

WATER PERMIT NO. 6711-3

Name of Applicant: Oscar, Inc.

Address: 18892 390th Ave, Hitchcock SD Phone: 605 266-2747

Amount of Water Claimed: 4.34 cfs Total Acres: 304

Source of Water Supply: groundwater (2 wells)

Water to be used for: irrigation County: Spink

Type of Waste Disposal System:

Location: 10 miles northwest of Hitchcock

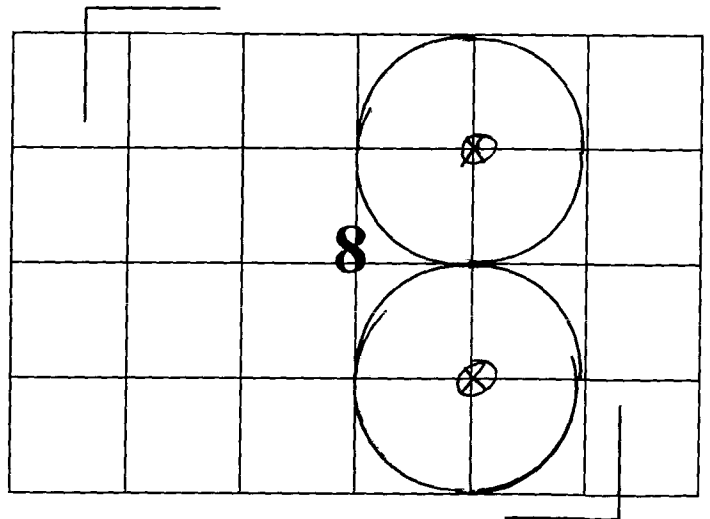
PRIORITY Date Received: 4-4-06 Application/License Fee: \$375

Corrected Application Received: Period of Annual Use: April 1 – October 31

Remarks:

Diversion Point: centers of SE ¼ & NE ¼ Sec 8-T114N-R61W

Land to be Irrigated: E ½ Sec 8-T114N-R61W



Depth of Well: 100 feet deep

Well Driller:

Remarks:

Type of Map: aerial

Prepared by: Jay ? NRCS

Reviewed and the Number Assigned on: 4-10-06

By: **Karen Schlaak**

Notice of Hearing - date to intervene: _____

never issued.

RECEIVED

APR 04 2006

WATER RIGHTS
PROGRAM

Mail to: Water Rights Program Joe Foss Building 523 E. Capitol Pierre, SD 57501-3181 (605) 773-3352	No. <u>6711-3</u>	(office use only) Hydrologic Unit <u>10160006</u>
	Basin <u>James River</u>	
	Newspaper <u>Redfield Press</u>	

Application For Permit To Appropriate Water For Irrigation

Type of Application: ☒ 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.)

1. Name of Applicant Oscar Inc Phone 605 266-2747
(check one) ☒ Owner ☐ Tenant/lessee
Mailing Address 18892 390th Avenue Hitchcock State SD 57348
(Street, RR, or Box and City) (Zip Code)
2. Amount of water claimed 4.34 *CFS or 3.890 **GPM ***AF Total Acreage 304 ~~272~~ FP
(*Cubic Feet per Second) (**Gallons per Minute) (***) Acre Feet - storage capacity of dam/dugout or annual use if applicable)
3. Source of water supply Tulare: East James Aquifer
4. Location of point of diversion (example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W) County Spink
approximate center of the SE 1/4 and NE 1/4 Section 8, T114N, R61W
5. County or counties where water will be used Spink
6. Annual period during which water is to be used April 1 - October 31
7. 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
NW 1/4 NE 1/4 Section 8, T114N, R61W	<u>38</u> 34	NW 1/4 SE 1/4 Section 8, T114N, R61W	<u>38</u> 34
NE 1/4 NE 1/4 Section 8, T114N, R61W	<u>38</u> 34	NE 1/4 SE 1/4 Section 8, T114N, R61W	<u>38</u> 34
SW 1/4 NE 1/4 Section 8, T114N, R61W	<u>38</u> 34	SW 1/4 SE 1/4 Section 8, T114N, R61W	<u>38</u> 34
SE 1/4 NE 1/4 Section 8, T114N, R61W	<u>38</u> 34	SE 1/4 SE 1/4 Section 8, T114N, R61W	<u>38</u> 34

8. Give a description of the project. (Attach sheet if more space is needed)

STATE OF SOUTH DAKOTA) SS
County of Hughes

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)

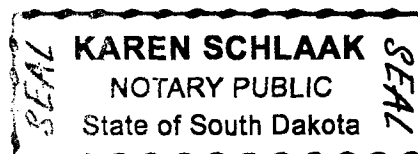
I, Floyd Peterson, the applicant, certify that I have read this application, have examined the attached map and that the matters stated are true and that I intend, and am able to complete the necessary construction.

Applicant's signature Oscar Inc. by Floyd Peterson

Subscribed and sworn to before me this 4th day of April 20 06

Karen Schlaak

Notary Public signature



My Commission Expires
April 1, 2007

Water Rights Program - DENR
Conversation File Documentation

NAME OF PERSON OR FILE: Oscar Inc. Water Permit No. 6711-3

ADDRESS: 18892 390th Avenue, Hitchcock COUNTY: Spink

DATE: May 14, 2007 TELEPHONE:

RE: Issuance of Water Permit No. 6711-3

COMMENTS:

Water Permit No. 6711-3 for Oscar Inc. was approved October 11, 2006. Prior to the Chief Engineer formally issuing the permit, Mr. Peterson filed an application to amend the permit by transferring to different acres. Because this application was pending, Water Permit No. 6711-3 was not issued. The application (No. 6711A-3) to change acres was approved on April 30, 2007 and issued on May 10, 2007. Condition No. 3 on the amended permit states that the applicable portions of Water Permit No. 6711-3 are incorporated into No. 6711A-3. Therefore, the Water Rights Program did not formally issue or send Permit No. 6711-3 to Floyd Peterson. The unsigned cover letter and permit are being kept as part of the file.

NAME:

Eric Thompson

SOUTH DAKOTA
WATER PERMIT NO. 6711-3 FOR IRRIGATION

Date of first receipt of application April 4, 2006.

The Water Management Board approved Water Permit No. 6711-3 on October 11, 2006 for Oscar Inc., c/o Floyd Peterson, 18892 390th Ave, Hitchcock SD 57348 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. 6711-3 appropriates 4.34 cubic feet of water per second from two wells to be completed into the Tulare:East James Aquifer (approximately 100 feet deep) located in the centers of the SE ¼ and NE ¼ Section 8 to irrigate 304 acres located in the E ½ Section 8; all in T114N-R61W.
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 April 4, 2006.
4. One-fifth of the construction is to be completed on or before April 11, 2009.
5. All construction is to be completed on or before October 11, 2011.
6. Water is to be put to beneficial use on or before October 11, 2015.
7. Water rights obtained in compliance with the laws of the State of South Dakota may not be unlawfully impaired by this appropriation.

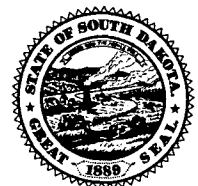
QUALIFICATIONS

1. The wells 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. The wells authorized by Permit No. 6711-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.
3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

WATER MANAGEMENT BOARD

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

_____ date





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

Oscar Inc.
c/o Floyd Peterson
18892 390th Ave
Hitchcock SD 57348

Dear Mr. Peterson:

Enclosed is Water Permit No. 6711-3 authorizing 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 the 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

(type or print in ink)

1. Well Information - Proposed Construction

- a) Drill Hole Diameter 16 Depth 100
- b) Casing Type PVC Diameter 16 Thickness
- c) Screen Type stainless Diameter 16 Thickness
- d) Gravel Pack Length of Gravel Pack
- e) Depth to Top of Water Bearing Material
- f) Depth to Water (ground surface to water level)
- g) Distance to nearest existing domestic well:
- On applicants property On property owned by others mile - Gordie Hofer

2. Wastewater Disposal System Information

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

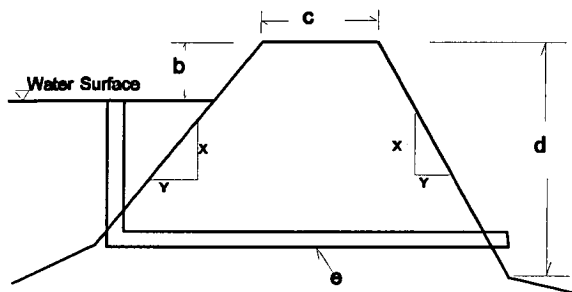
3. Dugout Information

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

4. Water Storage Dams

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

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



- b) Freeboard
- c) Crest Width
Crest Length
- d) Height
- e) Primary Outlet Capacity
If pipe, diameter
- f) Secondary Spillway Capacity
Spillway Width
- g) X & Y Slope
Upstream
Downstream
- h) Surface Area of Impoundment
- i) Storage Acre Feet
- j) Drainage Area Above Dam Acres

RECEIPT

WATER RIGHTS PROGRAM

South Dakota Department of Environment and Natural Resources

Date April 5, 20 06

RECEIVED OF Oscar Inc., 18892 390th Avenue, Hitchcock SD 57348

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

Fee for Application for Permit No. <u>6711-3</u> to Appropriate Water, to construct and to put water to beneficial use	325	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>6711-3</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	375.00

No.

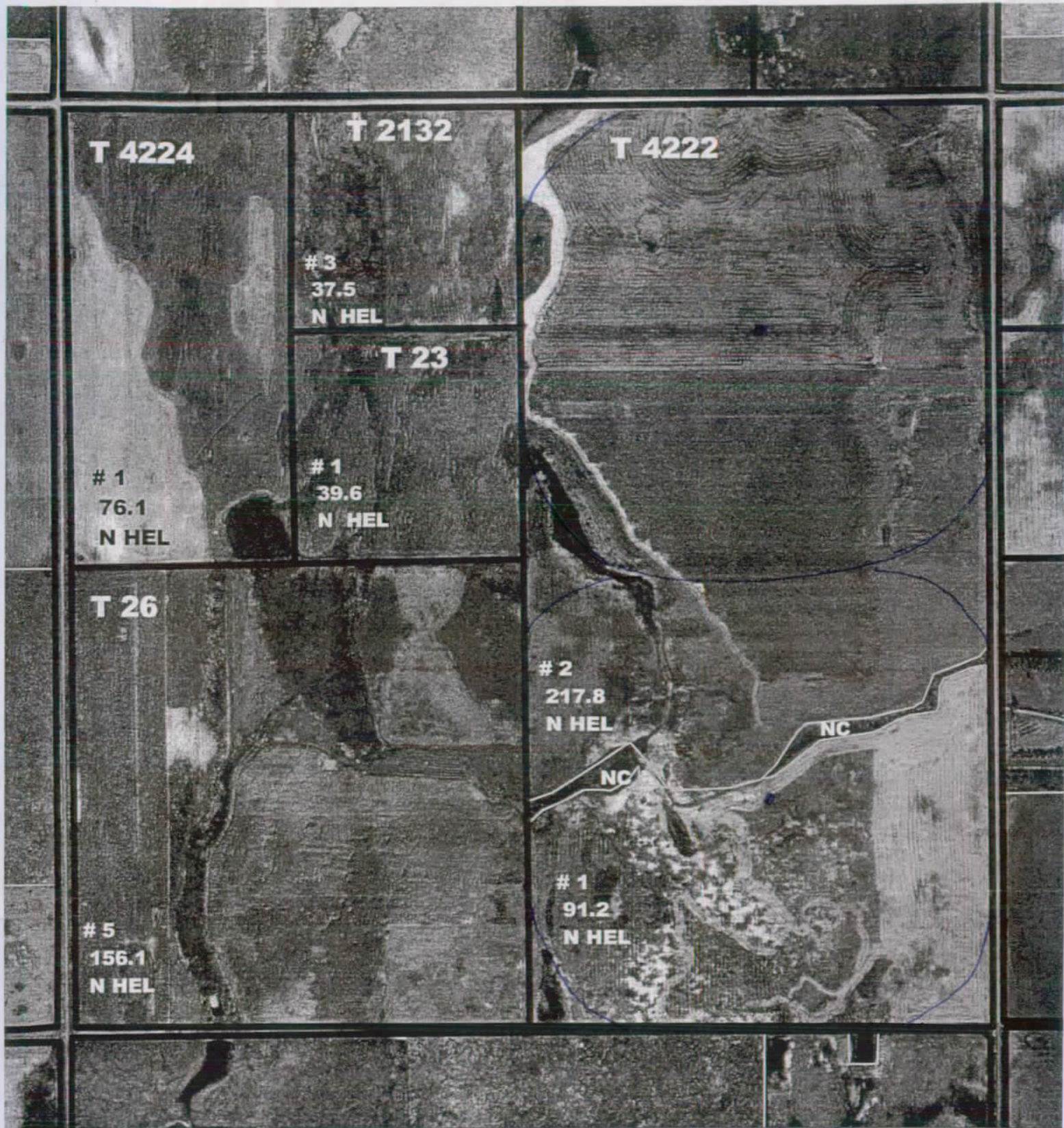
0239

By

Darland Erbe

Chief Engineer

gmm



United States Department of Agriculture
Farm Service Agency

John T. [Signature] Sol. Con.
USDA - NRCS N

08-114-61

April 4, 2005

Spink County



1997 Digital Orthophotography - Not To Scale



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

PMB 2020
JOE FOSS BUILDING
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PIERRE, SOUTH DAKOTA 57501-3182
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**RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT
APPLICATION NO. 6711-3, Oscar Inc.**

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. 6711-3, Oscar Inc., c/o Floyd Peterson, 18892 390th Avenue, Hitchcock SD 57348.

The Chief Engineer is recommending APPROVAL of Application No. 6711-3 because 1) there is reasonable probability that there is unappropriated water available for the applicant's proposed use, 2) the proposed diversion can be developed without unlawful impairment of existing rights, 3) the proposed use is a beneficial use and 4) it is in the public interest with the following qualifications:

1. The wells 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. The wells authorized by Permit No. ~~6625~~⁶⁷¹¹⁻³ shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.
3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

See report on application for additional information.

Garland Erbele, Chief Engineer
June 6, 2006

REPORT ON WATER PERMIT APPLICATION NO. 6711-3 for Oscar Inc and NOS.
6712-3 and 6713-3 for Peterson Farms
June 1, 2006

Application No. 6711-3 proposes to appropriate 4.34 cfs (1,950 gpm) from two wells approximately 100 feet deep located in the centers of the NE $\frac{1}{4}$ and SE $\frac{1}{4}$ of section 8 to irrigate 304 acres located in the E $\frac{1}{2}$ of section 8; all in T114N R61W in Spink County.

Application No. 6712-3 proposes to appropriate 1.94 cfs (870 gpm) from one well approximately 100 feet deep located in the center of the SW $\frac{1}{4}$ of section 13 to irrigate 136 acres located in the SW $\frac{1}{4}$ of section 13; all in T115N R62W in Spink County.

Application No. 6713-3 proposes to appropriate 1.94 cfs (870 gpm) from one well approximately 100 feet deep located in the center of the NW $\frac{1}{4}$ of section 24 to irrigate 136 acres located in the NW $\frac{1}{4}$ of section 24; all in T115N R62W in Spink County.

AQUIFER – TULARE EAST JAMES (T-EJ)

The Tulare East James is outwash (sand and gravel) that is under artesian conditions in this area. However, over much of Spink County the aquifer is under water table conditions. The aquifer underlies approximately 23,200 acres in Beadle County and 100,700 acres in Spink County for a total of 123,900 acres and contains an estimated 132,000 acre-feet of storage in Beadle County and 476,000 acre-feet in Spink County for a total of 608,000 acre-feet of recoverable water in storage (Hedges, 1982). Kuiper estimated "Area B" (the Tulare East James aquifer in Spink County) underlies 167 square miles (106,880 acres) (Kuiper, 1984). Goodman estimated the aquifer underlies 102,400 acres and contains an estimated 630,000 acre feet of recoverable water in storage in just Spink County (Goodman, 1984). The Goodman estimate considered a greater saturated thickness than the Hedges estimate (results in greater aquifer volume of storage) and also slightly larger aquifer area based upon better mapping of the aquifer (close to the Kuiper estimate). The difference among these estimates is not significant or important. For all practical purposes the estimates are basically the same considering the hydrologic conditions at the time of the estimates. This report will use an aquifer area of 125,600 acres based upon the Hedges estimate for Beadle County and the Goodman estimate for Spink County and the amount of recoverable water in storage is estimated to be 762,000 acre feet using those same two sources.

No test well data was submitted with application Nos. 6711-3 or 6712-3. For application No. 6713-3 there is a domestic well log available located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of section 24 that indicates sand from about 60 feet to 80 feet below land with a static water level of about 30 feet below land surface. This domestic well reportedly was capable of producing 100 gpm using air to develop. There is information from nearby irrigation wells, domestic wells, observation wells and the published studies that is sufficient to evaluate these applications.

RECHARGE DISCUSSION

Recharge to the aquifer has been estimated to range from 0.38 inches to 1.52 inches per year with a "best fit" of 0.76 inches per year (Hedges, 1983). Kuiper estimated the recharge volume to "area B" (the approximate Tulare East James aquifer in Spink County) to be about 6,800 acre-feet annually or 0.76 inches per year. Using the Kuiper "best fit" estimate of 0.76 inches per year the total aquifer recharge would be about 7,950 acre-feet per year for the Tulare East James aquifer for the entire 125,600 acres in Spink and Beadle Counties. This is a simple formula and calculation.

$$\text{RECHARGE} = \text{RECHARGE RATE} \times \text{AQUIFER AREA}$$

To calculate recharge simply multiply the rate (0.76 inches per year) times area (substitute an aquifer area of 125,600 acres) and divide by 12 (to get acre-inches into acre-feet). This results in a total annual recharge volume estimate of 7,950 acre-feet per year for the Tulare East James aquifer. It is easy to see that both the aquifer size and recharge rate are important. The size of the aquifer is fairly well established. The rate of recharge is the key variable. Doubling the recharge rate as indicated by the potential range maximum estimate of 1.52 inches per year would significantly impact potential diversions from the aquifer and conversely the lower limit estimate of 0.38 inches could obviously impact existing diversions. In terms of volume the range of recharge would be from a low of about 4,000 acre-feet to high of about 15,900 acre-feet per year. In order to further evaluate this conundrum it is necessary to look at both reported pumping data and observation well water levels. Note the recharge estimate is an average annual rate not a specific rate for any given year.

CLIMATIC DISCUSSION

Graphs showing the annual precipitation, annual departure from average precipitation, and cumulative departure from normal for sites near Redfield and at Raymond are included with this report. Some basic generalizations can be made using this data. First, the mid 1980's and most of the 1990's were wet years and this corresponds well with the observation well hydrographs. It makes sense that wet years would result in recharge and would be reflected by rising ground water levels in the aquifer. Second, it appears that the timing (during the given year) and duration (several years) of precipitation affect the overall ground water levels significantly. In other words, it appears there is a cumulative affect and that hydrographs appear to correspond well with the cumulative departure from normal precipitation graphs.

WATER USE DISCUSSION

A group of permit applications from the Tulare East James aquifer (Nos. 4699-3, 4714-3, 4739-3, 4753-3, 4772-3, 4845-3) all were approved in 1981 with the last permit approved in April of 1982. Another permit No. 2276-3A was approved in November of 1982 but this permit only authorized additional acres for an existing system. Since that time little permitting activity has occurred from the aquifer. The first water permit application to be recommended for denial was No. 5009-3 for Duane Muxon. A report was presented to

the Water Management Board in May of 1984 (Goodman, 1984). Since that application was considered seven permit applications (Nos. 5527-3, 5396-3, 4158A-3, 6287-3, 6445-3, 3325-3 and 3391-3) have been denied by the Water Management Board and two permit applications (Nos. 3470-3 and 5009-3) were withdrawn by the applicants. For all practical purposes the aquifer was considered to be fully appropriated based upon water use. This scenario was changed with water permit application No. 6431-3 (Philip Hines) and the subsequent court decision reversing the Water Management Board decision to deny that application. There will be more discussion on the court case later on in this report.

SDCL 46-2A-8 allows five years for development of a permit with four more years to put the water to beneficial use and SDCL 46-5-25 requires if one-fifth of the work shall not be completed within one-half the time allowed, as determined by the Water Management Board then the Board can issue additional permits from the forfeited water. Therefore, it appears reasonable to start a water use table beginning in 1986. The theory is that the time for development of those 1981 and 1982 issued permits would have passed in 1986 and thus water use would be reflected in the table. Also included in the table are the reported irrigated acres and the water use in inches per acre. Taken as a whole, these data provide insight into the interrelationship of climate, aquifer development and water use. The irrigated acres are taken directly from the irrigation questionnaire and the water use calculated from the irrigation questionnaire. The water used in inches per acre is calculated using the following formula.

$$\text{WATER USE} / \text{IRRIGATED ACRES} \times 12 = \text{WATER USED INCHES PER ACRE}$$

TABLE 1

YEAR	REPORTED ACRES	TOTAL APPROPRIATION ACRE-FEET	WATER USE ACRE-FEET	WATER USED INCHES PER ACRE
2005	12,272	39,322	8,417	8.2
2004	12,489	39,288	7,374	7.1
2003	12,349	39,811	11,864	11.5
2002	11,641	42,020	13,668	14.1
2001	11,153	41,324	10,287	11.1
2000	11,296	40,198	7,690	8.2
1999	10,025	40,498	5,012	6.0
1998	9,226	40,498	3,476	4.5
1997	7,105	40,498	2,676	4.5
1996	9,916	40,498	7,389	8.9
1995	7,242	40,498	2,932	4.9
1994	8,368	40,510	3,897	5.6
1993	5,891	40,164	1,089	2.2
1992	10,790	40,220	3,224	3.6
1991	9,689	40,772	7,890	9.8

1990	8,861	40,716	6,928	9.4
1989	10,510	40,971	11,282	12.9
1988	9,695	41,043	11,106	13.7
1987	9,597	39,978	8,481	10.6
1986	9,073	41,741	4,940	6.5

The data in Table 1 indicate the following. First, the reported irrigated acres appear to change with climatic conditions. The very wet years show a decline in irrigated acres with an even more dramatic corresponding drop in total water use. This makes sense intuitively because during wet years certainly less water would be needed and used. Second, the annual water use in inches shows a high of 14.1 inches (in 2002) and a low of 2.2 inches (in 1993). The average use is about 8.2 inches per year based upon the 20 years of record. Third, the total appropriation does not change much. This is because the permitted acreage did not change significantly. Finally, it appears that water use in inches may be a fair way to project potential water use from the aquifer.

WATER APPROPRIATION DISCUSSION

For the years of 1986 through 2005 the total appropriation from the aquifer has remained fairly constant. The total appropriation (in this case for irrigation) is the statutory limit allowed per acre. This limit is set by SDCL 46-5-6 and now is two acre-feet per acre. Originally this limit was three acre-feet per acre (changed by statute in 1978). All this means is that permits issued before the change are allowed three acre-feet per acre and subsequent permits are allowed two acre-feet per acre. It is obvious from looking at the Table 1 that the full allotment for irrigation water is never used. For this period of record, the year with the greatest water use is 2002. That year the "paper appropriation" was 42,020 acre-feet and the actual use was 13,668 acre-feet. This means for that year 32.5 percent of the appropriated water was used. A similar calculation can be made for any other year on the chart. The amount of water used in any given year is a reflection of many factors. Recognizing this as reality, the Water Management Board has always considered actual use (as reported on the irrigation questionnaire) as the primary factor for determining water availability and whether an aquifer should be considered fully appropriated.

There are good reasons for this assumption based upon both the historical reporting and statutes. The statutes SDCL 46-1-2, SDCL 46-1-4 and SDCL 46-1-6(3) are all relevant to this discussion. If the appropriation limit was used to determine water availability then the assumption would be that all water appropriated would be used. For irrigation in this area and in South Dakota this is physically improbable based upon crops grown, water needs for those crops and variable climatic conditions. In order to maximize water use the Board has based water availability decisions upon the reported water use rather than the total water appropriation.

As of March 2006, there are about 13,785 acres under irrigation permit or license for the Tulare East James aquifer with most of this acreage developed. Compare this acreage

with the reported 12,272 acres irrigated in 2005 (see Table 1) reveals that for any number of reasons there are acres that do not get irrigated in a given year.

OBSERVATION WELL HYDROGRAPH DISCUSSION

The Water Rights Program monitors thirty five observation wells completed into the Tulare East James aquifer. Observation well SP-77L is located adjacent to water permit application Nos. 6712-3 and 6713-3 and observation well SP-77V is located adjacent to water permit application No. 6711-3. Water levels for these wells show good response to climatic conditions. That is, rising water levels during wet years (recharge) and gradually declining water levels during dry years (Water Rights, 2006). The effects of pumping are also clearly evident on observation well SP-77L (notice the annual fluctuation in water levels). Hydrographs for these observation wells are included with this report. Two other observation well hydrographs for SP-66D and SP-66E are also included with this report. These two graphs are included because they are representative of conditions in the aquifer extending back another 10 to 11 years.

In general, the hydrographs illustrate response to similar hydrologic conditions. The water levels rise during the mid-1980's (1984 and 1986 were wet years) indicating recharge. Also beginning in about 1993 water levels for all graphs were trending upward due to wet years in the 1990's also indicating recharge. The downward trends from the mid 1960's to the early 1980's are shown by the two graphs with a longer period of record. These graphs also mirror the other graphs when matched with the recent time frame. Also there are downward trends in the late 1980's through the early 1990's and from 2000 to the present. The downward trends represent periods of less recharge (diminished precipitation) combined with increased pumping. The hydrographs indicate that pumping can affect water levels in the short term where the aquifer is under artesian conditions. Only where the observation well is under artesian conditions (SP-77L and SP-66E) is there a distinctive response to pumping (annual drawdown and recovery).

The absolute best records available are the observation well hydrographs. Even though there may be occasional measurement errors in this record the consistency of the record from well to well is remarkable. Since 1966, even with pumping associated with over 12,000 acres of irrigation development, and considering the intervening drought and wet years, the fall of 2005 aquifer water level as measured in the observation wells SP-66D and SP-66E is 1.4 feet and 2.0 feet respectively above the September 1967 level. This indicates that the aquifer is capable of sustaining permitted diversions within the context of the hydrologic conditions of the last forty years. The combination of wet years (more potential recharge) and less pumping are obvious from the hydrograph data and the data presented in Table 1.

REGULATORY DISCUSSION

SDCL 46-6-3.1 states:

"No application to appropriate groundwater may be approved if, according to the best information reasonable 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.”

In this instance the water source is the Tulare East James aquifer and this aquifer is not stratigraphically lower than the Greenhorn Formation.

The best estimate for average annual recharge is 7,950 acre-feet per year. The pumping record indicates that during the last 20 years the pumped volume has surpassed the estimate for average annual recharge seven years (Table 1). However, the average pumping for the last 20 years has been 6,981 acre-feet per year which is less than the estimated average recharge of 7,950 acre-feet per year. The average pumping for the last five years of record is 10,322 acre-feet and this is greater than the average annual recharge. These statistics must be balanced with common sense and a practical understanding of irrigation practices and climate. The statute does not say average use just simply annual use. A recent Sixth Judicial Circuit court decision in the Hines v. SD DENR the judge ruled that “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” and overturned the Board’s decision of denial in that case.

SDCL 46-1-2 states:

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

SDCL 46-1-4 states: (in part)

“It is hereby declared that because of conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable method of use of water be prevented, and that the conservation of such 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 46-1-6(3) states:

“Beneficial use” any use of water within or outside of 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:

From a practical point of view these three statutes convey the idea every effort should be made to put water to beneficial use. Whether this means to use as the judge described average pumping records or some other combination of factors yet to be determined is

open for consideration. If you examine the pumping records closely the very first thing noticed is the wide range in pumping volumes. Common sense dictates the reason for this. During wet years water is not needed, thus less is pumped and conversely during dry years more water is pumped because more is needed for crop growth. A more subtle fact is that management practices change with time. Not all permits are used every year and within individual permits, not all the acres permitted are irrigated every year. In fact, irrigation development is a gradual process with generally more water used as time goes by and full development of permits is realized (Table 1). For this particular aquifer full development appears to have been attained in the late 1980's and early 1990's. Then the acreage was redeveloped in the last five years. Apparently the very wet years of the middle 1990's impacted the use of existing permits and additional development of permitted acres. The most recent development is probably because of drier climatic conditions but also because new permit applications were being denied by the Board thus encouraging existing permits to be fully used.

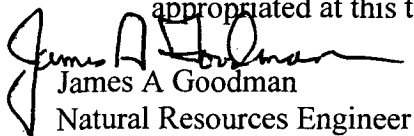
REVIEW OF EXISTING WATER PERMITS/RIGHTS

There are four existing irrigation wells within one mile of these proposed wells. The nearest irrigation well is about one-half mile northeast of the east well for this application. That is water right No. 1358-3. Interference is not expected to be a concern. Significant drawdown created by pumping does not extend very far from the pumping well. This is also shown by the observation well record. The question is not one of well interference but one of determination of average annual recharge and whether pumping exceeds that standard.

CONCLUSIONS

1. The Water Management Board has previously determined that water is not available for appropriation from the Tulare East James aquifer. This is based upon the expected water use from the aquifer compared to the average annual recharge to the aquifer. The Board has denied seven water permit applications for water from the Tulare East James aquifer. Water use from the Tulare East James has exceeded estimated average annual recharge seven years in the last 20 years.
2. In light of the judge's decision in *Hines v. SD DENR* the judge directed the Board to use average pumping as criteria for considering water availability. The average annual recharge for the aquifer is estimated at 7,950 acre feet. The average use from the aquifer for the last 20 years has been 6,981 acre feet. In theory, for an average year this would have left about 969 acre feet available for appropriation annually.
3. Using the 8.2 inches per acre per year average for water use from the aquifer, and considering there could have been 969 acre-feet of water available annually this would mean that an average of about 1,420 acres of additional land could have been irrigated during the last 20 years.
4. Well interference is not anticipated to be a concern. Pumping by individual production wells does not seriously impact other production wells. This is shown by the observation well record.

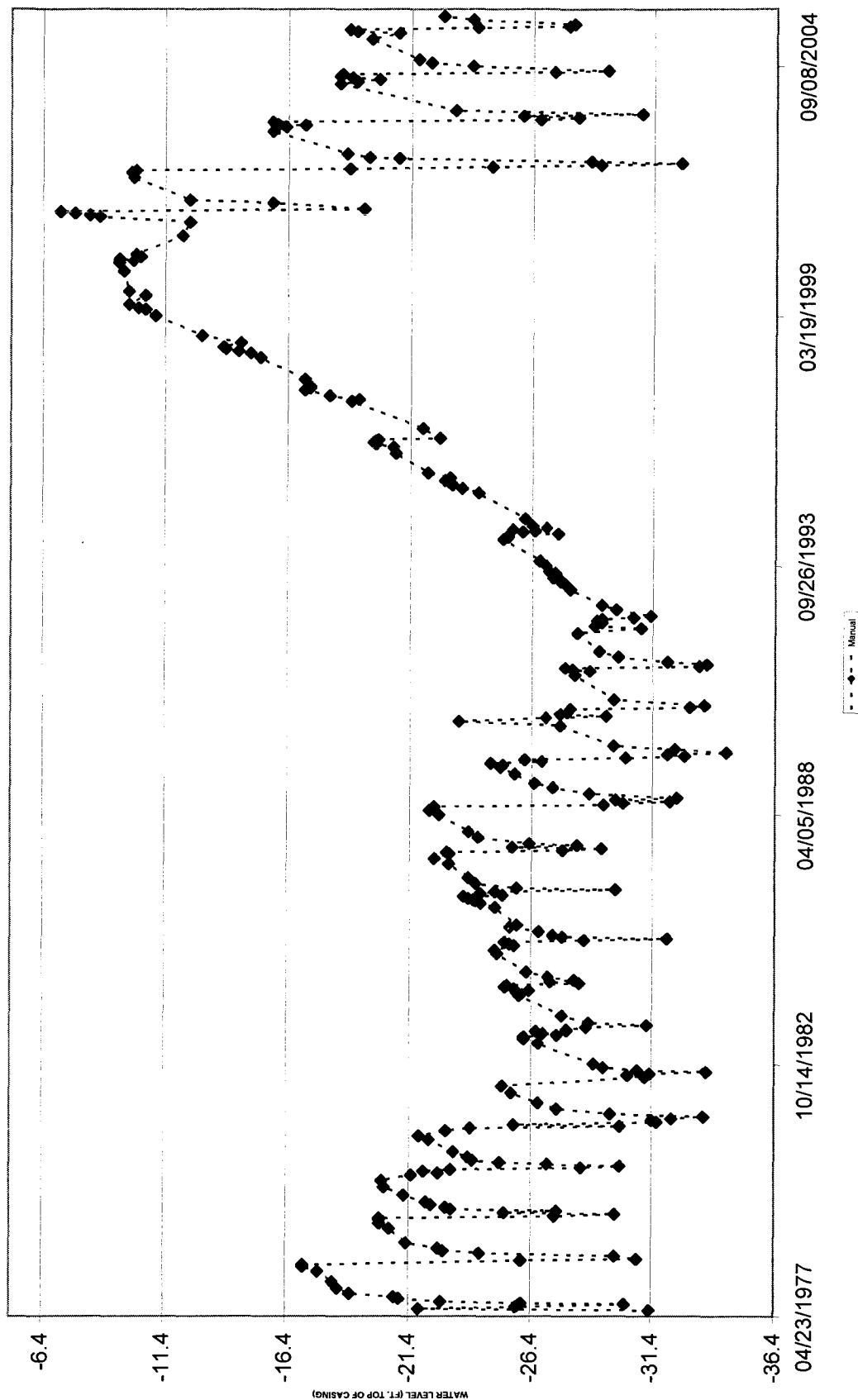
5. The best information available is the observation well record. That information combined with the precipitation data and the data presented in Table 1 are the most accurate and definitive available. It is also apparent that climatic conditions do affect the water level in the aquifer. Recharge from precipitation does occur. The effects of precipitation upon ground water levels appear to be gradual phenomena but nonetheless obvious.
6. Comparing aquifer storage to aquifer pumping indicates that less than three percent of water in storage has been used in a year of maximum pumping. The storage in aquifer dwarfs the water use. Pumping can go on for many years with little or no recharge to the aquifer and storage would be the source of water. This appears to be what occurred during the 1970's and early 1980's (based upon the observation well hydrographs). The problem is in determining how much of that decline can be attributed to pumping and how much simply lack of recharge.
7. Considering all the factors including pumping, recharge, aquifer area and storage, observation well hydrographs, historical development, statutes, and general irrigation practices on an equal basis, indicates that the preponderance of data suggests that the aquifer is near to being fully appropriated based upon use.
8. There is an overriding obligation in water law to protect the existing permit or right holders. Even though the estimates used to make the water availability determination are conservative and in part based upon experience there is a point in time where full appropriation does occur. This decision on full appropriation is inevitable.
9. There are 13,785 acres under irrigation permit or right for water from the Tulare East James aquifer as of March 2006. The record indicates that the acres reported used have never exceeded 12,489 acres (Table 1).
10. Aquifer development is not static and developed acres are always changing. There will be abandonment of acres, transfers, management decisions that will always affect permitting.
11. The analysis presented here is not meant to be the final word on the Tulare East James aquifer. The one factor which has the greatest potential for error is the estimate for average annual recharge. The 7,950 acre feet (0.76 inches per year) estimate for recharge is conservative but reasonable.
12. The Tulare East James aquifer should be considered fully appropriated with a developed acreage of 11,634 acres. This calculated acreage assumes an average use of 8.2 inches per year (the historical 20 year average) and is limited by the total average annual recharge of 7,950 acre-feet per year.
13. At the May 3, 2006 Water Management Board Meeting the Board approved 844 acres of additional development from the Tulare East James aquifer and also determined that 576 additional acres could be developed. Application Nos. 6711-3, 6712-3 and 6713-3 will use all the additional acreage available. Approval of these applications effectively means the Tulare East James aquifer is fully appropriated at this time.


James A. Goodman
Natural Resources Engineer

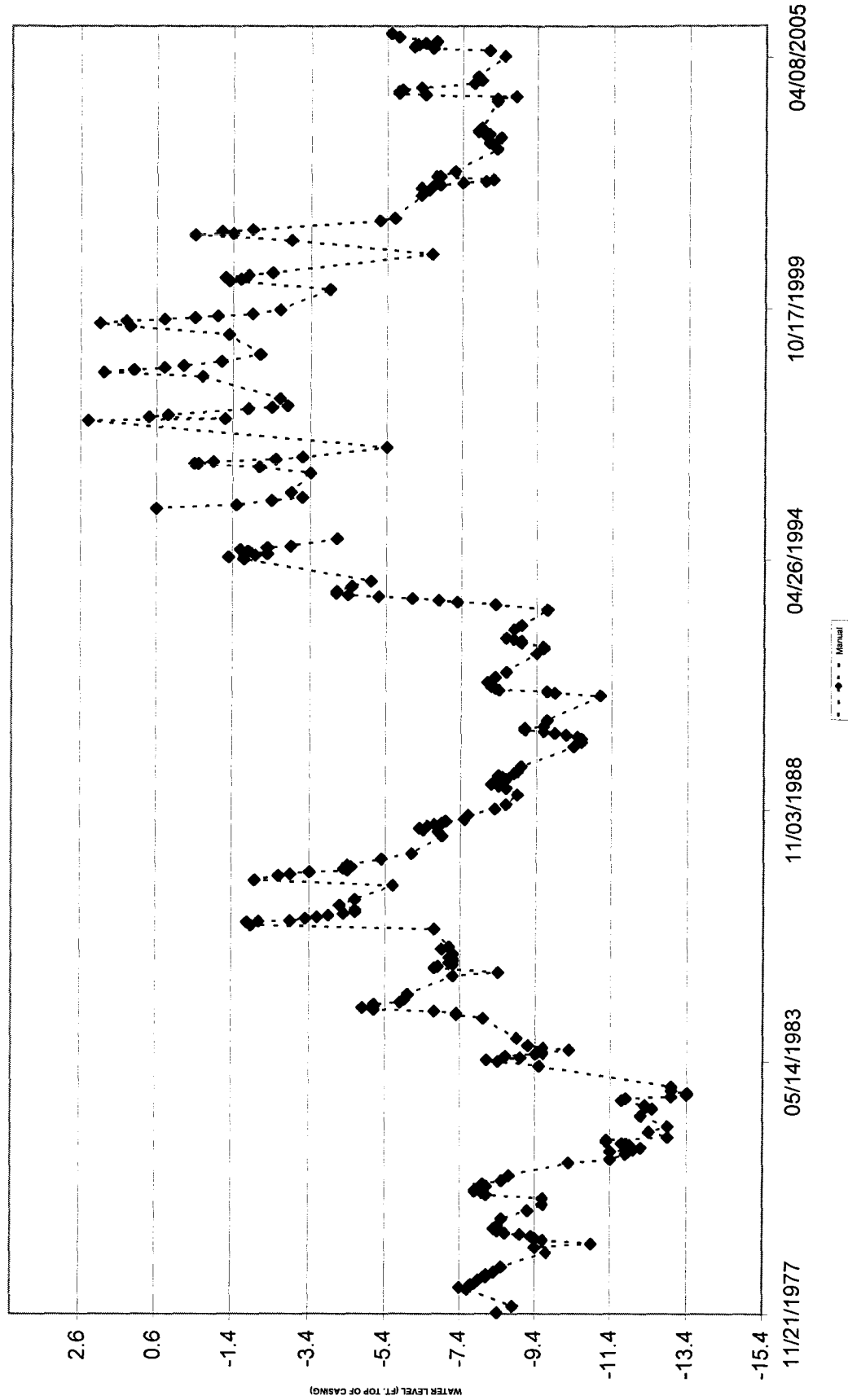
BIBLIOGRAPHY

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- Water Rights, 2006, Unpublished Observation Well Data for the Tulare East James Aquifer, SD DENR, DES, Water Rights Program, Pierre, SD, 57501.

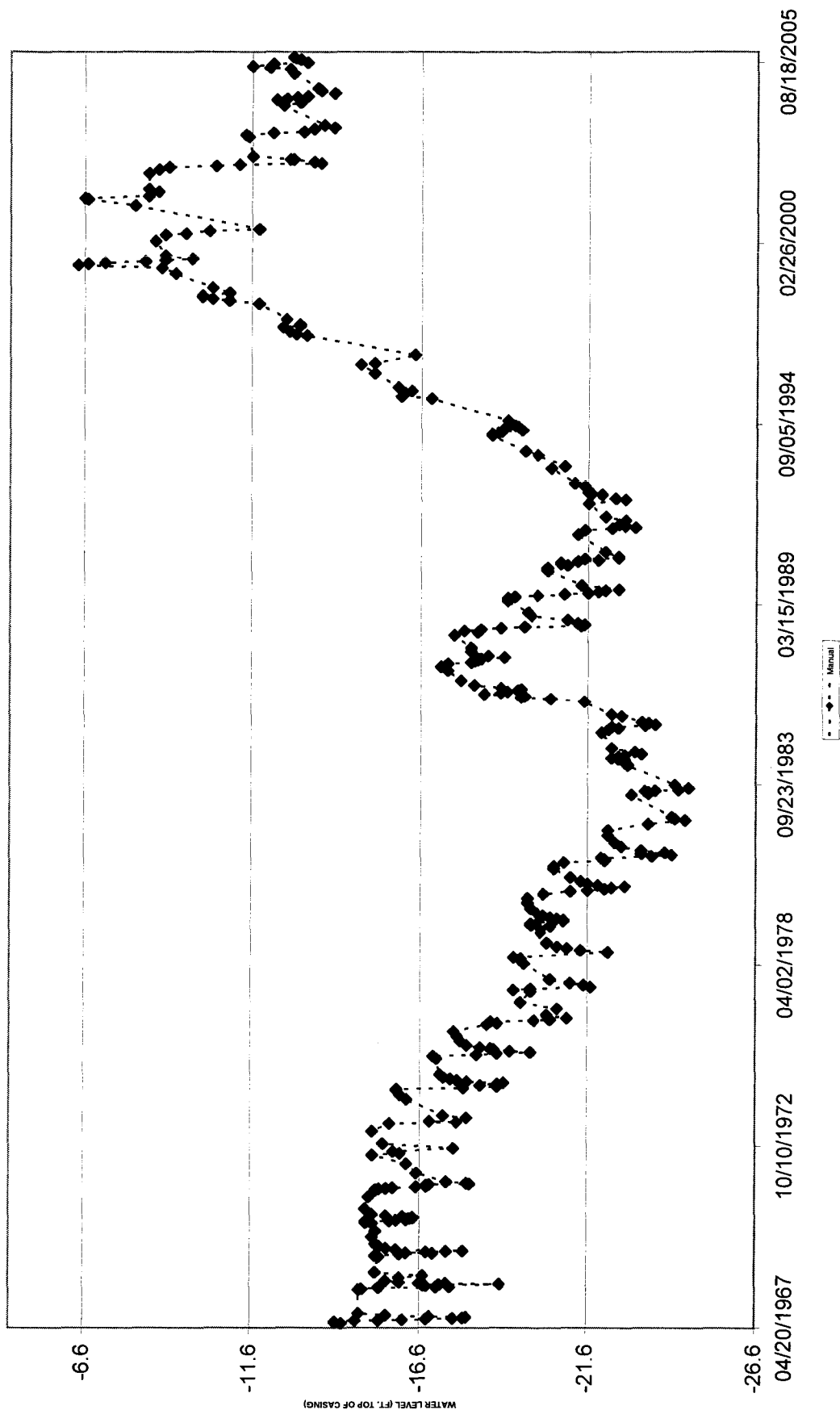
WATER RIGHTS' OBSERVATION WELL
SP-77L



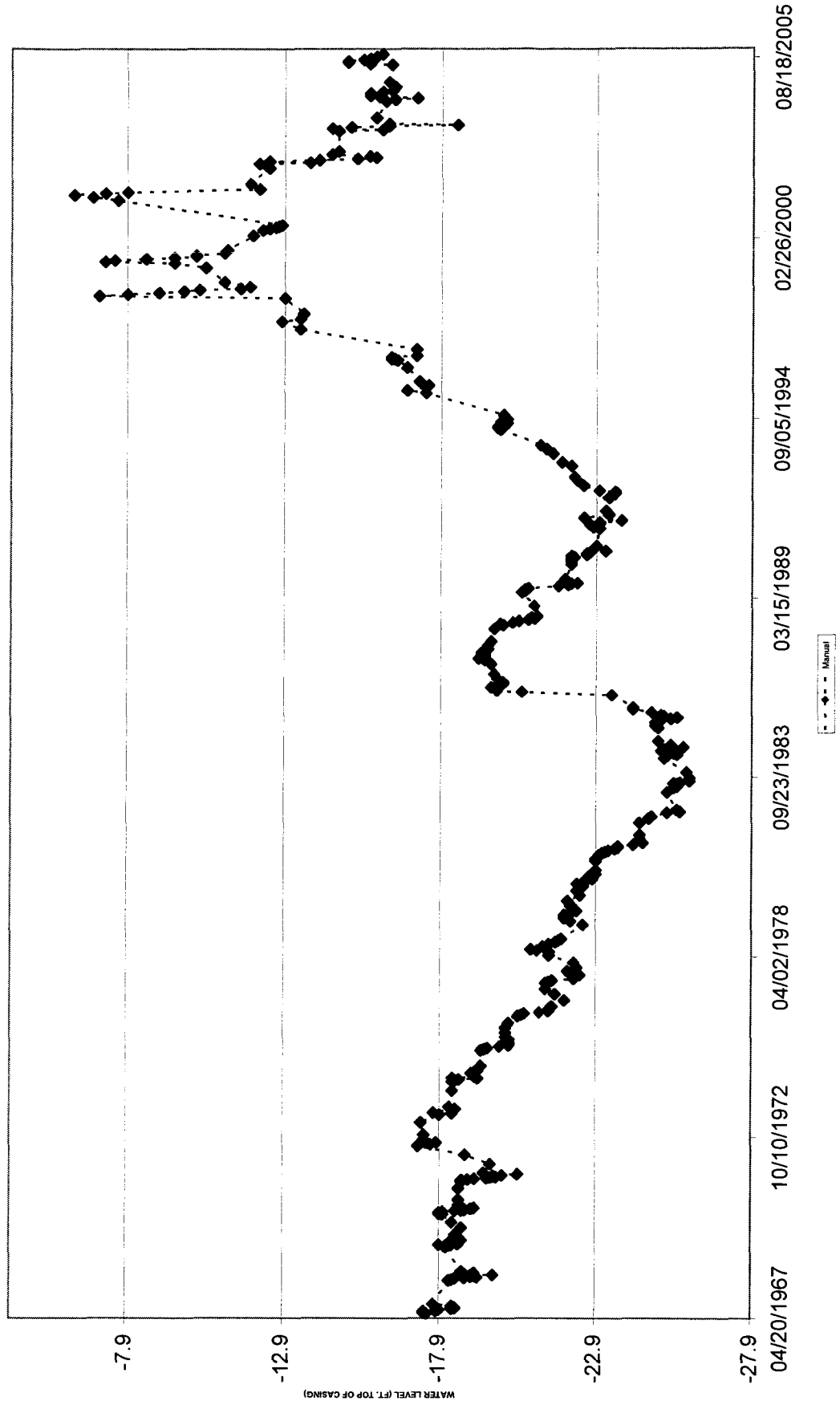
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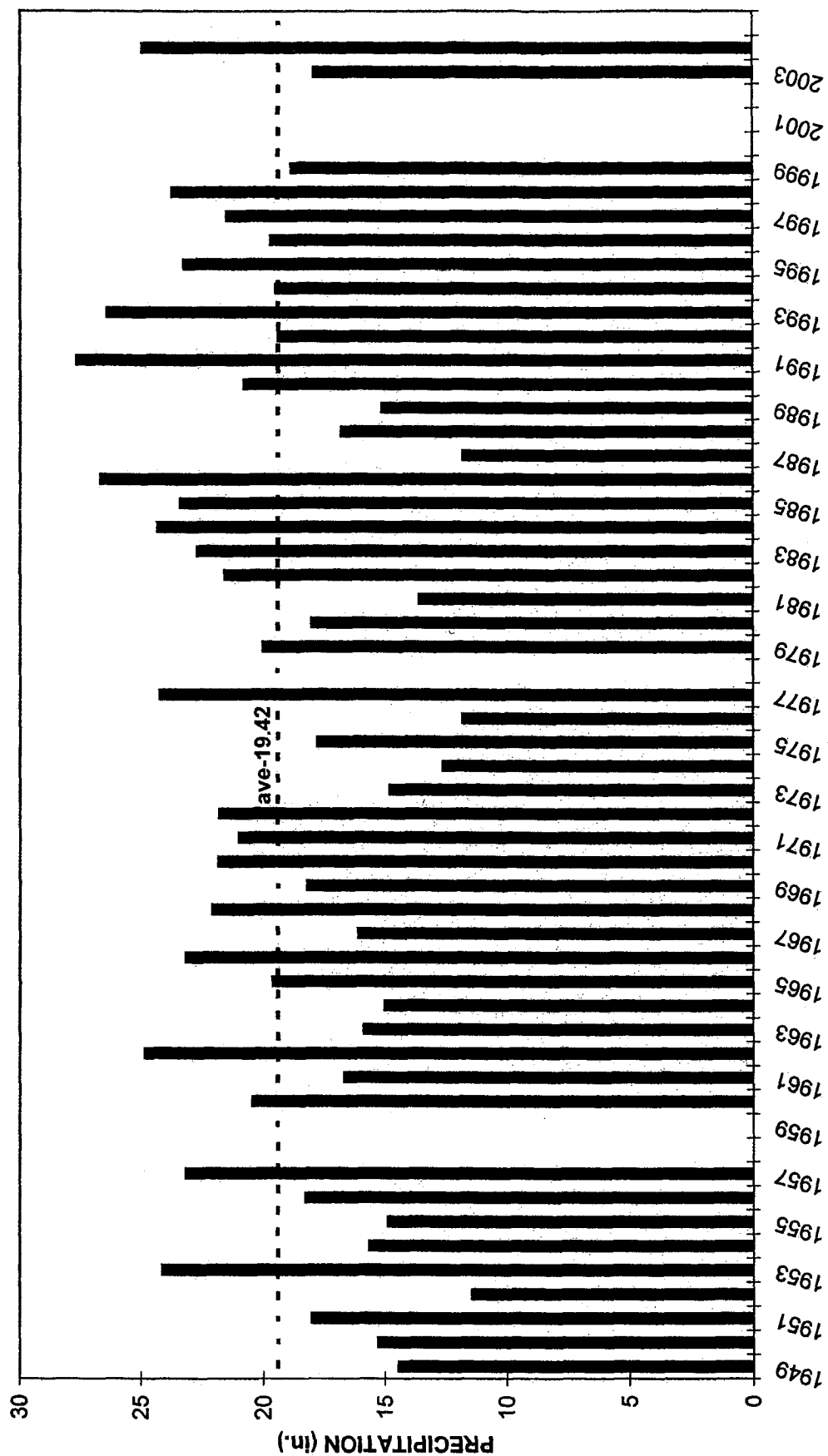
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SP-66E



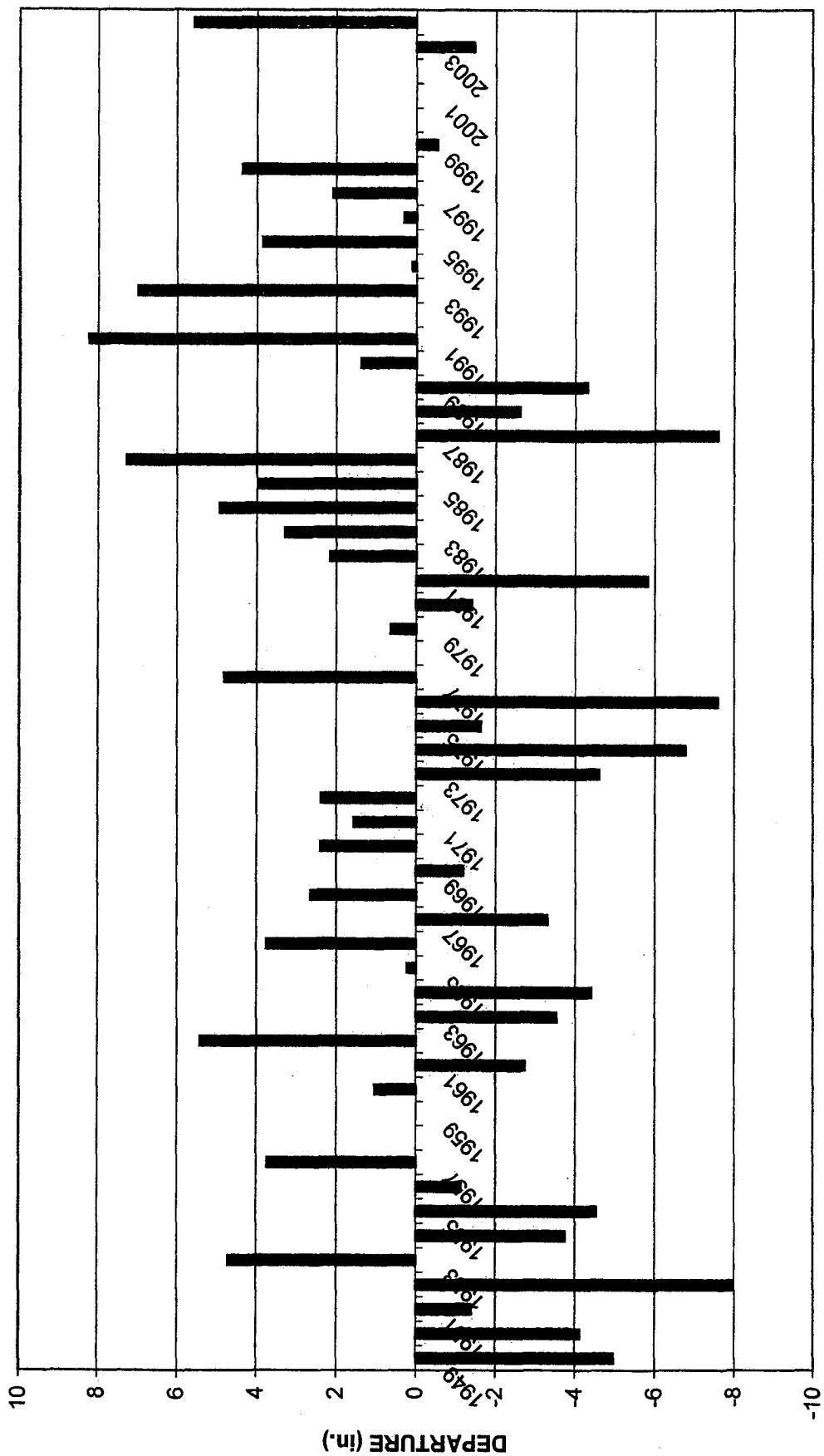
WATER RIGHTS' OBSERVATION WELL
SP-66D



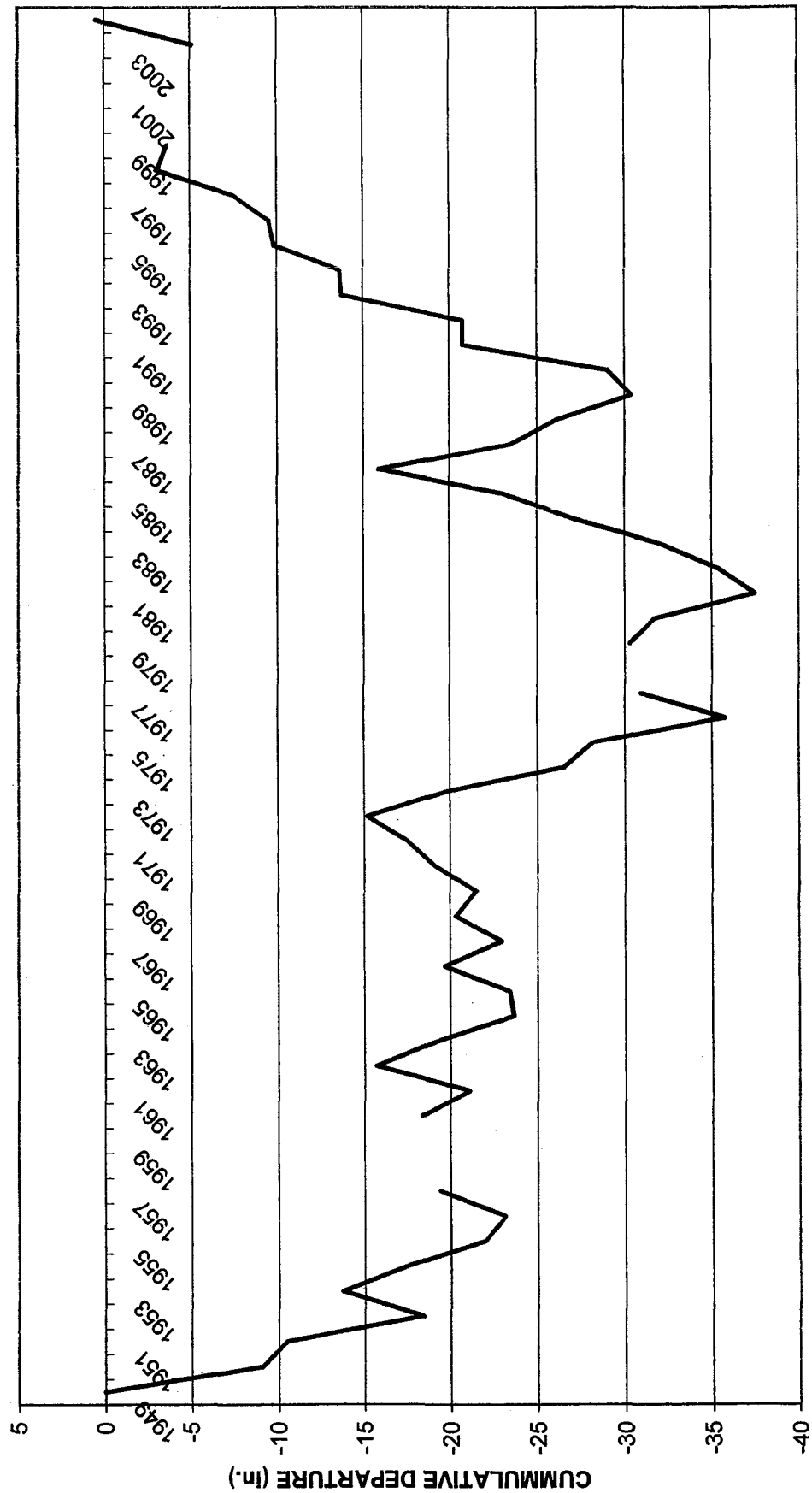
**ANNUAL PRECIPITATION
at REDFIELD 2 NE, SD
1949-2004**



ANNUAL DEPARTURE FROM AVERAGE PRECIPITATION
REDFIELD
1949-2004

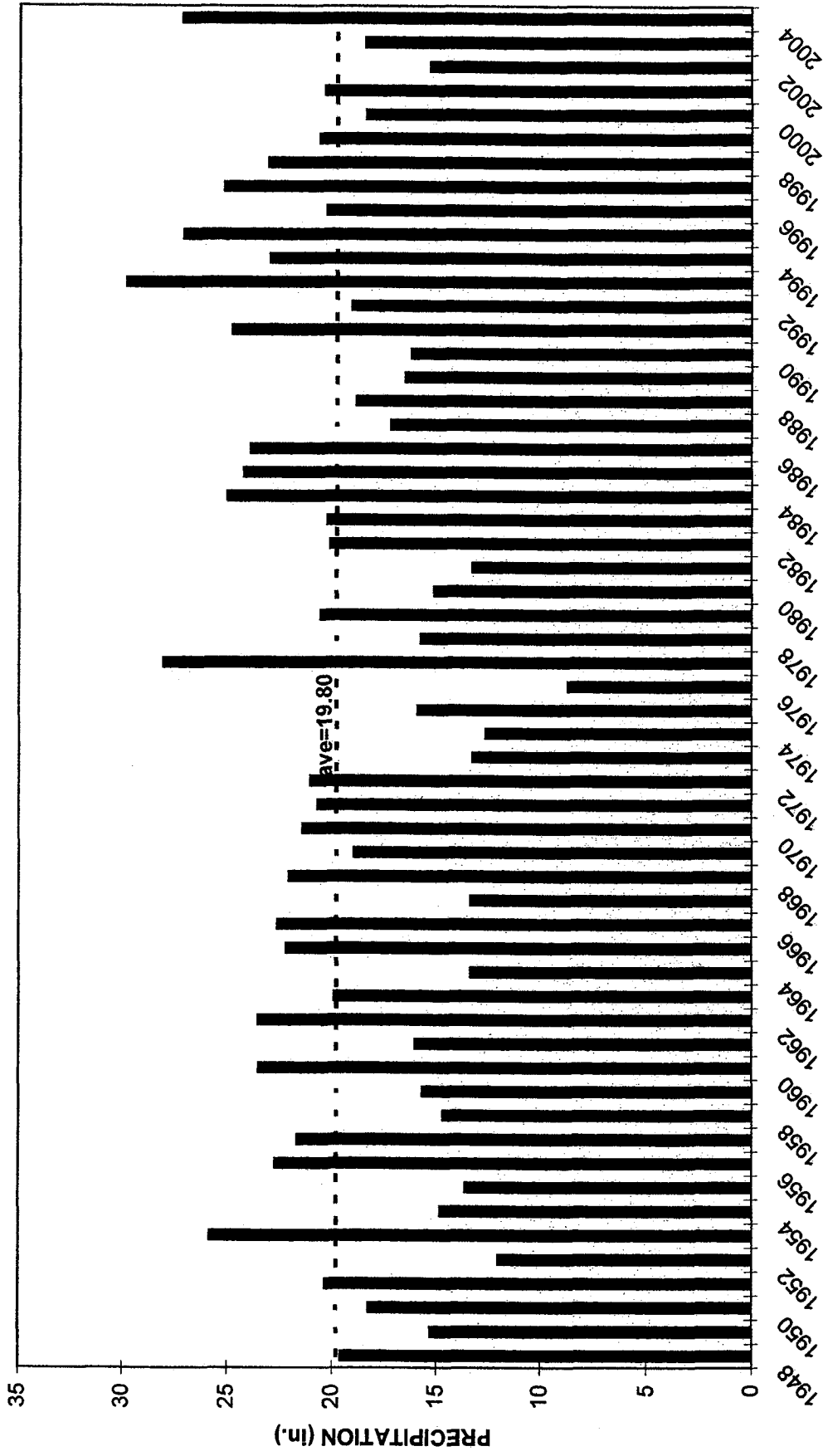


CUMMULATIVE ANNUAL DEPARTURE
FROM AVERAGE PRECIPITATION
REDFIELD
1949-2004

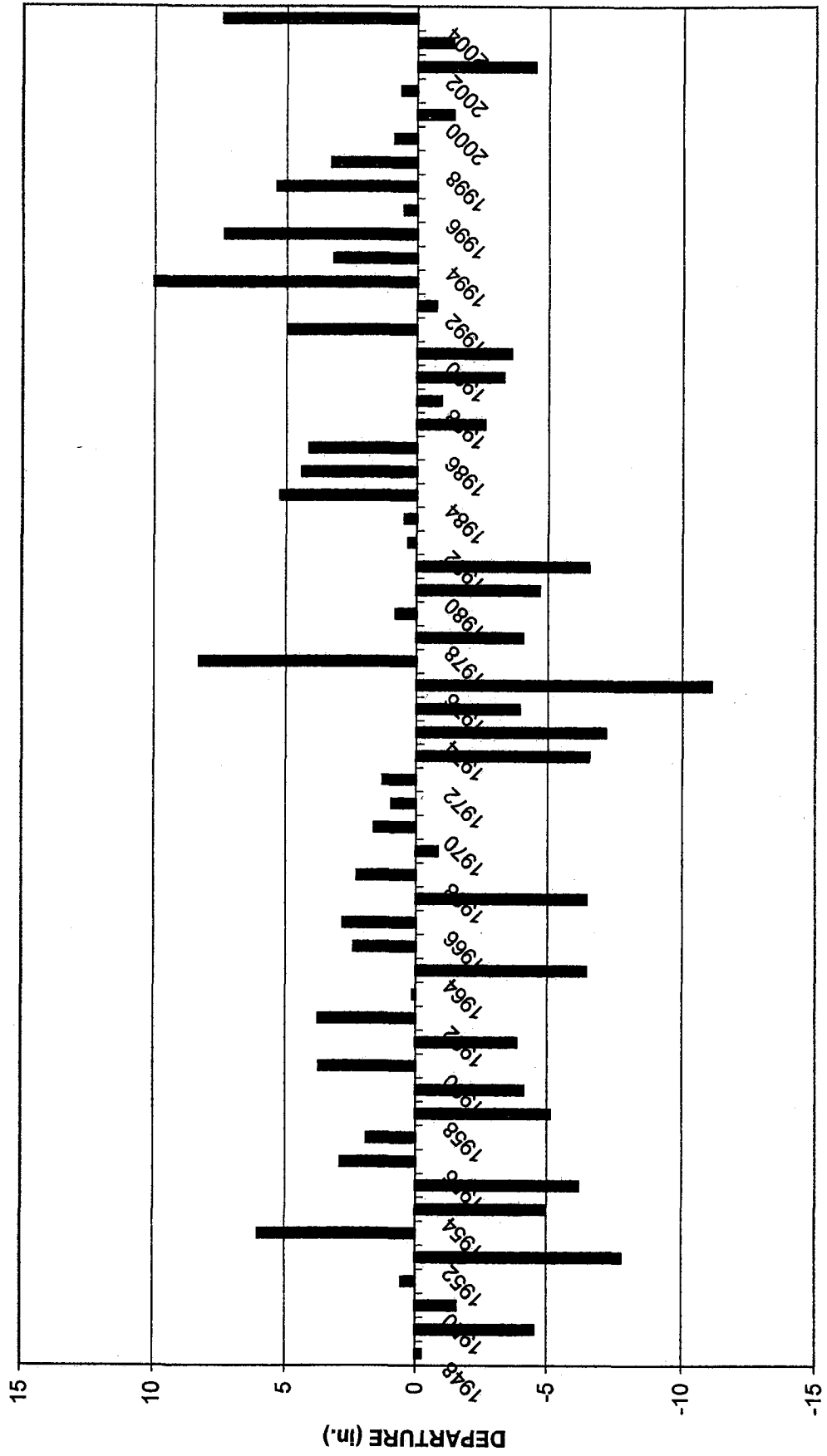


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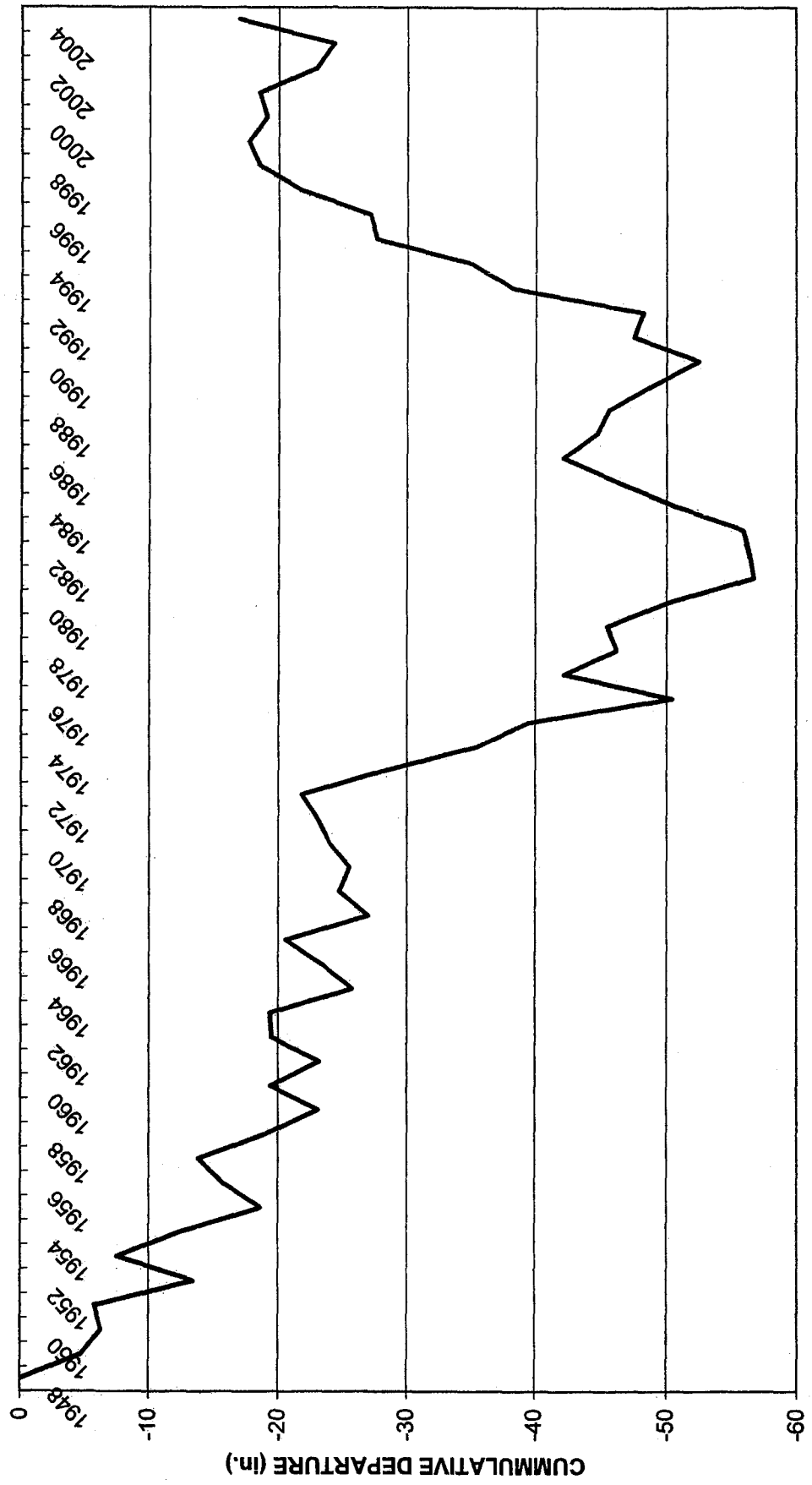
ANNUAL PRECIPITATION
at RAYMOND, SD
1948-2004



**ANNUAL DEPARTURE FROM AVERAGE PRECIPITATION
RAYMOND
1948-2004**



**CUMMULATIVE ANNUAL DEPARTURE
FROM AVERAGE PRECIPITATION
RAYMOND
1948-2004**



Affidavit of Publication

STATE OF SOUTH DAKOTA,
County of Spink: ss.

I, Mark E. Davis, of said County & State, being first duly sworn on oath, say that THE REDFIELD PRESS is a legal weekly newspaper as defined in Sec. 65.0508 South Dakota Code 1939, as amended by Chapter 298 of the Session of Laws of 1939, printed and published in the English language in the City of Redfield, in said County and State, by THE REDFIELD PRESS, and has been such newspaper during the time hereinafter mentioned, and that I Mark E. Davis, the undersigned, am Publisher of said newspaper in charge of the advertising department thereof, and have personal knowledge of all the facts stated in this affidavit, and that the legal or official notice entitled:

262 Floyd Peterson, Water Appropriation

A printed copy of which is hereto attached, was printed and published in said newspaper in 2 successive issues, to wit: The first publication being made on June 14, 2006 and the last publication being made on June 21, 2006 that the full amount of Seventy - Four and 30/100 Dollars, insures to the benefit of the publisher of THE REDFIELD PRESS, 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.



Subscribed and sworn to before me this 15th day of June, 2006.



Notary Public, South Dakota

My commission expires 11/10/09

Notice

#262

NOTICE OF HEARING on Application No. 6711-3 to Appropriate Water

Notice is given that Oscar Inc., c/o Floyd Peterson, 18892 390th Ave, Hitchcock SD 57348 has filed an application for a water permit to appropriate 4.34 cubic feet of water per second from two wells to be completed into the Tulare:East James Aquifer (approximately 100 feet deep) located in the centers of the SE 1/4 and NE 1/4 Section 8 to irrigate 304 acres located in the E 1/2 Section 8; all in T114N-R61W.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 6711-3 because 1) unappropriated water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest. In making this recommendation, the Chief Engineer recognizes a recent court decision directing the use of average pumping as a criteria for considering water availability. Based on this analysis, approximately 1,420 additional acres could be authorized for irrigation from the Tulare:East James Aquifer. Of that amount, applications comprising 844 acres were approved May 3, 2006. Currently, Application No.s. 6711-3, 6712-3 and 6713-3 are pending for the remaining 576 acres which will bring the Tulare:East James Aquifer to fully appropriated status under the present water availability analysis. There are five other new applications proposing to appropriate water from 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 July 3, 2006. 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,

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If legal counsel is obtained.

The Water Management Board will consider this application at 8:45 A.M. July 12, 2006 in the Matthew Training Center, Joe 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 July 12, 2006 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 July 3, 2006.

Any hearing will be an adversary proceeding. Any person filing a petition and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by July 3, 2006, 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.

Since this application does not involve a monetary controversy in excess of \$2,500.00 or termination of a property right in accordance with SDCL 1-26-18.3, the Chief Engineer has determined this contested case may not be referred to the Office of Hearing Examiners. If any party disagrees with this determination, the Chief Engineer shall be notified by July 3, 2006.

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.

(June 14, 21)



Instruction to Newspaper - Publish first Notice on June 14, 2006 with the second publication 7 days later. The applicant is responsible for payment.

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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.

June 7, 2006

Oscar Inc
% Floyd Peterson
18892 390th Ave
Hitchcock SD 57348

Dear Mr. Peterson:

Water Permit Application No. 6711-3 for irrigation use has been examined and found to comply with the South Dakota Water Laws and applicable rules. A notice has been sent to the Publisher of the Redfield Press printed at Redfield, SD (Ph # 605-472-0822). You will need to contact the newspaper and authorize publication of this notice. For your information, a copy of the notice, the recommendation of the Chief Engineer and a report on the application are enclosed. Please review the notice prior to publication and notify this office, if you have any corrections or questions.

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

Sincerely,

Eric Gronlund
Natural Resources Engineer
(605) 773-3352

enclosures

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



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

PMB 2020
JOE FOSS BUILDING
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www.state.sd.us/denr

June 7, 2006

Redfield Press
PO Box 440
Redfield SD 57469-0440

ATTENTION: Legal Public Notice

Enclosed is a Notice on Application No. 6711-3 to Appropriate Water to be published twice. Please publish the first notice on June 14, 2006 with the second publication 7 days later. The text of the notice can be e-mailed to your paper by contacting Karen Schlaak at (605) 773-3352.

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 Oscar Inc, % Floyd Peterson, 18892 390th Avenue, Hitchcock SD (Ph # 605-266-2747).

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-----

Nos. 6711-3

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

Date _____

We are in receipt of your letter of June 7, 2006 enclosing Notice to Appropriate Water by Application No. 6711-3 which was first published in our issue of _____. **ENCLOSED IS A COPY OF THIS FIRST PUBLICATION.**

Name

Newspaper

Chief Engineer
Water Rights Board

I am filing a written petition
with the water rights program
in opposition to any one
of three permit applications
~~6712~~ 6712-3 6713-3 6711-3. I
would like to be heard and
considered on a 30 yr old
application in conjunction with
3728-3

Ron Starr

Ron Starr

40283 US HWY 212
Doland SD, 57436

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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

July 3, 2006

Lenny Peterson
Peterson Farms
19111 Maple Avenue
Hitchcock SD 57348

Floyd Peterson
Oscar Inc.
18892 390th Avenue
Hitchcock SD 57348

Gentleman:

Enclosed is a petition filed in the matter of your water permit applications.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
605 773-3352

enclosure

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
FAX (605) 773-4106
www.state.sd.us/atg

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JUL 10 2006

WATER RIGHTS
PROGRAM

LARRY LONG
ATTORNEY GENERAL

July 6, 2006

MARK BARNETT
CHIEF DEPUTY ATTORNEY GENERAL

Frank E. Brink
1214 S. Wells St.
Aberdeen, SD 57401-7351

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

Dwayne Rollag
320 Lincoln Lane, S.
Brookings, SD 57006-2741

Everett Hoyt
4422 Carriage Hills Dr.
Rapid City, SD 57702-6874

Leo Holzbauer
29416 395th Ave.
Wagner, SD 57380

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

James Hutmacher
802 E. 7th St.
Oacoma, SD 57365

Hand Delivery to:
John Guhin
Office of Attorney General
1302 E. Hwy. 14, Ste. 1
Pierre, SD 57501-8501

RE: Tulare East James Aquifer Applications

Dear Board Members and Counsel:

Enclosed is a prehearing brief regarding the water permit applications for the Tulare East James Aquifer that will be heard on July 12.

Also, in preparing this brief I discovered an error in the proposed Findings for the previous round of Tulare East James cases. Those Findings are also scheduled for July 12. The error is that the acreage on one of the St. Clair applications (No. 6675-3) is 100 acres not 120 acres. This affects Finding of Fact 4 only. I apologize for the timing of this proposed correction.

Sincerely,

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

Diane Best
Assistant Attorney General

DB/sk

Enclosure

cc/enc: Peterson Brothers
William St. Clair
Oscar, Inc.

Water Management Board & Counsel

July 6, 2006

Page 2

bcc/enc: Garland Erbele (Interoffice)

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6711-3)
(OSCAR, INC.), 6712-3 AND) PREHEARING BRIEF
6713-3 (PETERSON FARMS),)
6715-3 (UNITED FEEDERS, LLP),)
AND 6728-3 (RON STARR))

PRELIMINARY STATEMENT

Several separate permit applications have been filed for water use from the Tulare East James Aquifer. They are scheduled for July 12, 2006. This prehearing brief discusses legal issues common to all of these pending permit applications.

BACKGROUND

A large number of water permit applications for irrigation were granted from the Tulare East James Aquifer in the 1970s. In the late 1970s concerns arose regarding the water level in the aquifer and the Board deferred a number of applications pending further study of the aquifer and due to concerns over spacing of irrigation wells. The Board discontinued issuing new permits from this aquifer in 1981 and early 1982. The Board also denied the deferred applications in the 1980s.¹ The basis

¹ At least one permit application remained in deferred status even longer at the applicant's request. This was application 3325-3 filed by Philip Hill. Ron Starr was a tenant on the property when this application was filed in the 1970s. The application was ultimately denied in 2002 and no appeal was lodged.

for denying these water permits is SDCL 46-6-3.1:

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.

As seen, SDCL 46-6-3.1 requires study of both the "quantity of water withdrawn annually" and the quantity of the "average estimated annual recharge of water in the ground water source for each aquifer."

For each of the above referenced applications, the Water Rights Program developed an analysis addressing the factors in SDCL 46-6-3.1 (in addition to the criteria in SDCL 46-2A-9).² In calculating the "quantity of water withdrawn annually," the Water Rights Program used pumping records. The Water Rights Program calculated the average annual pumping rate from the aquifer, studied recent trends in water use, and analyzed the pumping

² SDCL 46-2A-9 sets forth the four basic factors for considering water permits:

A permit to appropriate water may be issued only if there is reasonable probability that there is unappropriated water available for the applicant's proposed use, that the proposed diversion can be developed without unlawful impairment of existing rights and that the proposed use is a beneficial use and in the public interest.

records in light of recent climatic events. In each case, the Water Rights Program recommended that the permit applications should be denied because the "quantity of water withdrawn annually" exceeded the average annual recharge rate. The water permits were consistently denied by the Board under SDCL 46-6-3.1.

Not surprisingly, water permit applications in this area tapered off in the 1990s. Following the strong wet cycle in the 1990s, a new water permit application was again filed for the Tulare East James Aquifer (Hines application). The Water Rights Program again made the same analysis. Jim Goodman testified on behalf of the Water Rights program that the water permit should not be granted in light of SDCL 46-6-3.1. The Water Board agreed and denied the permit. An appeal was filed in Hughes County Circuit Court. The Court's Memorandum Opinion dated April 25, 2005, is attached.

As seen from the opinion, the Circuit Court disagreed with the analysis previously used by the Water Rights Program for calculating "quantity of water withdrawn annually." The Court's basis is its interpretation of SDCL 46-6-3.1. The Court held that calculating the "quantity of water withdrawn annually" must be based on average usage and that recent trends in climatic conditions or pumping use should not be separately accounted for.

The Court issued its judgment on June 15, 2005. The DENR did not appeal the Court's decision.

Following the Court's decision, four new permit applications were filed by Oscar, Inc. and Peterson Farms for water use from the Tulare East James Aquifer. Consistent with the Court's decision, a new calculation was then developed by the Water Rights program for analyzing these applications. The new calculation showed that there would be 969 acre feet of water available annually which would provide water for irrigation for an average of about 1,420 acres.

As part of the application process, applicants Peterson Farms and Oscar, Inc. were given a copy of the Chief Engineer's recommendation containing this calculation. This is required since the applicants must authorize publication. SDCL 46-2A-4. The analysis showed that the Chief Engineer recommended approval of the Peterson Farms/Oscar, Inc. applications for water sufficient to irrigate 844 acres. The recommendations and analysis further showed that the Oscar, Inc./Peterson Farms pending applications would use only part of the water available. Peterson Farms and Oscar, Inc. immediately filed more new applications for the rest of the calculated water available.

The hearing on the first set of applications filed by Peterson Farms and Oscar, Inc. was held in May. The second set is scheduled for July 12. Other applicants have filed for water

permits and those applications are also being heard on July 12. Those applicants are United Feeders, LLP and Ron Starr.

TESTIMONY TO BE PRESENTED

At hearing, the Water Rights Program expert witness, Jim Goodman, will testify concerning the calculations made under 46-6-3.1.

The new method for calculating water availability is, consistent with the recent court decision, based on average pumping over the last 20 years. The 20-year period was developed based upon the appropriation history for this aquifer. A group of permit applications from the aquifer was approved in 1981 with the last permit finally approved in April of 1982. Given the fact that South Dakota Water Right Law (SDCL 46-2A-8) allows for five years for development of a water permit, the water permits issued in 1981 and 1982 would have largely been developed by 1986. Accordingly, there is a period between 1986 and 2005 where the number of developed permits should have remained constant. Pumping history from this 20-year period was used for purposes of developing the calculation of average water use.

For the 20-year period, the Water Rights program examined annual irrigation questionnaires submitted by irrigators to the Water Rights program as required by permit conditions and administrative rule. The Water Rights program calculated the average water use, the total irrigated acres and the water use in

inches per acre. The average use from the aquifer for the last 20 years has been 6,981 acre feet. The average inches of water used per irrigated acre is 8.2 inches.

At hearing, Witness Goodman will compare the foregoing information with the other factor in SDCL 46-6-3.1: average estimated annual recharge. The average estimated annual recharge for the Tulare East James Aquifer was not disputed in the previous court decision and there is no new analysis on that issue. The total estimated aquifer recharge for the Tulare East James Aquifer is about 7,950 acre feet per year for the Tulare East James Aquifer in Spink and Beadle Counties.

The "average estimated annual recharge" is based on studies conducted by the USGS and the DENR in the early 1980s. The studies involved analysis of the aquifer area, saturated thickness and the recharge rate. This recharge rate has been accepted by the Board in many previous proceedings.

When the average annual use of 6,981 acre feet was subtracted from this 7,950 acre feet recharge rate, there were 969 acre feet left. Using the average 8.2 inches of water irrigated, this would allow for irrigation of an additional 1,420 acres beyond that previously permitted.

In May, 2006, the Water Board heard evidence regarding the foregoing methodology in the applications that had been filed right after the court decision was entered in the fall of 2005.

Findings of Fact and Conclusions of Law are pending and will be heard on July 13. Board Finding of Fact 15 is as follows:

The Board finds that there is an average use of 8.2 inches per acre per year of water use from the aquifer over the past 20 years. Considering that average across 969 acre feet of water available annually, it appears that an additional 1,420 acres of land can be irrigated without mining water, assuming that the 20-year average water use set forth above is unchanged in the future.

As seen, the Board's proposed Findings adopt the methodology advanced by the Water Rights Program at the May 2006 hearing.

Of the 1,420 acres involved, those first applications heard in May account for a total of 844 acres of land.

The pending applications to be heard on July 12 involve the same methodology. Given the 844 acres already spoken for, there is water available to irrigate 576 acres from the Tulare East James Aquifer. The total acreage of the various pending water permit applications filed in April 2006 would exceed that number of acres. Consequently, the Chief Engineer is necessarily recommending that some of the applications for water permits be granted and others be denied.

The Chief Engineer's recommendation is based on South Dakota's long standing water law providing that "the first in time is the first in right." SDCL 46-5-7. There is no legal discretion in that regard. Because the priority of appropriation dates from the time of filing of the application, the Chief

Engineer has recommended approval of irrigation permits filed by Oscar, Inc. (Application No. 6711-3) and Peterson Farms (Application Nos. 6712-3 and 6713-3). These applications are for irrigation of the full 576 acres and were filed on April 4, 2006.

The later applications were filed by United Feeders (Application No. 6715-3) and Ron Starr (Application No. 6728-3). They were filed on April 7, 2006, and April 24, 2006, respectively. The Chief Engineer is recommending denial of those permits.

Dated this 6th day of July, 2006.

A handwritten signature in cursive script that reads "Diane Best". The signature is written in black ink and is positioned above a horizontal line.

Diane Best
Assistant Attorney General
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Prehearing Brief In the Matter of Water Permit Application No. 6711-3 (Oscar, Inc.), 6712-3 and 6713-3 (Peterson Farms), 6715-3 (United Feeders, LLP), and 6728-3 (Ron Starr), before the South Dakota Water Management Board was served by United States mail, first class, postage prepaid, upon each of the following on this 6th day of July, 2006:

Frank E. Brink
1214 S. Wells St.
Aberdeen, SD 57401-7351

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

Dwayne Rollag
320 Lincoln Lane, S.
Brookings, SD 57006-2741

Everett Hoyt
4422 Carriage Hills Dr.
Rapid City, SD 57702-6874

Leo Holzbauer
29416 395th Ave.
Wagner, SD 57380

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

James Hutmacher
802 E. 7th St.
Oacoma, SD 57365

William St. Clair
37644 184th St.
Tulare, SD 57476

Lenny Peterson
Peterson Bros.
19111 Maple Ave.
Hitchcock, SD 57348

Floyd Peterson
Oscar, Inc.
18892 390th Ave.
Hitchcock, SD 57348

Gary Wipf
17801 401st Ave.
Frankfort, SD 57440

United Feeders, LLP
c/o Thomas Walsh
705 100th St. SE
DeGraff, MN 56271

Ron Starr
40283 U.S. Highway 212
Doland, SD 57436

and by hand delivery to:

John Guhin
Office of Attorney General
1302 E. Hwy. 14, Ste. 1
Pierre, SD 57501-8501

A handwritten signature in cursive script, reading "Diane Best", written over a horizontal line.

Diane Best
Assistant Attorney General
1302 E. Hwy. 14, Ste. 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215



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
Member South Dakota Association of Environmental Professionals

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 (DWNR - 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 (DWNR - 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 (DWNR - 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).

Nos. 6655-3 (Oscar Inc.), 6656-3 (Peterson Bros), 6675-3 and 6676-3 (St. Clair) approval from T-EJ aquifer for irrigation.
Nos. 6693-3, 6694-3, 6695-3 (L. Gatzke), 6687-3, 6688-3 (W. Watson), 6689-3 (M. Watson) irrigation T-WS and T-H aquifers.

Nos. 6668-3, 6669-3, 6670-3, 6671-3 for irrigation Bixler Farms deferral from T-H aquifer.
Nos. 6660-3 and 6661-3, for Lee Gatzke, deferral of irrigation permits from Tulare Hitchcock aquifer
No. 4586A-3, for William St. Clair, irrigation permit transfer from Tulare East James aquifer
No. 6632-3, for Prairie Gold Dairy, LLC. (commercial dairy)
No. 6594-3, for Riverside Colony, irrigation (Tulare-Hitchcock aquifer)
No. 6576-3, for Lee Kleinschmidt, irrigation
No. 6560-3 and 6578-3, for Louis Fritz, irrigation near Raymond
No. 6581-3, for Fremark Feedlot, cattle feedlot near Miller
No. 6540-3, for Roger Mohr, irrigation use above Watertown Future Use Area
No. 6476-3, for Morris Inc, industrial use
Nos. 6460-3, 6461-3, 6462-3, 6463-3 for Gary Marshall, irrigation (deferral)
No. 6201A-3 (and 6334C-3) for Peterson Farms, irrigation
No. 6445-3 for Spink Colony, irrigation use, recommend denial
No. 6456-3 for South Lincoln Rural Water System, rural water use, Dakota formation
No. 6407-3 for Marshall Brothers, commercial use for an existing cattle feedlot
No. 6437-3 for Crosswinds Jerseys, commercial use for a dairy
No. 6439-3 for Norway Dakota, commercial use for an existing cattle feedlot
No. 6435-3 for South Lincoln Rural Water System, rural water use including the ethanol plant at Chancellor

No. 6403-3 for Rick Even, irrigation
No. 6414-3 for Andy Weber, irrigation
No. 6431-3, Philip Hines, irrigation
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.



CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

HUGHES COUNTY COURTHOUSE
P.O. BOX 1238
PIERRE, SOUTH DAKOTA 57501-1238
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MAX A. GORS
PRESIDING JUDGE
Max.Gors@ujs.state.sd.us

COURT REPORTER
LESLIE HICKS
605-773-6839
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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

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 then 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.

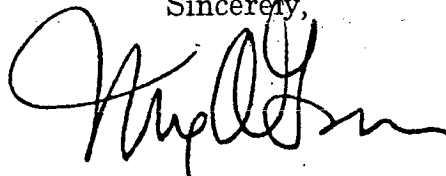
[¶19.] The proposed use is a beneficial use and in the public interest. Beneficial use is defined as "any use of water within or outside the state, that is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interests of the public of this state in the 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 in a cursive style.

Max Gors

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.



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

July 24, 2006

NOTICE

TO: Floyd Peterson
Oscar Inc.
18892 390th Avenue
Hitchcock SD 57348

Lenny Peterson
Peterson Brothers
19111 Maple Avenue
Hitchcock SD 57348

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

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

The Water Management Board directed John Guhin, Assistant Attorney General, to prepare proposed Findings of Fact, Conclusions of Law and a Final Decision in the approval of Water Permit Application No. 6711-3 (Oscar Inc.) and Nos. 6712-3 and 6713-3 (Peterson Farms) from the Tulare:East James Aquifer. The Board will consider adoption of Findings, Conclusions and Final Decision at 8:30 AM, on October 11, 2006, in the Visitor Center (west side of Capitol Lake) 650 E. Capitol Avenue, Pierre SD 57501.

The Board requested that a copy of the proposed Findings, Conclusions and Final Decision be mailed to each Board member and parties by September 21, 2006. Written objections or comments in support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision are to be mailed to each Board member, the Board attorney and Water Rights Program counsel (mailing list enclosed) by October 2, 2006.

At the Board's discretion, 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 October 11, 2006. The public hearing was completed on July 12, 2006. No additional testimony will be received on October 11, 2006.

If any party has questions about the findings process, please contact Eric Gronlund at (605) 773-3352.

Enclosure

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

WATER MANAGEMENT BOARD MEMBERS

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

Leo Holzbauer, Vice Chairman
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Brookings SD 57006-2741

James Hutmacher, Chairman
802 East 7th Street
Oacoma SD 57365

Everett Hoyt
4422 Carriage Hills Dr
Rapid City SD 57702-6874

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

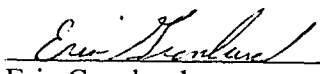
I hereby certify that on July 24, 2006, I personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated July 24, 2006, regarding a consideration of findings of fact, conclusions of law and final decision in the matter of Water Permit Application Nos. 6711-3, 6712-3 and 6713-3, addressed as stated below.

Floyd Peterson
Oscar Inc.
18892 390th Avenue
Hitchcock SD 57348

Lenny Peterson
Peterson Brothers
19111 Maple Avenue
Hitchcock SD 57348

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

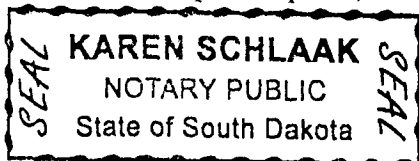
John Guhin, Assistant Attorney General
Diane Best, Assistant Attorney General


Eric Gronlund
Natural Resource Engineer
Water Rights Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 25th day of July, 2006.


Karen Schlaak
Notary Public
My Commission expires April 1, 2007



STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501

Phone (605) 773-3215

Fax (605) 773-4106

TTY (605) 773-6585

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RECEIVED

SEP - 8 2006

WATER RIGHTS
PROGRAM

LARRY LONG
ATTORNEY GENERAL

MARK BARNETT
CHIEF DEPUTY ATTORNEY GENERAL

MEMORANDUM

September 7, 2006

TO: Members of the Water Management Board and
Interested Parties

FROM: John P. Guhin, Assistant Attorney General

A handwritten signature in cursive script, appearing to read "John P. Guhin".

RE: Proposed Findings of Fact, Conclusions of Law and
Final Decision in Application Nos. 6711-3, 6712-3,
6713-3, 6715-3 and 6728-3

Pursuant to the direction of the Board, I am herewith enclosing proposed Findings of Fact, Conclusions of Law and a Final Decision in cases 6711-3, Oscar Inc.; 6712-3 and 6713-3, Peterson Farms; 6715-3, United Feeders, LLP; and 6728-3, Ron Starr.

Please see Notices of the Chief Engineer dated July 24, 2006, for further information.

JPG/jmm

Enclosure

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6711-3,)
OSCAR INC.;)
)

IN THE MATTER OF WATER PERMIT)
APPLICATION NOS. 6712-3 AND)
6713-3, PETERSON BROTHERS;)
)

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6715-3,)
UNITED FEEDERS, LLP;)
)

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6728-3, RON)
STARR.)

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND
FINAL DECISION

FINDINGS OF FACT

1. These findings and conclusions concern each of the above-named water permit applications. Each concerns legal issues arising from the changed legal context with regard to the Tulare:East James Aquifer. Because of the interrelated nature of the legal and factual issues, these cases are considered together.

2. Application No. 6711-3 proposes to appropriate 4.34 cfs (1,950 gpm) from two wells approximately one hundred feet deep to irrigate 304 acres in Spink County. The source of water is Tulare:East James Aquifer. The date this application was received in the Office of the Water Rights Program was April 4, 2006.

3. Application No. 6712-3 proposes to appropriate 1.94 cfs (870 gpm) from one well approximately one hundred feet deep to irrigate 136 acres in Spink County. The source of water is the Tulare:East James Aquifer. The date this application was received in the Office of the Water Rights Program was April 4, 2006.

4. Application No. 6713-3 proposes to appropriate 1.94 cfs (870 gpm) from one well approximately one hundred feet deep to irrigate 136 acres in Spink County. The source of water is the Tulare:East James Aquifer. The date this application was received in the Office of the Water Rights Program was April 4, 2006.

5. Application No. 6715-3 proposes to appropriate .56 cfs (250 gpm) from two wells approximately one hundred feet deep in Spink County. The source of water is the Tulare:East James Aquifer. The date this application was received in the Office of the Water Rights Program was April 7, 2006.

6. Application No. 6728-3 proposes to appropriate 1.88 cfs (844 gpm) from one well approximately eighty feet deep in Spink County. The source of water is the Tulare:East James Aquifer. The date this application was received in the Office of the Water Rights Program was April 24, 2006.

7. The Board finds that its jurisdiction to grant water permits is, in this case, limited by the South Dakota statute

forbidding water mining, SDCL 46-6-3.1. That statute provides, with an exception not applicable here, that an application to appropriate ground water may not be approved if it is probable that the quantity of water withdrawn annually from the ground water source will exceed the quantity of average estimated annual recharge of water from the ground source. The Court of the Sixth Judicial Circuit has interpreted this section to mean that the term "quantity of water withdrawn annually from a ground water source" should be calculated as an average; it implied that the period of time utilized for the "average" should be the same period of time as used to compute the statutory "quantity of the average estimated annual recharge of water." In the case entitled In the Matter of Water Permit Application No. 6655-3, Oscar Inc.; In the Matter of Water Permit Application No. 6656-3, Peterson Brothers; In the Matter of Water Permit Application Nos. 6675-3 and 6676-3, William St. Clair (Water Management Board, July 12, 2006) (hereinafter "Final Decision of July 12, 2006"), this Board adopted the ruling of the Sixth Judicial Circuit.

8. The first question to be determined pursuant to this ruling is the average amount of recharge to the Tulare:East James Aquifer. The state's expert, Mr. Jim Goodman, testified that the best available analysis yielded the recharge at a rate of .76 inches per acre per year. Expert evidence further

established that the total aquifer area of the Tulare:East James Aquifer in Beadle and Spink Counties is 125,600 acres. Using the best available estimate of .76 inches per year per acre, the total annual aquifer recharge is 7,950 acre feet per year for the Tulare:East James Aquifer.

9. The Board credits the estimates and calculations of Mr. Goodman. No contrary estimates, studies or analyses were offered to the Board.

10. The Board further agrees with the suggestions of the state's expert that the period of time from 1986 to 2005 comprises the most relevant period from which to derive an estimate of the annual water use in this case. No new water permit has been approved from this aquifer since April of 1982 meaning. For all practical purposes, therefore, there should have been no new water uses developed between 1986 and 2005.

11. The average water use in acre feet for the twenty-year period in the aquifer area has been 6,981 acre feet.

12. The best estimates yield an aquifer recharge of 7,950 acre feet per year. The difference between that recharge and the average annual water use per year over the past twenty years in the aquifer area is 969 acre feet.

13. The Board finds further that there has been an average of 8.2 inches per acre per year of water use from the aquifer over the past twenty years. Considering that average across 969

acre feet of water available annually, the Board finds that, at the time of the decision of the Sixth Judicial Circuit, an additional 1,420 acres of land could be irrigated without mining water.

14. This Board, in its Final Decision of July 12, 2006, granted irrigation permits of 844 acres.

15. Under the Circuit Court decision as adopted by this Board in its Final Decision of July 12, 2006, it follows that, an additional 576 acres may be approved from the Tulare:East James Aquifer for irrigation without violating the water mining statute (i.e., 1,420 acres minus 844 acres equals 576 acres).

16. South Dakota statutes provide, in the case of conflict, an earlier filed application takes precedence over a later application.

17. In the cases now before the Board, three applications were received by the Water Rights Program on April 4, 2006. These are No. 6711-3, requesting a permit to irrigate 304 acres; No. 6712-3, requesting a permit to irrigate 136 acres; and No. 6713-3, requesting a permit to irrigate 136 acres. The total acreage requested by these permits is 576 acres.

18. As found above, the total number of new acres which may be put to irrigation use under the interpretation of the facts and law adopted by this Board in its Final Decision of July 12, 2006, and here is 576 acres. The three applications

set forth above request precisely 576 acres. Therefore, if these three applications are granted, no water is available for additional irrigation permits from the Tulare:East James Aquifer, barring a change in circumstances not now before the Board.

19. The Board now turns to the specific question as to whether irrigation permits should be granted with regard to Application Nos. 6711-3, 6712-3 and 6713-3.

20. The uncontradicted expert evidence indicates that interference should not be caused by the pumping from these three permits.

21. The proposed use for irrigation for these three permits is a beneficial use.

22. The proposed use for each of the wells is in the public interest as explained below and as qualified in the Final Decision of July 12, 2006.

23. Application No. 6715-3, United Feeders, proposes to appropriate .56 cfs for commercial use in a dairy heifer development feed yard.

24. The Application No. 6715-3 was received in the Office of the Water Rights Program on April 7, 2006, after the receipt of Application Nos. 6711-3, 6712-3 and 6713-3.

25. As demonstrated above, the Board's approval of those three permits, exhaust the amount of water available from the

Tulare:East James Aquifer under the state mining statute. The Board finds, therefore, the grant of Application No. 6715-3 would not be consistent with the South Dakota statute forbidding water mining. SDCL 46-6-3.1.

26. Application No. 6728-3 proposed to appropriate 1.88 cfs from one well approximately eighty feet deep in Spink County. This application was received in the Office of the Water Rights Program on April 24, 2006. Again, the source of water is the Tulare:East James Aquifer. As found above, because the amount of water available from the aquifer in question is exhausted by the grant of Application Nos. 6711-3, 6712-3 and 6713-3, this permit may not be granted because, to do so, would not be consistent with the South Dakota statute forbidding water mining. SDCL 46-6-3.1.

27. The applicant for Water Permit No. 6728-3, Mr. Ron Starr, nonetheless makes several arguments as to why his permit should be granted. Mr. Starr's claim is based upon an application filed not by Starr himself, but by his landlord, for Water Permit No. 3325-3 in February of 1977. Mr. Starr at that time was the tenant. The first hearing on the landlord's application was in 1978. The representatives of the Water Rights Program requested and were granted a deferral at that time because they needed to gather additional information about

the aquifer. In 1979, a second hearing was held and the application was deferred again, for the same reason.

28. In 1982, a third hearing was held with regard to Application No. 3325-3, the application filed by Starr's landlord. By 1981-1982, the Water Rights Program believed that it had sufficient knowledge about the aquifer to advocate the grant of certain of the applications based on the first in time-first in right statute, and to advocate denial of other applications based on the same statute. The Board, in 1982, did grant certain applications based on the first in time-first in right statute. In particular, a group of permit applications from the Tulare:East James Aquifer, Nos. 4699-3, 4714-3, 4739-3, 4753-3, 4772-3, and 4845-3 all were approved in 1981 with the latest permit being approved in April of 1982. The April 1982 grant was essentially the last new permit for additional water approved until the Sixth Judicial Circuit's recent decision.

29. At the same time, the Water Rights Program began recommending denial of applications which could not be granted because of the first in time-first in right principle. The Water Rights Program thus recommended denial of the application filed by Starr's landlord, Application No. 3325-3. This Board could have denied Application No. 3325-3 in 1982 on the basis of the first in time-first in right statute, but instead it again deferred the application.

30. In 1984, the Water Rights Program recommended denial of Application No. 5009-3 for water from the Tulare:East James Aquifer. After receiving the recommendation to deny the application, the applicant for No. 5009-3 withdrew the application. Another seven permit applications for water from this aquifer were denied by this Board subsequent to 1982 up to the time of the Circuit Court's Decision referenced above.

31. In 1991, Starr became owner of the property formerly owned by his landlord, who had made the application for No. 3325-3.

32. In 2002, the Water Rights Program recommended denial of 3325-3 on two grounds. The first ground was that the applicant for the permit, Starr's former landlord, was no longer owner of the property and had no standing to apply for a water permit. Furthermore, the Division contended that there was no water available in the aquifer for appropriation due to the water mining statute.

33. Mr. Starr was notified of the date and time of the hearing regarding the Division's recommendation for denial. About two weeks before the hearing date, the date was changed to be one day earlier. Starr received notice of this change in date. Starr forthrightly admits that he received notice. He does not offer any satisfactory answer as to why he did not appear at the 2002 hearing. At the conclusion of the 2002

hearing, the application for Water Permit No. 3325-3 was denied. Mr. Starr did not appeal, nor did the landlord.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter.
2. There is a reasonable probability that there is unappropriated water available for application Nos. 6711-3, 6712-3 and 6713-3.
3. The diversions under Application Nos. 6711-3, 6712-3 and 6713-3 can be developed without unlawful impairment of existing rights if appropriate conditions are imposed upon the permits as set forth in the final decision.
4. The proposed uses, all for irrigation, under the applications for Water Permit Nos. 6711-3, 6712-3 and 6713-3 are all beneficial uses.
5. Grant of Application Nos. 6711-3, 6712-3 and 6713-3 is consistent with the South Dakota statute forbidding water mining. SDCL 46-6-3.1 provides, with an exception not applicable here, that an application to appropriate ground water may not be approved if it is probable that the quantity of water withdrawn annually from the ground water source will exceed the quantity of average estimated annual recharge of water from the ground water source. The Court of the Sixth Judicial Circuit has interpreted this section to mean that the term "quantity of water withdrawn annually from a ground water source" should be

calculated as an average and that the period of time utilized for the "average" should be the same period of time as used to compute the statutory "quantity of average estimated annual recharge of water." The Board, in its Final Decision of July 12, 2006, has adopted this legal approach. Using the appropriate calculations, the appropriations for Nos. 6711-3, 6712-3 and 6713-3 are allowable consistent with this interpretation of the water mining statute.

6. As with its Final Decision of July 12, 2006, the Board has also considered the interplay of the public interest requirement of the statute and the water mining statute. The Board again does not find it necessary to determine whether the public interest component of the state water law can be invoked to prove that water mining in those cases in which there is compliance with the water mining statute for the same reasons as set forth in the Final Decision of July 12, 2006.

7. Considering the foregoing, and all the evidence, the Board concludes that the grant of the applications for Water Permit Nos. 6711-3, 6712-3 and 6713-3 is in the public interest when qualified as set forth below.

8. The Board has also considered applications for Water Permit No. 6715-3, United Feeders, and No. 6728-3, Ron Starr. The Board concludes the grant of these permits would be inconsistent with the South Dakota statute forbidding water

mining. As explained above, in the Findings of Fact, the appropriate calculations revealed that only 576 additional acres were available for appropriation after the July 12, 2006, grant of other irrigation applications. The amount of water approved today under Application Nos. 6711-3, 6712-3 and 6713-3 exhausts the remaining amount of water. Therefore, additional grants of water rights would necessarily violate the water mining statute.

9. The Board has also considered the special considerations Mr. Starr wished to bring before the Board. The Board concludes that an application for a water permit may not be transferred to another person. The Legislature has provided that a water permit can itself be transferred but has not provided statutory authority for the transfer of an application for a water permit. This Board lacks the power to provide for such a transfer on its own authority. In this case, Mr. Starr's landlord applied for Water Permit No. 3325-3 but later sold the property to Mr. Starr. At the time the landlord sold the property to Mr. Starr, the application lost any vitality it might have. The landlord, because he was no longer a land owner, had no standing to apply for the water right. Mr. Starr, as the new owner of the lands, was not entitled by law to legally accept a transfer of the application for water right.

10. Mr. Starr's attempt to somehow rely on an alleged irregularity with the 2002 proceeding is without merit. The

permit was denied in 2002. Starr had adequate notification of the matter before the Board but simply did not appear.

Moreover, Starr did not appeal that denial.

11. Starr also argues that the Chief Engineer has discretion with regard to the application of the first in time-first in right statute. The statute, however, allows the Chief Engineer no such discretion. Moreover, the Board concludes that if it did have such discretion it would not necessarily follow that Starr himself would be first in line with regard to the application of equitable principles. At least seven others have been denied water permits in situations which may be analogous to those of Mr. Starr.

12. Starr's implicit argument that his current application should be deferred instead of denied is without merit. The Water Rights Program demonstrated that there is not, as of today, water available to grant a water permit to him. A deferral is available only in such cases in which the Board determines that further study of an aquifer or a hydrologic situation is appropriate. There is no evidence before the Board that the hydrologic determinations and opinions offered by the state's expert are insufficient or that further study needs to be made before appropriate determinations of this Board can be made on whether to approve or deny permits.

13. The Board further concludes that no statute allows the grant of a deferral to an applicant simply because it is speculated that a present user of water may, at some unknown time in the future, abandon his water right, thereby making water available to the applicant consistent with the water mining statute.

14. The Board also concludes that, as to this aquifer, it is unlikely that there will be a simple abandonment of any existing water right in the foreseeable future; it is much more likely that any existing holder of a water right will, if he or she chooses to discontinue his or her operation, choose to transfer that water permit to another. This makes the contingency referred to in the paragraph immediately above all the more unlikely.

FINAL DECISION IN WATER PERMIT
APPLICATION NO. 6711-3

The application for Water Permit No. 6711-3, Oscar Inc., is approved subject to the following qualifications:

1. The wells 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. The wells authorized by Permit No. 6711-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.

3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

FINAL DECISION IN WATER PERMIT
APPLICATION NO. 6712-3, PETERSON BROTHERS

The application for Water Permit No. 6712-3, Peterson Brothers, is approved subject to the following qualifications:

1. The wells 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. The wells authorized by Permit No. 6712-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.

3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

FINAL DECISION IN WATER PERMIT
APPLICATION NO. 6713-3, PETERSON BROTHERS

The application for Water Permit No. 6713-3, Peterson Brothers, is approved subject to the following qualifications:

1. The wells 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. The wells authorized by Permit No. 6713-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.

3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

FINAL DECISION IN WATER PERMIT
APPLICATION NO. 6715-3, UNITED FEEDERS, LLP

The application is denied.

FINAL DECISION IN WATER PERMIT
APPLICATION NO. 6728-3, RON STARR

The application is denied.

Dated this _____ day of _____, 2006.

BY THE BOARD

James Hutmacher, Chairman

p1d_jpg (Findings of Fact for Nos 6711-3, 6712-3, 6713-3, 6715-3 & 6728-3) (jmm)

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6711-3,)
OSCAR INC.;)

IN THE MATTER OF WATER PERMIT)
APPLICATION NOS. 6712-3, AND)
6713-3, PETERSON BROTHERS;)

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6715-3,)
UNITED FEEDERS, LLP;)

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6728-3, RON)
STARR)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of proposed Findings of Fact, Conclusions of Law and Final Decision In the Matter of Water Permit Application No. 6711-3, Oscar Inc.; In the Matter of Water Permit Application Nos. 6712-3 and 6713-3, Peterson Brothers; In the Matter of Water Permit Application No. 6715-3, United Feeders, LLP; and In the Matter of Water Permit Application No. 6728-3, Ron Starr, were served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Pierre, South Dakota, on this 7th day of September 2006:

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

Everett Hoyt
4422 Carriage Hills Dr.
Rapid City, SD 57702-6874

Leo Holzbauer
29416 395th Avenue
Wagner, SD 57380

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

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

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

James Hutmacher, Chairman
802 East 7th Street
Oacoma, SD 57365

Floyd Peterson
Oscar Inc.
18892 390th Avenue
Hitchcock, SD 57348

Lenny Peterson
Peterson Brothers
19111 Maple Avenue
Hitchcock, SD 57348

Tom Walsh
United Feeders, LLP
705 100th Street SE
DeGraff, MN 56271

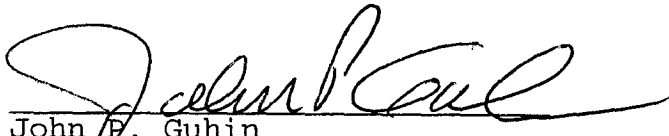
Ron Starr
40283 US Hwy 212
Doland, SD 57436

By interoffice to:

Garland Erbele, Chief Engineer
Water Rights Program
Department of Environment and Natural Resources
Foss Building
523 East Capitol
Pierre, SD 57501

By hand delivery to:

Diane Best
Assistant Attorney General
1302 East Hwy 34, Suite 1
Pierre, SD 57501-8501


John P. Guhin
Assistant Attorney General
1302 East Highway 34, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6711-3,)
OSCAR INC.;)
)

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6715-3, AND)
6713-3, PETERSON BROTHERS;)
)

RESPONSE TO PROPOSED
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL DECISION

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6715-3,)
UNITED FEEDERS, LLP;)
)

IN THE MATTER OF WATER PERMIT)
APPLICAION NO.6728-3, RON STARR.)

COMES NOW, the South Dakota Department of Environment and Natural Resources, Water Rights Program (hereinafter DENR) and makes its response to the proposed Findings of Fact, Conclusions of Law and Final Decision drafted by Board counsel:

1. The DENR urges adoption of Board Counsel's proposals with the revision addressed below.

2. The caption for application Nos. 6712-3 and 6713-3 should refer to "Peterson Farms" rather than "Peterson Brothers."

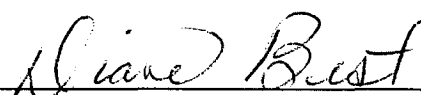
3. Finding of Fact 10 addresses the fact that no new water permits have been approved for the Tulare East James Aquifer since April of 1982, and also refers to the fact that water uses would have been developed by 1986. The DENR asks

that an additional finding be included which provides as follows:

A group of permit applications were approved in 1981 and the last one was finalized in 1982. Under the five year construction requirement, construction was required to have been completed in 1986 for any permits issued in 1981. SDCL 46-2A-8. One additional permit was approved in April of 1982 and irrigation began the next season for that permit. Accordingly, all permits were developed and all water use was reflected in water use measurements and reporting starting in the 1986 irrigation season. From 1986 through 2005 no additional water permits were issued. Accordingly, this twenty-year period reflects a time period during which all issued permits were developed.

3. Conclusion of Law 6, line 6, appears to contain an extra word. The word "that" should be deleted from the sentence.

Dated this 28th day of September, 2006.



Diane Best, Counsel for
Water Management Board
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6711-3,)
OSCAR INC.;)

IN THE MATTER OF WATER PERMIT)
APPLICATION NOS. 6712-3, AND)
6713-3, PETERSON BROTHERS;)

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6715-3,)
UNITED FEEDERS, LLP;)

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6728-3, RON)
STARR)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct
copies of Response to proposed Findings of Fact, Conclusions of
Law and Final Decision In the Matter of Water Permit Application
No. 6711-3, Oscar Inc.; In the Matter of Water Permit
Application Nos. 6712-3 and 6713-3, Peterson Brothers; In the
Matter of Water Permit Application No. 6715-3, United Feeders,
LLP; and In the Matter of Water Permit Application No. 6728-3,
Ron Starr, 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 28th day of
September 2006:

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

Everett Hoyt
4422 Carriage Hills Dr.
Rapid City, SD 57702-6874

Leo Holzbauer
29416 395th Avenue
Wagner, SD 57380

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

James Hutmacher, Chairman
802 East 7th Street
Oacoma, SD 57365

Lenny Peterson
Peterson Brothers
19111 Maple Avenue
Hitchcock, SD 57348

Ron Starr
40283 US Hwy 212
Doland, SD 57436

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

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

Floyd Peterson
Oscar Inc.
18892 390th Avenue
Hitchcock, SD 57348

Tom Walsh
United Feeders, LLP
705 100th Street SE
DeGraff, MN 56271

By interoffice to:

Garland Erbele, Chief Engineer
Water Rights Program
Department of Environment and Natural Resources
Foss Building
523 East Capitol
Pierre, SD 57501



Diane Best
Assistant Attorney General
1302 East Highway 34, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215

j-pld_db Certificate of Service

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6711-3,)
OSCAR INC.;)

IN THE MATTER OF WATER PERMIT)
APPLICATION NOS. 6712-3 AND)
6713-3, PETERSON FARMS;)

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6715-3,)
UNITED FEEDERS, LLP;)

FINAL DECISION

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 6728-3, RON)
STARR.)

FINDINGS OF FACT

1. These findings and conclusions concern each of the above-named water permit applications. Each concerns legal issues arising from the changed legal context with regard to the Tulare:East James Aquifer. Because of the interrelated nature of the legal and factual issues, these cases are considered together.

2. Application No. 6711-3 proposes to appropriate 4.34 cfs (1,950 gpm) from two wells approximately one hundred feet deep to irrigate 304 acres in Spink County. The source of water is Tulare:East James Aquifer. The date this application was received in the Office of the Water Rights Program was April 4, 2006.

3. Application No. 6712-3 proposes to appropriate 1.94 cfs (870 gpm) from one well approximately one hundred feet deep to irrigate 136 acres in Spink County. The source of water is the Tulare:East James Aquifer. The date this application was received in the Office of the Water Rights Program was April 4, 2006.

4. Application No. 6713-3 proposes to appropriate 1.94 cfs (870 gpm) from one well approximately one hundred feet deep to irrigate 136 acres in Spink County. The source of water is the Tulare:East James Aquifer. The date this application was received in the Office of the Water Rights Program was April 4, 2006.

5. Application No. 6715-3 proposes to appropriate .56 cfs (250 gpm) from two wells approximately one hundred feet deep in Spink County. The source of water is the Tulare:East James Aquifer. The date this application was received in the Office of the Water Rights Program was April 7, 2006.

6. Application No. 6728-3 proposes to appropriate 1.88 cfs (844 gpm) from one well approximately eighty feet deep in Spink County. The source of water is the Tulare:East James Aquifer. The date this application was received in the Office of the Water Rights Program was April 24, 2006.

7. The Board finds that its jurisdiction to grant water permits is, in this case, limited by the South Dakota statute

forbidding water mining, SDCL 46-6-3.1. That statute provides, with an exception not applicable here, that an application to appropriate ground water may not be approved if it is probable that the quantity of water withdrawn annually from the ground water source will exceed the quantity of average estimated annual recharge of water from the ground source. The Court of the Sixth Judicial Circuit has interpreted this section to mean that the term "quantity of water withdrawn annually from a ground water source" should be calculated as an average; it implied that the period of time utilized for the "average" should be the same period of time as used to compute the statutory "quantity of the average estimated annual recharge of water." In the case entitled In the Matter of Water Permit Application No. 6655-3, Oscar Inc.; In the Matter of Water Permit Application No. 6656-3, Peterson Brothers; In the Matter of Water Permit Application Nos. 6675-3 and 6676-3, William St. Clair (Water Management Board, July 12, 2006) (hereinafter "Final Decision of July 12, 2006"), this Board adopted the ruling of the Sixth Judicial Circuit.

8. The first question to be determined pursuant to this ruling is the average amount of recharge to the Tulare:East James Aquifer. The state's expert, Mr. Jim Goodman, testified that the best available analysis yielded the recharge at a rate of .76 inches per acre per year. Expert evidence further

established that the total aquifer area of the Tulare:East James Aquifer in Beadle and Spink Counties is 125,600 acres. Using the best available estimate of .76 inches per year per acre, the total annual aquifer recharge is 7,950 acre feet per year for the Tulare:East James Aquifer.

9. The Board credits the estimates and calculations of Mr. Goodman. No contrary estimates, studies or analyses were offered to the Board.

10. The Board further agrees with the suggestions of the state's expert that the period of time from 1986 to 2005 comprises the most relevant period from which to derive an estimate of the annual water use in this case. No new water permit has been approved from this aquifer since April of 1982 meaning. For all practical purposes, therefore, there should have been no new water uses developed between 1986 and 2005.

10A. A group of permit applications were approved in 1981 and the last one was finalized in 1982. Under the five year construction requirement, construction was required to have been completed in 1986 for any permits issued in 1981. SDCL 46-2A-8. One additional permit was approved in April of 1982 and irrigation began the next season for that permit. Accordingly, all permits were developed and all water use was reflected in water use measurements and reporting starting in the 1986 irrigation season. From 1986 through 2005 no additional water

permits were issued. Accordingly, this twenty-year period reflects a time period during which all issued permits were developed.

11. The average water use in acre feet for the twenty-year period in the aquifer area has been 6,981 acre feet.

12. The best estimates yield an aquifer recharge of 7,950 acre feet per year. The difference between that recharge and the average annual water use per year over the past twenty years in the aquifer area is 969 acre feet.

13. The Board finds further that there has been an average of 8.2 inches per acre per year of water use from the aquifer over the past twenty years. Considering that average across 969 acre feet of water available annually, the Board finds that, at the time of the decision of the Sixth Judicial Circuit, an additional 1,420 acres of land could be irrigated without mining water.

14. This Board, in its Final Decision of July 12, 2006, granted irrigation permits of 844 acres.

15. Under the Circuit Court decision as adopted by this Board in its Final Decision of July 12, 2006, it follows that, an additional 576 acres may be approved from the Tulare:East James Aquifer for irrigation without violating the water mining statute (i.e., 1,420 acres minus 844 acres equals 576 acres).

16. South Dakota statutes provide, in the case of conflict, an earlier filed application takes precedence over a later application.

17. In the cases now before the Board, three applications were received by the Water Rights Program on April 4, 2006. These are No. 6711-3, requesting a permit to irrigate 304 acres; No. 6712-3, requesting a permit to irrigate 136 acres; and No. 6713-3, requesting a permit to irrigate 136 acres. The total acreage requested by these permits is 576 acres.

18. As found above, the total number of new acres which may be put to irrigation use under the interpretation of the facts and law adopted by this Board in its Final Decision of July 12, 2006, and here is 576 acres. The three applications set forth above request precisely 576 acres. Therefore, if these three applications are granted, no water is available for additional irrigation permits from the Tulare:East James Aquifer, barring a change in circumstances not now before the Board.

19. The Board now turns to the specific question as to whether irrigation permits should be granted with regard to Application Nos. 6711-3, 6712-3 and 6713-3.

20. The uncontradicted expert evidence indicates that interference should not be caused by the pumping from these three permits.

21. The proposed use for irrigation for these three permits is a beneficial use.

22. The proposed use for each of the wells is in the public interest as explained below and as qualified in the Final Decision of July 12, 2006.

23. Application No. 6715-3, United Feeders, proposes to appropriate .56 cfs for commercial use in a dairy heifer development feed yard.

24. The Application No. 6715-3 was received in the Office of the Water Rights Program on April 7, 2006, after the receipt of Application Nos. 6711-3, 6712-3 and 6713-3.

25. As demonstrated above, the Board's approval of those three permits, exhaust the amount of water available from the Tulare:East James Aquifer under the state mining statute. The Board finds, therefore, the grant of Application No. 6715-3 would not be consistent with the South Dakota statute forbidding water mining. SDCL 46-6-3.1.

26. Application No. 6728-3 proposed to appropriate 1.88 cfs from one well approximately eighty feet deep in Spink County. This application was received in the Office of the Water Rights Program on April 24, 2006. Again, the source of water is the Tulare:East James Aquifer. As found above, because the amount of water available from the aquifer in question is exhausted by the grant of Application Nos. 6711-3, 6712-3 and

6713-3, this permit may not be granted because, to do so, would not be consistent with the South Dakota statute forbidding water mining. SDCL 46-6-3.1.

27. The applicant for Water Permit No. 6728-3, Mr. Ron Starr, nonetheless makes several arguments as to why his permit should be granted. Mr. Starr's claim is based upon an application filed not by Starr himself, but by his landlord, for Water Permit No. 3325-3 in February of 1977. Mr. Starr at that time was the tenant. The first hearing on the landlord's application was in 1978. The representatives of the Water Rights Program requested and were granted a deferral at that time because they needed to gather additional information about the aquifer. In 1979, a second hearing was held and the application was deferred again, for the same reason.

28. In 1982, a third hearing was held with regard to Application No. 3325-3, the application filed by Starr's landlord. By 1981-1982, the Water Rights Program believed that it had sufficient knowledge about the aquifer to advocate the grant of certain of the applications based on the first in time-first in right statute, and to advocate denial of other applications based on the same statute. The Board, in 1982, did grant certain applications based on the first in time-first in right statute. In particular, a group of permit applications from the Tulare:East James Aquifer, Nos. 4699-3, 4714-3, 4739-3,

4753-3, 4772-3, and 4845-3 all were approved in 1981 with the latest permit being approved in April of 1982. The April 1982 grant was essentially the last new permit for additional water approved until the Sixth Judicial Circuit's recent decision.

29. At the same time, the Water Rights Program began recommending denial of applications which could not be granted because of the first in time-first in right principle. The Water Rights Program thus recommended denial of the application filed by Starr's landlord, Application No. 3325-3. This Board could have denied Application No. 3325-3 in 1982 on the basis of the first in time-first in right statute, but instead it again deferred the application.

30. In 1984, the Water Rights Program recommended denial of Application No. 5009-3 for water from the Tulare:East James Aquifer. After receiving the recommendation to deny the application, the applicant for No. 5009-3 withdrew the application. Another seven permit applications for water from this aquifer were denied by this Board subsequent to 1982 up to the time of the Circuit Court's Decision referenced above.

31. In 1991, Starr became owner of the property formerly owned by his landlord, who had made the application for No. 3325-3.

32. In 2002, the Water Rights Program recommended denial of 3325-3 on two grounds. The first ground was that the

applicant for the permit, Starr's former landlord, was no longer owner of the property and had no standing to apply for a water permit. Furthermore, the Division contended that there was no water available in the aquifer for appropriation due to the water mining statute.

33. Mr. Starr was notified of the date and time of the hearing regarding the Division's recommendation for denial. About two weeks before the hearing date, the date was changed to be one day earlier. Starr received notice of this change in date. Starr forthrightly admits that he received notice. He does not offer any satisfactory answer as to why he did not appear at the 2002 hearing. At the conclusion of the 2002 hearing, the application for Water Permit No. 3325-3 was denied. Mr. Starr did not appeal, nor did the landlord.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter.
2. There is a reasonable probability that there is unappropriated water available for application Nos. 6711-3, 6712-3 and 6713-3.
3. The diversions under Application Nos. 6711-3, 6712-3 and 6713-3 can be developed without unlawful impairment of existing rights if appropriate conditions are imposed upon the permits as set forth in the final decision.

4. The proposed uses, all for irrigation, under the applications for Water Permit Nos. 6711-3, 6712-3 and 6713-3 are all beneficial uses.

5. Grant of Application Nos. 6711-3, 6712-3 and 6713-3 is consistent with the South Dakota statute forbidding water mining. SDCL 46-6-3.1 provides, with an exception not applicable here, that an application to appropriate ground water may not be approved if it is probable that the quantity of water withdrawn annually from the ground water source will exceed the quantity of average estimated annual recharge of water from the ground water source. The Court of the Sixth Judicial Circuit has interpreted this section to mean that the term "quantity of water withdrawn annually from a ground water source" should be calculated as an average and that the period of time utilized for the "average" should be the same period of time as used to compute the statutory "quantity of average estimated annual recharge of water." The Board, in its Final Decision of July 12, 2006, has adopted this legal approach. Using the appropriate calculations, the appropriations for Nos. 6711-3, 6712-3 and 6713-3 are allowable consistent with this interpretation of the water mining statute.

6. As with its Final Decision of July 12, 2006, the Board has also considered the interplay of the public interest requirement of the statute and the water mining statute. The

Board again does not find it necessary to determine whether the public interest component of the state water law can be invoked for the same reasons as set forth in the Final Decision of July 12, 2006.

7. Considering the foregoing, and all the evidence, the Board concludes that the grant of the applications for Water Permit Nos. 6711-3, 6712-3 and 6713-3 is in the public interest when qualified as set forth below.

8. The Board has also considered applications for Water Permit No. 6715-3, United Feeders, and No. 6728-3, Ron Starr. The Board concludes the grant of these permits would be inconsistent with the South Dakota statute forbidding water mining. As explained above, in the Findings of Fact, the appropriate calculations revealed that only 576 additional acres were available for appropriation after the July 12, 2006, grant of other irrigation applications. The amount of water approved today under Application Nos. 6711-3, 6712-3 and 6713-3 exhausts the remaining amount of water. Therefore, additional grants of water rights would necessarily violate the water mining statute.

9. The Board has also considered the special considerations Mr. Starr wished to bring before the Board. The Board concludes that an application for a water permit may not be transferred to another person. The Legislature has provided that a water permit can itself be transferred but has not

provided statutory authority for the transfer of an application for a water permit. This Board lacks the power to provide for such a transfer on its own authority. In this case, Mr. Starr's landlord applied for Water Permit No. 3325-3 but later sold the property to Mr. Starr. At the time the landlord sold the property to Mr. Starr, the application lost any vitality it might have. The landlord, because he was no longer a land owner, had no standing to apply for the water right. Mr. Starr, as the new owner of the lands, was not entitled by law to legally accept a transfer of the application for water right.

10. Mr. Starr's attempt to somehow rely on an alleged irregularity with the 2002 proceeding is without merit. The permit was denied in 2002. Starr had adequate notification of the matter before the Board but simply did not appear. Moreover, Starr did not appeal that denial.

11. Starr also argues that the Chief Engineer has discretion with regard to the application of the first in time-first in right statute. The statute, however, allows the Chief Engineer no such discretion. Moreover, the Board concludes that if it did have such discretion it would not necessarily follow that Starr himself would be first in line with regard to the application of equitable principles. At least seven others have been denied water permits in situations which may be analogous to those of Mr. Starr.

12. Starr's implicit argument that his current application should be deferred instead of denied is without merit. The Water Rights Program demonstrated that there is not, as of today, water available to grant a water permit to him. A deferral is available only in such cases in which the Board determines that further study of an aquifer or a hydrologic situation is appropriate. There is no evidence before the Board that the hydrologic determinations and opinions offered by the state's expert are insufficient or that further study needs to be made before appropriate determinations of this Board can be made on whether to approve or deny permits.

13. The Board further concludes that no statute allows the grant of a deferral to an applicant simply because it is speculated that a present user of water may, at some unknown time in the future, abandon his water right, thereby making water available to the applicant consistent with the water mining statute.

14. The Board also concludes that, as to this aquifer, it is unlikely that there will be a simple abandonment of any existing water right in the foreseeable future; it is much more likely that any existing holder of a water right will, if he or she chooses to discontinue his or her operation, choose to transfer that water permit to another. This makes the

contingency referred to in the paragraph immediately above all the more unlikely.

FINAL DECISION IN WATER PERMIT
APPLICATION NO. 6711-3

The application for Water Permit No. 6711-3, Oscar Inc., is approved subject to the following qualifications:

1. The wells 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. The wells authorized by Permit No. 6711-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.

3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

FINAL DECISION IN WATER PERMIT
APPLICATION NO. 6712-3, PETERSON FARMS

The application for Water Permit No. 6712-3, Peterson Farms, is approved subject to the following qualifications:

1. The wells 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. The wells authorized by Permit No. 6712-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.

3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

FINAL DECISION IN WATER PERMIT
APPLICATION NO. 6713-3, PETERSON FARMS

The application for Water Permit No. 6713-3, Peterson Farms, is approved subject to the following qualifications:

1. The wells 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. The wells authorized by Permit No. 6713-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.

3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

FINAL DECISION IN WATER PERMIT
APPLICATION NO. 6715-3, UNITED FEEDERS, LLP

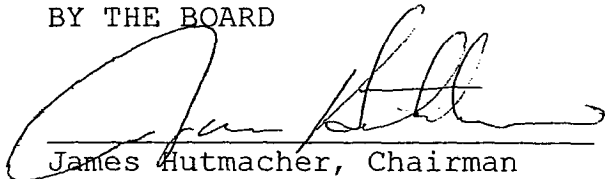
The application is denied.

FINAL DECISION IN WATER PERMIT
APPLICATION NO. 6728-3, RON STARR

The application is denied.

Dated this 26 day of October, 2006.

BY THE BOARD


James Gutmacher, Chairman

p1d.jpg (Findings of Fact for Nos 6711-3, 6712-3, 6713-3, 6715-3 & 6728-3) (jmm)



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 31, 2006

NOTICE

TO: Floyd Peterson
Oscar Inc.
18892 390th Avenue
Hitchcock SD 57348

Lenny Peterson
Peterson Brothers
19111 Maple Avenue
Hitchcock SD 57348

Ron Starr
40283 US Hwy 212
Doland SD 57436

FROM: Garland Erbele, Chief Engineer
Water Rights Program

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

This is to notify you that the Final Decision, including Findings of Fact and Conclusions of Law, were adopted October 11, 2006, by the Water Management Board approving Water Right Permit Nos. 6711-3 (Oscar Inc) and 6712-3 and 6713-3 (Peterson Farms). 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: Diane Best, Assistant Attorney General

CERTIFICATION

I hereby certify that on October 31, 2006, I personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated July 24, 2006, regarding adoption of findings of fact, conclusions of law and final decision in the matter of Water Permit Application Nos. 6711-3, 6712-3 and 6713-3, addressed as stated below.

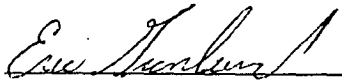
Floyd Peterson
Oscar Inc.
18892 390th Avenue
Hitchcock SD 57348

Lenny Peterson
Peterson Brothers
19111 Maple Avenue
Hitchcock SD 57348

Ron Starr
40283 US Hwy 212
Doland SD 57436

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

Diane Best, Assistant Attorney General



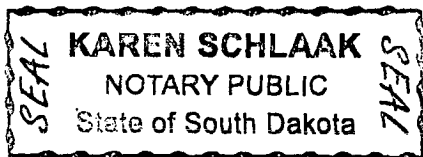
Eric Gronlund
Natural Resource Engineer
Water Rights Program

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 31st day of October, 2006.



Karen Schlaak
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 10 2007

6711-3
6711A-3

Oscar Incorporated
c/o Floyd Peterson
18892 390th Ave
Hitchcock SD 57348

Dear Mr. Peterson:

Enclosed is Water Permit No. 6711A-3 authorizing 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

Note: The applicable portions of No. 6711-3 are incorporated into No. 6711A-3.

enclosures