acres of property owned by Mr. Weiss in section 18. However, a field inspection completed on September 2, 1999, found that the size of the impoundment behind the dam was significantly larger than the impoundment shown on the 1950 topographic map. Mr. Aesoph indicated that maintenance and repair work was done on the dam in 1988 as a cost share project with the Soil Conservation Service. Following completion of the work, the primary spillway culvert on the west side of the dam began to wash out so Mr. Aesoph installed a larger, 24 inch culvert on the east side of the dam embankment. After reviewing aerial photos and slides from several years in the 1980's and 1990's, it is apparent the spillway elevation of the Aesoph dam was raised and the dam began storing more water in the 1990's. Observations made during the field inspection also support the finding that the spillway elevation was raised. Several large dead trees were observed standing in water even though the water level behind the dam was eighteen inches below the culvert spillway (see Appendix A). Aerial slides from the 1980's show the trees alive and near the water's edge.

As a result of the dam spillway being raised, the acreage being flooded on the Weiss property in section 18 is larger than the area shown on the 1950 topographic map. Based on the 1997 aerial photo, approximately 14 additional acres of the Weiss property are being flooded. An additional 10 acres of property owned by School and Public Lands in the E½NW¼ section 19 is also being flooded due to raising the spillway. This property is leased from School and Public Lands by Mr. Aesoph.

Order to Lower Spillway and Apply for a Water Right

South Dakota Codified Laws 46-4-1.1 and 46-5-2 allow a person to construct and maintain a dam as long as no land other than that belonging to the owner of the dam is flooded, or an easement for such flooding has been secured. Based on these statutes, Mr. Aesoph was ordered in a Notice dated September 15, 1999, to

lower the spillway on the dam since no easement exists to flood the acreage not owned by Mr. Aesoph. The order to lower the spillway elevation was to meet one of the following conditions:

1. Lower the spillway to an elevation which does not flood any property owned by Mr. Weiss in section 18-T116N-R70W; or
2. Lower the spillway to the elevation existing prior to the changes made in the late 1980's and 1990's provided Mr. Aesoph could demonstrate that a prescriptive easement exists to allow flooding of the Weiss property at that prior elevation.

A second issue raised in the Notice was to obtain a water right for the dam by either applying for a new water right permit or for a vested water right.

On September 21, 1999, Mr. Aesoph stopped by the office concerning the notice and to view the aerial slides showing the dam impoundment. Possible language was also discussed for purposes of entering into an easement agreement for the flooded acreage.

Second Order to Lower Spillway and Apply for a Water Right

On October 13, 1999, a second notice was sent ordering Mr. Aesoph to complete the work to lower the spillway elevation by November 15, 1999. Mr. Aesoph was also instructed to file a vested water right claim within 90 days pursuant to SDCL 46-5-49 provided Mr. Aesoph believed that the dam qualified for a vested water right. In response to the second notice, an application for a vested right was filed two days prior to the 90 day deadline. However, the work to lower the spillway elevation was not completed. Mr. Weiss has indicated that he does not want his property flooded and that he is not willing to enter into an easement with Mr. Aesoph. It was not discovered that property owned by School and Public Lands was also being flooded until preparation of this report. Any action taken to lower the spillway to alleviate flooding of the Weiss property would also alleviate flooding of the School and Public Lands property.

Review of Vested Right Claim No. 6173-3

On January 11, 2000, Mr. Aesoph filed Vested Right Claim No. 6173-3 to impound 70 acre feet of runoff for fish and wildlife propagation, recreational use, and livestock watering with a claimed priority date of 1950. Upon receipt of the claim, the application was reviewed for completeness. The application was incomplete due to the lack of an adequate map and failure to file the \$15.00 application fee. In order to assist with completing the application, a map (see attached) dated January 13, 2000 was prepared by Ron Duvall, staff engineer, based on the September 1999 inspection of the dam site. Ryan N Boe, representing Mr. Aesoph, agreed to use of the map for purposes of completing the application and Mr. Boe remitted the application fee.

Amount of Water Claimed

According to the cover letter submitted with the vested right application, the entire storage capacity of the dam is being claimed on the vested right application. The vested right claim indicates that the entire storage capacity of the dam is 70 acre-feet. As discussed in the background section of this report, the department believes the storage capacity of the dam was increased and the dam began storing more water in the 1990's. Based on the on-site investigation and aerial slides showing the increase in surface area of the impounded water, the estimated storage capacity at the spillway overflow elevation is 174 acre-feet. This estimate is

based on multiplying the depth of water to the spillway elevation (≈ 13.5 feet) by the surface area (≈ 43 acres) by a factor of either 0.3, 0.4, or 0.5 depending on the topography of where the dam is located. A factor of 0.3 was used in the formula resulting in the estimated storage of 174 acre-feet as compared with 70 acre-feet claimed on the application.

It is also possible to estimate the storage capacity of the dam as it existed prior to the spillway elevation being raised. The water surface area of the dam on the 1950 topographic map and on aerial photos during high water years in the 1980's is approximately the same (14 acres.) Mr. Aesoph provided a copy of a form completed by the Soil Conservation Service regarding repairs to be made to the dam. This form dated in 1988 noted that the depth of water in the dam was about 7.5 feet. Using the formula described above, the estimated storage capacity prior to the spillway being raised is (14 surface acres) by (7.5 feet) by (0.3) ≈ 32 acre-feet.

Priority Date

Evidence exists in the form of a US Geological Survey topographic map to support the claimed priority date of 1950 for a portion of the current storage capacity. Pursuant to SDCL 46-1-9, a claimed priority date of 1950 qualifies for vested status. According to the Affidavit of Water Use, the dam washed out or was damaged in approximately 1985-86 (but still held water) and was repaired in 1989. Based on the information available, water use has been continuous since the claimed priority date of 1950. However, the only portion of the storage capacity qualifying for vested status is that portion in existence in 1950. The increase in storage capacity in the late 1980's to early 1990's does not qualify for vested status.

Review of Existing Water Rights

The Aesoph dam is located on a drainage which reaches a defined watercourse known as Lost Creek. There are no existing surface water rights located on Lost Creek with the nearest downstream water right being held by M.A. Nelson, Water Right No. 415-3. This water right holds a priority date of 1957 for irrigation of 100 acres from Wolf Creek at a site approximately twenty-seven miles cross country from the Aesoph dam. Lost Creek is one of several tributaries supplying runoff to Wolf Creek which is a tributary to the James River.

Safety of Dams

The Aesoph dam is not on the state dam inventory and meets the definition of a small size, category 3 dam under safety of dams rules 74:02:08:05 and 74:02:08:06. Any category 3 dam constructed before October 27, 1986 (effective date of rules) is exempt from spillway requirements unless the dam fails and is rebuilt. Alteration of the dam in the late 1980's involved more than routine maintenance and should have been reviewed under the safety of dams rules. The culvert spillway elevation was raised and the culvert was resized and eventually relocated from the west end to the east end of the dam embankment. Plans and specifications for these alterations were not submitted to the Water Rights Program for approval prior to the work being done.

Conclusions

1. A flooding complaint has been filed by Don Weiss an upstream landowner with property being inundated by the Aesoph dam. The Weiss property subject to inundation increased by 14 acres when the dam was repaired and the spillway raised in the late 1980's. Mr. Weiss is not willing to grant an easement to allow flooding of his property. School and Public Lands also owns some property that is subject to inundation by the dam.
2. Mr. Aesoph has not complied with the portion of the chief engineer's order to either lower the spillway to an elevation which does not flood the Weiss property or else demonstrate that a prescriptive easement exists for flooding that portion of the Weiss property subject to periodic flooding since at least 1950.
3. Mr. Aesoph complied with that portion of the chief engineer's order to file a vested right claim within 90 days.
4. Repair work completed on the dam in the late 1980's resulted in the storage capacity of the dam being increased by raising the spillway elevation as much as six feet. This increase in storage capacity does not qualify for vested status since the additional storage capacity was not in place prior to March 2, 1955.
5. According to the vested right claim, the current storage capacity is 70 acre-feet. However, an estimate of the storage capacity based on the on-site inspection and from aerial photos found the approximate storage capacity to be 174 acre-feet. The estimated storage capacity prior to the spillway being raised is 32 acre-feet.
6. The repair work also represented a significant change in the dam design and was subject to approval of plans and specifications as part of a safety of dams review. Plans and specifications were not submitted to the Water Rights Program.

Recommended Action

It is recommended that Vested Water Right Application No. 6173-3 be validated to allow impoundment of an estimated 32 acre feet of runoff in the Aesoph dam for fish and wildlife propagation, recreational use, and livestock watering with a priority date of January 1, 1950. This recommendation is based on the following:

1. The Aesoph dam in the W $\frac{1}{2}$ NW $\frac{1}{4}$ section 19-T116N-R70W has been in existence since at least 1950 and water use has been continuous since that time according to the Affidavit of Water Use. Existing water rights will not be unlawfully impaired and the claimed uses for the water are beneficial uses.
2. The amount of water recommended for validation (32 acre-feet) represents the estimated amount of storage prior to the spillway elevation being raised in the late 1980's.
3. As shown on the 1950 topographic map, approximately two acres of the Weiss property in section 18 was subject to periodic flooding even at the lower spillway elevation. However, Mr. Weiss should have been aware of this since he has been either the owner or joint tenant of the property since November 12, 1949. No complaints of flooding were received until the spillway elevation was raised and approximately 14 additional acres became subject to flooding.

Validation of the vested right claim should be subject to the following conditions:

1. The spillway overflow elevation needs to be lowered to the elevation in existence prior to the spillway being raised in the late 1980's. This spillway overflow elevation is to be determined by lowering the water level behind the dam until the large dead trees are no longer standing in water. Aerial slides from the 1980's show the trees alive and near the water's edge.
2. A permanent benchmark needs to be established near the dam from which the lowered spillway elevation will be referenced. The location of the permanent benchmark needs to be identified on a map by direction and distance from a corner of a government surveyed section or quarter-section. This map needs to be no smaller than 8 by 11 inches and needs to be prepared by a South Dakota licensed land surveyor, a South Dakota registered professional engineer, or a government employee who regularly prepares such maps as part of their employment. A copy of the map shall be provided to the Water Rights Program.
3. Plans and specifications need to be prepared by an engineer in accordance with the safety of dams requirements and be submitted to the Water Rights Program for approval prior to beginning work to lower the spillway. The Natural Resources Conservation Service may be able to assist with completion of plans and specifications. Plans and specifications shall be submitted within 30 days of the date of issuance of this validation.
4. After final approval of plans and specifications, lowering the water level in the dam needs to begin within 30 days provided runoff conditions are such that the work can be done safely. Lowering of the water level is to be completed without causing damage to downstream property.
5. Following completion of lowering the spillway, the overflow elevation of the spillway needs to be set in reference to the permanent benchmark established near the dam. This spillway overflow elevation and a copy of the survey notes shall be provided to the Water Rights Program.



Ron Duvall
Natural Resources Engineer
Water Rights Program

Map of David Aesoph dam based on
Sep 2 , 1999 on-site investigation

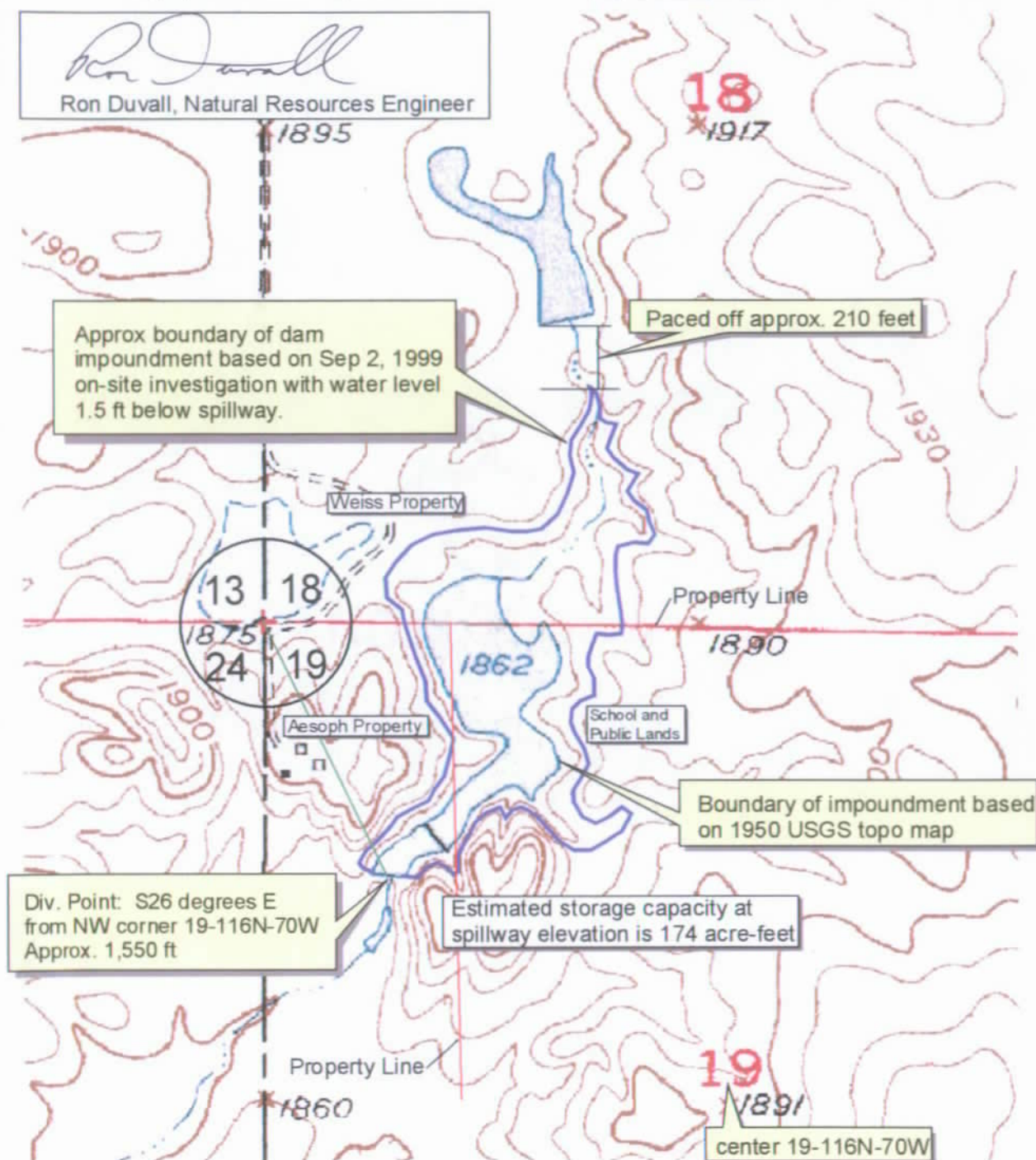
Date prepared – January 13, 2000

300 0 300 600 Feet



Ken Small

Ron Duvall, Natural Resources Engineer



Appendix A

Photos (four) taken September 2, 1999 during inspection of David Aesoph dam located in the W $\frac{1}{2}$ NW $\frac{1}{4}$ section 19-T116N-R70W (explanation below each photo)



Inlet to 24 inch culvert acting as primary spillway on the east side of the dam embankment.
Pool elevation is 18 inches below bottom of culvert.



Picture of the upstream side of the dam embankment looking towards the west.



Picture showing the downstream side of the dam embankment looking towards the west. Outlet of the 24 inch culvert is in the lower center of the picture.



This picture is the view of the impoundment looking North towards section 18. Note the large number trees inundated by the impounded water.

RECOMMENDATION OF CHIEF ENGINEER FOR VALIDATION OF VESTED WATER

RIGHT APPLICATION NO. 6173-3, David G. Aesoph

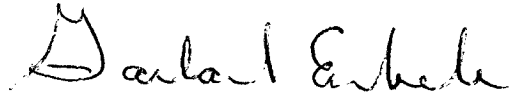
Pursuant to SDCL 46-2A-2, the following is the recommendation of the Chief Engineer, Water Rights Division, Department of Environment and Natural Resources concerning Validation of Vested Water Right Application No. 6173-3, David G. Aesoph, 17433 341st Avenue, Highmore SD 57345.

The Chief Engineer recommends VALIDATION of Vested Water Right Application No. 6173-3 for 32 acre feet of water for fish and wildlife propagation, recreation and livestock use with a claimed priority date of January 1, 1950 because 1) validation for an impoundment of 32 acre feet of water reflects the storage capacity which qualifies for vested status defined by SDCL 46-1-9 or 46-4-5, 2) validation of the dam at its 1950 spillway elevation does not unlawfully impair existing rights, 3) it is a beneficial use and is in the public interest subject to the following qualifications:

1. Vested Water Right No. 6173-3 authorizes a dam with storage capacity of 32 acre feet of water and sufficient water annually to maintain the water level to the 1950 spillway overflow elevation.
2. The spillway overflow elevation shall be lowered and maintained at an elevation which will not allow the permanent storage capacity of the impoundment to exceed 32 acre feet of water.
3. A permanent benchmark shall be established near the dam to allow the lowered spillway elevation to be referenced. The location of the permanent benchmark shall be identified on a map by direction and distance from a corner of a government surveyed section or quarter-section. This map shall be no smaller than 8 by 11 inches and be prepared by a South Dakota licensed land surveyor, a South Dakota registered professional engineer, or a government employee who regularly prepares maps as part of their employment.
4. Plans and specifications shall be prepared by an engineer in accordance with the safety of dams requirements and submitted to the Water Rights Program for approval prior to beginning work to lower the spillway. The plans and specifications shall be submitted within 30 days of the date Vested Water Right No. 6173-3 is issued.
5. Construction to lower the spillway elevation shall commence within 30 days after receiving Water Rights Program approval of plans and specifications provided runoff conditions allow the work to be performed safely.
6. The lowering of the dam's water level shall be completed without causing damage to downstream property.
7. The lowered spillway overflow elevation shall be surveyed in reference to the permanent benchmark and a copy of the survey notes provided to the Water Rights Program.

8. The Chief Engineer or his authorized staff shall be allowed to enter upon the land where the dam is located for the purpose of inspecting the dam and surveying to verify the spillway overflow elevation. The Chief Engineer shall make a reasonable attempt to notify the owner or possessor of the property prior to entry upon the land.

See report on application for additional information.

A handwritten signature in cursive script, reading "Garland Erbele". The signature is written in dark ink on a white background.

Garland Erbele, Chief Engineer
March 10, 2000

NAME: Donald Weiss

ADDRESS: 114 Pearl St, Faulkton SD 57438

DATE: August 25, 1999 **COUNTY:** Faulk **TELEPHONE:** 598-4102

RE: Dam Impoundment Flooding Complaint

COMMENTS:

Donald Weiss called regarding flooding of some of his property in the S1/2 SW1/4 section 18-T116N-R70W caused by a downstream dam backing up water on to his property. The downstream dam is located in the NW1/4 section 19-T116N-R70W and is owned by David Aesoph.

I contacted Mr. Aesoph regarding the dam in section 19 and he acknowledged that the dam does back water on to the property owned by Mr. Weiss. After reviewing the topographic map of the area, I found that the dam was in place as early as 1950 and the map showed water impounded back into section 18. Based on the topo map it appears that there may be a naturally-occurring slough area on the border between sections 18 and 19 and the dam impounds water back into the slough area. Mr. Aesoph advised me that work was done on the dam in 1988 as a cost share project with the Soil Conservation Service (now known as the Natural Resources Conservation Service - NRCS). According to Mr. Aesoph this work involved removing silt from upstream of the dam embankment, removal of some material below the dam and back filling with clay-type material, and installation of a culvert in the primary spillway. Mr. Aesoph's best recollection was that the primary spillway had eroded some was filled in and the culvert placed on top and then covered. Some siltation has since occurred in what is now the secondary spillway.

As a result, I contacted Kelly Stout on August 26, 1999 with the NRCS in Highmore SD. Mr. Stout indicated that he was not with the office when the project was completed and faxed me some information on the project and I received some information via fax from Mr. Aesoph as well. The NRCS documentation indicates the construction of a dugout and has some handwritten notes as sizing a culvert to handle so much runoff. Mr. Stout did not believe that installation of the culvert was part of the cost share because the form specifying construction of the dugout did not include any reference to a culvert as being part of the cost share. The person involved with the project was Nil Reber who had moved to the Lake Andes office of the NRCS.

On August 26, 1999 I contacted Mr. Reber to get his recollection of the project. According to Mr. Reber, the best he could recall that the project only called for construction of the dugout. To the best of his recollection, an inspection following completion of the project found that more work had been done other than that involved in the cost share. Mr. Reber believed that the work may have increased the pool elevation behind the dam. I told Mr. Reber about the file notes concerning the culvert, anti-seep collar, and hood inlet and asked if the culvert was part of the cost share project. Mr. Reber indicated that even though the work may have been done at the same time as the cost share, the expense of the culvert was not included as part of the cost share as best as he could recall.

INVESTIGATION RESULTS:

I checked the Location Notice files to determine whether the dam in section 19 was covered by a Location Notice. A notice was found in the NW $\frac{1}{4}$ section 19 but the legal description placed the dam about $\frac{1}{4}$ mile further North of the dam shown on the 1950 topo map. At this location the dam site specified on Location Notice No. 26065 would be within the impounded area shown on the 1950 topo map. In addition, this location notice filed by Joseph Hynek indicates that the storage capacity is 1.5 acre feet of water.

Calculations performed by the NRCS indicated that the storage capacity of the dam is 14 acre feet [Depth (11 feet) X Surface Area (4 acres) X factor (0.4) = 17.6 minus 3.6 acre feet of silt = 14 acre feet). Based on the size of the dam as it appeared in 1950, these calculations appear to underestimate the amount of storage capacity. As the dam appears on the 1950 topo, the surface area alone is just over 14 acres (including the slough area). Even though it is likely that not all of the storage in the slough can be attributed to the dam, it appears that the storage capacity well exceeds 14 acre feet of water. Mr. Aesoph indicated he thought the surface area may be in the neighborhood of 20 acres. Kelly Stout called and indicated that he will try to determine the present storage capacity of the dam. I told Mr. Stout to be sure and include the depth of water over the surface of the slough area that can be attributed to the dam being in place. This depth would be the difference in elevation between the high point on the "saddle" between the dam and slough and the primary spillway elevation on the dam.

I also contacted Rich Madsen with the US Fish and Wildlife Service in Huron SD regarding a perpetual wetlands easement on the land in the SW $\frac{1}{4}$ section 18. Mr. Madsen confirmed that the easement did exist for the SW $\frac{1}{4}$ section 18 on the land owned by Mr. Weiss. I asked Mr. Madsen what would happen if lowering the spillway elevation in the dam removed water from the portion of the slough in section 18. Mr. Madsen indicated that as long as changes to the dam did not lower the water level below what would naturally occur then the US Fish and Wildlife Service would not oppose the change.

September 2, 1999 On-Site Investigation

Conditions were foggy and raining on and off -- temperature in the mid 60's. I met with David Aesoph and Mr. Weiss' renter George Weisler at Mr. Aesoph's farm and traveled to the dam site. The height of the dam fill was estimated to be 17.5 feet using a hand level with an approximate freeboard of 4 feet. A 24 inch culvert serves as the primary spillway and the bottom of the culvert was approximately 1.5 feet above the current pond level. I paced off the distance from the tailwaters of Mr. Aesoph's dam to a breached dam located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ section 18 on Mr. Weiss' property. The approximate distance from the tailwaters (upper end of the impounded water) was 210 feet to the embankment of the breached dam. I also observed a large number of dead trees standing in the water impounded behind the dam. Many of trees were quite large before they apparently drowned in the impoundment. I obtained aerial photos taken in 1981 or 82 at the Highmore Farm Services Agency and photos taken in 1992 or 1993 from the Miller Farm Services Agency. The slides for 1984 through 1986 and from 1995 through 1997 were not available because duplicates were being made as I requested Kelly Stout to do. I did view the 1998 slide and noted a significant increase in the size of the impoundment as compared with the aerial photos. During the investigation I took four photos of the dam area with a digital camera -- photos are attached to this file documentation.

Mr. Aesoph indicated during the investigation that the 24 inch culvert replaced a smaller culvert that was installed at the time of the dugout cost share construction completed in 1988. The culvert location was moved from the west side of the dam to the east side. According to Mr. Aesoph the old culvert was undersized and had washed out which prompted the replacement with a larger culvert. Mr. Aesoph indicated the culvert was moved to prevent eroding along the base of the dam embankment.

September 3, 1999

Mr. Weiss called concerning the inspection completed on September 2, 1999. I informed Mr. Weiss of the inspection results and that I am awaiting copies of aerial photos for the mid 1980's and mid 1990's before making a decision on what action to take. I also told Mr. Weiss that I would keep him advised as I received more information.

RECOMMENDED ACTION:

Need to investigate to see whether the work completed in 1988 resulted in an increase in the pool elevation. In order to this I will try to obtain aerial photos for wet years prior to 1988 and after 1988.

August 30, 1999: Kelly Stout with the NRCS called and I requested aerial photos for the years 1984, 85, and 86 and then for 1995, 96, and 97. I also spoke with Mr. Aesoph and Mr. Weiss regarding review of the aerial photos to determine whether the dam size had been increased in 1988. After reviewing the photos, if available, I told them I would update them on what I found.

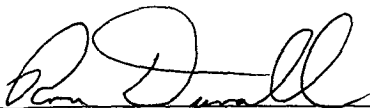
September 13, 1999

Slides of the aerial photos for 1984, 85, 95, 96, and 97 were received on September 10, 1999. After review of the slides it was apparent that the size of the dam was increased in the early to mid 1990's based on the size of the impoundment. These slides coupled with on-site observations of inundated trees show that the elevation of the spillway was raised significantly. Approximately 14 more acres are flooded in section 18 as a result of raising the spillway. Consequently, a notice needs to be issued ordering the spillway elevation to be lowered. In addition, either a vested water right or a new permit will be needed for the remaining amount of storage in the dam.

Rich Madsen and Bob Barrett with the US Fish and Wildlife Service in Huron were also advised by telephone on September 13, 1999 that the spillway elevation needs to be lowered. Mr. Barrett indicated that this should not cause a problem with the wetlands easement in section 18. However, Mr. Barrett wanted to be notified if any further action such as removal of the whole dam became an issue.

September 15, 1999

An order was issued to Mr. Aesoph with a copy to Don Weiss and Diane Best, Assistant Attorney General -- copy of Notice to lower spillway on file.



Ron Duvall, Natural Resources Engineer
Water Rights Program

Photos (four) taken September 2, 1999 during inspection of David Aesoph dam located in the W $\frac{1}{2}$ NW $\frac{1}{4}$ section 19-T116N-R70W (explanation below each photo)



Inlet to 24 inch culvert acting as primary spillway on the east side of the dam embankment. Pool elevation is 18 inches below bottom of culvert.



Picture of the upstream side of the dam embankment looking towards the west.



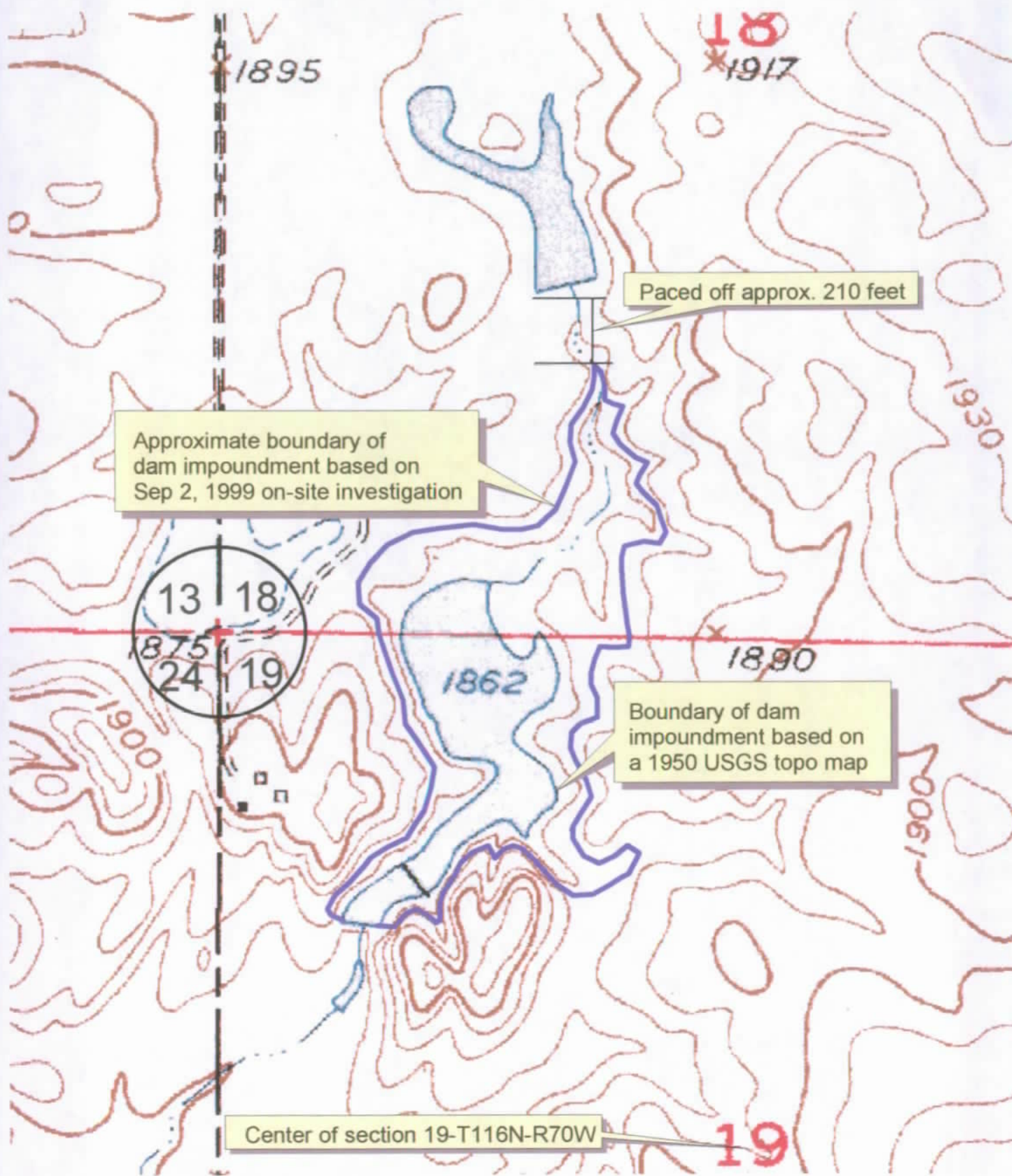
Picture showing the downstream side of the dam embankment looking towards the west. Outlet of the 24 inch culvert is in the lower center of the picture.



This picture is the view of the impoundment looking North towards section 18. Note the large number trees inundated by the impounded water.

Map of David Aesoph dam based on Sep 2 , 1999 on-site investigation

Date prepared -- November 22, 1999



CERTIFICATION

I hereby certify that on September 15, 1999, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated September 15, 1999, along with copies of photograph's of area, an aerial map, and a copy of the Water Rights Law State of South Dakota, regarding Order to Lower Spillway on Dam, addressed as stated below:

David Aesoph, HC 1, Box 27, Highmore, SD 57345.

Don Weiss, Box 186, Faulkton, SD 57438.

Just a copy of the Notice was sent inter-office to:

Diane Best, Assistant Attorney General, Capitol Building.

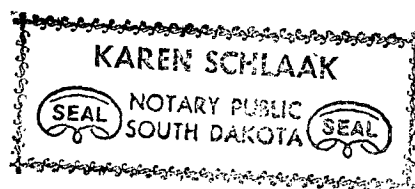
Cheryl F. Frost

Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 16th day of September, 1999

Karen Schlaak
Notary Public

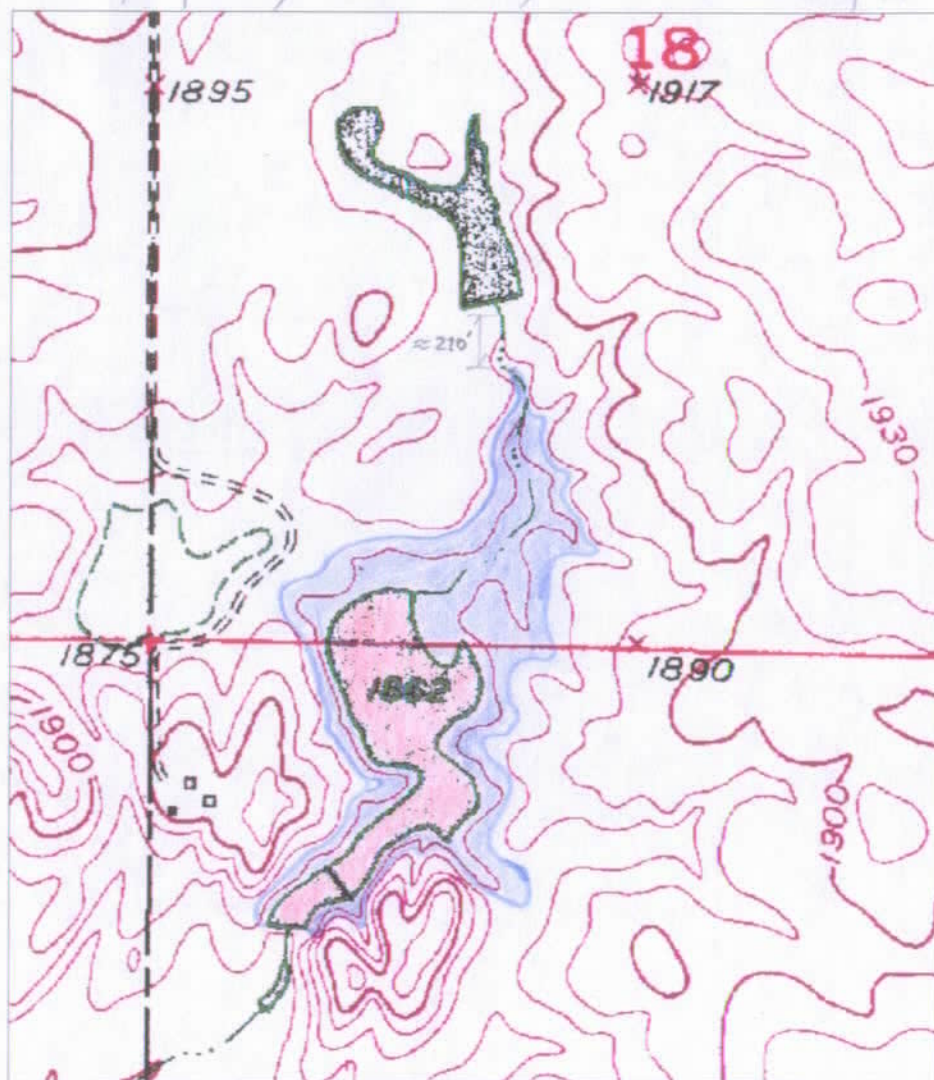


KAREN SCHLAAK, Notary Public
My Commission Expires
April 1, 2001

■ Area inundated by dam based on 1950 topo map

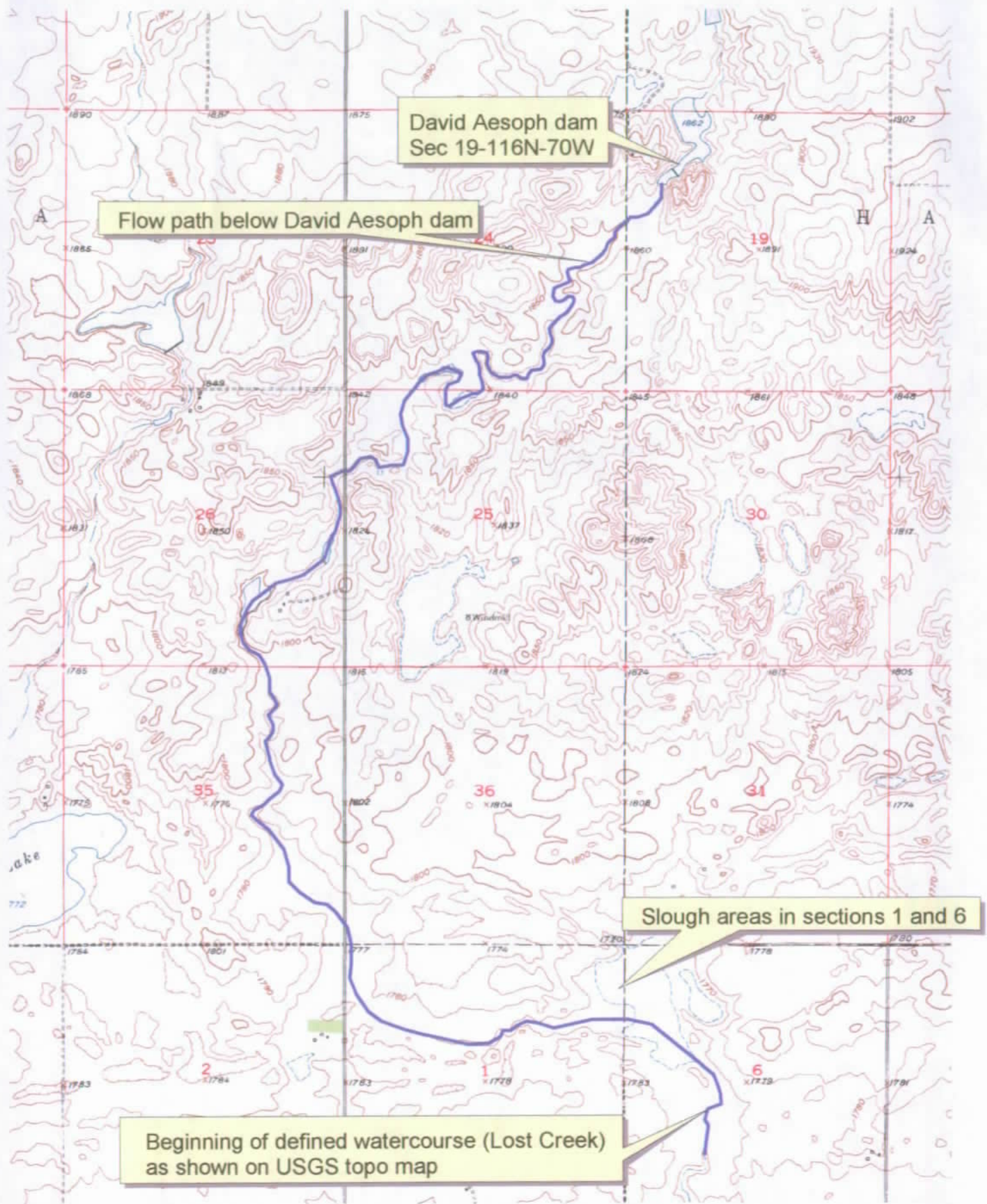
■ Area inundated by dam based on visual inspection completed 9/2/99

Dam located in section 19-T116N-R70W
on property owned by David Aesoph



*Original of this map provided to David Aesoph on 9/2/99 during an office visit. Printed on base map and recreated as close as possible to original.

Downstream drainage below David Aesoph dam November 18, 1999





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

September 15, 1999

NOTICE

TO: David Aesoph
HC 1 Box 27
Highmore, SD 57345

FROM: John Hatch, Chief Engineer
Water Rights Program

SUBJECT: Order to Lower Spillway on Dam

This Notice is in regard to a dam located on your property in the NW1/4 of Section 19-T116N-R70W that backs water on to property owned by Don Weiss in section 18-T116N-R70W. South Dakota Codified Laws (SDCL) 46-4-1.1 and 46-5-2 allow a person to construct and maintain a dam as long as no land other than that belonging to the owner of the dam is flooded, or an easement for such flooding has been secured.

On September 2, 1999 an on-site investigation was made by Ron Duvall, Water Rights Program engineer, in response to a flooding complaint by Mr. Weiss. Since at least 1950 according to a US Geological Survey topographical map, the dam has on occasion impounded water on land in section 18. You indicated to Mr. Duvall that repair work occurred on the dam in about 1988 and then again in the early 1990's to replace a spillway culvert that washed out. Based on the on-site investigation and review of aerial photos taken in the 1980's and 1990's, the amount of water impounded by the dam was increased during the early to mid 1990's by raising the spillway elevation. Enclosed is an aerial photo taken in the early 1990's. The surface area of the dam as it appeared in 1997 has been projected on to the photo and the outer boundary of the water is outlined in red. Aerial photos from 1995 and 1996 confirm similar increases in the size of the dam. According to the enclosed aerial photo, approximately 14 additional acres are being flooded in section 18 beyond the acreage previously affected by the dam.

September 15, 1999

David Aesoph

Page 2 of 2

There are two issues with this dam. First, the dam is flooding land owned by Mr. Weiss. Second, the dam is not authorized by a water right or location notice. Based upon this evidence and pursuant to SDCL 46-2-17, 46-2-18, 46-4-1.1, and 46-5-2 (see enclosed laws), you are **ordered** to lower the spillway elevation to meet one of the following conditions:

1. Lower the spillway to an elevation which does not flood any property owned by Mr. Weiss in section 18-T116N-R70W; or
2. Lower the spillway to the elevation existing prior to the changes made in the late 1980's and 1990's provided you can demonstrate that a prescriptive easement exists to allow flooding of Mr. Weiss' property at that prior elevation.

Discharging water from your dam while lowering the pool elevation needs to be accomplished in a manner that prevents damage to downstream property. Another option you may pursue is entering into some other type of easement or land purchase arrangement with Mr. Weiss at a mutually acceptable spillway elevation.

The second issue to be resolved is obtaining a water right for your dam. A review of our water rights files did not find any location notice or water right permit for your dam. The nearest location notice found was filed in 1962 by Joseph Hynek for a location approximately 1,200 feet North of your existing dam. A dugout, which is now inundated by the dam, is located near the site of the location notice.

Either a new water right permit application or a vested water right claim needs to be filed for the dam. A vested water right claim can be filed for the amount of water storage in existence on or before March 2, 1955. A new water right permit will be needed only if the size of the dam was increased after 1955 or if the dam was breached for three or more years and was then rebuilt. The continued existence of the dam is dependent upon obtaining either a vested water right or new water right for the dam.

If you have any questions, please contact Ron Duvall at (605) 773-3352.

c: Don Weiss, Box 186, Faulkton SD 57438
Diane Best, Assistant Attorney General

18

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Hyde Co.

N/C

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132.0

116-70
A-2

Property line

1907

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to
Hyde Co.
1981

19

Transferred
Hyde Co.
1981

Transferred
to

Water Rights Program -- File Documentation

NAME: David Aesoph

ADDRESS: HC 1 Box 27, Highmore SD 57438

DATE: September 21, 1999

COUNTY: Hand

TELEPHONE: 852-2119

RE: Dam Impoundment Flooding Complaint

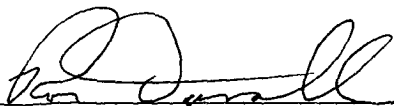
COMMENTS:

On September 21, 1999, Mr. Aesoph stopped by the office in response to receiving a Notice dated September 15, 1999, from John Hatch, Chief Engineer. The Notice orders Mr. Aesoph to lower the spillway on his dam located in the NW $\frac{1}{4}$ section 19-T116N-R70W to prevent flooding of property in section 18-T116N-R70W or obtain an easement to allow flooding of the property.

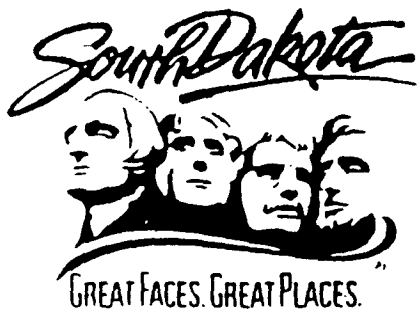
Mr. Aesoph viewed the aerial photo slides referenced in the Notice. A topo map was supplied to Mr. Aesoph showing the area impounded in 1950 and the current flooded area shaded in blue based on my September 2, 1999 on-site inspection. This flooded (blue) area represents the approximate water level at one and one half feet below the spillway elevation. Mr. Aesoph was interested in showing the map to Don Weiss (upstream property owner) to see if an agreement could be worked out (land purchase or easement) to allow flooding of the area outlined in blue. I told Mr. Aesoph that the topo map does not show the outline of the water level at its highest possible elevation since the water level was one and one half feet below the culvert spillway at the time of my inspection.

We discussed some possible language that could be used for purposes of Mr. Aesoph and Mr. Weiss entering into an easement agreement. I suggested the easement identify a certain spillway elevation to which both parties would agree to. In addition, I suggested that any easement also allow for temporary flooding at a higher elevation during periods of runoff until the pool elevation stabilizes at the spillway elevation. I also suggested establishing a benchmark and surveying the spillway outlet elevation so that any changes made in the future can be referenced from the benchmark. This would help prevent future disputes that the elevation of the spillway has been changed.

I informed Mr. Aesoph that until the upstream flooding matter is settled, it is not possible to specify the amount of storage on a vested right claim or new water permit application (whichever is applicable) since the final amount of storage capacity is not known. Mr. Aesoph indicated that the NRCS was scheduled to come out September 29, 1999 to determine how much water is being stored. Mr. Aesoph indicated that if he can not reach some agreement with Mr. Weiss then he will turn the matter over to the attorneys.



Ron Duvall, Natural Resources Engineer
Water Rights Program



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-0001

FAX TRANSMITTAL COVER PAGE

DATE: 10/8/99

TO: David Aesoph

PHONE #: _____ FAX #: 852-2119

NUMBER OF PAGES INCLUDING COVER PAGE 1

MESSAGE: Have you had any success
contacting Mr. Weiss about an easement or
land purchase? Please let me know.
Thank you, Ron

FROM: Ron Duvall

Water Rights Program

PHONE #: 773-3352 FAX #: (605) 773-4068



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

October 13, 1999

SECOND NOTICE

TO: David Aesoph
HC 1 Box 27
Highmore, SD 57345

FROM: John Hatch, Chief Engineer
Water Rights Program

SUBJECT: Order to Lower Spillway on Dam and Apply for Vested Water Right

On September 21, 1999, you stopped by the Water Rights office to discuss with Ron Duvall, staff engineer, your options to comply with the first Notice dated September 15, 1999 (see enclosed copy). It is my understanding based on a phone conversation last week between Mr. Duvall and Mr. Weiss that neither of the following options listed in the first Notice have been completed:

1. Lower the spillway to an elevation which does not flood any property owned by Mr. Weiss in section 18-T116N-R70W; or
2. Lower the spillway to the elevation existing prior to the changes made in the late 1980's and 1990's provided you can demonstrate that a prescriptive easement exists to allow flooding of Mr. Weiss' property at that prior elevation.

The second issue included in the first Notice was obtaining a water right for your dam. To date, no application has been received either for a new water right permit or to claim a vested right.

Since provisions of the first Notice have not been complied with, you are ordered to complete the lowering of the spillway as specified in the first Notice no later than **November 15, 1999**. In addition, you have ninety days from the date of this notice to file a vested water right claim for your dam provided you believe you are entitled to claim a vested water right. Failure to file a vested right claim within ninety days pursuant to South Dakota Codified Law (SDCL) 46-5-49 constitutes a waiver of any vested water right that may exist for the dam. The continued existence of your dam is contingent upon having some form of a water right to authorize impoundment of water.

October 13, 1999
David Aesoph
Page 2 of 2

All of the statutory provisions cited in the first Notice dated September 15, 1999, are still applicable. Failure to comply with provisions of the first Notice and this Notice can result in legal action being pursued in circuit court as allowed by SDCL 46-1-11. You need to be aware that anyone violating provisions of chapters 46-4 to 46-10, inclusive, is guilty of a Class 2 misdemeanor. In addition, a civil fine of not more than five hundred dollars may be imposed for the violation. Each day of noncompliance with the applicable statutes is deemed to be a separate violation.

If you have any questions, please contact Ron Duvall at (605) 773-3352.

c: Don Weiss, Box 186, Faulkton SD 57438
Diane Best, Assistant Attorney General

CERTIFICATION

I hereby certify that on October 13, 1999, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated October 13, 1999, regarding Order to Lower Spillway on Dam and Apply for Vested Water Rights, addressed as stated below:

David Aesoph, HC 1, Box 27, Highmore, SD 57345.

Don Weiss, Box 186, Faulkton, SD 57438.

A copy of the above described Notice was sent inter-office to:

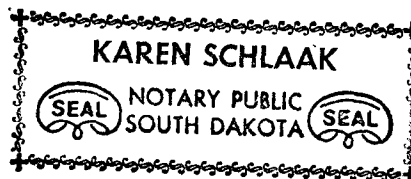
Diane Best, Assistant Attorney General, Capitol Building.


Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 14th day of August, 1999


Notary Public



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

Water Rights Program -- File Documentation

NAME: David Aesoph

ADDRESS: HC 1 Box 27, Highmore SD 57438

DATE: October 14, 1999 **COUNTY:** Hand **TELEPHONE:** 852-2119

RE: Dam Impoundment Flooding Complaint

COMMENTS:

Mr. Aesoph called in response to the fax I sent him on October 8, 1999, concerning whether he had contacted Mr. Weiss concerning an easement or land purchase. According to Mr. Aesoph, he had tried calling without success and had also approached Mr. Weiss at church to discuss the matter. Mr. Weiss was not able to discuss the matter at that time.

I informed Mr. Aesoph that we had mailed a second notice on October 13, 1999, and that he should be receiving it soon. I advised Mr. Aesoph that this second notice was setting a deadline to complete the work since a month had passed since the first notice was sent. Mr. Aesoph indicated that he will continue to try and get a hold of Mr. Weiss or turn the matter over to his attorney if that becomes necessary. Mr. Aesoph indicated that Mr. Weiss had told him some time ago that he intended to sell out in two or three years. This leads Mr. Aesoph to believe that they may be able to work out a purchase.



Ron Duvall, Natural Resources Engineer
Water Rights Program

WATER RIGHTS PROGRAM -- FILE DOCUMENTATION

NAME: David Aesoph

ADDRESS: HC 1 Box 27, Highmore SD 57438

DATE: November 12, 1999 **COUNTY:** Hand **TELEPHONE:** 852-2119

RE: Update on Status of Dam Impoundment Flooding Complaint

COMMENTS:

Mr. Aesoph called to inform me that he contacted Don Weiss regarding the dam in section 19 backing water on to property owned by Mr. Weiss in section 18. According to Mr. Aesoph, Mr. Weiss did not want to discuss the matter. I spoke with Mr. Weiss following my conversation with Mr. Aesoph. Mr. Weiss indicated that he did not want the water on his land and he was not interested in granting an easement for the flooding. Also, Mr. Weiss' daughter, Lynda Sandmann, 820 Triangle Road, Valley View TX 76272 wants to be copied any further correspondence concerning this matter.

Mr. Aesoph asked if Mr. Weiss had told me what happened when Mr. Weiss constructed a dugout in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ section 18 -- this dugout is in the drainage upstream from the dam in section 19 (dugout is surrounded by water impounded by the dam in section 19). I told Mr. Aesoph that Mr. Weiss had not told me anything regarding this dugout. Mr. Aesoph went on to explain that when the dugout was constructed that an underground water vein was hit which accounts for the water level in Mr. Aesoph's dam not receding in a timely manner. I informed Mr. Aesoph that whether it was surface water or ground water being impounded, the dam was still responsible for holding the water in place.

Mr. Aesoph also asked about filling out the application forms I sent to him. I informed Mr. Aesoph of his options to claim a vested right, apply for a new water right permit, or a combination of the two. Mr. Aesoph indicated that he wanted to claim a vested right for the entire storage capacity. I asked Mr. Aesoph whether he got a storage capacity for the dam when the NRCS representatives came out to survey the dam. Mr. Aesoph indicated that they did not show up on September 29, 1999, as planned. I told Mr. Aesoph that I could provide a very rough estimate of the storage capacity and helped Mr. Aesoph complete the remainder of the application over the phone. After helping Mr. Aesoph complete the application forms (except for the storage capacity), I informed Mr. Aesoph that the application would be considered by the state Water Management Board during a public hearing. I explained that this board was not the county commission as believed by Mr. Aesoph.

Mr. Aesoph then called later in the day for the storage capacity figure. I told Mr. Aesoph that I wanted to consult with Diane Best, Assistant Attorney General, and the chief engineer before providing any storage estimates since this matter may end up in court. After consulting with Diane Best and the chief engineer, I told Mr. Aesoph I would get back to him.



Ron Duvall

Natural Resources Engineer
Water Rights Program

WATER RIGHTS PROGRAM -- FILE DOCUMENTATION

NAME: Jeff Sveen, attorney, with Siegel, Barnett, & Schutz

ADDRESS: Box 490, Aberdeen SD 57401

DATE: November 16, 1999

TELEPHONE: 225-5420

RE: Don Weiss flooding complaint

COMMENTS:

Jeff Sveen called on behalf of David Aesoph regarding the flooding complaint lodged by Don Weiss on August 25, 1999. A dam located on property owned by Mr. Aesoph in section 19-T116N-R70W is backing water on to Mr. Weiss' property in section 18-T116N-R70W. Mr. Sveen is legal counsel for Mr. Aesoph.

Mr. Sveen requested that I fill him in on the background concerning this matter. I advised Mr. Sveen of my investigation findings and the notices ordering Mr. Aesoph to lower the dam spillway and obtain some form of a water right for the dam. I also advised Mr. Sveen that time had expired for Mr. Aesoph to complete the spillway work as specified in the October 13, 1999 notice and that the matter is being turned over to the attorney general's office. Mr. Sveen requested that I have Diane Best, Assistant Attorney General, call him prior to the attorney general's office filing any sort of court action. In addition, Mr. Sveen requested a copy of pertinent file information concerning this issue. In response to Mr. Sveen's request I advised Diane Best of his request and put together a copy of the following documents for Mr. Sveen:

- File Documentation dated August 25, 1999 with four photos of dam site
- Topo map showing area inundated in 1950 and approximate area inundated based on visual inspection on September 2, 1999
- First Notice dated September 15, 1999
- File Documentation dated September 21, 1999
- Second Notice dated October 13, 1999
- File Documentation dated October 14, 1999
- File Documentation dated November 12, 1999

I advised Mr. Sveen that I helped Mr. Aesoph partially-complete an application for a vested water right claim for the present size of the dam. I noted that I did not believe that the dam qualified for a vested right for the present amount of storage but that does not prevent Mr. Aesoph from claiming a vested right. One of the questions that I did not answer was the amount of storage in the dam. I told Mr. Sveen that I needed to inform Mr. Aesoph that I could not provide the amount of storage capacity since this matter may be headed for legal action. I indicated that either a consultant or the Natural Resources Conservation Service may be able to assist. Mr. Sveen told me that he would inform Mr. Aesoph of this so I did not need to contact Mr. Aesoph.



Ron Duvall
Natural Resources Engineer
Water Rights Program

WATER RIGHTS PROGRAM -- FILE DOCUMENTATION

NAME: Mike Aesoph

ADDRESS: 34165 174th St Highmore, SD 57345-5119

DATE: November 18, 1999

TELEPHONE: 605-852-2322

RE: Area downstream from the David Aesoph dam

COMMENTS:

Mike Aesoph (David Aesoph's brother) called regarding concerns about damages to downstream areas if David Aesoph is required to lower the dam's spillway. Mr. Aesoph mentioned that he owns land downstream in sections 24, and 26 and leases land from Gary Kopecky in the E½ section 35; all in T116N-R71W. According to Mr. Aesoph, the road running by these sections has been raised but is only three inches above water and the water from David Aesoph's dam will have no where to go once reaching this area. Mike Aesoph also indicated that he did not believe the game, fish and parks folks would allow the area to be drained. I told Mike Aesoph that our first notice dated September 15, 1999, indicates that lowering the water level needs to be completed in a controlled manner to prevent damages downstream. I informed Mike Aesoph that I would review the topographic map to determine the course of the water.

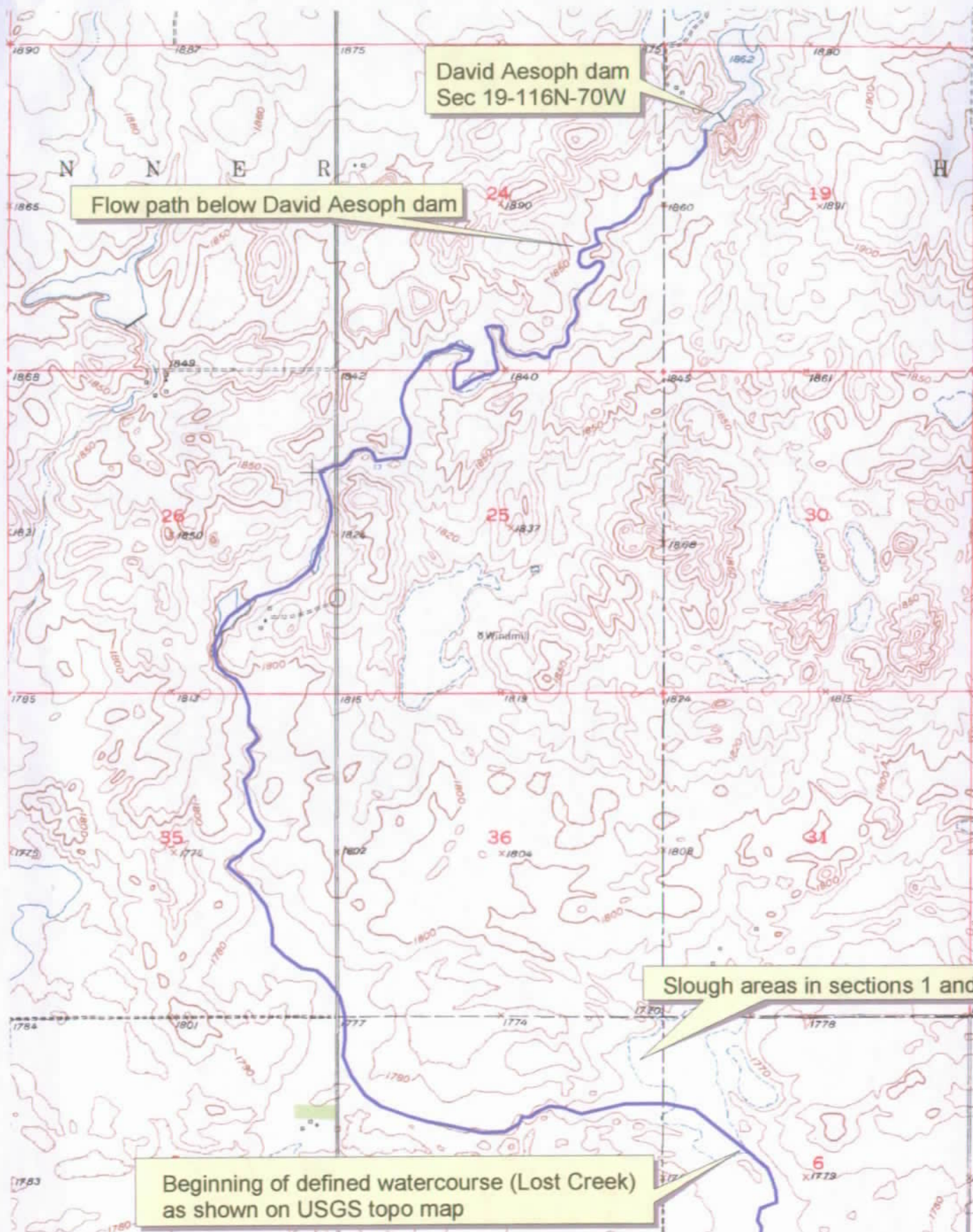
After reviewing the topo map (see attached map dated Nov 18, 1999) I found that the downstream watercourse from David Aesoph's dam follows the path mentioned by Mike Aesoph and enters a flat area located in sections 1-T115N-R71W (adjoins SE corner of section 35-T116N-R71W) and in section 6-T115N-R70W. The topographic map shows a defined channel known as Lost Creek headed southward from this flat area in section 6. Lost Creek then continues on to Wolf Creek and ultimately the James River. Although the topo map indicates that there is a slough area in portions of sections 1 and 6, this is not a closed basin that prevents runoff from leaving the slough area.



Ron Duvall

Natural Resources Engineer
Water Rights Program

Downstream drainage below David Aesoph dam November 18, 1999



Water Rights Program -- File Documentation

NAME: Donald Weiss

ADDRESS: 114 Pearl St, Faulkton SD 57438

DATE: December 3, 1999

COUNTY: Faulk

TELEPHONE: 598-4102

RE: Status of David Aesoph dam flooding complaint

COMMENTS:

Donald Weiss called for an update of what action is being taken regarding the David Aesoph dam. I informed Mr. Weiss that I had turned the matter over to Diane Best, Assistant Attorney General, to pursue action in circuit court. I noted that I did not know when an action would be filed since Ms. Best is working on several other cases. However, I told Mr. Weiss that he would be notified as soon as an action begins.

Mr. Weiss also mentioned that he had been informed by his renter that David Aesoph was circulating a petition to allow the dam to be left as is. I told Mr. Weiss that I did not know anything about a petition or with who this petition would be filed assuming it exists.



Ron Duvall, Natural Resources Engineer
Water Rights Program

SIEGEL, BARNETT & SCHUTZ, L.L.P.

ATTORNEYS AT LAW
500 CAPITOL BUILDING
P.O. BOX 490

ABERDEEN, SOUTH DAKOTA 57402-0490

TELEPHONE (605) 225-5420

FAX (605) 226-1911

[E-Mail siegellawabr@midco.net]

January 10, 2000

RAYMOND M. SCHUTZ
HARVEY C. JEWETT
RORY KING
JEFFREY T. SVEEN
JOSEPH P. BARNETT
RONALD J. HALL*
PAUL T. BARNETT
REED RASMUSSEN
GREGG C. MAGERA
KATHRYN J. HOSKINS
RYAN N. BOE

*Also Licensed in North Dakota

STAN SIEGEL (1928-1996)
JOSEPH H. BARNETT (1931-1985)
TERENCE A. O'KEEFE (1938-1999)

SIoux FALLS OFFICE
300 NORTH DAKOTA AVENUE, SUITE 606
P.O. BOX 1286
SIoux FALLS, SOUTH DAKOTA 57101
TELEPHONE (605) 335-6250
FAX (605) 335-6749
[E-mail sbslawssf@midco.net]

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



RE: Vested Water Right Application Stock Dam – W½NW¼ of 19-116-70 W of the 5th P.M., Hand County

To Whom It May Concern:

Please be advised that our law firm represents Mr. David Aesoph and have been asked to submit his application and accompanying information to your office in order to claim a vested right for the entire storage capacity of a dam located on his property.

Enclosed please find the original Application for Permit to Appropriate Water Within the State of South Dakota, Form 2A Supplemental Information, Affidavit of Water Use, and attached Exhibits A through F. Mr. Aesoph is submitting this application in order to claim a vested right to the entire storage capacity of the dam located on his property. The dam has been on the property since 1950, according to topographical maps of the area. The dam impounds water back into a naturally occurring slough area located in Section 19 to the north. Due to high water levels in the mid 1980's the dam was washed out in the winter of 1985 – 1986.

Mr. Aesoph repaired the dam in 1988 by moving soil from upstream of the dam embankment, removing some of the material below the dam and back filling with a clay-type material. Mr. Aesoph also installed a culvert in the primary spillway. The culvert was moved from the west side of the reservoir to the east side. The old culvert was undersized and had washed out, which had prompted the replacement with the larger culvert. The culvert was also moved to prevent eroding along the base of the dam embankment. This entire project was done in 1988 as a "cost-share" project with the Natural Resources Conservation Service (NRCS) formally known as the Soil Conservation Service.

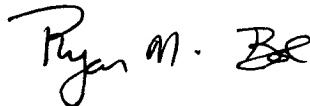
Water Rights Program
January 10, 2000
Page 2

This project was approved and cost-share funded through the NRCS office in Highmore, SD.

As the dam appears in the 1950 topographical map, the surface area of the dam was 14 acres. Because of above average precipitation levels in the 1980's and 1990's, the storage capacity of the dam has increased as larger amounts of water have collected behind the dam. Additionally, Mr. Aesoph's upstream neighbor, Don Weist, constructed a dugout in the upstream drainage of the dam. When the dugout was constructed, an underground spring was hit causing additional flow of water into the dam's reservoir. The storage capacity of the dam is estimated at 70-acre feet.

It is Mr. Aesoph's intention to apply for a vested water right over the entire inundated area as shown in blue on Exhibit A. If there are any questions or concerns, please do not hesitate to contact me at our Aberdeen office. Thank you very much for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Ryan N. Boe". The signature is fluid and cursive, with a stylized "R" and "B".

Ryan N. Boe
of SIEGEL, BARNETT & SCHUTZ, L.L.P.

RNB:klb

Enclosures

pc w/encl.: Mr. David Aesoph

LOCATION NOTICE—DRY DRAW

Hyde

County

Dry Draw No.

I, **Donald Weiss**,
Name

Highmore, South Dakota

Address

Town

Hyde

County

owner

of the following described land, do hereby notify the Water Resources
owner or operator

Commission of the State of South Dakota and all others concerned that I am exercising my
right under Section 61.0138 of Chapter 400 of the Session Laws of 1955 for construction of a
Dry Draw dam for the purpose of **storing** flood waters for
storing, diverting, or both

livestock

livestock, irrigation or both purposes

The following data is presented in compliance with Section 61.0138:

(1) Dates of

(a) This application **September 25, 1958**

(b) Posting at construction site **September 25, 1958**

(2) Legal description of the land upon which the dam is located. **NE** 1/4 of the **SW** 1/4 of
Section **18**, Township **116**, Range **70**. The dam is located **128** rods
N and **90** rods **E** of the **SW** corner of said Section
(N.S.E.W.) (N.S.E.W.) (NW, NE, SE, SW)
in the County of **Hand County, South Dakota**

The owner of the land is **Donald Weiss, Highmore, South Dakota**
Name Address

(3) Amount of water claimed for all purposes each year **1.8** acre feet.

(4) Storage capacity of reservoir **1.8** acre feet.

(5) Surface area of reservoir **.2** acres.

(6) Size of watershed above dam **230** acres.

(Over)

enclosed herewith is one dollar (\$1.00). The Water Resources Commission is requested to file this Location Notice in their official records.

A copy of this Location Notice has been filed (do not record) with the Register of Deeds of **Hood** County and has been posted at the structure site in accordance with Section 61.0138 of the Water Laws.

Owner

by _____
Locator

STATE OF SOUTH DAKOTA
County of **Hyde** ss.

On this **25th** day of **September**, 19 **58**, before me

Lilly Ragne

Notary Public

(Notary Public or other Official having a seal)

in and for the County and State aforesaid, personally appeared **Donald Weiss**
to me personally known to be the person who executed the foregoing instrument and acknowledged that he executed the same for the purposes therein set forth.

Witness my hand and official seal the day and date above written.

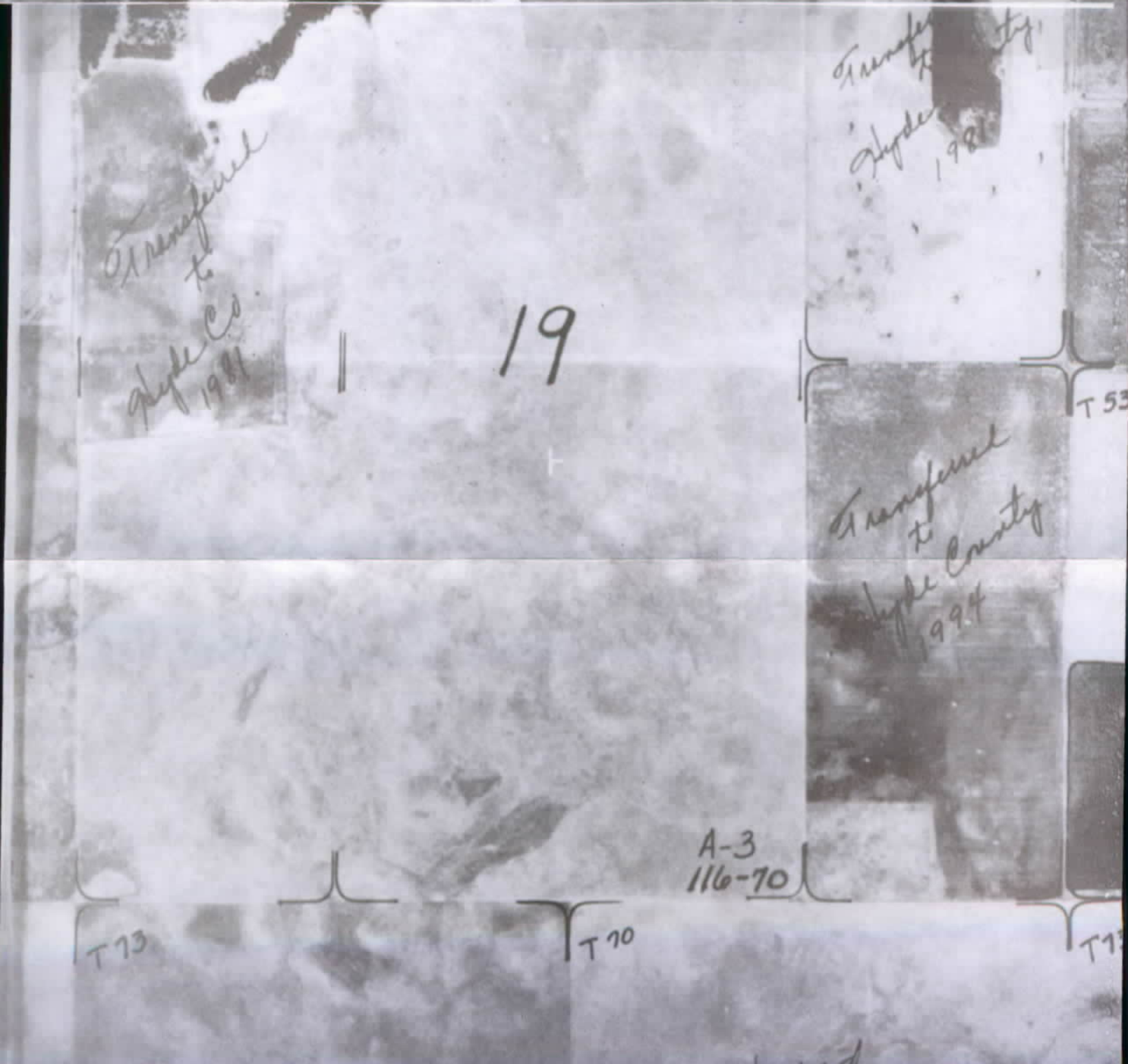
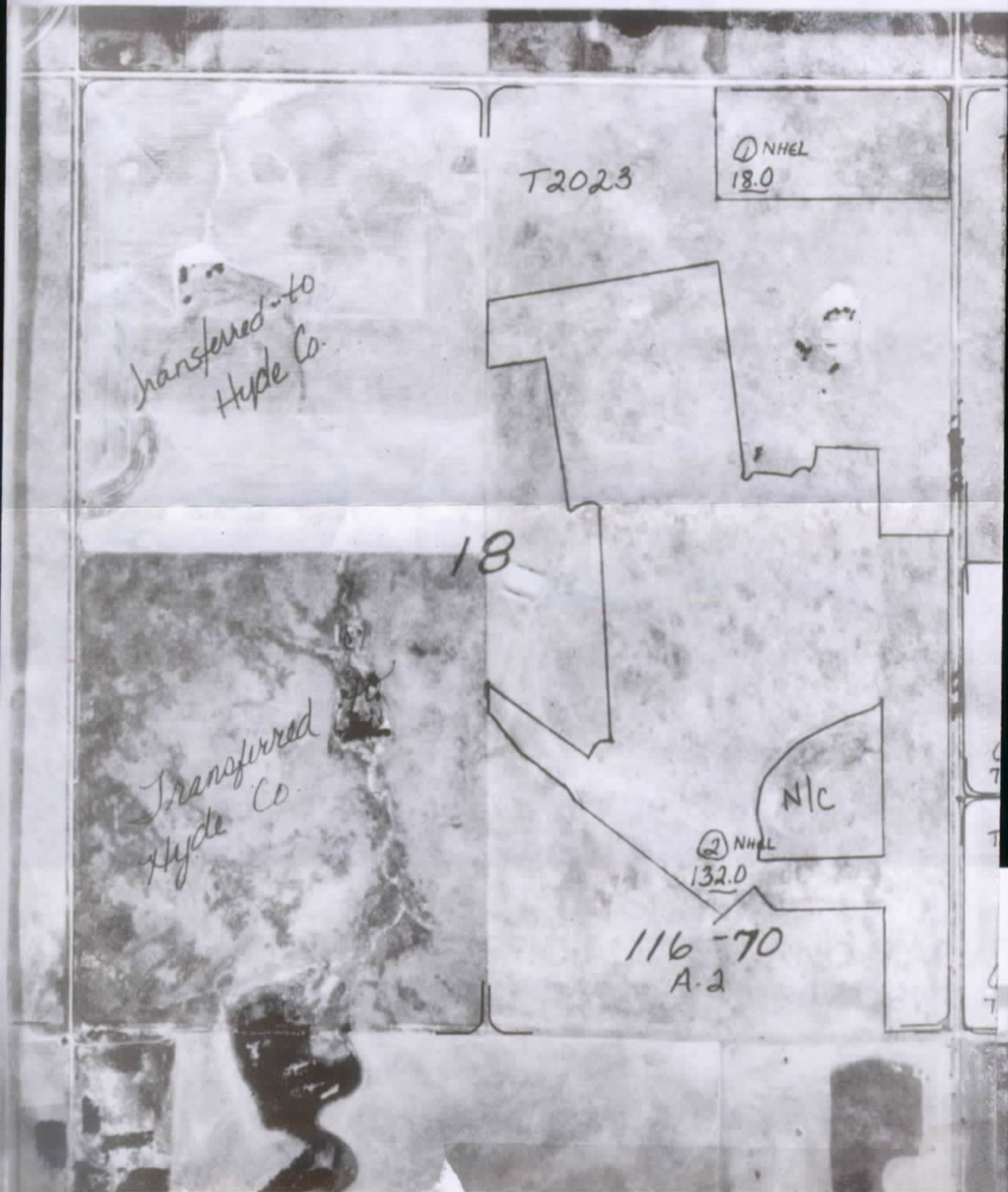
Name

(SEAL)

Notary Public

Title

MAP NOT TO SCALE
THIS IS NOT AN OFFICIAL WETLAND MAP.



Highmore 23 N

Highmore, SD, United States

Other Stations in Highmore

List Stations in Division SD-06

List Stations in Hyde County

Surrounding Stations (+/- 30' Lat/Lon)

Call Sign/ICS* :

WBAN* :

COOP ID* : 393838

Climate Division* : SD-06 - Central

WMO ID* :

In Service* : 02 May 1952 to Present

Elevation* : 570.0m (1869.6')
above sea level

Lat/Lon* : 44°51'N / 99°29'W

County* : Hyde

- Data Inventories
- Station History
- State Climatologist
- Regional Climate Center

Information at Other Sites

- National Weather Service
 - Central Region Headquarters
 - Regional Forecast Office
 - Local Weather Conditions
 - Local Weather Forecast
- Current Radar
- Current Satellite
- Sunrise/Sunset

Normal 17.32

* *Disclaimer*

* *List of NCDC Datasets*

* *Please report any Data Errors found.*

* *Note to webmasters: you can link directly to this page.*

Other Stations in Highmore

Highmore

Highmore 1 W

Data Inventories

Please note that additional data (digital and non-digital) are available for this station.

Contact NCDC if additional details are needed.

Click on INV to view data inventories, DOC for documentation about the dataset.

Surface

INV DOC 3200 -Cooperative Summary Of The Day

INV DOC 3220 -Summary Of The Month (SOM) Cooperative

Station History

Highmore 23 N

Date Began	Date Ended	Lat/Lon	Elevation meters/feet	COOP ID	WBAN	Call Sign	WMO ID	Type
------------	------------	---------	--------------------------	------------	------	--------------	-----------	------

HIGHMORE 23 N									
19 Sep 1992	Present	44°51'N / 99°29'W	570.0m / 1869.6'	393838	.	.	.	.	.
HIGHMORE 23 NNW									
14 May 1986	19 Sep 1992	44°51'N / 99°28'W	554.7m / 1819.4'	393838	.	.	.	.	.
26 May 1966	14 May 1986	44°51'N / 99°28'W	555.0m / 1820.4'	393838	.	.	.	.	.
HIGHMORE 25 N									
01 May 1966	26 May 1966	44°51'N / 99°28'W	555.0m / 1820.4'	393838	.	.	.	.	.
02 May 1952	01 May 1966	44°52'N / 99°27'W	570.0m / 1869.6'	393838	.	.	.	.	.

 **Top of Page**

 **NCDC / Climate-Radar Data Inventories / Locate Station / Search**

This page dynamically generated 03 Sep 1999 from:

<http://www.ncdc.noaa.gov/ol/climate/stationlocator.html>

Please send questions or comments about this system to webcliserv@ncdc.noaa.gov

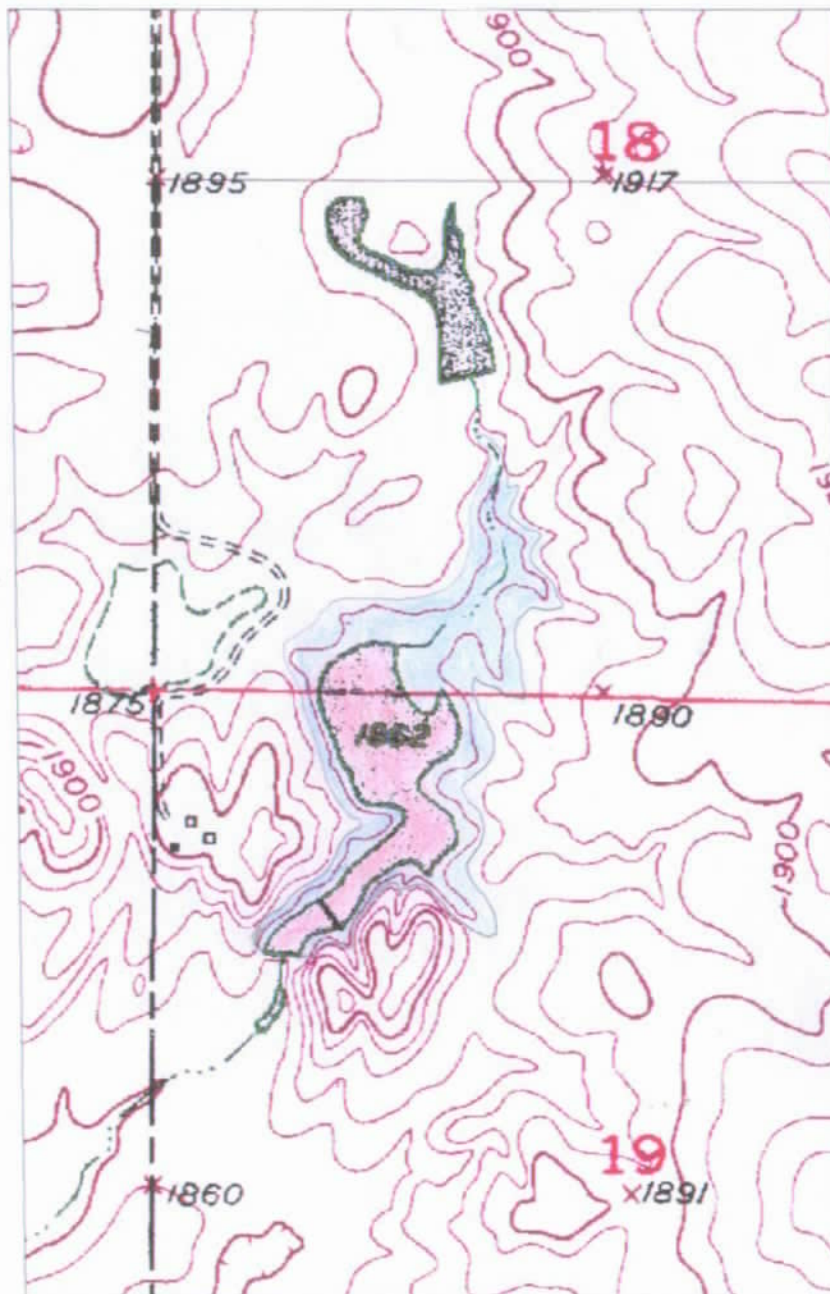
Please see the NCDC Contact Page if you have questions or comments.

ASK Don For EASEMENT - Agree To This MAP Red or Blue Area

Sections 18 and 19-T116N-R70W

■ Inundated area based
on 1950 topo map

■ Visual estimate of
inundated area as of
Sept 2, 1999

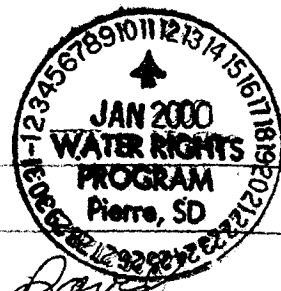


EXHIBIT

A

I agree to let D A impound ^{water} up to the elevation
of his spillway and temporarily ^{above that} during periods of runoff.
with the understanding that the survey will be completed
to establish an elevation.

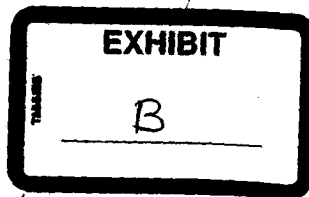
To whom it may concern:



To Whom it May Concern:

We don't feel that the dam on David Aeschoph's land is causing any extra problems. It is more of an asset than a problem. It is a good fishing spot and the extra water that is there was probably caused by the extra moisture we have had over the last 4 or 5 years. The land that it is flooding is just a slough anyway. We have pasture land along side of this area & it was only possible to drive down the section line 10 or 24 years out of the last 15.

Sincerely,
Mary Ann Witte
Harold Witte



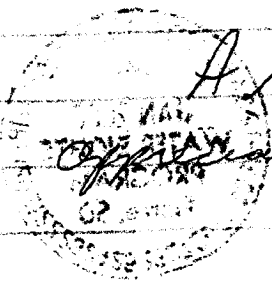
approved by the SLS or N/KCS.

from David
for Mr. Weiss
in his dam.
hunting much

with several
backed up on
from the
6 years or so.
around year the

This dam is
county road and
regularly
ty. It will
section 35, some

ending that Mr.
18 in Hand Co.
in of water
ter problem!
of these projects,
dam, were
(over) over



A response to this matter would be appreciated.

Thank you,
Mike Osepe





To whom it may Concern.

I live 2 miles downstream from Daniel Aesoph's Dam. Through the grapevine I understood you or Mr. Weiss are trying to make Aesoph drain his dam. To my knowledge the dam isn't hurting much more property than it ever did.

I have talked to several people in the area (neighbors) that have informed me that the water backed up on Weiss's is caused mainly from the excessive runoff the 6-7 yrs. They also said even in normal yrs the water had been backed onto Weiss's property.

If this dam is drained it will flood my road ^{to} the west ~~off~~ of me. It will also flood the E 1/2 section 35 that I farm.

P.S. I also understand Mr. Weiss dug a dugout on Sect -18- in Hand Co. And in the process struck a vein of water adding to the problem. Also people ~~that~~ ^{say that} both of these projects (Aesoph's dam + Weiss's dugout) were approved by The SCS or NRCS

Gary Kopecky

PO Box 421

Highmore 57345-0421

please respond
Yours Truly

Gary Kopecky

WATER RIGHTS PROGRAM -- FILE DOCUMENTATION

NAME: Darlene Droz, Register of Deeds -- Hand county

ADDRESS: 415 W 1rst Ave, Miller SD

DATE: January 14, 2000

TELEPHONE: 853-3512

RE: Property ownership

COMMENTS:

I contacted Darlene Droz to confirm property ownership regarding the David Aesoph flooding complaint filed by Don Weiss. Ms. Droz confirmed that Don Weiss is the owner of the SW¼ section 18-T116N-R70W and has been either the owner or joint tenant of the property since November 12, 1949. I was also informed by Ms. Droz that Mr. Aesoph owned only a portion of the NW¼ section 19-T116N-R70W. Mr. Aesoph owns the W½NW¼ on which the dam structure is located and School and Public Lands owns the E½NW¼ which is partly inundated by the dam. According to Mike Cornelison with School and Public Lands, Mr. Aesoph leases the property from School and Public Lands. I advised Mr. Cornelison that I believed the dam spillway was raised and that additional acreage is being flooded as a result.



Ron Duvall
Natural Resources Engineer
Water Rights Program



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

January 14, 2000

Ryan N Boe
Siegel, Barnett & Schultz, LLP
PO Box 490
Aberdeen SD 57402-0490

Dear Mr. Boe:

Thank you for submitting the *Application claiming a Vested Water Right to Appropriate Water* on behalf of David G. Aesoph. In order to complete the application the following is required.

The map submitted with the application does not meet the requirements of the Administrative Rules of South Dakota (ARSD 74:02:01:07 -- see attachment). Enclosed is a map I prepared which you may use as the application map. This map was originally prepared as part of a complaint investigation conducted September 2, 1999. I modified the map so that it may serve as an application map. As noted on the map, I estimate the total storage capacity of the dam as being 174 acre-feet rather than 70 acre-feet as specified on Mr. Aesoph's application. The estimated 174 acre-feet of storage was calculated by multiplying the surface area of the dam at the spillway elevation (≈ 43 acres) times the water depth at the spillway elevation (≈ 13.5 feet) times a factor of 0.3. You indicated in your cover letter that you wish to claim a vested right for the entire storage capacity of the dam. Please advise me whether you want to use the enclosed map as the application map and, if so, do you want to change the amount of water being claimed on the application from 70 acre-feet to 174 acre-feet.

NOTE: I prepared this map as a courtesy only, the map is not an endorsement of Mr. Aesoph's vested right claim for the entire storage capacity to the current spillway elevation. A vested right to water from a dry draw may only be claimed under conditions met in either South Dakota Codified Law 46-4-5 or 46-1-9. I believe the storage capacity of the dam was increased at a date later than what qualifies for vested status. This increase in storage capacity will need to be covered by a new water right permit. Another issue to be considered with the vested right claim is flooding of the Weiss property and School and Public Lands property for which a flood easement has not been obtained.

If you choose not to use my map, then please have a map completed in accordance with ARSD 74:02:01:07 and signed by one of the following: registered land surveyor, registered professional engineer or by any other government employee who normally prepares maps as a part of his assigned duties.

In addition to a completed map, a filing fee of \$15.00 needs to be submitted to complete your vested right application. Following completion of your application, a hearing will be scheduled for the Water Management Board to consider your vested right claim and the upstream flooding issue.

January 14, 2000

Ryan N Boe

Page 2 of 2

If you have any questions, please contact me at (605) 773-3352.

Sincerely,

A handwritten signature in black ink, appearing to read "Ron Duvall". The signature is fluid and cursive, with the first name "Ron" and last name "Duvall" clearly distinguishable.

Ron Duvall

Natural Resources Engineer

Water Rights Program

enclosure

c: David G Aesoph

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

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

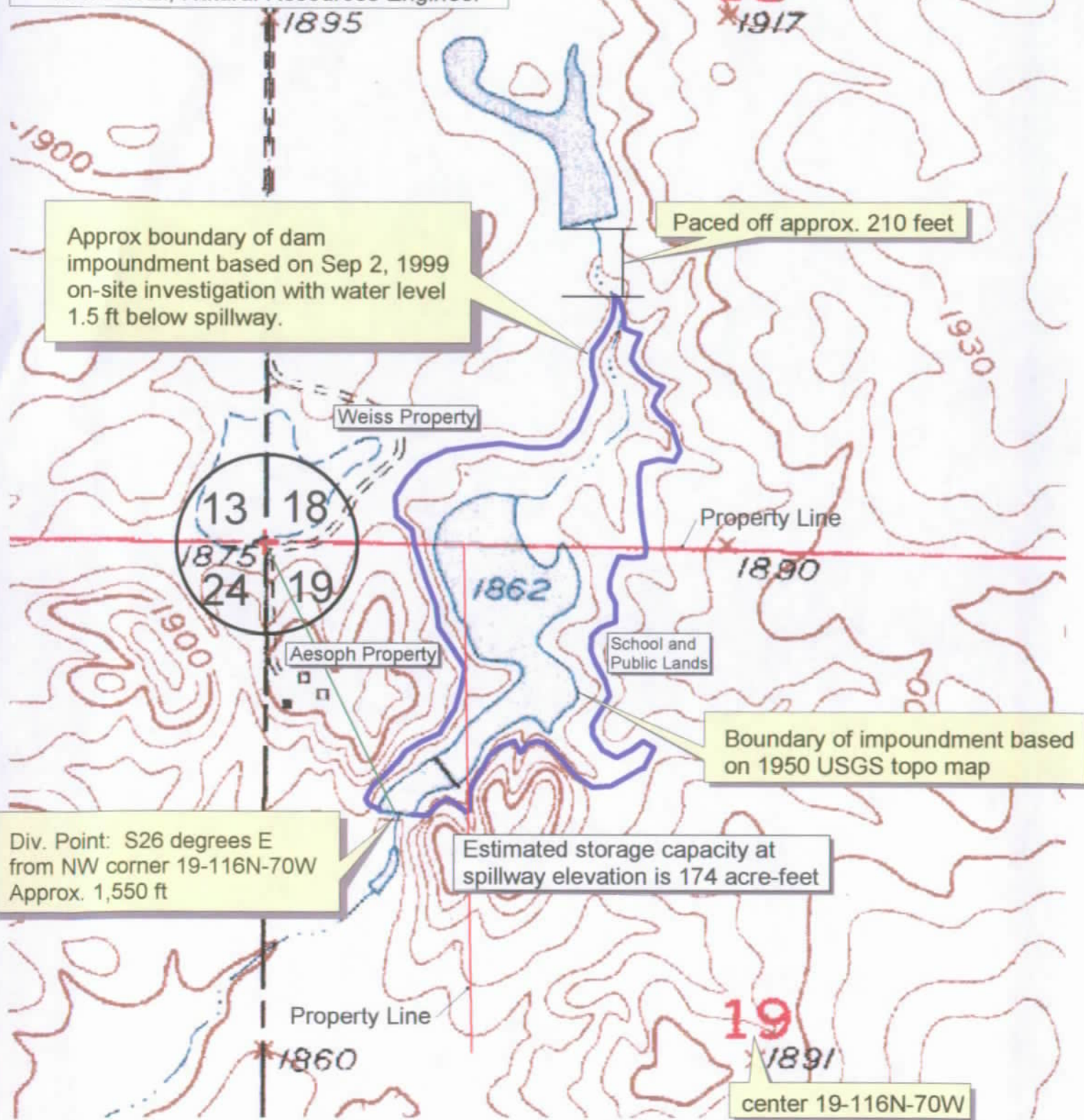
Map of David Aesoph dam based on Sep 2, 1999 on-site investigation

Date prepared -- January 13, 2000

300 0 300 600 Feet



Ron Duvall, Natural Resources Engineer



SIEGEL, BARNETT & SCHUTZ, L.L.P.

ATTORNEYS AT LAW
500 CAPITOL BUILDING
P.O. Box 490

ABERDEEN, SOUTH DAKOTA 57402-0490

TELEPHONE (605) 225-5420

FAX (605) 226-1911

[E-Mail siegellawabr@midco.net]

RAYMOND M. SCHUTZ
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SIoux FALLS OFFICE
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P.O. Box 1286
SIoux FALLS, SOUTH DAKOTA 57101
TELEPHONE (605) 335-6250
FAX (605) 335-6749
[E-mail sbslawfs@midco.net]

January 27, 2000

Mr. Ron Duvall
Natural Resources Engineer
Department of Environment and
Natural Resources
Joe Foss Building, 523 East Capitol
Pierre, SD 57501-3181



RE: Vested Water Right Application Stock Dam – W½NW¼ of 19-116-70 W of
the 5th P.M., Hand County

Dear Mr. Duvall:

I am in receipt of your January 14, 2000 letter. Enclosed please find our firm check in the amount of \$15.00 representing payment of the filing fee for Mr. David Aesoph's Vested Water Right Application.

In reference to the map you sent to us, we have no objection to using your map as the application map. However, we are not in agreement as to the estimated acre-feet of storage of the dam. Your calculations appear to factor the storage capacity of the dam utilizing a water depth of 13.5 feet throughout the entire reservoir. While the depth of the water at the dam itself is 13.5 feet, it is certainly not 13.5 feet deep throughout the reservoir. Most of the dam's water depth is from one to three feet deep.

In regards to my letter dated January 10, that I had submitted on behalf of Mr. Aesoph, I would like to clarify one error in the letter. On page 2 of the letter, the paragraph where I reference, "underground spring being hit during construction"; I inadvertently referenced the construction of the dam. The word "dam" should be replaced with the word "dugout" as the construction of the dugout caused an underground spring to be hit by Mr. Weiss causing additional continual flow of water into Mr. Aesoph's dam. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Ryan M. Boe
of SIEGEL, BARNETT & SCHUTZ, L.L.P.

RNB:kls
Enclosure

pc w/o encl.: Mr. David Aesoph



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

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

March 22, 2000

David G. Aesoph
17433 341st Ave.
Highmore, SD 57345

Dear Mr. Aesoph:

Vested Water Right Application No. 6173-3 for recreation, fish and wildlife propagation, and livestock use has been examined and found to comply with the South Dakota Water Laws and applicable rules. A notice of hearing has been sent to the Publisher of the Miller Press printed at Miller, SD (Ph # (605) 853-3575). For your information, a copy of the notice, the recommendation of the Chief Engineer and a report on the application are enclosed. Please review the notice prior to publication and notify this office, if you have any corrections or questions.

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

Sincerely,

Eric Gronlund
Natural Resources Engineer
(605) 773-3352

enclosures

c: Ryan N. Boe, Attorney, Siegel, Barnett & Schutz, L.L.P., P.O. Box 490, Aberdeen, SD 57402-0490

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



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

March 22, 2000

The Miller Press
Box 196
Miller, SD 57362-0196

ATTENTION: Legal Public Notice

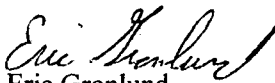
Enclosed is a Notice of Hearing on Application No. 6173-3 to Appropriate Water to be published twice. Please publish the first notice on April 5, 2000, with the second publication 7 days later.

The applicant must verify to you that the notice is to be published, before you make the first publication. **Please BILL the APPLICANT for the cost of publication.** The APPLICANT is David G. Aesoph, 17433 341st Ave., Highmore, SD 57345 (Ph # (605) 852-2119).

Please send the Water Rights Program the first publication immediately. The publication is checked for accuracy so any corrections can be made in the second publication. You may use the form below or fax a copy of the first publication. Any fax should be sent to the attention of Karen Schlaak at (605) 773-4068. Publication errors can invalidate the public notice.

After the second publication, **please send us an affidavit or use the enclosed Proof of Publication form.** The applicant pays the cost of publication, but the Water Rights Program records require an affidavit or Proof of Publication. Delays in receiving the affidavit can be costly to the applicant.

Sincerely,


Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

-----CU T HERE-----

No. 6173-3

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

Date _____

We are in receipt of your letter of March 22, 2000, enclosing Notice of Hearing to Appropriate Water by Application No. 6173-3 which was first published in our issue of _____. **ENCLOSED IS A COPY OF THIS FIRST PUBLICATION.**

Name

Newspaper

Instruction to Newspaper - Publish first Notice on April 5, 2000, with the second publication 7 days later. The applicant is responsible for payment.

NOTICE OF HEARING To Validate
Vested Water Right Application No. 6173-3 to Appropriate Water

Notice is given that David G Aesoph, 17433 341st Ave, Highmore SD 57345 has filed an application to validate a vested water right claim to impound 70 acre-feet of water from runoff in a dam located in the W ½ NW ¼ Section 19 with water impounded in portions of the NW ¼ Section 19 and SW ¼ Section 18; all in T116N-R70W. The water is for fish and wildlife propagation, recreational and livestock use. The application claims a priority date of 1950. However, based on an onsite investigation, review of aerial slides of the site, and a 1950 topographic map, it is apparent that the dam storage capacity has been increased to an estimated 174 acre feet of water. The department's estimate of the storage capacity at the time of the claimed 1950 priority date is 32 acre feet of water.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends VALIDATION of Vested Water Right Application No. 6173-3 for 32 acre feet of water for fish and wildlife propagation, recreation and livestock use with a claimed priority date of January 1, 1950 because 1) validation for an impoundment of 32 acre feet of water reflects the storage capacity which qualifies for vested status defined by SDCL 46-1-9 or 46-4-5, 2) validation of the dam at its 1950 spillway elevation does not unlawfully impair existing rights, 3) it is a beneficial use and is in the public interest if the spillway is lowered in accordance with the Chief Engineer's recommendation.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by April 24, 2000. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 11:00 a.m., May 3, 2000, Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol, Pierre, SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny this application based on the facts presented at the public hearing. The May 3, 2000, hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by April 24, 2000.

Any hearing will be an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by April 24, 2000, at the above Water Rights Program address to request copies of information pertaining to this application, to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

This application is made pursuant to SDCL 46-1-1 thru 46-1-9, 46-1-12 thru 46-1-16; 46-2-3.1, 46-2-9, 46-2-11, 46-2-13, 46-2-17; 46-2A-1 thru 46-2A-10, 46-2A-12, 46-2A-14, 46-2A-15, 46-2A-20, 46-2A-21; 46-5-1 thru 46-5-11, 46-5-13 thru 46-5-15, 46-5-24, 46-5-25, 46-5-30.2, 46-5-30.4, 46-5-31; 46-6-3, 46-6-3.1, 46-6-6.1, 46-6-10, 46-6-13, 46-6-14, 46-6-26; and Board Rules ARSD 74:02:01:01 thru 74:02:01:15. Nettie H. Myers, Secretary, Department of Environment and Natural Resources.

Length of line: 12 pica
Size of type: 8 pt.
Number of lines: 109
Line rate: _____

AFFIDAVIT OF PUBLICATION

STATE OF SOUTH DAKOTA)
)SS
County of Hand)

Gary L. McFarlane of said county being first duly sworn, on oath says that he is the publisher of *The Miller Press*, a weekly newspaper printed and published in Miller, said County of Hand and has full and personal knowledge of all the facts herein stated; that said newspaper is a legal newspaper and has a bona-fide circulation of at least two hundred copies weekly, and has been published within said County for fifty-two successive weeks next prior to the publication of the notice herein mentioned, and was and is printed wholly or in part in an office maintained at said place of publication; that the

Notice of Hearing

a printed copy of which, taken from the paper in which the same was published, is attached to this sheet, and is made a part of this Affidavit, was published in said newspaper at least once each week for 2 successive week(s), on the day of each week on which said newspaper was regularly published, to wit:

4-5 2000; _____ 20____
4-12 2000; _____ 20____
_____ 20____; _____ 20____

that the full amount of the fees for the publication of the annexed notice is

\$ 62.08

Gary L. McFarlane

Subscribed and sworn to before me this 16 day of 4 2000

Paula L. McFarlane
Paula L. McFarlane, Notary Public
My Commission expires: Oct. 11, 2004
State of South Dakota

Water right application made

NOTICE OF HEARING To Validate

Vested Water Right Application No. 6173-3 to Appropriate Water

Notice is given that David G. Aesoph, 17433 341st Ave., Highmore, SD 57345, has filed an application to validate a vested water right claim to impound 70 acre feet of water from runoff in a dam located in the W 1/2 NW 1/4 Section 19 with water impounded in portions of the NW 1/4 Section 19 and SW 1/4 Section 18; all in T116N, R70W. The water is for fish and wildlife propagation, recreational and livestock use. The application claims a priority date of 1950. However, based on an onsite investigation, review of aerial slides of the site, and a 1950 topographic map, it is apparent that the dam storage capacity has been increased to an estimate 174 acre foot of water. The department's estimate of the storage capacity at the time of the claimed 1950 priority date is 32 acre feet of water.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends VALIDATION of Vested Water Right Application No. 6173-3 for 32 acre feet of water for fish and wildlife propagation, recreation and livestock use with a claimed priority date of January 1, 1950, because 1) validation for an impoundment of 32 acre feet of water reflects the storage capacity which qualifies for vested status defined by SDCL 46-1-9 or 46-4-5; 2) validation of the dam at its 1950 spillway elevation does not unlawfully impair existing rights; 3) it is a beneficial use and is in the public interest if the spillway is lowered in accordance with the Chief Engineer's recommendation.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre, SD 57501 (605-773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by April 24, 2000. The petition may be informal, but must include a statement describing

the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 11:00 a.m., May 3, 2000, Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol, Pierre, SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny this application based on the facts presented at the public hearing. The May 3, 2000, hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by April 24, 2000.

Any hearing will be an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions by the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by April 24, 2000, at the above Water Rights Program address to request copies of information pertaining to this application, or assure access to the hearing by the handicapped or to obtain an interpreter for the hearing-impaired.

This application is made pursuant to SDCL 46-1-1 thru 46-1-9, 46-1-12 thru 46-1-16; 46-2-3.1, 46-2-9, 46-2-11, 46-2-13, 46-2-17; 46-2A-1 thru 46-2A-10, 46-2A-12, 46-2A-14, 46-2A-15, 46-2A-20, 46-2A-21; 46-5-1 thru 46-5-11, 46-5-13 thru 46-5-15, 46-5-24, 46-5-25, 46-5-30.2, 46-5-30.4, 46-5-31, 46-6-3, 46-6-3.1, 46-6-6.1, 46-6-10, 46-6-13, 46-6-14, 46-6-26; and Board Rules ARSD 74:02:01.01 thru 74:02:01:15.

Nettie H. Myers, Secretary,
Department of Environment and Natural Resources
FPNO 32 LPNO 33





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

March 22, 2000

Curt Johnson, Commissioner
School & Public Lands
Capitol Building
500 E. Capitol Avenue
Pierre SD 57501

Dear Mr. Johnson:

Please find enclosed a copy of the report, recommendation and publication notice regarding David Aesoph's vested water right application for a dam in Hand County. This information is being sent to School and Public Lands as an owner of adjoining property that appears to be inundated by the dam at its current level.

The enclosed notice of hearing is scheduled to be published April 5 and 12, 2000, in the Miller Press printed at Miller, South Dakota. This notice schedules a May 3rd hearing on the application before the Water Management Board in Pierre. Petitions to intervene in the hearing and present testimony to the Board must be filed by April 24, 2000. The notice of hearing contains details on how to file a petition.

If you have any questions on the application or the Board hearing, please contact Ron Duvall at (605) 773-3352.

Sincerely,

Eric Gronlund
Water Rights Program
(605) 773-3352

enclosures



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

March 22, 2000

Donald Weiss
114 Pearl Street
Faulkton SD 57438

Lynda Sandmann
820 Triangle Road
Valley View, TX 76272

Dear Mr. Weiss and Mrs. Sandmann:

Please find enclosed a copy of the report, recommendation and publication notice regarding David Aesoph's vested water right application for a dam in Hand County. This information is being sent to you because as a neighboring landowner you have expressed concern regarding the dam impounding water on your property.

The enclosed notice of hearing is scheduled to be published April 5 and 12, 2000, in the Miller Press printed at Miller, South Dakota. This notice schedules a May 3rd hearing on the application before the Water Management Board in Pierre. Petitions to intervene in the hearing and present testimony before the Board must be filed by April 24, 2000. The notice of hearing contains details on how to file a petition.

If you have any questions on the application or the Board hearing, please contact Ron Duvall at (605) 773-3352.

Sincerely,

Eric Gronlund
Water Rights Program
(605) 773-3352

enclosures



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
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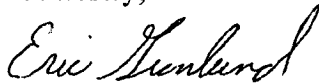
April 10, 2000

Ryan N. Boe
Siegel, Barnett & Schutz, LLP
P.O. Box 490
Aberdeen, SD 57402-0490

Dear Mr. Boe:

Please find enclosed a copy of a letter submitted by Donald Weiss in regard to David Aesoph's Vested Water Right Application No. 6173-3.

Sincerely,


Eric Gronlund
Water Rights Program
(605) 773-3352

enclosure

c: Diane Best, Assistant Attorney General



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

April 19, 2000

Ryan N. Boe
Siegel, Barnett & Schutz, LLP
P.O. Box 490
Aberdeen, SD 57402-0490

Dear Mr. Boe:

Please find enclosed a copy of the AMENDED letter submitted by Donald Weiss in regard to David Aesoph's Vested Water Right Application No. 6173-3.

Sincerely,

Eric Gronlund
Water Rights Program
(605) 773-3352

enclosure

c: Diane Best, Assistant Attorney General

Water Rights: NO.6173-3

April-3-2000

From: Donald Weiss
114 Pearl Street
Faulkton, SD 57438

Copies sent to: David G. Aesoph
17433 341 St Avenue
Highmore SD 57345

DEPT. OF ENVIRONMENT AND NATURAL RESOURCES
Attn: Eric Gronlund & Ron Duvall
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181

I (Donald Weiss) am in agreement with the Department Of Environment and Natural Resources of the State of South Dakota that the Dam mentioned should be lowered to pre 1988 water depth. This will make the lake a body of water 32 acre feet. I do not want the body of water to be 174 acre feet that it is currently set at due to excess of water that is impounded on my land.

I'm aware that there is a small amount of flooding even with the lowered level which is about 2 acres which was acceptable in 1950 and is satisfactory today.

Sincerely

Donald Weiss
Donald Weiss

Notary *Marilyn Hadrick*



My Commission
Expires May 12, 2003

An error was made in this document. WAS: This will make the lake a body of water 70 acre feet.

NOW: This will make the lake a body of water 32 acre feet.

AMENDED DATE: 4-17-00



Water Rights: NO.6173-3

April-3-2000

From: Donald Weiss
114 Pearl Street
Faulkton, SD 57438
Copies sent to: David G.Aesoph
17433 341 St Avenue
Highmore SD 57345



DEPT. OF ENVIRONMENT AND NATURAL RESOURCES
Attn:Eric Gronlund & Ron Duvall
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181

I (Donald Weiss) am in agreement with the Department Of Environment and Natural Resources of the State of South Dakota that the Dam mentioned should be lowered to pre 1988 water depth. This will make the lake a body of water 70 acre feet. I do not want the body of water to be 174 acre feet that it is currently set at due to to excess of water that is impounded on my land.

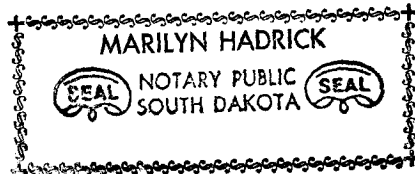
I'm aware that there is a small amount of flooding even with the lowered level which is about 2 acres which was acceptable in 1950 and is satisfactory today.

Sincerely

Donald Weiss
Donald Weiss

Notary

Marilyn Hadrack



My Commission
Expires May 12, 2003

SIEGEL, BARNETT & SCHUTZ, L.L.P.

ATTORNEYS AT LAW
500 CAPITOL BUILDING
P.O. BOX 490

ABERDEEN, SOUTH DAKOTA 57402-0490

TELEPHONE (605) 225-5420

FAX (605) 226-1911

[E-Mail siegellawabr@midco.net]

RAYMOND M. SCHUTZ
HARVEY C. JEWETT
RORY KING
JEFFREY T. SVEEN
JOSEPH P. BARNETT
RONALD J. HALL*
PAUL T. BARNETT
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GREGG C. MAGERA
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RYAN N. BOE

*Also Licensed in North Dakota

STAN SIEGEL (1928-1996)
JOSEPH H. BARNETT (1931-1985)
TERENCE A. O'KEEFE (1938-1999)

SIoux FALLS OFFICE
300 NORTH DAKOTA AVENUE, SUITE 606
P.O. BOX 1286
SIoux FALLS, SOUTH DAKOTA 57101
TELEPHONE (605) 335-6250
FAX (605) 335-6749
[E-mail sbslawsf@midco.net]

April 20, 2000

Mr. Ron Duvall
Natural Resources Engineer
Department of Environment and
Natural Resources
Joe Foss Building, 523 East Capitol
Pierre, SD 57501-3181



RE: Vested Water Right Application Stock Dam - W $\frac{1}{2}$ NW $\frac{1}{4}$ of 19-116-70 W of the 5th P.M., Hand County

Dear Mr. Duvall:

This letter is meant to act as a petition by our client, David Aesoph, in opposition to your recommendation in regards to his Vested Water Rights Application No. 6173-3.

Mr. Aesoph's main dispute with your recommendation is in regards to the validation of the impoundment of 32-acre feet of water. Mr. Aesoph specifically denies altering the height or the capacity of the dam and reservoir. As noted earlier, in 1998 with NRCS' approval the dam was repaired as a cost-share project. Mr. Aesoph's position remains that he is entitled to vested water rights for the entire area shown on the map as of September 2, 1999.

Additionally, this letter is meant to request an extension and delay of the May 3, 2000 hearing date. As you may be aware, Mr. Aesoph has been charged with the murder of his wife, Tania. Currently, he is incarcerated awaiting trial. The trial is scheduled to begin September 18 and will most likely take at least one month. Given these circumstances, Mr. Aesoph requests that this hearing be delayed at least until November 2000. Please contact me if you have any questions. Thank you for your cooperation.

Very truly yours,

A handwritten signature in black ink that reads "Ryan N. Boe".

RNB:kl
pc: Mr. David Aesoph

Ryan N. Boe
of SIEGEL, BARNETT & SCHUTZ, L.L.P.



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

April 25, 2000

NOTICE

TO: Ryan N. Boe
Siegel, Barnett & Schutz
P.O. Box 490
Aberdeen, SD 57402

FROM: Garland Erbele, Chief Engineer
Water Rights Program *Garland Erbele*

SUBJECT: Automatic Delay of Hearing on Vested Water Right Application No. 6173-3,
David Aesoph

A petition requesting an automatic delay has been submitted by Ryan N. Boe on behalf of David Aesoph in the matter of Vested Water Right Application No. 6173-3. This application proposes to validate a vested water right claim to impound 70 acre feet of water in a dam. The hearing on Application No. 6173-3 is automatically delayed pursuant to SDCL 46-2A-4 and 46-2A-5 and will not be held on May 3, 2000.

Mr. Boe's petition includes a request that the hearing be delayed until November, 2000. The Water Management Board will now conduct a motion hearing on the scheduling of Vested Water Right Application No. 6173-3. This motion hearing before the Board will be held at 10:00 AM on May 3, 2000, in the Floyd Matthew Training Center, 523 E. Capitol Avenue, Pierre SD.

At the motion hearing, the Water Rights Program will request that the hearing be scheduled for the Board's special meeting set for May 25, 2000 in Watertown.

Future notice of the exact date, time and location of the evidentiary hearing on Application No. 6173-3 will be provided to all parties.

Contact Diane Best at (605) 773-33215, if you have any questions on the motion hearing on May 3rd.

c: Diane Best, Assistant Attorney General
Jarvis Brown
Lynda Sandmann, 820 Triangle Road, Valley View, TX 76272

PARTIES OF RECORD
Vested Water Right Application No. 6173-3

APPLICANT

David Aesoph

Represented by: Ryan N. Boe
Siegel, Barnett & Schutz
P.O. Box 490
Aberdeen, SD 57402

PETITIONERS

Donald Weiss
Box 186
Faulkton, SD 57438

CERTIFICATION

I hereby certify that on April 25, 2000, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated April 25, 2000, along with a copy of the Parties of Record List, regarding Automatic Delay of Hearing on Vested Water Right Application No. 6173-3, addressed as stated below, and on the attached Parties of Record List:

Ryan N. Boe, Siegel, Barnett & Schutz, P.O. Box 490, Aberdeen, SD 57402.

Jarvis Brown, P.O. Box 37, Faulkton, SD 57438.

Lynda Sandmann, 820 Triangle Road, Valley View, TX 76272.

A copy of the above described Notice and attachment was sent Inter-office to:

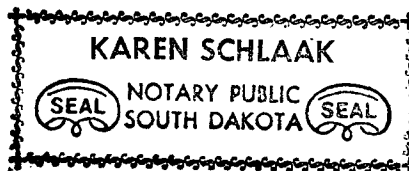
Diane Best, Assistant Attorney General, Capitol Building.


Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 27th day of April, 2000


Notary Public



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

PARTIES OF RECORD
Vested Water Right Application No. 6173-3

APPLICANT

David Aesoph

Represented by: Ryan N. Boe
Siegel, Barnett & Schutz
P.O. Box 490
Aberdeen, SD 57402

PETITIONERS

Donald Weiss
Box 186
Faulkton, SD 57438

BEFORE THE

SOUTH DAKOTA WATER MANAGEMENT BOARD

IN RE VESTED WATER RIGHT)
APPLICATION NO. 6173-3,)
DAVID AESOPH)

APPOINTMENT OF
HEARING CHAIRMAN

The South Dakota Water Management Board hereby appoints
Rodney Freeman to act as Hearing Chairman in the
above-entitled contested case proceeding. This appointment
includes the authority to set hearing for and act upon motions
involving prehearing discovery, scheduling, briefing,
continuances, or other prehearing matters. Further, this
appointment includes the authority to make recommended rulings on
substantive prehearing motions. The Board retains full authority
to make final binding decisions with regard to substantive
matters.

Dated this 3rd day of May, 2000.

BY THE BOARD:

Francis E Brink

Francis Brink, Chairman
South Dakota Water Management Board
(on behalf of the Board)

BEFORE THE

SOUTH DAKOTA WATER MANAGEMENT BOARD

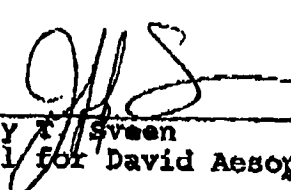
IN RE VESTED WATER RIGHT)
APPLICATION NO. 6173-3,)
DAVID AESOPH)

STIPULATION

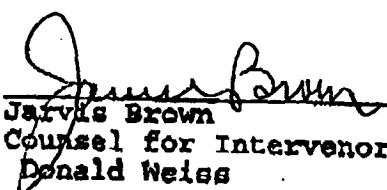


Counsel for the parties in the above-entitled matter hereby stipulate and agree that hearing may be held in the above-entitled matter before the South Dakota Water Management Board at its regularly scheduled meeting to be on July 11 and 12, 2000, in Pierre, South Dakota. The parties further stipulate that the time of hearing may be scheduled by the Department of Environment and Natural Resources and that notice will be provided to the parties accordingly.

Dated this 2 day of May, 2000.


Jeffrey T. Sween
Counsel for David Aesoph

Dated this 2nd day of May, 2000.


Jarvis Brown
Counsel for Intervenor
Donald Weiss

Dated this 2nd day of May, 2000.


Diane Best
Counsel for Department of
Environment and Natural Resources

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

500 EAST CAPITOL AVENUE
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX (605) 773-4106



MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

June 21, 2000

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

Re: David Aesoph vested water right hearing

Dear Mr. Brink:

Since the Board ordered that hearing will be held in the above-referenced matter during July or August 2000, I have been attempting to check the schedules for the various parties involved. I also contacted Mr. Guhin for his schedule. As a result, I would suggest that hearing be held in this matter on July 26, 27, or 28. In the alternative, I would ask that hearing be held on August 23, 24, or 25. I believe that these dates are clear. However, if anyone has an issue with one of these dates, I would suggest that they communicate with you in writing within the next ten days and provide a copy of the letter to all parties.

After the ten days, I would ask that you set the hearing date at whichever time is convenient for you and Mr. Guhin. Once you set the time, please let either myself or the Chief Engineer know so that we can send out the notice of hearing and make sure the arrangements are made for a meeting room and so forth.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

DB:nan

cc: John P. Guhin
Jarvis W. Brown
Jeffrey T. Sveen
Garland Erbele

SIEGEL, BARNETT & SCHUTZ, L.L.P.

ATTORNEYS AT LAW
500 CAPITOL BUILDING
P.O. Box 490

ABERDEEN, SOUTH DAKOTA 57402-0490

TELEPHONE (605) 225-5420

FAX (605) 226-1911

[E-Mail siegellawabr@midco.net]

RAYMOND M. SCHUTZ
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TELEPHONE (605) 335-6250
FAX (605) 335-6749
[E-mail sbslawfs@midco.net]

June 26, 2000

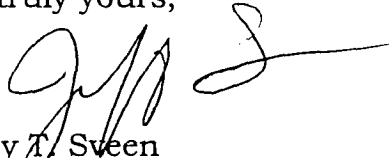
Mr. Francis Brink
1214 South Wells Street
Aberdeen, SD 57401-7351

RE: David Aesoph Vested Water Rights

Dear Francis:

I received Diane Best's letter concerning the hearing on David Aesoph's vested water rights. Diane has suggested the dates of July 26, 27, and 28. Please be advised that I am not available on July 27 or 28; however, I would be available on July 26. Likewise, I am available on August 23, 24, and 25. There are some dates, in between those above-listed dates in August, when I would be available. I would not be available at any time after August 25 until the middle of November, when the trial, which I have scheduled, is completed. Thank you for your consideration.

Very truly yours,



Jeffrey T. Sveen
of SIEGEL, BARNETT & SCHUTZ, L.L.P.

JTS:klb

pc: Ms. Diane Best
Mr. Jarvis W. Brown
✓ Mr. Garland Erbele



WATER RIGHTS PROGRAM -- FILE DOCUMENTATION

NAME: Mike Aesoph

ADDRESS: 34165 174th St Highmore, SD 57345-5119

DATE: November 18, 1999 & June 30, 2000

TELEPHONE: 605-852-2322

RE: Area downstream from the David Aesoph dam

COMMENTS:

Mike Aesoph (David Aesoph's brother) called November 18, 1999 regarding concerns about damages to downstream areas if David Aesoph is required to lower the dam's spillway. Mr. Aesoph mentioned that he owns land downstream in sections 24, and 26 and leases land from Gary Kopecky in the E½ section 35; all in T116N-R71W. According to Mr. Aesoph, the road running by these sections has been raised but is only three inches above water and the water from David Aesoph's dam will have no where to go once reaching this area. Mike Aesoph also indicated that he did not believe the Department of Game, Fish & Parks would allow the area to be drained. I told Mike Aesoph that our first notice dated September 15, 1999, indicates that lowering the water level needs to be completed in a controlled manner to prevent damages downstream. I also informed Mike Aesoph that I would review the topographic map to determine the course of the water.

After reviewing the topo map (see attached map dated Nov 18, 1999) I found that the downstream watercourse from David Aesoph's dam follows the path mentioned by Mike Aesoph and enters a flat area located in sections 1-T115N-R71W (adjoins SE corner of section 35-T116N-R71W) and in section 6-T115N-R70W. The topographic map shows a defined channel known as Lost Creek headed southward from this flat area in section 6. Lost Creek then continues on to Wolf Creek and ultimately the James River. Although the topo map indicates that there is a slough area in portions of sections 1 and 6, this is not a closed basin that prevents runoff from leaving the slough area.

June 30, 2000

I completed an on-site inspection of the drainage area below the David Aesoph dam at those points the watercourse crossed roadways. At each of the points photos were taken showing the watercourse. The locations at which photos were taken and the direction facing are shown on the attached map dated November 18, 1999. Each photo is also attached with a brief description.

Observations based on the on-site inspection and topographic map:

1. There is a defined watercourse leading from the David Aesoph dam to Lost Creek that does contain some low lying, wetland areas.
2. There was no flow in the creek at the time of the inspection and several dugouts\dams visible from the road were not completely full (e.g. see photo A1).
3. The nearly flooded roads described by Mike Aesoph are located at the section corner common to sections 35, 36-T116N-R71W and sections 1, 2-T115N-R71W (see photos A4 through A7). It appeared that portions of the intersection had been raised and at the lowest spot the crown of the road is approximately one foot higher than the current water elevation.

(continued)

4. Some portions of the watercourse visible from the road have crops planted across the drainage or are used for haying (see photos A9 through A11).

Conclusions:

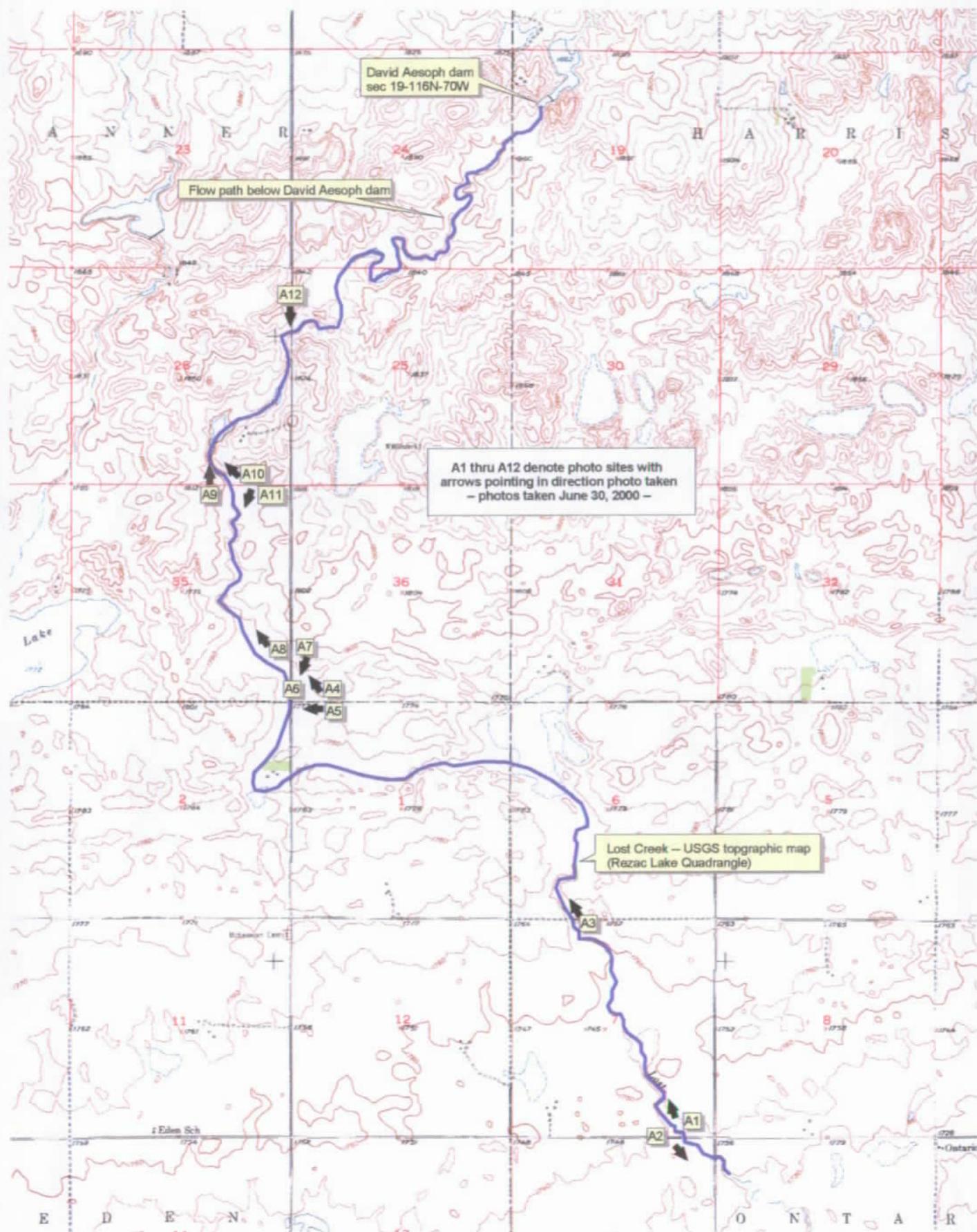
A defined watercourse is located below the David Aesoph dam which does not drain into a closed basin. This watercourse is named Lost Creek and drains to the James River. If a decision is made by the Water Management Board to require the water level in the David Aesoph dam to be lowered, then I recommend the following:

1. Complete no work to lower the water level prior to receiving approval of the plans and specifications required as part of the chief engineer's March 10, 2000 recommendation (qualification No. 4) on Vested Right Application No. 6173-3. These plans need to include how the water level will be lowered.
2. Lowering of the water level needs to be closely monitored and controlled to prevent flooding of downstream roads by exceeding culvert capacities. In particular, the intersection described in No. 3 of the above observations may be susceptible to flooding. Since these roads cross a natural drainage, culverts should be installed but none were visible due to the water level. The watercourse below the David Aesoph dam meanders approximately 4.5 miles before reaching the road intersection. Several small dams\dugouts located between these two points would be filled by lowering the dam before any water reaches the intersection.
3. According to the chief engineer's recommendation (qualification No. 6), lowering of the dam's water level needs to be completed without causing damage to downstream property. Since portions of the downstream watercourse have crops in place or is cut for hay, lowering of the water level should be completed this fall after harvest but before freeze up.



Ron Duvall
Natural Resources Engineer
Water Rights Program

Downstream drainage below David Aesoph dam November 18, 1999



Photos taken June 30, 2000 during an inspection of the drainage downstream from the David Aesoph dam. A brief description is given below each photo. The location along the watercourse where each photo was taken is also shown on the attached topographic map dated November 18, 1999.



A1: Looking upstream from SD highway 26 toward sec 7-115N-70W



A2: Downstream from SD highway 26. Creek bed is dry -- sec 18-115N-70W



A3: Looking upstream from section line road in sec 6-115N-70W -- small pond nearly dry



A4: Looking upstream near corners of sections 35, 36-116N-71W and sections 1, 2-115N-71W



A5: Looking west toward corners of sections 35, 36-116N-71W and sections 1, 2-115N-71W



A6: Road crown about 1 foot above water near corners of sections 35, 36 and sections 1, 2



A7: Looking south toward corners of sections 35, 36-116N-71W and sections 1, 2-115N-71W



A8: Looking upstream near corners of sections 35, 36-116N-71W and sections 1, 2-115N-71W



A9: Looking upstream from section line road -- crop in foreground and small dam near center -- section 26-116N-71W



A10: Looking upstream from section line road -- crop in foreground across watercourse -- section 26-116N-71W



A11: Looking downstream from section line road -- haying through watercourse -- section 35-116N-71W



A12: Looking south to where the drainage crosses road between sections 25 and 26-116N-71W - approximately 1.5 miles below the dam

ADDENDUM:

Regarding Mike Aesoph File Documentation dated November 18, 1999 & June 30, 2000

On August 18, 2000, a second inspection of the downstream area was completed while in route to the Don Weiss deposition held in Faulkton. Photos B1 through B4 shown below were taken at the same road intersection as photos A4 through A8. On June 30, 2000, the culvert was not visible due to the higher water level. Water levels have dropped over one foot since June 30, 2000. The area in photo B2 looking upstream now has water limited to the ditch area as compared with the same area in photo A7. The existence of the culvert demonstrates that a flow path does exist through the roadway for water to continue on downstream.



B1: Looking south (downstream) from near corners of sections 35, 36-116N-71W and sections 1, 2-115N-71W -- culvert now exposed due to lower water levels



B2: Looking upstream near corners of sections 35, 36-116N-71W and sections 1, 2-115N-71W -- opposite end of culvert shown in photo B1



B3: Looking upstream from near corners of sections 35, 36-116N-71W and sections 1, 2-115N-71W -- water levels along the road have dropped over 1 foot since 6/30/2000



B4: Photo taken near site of photo A6 (near corners of sections 35, 36 and sections 1, 2) for comparison. Water levels have dropped and road has had layer of gravel added.

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

500 EAST CAPITOL AVENUE
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX (605) 773-4106



MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

July 18, 2000

Jarvis Brown
Attorney at Law
PO Box 37
Faulkton SD 57438-0037

Jeff Sveen
Ryan Boe
Attorneys At Law
PO Box 490
Aberdeen SD 57402-0490

Re: In re Vested Water Right Application No. 6173-3,
David Aesoph

Dear Counsel:

Enclosed find a copy of a document entitled "Water Rights Program--File Documentation." This document includes a review of inspections conducted on November 18, 1999, and June 30, 2000, of the area downstream from the David Aesoph dam. In addition to the two page review, I have also enclosed a topographical map dated November 18, 1999, regarding the same area. Further, find enclosed copies of twelve photographs taken during the June 30, 2000, inspection.

Jarvis Brown
Jeff Sveen
Ryan Boe
July 18, 2000
Page 2

Hearing has now been scheduled for August 23, 2000, at 1 p.m. at the offices of the Brown County Sheriff's Department. Once we arrive at the sheriff's department, the sheriff will direct us to the appropriate location within Brown County facilities. For security reasons, we do need to provide the sheriff's department with a list of persons who will be in attendance at this hearing. I have, by separate letter, listed a number of persons. If you have additional names to give the sheriff, he asks that you write to him.

Finally, we have previously discussed taking a trial deposition of Don Weiss at Mr. Brown's law offices in Faulkton at a mutually acceptable time. Jeff, this is the issue that I mentioned during the hearing on June 15. Ryan, I talked to you about this issue last week on July 12. Please let me know whether you would be objecting to the admission of a trial deposition of this witness. I would like to get the issue resolved in advance of the water board's hearing. If, however, I need to make the motion on this issue I will do so. In support of a motion, I would indicate that Mr. Weiss is approximately eighty years old, that he is in poor health, and that SDCL 1-26-19(1) specifically provides that any part of the evidence may be received in written form so long as the parties will not be prejudiced substantially. Thank you for your prompt consideration of the issue.

Sincerely,



Diane Best
Assistant Attorney General

DB:clr
cc: Garland Erbele

c-ltr582.db

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

500 EAST CAPITOL AVENUE
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX (605) 773-4106



MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

July 18, 2000

Mark Milbrandt
Brown County Sheriff's Department
PO Box 369
Aberdeen SD 57402-0369

Re: In re Vested Water Right Application No. 6173-3,
David Aesoph

Dear Sheriff Milbrandt:

This letter confirms our telephone conversation of July 18, 2000, concerning a Water Management Board hearing to be held in the above-referenced matter in the Brown County facilities. Based upon our conversation, it is my understanding that parties to this Water Board hearing are to come to your office at 1 p.m. on August 23, for the hearing. You will arrange for a facility for that hearing.

Also, you have asked that I provide you with a list of persons who will be attending the hearing. As of right now, the list includes Francis Brink, Jeff Sveen, Ryan Boe, Jarvis Brown, Garland Erbele, Eric Gronlund, Ron Duvall, Brenda Brinegar, Don Weiss, a court reporter and myself. I expect that an attorney will also be present to serve as Board counsel with Mr. Brink.

Mark Milbrandt
July 18, 2000
Page 2

I am providing a copy this letter to the parties. I am suggesting that all parties provide you with the names of any other witnesses or persons who will be attending in advance for security purposes.

If you have any questions, please feel free to contact me at the above address and telephone number.

Sincerely,

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

Diane Best
Assistant Attorney General

DB:clr

cc: Garland Erbele
John P. Guhin, Deputy Attorney General
Jarvis Brown, Attorney at Law
Jeff Sveen, Attorney at Law
Ryan Boe, Attorney at Law

c-ltr581.db



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

July 26, 2000

NOTICE

TO: Jeff Sveen and Ryan Boe
Siegel, Barnett & Schutz
P.O. Box 490
Aberdeen, SD 57402-0490

Jarvis Brown
P.O. Box 37
Faulkton, SD 57438-0037

FROM: Garland Erbele, Chief Engineer
Water Rights Program 

SUBJECT: Scheduling of Hearing on Vested Water Right Application No. 6173-3,
David Aesoph

Francis Brink, acting as hearing officer on behalf of the Water Management Board, will consider Mr. Aesoph's Application No. 6173-3 on August 23, 2000, at 1:00 PM, at the Brown County Sheriff's Department, 22 SE Court Street, Aberdeen, SD 57401. Upon arriving at the Sheriff's office, we will be directed to a room within the Brown County facilities for conducting the hearing.

Applicable provisions of the Notice of Hearing published April 5 and 12, 2000, in the Miller Press will still apply at the August 23rd hearing before the hearing officer. This hearing is an adversary proceeding. Any party of record has the right to be present and to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

Contact Diane Best at (605) 773-3215, if you have any questions.

c: Francis Brink, 1214 S. Wells Street, Aberdeen, SD 57401-7351
John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General
Donald Weiss, Box 186, Faulkton, SD 57438
Lynda Sandmann, 820 Triangle Road, Valley View, TX 76272

CERTIFICATION

I hereby certify that on July 26, 2000, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated July 26, 2000, regarding Scheduling of Hearing on Vested Water Right Application No. 6173-3, David Aesoph, addressed as stated below:

Jeff Sveen and Ryan Boe
Siegel, Barnett & Schutz
P.O. Box 490
Aberdeen, SD 57402-0490

Jarvis Brown
P.O. Box 37
Faulkton, SD 57438-0037

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

Donald Weiss
Box 186
Faulkton, SD 57438

Lynda Sandmann
820 Triangle Road
Valley View, TX 76272

Copies of the above described Notice were sent Inter-office to:

John Guhin, Deputy Attorney General, Capitol Building.

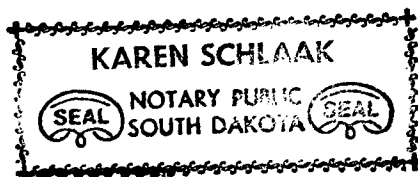
Diane Best, Assistant Attorney General, Capitol Building.


Cheryl F. Frost
Secretary

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 27th day of July, 2000


Notary Public



KAREN SCHLAACK, Notary Public
My Commission Expires
April 1, 2008

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

500 EAST CAPITOL AVENUE
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX (605) 773-4106



MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

August 4, 2000

Mark Milbrandt
Brown County Sheriff's Department
P.O. Box 369
Aberdeen, SD 57402-0369

Re: In re Vested Water Right Application No. 6173-3,
David Aesoph

Dear Sheriff Milbrandt:

This letter concerns the Water Board Hearing to be held on August 23, 2000, at the Brown County facilities. As previously discussed, the hearing will be conducted at 1 p.m. and you will have a meeting room available.

I previously provided you with a list of persons who would be attending the hearing. The list included attorneys Jeff Sveen, Ryan Boe, Jarvis Brown, and myself. I also listed state employees Garland Erbele, Eric Gronlund, Ron Duvall, and Brenda Brinegar. Witnesses regarding this situation are Don Weiss, and George Weisler. An additional person that will be attending is Deputy Attorney General John Guhin. Also, the court reporter will be Lynn Ormesher.

Sincerely,

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

Diane Best
Assistant Attorney General

DB:clr
cc: Garland Erbele
c-ltr583.db

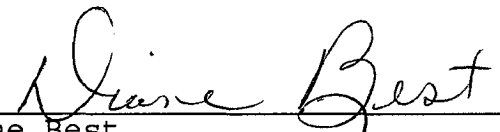
BEFORE THE SOUTH DAKOTA

WATER MANAGEMENT BOARD

IN RE VESTED WATER RIGHT	)	
APPLICATION NO. 6173-3	)	NOTICE OF TRIAL DEPOSITION
DAVID AESOPH	)	

COMES NOW counsel for the Department of Environment and Natural Resources and provides Notice that the deposition of Don Weiss will be taken on Friday, August 18, 2000, at the offices of Jarvis W. Brown, Attorney at Law, Faulkton, South Dakota. The deposition will be conducted at 10:30 a.m. This deposition will be conducted for the purposes of obtaining direct testimony and allowing for cross-examination of the witness, all for the purpose of submitting a transcript of said testimony to the South Dakota Water Management Board in the above-entitled proceeding.

Dated this 11th day of August, 2000.



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

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

500 EAST CAPITOL AVENUE
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX (605) 773-4106

MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

August 11, 2000

Jarvis Brown
Attorney at Law
P.O. Box 37
Faulkton, SD 57438-0037

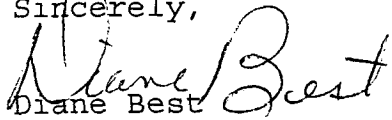
Jeff Sveen
Attorney at Law
P.O. Box 490
Aberdeen, SD 57402-0490

Re: Aesoph Water Case

Dear Counsel:

On Tuesday, August 8, I provided telephonic notice that the deposition would be held in this matter on August 16, 17, or 18. I had hoped that we would reach a time which was acceptable to all parties. I did not, however, hear from Mr. Sveen's office and am providing notice of the deposition.

Sincerely,


Diane Best
Assistant Attorney General

DB:js
cc: Ron Duvall, DENR

j-pld35.db Jarvis Brown





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

August 24, 2000

NOTICE

TO: Gregory C. Magera
Siegel, Barnett & Schutz
P.O. Box 490
Aberdeen, SD 57402-0490

Jarvis Brown
P.O. Box 37
Faulkton, SD 57438-0037

FROM: Garland Erbele, Chief Engineer
Water Rights Program 

SUBJECT: Rescheduling of Hearing on Vested Water Right Application No. 6173-3,
David Aesoph

Francis Brink, acting as hearing officer on behalf of the Water Management Board, reset the hearing for consideration of Mr. Aesoph's Application No. 6173-3 for **August 30, 2000**, at **10:00 AM**, at the Brown County Sheriff's Department, 22 SE Court Street, Aberdeen, SD 57401. Upon arriving at the Sheriff's office, we will be directed to a room within the Brown County facilities to conduct the hearing.

Applicable provisions of the Notice of Hearing published April 5 and 12, 2000, in the Miller Press will still apply at the August 30th hearing before the hearing officer. This hearing is an adversary proceeding. Any party of record has the right to be present and to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

Contact Diane Best at (605) 773-3215, if you have any questions.

c: Francis Brink, 1214 S. Wells Street, Aberdeen, SD 57401-7351
John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General

CERTIFICATION

I hereby certify that on August 24, 2000, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated August 24, 2000, regarding Scheduling of Hearing on Vested Right Permit Application No. 6173-3, David Aesoph, addressed as stated below:

Gregory C. Magera
Siegel, Barnett & Schutz
P.O. Box 490
Aberdeen, SD 57402-0490

Jarvis Brown
P.O. Box 37
Faulkton, SD 57438-0037

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

A copy of the above described Notice was sent Inter-office to:

John Guhin, Deputy Attorney General, Capitol Building

Diane Best, Assistant Attorney General, Capitol Building



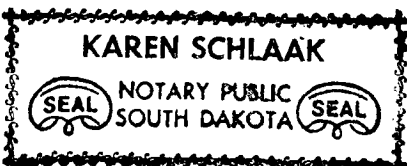
Eric S. Gronlund
Natural Resources Engineer
Water Right Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 25th day of August, 2000.



Karen Schlaak
Notary Public



KAREN SCHLAAK, Notary Public
My Commission Expires



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

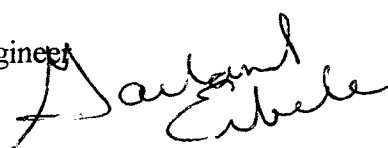
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

September 1, 2000

NOTICE

TO: Gregory C. Magera
Siegel, Barnett & Schutz
P.O. Box 490
Aberdeen, SD 57402-0490

Jarvis Brown
P.O. Box 37
Faulkton, SD 57438-0037

FROM: Garland Erbele, Chief Engineer
Water Rights Program 

SUBJECT: Preparation of Findings of Fact, Conclusions of Law and Final Decision

Francis Brink has directed each party to prepare proposed Findings of Fact, Conclusions of Law and a Final Decision in the matter of Vested Water Right Application No. 6173-3, David Aesoph. The entire Water Management Board will consider the proposed Findings, Conclusions and Final Decision at 2:00 PM on September 27, 2000 in the Angostura Room, Radisson Hotel, 445 Mt. Rushmore Road, Rapid City, SD. The agenda time is an estimate and may be delayed due to prior agenda items.

Mr. Brink requested that a copy of the proposed Findings, Conclusions and Final Decision be mailed to each Board member (mailing list enclosed) and Parties of Record (names listed above) by September 20, 2000.

Oral arguments in opposition to or support of the proposed Findings, Conclusions and Final Decision may be made on September 27, 2000. The hearing was completed August 30, 2000. No additional testimony will be received on September 27, 2000.

Enclosure

c: Harold Deering, Assistant Attorney General
John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General

WATER MANAGEMENT BOARD MEMBERS

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

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

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

Bernita Loucks
219 42nd Street
Rapid City, SD 57702-0240

Marian Gunderson
811 West 3rd
Yankton, SD 57078-3702

Dwayne Rollag
320 Lincoln Lane South
Brookings, SD 57006-2741

BOARD ATTORNEY

Harold Deering
Assistant Attorney General
300 No. Dakota Ave., Suite 403
Sioux Falls, SD 57104-6032

WATER RIGHTS PROGRAM

Department of Environment and
Natural Resources

Garland Erbele, Chief Engineer
Water Rights Program
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3181

STAFF ATTORNEY

Diane Best
Assistant Attorney General
Office of Attorney General
Natural Resources Section
State Capitol Building
Pierre, SD 57501

CERTIFICATION

I hereby certify that on September 1, 2000, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated September 1, 2000, regarding preparation of proposed Findings of Fact, Conclusions of Law and Final Decision on Vested Right Permit Application No. 6173-3, David Aesoph, addressed as stated below:

Gregory C. Magera, Siegel Barnett & Schutz, P.O. Box 490, Aberdeen, SD 57502-0490

Jarvis Brown, P.O. Box 37, Faulkton, SD 57438-0037

Harold Deering, 300 N. Dakota Ave., Suite 403, Sioux Falls, SD 57104-6032

A copy of the above described Notice was sent Inter-office to:

John Guhin, Deputy Attorney General, Capitol Building

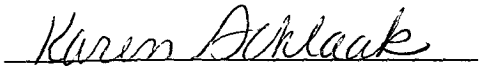
Diane Best, Assistant Attorney General, Capitol Building



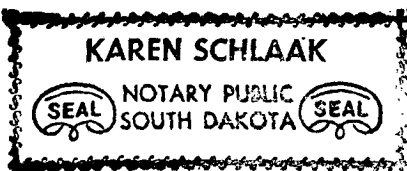
Eric S. Gronlund
Natural Resources Engineer
Water Right Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 5th day of September, 2000.



Karen Schlaak
Notary Public



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

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX (605) 773-4106
www.state.sd.us/atg

MARK BARNETT
ATTORNEY GENERAL



LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

September 20, 2000

MEMORANDUM

TO: Members of the South Dakota Water Management Board (and
Parties of Record)

FROM: Diane Best, Assistant Attorney General *OB*

RE: In the Matter of Vested Water Right Application
No. 6173-3, David Aesoph

As requested by Francis Brink at the conclusion of hearing in the
above-referenced matter, I am enclosing a copy of proposed
Findings, Conclusions, and Final Decision.

DB:nan
Enclosure

BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

In the Matter of Vested Water)	
Right Application No. 6173-3,)	FINDINGS OF FACT, CONCLUSIONS
David Aesoph)	OF LAW, AND FINAL DECISION

Having been duly appointed by the South Dakota Water Management Board, Board Chairman Francis Brink conducted the evidentiary hearing in the above-entitled matter on August 30, 2000, in Aberdeen, South Dakota. Harold Deering was present as Board counsel. Applicant David Aesoph was present and was represented by attorney Greg Magera. Diane Best appeared on behalf of the Department of Environment and Natural Resources (DENR) along with Chief Engineer Garland Erbele and DENR engineer Ron Duvall. Intervenor Don Weiss was present through counsel Jarvis Brown. Previous to hearing, the parties stipulated that the testimony of Don Weiss could be offered by means of a deposition transcript. He did not personally appear at hearing, and the deposition was entered into evidence.

After hearing, each Board member reviewed the record. The full Board met and considered this matter at its next regularly scheduled public meeting. Chairman Brink presented his recommendation that the DENR staff position be approved. However, the Board is not bound by that recommendation and independently considered the evidence presented at hearing. No further evidence was presented.

After considering the evidence presented, the Board makes the following Findings of Fact and Conclusions of Law, and Final Decision:

FINDINGS OF FACT

1. An unnamed watercourse flows from north to south through Section Eighteen (18), Township One Hundred Sixteen (116) North, Range Seventy (70) West, Hand County, South Dakota. From Section 18, the natural flow for the unnamed watercourse is south through Section 19. The natural flow for this unnamed watercourse proceeds downstream into Lost Creek in Hyde County. (DENR Report w/map.) Based on the filed application, the drainage area above the David Aesoph dam (NW 1/4 Section 19-116N-70W) is in excess of 900 acres.

2. Applicant David Aesoph owns or controls land located in Section 19.

3. A dam on the unnamed watercourse was constructed in Section 19 sometime before 1950. Although the exact date of construction is unknown, neighbor Don Weiss testified that the dam was constructed with horses, a construction method that predates 1950. Further, a 1950 U.S.G.S. topographical map of this area indicates that the dam was in existence on that date. All parties agree that the dam was constructed by 1950.

4. After a DENR investigation into the dam, the Chief Engineer issued a Notice under SDCL 46-5-49, requiring that Aesoph file a vested water right application within 90 days if he claimed a vested right for use of the dam. The Notice was issued on October 13, 1999. On January 11, 2000, Aesoph filed his application for validation of the vested right. The application lacked a map as required by rule. DENR Engineer Ron Duvall prepared a map showing the extent of the Aesoph claim in order to

assist in completing the application. (Duvall testimony TR 24.) Upon payment of the application fee on January 28, 2000, the application was complete.

5. Aesoph's application seeks a 1950 priority date. None of the parties dispute this date. This Board finds that the 1950 date is the appropriate priority date for this claim.

6. The claimed uses are livestock watering and fish, wildlife, and recreational purposes.

7. Aesoph requested a vested right for 70 acre feet. Aesoph presented no calculations whatsoever regarding the past or current spillway elevations of the dam or the amount of water that has been stored in the dam. (Aesoph testimony, TR 109.)

8. In reviewing this matter, DENR Engineer Ron Duvall obtained data from the Natural Resource Conservation Service (NRCS) in Highmore. The NRCS measurement showed a water depth to spillway elevation of 7.5 feet before improvements were made to the dam in the late 1980's. (Exhibit 10B.) However, the water depth to spillway elevation is now 13.5 feet. (Duvall testimony, TR 77, 78.) Based on this information, the height of the spillway increased, and, consequently, the storage capacity of the dam increased significantly.

9. The dam now backs up water across an improved section line highway. Although the dam had historically backed water over this road, it was an occasional sporadic spring time event until the mid-1990's. (Weiss deposition, Weisler testimony TR 81, 82.) Since the mid-1990's, the road has been permanently

inundated and is completely impassable. (Weiss deposition, Weisler testimony TR 81,82, aerial photos.)

10. Don Weiss owns part of Section 18. He has been familiar with Sections 18 and 19 since the 1950's. Water was backed up on Section 18 at different times during the period from the 1950's through the present. Historically, about two acres of farm land were occasionally inundated. During the 1990's, however, the water backed up on his land and covered 14 additional acres. (DENR report.)

11. Trees once grew along the sides and across the neck of the dam on the Aesoph property (aerial photos; Duvall testimony TR 14, 15). The trees were large enough for cattle to scratch their backs on and are quite large, up to 8 inches in diameter. (Weiss deposition.) The size of these trees is indicative of the historic shoreline or water elevation at the dam site. Since the mid-1990's, however, the trees have been standing in water and have died. The trees clearly were of sufficient size that a one-time unique spring event would not have caused their death. The death of trees of this size is consistent with continual longstanding inundation for the last several years.

12. Based upon measurements taken from the topographical map, information obtained during a visit to the site, and aerial photographs, DENR Engineer Duvall calculated the current dam capacity at 174 acre feet. (Duvall testimony TR 25-26.) The 1950 size of the dam was calculated at 32 acre feet.

13. The method used to calculate the dam capacity involved multiplying the surface area of the dam by the depth of the

structure from the bottom of the dam fill to the spillway (spillway elevation). Then, a multiplier is applied to account for the topography behind the dam. In this situation, there is a high spot or saddle in the area behind the dam, so less water is stored than if it were level. Considering this situation, the DENR applied a multiplier of 0.3 in calculating the capacity. This is a conservative number. DENR witness Duvall testified that the NRCS technical manual recommends using this method to estimate the storage capacity. Under the NRCS manual, a multiplier of 0.4 is generally acceptable.

14. Using the general 0.4 multiplier, the historic storage capacity would be 42 acre feet instead of 32 acre feet. By using the 0.4 factor, the current storage capacity would then be even more than the 174 acres calculated by Engineer Duvall.

15. At hearing, Aesoph testified that the dam had been washed out to some extent before he purchased the property in the early 1970's. (Aesoph testimony TR 106.) It still held some water, but Aesoph was unable to testify as to the remaining storage capacity. (TR 106.) Aesoph's testimony is that the dam was rebuilt or reconstructed in the late 1980's, and the increase in the elevation of the spillway was simply to bring the storage capacity back to its original design. TR 92-95. However, there was no testimony presented to show that the original design capacity of this dam was ever as large as the current size.

16. Although the dam was rebuilt or reconstructed, no plans and specifications were filed with the DENR. The DENR was not notified of this construction.

17. In the alternative, this Board finds that even if the dam was quite large in 1950, such renewed or revived water use would not warrant granting the vested right. The time period between the breach or "wash-out" and the improvements in the late 1980's was at least 17 years. TR 110, 114. Under that scenario, the structure would have been in disrepair for a period of 17 years. Since Aesoph failed to attempt to use any water right over this level in excess of 17 years, his action constitutes a forfeiture of his water right. (SDCL 46-5-37.) Further, the failure to repair the dam to the claimed previous level demonstrates that he intended to relinquish his water use and, therefore, constitutes an abandonment of the claimed higher water level. (SDCL 46-5-36.)

18. Aesoph further asserts that the enlarged water area in recent years was caused by unusually wet years. The years were, indeed, wet. However, dam structures cause water to be impounded, not the climate. A lower spillway elevation would have allowed the water to continue on downstream to Lost Creek and not flood the Weiss property.

19. The spillway elevation was increased in the late 1980's, and the inundated area behind the dam increased correspondingly. Water backed over the road and onto the Weiss property. By 1997, water was at or near the spillway elevation. TR 43-45. At that time, water inundated 16 acres of the Weiss land. The dam structure continues to impound more water than it did before the late 1980's improvements.

20. The DENR and Intervenor Weiss ask that water right be validated for up to 42 acre feet, with the specific spillway elevation to be set so that the trees would no longer be standing in water. Although the trees are already dead, they serve as a marker for the historic elevation.

21. Since the Applicant has no measurements whatsoever to rely on with respect to historic elevations, this Board finds that the trees would serve as an appropriate marker for determining the proper elevation of the dam. Based on the DENR calculations, the dam capacity at this elevation would be from 32 to 42 acre feet. Granting the application for 32 or 42 acre feet alone without using the trees as a marker has the possibility of validating a slightly greater dam capacity than is warranted under the evidence presented. The applicant has failed to measure any dam capacities whatsoever and should not be allowed to benefit from presenting a lack of data to this Board. The tree marker provides a sure way to establish the spillway elevation.

CONCLUSIONS OF LAW

1. This Board has jurisdiction to act on Aesoph's application pursuant to SDCL ch. 46.

2. The applicable statutes for considering this application for validation of a vested right are SDCL §§ 46-5-49, 46-1-9(1), 46-1-15, 46-2A-9, and 46-5-10.

3. SDCL 46-5-9(1) applies to riparian rights that were beneficially used before March 2, 1955. Under the riparian doctrine in existence at the time, the landowner was not required

to obtain a water right or water permit for such dam. SDCL 46-1-9 allows for validation of vested rights on the specific priority date claimed only to the extent they were in existence on or before March 2, 1955.

4. All applications for water rights are also governed by SDCL 46-2A-9, which requires the applicant to show that water is available for the purpose involved, that the use is a beneficial use, that the use is in the public interest, and that the use does not impair existing rights.

5. SDCL 46-5-49 requires that persons claiming vested water rights meet the foregoing standards. The applicant has the burden of demonstrating that validation of a vested water right is warranted.

6. Based on the foregoing statutes, Aesoph holds the burden of demonstrating that the dam was in existence at the time of the claimed priority date and was continually used since that time. Further, Aesoph has the burden of showing that such use is a beneficial use, is in the public interest, and does not impair existing rights.

7. Based on the evidence presented, there is no dispute as to the priority date. It is 1950. Since that date is before March 2, 1955, it meets the standard for a riparian vested water right.

8. There is a dispute regarding the quantity of water that has been continuously used. Aesoph claims 70 acre feet, but has failed to meet his burden of showing the actual quantity of water claimed in 1950 and beneficially used thereafter. The DENR and

Intervenor Weiss acknowledge that there has been some use and that the extent of any maximum beneficial use is in the neighborhood of 32 to 42 acre feet. The evidence supports this analysis. The 1950 topographical map, aerial photos, the NRCS document, and the testimony of neighboring landowner Weiss (and his tenant George Weisler) all support this number. Since there were trees on each side and across the neck of the dam for several years, the trees serve as a marker for determining the extent of consistent inundation and, accordingly, the capacity of the dam. Based on Aesoph's testimony, there is no other evidence that would tend to show the level of historic use. Accordingly, the Board adopts the DENR and Weiss analysis.

9. The claimed beneficial uses are livestock watering, recreational, and fish and wildlife propagation. To the extent that the dammed water is on his own property, Aesoph is able to use the water for such purposes. However, Aesoph does not use the water lying on the Weiss property for any purpose whatsoever. (Aesoph testimony, TR 111.) He has not shown that there is any beneficial use other than on his own property. However, the DENR and Weiss do not assert that the inundation of the two acres of land on the Weiss property is critical to this matter and are willing to concede that issue. To the extent that the inundation exceeds 2 acres, they do not concede that there is a beneficial use whatsoever.

10. Aesoph submits that the application is in the public interest since the water is used for fish and wildlife propagation, livestock watering, and recreational purposes.

Generally, such purposes are in the public interest. However, Aesoph admitted at hearing that he does not use the water on the Weiss property for any purpose whatsoever. (Aesoph testimony TR 111.) He has waived the right to a claim for any beneficial uses on the Weiss property. Further, no testimony, argument, or legal authority has been presented to show that an applicant is entitled to a right for fish and wildlife propagation, livestock watering, and recreational purposes on the lands of another without the ability to even obtain consent of the landowner for such uses. Finally, even if such uses occurred at present, there is no evidence of use for such purposes on the Weiss property from 1950 to the present.

11. There is no public interest in granting a vested right application for stockwatering on the area on the Weiss property. Aesoph's testimony waives that argument. Further, as Aesoph explains, he has no lease, easement, or other arrangement that would allow such use.

12. This Board has held that the element of SDCL 46-2A-9 pertaining to existing rights protects against impairment of any rights, including flooding. In a series of proceedings involving the LaCreek National Wildlife Refuge, this Board found that it would be an impairment of existing rights to grant water permits or rights for dams if they flooded the property of others.

13. Given the evidence presented in this proceeding, validating this water right would impair an existing right of Don Weiss. Inundation beyond the 32 to 42 acre foot level (as measured by the tree line) impairs the right of neighbor Don

Weiss insofar as his property is inundated, and he cannot use the property involved. Although he does not dispute the historic 2 acres, he has not granted consent for the additional 14 acres. The proposed use, at the level claimed, would impair existing rights.

14. After March 2, 1955 (more specifically the late 1980's), Aesoph engaged in or caused construction activities to occur on the above-described real property. Such construction activities increased the storage capacity of the dam described above. Aesoph does not hold a vested water right to use water impounded as a result of construction activities occurring after March 2, 1955.

15. This Board has promulgated rules for safety of dams. ARSD 74:02:08. The rules apply to any artificial barrier impounding 50 acre feet or more at the crest elevation (maximum storage elevation). ARSD 74:02:08:01(7) and ARSD 74:02:08:01(15). The dam safety rules clearly applied since the reconstruction resulted in an impoundment of at least 174 acre feet at the spillway elevation, without considering the freeboard. Further, since reconstruction or rebuilding the dam was involved, this dam was not excepted or "grandfathered in" as a preexisting structure under ARSD 74:02:08:02. All dam safety criteria were applicable. No plans and specifications were filed or no other dam safety criteria were followed. The DENR was not even provided with notice of any kind.

16. If the dam spillway is lowered as requested by the DENR, the dam safety criteria must be followed since the

structure would still impound more than 50 acre feet at the crest.

17. Aesoph's use of dammed water on his own property (as well as the additional two acres that are undisputed) constitutes a vested riparian right as defined in SDCL §§ 46-1-9 and 49-5-49.

18. Any water appropriated in excess of such vested right claim constitutes an appropriation of waters of the State without a water right or permit and, therefore, violates SDCL 46-1-15.

19. Aesoph's maintenance of a dam in Section 19 has caused upstream property to be flooded in Section 18. By maintaining the dam at this height, Aesoph has violated SDCL §§ 46-4-1.1, 46-5-2, and 46-5-1.1.

FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED that Vested Water Right Application No. 6173-3 be and hereby is validated for 42 acre feet of water for fish and wildlife propagation, recreation, and livestock use with a claimed priority date of January 1, 1950, subject to the following qualifications:

1. Vested Water Right No. 6173-3 authorizes a dam with a storage capacity at the spillway of 42 acre feet of water and sufficient water annually to maintain the water level to the 1950 spillway overflow elevation.

2. The spillway overflow elevation shall be lowered and maintained at an elevation which will not allow the permanent storage capacity of the impoundment to exceed 42 acre feet of

water or inundate trees along either the sides or across the neck of the dam at the location denoted as a black line on the 1950 topographical map. (Duvall report map.)

3. A permanent benchmark shall be established near the dam to allow the lowered spillway elevation to be referenced. The location of the permanent benchmark shall be identified on a map by direction and distance from a corner of a government surveyed section or quarter section. This map shall be no smaller than 8 by 11 inches and be prepared by a South Dakota licensed land surveyor, a South Dakota registered professional engineer, or a government employee who regularly prepares maps as part of their employment.

4. Plans and specifications shall be prepared by an engineer in accordance with the safety of dams requirements and submitted to the Water Rights Program for approval prior to beginning work to lower the spillway. The plans and specifications shall be submitted within 30 days of the date Vested Water Right No. 6173-3 is issued.

5. Construction to lower the spillway elevation shall commence within 30 days after receiving Water Rights Program approval of plans and specifications provided runoff conditions allow the work to be performed safely.

6. The lowering of the dam's water level shall be completed without causing damage to downstream property.

7. The lowered spillway overflow elevation shall be surveyed in reference to the permanent benchmark and a copy of the survey notes provided to the Water Rights Program.

8. The Chief Engineer or his authorized staff shall be allowed to enter upon the land where the dam is located for the purpose of inspecting the dam and surveying to verify the spillway overflow elevation. The Chief Engineer shall make a reasonable attempt to notify the owner or possessor of the property prior to entry upon the land.

Dated this _____ day of September, 2000.

Francis Brink, Chairman
South Dakota Water
Management Board
(on behalf of the Board)

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of proposed Findings of Fact, Conclusions of Law, and Final Decision in In the Matter of Vested Water Right No. 6173-3, David Aesoph, was served by United States mail, first class, postage prepaid upon:

Francis E. Brink
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Leo Holzbauer
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Harold Deering
Assistant Attorney General
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Jarvis Brown
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Pierre, SD 57501

and by hand delivery upon:

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

on this 20th day of September, 2000.



Diane Best
Assistant Attorney General
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Telephone: (605) 773-3215

SIEGEL, BARNETT & SCHUTZ, L.L.P.

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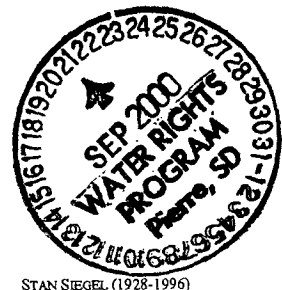
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September 20, 2000

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Mr. Garland Erbele, Chief Engineer
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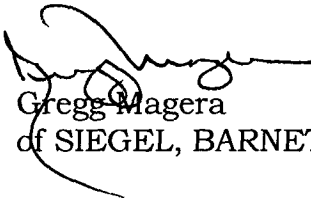
RE: Water Rights Application No. 6173-3--David Aesoph

Dear Garland:

As you know, our law firm represents David Aesoph in the above-captioned matter. As you know, Mr. Aesoph received a favorable recommendation concerning Water Permit No. 6173-3. In order to save our client the expense of a personal appearance in Rapid City, I wonder if I could appear via telephone? I will make myself available to either be called and/or call you in Rapid City. Please let me know if this is permissible. I have provided Attorney Diane Best, Francis Brink and Harold Deering with a courtesy copy of this correspondence.

Thank you, Garland.

Very truly yours,



Gregg Magera
of SIEGEL, BARNETT & SCHUTZ, L.L.P.

GM:mm/ks

pc: Mr. Francis Brink
Ms. Diane Best
Mr. Harold Deering

JARVIS W. BROWN
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Attorney General
209370
SEP 28 2000

September 21, 2000

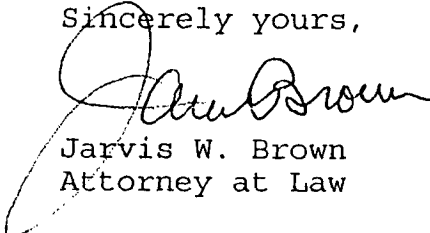
Ms. Diane Best
Office of Attorney General
500 East Capitol Ave.
Pierre, SD 57501-5070

Dear Diane:

I have just finished reviewing your Findings of Fact, Conclusions of Law, and Final Decision. I find that you have cited all of the information that was presented at the Aberdeen hearing; that in my estimation, it is all inclusive and I would not be able to add or subtract anything from your findings of fact.

I appreciate your outstanding work on this matter.

Sincerely yours,



Jarvis W. Brown
Attorney at Law

JWB:klc

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF VESTED WATER) FINDINGS OF FACT, CONCLUSIONS
RIGHT APPLICATION NO. 6173-3,) OF LAW, AND FINAL DECISION
DAVID AESOPH)

FINDINGS OF FACT

1. This is an application to validate a vested water right claim to impound 70 acre feet of water from runoff into a dam located in Hand County, South Dakota.
2. The water will be used for fish and wildlife propagation, recreation and livestock use.
3. According to topographical maps of the area, the dam has been on the property since 1950.
4. The dam impounds water into a naturally occurring slough in Sections 18 and 19, Hand County.
5. Due to high water levels in the mid 1980's, the dam washed out.
6. Applicant repaired the dam in 1988 by moving soil from upstream of the dam embankment, removing some of the material below the dam and back filling with a clay type material.
7. Claimant installed a culvert in the primary spillway.
8. A culvert was moved from the west side of the reservoir to the east side. The culvert was moved to prevent eroding along the base of the dam embankment.
9. Applicant's repair work was not construction of a new dam on top of an existing dam, but rather, repair work to the existing dam.
- 10 Applicant's repair work was as a "cost share" project with the Natural Resources Conservation Service (NRCS) formally known as the Soil Conservation Service.
11. The repair project was approved and cost-share funded through the NRCS office in Highmore, South Dakota.

12. Don Weiss, a neighboring landowner to the north, raised the issue of water backing on to his property.

13. Weiss agrees that the dam on the Aesoph property was constructed before 1955.

14. Weiss caused a dugout to be constructed on his property which struck an underground vein of water adding to the level of impounded water.

15. An upstream dam located on the Weiss property washed out in the 1970's further adding to the level of impoundment.

16. There is a slough located at the intersection of the southwest quarter of Section 18 and the southeast quarter of Section 13, which has been ditched by Weiss to the area of the present dam for 15 years, also adding to the level of impounded water..

17. The Board finds that there is no legally cognizable injury to said landowner.

18. Repair work completed by applicant on the dam in the late 1980's did not result in the storage capacity of the dam being increased.

19. Abnormal rainfalls in the mid and later 1990's naturally increased the size of the impoundment.

20. The repair work performed by Applicant did not represent a significant or material change in the dam's design.

CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter.

2. Applicant's proposed uses of the impounded water for fish and wildlife propagation, recreation and livestock are beneficial uses.

3. The proposed uses are in the public interest.

4. The Board has specifically weighed the possibility of an increase and decrease in the dam capacity due to changing weather conditions.

5. The Board has determined that since the benefits of a grant of the vested water right claim by Applicant are substantial and tangible and that the detriments from any impounding on neighboring landowners are small and speculative, that the public interest weighs in favor of the grant of the application.

6. Applicant's application qualifies for vested status as defined by SDCL 46-1-9 or 46-4-5(2).

7. Validation of the dam at its existing spillway elevation does not unlawfully impair existing rights.

FINAL DECISION

The application for Water Permit No. 6173-3 is granted with the following qualifications:

1. Permit No. 6173-3 is subject to compliance with the existing and applicable Water Management Board Rules:

- a. Chapter 74:54:01 Surface Water Quality Standards;
- b. Chapter 74:51-02 Uses Assigned to Lakes; and
- c. Chapter 74:51-03 Uses Assigned to Streams.

Dated this ____ day of September, 2000.

BY THE BOARD

Francis Brink, Chairman
South Dakota Water Management
Board

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION In the Matter of Water Permit Application No. 6173-3, David Aesoph was served by United States mail, first class, postage prepaid upon:

Mr. Francis Brink
1214 S. Wells St.
Aberdeen, SD 57401-7351

Mr. Rodney Freeman, Jr.
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Huron, SD 57350-0176

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Yankton, SD 57078

Mr. Leo Holzbauer
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Ms. Bernita Loucks
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Rapid City, SD 57702-0240

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Mr. Garland Erbele
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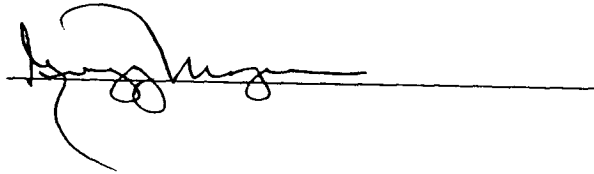
Mr. John P. Guhin
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Ms. Diane Best
Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070

Mr. Harold H. Deering, Jr.
Asst. Attorney General
300 N. Dakota Ave.
Suite 403
Sioux Falls, SD 57104-6032

Dated this ^{4th} 19 day of September, 2000.

SIEGEL, BARNETT & SCHUTZ, L.L.P.



BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

In the Matter of Vested Water)
Right Application No. 6173-3,)
David Aesoph)
)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL DECISION

Having been duly appointed by the South Dakota Water Management Board, Board Chairman Francis Brink conducted the evidentiary hearing in the above-entitled matter on August 30, 2000, in Aberdeen, South Dakota.

Applicant David Aesoph was present and was represented by attorney Greg Magera. Diane Best appeared on behalf of the Department of Environment and Natural Resources (DENR) along with Chief Engineer Garland Erbele and DENR engineer Ron Duvall. Harold Deering was present as Board counsel. Prior to the hearing, the parties stipulated that the Intervenor's testimony could be offered by means of a deposition transcript. Intervenor Don Weiss appeared through his counsel Jarvis Brown, and did not personally appear at hearing. The deposition was entered into evidence pursuant to the stipulation.

After hearing a transcript was prepared and each Board member reviewed the record. The full Board met and considered this matter at its next regularly scheduled public meeting in Rapid City, South Dakota on September 27, 1999. Chairman Brink presented his recommendation that the DENR staff position be approved. The Board is not bound by that recommendation and has independently considered the evidence presented at hearing. No further evidence was presented.

After considering the evidence presented, the Board makes the following Findings of Fact and Conclusions of Law, and Final Decision:

FINDINGS OF FACT

1. An unnamed watercourse flows from north to south through Section Eighteen (18), Township One Hundred Sixteen (116) North, Range Seventy (70) West, Hand County, South Dakota. From Section 18, the natural flow for the unnamed watercourse is south through Section 19, and the flow proceeds downstream into Lost Creek in Hyde County. (DENR Report w/map.) Based on the filed application, the drainage area above the David Aesoph dam (NW 1/4 Section 19-116N-70W) is in excess of 900 acres.
2. Applicant David Aesoph owns or controls land located in Section 19.
3. A dam on the unnamed watercourse was constructed in Section 19 sometime before 1950. Although the exact date of construction is unknown, neighbor Don Weiss testified that he has lived in the area since before 1950, that the dam predates 1950, and that the dam was constructed with horses. A 1950 U.S.G.S. topographical map of this area indicates that the dam was in existence on that date. All parties agree that the dam was constructed by 1950.
4. Upstream landowner Mr. Weiss complained to DENR on August 25, 1999 that the dam was flooding his property in section 18. After a DENR investigation into the dam, the Chief Engineer issued a Notice under SDCL 46-5-49, requiring that Mr. Aesoph file a vested water right application within 90

days if he claimed a vested right for use of the dam. The Notice was issued on October 13, 1999. On January 11, 2000, Mr. Aesoph filed his application for validation of the vested right. The application lacked a map as required by administrative rule. DENR Engineer Ron Duvall prepared a map showing the extent of the vested right claim in order to assist in completing the application. Upon payment of the application fee on January 28, 2000, the application was complete.

5. Mr. Aesoph's application seeks a 1950 priority date. None of the parties dispute this date. This Board finds that the 1950 date is the appropriate priority date for this vested right claim.

6. The claimed beneficial uses are livestock watering and fish, wildlife, and recreational purposes.

7. Mr. Aesoph requested a vested right for 70 acre feet, but presented no calculations whatsoever regarding the past or current spillway elevations of the dam or the amount of water that has been stored in the dam.

8. In reviewing this matter, DENR Engineer Ron Duvall obtained data from the Natural Resource Conservation Service (NRCS) in Highmore. NRCS assisted Mr. Aesoph in improvements to the dam in 1988 through its cost-share program. The NRCS measurement showed a water depth to spillway elevation of 7.5 feet before improvements were made to the dam in 1988. The water depth to spillway elevation at the time of the inspection of the site by Ron Duvall in 1999 was 13.5 feet. Based on this information, the height of the

spillway was increased in 1988, and, consequently, the storage capacity of the dam increased significantly.

9. The dam now backs up water across an improved section line highway. Although the dam had historically backed water over this road, it was an occasional sporadic spring time event until the mid-1990's. Since the mid-1990's, the road has been permanently inundated and is impassable.

10. Don Weiss owns part of Section 18. He has been familiar with Sections 18 and 19 since the 1950's. Water was backed up on Section 18 at different times during the period from the 1950's through the present. Historically, about two acres of farm land were occasionally inundated. During the mid-1990's, however, the water backed up on his land and covered 14 additional acres.

11. Trees once grew along the sides and across the neck of the dam on the Aesoph property. The trees were large enough for cattle to scratch their backs on and are quite large, up to 8 inches in diameter. The size of these trees indicates that the tree line is the historic shoreline or water elevation at the dam site. Since the mid-1990's, however, the trees have been standing in water and have died. The death of trees of this size is consistent with continual longstanding inundation for the last several years. The trees were of sufficient size that a one-time unique spring event would not have caused their death.

12. Based upon measurements taken from the topographical map, information obtained during a visit to the site, and aerial photographs, DENR

Engineer Duvall calculated the current dam capacity at 174 acre feet. He calculated the size of the dam to be 32 acre feet in 1950.

13. The method used to calculate the dam capacity involved multiplying the surface area of the dam by the depth of the structure from the bottom of the dam fill to the spillway (spillway elevation). Then, a multiplier is applied to account for the topography behind the dam. DENR witness Duvall testified that the NRCS technical manual recommends using this method to estimate the storage capacity. In this situation, there is a high spot or saddle in the area behind the dam, so less water is stored than if it were level. Considering this situation, Mr. Duvall applied a multiplier of 0.3 in calculating the capacity. This is a conservative number. Under the NRCS manual, a multiplier of 0.4 is generally acceptable.

14. Using the general 0.4 multiplier, the historic storage capacity would be 42 acre feet instead of 32 acre feet. Using the 0.4 factor, the current storage capacity of the dam would then be even more than the 174 acres calculated by Mr. Duvall.

15. At hearing, Mr. Aesoph testified that the dam had been washed out to some extent before he purchased the property in the early 1970's. The dam still held some water, but Mr. Aesoph was unable to testify as to the remaining storage capacity. Mr. Aesoph testified that the dam was rebuilt or reconstructed in the late 1980's, and the increase in the elevation of the spillway was simply to bring the storage capacity back to its original design.

However, there was no testimony presented to show that the original design capacity of this dam was ever as large as the current size.

16. Although the dam was rebuilt or reconstructed, no plans and specifications were filed with the DENR. The DENR was not notified of this construction.

17. In the alternative, this Board finds that even if it is assumed that the storage capacity of the dam was as large in 1950 as it is now, such renewed or revived water use would not warrant granting the vested right at 70 acre feet. The time period between the breach or "wash-out" which Mr. Aesoph testified was there in 1970 or 1971 when he purchased the property and the improvements in 1988 or 1989 was at least 17 years. The structure would have been in disrepair for a period of 17 years and would not have held as much water as it does now. Since Mr. Aesoph failed to attempt to use any water right over this level in excess of 17 years, under SDCL 46-5-37, this action constitutes a forfeiture of his water right to the extent of the decreased storage capacity. Mr. Aesoph presented no evidence of storage capacity during this 17 years period.

18. Mr. Aesoph further asserts that the enlarged surface area of the dam in recent years was caused by unusually wet years, a vein of water struck when Intervenor Weiss dug a dugout on his property, and water from a slough ditched into the drainage area. There is no evidence that a vein of water was struck in the construction of the dugout. While the mid-1990's were indeed wet and the slough was drained into the drainage area of the dam, the dam

structure and the spillway elevation caused water to be impounded, not the climate. A lower spillway elevation would have allowed the water to continue on downstream to Lost Creek and not flood the Weiss property.

19. The spillway elevation was increased in the late 1980's. By 1997, water was at or near the spillway elevation and water backed over the section line road and onto the Weiss property and the inundated area behind the dam increased correspondingly. At that time, water inundated 16 acres of the Weiss land. The dam structure continues to impound more water than it did before the improvements in late 1980's.

20. The DENR recommends that water right be validated for up to 42 acre feet, with the specific spillway elevation to be set so that the trees would no longer be standing in water. Although the trees are already dead, they serve as a marker for the historic elevation. Intervenor Weiss agrees with that recommendation.

21. Because the Applicant has provided no reliable evidence with respect to historic elevations of the spillway or storage capacity, this Board finds that the tree line would serve as an appropriate indicator for determining the proper spillway elevation of the dam. Based on the DENR calculations, the dam capacity at a spillway elevation determined by the tree line would be from 32 to 42 acre feet. DENR does not recommend granting the application for 32 or 42 acre feet alone, however, because without using the trees as a marker, there is the possibility of validating a slightly greater dam capacity than is warranted under the evidence presented. The Applicant has failed to provide

evidence of any storage capacities or spillway elevation whatsoever and should not be allowed to rely on the lack of data to this Board or to benefit from failing to satisfy his burden of proof. The Board finds that based on the evidence presented the tree line provides the most reliable indicator of the spillway elevation prior to the improvements in the late 1980's.

CONCLUSIONS OF LAW

1. This Board has jurisdiction to act on Mr. Aesoph's application pursuant to SDCL ch. 46.
2. The applicable statutes for considering this application for validation of a vested right are SDCL §§ 46-5-49, 46-1-9(1), 46-1-15, 46-2A-9, and 46-5-10.
3. SDCL 46-5-9(1) applies to riparian rights that were beneficially used before March 2, 1955. Under the riparian doctrine in existence at the time, the landowner was not required to obtain a water right or water permit for such dam. SDCL 46-1-9 allows for validation of vested rights on the specific priority date claimed only to the extent they were in existence on or before March 2, 1955.
4. All applications for water rights are also governed by SDCL 46-2A-9, which requires the applicant to show that water is available for the purpose involved, that the use is a beneficial use, that the use is in the public interest, and that the use does not impair existing rights.

5. SDCL 46-5-49 requires that persons claiming vested water rights meet the foregoing standards. The applicant has the burden of demonstrating that validation of a vested water right is warranted.

6. Based on the foregoing statutes, Mr. Aesoph has the burden of demonstrating that the dam was in existence at the time of the claimed priority date and was continually used since that time. Further, Mr. Aesoph has the burden of showing that such use is a beneficial use, is in the public interest, and does not impair existing rights.

7. Based on the evidence presented, there is no dispute that the priority date is 1950 which makes it eligible for validation as a riparian vested water right, if otherwise qualified.

8. There is a dispute regarding the quantity of water that has been continuously used. Mr. Aesoph claims 70 acre feet, but has failed to meet his burden of showing the actual quantity of water claimed in 1950 and beneficially used thereafter. The DENR and Intervenor Weiss acknowledge that there has been some use of the dam, and claim the extent of any maximum beneficial use is in the neighborhood of 32 to 42 acre feet. The evidence presented to the Board supports this analysis. The 1950 topographical map, aerial photos, the NRCS document, and the testimony of neighboring landowner Weiss (and his tenant George Wiesler) all support this quantification. The trees on each side and across the neck of the dam that have existed for several years, are a reliable indicator of the historical capacity

of the dam. There is no other evidence presented that would better show the level of historic use.

9. The uses of the dam for livestock watering, recreational, and fish and wildlife propagation are beneficial uses.

10. Use of the dam for fish and wildlife propagation, livestock watering, and recreational purposes is in the public interest.

11. It is not a beneficial use and it is not in the public interest to grant a vested right application for the inundated portion of the Weiss property. Further, Mr. Aesoph has no lease, easement, or other arrangement that would allow such use on the Weiss property.

12. SDCL 46-2A-9 pertaining to existing rights protects against impairment of any rights, including flooding. It would be an impairment of existing rights to grant water permits or rights for dams if they flooded the property of others without consent.

13. Given the evidence presented in this proceeding, validating this water right beyond the 32 to 42 acre foot level (as measured by the tree line) impairs the right of neighbor Don Weiss insofar as his property is inundated, and he cannot use the property involved. Although he does not dispute that historically 2 acres of his property has been inundated, he has not granted consent for the additional 14 acres. The proposed use, at the level claimed, would impair existing rights.

14. After March 2, 1955 (more specifically the late 1980's), Mr. Aesoph engaged in or caused construction activities to occur on the above-described

real property, which construction activity increased the storage capacity of the dam. Mr. Aesoph does not hold a vested water right to use water impounded as a result of construction activities occurring after March 2, 1955.

15. This Board has promulgated rules for safety of dams. ARSD 74:02:08. The rules apply to any artificial barrier impounding 50 acre feet or more at the crest elevation (maximum storage elevation). ARSD 74:02:08:01(7) and ARSD 74:02:08:01(15). The dam safety rules clearly applied since the reconstruction resulted in an impoundment of at least 174 acre feet at the spillway elevation, without considering the freeboard. Further, since reconstruction or rebuilding the dam was involved, this dam was not excepted or "grandfathered in" as a preexisting structure under ARSD 74:02:08:02. All dam safety criteria were applicable. No plans and specifications were filed or no other dam safety criteria were followed. The DENR was not even provided with notice of any kind.

16. The dam safety criteria must be followed in lowering the dam spillway as recommended by the DENR, since the structure would still impound more than 50 acre feet at the crest.

17. Mr. Aesoph's use of the water in the dam stored on his own property (as well as the additional two acres of Weiss property that are undisputed) constitutes a vested riparian right as defined in SDCL §§ 46-1-9 and 49-5-49.

18. Any water appropriated in excess of such vested right claim constitutes an appropriation of waters of the State without a water right or permit and, therefore, violates SDCL 46-1-15.

19. Mr. Aesoph's maintenance of a dam in Section 19 has caused upstream property to be flooded in Section 18. By maintaining the dam at its current spillway elevation, Mr. Aesoph has violated SDCL §§ 46-4-1.1, 46-5-2, and 46-5-1.1.

FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED that Vested Water Right Application No. 6173-3 be and hereby is validated for 42 acre feet of water for fish and wildlife propagation, recreation, and livestock use with a claimed priority date of January 1, 1950, subject to the following qualifications:

1. Vested Water Right No. 6173-3 authorizes a dam with a storage capacity at the spillway of 42 acre feet of water and sufficient water annually to maintain the water level to the 1950 spillway overflow elevation.

2. The spillway overflow elevation shall be lowered and maintained at an elevation which will not allow the permanent storage capacity of the impoundment to exceed 42 acre feet of water or inundate trees along either the sides or across the neck of the dam at the location denoted as a black line on the 1950 topographical map attached to the DENR Report.

3. A permanent benchmark shall be established near the dam to allow the lowered spillway elevation to be referenced. The location of the permanent benchmark shall be identified on a map by direction and distance from a corner of a government surveyed section or quarter section. This map shall be no smaller than 8 by 11 inches and be prepared by a South Dakota licensed land surveyor, a South Dakota registered professional engineer, or a government employee who regularly prepares maps as part of their employment.

4. Plans and specifications shall be prepared by an engineer in accordance with the safety of dams requirements and submitted to the Water Rights Program for approval prior to beginning work to lower the spillway. The plans and specifications shall be submitted within 30 days of the date Vested Water Right No. 6173-3 is issued.

5. Construction to lower the spillway elevation shall commence within 30 days after receiving Water Rights Program approval of plans and specifications provided runoff conditions allow the work to be performed safely.

6. The lowering of the dam's water level shall be completed without causing damage to downstream property.

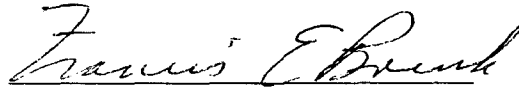
7. The lowered spillway overflow elevation shall be surveyed in reference to the permanent benchmark and a copy of the survey notes provided to the Water Rights Program.

8. The Chief Engineer or his authorized staff shall be allowed to enter upon the land where the dam is located for the purpose of inspecting the dam

and surveying to verify the spillway overflow elevation. The Chief Engineer shall make a reasonable attempt to notify the owner or possessor of the property prior to entry upon the land.

Dated this 16 day of October, 2000.

BY THE BOARD:

A handwritten signature in cursive script, appearing to read "Francis Brink", written over a horizontal line.

Francis Brink, Chairman
South Dakota Water
Management Board



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3181
www.state.sd.us/denr

October 18, 2000

NOTICE

TO: Gregory C. Magera
Siegel, Barnett & Schutz
P.O. Box 490
Aberdeen, SD 57402-0490

Jarvis Brown
P.O. Box 37
Faulkton, SD 57438-0037

FROM: Garland Erbele, Chief Engineer
Water Rights Program
(605) 773-3352

SUBJECT: Adoption of Findings of Fact, Conclusions of Law and Final Decision

This is to notify you that the Final Decision, including Findings of Fact and Conclusions of Law, were adopted September 27, 2000, by the Water Management Board validating Vested Water Right Permit Application No. 6173-3, David Aesoph. A copy of the signed Findings of Fact, Conclusions of Law and Final Decision is enclosed.

South Dakota statutes provide that decisions of the Board may be appealed to the Courts. Notice of appeal of the Board's decision must be filed within thirty days of this notice and be in accordance with procedures established in SDCL 1-26-31.

Enclosure

c: John Guhin, Deputy Attorney General
Harold Deering, Assistant Attorney General
Diane Best, Assistant Attorney General



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

June 7, 2001

NOTICE

TO: David Aesoph c/o Gregg Magera, attorney
PO Box 490
Aberdeen, SD 57402-0490

FROM: Garland Erbele, Chief Engineer
Water Rights Program *Garland Erbele*

SUBJECT: Notice of Hearing on Violation of qualification(s) on Vested Water Right No. 6173-3 and Order to Lower the Water Level in the Aesoph Dam

Notice of Hearing

This Notice is in regard to a dam in the NW1/4 of Section 19-T116N-R70W that backs water on to property owned by Don Weiss in section 18-T116N-R70W. On January 2, 2001, Vested Water Right No. 6173-3 was issued for the dam with several qualifications related to lowering the spillway elevation and preparation of plans and specifications. Enclosed is a copy of the vested right including all of the qualifications. According to qualification No. 4, plans and specifications were to be submitted to the Water Rights Program within 30 days of issuance of the vested right. To date, no plans and specifications have been submitted and the deadline expired February 1, 2001. Prior snow conditions limiting access to the dam have not been a factor since early April.

According to South Dakota Codified Law (SDCL) 46-1-12, the state Water Management Board may conduct a hearing to consider what action to take regarding the violation of a qualification or qualifications. Qualification No. 4 has not been complied with and, consequently, there has been no compliance with qualification Nos. 1, 2, 3, 5, 6 and 7. A hearing is scheduled for 8:45 am Central Daylight Savings Time (CDST), July 11, 2001 in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol, Pierre, SD, and will be conducted pursuant to SDCL 46-1-12, 46-1-14, 46-2-9, 46-2-11 and 46-2-17. This is a contested case hearing pursuant to Chapter 1-26. According to SDCL 46-1-12, the Board may suspend a permit for a period of up to one year for the first violation of a qualification or up to three years for a second violation, or cancel a permit for a third violation. Following the hearing, the Water Management Board can:

1. Suspend Vested Water Right No. 6173-3 in accordance with applicable provisions of SDCL 46-1-12;
2. Amend, delete, or add qualifications to No. 6173-3 in accordance with SDCL 46-1-14;
3. Postpone any action;
4. Take no action.

The hearing is an adversarial proceeding. The vested right owner or legally-appointed representative has the right to be present or to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and the State Supreme Court as provided by law.

Chief Engineer's Order to Lower Water Level

According to SDCL 46-2-18, the chief engineer has the authority to order the discontinuance of illegal use of water. Any water currently stored in the dam in excess of the 1950 spillway elevation (estimated to be near the base of the inundated trees as described in qualification No. 2) is an illegal use of water and is harmful to the inundated upstream property owner. South Dakota Codified Laws (SDCL) 46-4-1.1 and 46-5-2 allow a person to construct and maintain a dam as long as no land other than that belonging to the owner of the dam is flooded, or an easement for such flooding has been secured. Therefore, you are ordered to immediately begin lowering the water level by pumping or siphoning water in a controlled manner to prevent damages to downstream property. Lowering the water level is also necessary in anticipation of compliance with the qualifications included on Vested Right No. 6173-3. Please advise us when lowering of the water level begins by contacting Ron Duvall at (605) 773-3352 or by e-mail at ron.duvall@state.sd.us. This order will also be reviewed by the Water Management Board at the hearing scheduled for 8:45 am CDST, July 11, 2001 under the aforementioned procedures and statutory authority.

If you have any questions, please contact Ron Duvall at (605) 773-3352.

NOTE: Please contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) by June 20, 2001 to assure access to the meeting room for the handicapped, to obtain an interpreter for the hearing impaired, or for any other accommodations.

c: Diane Best, Assistant Attorney General
Jarvis Brown, PO Box 37, Faulkton SD 57438-0037
Don Weiss, PO Box 186, Faulkton SD 57438
Robert Aesoph, 17215 343rd Ave, Highmore, SD 57345

CERTIFICATION

I hereby certify that on June 7, 2001 , I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated June 7, 2001 regarding Notice of Hearing on Violation of qualification on Vested Water Right No. 6173-3 & order to Lower the Water Level in the Aesoph Dam addressed as stated below:

David Aesoph
%Gregg Magera, attorney
PO Box 490
Aberdeen, SD 57402-0490

Jarvis Brown
PO Box 37
Faulkton, SD 57438-0037

Don Weiss
PO Box 186
Faulkton, SD 57438

Robert Aesoph
17215 343rd Ave.
Highmore, SD 57345

A copy of the above described Notice was sent Inter-office to:

Diane Best, Assistant Attorney General, Capitol Building



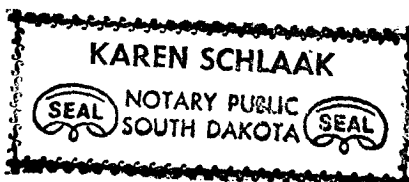
Ron Duvall
Water Rights

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 8th day of June, 2001.



Karen Schlaak
Notary Public
My Commission expires April 1, 2007



STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Phone (605) 773-3215
FAX (605) 773-4106
www.state.sd.us/atg

MARK BARNETT
ATTORNEY GENERAL

LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL

July 3, 2001

Gregory C. Magera
Attorney at Law
P.O. Box 490
Aberdeen, SD 57402-0490

Re: Aesoph Water Rights Hearing

Dear Greg:

Following our discussion yesterday, I checked regarding the availability of DDN facilities for purposes of holding the above-referenced water hearing. The studios are available for Aberdeen, Sioux Falls, and Pierre at 1 p.m. on July 11, 2001. The State can book these sites at no charge provided that we do so by noon on Friday, July 6. If the studios are booked after this time, a charge of \$35 per hour per site will be assessed to the persons seeking to attend via DDN. So if you know by Friday, it would save some money. If you contact me, I will make sure that the studios are booked.

Also, I contacted Department of Corrections. They advise that a Writ of Habeas Corpus adtestificandum would be required for that day. The location of the DDN site is the Mickelson Educational Center, Southeast Vo-Tech, 2301 Career Place, Sioux Falls, South Dakota. It is my understanding that Dave Schiefen handles arrangements pertaining to such writs at the penitentiary. His telephone number is (605) 367-5178. Also, given the time constraints, I would expect that you would submit the request for writ via facsimile transmission or e-mail to one of the Sioux Falls judges. I have no objections to this provided that the Department of Corrections receives adequate notice to transport the prisoner to Southeast Vo-Tech. Also, as you already know, I will resist any request for writ other than this location. If a judge needs anything additional from me regarding the State's consent to the writ (other than this letter) please let me know as quickly as possible.

Sincerely,


Diane Best
Assistant Attorney General

DB:js
j-1cr123.db

Attorney General
615730
JUL - 6 2001

SIEGEL, BARNETT & SCHUTZ, L.L.P.

ATTORNEYS AT LAW
500 CAPITOL BUILDING

P.O. Box 490
ABERDEEN, SOUTH DAKOTA 57402-0490
TELEPHONE (605) 225-5420
FAX (605) 226-1911
[E-Mail siegellawabr@midco.net]

July 5, 2001

VIA FACSIMILE AND
REGULAR MAIL

RAYMOND M. SCHUTZ
HARVEY C. JEWETT
RORY KING
JEFFREY T. SVEEN
JOSEPH P. BARNETT
RONALD J. HALL*
PAUL T. BARNETT
REED RASMUSSEN
GREGG C. MAGERA
KATHRYN J. HOSKINS
JULIA M. DVORAK

*Also Licensed in North Dakota

STAN SIEGEL (1928-1996)
JOSEPH H. BARNETT (1931-1985)
TERENCE A. O'KEEFE (1938-1999)

SIoux FALLS OFFICE
300 NORTH DAKOTA AVENUE, SUITE 606
P.O. Box 1286
SIoux FALLS, SOUTH DAKOTA 57101
TELEPHONE (605) 335-6250
FAX (605) 335-6749
[E-mail sbslawsf@midco.net]

Ms. Diane Best
Asst. Attorney General
500 E. Capitol Avenue
Pierre, SD 57501

Re: David Aesoph - Vested Water Right No. 6173-3

Dear Diane:

This will follow our telephone conversation of July 3. As I advised, Mr. Aesoph is waiving his right to be personally present at the water right hearing.

I plan on attending the hearing via telephone and making a statement in his behalf. As I have previously advised, the costs to prepare plans and specifications, pursuant to the requirements of the State, are really cost prohibitive. I have sent the vested water right to the Register of Deeds for filing and Attorney Brad Zell is aware of the same in preparation of the property being sold, hopefully this month.

It is my understanding that you may file a copy of this letter as verification of my client's willingness to waive his personal appearance at the water right hearing. If there is anything further that we need to discuss, please do not hesitate to call me. Thank you for your continued cooperation.

Very truly yours,


Gregg Magera
of SIEGEL, BARNETT & SCHUTZ, L.L.P.

GM/ks

pc: Mr. David Aesoph

SIEGEL, BARNETT & SCHUTZ, L.L.P.

ATTORNEYS AT LAW
500 CAPITOL BUILDING
P.O. Box 490

ABERDEEN, SOUTH DAKOTA 57402-0490
TELEPHONE (605) 225-5420
FAX (605) 226-1911
[E-Mail siegel@lawabr@midco.net]

July 12, 2001

VIA FACSIMILE
605-773-4068

STAN SIEGEL (1928-1996)
JOSEPH F. BARNETT (1931-1985)
TERENCE A. O'KEEFE (1938-1999)

SIOUX FALLS OFFICE
300 NORTH DAKOTA AVENUE, SUITE 600
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FAX (605) 335-6749
[E-mail sbslawsf@midco.net]

RAYMOND M. SCHUTZ
HARVEY C. JEWELL
RORY KING
JEFFREY T. SVEN
JOSEPH P. BARNETT
RONALD J. HALL*
PAUL T. BARNETT
REED RASMUSSEN
GREGG C. MAGGERA
KATHRYN J. HOSKINS
JULIA M. DVORAK

*Also licensed in North Dakota

Re: Vested Water Right No. 6173-3
David Aesoph

Dear South Dakota Water Management Board:

As you know, our law firm represents David Aesoph in the above-captioned matter. I have received and reviewed the proposed Findings of Fact and Conclusions of Law submitted by Attorney Diane Best. Although Attorney Best correctly states that the final decision of the Board was to suspend Mr. Aesoph's permit, the Findings, Conclusions and Decision do not reflect Mr. Aesoph's significant efforts in compliance with the permit.

As stated before the Board, contact was made with Clark Engineering of Aberdeen, and Stellner Engineering regarding preparation of plans and specifications. Initial estimates to do the work were in the neighborhood of \$8,000 to \$12,000. Based on either a misunderstanding or a change in requirements of the State, later estimates were reduced to \$6,000 to \$7,000.

Contact was also made with representatives of the United States Fish and Wildlife Service and Natural Resources Conservation Service to see if they could be of help with this matter.

As was indicated during the hearing, the property owned by Mr. Aesoph is presently for sale and it is hoped that the sale of the property will take place within the next 30 days. Therefore, it seems somewhat premature to suspend the water permit. I specifically requested on behalf of Mr. Aesoph that you either take no action or delay taking any action, both of which were options available to you.

Finally, given that there was no direct testimony as to any harm to the neighboring landowner to the north, it seems premature to suspend the water right.

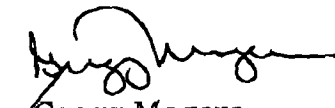
South Dakota Water Management Board

July 12, 2001

Page 2

Based on the foregoing, and in the interest of time, I would ask that you consider the issues raised in this letter as Mr. Aesoph's objections to the proposed Findings of Fact and Conclusions of Law and Final Decision. Thank you for your consideration.

Respectfully,



Gregg Magera
of SIEGEL, BARNETT & SCHUTZ, L.L.P.

GM/ks

pc: Ms. Diane Best (Via Facsimile)
Mr. David Aesoph

BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

In the Matter of Vested Water)	FINDINGS OF FACT,
Right No. 6173-3,)	CONCLUSIONS OF LAW,
David Aesoph)	AND FINAL DECISION

Upon request by the Department of Environment and Natural Resources (DENR), the Board conducted a hearing on July 11, 2001, for purposes of determining whether to suspend vested water right No. 6173-3, for failure to comply with qualifications within that vested water right (attached). The vested water right holder, David Aesoph, was present through his counsel, Greg Magera. The DENR staff was represented by Assistant Attorney General Diane Best. Evidence having been taken and arguments having been made, this Board hereby makes the following:

FINDINGS OF FACT

1. This Board granted Vested Water Right 6173-3 to David Aesoph. The Vested Right does not allow the permanent storage capacity of the impoundment to exceed 42 acre feet of water or inundate trees along either the side or across the neck of the dam at the location denoted as a black line on the 1950 topographical map attached to the DENR report.

2. In granting the vested right, the Board recognized that the existing dam at the Aesoph farm was in excess of 42 acre feet. Accordingly, this Board required the vested water right holder to lower the elevation of the spillway at the dam. Plans and specifications were to be filed within thirty days of issuance of the Vested Water Right. The Vested Water Right was issued on January 2, 2001.

3. As of the date of the July 11, 2001, hearing, no plans and specifications had been filed with the DENR. The vested water right holder claimed that preparation of the plans and specifications was too costly. The vested water right holder offered no other explanation for his failure to have an engineer prepare plans and specifications.

4. It is undisputed that a benchmark has not been installed pursuant to Qualification Number 3.

5. The vested water right holder's counsel asserts that the property may be sold within the next thirty days and that the future owner may take steps to remedy this situation, however, no guarantees could be given.

6. Although the water right authorizes storage at a level of up to 42 acre feet or the tree line, current actual storage at this location is greater than 42 acre feet and continues to back water across a section line road to the north and onto the property of the neighbor to the north.

7. In addition to the plans and specification issue, some water could have been removed from the impoundment in order to (a) relieve the flooding across the road and on the lands of the neighbor to the north and (b) to prepare the dam for construction activity. No efforts were made whatsoever to siphon or otherwise decrease the water level on this property. This Board finds that the vested water right holder has failed to comply with the conditions set forth in the vested right, and accordingly, the vested right should be suspended.

CONCLUSIONS OF LAW

1. Pursuant to SDCL 46-1-12, this Board is authorized to suspend water rights for violation of "any term of the permit or license." Suspension may be required for a period of up to one year for the first violation. This is the first violation.

2. Based upon the evidence presented at hearing, the Board concludes that suspension of the water right is warranted under SDCL 46-1-12 insofar as the vested water right holder has wholly failed to file plans and specifications (Qualification No. 4), and to take any other efforts to remove any water stored in excess of the 42 acre feet or tree line qualifications (Qualifications 1, and 2) and to install a benchmark (Qualification 3).

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Board hereby:

ORDERS that the Vested right is hereby suspended for one year. The Board will, however, consider lifting this suspension if evidence is produced to show that reasonable efforts have been undertaken to

evacuate water from the impoundment and to submit plans and specifications, and it is

FURTHER ORDERED that the vested water right holder is barred from impounding any additional water (inflows) at this location during the term of the suspension and must bypass such flows, and it is

FURTHER ORDERED that the vested water right holder must remove water (by pump, siphon, or other means) from this impoundment in order to relieve the flooding on the road to the north and on the neighboring property owner, and prepare for lowering the spillway.

A handwritten signature in black ink, appearing to read "Rodney Freeman", written over a horizontal line.

Rodney Freeman, Chairman, on
behalf of the South Dakota Water
Management Board

7/12/01



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

July 13, 2001

NOTICE

TO: David G Aesoph, c/o Gregg Magera, Attorney
PO Box 490
Aberdeen SD 57402-0490

FROM: *for* Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Adoption of Findings of Fact, Conclusions of Law and Final Decision

This is to notify you that the Final Decision, including Findings of Fact and Conclusions of Law, were adopted July 12, 2001, by the Water Management Board suspending Vested Water Right No. 6173-3 held by David G Aesoph for one year subject to review by the Board. A copy of the signed Findings of Fact, Conclusions of Law and Final Decision is enclosed.

South Dakota statutes provide that decisions of the Board may be appealed to the Courts. Notice of appeal of the Board's decision must be filed within thirty days of this notice and be in accordance with procedures established in SDCL 1-26-31.

Enclosure

c: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General
Jarvis Brown, Attorney, PO Box 37, Faulkton SD 57438
Don Weiss, Box 186, Faulkton SD 57438

CERTIFICATION

I hereby certify that on July 13, 2001, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated July 13, 2001 regarding Adoption of Findings of Fact, Conclusions of Law and Final Decision Vested Water Right No. 6173-3 addressed as stated below:

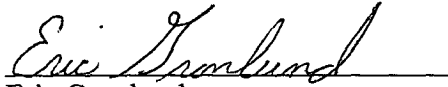
David G Aesoph
% Gregg Magera, Attorney
PO Box 490
Aberdeen, SD 57501

Jarvis Brown, Attorney
PO Box 37
Faulkton, SD 57438

Don Weiss
Box 186
Faulkton, SD 57438

A copy of the above described Notice was sent Inter-office to:

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



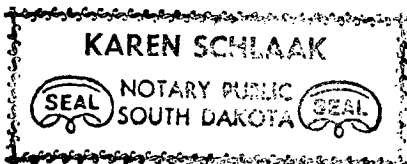
Eric Gronlund
Natural Resource Engineer
Water Rights

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 16th day of July, 2001.



Karen Schlaak
Notary Public
My Commission expires April 1, 2007



Water Rights Program -- File Documentation

NAME: Paul Meyers

ADDRESS: 39012 128th St, Aberdeen SD 57401

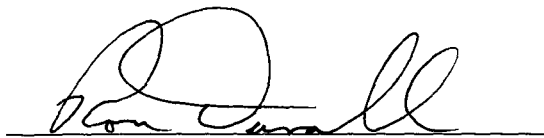
DATE: August 31, 2001 **TELEPHONE:** 605-225-0185

RE: Purchase of David Aesoph property and dam

COMMENTS:

I received notification from Diane Best that the Aesoph property involved with Vested Water Right No. 6173-3 was purchased by Paul Meyers. I contacted Mr. Meyers concerning his plans for the dam. Mr. Meyers indicated that he was going to be a good neighbor and lower the water level behind the dam. I asked Mr. Meyers if his intention was to breach the dam or only reduce the water level. Mr. Meyers indicated that he did want to maintain the dam but not flood the upstream property. According to Mr. Meyers, he does not take possession of the property until December.

I inform Mr. Meyers that he needs to comply with the Safety of Dams rules and the qualifications on the vested right. As requested, I faxed Mr. Meyers the vested right with the qualifications and I also faxed the findings of fact from the July 2001 board meeting during which the board suspended the vested right for one year.



Ron Duvall, Natural Resources Engineer
Water Rights Program

Water Rights Program -- File Documentation

NAME: Paul Meyers

ADDRESS: 39012 128th St, Aberdeen SD 57401

DATE: November 8, 2001

TELEPHONE: 605-225-0185

RE: On-site inspection of David Aesoph dam

COMMENTS:

On November 8, 2001 Tim Schaal and I inspected the David Aesoph dam after notifying Paul Meyers of our planned inspection. Mr. Meyer indicated that we could go out on the property and take a look at the work being done to lower the water level. Mr. Meyer also indicated that he may be around the property but we could not locate him during the inspection.

The inspection found that the water level had been lowered by cutting the dam fill and lowering an 18 inch culvert into the cut and then back-filling the cut. This process was apparently repeated several times to lower the water level in a controlled manner. At the time of the inspection the highest watermark on a cottonwood tree was 6.9 feet high and the water was down about 5 feet from the normal, continuous, eroded shoreline elevation. The invert of the 18 inch culvert was located 6 feet below the crest of the embankment.

Based on the 1950 topographical map it appeared the water level was approaching the 1950 elevation. Some of the largest cottonwood trees were out of the water and other large cottonwoods were in less than 1 foot of water. There was 1 foot of water over the base of a large willow tree. See attached three pages of photos.

Mr. Meyer was contacted by phone after we returned to the office. In order to address Safety of Dams concerns Mr. Meyer was asked if he was willing to install a 24 inch culvert at the final spillway elevation. We also requested that the water level be lowered another foot to approach the willow treeline and 1950 elevation. Mr. Meyer indicated that he would do both. I advised Mr. Meyer that once the work was done it would be necessary to provide notice of hearing and go to the Water Management Board. The hearing will be needed to ask the board to lift the suspension of the vested right and modify/delete certain qualifications pertaining to the submission of plans and specifications. I also called Don Weiss the upstream landowner and advised him of our inspection and conversation with Mr. Meyer. Mr. Weiss had not been to the site recently to see the current water level but he indicated that he wanted all of the water off his property. I advised Mr. Weiss that not all of the property was dry even in 1950 and the basis for

File No. 6173-3
November 8, 2001

validating Vested Right No. 6173-3 was to return the dam to its former size -- not to require the dam to be made smaller than the 1950 size. I further told Mr. Weiss that he would be provided notice of any hearing to lift the suspension and modify qualifications to No. 6173-3.

November 30, 2001

Tim Schaal spoke with Mr. Meyer via phone and was notified that the 24 inch culvert had been installed and the water level had been lowered one foot since our November 8 inspectionl. Mr. Meyer indicated that he may lower the elevation even further.

Ron Duvall, Natural Resources Engineer
Water Rights Program



Property line – Weiss property to left



Weiss Property – dugout fills toward back



Aesoph property – dugout fills visible



Dam embankment – dirt work to lower water



Upstream entrance to 18 in culvert



Downstream exit from 18 in culvert



Exposed shoreline – level about 5 ft down



Willows crossing dam – black line 1950 topo



Cottonwoods along shoreline



Closeup of cottonwoods looking upstream



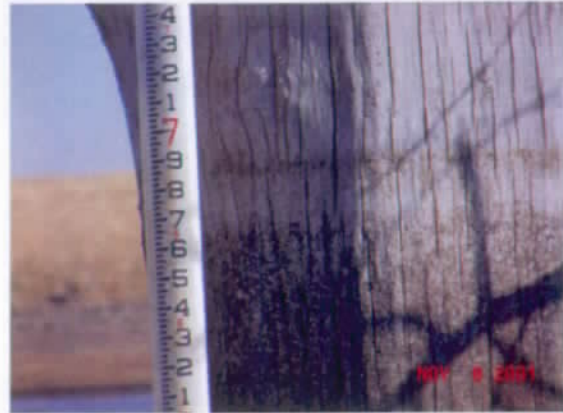
Entrance to 18 inch culvert spillway



Row of cottonwood trees



Highest watermark visible on cottonwood



Depth of water on cottonwood – 6.9 feet



Watermarks on trees



Large cottonwood out of water



Water depth 1 foot at base of willows



Narrow neck before water area widens

Water Rights Program -- File Documentation

NAME: Paul Meyers

ADDRESS: 39012 128th St, Aberdeen SD 57401

DATE: September 18, 2002 **TELEPHONE:** 605-225-0185

RE: On-site inspection of David Aesoph dam (now owned by Paul Meyers)

COMMENTS:

On September 17, 2002 Tim Schaal and I inspected the David Aesoph dam after being contacted by Paul Meyers who requested us to look at the recently completed spillway construction. Mr. Meyers indicated he wanted to see if the work was acceptable and then he would have his surveyors survey in the elevation of the spillway culvert.

The inspection found that the 18 inch culvert installed in 2001 had been replaced with a 24 inch culvert as requested by Tim Schaal. The culvert had also been lengthened so that the spillway would function better without significant erosion problems. Mr. Meyers had also lowered the elevation of the culvert (spillway) as requested to approximate the 1950 elevation. The water level was about 0.7 feet below the invert of the 24 inch spillway culvert and the invert of the culvert spillway is now 12.8 feet below the crest of the dam as compared to 6 feet below the crest during the November 2001 inspection. The water level was also below the culvert through the section line road upstream which separates the Meyers property from the Don Weiss property. The old section line road is out of water and has a 12 to 18 inch culvert through the road which is in very poor condition. It is estimated that the crown of the township road was 2 to 3 feet above the current water elevation.

On September 18, 2002 I phoned Mr. Meyers and informed him that we had inspected the work and the elevations and construction appeared adequate. Mr. Meyers indicated that he would have the spillway elevation surveyed and provide us with the survey results. I told Mr. Meyers that we would schedule this matter for hearing at the December Water Management Board meeting for purposes of rescinding the suspension of No. 6173-3 and asking the board to modify the qualifications as needed.



Ron Duvall, Natural Resources Engineer
Water Rights Program



Inlet to 24 inch culvert spillway



Upstream embankment with inlet on left



Outlet of the 24 inch culvert spillway



Dam embankment - dirt work to lower water



Upstream view of dam pool



Upstream closeup of dam pool



Property line (section road) along treeline



Property line -- Weiss property on left



Culvert outlet through section line road



Closeup of outlet through section line road



Culvert inlet through section line road



Water level below culvert outlet thru road

File No. 6173-3
September 17, 2002



Weiss dugout formerly inundated by dam



Water in Weiss dugout closeup



October 7, 2002

Tim Schaal
Water Rights Program
S.D. Dept. of Environment
& Natural Resources
Joe Foss Building
523 East Capitol
Pierre, SD 57501-3182

RE: Paul Meyers

Dear Tim:

Transmitted herewith is a Certificate of Survey with the elevations of culverts obtained for Paul Meyers in Hand County, SD. This is for your reference and file.

If you have questions or need further information, please call.

Sincerely,

A handwritten signature in cursive script that reads "Louis P. O'Donnell" followed by a stylized "L.S." or "JR" monogram.

Louis P. O'Donnell, L.S.
CLARK ENGINEERING CORPORATION

LPO/lk

Enc.

cc: file
Paul Meyers

1011 First Avenue SE

P.O. Box 20

Aberdeen, South Dakota 57402-0020

(605) 225-3494

(605) 225-5433 Fax

www.clark-eng.com

RECEIVED

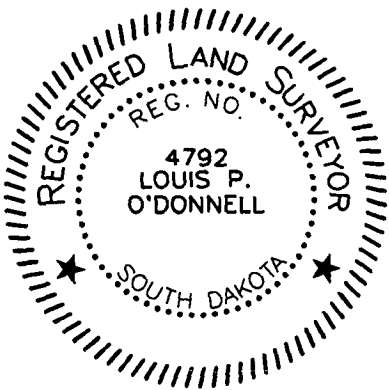
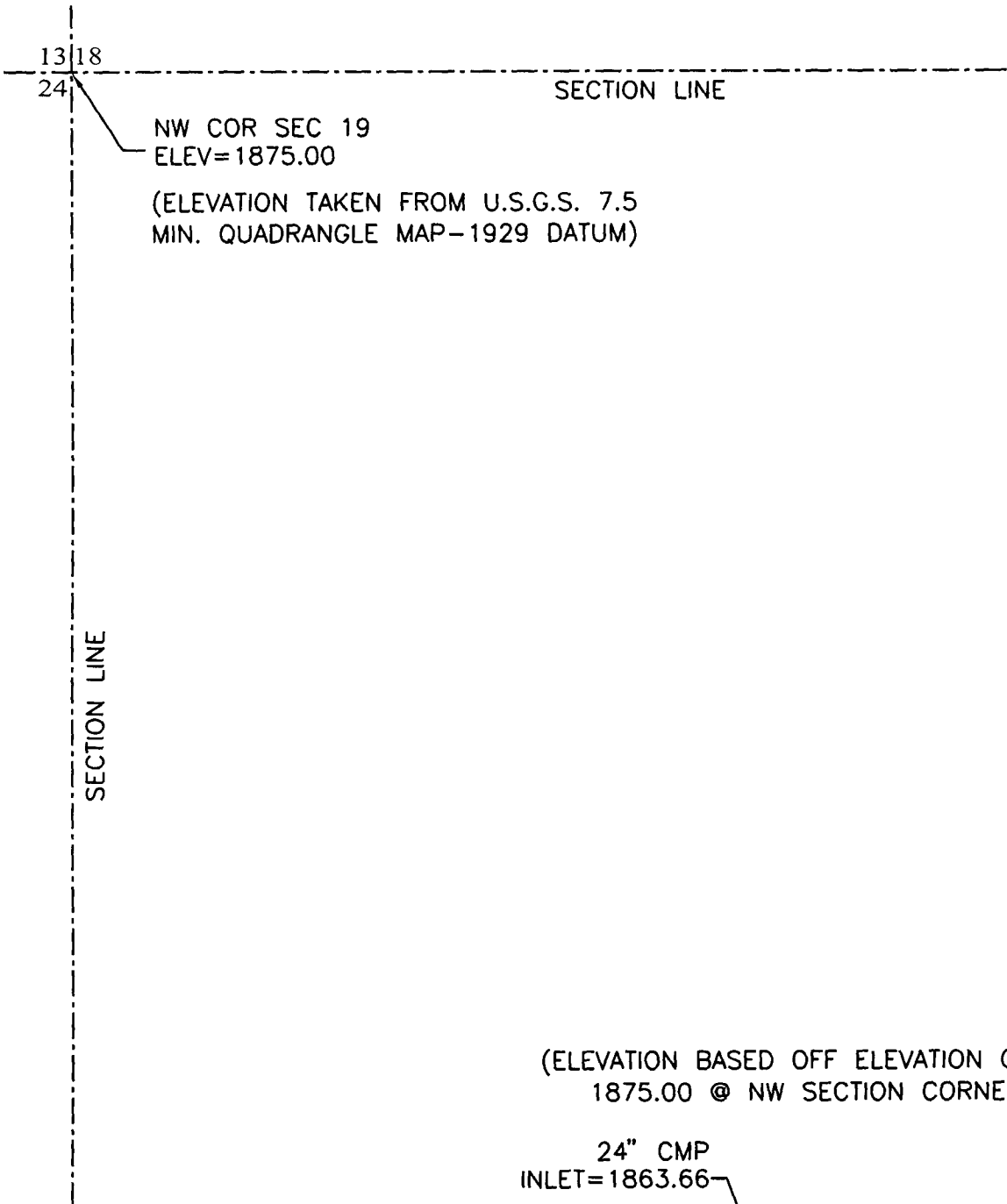
OCT - 8 2002

**WATER RIGHTS
PROGRAM**

CERTIFICATE OF SURVEY

DESCRIPTION: ELEVATIONS TO CMP THRU DAM AT
NW QUARTER SECTION 19, T116N, R70W OF
THE 5TH P.M., HAND COUNTY, SOUTH DAKOTA

PREPARED FOR: PAUL MEYERS



BASIS OF BEARINGS
ASSUMED



I HEREBY CERTIFY THIS SURVEY WAS
PERFORMED BY ME OR UNDER MY DIRECT
SUPERVISION AND THAT I AM A DULY
REGISTERED LAND SURVEYOR UNDER THE
LAWS OF THE STATE OF SOUTH DAKOTA.

Louis P. O'Donnell
LOUIS P. O'DONNELL, LS 4792

OCTOBER 4, 2002
DATE

CLARK
ENGINEERING CORPORATION

1011 First Avenue SE
P.O. Box 20
Aberdeen, SD 57402
(605) 225-3494



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

November 7, 2002

NOTICE

TO: Paul Meyers
39012 128th St
Aberdeen SD 57401

Don Weiss
PO Box 186
Faulkton SD 57438-0037

FROM: Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Notice of Hearing to Amend Qualifications on Vested Right No. 6173-3, David Aesoph

Vested Water Right No. 6173-3, David Aesoph, was validated on September 27, 2000 authorizing impoundment of 42 acre-feet of water in a dam located in the W $\frac{1}{2}$ NW $\frac{1}{4}$ section 19-T116N-R70W. The property on which the dam is located is now owned by Paul Meyers. Validation of the vested right was subject to several qualifications as listed on the attached Vested Water Right No. 6173-3. Due to failure to comply with all of the qualifications, the vested right was suspended for one year beginning on July 12, 2001. Suspension of the vested right automatically expired on July 12, 2002.

During the year of suspension the property was acquired by Paul Meyers in December 2001. Mr. Meyers has taken action to lower the water level behind the dam to address upstream flooding issues in compliance with the permit qualifications. An inspection was completed on September 18, 2002 (see attached report) to view the work completed by Mr. Meyers. The inspection found that the lowered spillway elevation and resultant water levels are consistent with the requirements specified in the vested right. A survey was also completed by Clark Engineering on behalf of Mr. Meyers referencing the new spillway elevation to the NW corner section 19-T116N-R70W.

As a result, the chief engineer recommends the following amendments to qualifications contained in the attached vested right. Proposed deletions are denoted by ~~overstrikes~~ and new language by underscores.

1. Vested Water Right No. 6173-3 authorizes a dam with a storage capacity at the spillway of 42 acre feet of water and sufficient water annually to maintain the water level to the 1950 spillway overflow elevation. **(no amendment proposed)**

2. The spillway overflow elevation shall be ~~lowered and~~ maintained at an elevation of 1863.66 feet mean sea level (see Certificate of Survey dated October 4, 2002). ~~which will not allow the permanent storage capacity of the impoundment to exceed 42 acre feet of water or inundate trees along either the sides or across the neck of the dam at the location denoted as a black line on the 1950 topographical map attached to the DENR report.~~
3. **(Delete this qualification – a spillway elevation and survey map have been provided.)**
4. **(Delete this qualification – the thirty day deadline has passed and the completed construction complies with spillway requirements contained in the Safety of Dams rules.)**
5. **(Delete this qualification – lowering of the spillway elevation has been completed.)**
6. **(Delete this qualification – the draining has been completed.)**
7. **(Delete this qualification – the spillway elevation has been surveyed and a copy is on file.)**
- 8 3. The Chief Engineer or his authorized staff shall be allowed to enter upon the lands where the dam is located for the purpose of inspecting the dam and surveying to verify the spillway overflow elevation. The Chief Engineer shall make a reasonable attempt to notify the owner or possessor of the property prior to entry upon the land. **(no amendment proposed)**

These proposed amendments to the qualifications included on Vested Right No. 6173-3 will be considered by the Water Management Board on December 4, 2002 at 9:00 AM in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol, Pierre SD. The Chief Engineer's recommendations are not final or binding upon the Board. The Board is authorized to 1) amend the qualifications as recommended, 2) modify the recommended amendments, or 3) make no amendments based on the facts presented at the hearing.

This hearing may be an adversarial proceeding. Any person has the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. This hearing is being conducted pursuant to SDCL 46-1-4, 46-1-14, 46-2-9 and 46-2-17.

Contact Eric Gronlund by November 25, 2002, at the above Water Rights Program address to assure access to the hearing by the handicapped or to obtain an interpreter for the hearing impaired.

c: Lynda Sandmann, 820 Triangle Road, Valley View TX 76272
Diane Best, Assistant Attorney General



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

MAR 13 2003

Paul Meyers

20010 120th St

RECEIPT

WATER RIGHTS PROGRAM

South Dakota Department of Environment and Natural Resources

Date December 4, 20 02

RECEIVED OF Paul Meyers, Aberdeen SD 57401

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

Fee for Application for Permit No. _____ to Appropriate Water, to construct and to put water to beneficial use		
Fee for Application for Permit No. _____ to Appropriate Water for Future use		
Fee to retain Future Use Permit No. _____ after period of seven years.		
Fee for Inspecting Constructed Works, confirming beneficial use and issuing Water License No. _____		
Fee for Filing Transfer Form <u>6173-3</u>		2.50
Fee for _____		
Fee for Issuing New Well Driller's License No. _____ for C.Y. _____		
Fee for Renewal of Well Driller's License No. _____ for C.Y. _____		
Fee for Issuing Well Pump Installer's License No. _____ for C.Y. _____		
Fee for Renewal of Well Pump Installer's License No. _____ for C.Y. _____		
(Any Other Work Provided by Law)	TOTAL	2.50

No.

100402

By

Darlene Erbe
Chief Engineer

Permit No. 6173-3
James River - Water District

Report of Examination of Works and/or Application of Water to Beneficial Use

TO: Chief Engineer, Water Rights Program, DENR, Foss Bldg., Pierre, SD 57501

I have this day, September 17, 2002, made a thorough examination of the water use system constructed by Paul Meyers of 39012 128th St Aberdeen SD 57401 holder of Permit No. 6173-3, bearing the priority of January 1, 1950 authorizing the storage of 42 acre-feet of the waters of dry draw runoff for fish & wildlife propagation, recreational, and livestock purposes, in Hand County.

Inspection contact & relationship to permit holder, if applicable: **Paul Meyers**

A. Works used to divert the water:

Dam Information:

- 1) Height to crest ≈ 20 feet
- 2) Height to primary spillway ≈ 7.5 feet
- 3) Height to secondary spillway NA ft
- 4) Crest width 10 feet
- 5) Crest length 300 feet
- 6) Spillway size 24 inch culvert
- 7) Approx. storage ≈ 42 ac-ft
- 8) Approx. storage to crest 174 + ac-ft
- 9) Date constructed: estimated 1950

B. Compliance with Permit Requirements:

- 1) Permit qualifications being abided by Y
- 2) Exceptions to compliance are: none

The system is in good condition with the point(s) of diversion located as follows: dam: 1,375 feet S and 700 feet E from the NW corner section 19-T116N-R70W -- Lot 2 (SW¼NW¼). The works are capable of diverting and storing 42 acre-feet of water which is to be used for fish & wildlife propagation, recreational, and livestock. Water has been put to beneficial use to the maximum extent and the license should be issued for 42 acre-feet of storage.

All structures, wells and lands on map Y

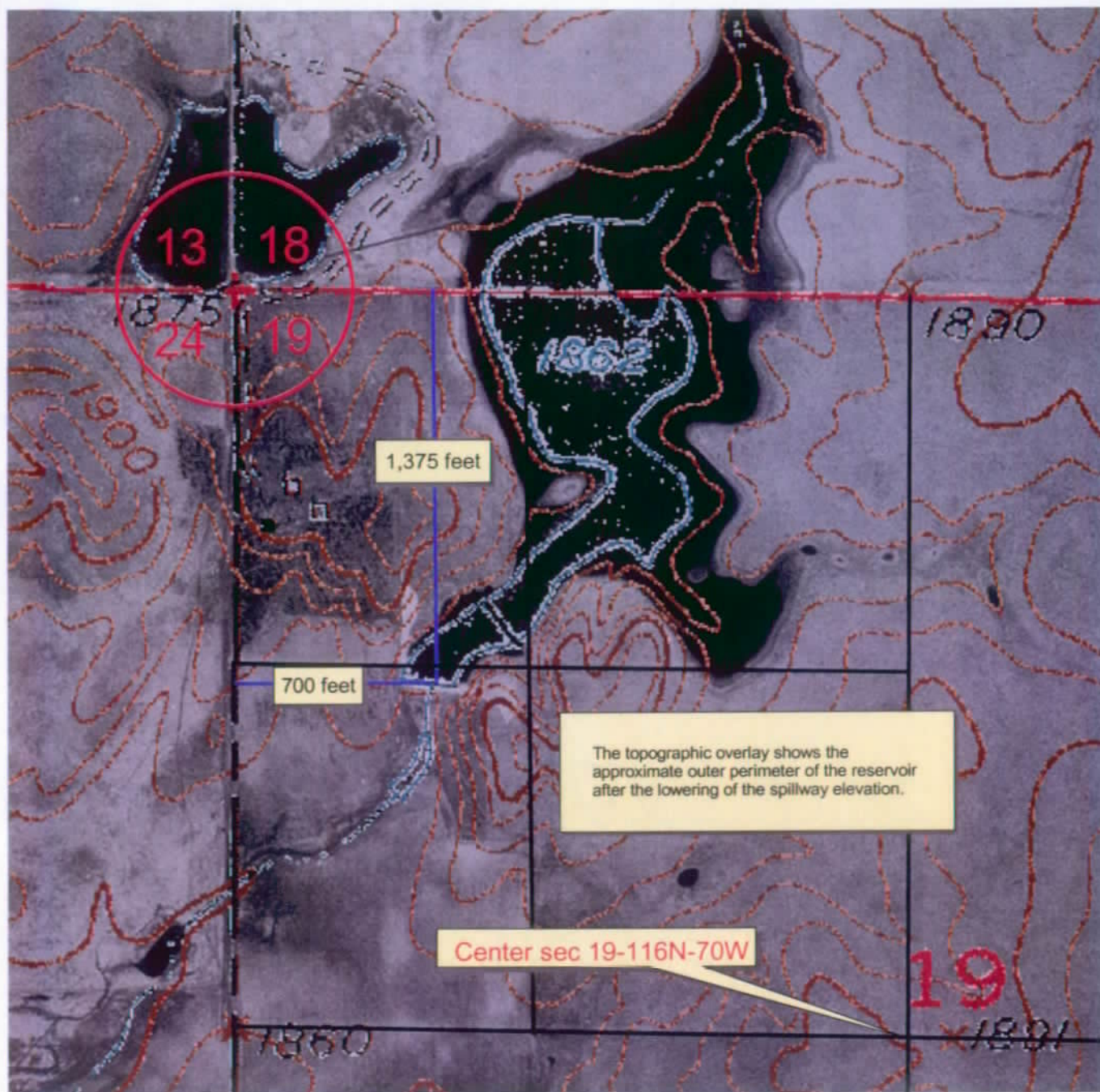
| Comments or other permit(s) associated with the project: none



Ron Duvall
Natural Resources Engineer
DENR, Water Rights Program

Date report completed: January 27, 2003

900 0 900 Feet



South Dakota
Department of Environment
& Natural Resources
Water Rights

Ron Duvall

Ron Duvall, Nat. Res. Engineer
January 27, 2003
No. 6173-3

DON WIESS
DEPOSITION

AUGUST 18, 2000

BEFORE THE SOUTH DAKOTA
WATER MANAGEMENT BOARD

= = = = =
IN RE VESTED WATER RIGHT
APPLICATION NO. 6173-3
DAVID AESOPH

ORIGINAL

= = = = =
Deposition of: DON WEISS
Date: August 18, 2000
Time: 10:35 a.m.
= = = = =

A P P E A R A N C E S

DIANE BEST,
SOUTH DAKOTA ATTORNEY GENERAL'S OFFICE,
Assistant Attorney General, 500 East Capitol,
Pierre, South Dakota 57501,
appearing on behalf of the Department of
Environment and Natural Resources;

GREGG MAGERA,
SIEGEL, BARNETT & SCHUTZ, LLP,
Attorneys at Law, 500 Capitol Building,
Aberdeen, South Dakota 57402-0490,
appearing on behalf of David Aesoph;

JARVIS BROWN,
BROWN LAW OFFICE,
Attorney at Law, 811 Main Street,
Faulkton, South Dakota 57438,
appearing on behalf of the Witness.

Reported by Cheri McComsey Wittler, RPR

PRECISION REPORTING
L I M I T E D

BEFORE THE SOUTH DAKOTA
WATER MANAGEMENT BOARD

IN RE VESTED WATER RIGHT
APPLICATION NO. 6173-3
DAVID AESOPH

Deposition of: DON WEISS
Date: August 18, 2000
Time: 10:35 a.m.

A P P E A R A N C E S

DIANE BEST,
SOUTH DAKOTA ATTORNEY GENERAL'S OFFICE,
Assistant Attorney General, 500 East Capitol,
Pierre, South Dakota 57501,
appearing on behalf of the Department of
Environment and Natural Resources;

GREGG MAGERA,
SIEGEL, BARNETT & SCHUTZ, LLP,
Attorneys at Law, 500 Capitol Building,
Aberdeen, South Dakota 57402-0490,
appearing on behalf of David Aesoph;

JARVIS BROWN,
BROWN LAW OFFICE,
Attorney at Law, 811 Main Street,
Faulkton, South Dakota 57438,
appearing on behalf of the Witness.

Reported by Cheri McComsey Wittler, RPR

STIPULATION

It is stipulated and agreed by and between the above-named parties, through their attorneys of record, whose appearances have been hereinabove noted, that the deposition of DON WEISS may be taken at this time and place, that is, at the Brown Law Office, 811 Main Street, Faulkton, South Dakota, on August 18, 2000, commencing at the hour of 10:35 a.m.; said deposition taken before Cheri McComsey Wittler, a Registered Professional Reporter and Notary Public within and for the State of South Dakota; said deposition taken for the purpose of discovery or for use at trial or for each of said purposes, and said deposition is taken in accordance with the applicable Rules of Civil Procedure as if taken pursuant to written notice. Insofar as counsel are concerned, the reading and signing of the transcript by the witness is waived, as is the notice of the filing of the original with the Department of Environment and Natural Resources' Attorney, Diane Best.

DON WEISS,
called as a witness, being first duly sworn in the above cause, testified under oath as follows:

I N D E X

Witness	Direct	Cross	Redirect	Recross
Don Weiss	4	26	36	42
Exhibit Nos.:	M	O	R	
1 - Photographs	2	25	--	
2 - Photographs	2	25	--	
3 - Photographs	2	25	--	
4 - Photographs	2	25	--	
5 - Photographs	2	25	--	
6 - Photographs	2	25	--	
7 - Photographs	2	25	--	

(Exhibits 1 through 7 are marked for identification)

MS. BEST: Before we get started here, I would like to state that the parties have stipulated in this matter that the trial deposition of Mr. Weiss may be taken today for admission into evidence in a South Dakota Water Management Board Hearing In Re Vested Water Right Application Of David Aesoph and that specifically Mr. Aesoph will not be objecting to the admissibility of the deposition but reserves obviously the ability to make objections here today regarding admissibility of specific questions and answers.

Is that a fair statement of your position, Mr. Magera?

MR. MAGERA: Yes, it is.

MS. BEST: And if you have objections with respect to foundation and so forth, you'd be making those today so we have an opportunity to --

MR. MAGERA: Yes.

DIRECT EXAMINATION

BY MS. BEST:

- Q Mr. Weiss, have you had a deposition taken before?
A What do you mean by that?
Q Have you been in this situation before where you've been someplace and provided testimony to a court

1 reporter and lawyers for this purpose? 2 A No. 3 Q Okay. Let's talk about that a little bit, about how it 4 works. I'm assuming you've had a chance to talk to 5 Mr. Brown as well. 6 Basically what we're doing is we're going to 7 take your testimony as though you were in court and 8 this way the court reporter here will take down 9 everything you say, and then we will present that into 10 evidence at the Water Management Board proceeding so 11 that you don't have to appear. 12 So since she's taking everything down that 13 all of us are saying, I would point out that nodding 14 your head, for example, to an answer isn't the way to 15 go. 16 A Sure. 17 Q You need to say yes or no, that kind of thing. 18 A Okay. 19 Q One difference between doing this, though, is that we 20 don't have someone here to rule on -- if someone's got 21 an objection to one of the questions, we don't have 22 someone here to rule. 23 So if there is an objection, then we just 24 stop and we either rephrase the question or the lawyers 25 handle it and you will be -- Mr. Brown will tell you	5 1 we're here today is with respect to this application of 2 Mr. Aesoph to have a vested water right for this dam on 3 some of the property that he owns. And you're familiar 4 with that water application; is that correct? 5 A Yes. Yes. 6 Q Okay. 7 A I've got to ask you one question. 8 Q Okay. Please do. 9 A I don't know whether he owns that land or not. I think 10 he rents it. I think it's school land. It was at one 11 time. 12 Q Do you know what the legal description is of the land 13 that you own that is by the dam involved in this case? 14 A Yes. It's west -- well, it's the southwest quarter of 15 Section 18. 16 Q Okay. 17 A I own that whole half section, but this water is just 18 on the southwest. 19 Q Okay. And how long have you owned that parcel of 20 property, that southwest quarter? 21 A Oh, probably 50 years. 22 Q Okay. And did you live out there? 23 A Yes. I was born and raised out there. 24 Q Okay. Well -- 25 A That was long before 50 years.
6 1 whether to go ahead and proceed with answering or not. 2 We're going to try and avoid so we don't both 3 talk at the same time, and if you need to take a break 4 at any time, we'll do it. This is going to be informal 5 to the extent we can. 6 So do you have any questions about how this 7 is going to work? 8 A Not really. 9 Q Okay. If I ask you a question and I'm phrasing it 10 awkwardly or for some reason it doesn't sound right, 11 you just tell me. 12 A Sure. 13 Q Tell me to ask it differently or ask me more 14 specifically what I mean, and I will be happy to do 15 that. If I need to talk louder, you make sure and tell 16 me that. With that, we'll proceed. 17 Am I pronouncing your name correctly, 18 Mr. Weiss? 19 A Right. 20 Q Okay. And could you spell your name for the court 21 reporter, please. 22 A My whole name, Don, D-O-N, W-E-I-S-S. 23 Q Okay. And where do you live? 24 A I live in Faulkton, 114 Pearl Street. 25 Q Okay. And, Mr. Weiss, the reason, of course, that	8 1 Q Okay. So you've owned it for 50 years? 2 A Yes. 3 Q And you're clearly older than 50 years. 4 A I bought it about 50 years ago. 5 Q You bought it about 50 years ago. And then you rented 6 it, or it was in your family before that time? 7 A Yeah. It was in the family. I bought it from the 8 family. 9 Q Okay. So how long -- and you lived right on that 10 quarter? 11 A No, not right on it. Just about a mile and a half from 12 there. 13 Q Okay. You lived a mile and a half from there? 14 A Yeah. 15 Q And that goes back from when you were a child? 16 A Right. My dad set it up in that same place. 17 Q Okay. Well, we're here to find out what your 18 background is with respect to the existence of the dam 19 that's involved in this water permit application. And 20 you have become involved, and I think in previous 21 dialogue with the State you've indicated that water is 22 backing up on your land. And that's correct, isn't it? 23 A Right. 24 Q Okay. Do you know when this dam was initially 25 constructed on that property that's currently operated

1 by David Aesoph? 2 A Well, there was a little dam built back there a long, 3 long time ago. 4 Q Okay. 5 A And at that time that water never came up on my land. 6 It might have on a couple acres maybe. 7 Q And this is the property immediately south of your 8 ground; right? 9 A Where the dam is, yeah. 10 Q Do you have any idea when that small dam would have 11 been constructed? 12 A Oh, boy. I don't know. I know they built it with 13 horses so you can figure that out. Quite awhile ago. 14 Q So there's no question that it was constructed before 15 1955? 16 A Oh, yes. 17 Q Okay. And you have -- do you specifically recall 18 seeing the dam at that time when it was constructed? 19 A Well, not really. I knew they built it, and then they 20 got some fishing put in there. They were going down 21 there fishing. That was a long time ago. 22 Q Okay. When that dam was first constructed did water 23 back up on your property? 24 A Like I said, about 2 acres. 25 Q Okay. Where did the 2 acres come from?	11 1 the State or SCS or your renter or who -- where is the 2 2 acres coming from? Or is that just based on when you 3 look at it you can just kind of eyeball and guess? 4 A Yes. I don't know for sure. 5 Q Okay. But to the best of your knowledge it would be 6 around 2 acres? 7 A Yeah. I didn't think it was even on my land at the 8 time, but they say it was. 9 Q Okay. So very minimal on your land? 10 A Yeah. 11 Q Okay. And then did there come a time where it backed 12 up more? 13 A Not until he built this dam. 14 Q Okay. So you're saying there's some recent 15 construction? 16 A Right. 17 Q Okay. When was the recent construction? 18 A As far as I know, it was around '95. I'm not sure 19 about that. 20 Q Okay. And then you don't have any specific knowledge 21 of when they went in and did work on the dam? 22 A Not for sure, no. 23 Q Okay. But your knowledge would be related to when the 24 water started backing up on your property? 25 A Yes.
10 1 A. I don't know for sure whether it was -- there was a 2 section line in between this land, and you could drive 3 over this at that time up until just a few years ago, 4 until he put that dam in. You can't anymore. You 5 can't even see the road anymore. 6 Q Okay. Are you saying there's a section line road -- 7 that the dam was built, it backed up water, and there 8 was a section line road, and you were always able to 9 drive on that section line road? 10 A That was before he built this dam. You could drive 11 down that section line. 12 Q That would be before the 1950s or '40s or whenever the 13 dam was built? 14 A Yes. 15 Q After the dam was initially built then it backed water 16 up on the section line road? 17 A Uh-huh. 18 Q And came over some on your ground? 19 A It was just 2 acres, they claim. I don't know for 20 sure. 21 Q Okay. 22 A But you could still drive over it. They had a culvert 23 in there. 24 Q Okay. And when you say they claimed, you mean the 25 water rights staff people that you have talked to with	12 1 Q Okay. So the construction could have happened a year 2 or so before that and then water started backing up 3 or -- 4 A Sure. 5 Q Okay. So you first started seeing the water back up on 6 your property around 1995? 7 A Uh-huh. Or '96, somewhere in there. I didn't even 8 know he was building this dam out there until one of my 9 renters said, hey, they're building a big dam over 10 there. 11 Q And then you went -- 12 A Then I went out and checked it, and the water was 13 starting to come up then. 14 Q Okay. Were you out there then in '95 or '96 when it 15 first -- 16 A Off and on, yeah. 17 Q Off and on you've been out there? 18 A Yeah. 19 Q Okay. When was the last time you were out there? 20 A I was out there about a year ago. 21 Q Okay. Have you been out there every year? 22 A Oh, yeah. I still own that farm out there beside this. 23 Q And has the water been continuously backed up on your 24 property? 25 A As far as I know.

13

1 Q Okay. You've been involved in farming for more than
2 50 years?

3 A Yes.

4 Q And you have a pretty good idea -- or would you have a
5 pretty good idea when you look at an area to be able to
6 give a guess as far as surface wide how many acres
7 something would be?

8 A Well, I know it's 14 acres because they measured it.

9 Q Okay. And do you think that it's been about that
10 14 acres the entire five-year or so period involved?

11 A I think so, yeah.

12 Q Okay. Now what kind of crop do you have on the area
13 where it's backed up?

14 A Just pasture.

15 Q Pasture. And that's been pasture the whole time?

16 A Yes.

17 Q Okay. Now I've got some aerial photographs here.

18 A That's the dam right there. This is my land up here.
19 I think it starts right here (Indicating).

20 Q Okay. Here's what I'm going to do. I'm going to give
21 you a couple of -- I've got one marked 1984. It's
22 Exhibit 1. One marked 1985, it's Exhibit 2. It kind
23 of shows the area, I mean, that we're talking about
24 here.

25 And I guess basically what I want to know is

14

1 if these photographs depict what you recall from the
2 1980s time frame regarding the existence of this dam?

3 A Well, I think that's where it started, right there
4 (Indicating).

5 Q And you're pointing to Exhibit 2?

6 A Uh-huh.

7 Q Okay. And then the photograph marked 1984, which is
8 Exhibit 1, then the dam would be --

9 A Right here (indicating).

10 Q Okay. On the outer left-hand corner there; correct?

11 A Yes.

12 Q Okay. By the farmstead.

13 A There's no farmstead there.

14 Q Okay. An old shelter belt. Is that a fair statement?

15 A There's an old dam -- I mean, an old dugout on my land
16 that's completely covered with water. You can't even
17 see it. One of these pictures shows the trees.

18 Q Okay. We'll talk about that a little bit too. Okay.
19 So basically when you're talking about the few acres
20 that came over on your ground, and we're looking at
21 Exhibit 1, 1984, you're talking about these acres clear
22 up on the north side of the photograph here that would
23 be on your ground?

24 A Right.

25 Q Okay. In fact -- well, no. I was going to have you --

15

1 you want to just initial where we're talking about,
2 where those acres would be backed up on your ground
3 just on the '84 one is fine. Yeah, 1984.
4 (Witness complies)

5 Q Okay. I'm just going to run through these photographs
6 with you, and they're all just different years. 1987
7 aerial photo marked Exhibit 3, again, could you point
8 out the dam and where your property is?

9 A Right here. Mine starts right there (Indicating).

10 Q Okay. You want to just put an initial right on top of
11 the photograph?

12 A Right here (Indicating).

13 Q Okay. And then 1989.

14 A That's the dam right there, and it backs up on my land
15 right here (Indicating).

16 Q Okay. Could you put an initial as to what your land is
17 here?

18 A Let's see. Mine starts right in here (Indicating).

19 Q Okay.

20 A In here (indicating).

21 Q Okay. Oh, I see. I've got '88 here too. The same
22 deal, I just want you to mark where your land is.
23 (Witness complies)

24 Q Let me give you another pen. Draw an arrow on it and
25 put something there.

16

1 A That's right there (Indicating).

2 Q Okay. And then I've got some later photos, '96.
3 That's the time period you were talking about, I think,
4 a little bit earlier about where the water was backing
5 up on your property.
6 Again, could you initial where your area is
7 there. I'll give you the better pen. I took it from
8 you.

9 A That's okay (Indicating).

10 Q Okay. And then I've got another aerial. It appears to
11 me to be upside down here, 1997, Exhibit 7. I've got
12 to get oriented here. It is right side up. Okay.

13 A Is that the way it was supposed to be?

14 MS. BEST: Which was the one you --

15 MR. MAGERA: '95.

16 MS. BEST: Okay.

17 Q Yeah. This one's a little bit different in that it's a
18 little bit closer up, but if you can identify where
19 your ground is.

20 A This is my land here (Indicating).

21 Q Okay. Let's take, for example, this '97 photo. Were
22 you out there in '97? You said you've been out there
23 every year.

24 A Oh, I'm sure I was.

25 Q Is that consistent with what you remember, being backed

17

1 up that far?

2 **A** Oh, I'm sure it's backed up that far.

3 **Q** Okay.

4 **A** Because there's an old dam here of land. It's just

5 about back -- you can't even drive across here anymore

6 (Indicating).

7 **Q** Okay. Let's talk about that old dam of yours. Do you

8 recall when that was constructed?

9 **A** No, I don't know. That was built with machinery,

10 though. That wasn't built with horses. That was a

11 pretty nice dam.

12 **Q** Okay.

13 **A** But it's no good anymore because it's washed out.

14 **Q** Okay. And that was a dam, not a dugout, that you're

15 talking about here?

16 **A** Right. It was a dam.

17 **Q** Okay. And it washed out -- when you're talking about

18 that for a landmark are you talking about 1980s, '70s,

19 '60s?

20 **A** Oh, I think that was probably built in '75, somewhere

21 like that.

22 **Q** The dam was built in '75?

23 **A** Yeah.

24 **Q** Do you know when it washed out?

25 **A** No. I have no idea.

18

1 **Q** Would your dam that washed out, that would have been

2 before this water started back -- before the '90s when

3 this water started backing up?

4 **A** Yes.

5 **Q** From Mr. Aesoph?

6 **A** Yes. And I was telling you about this dam down in

7 here. That was all covered with water now. You can't

8 even see it (Indicating).

9 **Q** Is that a dam or dugout?

10 **A** That's a dugout.

11 **Q** Okay. And did you have that dugout constructed?

12 **A** Yes.

13 **Q** Okay. And do you recall when that was?

14 **A** No, not for sure.

15 **Q** Okay. Let's go back to this aerial photo then from

16 1989. Okay. On Exhibit 4, the 1989 aerial photo, is

17 the dugout that you had constructed on that photograph?

18 **A** No. It don't show it. Unless that would be it right

19 there (Indicating).

20 **Q** Okay.

21 **A** Because the water --

22 **Q** That maybe is the dam you were talking about?

23 **A** Yes.

24 **Q** That would be the dam.

25 **A** See the water isn't up that far, but it's close. This

19

1 dugout I'm talking about is right down in here. It's

2 covered with water (Indicating).

3 **Q** Is that it that you were pointing to?

4 **A** It has to be in that area (Indicating).

5 **Q** Okay. Can you just circle that area then?

6 **A** You want to know where this dugout is?

7 **Q** Yeah. I want to know where the dugout is.

8 **A** It's right in that area (Indicating).

9 **Q** Okay.

10 **A** And that other dam of mine is up here, and actually

11 there's another dugout up north of that yet. That

12 doesn't hold water (Indicating).

13 **Q** Okay. Now why did -- let's talk about the dugout

14 that's now covered. Why did you construct that dugout?

15 **A** Well, because I figured on putting cattle in that

16 pasture.

17 **Q** Okay.

18 **A** But now it's all under water. The road, the fence,

19 it's all under water.

20 **Q** So if the dam -- I mean, this is going to sound pretty

21 obvious, but if water wasn't backing up on your ground,

22 you wouldn't have had any need to build a dugout; is

23 that right?

24 **A** I suppose. It wasn't backing up then. That was dry

25 down there where that was built.

20

1 **Q** Okay.

2 **A** In fact, I talked to the guy that built it the other

3 day, if he remembered. And he said, no, I've built so

4 many dams I don't remember. But I think it was dry,

5 though, when he dug it.

6 **Q** Okay. Now you had indicated that the dam first was --

7 or the water was at first right along the section line

8 there, and as it turns out, it was a couple of acres.

9 Is that a fair statement?

10 **A** Yes.

11 **Q** There was never an easement involved in that, was

12 there?

13 **A** No.

14 **Q** You never granted them an easement?

15 **A** No. They never even asked for one.

16 **Q** Okay. When I'm asking I'm asking about not just

17 David Aesoph but the fellow that lived there before

18 that.

19 **A** Sure. I know what you're talking about.

20 **Q** And you never granted an easement on that?

21 **A** No.

22 **Q** And this situation where we're into the '90s and the

23 water is backing up more, did you ever grant an

24 easement on that?

25 **A** No. I never give nobody no easement. I'm not going to

21 1 either. 2 Q Did they approach you for one? 3 A Yes. 4 Q Okay. When was that? 5 A Oh, I don't know. Last summer sometime. Not this 6 summer, the summer before. He sent two guys up here 7 with an easement, David, but I wouldn't sign it. 8 Q Okay. Now as the water was backing up on your pasture 9 ground, were -- there are some trees out there; is that 10 right? 11 A Yes. 12 Q And what is the condition of those trees at present? 13 A I think they're all dead. 14 Q And do you have a year that you can tell me or a couple 15 of years that those trees died in? 16 A Well, it's ever since that water has been backing up 17 there. 18 Q Okay. They started dying when the water backed up? 19 A Yes. Because there was trees around that dugout. 20 Q Okay. So water backed up beyond the trees now? 21 A Oh, yeah. Way beyond the trees. 22 Q Okay. Way back beyond the trees on your property? 23 A Right. Yeah. 24 Q Okay. You know, when we're talking about trees, the 25 Water Management Board is going to be reading this and	23 1 Q Okay. You said the dam that was built like with the 2 horses and that, the water backed up to the road or as 3 much as 2 acres into your ground? 4 A Yes. 5 Q But most of the time the road was still passable? 6 A Right. You could still go down that road. I used to 7 mow it. 8 Q You'd mow the road grade? 9 A Yes, the section line. 10 Q Okay. And so when, to your knowledge, was the last 11 time that that road was passable? 12 A Oh, I don't know for sure. 13 Q Okay. 14 A I know it's not passable anymore. 15 Q Okay. Hasn't been for the last three or four years; is 16 that fair? 17 A Oh, that's right. You can't even see the road anymore. 18 I know there was a culvert in there at one time. 19 Q Okay. Now there came a time when you approached the 20 State about this; is that right? 21 A Right. 22 Q Okay. And do you recall when you contacted the State? 23 A Well, not for sure. It was just after I found out all 24 the water was out there. First I went to Miller 25 because it's in Hand County. This land is all in
22 1 they're going to need to know, to get some general idea 2 of how many and what size of trees. 3 Can you describe those trees? Is it a big 4 shelter belt or just volunteer trees in the draw kind 5 of area? 6 A Yes. It's Chinese Elm is what they were. They just 7 grew up by themselves. I never planted nothing down 8 there. 9 Q Okay. How big of trees? Like how big around would 10 those trees be? 11 A 6, 8 inches, I suppose. They weren't very big. But 12 they grew up. They could still see them, but they're 13 dead. 14 Q Big enough for one of your cattle to go up to it and 15 rub its back on it? 16 A Right. 17 Q Now I guess getting back to the roadway, it wasn't real 18 clear to me on that section line road, were you able to 19 drive on that, do you think, in like the '60s and '70s 20 and '80s? 21 A Yes. 22 Q You were able to drive on that section line road? 23 A You could drive on that -- up until they built the dam, 24 you could drive on that road. It wasn't a very good 25 road, but it was passable	24 1 Hand County that we're talking about. So we went to 2 Miller to talk to the County Commissioners, and they 3 told us to go out to Pierre and talk to them guys. 4 Q And you talked to someone from the Water Rights? 5 A Oh, I talked to Ron several times. 6 Q Okay. Ron Duvall? 7 A I never went out there. 8 Q Okay. I have to think. You know that dam -- excuse 9 me, the dugout that you constructed, we talked about 10 when that might have been constructed. Do you think it 11 was more than 10 years ago? 12 A No. That's what I was just thinking. I think about 13 10 years ago. 14 Q About 10 years ago? 15 A I could even find out if you really wanted to know. In 16 Highmore they would know. Or Hand County, I mean, 17 Miller. 18 Q But about 10 years ago? 19 A Yes. 20 Q Okay. You know, when you construct a dugout they dig 21 down, they hit water. Did they hit a spring of some 22 kind? 23 A Not that I know of. 24 Q Were you there? 25 A I was out there, yeah. I was living out there at that

25

1 time.

2 Q Okay. So when they had the construction equipment over

3 there --

4 A Yes.

5 Q -- you went over there?

6 A Sure.

7 Q And you were there at least at some point while they

8 were digging?

9 A That's where I think -- somebody claims he hit a vein

10 there, but I'm sure he didn't.

11 Q That's what I'm trying to get at is you don't think

12 there was any underground water --

13 A No.

14 Q -- that just started gushing out?

15 A If there was, it was dam level. And I don't think

16 there was any veins down there. But he built it kind

17 of in that low spot.

18 MS. BEST: Okay. Well, I don't

19 have anymore questions. I'm going to make a record

20 motion for admission of these exhibits, aerial

21 exhibits, into evidence. They're public records

22 and Mr. Weiss has identified that they're the

23 subject of the property involved in this dispute.

24 I don't know if there's any objection to that.

25 MR. MAGERA: No objection.

26

1 MS. BEST: And then Mr. Magera has

2 an opportunity to cross-examine you and ask

3 follow-up questions.

4 THE WITNESS: Okay.

5 CROSS-EXAMINATION

6 BY MR. MAGERA:

7 Q Just before we get started I want to be sure I am

8 pronouncing your name correctly.

9 A Weiss. That's fine.

10 Q Weiss. I want to be sure I'm correct. Is it Weiss or

11 Weiss?

12 A Weiss.

13 Q So the German pronunciation is -- I've always felt if

14 you have an I or E, whichever one is last, that's how

15 it's pronounced.

16 A Right.

17 Q So your name would be pronounced Weiss?

18 A Right.

19 Q Again, Mr. Weiss, same rules apply to the questions

20 I'll be asking you, similar as to what Attorney Best

21 asked you. If for any reason you don't understand a

22 question I ask you or I phrase it in an awkward way, I

23 want to be sure you stop me and say, Gregg, I didn't

24 understand that question or I just don't understand and

25 I'm certainly going to try to rephrase it.

27

1 Again, I'm going to be asking you some

2 questions, and referring you to the photographs

3 Attorney Best referred you to, I believe your testimony

4 was that you own the west half of Section 18.

5 A That's right.

6 Q And really the specific area that we're talking about

7 here today is that southwest quarter of Section 18.

8 A Yes.

9 Q And it's my understanding, and I want you to tell me if

10 I'm wrong, that this slew area that you say backs up on

11 your property is in between your southwest quarter of

12 Section 18 and property owned by Mr. Aesoph in

13 Section 19.

14 A Right.

15 Q Okay. Again, just to be sure that I'm correct, you

16 said that the dam that's located on Section 19 was

17 initially constructed a long time ago. In fact, you

18 don't recall when it may have been constructed but that

19 it was built with horses.

20 A Right.

21 Q Okay. And, again, I think your testimony has been that

22 since the construction of that dam, whenever it was

23 initially built, that on occasion off and on since that

24 time you've had some water back up on your property.

25 A Yes.

28

1 Q Okay. And it's your testimony that more water has

2 backed up in the last four or five years?

3 A Right.

4 Q And would you agree with me that in the last four or

5 five years you've had wet conditions in Hand County?

6 A Yes.

7 Q We've had abnormal rainfall?

8 A Yes.

9 Q Okay. I want to refer you to an exhibit, and I'm going

10 to find it first. It's Exhibit No. 4. This is the

11 photograph that says it was taken in 1989.

12 Now I want you to correct me. I think your

13 testimony was you were uncertain as to when the dugout

14 on your property in the southern, I'll say, half of the

15 southwest quarter of Section 18 was built. Would it be

16 your recollection -- I think you talked about 10 years

17 ago.

18 A Right.

19 Q This was in 1989 that you may have caused that dugout

20 to be constructed in that year?

21 A What do you mean?

22 Q Did you have the dugout built around 1989?

23 A Yes.

24 Q And the reason I ask that is I didn't find what I could

25 see as a dugout on any of the photographs prior to

29

1 1989.

2 A See, you can't see them because it's all under water.

3 Q Right. I understand that. Now is it your

4 recollection, sir, that back in 1989 did you oversee

5 any of the work associated with the construction of the

6 southernmost dugout on your property? Were you out

7 there at all?

8 A Oh, yeah. I was out there, living out there at the

9 time.

10 Q And it's true, isn't it, you had a Hank Wugger,

11 W-U-G-G-E-R --

12 A Something like that.

13 Q He constructed --

14 A He constructed that dam.

15 Q Did you have to contact anyone with the State or any

16 other type of entity to get permission to construct the

17 dugout?

18 A I'm sure I did. They paid a share of it, the

19 government.

20 Q But you didn't physically do the work yourself?

21 A No.

22 Q You had Mr. Wugger do the work.

23 A Right.

24 Q Okay. And is it your recollection that any type of

25 vein or underwater spring was hit when that dugout was

30

1 constructed?

2 A No. I don't think there was.

3 Q Okay. But you don't have any direct knowledge one way

4 or the other?

5 A Well, I'm pretty sure it was dry, that hole was dry

6 when he dug it.

7 Q But isn't it true it filled rather quickly after the

8 dugout was built, wasn't it?

9 A Well, I suppose water started coming down there. It

10 filled up, but, like I say, it's all covered with

11 water. You can't even see it no more.

12 Q Okay. Now, sir, would you agree with me if -- and I

13 just want you to assume. If this underground vein or

14 underground spring would have been hit, that would have

15 added to the water on your property?

16 A Well, I talked to this Wugger about this, and he said

17 that would have never raised up -- if there was a vein,

18 it would have never raised up like it is now.

19 Q But none of us really knows --

20 A Yes.

21 Q -- because you certainly weren't out there when the

22 dugout was constructed.

23 A Well, I was living out there. I was down around there.

24 As far as I know, there was no water coming up from

25 down below.

31

1 Q Okay. And you say that you spoke with Mr. Wugger about

2 that?

3 A Yes.

4 Q Why did you go talk to him?

5 A Well, I wanted him to -- I wanted to talk to him about

6 this, to see if there was a vein out there or not. And

7 he said, I can't tell you.

8 Q Did you remember that a vein had been hit?

9 A No.

10 Q Okay. So you just happened to think of this and

11 thought you'd go check with him?

12 A Sure.

13 Q Okay. We'll keep looking at Exhibit No. 4 for a little

14 bit more, sir. Let's just start going north of the

15 area that you claim the water backs up on your

16 property. Let's go a little bit farther north from the

17 dugout that we've been talking about.

18 During your testimony in answer to a question

19 from Attorney Best you talked about a dam that had been

20 constructed, and is it fair for me to say that that dam

21 would be sort of close to the center of the southwest

22 quarter?

23 A Yes.

24 Q Okay. And can you put an X over the area where you

25 claim that dam was located.

32

1 (Witness complies)

2 Q Now I believe your testimony was that possibly in the

3 1970s or at some time previous that dam had washed out?

4 A Yes.

5 Q Okay. So any water above the dam would also be coming

6 down into the slew area, wouldn't it?

7 A Yes.

8 Q And it's done that since the dam washed out, hasn't it?

9 A Yes.

10 Q Okay. Now during your testimony, sir, you also

11 mentioned another dugout that was even farther north of

12 the dam in the middle of the section.

13 A Right.

14 Q Is that a fact?

15 A There's an old dam up here north of that -- that was a

16 dugout, actually, the one that I'm talking about now.

17 This was a dam here (Indicating).

18 Q Right.

19 A But this is just a dugout.

20 Q Okay. So the dugout at sort of the north edge of the

21 southwest quarter, do you recall when that dugout would

22 have been constructed?

23 A No.

24 Q Okay. Did you have to contact anyone about the

25 construction of that dugout?

33

1 A I think the government paid part of it.
 2 Q Okay. Do you know if there are any rules, Mr. Weiss,
 3 that prohibit a person from having three sort of dugout
 4 or dam areas in one section of property or one quarter
 5 of property?
 6 A Well, that one never held water, this north one
 7 (Indicating).
 8 Q Okay. The one you're indicating to is the northernmost
 9 section of the southwest quarter.
 10 A So then we built this one down here because this one
 11 wasn't holding water (Indicating).
 12 Q At the southernmost end of the property?
 13 A Yes. Where that's all covered up with property.
 14 Q Very good. We can look at a series of these
 15 photographs. Now do you own the property immediately
 16 to the west --
 17 A Yes.
 18 Q -- of the southwest quarter of Section 18?
 19 A Yes. I own that whole section there.
 20 Q Okay. What number section is that?
 21 A That's 13.
 22 Q Okay. Section 13 --
 23 A Yeah.
 24 Q Just wait for me to ask the question, and then you can
 25 go ahead and give me the answer. I'm not very good at

34

1 that either.
 2 A Okay.
 3 Q This is Section 13. Is that still in Hand County?
 4 A That's in Hyde County.
 5 Q That's in Hyde County. Very good. At the I'll call it
 6 the intersection of the southwest quarter of Section 18
 7 and it would be the southeast quarter of Section 13
 8 there's another slew area there, isn't there?
 9 A Yeah. There's a slew right on that corner.
 10 Q Okay. And I want to refer your attention to Exhibit 1.
 11 This is a USDA photo from 1984. And, again, that slew
 12 area between Sections 18 and Section 13 is also
 13 indicated on that photograph, isn't it?
 14 A Yeah. There's water there, and there's water down in
 15 that corner.
 16 Q Okay. And in looking at the photograph, you'd agree
 17 with me that there's a trench or a ditch from the slew
 18 area in the extreme southwest quarter over to the slew
 19 area that we're talking about here today.
 20 A Yeah. But that's down -- where is it? Yeah. I guess
 21 it comes from that over there. There's a trench made
 22 there (Indicating).
 23 Q Okay. Why don't you put an X over where the trenching
 24 is.
 25 (Witness complies)

35

1 Q Now, Mr. Weiss, the photograph that we're looking at in
 2 Exhibit 1 is taken from 1984. Can you tell us for how
 3 long the trench or ditch has been in existence taking
 4 water from that extreme southwest quarter over into the
 5 slew area we're talking about today?
 6 How long has the trench been there?
 7 A That's been a long time, like maybe 15 years.
 8 Q Okay. So the water from that extreme southwestern slew
 9 area also adds to the water in the slew area that we're
 10 talking about, doesn't it?
 11 A Right.
 12 Q Mr. Weiss, I just want to be sure I understand you
 13 correctly. We've talked about a dugout that you say is
 14 under water now.
 15 A Uh-huh.
 16 Q And if we think in terms of the photographs, moving
 17 north, the next was a washed out dam.
 18 A Dam, right.
 19 Q Further north was another dugout?
 20 A Yes.
 21 Q Are there any other dugouts? You mentioned a third
 22 dugout.
 23 A No. That's all that's on that quarter.
 24 Q Okay. That's all that's on the quarter. Thank you. I
 25 think in answer to one of Attorney Best's questions you

36

1 indicated that having this water on your property,
 2 that's a benefit if you're going to pasture cattle
 3 because then they've got drinking water; correct?
 4 A Sure.
 5 Q Okay.
 6 A Except we can't put a fence up there. It's all under
 7 water.

MR. MAGERA: I believe that's all
 the questions I have. Thank you, Mr. Weiss.

MS. BEST: Mr. Weiss, I'm going to
 have a few more questions, but your attorney,
 Mr. Brown, might have something first.

MR. BROWN: No.

REDIRECT EXAMINATION

BY MS. BEST:

1 Q I'm just going to follow-up on a few things. First of
 2 all, I've been pronouncing your name --
 3 A Mr. Weiss. Don Weiss, not Mr. Weiss.
 4 Q Okay. Thank you. One question that I want to make
 5 crystal clear. You know, there's an east-west section
 6 line road that is on the south end of that quarter that
 7 we've been talking about here. And you talked about --
 8 you gave us a little history of when that road's been
 9 passable for travel and when it's been inundated with
 10 water.

37

1 A Yes.

2 Q Could you describe for me again about your knowledge

3 about kind of the history of that? You know, were

4 there times when it was passable and not passable off

5 and on over the years, or could you always get a

6 vehicle through it?

7 A You could always go through it.

8 Q You could always go through it.

9 A There was fence on both sides of the road, that road,

10 his land and my land. That's all under water.

11 Q Okay. And how far back do you remember that road?

12 A Oh, I don't know. 20 years ago, I'm sure.

13 Q Well, was the road there when you were a kid?

14 A I think so.

15 Q Okay. And as far back as you can remember, though, of

16 taking a vehicle across the section line would be

17 20 years ago?

18 A I think so.

19 Q No more than that?

20 A Well, maybe more than that, but that's all I can

21 remember.

22 Q Okay. At least that. Okay. If that road had been

23 such that water was over it and you couldn't fence

24 along the south end of your property, would you have

25 recollection of that back clear to the time you owned

38

1 it?

2 A Not for sure.

3 Q Okay. Do you remember any time that water's been

4 sitting on that road?

5 A No.

6 Q Until --

7 A Until now.

8 Q Until '95?

9 A Right.

10 Q Okay.

11 A It wasn't a very good road, but it was passable. You

12 could go down that road.

13 Q Okay. Now this question came up about a vein in the --

14 you know, when you had this dugout built around -- or

15 10 years ago, and you had Mr. -- well, you had Hank --

16 A Wugger.

17 Q -- Wugger do the work. And you went and talked to him

18 recently --

19 A Yes.

20 Q -- about whether there was a vein. Now how did that

21 come up that you thought to talk to him about whether

22 there was a vein?

23 A Well, I knew he dug it and I thought maybe he would

24 remember it but he says, I built a lot of dugouts and I

25 don't know.

39

1 Q Okay. Well, where did you get the idea to talk to him

2 about the water vein?

3 A I had heard about this.

4 Q Through this water case that we're working on?

5 A Yes.

6 Q So had you ever thought about whether there was a water

7 vein there until this water dispute came up and the

8 State started looking --

9 A Not really. I think David was the one that started

10 this deal about the water in that dugout.

11 Q Oh, okay. And then there's an issue with respect to

12 this dam that washed out. And it's not clear to me how

13 long that -- now I'm talking about the dam, not either

14 of the dugouts.

15 A Uh-huh.

16 Q The dam that washed out, how long do you think that

17 that dam was in place? Like was it a deal where it was

18 constructed and washed out a couple of years later, or

19 had it been there a long time?

20 A Well, I'm not sure, but I think -- I don't think it was

21 ever repaired after it went out.

22 Q Okay. You mentioned about 1975 to me about that. And

23 it wasn't clear to me whether it was built in 1975 or

24 whether it washed out in 1975.

25 A That I don't know for sure when it washed out.

40

1 Q Okay. You don't know when it washed out?

2 A No.

3 Q But you think it was built in 1975?

4 A Well, somewhere in that area.

5 Q Somewhere in there? Okay. And then you owned that

6 property the whole time. Was it already washed out

7 when you went back and built that dugout?

8 A Yes.

9 Q Okay. So around the mid '70s it was built, and by 1989

10 it was washed out?

11 A Right.

12 Q Okay. Do you have any recollection if it had been

13 washed out quite awhile before you built the dugout?

14 A Not really, I don't.

15 Q One year, two years, six months?

16 A Well, probably a couple of years.

17 Q A couple years. Okay. Well, that kind of puts us at a

18 dam that was in place for a period of about 10 years.

19 Does that sound right to you?

20 A Oh, I think it was in there more than that.

21 Q More than 10 years?

22 A I think so. I can remember when it was built.

23 Q Okay. So sometime in the '70s until the late '80s?

24 A Right.

25 Q Okay. Now a question came up with regard to this water

41

1 being a benefit to your property. And here I'm talking
 2 about this 14 acres of water backed up on your
 3 property. Is that a benefit to you?
 4 **A** Not really.
 5 **Q** Okay.
 6 **A** They don't put cattle out there no more. They just go
 7 out and mow it.
 8 **Q** Okay.
 9 **A** For one thing, you know, I said you couldn't put a
 10 fence up because it's all under water down there on the
 11 south side.
 12 **Q** Okay. All right. So would it be your position then
 13 that the dam should be removed -- or the dam should be
 14 lowered enough that the water comes back off your
 15 property?
 16 **A** Yes.
 17 **Q** Okay. And if that dam were lowered in a couple of
 18 different stages so it wasn't a terrific problem to the
 19 neighbors downstream -- or lowered gradually so it
 20 wasn't a terrific flooding problem to the neighbors
 21 downstream, you wouldn't have any objection to that?
 22 **A** No.
 23 **Q** Okay. As long as it wasn't terribly gradually; is that
 24 right?
 25 **A** I've talked to some of those guys down there. They're

42

1 not worried about it.
 2 **Q** Okay. All right.
 3 MS. BEST: Well, I don't have
 4 anything further.
 5 MR. BROWN: Nothing.
 6 MR. MAGERA: Just a couple of
 7 follow-ups, Mr. Weiss, and I think we'll be able to
 8 let you go.
 9 RECROSS EXAMINATION
 10 BY MR. MAGERA:
 11 **Q** You indicated that your renter -- and I believe that is
 12 a Mr. Weisler?
 13 **A** Right now, yes.
 14 **Q** But it's really not important who's been renting it,
 15 but for a period of time now whoever's been renting the
 16 property hasn't been pasturing any animals down there?
 17 **A** Right. That's right.
 18 **Q** Okay. If a person wanted to pasture that and allow
 19 cattle in there, is there a way you could build fence
 20 up to the area of water and then have a breaking point
 21 and pick up on the other side?
 22 **A** Oh, I suppose it could be done, but it would really
 23 kind of screw things up.
 24 **Q** How would it screw things up?
 25 **A** Well, you'd have this area where all the water's in

43

1 that you can't use.
 2 **Q** And ideally you'd like all the water off your property
 3 so you can use it however you see fit?
 4 **A** Right.
 5 **Q** And that includes the water from the other slew area
 6 that you've been trenching over?
 7 **A** Yes.
 8 **Q** Previously Attorney Best had asked you or I think you
 9 commented that years ago you noticed that people
 10 started going down to this dam area and they were
 11 fishing. Did you ever go down there fishing?
 12 **A** No.
 13 **Q** But there are fish in it?
 14 **A** Yes. I know guys that have been going out there
 15 fishing.
 16 **Q** Okay. Are there other wildlife that makes use of this
 17 water? Ducks, geese?
 18 **A** Yes. Yes.
 19 **Q** Okay. If the water were drained, that would be
 20 potentially harmful to some of those fish and other
 21 birds; correct?
 22 **A** Yes.
 23 **Q** And, again, as I understand this, I think your
 24 testimony was you weren't exactly certain as to when
 25 the dam on your property was built, but I think when I

44

1 was asking you questions you'd say that's been washed
 2 out for at least 15 years.
 3 **A** Uh-huh.
 4 **Q** Okay. And, again, the water that was above that dam
 5 has always continued to come down and go into the slew
 6 area that we're talking about?
 7 **A** Yes.
 8 MR. MAGERA: I don't have anything
 9 further.
 10 MS. BEST: I have nothing further.
 11 MR. MAGERA: Thank you, Mr. Weiss.
 12 MS. BEST: Mr. Brown is going to
 13 want to talk to you about the reading. I guess
 14 this is a trial deposition so there's no
 15 opportunity to read, is there?
 16 (The deposition concluded at 11:45 a.m.)
 17
 18
 19
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 25

1 **STATE OF SOUTH DAKOTA)**

2 **:SS CERTIFICATE**

3 **COUNTY OF HUGHES)**

4
5 **I, CHERI MCCOMSEY WITTLER, a Registered**
6 **Professional Reporter and Notary Public in and for the**
7 **State of South Dakota:**

8 **DO HEREBY CERTIFY** that the witness was first
9 duly sworn by me to testify to the truth, the whole
10 truth, and nothing but the truth relative to said cause
11 and that the foregoing pages 1-44, inclusive, are a
12 true and correct transcript of my stenotype notes made
13 during the time of the taking of the deposition of this
14 witness.

15 **I FURTHER CERTIFY** that I am not an attorney
16 for, nor related to the parties to this action and that
17 I am in no way interested in the outcome of this
18 action.

19 In testimony whereof, I have hereto set my
20 hand and official seal this 23rd day of August 2000.

21
22 _____
23 Cheri McComsey Wittler,
24 Notary Public and
25 Registered Professional Reporter

1 STATE OF SOUTH DAKOTA)

2 :SS

CERTIFICATE

3 COUNTY OF HUGHES)

4
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21
22 Cheri M. Wittler
23 Cheri McComsey Wittler,
24 Notary Public and
25 Registered Professional Reporter

	20 [2] 3 1 3 1 2000 [3] 4 2 23rd [1] 4 2 25 [7] 1 1 26 [1]	Added [1] 30:15 Adds [1] 35:9 Admissibility [2] 4:8 4:10 Admission [2] 4:4 25:20 Aerial [6] 13: 17 15: 7 16: 10 18: 15 18: 16 25:20 Aesoph [9] 1:4 1: 16 4:7 4:7 7:2 9:1 18: 5 20:17 27:12 Ago [17] 8:4 8:5 9:3 9:13 9:21 10: 3 12: 20 24:11 24:13 24:14 24:18 27:17 28:17 37:12 37:17 38:15 43:9 Agree [3] 28:4 30:12 34:16 Agreed [1] 3:2 Ahead [2] 6:1 33:25 Allow [1] 42:18 Animals [1] 42:16 Answer [4] 5:14 31: 18 33:25 35:25 Answering [1] 6:1 Answers [1] 4:11 Appear [1] 5:11 Appearances [1] 3:4 Appearing [3] 1:13 1:16 1:19 Applicable [1] 3:14 Application [5] 1:4 4:6 7:1 7:4 8:19 Apply [1] 26:19 Approach [1] 21: 2 Approached [1] 23:19 Area [26] 13: 5 13: 12 13: 23 16: 6 19: 4 19: 5 19: 8 22:5 27:6 27:10 31: 15 31: 24 32:6 34:8 34:12 34:18 34:19 35:5 35:9 35:9 40:4 42: 20 42:25 43:5 43:10 44:6 Areas [1] 33:4 Arrow [1] 15: 24 Assistant [1] 1:12 Associated [1] 29:5 Assume [1] 30:13 Assuming [1] 5:4 Attention [1] 34:10 Attorney [11] 1:11 1:12 1:18 3:19 26:20 27:3 31: 19 35:25 36:11 43:8 45:15 Attorneys [2] 1:15 3:3 August [3] 1:7 3:7 45:20 Avoid [1] 6:2	Awhile [2] 9:13 40:13 Awkward [1] 26:22 Awkwardly [1] 6:10 B Backed [13] 10: 7 10: 15 11: 11 12: 23 13: 13 15: 2 16: 25 17: 2 21: 18 21: 20 23:2 28:2 41: 2 Background [1] 8:18 Backing [10] 8:22 11: 24 12: 2 16: 4 18: 3 19: 21 19: 24 20:23 21: 8 21: 16 Backs [3] 15: 14 27:10 31: 15 BARNETT [1] 1:15 Based [1] 11: 2 Become [1] 8:20 Behalf [3] 1:13 1:16 1:19 Below [1] 30:25 Belt [2] 14: 14 22:4 Benefit [3] 36:2 41: 1 41: 3 Beside [1] 12: 22 Best [19] 1:11 3:20 4:1 4:15 4:21 11 5 16: 14 16: 16 25:18 26:1 26:20 27:3 31: 19 36:10 36:15 42:3 43:8 44:10 44:12 Best's [1] 35:25 Better [1] 16: 7 Between [5] 3:2 5:19 10: 2 27:11 34:12 Beyond [3] 21: 20 21: 21 21: 22 Big [6] 12: 9 22:3 22:9 22:9 22:11 22:14 Birds [1] 43:21 Bit [7] 5:3 14: 18 16: 4 16: 17 16: 18 31: 14 31: 16 Board [4] 1:1 4:5 5:10 21: 25 Born [1] 7:23 Bought [3] 8:4 8:5 8:7 Boy [1] 9:12 Break [1] 6:3 Breaking [1] 42:20 Brown [9] 1:17 1:18 3:6 5:5 5:25 36:1 36:13 42:5 44:12 Build [2] 19: 22 42:19 Building [3] 1:15 12: 8 12: 9 Built [33] 9:2 9:12 9:19 10: 7 10: 10 10: 13 10: 15 11: 13 17: 9 17: 10 17: 20 17: 22 19: 25 20:2 20:3 22:23 23:1 25:16 27:19 27:23 28:15 28:22 30:8 33:10 38:14	38:24 39:23 40:3 40:7 40:9 40: 13 40:22 43:25 C Capitol [2] 1:12 1:15 Case [2] 7:13 39:4 Cattle [5] 19: 15 22:14 36:2 41: 6 42:1 Caused [1] 28:19 Center [1] 31: 21 Certain [1] 43:24 Certainly [2] 26:25 30:21 CERTIFICATE [1] 45:2 CERTIFY [2] 45:8 45:15 Chance [1] 5:4 Check [1] 31: 11 Checked [1] 12: 12 Cheri [4] 1:21 3:9 45:5 45:22 Child [1] 8:15 Chinese [1] 22:6 Circle [1] 19: 5 Civil [1] 3:14 Claim [3] 10: 19 31: 15 31: 25 Claimed [1] 10: 24 Claims [1] 25:9 Clear [6] 14: 21 22:18 36:20 37:25 39: 12 39:23 Clearly [1] 8:3 Close [2] 18: 25 31: 21 Closer [1] 16: 18 Coming [4] 11: 2 30:9 30:24 32:5 Commencing [1] 3:8 Commented [1] 43:9 Commissioners [1] 24:2 Completely [1] 14: 16 Complies [4] 15: 4 15: 23 32:1 34:25 Concerned [1] 3:16 Concluded [1] 44:16 Condition [1] 21: 12 Conditions [1] 28:5 Consistent [1] 16: 25 Construct [3] 19: 14 24:20 29:16 Constructed [20] 8:25 9:11 9:14 9:18 9:22 17: 8 18: 11 18: 17 24:9 24:10
'40s [1] 10: 12 '60s [2] 17: 19 22:19 '70s [4] 17: 18 22:19 40:9 40:23 '75 [2] 17: 20 17: 22 '80s [2] 22:20 40:23 '84 [1] 15: 3 '88 [1] 15: 21 '90s [2] 18: 2 20:22 '95 [4] 11: 18 12: 14 16: 15 38:8 '96 [3] 12: 7 12: 14 16: 2 '97 [2] 16: 21 16: 22	1 [7] 2:6 2:24 13: 22 14: 8 14: 21 34:10 35:2 1-44 [1] 45:11 10 [8] 24:11 24:13 24:14 24:18 28: 16 38:15 40:18 40:21 10:35 [2] 1:7 3:8 114 [1] 6:24 11:45 [1] 44:16 13 [5] 33:21 33:22 34:3 34:7 34:1 14 [3] 13: 8 13: 10 41: 2 15 [2] 35:7 44:2 18 [10] 1:7 3:7 7:15 27:4 27:7 27: 12 28:15 33:18 34:6 34:12 19 [2] 27:13 27:16 1950s [1] 10: 12 1955 [1] 9:15 1970s [1] 32:3 1975 [4] 39:22 39:23 39:24 40:3 1980s [2] 14: 2 17: 18 1984 [6] 13: 21 14: 7 14: 21 15: 3 34:1 35:2 1985 [1] 13: 22 1987 [1] 15: 6 1989 [9] 15: 13 18: 16 18: 16 28:11 28: 19 28:22 29:1 29:4 40:9 1995 [1] 12: 6 1997 [1] 16: 11	5 [1] 1 50 [7] 2 2 1 500 [2] 1 1 574020400 [1] 1 57438 [1] 1 57501 [1] 1 6 [2] 1 2 1 61733 [1] 7 [3] 1 2 1 1 8 [1] 2 1 811 [2] 1 11 4 2 Am [1] Aberdeen [1] 1 Ability [1] Able [5] 1 2 1 2 2 4 Abnormal [1] 2 Abovenamed [1] Accordance [1] 1 Acres [15] 2 2 1 1 1 1 1 1 1 1 1 1 1 2 1 2 2 4 Actin [2] 4 1 4 1		
2 [16] 2:6 2:7 2:7 2:8 2:9 2:10 2: 11 2:12 9:24 9:25 10: 19 11: 2 11: 6 13: 22 14: 5 23:3	2 [15] 2 2 1 1 1 1 1 1 1 1 1 1 1 2 1 2 2 4 Actin [2] 4 1 4 1			

Word Index

27:17 27:18 28:20 29:13 29:14 30:1 30:22 31: 20 32:22 39:18 Construction [7] 11: 15 11: 17 12: 1 25:2 27:22 29:5 32:25 Contact [2] 29:15 32:24 Contacted [1] 23:22 Continued [1] 44:5 Continuously [1] 12: 23 Corner [3] 14: 10 34:9 34:15 Correct [9] 7:4 8:22 14: 10 26:10 27:15 28:12 36:3 43:21 45:12 Correctly [3] 6:17 26:8 35:13 Counsel [1] 3:16 County [9] 23:25 24:1 24:2 24:16 28:5 34:3 34:4 34:5 45:3 Couple [9] 9:6 13: 21 20:8 21: 14 39:18 40:16 40:17 41: 17 42:6 Course [1] 6:25 Court [4] 4:25 5:7 5:8 6:20 Covered [6] 14: 16 18: 7 19: 2 19: 14 30:1 33:13 Crop [1] 13: 12 Cross [1] 2:2 CROSS-EXAMINATION [1] 26:5 Cross-examine [1] 26:2 Crystal [1] 36:20 Culvert [2] 10: 22 23:18	[1] 14: 1 Deposition [11] 1: 6 3:5 3:8 3:11 3:13 4:3 4: 9 4:22 44:14 44:16 45:13 Describe [2] 22:3 37:2 Description [1] 7:12 Dialogue [1] 8:21 Diane [2] 1: 11 3:20 Died [1] 21: 15 Difference [1] 5:19 Different [3] 15: 6 16: 17 41: 18 Differently [1] 6:13 Dig [1] 24:20 Digging [1] 25:8 Direct [3] 2:2 4:20 30:3 Discovery [1] 3:12 Dispute [2] 25:23 39:7 Ditch [2] 34:17 35:3 Don [7] 1: 6 2:3 3:5 3:22 6:22 6:22 36:18 Done [2] 32:8 42:22 Down [26] 5:8 5:12 9:20 10: 11 16: 11 18: 6 19: 1 19: 25 22:7 23:6 24: 21 25:16 30:9 30:23 30:25 32:6 33:10 34:14 34:20 38:12 41: 10 41: 25 42:16 43:10 43:11 44:5 Downstream [2] 41: 19 41: 21 Drained [1] 43:19 Draw [2] 15: 24 22:4 Drinking [1] 36:3 Drive [9] 10: 2 10: 9 10: 10 10: 22 17: 5 22:19 22:22 22:23 22:24 Dry [4] 19: 24 20:4 30:5 30:5 Ducks [1] 43:17 Dug [3] 20:5 30:6 38:23 Dugout [40] 14: 15 17: 14 18: 9 18: 10 18 11 18: 17 19: 1 19: 6 19: 7 19: 11 19: 13 19: 14 19: 22 21: 19 24:9 24:20 28:13 28:19 28:22 28:25 29:6 29:17 29:25 30:8 30:22 31: 17 32:11 32:16 32:19 32:20 32:21 32:25 33:3 35:13 35:19 35:22 38:14 39:10 40:7 40:13 Dugouts [3] 35:21 38:24 39:14 Duly [2] 3:23 45:9 During [3] 31: 18 32:10 45:13 Duvall [1] 24:6 Dying [1] 21: 18	[6] 20:11 20:14 20:20 20:24 20: 25 21: 7 East [1] 1: 12 East-west [1] 36:20 Edge [1] 32:20 Either [4] 5:24 21: 1 34:1 39:13 Elm [1] 22:6 End [3] 33:12 36:21 37:24 Entire [1] 13: 10 Entity [1] 29:16 Environment [2] 1: 13 3:19 Equipment [1] 25:2 Evidence [3] 4:5 5:10 25:21 Exactly [1] 43:24 EXAMINATION [2] 4:20 36:14 Example [2] 5:14 16: 21 Except [1] 36:6 Excuse [1] 24:8 Exhibit [14] 2:5 13: 22 13: 22 14: 5 14: 8 14: 21 15: 7 16: 11 18: 16 28:9 28:10 31: 13 34:10 35:2 Exhibits [3] 2:24 25:20 25:21 Existence [3] 8:18 14: 2 35:3 Extent [1] 6:5 Extreme [3] 34:18 35:4 35:8 Eyeball [1] 11: 3	[1] 19: 15 Filing [1] 3:18 Filled [2] 30:7 30:10 Fine [2] 15: 3 26:9 First [11] 3:23 9:22 12: 5 12: 15 20:6 20:7 23:24 28:10 36:12 36:16 45:8 Fish [2] 43:13 43:20 Fishing [5] 9:20 9:21 43:11 43:11 43:1 Fit [1] 43:3 Five [2] 28:2 28:5 Five-year [1] 13: 10 Flooding [1] 41: 20 Follow [1] 42:7 Follow-up [2] 26:3 36:16 Follow-ups [1] 42:7 Follows [1] 3:24 Foregoing [1] 45:11 Forth [1] 4:16 Foundation [1] 4:16 Four [3] 23:15 28:2 28:4 Frame [1] 14: 2	[5] 7:17 8:11 8:13 27:4 28:14 Hand [6] 23:25 24:1 24:16 28:5 34:3 45:20 Handle [1] 5:25 Hank [2] 29:10 38:15 Happy [1] 6:14 Harmful [1] 43:20 Head [1] 5:14 Heard [1] 39:3 Hearing [1] 4:6 Held [1] 33:6 HEREBY [1] 45:8 Hereinabove [1] 3:4 Hereto [1] 45:19 Highmore [1] 24:16 History [2] 36:23 37:3 Hit [6] 24:21 24:21 25:9 29:25 30: 14 31: 8 Hold [1] 19: 12 Holding [1] 33:11 Hole [1] 30:5 Horses [4] 9:13 17: 10 23:2 27:19 Hour [1] 3:8 HUGHES [1] 45:3 Hyde [2] 34:4 34:5
D Dad [1] 8:16 Dakota [10] 1: 1 1: 11 1: 12 1: 16 1: 19 3:7 3:11 4:5 45:1 45:7 Dam [68] 7:2 7:13 8:18 8:24 9:2 9:9 9:10 9:18 9:22 10: 4 10: 7 10: 10 10: 13 10: 15 11: 13 11: 21 12: 8 12: 9 13: 18 14: 2 14: 8 14: 15 15: 8 15: 14 17: 4 17: 7 17: 11 17: 14 17: 16 17: 22 18: 1 18: 6 18: 9 18: 22 18: 24 19: 10 19: 20 20:6 22: 23 23:1 24:8 25:15 27:16 27:22 29:14 31: 19 31: 20 31: 25 32:3 32:5 32:8 32:12 32:15 32:17 33:4 35:17 35:18 39:12 39:13 39:16 39:17 40:18 41: 13 41: 13 41: 17 43:10 43:25 44:4 Dams [1] 20:4 Date [1] 1:7 David [7] 1:4 1: 16 4:7 9:1 20:17 21: 7 39:9 Dead [2] 21: 13 22:13 Deal [3] 15: 22 39:10 39:17 Department [2] 1: 13 3:18 Depict	D Dad [1] 8:16 Dakota [10] 1: 1 1: 11 1: 12 1: 16 1: 19 3:7 3:11 4:5 45:1 45:7 Dam [68] 7:2 7:13 8:18 8:24 9:2 9:9 9:10 9:18 9:22 10: 4 10: 7 10: 10 10: 13 10: 15 11: 13 11: 21 12: 8 12: 9 13: 18 14: 2 14: 8 14: 15 15: 8 15: 14 17: 4 17: 7 17: 11 17: 14 17: 16 17: 22 18: 1 18: 6 18: 9 18: 22 18: 24 19: 10 19: 20 20:6 22: 23 23:1 24:8 25:15 27:16 27:22 29:14 31: 19 31: 20 31: 25 32:3 32:5 32:8 32:12 32:15 32:17 33:4 35:17 35:18 39:12 39:13 39:16 39:17 40:18 41: 13 41: 13 41: 17 43:10 43:25 44:4 Dams [1] 20:4 Date [1] 1:7 David [7] 1:4 1: 16 4:7 9:1 20:17 21: 7 39:9 Dead [2] 21: 13 22:13 Deal [3] 15: 22 39:10 39:17 Department [2] 1: 13 3:18 Depict	F Fact [4] 14: 25 20:2 27:17 32:14 Fair [5] 4:12 14: 14 20:9 23:16 31: 20 Familiar [1] 7:3 Family [3] 8:6 8:7 8:8 Far [9] 11: 18 12: 25 13: 6 17: 1 17: 2 18: 25 30:24 37:11 37:15 Farm [1] 12: 22 Farming [1] 13: 1 Farmstead [2] 14: 12 14: 13 Faultkton [3] 1: 19 3:7 6:24 Fellow [1] 20:17 Felt [1] 26:13 Fence [6] 19: 18 36:6 37:9 37:23 41: 1 42:19 Few [4] 10: 3 14: 19 36:11 36:16 Figure [1] 9:13 Figured	G Geese [1] 43:17 General [2] 1: 12 22:1 GENERAL'S [1] 1: 11 German [1] 26:13 Government [2] 29:19 33:1 Grade [1] 23:8 Gradually [2] 41: 19 41: 23 Grant [1] 20:23 Granted [2] 20:14 20:20 Gregg [2] 1: 14 26:23 Grew [2] 22:7 22:12 Ground [9] 9:8 10: 18 14: 20 14: 23 15: 2 16: 19 19: 21 21: 9 23:3 Guess [6] 11: 3 13: 6 13: 25 22:17 34:20 44:13 Gushing [1] 25:14 Guy [1] 20:2 Guys [4] 21: 6 24:3 41: 25 43:14	I Idea [6] 9:10 13: 4 13: 5 17: 25 22:1 39:1 Ideally [1] 43:2 Identification [1] 2:24 Identified [1] 25:22 Identify [1] 16: 18 Immediately [2] 9:7 33:15 Important [1] 42:14 Inches [1] 22:11 Includes [1] 43:5 Inclusive [1] 45:11 Indicated [5] 8:21 20:6 34:13 36:1 42:11 Indicating [23] 13: 19 14: 4 14: 9 15: 9 15: 1 15: 15 15: 18 15: 20 16: 1 16: 9 16: 20 17: 6 18: 8 18: 19 19: 2 19: 4 19: 8 19: 12 32:17 33:7 33:8 33:11 34:22 Informal [1] 6:4 Initial

Word Index

[4] 15: 1 15: 10 15: 16 16: 6 Insofar [1] 3:15 Interested [1] 45:17 Intersection [1] 34:6 Inundated [1] 36:24 Involved [7] 7:13 8:19 8:20 13: 1 13: 10 20:11 25:23 Issue [1] 39:11	[3] 41: 14 41: 17 41: 19 M Machinery [1] 17: 9 Magera [13] 1: 14 4:13 4:14 4:19 16: 15 25:25 26:1 26:6 36:8 42:6 42: 10 44:8 44:11 Main [2] 1:18 3:6 Management [4] 1: 1 4:5 5:10 21: 25 Mark [1] 15: 22 Marked [5] 2:24 13: 21 13: 22 14: 7 15: 7 Matter [1] 4:3 McComsey [4] 1: 21 3:9 4:5 5:45:22 Mean [8] 4:23 6:14 10: 24 13: 23 14: 1 19: 20 24:16 28:21 Measured [1] 13: 8 Mentioned [3] 32:11 35:21 39:22 Mid [1] 40:9 Middle [1] 32:12 Might [3] 9:6 24:10 36:12 Mile [2] 8:11 8:13 Miller [3] 23:24 24:2 24:17 Mine [3] 15: 9 15: 18 19: 10 Minimal [1] 11: 9 Months [1] 40:15 Most [1] 23:5 Motion [1] 25:20 Moving [1] 35:16 Mow [3] 23:7 23:8 41: 7	Nos [1] 2:5 Notary [3] 3:10 45:6 45:23 Noted [1] 3:4 Notes [1] 45:12 Nothing [4] 22:7 42:5 44:10 45:10 Notice [2] 3:15 3:17 Noticed [1] 43:9 Number [1] 33:20 O Oath [1] 3:24 Objecting [1] 4:8 Objection [5] 5:21 5:23 25:24 25:25 41: 2 Objections [2] 4:10 4:16 Obvious [1] 19: 21 Obviously [1] 4:9 Occasion [1] 27:23 Office [3] 1: 11 1: 18 3:6 Official [1] 45:20 Old [6] 14: 14 14: 15 14: 15 17: 4 17: 7 32:15 Older [1] 8:3 One [29] 5:19 5:21 7:7 7:10 12: 8 13: 21 13: 22 14: 17 15: 3 16: 14 20: 15 21: 2 22:14 23:18 26:14 30:3 32:16 33:4 33:4 33:6 33:6 33:8 33:10 33:10 35:25 36:19 39:9 40:15 41: 9 One's [1] 16: 17 Operated [1] 8:25 Opportunity [3] 4:18 26:2 44:15 Oriented [1] 16: 12 Original [1] 3:18 Outcome [1] 45:17 Outer [1] 14: 10 Oversee [1] 29:4 Own [6] 7:13 7:17 12: 22 27:4 33:15 33:19 Owned [5] 7:19 8:1 27:12 37:25 40:5 Owens [2] 7:3 7:9	Parties [3] 3:3 4:2 45:16 Passable [8] 22:25 23:5 23:11 23:14 36: 24 37:4 37:4 38:11 Pasture [7] 13: 14 13: 15 13: 15 19: 16 21 8 36:2 42:18 Pasturing [1] 42:16 Pearl [1] 6:24 Pen [2] 15: 24 16: 7 People [2] 10: 25 43:9 Period [4] 13: 10 16: 3 40:18 42:15 Permission [1] 29:16 Permit [1] 8:19 Person [2] 33:3 42:18 Photo [5] 15: 7 16: 21 18: 15 18: 16 34: 11 Photograph [8] 14: 7 14: 22 15: 11 18: 17 28: 11 34:13 34:16 35:1 Photographs [14] 2:6 2:7 2:8 2:9 2:10 2:11 2: 12 13: 17 14: 1 15: 5 27:2 28:25 33:15 35:16 Photos [1] 16: 2 Phrase [1] 26:22 Phrasing [1] 6:9 Physically [1] 29:20 Pick [1] 42:21 Pictures [1] 14: 17 Pierre [2] 1:12 24:3 Place [4] 3:6 8:16 39:17 40:18 Planted [1] 22:7 Point [4] 5:13 15: 7 25:7 42:20 Pointing [2] 14: 5 19: 3 Position [2] 4:12 41: 12 Possibly [1] 32:2 Potentially [1] 43:20 Present [2] 5:9 21: 12 Pretty [5] 13: 4 13: 5 17: 11 19: 20 30:5 Previous [2] 8:20 32:3 Previously [1] 43:8 Problem [2] 41: 18 41: 20 Procedure [1] 3:14 Proceed [2] 6:1 6:16 Proceeding [1] 5:10 Professional [3] 3:10 45:6 45:23 Prohibit	[1] 33 Pronounced [2] 26 1 26 1 Pronouncing [3] 6 1 26 36 1 Pronunciation [1] 26 1 Property [33] 7 7 2 8 2 9 9 2 11 2 12 12 2 15 16 21 2 25 2 27 1 27 1 27 2 28 1 29 30 1 31 1 33 33 33 1 33 1 33 1 36 37 2 40 41 41 41 1 42 1 43 43 2 Provided [1] 4 2 Public [4] 3 1 25 2 45 45 2 Purpose [2] 3 1 5 Purposes [1] 3 1 Pursuant [1] 3 1 Put [10] 9 2 10 15 1 15 1 15 2 31 2 34 2 36 41 41 Puts [1] 40 1 Putting [1] 19 1 Quarter [18] 7 1 7 2 8 1 27 27 1 28 1 31 2 32 2 33 33 33 1 34 34 34 1 35 35 2 35 2 36 2 Questions [11] 4 1 5 2 6 25 1 26 26 1 27 35 2 36 36 1 44 Quickly [1] 30 Quite [2] 9 1 40 1 Rainfall [1] 28 Raised [3] 7 2 30 1 30 1 Rather [1] 30 Re [2] 1 4 Read [1] 44 1 Reading [3] 3 1 21 2 44 1 Real [1] 22 1 Really [10] 6 9 1 24 1 27 30 1 39 40 1 41 42 1 42 2 Reason [4] 6 1 6 2 26 2 28 2 Recent [2] 11 1 11 1 Recently [1] 38 1 Recollection [5] 28 1 29 29 2 37 2 40 1 Record [2] 3 25 1 Records [1] 25 2 Recross [1] 2 RECROSS-EXAMINATION
---	---	--	---	---

Word Index

[1] 42:9 Redirect [2] 2:2 36:14 Refer [2] 28:9 34:10 Referred [1] 27:3 Referring [1] 27:2 Regard [1] 40:25 Regarding [2] 4:10 14: 2 Registered [3] 3:9 45:5 45:23 Related [2] 11: 23 45:16 Relative [1] 45:10 Remember [9] 16: 25 20:4 31: 8 37:11 37:1 37:21 38:3 38:24 40:22 Remembered [1] 20:3 Removed [1] 41: 13 Rented [1] 8:5 Renter [2] 11: 1 42:11 Renters [1] 12: 9 Renting [2] 42:14 42:15 Rents [1] 7:10 Repaired [1] 39:21 Rephrase [2] 5:24 26:25 Reported [1] 1:21 Reporter [6] 3:10 5:1 5:8 6:21 45:6 45:23 Reserves [1] 4:9 Resources [1] 1:13 Resources' [1] 3:19 Respect [4] 4:16 7:1 8:18 39:11 Rights [2] 10: 25 24:4 Road [25] 10: 5 10: 6 10: 8 10: 9 10: 16 19: 18 22:18 22:22 22:24 22:25 23:2 23:5 23:6 23:8 23:11 23: 17 36:21 37:9 37:9 37:11 37:13 37:22 38:4 38:11 38:12 Road's [1] 36:23 Roadway [1] 22:17 Ron [2] 24:5 24:6 RPR [1] 1:21 Rub [1] 22:15 Rule [2] 5:20 5:22 Rules [3] 3:14 26:19 33:2 Run [1] 15: 5	[1] 1:15 Screw [2] 42:23 42:24 SCS [1] 11: 1 Seal [1] 45:20 Section [31] 7:15 7:17 10: 2 10: 6 10: 8 10: 9 10: 11 10: 16 20:7 22:18 22:22 23:9 27:4 27:7 27:12 27: 13 27:16 28:15 32:12 33:4 33:9 33:18 33:19 33:20 33:22 34:3 34:6 34:7 34:12 36:20 37:16 Sections [1] 34:12 See [14] 10: 5 14: 17 15: 18 15: 21 18 8 18: 25 22:12 23:17 28:25 29:2 29:2 30:11 31: 6 43:3 Seeing [2] 9:18 12: 5 Sent [1] 21: 6 Series [1] 33:14 Set [2] 8:16 45:19 Several [1] 24:5 Share [1] 29:18 Shelter [2] 14: 14 22:4 Show [1] 18: 18 Shows [2] 13: 23 14: 17 Side [4] 14: 22 16: 12 41: 11 42:21 Sides [1] 37:9 SIEGEL [1] 1:15 Sign [1] 21: 7 Signing [1] 3:16 Similar [1] 26:20 Sitting [1] 38:4 Situation [2] 4:24 20:22 Six [1] 40:15 Size [1] 22:2 Slew [12] 27:10 32:6 34:8 34:9 34:1 34:17 34:18 35:5 35:8 35:9 43: 5 44:5 Small [1] 9:10 Someone [3] 5:20 5:22 24:4 Someplace [1] 4:25 Sometime [2] 21: 5 40:23 Somewhere [4] 12: 7 17: 20 40:4 40:5 Sort [3] 31: 21 32:20 33:3 Sound [3] 6:10 19: 20 40:19 South [14] 1:1 1:11 1:12 1:16 1:19 3:7 3:11 4:5 9:7 36:21 37:24 41: 11 45:1 45:7 Southeast	[1] 34:7 Southern [1] 28:14 Southernmost [2] 29:6 33:12 Southwest [13] 7:14 7:18 7:20 27:7 27:11 28:15 31: 21 32:21 33:9 33:18 34:6 34:18 35:4 Southwestern [1] 35:8 Specific [3] 4:11 11: 20 27:6 Specifically [3] 4:7 6:14 9:17 Spell [1] 6:20 Spot [1] 25:17 Spring [3] 24:21 29:25 30:14 SS [1] 45:2 Staff [1] 10: 25 Stages [1] 41: 18 Start [1] 31: 14 Started [14] 4:1 11: 24 12: 2 12: 5 14: 3 18: 2 18: 3 21: 18 25:14 26:7 30: 9 39:8 39:9 43:10 Starting [1] 12: 13 Starts [3] 13: 19 15: 9 15: 18 State [10] 3:11 4:2 8:21 11: 1 23:20 23:22 29:15 39:8 45:1 45:7 Statement [3] 4:12 14: 14 20:9 Stenotype [1] 45:12 Still [6] 10: 22 12: 22 22:12 23:5 23:6 34:3 Stipulated [2] 3:2 4:3 Stop [2] 5:24 26:23 Street [3] 1:18 3:7 6:24 Subject [1] 25:23 Summer [3] 21: 5 21: 6 21: 6 Suppose [4] 19: 24 22:11 30:9 42:22 Supposed [1] 16: 13 Surface [1] 13: 6 Sworn [2] 3:23 45:9	Themselves [1] 22:7 They've [1] 36:3 Thinking [1] 24:12 Third [1] 35:21 Three [2] 23:15 33:3 Today [7] 4:4 4:10 4:17 7:1 27:7 34:1 35:5 Took [1] 16: 7 Top [1] 15: 10 Transcript [2] 3:17 45:12 Travel [1] 36:24 Trees [14] 14: 17 21: 9 21: 12 21: 15 21: 19 21: 20 21: 21 21: 22 21: 24 22: 2 22:3 22:4 22:9 22:10 Trench [4] 34:17 34:21 35:3 35:6 Trenching [2] 34:23 43:6 Trial [3] 3:12 4:3 44:14 True [3] 29:10 30:7 45:12 Truth [3] 45:9 45:10 45:10 Try [2] 6:2 26:25 Trying [1] 25:11 Turns [1] 20:8 Two [2] 21: 6 40:15 Type [2] 29:16 29:24	[11] 25:9 29:25 30:13 30:17 31 6 31: 8 38:13 38:20 38:22 39:2 39:7 Veins [1] 25:16 Vested [3] 1:3 4:6 7:2 Volunteer [1] 22:4
W				
W-E-I-S-S [1] 6:22 W-U-G-G-E-R [1] 29:11 Wait [1] 33:24 Waived [1] 3:17 Washed [17] 17: 13 17: 17 17: 24 18: 1 32: 3 32:8 35:17 39:12 39:16 39:18 39:24 39:25 40:1 40:6 40:10 40:13 44:1 Water [82] 1:1 1:3 4:5 4:6 5:10 7:2 7:4 7:17 8:19 8:21 9:5 9:22 10: 7 10: 15 10: 25 11: 24 12: 2 12: 5 12: 12 12: 23 14: 16 16: 4 18: 2 18: 3 18: 7 18: 21 18: 25 19: 2 19: 12 19: 18 19: 19 19: 21 20:7 20: 23 21: 8 21: 16 21: 18 21: 20 21: 25 23:2 23:24 24:4 24:21 25:12 27:24 28:1 29:2 30:9 30:11 30: 15 30:24 31: 15 32:5 33:6 33:11 34:14 34:14 35:4 35:8 35:9 35: 14 36:1 36:3 36:7 36:25 37:10 37:23 39:2 39:4 39:6 39:7 39: 10 40:25 41: 2 41: 10 41: 14 42: 20 43:2 43:5 43:17 43:19 44:4 Water's [2] 38:3 42:25 Weisler [1] 42:12 Weiss [26] 1:6 2:3 3:5 3:22 4:4 4:22 6: 18 6:25 25:22 26:9 26:10 26:10 26:11 26:12 26:17 26:19 33:2 35:1 35:12 36:9 36:10 36:18 36:18 36:18 42:7 44:11 West [3] 7:14 27:4 33:16 Wet [1] 28:5 Whereof [1] 45:19 Whichever [1] 26:14 Whoever's [1] 42:15 Whole [6] 6:22 7:17 13: 15 33:19 40:6 45:9 Wide [1] 13: 6 Wildlife [1] 43:16 Witness [11] 1:19 2:2 3:17 3:23 15: 4 15 23 26:4 32:1 34:25 45:8 45:14 Wittler [4] 1:21 3:9 45:5 45:22 Works [1] 5:4 Worried [1] 42:1 Written [1] 3:15 Wugger [6] 29:10 29:22 30:16 31: 1 38: 16 38:17				
U				
Uncertain [1] 28:13 Under [8] 3:24 19: 18 19: 19 29:2 35:1 36:6 37:10 41: 10 Underground [3] 25:12 30:13 30:14 Underwater [1] 29:25 Unless [1] 18: 18 Up [61] 8:16 8:22 9:5 9:23 10: 3 10: 7 10: 16 11: 12 11: 24 12: 2 12: 5 12: 13 12: 23 13: 13 13: 18 14: 22 15: 2 15: 14 16: 5 16: 12 16: 18 17: 1 17: 2 18: 3 18: 25 19: 10 19: 11 19: 21 19: 24 20:23 21: 6 21: 8 21: 16 21: 18 21: 20 22:7 22:12 22:14 22:23 23:2 27:10 27:24 28:2 30:10 30:17 30:18 30:24 31: 15 32:15 33:13 36:6 38:13 38:21 39:7 40:25 41: 2 41: 10 42:20 42:21 42:23 42:24 Ups [1] 42:7 Upside [1] 16: 11 USDA [1] 34:11				
V				
Vehicle [2] 37:6 37:16 Vein				
S				
School [1] 7:10 SCHUTZ				
T				
Terms [1] 35:16 Terribly [1] 41: 23 Terrific [2] 41: 18 41: 20 Testified [1] 3:24 Testify [1] 45:9 Testimony [11] 4:25 5:7 27:3 27:21 28:1 28:13 31: 18 32:2 32:10 43:24 45:19				

Word Index

Y

Year

[7] 12: 1 12: 20 12: 21 16: 23 21:
14 28:20 40:15

Years

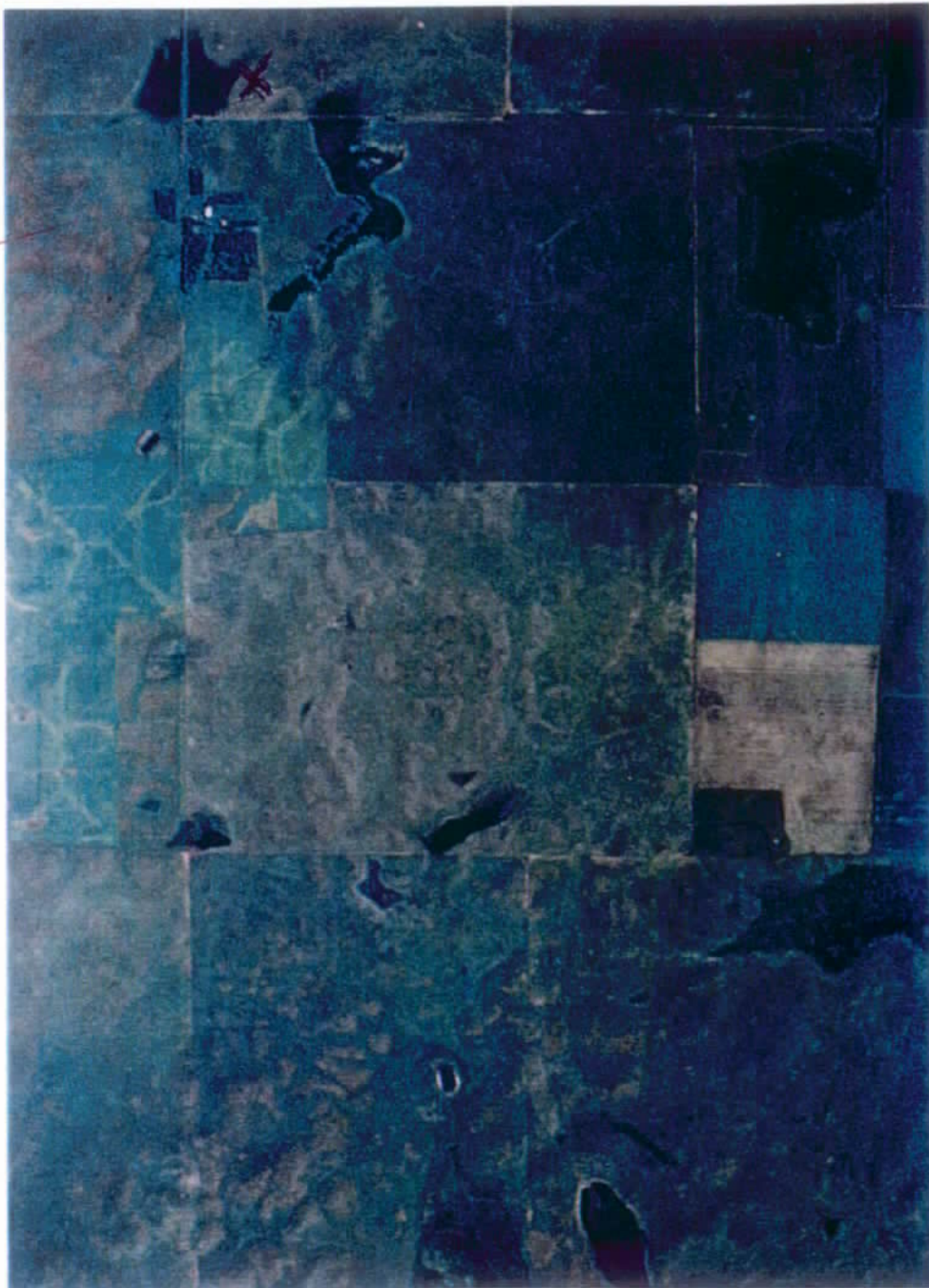
[31] 7:21 7:25 8:1 8:3 8:4 8:5
10: 3 13: 2 15: 6 21: 15 23:15 24:
11 24:13 24:14 24:18 28:2 28:5
28:16 35:7 37:5 37:12 37:17
38:15 39:18 40:15 40:16 40:17
40:18 40:21 43:9 44:2

Yourself

[1] 29:20

In the Matter of Vested Right Application 6173-3, David Aesoph
USDA Photo 1984

M & W



In the Matter of Vested Right Application 6173-3, David Aesoph
USDA Photo 1985



In the Matter of Vested Right Application 6173-3, David Aesoph
USDA Photo 1987



In the Matter of Vested Right Application 6173-3, David Aesoph
USDA Photo 1989



In the Matter of Vested Right Application 6173-3, David Aesoph
USDA Photo 1988



In the Matter of Vested Right Application 6173-3, David Aesoph
USDA Photo 1996



In the Matter of Vested Right Application 6173-3, David Aesoph
USDA Photo 1997



HEARING
TRANSCRIPT

AUGUST 30, 2000

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

In Re:

Vested Water Right
Application No. 6173-3
David Aesoph

HEARINGPROCEEDINGS:

August 30, 2000; 10:00 a.m.
Brown County Courthouse
22 SE Court Street
Aberdeen, South Dakota

BEFORE:

Mr. Francis E. Brink,
Hearing Chairman

APPEARANCES:

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Management Board:

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Also Present: Mr. Garland Erbele and Mr. Ron Duvall

I N D E X

WITNESSES:

PAGE

RON DUVAL

Direct Examination by Ms. Best	5
Cross-Examination by Mr. Magera.	46
Cross-Examination by Mr. Brown	66
Redirect Examination by Ms. Best	67
Recross-Examination by Mr. Magera.	75

GEORGE WIESLER

Direct Examination by Ms. Best	80
Cross-Examination by Mr. Magera.	83
Redirect Examination by Ms. Best	86

DAVID AESOPH

Direct Examination by Mr. Magera	87
Cross-Examination by Ms. Best.	105
Redirect Examination by Mr. Magera	119

EXHIBITS:

DENR Exhibit No. 1	5
DENR Exhibit Nos. 2 through 9.	14
DENR Exhibit Nos. 10A and 10B.	38
DENR Exhibit Nos. 11 and 12.	40
DENR Exhibit Nos. 13 and 14.	41
DENR Exhibit No. 15.	79
Aesoph Exhibit Nos. A and B.	46
Aesoph Exhibit No. C	65
Aesoph Exhibit No. D	85

Wednesday, August 30, 2000

(Opening remarks made by Chairman Brink.)

CHAIRMAN BRINK: Now we will go on the record.

Ms. Best?

MS. BEST: I guess we don't need any opening remarks.

CHAIRMAN BRINK: It's up to you. We're kind of informal, but yet it still needs to follow the guidelines a little bit.

MS. BEST: Well, the background on this case is something that Ron has been kind of involved with, an investigation that has occurred within the last year, and I think Ron is in a position to be able to give the background of the case, so I won't address that in an opening statement. I'll let him address the background and where we're at and the type of application.

What is involved here today is vested right application, an application for validation of a vested right under SDCL 49-1-9, okay, and it is an application for a riparian right, pre 1955. Evidence shows it was fully constructed before 1955, so it's that portion of the riparian right law for the matters which were fully constructed before 1955.

In a nutshell the case involves a situation where there's an application for a vested water right. The staff

1 has investigated it and we believe that the current structure,
2 as it currently exists, which involves a dam, exceeds the size
3 or impounds more water than what would have been continually
4 beneficially used previous to 1955. So what we're saying is
5 pre 1955 water use should be validated; post 1955 water use is
6 a use that, of course, cannot be validated under the vested
7 right laws.

8 There is no application for a new permit involved
9 in this situation. There is no request for declaratory
10 ruling. Obviously, you know, as you'll see through the
11 testimony, we're asserting that there is an illegal post 1955
12 use, that's a matter that likely will be ultimately determined
13 in the circuit courts or may be resolved through settlement.
14 But today we're here for validation of a vested water right
15 situation; therefore involves the quantification of that
16 vested water right, which of course includes showing how much
17 water was continually beneficially used at the dam location.

18 As I was indicated, Ron Duvall will be testifying
19 in this matter. And as is usually the case, it works well for
20 the department staff to go ahead and provide some background.
21 It's been very clear through the courts that in a vested right
22 application the person applying for the vested right holds the
23 burden of proof, and the division staff does not waive that
24 burden, but we will proceed to go first with the testimony.

25 And with that I would call Ron Duvall.

1 Whereupon,

2 RON DUVAL,

3 called as a witness, being first duly sworn as hereinafter
4 certified, testified as follows:

5 DIRECT EXAMINATION

6 BY MS. BEST:

7 Q. Go ahead, Ron.

8 A. Mr. Chairman, I would like to pass out a report that
9 I prepared on this vested right application, and I have extra
10 copies. There should be one for everybody.

11 Q. Before we get started with Ron's testimony, I would
12 like to ask that the department file, agency file be admitted
13 into evidence in this proceeding. The agency file involves
14 the application for validation of vested water right, the
15 newspaper -- affidavit of publication in the newspaper, notice
16 for the application, a letter of intervention and
17 correspondence among the parties, and with that I would ask
18 that that file be --

19 CHAIRMAN BRINK: Do the parties have any
20 objection?

21 MR. MAGERA: No.

22 CHAIRMAN BRINK: We'll accept the file.

23 (DENR Exhibit No. 1 was marked for
24 identification.)

25 Q. (By Ms. Best) Okay, Ron, to start with could you

1 explain for the record what your educational background is?

2 A. I got a bachelor of science degree at SDSU in
3 agricultural engineering in December of '82.

4 Q. And since then what has been your work experience?

5 A. After I left school I went -- started almost directly
6 in May of '83 for the water rights program, which is where
7 I've worked ever since.

8 Q. And can you describe generally what your position
9 involves?

10 A. Okay, I work primarily in the administrative end of
11 things, although we're a smaller program so we do get
12 involved with several things. When I first started working
13 in water rights I did some safety of dams inspections type
14 work. Eventually I moved into more of an administrative
15 position, and what that entails is when people apply for a
16 vested right or new water permit application, that's the
17 section of the program that reviews the applications for
18 completeness and then distributes them to get reports
19 prepared and so forth.

20 And then on occasion, like I did in this case,
21 I actually will prepare reports on applications also. I do
22 legislative stuff, drafting of laws, rules, a lot of our
23 records management sort of stuff involved with that. I go
24 out and do inspections yet today to license water permits.

25 Q. And in that capacity you have occasion to work on

1 water rights complaints; is that correct?

2 A. Yes, I have.

3 Q. And can you describe generally what your involvement
4 is with respect to the matter that's being heard here today?

5 A. Okay, I'll just briefly detail what the vested right's
6 for, and then I'll go to the background on how we got to the
7 position of a vested right actually being filed.

8 The claim that Mr. Aesoph filed was for storage
9 of 70 acre feet of water in a dry draw dam at a location
10 that's in Hand County about 25 miles north and little east of
11 Highmore. The claimed priority date is 1950, and the
12 beneficial uses claimed are livestock watering, fish and
13 wildlife and recreational purposes. Before getting any more
14 of what we're recommending on the claim, though, I would like
15 to go back and tell you how we arrived at the situation that
16 we're in.

17 On August 25 of 1999 Don Weiss, who is a
18 landowner upstream from the Aesoph dam, called in with a
19 complaint about some of his property being flooded, and if
20 you would -- in your report you can flip open and there is a
21 map that I prepared about six pages in and Mr. Magera has a
22 big copy of.

23 MR. MAGERA: If you want you can certainly use
24 it; it is the same map as in your reports, too. What I would
25 like to point out, and I guess we'll just use the map, is

1 this is the dam right here that's the subject of this vested
2 right claim. Right here is the dam fill, and then this is a
3 topo map, U.S. Geologic Survey topographic map dating back to
4 1950, which is the claimed date of the vested right.

5 This is the outline of the dam right here as it
6 appears on that 1950 topo map, so this light blue area with
7 the 1862 on it is what we're dealing with as far as the dam
8 goes. Right here is the common section corner between 13,
9 24, 18 and 19. Now David Aesoph owns the property in the
10 west half of the northwest quarter, which is slightly
11 undersized because it's a correction type section.

12 The Weiss property is up here in Section 18. So
13 right here is the property line and right here is another
14 property line and this separates the east half of the
15 northwest section, which is owned by School and Public Lands,
16 and I understand that is leased by Mr. Aesoph. So those are
17 the property boundaries. This is the area, of course, from
18 here up that Mr. Weiss is concerned with.

19 So what I did is -- the first thing I did --
20 well, first of all this area right here, based on this 1950
21 topo map, is approximately two acres in area. So there was
22 historically some water, according to the topo map, backed
23 across that section line.

24 Q. Ron, before you proceed further to clarify, as you've
25 identified the property lines the east-west section line is a

1 heavy red line and the north-south property line within
2 Section 19, the quarter that we're talking about, is a more
3 narrow red line; is that correct?

4 A. Right, that's correct. The Weiss property is located
5 in the southwest quarter of 18, Aesoph property and School of
6 Public Lands property is in the northwest quarter of 19,
7 directly to the south of 18.

8 One thing I did when I got the complaint was I
9 did some investigating to see if I could find any kind of a
10 water right or an existing vested right for this dam. And in
11 my review I could not find a water right or vested right for
12 the dam. I did find a location notice filed by Joseph Hynek
13 for an area up here and when we get to the slides later on
14 you'll actually see the dugout, I believe, that was the
15 subject of that location notice that Joseph Hynek filed. But
16 anyway we could not find anything for the dam when I looked at
17 that.

18 Q. And you were just pointing to the topographic map at a
19 location somewhere in the middle where it shows a water body
20 but below the letters 1862?

21 A. Right near the numbers 1862, yes, that's correct. And
22 I have it marked on one of the slides that will be coming up,
23 too. After I did that searching I went out to the site on
24 September 2nd to take a look at the situation. And when I was
25 out there one of the things -- I took some photos that we'll

1 look at in a minute, but one of the other things I did, I
2 paced off -- I went to the very tail waters of the dam and I
3 paced off the distance from the tail waters up to this dam
4 here in section -- southwest of 18 is now a breach dam. It's
5 not there but the dam fill is, and I paced that distance off.

6 And based upon knowing that distance I then
7 followed the contour lines around all the way to estimate the
8 approximate water's edge behind the dam at the time I was out
9 there September 2nd.

10 CHAIRMAN BRINK: Was that a spillway elevation
11 then?

12 A. No. You'll see that in the photos that I'm about to
13 show you. That's on the next page of the report. The first
14 photo that's taken is a shot of the culvert, 24-inch culvert
15 which acts as a spillway, and when I was out there the
16 distance between the surface of the water and the bottom of
17 the culvert was about 18 inches. So it was down about 18
18 inches at the time I was there.

19 The second picture is just another picture
20 showing the upstream face of the dam. Again, you can see the
21 culvert there. The next page I have another photo of the dam
22 showing more of the downstream slope of the embankment. And
23 then the picture on the bottom shows some of the trees that
24 are inundated by the dam at the time I was out there.

25 And I guess I would just point out in looking at

1 the trees, they are standing in water. They were dead when I
2 was out there, and I assume that was from drowning in the
3 water, and they were pretty good-sized trees. These aren't
4 the size of trees that will spring up and get that size in a
5 year or two, because the water level happens to be down in the
6 dam and then the water level rises and drowns them out.

7 CHAIRMAN BRINK: Where is the point that the
8 picture was taken from?

9 A. Okay, all these pictures were taken in about the same
10 exact area. It would have been on the east side of the dam
11 and that would be looking upstream.

12 CHAIRMAN BRINK: Right down at the dam looking
13 north then?

14 A. Yeah. It would have been right about in this area
15 here looking this way.

16 CHAIRMAN BRINK: Okay, thank you.

17 A. That's almost north.

18 Q. (By Ms. Best) Will you identify that spot?

19 A. Okay. On the map it says estimated storage capacity
20 at spillway elevation is 174 acre feet. It would have been
21 right near the upper left-hand corner of that note on the map
22 is where -- somewhere in there, probably a little closer to
23 water's edge than that. It was a very wet day. We couldn't
24 -- we had to come in across country because it was so muddy,
25 and so I walked -- we walked across the dam fill over to the

1 other side to take a look at the culvert.

2 Q. Okay. What did you do next?

3 A. Well, we went out there -- I went with Mr. Aesoph and
4 with George Wiesler, the renter. We drove out there
5 together. I visited with Mr. Aesoph at the time and he
6 indicated that there had been some work done in about 1988,
7 some cost share with the Soil Conservation Service, which is
8 now the NRCRS, Natural Resources Conservation Resource
9 Service, and that was to repair some damages.

10 And then later, following that it was indicated
11 to me that the culvert, which was initially towards the west
12 end of the dam fill, was maybe undersized. There was
13 starting to be some erosion started with that water coming
14 through the culvert, and then the culvert was moved from this
15 side over to the east side of the dam fill, which is where
16 it's at in the photos that we were just looking at now. I
17 think it was a larger culvert that was put in to help with
18 handling the runoff.

19 I guess with that, you know, I wanted to confirm
20 my suspicions. It appeared to me that the dam was bigger,
21 much bigger, and to confirm that I went to the Farm Services
22 Agency to get some slides made, some aerial photos, and what
23 I was specifically looking for initially was I wanted to see
24 wet years in the '80s, and I wanted to see wet years in the
25 '90s, to see if there was any change in the size of the dam

1 in that time frame. And if we can cut the lights, we had
2 photos made and I'm going to -- wherever they are, maybe they
3 are in that file. I had individual ones marked up. Some of
4 the things I'm going to point out on the slides I have labeled
5 on the photos, so I'll pass those up, if they are admitted
6 into evidence.

7 Q. Let me explain how we're intending to do that.
8 Obviously we want to use slides so that we can show the entire
9 group; at the same time what the pertinent features are in the
10 aerial photographs. Of course the record will have to be
11 photocopies back for the full board. So what we did is Ron
12 will show you on the slides, but we also took photocopies of
13 the slides and Ron took Post-its, little yellow Post-its and
14 made notations on it, and those we would propose be in the
15 official record, and that's what would go to the board,
16 instead of -- I mean it's to make it eminently clear from the
17 record, to help supplement Ron's pointing to things on the
18 aerial photos, on the slides. So with that I'll show them to
19 Gregg here a second and --

20 CHAIRMAN BRINK: What did you lose?

21 A. The slides.

22 CHAIRMAN BRINK: Here they are.

23 Q. (By Ms. Best) He'll show the slide and describe
24 what's on it, and I will ask that it had admitted since we
25 have slide aerial?

1 A. The thing with the slides, you can only see one slide
2 at the time. It's nice to have the photos to flip the
3 different years all down side by side so you can see them.

4 CHAIRMAN BRINK: Are the photos and slides
5 numbered somehow?

6 A. The year is on the back of the photos and the year is
7 on the slides.

8 MR. MAGERA: Thank you.

9 MS. BEST: Are you willing to stipulate --

10 MR. MAGERA: Certainly.

11 (DENR Exhibit Nos. 2 through 9 were marked for
12 identification.)

13 MS. BEST: Since the parties have stipulated to
14 the admission of the aerial photo exhibits, I'll just go ahead
15 and move those into evidence right now, and you can take and
16 look at them while we're going through the slide presentation
17 of the aerals.

18 MR. MAGERA: No objection.

19 MR. BROWN: No objection.

20 CHAIRMAN BRINK: They will be admitted.

21 Q. (By Ms. Best) Okay, Ron, please proceed with
22 explaining the aerial photos.

23 A. Okay, this is a 1984 photo, and just to orient
24 everybody, here's some shelter belts. Here's the abandoned
25 farmstead here. This is the dam fill right here. And then

1 on either side -- and you'll see probably better on the
2 photos than on the slides, there are trees that run along
3 the side of the dam here, and there's a few trees on this
4 side.

5 And something interesting here, you see that --
6 when the lights are back on you can see it on the map, that
7 1950 topo map that's part of the report, there's a black line
8 on the map. I don't know if that was a trail or a raised
9 area or what, but there's actually trees right in that area
10 across the neck of the water there.

11 Right here is the section line. So this area
12 right here would involve the Weiss property. This is a
13 slough area right here, and there is a ditch. You can see it
14 better on the photo, but this area has been ditched over to
15 the dam area, just kind of an upright there, and it's more
16 visible on the photo.

17 As we look at these different slides something
18 to keep in mind is there's surrounding wetlands and to pay
19 attention to what's going on in these areas around the dam as
20 well as what's going on with the dam. This dam area, if you
21 look at this area here and you look at that 1950 topo map,
22 they look very similar. The water coverage area here and the
23 topo map are very, very similar.

24 Q. What year again is that, Ron?

25 A. This is a 1984 aerial photo. Okay, the next year is

1 1985. What I would like to point out on this one is the water
2 level is down slightly. It looks like it's even off the Weiss
3 property at this point. Right here is the section line. I
4 mentioned earlier about a location notice that was filed for a
5 dugout by Joseph Hynek; that appears to be it right there
6 partially inundated by the dam.

7 Up here, this is the dam I talked about that is
8 now breached, and that is the area right about here where I
9 paced off up to that dam fill, that two hundred feet that --
10 little over two hundred feet, right about that strip there,
11 and again that's on that 1950 topo map.

12 Okay, this is 1987. The reason I don't have a
13 1986 slide is when Farm Services Agency mailed them to me
14 they said it wasn't flown that year. You can see the dam is
15 -- there's only water in the dam right here in this very --
16 toward the dam fill, and the areas on these photos that are
17 water, probably everybody knows but they are the dark area,
18 almost the black area would indicate water.

19 Again, you can see the trees near the water's
20 edge, if there were water in the dam, and this year there is
21 that dugout and again the breach dam upstream, and you can see
22 the surrounding wetlands are off to the east about a little
23 over a half mile, there's a big one that's dry, too.

24 Part of the reason the dam may have dropped so
25 much is in the cover letter that was submitted with the vested

1 right claim, I think Mr. Boe signed it, also counsel for
2 Mr. Aesoph, there was a mention in '85-'86 there was some
3 runoff and the dam breached or partially breached. So at this
4 point that may account for why the water level, as well as the
5 climatic conditions, why the water level is down.

6 Okay, this is 1988 and if you remember 1988 that
7 was -- it was dry. That was the year they had the big fires
8 out in Custer State Park, a very dry year, and that's
9 indicative -- you can see that by the wetlands and everything
10 looks dry. The dam looks totally dry, and then you can see
11 what -- I'll point out you can really see the trees well in
12 this photo, because you don't have the contrast of the water.
13 And again, there's that little neck of trees right across
14 upstream from the dam fill.

15 Okay, this is 1989. The only feature or a couple
16 things I want to point out here is you can see the dam is
17 getting water back in it again. In '89 some of the cost share
18 work was supposed to have taken place in '88, from what I
19 understand, Natural Resource Conservation Service.

20 One thing hard to see on the aerial slide but
21 easier to see on the photo itself is right here a dugout that
22 was constructed by Don Weiss, and that was done in '89. He
23 filed a location notice and there was dugout constructed
24 right there, and again the surrounding wetlands, the slough
25 area over here and to the west near the corners of sections

1 18 at the common corner of 18 and 19 is dry.

2 This other wetland about a half mile to the east
3 of the dam again is also dry, but the dam is starting to
4 catch some water again. There must have been some runoff.
5 With that I'm jumping into the 1990s. 1995 I do have and it's
6 in the water right folder file. I do have an aerial photo, a
7 paper copy which was flown in '91 or '92, and that's available
8 also. That's very similar to 1989.

9 This is 1995. Okay you can see by looking first
10 of all at the wetlands and surrounding area there is some
11 water -- there's a lot of water standing around, and it may be
12 hard to see on the slide, but on the photo it's more visible
13 right there where the red dot is, that is that dugout that was
14 dug in 1989 right there, as steady as I can hold it, and the
15 property line section 18, separating 18 and 19, is right
16 here.

17 The next year I have slide for is 1996, and what
18 I would like to point out in '96 is between '95 and '96,
19 especially a lot of these surrounding wetlands have dropped
20 off. This one here, about a half mile to the east was the
21 same color as the dam here in '95. A lot of that water is
22 gone. This one straight north of that one about a quarter of
23 a mile is dried up. But if you look at '95 and '96 together,
24 the area, surface area of this dam is very similar. The dam
25 didn't lose a whole lot in that time.

1 And now 1997, the last slide I have, as you may
2 recall we had all the snow in the winter of '96 and '97, and
3 these photos are usually flown in late summer, from what I
4 understand, so this would be the summer following the year we
5 had all that snow. And again look at the wetlands. There's
6 the dam area itself. I projected this area onto an aerial
7 photo, that I'll discuss a little later, in order to calculate
8 the storage capacity of the dam. But this area here is about
9 43 acres in surface area of the dam, all from here on up to
10 here. Well, I should say from the southern edge to the
11 northern end of the dam.

12 You look at that 1950 topo map, the surface area
13 of the dam, and in that shot is about 14 acres. So you have
14 43 acres versus 14 acres, and with that you can bring the
15 lights up, please, and here's the photos if you want to spread
16 them out so you can see them side by side.

17 Q. You just did the 1997 slide; do you want to go back to
18 the late '80s to kind of show the contrast there?

19 A. Okay, I can do that. I'll do '84 because '84 looked
20 very similar to the topo map that's part of the report that I
21 prepared. So do you want to get the lights again? That's the
22 dam in 1984 right there, and this is the dam in 1997. '97 and
23 '84 and just put the photos side by side, that would be a
24 much easier way to compare the two.

25 Q. Okay. After you looked at -- okay, you got the topo

1 map and you've used that, you've looked at the aerial photos,
2 what else?

3 A. Well, once I took the '97 photo, like I said, I
4 projected that down on to you. I projected the photo, the '97
5 photo down onto a hard copy, and the surface area on the Weiss
6 property that's inundated was an additional 14 acres over the
7 two acres shown on the 1950 topo map, so a total of 16 acres,
8 14 more than what was historically flooded, I guess the way I
9 would term it.

10 This area right here was two acres, and when you
11 accounted for this whole area here, this was an additional 14
12 acres, although like I said when I was out there in September
13 2nd of '99 the dam is not as full, based on following the
14 contours, as it was in '97. In '97 I would say it's near the
15 spillway. So it would have been slightly bigger than this
16 area shown in the dark blue line, is what I'm saying.

17 And then in addition to that I also estimated
18 the area of -- the additional area that was this flooded on
19 the School and Public Lands property, and that's about ten
20 more acres, an area that's now under water in the '97 photo
21 and is under water in the 1950 topographic map.

22 So after going out and doing the onsite
23 inspection and reviewing the aerial photos and slides,
24 checking for water rights and that sort of thing, the chief
25 engineer issued an order. And that was issued on September

1 15th of 1999, and the order was to, in essence, lower the
2 spillway on the dam back to the elevation it previously was.

3 The basis for that order is South Dakota
4 Codified Law 46-4-1.1 and 46-5-2, and what those statutes
5 allow a person to construct and maintain a dam as long as no
6 land other than that which belonged to the owner of the land
7 is flooded or an easement for such flooding has been secured.

8 So in this case, after talking to Mr. Weiss and
9 School and Public Lands, no flooding easement had been granted
10 to allow the flooding of the property, and Mr. Weiss made it
11 pretty clear that he wasn't going to grant one either, so we
12 issued an order. What the order instructed Mr. Aesoph to do
13 is lower the spillway elevation so that none of the Weiss
14 property was flooded, not even the two acres, unless it could
15 be demonstrated that a prescriptive easement existed because
16 of the term, the time that had passed to allow that two acres
17 to continue being flooded.

18 The other thing the notice directed Mr. Aesoph to
19 do was file a vested water right, if he believed he was
20 entitled to one, or a regular water permit application for a
21 new priority date. Mr. Aesoph came into the office following
22 receipt of that notice and he sat down with me and we
23 discussed some possible language that could be used for
24 entering into an easement in order to address the situation.

25 My understanding is that language was rejected by

1 Mr. Weiss. He didn't want to grant an easement, and so we
2 followed up with a second notice, and that was issued October
3 13, '99. It had the same -- it was basically the same order
4 except it had a couple more conditions. One was that the work
5 to lower the spillway be completed by November 15th of 1999,
6 and the second provision that was added to that notice was
7 that if Mr. Aesoph believed he was entitled to a vested right,
8 he had 90 days to file it or else forfeit his vested right
9 claim. And the basis for that 90-day deadline was statute
10 46-5-49, which allows the chief engineer to allow someone to
11 file a vested right if they believe they are entitled to, or
12 forfeit it.

13 So about 88 days later we did get the vested
14 right claim. It was pretty much quiet, nothing went on until
15 we got the vested right claim two days before the deadline,
16 and with that I'll talk about the specifics of the vested
17 right claim. That's the background.

18 CHAIRMAN BRINK: You've indicated in your report
19 here that any action taken to lower the spillway to alleviate
20 flooding Mr. Weiss' property would also alleviate flooding of
21 School and Public Lands. Looks like the original -- most of
22 the impoundment was on School and Public Lands?

23 A. Well, what I'm talking about --

24 CHAIRMAN BRINK: What do you mean when you say
25 that?

1 A. What I mean is this spillway, which is right about
2 here, is lower than all that area in here that is now under
3 water -- well, maybe not today. The dam is down. It's been
4 a dry summer. But at the time I was there all this area which
5 is here, which is on School and Public Lands, would not be
6 flooded anymore either.

7 Q. (By Ms. Best) We're not asserting that the entire
8 school lands area needs to be drained from water; is that
9 right, Ron?

10 A. Right. What I'm saying is this area has always,
11 since the dam was built, been inundated. What I'm talking
12 about is this area right in here being ten acres. It's much
13 more than ten acres all total.

14 Q. So you're referring to the additional flooding by
15 raising the spillway?

16 A. I'm referring the area between the dark blue line and
17 the lighter blue line representing the original size of the
18 dam, that area.

19 CHAIRMAN BRINK: Do you know if the school
20 district owned that at the time of pre 1950 or 1950?

21 A. I don't know, I could speculate but I don't know.

22 CHAIRMAN BRINK: It probably did.

23 A. Probably did. School and Public Lands, you know they
24 swap lands and do stuff like that, too, so I can't really
25 speak to that.

1 CHAIRMAN BRINK: Okay, it doesn't matter.

2 Q. (By Ms. Best) For the record, Office of School and
3 Public Lands was notified of this proceeding, and I guess I
4 can't really speak for them, but my understanding is they
5 don't object to the pre 1955 water level.

6 A. Well, moving on to the vested right claim then, that
7 was filed on January 11th of this year, and as I mentioned
8 earlier it was claiming impoundment of 70 acre feet of water
9 with a claimed priority date of 1950 based on the date of that
10 topographic map.

11 And in the cover letter that accompanied the
12 vested right claim it indicated that the claim was for the
13 entire storage capacity of the dam as it existed when the
14 claim was filed, present day storage capacity. When the
15 claim came in it wasn't complete. We didn't have the
16 application fee.

17 The map that was submitted really wasn't
18 complete as far as our rules requirements are concerned, so
19 I prepared a map on behalf of Mr. Aesoph, and that's the map
20 that I prepared here. I wrote a letter back to his counsel,
21 you know, asking him whether or not they wanted to use my
22 map, and I made it clear that I was in no way endorsing the
23 amount of water that was being claimed by doing that for
24 them, and they indicated it was fine to use the map.

25 What I spelled out in that letter to them was I

1 disagreed with 70 acre feet of water being the amount of
2 storage that the dam was currently holding. And what I base
3 my calculations on is a formula that the Natural Resources
4 Conservation Service uses to do a rough estimate of storage
5 capacity.

6 What I did is took the surface area of the dam,
7 based on that 1997 aerial slide, which is around 43 acres
8 approximately. Those maps aren't to scale, so there is some
9 give there, but approximately 43 surface acres. When I was
10 out at the site I used a hand level to shoot the height of
11 the dam from the downstream side up to the top, and I
12 subtracted out the freeboard. Freeboard is the difference
13 between the crest and the spillway elevation.

14 So I had maximum height. I had the surface
15 area, and then I use a factor of .3. Typically you use a
16 factor of .4 when using that formula, but you can also use
17 .3 or .5, depending upon the topography. I used the most
18 conservative number. I used .3. The reason I used .3 is
19 obviously you're going to get a lower number when you use
20 that factor for storage.

21 If you look at the map, the 1950 map, I strongly
22 believe that right in here is kind of a saddle area. The
23 water elevation actually goes up a little bit right through
24 here. I think if this dam was totally breached, you got some
25 runoff down the drainage, you would have some water standing

1 in here anyway. It's a low area, a slough area, so you can't
2 really attribute that amount of water to storage caused by
3 the dam.

4 So I used a conservative factor, and by doing
5 that I came up with 174 acre feet of water as being the
6 storage capacity based on that 1997 aerial photo. And then
7 the next thing I did was try to figure out, okay, how much
8 storage capacity do we really believe is entitled to a vested
9 right. The priority date is not a question. We have a topo
10 map showing 1950 that the dam was there.

11 So what I did is Mr. Aesoph had FAXed me a sheet
12 that he had been FAXed from the U.S. Department of Agriculture
13 out of Highmore and on their cost share sheet that they work
14 up, and I think it was in 1988, they estimated the size of the
15 dam at that time, and so they had a height on that form which
16 was 7.5 feet deep. When I was out there and shot it myself
17 with a hand level I got 13 and a half feet deep at the
18 maximum.

19 So I used their depth. I used this 1950 surface
20 area, which is around 14 acres, and I used that .3 factor
21 again and I came up with 32 acre feet of water being the
22 amount of water that was impounded at that time. As I
23 mentioned, we don't -- in reviewing the vested right we had no
24 concern with priority date being claimed. In fact, Mr. Weiss
25 indicated during his deposition that he could remember it

1 being built with horses. So in all actuality it was probably
2 there sometime before 1950, but that's the claimed date.

3 Existing water rights in the area, I checked on
4 that to see what effect, if any, this vested right would
5 have, and nearest one I could find was actually junior to
6 this claim, and it's 27 miles away, and that's as the crow
7 flies. It's much further in downstream miles. It's on Wolf
8 Creek, this downstream water right. This drainage goes into
9 Lost Creek, which is a tributary to Wolf Creek when Wolf
10 Creek eventually ends up in the James River.

11 The other thing we considered in preparing the
12 report and recommendation was safety of dams. We have safety
13 of dams rule 74:02:04:08, and they required if you do more
14 than -- first of all they specify what a dam is, what size a
15 dam needs to be in order to fall under the rules. This dam
16 does full under the rules.

17 And they also say if you're doing more than
18 routine maintenance, that you should file plans and specs and
19 get those approved before you do the work. And this is more
20 than routine maintenance as far as we're concerned. The
21 spillway was moved from one side of the dam to the other, and
22 the elevation was changed. And so they -- what I'm saying is
23 there was no plans and specs submitted.

24 I think with that if you want to follow along I'm
25 going to go right to the report now. On page four of the

1 report, and I'm going to summarize some of the conclusions of
2 what I found when I was out there, and then I'll go through
3 the chief engineer's recommended action on the vested right.

4 Mr. Weiss filed a complaint, as I mentioned,
5 about flooding of his property. Based on my inspection of
6 the area and the slides, it appears that there's about 14
7 more acres being flooded than was historically flooded.
8 School and Public Lands also has property that is inundated
9 that wasn't formerly inundated.

10 We filed -- we sent an order to Mr. Aesoph
11 ordering him to either lower the spillway to elevation that
12 didn't flood the Weiss property, or demonstrate that he had a
13 prescriptive easement to flood it. And we also had Mr. Aesoph
14 comply with part of that order. He filed a vested right as we
15 asked him to.

16 The repair work completed on the dam in the late
17 '80s resulted in storage capacity being increased by as much
18 as six feet, and the reason I got that six feet number is
19 seven and a half foot, from the information I had from the
20 NRCS, and I shot 13 and a half feet, so in that neighborhood.

21 According to the vested right claim the current
22 storage capacity is 70 acre feet. My estimate of the actual
23 storage capacity is 174 acre feet, and we believe 32 acre
24 feet is the amount that is actually entitled to vested
25 status. Any increase in the size of the dam after March 2nd

1 of 1955 would not be entitled to vested right under state
2 law.

3 I mean that is your deadline. So any increase
4 or additional storage above what was there March 2, 1955
5 would need to be covered by a new permit. And then also,
6 like I mentioned, repair work was a significant change in the
7 dam design. It should have been -- it is subject to approval
8 of plans and specs under safety of dams rules.

9 The chief engineer's recommendation is the last
10 two pages of the report. And the chief engineer recommends
11 validation of 6173-3, which is the application number for 32
12 acre feet of water, for fish and wildlife propagation,
13 recreation and livestock use, and with the claimed priority
14 date of January 1, 1950.

15 There are several qualifications attached. I
16 should read through the other three reasons, too. It says
17 because validation for an impoundment of 32 acre feet reflects
18 storage capacity, which qualifies for vested status under
19 46-1-9 and 46-4-5; validation of the dam at its 1950 spillway
20 elevation does not unlawfully impair existing rights; and it
21 is a beneficial use and is in the public interest subject to
22 the qualifications that then follow.

23 And in one it talks about the storage capacity of
24 the dam being 32 acre feet. The next one talks about the
25 spillway overflow elevation being lowered and then maintained

1 at an elevation which will not allow the permanent storage
2 capacity to exceed 32 acre feet.

3 There's a qualification that a permanent
4 benchmark be installed somewhere near the dam fill, and that
5 a map of that be prepared and provided to us. There's a
6 qualification number four that plans and specs be prepared by
7 an engineer in accordance with our safety of dams rules and
8 submitted to us prior to beginning the work to lower the
9 spillway, and then that those plans and specs be submitted
10 within 30 days of this vested water right being issued.

11 And then following that construction to lower the
12 spillway elevation start within 30 days after we approve those
13 plans and specs, provide runoff conditions allow and the work
14 can be performed safely; that the lowering of the dam's water
15 level be completed without causing damage to downstream
16 property. And in the plans and specs, we would like that to
17 be part of the plans and specs as well, detailing how this
18 water level is going to be lowered, how they intend to do
19 that.

20 And then as I mentioned earlier we wanted a
21 benchmark to be installed. The reason for that is number
22 seven, once that lower spillway elevation is determined, that
23 a survey be completed from that benchmark and we have what
24 the spillway elevation is exactly, and then there's no dispute
25 down the road as to what it should be. We'll know because we

1 have a benchmark to gauge it by.

2 And then the last qualification is that the
3 chief engineer's staff be allowed to enter the land where the
4 dam is located for purpose of inspecting the dam and surveying
5 to verify the spillway overflow elevation, and that we need to
6 provide a reasonable attempt at notifying the landowner before
7 we do that. In terms of an elevation that we think the dam
8 should be lowered to, there is a number on this map, 1862, and
9 that's talking about an elevation, but we don't know when that
10 was done, if they actually shot the surface water elevation or
11 if that's interpolated between the contours.

12 So you can't hang your hat on that number. I
13 think the real defining way to tell when you get the dam low
14 enough is where those trees are standing. If you refer back
15 to the photos, the slides, those trees are right along the
16 water's edge. So if you're lowering this dam, you get those
17 trees out of the water, you're going to be pretty close to
18 what it used to be.

19 We did a public notice in the paper. We had one
20 petitioner, and that was Mr. Weiss, and he submitted a
21 petition within the deadline requirement, and in his petition
22 he concurred with the chief engineer's recommendation and he
23 went beyond that to actually say he doesn't have a problem
24 with this two acres being periodically flooded like it has
25 been over the years, up until the late '80s or early '90s.

1 So if you validated the vested right for 32 acre
2 feet, you get the trees out of the water, you should be
3 looking at this thing right here, this blue area on this
4 topographic map, and Mr. Weiss indicated he doesn't care
5 about that area in his petition. And I'm open for questions.

6 CHAIRMAN BRINK: Are you imposing maybe
7 conflicting requirements here? You're saying 32 acre feet but
8 on the same token you're saying not to go beyond the 1950
9 elevation.

10 A. That's what I think it is, the 1950 elevation is --

11 CHAIRMAN BRINK: Are you going to require the
12 elevation be based on 32 acre feet, or are you going to
13 require that the elevation be based on prohibition of flooding
14 beyond -- your arrival at 32 acre feet goes through a lot of
15 gymnastics.

16 A. Oh, yeah.

17 CHAIRMAN BRINK: Of topography, contour intervals
18 and all sorts of things.

19 A. That's a formula that they use and in their words -- I
20 looked it up in the NRCS manual, a reasonable estimate of a
21 storage capacity, and frankly I don't know. If there's been
22 silt over the years, I don't know if that seven and a half
23 foot, how reflective all that is.

24 I'm not so concerned about a number, you know.
25 It could be 30 acre feet; it could be 35 acre feet. That's a

1 number. I think the important thing is that when the spillway
2 elevation is restored, lowered, it look a lot like this,
3 whether that's 32 or 33 acre feet or 28, and then you're back
4 to what you had in 1950.

5 CHAIRMAN BRINK: Probably the most important part
6 of approval of this then would be to establish the overflow
7 elevation. If it turns out to be 40 acre feet behind it, what
8 can you do about it?

9 A. Unless somebody does cross-sections on the whole
10 thing, no one is going to know for certain. That's the only
11 way to know for absolute certain. And frankly that's not
12 commonly done on either water rights or vested water rights
13 issues. That's the formula that is usually used is what I
14 used.

15 CHAIRMAN BRINK: So the thing I'm getting at, you
16 don't want to put those people in jeopardy. If you get them
17 down to 1950 elevation and it turns out it's storing 40 acre
18 feet or whatever?

19 A. The only way we would be able to determine if the
20 number was actually higher or lower would be to do the
21 cross-sectioning thing we talked about.

22 CHAIRMAN BRINK: And who is going to do it,
23 probably nobody?

24 A. Probably nobody. The elevation is the main thing. I
25 mean we need a number when you apply for a vested right, and

1 with the best information we have available, which is the
2 depth we have from the NRCS, the surface area off this map,
3 and you use the NRCS formula and you get a number.

4 CHAIRMAN BRINK: This work through the Soil
5 Conservation Service, what did they do, wing it? Go in and --

6 A. I can't answer that.

7 CHAIRMAN BRINK: They can produce no information
8 regarding what was done in --

9 A. Well, we do have a FAX. Mr. Aesoph FAXed me some
10 information that they FAXed him, and I also had another couple
11 sheets that were FAXed to me from Kelly Stout out of the
12 Highmore office, and they are in the water right file. They
13 are part of the record but -- wait a minute, they may be over
14 in this folder here.

15 CHAIRMAN BRINK: Do they show on there
16 information any depth of raise, or height of raise or --

17 A. Not that I saw, no. It should be in the record
18 because I've referred to it.

19 MS. BEST: What we did in this case was
20 apparently split the file. There was the formal
21 correspondence, like a Clerk of Courts type records there,
22 that's already been admitted into evidence that shows the
23 publications and the petitions to intervene and whatnot.
24 There is also a second file that has the Duvall file
25 documentation, regarding telephone calls, and it does include

1 the NRCS data that was received. I can pull that out and
2 admit that into evidence, but I don't think there's anything
3 in the file documentation that wouldn't ordinarily be in.

4 CHAIRMAN BRINK: It turned out that we --

5 MS. BEST: I like to admit it in the record. I
6 thought it was already in the record, is what I'm telling
7 you.

8 A. This is the FAX information, some of it came from
9 Mr. Aesoph, which he got from the NRCS, and some of it was
10 sent to me.

11 Q. (By Ms. Best) What I would ask is the first document
12 that you're holding, Ron, is the Kelly Stout NRCS document?

13 A. Yes.

14 Q. And that was handwritten calculations, correct?

15 A. Yes.

16 Q. And that was FAXed directly to you?

17 A. Yes.

18 Q. From the Highmore office?

19 A. Yes.

20 Q. I need to show it to the parties and then we'll mark
21 it up and admit it. But that -- to your knowledge that
22 doesn't show how much it was raised. It does not show details
23 of construction at all?

24 A. They did some estimate on storage capacity there, and
25 there's some cost estimates for this culvert to be installed,

1 and yet when I talked to them they said the culvert was not
2 part of the cost share. The only thing cost share involved
3 was the digging out of an area above the dam fill or work
4 associated with that, nothing to do with raising the dam or
5 culverts or anything, although they do have --

6 CHAIRMAN BRINK: Can you tell from their
7 calculations that the amount of storage increase can be
8 related to a depth increase?

9 A. I don't believe so.

10 CHAIRMAN BRINK: Using the same criteria you were
11 using?

12 A. In their calculations they use the same formula that I
13 did. They used .4 though, and they estimated the surface area
14 at four acres, which is grossly undersized to me, based upon
15 that, so I kind of discounted that.

16 CHAIRMAN BRINK: Okay.

17 A. Unless they were saying we're not even going to count
18 this, but we're going to count this. But even that is more
19 than four acres, so I don't know what they were trying to do.
20 I thought it was totally off base myself, their surface area
21 that they were using in those calculations.

22 MS. BEST: Okay.

23 MR. MAGERA: Do you want to submit this? My only
24 question for the record or possible objection is, Ron, it's my
25 understanding that these are Kelly Stout's calculations,

1 correct?

2 A. I don't believe so. He started later, from what I
3 understand. I got Nila somebody.

4 MR. MAGERA: Nilo Rheborg?

5 A. Yes, I think that is who was involved, and he has
6 since moved to another office.

7 MR. MAGERA: So we don't know whose calculations
8 these are, what they may pertain to or not pertain to?

9 A. No, that's true.

10 CHAIRMAN BRINK: From my standpoint they probably
11 don't add anything, and if you don't want to have those as
12 part of the report, I would not care.

13 MS. BEST: For the record I would offer Exhibit
14 10-A, and they would speak only to the extent that the
15 Division of Water Rights staff exhausted whatever efforts they
16 thought it could to find out available elevations, surface
17 acreage, whatever calculations it could to try to
18 differentiate or explain the difference between the 1955
19 elevation and the post 1989 elevation. And I would offer the
20 exhibit for that purpose.

21 CHAIRMAN BRINK: How about Mr. Weiss.

22 MR. BROWN: I have no objection?

23 A. There were some other forms that I had FAXed to me
24 also, are those over there, Diane?

25 CHAIRMAN BRINK: We will admit the exhibits.

1 A. That one I did use their depth. I reference the
2 depth that they filled out on that cost share form. I'm not
3 sure what they call it, but that's where I got the depth from
4 to figure out the 1950 storage capacity. It's on this other
5 FAX sheet.

6 (DENR Exhibit Nos. 10-A and 10-B were marked for
7 identification.)

8 Q. (By Ms. Best) This other FAX sheet that you're
9 mentioning, that's something you received directly from David
10 Aesoph, correct?

11 A. Yes.

12 Q. And that then looks like originated with USDA Highmore
13 office, correct?

14 A. Yes. It is on a sheet -- let's see, there's a title
15 on this. It says U.S. Department of Agriculture Conservation
16 Reporting and Evaluation System, and it is on that form, and
17 number seven of that form says "old dam and emergency
18 spillway in good condition about 7.5 foot maximum depth,
19 backs water into slough, lot of surface area. Also dugout in
20 upper end of slough.

21 That description does describe the dam. There
22 is a dugout in the upper end of that slough, the Hynek dugout,
23 and that's where I got the 7.5 foot depth from.

24 MS. BEST: Okay. I would ask that the document
25 that Mr. Duvall just testified to from, the USDA Highmore

1 office and ultimately from Mr. Aesoph be admitted into
2 evidence as DENR 10-B.

3 MR. BROWN: No objection.

4 MR. MAGERA: No objection.

5 CHAIRMAN BRINK: It will be admitted.

6 Q. (By Ms. Best) We have a little more testimony
7 regarding some additional investigation, if I can open this
8 back up again a little bit. Ron, you indicated during your
9 testimony that you tried to find as many aerals as you could,
10 I think; is that correct?

11 A. Yes, that I was particularly interested in what years
12 at the beginning, and later on I did get -- I wanted to get
13 several years from the '80s in particular.

14 Q. Okay, and one of the things that I think you testified
15 to was that you had actually looked at photocopies of aerals
16 but you didn't have them on slides, is that --

17 A. That's correct. I have two. After I got -- went out
18 to Mr. Aesoph's place I traveled into town to take a look at
19 aerial photos and slides. At that time I picked up some
20 copies of aerial photos, and one is -- they were indicated to
21 me that one of the two was '92 or '93 year. We don't have a
22 slide for that year, and on that photo I projected the 1997
23 slide down onto it, so I could trace the outline of the
24 water's edge. So I have that one, and then I also -- they had
25 a photo dating back to 1981 or '82, and that's also a year

1 that I don't have a slide for.

2 Q. Okay, and I just handed you black and white copies of
3 aerial photographs. Can you identify those black and white,
4 once they have markings on them, indicating that they are
5 intended to be Exhibits 11 and 12?

6 (DENR Exhibit Nos. 11 and 12 were marked for
7 identification.)

8 A. Okay, Exhibit 11 is a 1992 or '93 photo, and that has
9 my drawing on it of the outline of the water's edge, based on
10 the '97 aerial slide. The other one is Exhibit 12; that's a
11 1981 or '82 photo, and it shows the Aesoph dam in the lower
12 left-hand corner of the photo.

13 Q. Okay.

14 MR. MAGERA: 11 is for what year again?

15 A. That is '92 or '93.

16 MR. MAGERA: And Exhibit 12 is 1981 or '82?

17 A. Yes, that's what they told me at the Farm Services
18 Agency.

19 MR. MAGERA: No objection.

20 MR. BROWN: No objection.

21 CHAIRMAN BRINK: They will be accepted as part of
22 the record then.

23 MS. BEST: Finally, there was also mention with
24 respect to dry draw location notices filed with the Division
25 of Water Rights, and there again I guess I had assumed they

1 were in the file. Location notices are public records kept by
2 the Division itself, so would naturally look at them regarding
3 any investigation. But let's go ahead and mark those up as
4 exhibits to make sure there is no dispute regarding --

5 CHAIRMAN BRINK: Location notices for the
6 dugouts?

7 A. Yes, Joseph Hynek dugout, and I referred to one other
8 dugout on the Weiss property, and that was 1989.

9 (DENR Exhibit Nos. 13 and 14 were marked for
10 identification.)

11 Q. First handing you what is marked as Exhibit 13, please
12 describe that.

13 A. Exhibit 13 is a location notice. They are filed with
14 the register of deeds and with the water rights program. This
15 is from Donald Weiss filed -- it was received on July 31st of
16 1989, and location is Section 18 southeast of the southwest
17 quarter of 78 range 70 west. And if you recall back to the
18 slides I showed you, that's the dugout that did show up in
19 1989 and was subsequently inundated in the mid '90s. The
20 other dry draw location notice --

21 MS. BEST: Exhibit 14.

22 CHAIRMAN BRINK: That was on School and Public
23 Lands, was it not?

24 A. The '89 one is Donald Weiss.

25 CHAIRMAN BRINK: The one you just referred to

1 that shows up in the photos, I believe that was on school
2 land, wasn't it?

3 A. No. Do you have those -- if I can refer to the photos
4 I can show you.

5 CHAIRMAN BRINK: That's in 18 then?

6 A. Yes. The other one, the other location notice we're
7 going to talk about right now is the Hynek one, and that one
8 is on School and Public Lands.

9 CHAIRMAN BRINK: Okay, thank you.

10 A. And that was 14, I think.

11 MR. MAGERA: No objection to either 13 or 14.

12 MR. BROWN: No objection.

13 CHAIRMAN BRINK: They will be admitted then.

14 MS. BEST: At this time I would ask that DENR
15 Exhibits 13 and 14 be admitted into evidence.

16 CHAIRMAN BRINK: I think we just did that.

17 MS. BEST: Then the motion for the record.

18 MR. DEERING: There's two pieces of paper; are
19 they to be together?

20 CHAIRMAN BRINK: Yes.

21 A. No.

22 Q. (By Ms. Best) Ron, why don't you explain on Exhibit
23 13, there's two things marked 13, explain that.

24 A. I have two location notices for Donald Weiss; one is
25 1989, the other one was 1958, I believe. It's kind of --

1 yeah, that's when it was notarized, September of '58. These
2 are for two separate location notices. I did not address the
3 1958 one, but it's located to the north of that breached dam.
4 Here's the breached dam that I paced up to. That is up --
5 right up in here somewhere (indicating).

6 CHAIRMAN BRINK: Do you want that part of the
7 record?

8 A. It wasn't pertinent to me. I was looking up location
9 notices, and I was finding everything that was in Don Weiss'
10 name.

11 Q. (By Ms. Best) So Exhibit 13 that we want to enter
12 into evidence is the Exhibit 13, which would demonstrate --
13 which would be the one closer to this dam, and that would be
14 the July 1989 location notice and I'm not going to ask that
15 the other piece of paper be admitted. I don't believe it's
16 relevant to this proceeding.

17 Okay, there was a point during your testimony
18 where you were going through the aerial photos Ron and it
19 looks like 1997 is the highest level based upon the aerial
20 photos and based upon anything else you've looked at '97 was
21 the highest level at which you've seen that damn is that
22 right?

23 A. That's correct.

24 Q. Do you think the dam -- do you have any observations
25 with respect to looking at that aerial photo to tell whether

1 -- what the elevation of the water would have been in the
2 dam? In other words, was the dam full or what can you tell us
3 of whether 1997 would be representative of the maximum
4 impoundment?

5 A. Well, it's impossible to tell without having been
6 there the exact day the photo is shot what the level was in
7 the dam, whether it was actually a runoff event occurring.
8 If you look at the 1997 photo, in the area downstream from
9 the dam, you can actually see the snaking around of the
10 drainageway and water in it. You look at '95 and '96, I
11 don't think you'll see that water in the downstream drainage
12 snaking along.

13 And the reason I was pointing out the wetlands,
14 I think it was 1996, if there was a runoff event going on and
15 you had all kinds of high water in the dam, because if you
16 had a lot of runoff coming down, those surrounding wetlands
17 would be affected, too, unless you had a rain storm that fell
18 directly over or upstream from the dam.

19 But that doesn't appear to be the case in 1996.
20 You have drier conditions in the surrounding wetlands, and yet
21 you have the dam in '96 looking very much like the dam in
22 1995,. And with those surrounding wetlands not having water
23 in them, that tells me that there was no runoff going on at
24 the time the photo was taken.

25 The other reason I believe that is, if that dam

1 is six foot higher, in order to get that kind of surface area,
2 there's four foot of freeboard. If there was a runoff event
3 going on that would cause that type of surface area, that dam
4 would be overtopping, and the dam embankment is quite clear on
5 those photos in the '90s shows up as light brown on the photos
6 where the fill is. You don't see any dark areas of water
7 running over the top of the crest of that dam at all. So I
8 think they are representative of what the dam level is when
9 you're at or near the spillway elevation.

10 CHAIRMAN BRINK: In '97?

11 A. In '97. You know, there are -- I can point it out on
12 the photo.

13 CHAIRMAN BRINK: It looks like the channel has
14 water in it.

15 A. It looks like the channel does have water in until the
16 court reporter covered it up with a sticker and then you don't
17 see the dark area. There are low areas in the channel that
18 hold water and there's no flow.

19 Q. What month is that taken?

20 A. As I understand it photos are usually shot in late
21 summer, late summer. The other bit of evidence that tells me
22 that's the normal pool elevation and not representative of
23 runoff event is the fact that you have my photos from my
24 inspection that are part of the report. The water level was
25 18 inches below the spillway when I was out there, and yet

1 that is the outline of the water's edge at the time I was
2 there September 2nd of '99 so, you know, and of that I'm a
3 hundred percent sure of. I was there.

4 MS. BEST: I have nothing further. Mr. Duvall is
5 available for cross.

6 CHAIRMAN BRINK: Do the parties wish to
7 cross-examine Mr. Duvall?

8 MR. MAGERA: Yes, Your Honor.

9 CHAIRMAN BRINK: Okay.

10 (Aesoph Exhibit Nos. A and B were marked for
11 identification.)

12 CROSS-EXAMINATION

13 BY MR. MAGERA:

14 Q. If I may proceed. Just for the record, my name is
15 Gregg Magera, an attorney with the law firm Siegel, Barnett
16 and Schutz here in Aberdeen. Mr. Duvall made reference to
17 prior counsel for Mr. Aesoph by the name of Mr. Ryan Boe.
18 Ryan has left our office; is working in Omaha, Nebraska, and I
19 came on board and have been working with Mr. Aesoph recently.

20 Ron, let's -- I'm going to ask you some questions
21 about the calculations that you did, but before we get into
22 that, the first time you and I met was, I guess, a couple
23 weeks ago when we attended the deposition of Mr. Weiss in
24 Faulkton?

25 A. Correct.

1 Q. And you were in attendance that day and you heard
2 everything that Mr. Weiss testified to?

3 A. Yes.

4 Q. I believe we deposed Mr. Weiss on August 21st; is that
5 your recollection?

6 A. 21st or 18th.

7 MS. BEST: If I could coach, it was the 18th.

8 Q. 18th or 21st; it was within the last couple weeks.

9 A. Yes, that is correct.

10 Q. On your way to the deposition to Faulkton did you stop
11 by the affected area that we're talking about today?

12 A. Yep, we drove down the road. I guess I would say from
13 the road you cannot get up to the dam. You can see parts of
14 it from the road.

15 Q. That's fair. I'm going to show you what have been
16 marked Aesoph Exhibits A and B, and ask that you take a look
17 at those two photographs. I know you testified you were in
18 the area that day, and for the record those were photographs
19 that I took of the area after the deposition was completed.

20 Would you agree that those two photographs are
21 an accurate depiction of the area as of approximately August
22 18th of this year?

23 A. Well, like I said, from the road, I wasn't as close
24 but I'll take your word for it that you shot them that day,
25 yes.

1 Q. You don't have any disagreement with that?

2 A. No.

3 Q. Obviously from your testimony today you've indicated
4 the water level on the Weiss property is down considerably?

5 A. Yes, it has declined.

6 Q. Now to use your prior statements and your map, you
7 indicate that the high storage capacity mark is the heavy blue
8 line on your map?

9 A. When I was there September 2nd of '99, and it was 18
10 inches below the spillway then.

11 Q. Now from September 2, 1999 to August of 2000 could you
12 advise the water board and its representative Mr. Brink today
13 where approximately you think the water has receded to from
14 September of 1999 to August of 2000?

15 A. Well, it's going to be a guess at best.

16 Q. Your best guess?

17 A. Can I have the photos? I think it would be better
18 because I can pick out the dugout on the photos and you have a
19 picture of the dugout. When I say the dugout, I mean that's
20 the Weiss dugout, correct.

21 Q. And before we get to that, so the record is clear you
22 talked about a dugout that is on the Weiss property in the
23 southwestern quarter of section 18, on Aesoph Exhibit -- it's
24 actually on both, or visible I think on both Aesoph Exhibits A
25 and B, but probably more pronounced on Exhibit A. You can

1 clearly see the top of that Weiss dugout, can you not?

2 A. Yes.

3 Q. Go ahead, if you can give us your best guess as to
4 where the water has receded to from September of '99 to August
5 of 2000. If it would help you, Ron, I believe your testimony
6 was what I'll term the high water level, 14 acres of
7 Mr. Weiss' property had water on it?

8 A. Additional 14.

9 Q. Additional 14. How much in addition to the two acres
10 you talked about in reference to 1950 are on as of August of
11 2000?

12 A. That's a wild guess.

13 Q. You're an engineer, I'll take your best guess.

14 MS. BEST: Objection, speculative.

15 CHAIRMAN BRINK: I think we'll let Mr. Duvall
16 make some sort of estimate if you can.

17 A. I'm looking at the '96 photo. You can see on the '96
18 photo the embankments created by the dugout, and then to try
19 and look at this photo at land level and guess how far this
20 water is extending up past, such as this does here, it clearly
21 extends past for some distance on both photos. But you want
22 me to guess a hundred foot or less or -- I mean that's just a
23 guess.

24 Q. Would you disagree with me, Ron, that the area total
25 now, not in addition to two acres, but the total coverage area

1 on the Weiss property is approximately five to seven acres?

2 A. I have no idea without, you know, actually going out
3 there.

4 CHAIRMAN BRINK: Could you put a mark on that
5 photo where that dugout is at, the one that you have standing
6 up; where is that dugout on that sheet in Section 18? Put a
7 mark on it.

8 A. Where is that 1989 photo that shows it without the
9 water? That will be a better one to use. Okay, I would
10 guess that the dugout is right there (indicating).

11 Q. (By Mr. Magera) Do you want to make a mark as to
12 where the dugout is?

13 CHAIRMAN BRINK: Now somehow identify that for
14 the record.

15 A. Okay, Weiss dugout.

16 Q. And again just so the record is clear you have made a
17 square looking mark in the southwest quarter of Section 18
18 and marked it as the Weiss dugout. Again, that's your best
19 guess as to the location of the dugout on Section 18?

20 A. That's correct.

21 CHAIRMAN BRINK: This will be somebody's exhibit,
22 I hope, now that we have marked it up. Is that going to be
23 your exhibit?

24 MR. MAGERA: You can have it. I will offer
25 Aesoph's Exhibits A and B. I think Ron has testified he was

1 out there that day, and that he had no objection to that being
2 an accurate depiction of the area as of August of 2000.

3 MS. BEST: No objection.

4 Q. (By Mr. Magera) Now, Ron, your testimony this morning
5 has been that since 1950 there's been no question that a
6 certain amount of water has impounded on the Weiss property?

7 A. Well, I can speak to that for the 1980s because I have
8 aerial photos, you know, some of those in the '80s, '81, '82,,
9 excuse me, the slides and then the '81 or '82 photo, it does
10 show water backing up. But prior to that time I can't speak
11 to whether the dam was ever breached for a period of time or
12 whatever. I have no idea.

13 Q. Understood. Now when you were in attendance in
14 Faulkton and heard the testimony of Mr. Weiss, he talked about
15 a dam on his property that you've made reference to as far as
16 being 210 feet from the tail waters of the water that is on
17 the Weiss property, and that was at its highest point in 1996
18 or 1997?

19 A. That distance does not represent the distance in
20 1997; that represents what I paced off in September of 1999,
21 which is 18 inches below the spillway at that time the water
22 level was.

23 MR. MAGERA: Correct. And counsel I don't know
24 if you introduced the transcript of Mr. Weiss' testimony;
25 that's part of the record, is it not?

1 MS. BEST: I intended to make it clear it was
2 part of the record and introduce it next, if you intend to
3 refer to a photograph that was used on that day, we can go
4 ahead and use that now.

5 MR. MAGERA: Not at this time. I wanted to be
6 sure that it's part of the record and the water board will
7 review that.

8 Q. (By Mr. Magera) Now at the deposition of Mr. Weiss he
9 talked about this dam that is north in the southwest quarter
10 of his property, did he not?

11 A. In the northwest of the southwest quarter.

12 Q. It's --

13 A. Did you say the dam or dugout.

14 Q. The dam?

15 A. Yeah, this breach dam, yes, he referenced that.

16 Q. That's correct, and he talked about the dam being
17 breached or washed out as far back as 1975, didn't he?

18 A. I don't know the year without looking at the record.

19 Q. So it's true, isn't it, that water above that dam in
20 the area that's colored light blue or bluish gray also would
21 be adding to the water in the affected area that we're talking
22 about, isn't it?

23 A. Yes.

24 Q. Next when I asked questions of Mr. Weiss we talked
25 about a slough area that is between Sections 13 in Hyde County

1 and Section 18 in Hand County, did we not?

2 A. Yes.

3 Q. And earlier back on your slides, the 1984 slide in
4 particular, there is a clear reference to a ditch from that
5 slough area into the affected area that we're talking about
6 today, is there not?

7 A. Yes.

8 Q. Now you talked about a calculation that you performed
9 to come up with 174 acre feet being the storage capacity,
10 correct?

11 A. Yes.

12 Q. Can you tell me what part of that calculation takes
13 into account the amount of water coming from the bluish gray
14 area and/or the slough area?

15 A. It really has nothing to do with it. The calculation
16 is intended to tell you how many acre feet of water a dam
17 will hold at the bottom right at the spillway elevation. How
18 much runoff you get from the surrounding area has nothing to
19 do with the maximum storage capacity of a dam.

20 Q. Let's talk about that. Certainly the water coming
21 from the bluish gray area and the slough area adds to the
22 total in the area, doesn't it?

23 A. Certainly.

24 Q. But again your calculation doesn't necessarily factor
25 that in any way?

1 A. No.

2 Q. But you don't disagree that Mr. Weiss himself adds to
3 the water capacity from the washed-out dam and his ditching
4 activities, both of which have gone on for a number of years?

5 A. Yeah, the water that would be impounded now continues
6 downstream.

7 Q. For the purpose of this next question, Ron, I want you
8 to consider any dam, and that dam -- obviously a dam has a
9 certain spillway elevation, and in dry years that pool
10 elevation or spillway elevation may decrease, correct, in dry
11 years?

12 A. No, the spillway elevation doesn't decrease; the pool
13 elevation does, yes.

14 Q. And again, we don't have any control over that, do we?

15 A. No.

16 Q. The good Lord decides how much snow, how much rain,
17 how much runoff?

18 A. That's correct.

19 Q. So would you agree with me that the storage capacity
20 can change without any change being made to the height of a
21 dam?

22 A. Well, I don't want to nitpick, the storage capacity
23 of a dam never changes unless you change the spillway
24 elevation. The amount of water in storage does change, but
25 the storage capacity does not change.

1 Q. The ultimate storage capacity as you say?

2 A. Yes.

3 Q. Now in your reports you also contacted representatives
4 of the U.S. Fish and Wildlife Service, correct?

5 A. Yes.

6 Q. What did they tell you?

7 A. Well, it was my understanding that there was a
8 wetlands easement involved on the Weiss property and I
9 discussed the situation with them about us believing that the
10 water level was higher, and I was after what their concerns
11 would be, if any, putting the dam back to the way it used to
12 be. They indicated to me that they didn't have a concern
13 with it.

14 Q. And you disagree that there are fish and wildlife that
15 make use of that water?

16 A. No.

17 Q. And again I think you're correct in the U.S. Fish and
18 Wildlife Service stance was as long as the dam wasn't
19 completely taken out, et cetera, fish and wildlife not harmed,
20 they didn't have any objections?

21 A. That's true.

22 Q. I want to go back to an item and you talked about a
23 second page to an Exhibit 13; do you recall that?

24 A. Yes.

25 Q. And this second page of Exhibit 13 talked about

1 another dugout on the Don Weiss property?

2 A. Correct.

3 Q. And that dugout, if I'm correct, is even farther north
4 of the bluish gray area that we've been talking about here
5 today?

6 A. That's correct, and it shows up on photos.

7 Q. And Mr. Weiss testified at his deposition that that
8 dugout also has never held water, has it; do you recall that?

9 A. No, not specifically, but if it's in the report, it's
10 in the report. I do recall him talking about it, yes, or he
11 mentioned it.

12 Q. Now again, if my understanding of the state law is
13 correct, it's permissible for a person to have a dam on their
14 property as long as it does not flood land owned by another
15 person, correct?

16 A. Yes.

17 Q. And what we're talking about here is, as far back as
18 1950 at least, two acres has been inundated on the Weiss
19 property?

20 A. Periodically, yes.

21 Q. Now again some of your slides reference trees that
22 are under water. If the water were to recede to a level
23 where none of Mr. Weiss' property had water on it other than
24 the two acres, it really doesn't matter if those trees are
25 under water, does it?

1 A. No, the trees aren't the issue. They are just
2 indicative of water level changes, what happens to trees when
3 they are flooded.

4 Q. And from your testimony when you visited with
5 Mr. Aesoph, you talked about the spillway culvert initially
6 being on the west edge of the dam, and it was at some point in
7 time moved; is that correct?

8 A. Yes.

9 Q. And you also testified but I don't think it's clear in
10 the record that initially that spillway culverts was much
11 smaller than the culvert that was installed?

12 A. My recollection is that's what Mr. Aesoph told me,
13 that the former culvert was smaller in diameter.

14 Q. I want to be sure I understood your testimony
15 correctly, Ron. Your slide from 1984 you say is very similar
16 to the topo map from 1950; was that correct?

17 A. Yes.

18 Q. And again you estimate the darker area on the Weiss
19 property to be two acres there?

20 A. That would be approximate, yeah.

21 Q. How large an area do you think is the slough directly
22 to the west of the area on the Weiss property that gets water
23 that we're here to talk about; how large is this slough area?

24 A. The half of it that's in Section 18?

25 Q. Yes.

1 A. I would say the half in Section 18 is at least twice
2 as big.

3 Q. Four or five acres?

4 A. Yeah.

5 Q. Do you know whether or not, Ron, there's a culvert in
6 between Section 18 and Section 13, if you know?

7 A. I don't know.

8 Q. Do you know whether or not the elevation in Section 13
9 is higher than the elevation in Section 18?

10 A. The elevation of what?

11 Q. Say this area compared to this area, which direction
12 would water flow?

13 A. Well, if there is a culvert through the road, then the
14 elevation of the water would equalize on each side.

15 Q. A equalization culvert?

16 A. Yeah.

17 Q. Now I want you to -- let me ask the question, you
18 don't know anything about the elevation on Section 13 then?

19 A. No.

20 Q. But from your testimony the natural drainage from the
21 area that we're here to talk about then goes south and in a
22 westerly direction?

23 A. Yes.

24 Q. Okay. Now what can you tell me on your map you've got
25 a figure of 1875 in the section corner area and then you have

1 referenced this 1862 level, what's the important of 1857 and
2 1862?

3 A. Well, first of all the elevations aren't mine. Those
4 are part of the topographic map, and they are referencing
5 points, elevation points. My understanding is, and I do not
6 have first hand knowledge of it, is for example 1862, that
7 represents the surface elevation of the dam. It may or may
8 not have actually been shot, the elevation physically surveyed
9 in. It may have been interpolated between the contours and an
10 elevation put on there. So I can't say for certain that was
11 the actual elevation or not, or if it was a near guess based
12 on interpolating. The other elevations are usually like an
13 intersection or points along the roads, roadways.

14 Q. Is it incorrect for us to assume that the elevation
15 to the west of the area we're here to talk about, isn't it
16 true that that's higher than the 1862 figure?

17 A. This area right in here, yes. Yes, this area is
18 higher. There's 1900 contour here. This dark ground probably
19 also represents the 1900 contour here. So runoff, for example
20 coming off here, would come into here. This side would come
21 into here, and it would run on down here, except to the south,
22 entering the same drainage below the dam on those two
23 particular hills there.

24 Q. Thank you. I want to go into something a little
25 different, and that is during your testimony you talked about

1 visiting with Mr. Aesoph and possible easement language that
2 could be provided to Mr. Weiss should he be agreeable to
3 granting an easement; is that correct?

4 A. Yes.

5 Q. And again Mr. Aesoph took your advice; he tried that,
6 did he not?

7 A. That's my understanding, yes.

8 Q. And again your understanding is that Mr. Weiss would
9 have nothing to do with an easement?

10 A. Yes.

11 Q. And a similar situation existed as far as Mr. Aesoph
12 contacting Mr. Weiss about possibly purchasing the area, if
13 you know?

14 A. I'm not certain -- well, okay, I do seem to recall
15 that Mr. Aesoph thought that Don Weiss may be willing to sell
16 his land, maybe was thinking about selling out two or three
17 years down the road, and I do recall that.

18 Q. And that, in fact, shows up in one of your reports,
19 does it not?

20 A. Okay.

21 Q. Now you testified, Ron, about assisting Mr. Aesoph in
22 making his application for this vested water right; is that
23 correct?

24 A. Yes.

25 Q. Did you assist him in putting the figure of 70 acre

1 feet?

2 A. No.

3 Q. You had no discussions with him about how to arrive at
4 70 acre feet?

5 A. We discussed using that formula in order to estimate
6 surface area. At the time I believe it's in correspondence
7 with Mr. Aesoph that I was hesitant to even come up with a
8 number, or try to estimate it on his behalf, just because we
9 may end up in litigation and that may be the ultimate result
10 of this, too.

11 But actual 70 acre feet, no, but there were some
12 other figures on that Form 2-A that were based upon my hand
13 level, going out there and shooting the height of the dam.
14 So there are a couple numbers on what's called Form 2-A that
15 are based upon what I provided, but not the 70 acre feet. In
16 fact, there's a question mark written behind it on the
17 application form.

18 Q. That's correct. One question and, Ron, you may or may
19 not know the answer to this. But on one of the exhibits, the
20 exhibit that refers to Mr. Weiss' dugout, on the backside of
21 that exhibit are questions about the specific plans and specs
22 of his dugout; is that correct?

23 A. Yeah, who prepared them, yes.

24 Q. Okay. Now I looked at that document and there don't
25 appear to be any answers to any of those questions; am I

1 incorrect on that? Let me have you take a look at that. It's
2 marked as DENR Exhibit 13, and I'm -- it has also a number on
3 it of 71780 location notice number, and I'm referring to the
4 back of it. I don't -- is that -- are those plans and
5 specification questions on the back of the form?

6 A. It has on the form, question number seven we're
7 talking about, first part of that is dam/dugout designed by,
8 that is filled out and it says Soil Conservation Service,
9 Highmore, and then there are -- continuing on there are
10 questions B through J. Almost all of these questions, with
11 the exception of D relate to something you would fill out if
12 you were constructing a dam. You don't have freeboard with a
13 dugout, and so almost all of that question refers to dams and
14 not dugouts.

15 The primary thing that we're really interested
16 on the location notice is the amount of water that's being
17 claimed, and it's put on here as being claimed 1.2 acre feet,
18 which is not unreasonable for a dugout. That would explain
19 why most of this is blank, but there could have been a depth
20 provided for a dugout.

21 Q. Okay, thank you. Ron, just a couple final questions
22 for you, and for these I want to refer back. I guess we don't
23 have the large map noted as an exhibit. I'm sure we'll mark
24 it as such appropriately. Do you have any knowledge, Ron, of
25 how many acres of land actually drain into the area that we're

1 talking about?

2 A. According to the application that was filed 960 some
3 odd acres I think was the upstream drainage area.

4 Q. And you don't have any disagreements with that, do
5 you?

6 A. No, I did not check to confirm it.

7 Q. But again from the aerial slides and photos that you
8 have there, there are a number of wetland areas to the north?

9 A. Yeah. In this kind of topography it's difficult to
10 come up with exact drainage area because you have a lot of
11 pothole drainage that don't contribute unless they get full
12 and start spilling.

13 Q. And again I want to be clear that the water board
14 understands what I understand your position to be in reference
15 to this case, and that is you base your opinion on the fact
16 that there is more water in this area due to some type of
17 repair work that Mr. Aesoph would have done?

18 A. Or someone, yes.

19 Q. And in conjunction with that you base your opinion on
20 the fact of the aerial photos and slides that there is now
21 more water in the dam than existed prior -- say the 1980s,
22 because you have your aerial slides from the 1980s and 1990s,
23 correct?

24 A. Yes.

25 Q. And there are dry years there, correct?

1 A. Yes.

2 Q. Where there's no water on Mr. Weiss' property?

3 A. Yes.

4 Q. And there are some years where there obviously is some
5 water on his property?

6 A. Talking '80s now, yes.

7 Q. Same is true in the 1990s?

8 A. I believe everything that I have from the 1990s shows
9 the water, but there are years we don't have from the '90s as
10 well.

11 Q. And is it possible that the same conditions could have
12 existed in 1950?

13 A. That would cause what?

14 Q. Cause additional water to be on the Weiss property?

15 A. To change it from the way it looks on the map right
16 now the only -- that's a snapshot in time. So anything that
17 would have occurred from the 1980s prior to the 50s, I don't
18 know what happened. But if you're going to change the total
19 storage capacity, you have to change the spillway location.
20 There has to be a change, otherwise the water is at the
21 spillway elevation. It's flowing through it during a runoff
22 event, or in dry times it's below it.

23 Q. But you don't have any direct knowledge as to what the
24 spillway elevation was in 1950 other than what you look at in
25 your aerial slides?

1 A. Other than what I see on this topo map, 1862, I don't
2 know if that's an actual surveyed elevation or if it was
3 surveyed, if it was not at the spillway. The water level may
4 not have been at the spillway, that's true.

5 MR. MAGERA: What we'll do is if we can mark the
6 large map, and I apologize for making you take this with you,
7 but why don't we mark that.

8 (Aesoph Exhibit No. C was marked for
9 identification.)

10 Q. Again, Ron, so the record is clear Aesoph Exhibit C is
11 an enlarged version of the map that is attached in your report
12 that was submitted here today, is it not?

13 A. That's correct.

14 MR. MAGERA: Thank you. I don't have anything
15 further of Mr. Duvall.

16 MR. BROWN: I have no objection to these photos.

17 MR. MAGERA: I believe I offered photographs A
18 and B.

19 CHAIRMAN BRINK: No objections, Diane?

20 MS. BEST: None.

21 CHAIRMAN BRINK: We'll accept those then. We
22 need to give the reporter a little break here. Do you have --
23 do you want to do any redirect on Ron?

24 MS. BEST: Yes, I will have some for Ron.

25 (Off the record discussion.)

1 CHAIRMAN BRINK: Let's go ahead and do that. I
2 think after lunch we'll let the other parties question.

3 (A recess was taken at this time.)

4 CHAIRMAN BRINK: Okay, we're ready back in
5 session on the record.

6 CROSS-EXAMINATION

7 BY MR. BROWN:

8 Q. I'm Jarvis Brown, representing Don Weiss. Ron, I
9 want to ask you a few questions and they may seem very
10 simple, they do to me anyway, but there was some -- in your
11 testimony some conversation about some dugouts and some
12 sloughs that ran into this area that's being held by the dam;
13 do you remember that?

14 A. Yes.

15 Q. I guess my question is very simple, isn't it true that
16 if that water was running into that area that eventually if
17 there was not any dam there it would run down to the James
18 River; isn't that correct?

19 A. Yes, that's correct.

20 Q. And what's caused the problem to Mr. Weiss' property,
21 as I see it, is the fact that the dam has been raised, which
22 elevated the area back up onto Mr. Weiss' land; is that
23 correct?

24 A. Yes.

25 Q. And that's pretty much -- isn't that why you put a

1 culvert in there, so the water keeps draining down the water
2 course?

3 A. You mean the culvert in the dam?

4 Q. In the dam?

5 A. Yes.

6 Q. And so basically isn't it true that the problem of
7 Mr. Weiss' property being inundated with water is the fact
8 that we have this dam raised, which pushed the water back on
9 his land; that is pretty simple, but isn't that true?

10 A. The spillway elevation is higher.

11 Q. And it is true that even when you have it there
12 conditions of the weather and climate will make that water go
13 up and down?

14 A. Yes.

15 Q. But it doesn't alter the fact that when there is
16 runoff of water, that the dam holds it there and backs it up
17 onto Mr. Weiss' land; isn't that true?

18 A. Yes.

19 MR. BROWN: Thank you.

20 MS. BEST: I have some redirect, thank you.

21 REDIRECT EXAMINATION

22 BY MS. BEST:

23 Q. This is a validation of a vested water right. Based
24 on the information that you received from the applicant and
25 other information that you've looked at, do you have any

1 information that the dam impounded -- a dam at this location
2 impounded 70 acre feet at any period previous to 1955?

3 A. No.

4 Q. Okay. And you indicated you have some information
5 from NRCS pertaining to a 7.5 foot -- to 7.5 feet and that was
6 the distance between what and what?

7 A. That represented the maximum depth of the water and
8 that would be at your dam fill, and that would be the depth
9 from the bottom of the dam at that point up to the spillway
10 elevation.

11 Q. And based on that maximum water depth of 7.5 feet, as
12 well as looking at the other information that was provided to
13 you that you've testified about, you calculated a total
14 maximum acre feet; is that correct?

15 A. The spillway elevation.

16 Q. And that number is the 32 acre feet we've talked
17 about, correct?

18 A. Yes.

19 Q. Now you indicated that the calculation was
20 conservative; is that right?

21 A. Yes.

22 Q. And you used .3 number?

23 A. Uh-huh, yes, I did. With the topography around here,
24 I really wouldn't have a problem using .4 factor, which is a
25 typical one that's used. If you ran the number using .4 you

1 would get 42 acre feet of storage, rather than 32 acre feet.
2 And as we discussed earlier, we were talking about what's the
3 important number here, the storage capacity or the spillway
4 elevation.

5 And to my way of thinking whether the Water
6 Management Board wished to validate for 32 acre feet or 42
7 acre feet, in the final analysis that spillway elevation is
8 going to be the same. I mean that is a variability in your
9 calculations that you can have on the storage amount.

10 But when the decision is made, we think it
11 should be validated so the spillway elevation is such that
12 the best indicator we have are those big dead trees. When
13 those big dead trees are out of the water, then you are going
14 to be right in the ball park, very close to what that spillway
15 elevation used to be. Those trees would not have grown that
16 big if they were consistently inundated.

17 And you can see on the photos and the slides in
18 the '90s you can see water actually extending beyond the
19 trees, the same as on my photo when I was out there. The
20 trees couldn't have grown that large if they were inundated
21 for any period of time. They would be dead like they are
22 now. So whether it's 32 acre feet or 42 acre feet, using a
23 factor of .4, in a sense that's irrelevant.

24 You do need a number for your vested right. The
25 only time that number would become relevant is if someone

1 downstream with a senior water right, which there is no one
2 who would have a senior water right, would say, Look, you
3 have a vested water right validated for 32 acre feet and
4 someone has discovered it's 40 acre feet. You can only
5 impound 32 acre feet. You bypass that other eight acre feet
6 that you don't have a vested right for. I don't see that
7 issue here because there's no one downstream here with any
8 senior -- one person downstream will have a junior priority
9 date. I think it's 1957.

10 So .4, .3, 32 acre feet, 42 acre feet, is not
11 the main issue to me. The relevant issue to me is what's
12 that spillway elevation going to be when it's done. And our
13 recommendation is that it look like that dam as close as you
14 can approximate it as shown on the 1950 topo map, the light
15 blue area with 1862 on it.

16 Q. Can you explain why you went to 32 acre feet?

17 A. That's just due to that slough area, the water winds
18 up out there. I think there's a saddle there, but frankly I
19 don't know. I was using a conservative number, but the .4
20 doesn't bother me either.

21 Q. Based upon the information that's been provided to
22 you, the topographical map, the aerial photographs, the USDA
23 information, is the 42 acre feet a liberal number as opposed
24 to what you call the conservative number?

25 A. I would say that's the mid range number. Sometimes

1 you use a factor of .5, but the general topography in the area
2 would be such that that would not lead me to the .5
3 direction. I mean if I use the .4 -- I used .3 also when I
4 calculated the storage capacity based on that 1997 aerial
5 slide, it was 174 acre feet. If I use .4 it's even bigger
6 than that number that I used because that was calculated using
7 .3, the conservative factor again.

8 Q. Why wouldn't you use a .5 again?

9 A. Because of the topography. I mean there's nothing
10 special about this area in terms of it being a steep gradient
11 or gentle gradient. I would call it a typical type situation.

12 Q. And based upon your experience and background and any
13 technical manual or anything that you may have consulted, is
14 .4 a --

15 A. That's the normal one that's typically used, yes.

16 Q. So you chose .3 as a shallower number, correct?

17 A. I was more conservative, but I don't have a problem
18 with .4.

19 Q. Okay. So your testimony is that based upon the
20 evidence you have seen, the quantity of water that's
21 historically been impounded, we'd be looking at a number of up
22 to 42 acre feet?

23 A. Uh-huh.

24 Q. But that the best available marker is to get the water
25 back out of that tree line; is that accurate?

1 A. Absolutely, whether it was validated for 32 or 42 acre
2 feet, in the final analysis the spillway elevation would be
3 the same. There's a range of values and that's what those
4 factors are intended to represent. The only way an applicant
5 could give you an exact number is to go out and do
6 cross-sections of that whole area and use an end area type
7 calculation method to figure out what the amount is, but we
8 don't require that.

9 But, yes, when it's done, whether it's 32 or 42
10 acre feet, I would expect the elevation of the spillway to be
11 the same. In terms of the applicant, the 42 acre feet, I
12 guess it gives him a little more of a comfort level of anyone
13 downstream that would have a claim to that water, that their
14 vested right then reflects ten more acre feet of water than it
15 would at 32 acre feet.

16 Q. So 32 acre feet, 42 acre feet, you're not changing the
17 ultimate recommendation of the department that the water right
18 should be validated at the pre 1955 level, as shown on the
19 topo map, whatever the calculation is, and as demonstrated by
20 the tree line, correct?

21 A. That's correct.

22 Q. Okay. And there's no question under any circumstances
23 that the acre foot involved here is over 25; is that correct?

24 A. Say that again.

25 Q. Let me ask you a background question on that. In some

1 areas of water law a person can install a dam of less than 25
2 acre feet without having to come to the state for a permit;
3 isn't that right?

4 A. Yes.

5 Q. And can you describe what that circumstances is?

6 A. If you construct a dam on agricultural land 25 acre
7 feet in size or less, you can file a location notice similar
8 -- exactly the same to the ones that have been entered into
9 the record here, that was done for the dugouts.

10 Q. Okay. And in this circumstance the acre feet involved
11 would be more than 25 feet?

12 A. Yes.

13 Q. So if a person -- I think there was some general
14 questioning that was asked you on cross-examination regarding
15 this issue of, well, you're entitled to back up water on a non
16 navigable stream as long as you don't flood out of your --
17 over onto your neighbor. Now does this flood over on the
18 neighbor?

19 A. Yes.

20 Q. Even if it didn't flood over on the neighbor would a
21 water right permit be required?

22 A. Yes.

23 Q. And why is that?

24 A. Because of the amount of the storage capacity up to
25 the spillway elevation would be such that if you did get

1 sufficient runoff, you're going to be impounding X number acre
2 feet of water at the spillway elevation, and if it's more than
3 25 acre feet you need a water right permit or else a vested
4 right.

5 Q. And a vested right is available for pre 1955?

6 A. Right.

7 Q. Okay. Talk has been had -- Mr. Magera and Mr. Brown
8 both asked you questions about this issue of, well, from year
9 to year the amount of water that's impounded by the dam
10 varies. But when we talk about a vested water right, we can't
11 go out every year and calculate that amount of water every
12 year and say that's a vested water right and it's dynamic from
13 year to year in terms of what that acre feet is, right?

14 A. Right.

15 Q. So what do you do? Can you take the average? Do you
16 take the maximum? Tell me how that works.

17 A. We validate vested rights to the spillway elevation.
18 Now I suppose an extreme example, if someone wanted to grossly
19 over build the size of the dam for the amount of drainage
20 available to it, to just grab a number, build a 200 acre foot
21 dam and you only have ten acre of drainage, in all likelihood
22 you're never going to fill your 200 acre dam, so there could
23 be a situation or a case where it would not be proper to
24 validate it to the spillway elevation.

25 But in this case it's clearly been demonstrated

1 that this dam does fill up, based on the slides and photos.
2 So the number we use is the maximum storage capacity at the
3 spillway elevation. You're just a pool of water standing
4 there.

5 Q. And again to the best of your knowledge that storage
6 capacity as of 1955 did not exceed the 42 acre feet number?

7 A. True, based on the information that's been provided to
8 me.

9 MS. BEST: Okay. I have nothing further.

10 CHAIRMAN BRINK: Does that raise any questions
11 here?

12 MR. MAGERA: Just a couple brief follow-ups.

13 RECROSS-EXAMINATION

14 BY MR. MAGERA:

15 Q. Ron, if someone had a complaint concerning water
16 backing up on their property, are you the person that they
17 come to?

18 A. They would come to the water rights program. I just
19 happen to be the person that took this one.

20 Q. And your report indicates that on August 25th of 1999,
21 that's when Mr. Weiss contacted the water rights program?

22 A. Yes.

23 Q. Are you aware of any other complaints filed in
24 reference to the area we're talking about prior to August 25,
25 1999?

1 A. No.

2 Q. And you'd agree with me that the most water that was
3 on Mr. Weiss' property would have been after the big winter of
4 1996 and so the most water would have been in 1997?

5 A. It appears that way from the slides, yes.

6 Q. And no complaints were received at that time?

7 A. No.

8 Q. Wouldn't you agree that part of Mr. Weiss' complaint
9 here was those wet weather conditions of those mid 1990 years?

10 A. Sure, yes.

11 Q. Now I want to try to simplify what Attorney Best was,
12 I think, getting at toward the tail end of her questions and
13 that is Mr. Brink raised I think a good point. Just so I
14 guess I'm clear and the Water Rights Board is clear, if the
15 water were taken off to the tree line, whatever that acre feet
16 calculation were to be, are you saying that you still have a
17 problem with it? In other words, if the water was taken off
18 to get to the tree line, and instead of 42 acre feet it turned
19 out that that was 50 acre feet, whatever it might be, back to
20 the way it looked in 1950?

21 A. Okay.

22 Q. You don't have a problem with it?

23 A. If somebody actually went out and did the
24 cross-sections and we got it down to the elevation and
25 somebody did the cross-sections and showed this estimate of 42

1 acre feet is not accurate, it's 37 acre feet, we'd probably
2 re-issue the validation. There's a license that's issued. It
3 would be relicensed for the lesser amount.

4 If it happened to be more, then we would have to
5 go through this hearing process again to get it up to what it
6 truly is, I mean based on a detailed survey of the area. You
7 can decrease it without a hearing, but the increase it, to add
8 to a vested right, you have to claim another vested right.
9 You claim the same priority date is what you do.

10 Q. And again where you came up with the calculation of 32
11 acre feet is the topo map back to 1950?

12 A. That, using surface area from that topo map and that
13 7.5 foot depth from that NRCS cost share sheet.

14 Q. And again, you don't obviously have any direct
15 knowledge of what the spillway elevation was in 1950?

16 A. Not other than a tree line.

17 Q. And just so the record is clear in your computation
18 the thirteen and a half feet, can you just again briefly
19 explain how you arrive at the figure of thirteen and a half
20 feet?

21 A. Okay, I started from the downstream toe of the dam
22 fill, the embankment that physically holds the water back. I
23 used a hand level, and you look through your hand level, you
24 find a spot on the ground and you walk up to it. I happen to
25 be five foot five inches tall at eye level, so you just stair

1 step your way up to the top of the dam, and then you subtract
2 out the freeboard from the crest. You know, I shot to the
3 crest of the dam and you subtract out the freeboard from the
4 crest down to the spillway elevation.

5 Q. And that calculation, that is the total minus the
6 freeboard, gave you the thirteen and a half feet?

7 A. Yes.

8 Q. Now am I correct in understanding that your factor of
9 .3 allows for the sloping edges of the dam?

10 A. Uh-huh.

11 Q. And again from your testimony that's the most
12 conservative --

13 A. That would give you the smallest amount of storage.

14 Q. Storage capacity?

15 A. Yes.

16 MR. MAGERA: Nothing further.

17 MR. BROWN: Nothing further.

18 CHAIRMAN BRINK: Well, I guess that will conclude
19 the testimony from this witness then. If you have nothing
20 else to add, I believe at this time we'll take the
21 applicant --

22 MS. BEST: We do have one more matter from the
23 division, and that is the Weiss affidavit, and as previously
24 been testified to, the parties did take the affidavit of Don
25 Weiss the upstream landowner, about ten days ago. Mr. Weiss

1 is elderly. He has some heart problems. There was a question
2 as to his availability, and so the parties went and had him
3 stipulate that he would not be available and that a trial
4 deposition transcript could be admitted into evidence in his
5 stead.

6 MR. MAGERA: That's correct, Your Honor.

7 MR. BROWN: Correct.

8 MR. DEERING: No problem. I will give that to
9 you so you have an opportunity to study that. The exhibits
10 are stapled to the back. There are two copies actually that
11 we got, one is the full transcript page and the other is the
12 quarter page transcripts. So I guess both could be.

13 CHAIRMAN BRINK: Let the record show we'll take
14 them in. They will be accepted.

15 MS. BEST: And I have one final exhibit. Ron
16 testified off the slides and I never had them marked as an
17 exhibit, and that would be DENR 15.

18 (DENR Exhibit No. 15 was marked for
19 identification.)

20 CHAIRMAN BRINK: So accepted, okay.

21 MS. BEST: And I do have one additional witness
22 and this will be short. I would call George Wiesler, if he
23 could just sit right there where he's at.

24 CHAIRMAN BRINK: State your full name for the
25 reporter, if she doesn't already have it.

1 MR. WIESLER: George Wiesler, W-i-e-s-l-e-r.

2 CHAIRMAN BRINK: Thank you.

3 Whereupon,

4 GEORGE WIESLER,

5 called as a witness, being first duly sworn as hereinafter
6 certified, testified as follows:

7 DIRECT EXAMINATION

8 BY MS. BEST:

9 Q. Mr. Wiesler, you've been present throughout the
10 proceedings here today; is that correct?

11 A. Yes.

12 Q. And you are familiar with the property identified in
13 Aesoph Exhibit 3, which is the topographic map, correct?

14 A. Yes.

15 Q. And in fact what's your background with respect to
16 that property?

17 A. I've been renting it from Don Weiss.

18 Q. You rent the Weiss property?

19 A. Yes.

20 Q. And how long have you rented it?

21 A. Well, twelve, thirteen years. I don't know the exact
22 year, but twelve or thirteen years.

23 Q. And have you been on the premises before that?

24 A. On the Weiss place, you mean?

25 Q. Yeah.

1 A. Well, yes, I've been there, yes.

2 Q. And were you familiar with the area generally before
3 that?

4 A. Yes.

5 Q. In fact, how far back does your -- how far back are
6 you familiar with this?

7 A. In '54 and '55 I lived just east of there, about a
8 mile.

9 Q. Okay. Have you been in the area generally since 1954,
10 1955?

11 A. Yes.

12 Q. And during that time have you had occasion to drive on
13 the section line road that's marked with a heavy red line on
14 Aesoph Exhibit C or the topo map that we've been talking
15 about?

16 A. Yes, I've drove through there.

17 Q. Is the road passable now?

18 A. No.

19 Q. Okay, and there's water backed over the road isn't --

20 A. Yes.

21 Q. And has that historically been the case as far as you
22 have known, since '54, '55?

23 A. No.

24 Q. Can you tell Mr. Brink and the Water Board what your
25 knowledge is as far as if you can remember the history of

1 whether that road has been passable in years past, going back
2 to '54, just generally talk about it?

3 A. Well, through the year it would. There would be times
4 that the runoff in the spring you could maybe not go through
5 there. But now the last few years since '76 or -- '96 or '97,
6 I don't think anybody has drove down there.

7 Q. Could you drive down there if you wanted to?

8 A. No -- well, you would have to go across the water.

9 Q. You would need a boat?

10 A. Right.

11 Q. Was that ever -- do you ever remember that being the
12 case from 1954 until 1996?

13 A. No, it never amounted to that much.

14 Q. And what was it, are you saying just a few weeks in
15 the spring you would have some mud in the road or --

16 A. Yeah, during snowmelt or a big rain.

17 Q. Otherwise the road was generally passable the whole
18 rest of the year?

19 A. Yes.

20 CHAIRMAN BRINK: Excuse me, you said 1954 to when
21 you thought it had changed drastically?

22 A. Yes.

23 Q. (By Ms. Best) What '54 to -- when do you think you
24 first noticed major changes in driveability?

25 A. '96.

1 Q. '96, okay?

2 A. To '97.

3 Q. Obviously there have been some wet years since 1954?

4 A. Yes.

5 Q. And there were wet years between 1954 and 1996?

6 A. Well, yeah, but not that wet.

7 MS. BEST: Not that wet that the road was under,
8 okay, I have nothing further.

9 CROSS-EXAMINATION

10 BY MR. MAGERA:

11 Q. Mr. Wiesler, just a couple follow-up questions.

12 Again, my name is Gregg Magera, and I represent Mr. Aesoph in
13 this matter. You indicated that you rented land from
14 Mr. Weiss for the last twelve to thirteen years?

15 A. Yes.

16 Q. And on Aesoph Exhibit C that's the southwest quarter
17 of Section 18?

18 A. Yes.

19 Q. In fact, do you rent the entire half section of
20 Section 18?

21 A. Yes.

22 Q. Now again you've rented the property for twelve to
23 thirteen years; it's pasture land, isn't it?

24 A. Yes, hay land or pasture.

25 Q. But you've never had animals in there for pasture,

1 have you?

2 A. Since we rented it, yes, but they weren't our cattle.

3 Q. Do you recall what years you would have had animals in
4 there, or livestock?

5 A. I would suppose like about in '89 and '90 and '91.

6 Q. Is there any type of fence that divides -- obviously
7 there's the section line demarcation. Is there a fence that
8 was put up by Mr. Weiss along this property line?

9 A. Down to section line, yes.

10 Q. Go ahead, I didn't want to interrupt.

11 A. On the north side of the section line is fence, yes.

12 Q. So there's a fence down to the water level and again
13 it picks up on the other side where you could pasture?

14 A. Yes.

15 Q. So you could pasture animals there?

16 A. If you got a fence across the water.

17 Q. Now again you testified that the section line road has
18 been impassable for a number of years?

19 A. Yes.

20 Q. Now you're familiar with the general area that we're
21 talking about, aren't you?

22 A. Yes.

23 Q. You've lived there for a number of years?

24 A. Yes.

25 Q. Served as a county commissioner in the past?

1 A. Yes.

2 (Aesoph Exhibit No. D was marked for
3 identification.)

4 Q. I'm going to show you a photograph marked Aesoph
5 Exhibit D and ask you to take look at that photograph; does
6 that area look familiar to you?

7 A. I don't know where I'm standing, looking east?

8 Q. Looking east.

9 A. Okay, yes.

10 Q. Approximately one mile east of the area we're talking
11 about here, isn't it?

12 A. Well, I don't know if it's that far.

13 Q. Approximately?

14 A. Okay.

15 Q. Now the road in the photograph marked Aesoph Exhibit D
16 is also under water, isn't it?

17 A. I haven't been over there since the dam -- or since it
18 flooded.

19 Q. What's the last time you recall it being flooded?

20 A. What, this here?

21 Q. Uh-huh.

22 A. I don't know that it ever was.

23 Q. You don't disagree that the photograph clearly
24 indicates that there's water over that?

25 A. Yes.

1 Q. In fact, there's water over numerous roads?

2 A. In these wet years.

3 Q. In these wet years?

4 A. Yes.

5 Q. Isn't it true, sir, that to travel along the section
6 line road even in dry years required that you removed any
7 trees that were making the area impassable?

8 A. No.

9 Q. If you have to travel down the section line you would
10 have to move a tree?

11 A. I never did have to.

12 Q. When is the last time you would have traveled it?

13 A. I suppose it would have been in the early '90s, mostly
14 just to hunt.

15 MR. MAGERA: Nothing further.

16 MS. BEST: I have one thing.

17 REDIRECT EXAMINATION

18 BY MS. BEST:

19 Q. I think I asked, and I'm not positive. When we talked
20 about the road not being passable since '96, we're not just
21 talking about just a springtime circumstance there, are you?

22 A. No. Let's see, I think it was '96 and '97 we had all
23 the snow, since then there's nobody drove through there.

24 Q. And do you remember any time previous to that from
25 1954 where there would be water across the road all year long?

1 A. For a short time, yes.

2 Q. And then again it would be a spring runoff situation?

3 A. Yes.

4 MS. BEST: I have nothing further.

5 CHAIRMAN BRINK: Does that conclude the State's
6 presentation?

7 MS. BEST: Yes, it does. Thank you for your
8 patience.

9 CHAIRMAN BRINK: We'll go to the applicant,
10 Mr. Magera.

11 MR. MAGERA: Thank you. Is it all right if he
12 sits where he's seated and testifies from here.

13 CHAIRMAN BRINK: Is he going to testify?

14 MR. MAGERA: Yes.

15 CHAIRMAN BRINK: We'll swear you in.
16 Whereupon,

17 DAVID AESOPH,
18 called as a witness, being first duly sworn as hereinafter
19 certified, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. MAGERA:

22 Q. Would you give your full name and --

23 A. David Aesoph.

24 Q. David, you've obviously been present during all of the
25 proceedings here this morning?

1 A. You bet.

2 Q. You've heard all the testimony that's been presented?

3 A. Yep.

4 Q. And did I provide you with a copy of the transcript of
5 Mr. Weiss' testimony previously?

6 A. Yes.

7 Q. And you've had an opportunity to review that?

8 A. Yep.

9 Q. You're obviously aware of why we're here today?

10 A. Yeah.

11 Q. Can you tell us, for the benefit of the Water Board,
12 the area in between Section 18 and 19 specifically where
13 Mr. Weiss has had water in the past and on the property that
14 you own; is that any type of slough area?

15 A. It always was. It always has been.

16 Q. As far as you know is it a naturally-occurring type of
17 slough area?

18 A. Yeah.

19 Q. Now in this particular case you've caused an
20 application to be filed for a vested water right; is that
21 correct?

22 A. Yes.

23 Q. For the benefit of the Water Board why don't you go
24 ahead and explain your application to the Water Board's
25 representative, Mr. Brink, and obviously remember that this

1 transcript will be reviewed by the other members, so be as
2 complete as you can.

3 A. You mean how I filled it out or --

4 Q. Sure. Why don't -- let's back up a little bit. Why
5 don't you explain a little bit of history about the property
6 and specifically your dam, and then we'll go into your vested
7 right application. Why don't you start with a little
8 history.

9 A. Well, I bought that from Orville -- after Orville
10 Hynek died. I think it had been in like '70 or '71 when I
11 purchased it from the estate. That's pretty close to the
12 right year, I think. And I also rented that state land that
13 hooks on to the Hynek land, that would be Section 19.

14 Basically the reason I wanted the dam there is
15 we never had any water there. It would constantly dry up.
16 We never ever had water through the summer. We didn't graze
17 it in the spring, we didn't have water to graze through the
18 year, and those years I used it I had to use it early in the
19 year so I could get full use out of it, otherwise it would
20 dry up for water during the hot months of the summer. And
21 whatever year it was '88 or '89, I just talked to the SCS
22 people and they said they would help cost share or see what
23 they could do.

24 Q. Before we get into that, David, let's back up a
25 little bit. Now you've heard testimony from Mr. Duvall

1 today, and there doesn't appear to be a question that this
2 dam has been in existence prior to 1955; is that also your
3 understanding?

4 A. I never knew it until he told me that.

5 Q. But ever since you've been involved in the property,
6 the dam has been there; it's been in continuous use?

7 A. Yeah, what was -- what use you could get out of it, it
8 was there.

9 Q. But it was always operational to some degree?

10 A. Yeah.

11 Q. Again, can you advise or tell the Water Board what
12 specific uses did you make of the dam initially; was it just
13 for livestock purposes or anything else?

14 A. Well, originally it could be used only for livestock
15 because it would dry clear down to nothing during the heat of
16 the summer. There was nothing left. It would dry up. There
17 might have been a few years in there, and I don't know what
18 years were wet and which were dry, but there was usually more
19 dry than wet where we lived, and it would dry down to nothing
20 and so there would be no fish or anything that would survive
21 through the summers.

22 Q. Later on a fish population began to develop in the
23 dam?

24 A. Game and Fish put some fish in for us later.

25 Q. Did there come a certain period of time when the dam

1 washed out? And if it helps I'll hold this up and you can
2 indicate where the dam would have washed out.

3 A. Well, it would have been right down in here, and I'm
4 not so sure, I don't know as it ever was there after I owned
5 it. No, I don't ever remember it holding substantial amount
6 of water. I think it might have been washed out when I bought
7 it.

8 Q. Well, now you mentioned --

9 A. I don't know that for sure.

10 Q. You mentioned that you went to the NRCS office and you
11 mentioned a cost share type program, why don't you go ahead
12 and explain that.

13 A. It's just you apply and they will come out and measure
14 it up for you and give you the specifics, how you have to
15 build it or dig it, or whatever they want. You have to build
16 it according to their specs.

17 Q. Are you an engineer?

18 A. No.

19 Q. What's your background; what do you do for a living?

20 A. I'm just an old farm boy.

21 Q. Did you rely on the SCS people in helping you?

22 A. They have always dug our dugouts, measured them and
23 they cost share them and they do everything. I've never even
24 filed a dry draw thing, whatever you're talking about. I've
25 never done that. I've signed them and they took care of the

1 paperwork.

2 Q. When this repair work was done to the dam, do you
3 remember or recall approximately when that work was done?

4 A. Well, I'm sure it was '88 or '89.

5 Q. Were you physically present when any of the work was
6 completed?

7 A. Oh, yeah, when it was done I'm sure I looked at it,
8 absolutely.

9 Q. But you weren't one of the people that was on a Cat or
10 loader or anything like that?

11 A. No.

12 Q. What was your understanding of the repair work that
13 was being done; what specifically did they do?

14 A. Well, they tore out everything that was washed out
15 here. Must have been in the old days when they done that
16 with horses. All they could do is skim off the top and that
17 would be basically black dirt and the construction guy looked
18 at it and they decided it would be best to get that black
19 dirt out of there and dig down deeper where the original dam
20 was and haul in good clay dirt from the surrounding hills.

21 Q. Now again, do you have any idea of where the original
22 spillway was located?

23 A. Exactly the same place. They pushed that all out
24 here to the south. You can see it on the pictures there where
25 mounds of dirt are, and then we just dug down further to help

1 it seal, I guess that's what you call it. They had good clay
2 in there.

3 Q. Was a culvert placed at that time?

4 A. Yeah.

5 Q. What size culvert was that?

6 A. That was a 15-inch; that's what they recommend.

7 Q. And again is it your understanding that anything was
8 changed as far as the height of the dam?

9 A. No, I'm sure not. It was -- they designed it and the
10 man built it just like they said to build it.

11 Q. So is it your understanding that nothing was changed
12 also with the spillway elevation at the time of these repairs
13 in 1988 or 1989?

14 A. To my knowledge, no, and I wouldn't know how to read
15 them things,, I have no clue. I'm sure he did it according to
16 what they wanted.

17 Q. And again this was a cost share effort between you and
18 the SCS office?

19 A. Yes.

20 Q. What happened after that with those dam repairs and
21 the dam itself?

22 A. What do you mean?

23 Q. Anything happen with that original spillway culvert
24 that was more on the west side of the dam?

25 A. Oh, well, that did -- I don't know what year again, I

1 would say it would have been '91, two or three, there must
2 have been some high water in one of those years and the
3 culvert couldn't handle it. It took the culvert out.

4 Q. What did you do after that?

5 A. Well, we just lifted that culvert clear out, filled
6 that hole in and we moved it back over here.

7 Q. When you say "we", who are you referring to?

8 A. That would have been the same guy. He was in the area
9 burying rock piles again.

10 Q. So let's be clear that the record reflects what you're
11 saying here. So after this 15-inch culvert, more on the west
12 end of the dam, washes out for some reason, you again contact
13 the SCS office?

14 A. Well, yeah, but they -- when they come out and looked
15 at it the water was still running where that culvert had been
16 and I asked them if it would be all right just to fill that in
17 and move the culvert over to this area, and they said it
18 wouldn't really be that big of a deal, and they didn't figure
19 they would bother with the cost sharing of it and they said if
20 they would allow it I would bear the expense, if they would
21 allow putting in a bigger culvert. See the original spillway
22 is right here. It was designed into the dam and it comes
23 around this side of the dam road.

24 Q. When you saw the original spillway, is that basically
25 the same location as the spillway culvert that appears in the

1 photographs that Mr. Duvall presented today?

2 A. Yeah -- well, he never ever said anything about the
3 original spillway, just showed the culvert as the spillway.

4 Q. But it's basically in that same general area, so the
5 people reading this can have a sense of where it's at?

6 A. See they originally designed a berm -- I think they
7 call it a berm -- and they poured oversized rocks in so it
8 wouldn't wash out when the dam run over. So when this culvert
9 washed out over here, the water was just up to the spillway
10 here, somebody made a mistake in there. I don't know whether
11 it was the contractor or the people that designed it, but the
12 culvert went out before the water ever went out over this
13 spillway.

14 Q. Let's be clear. Did you have anything to do with the
15 decision to place the spillway culvert at the east end or its
16 depth or anything related to moving the culvert over to that
17 location more to the east side of the dam?

18 A. Well, the man told me I could put it there. It wasn't
19 like it was a big decision. He just said, don't bury it any
20 deeper than the spillway that was made on their
21 specifications.

22 Q. Again, did you physically do any of the work?

23 A. No.

24 Q. You hired that work done?

25 A. I went and picked up the culvert.

1 Q. That's all you did?

2 A. Dropped it off and then they put it in the hole. He
3 just dug down and set the culvert on top of it.

4 Q. So the construction folks, with the assistance of SCS
5 again decided the location and the depth of that spillway
6 culvert?

7 A. Well, yeah, just all there is to it. Pretty simple.

8 Q. Now, again, you've been here this morning and into the
9 afternoon and you heard the testimony of Mr. Duvall. There
10 was some reference made regarding attempts to resolve the
11 issue of water going onto Mr. Weiss' property. What
12 specifically did you try to do to resolve this issue?

13 A. Well, I think first I talked to Donnie and I tried to
14 buy maybe the south 30 acres, so it would cover that water.
15 I didn't think he wanted to do it, and he didn't. And then I
16 mentioned to him, well, hell, maybe I could just sell that
17 acreage that's under water. He didn't want to do that;
18 didn't think he would, but didn't hurt to ask.

19 And Ron mentioned maybe we ought to try an
20 easement for those acres, and maybe years it got wet later
21 and he didn't want to do that. So I guess I didn't know what
22 else to do. I tried. Whatever he wanted I would have gave
23 him for whatever acres he wanted to sell, and he just didn't
24 want to, and I don't blame him, I guess.

25 Q. And next if we continue on with the story, in

1 reference to some suggestions made by Mr. Duvall, you then
2 caused to be filed your application for the vested right
3 permit, correct?

4 A. Yep.

5 Q. Now I believe it's already in the record, and I think
6 I'm going to show you a copy of that application; is that a
7 copy of the application that you filled out?

8 A. Yeah, I tried to fill it out. I didn't know how to do
9 it.

10 Q. What did you do when you didn't know-how to fill it
11 out?

12 A. I asked Ron and whatever he gave me I put on it.

13 Q. Now on the application when it talks about the amount
14 of water claimed, there is an X to the left of number two that
15 talks about that question, and then --

16 A. I filled that out because I didn't know-how to do it,
17 that's why I put the question mark behind it.

18 Q. And the question mark is behind the figure 70 feet?

19 A. Yes.

20 Q. Is that something you arrived at with the help of
21 Mr. Duvall?

22 A. He didn't really want to be involved in it; he didn't
23 specify.

24 Q. Was that about the same time that he said, I really
25 don't know what the acre feet amount is?

1 A. I'm thinking -- I'm assuming that's the kind of acre
2 feet I want, or I thought that's maybe what was there. I
3 tried to figure it out. I come up with somewhere between 60
4 and 80, and I just wrote down 70, and it was a figure out of
5 the blue, like guessed at it and hoped it would be right;
6 that's why I put the question mark behind it.

7 Q. Now you're aware of the engineer's recommendation, and
8 that recommendation is a validation of 32 acre feet. If the
9 dam was required to be lowered to -- the spillway lowered,
10 what effect would that have on the dam other than the obvious
11 lowering of the water?

12 A. Well, if somebody could show me where 32 acre feet
13 would be in those brown lines, or in the blue lines, I could
14 tell you, you know. He's using those trees for a guideline.
15 I don't know if those trees were there in 1950. I bet they
16 weren't. Those trees can't be over 20 years old, I'd say, at
17 the maximum, if they are that old.

18 It would be a nice guideline to go by now. The
19 trees we are seeing are right along here, right along here
20 and right across here, this little walkway here and the
21 section line, and I don't ever remember being back in there
22 until I bought the land, you know. I don't know if those
23 trees were there back that early.

24 I'd been down to Hynek's many times when they
25 lived there and helped them with their well, and so on, but

1 that's over the hill; you would never see them. I don't know
2 if those trees were there, so how can you use it for a
3 guideline, is my question, and where is 32 acre feet on
4 there? See, that's what I would like to know, and I can tell
5 you what you need to know. I don't know.

6 Q. As far as you can recall, David, are there fish in the
7 dam impoundment?

8 A. There's a lot of fish in there now. Everybody in the
9 country has been fishing there.

10 Q. It's a popular fishing spot?

11 A. Oh, yeah, last two years since they found out it was a
12 good spot, yep.

13 Q. Now, again, just so your position is clear with the
14 Water Rights Board, you are basically saying that no changes
15 were made to the dam other than repair, so you're asking for
16 the right of any water that may impound on Mr. Weiss'
17 property; is that correct?

18 A. Well, I think a fair statement would be -- I mean I
19 don't want water rights clear up into here. I wouldn't want
20 that on my property either if I was Donald. I believe if we
21 have another dry year that water is going to be dried down to
22 this or less.

23 This year, I haven't seen it for three or four
24 months now, by your picture you can see the water has come
25 down to -- I don't know, George can probably help out. I

1 would say the water is down within this brown mark and up
2 into here; that's just in one dry year. These three, we've
3 had seven or eight wet years. I've never seen anything like
4 it. Of course I'm not as old as George. He could probably
5 help out more than I could, but these wet years, I'm sure we
6 had seven to eight foot of snow in '96 and '97, and that's
7 what caused the whole problem.

8 Q. And again according to Mr. Wiesler's testimony there
9 have been times that he's made use not with his own livestock
10 but of other livestock to pasture those animals in this area?

11 A. Well, I don't ever remember George having cattle over
12 there, if he said he did, he did, but I drive by there coming
13 down here with my cattle place three, four times a week. I
14 should have seen them.

15 Q. Do you have any type of fence along the section line
16 separating Sections 18 and 19?

17 A. Sure, we have fence on the outside that's being
18 pastured right now.

19 Q. And you obviously use the dam for livestock watering
20 purposes as well?

21 A. Absolutely, yep.

22 Q. Mr. Aesoph, you heard testimony from Mr. Wiesler about
23 and also read testimony about individuals ability to drive
24 along the section line road that separates Section 18 and 19.
25 What can you tell the Water Rights Board about accessibility

1 of the section line?

2 A. Well, I guess if anybody drove that it would have been
3 me because I have land on both sides of that. There would be
4 one out of ten or two out of 15 years you could drive that,
5 and if you did drive it you would usually have to get out and
6 pick up a tree and move it, because them trees would always
7 fall over.

8 And another thing I guess we never brought up
9 either, I rented that ground from Donnie just before George.
10 I never -- there was one year that I got to mow that slough
11 and I didn't get it all. It was always wet. It's never been
12 a piece of ground that Don could use. I could run a lot of
13 details after I get going here, but I'm not going to. That
14 has always been a slough. Hold this up so I can show on the
15 board.

16 Q. Sure.

17 A. This area here, and I'm pretty close, I would say has
18 always been wet. All we ever had was little old IH's or John
19 Deeres and they are not a very heavy tractor. You should be
20 able to zip right through them. With the big equipment now,
21 you're never going to get through there in your lifetime. But
22 we would always get stuck mowing it. Once you got it mowed it
23 would dry out, then you could get in there and either bucket
24 out or bail it out. I don't think we had a baler -- yeah, we
25 might have -- yeah, we would have had a baler then, but you

1 constantly get stuck in there on the driest year because it's
2 just that kind of property.

3 But I can't tell you the years. I think I had it
4 -- well, George knows the year he started. I had five or six
5 years previous to that, so it would have been early '80s,
6 where he had it in the later '80s, I would say. So if that's
7 a problem, you know, it's always been a problem across here,
8 but now there's water standing where before it would dry down,
9 but it would always be muddy. It would never dry up so much
10 that you could ever mow it completely like you would want to.
11 So that's about all I can tell you.

12 And in going through here, I think some of the
13 neighbors even testified that it has been impassable for the
14 same amount of years I thought. One out of ten or 15 you
15 could maybe go through that section line, and that's about all
16 I know about that part of it.

17 Q. Anything that you've heard --

18 A. It's never been to where it could be used. It's
19 always wet, but now there's water standing and that seems to
20 bother Mr. Weiss, I guess.

21 Q. Anything further you want to add?

22 A. I don't know what it would be. I might think of
23 something later.

24 MR. MAGERA: Nothing further at this time.

25 CHAIRMAN BRINK: Mr. Aesoph, I got confused when

1 you first started. You said you bought this property in the
2 '70s?

3 A. I'm thinking it was '71. Orville died I think in '69
4 or '70, and I think the estate sold it in '71.

5 CHAIRMAN BRINK: And then you said you wanted a
6 dam there because it was dry. Was the dam -- when we talk
7 about the one that was constructed in the '50s was there
8 nothing there when you bought it?

9 A. Maybe I didn't say it quite right. When I bought it
10 it had already been washed out, I'm pretty sure, and it held
11 -- it still held some water, but it would dry down during the
12 heat of the summer. You could never get a full year's use out
13 of it.

14 CHAIRMAN BRINK: Then I'm interested in -- you
15 talked about the repairs that were done in '88, '89, and I
16 wonder if you could look at this photo that was in the staff
17 report. This one right here on page two, the top one shows
18 the downstream side of the dam embankment.

19 A. Yep.

20 CHAIRMAN BRINK: I think you mentioned that your
21 contractor maybe decided to take out all of what was left and
22 started over; is that fair?

23 A. Him and the SCS guys thought it would be better to
24 knock it out because it was all dark dirt. They couldn't go
25 down very deep.

1 CHAIRMAN BRINK: So what we're looking at is a
2 total new dam from the ground up; is that what you said?

3 A. You bet.

4 CHAIRMAN BRINK: Okay.

5 A. You see we pushed all this -- if you look down here
6 you'll see all that dirt and it's all weeded over now but
7 that's all that old shit that was there and they pushed it
8 out, just because it was black dirt they didn't think it
9 would hold.

10 CHAIRMAN BRINK: It would be very helpful
11 because I'm envisioning something that was raised above the
12 old one, but this is total new construction then.

13 A. I would say pretty much new, maybe up on this part
14 here there would have been some that was left because it was
15 natural. It's a natural hill there. But down here it was all
16 black dirt, and I'm just sure them hold horses couldn't get
17 down into the clay.

18 CHAIRMAN BRINK: And your recollection when this
19 was built, did they leave an emergency spillway with the rock?

20 A. Nope. Right over here, it was cut out over here and
21 it's still there. You can still see it. There's rock there.

22 CHAIRMAN BRINK: We've been using spillways and
23 overflows kind of intermittent. I think of a spillway as a
24 spillway?

25 A. It's not over -- we didn't want it to go over the top

1 of the road, to wash it out, that's why we put the culvert in
2 there for an emergency spillway, in case this one couldn't
3 handle it all, instead of letting it come around the east
4 side.

5 CHAIRMAN BRINK: Usually it's the other way
6 around. Put the pipe in to control the overflow.

7 A. That's the way we put the culvert in, to match the
8 spillway. We didn't want it washing the dam road out again.
9 I think that's what happened to the original dam. It couldn't
10 hold when it got to the spring and high runoff and took it
11 out, goes over the top of the dam road and eventually just
12 eats its way down.

13 CHAIRMAN BRINK: Do you have anything to do with
14 setting the elevation of that pipe through there?

15 A. Heck no. All he did was -- and I know for a fact he
16 just dug down to the water with the Cat and they laid the
17 culvert on top of the water, covered over the culvert. The
18 spillway has already been established. The culvert is at the
19 same depth.

20 CHAIRMAN BRINK: Okay, thank you. You've been a
21 big help for me.

22 MS. BEST: I have some questions.

23 CROSS-EXAMINATION

24 BY MS. BEST:

25 Q. You purchased the ground in around 1971?

1 A. I think so, Diane. You would have to look that up in
2 the records, but I'm thinking that's close.

3 Q. Okay, and at the time you purchased the ground you
4 think the dam was washed out?

5 A. I think so.

6 Q. Okay. It was storing water though?

7 A. Yeah, it held a certain amount of water and I wouldn't
8 know how much. I know it wouldn't last a summer on a dry
9 year.

10 Q. It wouldn't last the summer?

11 A. No.

12 Q. Typically a small amount of storage in the springtime
13 then?

14 A. I can't give you any specifics how much but, yeah,
15 there would be some water in the dam part and maybe back
16 further towards the road there's kind of a hollow up towards
17 the section line, there's another little dig out there that
18 would even dry down on the dry years.

19 Q. Okay, the dam didn't back water up on the road in
20 1971?

21 A. I wouldn't say in '71 but sometime between '71 and '89
22 there was water over that road. I had to walk through water
23 to fix fence. It would be chest deep, so it had to have been
24 over the road.

25 Q. In the springtime?

1 A. Of course, when you always fix fence in the spring.

2 Q. If you have to?

3 A. If you have to.

4 Q. Dam backing water up in the -- is the dam backing
5 water up over the road in the fall, back in the early '70s?

6 A. Well, generally mow hay, you know, in July. I suppose
7 that would be the proper time. There had to be water sometime
8 because we couldn't mow it and maybe it wasn't over the road.
9 The road might have been two foot higher or a foot higher than
10 either side of Donnie's or my property. But most years there
11 was water on both sides of the road.

12 Q. All year, all year long most years?

13 A. I would say so, yep.

14 Q. Well, you drove on it --

15 A. Well, not always. I have driven that road one, two
16 years out of the 10, 15, maybe three years. I don't know
17 that; Christ, I can't remember yesterday let alone 15 years
18 ago.

19 Q. You've driven it one or two years out of the last 15
20 years?

21 A. Oh, no, since these wet years you can't get close to
22 it. In the '90s I don't think there had been a year that you
23 could have drove over it, not one year. I'm just sure of it.
24 And naturally it was worse in '95, '96 and '97, '98, '99, it
25 don't really matter, they are all wet.

1 Q. Okay. When you bought the property you believed the
2 dam was washed out?

3 A. I'm pretty sure it was.

4 Q. And what made you think it was washed out?

5 A. Well, you could see.

6 Q. Tell me about how it looked.

7 A. You could see right over on that east side that we
8 were just talking about where we put that culvert is where it
9 was right in here. It would have been just a little gully
10 through there. I'm sure the water just started going over and
11 I'm sure -- you know how water works.

12 Q. You could see it --

13 A. Once it starts going it will cut a gully and go out.

14 Q. Could you see a gully cut?

15 A. It wasn't a sharp gully, unless it was a washout and
16 it had been silted in. I'm sure it was out before I ever
17 bought it.

18 Q. So it was a gully cut through; it wasn't a deal where
19 the top elevation of the dam completely washed away?

20 A. That would have been if you wash out the dam road,
21 that's the elevation, that's -- I would describe it that way.

22 Q. So it wasn't just a gully, it was the whole length of
23 the dam?

24 A. It would have been the whole length. It was probably
25 a 20-foot section of it, but it just kind of gullied it out

1 over the years. It silts in again, and cattle walk down it.
2 It was washed out enough it didn't hold enough water to make
3 it last for the year.

4 Q. Okay. Do you have any information regarding what the
5 elevation of the dam was in the years 1955 or previous?

6 A. I don't have any then or now. I wouldn't know one
7 from the other.

8 Q. So your answer is the same for all times since 1971;
9 you don't have any elevations for what --

10 A. No, I don't personally. I'm sure Ron could help you
11 more there than me.

12 Q. What about spillway elevations, is your answer the
13 same for the entire period?

14 A. I wouldn't know what they were then or now.

15 Q. 1955?

16 A. I bet -- I don't know. I might have been five or six
17 then.

18 Q. Do you know what the storage -- how many acre feet of
19 water would have been stored in the dam in the early '70s when
20 you bought that ground?

21 A. No, that's why I asked, I would like to have somebody
22 show me between those guidelines, them brown and blue lines, I
23 could show you where the water probably was if you could tell
24 me -- I could tell you the depths probably, too. They weren't
25 very deep.

1 Q. And the circumstances with the washout was from 1971
2 until 1988; is that right?

3 A. Because I never did anything with it until '88 or '89.

4 Q. So there was period of 17 years where the structure
5 was not in good repair; is that a fair statement?

6 A. That's what I would say.

7 Q. Okay, and so the maximum it could hold, that that
8 structure could have held would have been the amount below
9 that washout, below that 20-foot gully washout?

10 A. Basically, yeah. That little dugout in there probably
11 further held water longer, but it's all silted out, too, and
12 it dried up in the summer, too.

13 Q. We've got one 17-year period from 1971 to 1989, or
14 16-year period, whatever you want to say there, that's one
15 period of time, and then from '88 until now, that's another
16 12-year period of time. You're not saying that the amount of
17 water that's consistently been stored during the last 12 years
18 is the same amount that was stored from 1971 to '89, are you?

19 A. Never did say that.

20 Q. Okay. And it is more, isn't it?

21 A. Oh, sure.

22 Q. We just don't know how much more, is that the issue
23 today?

24 A. Well, I think the issue is probably wet years.

25 Q. Wet years, okay.

1 A. That's what I think.

2 Q. Given this gully situation you're talking about, you
3 think that the dam before this 1988 repair or rehab, do you
4 think the dam could have held as much water as it's holding
5 now?

6 A. I think it probably would. I've never seen it. I've
7 never seen as wet a years as we've had, though. I can't
8 honestly answer that. I never had the specs.

9 Q. Okay. With respect to the water over on the Weiss
10 property, what is your beneficial use of water on the Weiss
11 property?

12 A. Well, the whole idea of the dam is to store water,
13 right; wouldn't you say?

14 Q. Certainly.

15 A. Okay. If you lower the dam, there goes the whole
16 idea. I mean that's why the SCS designed it that way, was to
17 hold water for my cattle.

18 Q. The beneficial use of the dam on your property is for
19 your cattle to water?

20 A. Yeah.

21 Q. What's the beneficial -- what good does it to you to
22 have water on Mr. Weiss' property?

23 A. It does me no good for the water to be over there, if
24 that's what you want to get at.

25 Q. You don't go over to his property to use the water?

1 A. No.

2 Q. You are not trespassing on the --

3 A. No.

4 Q. You don't -- you and Mr. Weiss really don't get along,
5 do you?

6 MR. MAGERA: What relevance does that have with
7 anything?

8 CHAIRMAN BRINK: I would have to agree.

9 Q. (By Ms. Best) I'll put it a different way. When did
10 you first approach Mr. Weiss to see if you could reach some
11 kind of accommodation about backing water up on his land?

12 A. I don't know. It was sometime after I talked to Ron,
13 I believe.

14 Q. Whatever date that was?

15 A. He kind of gave me a few ideas and I tried it. I
16 didn't think it could hurt.

17 Q. So you didn't approach Don about trying to figure out
18 some kind of an agreement until after he went and complained
19 to the state?

20 A. Oh, no, actually Donnie sold me the place back in the
21 '80s and I had a contract at home, and he had it drawn up, we
22 just never signed it. Something went wrong. His pills got
23 off balance or something and he got sickly, and I talked to
24 his daughter and she said just let it go.

25 Q. You had a sale deal all worked out for this ground?

1 A. Absolutely.

2 Q. And do you own all the ground around there?

3 A. No.

4 Q. Do you farm quite a bit of the ground around there?

5 A. No, I own ground east of him, southeast of him, south
6 and southeast of him.

7 Q. Okay.

8 A. No, there's other neighbors besides me.

9 Q. And you've approached him about buying the entire
10 quarter again?

11 A. Yeah, the entire quarter, 20 acres, 30 acres, the
12 water acres only, just whatever he wanted that would make him
13 happy, and that's -- there never was no argument, no nothing,
14 just a suggestion.

15 Q. Just a second, I may have one additional question. I
16 want to clarify something with you, Mr. Aesoph. I want to
17 make sure I heard the answer right. You bought the ground in

18 '71. Bear with me, I know I'm asking this again of you, but
19 I want to make it crystal clear. You bought the ground in

20 '71. There's a washout, which is about a 20-foot wide --

21 A. I don't know that for sure, but it's wide enough you
22 can see it, and that had to have been over years because it
23 wasn't a straight up and down washout, like a dam would
24 normally do. If the water took it out it would be cut out.

25 Q. And it remained in that shape. Did it wash out more

1 as you owned the property?

2 A. Never had any wet enough years to really tell, I don't
3 think.

4 Q. Okay. And I believe one of the questions that arises
5 is with that gully in place, was the dam physically capable of
6 holding as much water back during the period from '71 to '78
7 as it has in this last 12 years, given the fact that that
8 gully washout situation existed?

9 A. Well, that's obvious, Diane. You can't -- when it's
10 washed out it can't possibly hold as much water.

11 Q. And it was washed out for as many as 17 years?

12 A. Well, it had been washed out when I got it, I'm just
13 sure it was. The dam sure had to have been because it was
14 already silted in, you know. The washout wasn't straight up
15 and down, and that's what it would have been if it washed
16 out. The cattle, and whatever, had to have trampled it in
17 already.

18 Q. So -- but what's puzzling to me and what I'm trying to
19 get to the bottom of, you're claiming that a vested right
20 should be validated for the entire amount of water that's
21 being held, that the dam is capable of holding today, even
22 though we have a 16-year period where the structure couldn't
23 possibly have held that much water?

24 A. I want water on my property. I don't want it to dry
25 up in the middle of the summer. Why it holds so much water,

1 you'll have to take that up with the SCS. I didn't design
2 it.

3 Q. So you're saying they might have increased the
4 elevation of that culvert beyond the historic elevation?

5 A. No, I never said that.

6 Q. Do you have any idea what the depth would be -- yeah,
7 what the maximum water depth would have been -- see as a gully
8 washes out, it essentially creates a new spillway. That's
9 the -- it's the lowest possible point, so your water starts
10 going through there. What's -- what would be the depth from
11 the bottom of that gully down to the surface -- down to the
12 land surface?

13 A. To the beginning, do you want to know.

14 Q. NCRS has a notation of 7.5 feet as a
15 spillway-to-surface depth; is that where that -- is 7.5 feet
16 also from?

17 A. I don't understand that. Ron comes up with 13 and a
18 half and they come up with 7.5. I don't know where that comes
19 from.

20 Q. Okay.

21 A. I don't understand how they arrive at what they arrive
22 at.

23 Q. What about from the gully down to the surface, bottom
24 of the gully down to the surface?

25 A. The bottom of the gully? Where would that be, I mean

1 what gully?

2 Q. The gully you were just talking about.

3 A. Where the dam washed out?

4 Q. Sure. What we're getting at is, you know, if the
5 water raised up to the bottom of that gully and didn't start
6 flowing through the gully, how deep would the water be?

7 A. Behind the dam?

8 Q. Behind the dam, sure, and you said it was dry in a
9 number of the years, so can you -- give us a best guess as to
10 how many feet that would have been behind that dam?

11 A. I couldn't even guess. I know it was dry in '89;
12 that's when we dug it. We straightened it out so -- I don't
13 know. I've walked in the water different places fixing
14 fence. I know how deep it was there, but not behind the dam.

15 Q. Now I'm not talking about actual water depth, I'm
16 talking about how deep would the water have been if it filled
17 up to where that gully was?

18 A. I wouldn't know that. I bet that would vary every
19 year because of the washout, of the silting and so on.

20 Q. From the bottom of the gully to where the water
21 channel would be, do you have any --

22 A. Bottom of the gully to the channel; is the gully
23 behind the dam, is that what you're saying?

24 Q. Behind the dam, it's dry in the years we're talking
25 about but --

1 A. I wouldn't know. In '89 it's dry is all I can tell
2 you.

3 Q. Two feet?

4 A. I wouldn't even guess because if there was a gully
5 there it obviously didn't hold water very long. There was
6 nothing to run out. I don't know what you want. Can you show
7 me on this map what you want?

8 Q. Well, Mr. Aesoph I think you know.

9 A. No, I don't. I'm not trying to be obstinate, I don't
10 know what you want.

11 Q. I want to know how deep your dam was in 1971 or '72?

12 MR. MAGERA: I would interpose an objection;
13 we've been around and around. I haven't objected to this
14 point, but it's been asked and answered. He has indicated he
15 doesn't know.

16 CHAIRMAN BRINK: I believe he has said he
17 answered.

18 MS. BEST: He's refused to answer several times.

19 CHAIRMAN BRINK: Mr. Aesoph, do you know how deep
20 your well was -- or your dam was when you bought it?

21 A. No, I have no idea, with water or without?

22 CHAIRMAN BRINK: That's not the question, I
23 guess.

24 A. She wants to know how deep the gully is next to the
25 washout. I don't know.

1 Q. (By Ms. Best) Okay, there is a misunderstanding about
2 the way I've asked the question. Okay. You have identified a
3 gully and a washout; are those two separate things?

4 A. To me a gully is not a dam.

5 Q. I see. Okay, you're not talking about a gully across
6 the face of the dam?

7 A. No. The gully is back in here. There's a little
8 thing there, here's the dam, here's the wash -- where it was
9 washed out. Now where do you want to know? What do you want
10 to know?

11 Q. I'm asking you about the washout area on the dam.

12 A. Right here?

13 Q. As water would flow, normally the dam would stop the
14 water, but there's a washout area so that water would flow
15 through to the other side of the dam.

16 A. Okay.

17 Q. In 1971; that's what you testified to, right?

18 A. Yeah, I know it's washed out.

19 Q. So there's a washout. The bottom of the washout --

20 A. Compared to the top of the dam?

21 Q. As compared to the bottom channel behind the dam.

22 A. Come here and show me what she wants, Ron.

23 Q. That map isn't --

24 A. I can't make it out.

25 Q. Well, how deep would the water be?

1 A. If it didn't wash out?

2 Q. No, how deep would water be before it would start to
3 flow through the washout, assuming there was water there,
4 which you have already testified that there was not water
5 there; how deep would the water have to get before it flowed
6 through that washout?

7 A. I don't know that.

8 Q. Would it be more than two feet?

9 A. I answered your question, I do not know.

10 MS. BEST: Thank you. No questions.

11 MR. MAGERA: Very briefly.

12 REDIRECT EXAMINATION

13 BY MR. MAGERA:

14 Q. David, Attorney Best asked you about this washout, et
15 cetera, but your testimony when I was asking you questions,
16 and I believe this is correct, is that ever since you have
17 been involved with this property the dam area has been
18 operational to some degree?

19 A. Yeah, but I don't know how deep it was. I know there
20 was water in there.

21 Q. Correct.

22 A. I know it would dry up. I really don't know the depth
23 of it.

24 MR. MAGERA: Nothing further.

25 CHAIRMAN BRINK: Does that conclude the

1 applicant's --

2 MR. MAGERA: One final item, so the record is
3 clear, I had discussed this with Attorney Best. I had not
4 discussed it with Attorney Brown, but as part of the
5 application there were a number of exhibits and Attorney Best
6 did advise me that she wished to interpose an objection to
7 some of the recommendation letters from downstream landowners,
8 about the effect of water if the dam were lowered on their
9 property and on the fish population, et cetera. I think it's
10 already part of the file, but I know that Attorney Best wanted
11 to interpose an objection. Unless you feel it's necessary I
12 won't re-offer these because they are already in the record.

13 MS. BEST: Yes. I would like to make a record on
14 the circumstances. The validation for vested water right
15 process includes an application, and it allows people to file
16 with the application affidavits indicating -- in support of
17 the application indicating some historic use.

18 In this instance there were letters submitted,
19 not affidavits, but letters submitted regarding, to some
20 extent, recording what's perceived to be historical use, and
21 to some extent beneficial use today. And I guess that's not
22 really the question.

23 But the division takes the position that those
24 are affidavits or letters or whatever in support of the
25 application to help investigate the application. And the

1 division looks at those letters and it makes recommendations
2 along with whatever information it can get from anywhere
3 regarding what a proper number would be for validating a
4 vested water right.

5 But once we get to a hearing stage, those people
6 that make assertions regarding historic water use need to be
7 testifying regarding what they have seen as historic water
8 use rather than relying on letters. Now there are, in that
9 record, one, two, three, four, five letters. We have no
10 objection to two of those letters. If those people were
11 standing here today and they were testifying to these things,
12 we wouldn't be cross-examining two of those people anyway, and
13 we're not going to object to those letters coming in and those
14 are the letters of Virgil Hanson, Virgil -- Mr. and
15 Mrs. Virgil Hanson and Terry and Carol Wittig.

16 But there are three letters that we object to.
17 One is the letter from an individual named Marianne Wittig,
18 and if she were here today we would want to cross-examine
19 her. The fact that they are asking for letters to be admitted
20 into evidence denies us of that ability to cross-examine, and
21 it's hearsay evidence. The same is true with the letter from
22 a Mr. Mike Aesoph, and in addition -- we make the same
23 objections and in addition Mr. Mike Aesoph's comments
24 regarding what he's heard from the neighbors would also be
25 sort of a double hearsay issue.

1 Thirdly, there's a letter from Gary Kopecky that
2 is not an original letter that is in the record. I would, of
3 course, want to cross-examine him on that, and for that reason
4 I raise the same objections for those three entities.

5 CHAIRMAN BRINK: Very well. They will not be
6 part of the hearing then. Thank you, Mr. Aesoph for your
7 testimony today.

8 MR. AESOPH: Thank you.

9 CHAIRMAN BRINK: Mr. Brown, are you folks here to
10 testify or --

11 MR. BROWN: No, we had our -- Mr. Wiesler
12 testified as to what he's going to testify to.

13 CHAIRMAN BRINK: Then you were already a State's
14 witness today.

15 CHAIRMAN BRINK: What will happen, I think we're
16 done, are we?

17 MS. BEST: I think we waive a closing statement.
18 It's eminently clear what the State's position is on this.

19 CHAIRMAN BRINK: Do you wish to make any.

20 MR. MAGERA: I wouldn't waive a closing
21 statement. I would make a brief statement as follows for the
22 benefit of the Water Rights Board. It's clear from state law
23 that you're presented with four options regarding this
24 application. You can approve it. You can approve it with
25 qualifications. You can defer it, or you can deny it.

1 You've heard the testimony today. You'll read
2 the testimony from Mr. Weiss. Now one question that becomes
3 readily clear is the position of the State in recommending
4 validation up to a certain point. I don't think any of us
5 want to go through this exercise again, and I guess I would
6 want to point out it appears clear obviously Mr. Aesoph's
7 application is for the entire area. He's testified today he
8 certainly wouldn't want all that water on the property if he
9 owned it as well. We've tried to get it resolved;
10 unfortunately it hasn't been able to be resolved.

11 However, the State's recommendation for
12 validation and the 32 acre feet creates somewhat of a problem,
13 if in fact the water level were, in fact, lowered or that was
14 the recommendation or order, and it went down to that tree
15 line and it was more than 32 acre feet. My understanding
16 then is we may have to go through the same process to, so to
17 speak, validate that number of acre feet.

18 So with that I think it's clear that the repair
19 work that was done here, as you, Mr. Brink, appropriately
20 pointed out, this wasn't something built on top of an existing
21 dam. It was repair work. The plain and simple fact of the
22 matter is none of us knows what that initial spillway
23 elevation was, what the initial culvert -- spillway culvert
24 elevation was.

25 But again it's been clear from the testimony

1 that what repair work was done here was in fact repair work.
2 This dam has been in existence since 1950. The testimony is
3 clear that it's always been operational to some extent, and
4 certainly it appears that a large portion of the problem has
5 been due to extreme wet conditions in the mid to latter
6 1990s.

7 So with that, based on the testimony and
8 evidence that's been presented we would respectfully request
9 and urge you to approve the application. Thank you.

10 MS. BEST: I guess I would take this time. I
11 said I waived closing, and I still won't make other than a
12 couple comments here. Just so it's eminently clear, when
13 somebody comes in and applies for a water permit application,
14 including vested right validation application, they have the
15 burden of showing that they have continually, in the legal
16 sense, the no forfeiture or abandonment sense of the water
17 code which has been in existence for a hundred years, they
18 have the burden of showing that continuous beneficial use at
19 the amount claimed.

20 And the amount claimed here is 70 acre feet.
21 There just isn't the evidence on it. In fact, Ron Duvall --
22 so in fact they didn't meet their burden at all showing how
23 much water they used. So Ron Duvall, in looking give them the
24 benefit of the doubt, said it looks like 32 acre feet, and
25 possibly as high as 42 acre feet, but certainly in no event

1 above that tree line.

2 I frankly don't know what this 1971 to 1989
3 evidence regarding the washout does. If he's saying the
4 washout was even below that 32 acre foot level, I think
5 there's definitely an abandonment there. But the abandonment
6 would only be to the extent that they couldn't hold water
7 during that period of abandonment. You know, if the structure
8 is in disrepair for that period of time, there's an abandoned
9 water right.

10 So the legally speaking the water right would be
11 only that the amount of water that was capable of being
12 impounded behind that structure continually and beneficially,
13 and so during that 16-year period would be the lowest amount,
14 and it would be the only amount that would have been
15 continually beneficial.

16 Frankly, we don't know what that is, and so
17 we're staying with the 32 acre feet, 42 acre feet
18 recommendation, no greater than that, but that the tree
19 line -- using the tree line as a marker. I think that's
20 gracious, considering the fact that frankly there isn't any
21 evidence that that 32 acre feet was being used during that '71
22 to '89 time period for sure. But having said I waived a
23 closing statement, I talked anyway. Thank you for your time.

24 CHAIRMAN BRINK: Well, as you know, I'm just here
25 to pick up the information and make some sort of a

1 recommendation back to the full board, which will be done in
2 September, I believe, the September meeting. I can tell you
3 this, that looking at the aerial photos versus the testimony
4 regarding washouts that may have rendered the dam less than
5 what it was in 1950 or '75 or even '85, looks to me like the
6 dam was full. The aerial photos in '84 fill to the areas that
7 Mr. Duvall was referring to, couple acres up in 18 and 19.

8 I'm trying to find where there was any impact,
9 if it washed out, and so myself it looks like the dam was
10 working in '84 like it was intended to. And what was made
11 after that is another matter, so I'm leaning, I guess,
12 towards recommending to the board that the permit be
13 validated with the engineer's recommendations. And I do
14 think we will want to discuss any problems we may be creating
15 for the applicant if there is a problem with storage versus
16 elevation being different.

17 We may ask that perhaps someone, if they can
18 arrive at -- Ron, I know what you're using to develop the
19 estimated volume, surface air times three-tenths, four-tenths,
20 five-tenths, whatever, but I think you could also take the
21 topographic map and planimeter each layer and try that with
22 the increments between. Then there's no guesswork. You don't
23 apply three-tenths, four-tenths, five-tenths, I'm just saying
24 try that before the meeting to see what you come up with.
25 That takes away, to me, one of the question marks in

1 evaluating.

2 MR. DUVALL: The difficulty with that would be
3 you have a surface area shown there. You start assuming
4 where those contour lines run underneath that blue area.

5 CHAIRMAN BRINK: That's all you're doing now.

6 MR. DUVALL: I know there's assumptions being
7 made now, but I mean if you're going to planimeter down below
8 to get a cross-section of the total drainageway, that's what
9 you're talking about.

10 CHAIRMAN BRINK: Each contour line represents an
11 element. Instead of taking the cross-section this way, take
12 it this way. I'll talk to you after. With that --

13 MR. MAGERA: One final thing on the record,
14 Attorney Best and I, given your statement I'm not sure
15 proposed findings or conclusions would be necessary, unless
16 you still think they are. He's going to make a
17 recommendation.

18 CHAIRMAN BRINK: It will still be up to the Board
19 to decide. Do you want findings today? Is anybody waiving
20 them?

21 MS. BEST: Oh, no.

22 CHAIRMAN BRINK: I wouldn't think so.

23 MS. BEST: We want to get this case going, so we
24 want to propose findings. Get a procedure deal here worked
25 out so that the Board can do something for final consideration

1 in it's September 27th meeting. And originally Gregg and I
2 talked about submitting proposed findings of fact and
3 conclusions of law sometime between the 15th and the 20th of
4 September. My thought obviously is more toward the 15th and
5 Gregg's is more toward the 20th, but whatever date you choose
6 as the cutoff. We do have this issue of allowing additional
7 evidence into the record. You've asked the Division to
8 perform a calculation.

9 CHAIRMAN BRINK: Let me make it easier for you --

10 MS. BEST: I don't know how we're going to handle
11 that. If it's something we can do -- can we do it? I want
12 Ron to testify as to whether he can do it and if he can do it,
13 how we're going to handle that. Can we handle it in paper
14 by --

15 CHAIRMAN BRINK: I'll make it easier. My
16 recommendation will be on the higher level of stored water,
17 just because I don't want to see anybody ending up with a
18 problem of excessive storage.

19 MR. DUVALL: What higher level did you have --

20 CHAIRMAN BRINK: Whatever you had, 42 acre feet.

21 MR. DUVALL: And I don't have a problem with
22 that.

23 MS. BEST: You're saying instead of doing a
24 re-calculation, just take the .4 calculation?

25 CHAIRMAN BRINK: That's correct.

1 MS. BEST: Which Ron has testified as being the
2 42 acre feet as the maximum.

3 CHAIRMAN BRINK: It's not a big deal, but it
4 seems to address the concerns that this gentleman has, and
5 it's an area of -- point of argument on somebody's part. It's
6 really a judgment call, I guess, and --

7 MR. DUVALL: I don't think we have any trouble
8 with that number.

9 CHAIRMAN BRINK: If you don't have any trouble
10 with that, that would be my recommendation to the board, so we
11 can go from there, I guess. That way we get it over with, as
12 what Diane was talking about. Any problem with that?

13 MS. BEST: No. I certainly don't have a problem
14 with it, and I don't have a problem -- you're the guy in
15 charge. If you think that there's some additional
16 calculations you would like the parties to submit, I was only
17 suggesting it be in writing and shared among the parties.

18 CHAIRMAN BRINK: Sometimes it's better to not
19 know. It may come up with less. Well, I know that's the way
20 gravel stockpiles are done. They slice them a foot at a time
21 this way, and why couldn't you do it with water. But maybe
22 try it. I'll talk to you off the record when we get into
23 Pierre next week, but just see how it comes out.

24 MS. BEST: If you can just put it on the
25 record --

1 CHAIRMAN BRINK: My recommendation today will be
2 to be at the 42 acre feet, but if you would satisfy yourself
3 what you come up with, I don't know.

4 MS. BEST: We won't be doing any talking off the
5 record. If Ron does a number --

6 CHAIRMAN BRINK: I can do it myself; would you
7 give me a copy of the topo maps?

8 MR. MAGERA: I don't have any problem handling it
9 by mail --

10 CHAIRMAN BRINK: I'll just take one with me.
11 I'll satisfy myself, just to see, but it will not be on the
12 record. I'm just curious how these basin factors apply.
13 That's really what it is, basin characteristic coefficient is
14 what you're doing.

15 MR. DUVAL: That gets into the whole reason I
16 was hesitant to give -- help them with an acre foot number in
17 the first place. It's the applicant's burden of proof, so
18 anything we supply, you know, can be attacked by them or some
19 other opposition or whatever so --

20 CHAIRMAN BRINK: Did you tell them anything over
21 25 acre feet might get into a hazard dam category?

22 MR. DUVAL: It's in the qualifications, the
23 plans and specs be approved for the work that --

24 CHAIRMAN BRINK: Maybe that's why the 25 acre
25 feet showed up on the application.

1 MR. DUVAL: What.

2 CHAIRMAN BRINK: Maybe that's why there's no 21
3 acre feet -- I thought I saw one with a question mark behind
4 it.

5 MS. BEST: That's 70 acre feet.

6 CHAIRMAN BRINK: What was the one that had the
7 question mark on it? There we go, that is the one we were
8 looking at. That's just livestock -- I'm sorry. Okay, it was
9 the 70 acre feet question. The 21 acre feet was the amount he
10 was planning to use for livestock watering.

11 MS. BEST: Do we have a date certain for the
12 findings; did I miss that?

13 MR. DEERING: Do you want to do that on the
14 record?

15 MS. BEST: You bet.

16 MR. DEERING: Because I have a procedure
17 question. Is that the way it has been done, that the hearing
18 examiner's recommendation goes to the Board with his proposed
19 findings, or are you talking about the parties involved making
20 proposed findings to the entire Board.

21 MS. BEST: I was suggesting that the parties make
22 proposed findings to the full board.

23 MR. DEERING: Okay.

24 MS. BEST: We all know that the Water Board
25 normally sits as an entire body in a case and makes its

1 deliberations at the end of a proceeding and then its lawyer
2 generally puts those in writing for the full board.
3 Considering that the full board hasn't deliberated, I thought
4 that we just put our positions down in writing as to what we
5 think those findings ought to be, and present it to the board
6 and the board can accept or deny individual findings as
7 proposed by the parties. If Mr. Magera has -- I think he's
8 agreed to that procedure. We're certainly willing to
9 accommodate whatever procedure works. We just want to --

10 MR. DEERING: And what dates are the two of you
11 looking at?

12 MR. MAGERA: Between September 15th and 20th.
13 Attorney Best suggested the 15th date, and this was purely as
14 a courtesy to me because I'm covering work for other lawyers
15 in our office as they are in trial, so I wanted approximately
16 maybe five additional days, which would still be a week before
17 the full board meets.

18 MS. BEST: A decision -- I guess one question for
19 you is do you want them simultaneously and send them out with
20 the transcripts to the board at the same time? I think that
21 procedure is completely up to you, how you want to do it.

22 CHAIRMAN BRINK: That way they will take them at
23 the board meeting, sit down and pull them apart and take the
24 happy medium.

25 MR. DEERING: I will tell you that I will

1 probably take both of those sets and develop some of my own to
2 suggest to the board.

3 CHAIRMAN BRINK: That's correct; that's usually
4 the way.

5 MR. DEERING: So the more time you can give me,
6 the more time I'm going to like it.

7 MS. BEST: The board meeting is the 27th; is the
8 20th soon enough.

9 MR. MAGERA: Yes, as long as I get them on the
10 20th.

11 MR. DUVAL: Can I make one more thing clear
12 before we're off the record on this 42 acre business? I want
13 to make sure this is clearly understood, when I say I don't
14 see any problem with going with the 42 versus 32 acre feet, by
15 saying I'm agreeable to 42 acre feet I'm in no way, shape or
16 form saying this area is 32 acre feet or I think this area is
17 42 acre feet. I'm not saying that whatsoever. I'm talking
18 about this sort of an area, when it's all said and done,
19 marked with 1862. I want to make sure that's clear.

20 CHAIRMAN BRINK: We're meeting in Rapid City the
21 next time, is that right?

22 MS. BEST: Yes. We have no objection if -- I
23 haven't talked to Gregg, but we have no objection if
24 Mr. Aesoph's counsel appears by telephone.

25 CHAIRMAN BRINK: Because that's a long way out

1 there.

2 MS. BEST: Or comes to Rapid.

3 CHAIRMAN BRINK: Anything else for the good of
4 the order? If not, I appreciate your time and efforts and
5 we'll -- you're going to all mail your findings to John?

6 MR. DEERING: Probably to me.

7 MS. BEST: Okay.

8 CHAIRMAN BRINK: Or you.

9 MR. DEERING: Probably me; it should be me.

10 CHAIRMAN BRINK: Do you have his address?

11 MS. BEST: I do.

12 MR. MAGERA: Can you FAX it to me?

13 CHAIRMAN BRINK: Harold is in Sioux Falls. Do
14 you have a card for him here?

15 MR. DEERING: Yes, I do. One. I don't have to
16 hand those out very often.

17 CHAIRMAN BRINK: This meeting is adjourned.

18 (Whereupon, the proceedings were adjourned.)
19
20
21
22
23
24
25

1 STATE OF SOUTH DAKOTA)

2 COUNTY OF HUGHES)

CERTIFICATE

3
4
5
6 I, Lynne M. Ormesher, Registered Professional Reporter,
7 hereby certify that the foregoing pages 1 through 134,
8 inclusive, are a true and correct transcript of my stenotype
9 notes.

10 Dated at Pierre, South Dakota, this 11th day of
11 September, 2000.

12
13
14
15
16
17
18 
19 Lynne M. Ormesher, RPR
20
21
22
23
24
25

← slough area
↙ + ditch

↑ property line

↑
Shelter
belts

↑
Aesoph
dam fill

← Trees along water's
edge
← Trees across dam

DENR
EXHIBIT NO. 2
1984
L. ORMESHER



↑ Breached dam on
Weiss property

← Water off Weiss property

← Hynes dugout

DENR

EXHIBIT NO. 3

1985

L. ORMESHER



DENR

EXHIBIT NO. 4

1987

ORMESHER

An aerial photograph of a landscape, possibly a coastal or wetland area, with a grid overlay. The grid consists of several rectangular sections. A handwritten note on a yellow sticky note is placed over one of the grid sections. The note has an arrow pointing to a specific area in the upper left quadrant of the grid. The landscape shows various textures, including what appears to be water, land, and some vegetation. The overall color palette is muted, with shades of brown, tan, and grey.

↖ Trees clearly visible

DENR
EXHIBIT NO. 5
1988
L. ORMESHER

Weiss dugout constructed





Weiss dugout inundated

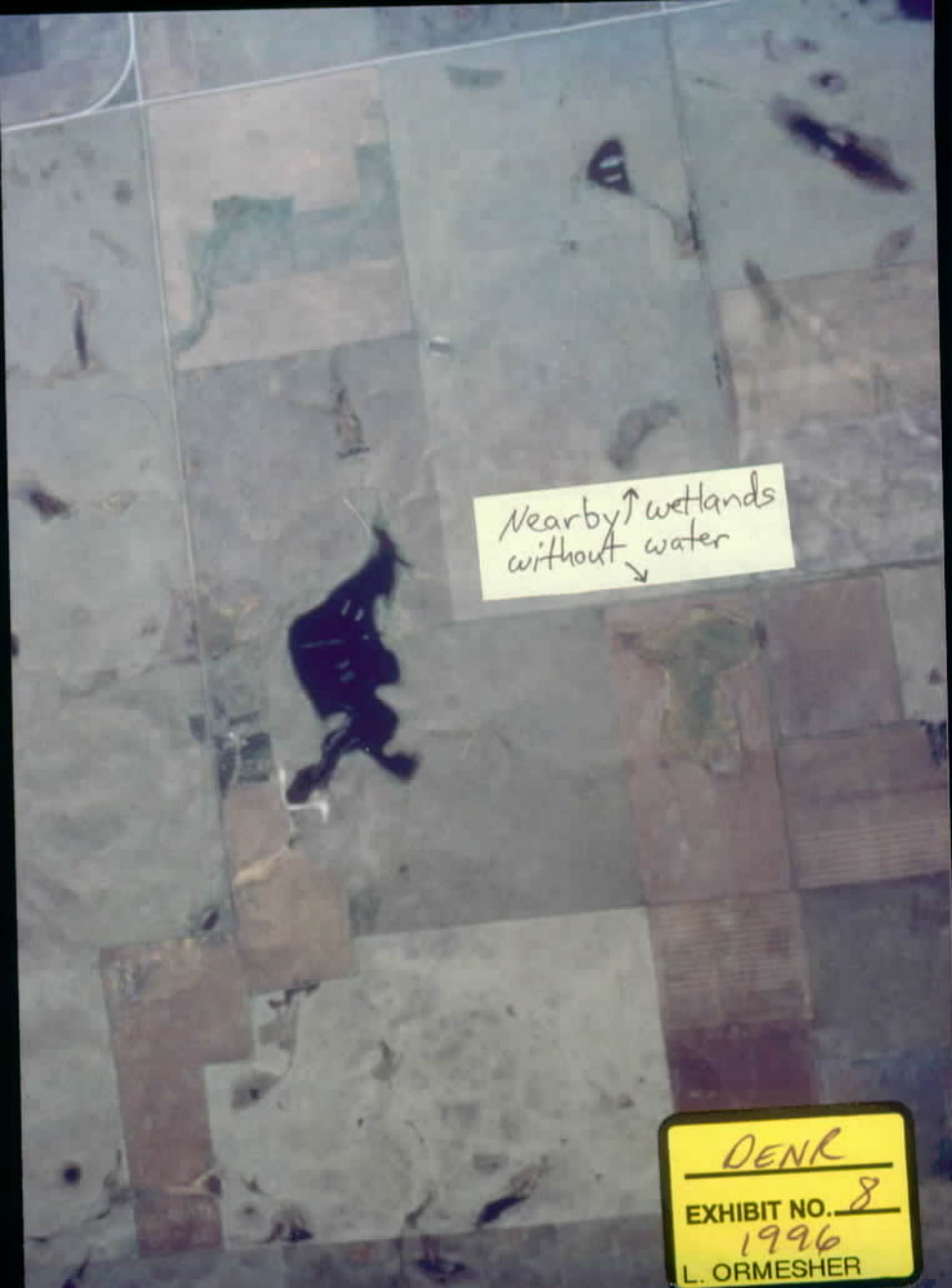
Nearby wetlands
with water

DENR

EXHIBIT NO. 7

1995

L. ORMESHER



Nearby ↑ wetlands
without water ↓

DENR

EXHIBIT NO. 8

1996

L. ORMESHER

DENR

EXHIBIT NO. 9

1997

L. ORMESHER

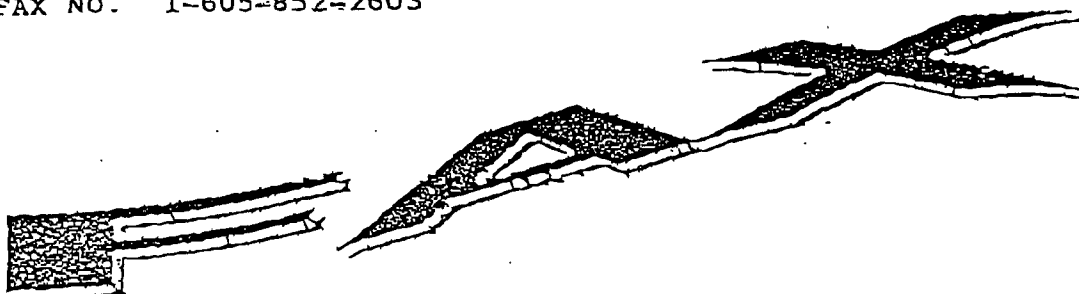




10A

NATURAL RESOURCES CONSERVATION SERVICE

P O BOX 484
HIGHMORE, SD 57345-0484
FAX NO. 1-605-852-2603

DATE: 8/26/99 PAGES: 1 + 2TO: Ron DuvallFROM: Kelly StoutMESSAGE: _____

DENR
EXHIBIT NO. 10A
L. ORMESHER

$$\begin{array}{r}
 \text{depth} \times \text{acs} \times .4 = 17.6 \\
 11 \quad 943 \quad \underline{3.6 \text{ AC Ft silt}} \\
 14.0 \text{ AC Ft Storage}
 \end{array}$$

$$14 = V_T$$

$$23.3 = V_r$$

$$14 \div 23.3 = .6$$

from table on 378-A-8
 $.35 \times 45 \times .35 = 5.5$ (spwy factor)

$$8.12 \quad 7.8$$

$$12'' \times 95' @ \$10.00 = \$950.00$$

45.00 / band
 Anti-seep collar
 \$151.00 ea.
 Hood Inlet
 \$90.00

$$\begin{array}{r}
 \text{depth} \times \text{surface Ac} \times \text{factor} \\
 11 \quad 4 \text{ (Approx)} \quad .4 = 17.6 \\
 \underline{- 3.6 \text{ Approx AC Ft of silt}} \\
 14.0 \text{ Ft Storage} = V_T \\
 23.3 \text{ from SO-Eng 29} = V_r
 \end{array}$$

$$14 \div 23.3 = .6$$

Go with .6 to tables in 378-A-8
 pick out .35

$$.35 \times 45 \text{ (from SO-Eng 29)} \times .35 \text{ (spwy factor)} = 5.5$$

From charts EFM-Ch. 6 7-50 (based on 70 length; we have approx 95')
 pick out 8.12 $\times$ factor 0.96 = 7.8

We have 5.5 - this tabe will carry 7.8 12" tube O.K.

United States Department of Agriculture
Soil Conservation Service

SP-534-110
Rev. 5/78

EXCAVATED POND (DUGOUT) INSTALLATION AND CHECK DATA

OWNER: David Aesoph

LOCATION: _____

DESIGN:

Excavation size: 14' x 71'
Side slopes: 2:1
End slope SW: 4:1
End slope SE: 4:1
Minimum depth: 12' 12"
Special provisions: None
Barre walls: None
Tiebacks: None

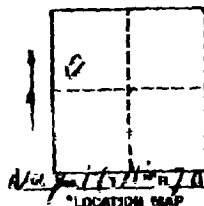
AS BUILT: As BUILT 10/26/98

SPECIFICATIONS: _____

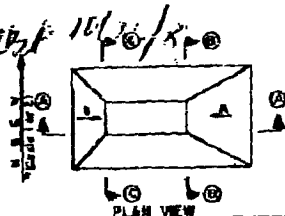
JOB APPROVAL: _____

SCS

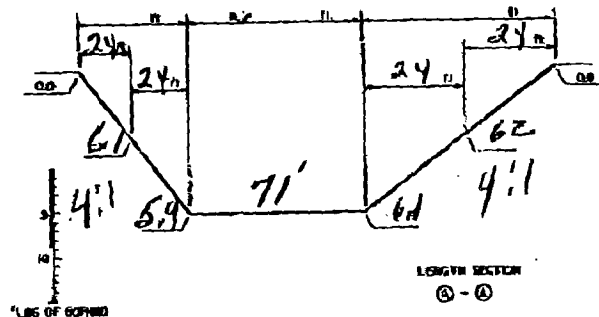
* Must be completed by SCS before form is given to owner.



LOCATION MAP

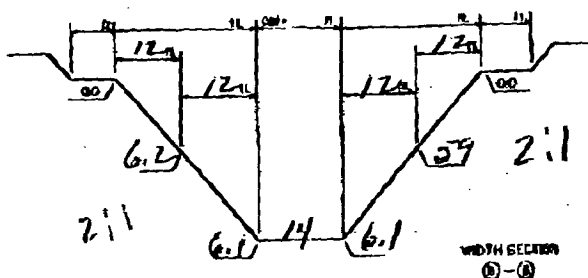


PLAN VIEW

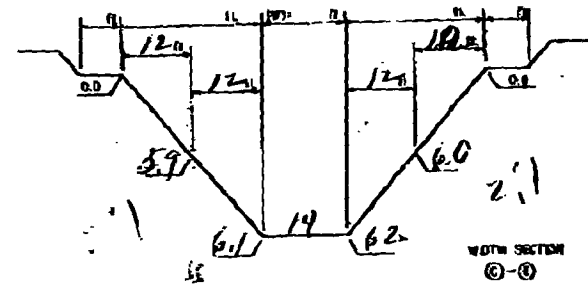


LONGITUDINAL SECTION
① - ②

2,115 c.y. - 1234.20



WIDTH SECTION
③ - ④



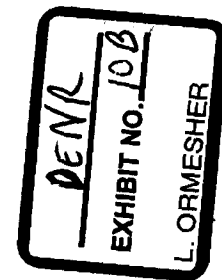
WIDTH SECTION
⑤ - ⑥

NOTES:

1. The depth reading shown must equal or exceed design depths for the horizontal section.
2. Complete all items on this form.

I certify that this design was constructed to the minimum dimensions shown on this form and the spot photograph and here with a one on ground.

10-4-98 David Aesoph Owner
10/26/98 David Aesoph As BUILT



08/23/88 WED 10:35 FAX 605 852 2803

USDA HIGHMORE

001

40-262
(66-23-66)U.S. DEPARTMENT OF AGRICULTURE
CONSERVATION REPORTING AND EVALUATION SYSTEMST. & CS. Code & C/D
46 069 2Control No. (FT & No.)
88 67

A. REFERRAL INFORMATION

1. Farm No.
421
Name and Address
DAVID G AESOPH
ROUTE 1
HCR 47, BOX 32 A
HIGHMORE SD 57345 97392. Telephone Number
605 852 2119

3. Contract Id.

4. Practice to Begin
07 88

5. Referral Expires

6. Practice Location
19-116-70

7. Needs Statement

old dam and emergency spillway in
good condition. about 7.5 ft. depth,
backs water into slough - lot of surface
area. Also dugout in upper end of
slough.The practices shown in item A3 with the units shown
in item A10 are needed and practical for the farm.

11. Signature

Date

B. GENERAL INFORMATION

Mike D. Ruler

7/25/88

1. Primary Purpose
C 2. Program
ACP-ANA 3. Program
Practice No.
SL6 4. VC/SL
N 5. Fund Code
6. Estimated Total Cost
7. Est. Cost-Share3. Practice Extents
Number Acres Treated
1 180
9. Land Capability
Class & Subclass
4E 10. Soil Loss
Tolerance
5 11. Land Cover/Use
Before After
5 5
12. Technical Practices Applied
Technical Practice Cost-Share? Units Planned/
Applied
378 1

C. EROSION CONTROL

1. Sheet & Rill
Erosion a. Before (Tons/Ac./Yr.)
1 b. After (Tons/Ac./Yr.)
1 c. Acres to which
Rate Applies
180
2. Wind
Erosion a. Before (Tons/Ac./Yr.)
1 b. After (Tons/Ac./Yr.)
1 c. Acres to which
Rate Applies
180
3. Other
Erosion a. Problem Type
b. Before (Tons/Yr.)
1 c. After (Tons/Yr.)
1 d. Acres Affected
1
4. Gully
Condition a. Condition Code
Before b. Condition Code
After c. Trend Cond.
Before d. Trend Cond.
After

D. WATER CONSERVATION

1. Irrigation
Water
Conservation a. Irrigation
Situation b. Water Applied
(Ac.-in./Ac.)
Before After c. System Efficiency (%)
Before After d. Water Cons.
Acres
2. Increased Water
Storage a. Primary
Use b. Capacity (Acres-Inches)
Before After 3. Soil Moisture
Measure?

E. WATER QUALITY

1. Problem Type
2. Type of Water Body
Treated/Protected
3. Pollution Severity

F. WOOD PRODUCTION

1. Site Description
a. Site Index b. Poten. Prod.
(Cu. Ft./Ac./Yr.) 2. Stand Condition
a. Forest Cover
Before After b. Stocking Level
Before After 3. Site Preparation
a. Acres b. Cost-Share

G. OTHER ASSISTANCE

Purpose

H. ACTUAL COST AND PERFORMANCE DATA

1. PERFORMANCE REPORT

1. Total Install. Cost
2. Cost-Share
3. Date Performed

14271 bottom 12' deep

This practice has been performed to the extent shown in item 312c and
meets program requirements. If the practice does not meet practice
specifications or if additional work is required, explain in item 1.

Mike D. Ruler

Date

10/26/88

08/25/99 WED 10:35 FAX 605 852 2803

USDA HIGHMORE

0002

UNITED STATES DEPARTMENT OF AGRICULTURE
Soil Conservation ServiceSD-ENG-29
Rev. 12/84

HYDROLOGIC DATA SHEET

Operator: David Aesop Farm No.: _____

Structure or Practice: Stockman Rebuild

Location: NW 4 Sec. 19 T116 R70 County: Hyde

Computations by: _____ Date: 8-24-90

PEAK RATE AND VOLUME OF RUNOFF
(See Chapt. 2, Eng. Field Manual)

Soil Group	Land Use and Condition	Curve Number	Acres	(CN) (Acres)
B	Past Fr condition	69	963	

TOTAL

Weighted CN -

Average Watershed Slope

Slope Factor

Weighted CN	Design Storm	P Inches Rainfall	Q Inches Runoff	q (ft ³ /s) Peak Flow	Storm Volume Ac.-In.
69	2.4r	2.2	0.29	45	23.3
69	25.4r	4.1	1.33	300	106.7

ANNUAL YIELD

% Chance	Freq.	Isogram No.	Area Acres	Inches	Ac.-In.	Ac.-Ft.

AUG-25-99 03:55 AM DAVID.AESOPH

605 852 2119

P.01

~~08/25/99~~ WED 10:36 FAX 605 852 2603

USDA HIGHMORE

004

NOT TO SCALE

08/25/98 WED 16:38 FAX 605 852 2603

USDA HIGHMORE

0003

112

100

100

100

100

100

100

100

100

100

08/25/98 WED 16:38 FAX 605 852 2603

USDA HIGHMORE

0001

100

CONSTRUCTION OF HIGHWAY 100

100

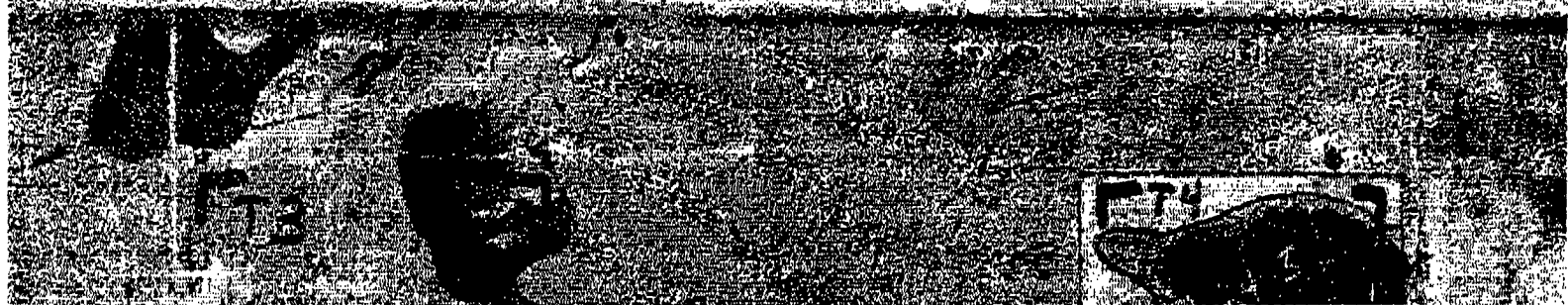
100

08/25/99 WED 16:36 FAX 605 852 2603

USDA HIGHMORE

004

NOT TO SCALE



NOT TO SCALE

116-70
HA

T24

1A
62.4

1B
34.1

18

1350

G2
116-70
HA

DENR

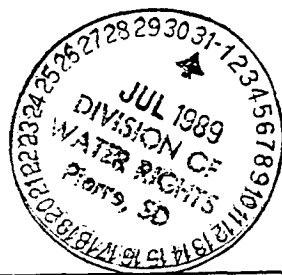
EXHIBIT NO. 12

L. ORMESHER

13

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

LOCATION NOTICE FOR DAM/DUGOUT



71780

Location Notice No.

Hyde
County

I, Donald Weiss, of
Name

Box 186, Faulkton, SD 57438, Faulk
Address & Zip Code County

Donald Weiss, of the following described land, do hereby
(owner or operator)

notify the Water Management Board of the State of South Dakota and all others concerned that I am exercising my right
under SDCL 46-4, for construction of a Dugout for the purpose of impounding runoff waters
(dam or dugout)
for livestock purposes.
(type of use)

The following data is presented in compliance with SDCL 46-4-3 and 46-4-4.

(1) Date of:

(a) This notice JULY 27, 1989

(b) Proposed construction July 1989

(2) Legal description of the land upon which the dam/dugout is located:

SE 1/4 of SW 1/4 18-116-70
(describe to the nearest 40 acre sub-division)

(3) Location of the dam/dugout from a section corner:

78 Rds East, 8 Rds N of SW corner 18-116-70
(describe distance N.S.E.W. from the corner)

(4) County Hand

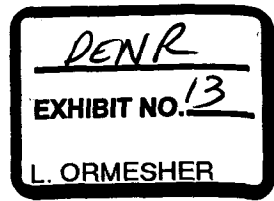
(5) The owner of the land Donald Weiss

(6) Acre feet of water claimed annually 1,2

Notes: If the storage of the proposed structure at the spillway crest or overflow elevation exceeds twenty five (25) acre feet, a water permit from the Water Management Board is required.

A location notice is only required on a dugout, if the dugout captures surface runoff waters.

** Continue on other side **



(7) Complete the following information for the proposed dam/dugout:

• Items to be completed for a dugout

*a) Dam/Dugout designed by Soil Conservation Service
Highmore, SD 57345
(name and address)

b) Freeboard _____

c) Crest Width _____

Crest Length _____

d) Height _____

• Depth, if Dugout _____

e) Outlet Dimensions:

Pipe diameter _____

Spillway width _____

f) X & Y Slope:

Upstream _____

Downstream _____

*g) Water surface area _____

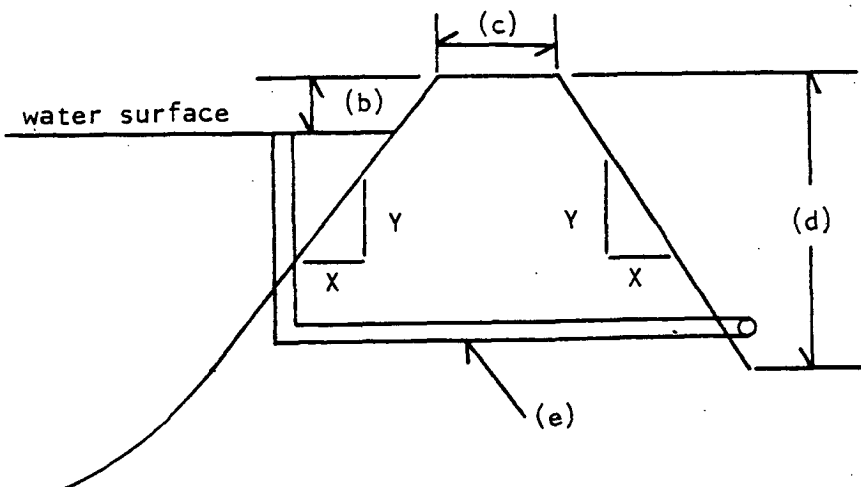
*h) Storage at spillway crest or overflow elevation

(acre feet) _____

i) Maximum storage to top of dam

(acre feet) _____

*j) Drainage area above dam/dugout



Enclosed herewith is ten dollars (\$10.00). The Water Management Board is requested to file this Location Notice in their official records. A copy of this Location Notice has been filed (do not record) with the Register of Deeds of _____ County in accordance with SDCL 46-4-3.

owner

STATE OF SOUTH DAKOTA)
COUNTY OF Faulk) ss

locator

I, Donald Weiss the applicant, certify that I have read this Location Notice and that the matters stated in this notice are true and that I intend, and am able to start construction within sixty days after the filing of this notice.

Signed Donald Weiss

Subscribed and sworn to before me this 28th day of July, 19 89

(seal)

Susan Schaefer
SUSAN SCHAEFERS, Notary
Faulk County, South
notary public

LOCATION NOTICE—DRY DRAW

HAND

County

51615
Dry Draw No.

I, Joseph Hynek, of _____, of
Name

Highmore, SD Hand
Address Town County

Owner of the following described land, do hereby notify the Water
owner or operator

Resources Commission of the State of South Dakota and all others concerned that I am exercising my right under Section 61-0138 of the 1960 Supplement to the South Dakota Code of 1929 for construction of a Dry Draw dam for the purpose of storing
(storing, diverting, or both) flood waters for livestock purposes.

The following data is presented in compliance with Section 61-0138, as amended:

(1) Dates of

(a) This application Nov. 14, 1962

(b) Posting at construction site _____

(2) Legal description of the land upon which the dam is located. NE 1/4 of the NW 1/4 of
Section 19 Township 116 Range 70 The dam is located 25 rods

S and 80 rods E of the NW corner of said Section
(N.S.E.W.) (N.S.E.W.) (NW,NE,SE,SW)

in the County of HAND

The owner of the land is Joseph Hynek Highmore, SD
Name Address

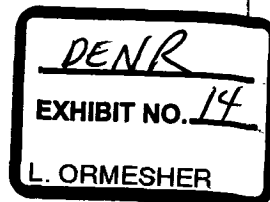
(3) Amount of water claimed for all purposes each year 1.5 acre feet.

(4) Storage capacity of reservoir 1.5 acre feet.

(5) Surface area of reservoir 0.25 acres.

(6) Size of watershed above dam Seep acres.

(Over)



Enclosed herewith is one dollar (\$1.00). The Water Resources Commission is requested to file this Location Notice in their official records.

A copy of this Location Notice has been filed (do not record) with the Register of Deeds of _____ County and has been posted at the structure site in accordance with Section 61.0138 of the Water Laws.

Joe Perak
Owner

by _____
Locator

STATE OF SOUTH DAKOTA

County of Lincoln } ss.

On this 21 day of November, 1945, before me

Will. H. Peterson & Notary Public
(Notary Public or other Official having a seal)

in and for the County and State aforesaid, personally appeared Joe Perak
to me personally known to be the person who executed the foregoing instrument and acknowledged that —he executed the same for the purposes therein set forth.

Witness my hand and official seal the day and date above written.

(SEAL)

Name

Title



JAN. 3, 2000

To whom it may concern:

The purpose of this letter is to save what we consider is a valuable resource to our community. It has been called to our attention that a small dam, the Joe Hynek Dam as we call it, is to be lowered because of a complaint by the adjoining landowner. This dam is now located on the land that is now owned by David Aesoph.

This dam has produced excellent fishing and to lower the water level is such a shame, because the proposed level will not sustain the present fish population. It seems to us that additional water, on land in this part of South Dakota, is a valuable asset rather than a deterrent. If water was not wanted why did the landowner dig a dugout on this adjoining property?

Thank you for any consideration that you may give to this letter. If we can do anything to promote this valuable fishing area, we will be glad to do so.

Yours truly,

Virgil Hansen
Mildred Hansen

Hansen's
106 Winter St
Orient SD 57467-2205
605-392-2361

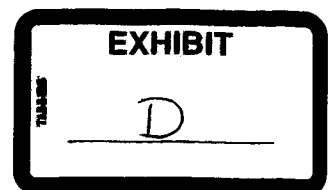
EXHIBIT

E

In reference to the David Geisoph
dam.

We don't feel the dam is causing
any problems as it is. It's not
putting water anywhere that wasn't
already a wetland. The dam is
used by the community for fishing
and it's also a haven for waterfowl.

Terry & Carol Witte



① NHSL
18.0

T2023

Transferred to
Hyde Co.

18

Transferred
Hyde Co.

20 147.521 acres
in sec 18

② NHSL
132.0

N/C

116-70
A-2

20 10 add'l acres
in E. 1/4 sec 19

473.1 Surface acres

Transferred
to
Hyde Co.
1981

19

Transferred
Hyde Co.
1981

DENR
EXHIBIT NO. 11
L. ORMESHER

Transferred
to
Hyde County
1994

A-3
116-70

T 73

T 70

T 71

DENR Exhibit No. 15
1984 aerial photo (No. 6173-3)



DENR Exhibit No. 15
1985 aerial photo (No. 6173-3)



DENR Exhibit No. 15
1987 aerial photo (No. 6173-3)



DENR Exhibit No. 15
1988 aerial photo (No. 6173-3)



DENR Exhibit No. 15
1989 aerial photo (No. 6173-3)



DENR Exhibit No. 15
1995 aerial photo (No. 6173-3)



DENR Exhibit No. 15
1996 aerial photo (No. 6173-3)



DENR Exhibit No. 15
1997 aerial photo (No. 6173-3)

