

Mail to: Water Rights Program Joe Foss Building 523 E. Capitol Pierre, SD 57501-3181 (605) 773-3352	(office use only)
	No. <u>6431-3</u> Hydrologic Unit <u>101160006</u>
	Basin <u>James River</u>
	Newspaper <u>The Plainsman</u>

RECEIVED
JUL 16 2003
WATER RIGHTS
PROGRAM

Application For Permit To Appropriate Water For Irrigation

Type of Application: X New Vested Right Amendment/Correction to Permit No.

(Use predates Mar 2, 1955)

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

- Name of Applicant Phillip W. Hines Phone 612-802-2964
(check one) Owner Tenant/lessee
Mailing Address 2719 Spring Lake Rd., Prior Lake State MN. 55372
(Street, RR, or Box and City) (Zip Code)
- Amount of water claimed 1 *CFS or **GPM ***AF Total Acreage 91
(*Cubic Feet per Second) (**Gallons per Minute) (**Acre Feet - storage capacity of dam/dugout or annual use if applicable)
- Source of water supply Ground Water
- Location of point of diversion (example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W) One Well 2100 feet
North and 350 Feet west of the S1/4, Section 13, T113N, R62W (CA)
(NE1/4 SW1/4) County
- County or counties where water will be used Beadle
- Annual period during which water is to be used 2004 April 1 - October 31
- List below each forty acre division, or lot, or fraction thereof and show number of acres to be irrigated in each.
(Attach sheet if more space is needed)

Land Description	Acres	Land Description	Acres
SE1/4 NW1/4	3	SE1/4 SW1/4	10
NW1/4 SW1/4	26	All in Section 13, T113N, R62W	
NE1/4 SW1/4	16	Total of	91
SW1/4 SW1/4	36		

8. Give a description of the project. (Attach sheet if more space is needed)
- Divert water from an existing well to provide water for Irrigation through a pivot
system for the land described above. See attached. Same well as described
in Permit # 3466-3. Map on file

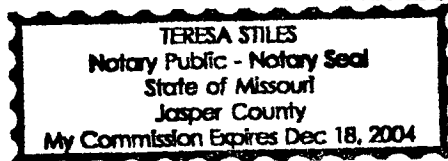
STATE OF ~~SOUTH DAKOTA~~ MISSOURI SS
County of Jasper

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, Phillip Hines, 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.

Applicant's signature Phillip Hines

Subscribed and sworn to before me this 15th day of July 20 03



Teresa Stiles
Notary Public signature

SOUTH DAKOTA
WATER PERMIT NO. 6431-3 FOR IRRIGATION

Date of first receipt of application July 16, 2003.

The Sixth Judicial Circuit Court approved Water Permit No. 6431-3 on June 7, 2005 for Phillip W Hines, 2719 Spring Lake Rd, Prior Lake MN 55372 authorizing the construction of the water use system and the placing of water to beneficial use subject to the following limitations, conditions and qualifications:

1. Water Permit No. 6431-3 authorizes 1.0 cubic feet of water per second from one well (Tulare:East James Aquifer) 54 feet deep located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 13 to irrigate 91 acres located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ Section 13; all in T113N-R62W.
2. The amount of the appropriation may not exceed 2 acre feet annually for each acre of land to which water is actually and beneficially applied for irrigation. The water is to be used during the following described annual period: April 1 – October 31.
3. The date from which applicant may claim right is July 16, 2003.
4. One-fifth of the construction is to be completed on or before December 7, 2007.
5. All construction is to be completed on or before June 7, 2010.
6. Water is to be put to beneficial use on or before June 7, 2014.
7. Water rights obtained in compliance with the laws of the State of South Dakota may not be unlawfully impaired by this appropriation.

QUALIFICATIONS

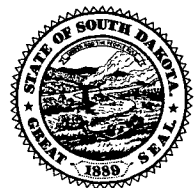
1. The well approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this Permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.
2. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

WATER MANAGEMENT BOARD

By: Garland Erbe
Garland Erbe, Chief Engineer
Water Rights Program
Department of Environment and Natural Resources

AUG 08 2005

date



NOTICE OF WELL CONSTRUCTION

INSUFFICIENT LOCATION

(1) WELL CONSTRUCTION

Location of well: 1/4 SW 1/4 Section 13 Township 11.3 Range 6.2
 Well owner Al Schwan (Name) Hitchcock (Address)
 Date well drilling completed 6-20-77 Purpose of well irrigation (domestic, irrigation, municipal, industrial, other)

WELL LOG

Layers, top to top in feet	Description of layer
0-1	Topsoil
1-3	Clay
3-5	coarse gravel & rocks
5-13	brown clay
13-28	rocks & gravel
28-54	good coarse sand
41-54	blue clay

Attach sheet if more space is needed

Depth to top of water producing aquifer 13
 Depth to static water level 23'
 Name of producing aquifer (if known) _____
 Total depth of drill hole 54
 Depth to bottom of casing _____

Casing information: In the space below show kind, size, weight, lengths & diameter, etc., for production casing and surface casing, if used.

34' fiberglass casing

Screen information: In the space below show length of screen below bottom of casing, diameter and kind of screen or casing perforations.

20' galvanized screen

If a flowing well, flow of completed well _____

Empire Irrigation Drilling Co.
 Name of Drilling Contractor

(2) PUMP INSTALLATION

Company name and size of pump _____ HP _____
 Type of pump _____ Capacity of installed pump _____
 Depth of pump placement _____ ft., Date of pump installation _____

(3) WATER SURFACE MEASURING TUBE

On some wells an air-tight water surface measuring tube is required: See Section 46.408 of Chapter 46.4, MI WELL CONSTRUCTION STANDARDS.

Show exact vertical length of water surface measuring tube, when installed _____ ft., tube diameter _____
 tube material _____

 Name of Pump Installation Contractor

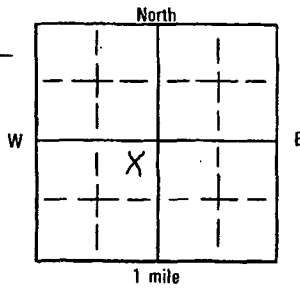


SOUTH DAKOTA WATER WELL COMPLETION REPORT

10-85

Location NE 1/4 SW 1/4 Sec 13 Twp 113 Rg 62County Bessie

Please mark well location with an "X"

Well Completion Date 12-10-91

PROPOSED USE:

- ☐ Domestic ☐ Municipal ☐ Test Holes
☐ Irrigation ☐ Industrial ☒ Stock

Method of Drilling:

Forward Rotary

CASING DATA:

- ☐ Steel ☒ Plastic ☐ Other

If other describe _____

PIPEWEIGHT	DIAMETER	FROM	TO	HOLE DIAMETER
_____ LB/FT	<u>5</u> IN	<u>0</u> FT	<u>55</u> FT	<u>8 3/4</u> IN
_____ LB/FT	_____ IN	_____ FT	_____ FT	_____ IN
_____ LB/FT	_____ IN	_____ FT	_____ FT	_____ IN
_____ LB/FT	_____ IN	_____ FT	_____ FT	_____ IN

GROUT:

Was the well grouted? ☒ YES ☐ NOTo what depth? 30 FEETWhat is grouting material? Cement & GroutIf cement, number of sacks? 8

Describe grouting procedure _____

line to 30 ft

What was grout weight? _____ LB/GAL

SCREEN: ☐ Perforated pipe ☒ ManufacturedDiameter 5 IN Length 10 FEETMaterial BVCSlot Size 016 Set From 45 Feet To 55 Feet

Slot Size _____ Set From _____ Feet To _____ Feet

Slot Size _____ Set From _____ Feet To _____ Feet

Other information _____

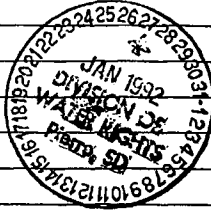
Well Owner:

Name Stan LovettAddress Box 34 Hitchcock SD 57348

Well Log:

Depth

Formation	From	To
Yellow Clay	0	15
Yellow Sand	15	20
Yellow Clay	20	30
Blue Clay w/ sand streaks	30	40
Sand	40	55
Blue Clay	55	60
Shale	60	70

STATIC WATER LEVEL 22 Feet

If flowing: closed in pressure _____ PSI

GPM flow _____ through _____ inch pipe

Controlled by ☐ Valve ☐ Reducers ☐ Other

If other, specify _____

Can well be completely shut in? _____

WELL TEST DATA:

☒ Pumped☐ Bailed☐ OtherDescribe: air compressor

Pumping Level Below Land Surface

_____ ft. After _____ Hrs. pumped _____ GPM

_____ ft. After _____ Hrs. pumped _____ GPM

_____ ft. After _____ Hrs. pumped _____ GPM

REMARKS:

This well was drilled under license # 440

And this report is true and accurate.

Drilling firm Pullman Well Drilling

Signature of License Representative:

B. E. Kuehl

Signature of Well Owner:

Date 12-31-911-29-92Completion? ☒ YES ☐ NOYES ☒ NOI not install pump

NOT TO SCALE

General
Gov

Y

14.5

General Schetter

Schetter Trust

178-175 R

11.3

Y

Y

2.7+4.1

3.6

W.A. Schwan

23.2

1.3

Brady Schetter

Y

35

59.0

4.4

WELL

350'

2100

13-62

12.2

38

101.7
101.7

30
30

52.6

Drain # 2-1023
Appl. # 3466-3 6431-3

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REPORT ON WATER PERMIT APPLICATION NO. 6431-3

For Phillip W. Hines

August 25, 2003

Application No. 6431-3 proposes to appropriate 1.0 cfs (450 gpm) from one well approximately 54 feet deep located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of section 13 to irrigate 91 acres located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ of section 13; all in T113N R62W in Beadle County.

AQUIFER – TULARE EAST JAMES (T-EJ)

The Tulare East James is predominantly buried outwash (sand and gravel) in Spink and Beadle Counties but can be under water table or artesian conditions in this area. The aquifer underlies 23,200 acres and contains an estimated 132,000 acre-feet of recoverable water in storage in Beadle County (Hedges, 1982). The aquifer extends into Spink County to the north and is bounded by the James River on the west. Ground water movement is from east to west across this area and toward the James River (Hedges, 1982). The aquifer is much larger in Spink County where it underlies 100,700 acres and contains an estimated 476,000 acre-feet of recoverable water in storage (Hedges, 1982). Another estimate for the Tulare East James aquifer is underlying 102,400 acres and containing 630,000 acre-feet of recoverable water in storage was made in 1984 for a report on some water permit applications from the aquifer (Goodman, 1984). Recharge to the aquifer has been estimated to be about 6,800 acre-feet per year (Kuiper, 1984). This equates to an average recharge rate of about 0.76 inches per year for the Tulare East James aquifer (Kuiper, 1984). This would equate to an average volume of recharge of 7,950 acre-feet per year for the entire aquifer in Spink and Beadle Counties. Comparing this result with the pumping records for the Tulare East James since 1979 (24 years) indicates that in six of those years pumping exceeded the average annual recharge to the aquifer. In fact, in the last two years pumping was 10,287 acre-feet in 2001 and 13,668 acre-feet in 2003. The average pumping from the aquifer has been 6,604 acre-feet for the last 24 years and the average pumping for the last three years has been 10,548 acre-feet.

The Water Rights Program monitors an observation well, BD-771, located within two miles of this application. The water levels for this observation well show good response to climatic conditions, that is, rising water levels during wet years and gradually declining water levels during dry years. The water level record indicates that the aquifer is capable of sustaining existing withdrawals. A hydrograph for this observation well is included with this report (Water Rights, 2003).

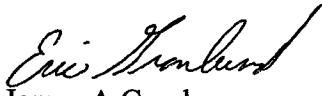
REVIEW OF EXISTING WATER PERMITS/RIGHTS

There is one other existing water right No. 3268-3 which is located within one mile of this application. Interference is not a concern. Drawdown created by pumping is not expected to be significant at this distance between wells (the map distance would be about 4,800 feet). The lands requested by this application were covered by Water Right No. 3466-3 which was cancelled by the Water Management Board at the July 10, 2003 Water Management Board Hearing. This application requests the very same irrigated

area and diversion point as the cancelled right. The water right was cancelled because of abandonment/forfeiture but the Conclusions of Law and Finding of Facts have not been adopted by the Board at this time.

CONCLUSIONS

1. Water is not available from the Tulare East James aquifer. The aquifer has been declared fully appropriated based upon use by the Water Management Board.
2. Interference is not a concern.
3. This application requests the same lands that were covered by Water Right No. 3466-3. This right has been cancelled by the Water Management Board.
4. On a separate issue as water availability but equally important, there are two sets of Findings of Fact and Conclusions of Law which could affect the outcome of this application that have not been adopted. These are Findings for water permit application No. 6382-3 for William St. Clair and for the cancellation of Water Right No. 3466-6 for Phillip Hines. Both of these decisions have the potential to affect the water availability determinations for the Tulare East James aquifer.

for 
James A Goodman
Natural Resources Engineer

BIBLIOGRAPHY

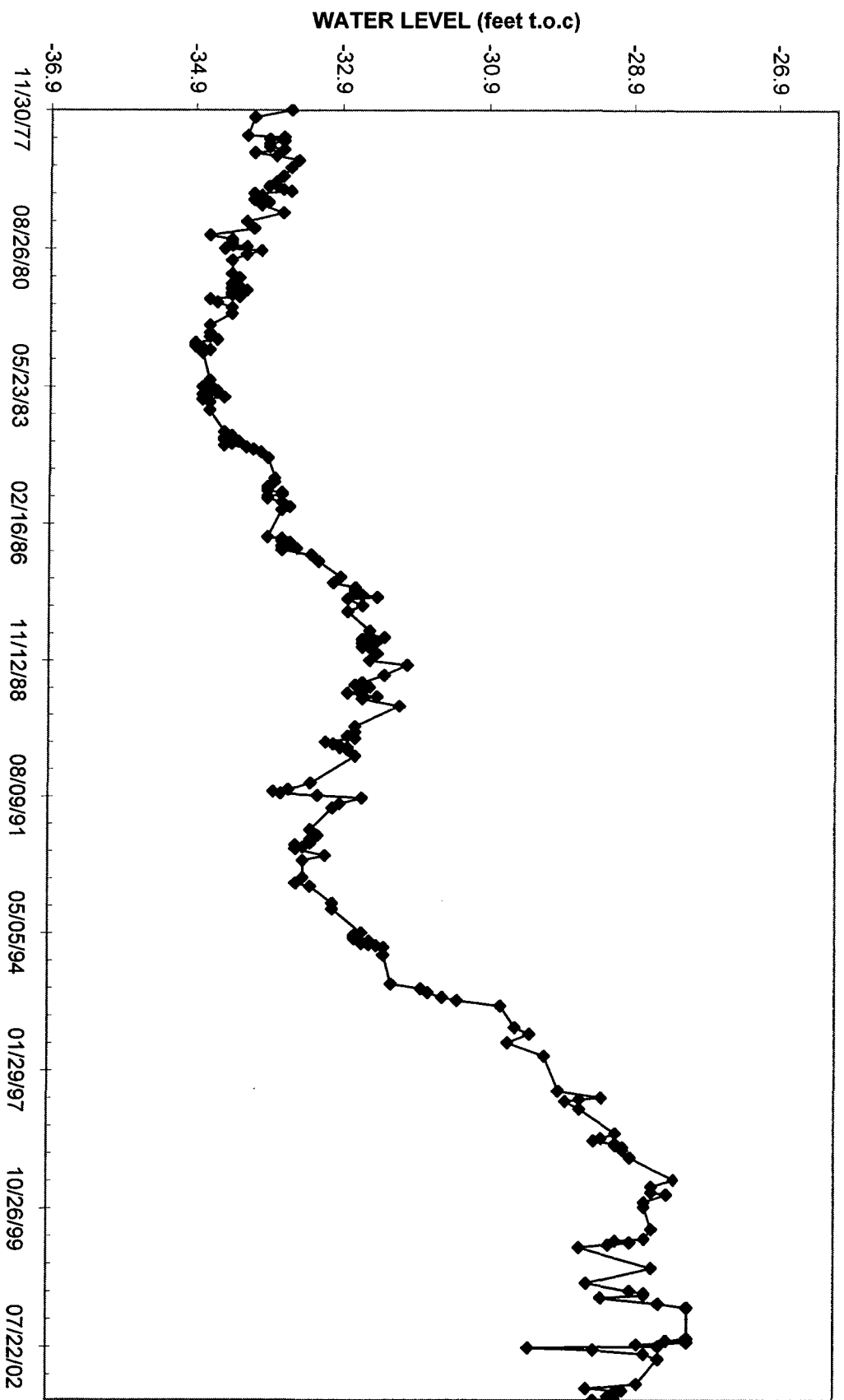
Goodman, J.A., 1984, Report on Application No. 5009-3 Duane Muxon, No. 3178A-3 MJT Inc., and No. 2235A-3 Gary D Wipf, SD DENR, DES, Water Rights Program, Pierre, SD, 57501.

Hedges, L.S., and others, 1982, Evaluation of Ground-Water Resources Eastern South Dakota and Upper Big Sioux River, South Dakota and Iowa, for US Army Corps of Engineers, SD DENR, SDGS, Vermillion, SD, 57069.

Kuiper, L.K., 1984, Appraisal of Water Resources of Eastern Part of the Tulare Aquifer, Beadle, Hand and Spink Counties, South Dakota, WRI 84-4978, USGS, Huron, SD, 57350.

Water Rights, 2003, Unpublished Observation Well Data for the Tulare Aquifer, SD DENR, DES, Water Rights Program, Pierre, SD, 57501.

WATER RIGHTS' OBSERVATION WELL
BD-771





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

**RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT
APPLICATION NO. 6431-3, Phillip W. Hines**

Pursuant to SDCL 46-2A-2, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Water Permit Application No. 6431-3, Phillip W. Hines, 2719 Spring Lake Road, Prior Lake MN 55372.

The Chief Engineer recommends DENIAL of Application No. 6431-3 because 1) SDCL 46-6-3.1 states that the annual withdrawal of groundwater shall not exceed the average estimated annual recharge to the aquifer; 2) all water available for appropriation within the Tulare East James Aquifer in Spink and Beadle County is presently appropriated; and 3) it is not in the public interest because the unavailability of proven recharge capacity within the Tulare East James Aquifer.

See report on application for additional information.

Garland Erbele, Chief Engineer
August 27, 2003

RECEIPT

WATER RIGHTS PROGRAM

South Dakota Department of Environment and Natural Resources

Date July 16, 20 03

RECEIVED OF Phillip Hines, 2719 Spring Lake Road SW, Prior Lake MN 55372

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

Fee for Application for Permit No. <u>6431-3</u> to Appropriate Water, to construct and to put water to beneficial use	250	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. <u>6431-3</u>	50	00
Fee for Filing Transfer Form _____		
Fee for _____		
Fee for Issuing New Well Driller's License No. _____ for C.Y. _____		
Fee for Renewal of Well Driller's License No. _____ for C.Y. _____		
Fee for Issuing Well Pump Installer's License No. _____ for C.Y. _____		
Fee for Renewal of Well Pump Installer's License No. _____ for C.Y. _____		
(Any Other Work Provided by Law)	TOTAL	300.00

No. 000035

By Darlene Elise
Chief Engineer

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**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182

www.state.sd.us/denr

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

August 27, 2003

Phillip W Hines
2719 Spring Lake Rd.
Prior Lake MN 55372

Dear Mr. Hines :

Water Permit Application No. 6431-3 for irrigation use has been examined and found to comply with the South Dakota Water Laws and applicable rules. The Chief Engineer's recommendation is for DENIAL of the Application No. 6431-3. For your information, a copy of the notice, the recommendation of the Chief Engineer and a staff report are enclosed.

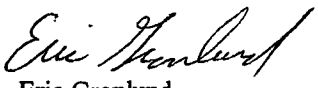
Please review the report and recommendation. If you wish to proceed with the application and schedule a October 1, 2003 hearing before the Water Management Board, you must contact the Plainsman (Ph#605-352-6401) to authorize publication of your notice of hearing. A copy of the notice was sent to the Plainsman with instructions to publish only if you authorize publication.

If the notice is published on September 4 and 11, 2003, a hearing will then be scheduled at 1:00 P.M., October 1, 2003 in the Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue in Pierre SD.

State law provides that if the Chief Engineer recommends denial of an application, the applicant has 20 days from the date the recommendation was mailed to state whether they intend to oppose the recommendation. Failure to submit a statement of intent to oppose the recommendation to deny constitutes withdrawal of the application. If you authorize the newspaper to publish the notice this will constitute your formal intent to oppose the recommendation. You may also choose to delay consideration of the application until the December Board meeting. If you want to delay the hearing, do not authorize publication of the notice at this time. Contact me by September 17, 2003 to state your intent to proceed with the application but wait until the December meeting. Failure to either authorize publication or contact me by September 17, 2003 will constitute withdrawal of your application.

Please contact me if you have any questions.

Sincerely,


Eric Gronlund
Natural Resources Engineer
(605)773-3352

cc: Ray Rylance, Wiles & Rylance, PO Box 227, Watertown SD 57201-0227

enclosure



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

August 27, 2003

The Plainsman
PO Box 1278
Huron SD 57350-1278

ATTENTION: Legal Public Notice

Enclosed is a Notice of Hearing on Application No. 6431-3 to Appropriate Water to be published twice. Please publish the first notice on September 4, 2003 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 Phillip W. Hines, 2719 Spring Lake Rd., Prior Lake MN 55372 (Ph # 612-802-2964).

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

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

No. 6431-3

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

Date _____

We are in receipt of your letter of August 27, 2003 enclosing Notice of Hearing to Appropriate Water by Application No. 6431-3 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 September 4, 2003 with the second publication 7 days later. The applicant is responsible for payment.

NOTICE OF HEARING ON APPLICATION NO. 6431-3 to Appropriate Water

Notice is given that Phillip W Hines, 2719 Spring Lake Rd, Prior Lake MN 55372 has filed an application for a water permit to appropriate 1.0 cubic feet of water per second from one well (Tulare:East James Aquifer) 54 feet deep located in the NE ¼ SW ¼ Section 13 to irrigate 91 acres located in the SE ¼ NW ¼, SW ¼ Section 13; all in T113N-R62W.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends DENIAL of Application No. 6431-3 because 1) SDCL 46-6-3.1 states that the annual withdrawal of groundwater shall not exceed the average estimated annual recharge to the aquifer; 2) all water available for appropriation within the Tulare East James Aquifer in Spink and Beadle County is presently appropriated; and 3) it is not in the public interest because the unavailability of proven recharge capacity within the Tulare East James Aquifer.

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 September 22, 2003. 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 1:00 P.M., October 1, 2003 in the Matthew Training Center, Foss Building, 523 E. 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 October 1, 2003 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 September 22, 2003.

Any hearing may be an adversarial 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 September 22, 2003, 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. Steven M. Pirner, Secretary, Department of Environment and Natural Resources.

PRINTER'S AFFIDAVIT

STATE OF SOUTH DAKOTA,
COUNTY OF BEADLE: ss.

I, Kimberly DeWall, being duly sworn on oath, say that THE PLAINSMAN is a daily paper published at Huron, Beadle County, South Dakota, and that said newspaper has a bona fide circulation of at least 250 copies daily; that said newspaper has been published within said county for fifty-two consecutive weeks immediately prior to this date, that said newspaper is printed in whole or in part, in an office maintained at said place of publication; that I am Legal Advertising Coordinator of said newspaper and know the facts herein state. The annexed notice headed:

Phillip W Hines – Appl #6431-3

Was published for Two days, once each week, on the same day, in said newspaper, and not in any supplement of the said newspaper, the first publication was on the 4th day of September, 2003 and the last publication was on the 11th day of September, 2003. That the full amount of the fee charged for publishing the same Seventy Seven 33/100 Dollars inures to the benefit of the publisher of said newspaper; that no agreement or understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever.

Kimberly DeWall

Subscribed and sworn to before me this 12th day of September, 2003.

Chris Borker
Notary Public, South Dakota

My term expires 11/27/08

Legal #342

RECEIVED

SEP 24 2003

WATER RIGHTS
PROGRAM

F.P. 9-4-03

NOTICE OF HEARING ON APPLICATION

NO. 6431-3 to

Appropriate Water

Notice is given that Phillip W Hines, 2719 Spring Lake Rd, Prior Lake MN 55372 has filed an application for a water permit to appropriate 1.0 cubic feet of water per second from one well (Tulare: East James Aquifer) 54 feet deep located in the NE 1/4 SW 1/4 Section 13 to irrigate 91 acres located in the SE 1/4 NW 1/4, SW 1/4 Section 13; all in T113N-R62W.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends DENIAL of Application No. 6431-3 because 1) SDCL 46-6-3.1 states that the annual withdrawal of groundwater shall not exceed the average estimated annual recharge to the aquifer; 2) all water available for appropriation within the Tulare East James Aquifer in Spink and Beadle County is presently appropriated;

and 3) it is not in the public interest because the unavailability of proven recharge capacity within the Tulare East James Aquifer.

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The Water Management Board will consider this application at 1:00 P.M., October 1, 2003 in the Matthew Training Center, Foss Building, 523 E. 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 October 1, 2003 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 September 22, 2003.

Any hearing may be an adversarial 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 September 22, 2003, 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

Steven M. Pirner
Secretary

Department of
Environment and Natural
Resources
No. 342 (adv.)

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6431-3,)
PHILLIP HINES)

PREHEARING BRIEF

In July 2003, the DENR brought a proceeding before the Board seeking to cancel Water Right No. 3466-3 held by Phillip Hines. Following hearing, the Board issued an oral determination that the water right had been forfeited for nonuse. The Board asked legal counsel to prepare written Findings of Fact and Conclusions of Law and scheduled final deliberation for October 1, 2003. The Findings of Fact, as proposed, accept the Department's position that the water right had been forfeited due to nonuse during the periods from 1984 through 1992 and again from 1994 through 1999. Therefore the Findings of Fact and Conclusions of Law provide that permit has been forfeited and should be cancelled pursuant to SDCL 46-5-37. SDCL 46-5-37 provides as follows:

When any person entitled to the use of appropriated water fails to use beneficially all or any part of such water for the purpose for which it was appropriated, for a period of three years, such unused water shall revert to the public and shall be regarded as unappropriated public water.

Mr. Hines now seeks a new permit for the same location, using the same water source. The only change would, of course, be in the priority date. The forfeited permit held a priority date of 1982; the new priority date would be for 2003. The application for this new permit will also be heard on October 1.

The water source for these permits is the Tulare East James Aquifer. Expert testimony at hearing in this matter will show that the Tulare East James Aquifer is fully appropriated. In

other words, any new appropriations from this aquifer would violate the average annual recharge statute (SDCL 46-6-3.1) which provides:

No application to appropriate groundwater may be approved if, according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from a groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source. An application may be approved, however, for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the greenhorn formation in excess of the average estimated annual recharge for use by water distribution systems.*

Given the foregoing statute, the Chief Engineer cannot recommend approval of the pending application.

It is expected that Mr. Hines will argue that the new permit ought to be granted because his cancelled water permit just made new water available for appropriation. Indeed, SDCL 46-5-37 does provide, among other things, that once a water permit is cancelled "such unused water shall revert to the public and shall be regarded as unappropriated public water." At first blush this argument makes sense; if the water right is cancelled then that quantity of water should theoretically be available for issuing a new permit. There are, however, two problems with the argument.

The first issue is factual. The initial water permit was cancelled because it was not being used. Because the average annual recharge statute requires consideration of actual water use, the old Hines permit was not factored into the recharge

* The Tulare East James Aquifer does not meet the greenhorn exception.

equation for considerable periods of time during the 1980's and the 1990's. Because water wasn't actually used during those periods, the pumping rates and water levels in monitoring wells show total water use without this permit. The total numbers for those years show that the water use exceeded the average annual recharge when the Hines permit was not even being used. Evidence will show that the average volume of recharge for this aquifer has been 7,950 acre-feet per year. However, pumping in recent years has been over 10,000 AF per year. The evidence will show that the recharge statute cannot support granting this water permit. The facts do not support substituting an old largely unused permit with a new irrigation permit (that presumably will actually be used) when considering that a fully appropriated aquifer is at issue.

The second part is legal. The application of SDCL 46-5-37 and SDCL 46-6-3.1 appear to conflict in this case. If statutes conflict, courts are to give meaning to all provisions under scrutiny, making them "harmonious and workable" if such an interpretation is "reasonable and consonant with logic and common sense." Verry v. City of Belle Fourche, 1999 S.D. 102, 598 N.W.2d 544. Further, a court's objective is to determine legislative intent. The courts give statutes their plain and ordinary meaning. Id. In examining statutes, intent is determined from examining the statute as a whole and any enactments similar in subject.

Courts also assume that the Legislature, in enacting a provision, had in mind previously enacted statutes relating to the

same subject. State v. Feiok, 364 N.W.2d 536, 539 (S.D. 1985). The pertinent part of SDCL 46-5-37 was enacted in its present form in 1905. S.D.Sess. Law ch.45. By contrast, SDCL 46-6-3.1 became effective on July 1, 1978. Clearly the 1978 Legislature had to have realized that it was changing long-standing water law by enacting SDCL 46-6-3.1. Feiok, 364 N.W.2d at 539. The Legislature could not have intended that the 1905 law would essentially grant applicants the right to obtain water permits without regard to the actual recharge rate. Id. If the Legislature had intended to exempt "forfeited water" from the groundwater recharge statute it would have done so.

Similarly, if the Legislature had intended that no independent showing of water availability is necessary when dealing with forfeited water, it would have made an exemption in the permit application statute, SDCL 46-2A-9 (requiring, among other things, that the applicant show that water is available in order to obtain any water permit).

Moreover, this is not a situation where a permit can be granted to this single irrigator under the assumption that one small permit would have little effect on the recharge rate for an entire aquifer. A legal principle is involved here that will set the stage for additional applications.

Ultimately, the Board mandate includes ensuring that conservation of water is "to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." SDCL 46-1-4. Allowing for a

loophole around the water mining statute would be inconsistent with the statutory criteria in SDCL 46-1-4.

The DENR asks that the Board consider the legal argument contained herein as well as the testimony to be offered and resolve this matter in favor of giving full effect to the average annual recharge statute found at SDCL 46-6-3.1. The Hines permit should be denied.



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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Prehearing Brief In the Matter of Water Permit Application No. 6431-3, Phillip Hines, were served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Pierre, South Dakota, on this 26th day of September, 2003:

Francis E. Brink
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

Phillip W. Hines
2719 Spring Lake Road
Prior Lake, MN 55372

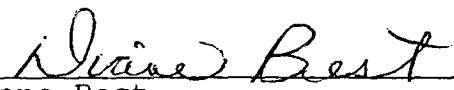
Stanley D. Lovett
19249 Beaver Lane
Hitchcock, SD 57348

by interoffice mail to:

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

and by hand delivery upon:

John P. Guhin
Deputy Attorney General
Office of Attorney General
State Capitol Building
Pierre, SD 57501


Diane Best
Assistant Attorney General



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

October 8, 2003

NOTICE

TO: Raymond Rylance
Wiles & Rylance, LLP
PO Box 227
Watertown SD 57201-0227

FROM: Garland Erbele, Chief Engineer
Water Rights Program 

SUBJECT: Scheduling Consideration of Findings of Fact, Conclusions of Law and Final Decision in the matter of Water Right No. 3466-3 and Scheduling the Hearing for Water Permit Application No. 6431-3, Phillip Hines

On October 1, 2003, the Water Management Board delayed consideration of Findings of Fact, Conclusions of Law and a Final Decision in the matter of Water Right No. 3466-3, Phillip Hines. The Board also delayed the hearing on Water Permit Application No. 6431-3 which Mr. Hines filed in response to the Board's decision to cancel Water Right No. 3466-3.

The Board will now consider the Findings, Conclusions and Final Decision in the matter of Water Right No. 3466-3 and Water Permit Application No. 6431-3 at 1:30 PM, on December 3, 2003, in the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre SD. The agenda time is an estimate and may be delayed due to prior agenda items.

Written responses to Board counsel's proposed Finding of Fact, Conclusions of Law and Final Decision are to be mailed to each Board member (mailing list enclosed), the Board attorney on or before November 21, 2003.

At the discretion of the Board, oral arguments by parties who file a written response in opposition or support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision may be made on December 3, 2003. The public hearing was completed July 10, 2003. No additional testimony will be received on December 3, 2003.

Enclosure

c: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General
Phillip Hines, 2719 Spring Lake Rd, Prior Lake MN 55372

2003/2004 WATER MANAGEMENT BOARD MEMBERS

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

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

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

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

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

Dwayne Rollag
320 Lincoln Lane S
Brookings SD 57006-2741

BOARD ATTORNEY

John Guhin, Deputy Attorney General
Office of Attorney General
Natural Resources Section
State Capitol Building
Pierre, SD 57501

WATER RIGHTS PROGRAM

Department of Environment and
Natural Resources

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

STAFF ATTORNEY

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

CERTIFICATION

I hereby certify that on October 8, 2003, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated October 8, 2003, regarding scheduling consideration of findings of fact, conclusions of law and final decision on cancellation of Water Right No. 3466-3 and consideration of Water Permit Application No. 6431-3, addressed as stated below.

Raymond Rylance
Wiles & Rylance, LLP
PO Box 227
Watertown SD 57201-0227

Phillip Hines
2719 Spring Lake Rd
Prior Lake MN 55372

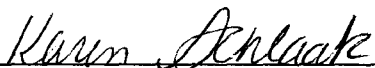
A copy of the Notice was sent Inter-office to:

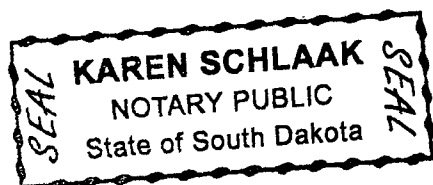
John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General


Eric Gronlund
Natural Resource Engineer
Water Rights Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 9th day of October, 2003.


Karen Schlaak
Notary Public
My Commission expires April 1, 2007



STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)	AMENDED
APPLICATION NO. 6431-3,)	PREHEARING BRIEF
PHILLIP HINES)	

PRELIMINARY STATEMENT

On September 26, 2003, the DENR filed its Prehearing Brief in the above-entitled matter. The matter was later delayed and is now scheduled for December 3, 2003. In the meantime, the brief has been amended to add additional analysis.

ARGUMENT

In July 2003, the DENR brought a proceeding before the Board seeking to cancel Water Right No. 3466-3 held by Phillip Hines. Following hearing, the Board issued an oral determination that the water right had been forfeited for nonuse. The Board asked legal counsel to prepare written Findings of Fact and Conclusions of Law and final deliberation is now scheduled for December 3, 2003. The Findings of Fact, as proposed, accept the Department's position that the water right had been forfeited due to nonuse during the periods from 1984 through 1992 and again from 1994 through 1999. Therefore the Findings of Fact and Conclusions of Law provide that the permit should be cancelled pursuant to SDCL 46-5-37. SDCL 46-5-37 provides as follows:

When any person entitled to the use of appropriated water fails to use beneficially all or any part of such water for the purpose for which it was appropriated, for a period of three years, such unused water shall revert to the public and shall be regarded as unappropriated public water.

Mr. Hines now seeks a new permit for the same location, using the same water source. Under his proposal, the only change would be

in the priority date. The forfeited permit held a priority date of 1976; the new priority date would be for 2003. The application for this new permit will also be heard on December 3.

The water source for these permits is the Tulare East James Aquifer. Expert testimony at hearing in this matter will show that water from the Tulare East James Aquifer is not available for this new appropriation. The reason is that any new appropriations from this aquifer would be inconsistent with the average annual recharge statute (SDCL 46-6-3.1) which provides:

No application to appropriate groundwater may be approved if, according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from a groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source. An application may be approved, however, for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the greenhorn formation in excess of the average estimated annual recharge for use by water distribution systems.*

Given the foregoing statute, the Chief Engineer cannot recommend approval of the pending application.

It is expected that Mr. Hines will argue that the new permit ought to be granted because his cancelled water permit just made new water available for appropriation. Indeed, SDCL 46-5-37 does provide, among other things, that once a water permit is cancelled "such unused water shall revert to the public and shall be regarded as unappropriated public water." Under this argument, any water right that is cancelled would then make water available for issuing a new permit. There are, however, three problems with the argument.

* The Tulare East James Aquifer does not meet the greenhorn exception.

The first issue is factual. The initial water permit was cancelled because it was not being used. Because the average annual recharge statute requires consideration of actual water use, the old Hines permit was not factored into the recharge equation for considerable periods of time during the 1980's and the 1990's. Because water wasn't actually used during those periods, the pumping rates and water levels in monitoring wells show total water use without this permit. The total numbers for those years show that the water use exceeded the average annual recharge when the Hines permit was not even being used. Evidence will show that the average volume of recharge for this aquifer has been 7,950 acre-feet per year. However, pumping in recent years has been over 10,000 AF per year. The evidence will show that the recharge statute cannot support granting this water permit. The facts do not support substituting an old largely unused permit with a new irrigation permit (that presumably will actually be used) when considering that a fully appropriated aquifer is at issue.

The second issue is the interpretation of SDCL 46-5-37. The DENR submits that SDCL 46-5-37 does not exist as a promise for water to new applicants if water rights are canceled. The statute was designed to express South Dakota's choice between two methods of determining what happens when water is available and a water right is canceled. The choice made by the legislature was available, could be administered as a public asset (as opposed to being prorated among the junior water rights holders). This law, enacted in 1905, provides that if a cancellation occurs (and

water is available) the water permitting process administered by the State applies and the water is not just relegated to the other water users. Given the context of the 1905 irrigation law (attached) it is apparent that incorporating old water claims into state law was intended. The statute remains meaningful today in that all water that is unavailable is now available through the permit system and is not simply prorated to the other appropriators.

To the extent that SDCL 46-5-37 and SDCL 46-6-3.1 conflict, the anticipated argument does not bear out anyway. If statutes conflict, courts are to give meaning to all provisions under scrutiny, making them "harmonious and workable" if such an interpretation is "reasonable and consonant with logic and common sense." Verry v. City of Belle Fourche, 1999 S.D. 102, 598 N.W.2d 544. Further, a court's objective is to determine legislative intent. The courts give statutes their plain and ordinary meaning. Id. In examining statutes, intent is determined from examining the statute as a whole and any enactments similar in subject.

Courts also assume that the Legislature, in enacting a provision, had in mind previously enacted statutes relating to the same subject. State v. Feiok, 364 N.W.2d 536, 539 (S.D. 1985). The pertinent part of SDCL 46-5-37 was enacted in its present form in 1905. S.D.Sess. Law ch.45. By contrast, SDCL 46-6-3.1 became effective on July 1, 1978. Clearly the 1978 Legislature had to have realized that it was changing long-standing water law by enacting SDCL 46-6-3.1. Feiok, 364 N.W.2d at 539. The

Legislature could not have intended that the 1905 law would essentially grant applicants the right to obtain water permits without regard to the actual recharge rate. Id. If the Legislature had intended to exempt "forfeited water" from the groundwater recharge statute it would have done so.

Similarly, if the Legislature had intended that no independent showing of actual water availability is necessary when dealing with forfeited water, it would have made an exemption in the permit application statute, SDCL 46-2A-9 (requiring, among other things, that the applicant show that water is available in order to obtain any water permit).

Further, the groundwater "mining" statute is specific to ground water. Regardless of whether the applicant's interpretation of SDCL 46-5-37 would merit consideration in a surface water case, it certainly does not bear out in this groundwater situation. The more specific (and more recent) ground water statute Peterson v. Burns, 2001 S.D. 126, 635 N.W.2d 556.

Moreover, this is not a situation where a permit can be granted to this single irrigator under the assumption that one small permit would have little effect on the recharge rate for an entire aquifer. A legal principle is involved here that will set the stage for additional applications. Indeed if the applicant's opinion is adopted, any fully appropriated water source in the state would now be subject to appropriation to the extent that any permit had ever been cancelled from the water source. This

would include other water sources closed to new appropriations for decades.

Ultimately, the Board's mandate includes ensuring that conservation of water is "to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." SDCL 46-1-4. Allowing for a loophole around the water mining statute would be inconsistent with the statutory criteria in SDCL 46-1-4.

The DENR asks that the Board consider the arguments contained herein as well as the testimony to be offered and resolve this matter in favor of giving full effect to the average annual recharge statute found at SDCL 46-6-3.1. The Hines permit should be denied.

Dated this 21st day of November, 2003.



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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the **Amended** Prehearing Brief In the Matter of Water Permit Application No. 6431-3, Phillip Hines, were served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Pierre, South Dakota, on this 21st day of November, 2003:

Francis E. Brink
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

Ray Rylance
Attorney at Law
P.O. Box 227
Watertown, SD 57201-0227

by interoffice mail to:

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

and by hand delivery upon:

John P. Guhin
Deputy Attorney General
Office of Attorney General
State Capitol Building
Pierre, SD 57501



Diane Best
Assistant Attorney General

sixty days thereafter he shall certify the amount thereof to the state's attorney of the county in which the said infested trees or plants are found, whose duty it shall be to proceed forthwith to collect the same of him in a civil suit, and to turn the amount so recovered over to the state auditor to reimburse the state for the money so expended.

§ 3. When nursery stock is shipped into the state, accompanied by a certificate of inspection by a state entomologist from the state from which said nursery stock was shipped, stating that the stock has been inspected and found to be free from any injurious insect pests and dangerous and contagious plant diseases, it shall be held prima facie evidence of the facts therein stated; but the state entomologist, when he have reason to believe that any such stock is, nevertheless, infested by any such injurious and dangerous pests, shall be authorized to inspect the same and submit it to like treatment as that provided for in section two hereof; and if, by reason of the failure for forty-eight hours of the owner of such stock to comply with the treatment prescribed, or to destroy the stock if so ordered, the state entomologist is required to perform the work himself, and it shall be the duty of the entomologist to certify the amount of the cost thereof to the owner or person in charge of such stock so treated or destroyed, and if the same is not paid to him within ten days thereafter he shall certify the amount thereof to the state's attorney of the county in which the stock may be found, in an affidavit, and it shall be the duty of such county attorney to file such affidavit with the register of deeds of the county in which said stock may be, and the same shall thereupon constitute a lien thereon, which it shall be the duty of such state's attorney to proceed to collect forthwith in a civil suit, and to turn over the amount so recovered by him in such suit to the state auditor to reimburse the state for the money so expended.

§ 4. It shall be unlawful for any person, firm or corporation to bring into this state any trees, plants, vines, cuttings or buds, commonly known as nursery stock, unless accompanied by a certificate of inspection by a state entomologist of the state from which the shipment is made, showing that the stock has been inspected and found apparently free from any injurious insect pests, or dangerous and contagious plant diseases.

§ 5. Any persons violating or failing to carry out the provisions of this act, or offering any hindrance to the same, shall be adjudged guilty of a misdemeanor, and upon conviction before any court having proper jurisdiction, shall be fined not less than ten dollars nor more than one hundred dollars for each and every offense, together with all the costs of the prosecution, and shall stand committed until the same is paid.

Approved March 6, 1905.

IRRIGATION

CHAPTER 132

(H. B. 44)

STATE IRRIGATION CODE

AN ACT Entitled an Act to Provide for a State Irrigation Code.

Be it Enacted by the Legislature of the State of South Dakota: *As'06-27*

§ 1. Waters Public] All waters within the limits of the state *As'06-27* from all sources of water supply not navigable, belong to the public and are subject to appropriation for beneficial use.

§ 2. Beneficial Use, Appurtenance, Priority] Beneficial use shall be the basis, the measure and the limit of the right to the use of water, that all water used for irrigation purposes shall be appurtenant to specified lands owned by persons claiming the right to use the water, as long as it shall be practicable to beneficially or economically use the water thereon. Priority in time shall give the better right. In all cases of claims to the use of water initiated prior to the passage of this act, the right shall relate back to the initiation of the claim, upon diligent prosecution to completion of the necessary surveys and construction for the application of the water to a beneficial use. All claims to the use of water initiated after the passage of this act shall relate back to the date of receipt of an application therefor in the office of the state engineer, subject to compliance with the provisions of this act, and the rules and regulations established thereunder.

§ 3. Eminent Domain] The beneficial use of water is a public use, and the United States or any person, corporation or association may exercise the right of eminent domain to acquiring a right now or hereafter existing to the use of water for beneficial purposes, or to acquire right of way for the storage or conveyance of waters for beneficial use, including the right to enlarge existing structures and use the same in common with the former owner. Such right of way shall in all cases be so located as to do the least damage to private or public property, consistent with proper and economical engineering construction. Such rights may be acquired in the manner provided by law for the taking of private property for public use.

§ 4. Reclaiming Waters.] Waters turned into any natural or artificial water course by any party entitled to the use thereof may be reclaimed below and diverted therefrom by such party, subject to existing rights. Due allowance for losses to be made, as determined by the state engineer.

§ 5. State Engineer—Appointment and Powers] There shall be a state engineer who shall be appointed by the governor and confirmed by the senate. He shall hold office for the term of six years unless removed by the governor for cause, or until his successor shall have been appointed, and shall have qualified. He shall have general supervision of the waters of the state and of the measurements and appropriation thereof, including the duties of locating, surveying and making estimates of the cost of drainage canals and ditches within the state to carry off the surplus waters, caused by overflow of rivers or otherwise, preventing malarial diseases and damage to growing crops. No person shall be appointed to this office except a technically qualified and experienced hydraulic engineer. The state engineer shall receive a salary of \$2,000 per annum.

§ 6. Assistant State Engineer—Bond—Expenses of Office] The state engineer shall have the power to employ an assistant state engineer at a salary not to exceed five dollars per day while actually engaged in the performance of the duties of his office. Before entering upon the duties of his office the assistant state engineer shall give bond, to be approved by the attorney general, for the faithful performance of the duties of his office, in the penal sum of five thousand dollars.

§ 7. Establishment of Office and Traveling Expenses] The office of state engineer shall be in the state capital. The state engineer and assistant state engineer shall be allowed actual and necessary traveling expenses while away from the office on official business.

§ 8. State Engineer's Report] The state engineer shall prepare and deliver to the governor on or before December 31st of the year preceding the regular session of the legislature, and at other times when required by the governor, a full report of the work in his office, including a detailed statement of the expenditures thereof, with such recommendations for legislation as he may deem advisable.

§ 9. Fees of State Engineer] The state engineer shall receive the following fees, to be collected in advance, and to be paid by him into the general fund of the state treasury on the first Monday of January, April, July and October respectively: (a) For filing and examining an application for permit to appropriate water, and map of the same, five dollars. (b) For recording any permit, certificate of construction or license issued, or any other water right instru-

ment, one dollar for the first hundred words and fifteen cents for each additional hundred words or fraction thereof. (c) For filing any other paper, one dollar. (d) For issuing certificates of construction or license to appropriate water, one dollar each. (e) For making copy of any document recorded or filed in his office, fifteen cents for each hundred words or fraction thereof. (f) For blue print copy of any map or drawing, ten cents per square foot or fraction thereof. For other copies or drawings, actual cost of the work. (g) For certifying to such copies, one dollar for each certificate. (h) For examining and approving plans and specifications for any dam not exceeding ten feet in extreme height from the foundation, ten dollars. For a dam higher than ten feet and not exceeding thirty feet, twenty dollars. For a dam higher than thirty feet and not exceeding fifty feet, thirty dollars. For a dam higher than fifty feet, fifty dollars. (i) For inspecting dam sites and construction work when required by law, or when necessary in the judgment of the state engineer, ten dollars per day and actual and necessary traveling expenses. The fees for any inspection deemed necessary by the state engineer and not paid on demand, shall be a lien on any land or other property of the owner of the works, and may be recovered by the state engineer in any court of competent jurisdiction. (j) For such other work as may be required of his office, the fees provided by law.

§ 10. Records of State Engineer] The records of the office of the state engineer are public records and shall remain on file in his office and be open to inspection of the public at all times during business hours. Such records shall show in full all permits, certificates of completion of construction and licenses issued, together with all action thereon, and all action or decisions of the state engineer affecting any rights or claims to appropriate water.

§ 11. Bond of State Engineer] Before entering upon the duties of his office the state engineer shall give bond, to be approved by the attorney general, for the faithful performance of the duties of his office, in the penal sum of five thousand dollars.

§ 12. Rules and Regulations] The state engineer shall make all necessary general rules and regulations to carry into effect the duties devolved upon his office. All such rules and regulations relating to applications for permits to appropriate water, for the inspection of works, for the issuance of license, and for the determination of rights to the use of water, shall be modified by the state engineer, if required by a two-thirds vote of the board of water commissioners hereinafter established.

§ 13. Appeal to Board of Water Commissioners] Such modifications of the rules and regulations of the state engineer shall be voted upon by the board of water commissioners only on an appeal from the decision of the state engineer.

DETERMINATION OF WATER RIGHTS

§ 14. Hydrographic Surveys and Co-operation] The state engineer shall make hydrographic surveys and investigations of each stream system and source of water supply in the state, beginning with those most needed for irrigation, obtaining and recording all available data, for the determination, development and adjudication of the water supply of the state. He shall be authorized to co-operate with the agencies of the federal government engaged in similar surveys and investigations, and in the construction of works for the development and use of the water supply in the state, expending for such purpose any money available for the work of his office.

§ 15. Suit of Adjudication of Water Rights] Upon the completion of such hydrographic survey of any stream system, the state engineer shall deliver a copy thereof, together with copies of all data necessary for the determination of all rights to the use of the waters of such system, to the attorney general of the state, who shall within sixty days thereafter enter suit on behalf of the state for the determination of all rights to the use of such water, and shall diligently prosecute the same to the final adjudication. Provided, that if suit for adjudication of such rights shall have been begun by private parties, the attorney general shall not be required to bring suit. Provided, however, that the attorney general shall intervene in any suit for the adjudication of rights to the use of water on behalf of the state, if notified by the state engineer that in his opinion the public interest requires such action.

§ 16. Parties and Cost of Suits] In any suit for the determination of a right to use of the waters of any stream system, all who claim the right to use such waters shall be made parties. When any such suit has been filed, the court shall, by its order duly entered, direct the state engineer to make or furnish a complete hydrographic survey of such stream system as hereinbefore provided, in order to obtain all data necessary to the determination of the rights involved. The cost of such suit, including the cost on behalf of the state and of such surveys, shall be charged against each of the private parties thereto, in proportion to the amount of water right allotted.

36-249 § 17. Fund for Hydrographic Survey] For the purpose of advancing the money required for any surveys so ordered by the court, there is hereby appropriated and set apart from any moneys in the treasury not otherwise appropriated, a fund of five hundred dollars, which shall be used to pay the expenses of such surveys. The amounts paid by the parties to such suits on account of such surveys shall be returned to such fund, which shall continue to be available for advancing the expenses of such surveys as ordered by the court from time to time.

§ 18. Filing of Decree Adjudicating Water Rights] Upon the adjudication of the rights for the use of the waters of a stream system, two certified copies of the decree shall be prepared by the clerk of the court at the cost of the parties; one copy shall be filed in the office of the state engineer, and the other in the office of the water commissioner of the water division in which the stream system is situated. Such decree shall in every case declare as to the water right adjudged to each party, the priority, amount, purpose, place of use and, as to waters used for irrigation, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be deemed necessary to define the right and its priority.

APPROPRIATION OF WATER

§ 19. Application for Water Right] Any person, association or corporation hereafter intending to acquire the right to the beneficial use of any waters shall, before commencing any construction for such purpose or before taking the same from any constructed works, make an application to the state engineer for a permit to appropriate, in the form required by the rules and regulations established by him. Such rules and regulations shall require the applicant to state all the data necessary for the proper description and limitation of the rights applied for, together with such information, maps, plans and specifications as may be necessary to show the method and practicability of the construction and the ability of the applicant to complete the same. All maps, plans and specifications shall be filed in duplicate, one copy to be retained in the office of the state engineer after the approval of the application. The state engineer may require additional information not provided for in the general rules and regulations, in any case involving the diversion of five hundred cubic feet of water per second or more, or the construction of a dam more than thirty feet high from the foundation. The owners of works proposing to store or carry water in excess of their needs for beneficial use, may make application for such excess and shall be held as trustees of such right for the parties applying the water to a beneficial use, and shall be required to furnish the water for such parties at reasonable rates for storage, or carriage, or both, as the case may be.

§ 20. Filing and Correction of Applications] The date of receipt of such applications in the state engineer's office shall be endorsed thereon and noted in his records. If the application is defective as to form, or unsatisfactory as to feasibility or safety of the plan, or as to the showing of the ability of the applicant to carry the construction to completion, it shall be returned with a statement of the corrections or changes required, within thirty days after its receipt, and sixty days shall be allowed for the re-filing thereof. If re-filed, corrected as required, within such time, the application shall, upon being accepted, take priority as of the date of its original

filing, subject to compliance with the further provisions of the law and the regulations thereunder. Any corrected application filed after the time allowed shall be treated in all respects as an original application received on the date of its re-filing. Provided, that the plans of construction may be amended, with the approval of the state engineer, at any time; but no such change shall authorize an extension of time for construction beyond five years from the date of the permit, except as provided in section thirty.

§ 21. Publication of Notice] Upon the filing of an application which complies with the provisions of this act and the rules and regulations established thereunder, the state engineer shall instruct the applicant to furnish notice thereof, in a form prescribed by him, in some newspaper of general circulation in the stream system, once a week for four consecutive weeks. Such notice shall give all essential facts as to the proposed appropriation, among them the places of appropriation and of use, amount of water, the purpose for which it is to be used, name and address of applicant and the time when the application will be taken up by the state engineer for consideration. Proof of publication as required shall be filed with the state engineer within sixty days from the date of his instructions to make publication. In case of failure to file satisfactory proof of publication in accordance with the rules and regulations applicable thereto, within the time required, the application shall thereafter be treated as an original application filed on the date of receipt of proofs of publication in proper form.

§ 22. Approval of Application] Upon the receipt of the proofs of publication, the state engineer shall determine from the evidence presented by the parties interested, from such surveys of the water supply as may be available, and from the records, whether there is unappropriated water available for the benefit of the applicant. If so, he shall endorse his approval on the application, which shall thereupon become a permit to appropriate water, and shall state in such approval the time within which the construction shall be completed, not exceeding five years from the date of approval, and the time within which the water shall be applied to a beneficial use, not exceeding four years in addition thereto.

§ 23. Rejection and Appeal] If, in the opinion of the state engineer, there is no unappropriated water available, he shall reject such application. He shall decline to order the publication of notice of any application which does not comply with the requirements of the law and the rules and regulations thereunder. He may also refuse to consider or approve an application or to order the publication of notice thereof, if in his opinion the approval thereof would be contrary to the public interest. Any applicant may appeal from such decision of the state engineer, or from any other decision by him which denies a substantial right, within sixty days

from the date thereof, to the circuit court of the county in which the proposed place of diversion or storage is situated. In the absence of such appeal, the decision of the state engineer shall be final.

§ 24. Prosecution of Work] The construction of the works shall be diligently prosecuted to completion, and if one-fifth of the work shall not be completed within one-half the time allowed, the state engineer may accept and approve, as herein provided, an application for the use of all or any of the waters included in the permit issued to the prior applicant, and the right to use such waters under such permit shall thereupon be forfeited.

§ 25. Completion of Work] On or before the date set for the completion of the work, the state engineer shall cause the work to be inspected, after due notice to the owner of the permit. Such inspection shall be thorough and complete, in order to determine the actual capacity of the works, their safety and efficiency. If not properly and safely constructed, the state engineer may require the necessary changes to be made within a reasonable time, not to exceed six months, and shall not issue his certificate of completion until such changes are made. Failure to make such changes shall cause the postponement of the priority under the permit for such time as may elapse from the date for completing such changes until made to the satisfaction of the state engineer, and applications subsequent in time shall have the benefit of such postponement of priority. Provided, that the works involving the diversion of not exceeding twenty cubic feet of water per second, or a dam not exceeding ten feet in extreme height from the foundation, the engineer may, in his discretion, accept the certificate of inspection of any reputable hydraulic engineer.

§ 26. Certificate of Completion] When the works are found in satisfactory condition, after inspection, the state engineer shall issue his certificate of construction, setting forth the actual capacity of the works, and such limitations upon the water right as shall be warranted by the condition of the works. But in no manner exceeding the rights described in the permit.

§ 27. Inspection of Works] If the state engineer shall in the course of his duties find that any works used for the storage, diversion or carriage of water are unsafe and a menace to life and property, he shall at once notify the owner or his agent, specifying the changes necessary and allowing a reasonable time for putting the works in safe condition, not exceeding three months. Upon the request of any party, accompanied by the estimated cost of inspection, the state engineer shall cause any alleged unsafe works to be inspected. If they shall be found unsafe by the state engineer, the money deposited by such party shall be refunded, and the fees for inspection shall be paid by the owner of such works, and, if not

paid by him within thirty days after the decision of the state engineer, shall be a lien against any property of such owner, to be recovered by suit instituted by state's attorney of the county at the request of the state engineer. The state engineer may, when in his opinion it is necessary, inspect any works under construction for storage, diversion and carriage of water, and require any changes necessary to secure their safety. The fees for such inspection shall be a lien on any property of the owner and shall be subject to collection as provided herein. Provided, that any works constructed by the United States, or by its duly authorized agencies, shall not be subject to such inspection while under the supervision of officers of the United States.

§ 28. Use of Unsafe Works] The use of works for the storage, diversion or carriage of water, at any time after an inspection thereof by the state engineer and receipt of notice from him that the same are unsafe for the purpose for which they are used, until the receipt of notice from him that in his opinion they have been made safe, shall be a misdemeanor and it shall be the duty of the state engineer to give prompt notice to the state's attorney of the county in which such works are located, in case of such violation. The state's attorney shall at once proceed against the owner, and all parties responsible therefor.

§ 29. Application to Beneficial Use] On or before the date set for the application of water to a beneficial use, the state engineer, shall cause the works to be inspected, after due notice to the owner of the permit. Upon the completion of such inspection, the state engineer shall issue a license to appropriate water to the extent and under the conditions of the actual application thereof to beneficial use, but in no manner extending the right described in the permit. Provided, that the inspection to determine the amount of water applied to a beneficial use shall be made at the same time as that of the constructed work, if requested by the owner, and if such action is deemed proper by the state engineer.

§ 30. Extension of Time] The state engineer shall have power to extend the time for completion of construction or for application to beneficial use, for three years and two years, respectively, but only on account of delays due to physical or engineering difficulties which could not have been reasonably anticipated, or by operation of law beyond the power of the applicant to avoid.

§ 31. Assignment of Permit or License] Any permit or license to appropriate water may be assigned, but no such assignment shall be binding, except upon the parties thereto, unless filed for record in the office of the state engineer. The evidence of the right to use water from any works constructed by the United States, or its duly authorized agencies, shall in like manner be filed in the office of the state engineer, upon assignment. Provided, that

no right to appropriate water for irrigation purposes shall be assigned, or the ownership thereof in any wise transferred, apart from the land to which it is appurtenant, except in the manner especially provided by law. Provided, further, that the transfer of title to land in any manner whatsoever shall carry with it all rights to the use of water appurtenant thereto for irrigation purposes.

§ 32. Transfer of Water Record] It shall be the duty of the county recorder and the county clerk of each county in the state within thirty days of the passage of this act, to prepare and forward by express or registered mail, at the expense of the county to the state engineer, a transcript of all records relating to water rights, provided that they may forward any original records in their office which have been duly recorded. The state engineer shall classify and arrange such papers to conform to the stream systems and shall send copies thereof relating to each water division to the water commissioner thereof. He shall likewise forward to the water commissioner copies of all records, permits, and licenses to appropriate water relating to his division, and shall advise him of all acts and decisions of the state engineer's office affecting the apportionment of waters in his division.

§ 33. Referee in Water Suits] In any water suit the court may appoint a referee or referees, not exceeding three, to take testimony and report upon the rights of the parties, as in other equity cases.

§ 34. Attorney General and State's Attorneys Advisors of State Engineer] The attorney general and the state's attorney of the county in which legal questions arise shall be the legal advisers of the state engineer, and shall perform any and all legal duties necessary in connection with his work, without other compensation than their salaries as fixed by law, except when otherwise provided.

§ 35. Charges for Carrying and Delivering Water] The owner or owners of any works for the storage, diversion or carriage of water, which contain water in excess of their needs for irrigation or other beneficial use, for which it has been appropriated, shall be required to deliver such surplus, at reasonable rates for storage, or carriage, or both, as the case may be, to the parties entitled to the use of the water for beneficial purposes. In case of the refusal of such owner or owners to deliver any such surplus water at reasonable rates, as determined by the state engineer, they may be compelled to do so by the circuit court for the county in which the surplus water is to be used.

§ 36. Appropriation of Waters by the United States] Whenever the proper officers of the United States, authorized by law to construct works for the utilization of waters within the state, shall notify the state engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated

at the date of such notice, shall not be subject to further appropriation under the laws of this state, for a period of three years from the date of said notice, at which time the proper officers of the United States shall file plans for the proposed works in the office of the state engineer for his information, and no adverse claim to the use of such water, initiated subsequent to the date of such notice, shall be recognized under the laws of this state, except as to such amount of the water described in such notice as may be formally released in writing by an officer of the United States thereunto duly authorized. Provided, that in case of failure to file plans of the proposed works within three years, as herein required, the waters specified in the notice given by the United States to the state engineer shall become public waters, subject to general appropriation.

WATER COMMISSIONERS

§ 37. Water Divisions] The state shall be divided into water divisions as follows:

Division 1. Butte, Meade and Lawrence counties.

Division 2. All counties west of the Missouri river except Butte, Meade and Lawrence counties.

Division 3. All counties east of the Missouri river.

§ 38. Water Commissioners] A water commissioner shall be appointed by the governor for each water division as hereinafter established, to serve for a term of six years or until his successor shall have qualified, and shall be subject to removal by the governor. Provided, that the water commissioners first appointed after the passage of this act shall serve for terms specified as follows: Water division No. 1, six years; water division No. 2, four years; water division No. 3, three years.

§ 39. Duties of Water Commissioners] Each water commissioner shall have the supervision of the apportionment of water in his division, according to the licenses issued by the state engineer and the adjudication of the courts. Each commissioner shall have the custody of the records relating to his division, which shall be public records and shall be transmitted to his successor in office. Each water commissioner, before entering upon the duties of his office, shall take and subscribe an oath of office and give a bond with good and sufficient sureties to be approved by the supreme court, in the sum of two thousand dollars, for the faithful performance of the duties of his office, which oath and bond shall, upon approval, be filed in the office of the secretary of state.

§ 40. Board of Water Commissioners] The water commissioners of all the water divisions, together with the state engineer, who shall be president thereof, shall constitute the board of water commissioners, which shall have general supervision of the apportionment of the waters of the state. The board shall adopt general

rules and regulations to govern its proceedings. The state engineer shall have a vote on all matters coming before the board, except appeals, authorized by law, from his acts as the state engineer. The board shall meet on the first Monday in March in every year, at the office of the state engineer, and at such other times and places as may be agreed upon by a majority of its members, whereupon the state engineer shall give notice of such meeting to all members.

§ 41. Pay to Water Commissioners] The water commissioners shall be paid from the state treasury at the rate of five dollars per day for the time actually engaged in official duties, not exceeding one hundred days in one year. They shall also be paid actual and necessary traveling expenses while away from their homes on official business.

§ 42. Water Districts] The state engineer shall, from time to time, as may be necessary, for the economical and satisfactory apportionment of the water, divide each water division into water districts, to be designated by names and comprise, so far as possible, one or more distinct stream systems in each district. The districts may be changed from time to time, as may in his opinion be necessary for the economical and satisfactory apportionment of the water.

§ 43. Appeals to State Engineer] Any person may appeal from the acts or decisions of the water commissioner to the state engineer, who shall promptly and at a stated time and place, to be fixed by him, upon due notice to the parties, hear and determine the matter in dispute, and his decision shall be final, unless an appeal is taken to the courts within thirty days.

MISCELLANEOUS PROVISIONS

§ 44. Units of Measurements] The standard of measurement of the flow of water shall be the cubic foot per second of time; and the standard of measurement of the volume of water shall be the acre foot, being the amount of water upon an acre covered one foot deep, equivalent to forty-three thousand five hundred sixty (43,560) cubic feet. The miner's inch shall be regarded as one-fiftieth of a cubic foot per second in all cases, except when some other equivalent of the cubic foot per second has been specially stated by contract, or has been established by actual measurement or use.

§ 45. Abandonment] When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of two years, such unused water shall revert to the public and shall be regarded as unappropriated public water.

§ 46. Amount of Water for Irrigation] In the issuance of permits to appropriate water for irrigation purposes or in the adjudication of rights to the use of water for such purpose, the amount



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

December 9, 2003

NOTICE

TO: Raymond Rylance
Wiles & Rylance, LLP
PO Box 227
Watertown SD 57201-0227

FROM: Garland Erbele, Chief Engineer
Water Rights Program

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

The Water Management Board directed John Guhin, Deputy Attorney General, to prepare proposed Findings of Fact, Conclusions of Law and a Final Decision in the denial of Water Permit Application No. 6431-3 filed by Phillip Hines. The Board will consider adoption of Findings, Conclusions and Final Decision at 1:00 PM, on March 3, 2004, in the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre SD. The agenda time is an estimate and may be delayed due to prior agenda items.

The Board requested that a copy of the proposed Findings, Conclusions and Final Decision be mailed to each Board member and parties by February 12, 2004. Written objections or comments in support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision are to be mailed to each Board member, the Board attorney (mailing list enclosed) by February 23, 2004.

Oral arguments by parties who timely filed written comments in opposition or support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision may be made on March 3, 2004. The public hearing was completed on December 3, 2003. No additional testimony will be received on March 3, 2004.

Enclosure

c: John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General
Philip Hines, 2719 Spring Lake Rd, Prior Lake MN 55372

2003/2004 WATER MANAGEMENT BOARD MEMBERS

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

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

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

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

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

Dwayne Rollag
320 Lincoln Lane S
Brookings SD 57006-2741

BOARD ATTORNEY

John Guhin, Deputy Attorney General
Office of Attorney General
Natural Resources Section
State Capitol Building
Pierre, SD 57501

WATER RIGHTS PROGRAM

Department of Environment and
Natural Resources

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

STAFF ATTORNEY

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

CERTIFICATION

I hereby certify that on December 9, 2003, I personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing two Notices both dated December 9, 2003, regarding adoption of findings of fact, conclusions of law and final decision canceling Water Right No. 3466-3 and preparation of findings of fact, conclusions of law and final decision in the matter of Water Permit Application No. 6431-3, addressed as stated below.

Raymond Rylance
Wiles & Rylance, LLP
PO Box 227
Watertown SD 57201-0227

Phillip Hines
2719 Spring Lake Road
Prior Lake MN 55372

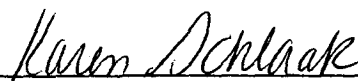
A copy of the Notice was sent Inter-office to:

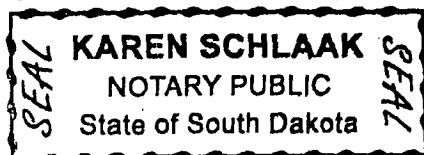
John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General


Eric Gronlund
Natural Resource Engineer
Water Rights Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 10th day of December, 2003.


Karen Schlaak
Notary Public
My Commission expires April 1, 2007





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

LARRY LONG
ATTORNEY GENERAL

MARK BARNETT
CHIEF DEPUTY ATTORNEY GENERAL

MEMORANDUM

February 12, 2004

TO: Members of the Water Management Board and Interested Parties

FROM: John P. Guhin, Attorney for the Water Management Board *John P. Guhin*

RE: Proposed Findings of Fact, Conclusions of Law and Final Decision, on Water Permit Application No. 6431-3, Phillip W. Hines

Pursuant to the direction of the Board, I am herewith enclosing proposed Findings of Fact, Conclusions of Law and a Final Decision in the above-entitled matter.

Please consult the Notice of the Chief Engineer of December 9, 2003, for further information.

JPG/jmm

Enclosure

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE)
APPLICATION FOR WATER PERMIT) FINDINGS OF FACT, CONCLUSIONS
NO. 6431-3, PHILLIP W. HINES) OF LAW AND FINAL DECISION

FINDINGS OF FACT

1. This is an application to appropriate 1.0 cfs (450 gpm) from one well approximately 54 feet deep to irrigate 91 acres in Beadle County.

2. The water permit requested is for the same acres and for the same well as Water Right No. 3466-3. Water Right No. 3466-3 was declared to be "cancelled by reason of forfeiture" by this Board on December 3, 2003. In the Matter of the Petition for Cancellation of Water Right No. 3466-3, Phillip Hines, Findings of Fact, Conclusions of Law and Final Decision (December 3, 2003). In that decision, the Board found that the 91 acres had not been irrigated for "several periods of three continuous years beginning in 1984." Id. at Findings, ¶ 7.

3. The aquifer proposed for this application is the Tulare East James. This aquifer is predominantly a buried outwash (sand and gravel) in Spink and Beadle counties. It can be either under water table or artesian conditions. In the area of the proposed well, the aquifer is under water table conditions.

4. The aquifer underlies 23,200 acres and contains an estimated 132,000 acre-feet of recoverable water in storage in Beadle County and underlies 100,700 acres and contains an estimated 476,000 acre-feet of recoverable water in storage in Spink County, according to a study by Hedges in 1982. A study by

Jim Goodman of the Spink County portion of the aquifer found that it underlies 102,400 acres and contains 630,000 acre-feet of recoverable water.

5. In 1984, L.K. Kuiper, for USGS, issued a document entitled "Appraisal of Water Resources of Eastern Part of the Tulare Aquifer, Beadle, Hand and Spink Counties, South Dakota." Kuiper estimated an average recharge rate of .76 inches per year for the aquifer. Applying the 0.76 inch per year to the Tulare East James Aquifer acreage in Spink and Beadle counties yields an average volume of recharge of 7,950 acre-feet per year.

6. The average pumping from the aquifer has been 6,604 acre-feet for the last twenty-four years. In six of the past twenty-four years, pumping exceeded the average annual recharge of 7,950 acre-feet per year. Pumping has significantly exceeded the average annual recharge in two of the past three years. Pumping was 10,287 acre-feet in 2001 and 13,668 acre-feet in 2003. The average of the last three years has been 10,548 acre-feet.

7. Evidence before the Board indicates that from 1966 through 1981 there were declining water levels and there was substantial concern about the future availability of water from the aquifer. Nonetheless, up through the period of 1981, a significant number of water permits were granted from the aquifer in the affected area.

8. After the period ending in 1981, no permits were granted virtually to the present time. The Board surmises that a pause in the early 1980s in the grant of permits was predicated

on the studies of water availability then in progress. The Hedges study was completed and published in 1982. The Kuiper and Goodman studies were completed in 1984. Based upon the facts revealed by the studies when they were completed, no permits have been granted in the area since 1981. The Board has thus relied upon the studies cited above for roughly two decades.

9. There is one exception to the statement above that there were no permits granted after 1981. In 1991, the Board approved a permit for Darrell Starr. This permit, however, did not include a diversion rate. Rather, the permit apparently simply relocated twenty-three acres for irrigation as a result of an inspection. The grant of this "correction permit" in 1991 was consistent with Board policy back to the 1980s in which the Board understood that, although the Tulare East James would not be available for further appropriations, there would likely be reasonable requests for "clean up" of at least a few permits.

10. The proponent of the permit, addressing specifically the water mining issue, argues that permits in the affected area allow withdrawals of roughly 42,000 acre-feet per year. The proponent argues that, even in the most extreme year of pumping, only 13,000 acre-feet have actually been used. The proponent thus argues that there must be at least one additional acre-foot available for his use.

11. The proponent of the water permit is correct that the theoretical maximum water use from irrigation is 42,000 acre-feet per year. This total volume of potential water use is based upon a calculation of three acre-feet of water per acre for acreage

permitted before 1976 and two acre-feet of water per acre for acreage permitted after that time. See generally SDCL 46-5-6. Although these statistics state the total amount of water which could, in theory, be used, practical experience has informed the Board that actual use is far below that potential.

12. The actual use of water is dependent upon factors which vary quite substantially. For example, precipitation in the affected area averages roughly eighteen inches per year. In some years in the 1990s, however, precipitation has been substantially more--thirty inches per year. In the last few years, the precipitation has been fourteen to sixteen inches per year. In years with below average precipitation, water use will be greater from the aquifer; in years with very abundant precipitation, water use may be negligible. Other climatic conditions, such as temperature and wind affect irrigation potential. Likewise, changes in crop selection will necessarily significantly affect the amount of water used to irrigate.

13. The argument of the proponent based on a potential of 42,000 acre-feet of use fails to account for these factors and must be rejected.

14. The Applicant makes a further, related argument. The Applicant argues that the average annual recharge in the aquifer in Spink and Beadle counties amounts to 7,950 acre-feet. The Applicant adds that the average pumping from the aquifer for the last twenty-four years has been 6,604. The Applicant thus argues, on the basis of SDCL 46-6-3.1 (the water mining law), that according to the "best information reasonably available," it

is probable that the quantity of water withdrawn annually from the Tulare East James will not exceed the quantity of average estimated annual recharge of water.

15. Therefore, the Applicant argues that there is at least one cfs available for his application.

16. The Board rejects this argument. First, in two of the last three years, the average pumping exceeded the average annual recharge to the aquifer. The pumping in 2001 amounted to 10,287 acre-feet and in 2003 amounted to 13,668 acre-feet. The average pumping for the last three years has been 10,548 acre-feet. Therefore, taking the last three years as the "average" annual recharge, it is clear that the additional application cannot be allowed consistent with the water mining law.

17. Second, in the alternative, the Board rejects the implicit and related argument that it should utilize the average of the past twenty-four years alone and disregard the last three years of pumping. The past three years reveal substantial over-use of the aquifer and, as they constitute the most recent evidence, are the most probative of what will occur in the future. Moreover, the Board credits the uncontradicted testimony of expert Jim Goodman, who testified, based upon his own studies and his professional observation of the aquifer over more than two decades, that the aquifer is being used at its capacity. Taking these factors together, the Board finds it reasonable to conclude that further applications will constitute water mining under the statute.

18. Finally, twenty-four years, in the context of hydrology, is a relatively short period of time. The Board acknowledges that in the next ten to twenty years, further reliable information may come to its attention which supports requests for further permits. The relatively short time period of record, combined with the very recent over-appropriation, dictate that no permit be allowed because of the water mining statute.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter.
2. This permit may not be granted consistent with SDCL 46-6-3.1. The Board finds that "according to the best information reasonably available," it is probable that the quantity of water withdrawn annually from the East James Tulare will exceed the quantity of average annual recharge water to the aquifer, all for the reasons set forth above.

FINAL DECISION

The application for Water Permit No. 6431-3 is denied.

Dated this _____ day of _____, 2004.

BY THE BOARD

Chairman

IN THE MATTER OF THE)
APPLICATION FOR WATER PERMIT) CERTIFICATE OF SERVICE
NO. 6431-3, PHILLIP W. HINES)

By hand delivery to:

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

A handwritten signature in black ink, appearing to read "John P. Guhin", written over a horizontal line.

John P. Guhin
Deputy Attorney General
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215
Assistant Attorney General

pld.jpg (Certificate of Service Phillip W. Hines) (jmm)

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE)	DENR RESPONSE TO PROPOSED
APPLICATION FOR WATER PERMIT)	FINDINGS OF FACT, CONCLUSIONS
NO. 6431-3, PHILLIP W. HINES)	OF LAW AND FINAL DECISION

COMES NOW, the South Dakota Department of Environment and Natural Resources, Water Rights Program (DENR), and makes its response to Board counsel's Proposed Findings of Fact, Conclusions of Law, and Final Decision.

2. On page 3, paragraph 9 addresses an exception to the Board's position regarding the aquifer in question. The DENR suggests that the first sentence be changed by deleting the words "is one exception" and inserting the words "are very few exceptions." The DENR submits that at line 5, the words "simply relocated" should be replaced with the word "added." Further, the DENR suggests an additional sentence to read: Other "cleanup" of water permits has involved changing the rate of water use, but not the quantity (volume) of water used for an appropriation.
3. On page three, the last sentence in Finding of Fact ten refers to "one additional acre foot." The DENR submits that the issue in controversy is "one cfs."
4. Based on dialog at a previous hearing, the DENR had expected that counsel for Hines would make an argument regarding the interpretation of SDCL 46-5-37. Accordingly, the DENR filed a pre-hearing brief. Upon review, it appears that the legal question was not raised at hearing. The DENR proposes the following additional Conclusion of Law:

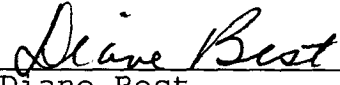
The DENR filed a pre-hearing brief. DENR argued that even though the Board had recently cancelled water right No. 3466-3 due to forfeiture, such cancellation did not make water available for appropriation under SDCL 46-5-37. More specifically, the brief addressed the interpretation of SDCL 46-5-37 in light of the "average annual recharge statute" found at SDCL 46-6-3.1. According to the brief, it was filed in anticipation that the Applicant would raise claims that SDCL 46-5-37 warranted a finding that once a water right is forfeited, an equivalent quantity of water then becomes available for appropriation. The Applicant did not in fact raise such argument and it is therefore not before this Board for consideration.

5. The DENR also submits that another conclusion of law is warranted:

The Board has addressed its consistent position since 1981 regarding this aquifer. This Board's findings are not, however, based entirely on the issue of whether it has made similar decisions in the past (or whether it has made exceptions in the past). The Board recognizes that the issue of whether a particular water use is beneficial or in the public interest may arguably change and the Board is not necessarily bound to its past decisions in that regard. However, the evidence on availability of water and its interpretation under SDCL 46-6-3.1 have been before the Board in past hearings and the facts and expert testimony cannot be ignored. Importantly, evidence before the Board in this specific case warrants the determination that water is not available for this application due to the water mining statute.

Other than the foregoing proposed changes, the DENR asks that the Board adopt the Proposed Findings of Fact, Conclusions of Law and Final Decision as proposed.

Dated this 23 day of February, 2004.


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

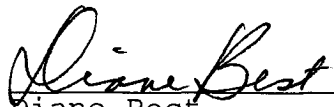
IN THE MATTER OF THE)
APPLICATION FOR WATER PERMIT) CERTIFICATE OF SERVICE
NO. 6431-3, PHILLIP W. HINES)

Phillip Hines
2719 Spring Lake Road
Prior Lake, MN 55372

5/

By hand delivery to:

John Guhin
Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501


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

p1d.db COS Water Permit No. 6431-3 (dp)

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE	)	APPLICANT'S PROPOSED
APPLICATION FOR WATER PERMIT	)	FINDINGS OF FACT AND
NO. 6431-3, PHILLIP W. HINES	)	CONCLUSIONS OF LAW

The above-entitled matter having come on for hearing before the Water Management Board, in the City of Pierre, South Dakota, on September 10, 2004, ; the Applicant, Phil Hines, appearing personally and with his attorney, Ray Rylance of the law firm of Wiles and Rylance, of Watertown, S.D. and Diane Best, appearing on behalf of the Dept. of Environment and Natural Resources of Pierre, South Dakota; evidence having been adduced on behalf of the Applicant, evidence having been adduced on behalf of the DENR; and the Board having heard and considered the same; the Board being fully advised in the premises; NOW, THEREFORE, the Board makes and enters the following:

FINDINGS OF FACT

1. This is an application to appropriate 1.0 cfs (450 gpm) from one well approximately 54 feet deep to irrigate 91 acres in Beadle County.
2. The water permit requested is for the same acres and for the same well as Water Right No. 3466-3. Water Right No. 3466-3 was declared to be "cancelled by reason of forfeiture" by this Board on December 3, 2003. In the Matter of the Petition for Cancellation of Water Right No. 3466-3, Phillip Hines, Findings of Fact, Conclusions of Law and Final Decision (December 3, 2003). In that decision, the Board found that the 91 acres had not been irrigated for "several periods of three continuous years beginning in 1984." Id. at Findings, ¶ 7.
3. The aquifer proposed for this application is the Tulare East James. This aquifer is predominantly a buried outwash (sand and gravel) in Spink and Beadle counties. It can be either under water table or artesian conditions. In the area of the proposed well, the aquifer is under water table conditions.
4. The aquifer underlies 23,200 acres and contains an estimated 132,000 acre-feet of recoverable water in storage in Beadle County and underlies 100,700 acres and

contains an estimated 476,000 acre-feet of recoverable water in storage in Spink County, according to a study by Hedges in 1982. A study by Jim Goodman of the Spink County portion of the aquifer found that it underlies 102,400 acres and contains 630,000 acre-feet of recoverable water.

5. In 1984, L.K. Kuiper, for USGS, issued a document entitled "Appraisal of Water Resources of Eastern Part of the Tulare Aquifer, Beadle, Hand and Spink Counties, South Dakota." Kuiper estimated an average recharge rate of .76 inches per year for the aquifer. Applying the 0.76 inch per year to the Tulare East James Aquifer acreage in Spink and Beadle counties yields an average volume of recharge of 7,950 acre-feet per year.

6. The average pumping from the aquifer has been 6,604 acre feet per year for 24 years for a total consumption of 158,496 Acre Feet.

7. The annual recharge to the aquifer is 7,950 acre feet per year for 24 years for a total recharge of 190,800 Acre Feet.

8. 32,304 acre feet of annual recharge has not been used over the last 24 years.

9. The last three years of pumping has exceeded the annual recharge by only 7794 acre feet or 2598 acre feet per year.

10. Over the last 24 years the annual average recharge has exceeded the usage by more than 24,510 acre feet.

11. The water level records indicates that the aquifer is capable of sustaining existing withdrawals.

12. Drawdown created by pumping for this application is not expected to be significant and interference is not a concern.

13. 42,00 acre feet of water withdrawal has been permitted by the Department of Water and Natural Resources out of this aquifer.

14. The average annual recharge is greater than the average annual withdrawal from the aquifer.

15. Water level records indicate that the aquifer is capable of sustaining existing withdrawals.

From the foregoing Findings of Fact, the Board makes and enters the following:

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this action.
2. The average quantity of water withdrawn annually over the last 24 years does not exceed the annual recharge.
3. Based on the Facts submitted water is available for appropriation.
4. The application should be approved and the water permit granted.

The application for Water Permit No. 6431-3 is approved.

DONE BY THE BOARD this _____ day of _____, 2004.

BY THE BOARD:

Chairman

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

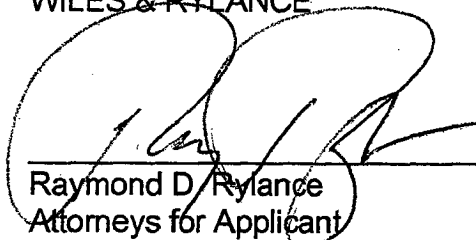
IN THE MATTER OF THE	)	OBJECTIONS TO FINDINGS OF
APPLICATION FOR WATER PERMIT	)	FACT, CONCLUSIONS OF LAW
NO. 6431-3, PHILLIP W. HINES	)	AND FINAL DECISION

COMES NOW, Phillip W. Hines, by and through his undersigned counsel of record, and respectfully submits the following Objections to the Water Management Board's proposed Findings of Fact, Conclusions of Law and Final Decision.

1. Objects to paragraphs 7, 8, 9, 12, 13, 16, 17 and 18 as they are not supported by the evidence.
2. Objects to Conclusion of Law #2 as it is not supported by the Findings of Fact.

Dated this 25th day of February, 2004.

WILES & RYLANCE



Raymond D. Rylance
Attorneys for Applicant
3 East Kemp, Suite 200
P. O. Box 227
Watertown, SD 57201-0227

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

PHILLIP W. HINES,)
)
 Appellant,)

vs.)

APPELLANT'S BRIEF

STATE OF SOUTH DAKOTA,)
WATER MANAGEMENT BOARD,)
)
 Appellee,)

COMES NOW, Phillip W. Hines, and respectfully submits this Brief requesting the Court to reverse the Decision of the South Dakota Water Management Board denying the Application for Water Permit #6431 on the basis that water was unavailable to grant the permit.

JURISDICTIONAL STATEMENT

Appellant, Phillip W. Hines, appeals from the Order and Findings of Fact and Conclusions of Law of the South Dakota Water Management Board dated March 11, 2004. Notice of Appeal was served on April 7, 2004.

STATEMENT OF ISSUES

1. Did the South Dakota Water Management Board properly deny the Application for Water Permit #6431 by asserting that water was not available to grant the permit to Phillip W. Hines.

STATEMENT OF FACTS

Phillip W. Hines filed an Application with the South Dakota Water Management Board requesting 1.0 cfs (450 gallons per minute) from one well approximately 54 feet

deep to irrigate approximately 91 acres in Beadle County. The Hines acquired the land in year 2000. The predecessor owners had a water permit (3466-3) and unknown to Hines, they had not been actively irrigating according to statute. The Department of Water and Natural Resources filed a notification that it would seek to terminate Water Right #3466-3 for reasons of forfeiture. The Water Management Board, on December 3, 2003, declared Water Right #3466-3 canceled by reason of forfeiture. Subsequent to that, Hines filed for Application #6431-3 to irrigate the same acres from the same well that was previously permitted under Water Right #3466-3.

The Application for Water Permit #6431-3 came on for hearing before the Water Management Board in the City of Pierre, South Dakota, on December 3, 2003.

James Goodman, an Engineer with the Department of Water and Natural Resources, testified on behalf of the Department. Goodman testified that the aquifer proposed for this Application was the Tulare East James, and that the aquifer is predominantly a buried outwash (sand and gravel) in Spink and Beadle Counties. He also testified that the proposed Application was for a well and that the aquifer in that area was under water table conditions (TR pg. 6, lines 3-8). Goodman further testified that the aquifer underlies 23,200 acres and contains an estimated 132,000 acre feet of recoverable water in storage in Beadle County, and also underlies 100,700 acres and contains an estimated 476,000 acre feet of recoverable water in storage in Spink County (TR pg. 6, lines 8-22). Goodman further went on to testify that the average annual recharge of the Tulare East James aquifer yields an average volume of recharge of 7,950 acre feet per year (TR pg. 16, lines 6-15). Goodman also stated that the average pumping from the aquifer has been 6,604 acre feet per year for the past 24

years (TR pg. 8, lines 3-7). This would provide for a total consumption of 158,496 acre feet over the 24-year period. The annual recharge of the same aquifer for the past 24 years would be 190,800 acre feet. By calculation, there is over 32,304 acre feet of annual recharge that has not been used over the past 24 years (TR pg. 17, lines 3-7). Goodman went on to testify that in the past three years, 2001, 2002 and 2003, the water usage for those years has exceeded the annual recharge by only 7,794 acre feet or 2,598 acre feet per year. By mathematical computation, over the past 24 years, the annual average recharge has exceeded the usage by more than 24,510 acre feet (32,304 acre feet minus 7,794 acre feet). The records, as supplied by the Department, indicate that the aquifer is capable of sustaining the existing withdrawals over a 24-year period. The average annual recharge is greater than the average annual withdrawal of the aquifer (TR pg. 16, lines 6-15 and TR pg. 8, lines 3-7).

The average pumping for the Tulare East James aquifer has been 6,604 acre feet for 24 years. In 2001, 10,287 acre feet were pumped and in 2003, 13,660 acre feet were pumped. The average pumping for 2001, 2002 and 2003 was 10,548 acre feet. The average pumping for 2002 was 7,689 acre feet, which is less than the average annual recharge (TR Goodman Report dated August 25, 2003).

The Water Management Board has issued permits authorizing the withdrawal of 42,000 acre feet of water out of the aquifer. The Department has indicated that since the end of 1981, they have not issued any further permits out of the Tulare East James aquifer. According to Goodman, the Tulare East James aquifer from 1977 to 2003 has actually been increasing in total volume (TR pg. 11, lines 14-18). Goodman also stated that the Water Management Board has permitted 42,000 acre feet of withdrawal. In

1981, the Water Management Board issued permits totaling 28.94 cfs to irrigate 2,071 acres when the observation wells in 1981 are at a lower level than they are today (TR pg. 17, lines 8-18). There is more water available today in the aquifer than in 1981.

ARGUMENT

The Water Management Board, in their Decision, determined that water was unavailable to grant Permit #6431-3. The Board relied on SDCL 46-6-3.1 in their Decision. SDCL 46-6-3.1 states as follows:

No application to appropriate groundwater may be approved if, according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from a groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source. An application may be approved, however, for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the greenhorn formation in excess of the average estimated annual recharge for use by water distribution systems.

The Decision of the Board did not rely on other factors in denying Permit #6431-3. Therefore, we need to look at the facts as set forth at the December 3, 2003 hearing. Do the facts support the Board's Decision? They do not. Jim Goodman, the Department's Engineer, through his testimony and his Report of August 25, 2003, sets forth that the annual average recharge is greater than the annual average discharge. In fact, when computing the average discharge in comparison to the average recharge, the recharge over the last 24 years is 24,510 acre feet greater than the discharge.

The position as set forth by the Board goes to great lengths to look at the last three years of pumping data (2001, 2002 and 2003). In trying to support their position, they conveniently left out the pumping rate for 2002. By calculation, the 2002 pumping

rate is 7,689 acre feet which is less than the average annual recharge of 7,950 acre feet. Therefore, in only two of the last three years (2001 and 2003) did we see a spike in discharges above the average recharge.

On the one hand, the Board states that 24 years is a short period of time when looking at water records, but on the other hand, they only want us to consider the last three years.

Even considering only the last three years, Goodman states in his August 25, 2003 report that "the water level record indicates that the aquifer is capable of sustaining existing withdrawals". Existing withdrawals therefore have not been a problem. When we consider the 24-year average, we are consistently withdrawing less water than the recharge. This indicates that water is available.

In complying with SDCL 46-6-3.1, the Board, in approving previous water permits for the Tulare East James aquifer, has stated that water is available for all permits. The total of the current outstanding permits is 42,000 acre feet that is available for appropriation. In order to grant all of the previous permits, the Board had to determine that water was available. Therefore, water is available for 42,000 acre feet. To do otherwise would be contrary to and in violation of SDCL 46-6-3.1. Even at the highest diversion rate set forth for 2003 (13,668 acre feet), there still is 28,332 acre feet of water that is not being appropriated.

However, the most important facts are these:

- 1) The average pumping rate is 6,642 acre feet per year.
- 2) The average recharge rate is 7,950 acre feet per year.
- 3) Well logs indicate greater water available in 2003 than in 1981.

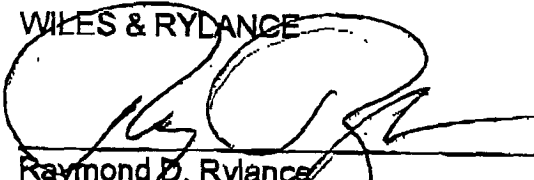
- 4) Goodman states the aquifer is capable of withstanding existing withdrawals.

CONCLUSION

The evidence presented to the Board supports the position that water is available for Permit 6431-3. No evidence was presented to the contrary. The Decision of the Board is unsupported by evidence and is arbitrary.

Respectfully submitted this 4th day of June, 2004.

WILES & RYLANCE



Raymond D. Rylance
Attorney for Appellant
3 East Kemp, Suite 200
P. O. Box 227
Watertown, SD 57201-0227

CERTIFICATE OF SERVICE

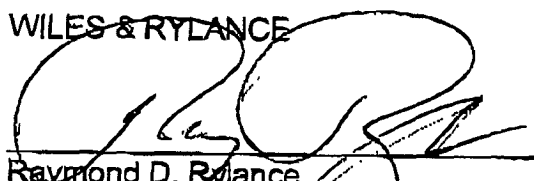
I, Raymond D. Rylance, one of the attorneys for the Appellant, certify that the above and foregoing "APPELLANT'S BRIEF" was served on the following:

John Guhin
Assistant Attorney General
500 E Capitol Ave
Pierre, SD 57501-5070

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

by depositing the same in the United States Mail Service at Watertown, South Dakota, with postage thereon fully prepaid, on the 4th day of June, 2004.

WILES & RYLANCE



Raymond D. Rylance
Attorney for Appellant

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE APPLICATION) BOARD ATTORNEY'S RESPONSE TO
FOR WATER PERMIT No. 6431-3,) APPLICANT'S PROPOSED FINDINGS
PHILLIP W. HINES) OF FACT AND CONCLUSIONS OF LAW
)

Applicant's Findings 1-5.

Rejected as duplicates of Board Attorney's proposals.

Applicant's Proposed Finding No. 6.

Accepted as modified. Insert the following text into Board Attorney's Proposed Findings No. 6 after the second sentence:

"This amounts to reported pumping of 158,496 acre feet over the last twenty-four years."

Applicant's Proposed Finding No. 7.

Accepted. Insert the text of text of Applicant's proposed No. 7 into Board Attorney's proposed Finding No. 6 after the insert identified immediately above.

Applicant's Proposed Finding No. 8.

Rejected. The statement that a particular number of acre feet of annual recharge "has not been used over the last twenty-four years" implies that there has been no loss of this recharge through leakage from the aquifer, through unreported pumping, or through other means. No evidence was adduced on this point by the Applicant.

Applicant's Proposed Finding No. 9.

Accepted as modified. Add the following as the last sentence to Board Attorney's proposed Finding No. 6:

The last three years of reported pumping have exceeded the annual recharge by 7,794 acre feet or 2,598 acre feet per year.

Applicant's Proposed Finding No. 10.

Reject. See response to Finding No. 8.

Applicant's Proposed Finding No. 11.

Accepted as modified. Insert the following between Board Attorney's proposed Findings Nos. 8 and 9, as a new Finding:

The water level records indicate that the aquifer is likely capable of sustaining existing withdrawals.

Applicant's Proposed Finding No. 12.

Rejected as unnecessary to the Findings. Draw down and interference need be addressed only in the event that the water mining issue is overcome by Applicant. It has not been overcome.

Applicant's Proposed Finding No. 13.

Reject as more thoroughly covered by Board Attorney's proposed Finding No. 11-13.

Applicant's Proposed Finding No. 14.

Reject. The text of this proposal is more thoroughly and accurately addressed in Board Attorney's proposed Findings Nos. 14-18. Further, the proposal fails to account for the factors set out in response to Applicant's Proposed Finding No. 8.

Applicant's Proposed Findings No. 15.

See Response to Finding No. 11.

Applicant's Conclusion of Law No. 1.

Reject. Covered by Board Attorney's Conclusion of Law
No. 1.

Applicant's Conclusions of Law Nos. 2-4.

Reject for the reasons set out with regard to the pertinent
Findings of Fact.

Comment on Separate Document Entitled "Objections to Findings of
Fact, Conclusions of Law, and Final Decision" Submitted by
Applicant.

The objections in paragraphs 1 and 2 of the named document
are rejected for the reasons set out above.

Dated this 1st day of March, 2004.



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



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

March 15, 2004

NOTICE

TO: Raymond Rylance
Wiles & Rylance, LLP
PO Box 227
Watertown SD 57201-0227

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

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 March 3, 2004, by the Water Management Board denying Water Permit Application No. 6431-3. 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
Philip Hines, 2719 Spring Lake Rd, Prior Lake MN 55372

CERTIFICATION

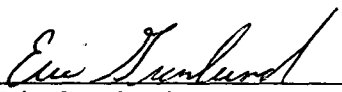
I hereby certify that on March 15, 2004, I personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated March 15, 2004, regarding adoption of findings of fact, conclusions of law and final decision denying Water Permit Application No. 6431-3, addressed as stated below.

Raymond Rylance
Wiles & Rylance, LLP
PO Box 227
Watertown SD 57201-0227

Phillip Hines
2719 Spring Lake Road
Prior Lake MN 55372

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

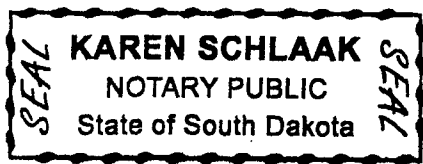
John Guhin, Deputy Attorney General
Diane Best, Assistant Attorney General


Eric Gronlund
Natural Resource Engineer
Water Rights Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 16th day of March, 2004.


Karen Schlaak
Notary Public
My Commission expires April 1, 2007



STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF THE)
APPLICATION FOR WATER PERMIT) FINDINGS OF FACT, CONCLUSIONS
NO. 6431-3, PHILLIP W. HINES) OF LAW AND FINAL DECISION

FINDINGS OF FACT

1. This is an application to appropriate 1.0 cfs (450 gpm) from one well approximately 54 feet deep to irrigate 91 acres in Beadle County.

2. The water permit requested is for the same acres and for the same well as Water Right No. 3466-3. Water Right No. 3466-3 was declared to be "cancelled by reason of forfeiture" by this Board on December 3, 2003. In the Matter of the Petition for Cancellation of Water Right No. 3466-3, Phillip Hines, Findings of Fact, Conclusions of Law and Final Decision (December 3, 2003). In that decision, the Board found that the 91 acres had not been irrigated for "several periods of three continuous years beginning in 1984." Id. at Findings, ¶ 7.

3. The aquifer proposed for this application is the Tulare East James. This aquifer is predominantly a buried outwash (sand and gravel) in Spink and Beadle counties. It can be either under water table or artesian conditions. In the area of the proposed well, the aquifer is under water table conditions.

4. The aquifer underlies 23,200 acres and contains an estimated 132,000 acre-feet of recoverable water in storage in Beadle County and underlies 100,700 acres and contains an estimated 476,000 acre-feet of recoverable water in storage in Spink County, according to a study by Hedges in 1982. A study by

Jim Goodman of the Spink County portion of the aquifer found that it underlies 102,400 acres and contains 630,000 acre-feet of recoverable water.

5. In 1984, L.K. Kuiper, for USGS, issued a document entitled "Appraisal of Water Resources of Eastern Part of the Tulare Aquifer, Beadle, Hand and Spink Counties, South Dakota." Kuiper estimated an average recharge rate of .76 inches per year for the aquifer. Applying the 0.76 inch per year to the Tulare East James Aquifer acreage in Spink and Beadle counties yields an average volume of recharge of 7,950 acre-feet per year.

6. The average pumping from the aquifer has been 6,604 acre-feet for the last twenty-four years. In six of the past twenty-four years, pumping exceeded the average annual recharge of 7,950 acre-feet per year. "This amounts to reported pumping of 158,496 acre-feet over the last twenty-four years." The annual recharge to the aquifer is 7,950 acre-feet per year for twenty-four years for a total recharge of 190,800 acre-feet. Pumping has significantly exceeded the average annual recharge in two of the past three years. Pumping was 10,287 acre-feet in 2001 and 13,668 acre-feet in 2003. The average of the last three years has been 10,548 acre-feet. The last three years of reported pumping have exceeded the annual recharge by 7,704 acre-feet or 2,598 acre-feet per year.

7. Evidence before the Board indicates that from 1966 through 1981 there were declining water levels and there was substantial concern about the future availability of water from the aquifer. Nonetheless, up through the period of 1981, a

significant number of water permits were granted from the aquifer in the affected area.

8. After the period ending in 1981, no permits were granted virtually to the present time. The Board surmises that a pause in the early 1980s in the grant of permits was predicated on the studies of water availability then in progress. The Hedges study was completed and published in 1982. The Kuiper and Goodman studies were completed in 1984. Based upon the facts revealed by the studies when they were completed, no permits have been granted in the area since 1981. The Board has thus relied upon the studies cited above for roughly two decades.

9. The water level records indicate that the aquifer is likely capable of sustaining existing withdrawals.

10. There are very few exceptions to the statement above that there were no permits granted after 1981. In 1991, the Board approved a permit for Darrell Starr. This permit, however, did not include a diversion rate. Rather, the permit apparently added twenty-three acres for irrigation as a result of an inspection. The grant of this "correction permit" in 1991 was consistent with Board policy back to the 1980s in which the Board understood that, although the Tulare East James would not be available for further appropriations, there would likely be reasonable requests for "clean up" of at least a few permits. Other "cleanup" of water permits has involved changing the rate of water use, but not the quantity (volume) of water used for an appropriation.

11. The proponent of the permit, addressing specifically the water mining issue, argues that permits in the affected area allow withdrawals of roughly 42,000 acre-feet per year. The proponent argues that, even in the most extreme year of pumping, only 13,000 acre-feet have actually been used. The proponent thus argues that there must be at least one additional acre-foot available for his use.

12. The proponent of the water permit is correct that the theoretical maximum water use from irrigation is 42,000 acre-feet per year. This total volume of potential water use is based upon a calculation of three acre-feet of water per acre for acreage permitted before 1976 and two acre-feet of water per acre for acreage permitted after that time. See generally SDCL 46-5-6. Although these statistics state the total amount of water which could, in theory, be used, practical experience has informed the Board that actual use is far below that potential.

13. The actual use of water is dependent upon factors which vary quite substantially. For example, precipitation in the affected area averages roughly eighteen inches per year. In some years in the 1990s, however, precipitation has been substantially more--thirty inches per year. In the last few years, the precipitation has been fourteen to sixteen inches per year. In years with below average precipitation, water use will be greater from the aquifer; in years with very abundant precipitation, water use may be negligible. Other climatic conditions, such as temperature and wind affect irrigation potential. Likewise,

changes in crop selection will necessarily significantly affect the amount of water used to irrigate.

14. The argument of the proponent based on a potential of 42,000 acre-feet of use fails to account for these factors and must be rejected.

15. The Applicant makes a further, related argument. The Applicant argues that the average annual recharge in the aquifer in Spink and Beadle counties amounts to 7,950 acre-feet. The Applicant adds that the average pumping from the aquifer for the last twenty-four years has been 6,604. The Applicant thus argues, on the basis of SDCL 46-6-3.1 (the water mining law), that according to the "best information reasonably available," it is probable that the quantity of water withdrawn annually from the Tulare East James will not exceed the quantity of average estimated annual recharge of water.

16. Therefore, the Applicant argues that there is at least one cfs available for his application.

17. The Board rejects this argument. First, in two of the last three years, the average pumping exceeded the average annual recharge to the aquifer. The pumping in 2001 amounted to 10,287 acre-feet and in 2003 amounted to 13,668 acre-feet. The average pumping for the last three years has been 10,548 acre-feet. Therefore, taking the last three years as the "average" annual recharge, it is clear that the additional application cannot be allowed consistent with the water mining law.

18. Second, in the alternative, the Board rejects the implicit and related argument that it should utilize the average

of the past twenty-four years alone and disregard the last three years of pumping. The past three years reveal substantial over-use of the aquifer and, as they constitute the most recent evidence, are the most probative of what will occur in the future. Moreover, the Board credits the uncontradicted testimony of expert Jim Goodman, who testified, based upon his own studies and his professional observation of the aquifer over more than two decades, that the aquifer is being used at its capacity. Taking these factors together, the Board finds it reasonable to conclude that further applications will constitute water mining under the statute.

19. Finally, twenty-four years, in the context of hydrology, is a relatively short period of time. The Board acknowledges that in the next ten to twenty years, further reliable information may come to its attention which supports requests for further permits. The relatively short time period of record, combined with the very recent over-appropriation, dictate that no permit be allowed because of the water mining statute.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter.
2. This permit may not be granted consistent with SDCL 46-6-3.1. The Board finds that "according to the best information reasonably available," it is probable that the quantity of water withdrawn annually from the East James Tulare will exceed the quantity of average annual recharge water to the aquifer, all for the reasons set forth above.

3. The DENR filed a pre-hearing brief. DENR argued that even though the Board had recently cancelled water right No. 3466-3 due to forfeiture, such cancellation did not make water available for appropriation under SDCL 46-5-37. More specifically, the brief addressed the interpretation of SDCL 46-5-37 in light of the "average annual recharge statute" found at SDCL 46-6-3.1. According to the brief, it was filed in anticipation that the Applicant would raise claims that SDCL 46-5-37 warranted a finding that once a water right is forfeited, an equivalent quantity of water then becomes available for appropriation. The Applicant did not in fact raise such argument and it is therefore not before this Board for consideration.

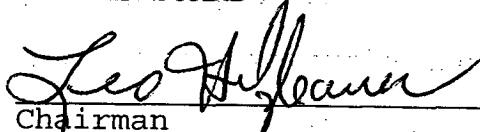
4. The Board has addressed its consistent position since 1981 regarding this aquifer. The Board's Findings are not, however, based entirely on similar decisions in the past or whether it has made exceptions in the past. The Board recognizes that the resolution of the issue of whether a particular water use is beneficial or in the public interest may change. However, evidence before the Board in this specific case warrants the determination that water is not available for this application due to the water mining statute.

FINAL DECISION

The application for Water Permit No. 6431-3 is denied.

Dated this 11 day of March, 2004.

BY THE BOARD


Chairman

pld.jpg Findings of Fact...Water Permit No. 6431-3 (jmm)

WILES & RYLANCE

ATTORNEYS AT LAW

3 East Kemp - Suite 200
P. O. Box 227
Watertown, South Dakota 57201-0227
(605) 886-5881

FACSIMILE

(605) 886-3934

E-MAIL:

rdr@wilesandrylance.com



John C. Wiles, P.C.
Raymond D. Rylance, P.C.
Rebecca L. Morlock Reeves

April 7, 2004

Steve Pirner
Department of Environment
and Natural Resources
Joe Foss Building
523 E Capitol
Pierre, SD 57501-3182

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

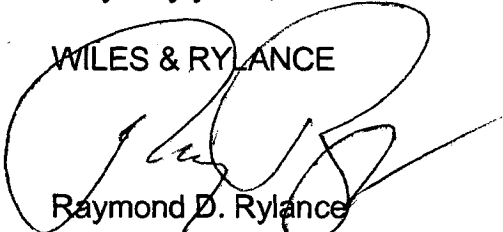
Re: Hines v. Water Management Board

Dear Folks:

Enclosed is a copy of our Notice of Appeal in this matter along with our Certificate of Service requesting a transcript of the hearing that was conducted before the Water Management Board on December 3, 2003. This is intended as service upon you by United States Mail.

Very truly yours,

WILES & RYLANCE


Raymond D. Rylance

RDR:bjs
Enclosures
cc. Phil Hines

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

PHILLIP W. HINES,

Appellant,

v.

DEPARTMENT OF ENVIRONMENT
AND NATURAL RESOURCES
(SOUTH DAKOTA WATER
MANAGEMENT BOARD),

Appellee.

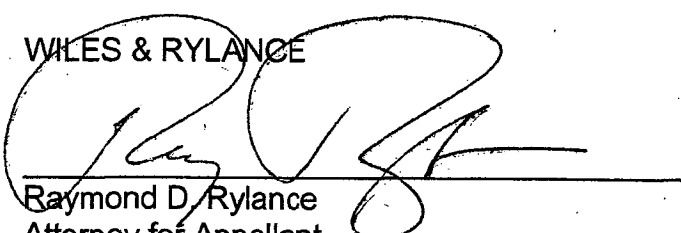
CIV. 04-

NOTICE OF APPEAL

COMES NOW, Appellant above-named, Phillip W. Hines, by and through his undersigned counsel of record, Raymond D. Rylance, of Wiles & Rylance, Watertown, South Dakota, pursuant to SDCL 1-26, appeals the Decision of the South Dakota Water Management Board, Department of Environment and Natural Resources, dated March 11, 2004, adopting the Findings of Fact and Conclusions of Law entered by the Water Management Board on March 11, 2004, on the Application for Water Permit No. 6431-3.

Dated this 7 day of April, 2004.

WILES & RYLANCE


Raymond D. Rylance
Attorney for Appellant
3 East Kemp, Suite 200
P. O. Box 227
Watertown, SD 57201-0227
(605) 886-5881

CERTIFICATE OF SERVICE

I, Raymond D. Rylance, one of the attorneys for the Appellant, certify that the above and foregoing "NOTICE OF APPEAL" was served on the interested parties herein as follows:

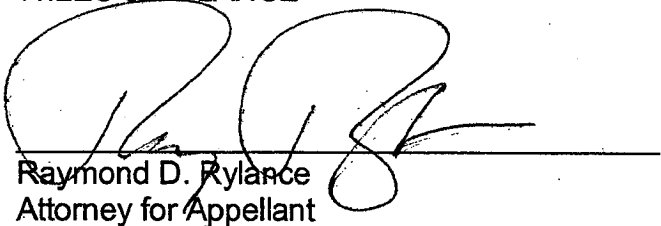
Steve Pirner, Secretary
Department of Environment
and Natural Resources
Joe Foss Building
523 E Capitol
Pierre, SD 57501-3182

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

by depositing the same in the United States Mail Service at Watertown, South Dakota,

with postage thereon fully prepaid, on the 7 day of April, 2004.

WILES & RYLANCE


Raymond D. Rylance
Attorney for Appellant

DENR Z

JAMES A GOODMAN

EDUCATION

B.S. Geological Engineering , SDSM&T in 1971.
35 Graduate Credit Hours of Study at SDSM&T in 1974 and 1975.

REGISTRATIONS AND PROFESSIONAL SOCIETIES

Registered Professional Engineer in South Dakota (# 3587)
Member National Society of Professional Engineers
Member National Ground Water Association / Association of Ground Water Scientists and Engineers

CAREER EXPERIENCE

From 1999 to Present - Title: Natural Resources Engineering Director (DENR - Water Rights)
Responsibilities: Conducting ground water investigations and investigating complaints, managing the Observation Well Network, compiling water well data, preparing and reviewing reports for new ground water permit applications, providing technical assistance to the Chief Engineer and providing expert testimony to the Water Management Board on contested water permit applications.

From 1989 to 1999: Natural Resources Engineer IV (DENR - Water Rights)
Responsibilities: Supervising the ground water section, developing well construction standards and well driller licensing, preparing reports for new water permit applications, investigating complaints, providing testimony to the Water Management Board.

From 1980 to 1989: Hydrologist III (DWRN - Water Rights)
Responsibilities: Ground water investigations, supervise observation well maintenance and data collection, developing well construction rules and licensing water well drillers and investigating complaints.

From 1978 to 1980: Hydrologist II (DWRN - SDGS)
Responsibilities: Ground water investigations, observation well drilling, water sampling, surveying, preparing ground water assessments for the Water Rights Commission.

From 1976 to 1978: Engineer I (DWRN - Water Rights)
Responsibilities: Well complaints, ground water problems investigations, observation well drilling, and basic hydrologic data collection.

MISCELLANEOUS- Testimony to Water Management Board for the following water permit applications (since July of 1999).

No. 6399-3 for Keith and Kip Krull, irrigation
No. 6425-3 for Harry Thomas, irrigation
No. 6382-3 for William St. Clair for irrigation
Nos. 6306-3 and 6416-3 for Haverhals Feedlot Inc., cattle feedlot
No. 6395-3 for Hutterville Hutterian Brethern, irrigation of garden
No. 6394-3 for Hutterville Hutterian Brethern, livestock and domestic use
No. 6386-3 for Tim Pazour, cattle feedlot
No. 6385-3 for SDAPV Dairy Development, LLC., dairy operation
No. 2729A-3 for Harvey Wollman, irrigation transfer
Nos. 5837A-3 and 5850A-3 for Taylor Properties, Inc., suburban housing development
No. 6339A-3 for Allen Gatzke, irrigation
No. 6341-3 for Jeffrey Gatzke, irrigation
No. 6374-3 for Bixler Farms, irrigation
Nos. 6376-3 and 6377-3, LDL cattle feedlot, commercial use
Tulare Western Spink, Tulare Hitchcock, irrigation report (22 applications)
No. 6341-3 for Jeffrey Gatzke, irrigation
No. 6362-3 for Rodney Zemlicka, irrigation
No. 6358-3 for Michael Johnson, commercial use (cattle)
No. 6342-3 for Ivan Sjovall, commercial use (cattle)
No. 4612A-3 for Oscar Inc., irrigation transfer
No. 6325-3 for VeraSun Energy, industrial use
No. 6287-3 for Oscar Inc., irrigation use

No. 6281-3 for Dakota Value Capture Cooperative, commercial use
No. 6260-3 for Heine Farms, commercial use
No. 6258-3 for Larry Krause and James Cremer, irrigation use.
No. 6257-3 for Thunderbird Colony, domestic use.
No. 6264-3 for Yankton Livestock Auction Market and Feedlot, commercial use.
No. 6255-3 for Turner County Dairy, LLP, commercial use.
No. 6252-3 for Haverhals Feedlot, Inc., commercial use.
No. 6227-3 for Goodwin Heritage Cattle, LLC, commercial use.
No. 6242-3 for Gary D Wipf, irrigation use.
No. 6228-3 for Sunburst (David Meyer), commercial use (swine).
No. 6212-3 for John Ulmer, irrigation and a small dam.
No. 6230-3 for Milbank Community Foundation, commercial use (dairy).
No. 6185-3 for Blumengaard Colony, domestic and commercial use (dairy).
No. 6158-3 for Ringling Cattle Company, commercial feedlot.
No. 6167-3 for Pearl Creek Hutterian Brethern, commercial use (turkeys).
No. 6150-3 for Classic Farms, LLC, commercial use (swine).
No. 6129-3 for Spring Tree AWMS, commercial use (swine).
No. 6128-3 for Deerfield Hutterian Brethern, Inc., domestic and commercial use.

STATUS: (see Remark section for description of each)

PE = Permit
LC = License
IL = Incorporated into a License
CA = Cancelled
DN = Denied
DF = Deferred
WI = Withdrawn

REMARKS:

Permit A water permit has been issued for the project which allows the holder to construct the project and put the water to beneficial use. If the status is PE (permit) we do not know the extent of development.

License: An investigation of the permitted water use system was conducted and a water license issued for the portion of the project that was developed.

Incorporated

License: If two or more permits cover one water use system, they are incorporated together into one water license. If the status = "IL", that particular water permit has been incorporated into another license with all of the developed project now being covered under the specific license.

Cancelled: The water use system has not been constructed or has been abandoned and/or forfeited. The Water Management Board cancelled the permit or license and it is no longer valid.

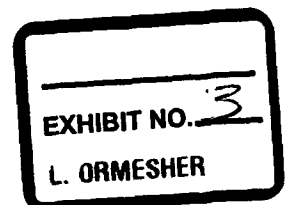
Denied: The Water Management Board denied the application - a permit was not issued.

Deferred: The application was placed in deferred status until additional information becomes available either from staff or from the applicant

Withdrawn: Application withdrawn by applicant prior to Board approval

USE TYPE:

IRR = IRRIGATION
REC = RECREATION
MUN = MUNICIPAL
IND = INDUSTRIAL
INS = INSTITUTIONAL
DOM = DOMESTIC
RWS = RURAL WATER SYSTEM
COM = COMMERCIAL
FWP = FISH & WILDLIFE PROPAGATION
SHD = SUBURBAN HOUSING DEVELOPMENT
LCO = LIVESTOCK CONFINEMENT OPERATION



Permit	Name	Legal_1	County_1	Aquifer	Diversion 18.2	Use 18.2	Status	CFS	Acreage	Priority Date
566-3	MARVIN HUBKA	35-118N-62W	SP	T:EJ	GROUNDWATER	IRR	CA	1.200	85.00	01/14/1959
1274-3	GEORGE N MANOLIS	34-114N-61W	SP	T:EJ	GROUNDWATER	IRR	CA	2.220	385.00	05/03/1966
988-3	WM F ST CLAIR	30-117N-61W	SP	T:EJ	GROUNDWATER	IRR	CA	2.230	156.00	03/07/1962
989-3	WM F ST CLAIR	17-117N-61W	SP	T:EJ	GROUNDWATER	IRR	CA	2.230	156.00	03/01/1962
1192-3	CARL HINKLE	27-118N-62W	SP	T:EJ	GROUNDWATER	IRR	CA	2.850	200.00	04/09/1965
1221-3	DUANE M MUXEN	33-117N-61W	SP	T:EJ	GROUNDWATER	IRR	CA	2.280	160.00	09/24/1965
1226-3	CLARENCE B HANSEN	31-118N-61W	SP	T:EJ	GROUNDWATER	IRR	CA	8.570	600.00	10/07/1965
1460-3	JOE S HOFER	15-116N-61W	SP	T:EJ	GROUNDWATER	IRR	CA	4.570	320.00	12/08/1967
1510-3	ROBERT J CUNNINGHAM	35-114N-62W	SP	T:EJ	GROUNDWATER	IRR	CA	2.200	160.00	02/16/1968
1521-3	RAYMOND REETZ	31-114N-61W	SP	T:EJ	GROUNDWATER	IRR	CA	2.200	160.00	02/20/1968
1570-3	RAYMOND REETZ	36-114N-62W	SP	T:EJ	GROUNDWATER	IRR	CA	1.100	80.00	04/23/1968
3034-3	W R SCHLOTTER JR	22-116N-61W	SP	T:EJ	GROUNDWATER	IRR	CA	2.280	160.00	08/04/1976
3177-3	RONALD MAENDL	23-115N-62W	SP	T:EJ	GROUNDWATER	IRR	CA	2.000	160.00	10/20/1976
3392-3	ALBERT J WIFE	05-115N-61W	SP	T:EJ	GROUNDWATER	IRR	CA	1.140	320.00	12/09/1976
3393-3	GARY D WIFE	14-115N-62W	SP	T:EJ	GROUNDWATER	IRR	CA	2.200	160.00	12/09/1976
3474-3	LAVINA ALLEMAN	25-115N-62W	SP	T:EJ	GROUNDWATER	IRR	CA	2.200	160.00	12/06/1976
3856-3	VOHN DECKER	29-115N-61W	SP	T:EJ	GROUNDWATER	IRR	CA	2.200	160.00	03/04/1977
4057-3	WALDO HOFER	21-114N-61W	SP	T:EJ	GROUNDWATER	IRR	CA	8.470	0.00	06/27/1977
4131-3	WILLARD WIFE	34-115N-61W	SP	T:EJ	GROUNDWATER	IRR	CA	2.200	270.00	08/24/1977
4389-3	GLENDALE HITTERN BRTH	24-115N-62W	SP	T:EJ	GROUNDWATER	IRR	CA	1.710	132.00	03/09/1979
4451-3	WALDO HOFER	30-114N-61W	SP	T:EJ	GROUNDWATER	IRR	CA	1.710	132.00	06/27/1977
4739-3	LLOYD NEITZEL	06-115N-61W	SP	T:EJ	GROUNDWATER	IRR	CA	2.300	160.00	04/08/1981
5527-3	HARVEY WOLLMAN	01-114N-62W	SP	T:EJ	GROUNDWATER	IRR	DN	1.820	1.28	/ /

Permit	Name	Legal_1	County_1	Aquifer	Diversion 18.2	Use 18.2	Status	CFS	Acreage	Priority Date
5396-3	SPINK HUTTERIAN BRETHREN	34-115N-62W	SP	T:EJ	GROUNDWATER	IRR	DN	2.000	131.00	/ /
3325-3	MARION SHORT	17-116N-61W	SP	T:EJ	GROUNDWATER	IRR	DN	4.570	320.00	/ /
3391-3	ALBERT J WIFE	06-115N-61W	SP	T:EJ	GROUNDWATER	IRR	DN	2.200	160.00	/ /
4158A-3	WILLIAM ST CLAIR	20-117N-61W	SP	T:EJ	GROUNDWATER	IRR	DN	4.000	320.00	/ /
6287-3	OSCAR, INC.	01-114N-62W	SP	T:EJ	GROUNDWATER	IRR	DN	1.940	136.00	/ /
1033-3	ELMER J WIFE	32-115N-61W	SP	T:EJ	GROUNDWATER	IRR	IL	2.200	320.00	04/05/1963
1049-3	DUWANE M/SHARON DECKER	16-115N-61W	SP	T:EJ	GROUNDWATER	IRR	IL	1.710	120.00	07/19/1963
134-3	DARYLE STARR	08-116N-61W	SP	T:EJ	GROUNDWATER	IRR	IL	1.300	92.00	06/12/1954
1552-3	GARY WIFE	35-116N-62W	SP	T:EJ	GROUNDWATER	IRR	IL	6.000	691.70	04/09/1968
2235-3	GARY WIFE	35-116N-62W	SP	T:EJ	GROUNDWATER	IRR	IL	2.660	264.00	03/17/1975
2276-3	SPINK HTRRN BRTH	36-115N-62W	SP	T:EJ	GROUNDWATER	IRR	IL	2.220	160.00	04/28/1975
3055-3	RALPH JOHNSON	11-117N-62W	SP	T:EJ	GROUNDWATER	IRR	IL	2.220	320.00	09/14/1976
3105-3	LARRY TSCHETTER	08-113N-61W	BD	T:EJ	GROUNDWATER	IRR	IL	2.000	140.00	10/15/1976
3106-3	LARRY TSCHETTER	08-113N-61W	BD	T:EJ	GROUNDWATER	IRR	IL	2.000	140.00	10/15/1976
3113-3	ROBERT G FREEBURG	03-116N-62W	SP	T:EJ	GROUNDWATER	IRR	IL	0.000	0.00	10/01/1976
3159-3	DANNY J BAUM	21-115N-61W	SP	T:EJ	GROUNDWATER	IRR	IL	0.000	0.00	10/01/1976
3178-3	M J T INC	18-116N-61W	SP	T:EJ	GROUNDWATER	IRR	IL	2.010	264.00	10/22/1976
3242-3	EDWARD E. BRENNER	13-114N-62W	SP	T:EJ	GROUNDWATER	IRR	IL	2.000	160.00	10/28/1976
3273-3	SPINK HTRRN BRTH	35-115N-62W	SP	T:EJ	GROUNDWATER	IRR	IL	0.000	0.00	10/26/1976
3390-3	ALBERT ALLEN WIFE	33-115N-61W	SP	T:EJ	GROUNDWATER	IRR	IL	2.200	160.00	12/07/1976
3490-3	DAN WILSON	10-116N-62W	SP	T:EJ	GROUNDWATER	IRR	IL	2.200	160.00	12/27/1976
3490-3A	DAN WILSON	20-116N-62W	SP	T:EJ	GROUNDWATER	IRR	IL	0.000	0.00	12/27/1976
4042-3	RALPH JOHNSON	22-117N-62W	SP	T:EJ	GROUNDWATER	IRR	IL	2.200	160.00	03/01/1977
4699-3	DARYLE STARR	08-116N-61W	SP	T:EJ	GROUNDWATER	IRR	IL	2.220	160.00	02/27/1981

Permit	Name	Legal_1	County_1	Aquifer	Diversion 1&2	Use 1&2	Status	CFS	Acreage	Priority Date
4772-3	DAN WILSON	10-116N-62W	SP	T:EJ	GROUNDWATER	IRR	IL	2.280	160.00	05/06/1981
1778-3	WESLEY DECKER	20-116N-61W	SP	T:EJ	GROUNDWATER	IRR	IL	2.280	160.00	10/01/1970
3103-3	LOWELL J HOFER	28-117N-61W	SP	T:EJ	GROUNDWATER	IRR	IL	1.700	120.00	08/18/1976
3714-3	LOWELL J HOFER	28-117N-61W	SP	T:EJ	GROUNDWATER	IRR	IL	0.000	160.00	03/04/1977
4376-3	GARY D WIFE	03-116N-62W	SP	T:EJ	GROUNDWATER	IRR	IP	1.560	138.00	10/01/1976
1033A-3	LARRY WIFE	25-115N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.780	136.00	04/05/1963
1048-3	MICHAEL J SILVER	28-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	2.280	160.00	07/19/1963
1050-3	DETLER FARMS	05-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	4.140	430.00	07/19/1963
1071-3	MICHAEL J SILVER	29-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	2.280	160.00	01/09/1964
1072-3	K-D TRUST	20-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	2.280	160.00	01/09/1964
1073-3	K-D TRUST	19-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	4.450	312.00	01/09/1964
1120-3	DETLER FARMS	33-117N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	3.420	240.00	08/13/1964
1201-3	BRENT A DECKER	05-115N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	2.000	140.00	04/27/1965
1223-3	DETLER FARMS	29-117N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.870	131.00	10/04/1965
1247-3	RONALD STARR	07-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.330	160.00	02/04/1966
1312-3	GARY D WIFE	06-115N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	2.200	160.00	09/27/1966
1358-3	LONNIE WIFE	17-115N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.780	160.00	02/10/1967
1458-3	K-D TRUST	22-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	2.280	160.00	12/05/1967
1504-3	DONALD J MENDEL	15-115N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	2.220	370.00	02/09/1968
1700-3	DUANE A WILSON	13-116N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.930	135.00	10/13/1969
1722-3	LONNIE WIFE	30-115N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	3.420	240.00	02/04/1970
1723-3	ALBERT A WIFE	28-115N-63W	SP	T:EJ	GROUNDWATER	IRR	LC	1.950	136.00	02/04/1970
1724-3	GLENDAL HTRN BRTH	17-115N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.780	128.00	02/04/1970
1876-3	GLENDAL HTRN BRTH	11-115N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	3.550	272.00	05/03/1971
1891-3	MICHAEL J SILVER	28-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	3.740	262.00	08/17/1971

Permit	Name	Legal_1	County_1	Aquifer	Diversion 1&2	Use 1&2	Status	CFS	Acreage	Priority Date
1894-3	RONALD MAENDL	12-115N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	2.660	200.00	10/21/1971
2208-3	DUANE A WILSON	19-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.670	160.00	02/24/1975
2235A-3	GARY D WIFE	35-116N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	5.330	539.00	03/17/1975
2236-3	WESLEY A DECKER	10-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.800	128.00	03/17/1975
2276-3A	SPINK HTRN BRTH	36-115N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	2.000	200.00	11/19/1982
2367-3	PETERSON FARMS	02-113N-62W	BD	T:EJ	GROUNDWATER	IRR	LC	1.770	124.00	09/17/1975
2375-3	SPINK HTRN BRTH	26-115N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.780	272.00	10/10/1975
2418-3	JEFFERY GATZKE	12-114N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.940	136.00	08/20/1975
2514-3	WILLARD WIFE	28-115N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.780	132.00	01/19/1976
2553-3	DUANE MUXEN	33-117N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	2.110	237.00	01/28/1976
2561-3	DARYLE STARR	18-117N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.780	153.00	01/28/1976
2613-3	MICHAEL J SILVER	21-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.850	130.00	01/20/1976
2618-3	ALBERT ALLEN WIFE	29-115N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	2.220	272.00	03/04/1976
2729-3	LEROY P GROSS	02-114N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.110	120.00	04/09/1976
3035-3	SHARLETT L REINKE	27-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.770	265.20	08/04/1976
3056-3	RUBEN ENANDER	35-115N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	2.000	202.00	09/22/1976
3062-3	BARRY MUXEN	05-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.890	140.00	09/21/1976
3063-3	HARVEY WOLLMAN	06-114N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	3.890	272.00	09/27/1976
3114-3	ROBERT G FREEBURG	30-117N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.950	137.00	10/01/1976
3173-3	GLENDAL E HTRN BRTH	01-115N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.780	136.00	10/15/1976
3175-3	DAN R/GENE A WILSON	18-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.350	132.00	10/21/1976
3176-3	RONALD MAENDL	14-115N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.880	272.00	10/20/1976
3178A-3	M J T INC	18-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	2.000	264.00	10/22/1976
3179-3	VIRGINIA HANSEN	08-117N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	2.000	264.00	10/19/1976
3181-3	WESLEY DECKER	20-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	2.010	232.00	09/14/1976

Permit	Name	Legal_1	County_1	Aquifer	Diversion 1&2	Use 1&2	Status	CFS	Acreage	Priority Date
3182-3	WESLEY DECKER	20-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.980	139.00	10/20/1976
3189-3	RUSS HANSEN ESTATE	11-117N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.330	132.00	10/01/1976
3268-3	HURON COLONY	19-113N-61W	BD	T:EJ	GROUNDWATER	IRR	LC	1.560	113.00	10/29/1976
3272-3	SPINK HTTRN BRTH	27-115N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.880	136.00	10/26/1976
3378-3	GORDIE J HOFER	06-114N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.880	136.00	11/23/1976
3390-3A	LONNIE WIPF	33-115N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.780	132.00	12/07/1976
3466-3	I A SCHWAN	13-113N-62W	BD	T:EJ	GROUNDWATER	IRR	LC	1.000	91.00	10/15/1976
3467-3	SPINK HTTRN BRTH	23-115N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.940	136.00	10/26/1976
3468-3	SPINK HTTRN BRTH	16-115N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.870	272.00	01/11/1977
3748-3	GLENDALE HTTRN BRTH	10-115N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.460	102.00	01/25/1977
4158-3	WILLIAM F ST CLAIR	20-117N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.940	136.00	10/18/1977
4195-3	SPINK HTTRN BRTH	35-115N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.880	272.00	12/15/1977
4196-3	DANNY J BAUM	21-115N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	2.000	190.00	12/20/1977
4203-3	DANNY J BAUM	21-115N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.780	136.00	12/20/1977
4374-3	DAVID OR WESLEY SWANSON	14-117N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.780	264.00	09/14/1976
4375-3	RALPH JOHNSEN	22-117N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.330	132.00	03/01/1977
4390-3	GLENDALE HTTRN BRTH	25-115N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.550	128.00	03/09/1979
4486-3	DUWANE/SHARON DECKER	16-115N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.710	132.00	03/06/1980
4586-3	WM F/JOHN BLAIN ST CLAIR	28-117N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.700	364.00	12/17/1980
4612-3	OSCAR INC	03-114N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.780	132.00	12/22/1980
4714-3	SHARLETT L REINKE	02-115N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.770	126.80	04/08/1981
4753-3	JEFFERY GATZKE	13-114N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	1.880	262.00	04/09/1981
4845-3	RONALD STARR	20-117N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.780	136.00	12/23/1981

Permit	Name	Legal_1	County_1	Aquifer	Diversion 1&2	Use 1&2	Status	CFS	Acreage	Priority Date
5280-3	DAN WILSON	10-116N-62W	SP	T:EJ	GROUNDWATER	IRR	LC	2.000	264.00	12/27/1976
5529-3	DARYLE STARR	08-116N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	2.220	160.00	04/22/1991
961-3	DETLER FARMS	32-117N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	4.450	320.00	01/25/1962
970-3	WILLIAM F ST CLAIR	29-117N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	1.880	132.00	03/07/1962
987-3	WM F ST CLAIR	29-117N-61W	SP	T:EJ	GROUNDWATER	IRR	LC	2.200	154.00	03/07/1962
6242-3	GARY D WIPF	06-115N-61W	SP	T:EJ	GROUNDWATER	IRR	PE	1.560	138.00	10/01/1976
6242A-3	GARY D WIPF	06-115N-61W	SP	T:EJ	GROUNDWATER	IRR	PE	0.000	0.00	10/01/1976
4612A-3	OSCAR INC	01-114N-62W	SP	T:EJ	GROUNDWATER	IRR	PE	1.780	132.00	12/22/1980
6341-3	JEFFERY GATZKE	12-114N-62W	SP	T:EJ	GROUNDWATER	IRR	PE	1.780	0.00	07/12/2002 
2729A-3	HARVEY WOLLMAN	01-114N-62W	SP	T:EJ	GROUNDWATER	IRR	PE	0.000	0.00	04/09/1976
3470-3	DONALD STARR	18-116N-61W	SP	T:EJ	GROUNDWATER	IRR	WI	0.000	0.00	/ /
5009-3	DUANE MUXEN	33-117N-61W	SP	T:EJ	GROUNDWATER	IRR	WI	1.880	132.00	/ /

BEFORE THE WATER MANAGEMENT BOARD

STATE OF SOUTH DAKOTA

In Re:

Consideration of Water Permit
Application No. 6431-3,
Phillip Hines.

HEARINGPROCEEDINGS:

December 3, 2003
Matthews Training Center
523 E. Capitol
Pierre, South Dakota

BOARD MEMBERS PRESENT:

Mr. Rodney Freeman,
Acting Chairman
Ms. Marion B. Gunderson
Mr. Dwayne A. Rollag
Ms. Bernita Loucks
Mr. Francis E. Brink

APPEARANCES:

Representing the Water
Management Board:

MR. JOHN GUHIN
Asst. Attorney General
500 East Capitol
Pierre, South Dakota 57501

Representing the State
Division of Water Rights:

MS. DIANE BEST
Asst. Attorney General
500 East Capitol
Pierre, South Dakota 57501

Representing the Applicant
Phillip Hines:

MR. RAYMOND D. RYLANCE
Wiles and Rylance
3 East Kemp, Suite 200
Watertown, South Dakota 57201

ORIGINAL

December 3, 2003,

MR. FREEMAN: We have a motion, do we have a second?

MS. GUNDERSON: Second.

MR. FREEMAN: Any discussion? All in favor signify aye.

Opposed?

That motion carried, which brings us to the final item on the agenda is the water permit application 6431-3 of Mr. Hines.

MS. BEST: If I may, I filed a pre-hearing brief on this case and my suggestion for procedure is that Ray and I argue about the legal issue, and then if you decide against the state, then we'll stipulate to issuance of the permit or do a -- but I shouldn't say -- is that what we're going to do? Is it?

MR. RYLANCE: I can always change my mind. I thought this was a time for a hearing.

MS. BEST: Yes, yes, but anyway, what we would like to do is to argue the legal part of the case first, or what I would like to do is argue legal part of the case first and then determine from there what direction we need to take. Ray may feel differently, and he's entitled to make his assertions.

MR. RYLANCE: Now is the time and place to have

1 a hearing on the application of Mr. Hines permit. Mr. Goodman
2 has issued a report and we would like to have Mr. Goodman
3 testify. We think there's facts that would be brought out
4 that bear heavily on any argument that counsel for the state
5 would suggest. She has suggested in a pre-hearing brief a
6 number of items. She simply doesn't know what's in my mind
7 and how I'm going to proceed. So I think it's presumptive to
8 say that I'm going to make the arguments that she thinks I'm
9 going to make, which quite frankly I'm not.

10 So anyhow, we need to proceed with the
11 fact-finding. One of the concerns that I have is that if we
12 argue to the board and we have no facts to talk about, then I
13 have nothing to appeal from, and I explained that to counsel
14 yesterday, and so we would like to proceed with having
15 Mr. Goodman testify on his report and other items that we have
16 questions about. With that we're ready to proceed.

17 MS. BEST: Well, the DENR with respect to this
18 case, as indicated in my pre-hearing brief, this is a case
19 that involves a new permit application in an area where you
20 come up against what I'll call the water mining statute. It's
21 an area that this board -- it's the average annual recharge
22 statute.

23 MR. FREEMAN: Can I interrupt just a moment,
24 because maybe I can shorten this up a little bit. It's my
25 understanding from your brief that you're arguing that water

1 is not available.

2 MS. BEST: Yep.

3 MR. FREEMAN: And that is, in fact, part of the
4 basis for the chief engineer's recommendation, and it seems to
5 me that that's a factual issue, so I tend to agree that I
6 think we need a hearing on whether or not water is available.
7 I understand your whole reasoning why water isn't available,
8 and I accept that, but -- so perhaps we should just proceed as
9 if it were regular permit.

10 MS. BEST: And I would point out that Mr. Hines,
11 as the permit applicant, has the burden of proof in this
12 proceeding, but as is typical before this board, the DENR
13 staff makes its presentation first anyway, and that isn't
14 intended to waive any kind of burden of proof issue.

15 And at this time I would ask that the DENR file
16 in this matter be admitted into evidence. The DENR file
17 consists of the permit application, the advertisement,
18 affidavit of publication, chief engineer's recommendation and
19 the report of Mr. Goodman.

20 MR. FREEMAN: Any objection?

21 MR. RYLANCE: No, I'm just -- does it have
22 Mr. Goodman's report that is dated August 25, 2003 in there;
23 is that part of the record?

24 MS. BEST: Yes.

25 MR. RYLANCE: One other procedure question, is

1 your pre-hearing brief that you submitted to the board part of
2 that record?

3 MS. BEST: Yes, it's a pleading.

4 MR. RYLANCE: And is it in there?

5 MS. BEST: Yes.

6 MR. RYLANCE: Is it considered as evidence by the
7 board?

8 MR. FREEMAN: No, not as evidence, it's a brief.
9 That will be received.

10 MS. BEST: With that I would call Jim Goodman to
11 explain the report in this matter.

12 Whereupon,

13 JAMES GOODMAN,

14 called as a witness, being first duly sworn, testified as
15 follows:

16 MR. GOODMAN: Okay, I'm here to present the
17 report on water permit application number 6431-3 filed by
18 Philip W. Hines. Geographically this land is located about 14
19 miles north and one mile west of Huron. Application number
20 6431-3 proposes to appropriate 1.0 cfs, which is approximately
21 450 gallons a minute from one well approximately 54 feet deep,
22 located in the northeast of the southwest quarter of Section
23 13 to irrigate 91 acres located in the southeast of the
24 northwest of the southwest of Section 13 and -- excuse me, let
25 me back up, located in the southeast quarter of the northwest

1 quarter and southwest quarter of Section 13, all in township
2 113 North, Range 62 west in Beadle County.

3 The aquifer is identified as the Tulare East
4 James. The Tulare East James aquifer is predominantly buried
5 outwash, outwash of sand and gravel in the Spink and Beadle
6 County area, but can be encountered under water table
7 conditions, it still can be buried within water table
8 conditions. The aquifer underlies approximately 23,200 acres
9 and contains an estimated 132,000 acre feet of recoverable
10 water storage in just Beadle County.

11 If you look at the aquifer, it does extend into
12 Spink County to the north of here, and in that county the
13 aquifer underlies approximately 100,700 acres and contains an
14 estimated 476,000 acre feet of recoverable water in storage.
15 Now those estimates were from a report that was completed in
16 1982, and I cite the cite here of Hedges.

17 Later on I did a little bit of an independent
18 assessment of the Tulare East James, and actually created, if
19 you will, or discovered or quantified another estimate of the
20 Tulare East James underlying 102,400 acres containing 630,000
21 acre feet of recoverable water, and that's just in the Spink
22 County portion, and that was my independent estimate. The
23 recharge rate as calculated from a report, it was a result of
24 a guy by the name of Logan Kuiper who did work for the U.S.
25 Geological Survey, and he did a simulation or a computer

1 simulation of this area, attempting to duplicate water
2 levels, recharge, discharge, that type of thing.

3 And so the estimate was based on -- my part of
4 the work was drilling the test holes and installing the
5 monitor wells. His part of the work was the mathematics. And
6 he hypothesized, or at least was able to come up with an
7 average recharge rate to the aquifer, the Tulare East James,
8 and that was 6800 acre feet per year, and that equates to a
9 volume, or a rate, I should say, that volume equates to a rate
10 of about .76 inches per year.

11 So if you apply -- if you accept that rate, which
12 I did, and I've testified in front of this board many times
13 and I think that that rate is reasonable and fair, and that
14 we've been using it for the better part of 20 years, I used
15 that rate then to calculate, if you go on in the report here,
16 to calculate an average annual volume of recharge, including
17 Spink and Beadle County together now, not just Spink, 7,950
18 acre feet per year.

19 I also go on to compare the pumping records for
20 the Tulare East James, and I went back to 1979 to basically
21 the present, that's about 24 years, and looked at the pumping
22 records from the Tulare East James, and we can juggle those
23 numbers, we can do a lot of things with them, but the bottom
24 line here, if I consider both Spink and Beadle County
25 together, consider the pumping rate, I come up with an average

1 pumping from the aquifer of around 6,600 acre feet per year.
2 Now that's average.

3 I also, looking at that 24 years of record I come
4 up with -- well, let me start back over again. I come up with
5 an average of 6,600 acre feet per year. That's less than the
6 total recharge, considering the Beadle Spink County numbers
7 together. Now, we all know that I have a history of standing
8 up in front of this board talking about the Tulare East James
9 and being fully appropriated. And I still stand by that. And
10 the numbers that I've used in the past are these very same
11 numbers, without the addition of the Beadle County portion,
12 because I've always talked about Spink County in the past.

13 If you look at it from a volumetric point of view
14 over these years, this 24-year period, even though the average
15 shows up 6,604 acre feet per year, in fact in half of the
16 years, pretty close to half of the 24 years we've either hit
17 or exceeded the average annual recharge, the 6,800 acre feet
18 estimated by Kuiper. In fact, the greatest volume that has
19 been pumped out of the aquifer, there were two years that were
20 very close, 1981 and 2002. In those years we pumped 13,000,
21 almost 14,000 acre feet in 2002, and almost 13,000 acre feet
22 in 1981.

23 Now, like I said, we can juggle these numbers,
24 you can do a lot of things. If you want to go with the
25 average 24 years record, or do you want to go with the last

1 two years. The last two records we pumped 10,287 acre feet
2 and 13,668. We can look at a lot of different things, but I
3 still stand by the concept, and the idea that I put forth in
4 1984 that said we're getting close to being fully appropriated
5 in this aquifer. Some years we're pumping more water out of
6 it than is there to be appropriated, than it recharges, and we
7 have operated under that premise then for the last ten years.

8 Now I did include a hydrograph of an observation
9 well located within a couple of miles, actually a couple miles
10 north of this application; it's called BD-77I, and I've
11 included that hydrograph for you to review. It looks very
12 similar to a lot of these hydrographs of the aquifer, showing
13 basically the rising water levels because of the recharge that
14 occurred, primarily occurred from '93 through '99. There was
15 a period there in '83, 4, 5 and 6 where we had some
16 significant recharge to the aquifer, but it was really
17 overshadowed by the wet years of the '90s.

18 Now what is significant about this hydrograph to
19 me is this is a water table aquifer here. And so the entire
20 rise, although it amounts to only five to six feet, is
21 actually filling up sand and gravel five or six feet. This
22 isn't pressure. This isn't artesian head. This accounts for
23 quite a bit of water actually under the ground during that
24 time.

25 Reviewing the existing water rights there is

1 another -- there is an existing water right located about a
2 mile from this application. Interference I did not expect to
3 be a concern. Drawdown created by pumping in this aquifer is
4 not significant. The actual map distance between this well
5 and the existing one would be about 4800 feet, and I don't
6 expect there would be any adverse problem with pumping. This
7 application, what's interesting about this is that this
8 application requests the very same irrigated acres and same
9 diversion rate as the canceled water right permit that we went
10 through the contested case hearing, that this board canceled.
11 It was canceled because of abandoned forfeiture, and you just
12 adopted the findings, I think.

13 Conclusions, water is not available from the
14 Tulare East James aquifer. The board has declared this fully
15 appropriated based on water use. I do not expect
16 interference. Interference would not be a problem. It's not
17 a concern. The application requests the very same lands that
18 were covered by the original water right 3466, and the very
19 same amount. And with that the chief engineer recommended
20 denial of this application.

21 Now I guess I would open it up to questions.

22 MS. BEST: If I may, before we get started, Jim,
23 do you have a copy of your list of expert qualifications? Do
24 you have a copy of your vitae handy? I had neglected to put
25 that into evidence before you testified as an expert.

1 MR. RYLANCE: Just put them in.

2 MR. FREEMAN: That will be received.

3 MS. BEST: And it's being marked as DENR 2.

4 Okay, sorry for the interruption there. Are there questions
5 for Jim?

6 MR. RYLANCE: Are you done?

7 MS. BEST: Yes.

8 CROSS-EXAMINATION

9 BY MR. RYLANCE:

10 Q. Jim, what your observation well, graph BD-77I, as we
11 start on the left-hand side, it indicates 33 inches below your
12 benchmark, correct? Are you familiar --

13 A. 33 feet.

14 Q. And that was in 1977, and today we're sitting at
15 somewhere around 29 feet below, so this whole aquifer from
16 1977 until 2002, 2003, has actually increased in total volume,
17 correct?

18 A. That's correct.

19 Q. Now do you know, or do you remember when, as a policy
20 from the department, that this aquifer was fully appropriated?

21 A. Well --

22 Q. When did that -- maybe to help you a little bit,
23 wouldn't that have occurred somewhere in 1981 or '82? There
24 was a bunch of permits issued in '81, but in '82 it probably
25 came off the list as an area for appropriation; would that be

1 about correct?

2 A. It was in the early '80s. I don't recall the exact
3 date of the first application that I would have made the
4 recommendation to deny, but it would have been in the early
5 '80s. I've always used '84.

6 Q. Would you agree with me that your records for permits
7 indicate no permits in the year 1982, up until the year 1991,
8 no permits issued between the last one in '81, there was none
9 in '82 and there was a permit issued in April 22, 1991; are
10 you familiar with that?

11 A. Yes.

12 MR. RYLANCE: I need to mark this.

13 (Exhibit No. 3 was marked for identification.)

14 Q. Jim, I want to give you what's been marked as Exhibit
15 3 and ask you if you can tell me if you're familiar with that,
16 first of all?

17 A. Yeah, I mailed this to you.

18 Q. We just have to let other people know. Now what that
19 Exhibit shows is the permits in this aquifer, correct?

20 A. That's correct.

21 Q. And it shows the date in which they -- what, the
22 priority date, when they were issued and what have you,
23 correct?

24 A. That's correct.

25 Q. I hate to put you on the spot here, but I'm going to

1 see how good your math is. But in 1979 there was a permit
2 issued and that was for 132 acres and 1.7 cfs. There was none
3 in '80, according to that report; is that correct? In order
4 to save some time I would indicate that there's eleven permits
5 issued in 1981.

6 A. It could be; I don't know.

7 Q. The record -- I'll indicate to you that the document
8 you gave me says that there were eleven permits issued in 1981
9 for 2071 acres and 28 cfs in 1981, correct?

10 A. Okay.

11 Q. When we go back to your chart, your observation well
12 BD-77I, those permits in 1981 and the water that was granted
13 and permitted at that time was virtually at the lowest period
14 of time in this aquifer; is that fair to say?

15 A. The time period of '81-'82 was virtually at the lowest
16 period of records that we have, correct.

17 Q. And in that year 1981, if the board would indicate
18 what I just -- what your records indicate, now in 1991 this
19 board authorized another permit out of this aquifer, and that
20 was the Daryle Starr permit 5529-3, and you're familiar with
21 that one, correct?

22 A. Yes, because you brought it up to me when you called
23 the other day, and I looked it up; otherwise I wouldn't have
24 been.

25 Q. So that's why I know you remember that one. And in

1 fact that one was issued for 2.2 cfs out of this aquifer to
2 irrigate 160 acres. Now there's a little bit of story behind
3 that, and there was some combination of things that were done
4 when they issued that permit, correct?

5 A. Well, the permit wasn't for any volume of water or --
6 what it was was that particular application was a kind of a
7 clean-up of an inspection that found that there were some more
8 acres. There was no water, no diversion rate or anything else
9 included. It added a few acres.

10 Q. But at the same time that permit there did increase
11 the total number of acres to be irrigated, correct?

12 A. Yes, it did.

13 Q. It added acres to a permit that already existed,
14 correct? You may have changed the number but it did add acres
15 to a permit that already existed. So in 1991, in April 22,
16 1991 priority date there we allowed 20 more acres to be
17 irrigated with water out of an aquifer that back in 1981-2 you
18 said was fully appropriated, correct? Right?

19 A. Well, if you read my report, from '81, '82, '83 I left
20 the provision in there that there may need to be some clean-up
21 of permits in the future for this situation, like you're
22 describing here in '91, where there would be -- pivots don't
23 always get set up exactly on the 133 acres that they were
24 supposed to. It may have overlapped two acres here and three
25 there, and that's what this was taking care of.

1 Q. Jim, when you recommend to the board that they ought
2 to approve a permit to irrigate, you make a determination that
3 there's water available to pump that permit, correct?

4 A. Yes.

5 Q. So if you had five permits here today out of this
6 aquifer or some other aquifer, and you said I recommend to the
7 board that they approve these five permits to take water out
8 of this aquifer, you're telling the board that there's water
9 available to pump all of those permits, correct?

10 A. Hopefully, yes.

11 Q. Now, in the Tulare aquifer you currently have permits
12 available for how many acre feet of water that currently exist
13 today?

14 A. I think that number is somewhere in 40,000 acre foot.

15 Q. If I told you that number -- that you've granted
16 permits in the Tulare aquifer for 42,000 acre feet, would you
17 agree that it's close to that number?

18 A. Yes, I would.

19 Q. Would you also agree with me today that your report
20 says that for the 24 years since 1979 until today that you've
21 only used 6,604 acre feet?

22 A. Average.

23 Q. Right, average.

24 A. Yes.

25 Q. That's far less than the 42,000 that you permitted,

1 correct?

2 A. That's correct.

3 Q. And when you permitted those permits you said there
4 was water available to pump them all, correct?

5 A. That's correct.

6 Q. Now, if I read your report, you indicate that the
7 average volume of recharge is 7,950 acre feet per year; that's
8 what it's been, based upon your latest study, correct?

9 A. That's based upon at the site of the aquifer and a
10 rate of recharge, the amount of water that would go in per
11 year.

12 Q. And for the same period of time that you've given the
13 average of 7,950 being the recharge, you've also said that the
14 average discharge was 6,604 over the same period of time?

15 A. That's the irrigation discharge.

16 Q. Well, we don't have any -- but we don't have any -- we
17 have the recharge and all we're talking about is irrigation
18 here today.

19 A. Well, which can of worms do you want to open up here?
20 Yeah, that's true.

21 Q. Okay. Now the difference between them is, you know,
22 1300 acre feet, correct?

23 A. Between the 66 and 79, yes.

24 Q. Right, plus your observation well from 1981 until the
25 current time indicates that you're gaining in total volume in

1 that aquifer, correct?

2 A. That's correct.

3 Q. Don't you think there's some relationship between your
4 average recharge of 7,900 and your discharge of 6,600 over the
5 24 years? There's been a gain -- by your own well there's
6 been a gain in water available?

7 A. That's right.

8 Q. Now, if you can say in 1981 that you advised this
9 board that you could give out 28.94 cfs to irrigate 2071 acre
10 feet, when your observation well is five foot lower than what
11 we are area at today, it seems that you ought to be able to
12 recommend 450 gallons a minute to irrigate 91 acres in 2003,
13 doesn't it?

14 A. Okay.

15 Q. Is that a yes?

16 A. Yes, I was wondering where the question was.

17 Q. It would perceive that way, doesn't it?

18 A. Yes, it does.

19 Q. Because I forget once in a while and I would rather
20 deal in gallons per minute, but since you like cfs and I
21 always forget, 450 gallons a minute is equal to how many cfs?

22 A. It's a little over one.

23 Q. But one --

24 A. It's close enough.

25 Q. So Mr. Hines is asking for one cfs per year, and by

1 your records you have 1300 that you're not using, correct?

2 A. On an average.

3 Q. On an average basis, and we know that in your report
4 it says that in 2003 you're at 10,000 acre feet, correct?

5 A. I believe it --

6 Q. Or 13,000, I believe, excuse me.

7 A. 2002.

8 Q. Whatever, but you have 13,000, but we know just as
9 well that that's going to drop, because over 24 years you've
10 charted this aquifer you've had highs and lows, correct?

11 A. The water level fluctuates in the aquifer, yes, it
12 does.

13 Q. So the average is still the average and still holds
14 true, even though you have a spike in 2002, today in 2003 we
15 have more water available in this aquifer than we've had since
16 1982 by your observation well?

17 A. That's correct.

18 Q. And yet in '81, '82 we issued 28 cfs out of this
19 aquifer?

20 A. Well, to be fair here --

21 Q. I just want to ask you the questions. You have to let
22 me ask the questions here. You can respond, but I get to ask
23 the questions.

24 A. You bet, but I would like to clarify that last one
25 just a little bit.

1 Q. Well, I'll ask another one. Now, in looking at your
2 report, in looking at your reports of wells and permits that
3 you currently have in place, and we talked about the 42,000
4 acre feet of permitting that you've done, we know that because
5 you're only using, at your highest rate, 13,000, that they are
6 not all being used to the extent that they could be. I mean
7 you've permitted 42,000 acre feet, correct?

8 A. Well --

9 Q. And we know on an average basis through the working of
10 your department not everybody pumps them every year?

11 A. That's correct.

12 Q. But we also know on an average that's at 6,600 acre
13 feet, correct; and you have a high spike of 13,000, correct?

14 A. Yes, we've said this twelve times now.

15 Q. All right. So between 42 and 13 there's a lot of
16 water that you permitted that isn't being used, correct?

17 A. That's correct.

18 MR. RYLANCE: That's all the questions I have.

19 MR. FREEMAN: Redirect?

20 MS. BEST: Yeah, I do. Thank you.

21 EXAMINATION

22 BY MS. BEST:

23 Q. I'll start with the last question first. This issue
24 of there's 42,000 acre feet permitted and a lesser number of
25 acre feet used, in light of that line of questioning, does

1 that change your opinion as far as whether this permit ought
2 to be issued?

3 A. No.

4 Q. Okay, what's the significance, Jim, of the fact that
5 permits were granted in 1981 when there's less water and now
6 they're being recommended for denial now; could you explain to
7 the board more fully, how you can reconcile that concept,
8 those concepts?

9 A. Well, we've been a little loose with the dates,
10 probably, but you know there are two questions here. Number
11 one, we've spent quite a bit of time talking about whether
12 there's 42,000 acre feet been appropriated or not, and this is
13 a discussion that we've had many, many times in front of this
14 board. This is the statutory limit that would be allowed for
15 irrigation. That simply either multiplied total acres out
16 there under permit by the number three or the number two; in
17 other words, three acre feet for the older permits that were
18 basically issued 1982 and prior, somewhere in there, and two
19 acre feet per acre after that time period.

20 So that if you looked at the irrigation data and
21 looked at the fact that in 2002 there were 32,000, 31,000
22 produced, there were 42,000, roughly 41 appropriated. This is
23 the way it is. This is the fact of life in South Dakota
24 irrigation. That difference there can be for two or three
25 reasons. The first reason mainly is that people don't use

1 their full allocation in this state, even though they may be
2 allowed two acre feet or three acre feet, normally we use less
3 than that.

4 So there's going to be quite a difference in the
5 numbers between actual use and actually appropriated. We have
6 counted on that as a staff. We have planned on it. We have
7 purposely looked at it for many years, and in fact argued
8 about it or discussed it in front of this board. That's why
9 we base our recommendation on use rather than permit.

10 Now, irrigation is special in this state because
11 of this reason. Irrigation is special because it gets three
12 acre feet or two acre feet, and three years from now they
13 might have to use that three acre feet. It's different. It
14 isn't -- just because you use six or eight inches this year or
15 next year and next year, doesn't mean you can't use 24 the
16 next, because that's the way it has to be for a common sense
17 approach.

18 So using a total volume and what is reported, you
19 know, we can use that. It sounds really significant, but it
20 doesn't mean anything because what we have decided 20, 25
21 years ago was based on use, not the paper right. Now --

22 Q. Jim, when you're -- are you saying that when we
23 calculate how much water is available, we have to calculate
24 actual use, but when we look at how appropriations ought to
25 be -- when we add up all the paper rights, we have to

1 recognize the fact that they have been permitted at the two
2 acre feet and three acre feet numbers, correct?

3 A. That's correct, and that's what I was trying to
4 explain. That's how that number is so much different.

5 Q. Jim, there was a dialogue between you and Mr. Rylance
6 regarding the issue of recharge and irrigation discharge. Can
7 you explain how those concepts factor into the analysis in
8 this case?

9 A. Well, the recharge rate was a calculation. It's based
10 upon a concept where you would look at water levels. You
11 would first of all attempt to map this aquifer. You map the
12 thicknesses. You look at this information. You put it then
13 in a frame that you could try to analyze it in blocks or
14 squares, or whatever you want to call that. You would then
15 basically go through a process, and it's always done on a
16 computer, or you could do it any way, I suppose, but it seems
17 to be easier.

18 You would go through this and attempt, by
19 assigning values to these blocks, aquifered thickness
20 permeabilities, water levels, pumping rates. You go through
21 this based on what you know, based on the drilling and water
22 levels that you can measure because really that's what you
23 have for basic data. You attempt to duplicate through this
24 process the water levels that you're measuring.

25 And that calibration procedure, as we go through

1 that, seem to zero in on this number .76. Now what that
2 number is, that's .76 inches per year. This area averages
3 maybe 18 inches per year precip. You know, in some of those
4 years in the '90s we approach 30 inches of precip in this very
5 same area, and like this year we probably had 14 or 16 inches
6 in that area. So it seemed reasonable. It duplicated because
7 it's very difficult to test these concepts and these models,
8 it seemed to be reasonable that those values were down.

9 Now to take that value and drag it back 20 years,
10 project it ahead 20 years, that is the interesting question.
11 I can average these things. I can juggle figures. You can do
12 all kinds of things, yet what we want to do is what's right,
13 and with the best information that we've got now, these
14 numbers look okay. And from a management point of view I feel
15 really good about the limits that we've set.

16 Now I also understand that that line in the sand
17 had to be drawn somewhere, and it just happens to be right
18 here. Now I rambled too much; is there another question?

19 Q. I think there was a question that Mr. Rylance asked
20 you about how you can issue -- how you can recommend issuance
21 of permits when water levels are declining, but you can't --
22 back in the '80s, but you would recommend denial of the
23 permits at this current time when water levels are what they
24 currently are; and he asked you for a yes or no answer and you
25 gave one and indicated an inclination to explain more fully.

1 Can you explain more fully at this time?

2 MR. RYLANCE: I'm going to object to the
3 question. You have to form a question, I think.

4 MR. FREEMAN: He can answer it, overruled.

5 A. Normally what the witness says is what was the
6 question again?

7 MR. RYLANCE: I'm not sure.

8 Q. (By Ms. Best) That would require me to ramble out
9 another question that is identical, and I can't do it.

10 A. Well, I kind of tried to answer that and I have kind
11 of not, I guess. If you look at my report, the citations that
12 I give are 1983-4. This computer model study wasn't completed
13 until '84, so we didn't have that recharge rate until '84.
14 These permits that were being approved in '79, '80, '81 and
15 '82. We're talking about real seat-of-the-pants hydrology
16 here. We were deferring applications in droves.

17 Some of the board members were here I think in
18 '79 and '80. We were deferring these in clumps and waiting
19 six months to a year and bringing them back up again. And in
20 this area some of these were held for one, two, three years.

21 It was a slowing-down tactic to give us time to
22 develop some information and to look more fully at some of
23 this stuff; that's all that was. It's absolutely right, in
24 1981 we probably did approve 28 cfs on however many acres.
25 Since that time we've probably canceled that many, too. You

1 know, not all permits get developed, and certainly not the
2 entire acreage get developed. That's how I can answer that, I
3 guess.

4 Q. Finally, Jim, a question was raised regarding the
5 Daryle Starr permit, and in '91 -- was the '91 action the
6 board issuance of 2.2 cfs at 162 acres, or what was the board
7 action?

8 A. Oh, as I recall this one, this is a hybrid permit. It
9 has an old vested right. It has another right, and it was
10 licensed together, and so there's some pre 1955 license rate
11 to the water and some other things, I believe. But the bottom
12 line here is that the permit that was approved in '91 was
13 approved for additional acres only. There was no diversion
14 rate in there. The diversion rate was existing from the
15 previous permits, I think, but it was additional acres.

16 Q. Do you recall how many additional acres?

17 A. I believe it was 28.

18 Q. But again, that was clean-up because of the location
19 of the center pivot?

20 A. Well --

21 MR. RYLANCE: I would object to the form of the
22 question because that's not what the witness said. You know,
23 counsel is testifying. Do it another way, but I don't think
24 that's what this witness said.

25 MR. FREEMAN: Perhaps you could clarify it.

1 Q. (By Ms. Best) What was the factual basis for the 28
2 acre change in the permit?

3 A. Well, I don't know. I didn't do the licensing but --

4 MS. BEST: I have nothing further.

5 MR. FREEMAN: Any recross?

6 MR. RYLANCE: First of all I want to have offer
7 Exhibit 3, so I don't forget.

8 MS. BEST: No objection.

9 MR. FREEMAN: That will be received.

10 RECROSS-EXAMINATION

11 BY MR. RYLANCE:

12 Q. Jim, Exhibit No. 3 I previously showed you; those are
13 active licenses, correct?

14 A. That's our database.

15 Q. It means they are active?

16 A. It says on there whether they are licensed, canceled,
17 active, withdrawn. There's a list, that first page tells you.

18 Q. But I believe when you and I talked on the phone you
19 indicated to me that you only sent me ones that were active.

20 A. Well, it's just a data base.

21 Q. Correct. Well, just point out to the board that,
22 without spending any more time, those ones referred to in
23 1981, those are all current active permits. They haven't been
24 disbanded, and I would just like to point that out. I don't
25 have any other questions.

1 MR. FREEMAN: Thank you, Jim.

2 MS. BEST: May I look at that exhibit again?

3 FURTHER REDIRECT EXAMINATION

4 BY MS. BEST:

5 Q. I'm going to hand you Exhibit 3, Jim, and see if that
6 refreshes your recollection as far as whether those are all
7 active permits or not?

8 A. Excuse me?

9 Q. Are they all active?

10 A. No.

11 Q. And in fact there's a notation by each one as far as
12 whether they are active or --

13 A. It's under the status column; it says either cancelled
14 or denied or incorporated or licensed, or what have you.

15 MS. BEST: I just wanted to clarify that.

16 MR. RYLANCE: And it points out some of those
17 were canceled.

18 MR. GOODMAN: Yes.

19 MR. RYLANCE: So they are the ones that go back
20 into the database.

21 MR. RYLANCE: That's all I have.

22 MR. FREEMAN: Thank you, Jim.

23 FURTHER REDIRECT EXAMINATION

24 BY MS. BEST:

25 Q. I intended to ask this and I neglected to earlier.

1 Does the table reflect whether those water rights are actually
2 used?

3 A. Excuse me?

4 Q. Does Exhibit 3 reflect whether those water rights are
5 actually used?

6 A. Well, no. I mean it doesn't say if the pivot was
7 running this year or last year, but as far as we're concerned
8 it's either a licensed or denied or canceled or whatever
9 permit.

10 Q. It reflects whether it's a legal right, correct?

11 A. That's correct.

12 MS. BEST: Thank you.

13 MR. BRINK: Do you have records prior to '77 on
14 this --

15 A. Yes, we do. It isn't on this one, but there are other
16 observation wells in the aquifer that go back to the early
17 '60S.

18 MR. BRINK: And they kind of reflect this same --

19 A. Yes, what they reflect is in the '60S they were higher
20 and gradually were going down. In fact, one of the reasons
21 that we had so many deferred permits in this area in the '80s,
22 early '80s was because if you just took that snapshot of that
23 time period, we had had declining water levels from 1966 to
24 1981 and everybody was getting a little excited.

25 MR. BRINK: I think I remember. The reason I

1 asked the question is what might have been the highest water
2 elevations compared to what we have here?

3 A. Compared to what we have here, the highest is in '98,
4 '99.

5 MR. BRINK: So that would be the highest?

6 A. In fact, I could say that with quite a bit of
7 certainty that goes clear back to '52 on some recorded wells,
8 not in this aquifer but the one right across the river, it was
9 a very similar situation.

10 MR. FREEMAN: Anything else, Diane?

11 MS. BEST: Nothing further.

12 MR. RYLANCE: No, other than just argument.

13 MR. FREEMAN: Go ahead, closing, Diane, or do you
14 have something else.

15 MS. BEST: Well, I'll tell you what, I filed a
16 brief based on at the last meeting when Mr. Rylance's client,
17 Mr. Hines' previous permit, we had a cancellation hearing and
18 at the tail end of the cancellation hearing he indicated he
19 had an argument to make regarding one of the water rights
20 statutes regarding a forfeiture, and I filed a pre-hearing
21 brief assuming what Ray was going to argue in this case. But
22 I haven't heard his arguments, and he says that I jumped the
23 gun and misstated what his arguments are, and also he has --
24 his client is the applicant and they have the burden of
25 proof. So what I'm saying is I would like him to go first.

1 MR. RYLANCE: It's accurate when you cancel a
2 permit under your statutes and, you know, it's really set out
3 in verbiage that Ms. Best put in hers, it does say that, you
4 know, if you don't use a permit for a period of three years
5 that, you know, it can be canceled.

6 I think this board has followed that for as long
7 as I can remember, some people who sat on this board, but it
8 also says that such unused water shall be reverted to the
9 public and shall be regarded as unappropriated water. Now we
10 didn't come in here today with some engineer that's going to
11 come in with numbers contrary to the department. We came in
12 here today and we used all the numbers that's provided by the
13 department, and whether they recommend you approve or
14 disapprove a permit.

15 One of the problems that you have is if you take
16 a look at what the statutes say on issuing permits, you know,
17 first of all it says that it can't be approved unless you
18 believe that water's available. It doesn't say be available
19 one out of every three years. It doesn't say that in wet
20 years you're going to irrigate less, and in dry years you're
21 going to irrigate more. It says that it has to be available.
22 This board, over a long period of time, has issued permits
23 somewhere in the neighborhood of 42,000 acre feet. It doesn't
24 matter if it's 41, but it's a far side north of 13,000 acre
25 feet, which the department says is highest use.

1 Calculation would then say that there's 27,000
2 acre feet available. But no place in the statutes can you
3 find where it says, well, let's issue three times the amount
4 of water that we think they are going to use because we know
5 the farmers don't do it. It doesn't say that. It says you
6 can only issue a permit if water is available.

7 You've already said water was available to the
8 tune of 40,000 acre feet. You're not using 40,000. The best
9 you're using is 13,000. Well, heck, there has to be a lot
10 left. There has to be a lot left because that's what this
11 board has said. I'm just going from what the statute says,
12 and what the records say. And they are not my records. They
13 are your records. They are the state's records, the
14 department's records. They are whatever they are.

15 When we look at Mr. Goodman's report, and we
16 don't need to get hung up on how many permits were issued in
17 what year, and what have you. Let's just cut to the quick of
18 it and look at his report and take a look at his observation
19 well. We stopped issuing permits in '81, '82, someplace in
20 there. We've got two permits. And I don't care if you call
21 them clean-up, or what you call them, they were issued in '99
22 and 2002, but for the most part you haven't issued any more
23 permits out of this aquifer that amounted to anything in terms
24 of usage.

25 But over that period of time since '81 or '82,

1 whatever it happened to be, and 2003, what does the
2 observation well say? It says that we're continuing to go up
3 and we have five more feet in our observation well. We have a
4 lot more water available today than the period of time in
5 which we took this thing out of appropriation.

6 Now, if you want to go back to 1977, we were at
7 somewhere south of 33 feet minus, okay, and we were issuing
8 permits then, and there's a lot of them. Today we're at 30
9 and, you know, there's a lot of usage out there, and every
10 year it goes up and down, and we understand that. But the
11 whole point of this graph is it's going up. I'm asking for
12 one acre foot of water on 91 acres; that's all I'm asking
13 for. All the data suggests that your average annual recharge
14 is 7,950. Your usage is 6,600. And third grade math tells
15 you there's one acre foot available.

16 Now, there's no statute that says what you've
17 done in practice; it says if it's available you are issue a
18 permit. You've already issued permits for 42,000 acre feet,
19 and now somebody is trying to tell me that we shouldn't have
20 only issued them for 13,000, or some number. We think the
21 facts suggest that there is water available. The statute and
22 criteria upon which you've issued the water permits say it's
23 available. And even under the statute that says that when you
24 cancel one it goes back in there suggests it's unavailable.

25 And in 1999 when -- or '91, I should say, on the

1 Daryle Starr permit, which is 5529-3, this board determined
2 that there was enough water to irrigate an additional 23
3 acres. Now I've been told you're not supposed to do it that
4 way, but that's what you've done in the past. That's all I'll
5 say on that point. But there's water available by the
6 department's own records. We believe that we should be
7 granted a permit. Thank you.

8 MR. FREEMAN: Thank you. Diane.

9 MS. BEST: Thank you. Mr. Rylance started out
10 his argument regarding 46-5-37, the forfeiture statute, once a
11 water right is forfeited it automatically -- that it
12 automatically -- that quantity of water under that right
13 automatically becomes available for public appropriation. I
14 filed -- in fact, as I filed two pre-hearing briefs in this
15 matter, I would refer you to the DENR's amended pre-hearing
16 brief regarding our argument on that matter, and the DENR
17 takes a pretty dim view that that statute was never intended
18 to supersede the water mining statute. And I'll leave it at
19 that, and if the board has questions regarding that legal
20 argument, I would be happy to answer them.

21 I'm also prepared to respond to some additional
22 arguments that Mr. Rylance raised. One is this Daryle Starr
23 issue. The record in this case shows that the Daryle Starr
24 matter involved 28 acres. It was a correction. It involved
25 a vested water right. The DENR submits that that correction

1 is proper and did not implicate the water mining statute.
2 However, if that permit did in some manner implicate that
3 statute, it involved a different interpretation of that
4 statute at that time, that still would not require that this
5 board is blindly bound to accept a ruling that it made in 1991
6 involving that one other permit.

7 In other words, you made findings of fact and
8 conclusions of law that were completely different than what
9 we're urging today. I would be darned surprised, but if you
10 did, we don't think you ought to follow it again. Secondly,
11 when the board issues permits for irrigation, the two acre
12 feet, three acre feet distinctions have come into play, and
13 Jim Goodman alluded to that or discussed that in his testimony
14 and we're talking about 46-5-6 that addresses the acre feet on
15 land. And in this state the two to three acre feet has been
16 assumed to be the maximum beneficial use allowed for
17 irrigation.

18 The duty of the water statute, if you will, in
19 western water law, and that has been the volume that's been
20 allowed for irrigation, that speaks to what the maximum can
21 be. And if you -- it doesn't speak to what's ordinarily used,
22 necessarily, or used during an average year. It speaks to
23 what the maximum ought to be. And certainly what's the
24 average of an irrigator's use ought not be the maximum.
25 Because if it is, if the average of their use is the maximum,

1 that means that they are violating the law on some occasions
2 in order to get that average. It makes sense.

3 In order to issue a license you have to say in
4 your license what the outer parameter of that license is, and
5 then at times they will peak up to that license and use that
6 peak use. But that doesn't mean that they have to customarily
7 and ordinarily or every single year use that quantity of
8 water. And so a peak appropriation does not mean that the
9 fact that the board has issued water for these people's
10 appropriations, doesn't mean that they ought to go ahead and
11 ratchet back a number of water users back to kind of average,
12 and it doesn't mean that those water rights that carry those
13 peaks ought not to be recognized as having been granted, and
14 that's appropriate.

15 But when you go ahead, at the same time, and look
16 at this particular aquifer, you've got to look at that water
17 mining statute and say, gosh, what is the average annual
18 recharge? Has it been exceeded in actual use? Jim explained
19 all these things, and I don't think I need to go into greater
20 detail than that.

21 And finally, Mr. Rylance talked about the
22 hydrograph. Look, the hydrograph is going up, shouldn't we
23 accommodate that. And Jim testified to that issue, that we
24 have to look at all factors rather than just looking today at
25 a hydrograph going up. Because what happens is you have to

1 look at it over a period of record. You have to look at it
2 based on experience and background, which Jim Goodman
3 definitely has. You have to look at it based on expert
4 reports, which Jim Goodman has reviewed periodically. You
5 have to look at it based on what you know in the field, and
6 Jim Goodman has that knowledge as well.

7 One more thing that was looked at during the
8 '90s, there were some conditions that contributed to these
9 aquifers having more water. Are those aquifers going to be
10 able to sustain that water over a long period? Don't know.
11 So those kind of factors all factor in, and Mr. Goodman has
12 offered an expert opinion, and I would ask the board to adopt
13 that opinion in its findings of fact.

14 MR. RYLANCE: Just one short comment. When your
15 average rate of recharge is greater than what you're getting
16 rid of by permit usage, by your records, you're not mining
17 water. That's all I have.

18 MR. FREEMAN: What is the pleasure of the board?

19 MR. BRINK: Mr. Chairman, I'd like to make a
20 comment a little bit before I make a motion. Sometimes graphs
21 and charts don't always tell the whole story. We've gone
22 through that in the Hills where we've had appropriations that
23 were far, far, far and above the actual measured stream flows,
24 after we had the information, and the same thing here, that's
25 why I asked Mr. Goodman how this thing looked back 40 years

1 ago, 50 years ago, if we had that type of record.

2 And I do seem to recall a real slipping in that
3 hydrograph about the start of when this one starts. So -- and
4 we've also been much aware of the impact of wet conditions in
5 South Dakota from '93 to '99 on hydrographs that have been
6 presented to us, as to what impacts those would have on our
7 decision. And so in this case I'm inclined to accept the
8 staff's recommendation on the basis of conservation, if you
9 will. I don't know if I can justify it away, other than to
10 the fact that they have been right in the past and their
11 qualifications, I think, speak to substantiate the
12 recommendation.

13 MR. FREEMAN: Thank you, Fran.

14 MR. ROLLAG: Well, I know we have rejected a lot
15 of applications in this aquifer previously to this date, and
16 I'm fully supportive of staff's recommendation, but the
17 thought occurred to me that I guess I wondered how many
18 aquifers in this state are -- you know, that we have shut down
19 for new applications, and that this projection on aquifer
20 capacity was based upon 24 years of data.

21 And as time goes on, let's say 20 years from now
22 we'll have more data. If these aquifers are subject to, you
23 know, periodic reevaluations, and that more -- if a conclusion
24 is that the aquifer has greater capacity than previously
25 estimated, that there would be some means of increasing the

1 number of permits. And I believe we have a system where we
2 keep track of recommendations that we've turned down for
3 aquifers that are estimated to be at capacity, that maybe at
4 some future date, upon further investigation and refinement of
5 models, and so on, that there would be some way to recognize
6 the priority of the applications, so that these applications
7 can be -- more applications can be granted. That's I guess
8 all I have to say about it.

9 MR. FREEMAN: Marian, do you have anything?

10 MS. GUNDERSON: Well, sometime in the last 24 or
11 25 years I've made a decision and got my fingers burned
12 because I was not able, or did not take the time to study the
13 whole picture, and perhaps I could be called -- heavens, I
14 would hate to admit it -- conservative. But I think it is
15 wise that we have, as a board, accepted conservatism in the
16 use of water, because it's pretty serious when the pump is
17 turned on and there isn't any.

18 And we were on the route to overusing water in
19 the first three or four or five years that I was on this
20 board, because there wasn't any history. And for that
21 purpose I think our reasoning has been firm and consistent,
22 and for that reason I would move that we deny the granting of
23 this permit.

24 MR. FREEMAN: We have a motion; is there a
25 second.

1 MR. ROLLAG: I'll second the motion.

2 MR. FREEMAN: We have a motion and a second, any
3 discussion? Other than me, I just want to pipe in my two
4 cents' worth. It would appear to me that if we followed Ray's
5 line of reasoning we would have to open this aquifer up to and
6 appropriate 42,000 cubic feet, and I don't know how you would
7 draw the line.

8 I understand exactly what you've said, but I just
9 believe that that would be an absolutely unreasonable adoption
10 of a rule for us, or ruling for us; and in addition to that it
11 would open up every other aquifer in the state that is
12 probably close to being appropriated.

13 So unless there's further discussion, all in
14 favor signify by saying aye.

15 Opposed?

16 That motion is carried.

17 MR. RYLANCE: To answer your question, you don't
18 have to go to 42, but you have to worry about the 13,000.

19 MR. GUHIN: Findings?

20 MR. RYLANCE: Yes.

21 MR. FREEMAN: Some judge may tell us otherwise.

22 MS. GUNDERSON: I think it's a good argument, and
23 we need to consider.

24 MR. RYLANCE: There are some times that aquifers
25 recharge greater and gain a point, you can go in on priority

1 date, and you get to a certain point, they have to make an
2 economic decision whether they want to spend the money on a
3 priority date system. But just because it's always been that
4 way, doesn't mean it can't change.

5 MS. GUNDERSON: People stop using the water and
6 at sometime or another we have to recognize that.

7 MR. FREEMAN: Meeting adjourned officially.

8 (Whereupon, the proceedings were adjourned.)
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1 STATE OF SOUTH DAKOTA)
2 COUNTY OF HUGHES) CERTIFICATE

3

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5

6 I, Lynne M. Ormesher, Registered Professional Reporter,
7 hereby certify that the foregoing pages 1 through 40,
8 inclusive, are a true and correct transcript of my stenotype
9 notes.

10 Dated at Pierre, South Dakota, this 18th day of April,
11 2004.

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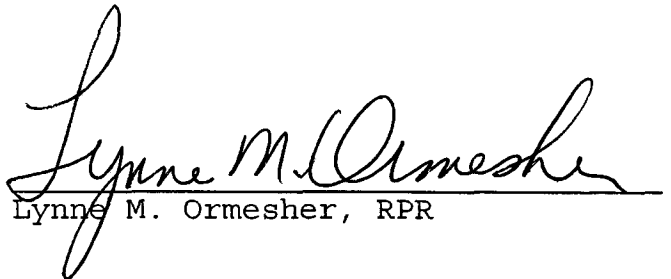
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Lynne M. Ormesher, RPR

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

CIV. 04-

PHILLIP W. HINES,

Appellant,

v.

DEPARTMENT OF ENVIRONMENT
AND NATURAL RESOURCES
(SOUTH DAKOTA WATER
MANAGEMENT BOARD),

Appellee.

CERTIFICATE OF SERVICE

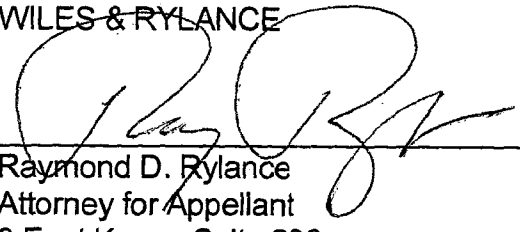
I, Raymond D. Rylance, one of the attorneys for the Appellant in the above-entitled matter, certify that a letter requesting a transcript of the hearing conducted before the Water Management Board on December 3, 2003, in Pierre, South Dakota, a true and correct copy of which is attached hereto, was served on the interested parties herein by mailing a true and correct copy thereof by first class mail with postage prepaid to:

Steve Pirner
Department of Environment
and Natural Resources
Joe Foss Building
523 E Capitol
Pierre, SD 57501-3182

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

on the 7 day of April, 2004.

WILES & RYLANCE


Raymond D. Rylance
Attorney for Appellant
3 East Kemp, Suite 200
P. O. Box 227
Watertown, SD 57201-0227

WILES & RYLANCE
ATTORNEYS AT LAW

3 East Kemp - Suite 200
P. O. Box 227
Watertown, South Dakota 57201-0227
(605) 886-5881

FACSIMILE
(605) 886-3934

E-MAIL:
rdr@wilesandrylance.com

John C. Wiles, P.C.
Raymond D. Rylance, P.C.
Rebecca L. Morlock Reeves

April 7, 2004

Lynne Ormesher
Capital Reporting Service
1805 Sunrise Dr
Pierre, SD 57501-5750

Re: Hines v. Water Management Board

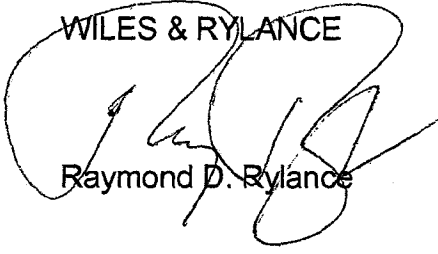
Dear Lynne:

By this letter, we are requesting that you prepare a transcript of the hearing that was conducted before the Water Management Board on December 3, 2003, in Pierre, South Dakota. On page 2 of this letter, please acknowledge the receipt of our request for the preparation of the transcript, and forward the same to the Clerk of Courts of Hughes County. The original transcript should be filed with the Clerk of Courts of Hughes County within 30 days.

Thank you.

Very truly yours,

WILES & RYLANCE



Raymond D. Rylance

RDR:bjs

RECEIPT

RECEIVED FROM WILES & RYLANCE a letter dated April 7, 2004 requesting a transcript of the hearing that was conducted before the Water Management Board on December 3, 2003, in Pierre, South Dakota, on Phillip W. Hines Application for Permit No. 6431-3.

Dated this _____ day of April, 2004.

CAPITAL REPORTING SERVICE

By: _____
Lynne Ormesher

WILES & RYLANCE

ATTORNEYS AT LAW

3 East Kemp - Suite 200
P. O. Box 227
Watertown, South Dakota 57201-0227
(605) 886-5881

FACSIMILE
(605) 886-3934

E-MAIL:
rdr@wilesandrylance.com



John C. Wiles, P.C.
Raymond D. Rylance, P.C.
Rebecca L. Morlock Reeves

April 15, 2004

Steve Pirner
Department of Environment
and Natural Resources
Joe Foss Building
523 E Capitol
Pierre, SD 57501-3182

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

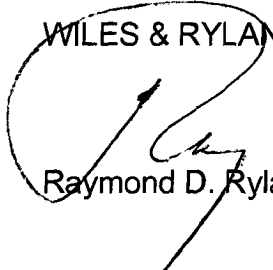
Re: Hines v. Water Management Board

Dear Folks:

Enclosed to each of you is a copy of our Statement of Issues in this matter. This is intended as service upon you by United States Mail.

Very truly yours,

WILES & RYLANCE


Raymond D. Rylance

RDR:bjs

Enclosure

cc. Phil Hines

STATE OF SOUTH DAKOTA)
COUNTY OF HUGHES) : SS

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

PHILLIP W. HINES,

Appellant,

v.

SOUTH DAKOTA DEPARTMENT
OF ENVIRONMENT AND
NATURAL RESOURCES
(SOUTH DAKOTA WATER
MANAGEMENT BOARD),

Appellee.

CIV. 04-

STATEMENT OF ISSUES

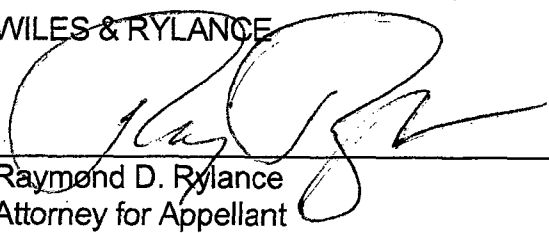
COMES NOW, Appellant above-named, Phillip W. Hines, by and through his undersigned counsel of record, Raymond D. Rylance, of Wiles & Rylance, Watertown, South Dakota, and submits Appellant's Statement of Issues as follows:

Phillip W. Hines applied for a water permit #6431. Hines asserts that water is available to grant the permit.

The Water Management Board held that water was not available.

Dated this 14 day of April, 2004.

WILES & RYLANCE


Raymond D. Rylance
Attorney for Appellant
3 East Kemp, Suite 200
P. O. Box 227

Watertown, SD 57201-0227
(605) 886-5881

CERTIFICATE OF SERVICE

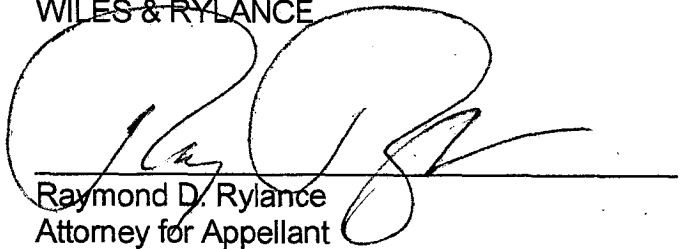
I, Raymond D. Rylance, one of the attorneys for the Appellant, certify that the above and foregoing "STATEMENT OF ISSUES" was served on the interested parties herein as follows:

Steve Pirner, Secretary
Department of Environment
and Natural Resources
Joe Foss Building
523 E Capitol
Pierre, SD 57501-3182

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

by depositing the same in the United States Mail Service at Watertown, South Dakota, with postage thereon fully prepaid, on the 15th day of April, 2004.

WILES & RYLANCE



Raymond D. Rylance
Attorney for Appellant

WILES & RYLANCE

ATTORNEYS AT LAW

3 East Kemp - Suite 200
P. O. Box 227
Watertown, South Dakota 57201-0227
(605) 886-5881

FACSIMILE
(605) 886-3934

E-MAIL:
rdr@wilesandrylance.com



John C. Wiles, P.C.
Raymond D. Rylance, P.C.
Rebecca L. Morlock Reeves

April 15, 2004

Christal L. Espeland
Hughes County Clerk of Courts
PO Box 1238
Pierre, SD 57501

Re: Hines v. Department of Environment & Natural Resources

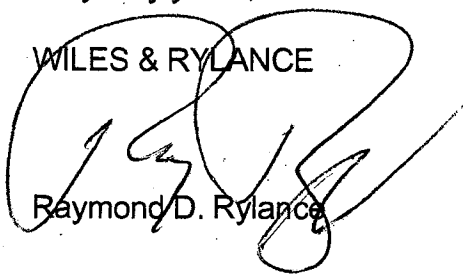
Dear Ms. Espeland:

Enclosed for filing in the above matter is a signed receipt of Capital Reporting Service.

Thank you.

Very truly yours,

WILES & RYLANCE


Raymond D. Rylance

RDR:bjs

Enclosure

cc. Steve Pirner
Diane Best

INFORMATION COPY

RECEIPT

RECEIVED FROM WILES & RYLANCE a letter dated April 7, 2004 requesting a transcript of the hearing that was conducted before the Water Management Board on December 3, 2003, in Pierre, South Dakota, on Phillip W. Hines Application for Permit No. 6431-3.

Dated this 10th day of April, 2004.

CAPITAL REPORTING SERVICE

By: Lynne Ormesher
Lynne Ormesher

INFORMATION COPY

605 773 4106		P.02
Post-it® Fax Note		
To	DIANE BEST	Fr
Co./Dept.		Co.
Phone	605-773-6839	Ph
Fax	total	Fax



MAX A. GORS
PRESIDING JUDGE
Max.Gors@jfs.state.sd.us

CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

HUGHES COUNTY COURTHOUSE
P.O. BOX 1238
PIERRE, SOUTH DAKOTA 57501-1238
(605) 773-3711

COURT REPORTER
LESLIE HICKS
605-773-6839
Leslie.Hicks@jfs.state.sd.us

CIRCUIT ADMINISTRATIVE ASSISTANT
LINDA W SHEPHERD

April 29, 2005

Raymond D. Rylance
PO Box 227
Watertown, SD 57201-0227

MEMORANDUM DECISION

Diane Best
Assistant Attorney General
500 E. Capitol Ave
Pierre, SD 57501- 5070

re: HU04-37 Hines v. SD Department of Environment and Natural
Resources

Counsel:

[¶1.] In an order dated March 11, 2004, the South Dakota Water Management Board (Board) denied Phillip Hines' (Hines) Application for Water Permit #6431-3 on the basis that water was unavailable. Hines appealed this order on April 9, 2004. Oral arguments were heard on February 2, 2005. The court has considered the briefs, arguments and the record. The Board's decision to deny Hines a water permit is reversed.

Facts

[¶2.] On July 16, 2003, Phillip W. Hines (Hines) filed application #6431-3, requesting a Permit to Appropriate Water for Irrigation with the Board. Hines' application asked to appropriate 1.0 cfs (451 gpm) of water from a well, 54 feet deep, to irrigate 91 acres in Beadle County. Under the description of the project Hines wrote, "Divert water from an existing well to provide water for irrigation through a pivot system for the land described above. Same well as described in permit #3466-3"

[¶3.] Permit #3466-3 was issued in 1976, to the previous owners of the land. Hines purchased the land in 2000. Permit #3466-3 had a diversion rate of 1.0 cfs

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and diverted water from the same well and was used to irrigate the same land that Hines described in his application. The previous owners did not use the water right for several three-year periods throughout the 1980's and 1990's. In 2003, the Department filed a notification that it was seeking to terminate Permit #3466-3 for reasons of forfeiture, pursuant to SDCL 46-5-37 which provides:

When any person entitled to the use of appropriated water fails to use beneficially all or any part of such water for the purpose for which it was appropriated, for a period of three years, such unused water shall revert to the public and shall be regarded as unappropriated public water.

Hines did not know that the previous owners had not been irrigating according to the statute. In July 2003, the hearing to cancel Permit #3466-3 was held before the Board. The Board issued an oral determination that water right #3466-3 had been forfeited for nonuse. The cancellation was not appealed.

[¶4.] On August 27, 2003, Garland Erbele, Chief Engineer for the Department of Environment and Natural Resources (DENR), recommended that Hines' permit be denied for the following reasons:

- 1) SDCL 46-6-3.1 states that the annual withdrawal of groundwater shall not exceed the average estimated annual recharge to the aquifer;
- 2) All water available for appropriation within the Tulare East James Aquifer in Spink and Beadle County is presently appropriated; and
- 3) It is not in the public interest because the unavailability of proven recharge

[¶5.] On December 3, 2003, the hearing for Hines' application was held before the Water Management Board. James Goodman (Goodman) presented the DENR report on Hines' application at the hearing. Goodman is a Natural Resources Engineer for the DENR. Goodman testimony was based on a report he completed in 1984, a report completed by L.S. Hedges in 1982, a report completed by L.K. Kuiper in 1984 and a report entitled, "Water Rights" completed in 2003.

[¶6.] Goodman testified that the source for the water is the Tulare East James Aquifer (Aquifer). The Aquifer is in two counties, Beadle and Spink. In Beadle County, the Aquifer underlies 23,200 acres and contains an estimated 132,000 acre feet of recoverable water storage. In Spink County, the Aquifer underlies 100,700 acres and contains an estimated 476,000 acre feet of recoverable water storage. Goodman testified that those numbers came from a report done by L.S. Hedges in 1982. Goodman said he did a little bit of independent assessment of the Tulare East James and found that in Spink County, the Aquifer underlies 102,400 acres and contains 630,000 acre feet of recoverable water. Goodman also testified about a report completed by Logan K. Kuiper. Kuiper is employed with the US Geological Survey. In 1984, Kuiper, issued a report entitled, "Appraisal of Water Resources of

HU04-37 Hines v. SD Department of Environment and Natural Resources Memorandum Decision

Eastern Part of Tulare Aquifer, Beadle, Hand and Spink Counties, South Dakota." In the report, Kuiper said the recharge rate for the Spink portion of the Aquifer was 6800 acre feet per year which equates to a rate of .76 inches per year. Using that rate of .76 inches, Kuiper estimated that the average volume of recharge for the entire aquifer is 7,950 acre feet per year.

[¶7.] Goodman also discussed the pumping records for the Aquifer for the last 24 years. To calculate an average, Goodman looked back from 1979 to 2003 and estimated that the average pumping from the aquifer is 6,642 acre feet per year.

[¶8.] During those 24 years, Goodman says that about half of the time, the average annual recharge of 7,950 acre feet has been hit or exceeded. In the last two reports, which reflect 2003 and 2001, 13,668 acre feet and 10,287 acre feet was pumped from the aquifer. The average pumping for 2001, 2002 and 2003 was 10,548 acre feet. Based on those numbers the average pumping for 2002 was 7,697 acre feet.

[¶9.] Goodman presented a hydrograph of the Aquifer. The hydrograph showed the Aquifer has increased in volume. In 1977, the Aquifer was 33 feet below the benchmark and now the Aquifer is 29 feet below.

[¶10.] Overall, the Board has issued permits authorizing the withdrawal of 42,000 acre feet of water from the Aquifer. In 1979, there was a permit issued for 132 acres and 1.7 cfs. There were no permits issued in 1980. In 1981, there were eleven permits issued for 2071 acres and 28.94 cfs. After the last one in 1981, there were no more issued until 1991. For all practical purposes, the Aquifer was declared appropriated in 1982, in that most applications for water appropriation were denied after that year. Goodman testified that he uses the year 1984 as the year the Aquifer was fully appropriated.

[¶11.] In 1991 the Board authorized another permit, to Daryle Starr, # 5529-3 for 2.2 cfs to irrigate 160 acres. Goodman explained that this was a clean-up of a permit that had already been granted.

Well, if you read my report, from '81, '82, '83 I left the provision in there that there may need to be some clean-up of permits in the future for this situation, like you're describing here in '91, where there would be - pivots don't always get set up exactly on the 133 acres that they were supposed to. It may have overlapped two acres here and three there, and that what this was taking care of.

There was an inspection of a permit already granted, which found some additional acres so the permit added 28 acres. The permit did not appropriate any additional volume of water.

HU04-37 Hines v. SD Department of Environment and Natural Resources Memorandum Decision

[¶12.] The Board decided that water was not available to grant Hines a permit based on SDCL 46-6-3.1. The final decision was sent to Hines on March 11, 2004. Hines filed this appeal on April 9, 2004.

Standard of Review

[¶13.] SDCL 1-26-36 establishes the standard of review for an administrative appeal. *Brown v. Douglas School District*, 2002 SD 92, ¶ 9, 650 NW2d 264, 267. Questions of fact are viewed under the clearly erroneous standard while questions of law are reviewed de novo. *Id.* Under SDCL 1-26-36 great weight is given to the agency's findings of fact and inferences drawn. *Sopko*, 1998 SD 8, ¶6, 575 NW2d at 228. This court will only reverse factual issues if it is firmly and definitely convinced a mistake was made. *Id.* Questions mixed with fact and law are fully reviewed. *Herr v. Dakota, Inc.*, 2000 SD 90, ¶11, 613 NW2d 549, 552. The issue of whether water was available to grant Hines' a water permit is factual, therefore the clearly erroneous standard applies.

Analysis and Decision

Whether the Board properly denied Hines' application based on SDCL 46-6-3.1

[¶14.] SDCL 46-6-3.1 was the basis for the denial of Hines' water permit. SDCL 46-6-3.1 states:

No application to appropriate groundwater may be approved if, according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from a groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source. An application may be approved, however, for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the greenhorn formation in excess of the average estimated annual recharge for use by water distribution systems¹.

The statute is concerned with two numbers: 1) the quantity of water withdrawn annually and 2) the quantity of the average estimated recharge of water. It's a simple equation: if quantity withdrawn is greater than annual recharge an application for a permit cannot be approved. The Department does not look at the amount of water used in relation to what has been appropriated when deciding to issue a permit. The Department looks at the annual recharge rate in relation to the actual use.

[¶15.] Hines did not hire an independent engineer to contradict Goodman's testimony therefore the only evidence available is from Goodman. According to

¹ The Tulare East James Aquifer does not meet the greenhorn exception.

HU04-37 Hines v. SD Department of Environment and Natural Resources Memorandum Decision

Goodman the average pumping rate is 6,642 and the average recharge rate is 7,950. To calculate the recharge of the water in the aquifer the Board has used the recharge from the past 24 years and calculated an average. Yet when they are deciding what the quantity of water withdrawn is the Board uses the numbers from each individual year rather than an average. If the Board uses an average to calculate the average pumping rate, then the Board should use the average recharge rate. The average recharge rate is greater than the average pumping rate. Therefore, according to 46-6-3.1, the Board should grant Hines a water permit.

[¶16.] Under SDCL 46-2A-9, three things must be present in order to grant a permit. There must be 1) a reasonable probability that there is unappropriated water available for the applicant's proposed use, 2) that the proposed diversion can be developed without unlawful impairment of existing rights and 3) the proposed use is a beneficial use and in the public interest. SDCL 46-2A-9.

[¶17.] There is a reasonable probability that there is unappropriated water. Hines argued that there is 42,000 acre feet appropriated and at most only about 13,000 acre feet withdrawn from the aquifer in a given year, therefore there is enough water available for his permit. Hines is not asking the Board to appropriate more than 42,000 acre feet of water, because the forfeiture of permit 3466-3 caused the acre feet of water appropriated to be under 42,000. SDCL 46-5-37 provides that water which is forfeited reverts to the public and is regarded as unappropriated water. Therefore the water permitted by 3466-3 reverted to the public and should be regarded as unappropriated water. Hines is asking for a permit that would virtually replace the permit that was forfeited. The Board concluded that this argument was flawed because when issuing a permit, the Board looks at the actual use in relation to the recharge rate, not whether there is unappropriated water. If there is not water available pursuant to SDCL 46-6-3.1, the Board cannot grant a permit. This court finds that there was water available; therefore, SDCL 46-6-3.1 was satisfied and that the Board's finding that there was not water available is clearly erroneous.

[¶18.] The proposed diversion can be developed without unlawful impairment of existing rights. The diversion has already been developed because it was used by a previous water permit. Also, in Goodman's report he discusses another existing water permit which was located within one mile of Hines land and said, "Interference is not a concern. Drawdown created by pumping is not expected to be significant at this distance between wells" Record 7.

[¶19.] The proposed use is a beneficial use and in the public interest. Beneficial use is defined as "any use of water within or outside the state, that is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interests of the public of this state in the best utilization of water supplies." SDCL 16-1-6(3). Many water permits have been granted for irrigation permits so it stands to reason that irrigation is considered to be a beneficial use and in the public interest by the state.

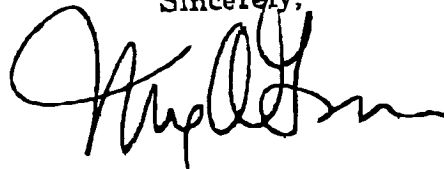
HU04-37 Hines v. SD Department of Environment and Natural Resources Memorandum Decision

Conclusion

[¶20.] The annual average recharge rate is greater than the average annual pumping of the Aquifer. The Aquifer has increased in volume. The Board's decision that there was not enough water to grant Hines a water permit was clearly erroneous. Hines application for a water permit should have been granted. Reversed.

[¶21.] Mr. Rylance shall submit proposed findings of fact and conclusions of law and a proposed judgment and Ms. Best shall submit objections and proposed findings of fact and conclusions of law and a proposed judgment in accordance with the rules of procedure.

Sincerely,

A handwritten signature in black ink, appearing to read 'Max Gors', written in a cursive style.

Max Gors



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

May 6, 2004

Christal L. Espeland
Hughes County Clerk of Court
PO Box 1238
Pierre SD 57501

Re: Transmittal of Record in the Matter of Water Right Permit Application No.
6431-3, Philip Hines (Hughes County Civ. No. 004-__)

Dear Clerk:

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

1. agency record (administrative file, exhibits, transcript)
2. transmittal of record
3. chronological index
4. alphabetical index
5. list of exhibits

Sincerely,

Eric Gronlund
Water Rights Program
(605) 773-3352

enclosures

STATE OF SOUTH DAKOTA

)

IN CIRCUIT COURT

: SS

COUNTY OF LAWRENCE

)

SIXTH JUDICIAL CIRCUIT

)

(04-__)

IN THE MATTER OF

)

WATER RIGHT PERMIT

)

TRANSMITTAL OF RECORD

APPLICATION NO. 6431-3,

)

PHILIP W. HINES .

)

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

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

2. Consistent with my responsibilities in the Water Rights Program, I have kept the agency record in the matter of Water Right Permit Application No. 6431-3, Philip W. Hines. The record is herewith transmitted to the above-captioned reviewing court pursuant to SDCL 1-26-33.

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

Dated this 6th day of May, 2004.

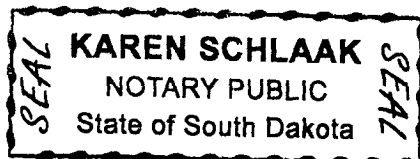


Eric S. Gronlund, Natural Resource Engineer
Water Rights Program
Dept. of Environment & Natural Resources

Subscribed and sworn to before me this
6th day of May, 2004


Notary Public

My commission expires: April 1, 2007





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

May 6, 2004

NOTICE

TO: Raymond Rylance
Wiles & Rylance LLP
PO Box 227
Watertown SD 57201-0227

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

SUBJECT: Transmittal of Agency File in the Matter of Water Right Permit Application No. 6431-3, Philip W. Hines. (Hughes County Civ. No. 04- __)

Consistent with SDCL 1-26-33, the agency record for the above entitled matters has been transmitted to the Sixth Judicial Circuit Court in Hughes County. A chronological and alphabetical index of the agency record and a list of exhibits has also been transmitted to the court. A copy of each index is enclosed.

Enclosure

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

STATE OF SOUTH DAKOTA

COUNTY OF HUGHES

)
: SS
)

IN CIRCUIT COURT

SIXTH JUDICIAL COURT

(CIV NO. 04-

PHILLIP W. HINES

V.

DEPARTMENT OF ENVIRONMENT AND
NATURAL RESOURCES (SOUTH DAKOTA)
MANAGEMENT BOARD)

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CHRONOLOGICAL
INDEX

<u>Entry</u>	<u>Date Filed</u>	<u>Document</u>	<u>Pages</u>
1.	July 16, 2003	Application For Permit To Appropriate Water for Irrigation (Form 2, 3 Well Logs, map)	1-5
2.	July 16, 2003	Receipt to Phillip Hines for payment of Application Fee	6
3.	August 25, 2003	Report on Water Permit Application No. 6431-3	7-9
4.	August 27, 2003	Recommendation of Chief Engineer for Water Permit Application No. 6431-3, Phillip W. Hines	10
5.	August 27, 2003	Letter to Phillip W Hines regarding publishing the Notice of Hearing	11
6.	August 27, 2003	Letter to The Plainsman regarding publishing the Notice of Hearing (w/ copy of the notice)	12-13
7.	September 24, 2003	Affidavit of Publication of Notice of Hearing from The Plainsman	14
8.	September 26, 2003	Prehearing Brief prepared by Staff's Attorney (w/certificate of service)	15-20
9.	October 8, 2003	Notice from Garland Erbele Scheduling Consideration of Findings of Fact, Conclusions of Law and Final Decision in the matter of Water Right No. 3466-3 and Scheduling the Hearing for Water Permit Application No. 6431-3, Phillip Hines (w/certificate of service)	21-23
10.	November 21, 2003	Amended Prehearing Brief and attachment prepared by Staff's Attorney (w/certificate of service)	24-36
11.	December 9, 2003	Notice from Garland Erbele for Preparation of Findings of Fact, Conclusions of Law and Final Decision (w/certificate of service)	37-39
12.	February 12, 2004	Proposed Findings of Fact, Conclusions of Law and Final Decision in the Matter of Water Permit Application No. 6431-3, Phillip W. Hines prepared by Board's Attorney (w/certificate of service)	40-48

<u>Entry</u>	<u>Date Filed</u>	<u>Document</u>	<u>Pages</u>
13.	February 23, 2004	DENR Response to Proposed Findings of Fact, Conclusions of Law and Final Decision in the Matter of Water Permit Application No. 6431-3, Phillip W Hines (w/certificate of service)	49-52
14.	February 25, 2004	Applicant's Proposed Findings of Fact and Conclusions of Law in the Matter of Water Permit Application No. 6431-3, Phillip W. Hines	53-55
15.	February 25, 2004	Objections to Findings of Fact, Conclusions of Law and Final Decision in the Matter of Water Permit Application No. 6431-3, Phillip W. Hines prepared by Applicant's Attorney	56
16.	March 1, 2004	Board Attorney's Response to Applicant's Proposed Findings of Fact and Conclusions of Law in the Matter of Water Permit Application No. 6431-3, Phillip W. Hines	57-59
17.	March 15, 2004	Notice from Garland Erbele transmitting adopted Findings of Fact, Conclusions of Law and Final Decision to Parties (w/certificate of service)	60-68
18.	April 7, 2004	Notice of Appeal (w/certificate of service)	69-71
19.	April 18, 2004	Transcript of Water Management Board hearing December 3, 2003 to consider Water Permit Application No. 6431-3, Phillip Hines	separate

STATE OF SOUTH DAKOTA

COUNTY OF HUGHES

)
: SS
)

IN CIRCUIT COURT
SIXTH JUDICIAL COURT

(CIV NO. 04-

PHILLIP W. HINES

V.

DEPARTMENT OF ENVIRONMENT AND
NATURAL RESOURCES (SOUTH DAKOTA)
MANAGEMENT BOARD)

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ALPHABETICAL
INDEX

<u>Entry</u>	<u>Date Filed</u>	<u>Document</u>	<u>Pages</u>
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Exhibits Introduced into Evidence

**in the Matter of the Water Permit Application No. 6431-3,
Phillip W. Hines**

Exhibit No.	Description
DENR-1	DENR file on Water Permit Application No. 6431-3, Phillip W. Hines
DENR-2	James A Goodman Vita
DENR-3	List of Water Permit/Rights from the Tulare:East James Aquifer

CERTIFICATION

I hereby certify that on May 6, 2004, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated May 6, 2004, regarding transmittal of record in the matter of Water Permit Application No. 6431-3, Philip W. Hines. addressed as stated below and on the attached parties of record list:

Raymond Rylance
Wiles & Rylance LLP
PO Box 227
Watertown SD 57201-0227

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

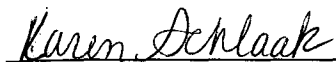
John Guhin, Deputy Attorney General, Capitol Building
Diane Best, Assistant Attorney General, Capitol Building



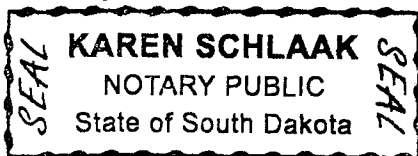
Eric S. Gronlund
Natural Resources Engineer
Water Right Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this _____ day of May 6, 2004.



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

LARRY LONG
ATTORNEY GENERAL

MARK BARNETT
CHIEF DEPUTY ATTORNEY GENERAL

May 17, 2005

RECEIVED

MAY 18 2005

WATER RIGHTS
PROGRAM

Christal L. McKittrick
Hughes County Clerk of Courts
P.O. Box 1238
Pierre, SD 57501-1238

Re: Phillip W. Hines v. State of South Dakota, Water Management Board, Civ. 04-137

Dear Clerk McKittrick:

Enclosed please find a true and correct copy of Objections to Appellant's Proposed Findings of Fact and Conclusions of Law and Certificate of Service in the above-entitled matter. By copy of this letter, service by mail is intended upon counsel of record.

Sincerely,

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

Diane Best
Assistant Attorney General

DB/jmm

Enclosures

cc w/enc: Raymond D. Rylance
bcc w/enc: Garland Erbele

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

LARRY LONG
ATTORNEY GENERAL

MARK BARNETT
CHIEF DEPUTY ATTORNEY GENERAL

May 17, 2005

The Honorable Max A. Gors
Circuit Court Judge
P.O. Box 1238
Pierre, SD 57501-1238

Re: Phillip W. Hines v. State of South Dakota, Water Management Board, Civ. 04-137

Dear Judge Gors:

Enclosed for your consideration please find the original Objections to Appellant's Proposed Findings of Fact and Conclusions of Law and Certificate of Service in the above-entitled matter.

Sincerely,

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

Diane Best
Assistant Attorney General

DB/jmm

Enclosures

bcc: ✓ Garland Erbele

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

CIV. 04-

PHILLIP W. HINES, *
 *
 Appellant, *
 *
v. *
 *
DEPARTMENT OF ENVIRONMENT *
AND NATURAL RESOURCES *
(SOUTH DAKOTA WATER *
MANAGEMENT BOARD), *
 *
 *
 Appellee. *

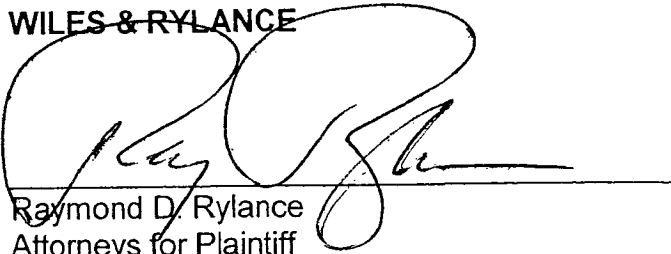
NOTICE OF ENTRY OF
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

TO: DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES (SOUTH DAKOTA WATER MANAGEMENT BOARD) and DIANE BEST, ASSISTANT ATTORNEY GENERAL, its attorney:

YOU WILL HEREBY TAKE NOTICE that the FINDINGS OF FACT AND CONCLUSIONS OF LAW and the JUDGMENT both rendered in the above-entitled action on the 7th day of June, 2005, copies of which are attached hereto and by this reference incorporated herein, were signed by the Court, attested by the Clerk and filed in the office of the Clerk of Courts on June 7, 2005.

Dated this 15th day of June, 2005.

WILES & RYLAND


Raymond D. Rylance
Attorneys for Plaintiff
3 East Kemp, Suite 200
P. O. Box 227
Watertown, SD 57201-0227

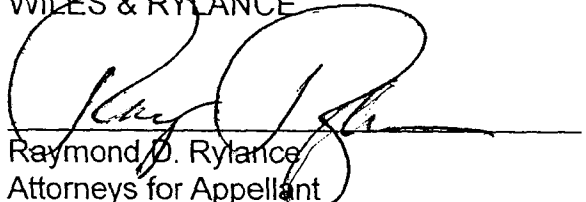
CERTIFICATE OF SERVICE

I, Raymond D. Rylance, hereby certify that a true and correct copy of the foregoing
"NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND
JUDGMENT" was served upon the following:

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

by depositing the same in the United States Mail Service at Watertown, South Dakota,
with postage thereon fully prepaid, on the 15th day of June, 2005.

WILES & RYLANCE



Raymond D. Rylance
Attorneys for Appellant
3 East Kemp, Suite 200
P. O. Box 227
Watertown, SD 57201-0227

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

JUDGMENT

The above-entitled matter having come on for oral argument before the Honorable Max A. Gors, Judge of the Circuit Court, in the Courtroom of the Court in the Courthouse in the City of Pierre, Hughes County, South Dakota, on February 2, 2005. The Appellant, Phillip W. Hines, appearing by and through his attorney, Raymond D. Rylance of the law firm of Wiles & Rylance, of Watertown, South Dakota; and the Appellee, Department of Environment and Natural Resources (South Dakota Water Management Board) appearing by and through its attorney Diane Best, of the South Dakota Attorney General's Office; the Court having considered the briefs, arguments and the record of the parties on behalf of the Appellant, and on behalf of the Appellee; and the Court having heard and considered the same; the Court being fully advised in the premises; NOW, THEREFORE,

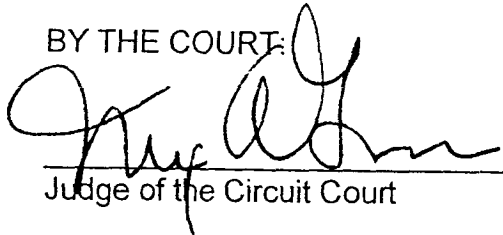
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of the Water Management Board denying Phillip W. Hines' Water Permit #6431-3 is hereby reversed.

✓
KLL
RR

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Chief Engineer
for the Department of Water and Natural Resources is hereby directed to issue Permit
#4631.3 to Phillip W. Hines.

DONE BY THE COURT this 7th day of June, 2005.

BY THE COURT:



Judge of the Circuit Court

ATTEST:



Clerk of Courts
(SEAL) Deputy

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.

FILED

JUN 07 2005

~~Deputy Clerk~~ CLERK

By  Deputy

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

PHILLIP W. HINES,

Appellant,

v.

DEPARTMENT OF ENVIRONMENT
AND NATURAL RESOURCES
(SOUTH DAKOTA WATER
MANAGEMENT BOARD),

Appellee.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled matter having come on for oral argument before the Honorable Max A. Gors, Judge of the Circuit Court, in the Courtroom of the Court in the Courthouse in the City of Pierre, Hughes County, South Dakota, on February 2, 2005. The Appellant, Phillip W. Hines, appearing by and through his attorney, Raymond D. Rylance of the law firm of Wiles & Rylance, of Watertown, South Dakota; and the Appellee, Department of Environment and Natural Resources (South Dakota Water Management Board) appearing by and through its attorney Diane Best, of the South Dakota Attorney General's Office; the Court having considered the briefs, arguments and the record of the parties on behalf of the Appellant, and on behalf of the Appellee; and the Court having heard and considered the same; the Court being fully advised in the premises; NOW, THEREFORE, the Court makes and enters the following:

FINDINGS OF FACT

1. The Court's Memorandum Decision dated April 29, 2005, is hereby incorporated by reference.

2. On July 16, 2003 Phillip W. Hines filed an application #6431-3 with the South Dakota Management Board requesting to appropriate 1.0 cfs (450 gallons per

ICC
RR

minute) from one well approximately 54 feet deep to irrigate approximately 91 acres in Beadle County.

3. Hines proposed to irrigate from an existing well under previous permit # 3466-3 which was terminated by the Water Management Board on December 3, 2003 by reason of forfeiture.

4. The application for Water Permit #6431-3 came before the Water Management Board on December 3, 2003.

5. Permit # 3466-3 was issued in 1976, to the previous owner of the land. Hines purchased the land in year 2000.

6. On August 27, 2003 Garland Erbele, Chief Engineer for the Department of Environment and Natural Resources recommended that Hines' permit #6431-3 be denied for the following reasons:

(a) SDCL 46-6-3.1 states that the annual withdrawal of groundwater shall not exceed the average estimated annual recharge to the aquifer;

(b) All water available for appropriation within the Tulare East James Aquifer in Spink County and Beadle County is presently appropriated; and

(c) It is not in the public interest because the unavailability of proven recharge.

7. The source of the water for the Permit # 6431-3 is the Tulare East James Aquifer.

8. In Beadle County, the Aquifer underlies 23,200 acres and contains 132,000 acre feet of recoverable water.

9. In Spink County, the Aquifer underlies 100,700 acres and contains 476,000 acre feet of recoverable water.

10. The annual recharge of the Tulare East James Aquifer yields an average volume of recharge of 7,950 acre feet of water per year.

11. The average pumping from the Aquifer has been 6,604 acre feet of water per year for the past 24 years.

12. Total consumption over the last 24 years of pumping from the Aquifer was 158,496 acre feet of water.

13. The annual recharge of the Aquifer for the same 24 years was 190,800 acre feet of water.

14. 32,304 acre feet of annual recharge water has not been used over the past 24 years.

15. The hydrograph of the Aquifer showed the Aquifer has increased in volume from 1977 to 2002 from 33 feet below the benchmark to 29 feet below the benchmark, an increase of 4 feet.

16. The Water Management Board has issued permits authorizing the withdrawal of 42,000 acre feet of water out of the Aquifer.

17. In 1981 the Water Management Board issued eleven water permits for 2071 acres and 28.94 cfs, at the time the hydrograph showed the level of water to be 5 feet lower than at the time of the Hines application.

18. The average recharge rate of the Tulare East James Aquifer is greater than the average pumping (discharge) rate.

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

20. Interference between existing permits is not a concern.

21. The proposed use is a beneficial use and in the public interest.

From the foregoing Findings of Fact, the Court makes and enters the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and subject matter of this action.

2. The annual average recharge rate is greater than the average annual pumping (discharge) of the Tulare East James Aquifer.

3. Permit #6431-3 should be granted, it is consistent with SDCL 46-2A-9.

4. The decision of the Water Management Board denying Permit #6431-3 is clearly erroneous.

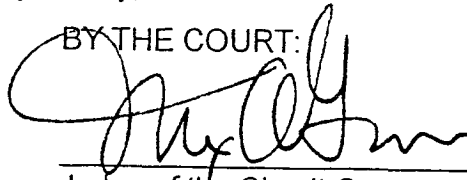
5. The decision of the Water Management Board denying Permit #6431-3 is reversed.

6. Permit #6431-3 should be issued to Mr. Hines.

LET JUDGEMENT BE ISSUED BY THE COURT.

DONE BY THE COURT this 7th day of June, 2005.

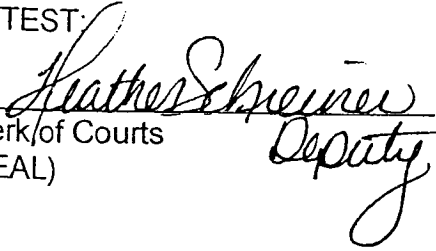
BY THE COURT:



Judge of the Circuit Court

ATTEST:

Clerk of Courts
(SEAL)


Deputy

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.

FILED

JUN 07 2005

~~Deputy Clerk~~ CLERK

By  Deputy



MAX A. GORS
PRESIDING JUDGE
Max.Gors@ujs.state.sd.us

CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

HUGHES COUNTY COURTHOUSE
P.O. BOX 1238
PIERRE, SOUTH DAKOTA 57501-1238
(605) 773-3711

COURT REPORTER
LESLIE HICKS
605-773-6839
Leslie.Hicks@ujs.state.sd.us

CIRCUIT ADMINISTRATIVE ASSISTANT
LINDA W. SHEPHERD

April 29, 2005

Raymond D. Rylance
PO Box 227
Watertown, SD 57201-0227

MEMORANDUM DECISION

Diane Best
Assistant Attorney General
500 E. Capitol Ave
Pierre, SD 57501- 5070

re: HU04-37 Hines v. SD Department of Environment and Natural
Resources

Counsel:

[¶1.] In an order dated March 11, 2004, the South Dakota Water Management Board (Board) denied Phillip Hines' (Hines) Application for Water Permit #6431-3 on the basis that water was unavailable. Hines appealed this order on April 9, 2004. Oral arguments were heard on February 2, 2005. The court has considered the briefs, arguments and the record. The Board's decision to deny Hines a water permit is reversed.

Facts

[¶2.] On July 16, 2003, Phillip W. Hines (Hines) filed application #6431-3, requesting a Permit to Appropriate Water for Irrigation with the Board. Hines' application asked to appropriate 1.0 cfs (451 gpm) of water from a well, 54 feet deep, to irrigate 91 acres in Beadle County. Under the description of the project Hines wrote, "Divert water from an existing well to provide water for irrigation through a pivot system for the land described above. Same well as described in permit #3466-3."

[¶3.] Permit #3466-3 was issued in 1976, to the previous owners of the land. Hines purchased the land in 2000. Permit #3466-3 had a diversion rate of 1.0 cfs

and diverted water from the same well and was used to irrigate the same land that Hines described in his application. The previous owners did not use the water right for several three-year periods throughout the 1980's and 1990's. In 2003, the Department filed a notification that it was seeking to terminate Permit #3466-3 for reasons of forfeiture, pursuant to SDCL 46-5-37 which provides:

When any person entitled to the use of appropriated water fails to use beneficially all or any part of such water for the purpose for which it was appropriated, for a period of three years, such unused water shall revert to the public and shall be regarded as unappropriated public water.

Hines did not know that the previous owners had not been irrigating according to the statute. In July 2003, the hearing to cancel Permit #3466-3 was held before the Board. The Board issued an oral determination that water right #3466-3 had been forfeited for nonuse. The cancellation was not appealed.

[¶4.] On August 27, 2003, Garland Erbele, Chief Engineer for the Department of Environment and Natural Resources (DENR), recommended that Hines' permit be denied for the following reasons:

- 1) SDCL 46-6-3.1 states that the annual withdrawal of groundwater shall not exceed the average estimated annual recharge to the aquifer;
- 2) All water available for appropriation within the Tulare East James Aquifer in Spink and Beadle County is presently appropriated; and
- 3) It is not in the public interest because the unavailability of proven recharge

[¶5.] On December 3, 2003, the hearing for Hines' application was held before the Water Management Board. James Goodman (Goodman) presented the DENR report on Hines' application at the hearing. Goodman is a Natural Resources Engineer for the DENR. Goodman testimony was based on a report he completed in 1984, a report completed by L.S. Hedges in 1982, a report completed by L.K. Kuiper in 1984 and a report entitled, "Water Rights" completed in 2003.

[¶6.] Goodman testified that the source for the water is the Tulare East James Aquifer (Aquifer). The Aquifer is in two counties, Beadle and Spink. In Beadle County, the Aquifer underlies 23,200 acres and contains an estimated 132,000 acre feet of recoverable water storage. In Spink County, the Aquifer underlies 100,700 acres and contains an estimated 476,000 acre feet of recoverable water storage. Goodman testified that those numbers came from a report done by L.S. Hedges in 1982. Goodman said he did a little bit of independent assessment of the Tulare East James and found that in Spink County, the Aquifer underlies 102,400 acres and contains 630,000 acre feet of recoverable water. Goodman also testified about a report completed by Logan K. Kuiper. Kuiper is employed with the US Geological Survey. In 1984, Kuiper, issued a report entitled, "Appraisal of Water Resources of

Department of Environment and Natural Resources Memorandum Decision

Eastern Part of Tulare Aquifer, Beadle, Hand and Spink Counties, South Dakota." In the report, Kuiper said the recharge rate for the Spink portion of the Aquifer was 6800 acre feet per year which equates to a rate of .76 inches per year. Using that rate of .76 inches, Kuiper estimated that the average volume of recharge for the entire aquifer is 7,950 acre feet per year.

[¶7.] Goodman also discussed the pumping records for the Aquifer for the last 24 years. To calculate an average, Goodman looked back from 1979 to 2003 and estimated that the average pumping from the aquifer is 6,642 acre feet per year.

[¶8.] During those 24 years, Goodman says that about half of the time, the average annual recharge of 7,950 acre feet has been hit or exceeded. In the last two reports, which reflect 2003 and 2001, 13,668 acre feet and 10,287 acre feet was pumped from the aquifer. The average pumping for 2001, 2002 and 2003 was 10,548 acre feet. Based on those numbers the average pumping for 2002 was 7,697 acre feet.

[¶9.] Goodman presented a hydrograph of the Aquifer. The hydrograph showed the Aquifer has increased in volume. In 1977, the Aquifer was 33 feet below the benchmark and now the Aquifer is 29 feet below.

[¶10.] Overall, the Board has issued permits authorizing the withdrawal of 42,000 acre feet of water from the Aquifer. In 1979, there was a permit issued for 132 acres and 1.7 cfs. There were no permits issued in 1980. In 1981, there were eleven permits issued for 2071 acres and 28.94 cfs. After the last one in 1981, there were no more issued until 1991. For all practical purposes, the Aquifer was declared appropriated in 1982, in that most applications for water appropriation were denied after that year. Goodman testified that he uses the year 1984 as the year the Aquifer was fully appropriated.

[¶11.] In 1991 the Board authorized another permit, to Daryle Starr, # 5529-3 for 2.2 cfs to irrigate 160 acres. Goodman explained that this was a clean-up of a permit that had already been granted.

Well, if you read my report, from '81, '82, '83 I left the provision in there that there may need to be some clean-up of permits in the future for this situation, like you're describing here in '91, where there would be - pivots don't always get set up exactly on the 133 acres that they were supposed to. It may have overlapped two acres here and three there, and that what this was taking care of.

There was an inspection of a permit already granted, which found some additional acres so the permit added 28 acres. The permit did not appropriate any additional volume of water.

[¶12.] The Board decided that water was not available to grant Hines a permit based on SDCL 46-6-3.1. The final decision was sent to Hines on March 11, 2004. Hines filed this appeal on April 9, 2004.

Standard of Review

[¶13.] SDCL 1-26-36 establishes the standard of review for an administrative appeal. *Brown v. Douglas School District*, 2002 SD 92, ¶ 9, 650 NW2d 264, 267. Questions of fact are viewed under the clearly erroneous standard while questions of law are reviewed de novo. *Id.* Under SDCL 1-26-36 great weight is given to the agency's findings of fact and inferences drawn. *Sopko*, 1998 SD 8, ¶6, 575 NW2d at 228. This court will only reverse factual issues if it is firmly and definitely convinced a mistake was made. *Id.* Questions mixed with fact and law are fully reviewed. *Herr v. Dakota, Inc.*, 2000 SD 90, ¶11, 613 NW2d 549, 552. The issue of whether water was available to grant Hines' a water permit is factual, therefore the clearly erroneous standard applies.

Analysis and Decision

Whether the Board properly denied Hines' application based on SDCL 46-6-3.1

[¶14.] SDCL 46-6-3.1 was the basis for the denial of Hines' water permit. SDCL 46-6-3.1 states:

No application to appropriate groundwater may be approved if, according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from a groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source. An application may be approved, however, for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the greenhorn formation in excess of the average estimated annual recharge for use by water distribution systems¹.

The statute is concerned with two numbers: 1) the quantity of water withdrawn annually and 2) the quantity of the average estimated recharge of water. It's a simple equation: if quantity withdrawn is greater than annual recharge an application for a permit cannot be approved. The Department does not look at the amount of water used in relation to what has been appropriated when deciding to issue a permit. The Department looks at the annual recharge rate in relation to the *actual* use.

[¶15.] Hines did not hire an independent engineer to contradict Goodman's testimony therefore the only evidence available is from Goodman. According to

¹ The Tulare East James Aquifer does not meet the greenhorn exception.

Goodman the average pumping rate is 6,642 and the average recharge rate is 7,950. To calculate the recharge of the water in the aquifer the Board has used the recharge from the past 24 years and calculated an average. Yet when they are deciding what the quantity of water withdrawn is the Board uses the numbers from each individual year rather than an average. If the Board uses an average to calculate the average pumping rate, then the Board should use the average recharge rate. The average recharge rate is greater than the average pumping rate. Therefore, according to 46-6-3.1, the Board should grant Hines a water permit.

[¶16.] Under SDCL 46-2A-9, three things must be present in order to grant a permit. There must be 1) a reasonable probability that there is unappropriated water available for the applicant's proposed use, 2) that the proposed diversion can be developed without unlawful impairment of existing rights and 3) the proposed use is a beneficial use and in the public interest. SDCL 46-2A-9.

[¶17.] There is a reasonable probability that there is unappropriated water. Hines argued that there is 42,000 acre feet appropriated and at most only about 13,000 acre feet withdrawn from the aquifer in a given year, therefore there is enough water available for his permit. Hines is not asking the Board to appropriate more than 42,000 acre feet of water, because the forfeiture of permit 3466-3 caused the acre feet of water appropriated to be under 42,000. SDCL 46-5-37 provides that water which is forfeited reverts to the public and is regarded as unappropriated water. Therefore the water permitted by 3466-3 reverted to the public and should be regarded as unappropriated water. Hines is asking for a permit that would virtually replace the permit that was forfeited. The Board concluded that this argument was flawed because when issuing a permit, the Board looks at the actual use in relation to the recharge rate, not whether there is unappropriated water. If there is not water available pursuant to SDCL 46-6-3.1, the Board cannot grant a permit. This court finds that there was water available; therefore, SDCL 46-6-3.1 was satisfied and that the Board's finding that there was not water available is clearly erroneous.

[¶18.] The proposed diversion can be developed without unlawful impairment of existing rights. The diversion has already been developed because it was used by a previous water permit. Also, in Goodman's report he discusses another existing water permit which was located within one mile of Hines land and said, "Interference is not a concern. Drawdown created by pumping is not expected to be significant at this distance between wells" Record 7.

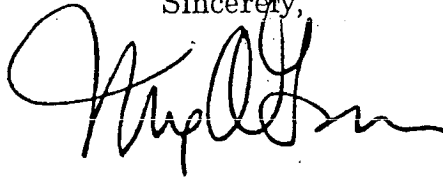
[¶19.] The proposed use is a beneficial use and in the public interest. Beneficial use is defined as "any use of water within or outside the state, that is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interests of the public of this state in the best utilization of water supplies." SDCL 16-1-6(3). Many water permits have been granted for irrigation permits so it stands to reason that irrigation is considered to be a beneficial use and in the public interest by the state.

Conclusion

[¶20.] The annual average recharge rate is greater than the average annual pumping of the Aquifer. The Aquifer has increased in volume. The Board's decision that there was not enough water to grant Hines a water permit was clearly erroneous. Hines application for a water permit should have been granted. Reversed.

[¶21.] Mr. Rylance shall submit proposed findings of fact and conclusions of law and a proposed judgment and Ms. Best shall submit objections and proposed findings of fact and conclusions of law and a proposed judgment in accordance with the rules of procedure.

Sincerely,

A handwritten signature in black ink, appearing to read 'Max Gors', written over a horizontal line.

Max Gors

STATE OF SOUTH DAKOTA)
 : SS.
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

PHILLIP W. HINES,)
)
 Appellant,)
)
v.)
)
STATE OF SOUTH DAKOTA,)
WATER MANAGEMENT BOARD,)
)
 Appellee.)

Civ. 04-137

OBJECTIONS TO APPELLANT'S
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW

COMES NOW the Department of Environment and Natural Resources, Water Rights Program, and makes its objection to Appellant's proposed Findings of Fact and Conclusions of Law as follows:

1. Although Appellant's caption names the South Dakota Water Management Board, it is not the Appellee. The Department of Environment and Natural Resources, Water Rights Program is the Appellee. It is the agency staff that appeared before the Water Management Board in opposition to Mr. Hines. The Water Rights Program is a party to this matter and is not the initial decision maker. The initial decision maker in this matter is the South Dakota Water Management Board, a citizen board. As such, the Board is not the Appellee in this matter.

2. The Water Rights Program objects to the entry of Findings of Fact and Conclusions of Law by the Court in this matter. Under SDCL 1-26-36, the circuit court has jurisdiction to enter its own Findings of Facts and Conclusions of Law when it reverses or remands an agency decision. When agency decisions are affirmed, there is no need to enter Findings of Fact and Conclusions of Law. SDCL 1-26-36; Matter of Midwest Motor

Express, Inc., 431 N.W.2d 160 (S.D. 1988). Because the Water Rights Program asserts that the agency Findings of Fact and Conclusions of Law ought to be affirmed, it therefore objects to entry of Findings of Fact and Conclusions of Law from this Court.

3. The Water Rights Program objects to incorporation of the Court's Memorandum Decision dated April 29, 2005. The specific reasons for this objection are listed below.

4. The Water Rights Program objects to the factual characterization of the previous water permit cancellation. Memorandum Decision, paragraph 3. Paragraph 3 indicates that "Hines did not know that the previous owners had not been irrigating according to the statute." The previous cancellation is final and was not appealed. Accordingly, a recital as to the factual basis for the forfeiture is not relevant to this particular proceeding. Further, knowledge or intent was not an issue in that previous case anyway. Forfeiture is a statutory cancellation of water rights when they have not been used for three years. SDCL 46-5-37. This is different than "abandonment," under SDCL 46-5-36. Abandonment applies to the intentional relinquishment of a water right. The previous Hines case involved forfeiture, not abandonment. As such, no knowledge or intent element need be proven. Crow v. Carlson, 690 P.2d 916, 922 (Idaho 1984)

5. Also, in the Memorandum Decision paragraph 3, the Court concludes that the Board issued an oral determination regarding the previous cancellation. To clear up the record, the oral determination was followed by written Findings of Fact and

Conclusions of Law. All parties were afforded an opportunity to submit alternate findings and make objections. No party in this case has suggested that only an oral determination was made. Further, the matter was not appealed and any recital of procedural status (or perceived procedural anomalies or defects) is simply not before this Court.

6. The DENR objects to the Court's legal conclusion in paragraph 17. In paragraph 17, the Court concludes that "therefore the water permitted by 3466-3 reverted to the public and should be regarded as unappropriated water. Hines is asking for a permit that would virtually replace the permit that was forfeited." This is a legal conclusion as to the meaning of SDCL 46-5-37. Hines previously waived this claim.

Based on a previous non-record contact with counsel for Hines, undersigned counsel filed an anticipatory prehearing brief on this exact issue. AR 34-36. In the response to the prehearing brief, counsel for Hines stated "she has suggested in a prehearing brief a number of items. She simply doesn't know what's in my mind and how I am going to proceed. So I think it's presumptive to say that I am going to make the arguments that she thinks I am going to make, which quite frankly I'm not." TR 3. The hearing then proceeded on the facts of the case. Later, Hines' counsel appeared to allude to this issue in his closing argument, but did not recite to SDCL 46-5-37.. TR 30, lines 9-10. Instead, Hines argued at length concerning the question of whether the facts presented supported granting a water permit in light of the water mining statute.

Based on the single sentence at the end of the argument, the Water Rights Program sought to clear up the issue again during closing argument. Undersigned counsel argued that cancellation under SDCL 46-5-37 does not automatically result in a situation where the same quantity of water would automatically be immediately available. TR 33. The Water Rights Program referred to its previously filed brief in this regard. TR 33. The Water Board engaged in oral deliberations and made its determination on the basis of the water mining statute alone.

The Water Board's attorney prepared proposed Findings of Fact and Conclusions of Law based on the water mining statute. Both Hines and the Water Rights Program filed responses to the proposed Findings of Fact and Conclusions of Law. The Water Rights Program (DENR) proposed an additional Conclusion of Law on the subject of SDCL 46-5-37. AR 50. The proposed Conclusion of Law specifically stated, "The Applicant did not in fact raise such argument and it is therefore not before this Board for consideration." Counsel for Hines made no proposed Findings of Fact and Conclusions of Law regarding this issue whatsoever. The Board adopted the proposed Conclusion advanced by the Water Rights Program. This is Conclusion 3 of the Board's Final Decision.

Hines never appealed from Board Conclusion 3. The brief does not mention this issue whatsoever. At oral argument, counsel for Hines never brought up the issue during his opening argument. Accordingly, the DENR did not argue the question. During Hines' response to the DENR argument, Hines' counsel made

another passing oblique reference to the issue, shrugged his shoulders, and indicated to the Court that the issue really was not the issue of the day. The Water Rights Program had already made its sole argument as the Appellee. There was no opportunity to respond to the issue at that point.

As seen, the matter was waived and should not be considered by this Court.

7. Paragraph 8 of the Court's Memorandum Decision refers to pumping of water from the aquifer in the last three years. Although the total numbers are correct, clarification is necessary as to the actual years involved. The Water Board findings refer to the "last three years" and also to testimony regarding use of water in years 2001 and 2003 (Finding of Fact 5 at AR 63). However, the "last three years" in the record are actually 2000, 2001, and 2002. The reference to pumping of 13,668 acre-feet in the year 2003 was an error in the initial expert report. This confusion occurred at hearing as well and was cleared up then. TR 18. The reference should have been 2002. TR 18. Consequently, the "last three years" of pumping would be for year 2000 (7,690 acre-feet), 2001 (10,287 acre-feet), and 2002 (13,668 acre-feet). No pumping records were introduced for 2003 since the hearing was held immediately after the irrigation season ended in 2003 and irrigators had not yet submitted their pumping records for that year. As seen, even this three-year period reflects that as the wet cycle ended in northeast South Dakota, the pumping rates increased rapidly during the period 2000 through 2002.

8. The Water Rights Program objects to the Court's determination that SDCL 46-6-3.1 requires, as a matter of law, that "average annual pumping of the aquifer" be in excess of the "annual average recharge rate" in order to deny a permit. At paragraph 14, the Court found that SDCL 46-6-3.1 is concerned with two numbers: (1) the quantity of water withdrawn annually and (2) the quantity of the average estimated recharge water. In examining these two components of SDCL 46-6-3.1, it is apparent that the initial equation, i.e., quantity of water withdrawn annually does not require averaging as a matter of law. In paragraphs 15 and 20, however, the word "average" is used. The Water Rights Program objects to such usage since it writes the word "average" into the law in SDCL 46-6-3.1. If the Legislature had intended the word "average" to be used in both components of the calculation, it would have inserted that language. It did not do so. The Water Rights Program submits that the Board has discretion to hear expert testimony and determine whether the quantity of water withdrawn annually ought to be examined from the standpoint of historical averaging, or an analysis of overall trends factoring in climatic use, or some other expert analysis.

In this case, mandatory use of the average pumping rate illustrates the problem with using averages. The period of record (twenty-four years) includes several years of extremely wet conditions in northeast South Dakota. Due to those wet conditions, very little pumping was necessary to irrigate. The low pumping rates during the 1990s skewed the overall average. Expert witness Goodman testified that he had examined the records

of pumping and that while the average pumping from the aquifer over the twenty-four year period was only 6,642 acre-feet per year, there were several years during the 1990s that ought to be discounted due to the high water conditions. See also Parks v. Cooper, 2004 S.D. 27, 676 N.W.2d 823 (referring to water conditions in northeast South Dakota in the late 1990s as flood conditions); Hendrickson v. Wagners, Inc., 1999 S.D. 74, 598 N.W.2d 507 (holding that "during the years 1986 and 1991 through 1996 the area experienced unusually high precipitation."); Steiner v. County of Marshall, 1997 S.D. 109, 568 N.W.2d 627 (referring to unusual precipitation and flooding in the 1990s).

SDCL 46-6-3.1 does not, as a matter of law, require the calculation of the quantity of water withdrawn annually to be averaged. Instead, it is proper for the Board to consider expert testimony and to develop a reasoned interpretation of the annual withdrawal statute based upon the evidence presented as well as its own experience and background. This is a situation where the administrative agency is not restricted to any single formula but, of course, cannot use a formula that is arbitrary or unjust. This is similar to the latitude afforded to the PUC in utility rate making. The PUC staff and the PUC itself are not restricted to a single formula in arriving at rates "so long as the method followed and the order entered when applied to the facts and viewed as a whole do not produce an unjust or arbitrary result." Northwestern Public Service Company v. City of Chamberlain et al., 265 N.W.2d 867, 872 (S.D. 1978).

As seen, the statute here does not require a particular methodology. Accordingly, the agency is not restricted to averaging but must rely on a method that, when applied to the facts and viewed as a whole does not produce an unjust or arbitrary result.

In the utility analysis, it is proper to discount particular costs if they would not be experienced again within the foreseeable future. Id. Indeed, the Supreme Court held that in the utility rate making context, it would be "arbitrary, capricious and unreasonable" to use anomalous data to establish cost base rates in the future. Id. This is similar to the situation at bar where using extreme climatic conditions would simply not be reliable to project whether "it is probable that the quantity of water withdrawn annually from a ground water source will exceed the quantity of the average estimated annual recharge of water."

In sum, SDCL 46-6-3.1 requires an analysis of past information, climatic events, and ground water expertise to make projections as to the probability that the quantity of water withdrawn annually from a ground water source will, in the future, exceed the average estimated annual recharge. Because this matter involves projections, simple averaging of past water use is inappropriate, particularly when considering the recent flood event.

For this reason, the Water Rights Program asserts that the Court's reliance solely on averaging (paragraphs 15 and 20) is erroneous as a matter of law.

9. In the event that the Court determines that the "average use" is not required as a matter of law, but is the appropriate factual test, the Water Rights Program objects on that basis. On administrative appeal, the Board's findings are not to be overturned unless the Court is "left with a definite and firm conviction that a mistake has been made." Petersen v. Hinky Dinky, 515 N.W.2d 226, 231 (S.D. 1994). Indeed, "the question is not whether there is substantial evidence contrary to the [agency's] finding, but whether there is substantial evidence to support the finding of the [agency]." Schuck v. John Morrell & Company, 529 N.W.2d 894 (S.D. 1995). There is substantial evidence for the Board to rely on the expert evidence given rather than simple averaging in order to make its projections about the probability of withdrawals of water in the future. Substantial evidence was presented by DENR expert Goodman. No other expert testified other than Mr. Goodman as to a methodology. Mr. Goodman testified that it is necessary to look at several factors in order to determine the reasonable probability of water withdrawals in the future and that averages should not be the sole consideration.

10. In addition to the foregoing, the Water Rights Program submits that the Appellant waived the issue of whether "average" withdrawal ought to be the sole methodology for calculating the reasonable probability of withdrawals in the future. Because the Applicant never raised this legal issue, waiver applies. Gilkyson v. Wheelchair Express, 1998 S.D. 45, ¶ 12, 579 N.W.2d 1 (where parties let experts testify as to their conclusions

without objection and then later question the methodology in post trial proceedings, error is waiver).

11. In addition to the foregoing, the Water Rights Program objects to the Memorandum Decision in that it places the burden of proof with the administrative agency, and not the Applicant. In this case, the Applicant bore the burden of proof at the agency level to show that sufficient water was available to grant his water right request. Moreover, the Applicant bore the burden of proof at the circuit court level to show that the Water Board was in error. The Applicant failed in his burden of proof at both stages.

12. The Memorandum Decision also refers to the fact that 42,000 acre-feet of water had been appropriated from this aquifer and that at most only about 13,000 acre-feet are withdrawn from the aquifer in a given year. Therefore, according to the Court's decision (paragraph 17) there is enough water available for this permit. The Water Rights Program objects to this factual and legal conclusion. While the Board has, indeed, granted water permits that would authorize water use at the level of 42,000 acre-feet per year, this number represents the highest volume of water that would be irrigated if all irrigators used all their permitted acreage every year at full legal capacity. TR 20; SDCL 46-5-6. In briefing, the Appellant used this number as a suggestion that the Board had somehow previously found that 42,000 acre-feet of water are available from this aquifer for additional permits. This analysis does not work for two reasons. First, a majority of the permits at issue were issued before the

aquifer was fully studied and the analysis of average annual recharge was published and presented to the Board in the early 1980s. Before the early 1980s, water rights were freely granted from this aquifer and the analysis of average annual recharge had not been brought to bear under SDCL 46-6-3.1. Consequently, the Board was not acknowledging or admitting anything about the total availability of acre-feet in this aquifer at the time those permits were issued.

Moreover, the 42,000 acre-feet is simply not representative of actual use. Normal irrigation uses less. TR 21. The 42,000 number represents the maximum volume of water for water rights that would legally be available for existing water permits. SDCL 46-5-6. This number would assume that each irrigator pumps at maximum authorized capacity at all times. TR 21. In projecting probable withdrawal (as it is required to do under SDCL 46-6-3.1), the Board relies on actual and anticipated actual use, not theoretical maximums. To do otherwise would ignore basics of the irrigation business: climatic changes and daily and weekly adjustments for wind issues and temperature patterns. Further, assuming maximum irrigation use at all times would ignore crop rotation, equipment malfunction and well maintenance issues. The Board, a citizen board experienced in water issues, appropriately recognized that the 42,000 acre-feet ought not be the consideration.

13. The Water Rights Program objects to Appellant's proposed Finding 16 for the same reason as set forth in paragraph 12 of these objections.

14. The Water Rights Program objects to Appellant's proposed Finding of Fact 5 in that the date of issuance of a previous water permit, now cancelled, has no relevance whatsoever to the pending application for the new water permit.

15. The Water Rights Program objects to Appellant's proposed Finding of Fact 18 in that it relies on "average" pumping rate, a methodology that is not required by law and that is not based on reasonable expert methodology. Appellant's proposed Conclusion 2 should also be rejected for the same reason. This is more fully explained in paragraphs 8, 9, and 10 of these objections.

16. Based on the foregoing arguments and authorities, the Water Rights Program objects to the whole of the Findings of Fact and Conclusions of Law proposed by Appellant.

Dated this 17th day of May, 2005.

Respectfully submitted,



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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Objection to Appellant's Proposed Findings of Fact and Conclusion of Law in the matter of Phillip W. Hines v. State of South Dakota, Water Management Board, was served by United States mail, first class, postage prepaid, upon Raymond D. Rylance, Attorney at Law, P.O. Box 227, Watertown, South Dakota 57201, this 14th day of May, 2005.



Diane Best
Assistant Attorney General

pld.db Objections to Appellant's proposed FOF & COL(jmm)

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

PHILLIP W. HINES,)
)
Appellant,)
)
v.)
)
STATE OF SOUTH DAKOTA,)
WATER MANAGEMENT BOARD,)
)
Appellee.)

Civ. No. 04-137

BRIEF OF APPELLEE
DEPARTMENT OF ENVIRONMENT
AND NATURAL RESOURCES

PRELIMINARY STATEMENT

In this Brief, Appellant Philip W. Hines, will be referred to as "Hines." The Appellee in this administrative contested case is the Department of Environment and Natural Resources, Water Rights Program ("Water Rights Program"). The administrative agency from which this appeal is taken is the South Dakota Water Management Board, a citizen's board which will be referred to herein as "Board."

Documents in the certified record will be referred to as "AR," followed by the appropriate page number. The transcript of the evidentiary hearing held in this matter will be referred to as "TR," followed by the appropriate page number.

JURISDICTIONAL STATEMENT

The Water Rights Program accepts Hines assertion that jurisdiction is properly before this Court. Notice of the Board's final decision was issued on March 11, 2004. AR 60-68. The Notice of Appeal was filed on April 9, 2004, pursuant to SDCL 1-26-31.

ISSUE PRESENTED

WHETHER THE BOARD PROPERLY DENIED HINES' APPLICATION IN LIGHT OF SDCL 46-6-3.1?

The Board recognized that it is prohibited from granting a water permit if the standard in SDCL 46-6-3.1 is not met, and it therefore denied the permit in question.

STATEMENT OF THE CASE AND FACTS

By way of background, the Water Rights Program brought a proceeding before the Board in July 2003, seeking to cancel a Water Right for irrigation in Beadle County. The water right, held by Hines, had been issued in 1976 but irrigation had not been conducted for several years during the 1980s and 1990s. AR 62 (FOF 2) and AR 68 (COL 3). Accordingly, the water right was cancelled on the basis of the forfeiture law set forth in SDCL 46-5-37 (failure to use water for three years or more). AR 62 (FOF 2). The cancellation was not appealed, the matter is final, and it is not directly before the court.

The present appeal involves a new permit application. Hines filed the present application on July 16, 2003. AR 1-5. He sought a water permit for the same location and the same rate of diversion as the previous water right.¹ AR 1, TR 10. The water source for the permit request is the Tulare East James aquifer, an aquifer used extensively for irrigation in Beadle and Spink County. DENR Exh. 3. A number of water permits for irrigation were granted from this aquifer in the 1970s. DENR Exh. 3. The

¹ A new water right would carry a 2003 priority date (relating back to the time of application under SDCL 46-5-7) rather than the 1976 date for the prior permit.

Water Board largely discontinued issuing permits from this aquifer in the early 1980s. TR 11. The basis for denying these water permits is SDCL 46-6-3.1.

SDCL 46-6-3.1 provides that the Water Board may not issue new permits for appropriations if the quantity of water withdrawn annually will exceed the "average estimated annual recharge of water to the ground water source." This statute basically requires study of both the "quantity of water withdrawn annually" and the quantity of the "average estimated annual recharge of water to the ground water source for each aquifer." Studies were conducted by both the United States Geological Survey and by the State of South Dakota and were published in the early 1980s. TR 6. One of the experts involved in those studies, Jim Goodman, testified at the administrative hearing in the matter. TR 6.

Jim Goodman was the only expert to testify. He testified that the volume of average annual recharge for Spink County was calculated by the United States Geological Survey at 6,800 acre-feet annually. TR 7, 18. The United States Geological Survey study was conducted by Logan Kuiper. The majority of the aquifer is in Spink County. Goodman further testified that by using the same calculations, the total average volume of recharge (both Spink and Beadle counties) in the entire Tulare East James aquifer is 7,950 acre-feet per year. TR 7, 16. This evidence is undisputed by Hines.

Mr. Goodman also testified regarding the second calculation required under SDCL 46-6-3.1. He testified that water usage for 2002 exceeded the total average annual recharge for this aquifer.

It was at almost 14,000 acre-feet (13,668 acre-feet). TR 18. The year before, the volume pumped was 10,287 acre-feet. TR 9. He also testified regarding the quantity of water used annually for the last 24 years. TR 8-10. He stated that, based on his review, that "half the years, pretty close to half the years we've either hit or exceeded the average annual recharge, the 6,800 acre-feet estimated by Kuiper." TR 8. Although the average was 6,604 acre-feet, the volume pumped has increased in the last few years. TR 8, 9. It was 13,668 acre-feet in 2002. TR 18. Further, the water use exceeded the total 7,950 acre-feet six times in the last 24 years. AR 7. (Goodman Report).

Goodman also testified that this aquifer is "capable of sustaining additional withdrawals," a general measure of whether additional water can physically be drawn from the aquifer. This measure is not a standard as part of SDCL 46-6-3.1.

The Water Management Board determined that water was not available to grant this water permit due to SDCL 46-6-3.1. AR 67. Notice of the Board's final decision was issued on March 11, 2004. AR 60-68. Hines filed his Notice of Appeal on April 7, 2004. AR 69-71.

ARGUMENT

Standard of Review

This Court's standard for review of an administrative agency decision is codified at SDCL 1-26-36. Under this statute, Hines has the burden of showing that his substantial rights were prejudiced, and that one of the six violations listed in SDCL 1-26-36 has occurred. Gratzfeld v. Bomgaars Supply, 391 N.W.2d 200

(S.D. 1986); Ashland v. South Dakota Department of Labor Unemployment Ins. Div., 321 N.W.2d 103, 105 (S.D. 1982).

In analyzing whether Hines has met his burden under SDCL 1-26-36, the initial inquiry is whether the matter is a question of law or one of fact. Questions of law are fully reviewable. Island v. Department of Corrections, 1996 S.D. 28, 545 N.W.2d 201 (1996). Mixed questions of fact and law that "require the application of a legal standard" are fully reviewable. Abild v. Gateway 2000, 1996 S.D. 50, 547 N.W.2d 556 (1996). If, however, the issue involves a question of fact or is "essentially factual" it is reviewed under the "clearly erroneous" standard. Rios v. South Dakota Department of Social Servs., 420 N.W.2d 757 (S.D. 1988). Questions that are "essentially factual" are those that involve the exercise of judgment about the values underlying legal principles. Id.

If the issue is factual or essentially factual subject to the "clearly erroneous" standard, the agency's determinations must be reviewed in light of the entire evidence in the record. Petersen v. Hinky Dinky, 515 N.W.2d 226, 231 (S.D. 1994). Under Petersen, the Board's findings are not to be overturned unless this Court is "left with a definite and firm conviction that a mistake has been made." Finally, "the question is not whether there is substantial evidence contrary to the [agency's] finding, but whether there is substantial evidence to support the finding of the [agency]." Schuck v. John Morrell and Company, 529 N.W.2d 894 (S.D. 1995).

The issue presented here is a question of fact and the "clearly erroneous" standard applies. Hines brief discusses the applicable facts and asks the court to review the evidence and determine whether enough facts were presented to support the decision. The "clearly erroneous" standard applies.

ARGUMENT

The Hines permit was properly denied in light of SDCL 46-6-3.1.

The parties agree that SDCL 46-6-3.1 applies:

No application to appropriate groundwater may be approved if, according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from a groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source. An application may be approved, however, for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the greenhorn formation in excess of the average estimated annual recharge for use by water distribution systems.

Hines basically asserts that the DENR did not meet its burden of demonstrating that the proposed application should be denied under SDCL 46-6-3.1. The burden of proof here is, however, on the Applicant. Kent v. Lyon, 1996 S.D. 131, 155 N.W.2d 104.

Moreover, Hines bears the burden in this appeal to support his argument that there is not substantial evidence in the record to support the Board's decision. He has not met that burden.

The Hines Brief first indicates that the Board's analysis of actual use from the aquifer is flawed. (Hines Brief at 4). First, the Hines brief addresses the Board's findings regarding

actual use in the last three years.² Hines claims that the Board improperly considered only two out of the last three years and that one of those three years was 7,689 acre-feet, a number below the recharge calculation.³ The Board did not, however, claim to base its analysis of the evidence of the last three years alone. (FOF 6 at AR 63). Instead, Finding of Fact 6 and Finding of Fact 13 show that the Board considered whether some of the high pumping numbers in recent years demonstrated a reversion back to a trend toward high pumping numbers as experienced at the beginning of the period of record in the early 1980s. The Board heard testimony that the actual pumping for year 2002 was similar to that in 1981. TR 8, 18. The reason for concern about this trend is that the total period of study is twenty-four years, yet the middle of the twenty-four years shows a period of considerable precipitation. FOF 13 at 65. In particular, the Board recognized that precipitation in the 1990s was 30 inches per year, while the average for that area was only 18 inches per year. Id. TR 23.

Ultimately, the Board recognized that the average pumping rates over the 24 years were conservative, i.e. did not show as much water use over an average period of years as they might

² The Board's findings refer to the "last three years" and also to testimony regarding use in years 2001 and 2003. (FOF 5 at AR 63). However, the "last three years" in the record are actually 2000, 2001, and 2002. The reference to pumping of 13,668 acre-feet in the year 2003 was in error. This confusion occurred at hearing as well and the reference should have been 2002. TR 18. However, crediting the pumping number of 13, 668 to 2003 instead of 2002 would not change the result of this argument.

³ Although Hines refers to this 7,689 as being 2002, it was actually 2000.

otherwise show over an even longer period. This reflects realities of irrigation in Spink and Beadle counties in the mid-1990s. There was more than adequate precipitation during this period and little irrigation was reported.

Along the same lines, Hines also asserts that the Board is inconsistent when it states that 24 years of record is a short period of time, but also examines the last three years fairly closely. The answer to this situation is also addressed above. Does the strong wet cycle in the middle of these 24 years skew the overall average and does the recent three years of data represent a more correct trend? These are the factual conclusions the Board grappled with. It determined that there was inadequate evidence to show that there was water available for this permit in light of the overall numbers presented.

Another factual issue is the question of whether the aquifer is "capable of sustaining additional withdrawals." This language is in both Board Findings and in the Goodman report (AR 7). It simply points out that the aquifer is not dry, and that if additional water permits were granted, the aquifer would not physically go dry. The "capable of sustaining additional withdrawals" finding does not compromise the Board's ultimate determination regarding legal availability under SDCL 46-6-3.1. It does not mean that water is legally available within the meaning of SDCL 46-6-3.1. This is apparent given other Goodman testimony and other Board findings regarding the "water mining" calculations in SDCL 46-6-3.1.

Another factual issue presented in the Hines brief is the 42,000 acre-feet issue. Hines asserts that the Board has granted water permits that would authorize water use at the level of 42,000 acre-feet per year. He further argues that by doing so, the Board acknowledged that 42,000 acre-feet of water was available when those permits were issued. This number represents the highest volume of water irrigated if all irrigators irrigated all their permitted acreage every year at full legal capacity. TR 20; SDCL 46-5-6. Following that rationale, Hines asserts that because study shows that the 42,000 acre-feet is not fully used (only an average of 6,604 acre-feet is actually used), there is leftover water available for his permit.

This argument has theoretical charm. But it does not bear out. First, when permits are issued by the Board, the general standard is SDCL 46-2A-9. Among the criteria is whether "there is unappropriated water available for the applicant's proposed use." Unless SDCL 46-6-3.1 comes into play, this criterion is the basic standard for granting water permit applications. Consequently, as to permits issued before the water mining language in SDCL 46-6-3.1 was invoked for this aquifer in about 1981, the Board would have necessarily found that "there was unappropriated water available for the applicant's proposed use." This finding does not constitute an admission that the Board found water to be available at the maximum legally permissible level in SDCL 46-5-6, but simply that the Board found water available for the use, as proposed.

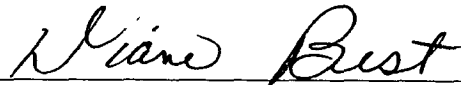
Moreover, each water use is simply not presumed to operate at maximum level. Normal irrigation use is less. TR 21. The Board recognizes that. The 42,000 number represents the maximum volume of water for water rights that would legally be available for existing water permits. SDCL 46-5-6. This number would assume that each irrigator pumps at maximum authorized capacity at all times and is unrealistic. TR 21. In issuing permits the Board relies on actual use and anticipated actual use, not theoretical maximums. To do otherwise would ignore basics of the irrigation business: climatic changes and daily and weekly adjustments for wind issues and temperature patterns. Further, crop rotation would affect the amount of water actually used. Although not noted by the Board, it is obvious that irrigation equipment malfunction and well maintenance issues affect the volume of water pumped for individual producers. Although the number in SDCL 46-5-6 is the highest volume of water any permit holder can pump, it is not the actual number pumped. This is a critical distinction that the Board has recognized.

The factual statement in the Hines brief also presents a statement that annual recharge should be multiplied out to provide a cumulative volume of acre-feet over 24 years. Under this analysis, the time period for calculating the cumulative volume under the Hines theory would be twenty-four years, the period of study for this aquifer. No expert testified a hearing that the cumulative total should be substituted for the "average annual" number, why it should be calculated that way, or how it would bear on the legal test required under SDCL 46-6-3.1. As

Hines argues in his legal analysis, Goodman did testify that recent trends show actual water volume in the aquifer is increasing. There was a significant period of recharge during 1993-1999, years that were very wet. TR 9. The other side of the coin is that water use is now also starting to show a corresponding increase in use. TR 8, 18. This is consistent with an extremely wet period followed by a dry period. The period of 24 years involved in this analysis shows very little use during the wet years in the early and mid-1990s, a time when the recharge was increasing. Water use is now increasing during dry years.

SUMMARY

Based on the foregoing arguments and authorities, the Water Rights Program urges the court of affirm the Board's decision.



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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Brief of Appellee Department of Environment and Natural Resources in the matter of Phillip W. Hines v. State of South Dakota, Water Management Board was served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Pierre, South Dakota, on this 1st day of July, 2004:

John Guhin
Assistant Attorney General
500 East Capitol
Pierre, SD 57501-5070

Ray Rylance
Attorney at Law
P.O. Box 227
Watertown, SD 57201



Diane Best
Assistant Attorney General

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

CIV. 04-

PHILLIP W. HINES, *

Appellant, *

v. *

DEPARTMENT OF ENVIRONMENT
AND NATURAL RESOURCES
(SOUTH DAKOTA WATER
MANAGEMENT BOARD), *

Appellee. *

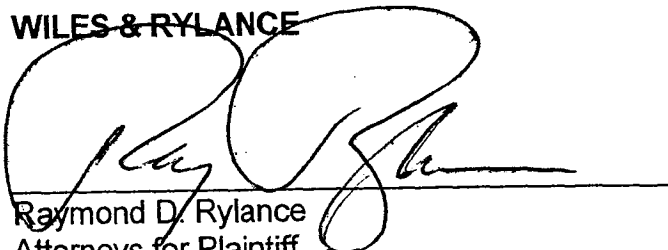
NOTICE OF ENTRY OF
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

TO: DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES (SOUTH DAKOTA WATER MANAGEMENT BOARD) and DIANE BEST, ASSISTANT ATTORNEY GENERAL, its attorney:

YOU WILL HEREBY TAKE NOTICE that the FINDINGS OF FACT AND CONCLUSIONS OF LAW and the JUDGMENT both rendered in the above-entitled action on the 7th day of June, 2005, copies of which are attached hereto and by this reference incorporated herein, were signed by the Court, attested by the Clerk and filed in the office of the Clerk of Courts on June 7, 2005.

Dated this 15th day of June, 2005.

WILES & RYLANCE


Raymond D. Rylance
Attorneys for Plaintiff
3 East Kemp, Suite 200
P. O. Box 227
Watertown, SD 57201-0227

CERTIFICATE OF SERVICE

I, Raymond D. Rylance, hereby certify that a true and correct copy of the foregoing "NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT" was served upon the following:

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

by depositing the same in the United States Mail Service at Watertown, South Dakota, with postage thereon fully prepaid, on the 15th day of June, 2005.

WILES & RYLANCE

A handwritten signature in black ink, appearing to read 'Ray D. Rylance', is written over a horizontal line.

Raymond D. Rylance
Attorneys for Appellant
3 East Kemp, Suite 200
P. O. Box 227
Watertown, SD 57201-0227

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

PHILLIP W. HINES, *

Appellant, *

v. *

DEPARTMENT OF ENVIRONMENT
AND NATURAL RESOURCES
(SOUTH DAKOTA WATER
MANAGEMENT BOARD), *

Appellee. *

JUDGMENT

The above-entitled matter having come on for oral argument before the Honorable Max A. Gors, Judge of the Circuit Court, in the Courtroom of the Court in the Courthouse in the City of Pierre, Hughes County, South Dakota, on February 2, 2005. The Appellant, Phillip W. Hines, appearing by and through his attorney, Raymond D. Rylance of the law firm of Wiles & Rylance, of Watertown, South Dakota; and the Appellee, Department of Environment and Natural Resources (South Dakota Water Management Board) appearing by and through its attorney Diane Best, of the South Dakota Attorney General's Office; the Court having considered the briefs, arguments and the record of the parties on behalf of the Appellant, and on behalf of the Appellee; and the Court having heard and considered the same; the Court being fully advised in the premises; NOW, THEREFORE,

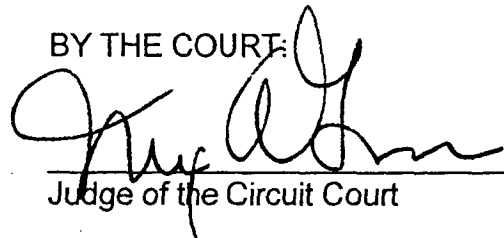
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of the Water Management Board denying Phillip W. Hines' Water Permit #6431-3 is hereby reversed.

✓
KCL
RR

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Chief Engineer for the Department of Water and Natural Resources is hereby directed to issue Permit #4631.3 to Phillip W. Hines.

DONE BY THE COURT this 7th June day of May, 2005.

BY THE COURT:



Judge of the Circuit Court

ATTEST:



Clerk of Courts
(SEAL) Deputy

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.

FILED

JUN 07 2005

~~Deputy Clerk~~ CLERK

By  Deputy

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

2. On July 16, 2003 Phillip W. Hines filed an application #6431-3 with the South Dakota Management Board requesting to appropriate 1.0 cfs (450 gallons per

ICC ✓
RR

minute) from one well approximately 54 feet deep to irrigate approximately 91 acres in Beadle County.

3. Hines proposed to irrigate from an existing well under previous permit # 3466-3 which was terminated by the Water Management Board on December 3, 2003 by reason of forfeiture.

4. The application for Water Permit #6431-3 came before the Water Management Board on December 3, 2003.

5. Permit # 3466-3 was issued in 1976, to the previous owner of the land. Hines purchased the land in year 2000.

6. On August 27, 2003 Garland Erbele, Chief Engineer for the Department of Environment and Natural Resources recommended that Hines' permit #6431-3 be denied for the following reasons:

(a) SDCL 46-6-3.1 states that the annual withdrawal of groundwater shall not exceed the average estimated annual recharge to the aquifer;

(b) All water available for appropriation within the Tulare East James Aquifer in Spink County and Beadle County is presently appropriated; and

(c) It is not in the public interest because the unavailability of proven recharge.

7. The source of the water for the Permit # 6431-3 is the Tulare East James Aquifer.

8. In Beadle County, the Aquifer underlies 23,200 acres and contains 132,000 acre feet of recoverable water.

9. In Spink County, the Aquifer underlies 100,700 acres and contains 476,000 acre feet of recoverable water.

10. The annual recharge of the Tulare East James Aquifer yields an average volume of recharge of 7,950 acre feet of water per year.

11. The average pumping from the Aquifer has been 6,604 acre feet of water per year for the past 24 years.

12. Total consumption over the last 24 years of pumping from the Aquifer was 158,496 acre feet of water.

13. The annual recharge of the Aquifer for the same 24 years was 190,800 acre feet of water.
14. 32,304 acre feet of annual recharge water has not been used over the past 24 years.
15. The hydrograph of the Aquifer showed the Aquifer has increased in volume from 1977 to 2002 from 33 feet below the benchmark to 29 feet below the benchmark, an increase of 4 feet.
16. The Water Management Board has issued permits authorizing the withdrawal of 42,000 acre feet of water out of the Aquifer.
17. In 1981 the Water Management Board issued eleven water permits for 2071 acres and 28.94 cfs, at the time the hydrograph showed the level of water to be 5 feet lower than at the time of the Hines application.
18. The average recharge rate of the Tulare East James Aquifer is greater than the average pumping (discharge) rate.
19. The proposed diversion of water can be developed without unlawful impairment of existing water rights.
20. Interference between existing permits is not a concern.
21. The proposed use is a beneficial use and in the public interest.

From the foregoing Findings of Fact, the Court makes and enters the following:

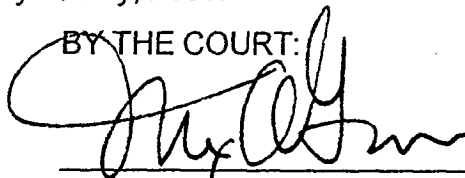
CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and subject matter of this action.
2. The annual average recharge rate is greater than the average annual pumping (discharge) of the Tulare East James Aquifer.
3. Permit #6431-3 should be granted, it is consistent with SDCL 46-2A-9.
4. The decision of the Water Management Board denying Permit #6431-3 is clearly erroneous.
5. The decision of the Water Management Board denying Permit #6431-3 is reversed.
6. Permit #6431-3 should be issued to Mr. Hines.

LET JUDGEMENT BE ISSUED BY THE COURT.

DONE BY THE COURT this 7th day of June, 2005.

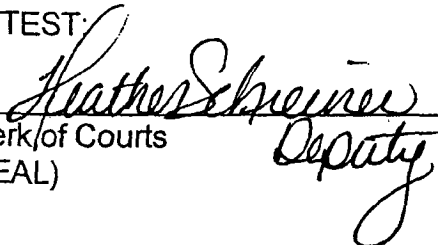
BY THE COURT:



Judge of the Circuit Court

ATTEST:

Clerk of Courts
(SEAL)

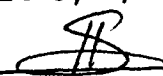


STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO.

FILED

JUN 07 2005

~~Deputy Clerk~~ CLERK

By  Deputy



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

AUG 08 2005

Phillip W Hines
2719 Spring Lake Rd
Prior Lake MN 55372

Dear Mr. Hines:

Enclosed is Water Permit No. 6431-3. The permit is issued pursuant to the Notice of Entry of Judgment in the matter of Water Permit Application No. 6431-3. The permit authorizes construction of your water diversion system and beneficial use of the water, not exceeding the limits as specified in the Water Permit.

Form 10, *Notice of Completion of Works and Application of Water to Beneficial Use*, is enclosed. Please return this completed form after you have finished the system and have put the water to beneficial use. An investigation can then be scheduled so the water license may be issued, thus completing the acquisition of a water right.

An informational sheet *Common Water Right Questions* is also enclosed. This sheet is intended to answer some of the questions associated with obtaining and keeping a water right.

Sincerely,

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

enclosures

c: Ray Rylance



6431-3
DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

January 26, 2007

NOTICE

TO: PHILIP HINES, 2719 SPRING LAKE RD, PRIOR LAKE, MN 55372
FROM: Ron Duvall, Natural Resources Engineer
for Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Reporting Requirement for 2006 Irrigation Questionnaire

Our records indicate that the 2006 Irrigation Questionnaire(s) has not been submitted for Permit No(s) 6431-3. The request for the Questionnaire was dated October 20, 2006. The Water Management Board has directed that owners of water permits who have not submitted the 2006 Irrigation Questionnaire(s) be given notice of permit violation and a hearing to be held by the Board. The hearing is to determine what action is to be taken for violation of Water Permit No(s) 6431-3 qualification:

"This permit is approved subject to the Irrigation Water Use Questionnaire being submitted each year."

The hearing will be held at 10:30 am, March 7, 2007 in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, 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. These are contested case hearings 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 permit 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 or cancel Permit No(s) 6431-3 in accordance with applicable provisions of SDCL 46-1-12;
2. Postpone any action; or
3. Take no action.

The hearing is an adversary proceeding. The permit owner 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.

If the questionnaire(s) is(are) received in this office on/or before **March 1, 2007**, you will no longer be in violation of your permit and your name will be deleted from the Board agenda. Enclosed are additional questionnaire(s) for your use. If you have questions or need assistance, please contact Genny McMath at (605) 773-3352. If you prefer, you can complete the questionnaire on-line at the following link:

<https://www.state.sd.us/eforms/secure/eforms/E0455V5-IQ.pdf>

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

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DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

PMB 2020
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PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

February 20, 2007

6431-3

Philip Hines
2719 Spring Lake Rd
Prior Lake MN 55372

Dear Mr. Hines:

I am writing to acknowledge receipt of your 2006 irrigation questionnaire. You may disregard the January 26, 2007, "Notice" concerning reporting requirements for Water Permit No. 6431-3.

The information was received in our office prior to the Water Management Board meeting and your name has been deleted from the agenda.

If you have any questions, please contact me.

Sincerely,

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352

6431-3 F

CLERK OF COURTS

Hughes County
104 East Capitol
Pierre, SD 57501

April 18, 2007

ATTORNEY GENERAL
1302 E HWY 14 SUITE 1
PIERRE SD 57501

RE: CIV04-137 PHILLIP HINES V DEPT OF ENVIRON AND NATURAL
RESOURCES

Please be advised that a final decision and/or judgment has been filed in the
above-entitled action. Therefore, pursuant to Supreme Court Rule #82-22, I
am returning the Administrative Record to your agency.

Please acknowledge receipt of the Administrative Record by signing below
and returning the same to us. If you have any questions concerning this
please do not hesitate to contact this office.

Thank you.

Sincerely,

JUDY FEDDERSEN
CLERK OF COURTS

Deputy Clerk of Courts
Hughes County

The Administrative Record in the above entitled action was received by this
agency on the 23rd day of April, 2007.

Niane Best

6431-3



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

January 18, 2008

NOTICE

TO: PHILIP HINES, 2719 SPRING LAKE RD, PRIOR LAKE, MN 55372
FROM: Ron Duvall, Natural Resources Engineer
for Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Reporting Requirement for 2007 Irrigation Questionnaire(s)

Our records indicate that the 2007 Irrigation Questionnaire(s) has not been submitted for Permit No(s) 6431-3. The request for the Questionnaire was dated October 19, 2007. The Water Management Board has directed that owners of water permits who have not submitted the 2007 Irrigation Questionnaire(s) be given notice of permit violation and a hearing to be held by the Board. The hearing is to determine what action is to be taken for violation of Water Permit No(s) 6431-3 qualification:

"This permit is approved subject to the Irrigation Water Use Questionnaire being submitted each year."

The hearing will be held at **10:00 am, March 11, 2008** in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, 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. These are contested case hearings 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 permit 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 or cancel Permit No(s) 6431-3 in accordance with applicable provisions of SDCL 46-1-12;
2. Postpone any action; or
3. Take no action.

The hearing is an adversary proceeding. The permit owner 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.

If the questionnaire(s) is(are) received in this office on/or before **March 3, 2008**, you will no longer be in violation of your permit and your name will be deleted from the Board agenda. Enclosed are additional questionnaire(s) for your use. If you have questions or need assistance, please contact Genny McMath at (605) 773-3352. If you prefer, you can complete the questionnaire on-line at the following link:

<https://www.state.sd.us/eforms/secure/eforms/E0455V6-IQ.pdf>

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

6431-3

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PHILIP HINES
2719 SPRING LAKE RD
PRIOR LAKE MN 55372

Waiver of Signature ☐ YES ☐ NO

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McMath, Genny

From: Barb O'Riley [bcregdeeds@midco.net]
Sent: Thursday, February 21, 2008 10:05 AM
To: McMath, Genny
Subject: RE: land ownership in Beadle County

Good Morning to Genny

In answering your question, the land in question was sold to Bradley N Tschetter of 40300 South Shore Road, Huron, SD 57350.

The land listed is W1/2 of 13-113-62 except Weese OL 1

Hope this helps.

Sincerely

Barb O'Riley

From: Genny.McMath@state.sd.us [mailto:Genny.McMath@state.sd.us]
Sent: Thursday, February 21, 2008 9:04 AM
To: bcregdeeds@midco.net
Subject: land ownership in Beadle County

Ms. O'Riley,

I am currently reviewing a water permit listed in the name of Philip Hines. It is my understanding that Philip sold his land.

The land covered under the water right is as follows: SE ¼ NW ¼ and the SW ¼ Section 13, T113N, R62W.

If you would, please let me know who has purchased the land and their current mailing address. This will allow me to contact them concerning transfer of ownership for the water right.

Thank you in advance for your help.

Genny McMath

Water Rights Program

605 773-5455



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
PMB 2020
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

February 21, 2008

6431-3

Brad Tschetter
40300 South Shore Rd
Huron SD 57350

Dear Mr. Tschetter:

Thank you for visiting with me regarding the water permit listed in the name of Phillip Hines. I have included a copy of the water permit for your review.

Enclosed is a partially completed Notice of Transfer of Ownership form for filing an ownership change. Please complete the form and return it to our office with a required filing fee of \$2.50. The check or money order for the fee can be made payable to the Water Rights Program.

If you have any questions, please contact me.

Sincerely,

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

April 19, 2008

No. 6431-3

Brad Tschetter
40300 South Shore Rd
Huron SD 57350

Dear Mr. Tschetter:

In February, we forwarded you a "Notice of Transfer" form to complete and return to us for filing an ownership change on Water Permit No. 6431-3. The water right is currently listed in the name of Phillip Hines. To date, we have not received the form back.

Enclosed is another partially completed form. Upon completion, return the form to our office with a required filing fee of \$2.50. The check or money order for the fee can be made payable to the Water Right Program.

If you have any questions, please contact Genny McMath or me.

Sincerely,

Karen Schlaak
Water Rights Program
605 773-3352
email: karen.schlaak@state.sd.us

enclosure



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
PMB 2020
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

June 18, 2008

6431-3

Brad Tschetter
40300 South Shore Rd
Huron SD 57350

Dear Mr. Tschetter:

I am contacting you in regard to ownership of land described in Water Permit No. 6431-3 currently listed in the name of Philip Hines (copy enclosed). We contacted you back in February and again in April concerning the ownership change but to date have not received anything back from you.

In the event you no longer have the original "Notice of Transfer of Ownership" form, I am enclosing an additional one for your use. Please complete the form and return it to our office with a required filing fee of \$2.50. The check or money order for the fee can be made payable to the Water Rights Program.

Your name was obtained back in February from the county register of deeds office as being owner of the property. If ownership has changed again and you no longer own the land, please get in touch with me.

Sincerely,

A handwritten signature in black ink that reads 'Genny McMath'.

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352
email: genny.mcmath@state.sd.us

enclosures



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
PMB 2020
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

October 15, 2008

6431-3

Brad Tschetter
40328 South Shore Rd
Huron SD 57350

Dear Mr. Tschetter:

I am contacting you in regard to ownership of land described in Water Permit No. 6431-3 currently listed in the name of Philip Hines (copy enclosed). We contacted you back in February, April and again in June concerning the ownership change but to date have not received anything back from you.

In the event you no longer have the original "Notice of Transfer of Ownership" form, I am enclosing an additional one for your use. Please complete the form and return it to our office with a required filing fee of \$2.50. The check or money order for the fee can be made payable to the Water Rights Program.

If you no longer own the land or wish to relinquish the water permit, let us know.

Sincerely,

A handwritten signature in black ink that reads "Genny McMath". The signature is written in a cursive, flowing style.

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352
email: genny.mcmath@state.sd.us

enclosures



6431-3
DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

JOE FOSS BUILDING
PMB 2020
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

January 23, 2009

NOTICE

TO: BRAD TSCHETTER, OPERATOR, 40328 S SHORE RD, HURON, SD 57350
FROM: Ron Duvall, Natural Resources Engineer
for Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Reporting Requirement for 2008 Irrigation Questionnaire(s)

Our records indicate that the 2008 Irrigation Questionnaire(s) has not been submitted for Permit No(s) 6431-3. The request for the Questionnaire was dated October 24, 2008. The Water Management Board has directed that owners of water permits who have not submitted the 2008 Irrigation Questionnaire(s) be given notice of permit violation and a hearing to be held by the Board. The hearing is to determine what action is to be taken for violation of Water Permit No(s) 6431-3 qualification:

"This permit is approved subject to the Irrigation Water Use Questionnaire being submitted each year."

The hearing will be held at **10:00 am, March 11, 2009** in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, 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. These are contested case hearings 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 permit 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 or cancel Permit No(s) 6431-3 in accordance with applicable provisions of SDCL 46-1-12;
2. Postpone any action; or
3. Take no action.

The hearing is an adversary proceeding. The permit owner 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.

If the questionnaire(s) is (are) received in this office on/or before **March 6, 2009**, you will no longer be in violation of your permit and your name will be deleted from the Board agenda. Enclosed are additional questionnaire(s) for your use. If you have questions or need assistance, please contact Genny McMath at (605) 773-3352. If you prefer, you can complete the questionnaire on-line at the following link:

<https://www.state.sd.us/efrms/secure/efrms/E0455V7-IQ.pdf>

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

6431-3

[Home](#) | [Help](#)[Track & Confirm](#)

Track & Confirm

Search Results

Label/Receipt Number: 2303 2160 0000 0802 7545
Status: **Delivered**

Your item was delivered at 3:06 PM on January 24, 2009 in HURON, SD 57350. The item was signed for by B TSCHETTER.

Track & Confirm

Enter Label/Receipt Number.

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FOIA

U.S. Postal Service™ Signature Confirmation™ Receipt

SIGNATURE CONFIRMATION NUMBER:
2303 2160 0000 0802 7545

BRAD TSCHETTER, OPERATOR
40328 S SHORE RD
HURON SD 57350

ailing.

Waiver of Signature ☐ YES ☐ NOPostmark
Here**POSTAL CUSTOMER:**

Keep this receipt. For inquiries:
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PS Form 153, May 2002

(See Reverse)



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
PMB 2020
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

February 26, 2009

6431-3

Brad Tschetter
40328 South Shore Rd
Huron SD 57350

Dear Mr. Tschetter:

I am writing to acknowledge receipt of your 2008 irrigation questionnaire. You may disregard the January 23, 2009, "Notice" concerning reporting requirements for Water Permit No. 6431-3. The information was received in our office prior to the Water Management Board meeting and your name has been deleted from the agenda.

The water permit is still listed in the name of Philip Hines. I am sending you another "Notice of Transfer of Ownership" form to file the ownership change. Four letters were sent to you last year to file the ownership change. Please complete the form and return it to our office with a required filing fee of \$2.50. The check or money order for the fee can be made payable to the Water Rights Program.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in cursive script that reads "Genny McMath".

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352
email: genny.mcmath@state.sd.us

RECEIVED

APR - 2 2009

WATER RIGHTS
PROGRAM

NOTICE OF TRANSFER OF OWNERSHIP

To: Chief Engineer
Water Rights Program, DENR
523 E. Capitol
Pierre, SD 57501-3181

No. 6431-3

Date: 3/10/09

I/We request that Water Permit No. 6431-3

formerly owned by: Phillip W Hines

be transferred to: (name & address) Bradley W Tschetter, 40300 S State Rd.
Huron S.D. 57350

Telephone No. 352-7114 Home

352-7037 Shop

353-4000 cell

Title to the following described land(s)/property has been transferred as described above:

91 acres - SE 1/4 NW 1/4 and SW 1/4 Section 13, T113N, R62W

I/We understand that the validity of Water Permit No. 6431-3 has not been determined by this transfer action. If I/We have any questions on validity, I/We understand that only the Water Management Board has the authority to determine if a water permit/right is valid (see note).

You are requested to file this "Notice of Transfer" in the appropriate file with the Water Rights Program, as evidence of the change of ownership.

A fee of Two Dollars and Fifty Cents (\$2.50) is required to cover the filing fees as required under SDCL 46-2-13. This form must be signed by the new owner.

I/We Bradley W Tschetter, the new owner, certify that the above information is true and correct.

Bradley W Tschetter

(Signed by new owner)

NOTE: Water permits may be cancelled for nonconstruction after the five year construction period has expired. Once a water permit is developed and the water used, the permit becomes a right. A water right may be lost for three reasons:

1. Abandonment - no intent to use water and use is abandoned.
2. Forfeiture - no use of water for three year period without legal excuse.
3. For a third violation of a condition of a water permit/right.

RECEIPT

WATER RIGHTS PROGRAM

South Dakota Department of Environment and Natural Resources

Date 4/2, 20 09

RECEIVED OF Bradley N Tschetter 40300 S Shore Line Rd Huron SD 57350

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

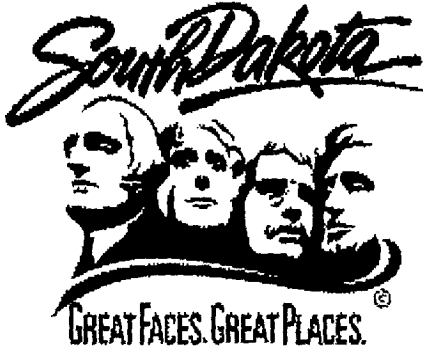
Fee for Application for Permit No. _____ to Appropriate Water, to construct and to put water to beneficial use	2	50
Fee for Application for Permit No. _____ to Appropriate Water for Future use		
Fee to retain Future Use Permit No. _____ after period of seven years.		
Fee for Inspecting Constructed Works, confirming beneficial use and issuing Water License No. _____		
Fee for Filing Transfer Form <u>6431-3</u>		
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.

64103

By

[Signature]
Chief Engineer



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
PMB 2020
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

April 2, 2009

6431-3

Brad Tschetter
40328 South Shore Rd
Huron SD 57350

Dear Mr. Tschetter:

I am writing to acknowledge receipt of the "Notice of Transfer of Ownership" form and filing fee you submitted for Water Permit No. 6431-3. The transfer has been completed. The permit formerly held by Philip Hines is now listed in your name.

Enclosed is your Receipt No. 04103 in the amount of \$2.50. You may keep this for your records.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in black ink that reads "Genny McMath". The signature is written in a cursive, flowing style.

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352
email: genny.mcmath@state.sd.us

enclosure



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
PMB 2020
523 EAST CAPITOL
PIERRE SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

February 8, 2010

6431-3

Joey Waldner
Huron Colony
40068 Huron Colony
Huron SD 57350

Dear Mr. Waldner

I am writing in follow-up to your phone conversation with Eric Gronlund in our program concerning Water Permit No. 6431-3 currently held by Bradley Tschetter.

Enclosed is a partially completed Notice of Transfer of Ownership form for filing an ownership change. Please review the form and make any necessary corrections. Upon completion, please sign the form and return it to our office with a required filing fee of \$50.00. The check or money order for the fee can be made payable to the Water Rights Program.

If you have any questions, please contact me.

Sincerely,

Genny McMath
Environmental Scientist
Water Rights Program
(605) 773-3352
email: genny.mcmath@state.sd.us

enclosure

RECEIPT

WATER RIGHTS PROGRAM

South Dakota Department of Environment and Natural Resources

Date 2/16, 20 10

RECEIVED OF Huron Hutterian Brethren Inc 40068 Huron Colony Ln Huron SD 57350

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	50	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 <u>6431-3</u>		
Fee for _____		
Fee for Issuing New Well Driller's License No. _____ for C.Y. _____		
Fee for Renewal of Well Driller's License No. _____ for C.Y. _____		
Fee for Issuing Well Pump Installer's License No. _____ for C.Y. _____		
Fee for Renewal of Well Pump Installer's License No. _____ for C.Y. _____		
(Any Other Work Provided by Law)	TOTAL	50 00

No.

04478

By

Harold E. Eide
Chief Engineer

NOTICE OF TRANSFER OF OWNERSHIP

RECEIVED

FEB 16 2010

WATER RIGHTS
PROGRAM

To: Chief Engineer
Water Rights Program, DENR
523 E. Capitol
Pierre, SD 57501-3181

No. 6431-3

Date: 2-9-2010

I/We request that Water Permit No. 6431-3

formerly owned by: Bradley N Tschetter

be transferred to: (name & address) Huron Hutterian Brethren Inc.
40068 Huron Colony Lane Huron S. Dak 57350-8001

Telephone No. 605-352-5647

Title to the following described land(s)/property has been transferred as described above:

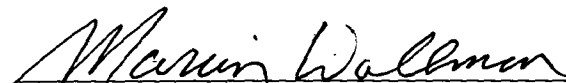
91 acres - SE 1/4 NW 1/4 and SW 1/4 Section 13, T113N, R62W

I/We understand that the validity of Water Right No. 6431-3 has not been determined by this transfer action. If I/We have any questions on validity, I/We understand that only the Water Management Board has the authority to determine if a water permit/right is valid (see note).

You are requested to file this "Notice of Transfer" in the appropriate file with the Water Rights Program, as evidence of the change of ownership.

A fee of Fifty Dollars (\$50.00) is required to cover the filing fees as required under SDCL 46-2-13. This form must be signed by the new owner.

I/We Huron Colony, the new owner, certify that the above information is true and correct.


(Signed by new owner)

NOTE: Water permits may be cancelled for nonconstruction after the five year construction period has expired. Once a water permit is developed and the water used, the permit becomes a right. A water right may be lost for three reasons:

1. Abandonment - no intent to use water and use is abandoned.
2. Forfeiture - no use of water for three year period without legal excuse.
3. For a third violation of a condition of a water permit/right.



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
denr.sd.gov

February 16, 2010

Huron Hutterian Brethren, Inc.
c/o Joey Waldner
40068 Huron Colony Lane
Huron SD 57350

Dear Mr. Waldner:

Thank you for submitting the *Application for a Permit to Appropriate Water* for the amendment of Water Permit No. 6431-3. In order to complete the application the following is required.

- We are returning the application because the bottom portion of the form needs to be signed and notarized.
- Also, enclosed is the aerial photo map submitted with the application. The map must be 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 (i.e. local NRCS office).
- The application/license filing fee will be \$300.00.

Enclosed is your Receipt No. 4478 in the amount of \$50.00 for the Transfer of Ownership on Water Permit No. 6431-3. The transfer has been completed. The water permit formerly listed in the name of Bradley N Tschetter is now listed in the name of Huron Hutterian Brethren Inc.

If you have any questions, please contact Eric Gronlund or me.

Sincerely,

Karen Schlaak
Water Rights Program
605 773-3352
karen.schlaak@state.sd.us

enclosure



DENR
SOUTH DAKOTA

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
denr.sd.gov

January 22, 2021

NOTICE

TO: HURON COLONY, JOEY WALDNER, 40068 HURON COLONY LANE, HURON, SD 57350 8001

FROM: Ron Duvall, Natural Resources Engineer
for Jeanne Goodman, Chief Engineer
Water Rights Program

SUBJECT: Reporting Requirement for 2020 Irrigation Questionnaire(s)

Our records indicate your 2020 Irrigation Questionnaire(s) has not been submitted for Permit No(s) 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3. The request for the Questionnaire was dated October 23, 2020. The Water Management Board has directed that owners of water permits who have not submitted the 2020 Irrigation Questionnaire(s) be given notice of permit violation and a hearing to be held by the Board. The hearing is to determine what action is to be taken for violation of Water Permit No(s) 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3 qualification:

"This permit is approved subject to the Irrigation Water Use Questionnaire being submitted each year."

The hearing will be held at **Wednesday, March 3, 2021 at 10:00 am (Central Time)** in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, 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. These are contested case hearings 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 permit 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 or cancel Permit No(s) 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3 in accordance with applicable provisions of SDCL 46-1-12;
2. Postpone any action; or
3. Take no action.

The hearing is an adversary proceeding. The permit owner 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.

If the questionnaire(s) is (are) received in this office before the **March 3, 2021** hearing you will no longer be in violation of your permit and your name will be removed from the Board agenda. Enclosed are additional questionnaire(s) for your use. If you have questions or need assistance, please contact Genny McMath at (605) 773-3352 or email at genny.mcmath@state.sd.us. **If you prefer, you can complete the questionnaire online at the following link: <https://denr.sd.gov/iq> using this password: LHSJWM**

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

6431-3



DENR
SOUTH DAKOTA

**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
denr.sd.gov

February 4, 2021

Joey Waldner
Huron Colony
40068 Huron Colony Lane
Huron SD 57350 8001

RE: Water Permit or Right Nos. 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3

Dear Mr. Waldner:

I am writing to acknowledge receipt of your 2020 irrigation questionnaires.

You may disregard the January 22, 2021, "Notice" concerning reporting requirements for the above listed water rights or water permits. The information was received in our office prior to the Water Management Board meeting and your name has been deleted from the agenda.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in cursive script, reading "Genny McMath". The signature is written in dark ink and is positioned above the printed name and contact information.

Genny McMath
Water Rights Program
605 773-3352
Genny.mcmath@state.sd.us



DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES
JOE FOSS BUILDING
523 E. CAPITOL AVE
PIERRE SD 57501-3182
danr.sd.gov

January 20, 2022

NOTICE

TO: HURON COLONY, JOEY WALDNER, 40068 HURON COLONY LANE, HURON, SD 57350

FROM: Ron Duvall, Water Rights Permitting Administrator
for Eric Gronlund, Chief Engineer
Water Rights Program

SUBJECT: Reporting Requirement for 2021 Irrigation Questionnaire(s)

Our records indicate your 2021 Irrigation Questionnaire(s) has not been submitted for Permit No(s) 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3. The request for the Questionnaire was dated October 22, 2021. The Water Management Board has directed that owners of water permits who have not submitted the 2021 Irrigation Questionnaire(s) be given notice of permit violation and a hearing to be held by the Board. The hearing is to determine what action is to be taken for violation of Water Permit No(s) 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3 qualification:

"This permit is approved subject to the Irrigation Water Use Questionnaire being submitted each year."

The hearing will be held at **Wednesday, March 2, 2022 at 9:30 am (Central Time)** in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, 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. These are contested case hearings 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 permit 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 or cancel Permit No(s) 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3 in accordance with applicable provisions of SDCL 46-1-12;
2. Postpone any action; or
3. Take no action.

The hearing is an adversary proceeding. The permit owner 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.

If the questionnaire(s) is (are) received in this office before the **March 2, 2022** hearing you will no longer be in violation of your permit and your name will be removed from the Board agenda. Enclosed are additional questionnaire(s) for your use. If you have questions or need assistance, please contact Genny McMath at (605) 773-3352 or email at genny.mcmath@state.sd.us. **If you prefer, you can complete the questionnaire online at the following link: <https://danr.sd.gov/iq> using this password: RDXOUP**

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

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Processed In transit Delivered 

DATE	TIME	LOCATION	STATUS
Jan 21	11:07 AM	Huron, SD, United States	Delivered, left with individual
Jan 20	9:24 PM	Huron Sd Distribution Center	Arrived at USPS regional facility

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 40068 HURON COLONY LANE
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See Reverse for Instructions

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 Two Ways to Track Your
 Tax Refund

Instead of just blindly
 waiting for this year's tax
 refund to come through,
 know that there are a
 couple of handy ways to





**DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES**

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

March 3, 2022

**NOTICE OF ENTRY OF ORDER FOR ONE YEAR SUSPENSION
OF WATER RIGHTS AND WATER PERMITS**

TO: Joey Waldner, Huron Colony, 40068 Huron Colony Ln, Huron SD 57350-8001

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

SUBJECT: One Year Suspension of Water Permit/Right Nos. 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3

On March 2, 2022, the Water Management Board ordered:

Effective April 4, 2022, Water Permit/Right Nos. 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3 be suspended for the 2022 irrigation season for failure to submit the 2021 irrigation questionnaires.

If the 2021 irrigation questionnaires are received prior to April 4, 2022, the suspensions will not take effect.

Suspension of a water permit or right means water may not be pumped during the 2022 irrigation season. Consistent with the Board's order, you are not permitted to irrigate in 2022 unless the 2021 irrigation questionnaires are submitted by April 4, 2022.

After April 4th, you may petition the Water Management Board to rescind the suspension. You will need to submit the 2021 irrigation questionnaires and a letter to our office requesting time on the agenda for the next Water Management Board meeting scheduled for May 4-5, 2022, in Pierre, SD. The letter should include your reasons for not completing the 2021 irrigation questionnaires. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

Water Rights Staff will conduct compliance checks of suspended water rights this summer to determine if irrigation is taking place.

Please contact Genny McMath (605) 773-3352, if you have any questions.

CERTIFICATION

I hereby certify that on March 3, 2022, I have personally deposited with the United States mail at Pierre, South Dakota, a first class postage prepaid envelopes containing a "Notice" dated March 3, 2022, concerning Board action to amend and/or suspend water rights to the following:

Amendments:

No. 3487-3: Dave Hanson, 31489 455th Ave., Meckling SD 57069
No. 2460-3: Ryan Patterson, 10946 425th Ave., Britton SD 57430
Patterson Farm Inc, 42474 SD Hwy 10, Britton SD 57430

Amend & Suspend:

Nos. 1397-2, 2647-2 & 2701-2: Cody Burull, 25299 Deer Valley Rd, Reliance SD 57569

Nos. 2072-3, 2126-3, 3204-3, 7236-3 & 7237-3:

- David Ulvestad, 46720 201st St., Bruce SD 57220
- Darwin Ulvestad, 46679 201st St, Bruce SD 57220

Three year suspensions:

No. 410B-2: Kathi Koester, PO Box 206, Custer SD 57730-0206
Nos. 1350-3 & 6042-3: Scott Jensen, 24348 478th Ave., Dell Rapids SD 57022

One year suspensions:

No. 6947-3: Joe Adler, 48353 149th St, Milbank SD 57252
Nos. 6263-3 & 8041-3: George G Hofer, Cedar Grove Colony, 36926 266th St, Platte SD 57369
No. 881-2: Ryan Edwards, 25331 Yellow Eagle Rd, White River SD 57579
No. 6316-3: Howard Athletic Club Inc., 508 E Farmer Ave., Howard SD 57349-9017
Nos. 2851-3 & 4955-3: David Huber, 16010 413th Ave., Conde SD 57434

Nos. 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3: Joey Waldner Colony, 40068 Huron Colony Lane, Huron SD 57350-8001

Nos. 7286-3 & 7543-3: Brian Kozak, 30620 417th Ave., Tyndall SD 57066
No. 5665-3: Pat Mentele, PO Box 41, Woonsocket SD 57385-0041
No. 8326-3: Jerry D Nelsen, 45125 291st St., Viborg SD 57070
No. 7005-3: Troy Randall, Randall Enterprise LLC, 24250 479th Ave., Dell Rapids SD 57022 6139
No. 2497-2: Marty Vanderploeg, 22958 293rd St, Martin SD 57551-5930
No. 8265-3: Carl Pulvermacher, Wiskota Farm, 14050 SD Hwy 25, Webster SD 57274
Nos. 516-1 & 715-1: Lawrence Woodward, PO Box 220, Dupree SD 57623-0220



Genny McMath
Program Assistant-Water Rights

STATE OF SOUTH DAKOTA)

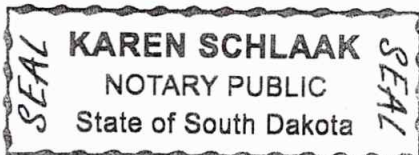
) SS

COUNTY OF HUGHES)

Sworn to, before me, this 3rd day of March, 2022.



Karen Schlaak
Notary Public
My Commission expires April 1, 2025





**DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES**

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

March 16, 2022

Joey Waldner
Huron Colony
44068 Huron Colony Ln
Huron SD 57350 8001

RE: Water Permit/Right Nos. 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3

Dear Mr. Waldner:

On March 2, 2022, the Water Management Board ordered Water Permit/Right Nos. 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3 be suspended if the 2021 irrigation questionnaires were not received prior to April 4, 2022. The questionnaire information has been received.

Since the irrigation questionnaires are on file, no violations have occurred, and no suspensions will take place. You may irrigate during the 2022 irrigation season.

If you have any questions, please contact us.

Sincerely,

Ron Duvall
Water Rights Permitting Administrator
Water Rights Program
(605) 773-3352



DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES
JOE FOSS BUILDING
523 E. CAPITOL AVE
PIERRE SD 57501-3182
danr.sd.gov

January 19, 2024

NOTICE

TO: HURON COLONY, JOEY WALDNER, 40068 HURON COLONY LN, HURON, SD 57350
8001

FROM: Ron Duvall, Engineer III
for Eric Gronlund, Chief Engineer
Water Rights Program

SUBJECT: Reporting Requirement for 2023 Irrigation Questionnaire(s)

Our records indicate your 2023 Irrigation Questionnaire(s) has not been submitted for Permit No(s) 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3. The request for the Questionnaire was dated October 20, 2023. The Water Management Board has directed owners of water permits who have not submitted the 2023 Irrigation Questionnaire(s) be given notice of permit violation and a hearing to be held by the Board. The hearing is to determine what action is to be taken for violation of Water Permit No(s) 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3 qualification:

"This permit is approved subject to the Irrigation Water Use Questionnaire being submitted each year."

The hearing will be held at **Wednesday, March 6, 2024 at 9:30 am (Central Time)** in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, 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. These are contested case hearings 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 permit 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 or cancel Permit No(s) 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3 in accordance with applicable provisions of SDCL 46-1-12;
2. Postpone any action; or
3. Take no action.

The hearing is an adversary proceeding. The permit owner 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.

If the questionnaire(s) is (are) received in this office before the **March 6, 2024** hearing you will no longer be in violation of your permit and your name will be removed from the Board agenda. Enclosed are additional questionnaire(s) for your use. If you have questions or need assistance, please contact Amanda Dewell at (605) 773-3352 or email at amanda.dewell@state.sd.us. **If you prefer, you can complete the questionnaire online at the following link: <https://danr.sd.gov/iq> using this password: FTBPLU**



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January 31, 2024

2390A-3, 3268A-3, 4400A-3,
5651-3, 6431-3, 7365-3, 7366-3,
7367-3, 7370-3, 7395-3, 7905-3,
7906-3, 7369A-3, 7369B-3,
7369C-3, 7906A-3 & 8678-3

Huron Httm Brth
c/o Joey Waldner
40068 Huron Colony Ln
Huron SD 57350

Dear Mr. Waldner:

I am writing to acknowledge the receipt of your 2023 irrigation questionnaire(s).

You may disregard the January 19, 2024, "Notice" concerning the reporting requirements for Water Permit No(s). 2390A-3, 3268A-3, 4400A-3, 5651-3, 6431-3, 7365-3, 7366-3, 7367-3, 7370-3, 7395-3, 7905-3, 7906-3, 7369A-3, 7369B-3, 7369C-3, 7906A-3 & 8678-3.

The information was received prior to the March 6, 2024, Water Management Board meeting and these permit numbers have been removed from the agenda.

If you have any questions, please contact me.

Sincerely,

Amanda Dewell
Water Rights Program
605 773-3352
Amanda.Dewell@state.sd.us