SOUTH DAKOTA
WATER PERMIT NO. 7206-3

Date of first receipt of application July 8, 2010.

The Water Management Board approved Water Permit No. 7206-3 on October 5, 2011 for Long View Farms, LLP, c/o Arlan J Moss, 3172 320th St, Hull IA 51239 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. 7206-3 appropriates 0.067 cubic feet of water per second (30 gallons per minute) from one well to be completed into the Codell Aquifer (approximately 600 feet deep) located in the SW ¼ NW ¼ Section 9-T95N-R64W.

2. The water appropriated shall be used for the purpose of commercial use in a swine farrowing facility and may not exceed the amount of water needed for beneficial use.

3. The water is to be used during the following described annual period: January 1 – December 31.

4. The date from which applicant may claim right is July 8, 2010.

5. One-fifth of the construction is to be completed on or before April 5, 2014.

6. All construction is to be completed on or before October 5, 2016.

7. Water is to be put to beneficial use on or before October 5, 2020.

8. Water rights obtained in compliance with the laws of the State of South Dakota may not be unlawfully impaired by this appropriation.

QUALIFICATIONS

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

2. The well authorized by Permit No. 7206-3 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. Permit No. 7206-3 is subject to compliance with requirements of the Department's Water Pollution Control Permit issued pursuant to SDCL 34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

4. Permit No. 7206-3 is subject to compliance with all existing and applicable Water Management Board Rules including but not limited to:

   a) Chapter 74:54:01 Ground Water Quality Standards,
   b) Chapter 74:54:02 Ground Water Discharge Permit,
   c) Chapter 74:51:01 Surface Water Quality Standards,
   d) Chapter 74:51:02 Uses Assigned to Lakes,
   e) Chapter 74:51:03 Uses Assigned to Streams, and
   f) Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions.

WATER MANAGEMENT BOARD

By: Garland Erbele

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

AUG 1 0 2012
date

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
denr.sd.gov

AUG 1 0 2012

Long View Farms LLP
Arlen J Moss
3172 320th St
Hull IA 51239

Dear Mr. Moss:

Enclosed is Water Permit No. 7206-3 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

enclosures

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

December 9, 2011

Deborah Pfeiffer
Charles Mix County Clerk of Courts
PO Box 640
Lake Andes SD 57356

Re: Transmittal of Record in the Matter of Water Permit Application No. 7206-3, LongView Farms LLP (CIV 11-146)

Dear Clerk:

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

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

The agency record includes correspondence and filings with the Chief Engineer that occurred after the July 13th – 15th evidentiary hearing and October 5th hearing to consider findings of fact, conclusions of law and final decision.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
(605) 773-3352

enclosures

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

December 9, 2011

NOTICE

TO: Eric Kerkvliet
Lynn Jackson Shultz & Lebrun
PO Box 2700
Sioux Falls SD 57104

Jon J LaFleur
Abourezk & Zephier PC
PO Box 9460
Rapid City SD 57709-9460

Faith Spotted Eagle
PO Box 667
Lake Andes SD 58356

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

SUBJECT: In the Matter of the Water Permit No. 7206-3, LongView Farms LLP

Consistent with SDCL 1-26-33, the agency record for the above entitled matter is being transmitted to the First Judicial Circuit Court in Charles Mix County. A chronological and alphabetical index of the agency record and a list of exhibits is also being transmitted to the court. A copy of the transmittal of record and each index is enclosed.

enclosures

c: Diane Best, Assistant Attorney General
Thomasina Real Bird, Attorney at Law, 1900 Plaza Drive, Louisville CO 80037

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF CHARLES MIX	)	FIRST JUDICIAL CIRCUIT
	)	(CIV 11-146)
IN THE MATTER OF WATER	)	
PERMIT APPLICATION NO. 7206-3,	)	
LONGVIEW FARMS, LLP	)	TRANSMITTAL OF RECORD

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

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

2. Consistent with my responsibilities in the Water Rights Program, I have kept the agency record in the Matter of the Water Permit Application No. 7206-3, LongView Farms. A copy of the record is herewith transmitted to the above-captioned reviewing court pursuant to SDCL 1-26-33.

3. This agency record includes a copy of all pleadings, correspondence and other filings that were submitted for consideration by the South Dakota Water Management Board as well as the Board's Final Decision. I hereby certify under penalty of perjury that the enclosed documents are true and correct copies of the originals as they appear on record in the offices of the Water Rights Program.

4. I have enclosed the original exhibits from the July 13 - 15, 2011 hearing in the above entitled matter.

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

Dated this 9th day of December, 2011.

Eric S. Gronlund

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

Subscribed and sworn to before me this
9th day of December, 2011

Karen Schlaak
Notary Public

My commission expires: 4/1/2013

SEAL KAREN SCHLAAK NOTARY PUBLIC State of South Dakota SEAL

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
: SS
COUNTY OF CHARLES MIX) FIRST JUDICIAL COURT

(CIV 11-146)

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 7206-3) CHRONOLOGICAL
LONG VIEW FARMS, LLP) INDEX

Entry	Date	Document	Pages
1.	July 6, 2010	Letter from Todd Van Maanen transmitting Application for Permit to Appropriate Water	1-2
2.	July 8, 2010	Application For Permit To Appropriate Water (Form 2, Form 2A, 2 maps	3-6
3.	July 8, 2010	Receipt to Longview Farm LLP for payment of Application Fee	7
4.	July 8, 2010	Letter of Transmittal from Eisenbraun & Associates with 2 signed maps	8-10
5.	August 27, 2010	Report on Water Permit Application No. 7206-3	11-16
6.	September 1, 2010	Recommendation of Chief Engineer for Water Permit Application No. 7206-3, Long View Farms, LLP	17
7.	September 1, 2010	Letter to Long View Farms LLP regarding publishing the Notice of Application (with report, recommendation and notice)	18-26
8.	September 1, 2010	Letter to Wagner Post regarding publishing the Notice of Application (w/notice)	27-28
9.	September 2, 2010	Letter to Rebecca Kidder and Harold Shepherd transmitting notice, report and recommendation	29-37
10.	September 24, 2010	Letter opposing Application No. 7206-3 from Joan Olive	38-39
11.	September 27, 2010	Letter from Rebecca L Kidder transmitting Notice of Appearance and Petition in Opposition to Application and Recommendation, Petition to Intervene and Request for Hearing Extension of at least 20 days (w/certificate of service)	40-41
12.	September 27, 2010	Notice of Appearance by Rebecca Kidder	42
13.	September 27, 2010	Petition in Opposition to Application and Recommendation, Petition to Intervene and Request for Hearing Extension of at Least 20 Days (w/attachments)	43-89

Entry	Date	Document	Pages
14.	September 27, 2010	Letter opposing Application No. 7206-3 from Sister Patricia Mylott	90
15.	September 27, 2010	Letter opposing Application No. 7206-3 from Eva Bruguier	91
16.	September 27, 2010	Affidavit of Publication of Notice of Application from the Wagner Post	92-93
17.	September 28, 2010	Letter from Faith Spotted Eagle transmitting Petition in Opposition to Application and Recommendation, Petition to Intervene, and Request for Hearing Extension of at Least 20 Days (w/certificate of service)	94-95
18.	September 28, 2010	Petition in Opposition to Application and Recommendation, Petition to Intervene, and Request for Hearing Extension of at Least 20 Days	96-110
19.	September 29, 2010	Notice from Garland Erbele for Automatic Delay of Hearing (w/certificate of service)	111-113
20.	October 4, 2010	Letter from Diane Best to Board transmitting Motion for Procedural Order	114
21.	October 4, 2010	Motion for Procedural Order (w/certificate of service)	115-119
22.	October 4, 2010	Procedural Order (proposed)	120-122
23.	October 18, 2010	Notice from Garland Erbele for transmitting Procedural Order and Schedule of Hearing (w/certificate of service and enclosures – report, recommendation, affidavit, petitions, summary of water rights law and procedure for hearing)	123-218
24.	October 18, 2010	Procedural Order (signed)	219-221
25.	November 9, 2010	Letter from Rebecca L Kidder transmitting Joint Pre-Hearing Brief on Legal Issues of Petitioner Yankton Sioux Tribe and Individual Petitioners Represented by Harold Shepard (w/certificate of service)	222-224
26.	November 9, 2010	Joint Pre-Hearing Brief on Legal Issues of Petitioner Yankton Sioux Tribe and Individual Petitioners Represented by Harold Shepard	225-256
27.	November 19, 2010	Letter from Eric Gronlund to Olive, Mylott and Bruguier regarding December 2, 2010 evidentiary hearing (with enclosures)	257-410
28.	November 22, 2010	Letter from Eric R Kerkvliet transmitting Applicant's Brief in Response to the Joint Pre-Hearing Brief of the Yankton Sioux Tribe and Individual Petitioners (w/certificate of service)	411-413
29.	November 22, 2010	Applicant's Brief in Response to the Joint Pre-Hearing Brief of the Yankton Sioux Tribe and Individual Petitioners	414-426
30.	November 22, 2010	Letter from Diane Best to Board transmitting Response	427-429

Entry	Date	Document	Pages
		to Joint Prehearing Brief on Legal Issues of Petitioner Yankton Sioux Tribe and Individual Petitioners represented by Harold Shepherd (w/certificate of service)	
31.	November 22, 2010	DENR Response to Joint Prehearing Brief on Legal Issues of Petitioner Yankton Sioux Tribe and Individual Petitioners represented by Harold Shepherd	430-447
32.	November 23, 2010	Letter from Rebecca L Kidder to Stanley County Clerk of Courts regarding Pro Hac Vice Admission of Harold Shepherd in Proceedings Before the South Dakota Water Rights Management Board (w/certificate of service)	448-450
33.	November 23, 2010	Motion of Harold Shepherd for Admission Pro Hac Vice	451-452
34.	November 23, 2010	Motion for Admission of Harold Shepherd submitted by Rebecca L Kidder	453
35.	November 23, 2010	Proposed Order	454
36.	November 23, 2010	Attachment to the Motion for Admission of Harold Shepherd – Copy of Water Rights Management Board Order on Proceedings and Copy of the Petitions Filed	455-477
37.	November 23, 2010	Letter from Rebecca Kidder transmitting Exhibit List, Witness List and Exhibits of Petitioner Yankton Sioux Tribe and the Witness List of Individual Petitioners (w/certificate of service)	478-479
38.	November 23, 2010	Witness List of Petitioner Yankton Sioux Tribe	480
39.	November 23, 2010	Witness List of Individual Petitioners	481
40.	November 23, 2010	Petitioner Yankton Sioux Tribe Exhibit List	482-483
41.	November 23, 2010	Exhibits of the Petitioner Yankton Sioux Tribe	Separate
42.	November 23, 2010	Letter from Rebecca L Kidder transmitting Notice of Appearance (w/certificate of service)	484-485
43.	November 23, 2010	Notice of Appearance	486
44.	November 23, 2010	Letter from Eric R Kerkvliet transmitting Applicant's Witness and Exhibit List (w/certificate of service)	487-489
45.	November 23, 2010	Applicant's Witness and Exhibit List	490-492
46.	November 29, 2010	DENR Witness and Exhibit List (w/certificate of service)	493-499
47.	December 1, 2010	Letter from Charles Abourezk transmitting Notice of Withdrawal as Legal Counsel and Notice of Appearance (w/certificate of service)	500-501
48.	December 1, 2010	Notice of Rebbeca Kidder's Withdrawal as Legal Counsel	502
49.	December 1, 2010	Notice of Appearance of Charles Abourezk	503
50.	December 1, 2010	Letter from Charles Abourezk transmitting Pre-Hearing	504-505

Entry	Date	Document	Pages
		Reply Brief (w/certificated of service)	
51.	December 1, 2010	Pre-Hearing Reply Brief on Legal Issues of Petitioner Yankton Sioux Tribe and Individual Petitioners Represented by Harold Shepherd Pro Hac Vice	506-517
52.	December 9, 2010	Notice from Garland Erbele for Continuance and Rescheduling of Hearing (w/certificate of service)	518-520
53.	December 9, 2010	Order Granting Continuance	521
54.	January 20, 2011	Letter from Diane Best transmitting DENR Disclosures and Revised Exhibit List (w/amended certificate of service)	522-525
55.	January 20, 2011	DENR Disclosures and Revised Exhibit List	526-542
56.	January 25, 2011	Letter from Jon L LaFleur transmitting Notice of Appearance	543
57.	January 25, 2011	Notice of Appearance by Jon L LaFleur (w/certificate of service)	544-545
58.	January 31, 2011	Motion to Withdraw as Counsel by Harold Shepherd	546-547
59.	January 31, 2011	Declaration of Harold Shepherd	548
60.	January 31, 2011	Proposed Order for Shepherd's withdrawal as Counsel (w/certificate of service)	549-551
61.	February 15, 2011	Letter from Diane Best regarding Request for Continuance and e-mail correspondence	552-555
62.	February 16, 2011	Letter from Eric C Kerkvliet regarding Request for Continuance	556-557
63.	February 22, 2011	Notice from Garland Erbele regarding Continuance of Hearing (w/certificate of service)	558-560
64.	February 22, 2011	Order Granting Faith Spotted Eagle's Motion for Continuance	561-562
65.	February 25, 2011	Letter from Eric R Kervliet regarding reconsideration of decision to Granting Motion for Continuance (w/certificate of service)	563-565
66.	February 28, 2011	Order Scheduling Long View Farms, LLP's Request to Reconsider Granting Motion for Continuance	566
67.	March 1, 2011	Notice from Garland Erbele regarding Order Scheduling Long View Farms, LLP's Request to Reconsider Granting Motion for Continuance (w/certificate of service and enclosed order)	567-569
68.	March 9, 2011	Order Granting Shepherd's withdrawal as Counsel	570-571
69.	March 16, 2011	Order Affirming Prehearing Chairman's February 18, 2011 Order Granting Motion for Continuance	572-573
70.	March 22, 2011	Notice from Garland Erbele regarding Order Affirming Prehearing Chairman's February 18, 2011 Order Granting Motion for Continuance (w/certificate of service and enclosed orders)	574-579

Entry	Date	Document	Pages
71.	June 27, 2011	E-mail correspondence from Nicole Martin to Eric Gronlund transmitting June 27, 2011 letter from Jon J LaFleur and Revised Exhibit List of Petitioner Yankton Sioux Tribe including Exhibit Nos. 21 thru 29	580-595
72.	June 28, 2011	Letter from Jon J LaFleur transmitting Revised Exhibit List of Petitioner Yankton Sioux Tribe	596
73.	June 28, 2011	Revised Exhibit List of Petitioner Yankton Sioux Tribe including Exhibit Nos. 21 thru 29 (w/certificate of service)	597-610
74.	June 29, 2011	Notice from Garland Erbele regarding evidentiary hearing to consider Water Permit Application No. 7206-3 (w/certificate of service)	611-613
75.	July 8, 2011	Letter from Diane Best transmitting a subpoena	614
76.	July 8, 2011	Subpoena and Admission of Service of James Goodman	615
77.	July 15, 2011	Transcript of July 13-15, 2011 Proceeding	separate
78.	July 19, 2011	Notice from Garland Erbele regarding Preparation of Findings of Fact, Conclusions of Law and Final Decision (w/certificate of service)	616-618
79.	July 27, 2011	E-mail correspondence from Diane Best to Eric Gronlund, Faith Spotted Eagle and Harold Shepherd	619-627
80.	July 27, 2011	Letter from Eric Gronlund to Faith Spotted Eagle (with enclosure)	628-631
81.	September 16, 2011	Letter from Eric R Kerkvliet transmitting Applicant's Proposed Findings of Fact and Conclusions of Law (w certificate of service)	632-634
82.	September 16, 2011	Applicant's Proposed Findings of Fact and Conclusions of Law	635-652
83.	September 22, 2011	Letter from Diane Best regarding Proposed Findings of Fact and Conclusions of Law (w/certificate of service)	653-655
84.	September 27, 2011	Letter from Jon J LaFleur transmitting Petitioner Yankton Sioux Tribe's Objections to Applicant's Proposed Findings of Fact and Conclusions of Law	656
85.	September 27, 2011	Petitioner Yankton Sioux Tribe's Objections to Applicant's Proposed Findings of Fact and Conclusions of Law (w/certificate of service)	657-670
86.	September 27, 2011	Petitioner Yankton Sioux Tribes Additional Proposed Findings of Fact and Conclusions of Law	671-675
87.	September 27, 2011	Letter from Jon J LaFleur transmitting Certificate of Service	676-677
88.	September 29, 2011	Letter from Jeffrey Hallem to Tornow, Erbele, Kerkvliet and Water Management Board members transmitting proposed Board rulings and Findings of Fact, Conclusions of Law and Final Decision (w/certificate of	678-680

Entry	Date	Document	Pages
		service)	
89.	September 29, 2011	Water Management Board's rulings on the Applicant's proposed findings of fact and conclusions of law; petitioner Yankton Sioux Tribe's additional proposed findings of fact and conclusions of law; and petitioner Yankton Sioux Tribe's objections to applicant's proposed findings of fact, and conclusions of law (proposed)	681-686
90.	September 29, 2011	Findings of Fact, Conclusions of Law and Final Decision (proposed)	687-721
91.	October 5, 2011	Findings of Fact, Conclusions of Law and Final Decision	722-754
92.	October 5, 2011	Water Management Board's Rulings on Applicant's Proposed Findings of Fact and Conclusions of Law; Petitioner Yankton Sioux Tribe's Additional Proposed Findings of Fact and Conclusions of Law; and Petitioner Yankton Sioux Tribe's Objections to Applicant's Proposed Findings of Act and Conclusions of Law	755-760
93.	October 7, 2011	Notice from Garland Erbele transmitting Adopted Findings of Fact, Conclusions of Law and Final Decision to Parties (w/certificate of service and enclosed signed findings and ruling)	761-802
94.	November 7, 2011	Letter from Jon J LaFleur transmitting Notice of Appeal (w/certificate of service)	803
95.	November 7, 2011	Notice of Appeal	804-838

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
: SS
COUNTY OF CHARLES MIX) FIRST JUDICIAL COURT

(CIV 11-146)

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 7206-3) ALPHABETICAL
LONG VIEW FARMS, LLP) INDEX

Entry	Date	Document	Pages
1.	September 27, 2010	Affidavit of Publication of Notice of Application from the Wagner Post	92-93
2.	November 22, 2010	Applicant's Brief in Response to the Joint Pre-Hearing Brief of the Yankton Sioux Tribe and Individual Petitioners	414-426
3.	September 16, 2011	Applicant's Proposed Findings of Fact and Conclusions of Law	635-652
4.	November 23, 2010	Applicant's Witness and Exhibit List	490-492
5.	July 8, 2010	Application For Permit To Appropriate Water (Form 2, Form 2A, 2 maps	3-6
6.	November 23, 2010	Attachment to the Motion for Admission of Harold Shepherd – Copy of Water Rights Management Board Order on Proceedings and Copy of the Petitions Filed	455-477
7.	January 31, 2011	Declaration of Harold Shepherd	548
8.	January 20, 2011	DENR Disclosures and Revised Exhibit List	526-542
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13.	November 23, 2010	Exhibits of the Petitioner Yankton Sioux Tribe	Separate
14.	October 5, 2011	Findings of Fact, Conclusions of Law and Final Decision	722-754
15.	September 29, 2011	Findings of Fact, Conclusions of Law and Final	687-721

Entry	Date	Document	Pages
		Decision (proposed)	
16.	November 9, 2010	Joint Pre-Hearing Brief on Legal Issues of Petitioner Yankton Sioux Tribe and Individual Petitioners Represented by Harold Shepard	225-256
17.	December 1, 2010	Letter from Charles Abourezk transmitting Notice of Withdrawal as Legal Counsel and Notice of Appearance (w/certificate of service)	500-501
18.	December 1, 2010	Letter from Charles Abourezk transmitting Pre-Hearing Reply Brief (w/certificated of service)	504-505
19.	September 22, 2011	Letter from Diane Best regarding Proposed Findings of Fact and Conclusions of Law (w/certificate of service)	653-655
20.	February 15, 2011	Letter from Diane Best regarding Request for Continuance and e-mail correspondence	552-555
21.	October 4, 2010	Letter from Diane Best to Board transmitting Motion for Procedural Order	114
22.	November 22, 2010	Letter from Diane Best to Board transmitting Response to Joint Prehearing Brief on Legal Issues of Petitioner Yankton Sioux Tribe and Individual Petitioners represented by Harold Shepherd (w/certificate of service)	427-429
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31.	February 25, 2011	Letter from Eric R Kervliet regarding reconsideration of decision to Granting Motion for Continuance (w/certificate of service)	563-565

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33.	September 29, 2011	Letter from Jeffrey Hallem to Tornow, Erbele, Kerkvliet and Water Management Board members transmitting proposed Board rulings and Findings of Fact, Conclusions of Law and Final Decision (w/certificate of service)	678-680
34.	September 27, 2011	Letter from Jon J LaFleur transmitting Certificate of Service	676-677
35.	November 7, 2011	Letter from Jon J LaFleur transmitting Notice of Appeal (w/certificate of service)	803
36.	September 27, 2011	Letter from Jon J LaFleur transmitting Petitioner Yankton Sioux Tribe's Objections to Applicant's Proposed Findings of Fact and Conclusions of Law	656
37.	June 28, 2011	Letter from Jon J LaFleur transmitting Revised Exhibit List of Petitioner Yankton Sioux Tribe	596
38.	January 25, 2011	Letter from Jon L LaFleur transmitting Notice of Appearance	543
39.	November 23, 2010	Letter from Rebecca Kidder transmitting Exhibit List, Witness List and Exhibits of Petitioner Yankton Sioux Tribe and the Witness List of Individual Petitioners (w/certificate of service)	478-479
40.	November 23, 2010	Letter from Rebecca L Kidder to Stanley County Clerk of Courts regarding Pro Hac Vice Admission of Harold Shepherd in Proceedings Before the South Dakota Water Rights Management Board (w/certificate of service)	448-450
41.	November 9, 2010	Letter from Rebecca L Kidder transmitting Joint Pre-Hearing Brief on Legal Issues of Petitioner Yankton Sioux Tribe and Individual Petitioners Represented by Harold Shepard (w/certificate of service)	222-224
42.	November 23, 2010	Letter from Rebecca L Kidder transmitting Notice of Appearance (w/certificate of service)	484-485
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44.	July 6, 2010	Letter from Todd Van Maanen transmitting Application for Permit to Appropriate Water	1-2
45.	July 8, 2010	Letter of Transmittal from Eisenbraun & Associates	8-10

Entry	Date	Document	Pages
		with 2 signed maps	
46.	September 27, 2010	Letter opposing Application No. 7206-3 from Eva Bruguier	91
47.	September 24, 2010	Letter opposing Application No. 7206-3 from Joan Olive	38-39
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53.	October 4, 2010	Motion for Procedural Order (w/certificate of service)	115-119
54.	November 23, 2010	Motion of Harold Shepherd for Admission Pro Hac Vice	451-452
55.	January 31, 2011	Motion to Withdraw as Counsel by Harold Shepherd	546-547
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57.	December 9, 2010	Notice from Garland Erbele for Continuance and Rescheduling of Hearing (w/certificate of service)	518-520
58.	October 18, 2010	Notice from Garland Erbele for transmitting Procedural Order and Schedule of Hearing (w/certificate of service and enclosures – report, recommendation, affidavit, petitions, summary of water rights law and procedure for hearing)	123-218
59.	February 22, 2011	Notice from Garland Erbele regarding Continuance of Hearing (w/certificate of service)	558-560
60.	June 29, 2011	Notice from Garland Erbele regarding evidentiary hearing to consider Water Permit Application No. 7206-3 (w/certificate of service)	611-613
61.	March 22, 2011	Notice from Garland Erbele regarding Order Affirming Prehearing Chairman's February 18, 2011 Order Granting Motion for Continuance (w/certificate of service and enclosed orders)	574-579
62.	March 1, 2011	Notice from Garland Erbele regarding Order Scheduling Long View Farms, LLP's Request to Reconsider Granting Motion for Continuance (w/certificate of service and enclosed order)	567-569
63.	July 19, 2011	Notice from Garland Erbele regarding Preparation of	616-618

Entry	Date	Document	Pages
		Findings of Fact, Conclusions of Law and Final Decision (w/certificate of service)	
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67.	January 25, 2011	Notice of Appearance by Jon L LaFleur (w/certificate of service)	544-545
68.	September 27, 2010	Notice of Appearance by Rebecca Kidder	42
69.	December 1, 2010	Notice of Appearance of Charles Abourezk	503
70.	December 1, 2010	Notice of Rebbeca Kidder's Withdrawal as Legal Counsel	502
71.	March 16, 2011	Order Affirming Prehearing Chairman's February 18, 2011 Order Granting Motion for Continuance	572-573
72.	December 9, 2010	Order Granting Continuance	521
73.	February 22, 2011	Order Granting Faith Spotted Eagle's Motion for Continuance	561-562
74.	March 9, 2011	Order Granting Shepherd's withdrawal as Counsel	570-571
75.	February 28, 2011	Order Scheduling Long View Farms, LLP's Request to Reconsider Granting Motion for Continuance	566
76.	September 27, 2010	Petition in Opposition to Application and Recommendation, Petition to Intervene and Request for Hearing Extension of at Least 20 Days (w/attachments)	43-89
77.	September 28, 2010	Petition in Opposition to Application and Recommendation, Petition to Intervene, and Request for Hearing Extension of at Least 20 Days	96-110
78.	November 23, 2010	Petitioner Yankton Sioux Tribe Exhibit List	482-483
79.	September 27, 2011	Petitioner Yankton Sioux Tribe's Objections to Applicant's Proposed Findings of Fact and Conclusions of Law (w/certificate of service)	657-670
80.	September 27, 2011	Petitioner Yankton Sioux Tribes Additional Proposed Findings of Fact and Conclusions of Law	671-675
81.	December 1, 2010	Pre-Hearing Reply Brief on Legal Issues of Petitioner Yankton Sioux Tribe and Individual Petitioners Represented by Harold Shepherd Pro Hac Vice	506-517
82.	October 4, 2010	Procedural Order (proposed)	120-122
83.	October 18, 2010	Procedural Order (signed)	219-221
84.	November 23, 2010	Proposed Order	454
85.	January 31, 2011	Proposed Order for Shepherd's withdrawal as Counsel (w/certificate of service)	549-551

Entry	Date	Document	Pages
86.	July 8, 2010	Receipt to Longview Farm LLP for payment of Application Fee	7
87.	September 1, 2010	Recommendation of Chief Engineer for Water Permit Application No. 7206-3, Long View Farms, LLP	17
88.	August 27, 2010	Report on Water Permit Application No. 7206-3	11-16
89.	June 28, 2011	Revised Exhibit List of Petitioner Yankton Sioux Tribe including Exhibit Nos. 21 thru 29 (w/certificate of service)	597-610
90.	July 8, 2011	Subpoena and Admission of Service of James Goodman	615
91.	July 15, 2011	Transcript of July 13-15, 2011 Proceeding	separate
92.	October 5, 2011	Water Management Board's Rulings on Applicant's Proposed Findings of Fact and Conclusions of Law; Petitioner Yankton Sioux Tribe's Additional Proposed Findings of Fact and Conclusions of Law; and Petitioner Yankton Sioux Tribe's Objections to Applicant's Proposed Findings of Act and Conclusions of Law	755-760
93.	September 29, 2011	Water Management Board's rulings on the Applicant's proposed findings of fact and conclusions of law; petitioner Yankton Sioux Tribe's additional proposed findings of fact and conclusions of law; and petitioner Yankton Sioux Tribe's objections to applicant's proposed findings of fact, and conclusions of law (proposed)	681-686
94.	November 23, 2010	Witness List of Individual Petitioners	481
95.	November 23, 2010	Witness List of Petitioner Yankton Sioux Tribe	480

Exhibits Introduced into Evidence

in the Matter of the Water Permit Application No. 7206-3, Long View Farms, LLP

Exhibit No.	Description
DENR-1	Agency file on Water Permit Application No. 7206-3, Long View Farms, LLP
DENR-2	Curriculum Vitae - James Goodman
DENR-3	August 20, 2007 Affidavit of Publication (General Permit)
DENR-4	General Water Pollution Control Permit for Concentrated Animal Feeding Operations (2003)
DENR-5	10 Most Asked Questions about the State General Permit Process for Concentrated Animal Feeding Operations
DENR-6	September 10, 2007 Letter to Lyndon Moss from Kent Woodmansey
DENR-7	September 16, 2008 Letter to Lyndon Moss from Kent Woodmansey
DENR-8	January 26, 2010 Letter to Lyndon Moss from Kent Woodmansey
DENR-10	Long View Farms Site Location Map
DENR-11	September 9, 2007 Memorandum from Sara Speck to Darold Krein
DENR-12	March 16, 2009 letter from Jeanne Goodman to Rebecca Kidder
DENR-13	January 14, 2009 letter from Rebecca Kidder to Kent Woodmansey
DENR-14	February 2, 2009 Memorandum from Derric Iles to Jeanne Goodman
DENR-15	Curriculum Vitae - Derric Iles
DENR-16	Report on Water Permit Application No. 7206-3, for Long View Farms, August 27, 2010
DENR-20	SD DENR Permitted CAFOs – November 12, 2010
DENR-21	2008 Jensen aquifer map of Charles Mix County
DENR-22	Plate 7 of Hedges Report
DENR-A	Memorandum Decision and Order
DENR-B	July 12,2010 Letter to David L Nadolski from Hon. Bruce V Anderson
Applicants-1	Longview's Water Rights Permit Application
Applicants-2	Affidavit of Publication and Public Notice (Wagner Post)
Applicants-3	September 1, 2010 letter from Eric Gronlund to Arlan Moss
Applicants-4	September 1, 2010 letter from Eric Gronlund to Wagner Post

	with Notice of Hearing
Applicants-5	Recommendation of Chief Engineer for Water Permit Application No. 7206-3 with staff report
Applicants-7	South Dakota Well Completion Report of Hutmacher Drilling, Inc.
Applicants-8	Payroll Summary of Longview Farms, LLP
Applicants-9	Summary of Amounts Paid to Vendors in Charles Mix County
Applicants-10	Longview's Randall Community Water District's Water Usage Records
Applicants-11	April 29, 2008 letter from Kent Woodmansey to Lyndon Moss
Applicants-12	September 16, 2008 letter from Kent Woodmansey to Lyndon Moss
Applicants-13	January 26, 2010 letter from Kent Woodmansey to Lyndon Moss
Applicants-14	Soil Boring Logs
Applicants-16	Site Plan for Long View Farms, LLP
YST-2	Curriculum Vitae – Dr. Perry Rahn
YST-3	Hydrogeology of the Ft. Randall Casino area, Charles Mix County, SD, November 25, 2008, Dr. Perry Rahn
YST-4	Response to Derric Iles' Comments Regarding Request for Modifications and/or Reconsideration of the Permitting of Longview Farm, LLP, Prepared by Dr. Perry Rahn
YST-5	Flow Net Analysis, Dr. Perry Rahn
YST-6	Yankton Sioux Tribe Wells in the USGS ground-water database with the historical boundary area
YST-7	South Dakota Well Completion Reports, Charles Mix County 2008
YST-8	South Dakota DENR September 16, 2008 Long View Farm, LLP Notifications of Certificate of Compliance
YST-9	South Dakota DENR September 16, 2008 Longview Farm, LLP Notification of Approval of Changes in As-Built Drawings
YST-11	South Dakota DENR April 29, 2008 Long View Farms, LLP Approval of Manure Management System Revised Plans and Specifications
YST-14	Map of Longview Farm, LLP in Relation to Karl Mundt National Wildlife Refuge
YST-15	Steve Wing et.al, "Air Pollution and Odor in Communities Near Industrial Swine Operations", Environmental Health Perspectives, October 2008
YST-16	Burkholder et.al, "Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality," Environmental Health Perspectives, February 2007
YST-17	Heederick et.al, "Health Effects of Airborne Exposures from Concentrated Animal Feeding Operations", Environmental

	Health Perspective, February 2007
YST-18	Bureau of Indian Affairs 2005 Labor Force Report, Yankton Sioux Tribe
YST-19	April 24, 2008 Correspondence from Mike Horned Eagle, Wagner Service Unit Indian Health Service on Health Characteristics of Wagner Service Unit User Population
YST-21	SDGS Map
YST-22	Preglacial Streams Map
YST-23	Land Application Sites for Long View Farms, LLP Manure Areas
YST-24	SD Academy of Science Antimicrobial Activity of Native South Dakota Plant Extracts on Escherichia Coli
YST-25	Ablation/Lodgement Tills
YST-26	Definition of Aquifer
YST-27	Glossary of Geology
YST-28	Codell SS. Map
YST-29	Generalized Stratigraphic Column Listing Geologic Formations and some of their Water Bearing Characteristics

CERTIFICATION

I hereby certify that on December 9, 2011, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated December 9, 2011, regarding transmittal of the administrative record to the First Judicial Court of Water Right Permit Application No. 7206-3, addressed as stated below :

Eric Kerkvliet
Lynn Jackson Shultz & Lebrun
PO Box 2700
Sioux Falls SD 57104

Jon J LaFleur
Abourezk & Zephier PC
PO Box 9460
Rapid City SD 57709-9460

Diane Best, Assistant Attorney General
317 N Main Street
Sioux Falls SD 57104-6004

Faith Spotted Eagle
PO Box 667
Lake Andes SD 58356

Thomasina Real Bird, Attorney at Law
1900 Plaza Drive
Louisville CO 80037

Gail Jacobson

Gail Jacobson
Water Right Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 12th day of December 2011.

Karen Schlaak

Karen Schlaak
Notary Public
My Commission expires April 1, 2013

SEAL KAREN SCHLAAK NOTARY PUBLIC State of South Dakota SEAL

PARTIES OF RECORD

WATER PERMT APPLICATION No. 7206-3, Long View Farms LLP

Applicant

Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239

represented by:

Dave Nadolski, Attorney
Lynn, Jackson, Shultz & Lebrun
PO Box 1920
Sioux Falls SD 57101

Petitioners

Yankton Sioux Tribe
Represented by:
Rebecca L. Kidder, Attorney
Abourezk & Zephier, PC
PO Box 9460
Rapid City SD 57709

Sister Patricia Mylott
PO Box 217
Marty SD 57361

Joan Olive
Box 72
Spencer NE 68777

Ms. Eva Bruguier
PO Box 274
Marty SD 57361

Faith Spotted Eagle
PO Box 667
Lake Andes SD 57356

Judy Honimichle
c/o Fort Randall Casino
38538 SD Hwy 46
Lake Andes SD 57356-7011

Sharon Drapeau
General Delivery
Marty SD 57361

Wesly Hare
General Delivery
Marty SD 57361

Glenn Drapeau
General Delivery
Lake Andes SD 57361

Kip (Spotted Eagle) Collins
PO Box 667
Lake Andes SD 57356

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Eisenbraun & Associates
Professional Engineers & Surveyors

July 6, 2010

Mr. Garland Erbele, Chief Engineer
Water Rights Program
South Dakota Department of Environment and Natural Resources
Joe Foss Building
523 E. Capitol Avenue
Pierre, SD 57501-3182

RE: Longview Farms, LLP, Charles Mix County, South Dakota
E/A Project No. Y06240.C01

Dear Mr. Erbele:

Enclosed is a Water Rights Permit application, project site location map, and application fee ($300.00) for Long View Farm, LLP. This information is being submitted to your office for review and approval of the application. The submittal package has been assembled utilizing the requirements as set forth in the South Dakota Department of Environment and Natural Resources' Water Rights guidelines.

The legal description for the project property is the Southwest 1/4 of the Northwest 1/4 of Section 9, Township 95 North, Range 64 West, Charles Mix County, South Dakota. The contact information for the facility is as follows: Arlan Moss, 3172 320th St, Hull, Iowa 51239; Phone: (712) 439-2748. The well will serve Long View Farms which is an existing swine farrowing, breeding and gestation operation. The operation has been approved by the SD DENR for coverage under the CAFO permit. The waste/nutrient containment system for Long View Farm, LLP shall be deep pits located under the GDU barn and the breeding and gestation barn.

To meet the SD DENR's CAFO permit requirements, a well will not be located within 150 feet of the waste containment structures or the composting facility. The proposed well will be located near the existing collapsed well. Due to possible site condition variations, the proposed final location of the well will be at the discretion of the well driller and the owner(s).

The primary water supply for the facility comes from a rural water hookup and will be supplemented by the proposed onsite well with a maximum pump rate of 30 gallons per minute. Water lines have not been installed in the waste containment pit. Water lines have been installed in accordance with state plumbing codes.

215 Walnut Street
Yankton, SD 57078
Phone: 605-665-8092
Fax: 605-665-0523

Visit our web site or e-mail us @ www.eaweb.com

1-800-888-8307

The proposed well information provided on the application was obtained from Hutmacher Drilling, Inc. This information is for a typical well in this area and may change depending on site conditions once drilling has begun.

If you require any additional information or clarification, please contact my office. Your timely review of the submittal will be greatly appreciated. Thank you.

Sincerely,
Eisenbraun & Associates, Inc.

Todd Van Maanen, PE
Vice President

cc: Arlen Moss, Longview Farms, LLP
Dave Nadolski, Attorney

SD EForm - 1585LD V3
FORM 2: Application for uses other than irrigation
(type or print)

Mail to: PMB 2020 DENR - Water Rights 523 E Capitol Ave Pierre, SD 57501-3182 ph. (605) 773-3352	(office use only) No. 7206-3 Hydrologic Unit 10170101 Basin Missouri River Newspaper Wagner Post

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

Check use(s) of water:

- [ ] Municipal
- [ ] Rural Water System
- [ ] Domestic (over 18 gpm)
- [ ] Suburban Housing
- [x] Commercial
- [ ] Industrial
- [ ] Recreational
- [ ] Fish & Wildlife
- [ ] Other
- [ ] Institutional
- [ ] Geothermal Heat

Type of Application: (check one)
- [x] **New**
- [ ] **Vested Right** (Use predates Mar 2, 1955)
- [ ] **Future Use Reservation**
- [ ] **Place to Beneficial Use Water Reserved by Future Use Permit No.** _____
- [ ] **Amendment/Correction to Permit No.** _____

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

1. Name of Applicant Long View Farms, LLP Phone 712-439-2748
   (check one) [x] Owner [ ] Tenant/lessee
   Mailing Address 3172 320th St (Address) Hull (City) IA (State) 51239 (Zip Code)
2. Amount of water claimed 0.067 *CFS or 30 **GPM ***AF
   (*Cubic Feet per Second) (**Gallons per Minute) (***Acre Feet - storage capacity of dam/dugout or annual use if applicable)
3. Source of water supply Codell Aquifer
4. Location of point of diversion (example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W) County Charles Mix
   SW 1/4 X NW 1/4, Sec 9, T95N, R64W, Charles Mix County, SD
5. County or counties where water will be used Charles Mix
6. Annual period during which water is to be used year round January 1 - December 31
7. Give a description of the project. When available include any preliminary engineering report or other reports or information that will help explain the project. (Attach sheet if more space is needed)
   The facility is a swine farrowing operation which produces piglets for finishing at other off-site locations. Long View farms is a zero-discharge CAFO permitted by SD DENR.

STATE OF SOUTH DAKOTA)
County of Yankton) SS

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

I, Arlan Moss, 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 Arlan J. Moss

Subscribed and sworn to before me this 3rd day of July 20 10

Lois E. Bottolfsen
Notary Public signature

2010-01

Form 2A
(Complete applicable portions only)

Supplemental Information

(type or print in ink)

1. Well Information - Proposed Construction

a) Drill Hole Diameter 8 3/4" Depth 600'

b) Casing Type Steel Sch 40 Diameter 5" Thickness 0.26"

c) Screen Type Stainless steel Diameter 5" Thickness Slot 0.025"

d) Gravel Pack Sand Length of Gravel Pack 20'

e) Depth to Top of Water Bearing Material 570'

f) Depth to Water (ground surface to water level) 460'

g) Distance to nearest existing domestic well:

On applicant's property Collapsed well ~ 100' On property owned by others ~1.25-1.5 miles NNW

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 - _____

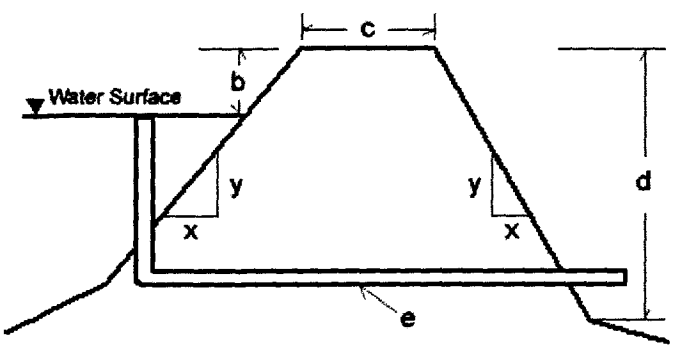
b) Depth to water (ground surface to water level) - _____

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 (e.g. 3 to 1 is a typical slope)

Upstream -

Downstream -

h) Surface Area of Impoundment -

i) Storage _____ Acre Feet

j) Drainage Area Above Dam _____ Acres

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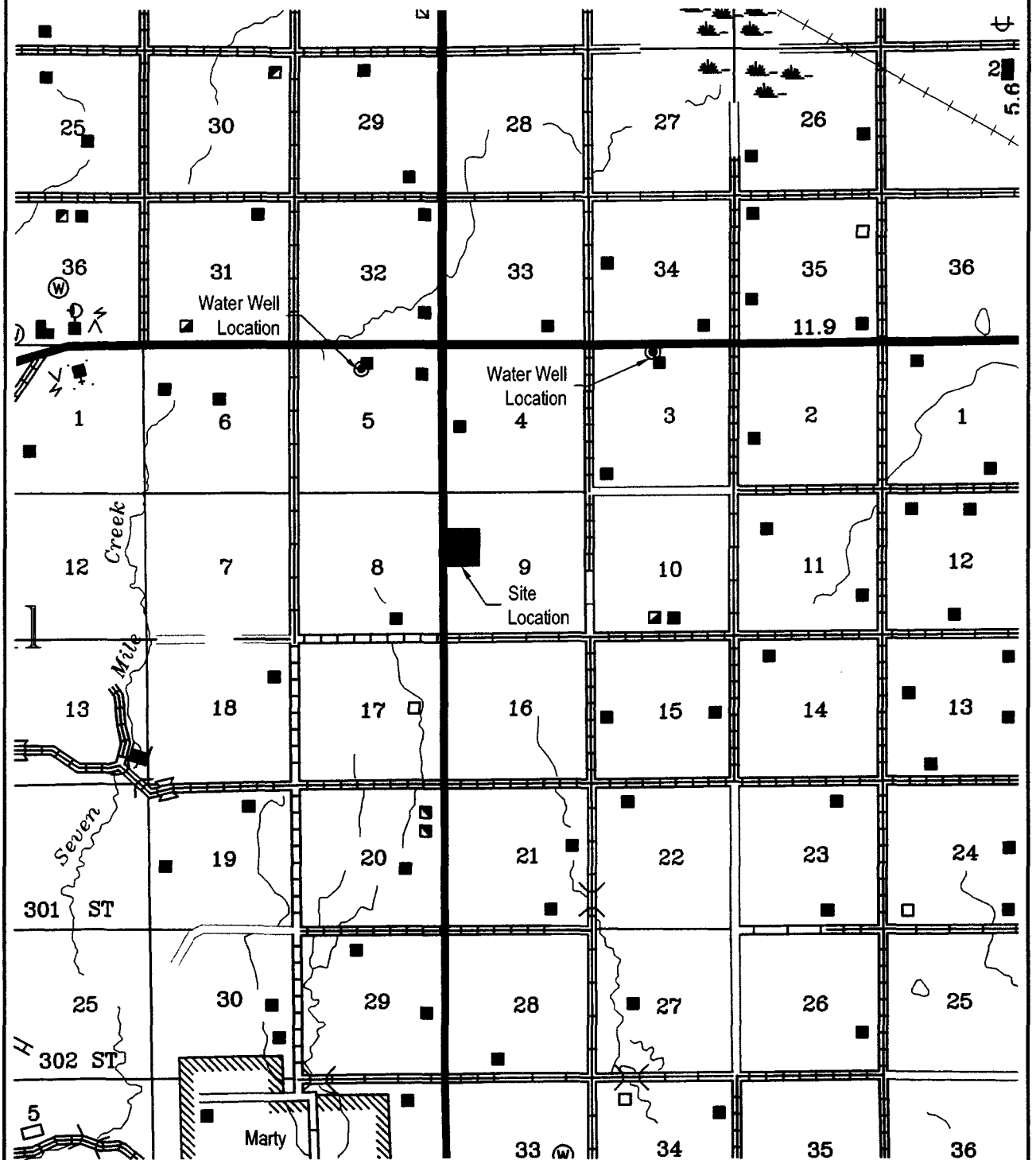
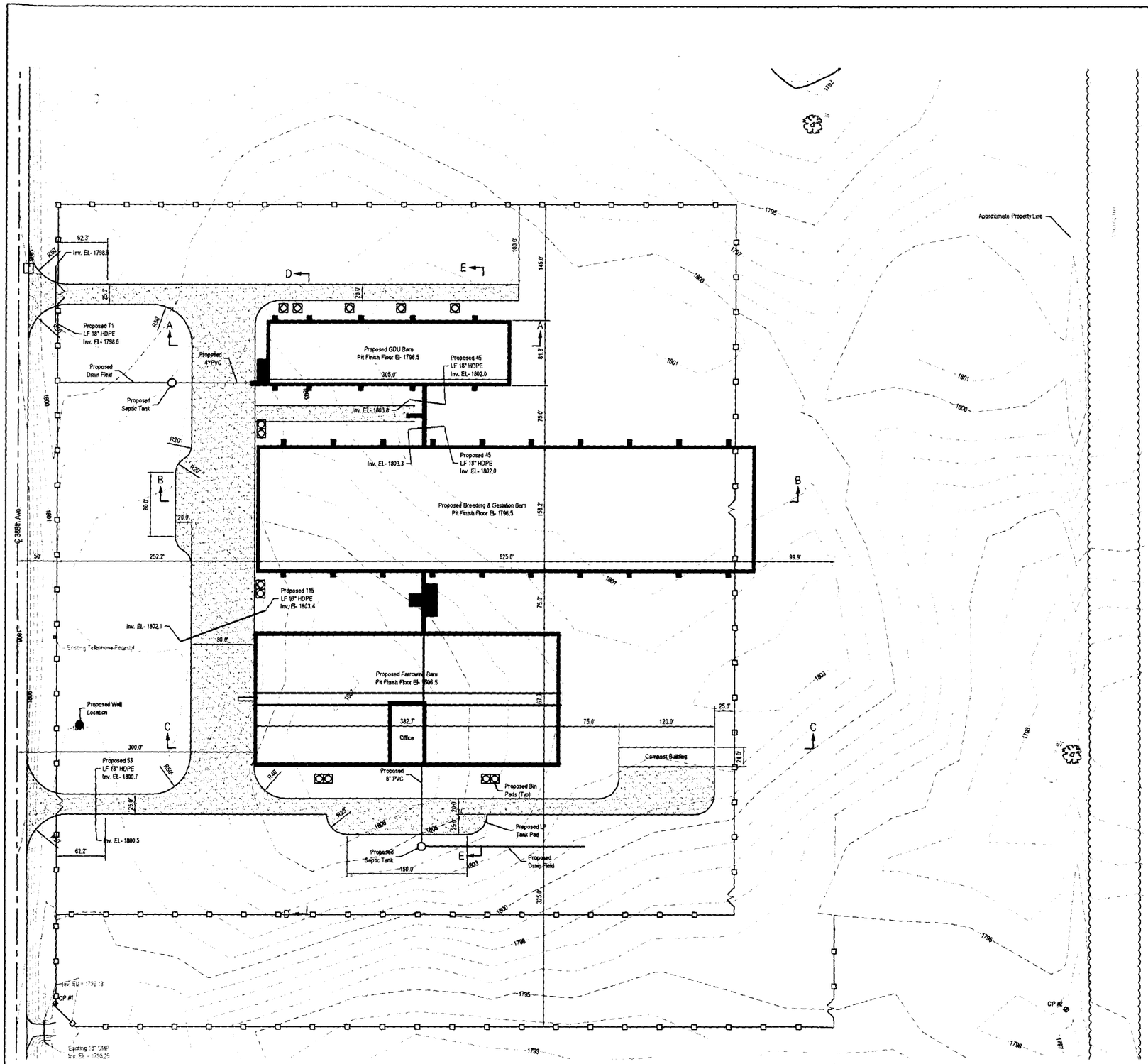
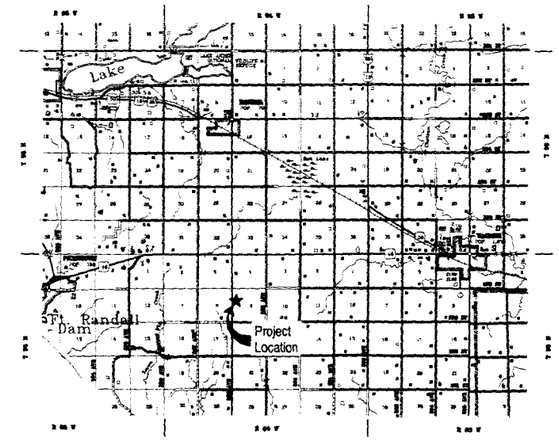
Water Well Location Map for NW 1/4, Sec. 9, T 95 N, R 64 W, Charles Mix County, SD



Title:	Project Name:	Prepared By
Water Well Location for Long View Farm, LLP Charles Mix County, SD	**Long View Farm, LLP Charles Mix County, SD**	Eisenbraun & Associates Professional Engineers & Surveyors
	Sheet Name: **Site Map**	215 Walnut Yankton, South Dakota 57078 605-665-6092 FAX 605-665-05 www.eaweb.co
	Proj. No.:	Drawn By: Checked By: Date:



Water Well Location Map



Location Map

Scale: 1/2 Inch = 1 Mile

CONTOUR INTERVAL = ONE FOOT

Legend

- CP#1 — Control Point
- 1800 — Existing Contour
- 1800 — Proposed Contour
- Existing Trees
- Existing Wetland
- Proposed Building
- Proposed Gravel
- 60" — Deciduous Tree (Trunk Diameter shown)

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Eisenbraun & Associates

Project Name: Long View Farm, LLP
Charles Mix County, SD

Sheet Name: Site Layout

Long View Farm, LLP
NW 1/4, Section 9, T95N, R64W
Charles Mix County, SD

Date: 26-June-07

SHEET NO.
1
OF
8
SHEETS

RECEIPT

WATER RIGHTS PROGRAM

South Dakota Department of Environment and Natural Resources

Date 7/8, 20 10

RECEIVED OF Longview Farm LLP 3211 Indian Ave Hull IA 51239

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

Fee for Application for Permit No. 7206-3 to Appropriate Water, to construct and to put water to beneficial use	200	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. 7206-3	100	00
Fee for Filing Transfer Form _____		
Fee for _____		
Fee for Issuing New Well Driller's License No. _____ for C.Y. _____		
Fee for Renewal of Well Driller's License No _____ for C.Y. _____		
Fee for Issuing Well Pump Installer's License No. _____ for C.Y. _____		
Fee for Renewal of Well Pump Installer's License No. _____ for C.Y. _____		
(Any Other Work Provided by Law) TOTAL	300	00

No. 04580

By Harland Erickson
Chief Engineer

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215 Walnut Street
Yankton, South Dakota
(605) 665-8092
Fax (605) 665-0523

Eisenbraun & Associates
Professional Engineers & Surveyors
Innovative Solutions – Long Term Value

Letter of Transmittal

To: ATTN: Eric
SD DENR – Water Rights Program
523 E. Capitol Avenue
Pierre, SD 57501-3182

Date: 7/8/2010

Project #: Y06240.C01

Subject: Requested Maps

WE ARE SENDING YOU:

X Enclosed ☐ Under Separate Cover via _____

the following items:

☐ Shop drawings ☐ Prints ☐ Plans ☐ Specifications
☐ Copy of letter ☐ Change Order X two maps

THESE ARE TRANSMITTED AS CHECKED BELOW:

☐ For approval ☐ Approved as submitted ☐ Corrected as requested
☐ For your records ☐ Approved as noted ☐ Documents returned after loan to us
X As requested ☐ Returned for corrections ☐ For bids due
☐ For review and comments ☐ _____

REMARKS :

Copy To: _____ Signed: Todd Van Maanen

If enclosures are not as noted, kindly notify us at once.

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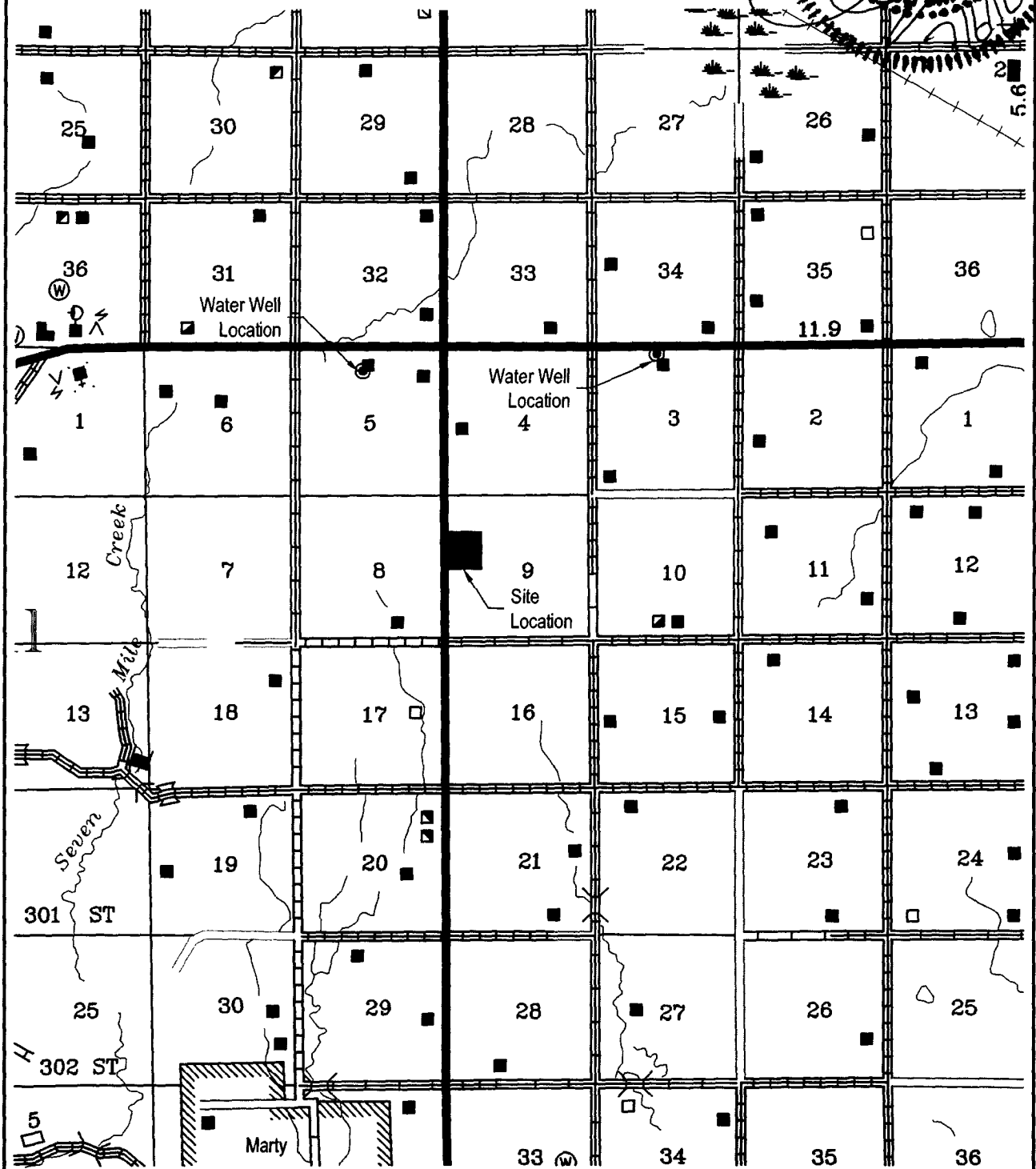
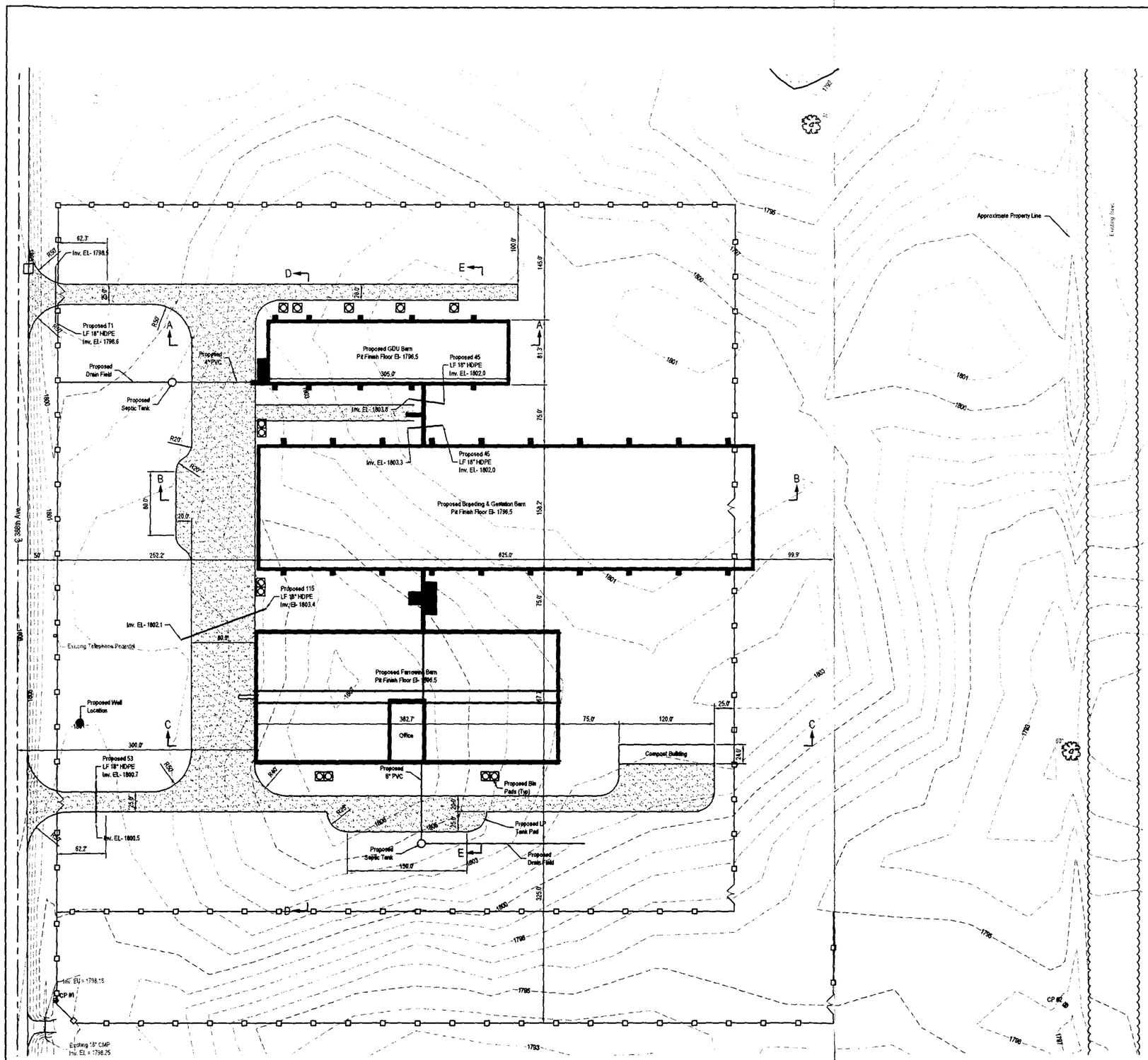
WATER RIGHTS PROGRAM

Water Well Location Map for NW 1/4, Sec. 9, T 95 N, R 64 W, Charles Mix County, SD

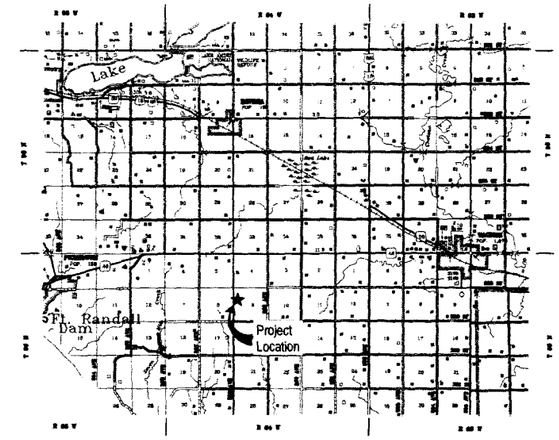


Title:	Project Name:	Prepared By
Water Well Location for Long View Farm, LLP Charles Mix County, SD	Long View Farm, LLP Charles Mix County, SD	Eisenbraun & Associates Professional Engineers & Surveyors, 215 Walnut, Yankton, South Dakota 57078, 605-665-6092, FAX 605-665-05, www.eaweb.co
	Sheet Name: Site Map	
	Proj. No.:	Dwg. No.: Drawn By: Checked By: Date:

J:\PROJECTS\Ag Clients\Other Ag Clients\Y06240 - Long View Farm LLP (Hull)\dwg\Water Well.dwg, Site Map, 8/4/2008 8:20:55 AM



Water Well Location Map



Location Map
Scale: 1/2 Inch = 1 Mile

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WATER RIGHTS PROGRAM

CONTOUR INTERVAL = ONE FOOT

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- 1800 — Existing Contour
- 1800 — Proposed Contour
- Existing Trees
- Existing Wetland
- Proposed Building
- Proposed Gravel
- 60" — Deciduous Tree (Trunk Diameter shown)

REGISTERED PROFESSIONAL ENGINEER
REG. NO. 6820
TODD VAN MANEN
SOUTH DAKOTA
7/6/10

Prepared by
Eisenbraun & Associates
Professional Engineers
Phone: 605-996-2000
Fax: 605-996-2001

Project Name
Long View Farm, LLP
Charles Mix County, SD

Sheet Name
Site Layout

Long View Farm, LLP
NW 1/4, Section 9, T95N, R64W
Charles Mix County, SD

Date	Y08246.D02
Dwg. No.	Y08246D02
Drawn	SBV
Checked	AKK
Revision	
Revision	
Revision	
Date	28-June-07

SHEET NO.
1
OF
8
SHEETS

REPORT ON WATER PERMIT APPLICATION NO. 7206-3
For Long View Farms
August 27, 2010

Application No. 7206-3 proposes to appropriate 0.067 cfs (30 gpm) from one well approximately 600 feet deep located in the SW ¼ NW ¼ of section 9, T95N R64W in Charles Mix County. The water will be used for commercial use at a swine farrowing facility.

AQUIFER – CODELL SANDSTONE (CDLL)

The Codell sandstone is a buried sedimentary rock member of the Carlile shale which consists of loose to tightly cemented very fine to coarse light brownish gray to dark greenish black and brown sand with clay (Kume, 1977). The aquifer is confined and under artesian conditions at this site. The Codell aquifer is known locally as the "sandrock" or the "soft water sand" (Kume, 1977). Data from the county study and Water Right well files indicate the top of the Codell sandstone should be approximately 1150 to 1200 feet msl. This would mean a well depth of at least 570 feet to 620 feet at this site to penetrate the Codell sandstone. The applicant indicates an expected depth of 600 feet. In this area the Niobrara formation (also considered and aquifer) overlies the Codell aquifer.

The Codell sandstone underlies 1,134 square miles (725,760 acres) of Charles Mix County and is estimated to contain 1.45 million acre-feet of recoverable water in storage (Hedges, 1982). The aquifer extends into Douglas and Hutchinson Counties to the north and into Bon Homme County to the east and into Nebraska to the south. A map of the Codell sandstone published by Hedges is included with this report (Hedges, 1982). Ground water movement is probably from northwest to southeast in the area of this application (Kume, 1977).

The Water Right Program monitors two observation wells completed into the Codell sandstone (DG-80F and HT-87D) but are located about 23 and 25 miles north and northeast of this site respectively. Water levels for these two wells show response to climatic conditions and annual fluctuations that may be due to pumping (Water Rights, 2010). However, because these wells are located so far from this site the record would only be representative of the entire aquifer and not show any aquifer response due to pumping from this site. Water levels for these two observation wells are included with this report for informational purposes.

The Corps of Engineers drilled an observation well in T95N R64W in the northeast corner of section 11 which is located about two miles east of this site. Kume published a hydrograph of the water levels beginning in 1952 and extending through 1970 (page 21, Figure 17) in Bulletin 22, Geology and Water Resources of Charles Mix and Douglas Counties. The Water Rights Program began monitoring this same well in 1982 and continued through 1993 when the monitoring well ceased to function properly. The Water Rights well name was CM-52A for this Corps of Engineer well and a hydrograph for the available record is included with this report. The entire water level record for the Codell indicates the aquifer is capable of sustaining additional withdrawals (Water Rights, 2010).

REVIEW OF EXISTING WATER PERMITS/RIGHTS

There are no nearby water permits/rights that obtain water from the Codell sandstone aquifer. There are domestic wells in the area which use the Codell as a source of water. The applicant indicates two sites with water well locations about 1.5 miles northwest and northeast of this site. At this distance and with the relatively small pumping rate drawdown is not expected to be significant nor cause any adverse impacts. At one time the City of Geddes, Town of Ravinia and the City of Lake Andes used wells from the Codell but now obtain water from the Missouri River or from rural water. Those wells are used as a backup water supply at this time. The only other Codell aquifer Water Right in Charles Mix County is for Clearfield Colony for domestic use.

CONCLUSIONS

1. Water is available from the Codell aquifer.
2. The aquifer is under artesian conditions at this site. Drawdown due to pumping can be expected to occur. However, drawdown is not expected to be significant at this pumping rate nor cause any adverse effects on existing water rights or on area domestic users.
3. The well authorized by this application must be constructed in accordance with SD Well Construction Rules. Also there is a collapsed well near this site that must be plugged in accordance with SD Well Construction Standards if that has not already been done.
4. Plans and specifications for this facility have been approved by the Department.
5. The primary source of water for this facility is from Randall Rural Water System and this well will be a supplemental source for the facility.

James A Goodman
Natural Resources Engineer

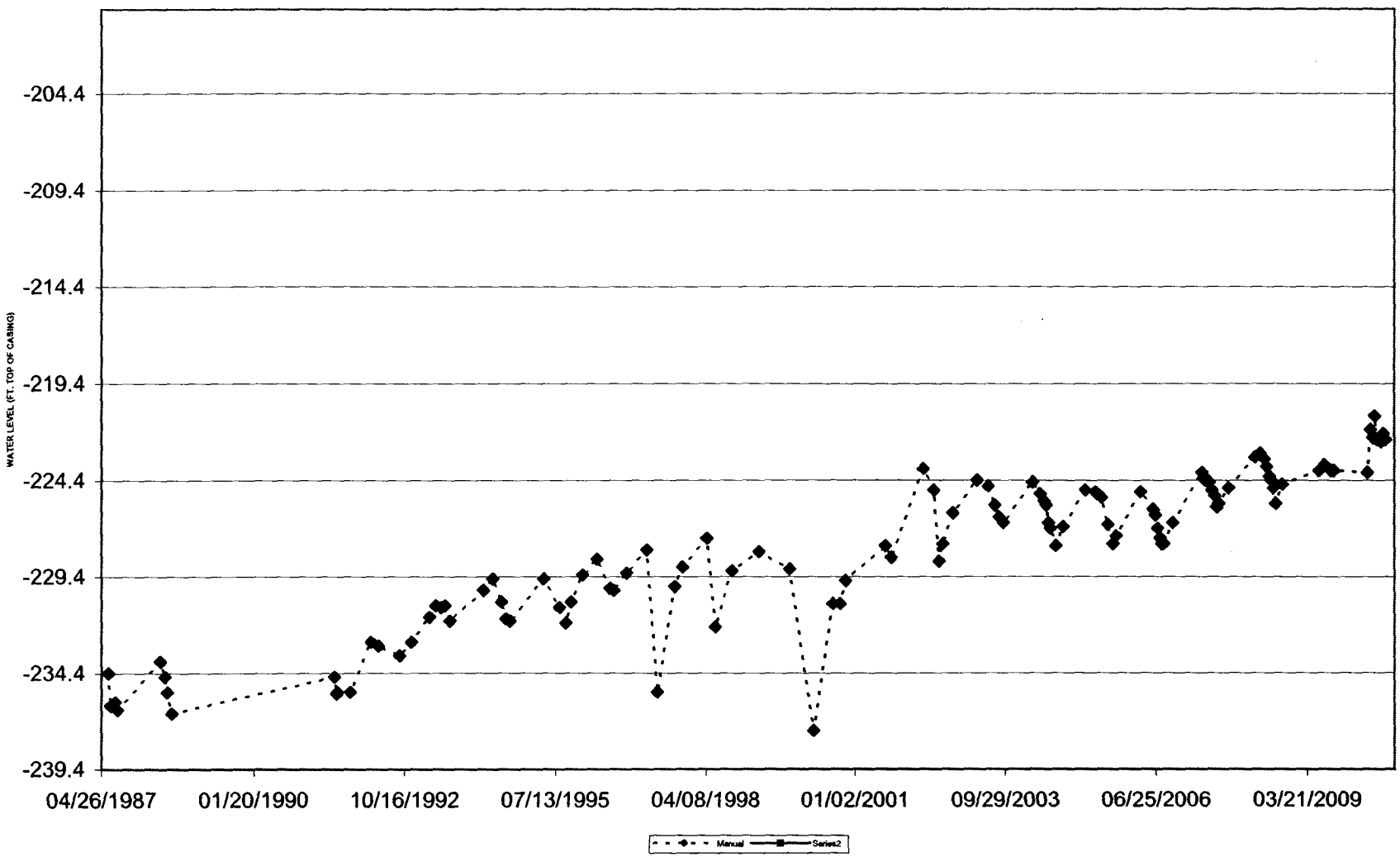
BIBLIOGRAPHY

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

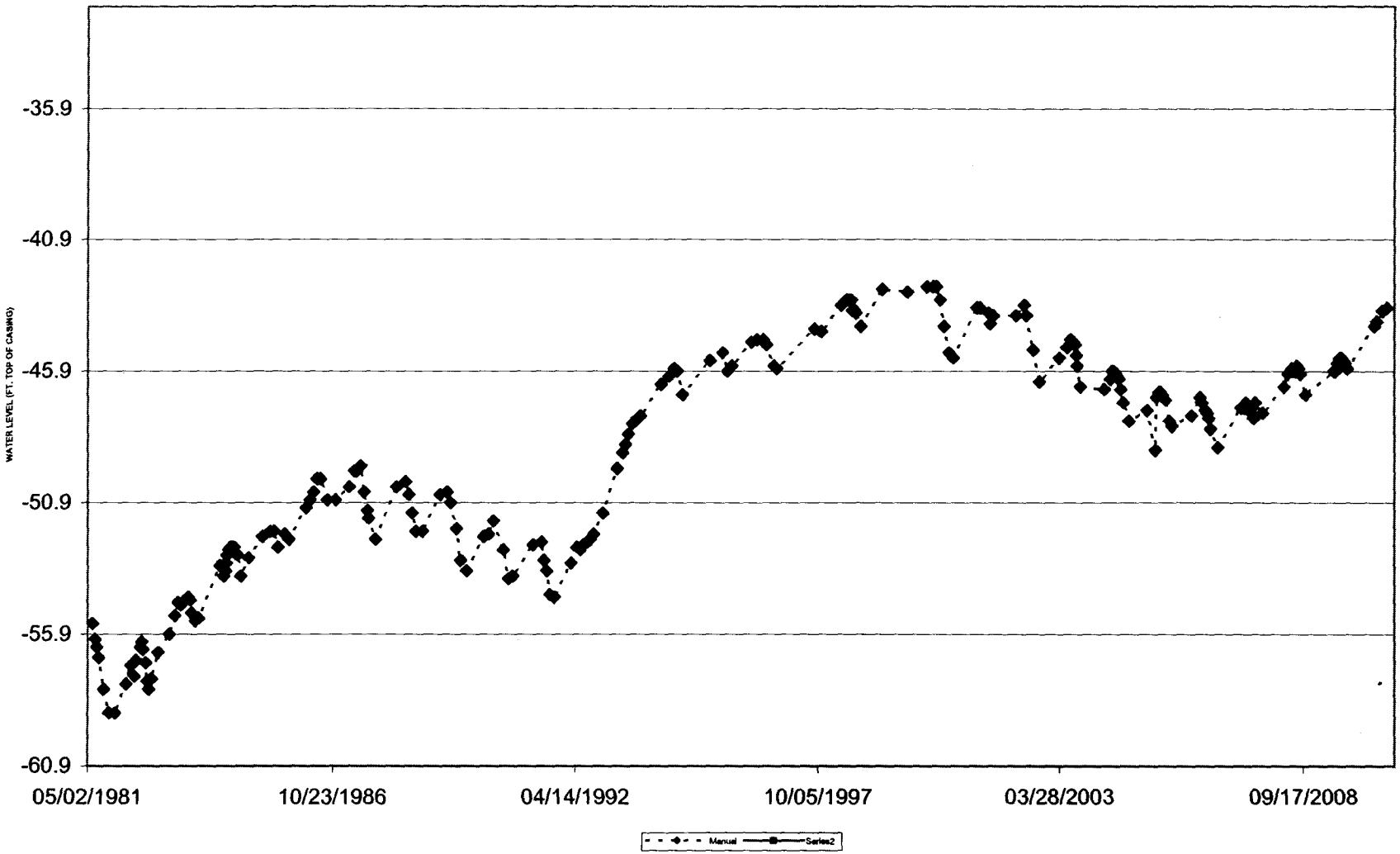
Kume, J., 1977, Geology and Water Resources of Charles Mix and Douglas Counties, South Dakota, Part II Water Resources, Bulletin 22, SD DENR, SDGS, Vermillion, SD, 57069.

Water Rights, 2010, Unpublished Observation Well Records for the Codell Aquifer, SD DENR, DES, Water Rights Program, Pierre, SD, 57501.

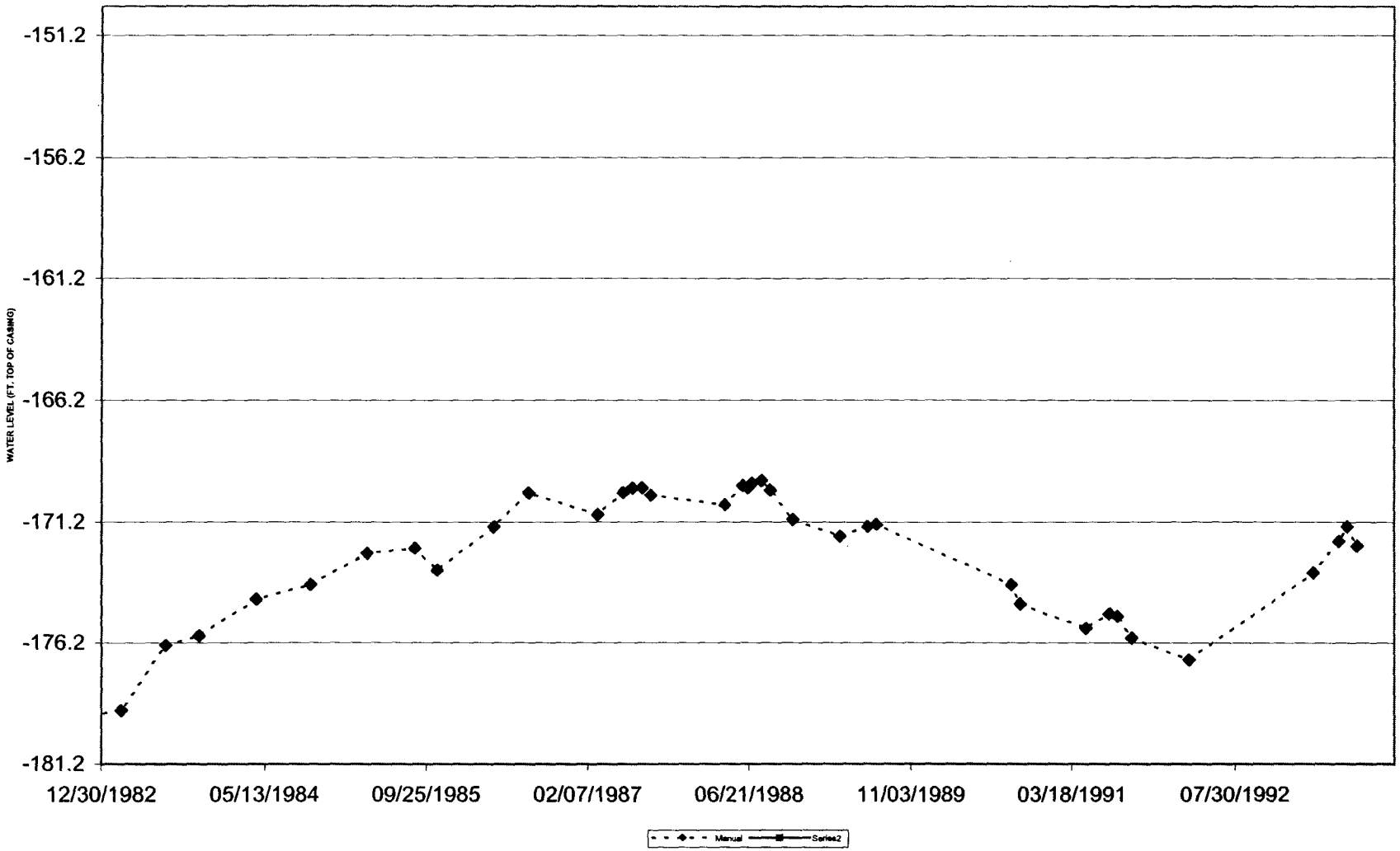
WATER RIGHTS' OBSERVATION WELL
HT-87D



WATER RIGHTS' OBSERVATION WELL
DG-80F



WATER RIGHTS' OBSERVATION WELL
CM-52A



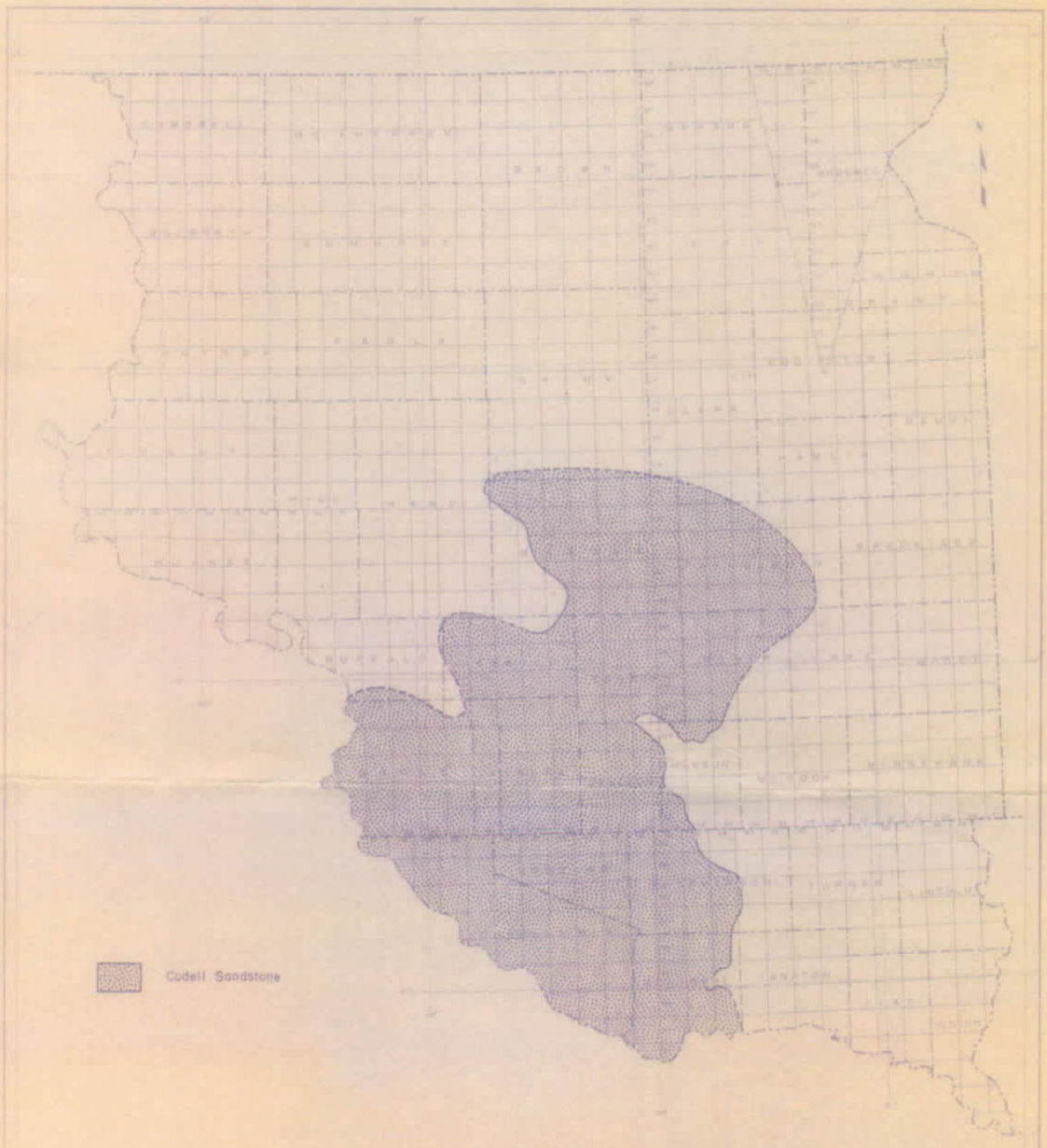


PLATE 9 MAP OF EASTERN SOUTH DAKOTA SHOWING MINIMUM DISTRIBUTION OF THE CODELL SANDSTONE MEMBER OF THE CARLILE SHALE

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
denr.sd.gov

RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT APPLICATION NO. 7206-3, Long View Farms, LLP

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. 7206-6, Long View Farms, LLP, 3172 320th Street, Hull IA 51239.

The Chief Engineer is recommending APPROVAL of Application No. 7206-3 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 well approved 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 well authorized by Permit No. 7206-3 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. Permit No. 7206-3 is subject to compliance with requirements of the Department's Water Pollution Control Permit issued pursuant to SDCL 34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

4. Permit No. 7206-3 is subject to compliance with all existing and applicable Water management Board Rules including but not limited to:

   a) Chapter 74:54:01 Ground Water Quality Standards,
   b) Chapter 74:54:02 Ground Water Discharge Permit,
   c) Chapter 74:51:01 Surface Water Quality Standards,
   d) Chapter 74:51:02 Uses Assigned to Lakes,
   e) Chapter 74:51:03 Uses Assigned to Streams, and
   f) Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions

See report on application for additional information.

Garland Erbele, Chief Engineer
September 1, 2010

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
denr.sd.gov

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

September 1, 2010

Long View Farms LLP
Arlen Moss
3172 320th St
Hull IA 51239

Dear Mr. Moss:

Water Permit Application No. 7206-3 for commercial 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 Wagner Post printed at Wagner SD (Ph # 605-384-5616). 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 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
eric.gronlund@state.sd.us

enclosures

c: Todd Van Manen, 215 Walnut Street, Yankton SD 57078
Eric Kerkvliet, Attorney, PO Box 2700, Sioux Falls SD 57101

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
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
denr.sd.gov

September 1, 2010

Wagner Post
PO Box 187
Wagner SD 57380

ATTENTION: Legal Public Notice

Enclosed is a Notice on Application No. 7206-3to Appropriate Water to be published twice. Please publish the first notice on September 8, 2010 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 Long View Farms LLP, c/o Arlen Moss, 3172 320th St., Hull IA 51239 (Ph # 712-439-2748).

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----------

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

No. 7206-3

Date_____

We are in receipt of your letter of September 1, 2010 enclosing Notice to Appropriate Water by Application No. 7206-3 which was first published in our issue of_____. ENCLOSED IS A COPY OF THIS FIRST PUBLICATION.

_____ _____

Name Newspaper

Instruction to Newspaper - Publish first Notice on September 8, 2010 with the second publication 7 days later. The applicant is responsible for payment. The text of the notice can be e-mailed to your paper by contacting Karen Schlaak at (605) 773-3352 or email: Karen.schlaak@state.sd.us.

NOTICE OF HEARING on Application No. 7206-3 to Appropriate Water

Notice is given that Long View Farms, LLP c/o Arlan Moss, 3172 320th St, Hull IA 51239 has filed an application for a water permit to appropriate 0.067 cubic feet of water per second (30 gallons per minute) from one well to be completed into the Codell Aquifer (approximately 600 feet deep) located in SW ¼ NW ¼ Section 9-T95N-R64W for commercial use at a swine farrowing facility.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 7206-3 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.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by September 27, 2010. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 1:00 p.m. (CST) on October 6, 2010 in the Matthews Training Center, Joe Foss Building, 523 E. Capitol Ave, Pierre SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny this application based on the facts presented at the public hearing. The October 6, 2010 hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by September 27, 2010.

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 September 27, 2010, at the above Water Rights Program address to request copies of information pertaining to this application. Notice is given to individuals with disabilities that this hearing is being held in a physically accessible place. Please notify the Department of Environment and Natural Resources at least 48 hours before the hearing if you have a disability for which special arrangements must be made at the hearing. The telephone number for making arrangements is (605) 773-3352.

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 September 27, 2010.

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. Published twice at the total approximate cost of_____.

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
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523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
denr.sd.gov

September 2, 2010

Rebecca Kidder
Abourezk & Zephier, PC
PO Box 9460
Rapid City SD 57709

Harold Shepherd
The Center for Water Advocacy
PO Box 331
Moab UT 84532

Dear Ms. Kidder and Mr. Shepherd

Please find enclosed the publication notice, report and recommendation on Water Permit Application No. 7206-3 filed by Long View Farms LLP.

The public notice is set to be published by the Wagner Post in Charles Mix County, South Dakota on September 8 and 15, 2010 and this notice schedules a hearing before the Water Management Board for October 6, 2010. The date to file a petition to intervene is on or before September 27, 2010.

If you have any questions, please contact Diane Best, Assistant Attorney General at (605) 367-5880.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
605 773-3352
eric.gronlund@state.sd.us

enclosures

c: Diane Best, Assistant Attorney General, 300 N Dakota Ave, Suite403, Sioux Falls SD 57104-6032

REPORT ON WATER PERMIT APPLICATION NO. 7206-3
For Long View Farms
August 27, 2010

Application No. 7206-3 proposes to appropriate 0.067 cfs (30 gpm) from one well approximately 600 feet deep located in the SW ¼ NW ¼ of section 9, T95N R64W in Charles Mix County. The water will be used for commercial use at a swine farrowing facility.

AQUIFER – CODELL SANDSTONE (CDLL)

The Codell sandstone is a buried sedimentary rock member of the Carlile shale which consists of loose to tightly cemented very fine to coarse light brownish gray to dark greenish black and brown sand with clay (Kume, 1977). The aquifer is confined and under artesian conditions at this site. The Codell aquifer is known locally as the "sandrock" or the "soft water sand" (Kume, 1977). Data from the county study and Water Right well files indicate the top of the Codell sandstone should be approximately 1150 to 1200 feet msl. This would mean a well depth of at least 570 feet to 620 feet at this site to penetrate the Codell sandstone. The applicant indicates an expected depth of 600 feet. In this area the Niobrara formation (also considered and aquifer) overlies the Codell aquifer.

The Codell sandstone underlies 1,134 square miles (725,760 acres) of Charles Mix County and is estimated to contain 1.45 million acre-feet of recoverable water in storage (Hedges, 1982). The aquifer extends into Douglas and Hutchinson Counties to the north and into Bon Homme County to the east and into Nebraska to the south. A map of the Codell sandstone published by Hedges is included with this report (Hedges, 1982). Ground water movement is probably from northwest to southeast in the area of this application (Kume, 1977).

The Water Right Program monitors two observation wells completed into the Codell sandstone (DG-80F and HT-87D) but are located about 23 and 25 miles north and northeast of this site respectively. Water levels for these two wells show response to climatic conditions and annual fluctuations that may be due to pumping (Water Rights, 2010). However, because these wells are located so far from this site the record would only be representative of the entire aquifer and not show any aquifer response due to pumping from this site. Water levels for these two observation wells are included with this report for informational purposes..

The Corps of Engineers drilled an observation well in T95N R64W in the northeast corner of section 11 which is located about two miles east of this site. Kume published a hydrograph of the water levels beginning in 1952 and extending through 1970 (page 21, Figure 17) in Bulletin 22, Geology and Water Resources of Charles Mix and Douglas Counties. The Water Rights Program began monitoring this same well in 1982 and continued through 1993 when the monitoring well ceased to function properly. The Water Rights well name was CM-52A for this Corps of Engineer well and a hydrograph for the available record is included with this report. The entire water level record for the Codell indicates the aquifer is capable of sustaining additional withdrawals (Water Rights, 2010).

REVIEW OF EXISTING WATER PERMITS/RIGHTS

There are no nearby water permits/rights that obtain water from the Codell sandstone aquifer. There are domestic wells in the area which use the Codell as a source of water. The applicant indicates two sites with water well locations about 1.5 miles northwest and northeast of this site. At this distance and with the relatively small pumping rate drawdown is not expected to be significant nor cause any adverse impacts. At one time the City of Geddes, Town of Ravinia and the City of Lake Andes used wells from the Codell but now obtain water from the Missouri River or from rural water. Those wells are used as a backup water supply at this time. The only other Codell aquifer Water Right in Charles Mix County is for Clearfield Colony for domestic use.

CONCLUSIONS

1. Water is available from the Codell aquifer.
2. The aquifer is under artesian conditions at this site. Drawdown due to pumping can be expected to occur. However, drawdown is not expected to be significant at this pumping rate nor cause any adverse effects on existing water rights or on area domestic users.
3. The well authorized by this application must be constructed in accordance with SD Well Construction Rules. Also there is a collapsed well near this site that must be plugged in accordance with SD Well Construction Standards if that has not already been done.
4. Plans and specifications for this facility have been approved by the Department.
5. The primary source of water for this facility is from Randall Rural Water System and this well will be a supplemental source for the facility.

James A Goodman
Natural Resources Engineer

BIBLIOGRAPHY

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

Kume, J., 1977, Geology and Water Resources of Charles Mix and Douglas Counties, South Dakota, Part II Water Resources, Bulletin 22, SD DENR, SDGS, Vermillion, SD, 57069.

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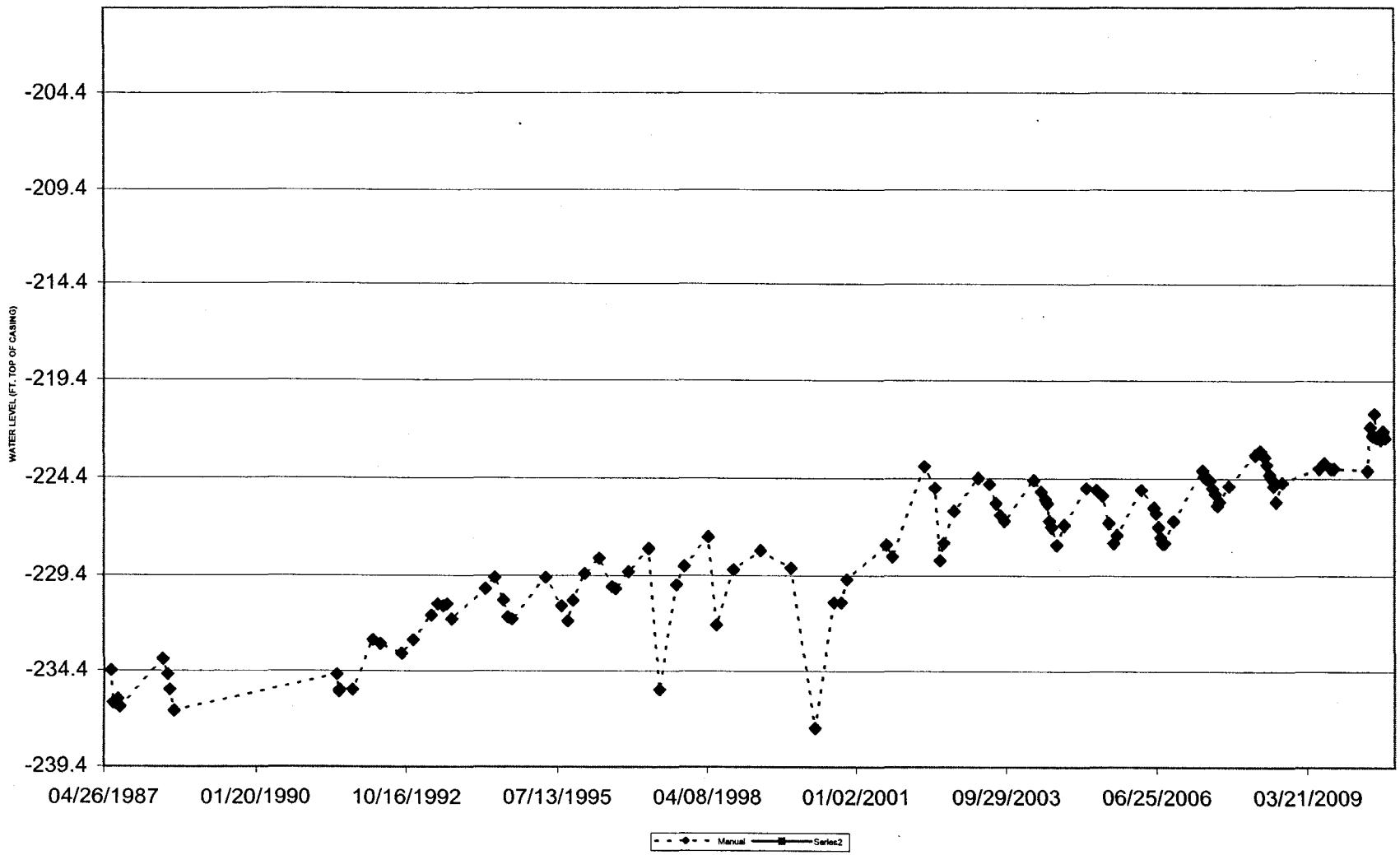
WATER RIGHTS' OBSERVATION WELL
HT-87D



WATER RIGHTS' OBSERVATION WELL
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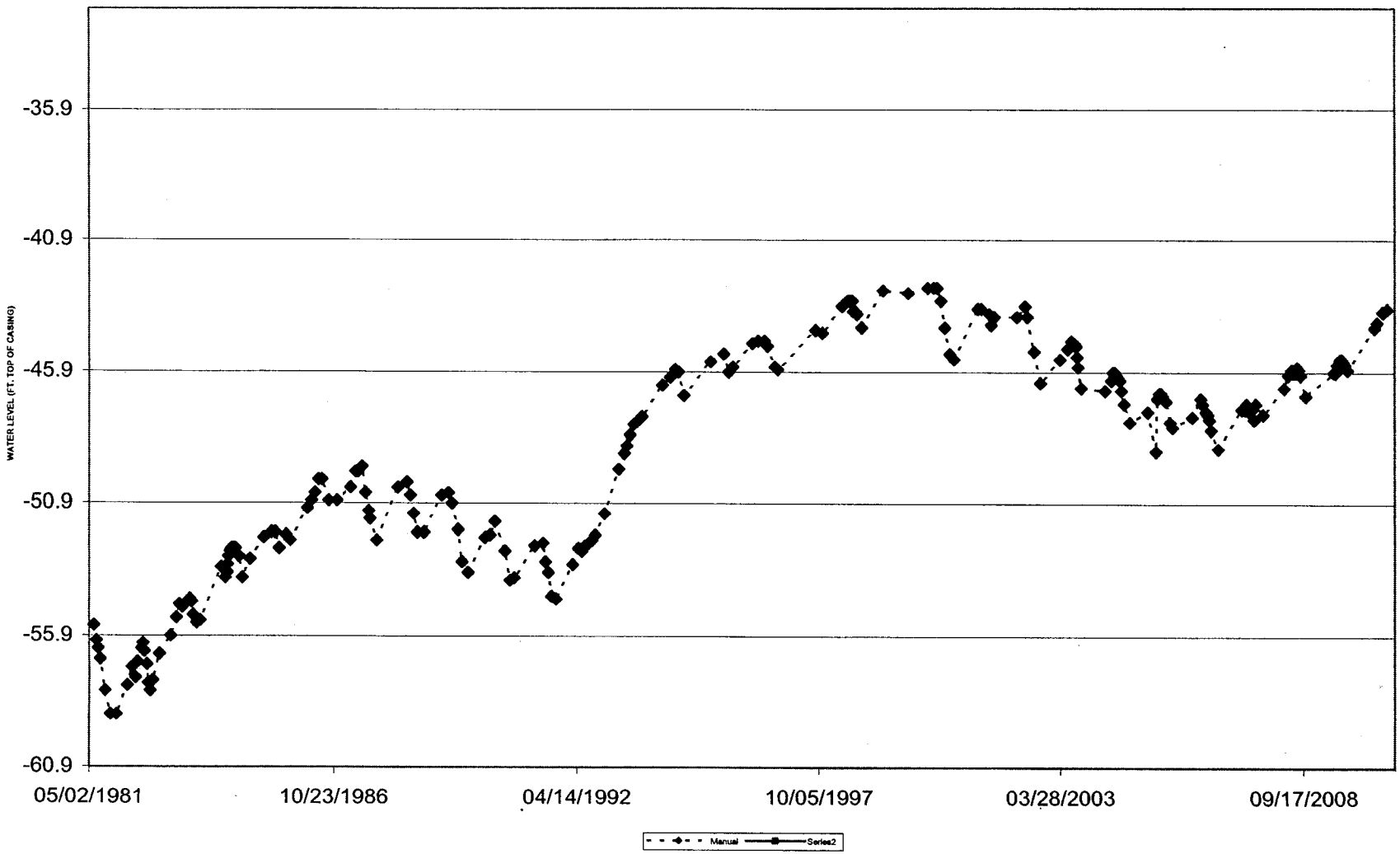

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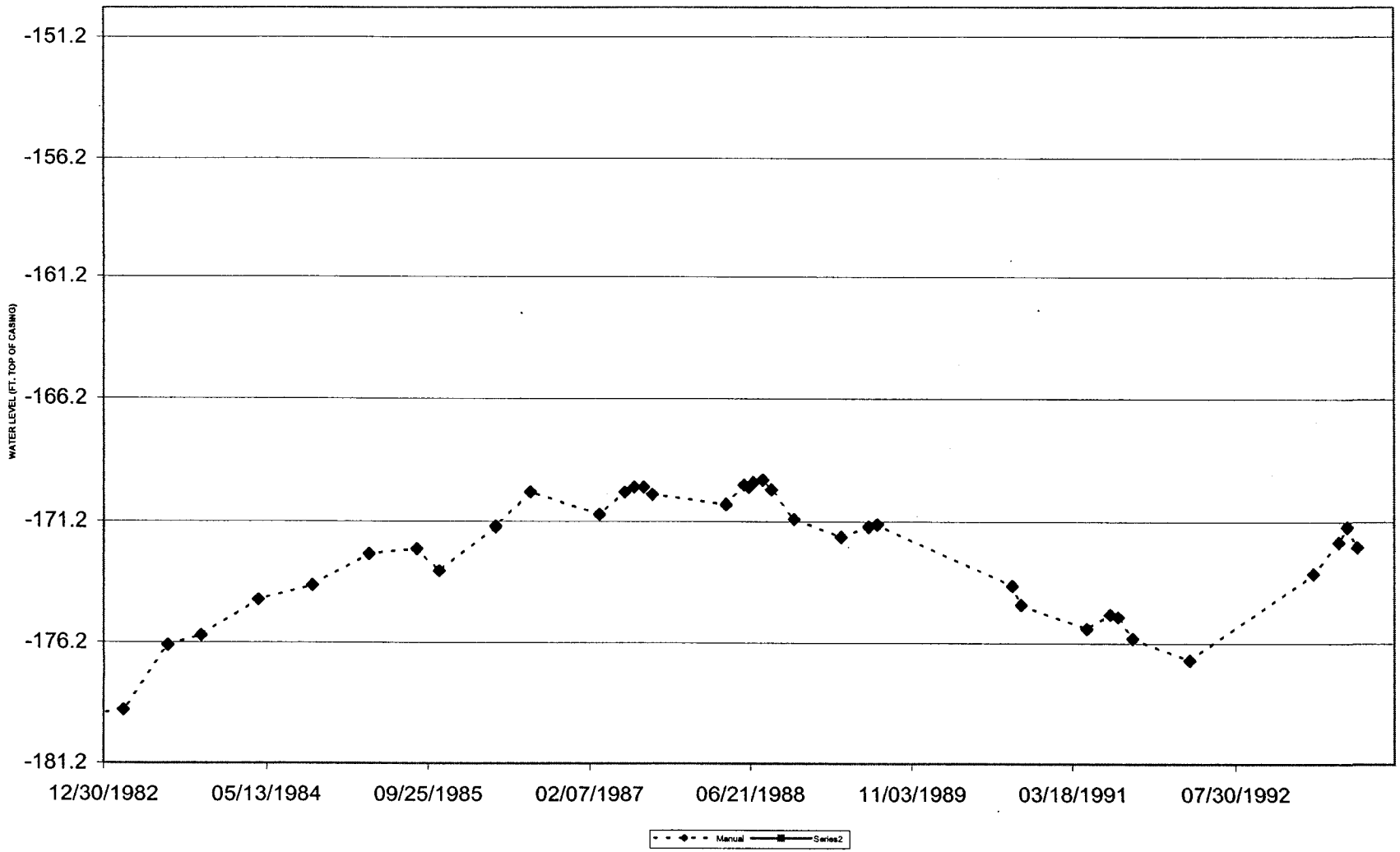
CM-52A



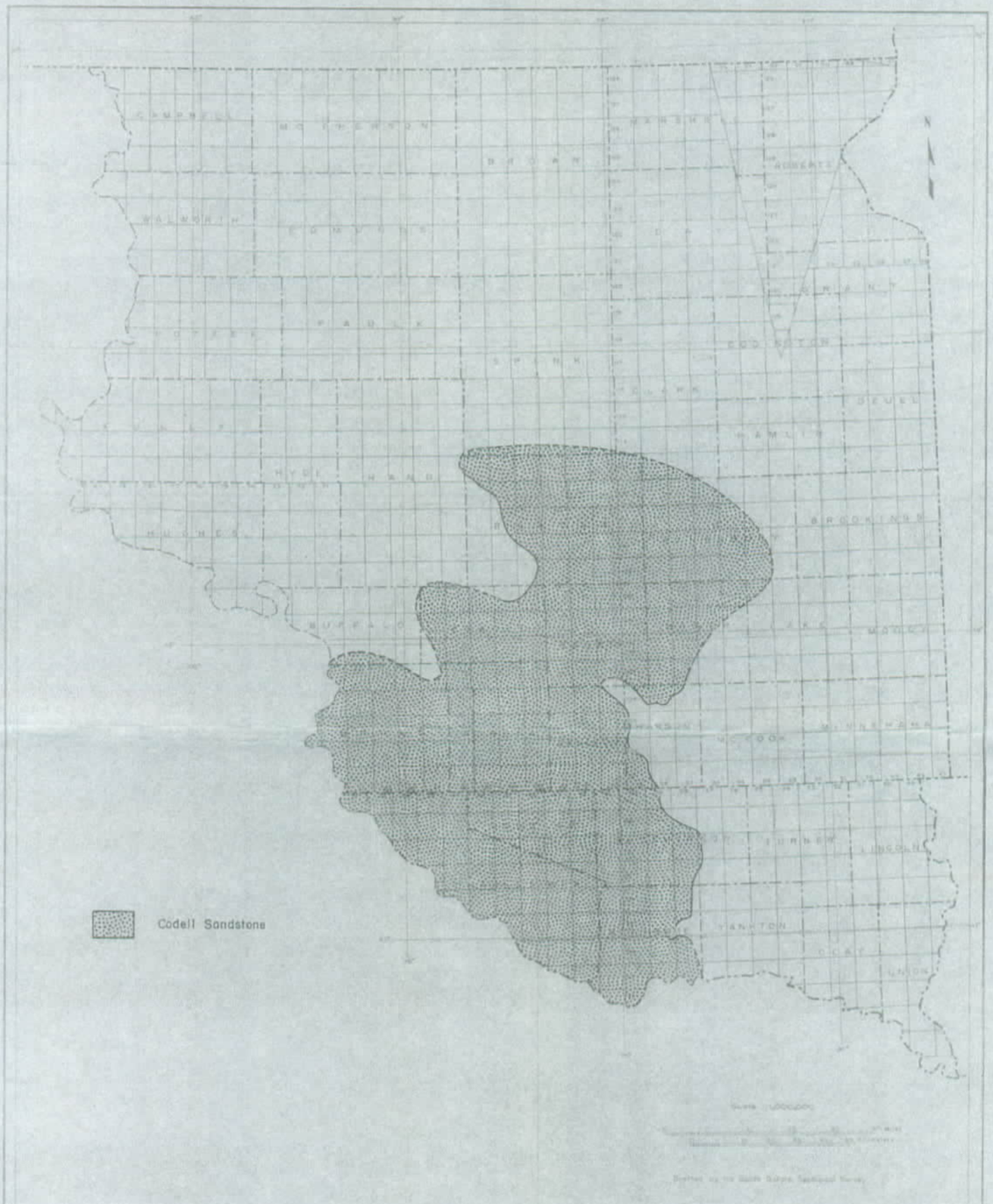


PLATE 9 MAP OF EASTERN SOUTH DAKOTA SHOWING MINIMUM DISTRIBUTION OF THE CODELL SANDSTONE MEMBER OF THE CARLILE SHALE

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
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denr.sd.gov

RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT APPLICATION NO. 7206-3, Long View Farms, LLP

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. 7206-6, Long View Farms, LLP, 3172 320th Street, Hull IA 51239.

The Chief Engineer is recommending APPROVAL of Application No. 7206-3 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 well approved 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 well authorized by Permit No. 7206-3 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. Permit No. 7206-3 is subject to compliance with requirements of the Department's Water Pollution Control Permit issued pursuant to SDCL 34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

4. Permit No. 7206-3 is subject to compliance with all existing and applicable Water management Board Rules including but not limited to:

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   c) Chapter 74:51:01 Surface Water Quality Standards,
   d) Chapter 74:51:02 Uses Assigned to Lakes,
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   f) Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions

See report on application for additional information.

Garland Erbele, Chief Engineer
September 1, 2010

Instruction to Newspaper - Publish first Notice on September 8, 2010 with the second publication 7 days later. The applicant is responsible for payment. The text of the notice can be e-mailed to your paper by contacting Karen Schlaak at (605) 773-3352 or email: Karen.schlaak@state.sd.us.

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Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 7206-3 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.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by September 27, 2010. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 1:00 p.m. (CST) on October 6, 2010 in the Matthews Training Center, Joe Foss Building, 523 E. Capitol Ave, Pierre SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny this application based on the facts presented at the public hearing. The October 6, 2010 hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by September 27, 2010.

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 September 27, 2010, at the above Water Rights Program address to request copies of information pertaining to this application. Notice is given to individuals with disabilities that this hearing is being held in a physically accessible place. Please notify the Department of Environment and Natural Resources at least 48 hours before the hearing if you have a disability for which special arrangements must be made at the hearing. The telephone number for making arrangements is (605) 773-3352.

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 September 27, 2010.

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. Published twice at the total approximate cost of_____.

9-23-10

RECEIVED
SEP 24 2010
WATER RIGHTS
PROGRAM

Dear Chief Engineer,

I am writing to oppose approval of a commercial well permit to Long View Farms. I also am requesting an automatic delay of the hearing.

Long View Farms should not be allowed to have a commercial well (permit) for these reasons:

1) It is not in the public interest. Many people work and live near Long View Farms and the areas where hog waste is applied. These people are exposed to harmful toxins, bacteria, and viruses produced by this facility and distributed via the air and water run-off. The Native American community already carries a high disease burden and would thus be more vulnerable to the health hazards associated with large confinement facilities.

2) It is not a beneficial use of water. Annually, millions of gallons of swine waste will be combined with the water pumped from the Goddell Aquifer and applied as fertilizer to the farm fields of a few farmers. Easy access to "free" public waters benefits the owners of Long View and the farmers who are in the manure management plan

Studies from other states where large animal confinements confirm that the run-off from these fields ends up polluting rivers, streams, lakes, and shallow aquifers, resulting in "water too dirty to drink without chemical treatment". LongView should have to pay to use rural water, rather than be encouraged and sanctioned to pollute public waters by approving a commerial well permit to allow them easy access to the Coddell Aquifer.

I hope you will do the right thing. Thank you for your thoughtful consideration.

Joan Olive

Joan Olive, M.S., Speech-Language Therapist
Marty Indian School

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September 24, 2010

Chief Engineer, SD DENR
Water Rights Program
Foss Building
523 E. Capitol
Pierre, SD 57501

South Dakota Department of Environment and Natural Resources
Water Rights Management Board
c/o Mr. Eric Gronlund
PMB 2020, Joe Foss Building
523 East Capitol
Pierre, SD 57501

Dear Chief Engineer and Board:

Please find enclosed herewith a Notice of Appearance on behalf of the Yankton Sioux Tribe, and the Petition in Opposition to the Permit, Petition to Intervene, and Request for Extension of at least 20 days, in the Matter of Water Rights Application 7206-03. If you have any questions or concerns, please do not hesitate to contact me at your convenience.

Respectfully submitted,

Rebecca L. Kidder,
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Attorney for the Yankton Sioux Tribe
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of September, 2010, she mailed a true and correct copy of the foregoing **Notice of Appearance of Rebecca Kidder as Counsel to Petitioner Yankton Sioux Tribe** and **Petition in Opposition to Water Permit Application 7206-03 and Petition to Intervene** to:

Chief Engineer, SD DENR
Water Rights Program
Foss Building
523 E. Capitol
Pierre, SD 57501

South Dakota Department of Environment and Natural Resources
Water Rights Management Board
c/o Mr. Eric Gronlund
PMB 2020, Joe Foss Building
523 East Capitol
Pierre, SD 57501

Longview Farms LLP c/o
Arlen Moss
3172 320th St.
Hull, IA 51239

and that the same was provided by United States Mail, postage prepaid.

Rebecca L. Kidder

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STATE OF SOUTH DAKOTA BEFORE THE WATER MANAGEMENT BOARD	)))	
IN THE MATTER OF WATER RIGHTS PERMIT APPLICATION 7206-03 BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD	)))))	**NOTICE OF APPEARANCE**

NOTICE IS HEREBY GIVEN that Rebecca Kidder hereby enters her Notice of Appearance as Counsel of record for the Yankton Sioux Tribe.

Dated this 24th day of September, 2010.

R. Kidder

Rebecca Kidder, Attorney
Abourezk & Zephier, P.C.

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OFFICE OF THE CHIEF ENGINEER
WATER RIGHTS PROGRAM
STATE OF SOUTH DAKOTA

In the Matter of Water Permit	)	Application No. 7206-3
	)	
Application 7206-03	)	PETITION IN OPPOSITION TO
	)	APPLICATION AND
	)	RECOMMENDATION, PETITION TO
	)	INTERVENE, AND REQUEST FOR
	)	HEARING EXTENSION OF AT LEAST
	)	20 DAYS

The Yankton Sioux Tribe, Petitioner, hereby submits this Petition in Opposition, Petition to Intervene, and Petition for a Hearing Extension of at least 20 days, pursuant to SDCL §46-2A-6, Application to Appropriate Water 7206-03 (Application) filed by Long View Farms LLP (LVF). The Yankton Sioux Tribe is a federally recognized Indian Tribe located within Charles Mix County, South Dakota. The Yankton Sioux Tribe files this Protest and Petition on its own behalf and on behalf of its individual tribal members. The Application – No. 7206-3 - requests approval for the diversion of 0.067 cubic feet of water per second from one well to be completed into the Codell Sandstone Aquifer for purposes of commercial use in a livestock confinement operation located directly adjacent to and abutting lands comprising the Yankton Sioux Indian Reservation, South Dakota. The diversion point will be located in SW ¼ NW ¼ Section 9,T. 95N, R64W.

The Yankton Sioux Tribe and its individual members include over 3,000 residents of Charles Mix County, South Dakota residing on and near Tribal Reservation lands adjacent to and near the Longview Farms LLP proposed well location and the CAFO site it serves. The Yankton Sioux Tribe and its individual members are owners of numerous wells utilized for domestic

water supply, livestock, and irrigation located upon Reservation lands and other lands adjacent to and surrounding the well location. These are primarily shallow water wells which will be impacted if the aquifer recharge is not commensurate with total withdrawals from the aquifer.

The Yankton Sioux Tribe on its own behalf and on behalf of its individual members files these petitions in opposition and to intervene for the following reasons:

1. This Application does not satisfy any of the four statutory criteria in SDCL Chapter 46-2A governing the approval of applications to appropriate water resources. The Chief Engineers' determinations on all four criteria are unsupported by factual data and evidence on the recharge rate of the aquifer, or existing wells and springs utilized for domestic use in the immediate vicinity of this proposed well. See, Recommendation of Chief Engineer for Water Permit Application No. 7206-3, Long View Farms, LLP.

2. SDCL §46-2A-9 dictates that 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. The application proposes to appropriate .067 cf/s from a well completed into the Codell Aquifer. SD DENR has not mapped the Codell Aquifer since 1982, despite the significant expansion of wells in the counties served by this aquifer. The only test wells DENR has investigated recently are 23 and 25 miles north and northeast of this location, which is too far from the present location to make a factual determination that this proposed well will have no impact on the existing domestic wells in close proximity to the location of this proposed well. Further, the Chief Engineer determined that the test well 23 and 25 miles north and northwest of the proposed location "show response to climatic conditions and annual fluctuations that may be due to pumping."

Further, the Chief Engineer relied solely upon the Applicant's report of two domestic wells in the immediate vicinity of this well, and has made no investigation of existing domestic wells in the vicinity of this proposed well. The Petitioner in this matter provided to the South Dakota DENR on June 2, 2009 and January 14, 2009 a report from Professor Perry Rahn that documents the presence of nine shallow wells and springs in the immediate vicinity of the proposed well. Attachment 1, Reports of Professor Perry Rahn. Therefore, the conclusion that there is a reasonable probability of the availability of water is not based upon a factual determination based upon the data, examination of the springs and well in the immediate vicinity of this proposed well, or determination of the recharge rate of the Codell or Niobrara, or the shallow aquifer located in this area located within the Herrick formation.

3. Granting this permit will result in "unlawful impairment of existing rights." The Chief Engineer determined that there:

> are no nearby water permits/rights that obtain water from the Codell sandstone aquifer. There are some domestic wells in the area that use the Codell aquifer. The applicant indicates two sites with water well locations about 1.5 miles northwest and northeast of this site. At this distance and with relatively small pumping rate drawdown is not expected to be significant nor cause any adverse impacts. At one time the City of Geddes, Town of Ravinia and City of Lake Andes used wells from the Codell but now obtain water from the Missouri River or from rural water. Those wells are used as a backup water supply at this time. The only other Codell aquifer Water Right in Charles Mix County is for Clearfield Colony for domestic use.

Report on Water Permit No. 7026-6, For Long View Farms LLP, p. 1 (August 27, 2010). (LVF Report)

The Chief Engineer, however, has not provided any basis for his assumption that there "should not be" interference with existing water rights or domestic wells. The Engineer does not provide any information as to the relationship of the location of water right points of diversion or domestic wells and the hydrological connectivity of the proposed well in the Application. In

addition, the Chief Engineer does not provide any data on the specific amount of water needed by all other pre-existing wells. The Chief Engineer points to no assessment of the depths of the thousands of wells in this aquifer to determine this permit will not impact pre-existing appropriations of water. There is simply no basis upon which to determine that "no -interference" with domestic water supply will occur. The United States Geological Survey has documented thousands of wells for domestic consumption in the Codell Aquifer Region. USGS Well Survey of Yankton Sioux Reservation, 2005; USGS 2007 Charles Mix County Well Survey. The Department was made aware of this information when the Tribe filed its Protest the Water Permit Application 7006-3, but has failed to investigate this information since that objection was filed on June 23, 2008. Until such time as the DENR has fully investigated the drawdown rates, capacity of the Codell aquifer, and the amount of water currently in use by domestic and other existing wells and natural shallow springs, given the sensitivity of the two test wells located 23 and 25 miles north and northeast of the proposed well location, the finding of the Chief Engineer that there is a reasonable probability that there will be no impairment of existing rights is unfounded.

4. The Yankton Sioux Tribe is the owner of reserved water rights upon its Reservation lands established by the Treaty of 1858 and as diminished by the Act of1894. See, Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable). The Tribe's rights to water from the Codell Aquifer are rights to sufficient water to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, and their "reasonably feasible" uses of such water. Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969). It

includes the amount of water required to make the Reservation viable. Arizona v. California, 373 U.S. 546, 599 (1963). The courts have already determined that Tribes have the right to assert these rights on behalf of its members. See, United States v. Nebraska, 520 F.2d 676, 688 (9th Cir. 1975). The Chief of Engineers has not assessed the reserved water rights of the Tribe or determined the amount of water in the aquifer, and so has no reasonable basis to conclude, without further investigation, that the federally protected water rights of the Yankton Sioux Tribe are not impaired by this permit. These reserved water rights are federally protected from impairment by off-reservation withdrawals from the Codell Aquifer, including Permit 7006-3. Winters v. United States, 207 U.S. at 576; Arizona v. California, 373 U.S. at 599; Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981). The Yankton Sioux Tribe has the right to protect its reserved treaty water rights from appropriation by others and from "man-made despoliation." See, United States v. State of Washington, 506 F.Supp. 187, 203 (D. Wa. 1980). See also, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984)(requiring revival of wetlands decimated by non-Indian stream withdrawals); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)(requiring maintenance of minimum stream flow for downstream tribal fishery).

The use of water for a CAFO on lands upland from and directly adjacent to tribal lands and water supplies, both surface and subsurface, and the location of manure dumping fields adjacent to Reservation lands ensures runoff from the 976,200 cubic feet of liquid manure dumped annually will contaminate the Codell Aquifer and all surface waters on Reservation lands, resulting in impairment of the Tribe's and its tribal members' currently appropriated water and its reserved water rights.

5. The use of water pursuant to this Permit is not in the public interest.

The discharge of manure into waterways through runoff releases antibiotic resistant toxic bacteria (i.e. e.coli, yersinia, leptospora, cryptosporidium parvum, giardia lamblia), other pathogens, and excessive nutrients into groundwater and surface water is a public health threat.

6. The use of the water from this Permit is not in the public interest. High concentrations of animal waste from this CAFO will emit hydrogen sulfide, ammonia, Volatile Organic Compounds, and other gases and particulate matter that are known to cause a human health threat once released into the air. Hydrogen sulfide is a health threat that is irreversible, exposure causes sore throat, seizures, comas and even death. Farmworkers and neighbors of existing hog CAFOs report headaches, shortness of breath, wheezing, excessive coughing, and diarrhea. Ammonia is another byproduct of animal waste and has been linked to acid rain. In Oregon, for example, the Columbia River Gorge has seen unprecedented levels of acid rain in recent years which is likely linked to ammonia releases at Three-mile Canyon Farms which is the single largest source of air pollution in that state. The American Public Health Association issued a resolution urging federal, state, and local governments and public health agencies, "to impose a moratorium on new CAFO's" on November 11, 2003. The noxious odors of the CAFO in question will create an ongoing and persistent nuisance to the thousands of people living and working within 6 miles of the CAFO and associated manure fields, including the Head Start School, the Tribe's Fort Randall Casino, which is heavily dependent on tourism, and the Tribe's Travel Plaza.

7. The permit is not in the public interest. Petitioners submit that there is a high probability that water appropriated by this permit, and ground and surface waters of all properties and owners located on and adjacent to the CAFO and manure dumping fields in this area will be contaminated by excessive nutrients, heavy metals, VOC's, antibiotic resistant bacteria, ammonia, and hydrogen sulfide from runoff and airborne emissions. Polluted waters present a clear and present threat to public health, the environment, and the endangered species in the area including the federally protected eagle population of the Karl Mundt Wildlife Preserve, in the immediate area and for downstream users.

8. This permit is not in the public interest. There is a daycare owned by a tribal member serving children ages 1 month to 4 years old within 1 mile of the CAFO site where 1 in 4 children are asthmatic. The CAFO's noxious fumes and odors will directly impact the health and well-being of these children and those who work in the daycare. The CAFO is also located within 4 miles of a federally funded Head Start School serving 3 and 4 year old children. The manure dumping locations surround this school and the Marty Indian School serving youth ages 6-18 years of age, as well as a Boys and Girls Club, Tribal Headquarters, and Nutrition programs. The odor from manure dumped on the fields and the CAFO itself will negatively impact the education, health and welfare of these residents.

9. The granting of this Permit is not in the public interest. This CAFO will produce less than 10 local jobs, and will result in the inability of landowners and residents to utilize surrounding lands for tourism, recreation, and homesites due to the water and air pollution and noxious odors emitted. Longview Farms LLP principals are domiciled in Iowa and have no

connection to the local economy. Longview Farms LLP has signed manure dumping agreements with local farmers releasing Longview Farms LLP from all liability for any impacts caused by runoff of manure into water and resultant water and air pollution. Longview Farms CAFO Application, Manure Application Agreements.

10. This Permit is not in accordance with SDCL §46-2A-9 and §46-1-4. The Chief Engineer's Report indicates that this well will be used only for backup water supply, and does not contain any statement of facts of the proposed use of water that would support a determination the water will be immediately used, or when it will be used, or that such use is necessary for operation of Longview Farm LLP.

The Chief Engineer should not condone this type of speculation in water and must prevent such precedent, particularly in light of DENR's role as protector of South Dakota citizens. SDCL §46-1-4 requires 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." This requires the applicant to establish that it "can and will put the conditionally appropriated water to beneficial use within a reasonable period of time." See e.g. Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights), 170 P.3d 307 (Colo. 2007).

These requirements are intended to ensure that the public's water resource is available to those who actually need water. David B. Schorr, Appropriation as Agrariaranism: Distributive Justice in the Creation of Property Rights, 33 Ecol. L.Q. 3,9,22 (2005).

In this case, in violation of the beneficial use doctrine and SDCL § 46-1-4 and §46-2A-9, the amount of water requested is for speculative purposes. There is no finding by the Chief Engineer that he reviewed the CAFO water requirements for existing operations, or the basis for determining that the amount reserved by this Permit will be used in a reasonable period of time.

11. This permit is not in the public interest. Petitioners have previously submitted an independent hydro-geological investigation of the specific area within which the proposed well is located indicating the existence of a shallow aquifer and unique geologic formation known as the Herrick formation, which is highly permeable, in this vicinity. Attachment 1, Rahn Reports. This report is further supported by the Chief Engineer's determination that "In this area the Niobrara formation (also considered an aquifer) overlies the Codell aquifer." The Chief Engineer has not made any assessment of the impact of this proposed well on the Niobrara formation, the Herrick formation, or any other shallow aquifer located on top of the Codell aquifer, as required by S.D.C.L. 34A-3A-24. In State *ex. rel* Missouri Parks Assoc. *et. al* v. Missouri Dep't. of Nat'l. Resources, Case No. 07AC-CC00923, Cole County District Court, the District Court determined the potential for damage to unique geologic historic formations located near a proposed CAFO warranted denial of construction permits in order to protect the unique geologic structure and the public interest. Denial of the water permit to protect the unique geologic structure and the shallow aquifer located in this area, until and unless an investigation is conducted at the proposed location to determine, based upon fact rather than speculation, that there is no shallow aquifer or Herrick Formation, nor any potential damage to the Niobrara Formation, is warranted.

For the foregoing reasons, Petitioner submits this petition and urges that the permit:

1. Should be denied as unsupported by facts and evidence upon which to form a reasonable basis for concluding the requirements of any of the four criteria in SDCL Chapter 46-2A-9 have been met; or in the alternative

2. Should be deferred pursuant to SDCL § 46-2A-7 until an investigation of the impacts that the point of diversion will have on the existing (and prospective) in-stream flows in the area, senior water rights, domestic use, unique geologic and hydro-geologic structures, and the public health and welfare from the CAFO for which the water is requested; and the structure and finances of Longview Farms LLP to determine they are sufficiently financially responsible for and maintain liability for pollution of the area and damage to domestic use of water is documented; and

3. Pursuant to SDCL §46-2A-5, Petitioner further requests that the Chief Engineer postpone the date set for hearing on the Application for at least 20 days; and

4. That the Petition to Intervene be granted.

Respectfully Submitted this 24th day of September 2010.

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Hydrogeology of the Ft. Randall Casino area, Charles Mix County, South Dakota

by
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1207 11th St.
Rapid City, SD, 57701

Prepared for:
Yankton Sioux Tribe
P. O. Box 248
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November 25, 2008

PERRY H. RAHN
ASSOCIATION OF PROFESSIONAL GEOLOGICAL SCIENTISTS
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#3724

REGISTERED PROFESSIONAL ENGINEER
REG. NO. 4513
PERRY H. RAHN, PhD.
SOUTH DAKOTA

Attachment 16

Introduction

The Yankton Sioux Tribe operates the Ft. Randall Casino in Charles Mix County, South Dakota. Currently a large hog farm, called Long View Farm, is being constructed approximately 3 miles southeast of the Casino. Figure 1 shows the location of the Ft. Randall Casino and the Long View Farm (NW ¼, Section 9, Township 95 North, Range 64 West).

This concentrated animal feeding operation (CAFO) involves the main feed lot as well as scattered lands within 4 miles where landowners have agreed to receive manure from the operation. Figure 2 shows the location of the main facility and the nearby manure spreading areas. Tracks of land owned or leased by the Yankton Sioux Tribe or tribal members are located in this 4 mile area.

Concern has been expressed by the Yankton Sioux Tribe and many landowners that ground water could be contaminated because of this CAFO. The purpose of this report is to examine the hydrogeology for this area, and to evaluate the potential for ground water contamination. This report does not address engineering projects related to this feedlot such as the animal waste management or the storm water pollution prevention systems. This report is a reconnaissance study of the geology and hydrology of the area with reference to the occurrence and flow of ground water that could be impacted by Long View Farm.

Possible Contaminants

Contaminants associated with CAFOs that could affect water supplies include nitrate, nitrite, ammonia, and

phosphate (Freeze and Cherry, 1979; Hallberg and Keeney, 1993). Pharmaceutical compounds may be present due to antimicrobials (Chlortetracycline and Tyrosin) or growth promoters used in feeds (E. Dreis, pers. comm., 10/6/08). These compounds are excreted by pigs, and if the pig manure is applied to the land as fertilizer, there is the potential for water contamination either from surface runoff or percolation to the water table. Antibiotic resistant genes have been traced from hog waste lagoons to ground water in a 2007 study in Illinois. The transmission of antibiotic resistant bacteria from CAFOs to humans is discussed by Groupman (2008).

Geology

The physiography of this area consists of a low Northwest-Southeast trending ridge separating the Missouri River valley from the Lake Andes-Red Lake valley containing Choteau Creek (Figure 1).

The bedrock geology consists of flat-lying Cretaceous sedimentary rocks (Hedges, 1975). Under the Ft. Randall Casino, the Pierre Shale extends from approximately 100 ft depth to 400 ft. The Niobrara Formation, referred to as the Niobrara aquifer by Kume (1972) underlies the Pierre Shale. The Codell aquifer ("sand rock") lies at approximately 600 ft depth. The Dakota aquifer is approximately 1,000 ft depth. The potentiometric surface of these aquifers generally flow westerly towards the Missouri River.

Shallow ground water is important to this study. Walker (1961) studied shallow ground water in the Wagner area,

but there is limited published information about the hydrogeology of surficial deposits in the Ft. Randall or Long View Farm area.

Flint (1950) shows a general map of the glacial deposits of eastern South Dakota. The exposed glacial deposits near the Ft. Randall Casino are shown as part of the James Lobe, late Wisconsin ("Cary") in age, roughly 10,000 to 25,000 years old.

A detailed geologic map of this area was published by the South Dakota Geologic Survey (Hedges, 1975). This map shows late Wisconsin stagnation drift covering earlier Pleistocene glacial and fluvial deposits. Figure 3 and 4 shows Qwlts (a variety of glacial till called "stagnation drift") and Qwlt ("glacially modified bedrock"). Stagnation till is loosely compacted ablation till that accumulates as the stagnant glacier melted, as opposed to compact lodgment till that is overridden and compacted by an active glacier. Figure 3 shows early Pleistocene Herrick Formation sand and gravels exposed near the Ft. Randall Casino. Figure 5 includes photographs by the author taken October 9-10, 2008, showing these exposures of the Herrick Formation.

Herrick Formation

Figure 5 shows the Herrick Formation exposed in a large pit (Wagner Building and Supply quarry) approximately ¼ mile Northwest of the Ft. Randall Casino. The sand and gravel is presently being quarried down to the elevation where it is saturated.

The presence of permeable deposits such as the Herrick Formation has legal relevance because a ground water discharge permit and ground water monitoring is required by SD DENR for new CAFOs located over shallow aquifers. Approximately 10 ft of till overlies the permeable Herrick sand and gravel at the Wagner Building and Supply quarry. The SD DENR uses 15 ft overburden thickness to evaluate regulations concerning feedlots located above shallow aquifers.

The Herrick Formation consists of non-glacial fluvial sand and gravel that is derived from western sources. Stevenson and Carlson (1951) mapped the Lake Andes area and show the "Herrick gravels" as early Pleistocene in age. Hedges (1975) found deposits of the Herrick Formation at scattered locations throughout Charles Mix and Douglas Counties. Green and Lillegraven describe a caribou antler found in the sand and gravel to be Kansan or Nebraskan age. Harksen and Macdonald (1969) found Herrick gravel to be equivalent to the Medicine Root Gravel which is early Pleistocene (Nebraskan glacial stage).

The Herrick Formation is a fluvial deposit. Flint (1951) and Hedges (1975) show the early Pleistocene streams (e.g. the ancestral White, Niobrara, and Cheyenne Rivers) flowed easterly from the Black Hills and Wyoming. Repeated glaciation covered these alluvial deposits and diverted the flow of these streams. Simpson (1960) describes the diversion of the ancestral White River in the Yankton area. Eventually the Missouri River developed its present location and now the streams in western South Dakota flow into it.

The Herrick Formation supplies municipal water to towns along Rt. 18 in the Burke, St. Charles, and Bonesteel area (Gries, 1996).

The Geologic Map of South Dakota (Martin et al., 2004) shows the Herrick gravel deposit as "To", the "Ogallala Group", Miocene to Pliocene in age. The Ogallala Formation, also called the High Plains aquifer, underlies parts of eight states from South Dakota to Texas. It is used extensively for irrigation in Texas and Kansas (Domenico and Schwartz, 1990; Anderson and Woosley, 2005).

The significance of the Herrick Formation to this study is that this thick permeable unit is exposed at the Ft. Randall Casino area and is thinly covered by glacial till. Although Jensen's (2008) map shows the Herrick Formation not extending under the Long View Farm, without detailed test drilling the areal extent (and proximity to the surface) of this permeable unit is not known.

Water Quality

There is some published water quality data for the Charles Mix County area. For example, Sando and Neitzert (2003) show the average total dissolved solids of Choteau Creek is approximately 1,500 mg/L, and the Missouri River is approximately 500 mg/L.

Kume (1977) shows the Choteau aquifer extending to 3 miles west of Wagner. The Choteau aquifer contains largely sodium sulfate ground water with an average total dissolved solids of 1,700 mg/L.

Table 1 shows data for three water samples collected by the author during October 9-10, 2008. The total dissolved

solids average 2,557 mg/L, which is higher than the Choteau aquifer. The nitrate at two locations is less than 1 mg/L, which is an indication of ground water chemistry of this area. The anomalously high nitrate at tributary to Sevenmile Creek is undoubtedly because the sample was not taken at the spring source, but was sampled approximately ½ mile downstream in a pasture where cattle were present.

Hydrologic measurements made October 9-10, 2008

The average annual precipitation of this area is approximately 22 inches (General Electric Co., 1980). May and June are the months of highest precipitation. In order to study the discharge of springs, the driest months of the year, typically September or October, are most useful because little if any surface water would be contributing to the spring discharge at this time. Rather, the discharge is representative of the ground water discharging from permeable deposits. Kume (1977) shows that September and October are generally the time of year when lowest water table conditions exist.

Conducting field measurement is handicapped by accessibility to private lands. Because of this, not all springs or wells were available for measurement on October 9-10.

Figure 6 is a copy of the USGS Wagner SW topographic map. The Ft. Randall Casino and Long View Farm is shown. On October 9-10, 2008, the author visited this area with Marilyn Bercier of the BIA, Richard Leasure of the Yankton Sioux Tribe, and Janet DeLoughery, a local

resident. Springs and static levels of water wells were made where landowners allowed access. Some water samples were collected.

Figure 7 shows: (1) the location and elevation of springs, and (2) the location and static level of shallow wells. The USGS topographic map "Wagner SW", at 1:24,000 scale, was used for land elevation. The source of the water table elevation data includes spring elevation or static level measured on October 9-10 (circled number on Figure 7). Additional springs are reportedly present at approximately the same elevation as the three springs measured on October 9-10; however, access to these additional springs was not available. Some data shown in Figure 7 are based on the static level of wells published in USGS or SDGS websites. Based on these elevations, a map of the water table was prepared. The water table map is similar to the general topography of the area.

Figure 8 is a geologic cross section though the Ft. Randall Casino showing the geology and water table, and the flow direction of the shallow ground water. The vertical exaggeration in Figure 8 is 11X.

Spring discharge was measured at three locations by a 90 degree V-notch weir (Figure 9). A general flow net (Figure 10) was prepared based on the water table map. Shallow ground water flow is generally NE, SE, and SW from Long View Farm.

Conclusion

From this study, the following conclusions can be drawn:

---Shallow ground water is present in sufficient quantity for domestic and livestock use.
---Shallow ground water flow from the Long View Farm disperses in nearly all directions away from the site.
---The background ground water quality is typical for this area.
---Shallow permeable geologic materials exist in this area. The stagnation till itself is fairly permeable, and may contain isolated unmapped outwash sand and gravel units. More importantly, the thick Herrick Formation sand and gravel is exposed close to the Ft. Randall Casino, and may extend under the till throughout a large part of the area impacted by this CAFO.

Future work in this area should include a comprehensive inventory and measurement of shallow wells and springs, including those on private lands. Future measurement of the discharge and chemistry of springs would add to the understanding of the hydrogeology of the area.

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Materials Map 29.
Kume, J., 1972, Major aquifers in Charles Mix and Douglas Counties, South Dakota: South Dakota Geological Survey, Info. Pamphlet No. 2.
Kume, J., 1977, Geology and water resources of Charles Mix and Douglas Counties, South Dakota: Part II- Water Resources: South Dakota Geological Survey, Bulletin 22, Vermillion, South Dakota.
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Simpson, H.E., 1960, Geology of the Yankton area, South Dakota and Nebraska: U.S. Geological Survey, Prof. Paper 328.
Stevenson, R.E., and L.A. Carlson, 1951, Areal geology of the Lake Andes Quadrangle: South Dakota Geological Survey, Vermillion, SD.
Sando, S.K., and K.M. Neitzert, 2003, Water and sediment quality of the Lake Andes and Choteau Creek Basin, South Dakota, 1983-2000: U.S. Geological Survey, Water-Resources Investigations 03-4148.
Walker, I.R., 1961, Shallow ground water resources in the Wagner area, Charles Mix and Douglas Counties, South Dakota: South Dakota Geological Survey, Report of Investigations No. 90, Vermillion, South Dakota.

Table 1. Water quality data (mg/L) for ground water samples collected October 10, 2008. Midcontinent Testing Laboratories, Rapid City, SD performed the analyses. The sample "Brad Irwin" was collected from a pipe at the spring source. The sample "Sevenmile Creek" was collected in a pasture of an eastern tributary approximately ½ mile below the spring complex. The sample "L. Kreeger" was collected from a shallow well. On October 16, 2008, Midcontinent Lab received a bacterial sample from L. Kreeger; their analyses indicate total coliform "present" but fecal coliform "absent".

Location	Time	TDS	Chloride	Nitrate (as Nitrogen)	Phosphate
Brad Irwin	8:30 am	2,630	17.8	0.657	0.010
Sevenmile Creek	10:00 am	2,720	55.0	29.1	<0.010
L. Kreeger	11:00 am	2,320	10.8	0.236	0.049

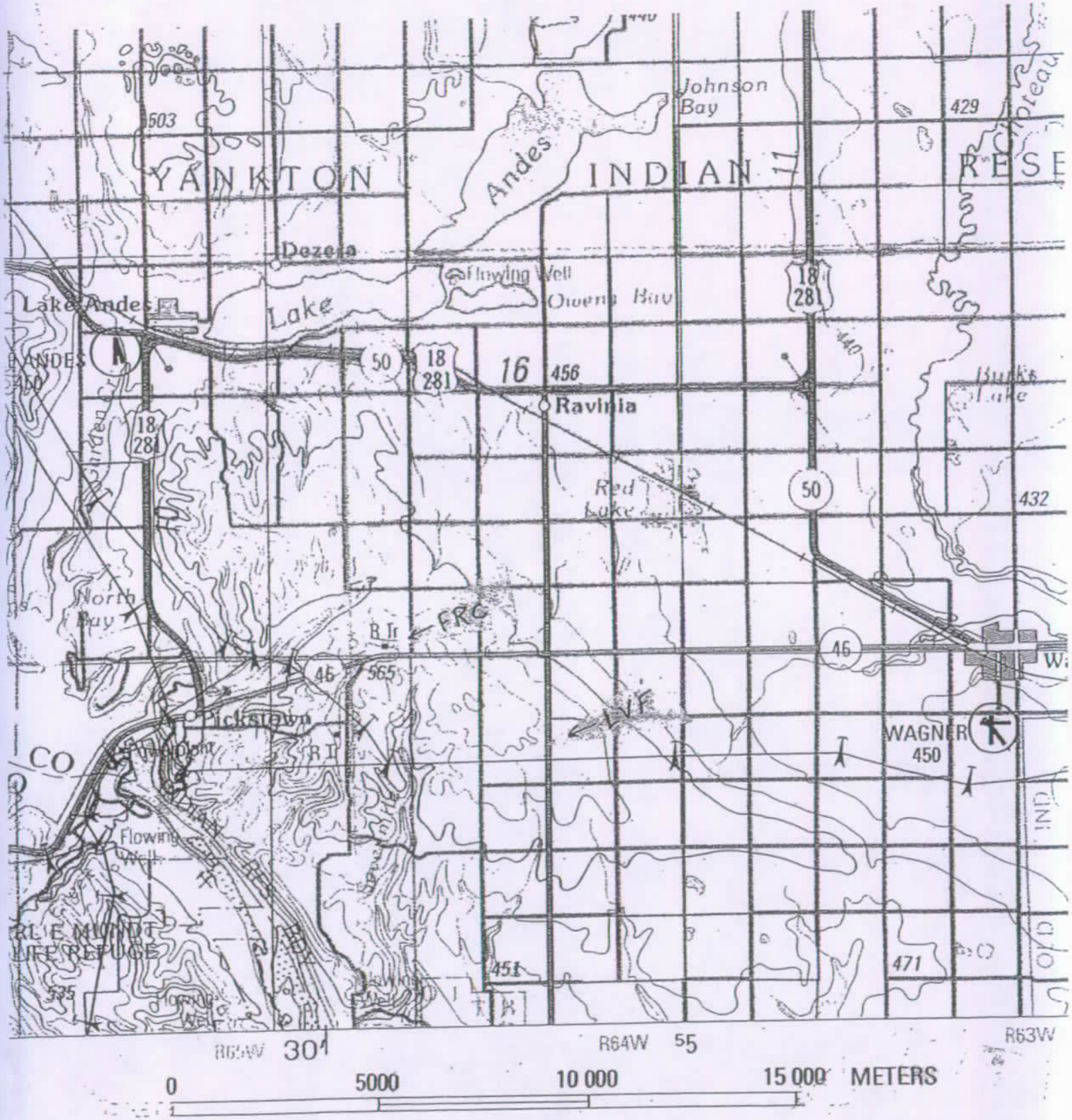


Figure 1. Map of Pickstown-Wagner area showing location of Long View Farm (LVF) and the Ft. Randall Casino (FRC). This map is from the USGS Mitchell (1990) quadrangle, contour interval 20 m. Original at 1:250,000 scale.

Figure 2. Road map of area near Long View farm (LVF). The shaded lands are proposed areas where manure is to be spread. From Eisenbraun and Associates (2007).

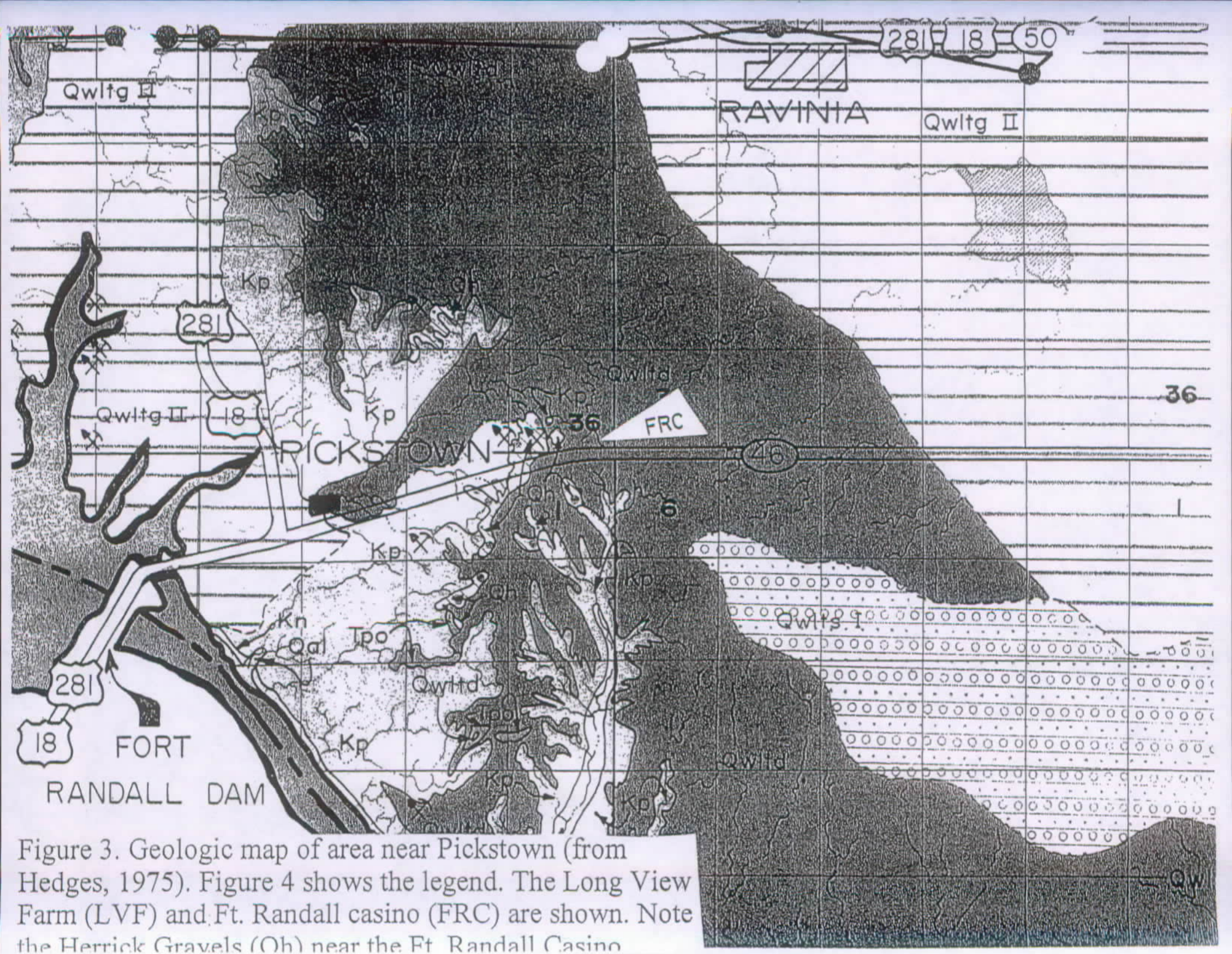


Figure 3. Geologic map of area near Pickstown (from Hedges, 1975). Figure 4 shows the legend. The Long View Farm (LVF) and Ft. Randall casino (FRC) are shown. Note the Herrick Gravels (Oh) near the Ft. Randall Casino

Alluvium—Black humic silty clay, stratified; sand and gravel; 0 to 15 feet thick along minor streams; up to 150 feet thick along Missouri River.

vium—Yellow to dark-gray silty clay or silt, poorly stratified; 0 to 10 feet thick.

Loess—Yellow silt or sandy silt, calcareous, 0 to 10 feet thick.

Terrace—Flat or sloping terrace along Missouri River, locally underlain with alluvium, till, outwash or loess; 0 to 90 feet thick.

Outwash terrace—Sand and gravel outwash terrace, some s... sand; iron-carbonate cementing common; 0 to 30 feet thick.

Valley outwash—Predominantly sand and gravel with some fine sand or silt; flat to nearly flat; 0 to 30 feet thick.

Collapsed outwash—Collapsed outwash deposits of variable texture; may contain some till. Qwloc I—Yellow silt and sandy silt, calcareous; local relief 10 to 20 feet; 0 to 15 feet thick. Qwloc II—Fine to coarse sand, relief 10 to 20 feet, 0 to 15 feet thick. Qwloc III—... to coarse sand and gravel, maximum local relief 30 feet; 0 to ... feet thick.

Undifferentiated outwash—Undifferentiated bodies of outwash material; Qwlou I—Mostly silt, clayey silt, and fine sand; 0 to 10 feet thick; Qwlou II—Coarse sand or sand and gravel; mostly ice contact origin, 0 to 20 feet thick.

Till (ground moraine)—Boulder-clay till, calcareous, oxidized portion yellow-brown to reddish-brown; unoxidized dark olive-gray to black; Qwltg I—low relief; Qwltg II—high relief.

Qwlts I

Till (stagnation drift)—Boulder-clay till, calcareous; varies locally from clay rich till to sandy gravelly till; Qwlts I—Low relief; Qwlts II—High relief; Qwlts III—Stagnation drift characterized by oblong to ovale disintegration ridges composed of till.

Qwltd

Till (glacially modified bedrock)—Glacially modified stream-eroded bedrock topography, till generally less than 50 feet thick; ...drock outcrops common; local relief highly variable, integrated ...age.

Till (end moraine)—Boulder-clay till, calcareous; oxidized portion yellow to reddish brown, unoxidized portion dark-gray to black; forms discontinuous elongate ridge up to 15 feet high.

LATE WISCONSIN — QUATERNARY

Qh

Herrick gravel—Gravelly medium to coarse sand, stratified; quartz and feldspar dominant; pinkish color due to feldspar content; as much as 80 feet thick; western derived fluvial deposit; fossiliferous.

PLEISTOCENE — PRE-KANSAN — QUATERNARY

T_{po}

Ogallala undifferentiated—Light greenish-brown clay, silty clay and loose fine sand; a green massive orthoquartzite conglomerate as much as 6 feet thick locally present; sparsely fossiliferous; 40 feet thick.

MIOCENE-PLIOCENE — OGALLALA — TERTIARY

Fort Randall Formation—Light brown to pink siltstones and clay; 5 foot zone of barite crystals or "rock rose" zone about 50 feet above base; sparsely fossiliferous; 60 to 120 feet thick.

MIOCENE — FORT RANDALL FORMATION

K_p

Pierre Shale undifferentiated—Light gray to black marine claystone and shale; locally calcareous; marl and chalky zones occur throughout; manganese and iron-carbonate concretions common; bentonitic; about 600 feet thick.

UPPER CRETACEOUS — PIERRE SHALE — CRETACEOUS

Niobrara Marl—Light gray to dark bluish-gray limestone and marl; weathers to dark yellowish-orange; macrofossils include Ostrea and Inoceramus; microfossils predominantly Foraminifera; about 150 feet thick.

NIOBRARA MARL

Geologic Contact dashed where approximately located

Lake

Meltwater channel

Ice-contact face

Intermittent lake or slough

Intermittent stream

Gravel pit

Figure 4. Legend for Figure 3 geologic map (from Hedges, 1975).

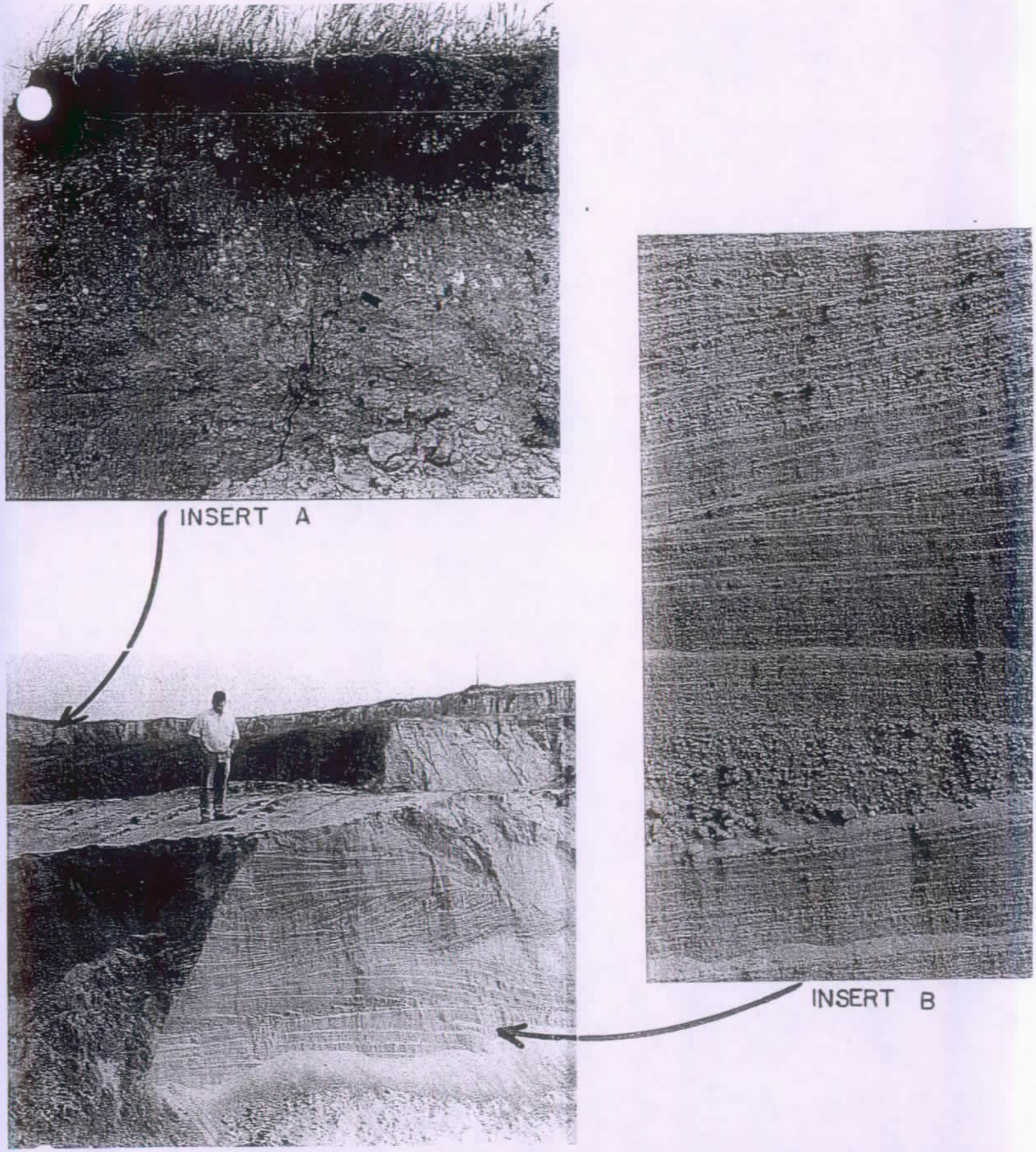
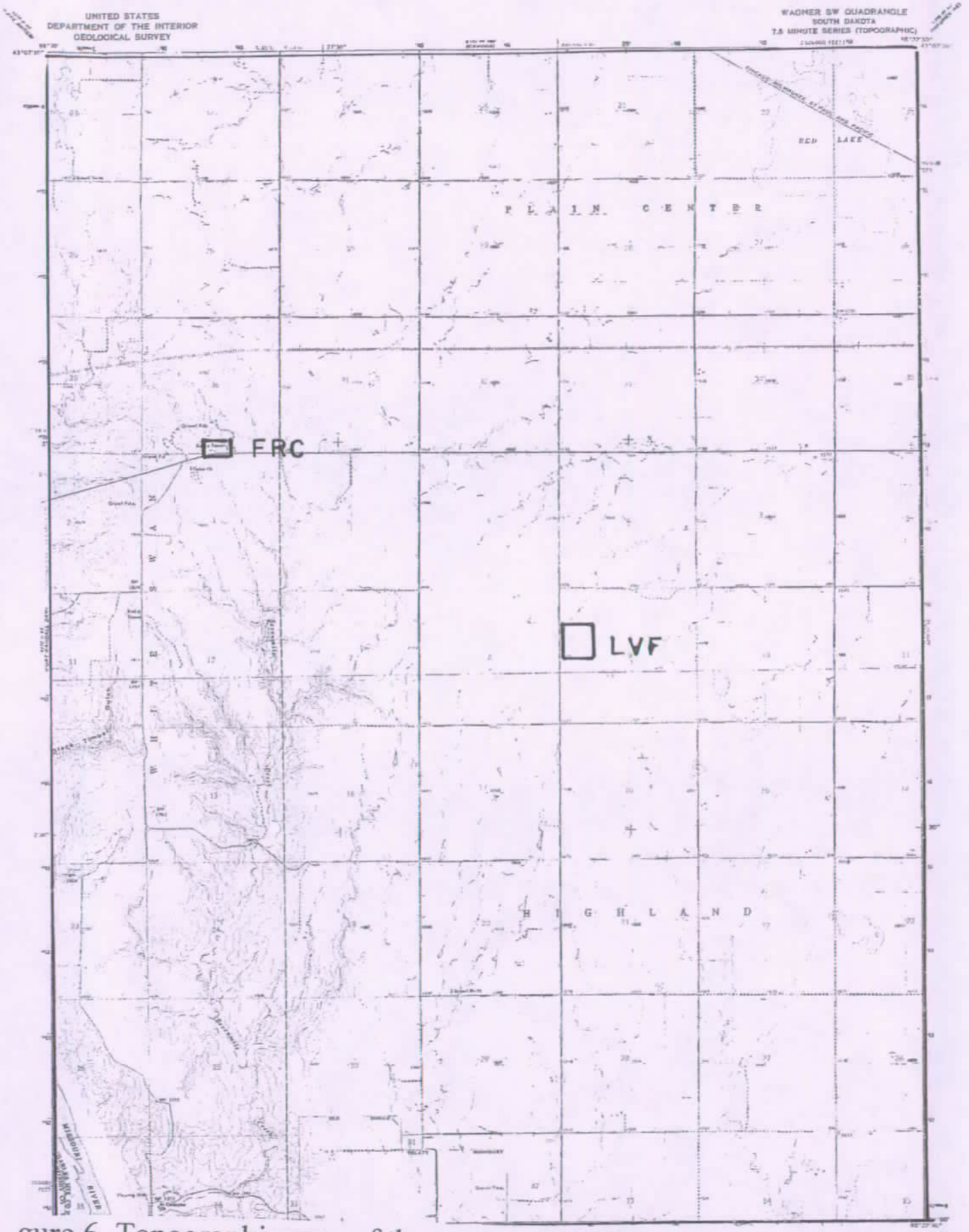


Figure 5. Photographs of the Wagner Building and Supply Co. sand and gravel pit just NW of the Ft. Randall Casino. About 10 ft of till (Insert A) overlies about 40 ft of Herrick Formation sand and gravel (Insert B).



igure 6. Topographic map of the area east of Pickstown. From USGS Wagner SW 7.5 minute quadrangle. Original at 1:24,000 scale. Contour interval 10 ft. Long View Farm (LVF) and Ft. Randall Casino (FRC) are shown.

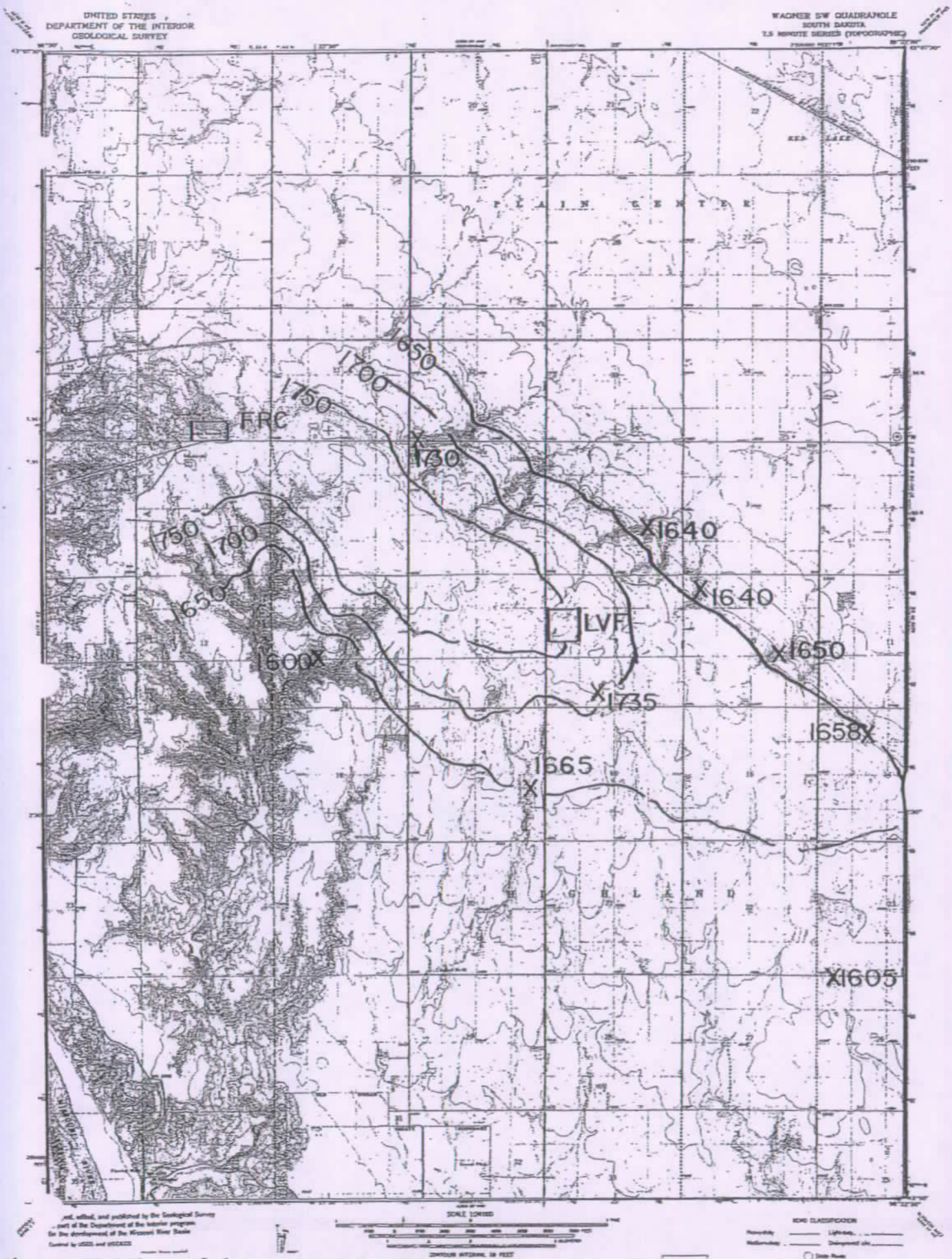


Figure 7. Map of the water table (ft above sea level). Long View Farm (LFF) and Ft. Randall Casino (FRC) are shown.

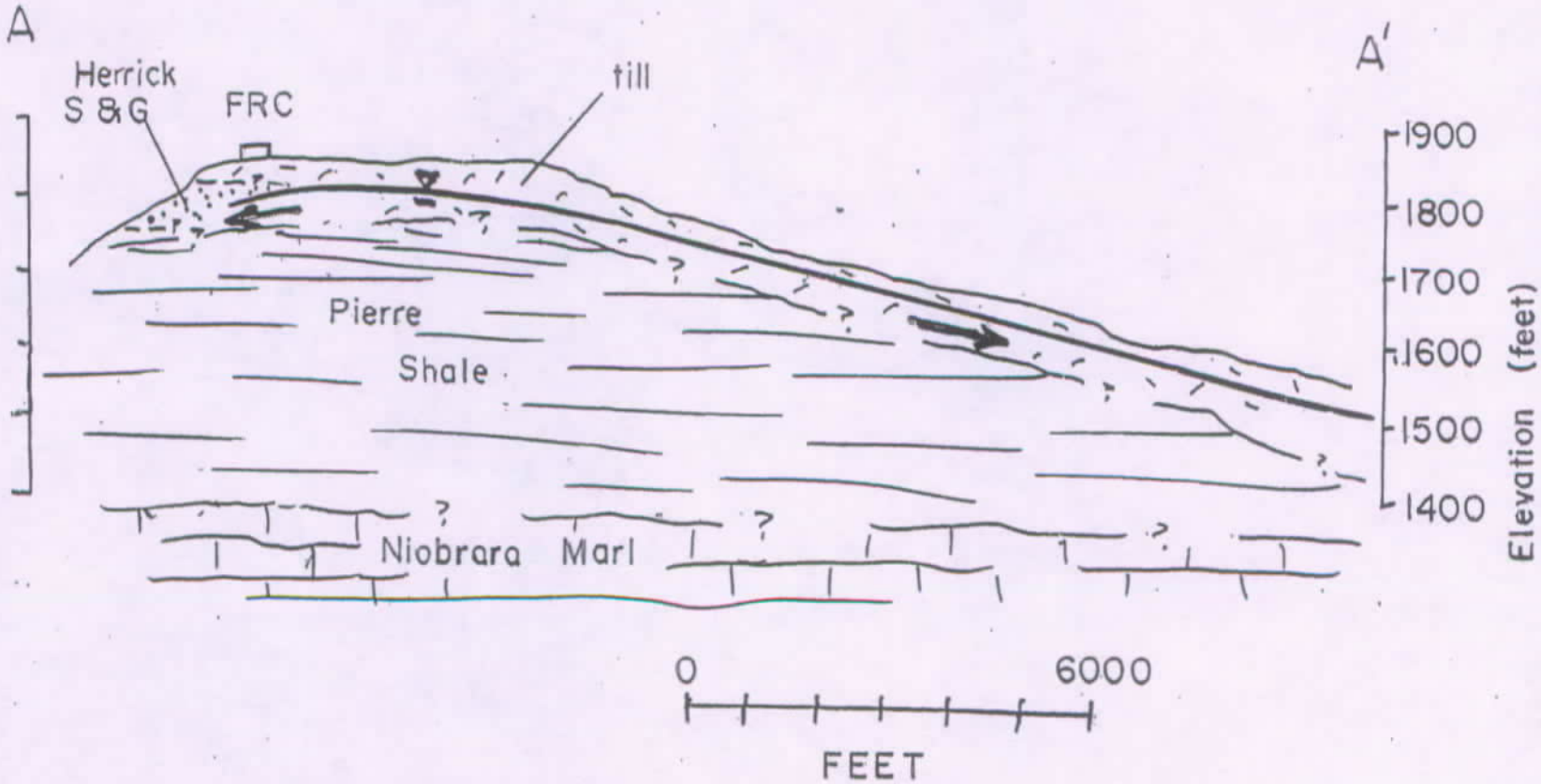


Figure 8. Geologic cross-section through Ft. Randall Casino. The location of A-A' is shown in Figure 10. The geologic contacts and position of water table are approximate. The general ground water direction is shown.

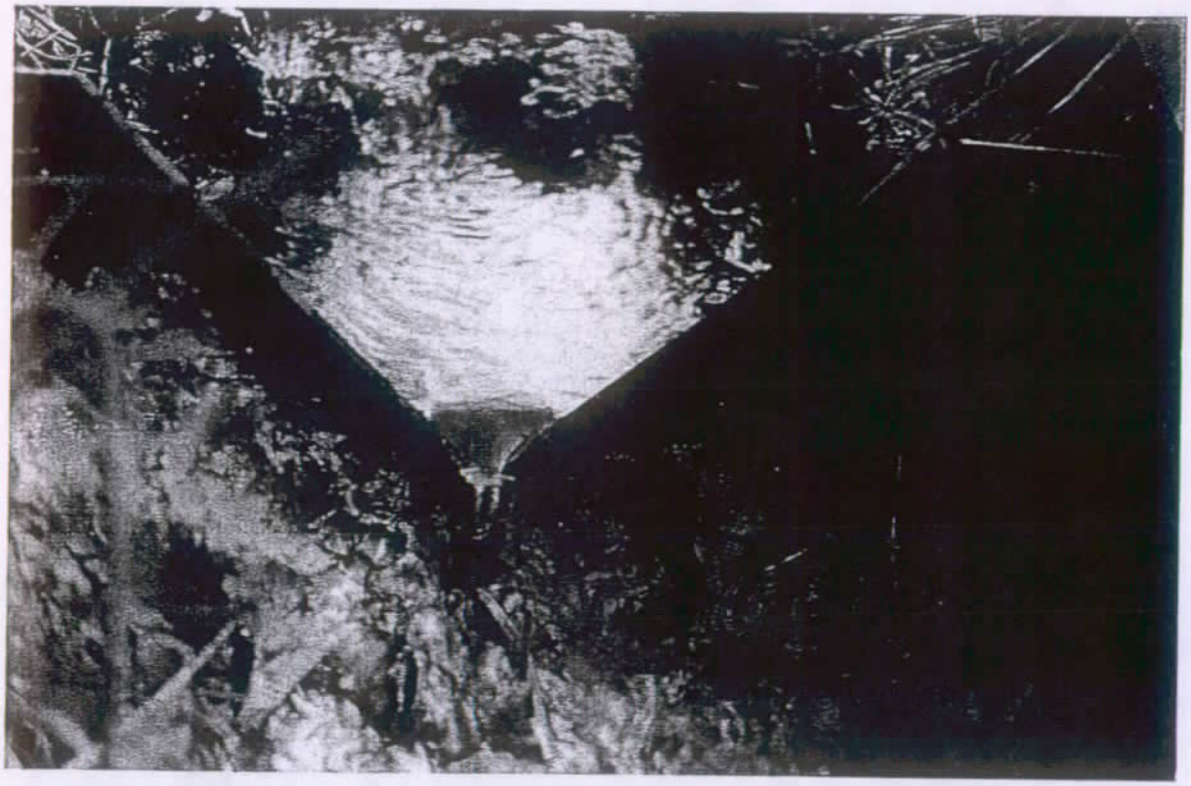


Figure 9. October 10, 2008, photograph of 6 gpm flowing through 90 degree V-notch weir. This measurement of spring discharge was made on a tributary to Sevenmile Creek (located by the 1600 ft data point on Figure 7).

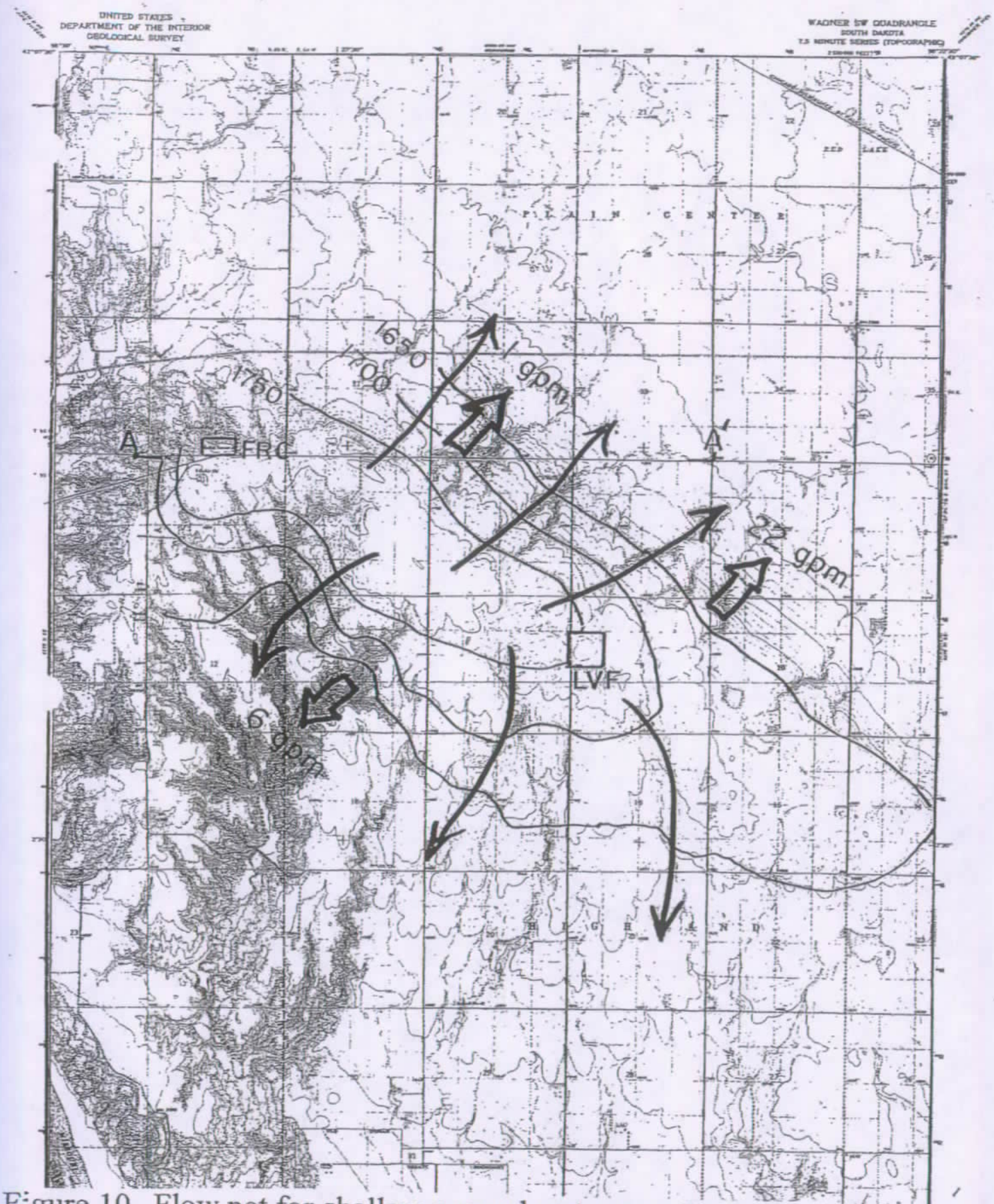


Figure 10. Flow net for shallow ground water near Long V. v Farm. This map is based on the water table map (Figure 7). Spring discharge (gallons per minute) measured October 9 and 10 is shown. The direction shallow ground water movement is shown

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
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PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

RECEIVED
MAR 17 2009

March 16, 2009

Rebecca L. Kidder
Abourezk Law Firm
P.O. Box 9460
Rapid City, SD 57709-9460

Dear Ms. Kidder:

This is in response to your January 14, 2009, letter to Kent Woodmansey. In your letter, you requested the Department of Environment and Natural Resources to reconsider its September 2007 assessment of the ground water conditions at the Long View Farm LLP site in Charles Mix County. Your request was based on a hydrology study by Perry H. Rahn, PhD, PE, which was included with your letter.

In your letter you also indicate your request is based on Administrative Rules of South Dakota (ARSD) 74:52:04:07(2) and (4). This rule allows modification of a permit or its revocation if information becomes available that the permittee failed to disclose all relevant facts or if there is a determination that the permitted activity actively endangers human health or the environment. You indicate that the department was aware of the presence of shallow ground water at the Long View Farm site because it was evident during site construction and because petitions filed with the department indicated as such.

To respond to your request, it is important to note that the department is required to determine the presence of shallow aquifers, not shallow ground water, at proposed concentrated animal feeding operations and land application sites. The presence of shallow ground water does not indicate the presence of a shallow aquifer. "Shallow aquifer" is a term statutorily defined in South Dakota Codified Law (SDCL) 34A-3A-24.

Sarah Speck with the Surface Water Quality Program did the department's initial assessment for the Long View Farm site to determine the presence of a shallow aquifer relative to the site. In light of your request, Derric Iles, State Geologist, South Dakota Geological Survey, reviewed Ms. Speck's assessment and Dr. Rahn's hydrology report. The summation of Mr. Iles' review is enclosed.

In short, Mr. Iles agrees with Ms. Speck's assessment of the lack of a shallow aquifer at the Long View Farm site in Charles Mix County. Therefore, the department's decision there is no requirement for ground water monitoring or a ground water discharge permit remains unchanged. Also, there is no need to modify or revoke the general permit coverage issued to Long View Farm.

Please contact me if you have questions regarding this letter.

Sincerely,

Jeanne Goodman, Administrator
Surface Water Quality Program

Enclosure

cc: Derric Iles, State Geologist
Yankton Sioux Tribe Business and Claims Committee
Roxanne Giedd, Deputy Attorney General

South Dakota Department of
Environment and Natural Resources
GEOLOGICAL SURVEY

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414 EAST CLARK STREET
VERMILLION, SD 57069–2390
605–677–5227
FAX 605–677–5895
INTERNET *www.state.sd.us/denr*

Memorandum

To: Jeanne Goodman
From: Derric L. Iles
Date: February 2, 2009
Re: Long View Farm in Charles Mix County

At your request, I have reviewed the following three documents.

1. A letter from Rebecca L. Kidder (Abourezk Law Firm) to Kent R. Woodmansey of the Department of Environment and Natural Resources (DENR) dated January 14, 2009
2. A memorandum from Sarah Speck (DENR) to Darold Krein (DENR) dated September 9, 2007
3. A report authored by Perry H. Rahn titled *Hydrogeology of the Ft. Randall Casino area, Charles Mix County, South Dakota* and dated November 25, 2008

My comments presented below are referenced to specific portions of the letter, memorandum, or report where appropriate.

<u>Kidder Letter, page 1, first and last paragraphs</u>
It is stated in the first paragraph that "*The report documents the presence of shallow groundwater near and under this CAFO and the manure management fields for Longview Farm LLP.*" In the last paragraph and last sentence on page 1 that continues onto page 2, it is stated that "*It is further evident in the hydrology report that prior studies of groundwater in Charles Mix County, which were relied upon in the hydrology report commissioned, documented the presence of shallow ground water as early as 1975.*" These two quoted sentences imply that the author of the letter believes that the presence of shallow ground water is significant and perhaps may have been unknown or overlooked as the permit for the CAFO was considered by the DENR. However, shallow ground water is the norm in most of the state east of the Missouri River and its likely presence at shallow depths near the CAFO is not a revelation. Shallow ground water may be present in permeable sediments (e.g., sands and gravels) and low-permeability sediments (e.g., clays) alike. An important aspect of the permitting process is to assess whether a shallow aquifer is present, not whether shallow ground water is present.

Kidder Letter, page 1, third paragraph

The first sentence of this paragraph states "*Our request is based upon South Dakota administrative regulations 74:52:04:07 (2) and (4) which allow modification of a permit or its revocation if information becomes available that the permittee failed to disclose fully all relevant facts, or if there is a determination that the permitted activity actively endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination, and additional South Dakota law and regulation as applicable to NPDES permitting.*" The implication here is that the permittee failed to fully disclose relevant facts during the permitting process or that some new information has been found that could be grounds for modification or revocation of the permit. I cannot speak to the former, but I did not find any information in the report prepared by Perry H. Rahn that would be grounds for modification or revocation of the permit.

Speck Memorandum, page 1, second paragraph

It is stated that "*According to aquifer studies of Charles Mix County, there are no shallow aquifers present at the facility location that meet the definition in SDCL 34A-3A-24. Three submitted on-site boring logs indicate a soil profile of 51 feet of weathered lean clay.*" This shows that DENR, in consideration of the permit application for the CAFO, determined that there are no shallow aquifers at the CAFO site (as defined in SDCL) and also shows that there was new, site-specific evidence provided by the permittee to demonstrate the lack of a shallow aquifer at the CAFO site.

Rahn Report, numbered page 3, Geology section, second paragraph

This paragraph briefly mentions three aquifers: the Niobrara Formation, the Codell Sandstone member of the Carlile Shale, and the Dakota Sandstone. It is stated that "*the potentiometric surface of these aquifers generally flow westerly towards the Missouri River.*" Potentiometric surfaces do not flow; rather, ground water flows. A map of a potentiometric surface can be used to help predict the potential direction(s) of ground-water flow. Two references for Mr. Rahn's information are listed in the paragraph as Kume (1972) and Hedges (1975). The Kume (1972) reference was superseded by a later report (Kume, 1977) that contains more, and more detailed, information related to water resources of Charles Mix County.

- None of the three references contains information on the potential ground-water flow directions in the Niobrara Formation so it is unknown on what Mr. Rahn based his opinion of flow direction in the Niobrara Formation.
- Figure 17 in Kume (1977) shows that the potential direction of ground-water flow in the general area of the Ft. Randall Casino and the CAFO, in the Codell aquifer, is to the south-southeast and not westerly as stated by Mr. Rahn. Neither of Mr. Rahn's stated references (Kume, 1972 and Hedges, 1975) contain information on the potential direction of ground-water flow in the Codell aquifer.
- Figure 4 in Kume (1972) and figure 20 in Kume (1977) show that the potential direction of ground-water flow in the area of the Ft. Randall Casino, in the Dakota aquifer, is likely

westerly as stated by Mr. Rahn but the potential direction of ground-water flow in the Dakota aquifer in the area of the CAFO likely different.

There was no explanation provided in Mr. Rahn's report regarding the significance of his stated westerly ground-water flow direction as related to the topic of the CAFO.

The references of Kume (1972, 1977) and Hedges (1975) are available for free download from the Geological Survey Program web site. The links to these references are provided below.

Kume (1972):

- http://jurassic2.sdgs.usd.edu/pubs/pdf/IP-02.pdf

Hedges (1975):

- http://jurassic2.sdgs.usd.edu/pubs/pdf/B-22(1)%20-%2049%20pages.pdf
- http://jurassic2.sdgs.usd.edu/pubs/pdf/B-22(1)%20-%20figures%202%20&%2011,%20plates%202,%203,%204%20&%205,%2011x17%20inches,%206%20pages.pdf
- http://jurassic2.sdgs.usd.edu/pubs/pdf/B-22(1)%20-%20plate%201,%2025x36%20inches.pdf
- http://jurassic2.sdgs.usd.edu/pubs/pdf/B-22(1)%20-%20plate%207,%2013x11%20inches.pdf

Kume (1977):

- http://jurassic2.sdgs.usd.edu/pubs/pdf/B-22(2).pdf

Rahn Report, numbered page 4, second full paragraph

It is stated that "*Figure 3 and 4 shows Qwlts (a variety of glacial till called "stagnation drift") and Qwlt ("glacially modified bedrock").*" Figures 3 and 4 are excerpts from Plate 1 in Hedges (1975). There is no unit labeled Qwlt on Plate 1. From the definition for Qwlt provided by Mr. Rahn, I suspect that he meant Qwltd instead of Qwlt. The complete definition for the geologic unit Qwltd on Plate 1 in Hedges (1975) is "Till (glacially modified bedrock)—Glacially modified stream-eroded bedrock topography, till generally less than 50 feet thick; bedrock outcrops common; local relief highly variable, integrated drainage."

Rahn Report, numbered page 5, first paragraph

It is stated that "*The presence of permeable deposits such as the Herrick Formation has legal relevance because a ground water discharge permit and ground water monitoring is required by SD DENR for new CAFOs located over shallow aquifers.*" I assume that the Herrick Formation referred to by Mr. Rahn is the same as the Herrick gravel identified in Hedges (1975). No information was provided by Mr. Rahn that would document the Herrick gravel to be present under the CAFO. Kume (1972, 1977) and Hedges (1975) did not show the Herrick gravel to be present under the CAFO. A more recent map prepared by the Geological Survey Program does not show a shallow aquifer (as defined in SDCL 34A-3A-24) to be present under the CAFO. This recent report (Jensen, 2008) is titled *First Occurrence of Aquifer Materials in Charles Mix County, South Dakota* and was published in 2008. This map was prepared specifically to provide

information regarding the depth to the first mappable aquifer unit/material. The reference of Jensen (2008) is available for free download from the Geological Survey Program web site (http://jurassic2.sdgs.usd.edu/pubs/pdf/AM-29_20080515.pdf).

Rahn Report, numbered page 6, second full paragraph

It is stated that "*The significance of the Herrick Formation to this study is that this thick permeable unit is exposed at the Ft. Randall Casino area and is thinly covered by glacial till. Although Jensen's (2008) map shows the Herrick Formation not extending under the Long View Farm, without detailed test drilling the areal extent (and proximity to the surface) of this permeable unit is not known*" The significance of a unit cropping out at land surface near the casino and being thinly covered by till is not clearly explained by Mr. Rahn. The implied meaning of these two quoted sentences seems to be that if the Herrick gravel that can be seen at land surface near the casino, it might also be present elsewhere where it cannot be seen. However, Kume (1972, 1977), Hedges (1975), and Jensen (2008), after consideration of all available test hole and well logs and other geologic information, did not interpret the Herrick gravel to be present beyond its present mapped extent. Additionally, there are three test holes that were drilled to 51 feet at the CAFO facility (Long View Farm) that document the absence of a shallow aquifer at the CAFO site. Results from these three test holes, which were submitted to DENR as part of the permit application, are consistent with the interpretations of Jensen, Hedges, and Kume. Mr. Rahn offered no evidence to bring these interpretations into doubt.

Rahn Report, numbered page 6, last full paragraph

It is stated that "*Kume (1977) shows the Choteau aquifer extending to 3 miles west of Wagner.*" Figure 15 in Kume (1977) actually shows the western boundary of the Choteau to be slightly greater than 5 miles due west of Wagner and about 3 miles to the southwest of Wagner.

Rahn Report, numbered page 6, last paragraph continuing onto page 7

It is stated that "*Table 1 shows data for three water samples collected by the author during October 9-10, 2008. The total dissolved solids average 2,557mg/L, which is higher than the Choteau aquifer.*" Table 1 indicates that one of these three samples was "*collected from a pipe at the spring source,*" one was "*collected in a pasture ..... approximately ½ mile below the spring complex,*" and one was "*collected from a shallow well.*" A reason for averaging the total dissolved contents of these three samples and then presenting the average concentration in the report was not provided by Mr. Rahn.

It is stated that "*The nitrate at two locations is less than 1 mg/L, which is an indication of ground water chemistry of this area.*" The significance of this statement is not clear. Any results of analyses of ground water from the area, whether the parameter is nitrate or something else, would be an indication of the chemical composition of water in the area.

Rahn Report, numbered page 8, first full paragraph

It is stated that "*Figure 7 shows: (1) the location and elevation of springs, and (2) the location and static level of shallow wells.*" There is no differentiation between springs and wells on figure 7. There are only Xs on the map which I presume represent the locations of springs and wells.

It is stated that "*The source of the water table elevation data includes spring elevation or static level measured on October 9-10 (circled number on Figure 7).*" There is no number on figure 7 which is circled.

It is stated that "*Additional springs are reportedly present at approximately the same elevation as the three springs measured on October 9-10 .....*" The locations of the three springs which were measured are not indicated.

It is stated that "*Some data shown in Figure 7 are based on the static level of wells published in USGS or SDGS websites. Based on these elevations, a map of the water table was prepared.*" Figure 7 is stated to have been developed using water levels from springs and wells measured by Mr. Rahn and from water levels from USGS or SDGS sources. The water levels from USGS and SDGS sources were not identified/provided in Mr. Rahn's report. Documentation must be available to justify using a particular well to represent the hydraulic conditions in a particular hydrostratigraphic unit; in this case, the water table in the shallow till. For example, it must be demonstrated that each well is completed at the appropriate depth and has a water level that is representative of the water table (unconfined hydraulic conditions) and not a water level that is representative of confined conditions. No information on well depths, well construction, or geologic conditions near each well was provided by Mr. Rahn. Additionally, water levels measured at springs may or may not be representative of the water table. For example, it would not be uncommon to have springs or seeps at several elevations on a hill slope in stagnation moraine. A change in the permeability of the moraine sediments could cause water migrating vertically downward toward the water table to be diverted to a hill slope at an elevation that is above the local water table. No documentation of geologic conditions or nearby water levels was provided for any of the spring sites discussed by Mr. Rahn. Thus, without further information it is not possible to adequately determine whether Mr. Rahn's representation of the water-table surface appropriately depicts the water table in the map area.

<u>Rahn Report, numbered page 9, points of conclusion</u>
It is stated that "*Shallow ground water is present in sufficient quantity for domestic and livestock use.*" To what area does this statement pertain? What is the significance of the statement? What evidence is there to substantiate this claim?

It is stated that "*Shallow ground water flow from the Long View Farm disperses in nearly all directions away from the site.*" It is my opinion that this statement is a bit too far reaching and generalized given the questions about the validity of the water table map and the lack of any site-specific evidence.

It is stated that "*The background ground water quality is typical for this area.*" It is not clear what the significance of this statement is or what constitutes "background ground water quality." Mr. Rahn offered only three water samples from disparate sources (a spring, from a pasture, and a well) and only provided data for total dissolved solids, chloride, nitrate as nitrogen, and phosphate. Additionally, there was insufficient discussion of the quality of water from samples, other than those three, to clearly establish what would commonly be expected as the quality of water from various sources.

It is stated that "*The stagnation till itself is fairly permeable, and may contain isolated unmapped outwash sand and gravel units.*" No evidence was provided by Mr. Rahn to support the generalized characterization of the permeability of this till unit as a whole. The occurrence of a spring is likely due to very localized geologic conditions and should not be used as a basis for characterizing and entire geomorphic unit as being fairly permeable.

It is also stated that "*More importantly, the thick Herrick Formation sand and gravel is exposed close to the Ft. Randall Casino, and may extend under the till throughout a large part of the area impacted by this CAFO.*" However, the four most comprehensive assessments of the area Kume (1972, 1977), Hedges (1975), and Jensen (2008) did not document the presence of shallow aquifer units (as defined in SDCL 34A-3A-24) in the area implied by Mr. Rahn. Additionally, Mr. Rahn did not provide any new evidence that would be cause for changing this interpretation. In fact, the only new subsurface information (three test holes to 51 feet) provided for the CAFO area was provided by the permittee for the CAFO facility and supports the interpretation that there is no shallow aquifer under the CAFO site.

DLI:co

RESPONSE TO DERRIC ILES' COMMENTS REGARDING REQUEST FOR MODIFICATION AND/OR RECONSIDERATION OF THE PERMITTING OF LONGVIEW FARM LLP

Prepared by Perry H. Rahn
May 26, 2009

I appreciate the careful review by Derric Isles on February 2, 2009, sent as a Memorandum to Jeanne Goodman. His comments primarily relate to my November 25, 2008, report "Hydrogeology of the Ft. Randall Casino area, Charles Mix County, South Dakota". My response to his comments is arranged according to his Memorandum.

Kidder Letter, page 1, first and last paragraph.
Iles confirms that "...shallow ground water is present" under and near Longview Farm.

Kidder Letter, page 1, third paragraph.
Iles states he "...did not find any information in the report prepared by Perry H. Rahn that would be grounds for modification or revocation of the permit". But my report shows ground water is utilized in this area by domestic wells, and springs discharge ground water away from the hill where the main CAFO facility is located. The permittee failed to disclosed all relevant hydrogeologic facts. The CAFO site has a unique hydrogeologic setting and requires special consideration concerning the modification or revocation of the permit.

Speck Memorandum, page 1, second paragraph.
The Memorandum from Sarah Speck to Darold Krein, dated September 9, 2007, describes water wells in this area. The memorandum states that three on-site boring logs were submitted by the permittee, indicating "...51 feet of weathered lean clay". The DENR concluded there were no shallow aquifers. Reliance upon the three soil borings to conclude there is no shallow aquifer present is inappropriate. Based on published documents available to me, it appears that only one of the soil borings went to 51 feet, while the other two went only to 30 feet. None of the soil borings went to 100 feet. No testing was done of the water table level as part of these three soil borings, although all borings indicate the soils are moist. If the water table is within 50 to 100 feet of the surface, and is in low permeability material, it is my understanding that is would meet the requirements of a protected aquifer.

My November 25, 2008 report shows the occurrence of ground water and the location of the water table by identifying and testing shallow wells, and measuring the discharge of springs on every side of the CAFO location. Figure 7 of my report documents, at every circled elevation on the map (shown as feet above sea level), the site of a spring or well and provides the elevation at which ground water occurs. Longview

Farm LLP CAFO is located on the top of a low ridge, at an elevation of approximately 1770 ft. [Note: I understand that, through some computer function, the circles that I drew around the elevation number of Figure 7 did not reproduce on all the copies of my report. Because of this, a copy of Figure 7 is attached hereto which shows sites identified by the elevation number enclosed within a circle (to be precise, an "oval"). As shown in the attached Figure 7, ground water discharge as springs was documented at elevation 1730 ft north of the CAFO site, 1640 ft east of the CAFO site, 1665 ft south of the CAFO site, and at 1600 ft west of the CAFO site. In addition, the elevation at two spring elevations (taken from the topographic map) and the water table elevation (taken from static levels of the wells from public records) are shown on Figure 7 as "X" with elevation numbers. The static level on the well shown at 1735 ft above sea level on Figure 7 was measured on October 10, 2008. This is an abandoned well known locally as the old Morris Thompson place, now owned by Lynn Fisher. I measured a static level of 10 ft, and used the elevation of 1745 ft from the topographic map, thereby obtaining a ground water level of 1735 ft. These data, which were not previously available from general geological studies or hydrological studies of Charles Mix County, document a water table depth generally less than 35 ft throughout the area impacted by the CAFO operations.

<u>Rahn Report, numbered page 3, Geology section, second paragraph.</u>
I appreciate Iles' discovery of a typo in the sentence where the words "indicates ground water" were inadvertently left out. Iles identifies 3 issues with my report in this section. First, none of the references cited in my report identify ground water flow direction for the Niobrara formation, so there is no evidence upon which to determine ground water flow in this area. Second, Iles concludes from reviewing Figure 17 in the 1977 Kume report, that in this general area, ground water in the Codell aquifer flows south to southeasterly direction. Third, Iles concludes, based on review of Figure 4 in Kume (1972) that the ground water flow direction in the Dakota aquifer underlying the Fort Randall Casino area is likely westerly, but gives the opinion that in the area of the CAFO it is "...likely different". But all this discussion of hypothetical flow directions in these deep bedrock aquifers is irrelevant to the central issue, i.e. the shallow ground water conditions. As Iles points out, ground water flow direction in the Codell, Niobrara and Dakota aquifers does not affect a determination of DENR regarding the presence or lack thereof of shallow ground water or a shallow aquifer overlying these three bedrock aquifers in the area.

<u>Rahn Report, numbered page 4, second full paragraph.</u>
Iles found a typo on p. 4: the proper notation should be Qwltd (as shown correctly on Figure 3 and 4), and not as Qwlt. This comment is not relevant to the presence or lack thereof of a shallow aquifer protected under SDCL 34A-3A-24. The significance of this unit (stagnation drift), as documented by Hedges (1975), is confirmation of low permeability material. Further, Figure 5 in my report shows that just northeast of the Ft. Randall Casino, and northwest of the CAFO site, stagnation till lies on top of the Herrick Formation (extremely high permeability material). In addition, Plate 1 of Hedges (1975) documents the presence of stagnation drift in the area of the CAFO (a portion of Plate 1 is reproduced in my reports as Figure 3). Stagnation drift is a low permeability material under SDCL 34A-3A-24. If further documentation is necessary, I have determined,

through flow net analyses of this material, that it has a hydraulic conductivity of at least approximately 0.2 meters per day, roughly equivalent to published values of hydraulic conductivity for sandy till.

Rahn Report, numbered page 5, first paragraph.
Iles questions my use of the term "Herrick gravels" instead of the proper title "Herrick Formation". The term "Herrick gravels" was used by Gries (1996, p. 121).

Iles states that Kume (1972, 1977) and Hedges (1975) do not document the presence of Herrick Formation under the CAFO site, nor do they provide proof that it underlies the site. I made no borings at the precise CAFO location. Neither Kume nor Hedges made borings at the precise CAFO location to determine if the Herrick Formation underlies the site. Hedges (1975, Plate 1), shows Qh, the Herrick Formation (reproduced as Figure 3 in my report), in several locations both north, south, and east of the CAFO site. The presence of Herrick Formation near the Ft. Randall Casino is documented in my report (see Figure 5), and there is every reason to believe the Herrick Formation occurs under the areas impacted by this CAFO operation. The Herrick Formation certainly underlies, at less than 50 ft depth, some of the proposed manure spreading areas. I do not have access to the actual CAFO site, as DENR is aware. But DENR can perform testing at the CAFO site (as well as the area impacted by the manure spreading operations) pursuant to its regulatory authority and responsibility, which it has not done. In my report (p. 6, last full paragraph), I contend the Herrick Formation is present beyond the immediate mapped areas where it is exposed at the land surface. The three areas mapped by Hedges (see Figure 3 in my report) are simply areas where till was eroded off the Herrick Formation and it became exposed.

With respect to the Jensen (2008) report referenced by Iles to support his conclusion that there is no shallow aquifer at this location. It should be noted that Jensen (2008) actually infers the Herrick Formation in this area. His map legend includes a sand and gravel deposit and states: "First occurrence is generally below land surface; may not be uniform in depth and thickness and may be discontinuous in lateral extent." Additionally, Jensen's report is based upon a review of Hedges (1975) report. No study was conducted by Jensen at this CAFO location. To my knowledge, DENR has not made any spring discharge measurements near the CAFO location such as published in my report.

Rahn Report, numbered page 6, second full paragraph.
In the previous paragraphs I discuss the significance of the Herrick Formation. I respectfully disagree with Iles' interpretation that the Herrick Formation is not present beyond its present mapped extent.

Rahn Report, numbered page 6, last full paragraph.
Iles' comment about the distance to the Choteau aquifer is inconsequential and has no impact on the presence or lack thereof of a shallow aquifer or shallow ground water in this area.

Rahn Report, numbered page 6, last paragraph continuing onto page 7.
Iles questions why an average water quality, based on the three samples, was presented in my report. The rationale behind the inclusion of water quality data in my report was to

establish a baseline of water quality prior to operation of the CAFO. I was trying to encourage the local users of ground water to have water quality testing before the CAFO operation came into existence.

Iles is correct that the information on water quality is an indication of quality, not quantity or location of ground water. Water quality data was provided in my report so that a future study of water quality will have a historic reference, prior to the CAFO operation.

Rahn Report, numbered page 8, first full paragraph.

As discussed above, attached hereto is Figure 7 showing the spring and well locations and elevations. Iles indicates he disagrees with my conclusions concerning the water table elevation (e.g.; Figure 7, 8 and 10) because I did not provide data sets or detailed information on each well. Attached hereto is an example of well information that is available within USGS databases for examination.

Iles also casts doubt on my Figure 7, 8, and 10 based upon his theory that a "...change in the permeability of the moraine sediments could cause water migrating vertically downward toward the water table to be diverted to a hill slope at an elevation that is above the local water table." No citation to any literature is provided by Iles. My Figure 7 shows the location of springs and wells I measured in the field, and I stand by those measurements. Iles seems to be suggesting that the water table could be lower than the documented spring elevations and static water level in surrounding wells, but I think such a hypothesis is not tenable at this location. Iles' comment notwithstanding, I firmly believe my Figures 7 through 10 in my report are accurate depictions of the water table. Figure 7 shows an abandoned water well within one half mile of the CAFO site where a static level of 10 ft was obtained on October 10, 2008. At a minimum, with eight documented sites of ground water surrounding this CAFO on all sides, the water table is certainly much less than 100 feet below the CAFO site (elevation approximately 1770 ft). This documentation warrants further investigation by DENR. It should be noted that Iles does not reject my conclusions regarding the water table level, but simply states, "...without further information it is not possible to adequately determine whether Mr. Rahn's representation of the water-table surface appropriately depicts the water table in the map area."

Rahn Report, numbered page 9, points of conclusion.

Iles questions what area I am talking about, and what evidence is presented to support the conclusion that shallow ground water is present in sufficient quantities for domestic and livestock consumption. Figures 6, 7, and 10 show the area referenced in my report. This includes the CAFO facility as well as the manure management areas LVF has contracted for dumping of manure. This is apparent from my report, but is stated herein to clarify this issue. Hydrogeologic evidence is set forth in my report, including on-site investigation of shallow wells and springs at multiple locations on every side of the CAFO location. [Interestingly, Iles does not challenge my spring discharge measurements with the V-notched weir.] I did not have access to the actual CAFO site. Only DENR may access the CAFO site to conduct further investigation. DENR did not require soil borings to 100 feet, nor did DENR require water table measurements to be obtained onsite as part of the soil boring process. Neither Iles' memorandum nor any

DENR report provides any documentation supporting a conclusion that shallow ground water is not present in sufficient quantities for use for domestic and livestock purposes. The significance of my report is that (1) it documents the presence of shallow ground water that is susceptible to contamination from the CAFO that is used for human and livestock consumption, and (2) it documents the possible presence of the Herrick Formation, a shallow aquifer under the areas impacted by this project.

Iles offers the opinion that my statement that ground water flows in all directions away from the CAFO site is "...a bit too far reaching and generalized". It seems rather picayune to argue whether my Figure 10 shows arrows that point in all directions. Iles further opines upon the lack of "...site specific evidence" on the actual CAFO site (which is available only to DENR to test). He states that my conclusions are invalid unless the source data for USGS wells and geologic studies for each of the spring sites is provided to independently verify my conclusions. My original report and this "Response" are provided for DENR's consideration.

Iles objects to my conclusion that the water quality from the three samples I obtained is typical for this area. There are numerous water quality studies given in the references cited of my report. DENR is in possession of these references and could pursue this question, although I find such an endeavor to be beside the point.

Iles concludes, without any scientific citation, that the "...occurrence of a spring is likely due to localized geologic conditions" There are three springs that I measured on October 9-10, 2008; they are located to the east, south, and west of the CAFO. Their location and elevation is consistent with the static water level in surrounding wells, and therefore is not indicative of "localized" conditions. In other words, I believe my Figures 7 through 10 represent the true water table, not some perched conditions.

The soil borings taken on the CAFO site at 51 and 30 feet showed weathered clay with gravel deposits, which under SDCL 34A-3A-24 is defined as low permeability soils. This is consistent with Kume, Hedges, etc. There is no evidence cited by Iles or any evidence in the scientific literature that the area within 100 feet of the land surface is anything other than low permeability soils. Therefore, with a water table within 100 feet of the surface of the land, and low permeability materials overlying this water table, there is evidence of a shallow aquifer protected under SDCL 34A-3A-24 that merits further investigation by DENR. This is not just a flat terrain underlain by impermeable glacial till. It is a unique place.

In summary, it appears that the Iles memorandum was an assessment conducted to discredit my study, and not to evaluate my new hydrogeologic evidence that is specific to the CAFO operation. Iles has carefully reviewed my report, and I thank him for that. And he has improved the content of my report by discovering a few typos. But he made no effort to look at the significance of shallow ground water and the extent of a major aquifer under the areas impacted by this operation. Instead, he seems focused on justifying his decision that no further investigation is warranted.

Perry H. Rahn

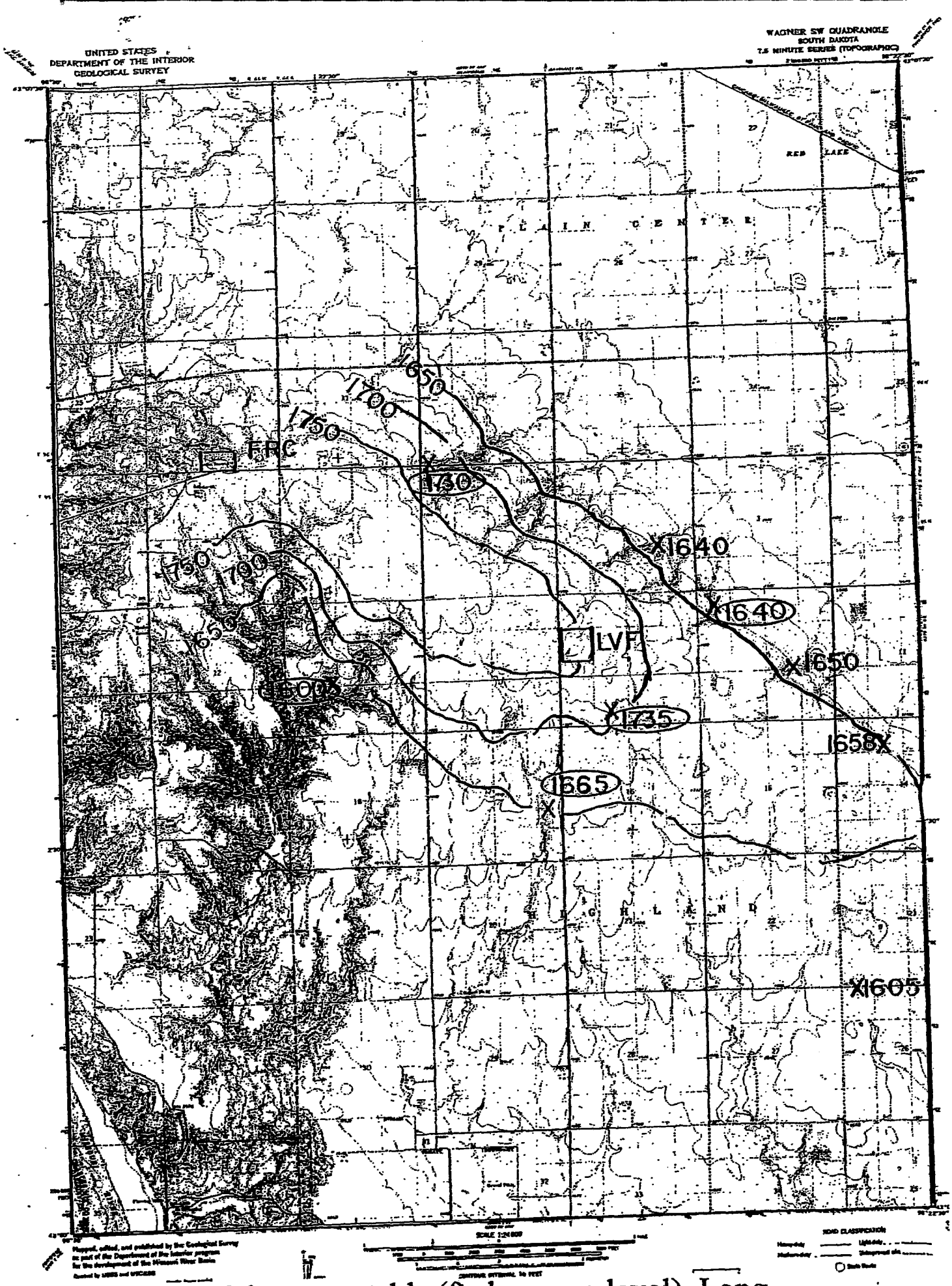

Figure 7. Map of the water table (ft above sea level). Long View Farm (LFF) and Ft. Randall Casino (FRC) are shown.

Sect 9

Record 229 of 780

Location Information

Legal Location:	SW SW SW SW SEC. 09, T. 095 N., R. 64 W.		
County:	CHARLES MIX	**Location:**	095N-64W-09CCCC
Basin:	MISSOURI	**Latitude:**	43 03' 12"
Hydrologic Unit Code:	10170101	**Longitude:**	98 25' 36"
Land Owner:		**Ground Surface Elev. (ft.):**	1725 T

Project Information

Project:	CHARLES MIX COUNTY STUDY		
Drill Date:	07/08/1969	**Geologist:**	
Company:	SDGS	**Geologist's Log:**	
Drilling Method:	AUGER	**Driller:**	J. KALISZEWSKI
Test Hole Number:	1-69	**Driller's Log:**	
Samples:		**Total Drill Hole Depth (ft.):**	118.0

Geophysical Information

Spontaneous Potential:		**Single Point Resistivity:**	
Natural Gamma:		**Extra:**	

DEPTH TO WATER ABOUT 35 FEET.

Elevation (ft.)	Depth (ft.)	Description
1725.0 - 1723.0	0.0 - 2.0	TOPSOIL
1723.0 - 1719.0	2.0 - 6.0	CLAY, SILTY
1719.0 - 1696.0	6.0 - 29.0	CLAY, BROWN, PEBBLY; SOME VERY FINE SAND FROM 24 TO 29 FEET
1696.0 - 1692.0	29.0 - 33.0	CLAY, GRAY, PEBBLY
1692.0 - 1681.0	33.0 - 44.0	CLAY, BROWN, PEBBLY
1681.0 - 1612.0	44.0 - 113.0	CLAY, GRAY, PEBBLY
1612.0 - 1607.0	113.0 - 118.0	MARL, SPECKLED

No

Record 231 of 780

Location Information

Legal Location:	NW NW NW SW SEC. 11, T. 095 N., R. 64 W.		
County:	CHARLES MIX	**Location:**	095N-64W-11CBBB
Basin:	MISSOURI	**Latitude:**	43 03' 35"

Sister Patricia Mylott
P.O. Box 217
Marty, SD 57361

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September 20, 2010

Chief Engineer
Water Rights Program
Foss Building
523 E. Capitol
Pierre, SD 57501

Dear Sir:

Long View Farms' application for a permit to appropriate 0.067 cubic feet per water from the Codell Aquifer is of great concern to me. Long View Farms will draw that much more water from the compromised aquifer.

I have been concerned about the pollution of our waters for quite a while. If water is drawn from the aquifer and then used for various purposes in the hog confinement area, it will return to the ground and eventually the aquifer, polluted.

I don't believe the holding receptacle for the hog waste is safe in the long term. According to Professor Thaler, the expert for Long View Farms, the gases emanating from the hog site are noxious even if not smelled . Many here believe they are causing and will cause or exacerbate health problems especially for children here. Many children have asthma. There is a day care center a mile and a half southwest of the hog containment facility. Marty Head Start moved to a new location, mostly because of this. I can get the statistics from Indian Health Service, if necessary.

We at Marty are offended by the pig smell often as we go past the confinement area. Sometimes the smell reaches us clear down to at Marty. Sometimes the smell is from local fields which take the hog waste and fertilize their fields with it. June 12 we had a bad flood here at Marty from which we are still cleaning up. I don't know if any waste from the confinement area got washed down to Marty but the fields south of the hog confinement area washed down to Marty all sorts of contaminants.

I don't know how Long View Farms got away with its water use considered residential.

Please give us who are opposed to the Hog Confinement operation more time before deciding to give or not give them more water from our precious aquifer. Please do not give them any more water. I would prefer the operation to be shut down permanently. It seems to me that they employ only about 8 people.

Sincerely yours,

Sr. Patricia Mylott

cc to Mr. Arlan Moss

September 23, 2010

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Dear Mr. Chief Engineer;

Hello! My name is Eva Bruguier; I am a resident of Marty, South Dakota, which is located about four (4) miles south of the Longview Hog Farm.

I am writing to you to voice my concerns about Longview Farms requesting a permit for a commercial well.

I oppose issuing a commercial permit to the Longview Farms for the following reasons:

1. It is not in the public interest.
2. It is harmful to the environment and health of those who live near it or where manure is being spread.
3. It will contaminate our water, which will make us sick.

I am also requesting an automatic delay of the hearing.

Sincerely,

Ms. Eva Bruguier
Ms. Eva Bruguier

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WATER RIGHTS PROGRAM

Affidavit of Publication

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF CHARLES MIX)

Kim Johnson, of said County and State being first duly sworn on her oath says: That ***The Wagner Post*** is a legal newspaper of general circulation, printed and published in Wagner, in said County and State, by Kim Johnson, and has been such newspaper during the time herein mentioned; and that I, Kim Johnson, the undersigned, am office manager of said newspaper in charge of the advertising department thereof, and have personal knowledge of all the facts stated in this affidavit; a printed copy of which is hereunto attached, was printed and published in the regular and entire issue of said newspaper and not in supplement, once each week for 2 successive weeks.

1st publication made on 8 day of Sept., 2010

2nd publication made on 15 day of Sept, 2010

3rd publication made on _____ day of _____, 2010

4th publication made on _____ day of _____, 2010

5th publication made on _____ day of _____, 2010

That said newspaper is a legal newspaper, and has a bonafide circulation of more than two hundred copies weekly, and has been published within the County of Charles Mix for more than fifty-two successive weeks prior to the first publication of said notice, and is printed in an office maintained in Wagner, South Dakota, the place of publication of said newspaper. That the full amount of the fee for the publication of the annexed notice is

$ 165.34

Kim Johnson

Subscribed and sworn before me this 24 day of September, 2010.

Notary Public

My commission expires

My Comm. Expires 03-05-2012

Wednesday, September 15, 2010

PUBLIC NOTICES

NOTICE OF HEARING ON APPLICATION NO 7206-3 TO APPROPRIATE WATER

Notice is given that Long View Farms, LLP c/o Arlan Moss, 3172 320th St. Hull IA 51239 has filed an application for a water permit to appropriate 0.067 cubic feet of water per second (30 gallons per minute) from one well to be completed into the Codell Aquifer (approximately 600 feet deep) located in SW 1/4 NW 1/4 Section 9-T95N-R64W for commercial use at a swine farrowing facility.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 7206-3 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.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605-773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by September 27, 2010. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 1:00 p.m. (CST) on October 6, 2010 in the Matthews Training Center, Joe Foss Building, 523 E. Capitol Ave, Pierre, SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny this application based on the facts presented at the public hearing. The October 6, 2010 hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by September 27, 2010.

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 September 27, 2010, at the above Water Rights Program address to request copies of information pertaining to this application. Notice is given to individuals with disabilities that this hearing is being held in a physically accessible place. Please notify the Department of Environment and Natural Resources at least 48 hours before the hearing if you have a disability for which special arrangements must be made at the hearing. The telephone number for making arrangements is (605) 773-3352.

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 September 27, 2010.

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.

Published twice at the total approximate cost of $165.34

Pub: September 8, 15, 2010

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WATER RIGHTS
PROGRAM

September 27, 2010

Chief Engineer
Water Rights Program
Foss Building
523 E. Capitol
Pierre, SD 57501

Long View Farms, LLP
c/o Arlan Moss
3172 320th St.
Hull, IA 51239

Re: Public Notice, Report, Recommendations and Notice Of Hearing on Application No. 7203 to Appropriate Water Filed by Long View Farm, LLP.

Dear Clerk of Court:

Please find enclosed for filing a Petition in Opposition to Application and Recommendation, Petition to Intervene, and Request for Hearing Extension of at Least 20 Days and Certification of Service in the above matter. If you have any questions or concerns, please contact me, at your convenience. Thank you.

Sincerely,

Faith Spotted Eagle
P.O. Box 667
Lake Andes, SD 57356
(605) 481-0416

cc: Parties on Services List
Judy Honimichle
Sharon Drapeau
Wesly Hare
Glenn Drapeau
Kip (Spotted Eagle) Collins

CERTIFICATE OF SERVICE

I hereby certify that I mailed, First Class, a copy of this Petition on September 27, 2010 to:

Chief Engineer
South Dakota DENR
Water Rights Program
Foss Building
523 E. Capitol
Pierre SD 57501

Longview Farms LLP c/o
Arlen Moss
3172 320th St.
Hull, IA 51239

Rebecca Kidder, Attorney
Abourezk & Zephier PC
2020 W. Omaha St.
Rapid City, SD 57702

Faith Spotte Eagle, Petitioner
P.O. Box 667
Lake Andes, SD 57356
(605) 481-0416

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WATER RIGHTS PROGRAM

OFFICE OF THE CHIEF ENGINEER
WATER RIGHTS PROGRAM
STATE OF SOUTH DAKOTA

In the Matter of Water Permit	)	Application No. 7206-3
	)	
Application 7206-03	)	PETITION IN OPPOSITION TO
	)	APPLICATION AND
	)	RECOMMENDATION, PETITION TO
	)	INTERVENE, AND REQUEST FOR
	)	HEARING EXTENSION OF AT LEAST
	)	20 DAYS

Individual Petitioners Faith Spotted Eagle, Judy Honimichle, Sharon Drapeau, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins(Petitioners), hereby submit this Petition in Opposition, Petition to Intervene, and Petition for a Hearing Extension of at least 20 days, pursuant to SDCL §46-2A-6, Application to Appropriate Water 7206-03 (Application) filed by Long View Farms LLP (LVF). Petitioners are also members of the Yankton Sioux Tribe which is a federally recognized Indian Tribe located within Charles Mix County, South Dakota. The Application – No. 7206-3 - requests approval for the diversion of 0.067 cubic feet of water per second from one well to be completed into the Codell Sandstone Aquifer for purposes of commercial use in a livestock confinement operation located directly adjacent to and abutting lands comprising the Yankton Sioux Indian Reservation, South Dakota. The diversion point will be located in SW ¼ NW ¼ Section 9,T. 95N, R64W.

Petitioner Faith Spotted Eagle, Kipp Spotted Eagle Collens and Allen Hare are owners of numerous wells utilized for domestic water supply, livestock, and irrigation located upon Reservation lands and other lands adjacent to and surrounding the well

location. These are primarily shallow water wells which will be impacted if the aquifer recharge is not commensurate with total withdrawals from the aquifer.

Petitioners file this petition in opposition and to intervene for the following reasons:

1. This Application does not satisfy any of the four statutory criteria in SDCL Chapter 46-2A governing the approval of applications to appropriate water resources. The Chief Engineers' determinations on all four criteria are unsupported by factual data and evidence on the recharge rate of the aquifer, or existing wells and springs utilized for domestic use in the immediate vicinity of this proposed well. See, Recommendation of Chief Engineer for Water Permit Application No. 7206-3, Long View Farms, LLP.

2. SDCL §46-2A-9 dictates that 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..." The application proposes to appropriate .067 cf/s from a well completed into the Codell Aquifer. SD DENR has not mapped the Codell Aquifer since 1982, despite the significant expansion of wells in the counties served by this aquifer. The only test wells DENR has investigated recently are 23 and 25 miles north and northeast of this location, which is too far from the present location to make a factual determination that this proposed well will have no impact on the existing domestic wells in close proximity to the location of this proposed well. Further, the Chief Engineer determined that the test well 23 and 25 miles north and northwest of the proposed location "show response to climatic conditions and annual fluctuations that may be due to pumping."

Further, the Chief Engineer relied solely upon the Applicant's report of two domestic wells in the immediate vicinity of this well, and has made no investigation of existing domestic wells in the vicinity of this proposed well. Petitoner Yankton Souix

Tribe in this matter provided to the South Dakota DENR on June 2, 2009 and January 14, 2009 a report from Professor Perry Rahn that documents the presence of nine shallow wells and springs in the immediate vicinity of the proposed well. See In re: Application No. 7206-3 Yankton Souix Tribe Petition In Opposition to Application and Recommendations, Petitioner to Intervene, and Request for Hearing Extension of at Least 20 Days (September 25, 2010) (Tribe's Petition) Attachment 1, Reports of Professor Perry Rahn (Rahn Report). Therefore, the conclusion that there is a reasonable probability of the availability of water is not based upon a factual determination based upon the data, examination of the springs and well in the immediate vicinity of this proposed well, or determination of the recharge rate of the Codell or Niobrara, or the shallow aquifer located in this area located within the Herrick formation.

3. Granting this permit will result in "unlawful impairment of existing rights." SDCL 46-2A-9. The Chief Engineer determined that there:

> are no nearby water permits/rights that obtain water from the Codell sandstone aquifer. There are some domestic wells in the area that use the Codell aquifer. The applicant indicates two sites with water well locations about 1.5 miles northwest and northeast of this site. At this distance and with relatively small pumping rate drawdown is not expected to be significant nor cause any adverse impacts. At one time the City of Geddes, Town of Ravinia and City of Lake Andes used wells from the Codell but now obtain water from the Missouri River or from rural water. Those wells are used as a backup water supply at this time. The only other Codell aquifer Water Right in Charles Mix County is for Clearfield Colony for domestic use.

Report on Water Permit No. 7026-6, For Long View Farms LLP, p. 1 (August 27, 2010). (LVF Report)

The Chief Engineer, however, has not provided any basis for his assumption that there "should not be" interference with existing water rights or domestic wells. The Engineer does not provide any information as to the relationship of the location of water right points of diversion or domestic wells and the hydrological connectivity of the proposed well in the Application. In addition, the Chief Engineer does not provide any

data on the specific amount of water needed by all other pre-existing wells. The Chief Engineer points to no assessment of the depths of the thousands of wells in this aquifer to determine this permit will not impact pre-existing appropriations of water. There is simply no basis upon which to determine that "no -intereference" with domestic water supply will occur. The United States Geological Survey has documented thousands of wells for domestic consumption in the Codell Aquifer Region. USGS Well Survey of Yankton Sioux Reservation, 2005; USGS 2007 Charles Mix County Well Survey. The Department was made aware of this information when the Petitioners filed its Protest of the Water Permit Application 7006-3, but has failed to investigate this information since that objection was filed on June 23, 2008. Until such time as the DENR has fully investigated the drawdown rates, capacity of the Codell aquifer, and the amount of water currently in use by domestic and other existing wells and natural shallow springs, given the sensitivity of the two test wells located 23 and 25 miles north and northeast of the proposed well location, the finding of the Chief Engineer that there is a reasonable probability that there will be no impairment of existing rights is unfounded.

Similarly, when combined with the fact that climate change is increasing the risk of U.S. crop failures, depleting the nation's water resources, and contributing to outbreaks of invasive species and insects, the water right will directly and negatively affect agriculture and livestock in central South Dakota. According to a report compiled by 38 scientists with the U.S. Department of Agriculture, the effects of climate change and other problems for the agricultural and forestry industries will persist for at least the next 25 years. AP, Feds: Climate Change Will Threaten Livestock Water Supply for Years (May 28, 2008). According to the report, drought-strained forests in the West and Southeast are easy prey for tree-killing insects like bark beetles. Snow in the Western mountains is melting earlier, making it more difficult for managers overseeing a long-

established system of reservoirs and irrigation ditches that serve Western states. *Id.* Further, the Southeast does not have the same kind of storage system because rain historically has been more consistent. Current weather disruptions have the region struggling with drought. Rising carbon dioxide levels are changing the metabolism of grasses and shrubs on range land, decreasing the protein levels in plants eaten by cattle. Permits for industrial uses that consume large amounts of water like the one in question will exacerbate such impacts.

4. On behalf of its membership, the Yankton Sioux Tribe is the owner of reserved water rights upon its Reservation lands established by the Treaty of 1858 and as diminished by the Act of 1894. See, Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable). The Tribe's rights to water from the Codell Aquifer are rights to sufficient water to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, and their "reasonably feasible" uses of such water. Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969). It includes the amount of water required to make the Reservation viable. Arizona v. California, 373 U.S. 546, 599 (1963). The courts have already determined that Tribes have the right to assert these rights on behalf of its members. See, United States v. Nebraska, 520 F.2d 676, 688 (9th Cir. 1975). The Chief of Engineers has not assessed the reserved water rights of the Tribe or determined the amount of water in the aquifer, and so has no reasonable basis to conclude, without further investigation, that the federally protected water rights of the Yankton Sioux Tribe are not impaired by this permit. These reserved water rights are federally protected from impairment by off-reservation withdrawals from the Codell Aquifer, including Permit 7006-3. Winters v. United States, 207 U.S. at 576; Arizona v. California, 373 U.S. at 599; Colville

Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981). The Yankton Sioux Tribe has the right to protect its reserved treaty water rights from appropriation by others and from "man-made despoliation." See, United States v. State of Washington, 506 F.Supp. 187, 203 (D. Wa. 1980). See also, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984)(requiring revival of wetlands decimated by non-Indian stream withdrawals); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)(requiring maintenance of minimum stream flow for downstream tribal fishery).

The use of water for a CAFO on lands upland from and directly adjacent to tribal lands and water supplies, both surface and subsurface, and the location of manure dumping fields adjacent to Reservation lands ensures runoff from the 976,200 cubic feet of liquid manure dumped annually will contaminate the Codell Aquifer and all surface waters on Reservation lands, resulting in impairment of the Tribe's and its tribal members' currently appropriated water and its reserved water rights.

As in this case, the Courts have found that if the suit is challenging the impact of a particular action on natural resources rights which are held for the benefit of tribal members, then individual members can file suit to protect such rights. *See Sohappy v. Smith*, 302 F. Supp. 899, 904 (D. Or. 1969). In other words, under *Sohappy*, the Extension violates Appellants' reserved water rights to the extent it threatens the amount of water they need to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, their "reasonably feasible" uses of such water. In addition, the courts have determined that the Tribe has the right to assert these rights on behalf of its members. *See United States v. Nebraska*, 520 F.2d 676, 688 (9th Cir. 1975). This is important because the Yankton Souix Tribe (Tribe) has similarly protested the granting of the water right. See Tribe's Petition

The ability of Appellants and the Tribe to apply to apply treaty water rights to preventing environmental degradation from the Water Right is also support by existing federal case law. While the courts have never settled on the question of whether treaty rights may be used to protect environmental resources, they have addressed it in several key places. In a case that was ultimately overturned by the 9th circuit on procedural grounds, for example, after enumarting the list of human caused factors sponsored by governmental entities, that have resulted in the rapid decline of the Columbia River salmon, the U.S. District Court for the Western District of Washington held that "implicity incorporated in the treaties' fishing claus is the right to have the fishery habitat protected from man-made despolation." *United States v. State of Washington*, 506 F.Supp. 187, (Dist. WA 1980). In reaching this conclusion, the court made the logical assumption that the "most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken." *Id.* Similarly, other courts have recognized the tribal interests in protecting environmental resources. In *United States v. Washington*, Phase II, the initial lower court decision applied the "moderate living needs" standard. *See also, United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. Denied*, 467 U.S. 1252 (1984), requiring a revival of wetlands that had been desicatted by non-Indian stream withdrawals. In *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), the court upheld a lower court ruling requiring non-Indians to maintain a minimum stream flow necessary for the survival of a tribal fishery.

Similarly, the discharge of manure into waterways through runoff releases antibiotic resistant toxic bacteria (i.e. e.coli, yersinia, leptospora, cryptosporidium parvum, giardia lamblia), other pathogens, and excessive nutrients into groundwater and surface water is a public health threat. High concentrations of animal waste from this CAFO will emit hydrogen sulfide, ammonia, Volatile Organic Compounds, and other

gases and particulate matter that are known to cause a human health threat once released into the air. Hydrogen sulfide is a health threat that is irreversible, exposure causes sore throat, seizures, comas and even death. Farmworkers and neighbors of existing hog CAFOs report headaches, shortness of breath, wheezing, excessive coughing, and diarrhea. Ammonia is another byproduct of animal waste and has been linked to acid rain. In Oregon, for example, the Columbia River Gorge has seen unprecedented levels of acid rain in recent years which is likely linked to ammonia releases at Three-mile Canyon Farms which is the single largest source of air pollution in that state. The American Public Health Association issued a resolution urging federal, state, and local governments and public health agencies, "to impose a moratorium on new CAFO's" on November 11, 2003. The noxious odors of the CAFO in question will create an ongoing and persistent nuisance to the thousands of people living and working within 6 miles of the CAFO and associated manure fields, including the Head Start School, the Tribe's Fort Randall Casino, which is heavily dependent on tourism, and the Tribe's Travel Plaza.

Further, Petitioners submit that there is a high probability that water appropriated by this permit, and ground and surface waters of all properties and owners located on and adjacent to the CAFO and manure dumping fields in this area will be contaminated by excessive nutrients, heavy metals, VOC's, antibiotic resistant bacteria, ammonia, and hydrogen sulfide from runoff and airborne emissions. Polluted waters present a clear and present threat to public health, the environment, and the endangered species in the area including the federally protected eagle population of the Karl Mundt Wildlife Preserve (Preserve), in the immediate area and for downstream users.

In addition, the South Dakota Division of Wildlife Resources states that water

developments, such as the proposed use in this case, may proceed in the Basin only in accordance with federal and state laws.[1] An endangered species is one that is" in danger" of extinction throughout all or a large portion of it's habitat. Because the eagles in the Preserve are so rare, they are protected by state laws and the federal Endangered Species Act (ESA).[2] In passing the ESA, Congress reflected society's belief that rare species should be saved whenever possible.[3] Specifically, recovery of the endangered eagles requires that use and development of water from the Codell or Niobrara, or the shallow aquifer located in this area which are hydrologically connected to the Missouri River. In addition, minimum streamflows ensure and increase public recreation in the area. These activities generate a significant economic base in the communities of along the Missouri River, and elsewhere in the State of South Dakota.

Further, there is a daycare owned by a tribal member serving children ages 1 month to 4 years old within 1 mile of the CAFO site where 1 in 4 children are asthmatic. The CAFO's noxious fumes and odors will directly impact the health and well-being of these children and those who work in the daycare. The CAFO is also located within 4 miles of a federally funded Head Start School serving 3 and 4 year old children. The manure dumping locations surround this school and the Marty Indian School serving youth ages 6-18 years of age, as well as a Boys and Girls Club, Tribal Headquarters, and Nutrition programs. The odor from manure dumped on the fields and the CAFO itself will negatively impact the education, health and welfare of these residents.

Finally, this CAFO will produce less than 10 local jobs, and will result in the inability of landowners and residents to utilize surrounding lands for tourism, recreation, and homesites due to the water and air pollution and noxious odors emitted. Longview

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[1] South Dakota nonnative fish management questions and answers (UDWR Q&A)-http://wildlife.South Dakota.gov/fishing/nonnative/q_and_a.html.
[2] 16 U.S.C. § 1533.

Farms LLP principals are domiciled in Iowa and have no connection to the local economy. Longview Farms LLP has signed manure dumping agreements with local farmers releasing Longview Farms LLP from all liability for any impacts caused by runoff of manure into water and resultant water and air pollution. Longview Farms CAFO Application, Manure Application Agreements.

10. This Permit is not in accordance with SDCL §46-2A-9 and §46-1-4. §46-1-4 provides:

> Beneficial use of water resources--Prevention of waste--Right to water from natural stream or watercourse. 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. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of diversion of water.

Longview Farms LLP has not begun construction on Phase II facilities utilizing the full reservation requested, nor provided any time frame in which it intends to appropriate the full amount of water requested to be reserved. April 29, 2008 DENR CAFO Revised Plans and Specifications Review by DENR. (Attachment 3). DENR should not condone this type of speculation in water and must prevent such precedent, particularly in light of DENR's role as protector of South Dakota citizens. SDCL §46-1-4 requires 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." This requires the applicant to establish that it "can and will put the conditionally appropriated

[3] 16 U.S.C. § 1531, et seq.

water to beneficial use within a reasonable period of time." See e.g. Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights), 170 P.3d 307 (Colo. 2007).

These requirements are intended to ensure that the public's water resource is available to those who actually need water. David B. Schorr, Appropriation as Agrariaranism: Distributive Justice in the Creation of Property Rights, 33 Ecol. L.Q. 3,9,22 (2005).

In this case, in violation of the beneficial use doctrine and SDCL § 46-1-4 and §46-2A-9, the amount of water requested is for speculative purposes and is far in excess of that appropriate to the scale of the (CAFO) as described in the LVF Report. There is no finding by DENR that it reviewed the CAFO water requirements for existing operations, or the basis for determining that the amount reserved by this Permit will be used in a reasonable period of time. Data and information regarding the water requirements for the contemplated CAFO is needed before DENR can approve the Application.

11. Similarly, SDCL §46-1-4 requires that the State Engineer may not certify a water right until, among other things, that "the water resources of the state be put to beneficial use to the fullest extent of which they are capable." This requires the applicant to establish that it "can and will put the conditionally appropriated water to beneficial use within a reasonable period of time." *See e.g. Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights)*, 170 P.3d 307 (Colo. 200&). Similarly, the appropriator may not merely posses or waste the water. Water right holders who fail to show continuous beneficial use of the water may lose the water right through abandonment or forfeiture. SDCL § 4-1-4.

These requirements are intended to ensure that the public's water resource is

available to those who actually need water. David B. Schorr, Appropriation as Agrariaranism: Distributive Justice in the Creation of Property Rights, 33 Ecol. L.Q. 3,9,22 (2005). In South Dakota, the restriction on speculation and waste is enforced by a recognition that the approval of an application is "only a preliminary step which gives the applicant the authority to proceed and perfect, if possible, the proposed appropriation by actual diversion and application of the water to a beneficial use. *See Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.,* 104 South Dakota 202, 212--13, 135 P.2d 108, 113 (1943); *Little v. Greene & Weed Inv.,* 839 P.2d 791, 794 (South Dakota 1992).

The adoption of the Prior Appropriation Doctrine, by definition, required the appropriator to apply the water to beneficial use, thereby precluding speculative hoarding in hopes of future gain. Neuman, 28 Envtl. L. 919, 963-64. "Because actual, beneficial use was required, no one could acquire all of the water and thereby monopolize a scarce and valuable resource. Nor could anyone speculate by holding water without using it, and then make a steep profit by selling to those who need it." *Id.* at 964. *See High Plaints A & M. LLC v. Southeastern Colorado Water Conservancy Dist.*, 120 P.3d 710, 719 n.3 (Colo. 2005).

In this case, in violation of the beneficial use doctrine and SDCL §46-2A-9 and §46-1-4, the amount of water requested is far in excess of that generally required for a nuclear power plant of the kind described in the application. Data and information regarding the water requirements for existing nuclear power plants and the contemplated power plant is needed before the State Engineer can approve the Application.

12. This permit is not in the public interest. Petitioners have previously submitted an independent hydro-geological investigation of the specific area within which the proposed well is located indicating the existence of a shallow aquifer and unique geologic formation known as the Herrick formation, which is highly permeable, in this vicinity.

Rahn Report. This report is further supported by the Chief Engineer's determination that "In this area the Niobrara formation (also considered an aquifer) overlies the Codell aquifer." The Chief Engineer has not made any assessment of the impact of this proposed well on the Niobrara formation, the Herrick formation, or any other shallow aquifer located on top of the Codell aquifer, as required by S.D.C.L. 34A-3A-24. In State *ex. rel* Missouri Parks Assoc. *et. al* v. Missouri Dep't. of Nat'l. Resources, Case No. 07AC-CC00923, Cole County District Court, the District Court determined the potential for damage to unique geologic historic formations located near a proposed CAFO warranted denial of construction permits in order to protect the unique geologic structure and the public interest. Denial of the water permit to protect the unique geologic structure and the shallow aquifer located in this area, until and unless an investigation is conducted at the proposed location to determine, based upon fact rather than speculation, that there is no shallow aquifer or Herrick Formation, nor any potential damage to the Niobrara Formation, is warranted.

12. South Dakota has adopted the "public trust doctrine" in its laws regulating water useage. Under this doctrine, private landowners' common law rights to access water unrestricted on their lands was eliminated. SDCL 46-1-1 declares that:

> the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection.

SDCL 46-1-3 establishes the public trust doctrine and the obligation of the state to regulate water use to protect water, declaring, "that all water within the state is the property of the people of the state, but the right to use of water may be acquired by appropriation as provided by law." As in this case, therefore, the public trust doctrine

prohibits the granting of a water right that does not meet the beneficial use and public interest standard.

Indeed, the Public Trust doctrine requires the Applicant to meet a higher beneficial use and public interest standard before the water right can be granted. The South Dakota Supreme Court has recognized, the responsibility of state agencies under this public trust doctrine, under common law, and as codified, is broader than "mere compliance by [agencies] with their legislative authority. . . ." Parks v. Cooper, 2004 S.D. 27, ¶44, 676 N.W.2d 823, 838 (citing Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085, 1095 (1983)).

For the foregoing reasons, Petiioners submits this petition and urges that the permit:

1. Should be denied as unsupported by facts and evidence upon which to form a reasonable basis for concluding the requirements of any of the four criteria in SDCL Chapter 46-2A-9 have been met; or in the alternative

2. Deferred pursuant to SDCL § 46-2A-7 until an investigation of the impacts that the point of diversion will have on the existing (and prospective) instream flows in the area, senior water rights, domestic use, unique geologic and hydro-geologic structures, and the public health and welfare from the CAFO for which the water is requested; and the structure and finances of Longview Farms LLP to determine they are sufficiently financially responsible for and maintain liability for pollution of the area is completed; and

3. Pursuant to SDCL §46-2A-5, Petitioners further requests that the Chief Engineer postpone the date set for hearing on the Application for at least 20 days; and

4. That the Chief of Engineers refer this matter to a Hearing Examiner, pursuant to SDCL §1-26-18.3, as the damage from CAFO operations and the granting of this permit

for that purpose threatens to impair wells for domestic water supply by appropriation without investigation of aquifer recharge rates, cumulative withdrawals from the aquifer, and the risk of contamination of the aquifer from the CAFO operation, resulting in damages in excess of $2,500.00 to the Petitioner and any other Petitioners in this matter; and

5. That the Petition to Intervene be granted.

Respectfully Submitted this 27th day of September 2010.

Faith Spotted Eagle, Petitioner
P.O. Box 667
Lake Andes, SD 57356
(605) 481-0416

On behalf of:

Judy Honimichle, Petitioner
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DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
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PIERRE, SOUTH DAKOTA 57501-3182
denr.sd.gov

September 29, 2010

NOTICE

TO: Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239
and Parties of Record (see attached list)

FROM: Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Automatic Delay of Hearing for Water Permit Application No. 7206-3, Long View Farms LLP

Five petitions have been submitted opposing Water Permit Application No. 7206-3 in response to the notice of hearing published September 8 and 15, 2010 in the Wagner Post. A number of petitions also request an automatic delay of the October 6, 2010 hearing on Water Permit Application No. 7206-3. Therefore, the hearing on Application No. 7206-3 is automatically delayed pursuant to SDCL 46-2A-4 and 46-2A-5 and will not be held on October 6, 2010.

The hearing to consider Application No. 7206-3 will now be scheduled for the December 8 and 9, 2010 Water Management Board meeting tentatively to be held in Pierre. Future notice of the time and place of the hearing for Application No. 7206-3 will be provided to parties of record.

Please contact Eric Gronlund at (605) 773-3352, if you have any questions.

c: Diane Best, Assistant Attorney General
Todd Van Maanen, Eisenbraun & Associates, 215 Walnut St, Yankton SD 57078
Dave Nadolski, Attorney, PO Box 1920, Sioux Falls SD 57101

PARTIES OF RECORD

WATER PERMT APPLICATION No. 7206-3, Long View Farms LLP

Applicant

Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239

represented by:

Dave Nadolski, Attorney
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Petitioners

Yankton Sioux Tribe
Represented by:
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Sharon Drapeau
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Wesly Hare
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Marty SD 57361

Glenn Drapeau
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Lake Andes SD 57361

Kip (Spotted Eagle) Collins
PO Box 667
Lake Andes SD 57356

CERTIFICATION

I hereby certify that on September 29, 2010, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated September 29, 2010, regarding automatic delay of hearing on Water Right Permit Application No. 7206-3, as addressed below:

Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239

Dave Nadolski, Attorney
PO Box 1920
Sioux Falls SD 57101

Sister Patricia Mylott
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Rebecca L. Kidder, Attorney
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PO Box 667
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Gail Jacobson

Gail Jacobson
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 29th day of September, 2010.

Karen Schlaak

Karen Schlaak
Notary Public
My Commission expires April 1, 2013

SEAL KAREN SCHLAAK NOTARY PUBLIC State of South Dakota SEAL

STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL

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MARTY J. JACKLEY
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY

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WATER RIGHTS PROGRAM

September 30, 2010

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Jeffrey P. Hallem
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1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

Re: *In the Matter of Water Permit Application No. 7203-3, Longview Farms LLP*

Dear Board Water Board Members,

Enclosed is a Procedural Motion for consideration next week at the Board's meeting. I have contacted the DENR staff and this matter has been added to the agenda for 8:30 am on October 6 at the Matthews Training Center at 523 E. Capitol Ave, in Pierre. I am advising the parties by copy of this correspondence.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

RECEIVED
OCT - 4 2010
WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF APPLICATION NO. 7203-3, LONG VIEW FARMS, LLP	)))	MOTION FOR PROCEDURAL ORDER

COMES NOW the Department of Environment and Natural Resources, Water Rights Program, and makes its Motion for Procedural Order as follows:

1. The evidentiary hearing in this matter was originally scheduled for October 5, 2010. Pursuant to SDCL 46-2A-4, the matter was advertised and opened for intervention. Several petitions to intervene were filed.(See attached service list) Several Petitioners invoked the provision of SDCL 46-2A-4 and SDCL 46-2A-5 which provide that any party who has intervened has an opportunity to delay hearing for at least twenty days. Also, Intervenor Spotted Eagle has asked that this matter be referred to a hearing examiner under SDCL 1-26-18.3.

2. Although the evidentiary hearing scheduled for October 5, 2010, has been automatically delayed as a matter of law, the Board is holding its regularly scheduled meeting for other water management matters on October 6. Accordingly, the Water Rights Program has scheduled a motion hearing for October 6 to address procedural items in the above entitled case.

3. The first issue is whether a hearing examiner must be appointed under SDCL 1-26-18.3 or whether the Board should hear

the evidence at its next meeting in December. SDCL 1-26-18.3 provides as follows:

> In any contested case, if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request no later than ten days after service of a notice of hearing issued pursuant to § 1-26-17. This section does not apply to any contested case before the Public Utilities Commission.

4. The Water Rights Program submits that a hearing examiner is not required since no license is being terminated and no funds are at issue. Petitioner Spotted Eagle's request is attached and the hearing examiner issue is raised on page 14. The Water Rights Program asks that the request be denied and this matter be scheduled before the Board on December 8 or 9 in Pierre.

5. Second, the Water Rights Program asks that the Board appoint one of its members to act as a Prehearing Chairman for purposes of acting on any procedural motions and discovery issues previous to hearing and for hearing and making recommendations to the Board on any dispositive motions.

6. The Water Rights Program further asks that the Board require attorneys to file Notices of Appearance if they have not yet appeared on behalf of any party but intend to participate in the evidentiary hearing. Further, although no specific prehearing action from the Board is required, the Water Rights

Program notes that nonresident counsel must be able to demonstrate compliance with the pro hac vice requirement of SDCL 16-18-2 at the time of hearing.

7. The Water Rights Program further proposes that the parties exchange witness lists and exhibits 10 days previous to hearing.

8. As required by law, all original pleadings are to be filed with the Water Rights Program for inclusion in the agency files. Such documents should be sent by first class mail or by facsimile transmission (605-773-4068) to Eric Gronlund at the offices of the Water Rights Program, Department of Environment and Nature Resources, Foss Building, 523 East Capitol Avenue, Pierre, SD 57501-3182. In addition, the Water Rights Program also asks that the parties serve any pleadings on each other, the Prehearing Chairman, Board counsel Jeffrey Hallem and undersigned counsel by means of facsimile transmission or electronic transmission to the extent possible in order to promote efficient use of time.

9. The Water Rights Program submits that the foregoing schedule would provide for an orderly and efficient administrative process. A Procedural Order is enclosed for Board consideration.

Dated this 30th day of September, 2010.

Diane Best
Assistant Attorney General
Counsel for Water Rights Program
300 N. Dakota Ave. Suite 403
Sioux Falls, SD 57104

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Motion for Procedural Order and proposed Order was served by United States mail, first class, postage prepaid upon the following on September 30, 2010:

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2020 W. Omaha Street
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Sharon Drapeau
General Delivery
Marty, SD 57361

Sister Patricia Mylott
PO Box 217
Marty, SD 57361

Joan Olive
Box 72
Spencer, NE 68777

Faith Spotted Eagle
PO Box 667
Lake Andes, SD 57356

Glenn Drapeau
General Delivery
Lake Andes, SD 57361

Wesly Hare
General Delivery
Marty, SD 57361

Judy Honimichle
c/o Fort Randall Casino
38538 SD Hwy 46
Lake Andes, SD 57356-7011

Kip (Spotted Eagle) Collins
PO Box 667
Lake Andes, SD 57356

was e-mailed on the same date to:

Rebecca Kidder
Abourezk & Zephier, PC
rebasgarden@yahoo.com

David L. Nadolski
Lynn, Jackson, Shultz & Lebrun
dnadolski@lynnjackson.com

Eric Kerkvliet
Lynn, Jackson, Shultz & Lebrun
ekerkvliet@lynnjackson.com

Diane Best

Diane Best
Assistant Attorney General
300 N. Dakota Ave. Suite 403
Sioux Falls, SD 57104

Pld_DB_waterboard_longviewfarms_9-30-10_Mtnforproceduralorder_an

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF APPLICATION NO. 7203-3, LONG VIEW FARM, LLP	)))	PROCEDURAL ORDER

On September 30, 2010, the Department of Environment and Natural Resources, Water Rights Program, filed its Motion for Procedural Order. The motion was heard before the Board on October 6, 2010. As a result of the hearing in the above-referenced matter, the Board hereby ORDERS as follows:

1. The request for appointment of a hearing examiner under SDCL 1-26-18.3 is denied.

2. This Order approves the appointment of Board member _____ to act as a Prehearing Chairman in this matter for purposes of acting on procedural motions and discovery disputes. Any dispositive motion made before the Prehearing Chairman may result in a recommendation, but the Board itself will act on all dispositive motions.

3. Any attorney who has not yet appeared on behalf of any party but intends to participate in the evidentiary hearing in the above-entitled matter must mail a Notice of Appearance to all other parties within ten days following this Order. Nonresident counsel must be able to demonstrate compliance with the pro hac vice requirement of SDCL 16-18-2 at the time of hearing.

4. Unless modified by the Prehearing Chairman, witness lists and exhibit lists are to be exchanged ten days before hearing.

5. For the exchange of exhibits, each party shall provide a copy of each exhibit intended to be produced at hearing in this matter (except for the agency file which may be viewed in the offices of the Water Rights Program, Department of Environment and Natural Resources, at any time). Maps, schematics, and other large-scale exhibits may be provided to the other parties in reduced form.

6. Witness lists are to be provided to all other parties. The name, address, and a short statement of anticipated testimony is to be included for each witness. Further, in order to expedite the proceeding, the Water Management Board encourages the parties to discuss whether there are exhibits to which they can stipulate to admission without foundation. Unless otherwise expressly stipulated, stipulating to admission will not restrict the scope of cross-examination by a party with respect to the subject matter of the exhibit or the credibility or accuracy of the exhibit.

7. Original pleadings are to be filed with Eric Gronlund, Water Rights Program, DENR, Foss Building, 523 East Capitol Avenue, Pierre, South Dakota 57501 by fax or first class mail. One copy of each pleading is to be sent or faxed to the

Prehearing Chairman at_____, and to Board counsel Jeffrey Hallem at 1302 East Highway 14, Suite 1, Pierre, South Dakota 57501-8501 or (605) 773-4106 (fax) as well as to all parties listed on the attached service list, including counsel for the Water Rights Program. Electronic or facsimile service of documents is encouraged.

8. The Prehearing Chairman shall issue such further orders as are appropriate to implement this Order.

Dated this _____ day of October, 2010.

BY THE BOARD:

_____
Tim Bjork, Chairman

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
denr.sd.gov

October 18, 2010

NOTICE

TO: Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239
and Parties of Record (see attached list)

FROM: Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Procedural Order and Schedule of Hearing for Water Permit Application No. 7206-3, Long View Farms LLP

On October 6, 2010, the Water Management Board established a Procedural Order in the matter of Water Permit Application No. 7206-3. The Procedural Order is attached.

Water Permit Application No. 7206-3 seeks to appropriate 30 gallons per minute from one well to be completed into the Codell Aquifer located in the SW ¼ NW ¼ Section 9, T95N, R64W for commercial use at a swine farrowing facility in Charles Mix County. In response to the public notice a number of petitions to intervene were filed.

The Board established a briefing schedule in the procedural order as follows:

Intervenor's Opening Briefs	November 8, 2010
Applicant's and Department's Reply Briefs	November 18, 2010
Intervenor's Reply Briefs	November 29, 2010

All briefs are to be filed with all parties (or counsel for those who are represented by counsel) by US Postal Service. In addition, the Board directed that briefs be sent electronically to Jeff Hallem, Board Attorney at jeff.hallem@state.sd.us and Eric Gronlund, Water Rights Program at eric.gronlund@state.sd.us. These gentlemen will forward the filings to Board members prior to the hearing.

The Water Management Board will conduct an evidentiary hearing to consider Application No. 7206-3 beginning at 8:30 AM on Thursday, December 2, 2010 in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre SD. The Board meeting will continue on the morning of Friday December 3rd if necessary to complete testimony. Parties should plan accordingly. Future notice will be provided to all parties if there are changes to the hearing time or date.

Enclosed is a copy of the report, recommendation, affidavit of publication and petitions in the matter of Water Permit Application No. 7206-3. State law directs the Chief Engineer to provide Water Management Board members with a copy of all pleadings including petitions for each proceeding. This same information will be sent to the Board members in advance of the hearing. In addition, enclosed are two documents intended to acquaint parties with the hearing process entitled "Procedure for Hearings before the Water Management Board" and "Summary of South Dakota Water Laws and Rules". You are encouraged to review these documents prior to the hearing.

Applicable provisions of the notice of hearing published September 8 and 15, 2010 in the Wagner Post will still apply at the hearing.

Please contact Eric Gronlund at (605) 773-3352, if you have any questions.

enclosures

c: Diane Best, Assistant Attorney General
Harold Shepherd, PO Box 398, Moab UT 84532-0298

PARTIES OF RECORD

WATER PERMT APPLICATION No. 7206-3, Long View Farms LLP

Applicant

Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239

represented by:

Dave Nadolski and Eric Kerkvliet, Attorneys
Lynn, Jackson, Shultz & Lebrun
PO Box 1920
Sioux Falls SD 57101

Petitioners

Yankton Sioux Tribe
Represented by:
Rebecca L. Kidder, Attorney
Abourezk & Zephier, PC
PO Box 9460
Rapid City SD 57709

Sister Patricia Mylott
PO Box 217
Marty SD 57361

Joan Olive
Box 72
Spencer NE 68777

Ms. Eva Bruguier
PO Box 274
Marty SD 57361

Faith Spotted Eagle
PO Box 667
Lake Andes SD 57356

Judy Honimichle
c/o Fort Randall Casino
38538 SD Hwy 46
Lake Andes SD 57356-7011
(returned by USPS as undeliverable)

Sharon Drapeau
General Delivery
Marty SD 57361

Wesly Hare
General Delivery
Marty SD 57361

Glenn Drapeau
PO Box 102
Pickstown SD 57367

Kip (Spotted Eagle) Collins
PO Box 667
Lake Andes SD 57356

CERTIFICATION

I hereby certify that on October 18, 2010, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated October 18, 2010, regarding Procedural Order, Briefing Schedule and Hearing for Water Right Permit Application No. 7206-3, as addressed below:

Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239

Dave Nadolski, Attorney
PO Box 1920
Sioux Falls SD 57101

Sister Patricia Mylott
PO Box 217
Marty SD 57361

Rebecca L. Kidder, Attorney
Abourezk & Zephier, PC
PO Box 9460
Rapid City SD 57709

Diane Best, Assistant Attorney General
300 N. Dakota Avenue, Suite 403
Sioux Falls SD 57104

Ms. Eva Bruguier
PO Box 274
Marty SD 57361

Joan Olive
Box 72
Spencer NE 68777

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Sharon Drapeau
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Marty SD 57361

Wesly Hare
General Delivery
Marty SD 57361

Glenn Drapeau
General Delivery
Lake Andes SD 57361

Kip (Spotted Eagle) Collins
PO Box 667
Lake Andes SD 57356

Harold Shepherd
PO Box 398
Moab UT 84532-0298

Gail Jacobson
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 19th day of October, 2010.

Karen Schlaak
Notary Public
My Commission expires April 1, 2013

SEAL KAREN SCHLAAK NOTARY PUBLIC State of South Dakota SEAL

REPORT ON WATER PERMIT APPLICATION NO. 7206-3
For Long View Farms
August 27, 2010

Application No. 7206-3 proposes to appropriate 0.067 cfs (30 gpm) from one well approximately 600 feet deep located in the SW ¼ NW ¼ of section 9, T95N R64W in Charles Mix County. The water will be used for commercial use at a swine farrowing facility.

AQUIFER – CODELL SANDSTONE (CDLL)

The Codell sandstone is a buried sedimentary rock member of the Carlile shale which consists of loose to tightly cemented very fine to coarse light brownish gray to dark greenish black and brown sand with clay (Kume, 1977). The aquifer is confined and under artesian conditions at this site. The Codell aquifer is known locally as the "sandrock" or the "soft water sand" (Kume, 1977). Data from the county study and Water Right well files indicate the top of the Codell sandstone should be approximately 1150 to 1200 feet msl. This would mean a well depth of at least 570 feet to 620 feet at this site to penetrate the Codell sandstone. The applicant indicates an expected depth of 600 feet. In this area the Niobrara formation (also considered and aquifer) overlies the Codell aquifer.

The Codell sandstone underlies 1,134 square miles (725,760 acres) of Charles Mix County and is estimated to contain 1.45 million acre-feet of recoverable water in storage (Hedges, 1982). The aquifer extends into Douglas and Hutchinson Counties to the north and into Bon Homme County to the east and into Nebraska to the south. A map of the Codell sandstone published by Hedges is included with this report (Hedges, 1982). Ground water movement is probably from northwest to southeast in the area of this application (Kume, 1977).

The Water Right Program monitors two observation wells completed into the Codell sandstone (DG-80F and HT-87D) but are located about 23 and 25 miles north and northeast of this site respectively. Water levels for these two wells show response to climatic conditions and annual fluctuations that may be due to pumping (Water Rights, 2010). However, because these wells are located so far from this site the record would only be representative of the entire aquifer and not show any aquifer response due to pumping from this site. Water levels for these two observation wells are included with this report for informational purposes.

The Corps of Engineers drilled an observation well in T95N R64W in the northeast corner of section 11 which is located about two miles east of this site. Kume published a hydrograph of the water levels beginning in 1952 and extending through 1970 (page 21, Figure 17) in Bulletin 22, Geology and Water Resources of Charles Mix and Douglas Counties. The Water Rights Program began monitoring this same well in 1982 and continued through 1993 when the monitoring well ceased to function properly. The Water Rights well name was CM-52A for this Corps of Engineer well and a hydrograph for the available record is included with this report. The entire water level record for the Codell indicates the aquifer is capable of sustaining additional withdrawals (Water Rights, 2010).

REVIEW OF EXISTING WATER PERMITS/RIGHTS

There are no nearby water permits/rights that obtain water from the Codell sandstone aquifer. There are domestic wells in the area which use the Codell as a source of water. The applicant indicates two sites with water well locations about 1.5 miles northwest and northeast of this site. At this distance and with the relatively small pumping rate drawdown is not expected to be significant nor cause any adverse impacts. At one time the City of Geddes, Town of Ravinia and the City of Lake Andes used wells from the Codell but now obtain water from the Missouri River or from rural water. Those wells are used as a backup water supply at this time. The only other Codell aquifer Water Right in Charles Mix County is for Clearfield Colony for domestic use.

CONCLUSIONS

1. Water is available from the Codell aquifer.
2. The aquifer is under artesian conditions at this site. Drawdown due to pumping can be expected to occur. However, drawdown is not expected to be significant at this pumping rate nor cause any adverse effects on existing water rights or on area domestic users.
3. The well authorized by this application must be constructed in accordance with SD Well Construction Rules. Also there is a collapsed well near this site that must be plugged in accordance with SD Well Construction Standards if that has not already been done.
4. Plans and specifications for this facility have been approved by the Department.
5. The primary source of water for this facility is from Randall Rural Water System and this well will be a supplemental source for the facility.

James A Goodman
Natural Resources Engineer

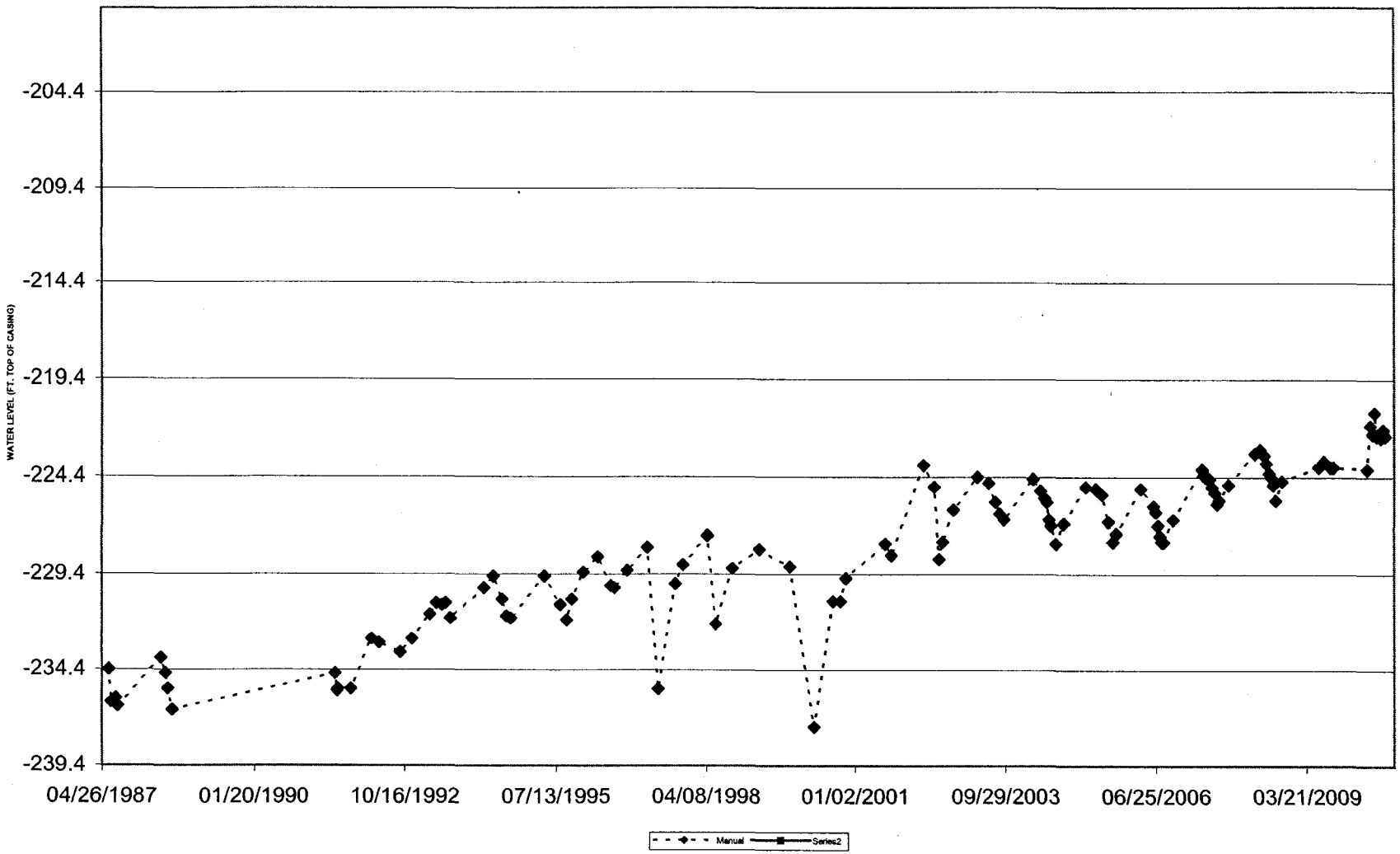
BIBLIOGRAPHY

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

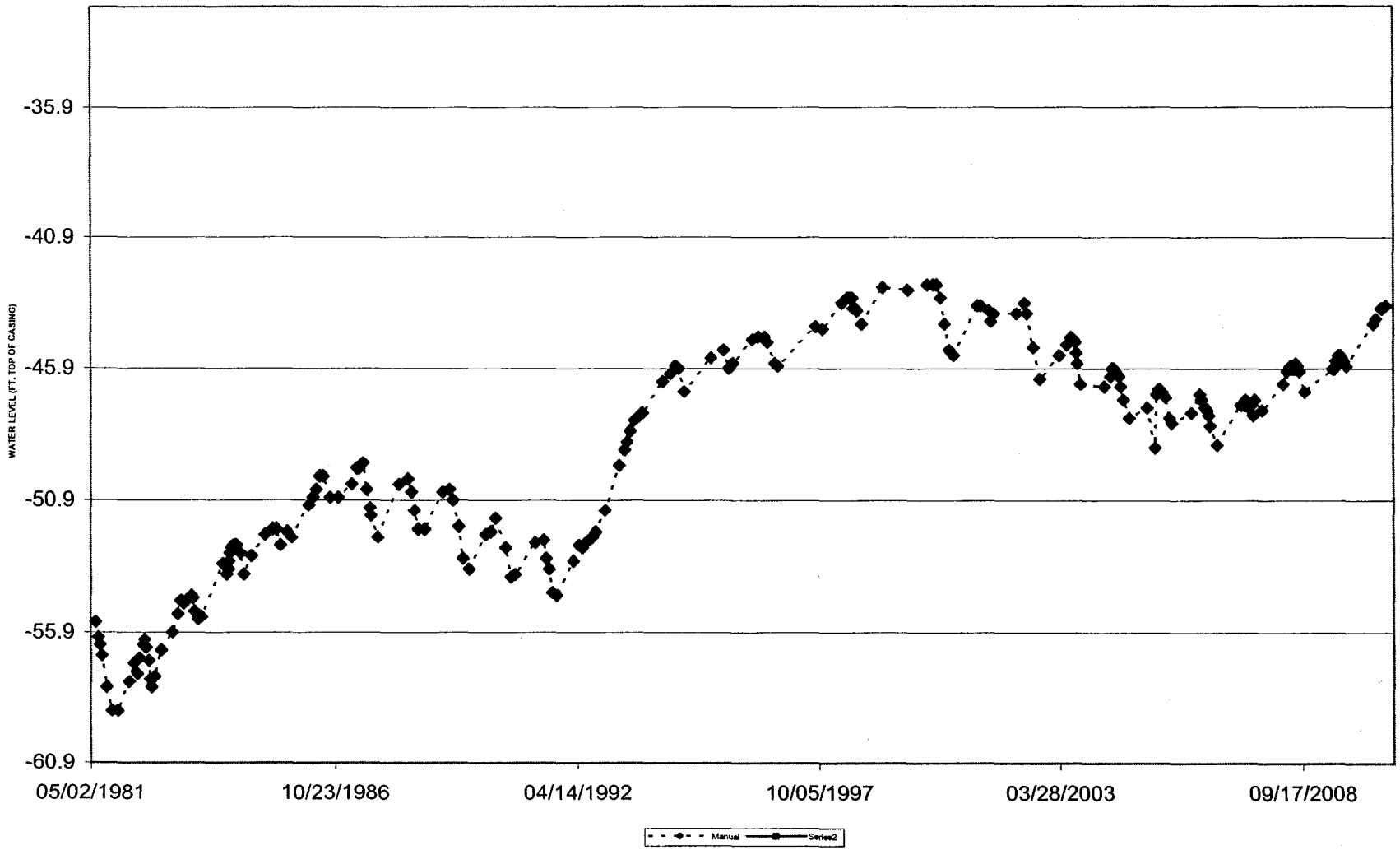
Kume, J., 1977, Geology and Water Resources of Charles Mix and Douglas Counties, South Dakota, Part II Water Resources, Bulletin 22, SD DENR, SDGS, Vermillion, SD, 57069.

Water Rights, 2010, Unpublished Observation Well Records for the Codell Aquifer, SD DENR, DES, Water Rights Program, Pierre, SD, 57501.

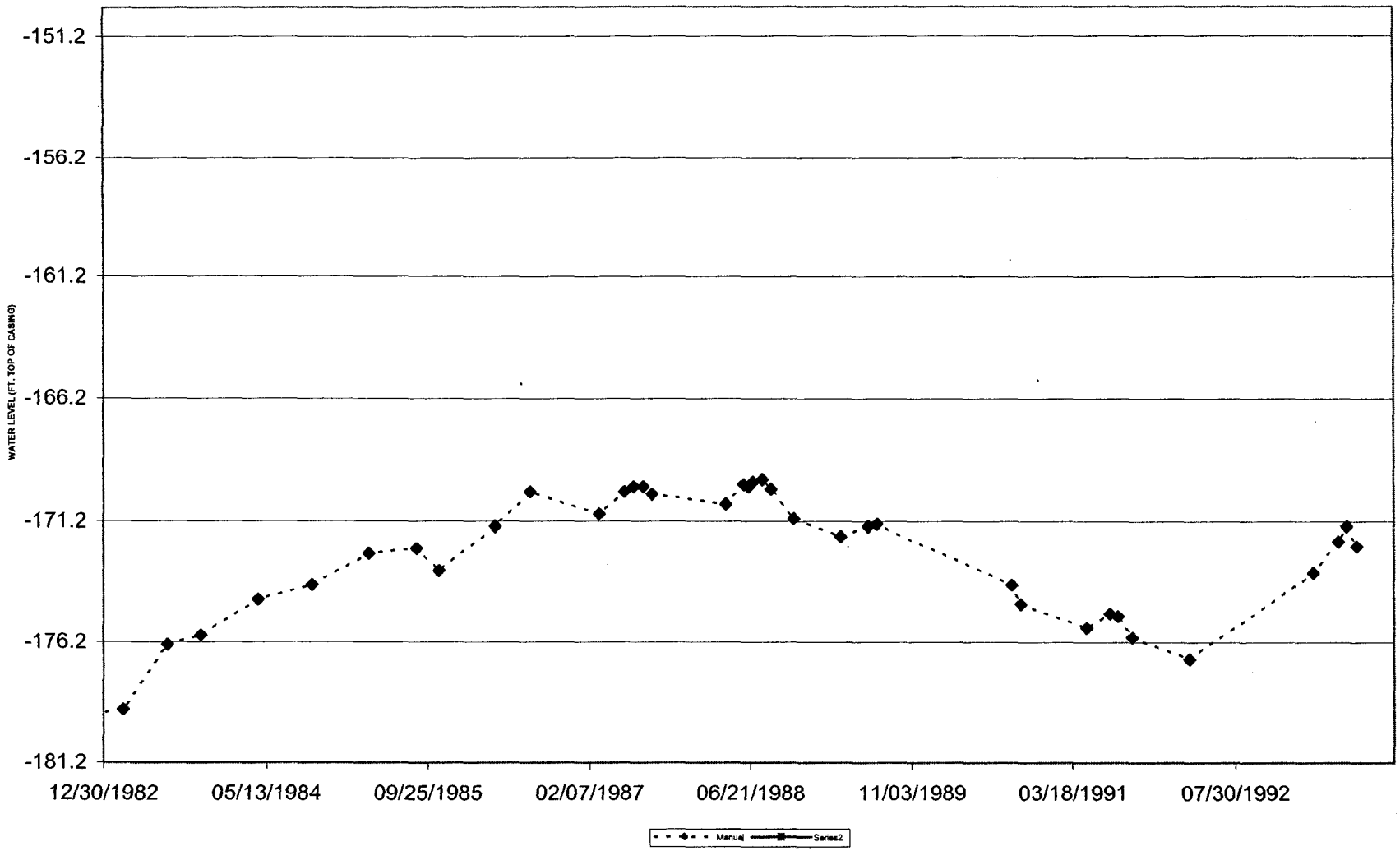
WATER RIGHTS' OBSERVATION WELL
HT-87D



WATER RIGHTS' OBSERVATION WELL
DG-80F



WATER RIGHTS' OBSERVATION WELL
CM-52A



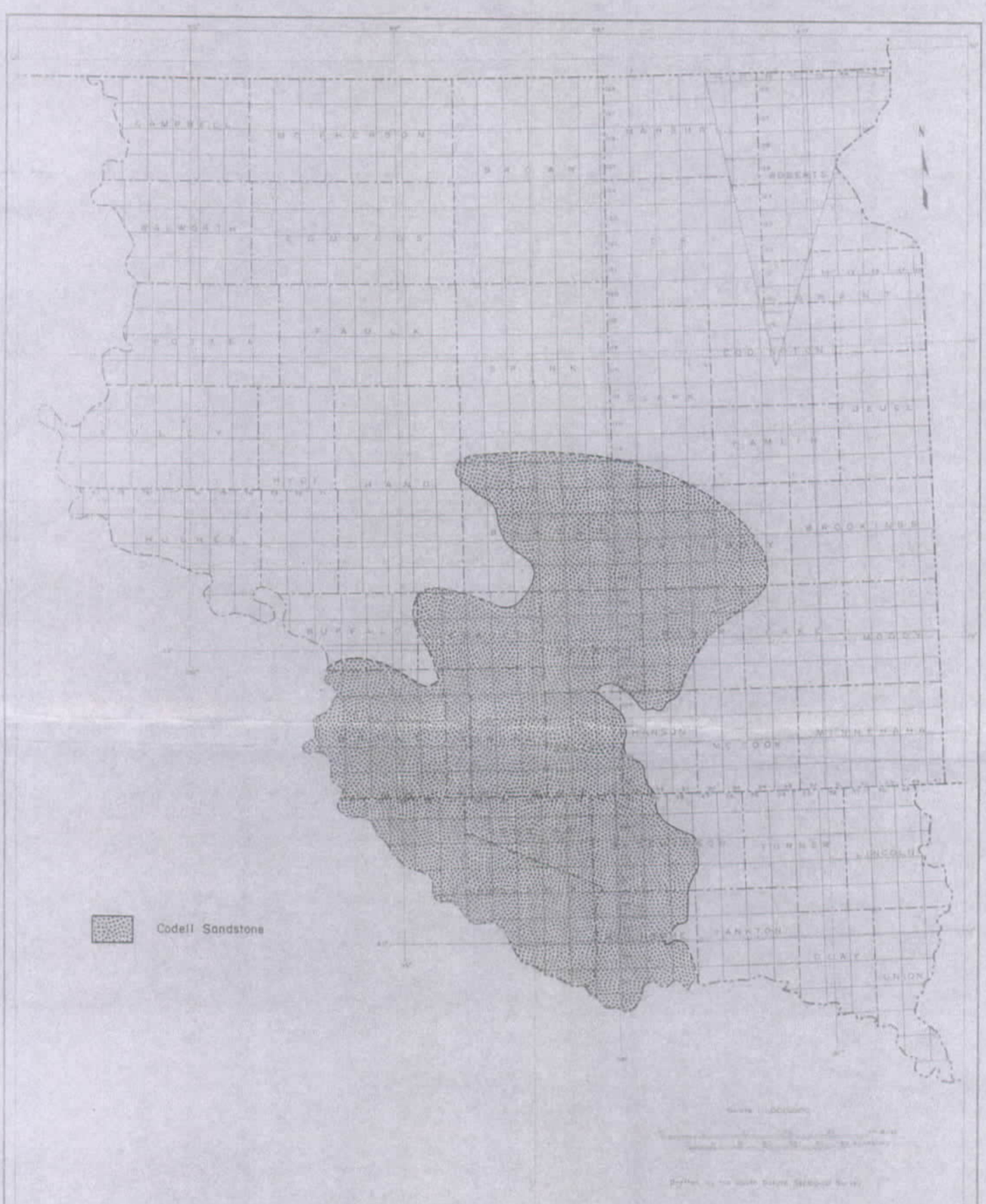


PLATE 9 MAP OF EASTERN SOUTH DAKOTA SHOWING MINIMUM DISTRIBUTION OF THE CODELL SANDSTONE MEMBER OF THE CARLILE SHALE

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
denr.sd.gov

RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT APPLICATION NO. 7206-3, Long View Farms, LLP

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. 7206-6, Long View Farms, LLP, 3172 320th Street, Hull IA 51239.

The Chief Engineer is recommending APPROVAL of Application No. 7206-3 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 well approved 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 well authorized by Permit No. 7206-3 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. Permit No. 7206-3 is subject to compliance with requirements of the Department's Water Pollution Control Permit issued pursuant to SDCL 34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

4. Permit No. 7206-3 is subject to compliance with all existing and applicable Water management Board Rules including but not limited to:

   a) Chapter 74:54:01 Ground Water Quality Standards,
   b) Chapter 74:54:02 Ground Water Discharge Permit,
   c) Chapter 74:51:01 Surface Water Quality Standards,
   d) Chapter 74:51:02 Uses Assigned to Lakes,
   e) Chapter 74:51:03 Uses Assigned to Streams, and
   f) Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions

See report on application for additional information.

Garland Erbele, Chief Engineer
September 1, 2010

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WATER RIGHTS
PROGRAM

Affidavit of Publication

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF CHARLES MIX)

Kim Johnson, of said County and State being first duly sworn on her oath says: That ***The Wagner Post*** is a legal newspaper of general circulation, printed and published in Wagner, in said County and State, by Kim Johnson, and has been such newspaper during the time herein mentioned; and that I, Kim Johnson, the undersigned, am office manager of said newspaper in charge of the advertising department thereof, and have personal knowledge of all the facts stated in this affidavit; a printed copy of which is hereunto attached, was printed and published in the regular and entire issue of said newspaper and not in supplement, once each week for 2 successive weeks.

1st publication made on 8 day of Sept., 2010

2nd publication made on 15 day of Sept., 2010

3rd publication made on _____ day of _____, 2010

4th publication made on _____ day of _____, 2010

5th publication made on _____ day of _____, 2010

That said newspaper is a legal newspaper, and has a bonafide circulation of more than two hundred copies weekly, and has been published within the County of Charles Mix for more than fifty-two successive weeks prior to the first publication of said notice, and is printed in an office maintained in Wagner, South Dakota, the place of publication of said newspaper. That the full amount of the fee for the publication of the annexed notice is

$ 165.34

Kim Johnson

Subscribed and sworn before me this 24 day of September, 2010.

Notary Public

My commission expires

My Comm. Expires 03-05-2012

Wednesday, September 15, 2010

PUBLIC NOTICES

NOTICE OF HEARING ON APPLICATION NO 7206-3 TO APPROPRIATE WATER

Notice is given that Long View Farms, LLP c/o Arlan Moss, 3172 320th St. Hull IA 51239 has filed an application for a water permit to appropriate 0.067 cubic feet of water per second (30 gallons per minute) from one well to be completed into the Codell Aquifer (approximately 600 feet deep) located in SW 1/4 NW 1/4 Section 9-T95N-R64W for commercial use at a swine farrowing facility.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 7206-3 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.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605-773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by September 27, 2010. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 1:00 p.m. (CST) on October 6, 2010 in the Matthews Training Center, Joe Foss Building, 523 E. Capitol Ave, Pierre, SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny this application based on the facts presented at the public hearing. The October 6, 2010 hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by September 27, 2010.

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 September 27, 2010, at the above Water Rights Program address to request copies of information pertaining to this application. Notice is given to individuals with disabilities that this hearing is being held in a physically accessible place. Please notify the Department of Environment and Natural Resources at least 48 hours before the hearing if you have a disability for which special arrangements must be made at the hearing. The telephone number for making arrangements is (605) 773-3352.

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 September 27, 2010.

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.

Published twice at the total approximate cost of $165.34

Pub: September 8, 15, 2010

9-23-10

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Dear Chief Engineer,

I am writing to oppose approval of a commercial well permit to LongView Farms. I also am requesting an automatic delay of the hearing.

LongView Farms should not be allowed to have a commercial well (permit) for these reasons:

1) It is not in the public interest. Many people work and live near LongView Farms and the areas where hog waste is applied. These people are exposed to harmful toxins, bacteria, and viruses produced by this facility and distributed via the air and water run-off. The Native American community already carries a high disease burden and would thus be more vulnerable to the health hazards associated with large confinement facilities.

2) It is not a beneficial use of water. Annually millions of gallons of swine waste will be combined with the water pumped from the Coddell Aquifer and applied as fertilizer to the farm fields of a few farmers. Easy access to "free" public waters benefits the owners of LongView and the farmers who are in the manure management plan

Studies from other states where large animal confinements confirm that the run-off from these fields ends up polluting rivers, streams, lakes, and shallow aquifers, resulting in "water too dirty to drink without chemical treatment". LongView should have to pay to use rural water, rather than be encouraged and sanctioned to pollute public waters by approving a commerial well permit to allow them easy access to the Coddell Aquifer.

I hope you will do the right thing. Thank you for your thoughtful consideration.

Joan Olive

Joan Olive, M.S., Speech-Language Therapist
Marty Indian School

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Charles Abourezk
*Robin L. Zephier
George J. Nelson
Rebecca L. Kidder

*Also licensed in Colorado

ABOUREZK LAW FIRM

P.O. BOX 9460
RAPID CITY, SD 57709-9460
(2020 W. Omaha Street)
TEL: (605) 342-0097
FAX: (605) 342-5170

Mike Abourezk
**Alicia D. Garcia

**Also licensed in California

September 24, 2010

Chief Engineer, SD DENR
Water Rights Program
Foss Building
523 E. Capitol
Pierre, SD 57501

South Dakota Department of Environment and Natural Resources
Water Rights Management Board
c/o Mr. Eric Gronlund
PMB 2020, Joe Foss Building
523 East Capitol
Pierre, SD 57501

Dear Chief Engineer and Board:

Please find enclosed herewith a Notice of Appearance on behalf of the Yankton Sioux Tribe, and the Petition in Opposition to the Permit, Petition to Intervene, and Request for Extension of at least 20 days, in the Matter of Water Rights Application 7206-03. If you have any questions or concerns, please do not hesitate to contact me at your convenience.

Respectfully submitted,

Rebecca L. Kidder,
Abourezk & Zephier, P.C.
Attorney for the Yankton Sioux Tribe
2020 W. Omaha St.
P.O. Box 9460
Rapid City, SD 57709
(605) 342-0097

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SEP 27 2010
WATER RIGHTS
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of September, 2010, she mailed a true and correct copy of the foregoing **Notice of Appearance of Rebecca Kidder as Counsel to Petitioner Yankton Sioux Tribe** and **Petition in Opposition to Water Permit Application 7206-03 and Petition to Intervene** to:

Chief Engineer, SD DENR
Water Rights Program
Foss Building
523 E. Capitol
Pierre, SD 57501

South Dakota Department of Environment and Natural Resources
Water Rights Management Board
c/o Mr. Eric Gronlund
PMB 2020, Joe Foss Building
523 East Capitol
Pierre, SD 57501

Longview Farms LLP c/o
Arlen Moss
3172 320th St.
Hull, IA 51239

and that the same was provided by United States Mail, postage prepaid.

Rebecca L. Kidder

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SEP 27 2010
WATER RIGHTS
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STATE OF SOUTH DAKOTA BEFORE THE WATER MANAGEMENT BOARD	)))	
IN THE MATTER OF WATER RIGHTS PERMIT APPLICATION 7206-03 BEFORE THE SOUTH DAKOTA WATER MANAGEMENT BOARD	)))))	**NOTICE OF APPEARANCE**

NOTICE IS HEREBY GIVEN that Rebecca Kidder hereby enters her Notice of Appearance as Counsel of record for the Yankton Sioux Tribe.

Dated this 24th day of September, 2010.

Rebecca Kidder, Attorney
Abourezk & Zephier, P.C.

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SEP 27 2010
WATER RIGHTS PROGRAM

OFFICE OF THE CHIEF ENGINEER
WATER RIGHTS PROGRAM
STATE OF SOUTH DAKOTA

In the Matter of Water Permit	)	Application No. 7206-3
	)	
Application 7206-03	)	PETITION IN OPPOSITION TO
	)	APPLICATION AND
	)	RECOMMENDATION, PETITION TO
	)	INTERVENE, AND REQUEST FOR
	)	HEARING EXTENSION OF AT LEAST
	)	20 DAYS

The Yankton Sioux Tribe, Petitioner, hereby submits this Petition in Opposition, Petition to Intervene, and Petition for a Hearing Extension of at least 20 days, pursuant to SDCL §46-2A-6, Application to Appropriate Water 7206-03 (Application) filed by Long View Farms LLP (LVF). The Yankton Sioux Tribe is a federally recognized Indian Tribe located within Charles Mix County, South Dakota. The Yankton Sioux Tribe files this Protest and Petition on its own behalf and on behalf of its individual tribal members. The Application – No. 7206-3 - requests approval for the diversion of 0.067 cubic feet of water per second from one well to be completed into the Codell Sandstone Aquifer for purposes of commercial use in a livestock confinement operation located directly adjacent to and abutting lands comprising the Yankton Sioux Indian Reservation, South Dakota. The diversion point will be located in SW ¼ NW ¼ Section 9,T. 95N, R64W.

The Yankton Sioux Tribe and its individual members include over 3,000 residents of Charles Mix County, South Dakota residing on and near Tribal Reservation lands adjacent to and near the Longview Farms LLP proposed well location and the CAFO site it serves. The Yankton Sioux Tribe and its individual members are owners of numerous wells utilized for domestic

water supply, livestock, and irrigation located upon Reservation lands and other lands adjacent to and surrounding the well location. These are primarily shallow water wells which will be impacted if the aquifer recharge is not commensurate with total withdrawals from the aquifer.

The Yankton Sioux Tribe on its own behalf and on behalf of its individual members files these petitions in opposition and to intervene for the following reasons:

1. This Application does not satisfy any of the four statutory criteria in SDCL Chapter 46-2A governing the approval of applications to appropriate water resources. The Chief Engineers' determinations on all four criteria are unsupported by factual data and evidence on the recharge rate of the aquifer, or existing wells and springs utilized for domestic use in the immediate vicinity of this proposed well. See, Recommendation of Chief Engineer for Water Permit Application No. 7206-3, Long View Farms, LLP.

2. SDCL §46-2A-9 dictates that 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. The application proposes to appropriate .067 cf/s from a well completed into the Codell Aquifer. SD DENR has not mapped the Codell Aquifer since 1982, despite the significant expansion of wells in the counties served by this aquifer. The only test wells DENR has investigated recently are 23 and 25 miles north and northeast of this location, which is too far from the present location to make a factual determination that this proposed well will have no impact on the existing domestic wells in close proximity to the location of this proposed well. Further, the Chief Engineer determined that the test well 23 and 25 miles north and northwest of the proposed location "show response to climatic conditions and annual fluctuations that may be due to pumping."

Further, the Chief Engineer relied solely upon the Applicant's report of two domestic wells in the immediate vicinity of this well, and has made no investigation of existing domestic wells in the vicinity of this proposed well. The Petitioner in this matter provided to the South Dakota DENR on June 2, 2009 and January 14, 2009 a report from Professor Perry Rahn that documents the presence of nine shallow wells and springs in the immediate vicinity of the proposed well. Attachment 1, Reports of Professor Perry Rahn. Therefore, the conclusion that there is a reasonable probability of the availability of water is not based upon a factual determination based upon the data, examination of the springs and well in the immediate vicinity of this proposed well, or determination of the recharge rate of the Codell or Niobrara, or the shallow aquifer located in this area located within the Herrick formation.

3. Granting this permit will result in "unlawful impairment of existing rights." The Chief Engineer determined that there:

> are no nearby water permits/rights that obtain water from the Codell sandstone aquifer. There are some domestic wells in the area that use the Codell aquifer. The applicant indicates two sites with water well locations about 1.5 miles northwest and northeast of this site. At this distance and with relatively small pumping rate drawdown is not expected to be significant nor cause any adverse impacts. At one time the City of Geddes, Town of Ravinia and City of Lake Andes used wells from the Codell but now obtain water from the Missouri River or from rural water. Those wells are used as a backup water supply at this time. The only other Codell aquifer Water Right in Charles Mix County is for Clearfield Colony for domestic use.

Report on Water Permit No. 7026-6, For Long View Farms LLP, p. 1 (August 27, 2010). (LVF Report)

The Chief Engineer, however, has not provided any basis for his assumption that there "should not be" interference with existing water rights or domestic wells. The Engineer does not provide any information as to the relationship of the location of water right points of diversion or domestic wells and the hydrological connectivity of the proposed well in the Application. In

addition, the Chief Engineer does not provide any data on the specific amount of water needed by all other pre-existing wells. The Chief Engineer points to no assessment of the depths of the thousands of wells in this aquifer to determine this permit will not impact pre-existing appropriations of water. There is simply no basis upon which to determine that "no -interference" with domestic water supply will occur. The United States Geological Survey has documented thousands of wells for domestic consumption in the Codell Aquifer Region. USGS Well Survey of Yankton Sioux Reservation, 2005; USGS 2007 Charles Mix County Well Survey. The Department was made aware of this information when the Tribe filed its Protest the Water Permit Application 7006-3, but has failed to investigate this information since that objection was filed on June 23, 2008. Until such time as the DENR has fully investigated the drawdown rates, capacity of the Codell aquifer, and the amount of water currently in use by domestic and other existing wells and natural shallow springs, given the sensitivity of the two test wells located 23 and 25 miles north and northeast of the proposed well location, the finding of the Chief Engineer that there is a reasonable probability that there will be no impairment of existing rights is unfounded.

4. The Yankton Sioux Tribe is the owner of reserved water rights upon its Reservation lands established by the Treaty of 1858 and as diminished by the Act of1894. See, Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable). The Tribe's rights to water from the Codell Aquifer are rights to sufficient water to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, and their "reasonably feasible" uses of such water. Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969). It

includes the amount of water required to make the Reservation viable. Arizona v. California, 373 U.S. 546, 599 (1963). The courts have already determined that Tribes have the right to assert these rights on behalf of its members. See, United States v. Nebraska, 520 F.2d 676, 688 (9th Cir. 1975). The Chief of Engineers has not assessed the reserved water rights of the Tribe or determined the amount of water in the aquifer, and so has no reasonable basis to conclude, without further investigation, that the federally protected water rights of the Yankton Sioux Tribe are not impaired by this permit. These reserved water rights are federally protected from impairment by off-reservation withdrawals from the Codell Aquifer, including Permit 7006-3. Winters v. United States, 207 U.S. at 576; Arizona v. California, 373 U.S. at 599; Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981). The Yankton Sioux Tribe has the right to protect its reserved treaty water rights from appropriation by others and from "man-made despoliation." See, United States v. State of Washington, 506 F.Supp. 187, 203 (D. Wa. 1980). See also, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984)(requiring revival of wetlands decimated by non-Indian stream withdrawals); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)(requiring maintenance of minimum stream flow for downstream tribal fishery).

The use of water for a CAFO on lands upland from and directly adjacent to tribal lands and water supplies, both surface and subsurface, and the location of manure dumping fields adjacent to Reservation lands ensures runoff from the 976,200 cubic feet of liquid manure dumped annually will contaminate the Codell Aquifer and all surface waters on Reservation lands, resulting in impairment of the Tribe's and its tribal members' currently appropriated water and its reserved water rights.

5. The use of water pursuant to this Permit is not in the public interest.

The discharge of manure into waterways through runoff releases antibiotic resistant toxic bacteria (i.e. e.coli, yersinia, leptospora, cryptosporidium parvum, giardia lamblia), other pathogens, and excessive nutrients into groundwater and surface water is a public health threat.

6. The use of the water from this Permit is not in the public interest. High concentrations of animal waste from this CAFO will emit hydrogen sulfide, ammonia, Volatile Organic Compounds, and other gases and particulate matter that are known to cause a human health threat once released into the air. Hydrogen sulfide is a health threat that is irreversible, exposure causes sore throat, seizures, comas and even death. Farmworkers and neighbors of existing hog CAFOs report headaches, shortness of breath, wheezing, excessive coughing, and diarrhea. Ammonia is another byproduct of animal waste and has been linked to acid rain. In Oregon, for example, the Columbia River Gorge has seen unprecedented levels of acid rain in recent years which is likely linked to ammonia releases at Three-mile Canyon Farms which is the single largest source of air pollution in that state. The American Public Health Association issued a resolution urging federal, state, and local governments and public health agencies, "to impose a moratorium on new CAFO's" on November 11, 2003. The noxious odors of the CAFO in question will create an ongoing and persistent nuisance to the thousands of people living and working within 6 miles of the CAFO and associated manure fields, including the Head Start School, the Tribe's Fort Randall Casino, which is heavily dependent on tourism, and the Tribe's Travel Plaza.

7. The permit is not in the public interest. Petitioners submit that there is a high probability that water appropriated by this permit, and ground and surface waters of all properties and owners located on and adjacent to the CAFO and manure dumping fields in this area will be contaminated by excessive nutrients, heavy metals, VOC's, antibiotic resistant bacteria, ammonia, and hydrogen sulfide from runoff and airborne emissions. Polluted waters present a clear and present threat to public health, the environment, and the endangered species in the area including the federally protected eagle population of the Karl Mundt Wildlife Preserve, in the immediate area and for downstream users.

8. This permit is not in the public interest. There is a daycare owned by a tribal member serving children ages 1 month to 4 years old within 1 mile of the CAFO site where 1 in 4 children are asthmatic. The CAFO's noxious fumes and odors will directly impact the health and well-being of these children and those who work in the daycare. The CAFO is also located within 4 miles of a federally funded Head Start School serving 3 and 4 year old children. The manure dumping locations surround this school and the Marty Indian School serving youth ages 6-18 years of age, as well as a Boys and Girls Club, Tribal Headquarters, and Nutrition programs. The odor from manure dumped on the fields and the CAFO itself will negatively impact the education, health and welfare of these residents.

9. The granting of this Permit is not in the public interest. This CAFO will produce less than 10 local jobs, and will result in the inability of landowners and residents to utilize surrounding lands for tourism, recreation, and homesites due to the water and air pollution and noxious odors emitted. Longview Farms LLP principals are domiciled in Iowa and have no

connection to the local economy. Longview Farms LLP has signed manure dumping agreements with local farmers releasing Longview Farms LLP from all liability for any impacts caused by runoff of manure into water and resultant water and air pollution. Longview Farms CAFO Application, Manure Application Agreements.

10. This Permit is not in accordance with SDCL §46-2A-9 and §46-1-4. The Chief Engineer's Report indicates that this well will be used only for backup water supply, and does not contain any statement of facts of the proposed use of water that would support a determination the water will be immediately used, or when it will be used, or that such use is necessary for operation of Longview Farm LLP.

The Chief Engineer should not condone this type of speculation in water and must prevent such precedent, particularly in light of DENR's role as protector of South Dakota citizens. SDCL §46-1-4 requires 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." This requires the applicant to establish that it "can and will put the conditionally appropriated water to beneficial use within a reasonable period of time." See e.g. Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights), 170 P.3d 307 (Colo. 2007).

These requirements are intended to ensure that the public's water resource is available to those who actually need water. David B. Schorr, Appropriation as Agrariaranism: Distributive Justice in the Creation of Property Rights, 33 Ecol. L.Q. 3,9,22 (2005).

In this case, in violation of the beneficial use doctrine and SDCL § 46-1-4 and §46-2A-9, the amount of water requested is for speculative purposes. There is no finding by the Chief Engineer that he reviewed the CAFO water requirements for existing operations, or the basis for determining that the amount reserved by this Permit will be used in a reasonable period of time.

11. This permit is not in the public interest. Petitioners have previously submitted an independent hydro-geological investigation of the specific area within which the proposed well is located indicating the existence of a shallow aquifer and unique geologic formation known as the Herrick formation, which is highly permeable, in this vicinity. Attachment 1, Rahn Reports. This report is further supported by the Chief Engineer's determination that "In this area the Niobrara formation (also considered an aquifer) overlies the Codell aquifer." The Chief Engineer has not made any assessment of the impact of this proposed well on the Niobrara formation, the Herrick formation, or any other shallow aquifer located on top of the Codell aquifer, as required by S.D.C.L. 34A-3A-24. In State *ex. rel* Missouri Parks Assoc. *et. al* v. Missouri Dep't. of Nat'l. Resources, Case No. 07AC-CC00923, Cole County District Court, the District Court determined the potential for damage to unique geologic historic formations located near a proposed CAFO warranted denial of construction permits in order to protect the unique geologic structure and the public interest. Denial of the water permit to protect the unique geologic structure and the shallow aquifer located in this area, until and unless an investigation is conducted at the proposed location to determine, based upon fact rather than speculation, that there is no shallow aquifer or Herrick Formation, nor any potential damage to the Niobrara Formation, is warranted.

For the foregoing reasons, Petitioner submits this petition and urges that the permit:

1. Should be denied as unsupported by facts and evidence upon which to form a reasonable basis for concluding the requirements of any of the four criteria in SDCL Chapter 46-2A-9 have been met; or in the alternative

2. Should be deferred pursuant to SDCL § 46-2A-7 until an investigation of the impacts that the point of diversion will have on the existing (and prospective) in-stream flows in the area, senior water rights, domestic use, unique geologic and hydro-geologic structures, and the public health and welfare from the CAFO for which the water is requested; and the structure and finances of Longview Farms LLP to determine they are sufficiently financially responsible for and maintain liability for pollution of the area and damage to domestic use of water is documented; and

3. Pursuant to SDCL §46-2A-5, Petitioner further requests that the Chief Engineer postpone the date set for hearing on the Application for at least 20 days; and

4. That the Petition to Intervene be granted.

Respectfully Submitted this 24th day of September 2010.

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PROGRAM

Hydrogeology of the Ft. Randall Casino area, Charles Mix County, South Dakota

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November 25, 2008

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SOUTH DAKOTA

Attachment 1

Introduction

The Yankton Sioux Tribe operates the Ft. Randall Casino in Charles Mix County, South Dakota. Currently a large hog farm, called Long View Farm, is being constructed approximately 3 miles southeast of the Casino. Figure 1 shows the location of the Ft. Randall Casino and the Long View Farm (NW ¼, Section 9, Township 95 North, Range 64 West).

This concentrated animal feeding operation (CAFO) involves the main feed lot as well as scattered lands within 4 miles where landowners have agreed to receive manure from the operation. Figure 2 shows the location of the main facility and the nearby manure spreading areas. Tracks of land owned or leased by the Yankton Sioux Tribe or tribal members are located in this 4 mile area.

Concern has been expressed by the Yankton Sioux Tribe and many landowners that ground water could be contaminated because of this CAFO. The purpose of this report is to examine the hydrogeology for this area, and to evaluate the potential for ground water contamination. This report does not address engineering projects related to this feedlot such as the animal waste management or the storm water pollution prevention systems. This report is a reconnaissance study of the geology and hydrology of the area with reference to the occurrence and flow of ground water that could be impacted by Long View Farm.

Possible Contaminants

Contaminants associated with CAFOs that could affect water supplies include nitrate, nitrite, ammonia, and

phosphate (Freeze and Cherry, 1979; Hallberg and Keeney, 1993). Pharmaceutical compounds may be present due to antimicrobials (Chlortetracycline and Tyrosin) or growth promoters used in feeds (E. Dreis, pers. comm., 10/6/08). These compounds are excreted by pigs, and if the pig manure is applied to the land as fertilizer, there is the potential for water contamination either from surface runoff or percolation to the water table. Antibiotic resistant genes have been traced from hog waste lagoons to ground water in a 2007 study in Illinois. The transmission of antibiotic resistant bacteria from CAFOs to humans is discussed by Groupman (2008).

Geology

The physiography of this area consists of a low Northwest-Southeast trending ridge separating the Missouri River valley from the Lake Andes-Red Lake valley containing Choteau Creek (Figure 1).

The bedrock geology consists of flat-lying Cretaceous sedimentary rocks (Hedges, 1975). Under the Ft. Randall Casino, the Pierre Shale extends from approximately 100 ft depth to 400 ft. The Niobrara Formation, referred to as the Niobrara aquifer by Kume (1972) underlies the Pierre Shale. The Codell aquifer ("sand rock") lies at approximately 600 ft depth. The Dakota aquifer is approximately 1,000 ft depth. The potentiometric surface of these aquifers generally flow westerly towards the Missouri River.

Shallow ground water is important to this study. Walker (1961) studied shallow ground water in the Wagner area,

but there is limited published information about the hydrogeology of surficial deposits in the Ft. Randall or Long View Farm area.

Flint (1950) shows a general map of the glacial deposits of eastern South Dakota. The exposed glacial deposits near the Ft. Randall Casino are shown as part of the James Lobe, late Wisconsin ("Cary") in age, roughly 10,000 to 25,000 years old.

A detailed geologic map of this area was published by the South Dakota Geologic Survey (Hedges, 1975). This map shows late Wisconsin stagnation drift covering earlier Pleistocene glacial and fluvial deposits. Figure 3 and 4 shows Qwlts (a variety of glacial till called "stagnation drift") and Qwlt ("glacially modified bedrock"). Stagnation till is loosely compacted ablation till that accumulates as the stagnant glacier melted, as opposed to compact lodgment till that is overridden and compacted by an active glacier. Figure 3 shows early Pleistocene Herrick Formation sand and gravels exposed near the Ft. Randall Casino. Figure 5 includes photographs by the author taken October 9-10, 2008, showing these exposures of the Herrick Formation.

Herrick Formation

Figure 5 shows the Herrick Formation exposed in a large pit (Wagner Building and Supply quarry) approximately ¼ mile Northwest of the Ft. Randall Casino. The sand and gravel is presently being quarried down to the elevation where it is saturated.

The presence of permeable deposits such as the Herrick Formation has legal relevance because a ground water discharge permit and ground water monitoring is required by SD DENR for new CAFOs located over shallow aquifers. Approximately 10 ft of till overlies the permeable Herrick sand and gravel at the Wagner Building and Supply quarry. The SD DENR uses 15 ft overburden thickness to evaluate regulations concerning feedlots located above shallow aquifers.

The Herrick Formation consists of non-glacial fluvial sand and gravel that is derived from western sources. Stevenson and Carlson (1951) mapped the Lake Andes area and show the "Herrick gravels" as early Pleistocene in age. Hedges (1975) found deposits of the Herrick Formation at scattered locations throughout Charles Mix and Douglas Counties. Green and Lillegraven describe a caribou antler found in the sand and gravel to be Kansan or Nebraskan age. Harksen and Macdonald (1969) found Herrick gravel to be equivalent to the Medicine Root Gravel which is early Pleistocene (Nebraskan glacial stage).

The Herrick Formation is a fluvial deposit. Flint (1951) and Hedges (1975) show the early Pleistocene streams (e.g. the ancestral White, Niobrara, and Cheyenne Rivers) flowed easterly from the Black Hills and Wyoming. Repeated glaciation covered these alluvial deposits and diverted the flow of these streams. Simpson (1960) describes the diversion of the ancestral White River in the Yankton area. Eventually the Missouri River developed its present location and now the streams in western South Dakota flow into it.

The Herrick Formation supplies municipal water to towns along Rt. 18 in the Burke, St. Charles, and Bonesteel area (Gries, 1996).

The Geologic Map of South Dakota (Martin et al., 2004) shows the Herrick gravel deposit as "To", the "Ogallala Group", Miocene to Pliocene in age. The Ogallala Formation, also called the High Plains aquifer, underlies parts of eight states from South Dakota to Texas. It is used extensively for irrigation in Texas and Kansas (Domenico and Schwartz, 1990; Anderson and Woosley, 2005).

The significance of the Herrick Formation to this study is that this thick permeable unit is exposed at the Ft. Randall Casino area and is thinly covered by glacial till. Although Jensen's (2008) map shows the Herrick Formation not extending under the Long View Farm, without detailed test drilling the areal extent (and proximity to the surface) of this permeable unit is not known.

Water Quality

There is some published water quality data for the Charles Mix County area. For example, Sando and Neitzert (2003) show the average total dissolved solids of Choteau Creek is approximately 1,500 mg/L, and the Missouri River is approximately 500 mg/L.

Kume (1977) shows the Choteau aquifer extending to 3 miles west of Wagner. The Choteau aquifer contains largely sodium sulfate ground water with an average total dissolved solids of 1,700 mg/L.

Table 1 shows data for three water samples collected by the author during October 9-10, 2008. The total dissolved

solids average 2,557 mg/L, which is higher than the Choteau aquifer. The nitrate at two locations is less than 1 mg/L, which is an indication of ground water chemistry of this area. The anomalously high nitrate at tributary to Sevenmile Creek is undoubtedly because the sample was not taken at the spring source, but was sampled approximately ½ mile downstream in a pasture where cattle were present.

Hydrologic measurements made October 9-10, 2008

The average annual precipitation of this area is approximately 22 inches (General Electric Co., 1980). May and June are the months of highest precipitation. In order to study the discharge of springs, the driest months of the year, typically September or October, are most useful because little if any surface water would be contributing to the spring discharge at this time. Rather, the discharge is representative of the ground water discharging from permeable deposits. Kume (1977) shows that September and October are generally the time of year when lowest water table conditions exist.

Conducting field measurement is handicapped by accessibility to private lands. Because of this, not all springs or wells were available for measurement on October 9-10.

Figure 6 is a copy of the USGS Wagner SW topographic map. The Ft. Randall Casino and Long View Farm is shown. On October 9-10, 2008, the author visited this area with Marilyn Bercier of the BIA, Richard Leasure of the Yankton Sioux Tribe, and Janet DeLoughery, a local

resident. Springs and static levels of water wells were made where landowners allowed access. Some water samples were collected.

Figure 7 shows: (1) the location and elevation of springs, and (2) the location and static level of shallow wells. The USGS topographic map "Wagner SW", at 1:24,000 scale, was used for land elevation. The source of the water table elevation data includes spring elevation or static level measured on October 9-10 (circled number on Figure 7). Additional springs are reportedly present at approximately the same elevation as the three springs measured on October 9-10; however, access to these additional springs was not available. Some data shown in Figure 7 are based on the static level of wells published in USGS or SDGS websites. Based on these elevations, a map of the water table was prepared. The water table map is similar to the general topography of the area.

Figure 8 is a geologic cross section though the Ft. Randall Casino showing the geology and water table, and the flow direction of the shallow ground water. The vertical exaggeration in Figure 8 is 11X.

Spring discharge was measured at three locations by a 90 degree V-notch weir (Figure 9). A general flow net (Figure 10) was prepared based on the water table map. Shallow ground water flow is generally NE, SE, and SW from Long View Farm.

Conclusion

From this study, the following conclusions can be drawn:

---Shallow ground water is present in sufficient quantity for domestic and livestock use.
---Shallow ground water flow from the Long View Farm disperses in nearly all directions away from the site.
---The background ground water quality is typical for this area.
---Shallow permeable geologic materials exist in this area. The stagnation till itself is fairly permeable, and may contain isolated unmapped outwash sand and gravel units. More importantly, the thick Herrick Formation sand and gravel is exposed close to the Ft. Randall Casino, and may extend under the till throughout a large part of the area impacted by this CAFO.

Future work in this area should include a comprehensive inventory and measurement of shallow wells and springs, including those on private lands. Future measurement of the discharge and chemistry of springs would add to the understanding of the hydrogeology of the area.

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Table 1. Water quality data (mg/L) for ground water samples collected October 10, 2008. Midcontinent Testing Laboratories, Rapid City, SD performed the analyses. The sample "Brad Irwin" was collected from a pipe at the spring source. The sample "Sevenmile Creek" was collected in a pasture of an eastern tributary approximately ½ mile below the spring complex. The sample "L. Kreeger" was collected from a shallow well. On October 16, 2008, Midcontinent Lab received a bacterial sample from L. Kreeger; their analyses indicate total coliform "present" but fecal coliform "absent".

Location	Time	TDS	Chloride	Nitrate (as Nitrogen)	Phosphate
Brad Irwin	8:30 am	2,630	17.8	0.657	0.010
Sevenmile Creek	10:00 am	2,720	55.0	29.1	<0.010
L. Kreeger	11:00 am	2,320	10.8	0.236	0.049

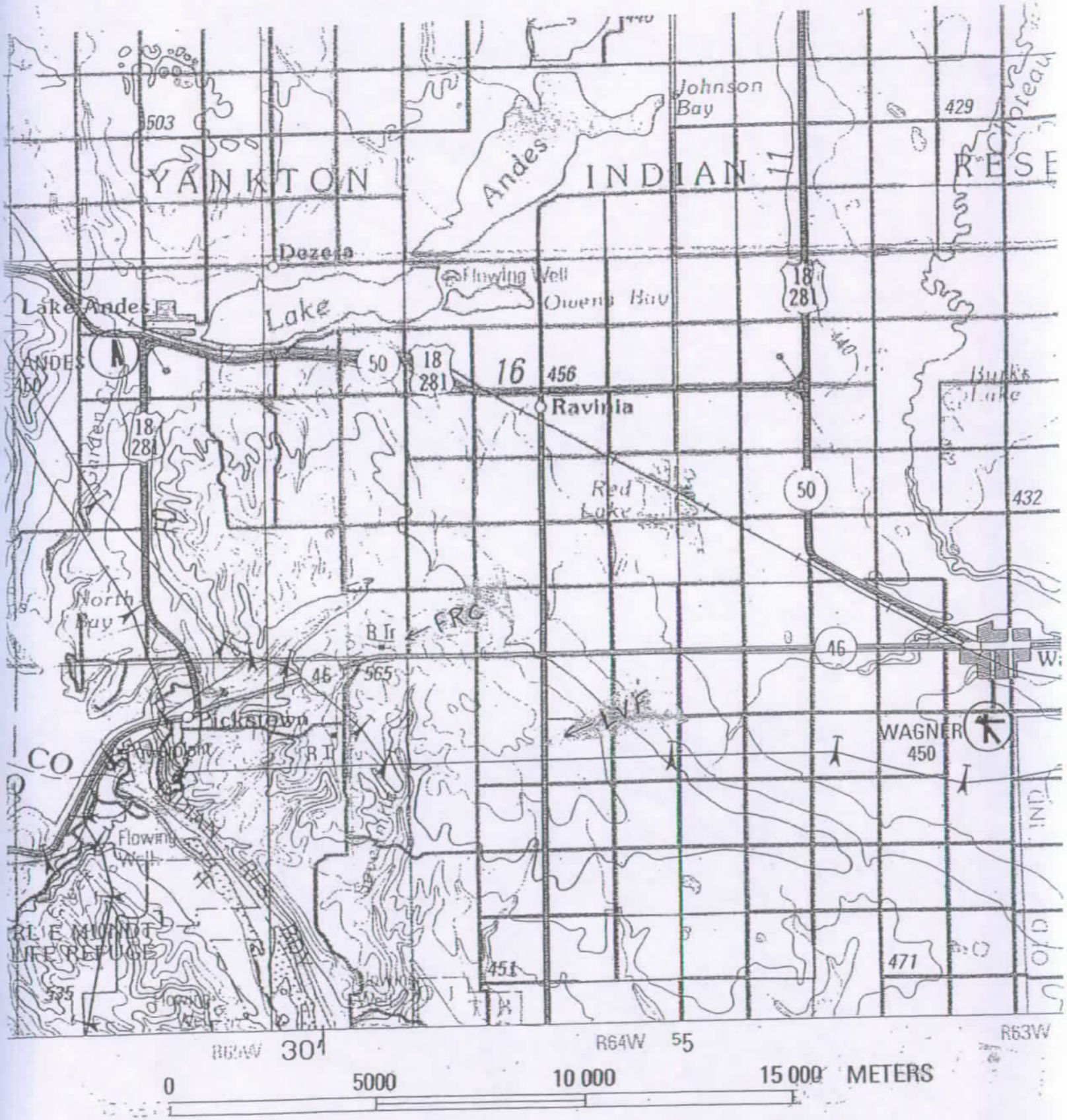

Figure 1. Map of Pickstown-Wagner area showing location of Long View Farm (LVF) and the Ft. Randall Casino (FRC). This map is from the USGS Mitchell (1990) quadrangle, contour interval 20 m. Original at 1:250,000 scale.

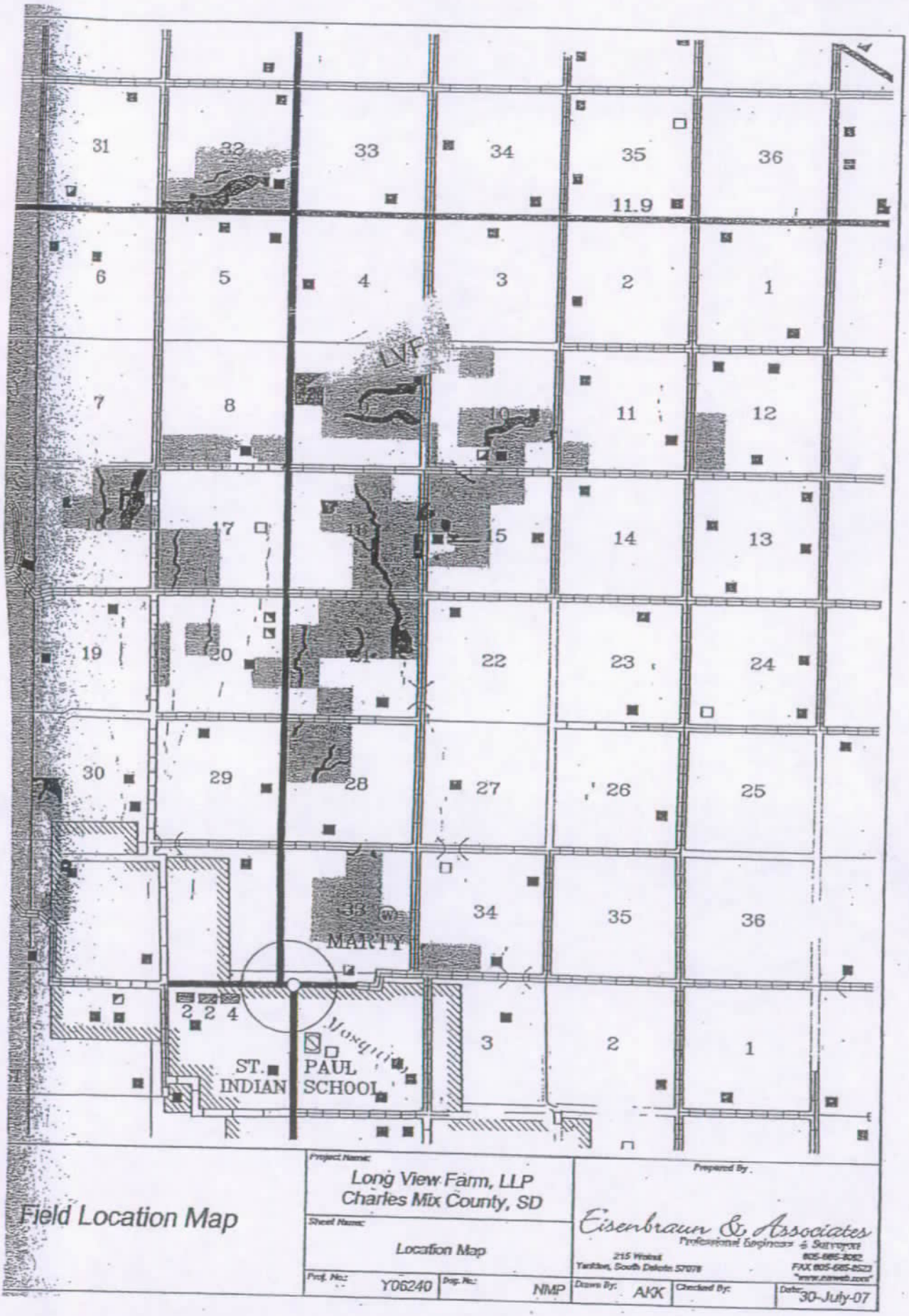

Figure 2. Road map of area near Long View farm (LVF). The shaded lands are proposed areas where manure is to be spread. From Eisenbraun and Associates (2007)

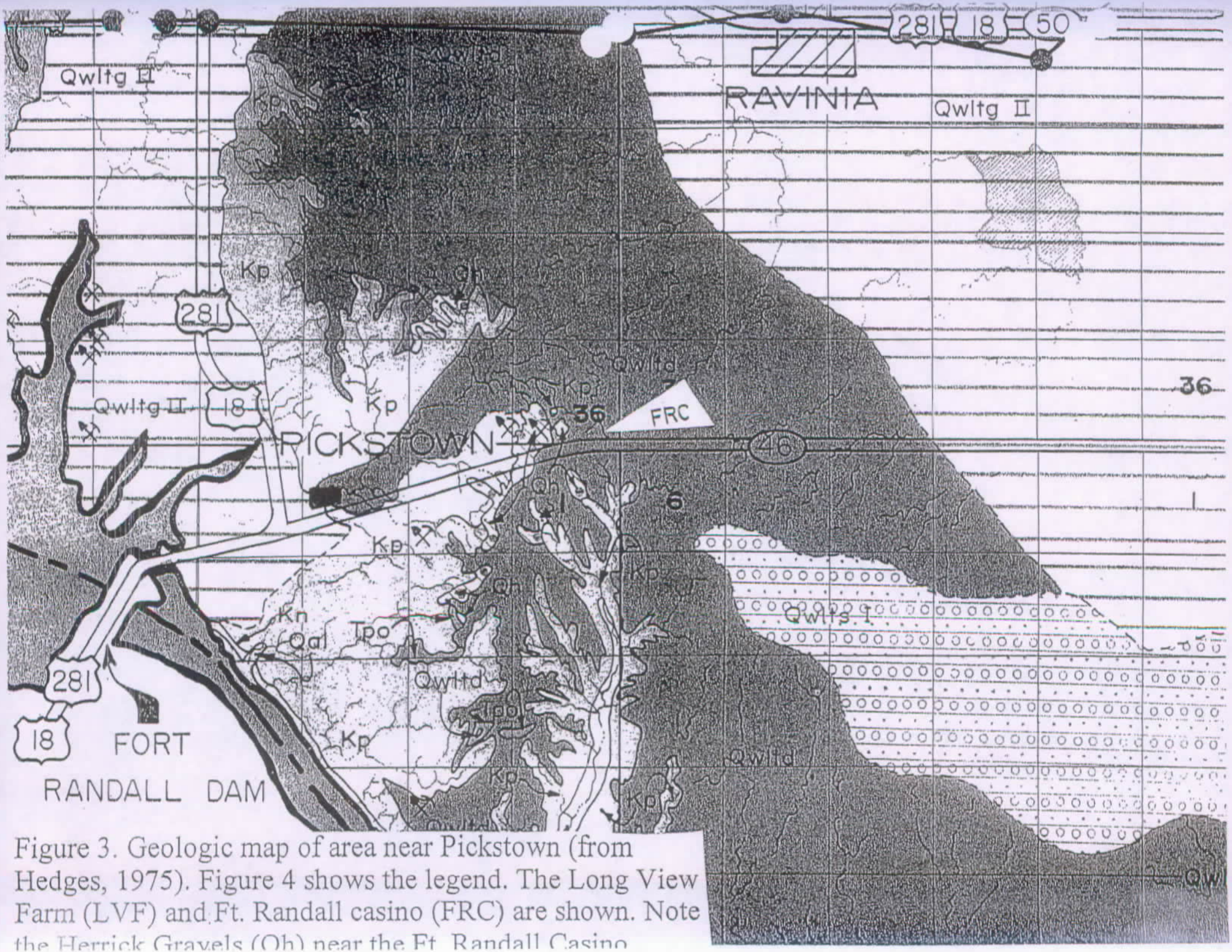

Figure 3. Geologic map of area near Pickstown (from Hedges, 1975). Figure 4 shows the legend. The Long View Farm (LVF) and Ft. Randall casino (FRC) are shown. Note the Herrick Gravels (Qh) near the Ft. Randall Casino

Alluvium—Black humic silty clay, stratified; sand and gravel; 0 to 15 feet thick along minor streams; up to 150 feet thick along Missouri River.

...vium—Yellow to dark-gray silty clay or silt, poorly stratified; 0 to 10 feet thick.

Loess—Yellow silt or sandy silt, calcareous, 0 to 10 feet thick.

Terrace—Flat or sloping terrace along Missouri River, locally underlain with alluvium, till, outwash or loess; 0 to 90 feet thick.

Outwash terrace—Sand and gravel outwash terrace, some s... sand; iron-carbonate cementing common; 0 to 30 feet thick.

Valley outwash—Predominantly sand and gravel with some fine sand or silt; flat to nearly flat; 0 to 30 feet thick.

Collapsed outwash—Collapsed outwash deposits of variable texture; may contain some till. Qwloc I—Yellow silt and sandy silt, calcareous; local relief 10 to 20 feet; 0 to 15 feet thick. Qwloc II—Fine to coarse sand, relief 10 to 20 feet, 0 to 15 feet thick. Qwloc III—... to coarse sand and gravel, maximum local relief 30 feet; 0 to ... feet thick.

Undifferentiated outwash—Undifferentiated bodies of outwash material; Qwlou I—Mostly silt, clayey silt, and fine sand; 0 to 10 feet thick; Qwlou II—Coarse sand or sand and gravel; mostly ice contact origin, 0 to 20 feet thick.

Till (ground moraine)—Boulder-clay till, calcareous, oxidized portion yellow-brown to reddish-brown; unoxidized dark olive-gray to black; Qwltg I—low relief; Qwltg II—high relief.

Qwlts I

Till (stagnation drift)—Boulder-clay till, calcareous; varies locally from clay rich till to sandy gravelly till; Qwlts I—Low relief; Qwlts II—High relief; Qwlts III—Stagnation drift characterized by oblong to ovale disintegration ridges composed of till.

Qwlfd

Till (glacially modified bedrock)—Glacially modified stream-eroded bedrock topography, till generally less than 50 feet thick; ...drock outcrops common; local relief highly variable, integrated ...age.

Till (end moraine)—Boulder-clay till, calcareous; oxidized portion yellow to reddish brown, unoxidized portion dark-gray to black; forms discontinuous elongate ridge up to 15 feet high.

LATE WISCONSIN

QUATERNARY

Qh

Heinick gravel—Gravelly medium to coarse sand, stratified; quartz and feldspar dominant; pinkish color due to feldspar content; as much as 80 feet thick; western derived fluvial deposit; fossiliferous.

Tpo

Ogallala undifferentiated—Light greenish-brown clay, silty clay and loose fine sand; a green massive orthoquartzite conglomerate as much as 6 feet thick locally present; sparsely fossiliferous; 40 feet thick.

Fort Randall Formation—Light brown to pink siltstones and clay; 5 foot zone of barite crystals or "rock rose" zone about 50 feet above base; sparsely fossiliferous; 60 to 120 feet thick.

Kp

Pierre Shale undifferentiated—Light gray to black marine claystone and shale; locally calcareous; marl and chalky zones occur throughout; manganese and iron-carbonate concretions common; bentonitic; about 600 feet thick.

Kn

Niobrara Marl—Light gray to dark bluish-gray limestone and marl; weathers to dark yellowish-orange; macrofossils include Ostrea and Inoceramus; microfossils predominantly Foraminifera; about 150 feet thick.

PLEISTOCENE — PRE-KANSAN

MIOCENE-PLIOCENE — OGALLALA

MIOCENE-PLIOCENE — FORT RANDALL FORMATION

UPPER CRETACEOUS — PIERRE SHALE

UPPER CRETACEOUS — NIOBRARA MARL

QUATERNARY

TERTIARY

CRETACEOUS

Geologic Contact dashed where approximately located

Lake

Meltwater channel

Ice-contact face

Intermittent lake or slough

Intermittent stream

Gravel pit

Figure 4. Legend for Figure 3 geologic map (from Hedges, 1975).

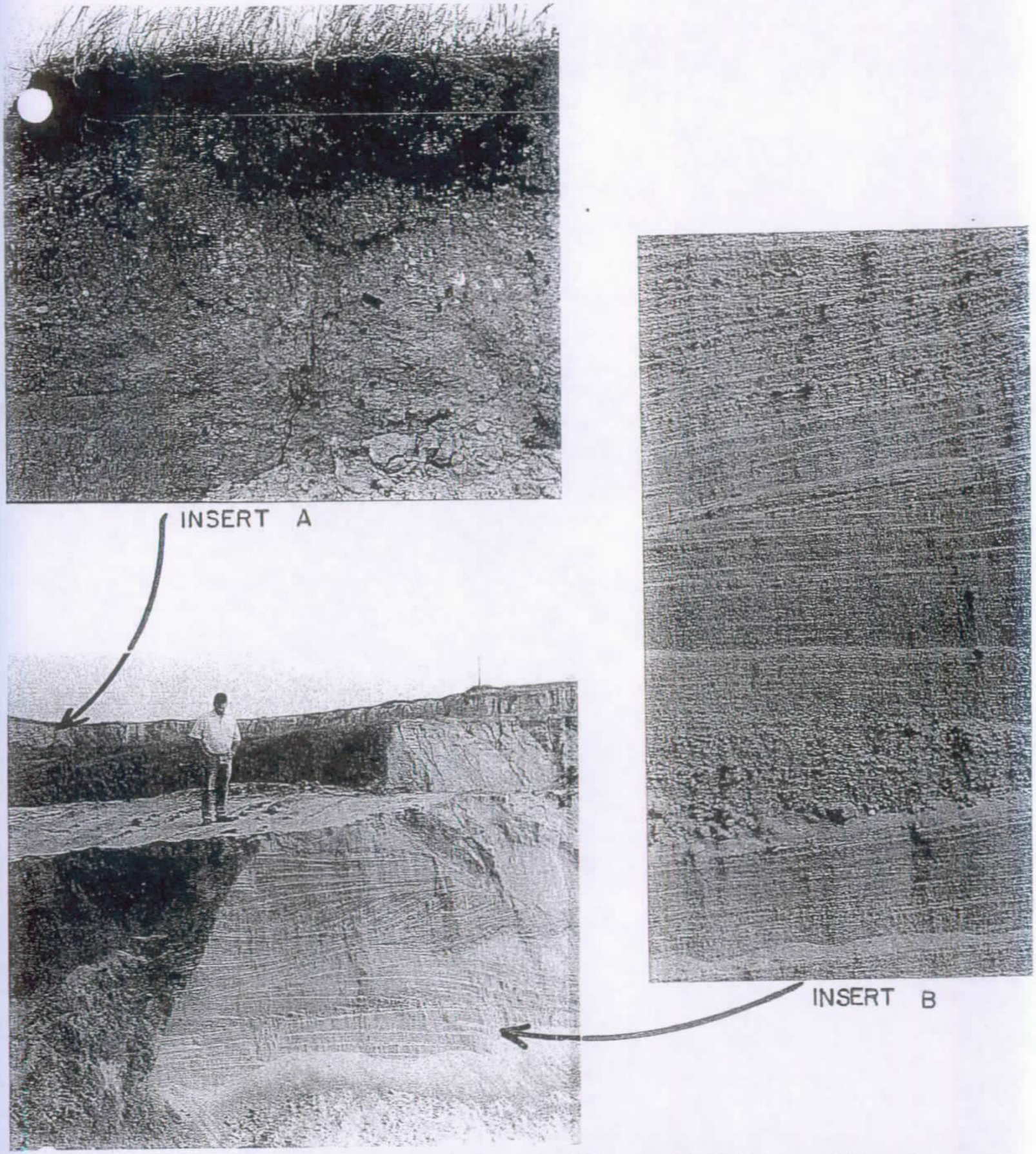

Figure 5. Photographs of the Wagner Building and Supply Co. sand and gravel pit just NW of the Ft. Randall Casino. About 10 ft of till (Insert A) overlies about 40 ft of Herrick Formation sand and gravel (Insert B).

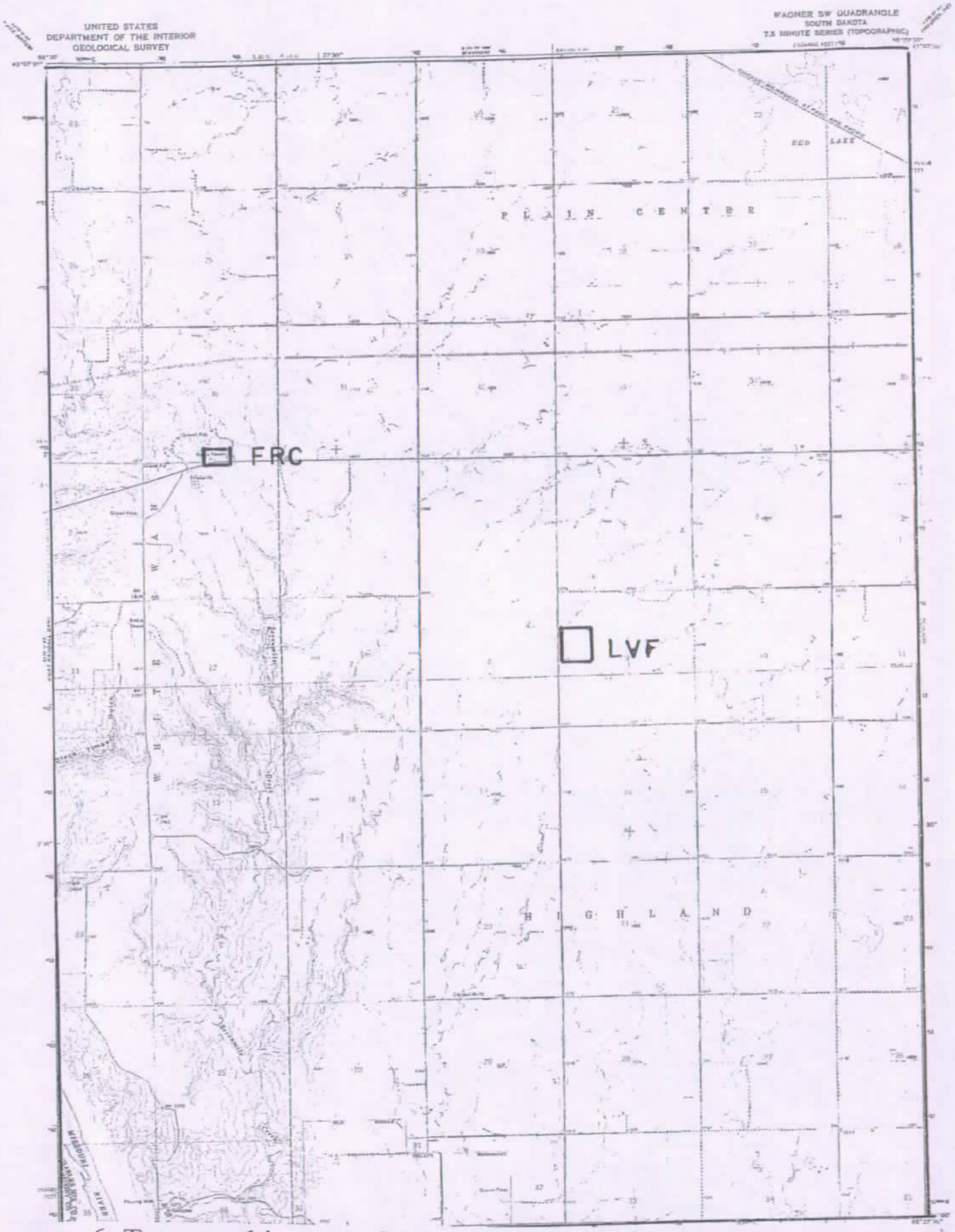

Figure 6. Topographic map of the area east of Pickstown. From USGS Wagner SW 7.5 minute quadrangle. Original at 1:24,000 scale. Contour interval 10 ft. Long View Farm

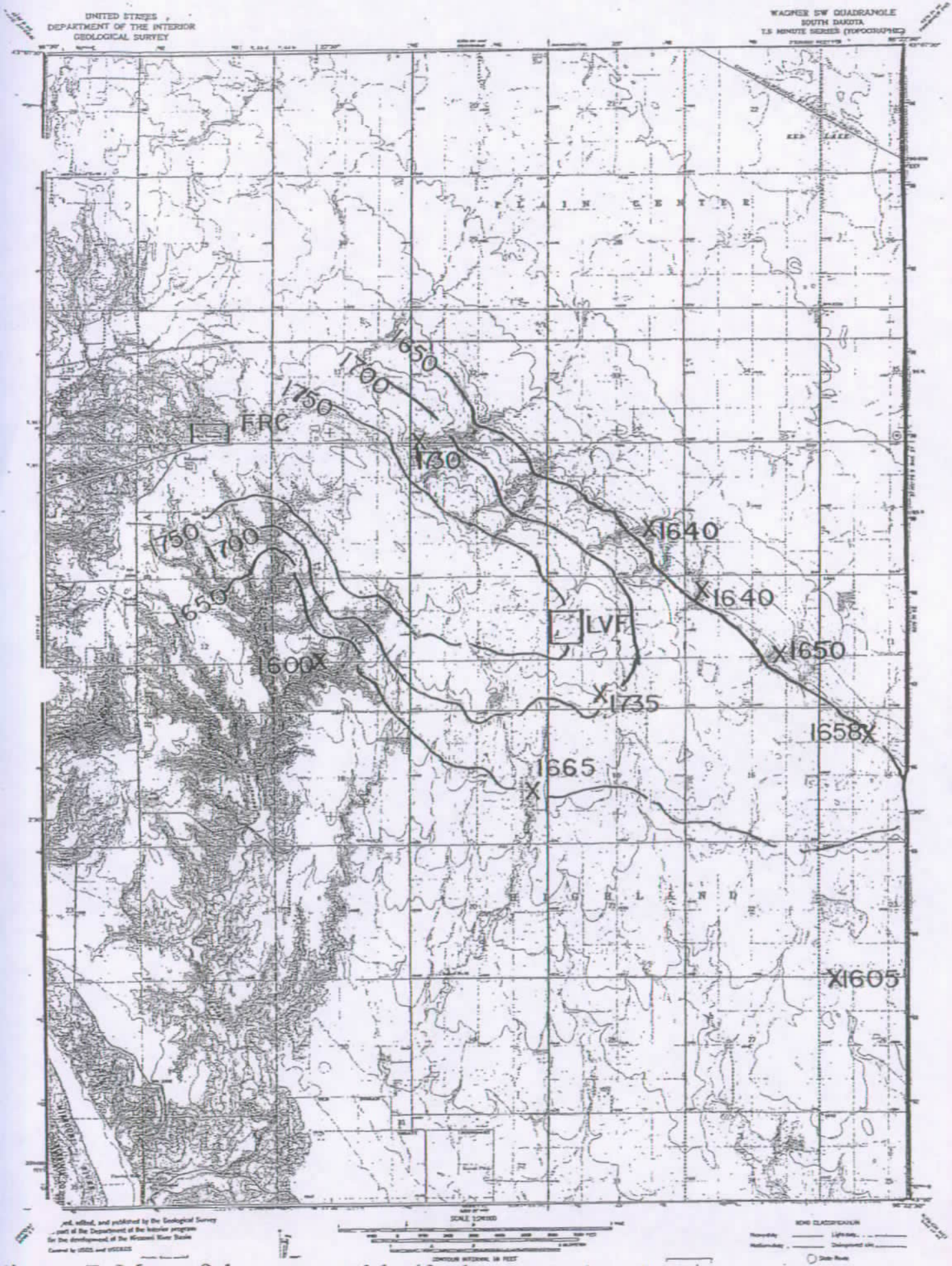

Figure 7. Map of the water table (ft above sea level). Long View Farm (LFF) and Ft. Randall Casino (FRC) are shown

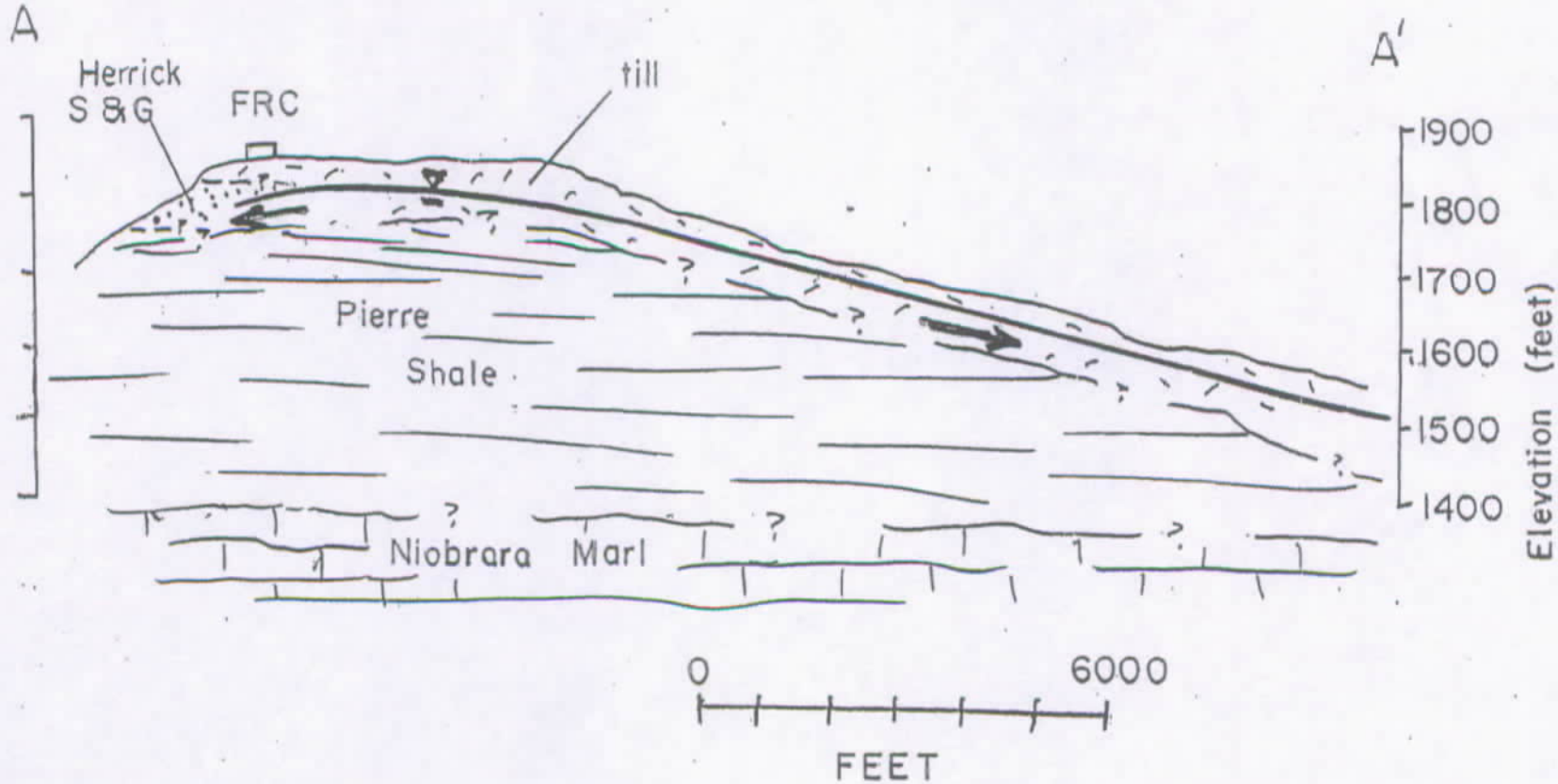

Figure 8. Geologic cross-section through Ft. Randall Casino. The location of A-A' is shown in Figure 10. The geologic contacts and position of water table are approximate. The general ground water direction is shown.

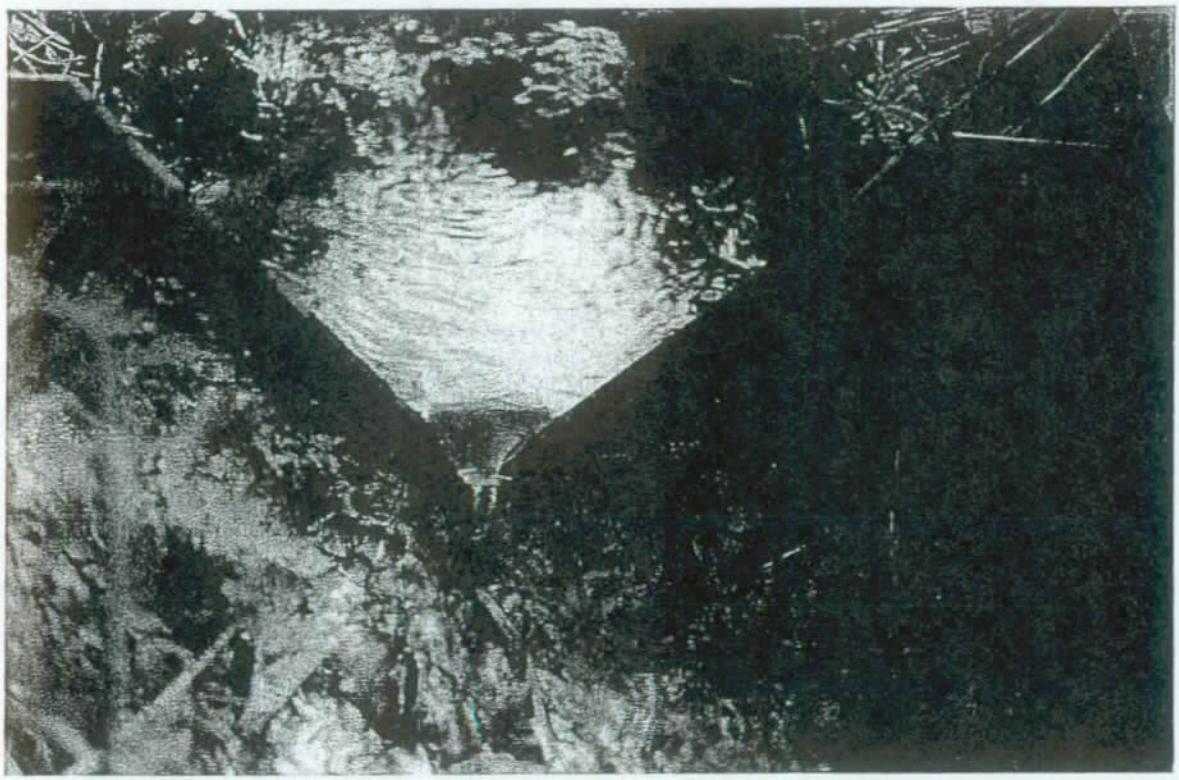

Figure 9. October 10, 2008, photograph of 6 gpm flowing through 90 degree V-notch weir. This measurement of spring discharge was made on a tributary to Sevenmile Creek (located by the 1600 ft data point on Figure 7).

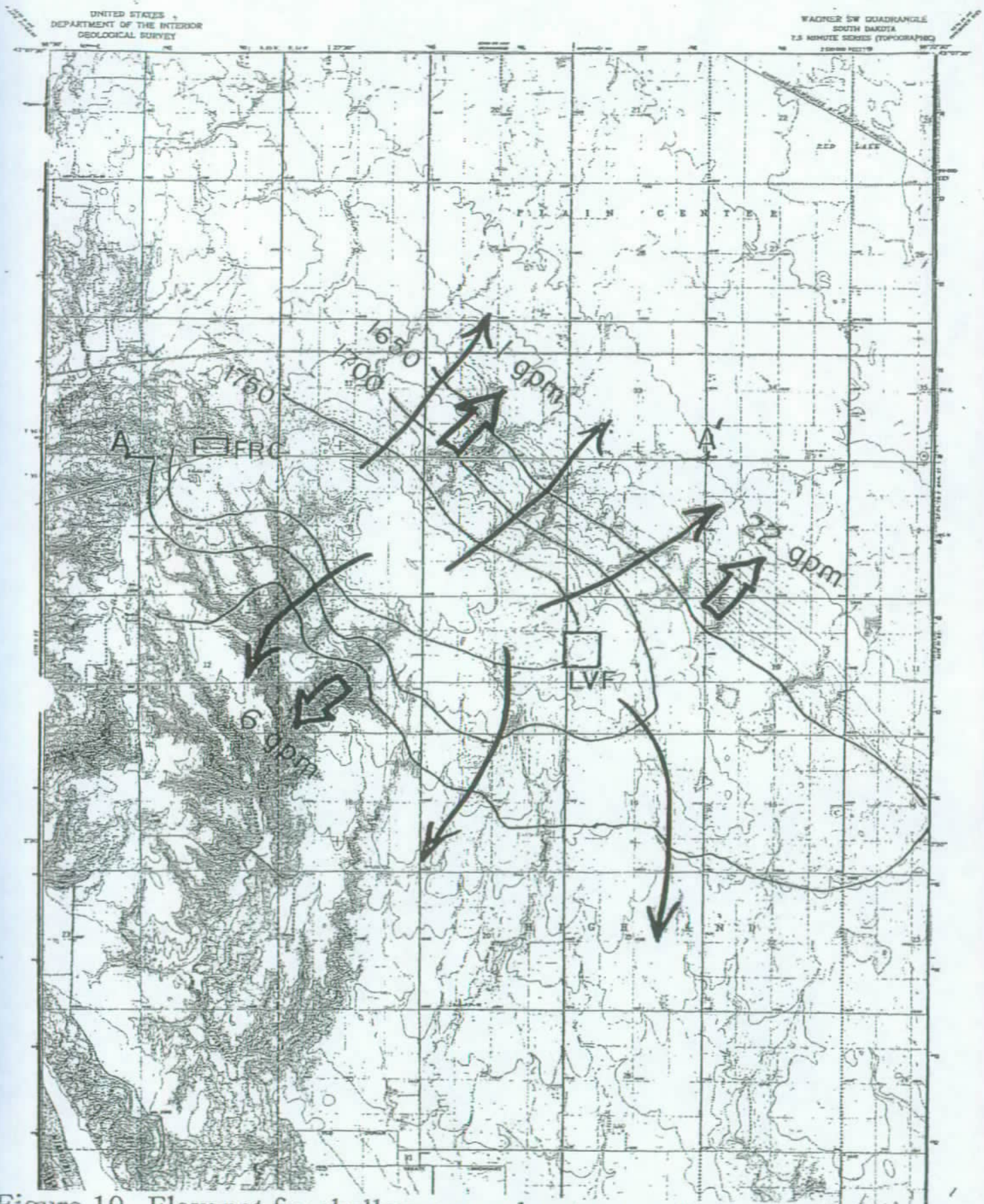

Figure 10. Flow net for shallow ground water near Long View Farm. This map is based on the water table map (Figure 7). Spring discharge (gallons per minute) measured October 9 and 10 is shown. The direction shallow ground water movement is shown.

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

RECEIVED
MAR 17 2009

March 16, 2009

Rebecca L. Kidder
Abourezk Law Firm
P.O. Box 9460
Rapid City, SD 57709-9460

Dear Ms. Kidder:

This is in response to your January 14, 2009, letter to Kent Woodmansey. In your letter, you requested the Department of Environment and Natural Resources to reconsider its September 2007 assessment of the ground water conditions at the Long View Farm LLP site in Charles Mix County. Your request was based on a hydrology study by Perry H. Rahn, PhD, PE, which was included with your letter.

In your letter you also indicate your request is based on Administrative Rules of South Dakota (ARSD) 74:52:04:07(2) and (4). This rule allows modification of a permit or its revocation if information becomes available that the permittee failed to disclose all relevant facts or if there is a determination that the permitted activity actively endangers human health or the environment. You indicate that the department was aware of the presence of shallow ground water at the Long View Farm site because it was evident during site construction and because petitions filed with the department indicated as such.

To respond to your request, it is important to note that the department is required to determine the presence of shallow aquifers, not shallow ground water, at proposed concentrated animal feeding operations and land application sites. The presence of shallow ground water does not indicate the presence of a shallow aquifer. "Shallow aquifer" is a term statutorily defined in South Dakota Codified Law (SDCL) 34A-3A-24.

Sarah Speck with the Surface Water Quality Program did the department's initial assessment for the Long View Farm site to determine the presence of a shallow aquifer relative to the site. In light of your request, Derric Iles, State Geologist, South Dakota Geological Survey, reviewed Ms. Speck's assessment and Dr. Rahn's hydrology report. The summation of Mr. Iles' review is enclosed.

In short, Mr. Iles agrees with Ms. Speck's assessment of the lack of a shallow aquifer at the Long View Farm site in Charles Mix County. Therefore, the department's decision there is no requirement for ground water monitoring or a ground water discharge permit remains unchanged. Also, there is no need to modify or revoke the general permit coverage issued to Long View Farm.

Please contact me if you have questions regarding this letter.

Sincerely,

Jeanne Goodman, Administrator
Surface Water Quality Program

Enclosure

cc: Derric Iles, State Geologist
Yankton Sioux Tribe Business and Claims Committee
Roxanne Giedd, Deputy Attorney General

South Dakota Department of
Environment and Natural Resources
GEOLOGICAL SURVEY

AKELEY-LAWRENCE SCIENCE CENTER, USD
414 EAST CLARK STREET
VERMILLION, SD 57069–2390
605–677–5227
FAX 605–677–5895
INTERNET *www.state.sd.us/denr*

Memorandum

To: Jeanne Goodman
From: Derric L. Iles
Date: February 2, 2009
Re: Long View Farm in Charles Mix County

At your request, I have reviewed the following three documents.

1. A letter from Rebecca L. Kidder (Abourezk Law Firm) to Kent R. Woodmansey of the Department of Environment and Natural Resources (DENR) dated January 14, 2009
2. A memorandum from Sarah Speck (DENR) to Darold Krein (DENR) dated September 9, 2007
3. A report authored by Perry H. Rahn titled *Hydrogeology of the Ft. Randall Casino area, Charles Mix County, South Dakota* and dated November 25, 2008

My comments presented below are referenced to specific portions of the letter, memorandum, or report where appropriate.

<u>Kidder Letter, page 1, first and last paragraphs</u>
It is stated in the first paragraph that "*The report documents the presence of shallow groundwater near and under this CAFO and the manure management fields for Longview Farm LLP.*" In the last paragraph and last sentence on page 1 that continues onto page 2, it is stated that "*It is further evident in the hydrology report that prior studies of groundwater in Charles Mix County, which were relied upon in the hydrology report commissioned, documented the presence of shallow ground water as early as 1975.*" These two quoted sentences imply that the author of the letter believes that the presence of shallow ground water is significant and perhaps may have been unknown or overlooked as the permit for the CAFO was considered by the DENR. However, shallow ground water is the norm in most of the state east of the Missouri River and its likely presence at shallow depths near the CAFO is not a revelation. Shallow ground water may be present in permeable sediments (e.g., sands and gravels) and low-permeability sediments (e.g., clays) alike. An important aspect of the permitting process is to assess whether a shallow aquifer is present, not whether shallow ground water is present.

Kidder Letter, page 1, third paragraph

The first sentence of this paragraph states "*Our request is based upon South Dakota administrative regulations 74:52:04:07 (2) and (4) which allow modification of a permit or its revocation if information becomes available that the permittee failed to disclose fully all relevant facts, or if there is a determination that the permitted activity actively endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination, and additional South Dakota law and regulation as applicable to NPDES permitting.*" The implication here is that the permittee failed to fully disclose relevant facts during the permitting process or that some new information has been found that could be grounds for modification or revocation of the permit. I cannot speak to the former, but I did not find any information in the report prepared by Perry H. Rahn that would be grounds for modification or revocation of the permit.

Speck Memorandum, page 1, second paragraph

It is stated that "*According to aquifer studies of Charles Mix County, there are no shallow aquifers present at the facility location that meet the definition in SDCL 34A-3A-24. Three submitted on-site boring logs indicate a soil profile of 51 feet of weathered lean clay.*" This shows that DENR, in consideration of the permit application for the CAFO, determined that there are no shallow aquifers at the CAFO site (as defined in SDCL) and also shows that there was new, site-specific evidence provided by the permittee to demonstrate the lack of a shallow aquifer at the CAFO site.

Rahn Report, numbered page 3, Geology section, second paragraph

This paragraph briefly mentions three aquifers: the Niobrara Formation, the Codell Sandstone member of the Carlile Shale, and the Dakota Sandstone. It is stated that "*the potentiometric surface of these aquifers generally flow westerly towards the Missouri River.*" Potentiometric surfaces do not flow; rather, ground water flows. A map of a potentiometric surface can be used to help predict the potential direction(s) of ground-water flow. Two references for Mr. Rahn's information are listed in the paragraph as Kume (1972) and Hedges (1975). The Kume (1972) reference was superseded by a later report (Kume, 1977) that contains more, and more detailed, information related to water resources of Charles Mix County.

- None of the three references contains information on the potential ground-water flow directions in the Niobrara Formation so it is unknown on what Mr. Rahn based his opinion of flow direction in the Niobrara Formation.
- Figure 17 in Kume (1977) shows that the potential direction of ground-water flow in the general area of the Ft. Randall Casino and the CAFO, in the Codell aquifer, is to the south-southeast and not westerly as stated by Mr. Rahn. Neither of Mr. Rahn's stated references (Kume, 1972 and Hedges, 1975) contain information on the potential direction of ground-water flow in the Codell aquifer.
- Figure 4 in Kume (1972) and figure 20 in Kume (1977) show that the potential direction of ground-water flow in the area of the Ft. Randall Casino, in the Dakota aquifer, is likely

westerly as stated by Mr. Rahn but the potential direction of ground-water flow in the Dakota aquifer in the area of the CAFO likely different.

There was no explanation provided in Mr. Rahn's report regarding the significance of his stated westerly ground-water flow direction as related to the topic of the CAFO.

The references of Kume (1972, 1977) and Hedges (1975) are available for free download from the Geological Survey Program web site. The links to these references are provided below.

Kume (1972):

- http://jurassic2.sdgs.usd.edu/pubs/pdf/IP-02.pdf

Hedges (1975):

- http://jurassic2.sdgs.usd.edu/pubs/pdf/B-22(1)%20-%2049%20pages.pdf
- http://jurassic2.sdgs.usd.edu/pubs/pdf/B-22(1)%20-%20figures%202%20&%2011,%20plates%202,%203,%204%20&%205,%2011x17%20inches,%206%20pages.pdf
- http://jurassic2.sdgs.usd.edu/pubs/pdf/B-22(1)%20-%20plate%201,%2025x36%20inches.pdf
- http://jurassic2.sdgs.usd.edu/pubs/pdf/B-22(1)%20-%20plate%207,%2013x11%20inches.pdf

Kume (1977):

- http://jurassic2.sdgs.usd.edu/pubs/pdf/B-22(2).pdf

Rahn Report, numbered page 4, second full paragraph

It is stated that "*Figure 3 and 4 shows Qwlts (a variety of glacial till called "stagnation drift") and Qwlt ("glacially modified bedrock").*" Figures 3 and 4 are excerpts from Plate 1 in Hedges (1975). There is no unit labeled Qwlt on Plate 1. From the definition for Qwlt provided by Mr. Rahn, I suspect that he meant Qwltd instead of Qwlt. The complete definition for the geologic unit Qwltd on Plate 1 in Hedges (1975) is "Till (glacially modified bedrock)–Glacially modified stream-eroded bedrock topography, till generally less than 50 feet thick; bedrock outcrops common; local relief highly variable, integrated drainage."

Rahn Report, numbered page 5, first paragraph

It is stated that "*The presence of permeable deposits such as the Herrick Formation has legal relevance because a ground water discharge permit and ground water monitoring is required by SD DENR for new CAFOs located over shallow aquifers.*" I assume that the Herrick Formation referred to by Mr. Rahn is the same as the Herrick gravel identified in Hedges (1975). No information was provided by Mr. Rahn that would document the Herrick gravel to be present under the CAFO. Kume (1972, 1977) and Hedges (1975) did not show the Herrick gravel to be present under the CAFO. A more recent map prepared by the Geological Survey Program does not show a shallow aquifer (as defined in SDCL 34A-3A-24) to be present under the CAFO. This recent report (Jensen, 2008) is titled *First Occurrence of Aquifer Materials in Charles Mix County, South Dakota* and was published in 2008. This map was prepared specifically to provide

information regarding the depth to the first mappable aquifer unit/material. The reference of Jensen (2008) is available for free download from the Geological Survey Program web site (http://jurassic2.sdgs.usd.edu/pubs/pdf/AM-29_20080515.pdf).

Rahn Report, numbered page 6, second full paragraph

It is stated that "*The significance of the Herrick Formation to this study is that this thick permeable unit is exposed at the Ft. Randall Casino area and is thinly covered by glacial till. Although Jensen's (2008) map shows the Herrick Formation not extending under the Long View Farm, without detailed test drilling the areal extent (and proximity to the surface) of this permeable unit is not known*" The significance of a unit cropping out at land surface near the casino and being thinly covered by till is not clearly explained by Mr. Rahn. The implied meaning of these two quoted sentences seems to be that if the Herrick gravel that can be seen at land surface near the casino, it might also be present elsewhere where it cannot be seen. However, Kume (1972, 1977), Hedges (1975), and Jensen (2008), after consideration of all available test hole and well logs and other geologic information, did not interpret the Herrick gravel to be present beyond its present mapped extent. Additionally, there are three test holes that were drilled to 51 feet at the CAFO facility (Long View Farm) that document the absence of a shallow aquifer at the CAFO site. Results from these three test holes, which were submitted to DENR as part of the permit application, are consistent with the interpretations of Jensen, Hedges, and Kume. Mr. Rahn offered no evidence to bring these interpretations into doubt.

Rahn Report, numbered page 6, last full paragraph

It is stated that "*Kume (1977) shows the Choteau aquifer extending to 3 miles west of Wagner.*" Figure 15 in Kume (1977) actually shows the western boundary of the Choteau to be slightly greater than 5 miles due west of Wagner and about 3 miles to the southwest of Wagner.

Rahn Report, numbered page 6, last paragraph continuing onto page 7

It is stated that "*Table 1 shows data for three water samples collected by the author during October 9-10, 2008. The total dissolved solids average 2,557mg/L, which is higher than the Choteau aquifer.*" Table 1 indicates that one of these three samples was "*collected from a pipe at the spring source,*" one was "*collected in a pasture ..... approximately ½ mile below the spring complex,*" and one was "*collected from a shallow well.*" A reason for averaging the total dissolved contents of these three samples and then presenting the average concentration in the report was not provided by Mr. Rahn.

It is stated that "*The nitrate at two locations is less than 1 mg/L, which is an indication of ground water chemistry of this area.*" The significance of this statement is not clear. Any results of analyses of ground water from the area, whether the parameter is nitrate or something else, would be an indication of the chemical composition of water in the area.

Rahn Report, numbered page 8, first full paragraph

It is stated that "*Figure 7 shows: (1) the location and elevation of springs, and (2) the location and static level of shallow wells.*" There is no differentiation between springs and wells on figure 7. There are only Xs on the map which I presume represent the locations of springs and wells.

It is stated that "*The source of the water table elevation data includes spring elevation or static level measured on October 9-10 (circled number on Figure 7).*" There is no number on figure 7 which is circled.

It is stated that "*Additional springs are reportedly present at approximately the same elevation as the three springs measured on October 9-10 .....*" The locations of the three springs which were measured are not indicated.

It is stated that "*Some data shown in Figure 7 are based on the static level of wells published in USGS or SDGS websites. Based on these elevations, a map of the water table was prepared.*" Figure 7 is stated to have been developed using water levels from springs and wells measured by Mr. Rahn and from water levels from USGS or SDGS sources. The water levels from USGS and SDGS sources were not identified/provided in Mr. Rahn's report. Documentation must be available to justify using a particular well to represent the hydraulic conditions in a particular hydrostratigraphic unit; in this case, the water table in the shallow till. For example, it must be demonstrated that each well is completed at the appropriate depth and has a water level that is representative of the water table (unconfined hydraulic conditions) and not a water level that is representative of confined conditions. No information on well depths, well construction, or geologic conditions near each well was provided by Mr. Rahn. Additionally, water levels measured at springs may or may not be representative of the water table. For example, it would not be uncommon to have springs or seeps at several elevations on a hill slope in stagnation moraine. A change in the permeability of the moraine sediments could cause water migrating vertically downward toward the water table to be diverted to a hill slope at an elevation that is above the local water table. No documentation of geologic conditions or nearby water levels was provided for any of the spring sites discussed by Mr. Rahn. Thus, without further information it is not possible to adequately determine whether Mr. Rahn's representation of the water-table surface appropriately depicts the water table in the map area.

<u>Rahn Report, numbered page 9, points of conclusion</u>
It is stated that "*Shallow ground water is present in sufficient quantity for domestic and livestock use.*" To what area does this statement pertain? What is the significance of the statement? What evidence is there to substantiate this claim?

It is stated that "*Shallow ground water flow from the Long View Farm disperses in nearly all directions away from the site.*" It is my opinion that this statement is a bit too far reaching and generalized given the questions about the validity of the water table map and the lack of any site-specific evidence.

It is stated that "*The background ground water quality is typical for this area.*" It is not clear what the significance of this statement is or what constitutes "background ground water quality." Mr. Rahn offered only three water samples from disparate sources (a spring, from a pasture, and a well) and only provided data for total dissolved solids, chloride, nitrate as nitrogen, and phosphate. Additionally, there was insufficient discussion of the quality of water from samples, other than those three, to clearly establish what would commonly be expected as the quality of water from various sources.

It is stated that "*The stagnation till itself is fairly permeable, and may contain isolated unmapped outwash sand and gravel units.*" No evidence was provided by Mr. Rahn to support the generalized characterization of the permeability of this till unit as a whole. The occurrence of a spring is likely due to very localized geologic conditions and should not be used as a basis for characterizing and entire geomorphic unit as being fairly permeable.

It is also stated that "*More importantly, the thick Herrick Formation sand and gravel is exposed close to the Ft. Randall Casino, and may extend under the till throughout a large part of the area impacted by this CAFO.*" However, the four most comprehensive assessments of the area Kume (1972, 1977), Hedges (1975), and Jensen (2008) did not document the presence of shallow aquifer units (as defined in SDCL 34A-3A-24) in the area implied by Mr. Rahn. Additionally, Mr. Rahn did not provide any new evidence that would be cause for changing this interpretation. In fact, the only new subsurface information (three test holes to 51 feet) provided for the CAFO area was provided by the permittee for the CAFO facility and supports the interpretation that there is no shallow aquifer under the CAFO site.

DLI:co

RESPONSE TO DERRIC ILES' COMMENTS REGARDING REQUEST FOR MODIFICATION AND/OR RECONSIDERATION OF THE PERMITTING OF LONGVIEW FARM LLP

Prepared by Perry H. Rahn
May 26, 2009

I appreciate the careful review by Derric Isles on February 2, 2009, sent as a Memorandum to Jeanne Goodman. His comments primarily relate to my November 25, 2008, report "Hydrogeology of the Ft. Randall Casino area, Charles Mix County, South Dakota". My response to his comments is arranged according to his Memorandum.

Kidder Letter, page 1, first and last paragraph.
Iles confirms that "...shallow ground water is present" under and near Longview Farm.

Kidder Letter, page 1, third paragraph.
Iles states he "...did not find any information in the report prepared by Perry H. Rahn that would be grounds for modification or revocation of the permit". But my report shows ground water is utilized in this area by domestic wells, and springs discharge ground water away from the hill where the main CAFO facility is located. The permittee failed to disclosed all relevant hydrogeologic facts. The CAFO site has a unique hydrogeologic setting and requires special consideration concerning the modification or revocation of the permit.

Speck Memorandum, page 1, second paragraph.
The Memorandum from Sarah Speck to Darold Krein, dated September 9, 2007, describes water wells in this area. The memorandum states that three on-site boring logs were submitted by the permittee, indicating "...51 feet of weathered lean clay". The DENR concluded there were no shallow aquifers. Reliance upon the three soil borings to conclude there is no shallow aquifer present is inappropriate. Based on published documents available to me, it appears that only one of the soil borings went to 51 feet, while the other two went only to 30 feet. None of the soil borings went to 100 feet. No testing was done of the water table level as part of these three soil borings, although all borings indicate the soils are moist. If the water table is within 50 to 100 feet of the surface, and is in low permeability material, it is my understanding that is would meet the requirements of a protected aquifer.

My November 25, 2008 report shows the occurrence of ground water and the location of the water table by identifying and testing shallow wells, and measuring the discharge of springs on every side of the CAFO location. Figure 7 of my report documents, at every circled elevation on the map (shown as feet above sea level), the site of a spring or well and provides the elevation at which ground water occurs. Longview

Attachment

Farm LLP CAFO is located on the top of a low ridge, at an elevation of approximately 1770 ft. [Note: I understand that, through some computer function, the circles that I drew around the elevation number of Figure 7 did not reproduce on all the copies of my report. Because of this, a copy of Figure 7 is attached hereto which shows sites identified by the elevation number enclosed within a circle (to be precise, an "oval"). As shown in the attached Figure 7, ground water discharge as springs was documented at elevation 1730 ft north of the CAFO site, 1640 ft east of the CAFO site, 1665 ft south of the CAFO site, and at 1600 ft west of the CAFO site. In addition, the elevation at two spring elevations (taken from the topographic map) and the water table elevation (taken from static levels of the wells from public records) are shown on Figure 7 as "X" with elevation numbers. The static level on the well shown at 1735 ft above sea level on Figure 7 was measured on October 10, 2008. This is an abandoned well known locally as the old Morris Thompson place, now owned by Lynn Fisher. I measured a static level of 10 ft, and used the elevation of 1745 ft from the topographic map, thereby obtaining a ground water level of 1735 ft. These data, which were not previously available from general geological studies or hydrological studies of Charles Mix County, document a water table depth generally less than 35 ft throughout the area impacted by the CAFO operations.

Rahn Report, numbered page 3, Geology section, second paragraph.
I appreciate Iles' discovery of a typo in the sentence where the words "indicates ground water" were inadvertently left out. Iles identifies 3 issues with my report in this section. First, none of the references cited in my report identify ground water flow direction for the Niobrara formation, so there is no evidence upon which to determine ground water flow in this area. Second, Iles concludes from reviewing Figure 17 in the 1977 Kume report, that in this general area, ground water in the Codell aquifer flows south to southeasterly direction. Third, Iles concludes, based on review of Figure 4 in Kume (1972) that the ground water flow direction in the Dakota aquifer underlying the Fort Randall Casino area is likely westerly, but gives the opinion that in the area of the CAFO it is "...likely different". But all this discussion of hypothetical flow directions in these deep bedrock aquifers is irrelevant to the central issue, i.e. the shallow ground water conditions. As Iles points out, ground water flow direction in the Codell, Niobrara and Dakota aquifers does not affect a determination of DENR regarding the presence or lack thereof of shallow ground water or a shallow aquifer overlying these three bedrock aquifers in the area.

Rahn Report, numbered page 4, second full paragraph.
Iles found a typo on p. 4: the proper notation should be Qwltd (as shown correctly on Figure 3 and 4), and not as Qwlt. This comment is not relevant to the presence or lack thereof of a shallow aquifer protected under SDCL 34A-3A-24. The significance of this unit (stagnation drift), as documented by Hedges (1975), is confirmation of low permeability material. Further, Figure 5 in my report shows that just northeast of the Ft. Randall Casino, and northwest of the CAFO site, stagnation till lies on top of the Herrick Formation (extremely high permeability material). In addition, Plate 1 of Hedges (1975) documents the presence of stagnation drift in the area of the CAFO (a portion of Plate 1 is reproduced in my reports as Figure 3). Stagnation drift is a low permeability material under SDCL 34A-3A-24. If further documentation is necessary, I have determined,

through flow net analyses of this material, that it has a hydraulic conductivity of at least approximately 0.2 meters per day, roughly equivalent to published values of hydraulic conductivity for sandy till.

Rahn Report, numbered page 5, first paragraph.
Iles questions my use of the term "Herrick gravels" instead of the proper title "Herrick Formation". The term "Herrick gravels" was used by Gries (1996, p. 121).

Iles states that Kume (1972, 1977) and Hedges (1975) do not document the presence of Herrick Formation under the CAFO site, nor do they provide proof that it underlies the site. I made no borings at the precise CAFO location. Neither Kume nor Hedges made borings at the precise CAFO location to determine if the Herrick Formation underlies the site. Hedges (1975, Plate 1), shows Qh, the Herrick Formation (reproduced as Figure 3 in my report), in several locations both north, south, and east of the CAFO site. The presence of Herrick Formation near the Ft. Randall Casino is documented in my report (see Figure 5), and there is every reason to believe the Herrick Formation occurs under the areas impacted by this CAFO operation. The Herrick Formation certainly underlies, at less than 50 ft depth, some of the proposed manure spreading areas. I do not have access to the actual CAFO site, as DENR is aware. But DENR can perform testing at the CAFO site (as well as the area impacted by the manure spreading operations) pursuant to its regulatory authority and responsibility, which it has not done. In my report (p. 6, last full paragraph), I contend the Herrick Formation is present beyond the immediate mapped areas where it is exposed at the land surface. The three areas mapped by Hedges (see Figure 3 in my report) are simply areas where till was eroded off the Herrick Formation and it became exposed.

With respect to the Jensen (2008) report referenced by Iles to support his conclusion that there is no shallow aquifer at this location. It should be noted that Jensen (2008) actually infers the Herrick Formation in this area. His map legend includes a sand and gravel deposit and states: "First occurrence is generally below land surface; may not be uniform in depth and thickness and may be discontinuous in lateral extent." Additionally, Jensen's report is based upon a review of Hedges (1975) report. No study was conducted by Jensen at this CAFO location. To my knowledge, DENR has not made any spring discharge measurements near the CAFO location such as published in my report.

Rahn Report, numbered page 6, second full paragraph.
In the previous paragraphs I discuss the significance of the Herrick Formation. I respectfully disagree with Iles' interpretation that the Herrick Formation is not present beyond its present mapped extent.

Rahn Report, numbered page 6, last full paragraph.
Iles' comment about the distance to the Choteau aquifer is inconsequential and has no impact on the presence or lack thereof of a shallow aquifer or shallow ground water in this area.

Rahn Report, numbered page 6, last paragraph continuing onto page 7.
Iles questions why an average water quality, based on the three samples, was presented in my report. The rationale behind the inclusion of water quality data in my report was to

establish a baseline of water quality prior to operation of the CAFO. I was trying to encourage the local users of ground water to have water quality testing before the CAFO operation came into existence.

Iles is correct that the information on water quality is an indication of quality, not quantity or location of ground water. Water quality data was provided in my report so that a future study of water quality will have a historic reference, prior to the CAFO operation.

Rahn Report, numbered page 8, first full paragraph.

As discussed above, attached hereto is Figure 7 showing the spring and well locations and elevations. Iles indicates he disagrees with my conclusions concerning the water table elevation (e.g.; Figure 7, 8 and 10) because I did not provide data sets or detailed information on each well. Attached hereto is an example of well information that is available within USGS databases for examination.

Iles also casts doubt on my Figure 7, 8, and 10 based upon his theory that a "...change in the permeability of the moraine sediments could cause water migrating vertically downward toward the water table to be diverted to a hill slope at an elevation that is above the local water table." No citation to any literature is provided by Iles. My Figure 7 shows the location of springs and wells I measured in the field, and I stand by those measurements. Iles seems to be suggesting that the water table could be lower than the documented spring elevations and static water level in surrounding wells, but I think such a hypothesis is not tenable at this location. Iles' comment notwithstanding, I firmly believe my Figures 7 through 10 in my report are accurate depictions of the water table. Figure 7 shows an abandoned water well within one half mile of the CAFO site where a static level of 10 ft was obtained on October 10, 2008. At a minimum, with eight documented sites of ground water surrounding this CAFO on all sides, the water table is certainly much less than 100 feet below the CAFO site (elevation approximately 1770 ft). This documentation warrants further investigation by DENR. It should be noted that Iles does not reject my conclusions regarding the water table level, but simply states, "...without further information it is not possible to adequately determine whether Mr. Rahn's representation of the water-table surface appropriately depicts the water table in the map area."

Rahn Report, numbered page 9, points of conclusion.

Iles questions what area I am talking about, and what evidence is presented to support the conclusion that shallow ground water is present in sufficient quantities for domestic and livestock consumption. Figures 6, 7, and 10 show the area referenced in my report. This includes the CAFO facility as well as the manure management areas LVF has contracted for dumping of manure. This is apparent from my report, but is stated herein to clarify this issue. Hydrogeologic evidence is set forth in my report, including on-site investigation of shallow wells and springs at multiple locations on every side of the CAFO location. [Interestingly, Iles does not challenge my spring discharge measurements with the V-notched weir.] I did not have access to the actual CAFO site. Only DENR may access the CAFO site to conduct further investigation. DENR did not require soil borings to 100 feet, nor did DENR require water table measurements to be obtained onsite as part of the soil boring process. Neither Iles' memorandum nor any

DENR report provides any documentation supporting a conclusion that shallow ground water is not present in sufficient quantities for use for domestic and livestock purposes. The significance of my report is that (1) it documents the presence of shallow ground water that is susceptible to contamination from the CAFO that is used for human and livestock consumption, and (2) it documents the possible presence of the Herrick Formation, a shallow aquifer under the areas impacted by this project.

Iles offers the opinion that my statement that ground water flows in all directions away from the CAFO site is "...a bit too far reaching and generalized". It seems rather picayune to argue whether my Figure 10 shows arrows that point in all directions. Iles further opines upon the lack of "...site specific evidence" on the actual CAFO site (which is available only to DENR to test). He states that my conclusions are invalid unless the source data for USGS wells and geologic studies for each of the spring sites is provided to independently verify my conclusions. My original report and this "Response" are provided for DENR's consideration.

Iles objects to my conclusion that the water quality from the three samples I obtained is typical for this area. There are numerous water quality studies given in the references cited of my report. DENR is in possession of these references and could pursue this question, although I find such an endeavor to be beside the point.

Iles concludes, without any scientific citation, that the "...occurrence of a spring is likely due to localized geologic conditions" There are three springs that I measured on October 9-10, 2008; they are located to the east, south, and west of the CAFO. Their location and elevation is consistent with the static water level in surrounding wells, and therefore is not indicative of "localized" conditions. In other words, I believe my Figures 7 through 10 represent the true water table, not some perched conditions.

The soil borings taken on the CAFO site at 51 and 30 feet showed weathered clay with gravel deposits, which under SDCL 34A-3A-24 is defined as low permeability soils. This is consistent with Kume, Hedges, etc. There is no evidence cited by Iles or any evidence in the scientific literature that the area within 100 feet of the land surface is anything other than low permeability soils. Therefore, with a water table within 100 feet of the surface of the land, and low permeability materials overlying this water table, there is evidence of a shallow aquifer protected under SDCL 34A-3A-24 that merits further investigation by DENR. This is not just a flat terrain underlain by impermeable glacial till. It is a unique place.

In summary, it appears that the Iles memorandum was an assessment conducted to discredit my study, and not to evaluate my new hydrogeologic evidence that is specific to the CAFO operation. Iles has carefully reviewed my report, and I thank him for that. And he has improved the content of my report by discovering a few typos. But he made no effort to look at the significance of shallow ground water and the extent of a major aquifer under the areas impacted by this operation. Instead, he seems focused on justifying his decision that no further investigation is warranted.

Perry H. Rahn

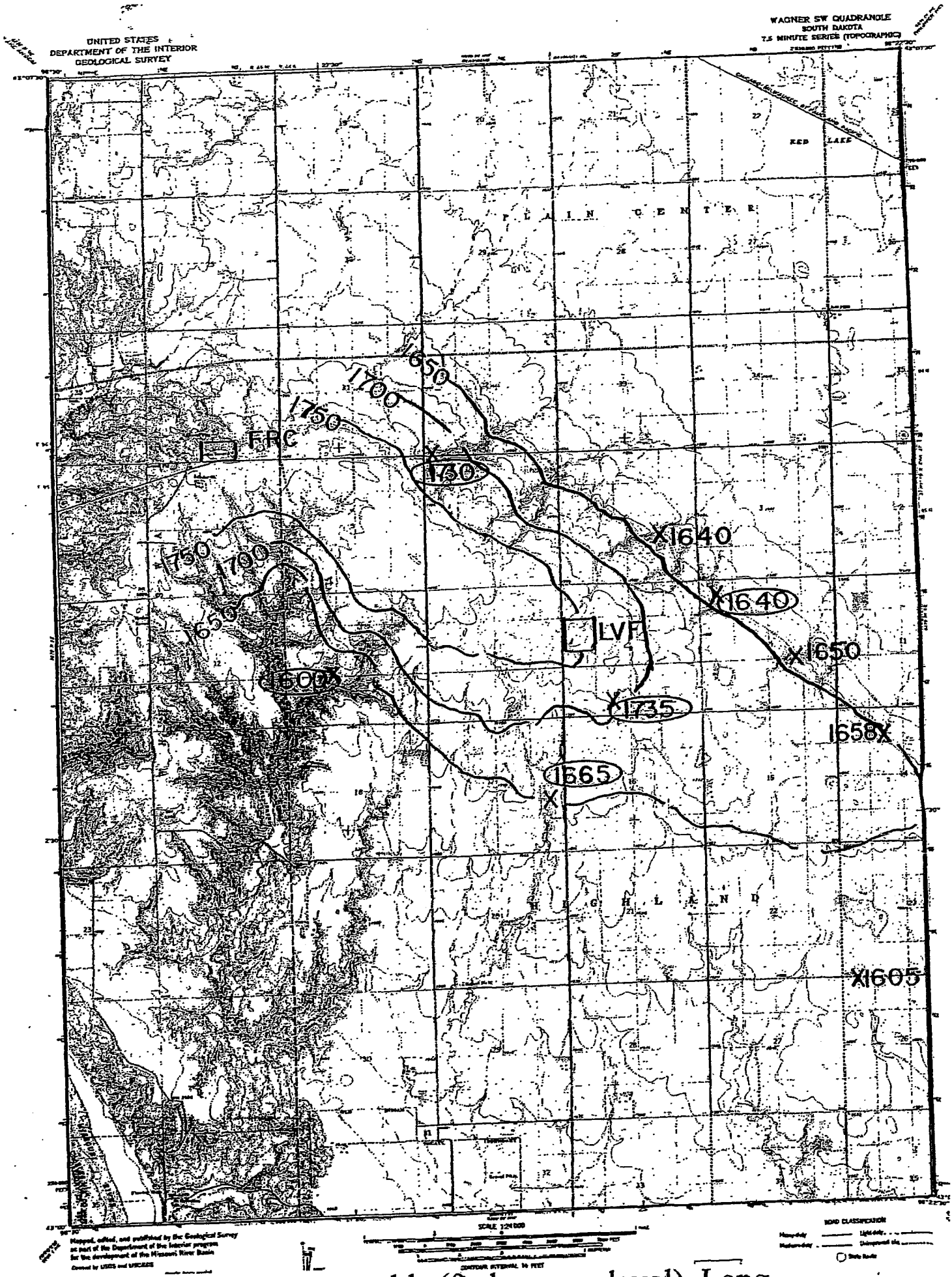

Figure 7. Map of the water table (ft above sea level). Long View Farm (LFF) and Ft. Randall Casino (FRC) are shown.

Sect 9

Record 229 of 780

Location Information

Legal Location:	SW SW SW SW SEC. 09, T. 095 N., R. 64 W.		
County:	CHARLES MIX	**Location:**	095N-64W-09CCCC
Basin:	MISSOURI	**Latitude:**	43 03' 12"
Hydrologic Unit Code:	10170101	**Longitude:**	98 25' 36"
Land Owner:		**Ground Surface Elev. (ft.):**	1725 T

Project Information

Project:	CHARLES MIX COUNTY STUDY		
Drill Date:	07/08/1969	**Geologist:**	
Company:	SDGS	**Geologist's Log:**	
Drilling Method:	AUGER	**Driller:**	J. KALISZEWSKI
Test Hole Number:	1-69	**Driller's Log:**	
Samples:		**Total Drill Hole Depth (ft.):**	118.0

Geophysical Information

Spontaneous Potential:		**Single Point Resistivity:**	
Natural Gamma:		**Extra:**	

DEPTH TO WATER ABOUT 35 FEET.

Elevation (ft.)	Depth (ft.)	Description
1725.0 - 1723.0	0.0 - 2.0	TOPSOIL
1723.0 - 1719.0	2.0 - 6.0	CLAY, SILTY
1719.0 - 1696.0	6.0 - 29.0	CLAY, BROWN, PEBBLY; SOME VERY FINE SAND FROM 24 TO 29 FEET
1696.0 - 1692.0	29.0 - 33.0	CLAY, GRAY, PEBBLY
1692.0 - 1681.0	33.0 - 44.0	CLAY, BROWN, PEBBLY
1681.0 - 1612.0	44.0 - 113.0	CLAY, GRAY, PEBBLY
1612.0 - 1607.0	113.0 - 118.0	MARL, SPECKLED

No

Record 231 of 780

Location Information

Legal Location:	NW NW NW SW SEC. 11, T. 095 N., R. 64 W.		
County:	CHARLES MIX	**Location:**	095N-64W-11CBBB
Basin:	MISSOURI	**Latitude:**	43 03' 35"

Sister Patricia Mylott
P.O. Box 217
Marty, SD 57361

RECEIVED
SEP 27 2010
WATER RIGHTS
PROGRAM

September 20, 2010

Chief Engineer
Water Rights Program
Foss Building
523 E. Capitol
Pierre, SD 57501

Dear Sir:

Long View Farms' application for a permit to appropriate 0.067 cubic feet per water from the Codell Aquifer is of great concern to me. Long View Farms will draw that much more water from the compromised aquifer.

I have been concerned about the pollution of our waters for quite a while. If water is drawn from the aquifer and then used for various purposes in the hog confinement area, it will return to the ground and eventually the aquifer, polluted.

I don't believe the holding receptacle for the hog waste is safe in the long term. According to Professor Thaler, the expert for Long View Farms, the gases emanating from the hog site are noxious even if not smelled . Many here believe they are causing and will cause or exacerbate health problems especially for children here. Many children have asthma. There is a day care center a mile and a half southwest of the hog containment facility. Marty Head Start moved to a new location, mostly because of this. I can get the statistics from Indian Health Service, if necessary.

We at Marty are offended by the pig smell often as we go past the confinement area. Sometimes the smell reaches us clear down to at Marty. Sometimes the smell is from local fields which take the hog waste and fertilize their fields with it. June 12 we had a bad flood here at Marty from which we are still cleaning up. I don't know if any waste from the confinement area got washed down to Marty but the fields south of the hog confinement area washed down to Marty all sorts of contaminants.

I don't know how Long View Farms got away with its water use considered residential.

Please give us who are opposed to the Hog Confinement operation more time before deciding to give or not give them more water from our precious aquifer. Please do not give them any more water. I would prefer the operation to be shut down permanently. It seems to me that they employ only about 8 people.

Sincerely yours,

Sr. Patricia Mylott

cc to Mr. Arlan Moss

September 23, 2010

RECEIVED
SEP 27 2010
WATER RIGHTS
PROGRAM

Dear Mr. Chief Engineer;

Hello! My name is Eva Bruguier; I am a resident of Marty, South Dakota, which is located about four (4) miles south of the Longview Hog Farm.

I am writing to you to voice my concerns about Longview Farms requesting a permit for a commercial well.

I oppose issuing a commercial permit to the Longview Farms for the following reasons:

1. It is not in the public interest.
2. It is harmful to the environment and health of those who live near it or where manure is being spread.
3. It will contaminate our water, which will make us sick.

I am also requesting an automatic delay of the hearing.

Sincerely,

Ms. Eva Bruguier
Ms. Eva Bruguier

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SEP 2 8 2010
WATER RIGHTS
PROGRAM

September 27, 2010

Chief Engineer
Water Rights Program
Foss Building
523 E. Capitol
Pierre, SD 57501

Long View Farms, LLP
c/o Arlan Moss
3172 320th St.
Hull, IA 51239

Re: Public Notice, Report, Recommendations and Notice Of Hearing on Application No. 7203 to Appropriate Water Filed by Long View Farm, LLP.

Dear Clerk of Court:

Please find enclosed for filing a Petition in Opposition to Application and Recommendation, Petition to Intervene, and Request for Hearing Extension of at Least 20 Days and Certification of Service in the above matter. If you have any questions or concerns, please contact me, at your convenience. Thank you.

Sincerely,

Faith Spotted Eagle

Faith Spotted Eagle
P.O. Box 667
Lake Andes, SD 57356
(605) 481-0416

cc: Parties on Services List
Judy Honimichle
Sharon Drapeau
Wesly Hare
Glenn Drapeau
Kip (Spotted Eagle) Collins

CERTIFICATE OF SERVICE

I hereby certify that I mailed, First Class, a copy of this Petition on September 27, 2010 to:

Chief Engineer
South Dakota DENR
Water Rights Program
Foss Building
523 E. Capitol
Pierre SD 57501

Longview Farms LLP c/o
Arlen Moss
3172 320th St.
Hull, IA 51239

Rebecca Kidder, Attorney
Abourezk & Zephier PC
2020 W. Omaha St.
Rapid City, SD 57702

Faith Spotte Eagle, Petitioner
P.O. Box 667
Lake Andes, SD 57356
(605) 481-0416

RECEIVED
SEP 2 8 2010
WATER RIGHTS PROGRAM

OFFICE OF THE CHIEF ENGINEER
WATER RIGHTS PROGRAM
STATE OF SOUTH DAKOTA

In the Matter of Water Permit	)	Application No. 7206-3
	)	
Application 7206-03	)	PETITION IN OPPOSITION TO
	)	APPLICATION AND
	)	RECOMMENDATION, PETITION TO
	)	INTERVENE, AND REQUEST FOR
	)	HEARING EXTENSION OF AT LEAST
	)	20 DAYS

Individual Petitioners Faith Spotted Eagle, Judy Honimichle, Sharon Drapeau, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins(Petitioners), hereby submit this Petition in Opposition, Petition to Intervene, and Petition for a Hearing Extension of at least 20 days, pursuant to SDCL §46-2A-6, Application to Appropriate Water 7206-03 (Application) filed by Long View Farms LLP (LVF). Petitioners are also members of the Yankton Sioux Tribe which is a federally recognized Indian Tribe located within Charles Mix County, South Dakota. The Application – No. 7206-3 - requests approval for the diversion of 0.067 cubic feet of water per second from one well to be completed into the Codell Sandstone Aquifer for purposes of commercial use in a livestock confinement operation located directly adjacent to and abutting lands comprising the Yankton Sioux Indian Reservation, South Dakota. The diversion point will be located in SW ¼ NW ¼ Section 9,T. 95N, R64W.

Petitioner Faith Spotted Eagle, Kipp Spotted Eagle Collens and Allen Hare are owners of numerous wells utilized for domestic water supply, livestock, and irrigation located upon Reservation lands and other lands adjacent to and surrounding the well

location. These are primarily shallow water wells which will be impacted if the aquifer recharge is not commensurate with total withdrawals from the aquifer.

Petitioners file this petition in opposition and to intervene for the following reasons:

1. This Application does not satisfy any of the four statutory criteria in SDCL Chapter 46-2A governing the approval of applications to appropriate water resources. The Chief Engineers' determinations on all four criteria are unsupported by factual data and evidence on the recharge rate of the aquifer, or existing wells and springs utilized for domestic use in the immediate vicinity of this proposed well. See, Recommendation of Chief Engineer for Water Permit Application No. 7206-3, Long View Farms, LLP.

2. SDCL §46-2A-9 dictates that 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..." The application proposes to appropriate .067 cf/s from a well completed into the Codell Aquifer. SD DENR has not mapped the Codell Aquifer since 1982, despite the significant expansion of wells in the counties served by this aquifer. The only test wells DENR has investigated recently are 23 and 25 miles north and northeast of this location, which is too far from the present location to make a factual determination that this proposed well will have no impact on the existing domestic wells in close proximity to the location of this proposed well. Further, the Chief Engineer determined that the test well 23 and 25 miles north and northwest of the proposed location "show response to climatic conditions and annual fluctuations that may be due to pumping."

Further, the Chief Engineer relied solely upon the Applicant's report of two domestic wells in the immediate vicinity of this well, and has made no investigation of existing domestic wells in the vicinity of this proposed well. Petitoner Yankton Souix

Tribe in this matter provided to the South Dakota DENR on June 2, 2009 and January 14, 2009 a report from Professor Perry Rahn that documents the presence of nine shallow wells and springs in the immediate vicinity of the proposed well. See In re: Application No. 7206-3 Yankton Souix Tribe Petition In Opposition to Application and Recommendations, Petitioner to Intervene, and Request for Hearing Extension of at Least 20 Days (September 25, 2010) (Tribe's Petition) Attachment 1, Reports of Professor Perry Rahn (Rahn Report). Therefore, the conclusion that there is a reasonable probability of the availability of water is not based upon a factual determination based upon the data, examination of the springs and well in the immediate vicinity of this proposed well, or determination of the recharge rate of the Codell or Niobrara, or the shallow aquifer located in this area located within the Herrick formation.

3. Granting this permit will result in "unlawful impairment of existing rights." SDCL 46-2A-9. The Chief Engineer determined that there:

> are no nearby water permits/rights that obtain water from the Codell sandstone aquifer. There are some domestic wells in the area that use the Codell aquifer. The applicant indicates two sites with water well locations about 1.5 miles northwest and northeast of this site. At this distance and with relatively small pumping rate drawdown is not expected to be significant nor cause any adverse impacts. At one time the City of Geddes, Town of Ravinia and City of Lake Andes used wells from the Codell but now obtain water from the Missouri River or from rural water. Those wells are used as a backup water supply at this time. The only other Codell aquifer Water Right in Charles Mix County is for Clearfield Colony for domestic use.

Report on Water Permit No. 7026-6, For Long View Farms LLP, p. 1 (August 27, 2010). (LVF Report)

The Chief Engineer, however, has not provided any basis for his assumption that there "should not be" interference with existing water rights or domestic wells. The Engineer does not provide any information as to the relationship of the location of water right points of diversion or domestic wells and the hydrological connectivity of the proposed well in the Application. In addition, the Chief Engineer does not provide any

data on the specific amount of water needed by all other pre-existing wells. The Chief Engineer points to no assessment of the depths of the thousands of wells in this aquifer to determine this permit will not impact pre-existing appropriations of water. There is simply no basis upon which to determine that "no -intereference" with domestic water supply will occur. The United States Geological Survey has documented thousands of wells for domestic consumption in the Codell Aquifer Region. USGS Well Survey of Yankton Sioux Reservation, 2005; USGS 2007 Charles Mix County Well Survey. The Department was made aware of this information when the Petitioners filed its Protest of the Water Permit Application 7006-3, but has failed to investigate this information since that objection was filed on June 23, 2008. Until such time as the DENR has fully investigated the drawdown rates, capacity of the Codell aquifer, and the amount of water currently in use by domestic and other existing wells and natural shallow springs, given the sensitivity of the two test wells located 23 and 25 miles north and northeast of the proposed well location, the finding of the Chief Engineer that there is a reasonable probability that there will be no impairment of existing rights is unfounded.

Similarly, when combined with the fact that climate change is increasing the risk of U.S. crop failures, depleting the nation's water resources, and contributing to outbreaks of invasive species and insects, the water right will directly and negatively affect agriculture and livestock in central South Dakota. According to a report compiled by 38 scientists with the U.S. Department of Agriculture, the effects of climate change and other problems for the agricultural and forestry industries will persist for at least the next 25 years. AP, Feds: Climate Change Will Threaten Livestock Water Supply for Years (May 28, 2008). According to the report, drought-strained forests in the West and Southeast are easy prey for tree-killing insects like bark beetles. Snow in the Western mountains is melting earlier, making it more difficult for managers overseeing a long-

established system of reservoirs and irrigation ditches that serve Western states. *Id.* Further, the Southeast does not have the same kind of storage system because rain historically has been more consistent. Current weather disruptions have the region struggling with drought. Rising carbon dioxide levels are changing the metabolism of grasses and shrubs on range land, decreasing the protein levels in plants eaten by cattle. Permits for industrial uses that consume large amounts of water like the one in question will exacerbate such impacts.

4. On behalf of its membership, the Yankton Sioux Tribe is the owner of reserved water rights upon its Reservation lands established by the Treaty of 1858 and as diminished by the Act of 1894. See, Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable). The Tribe's rights to water from the Codell Aquifer are rights to sufficient water to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, and their "reasonably feasible" uses of such water. Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969). It includes the amount of water required to make the Reservation viable. Arizona v. California, 373 U.S. 546, 599 (1963). The courts have already determined that Tribes have the right to assert these rights on behalf of its members. See, United States v. Nebraska, 520 F.2d 676, 688 (9th Cir. 1975). The Chief of Engineers has not assessed the reserved water rights of the Tribe or determined the amount of water in the aquifer, and so has no reasonable basis to conclude, without further investigation, that the federally protected water rights of the Yankton Sioux Tribe are not impaired by this permit. These reserved water rights are federally protected from impairment by off-reservation withdrawals from the Codell Aquifer, including Permit 7006-3. Winters v. United States, 207 U.S. at 576; Arizona v. California, 373 U.S. at 599; Colville

Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981). The Yankton Sioux Tribe has the right to protect its reserved treaty water rights from appropriation by others and from "man-made despoliation." See, United States v. State of Washington, 506 F.Supp. 187, 203 (D. Wa. 1980). See also, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984)(requiring revival of wetlands decimated by non-Indian stream withdrawals); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)(requiring maintenance of minimum stream flow for downstream tribal fishery).

The use of water for a CAFO on lands upland from and directly adjacent to tribal lands and water supplies, both surface and subsurface, and the location of manure dumping fields adjacent to Reservation lands ensures runoff from the 976,200 cubic feet of liquid manure dumped annually will contaminate the Codell Aquifer and all surface waters on Reservation lands, resulting in impairment of the Tribe's and its tribal members' currently appropriated water and its reserved water rights.

As in this case, the Courts have found that if the suit is challenging the impact of a particular action on natural resources rights which are held for the benefit of tribal members, then individual members can file suit to protect such rights. *See Sohappy v. Smith*, 302 F. Supp. 899, 904 (D. Or. 1969). In other words, under *Sohappy*, the Extension violates Appellants' reserved water rights to the extent it threatens the amount of water they need to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, their "reasonably feasible" uses of such water. In addition, the courts have determined that the Tribe has the right to assert these rights on behalf of its members. *See United States v. Nebraska*, 520 F.2d 676, 688 (9th Cir. 1975). This is important because the Yankton Souix Tribe (Tribe) has similarly protested the granting of the water right. See Tribe's Petition

The ability of Appellants and the Tribe to apply to apply treaty water rights to preventing environmental degradation from the Water Right is also support by existing federal case law. While the courts have never settled on the question of whether treaty rights may be used to protect environmental resources, they have addressed it in several key places. In a case that was ultimately overturned by the 9th circuit on procedural grounds, for example, after enumarting the list of human caused factors sponsored by governmental entities, that have resulted in the rapid decline of the Columbia River salmon, the U.S. District Court for the Western District of Washington held that "implicity incorporated in the treaties' fishing claus is the right to have the fishery habitat protected from man-made despolation." *United States v. State of Washington*, 506 F.Supp. 187, (Dist. WA 1980). In reaching this conclusion, the court made the logical assumption that the "most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken." *Id.* Similarly, other courts have recognized the tribal interests in protecting environmental resources. In *United States v. Washington*, Phase II, the initial lower court decision applied the "moderate living needs" standard. *See also, United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. Denied*, 467 U.S. 1252 (1984), requiring a revival of wetlands that had been desicatted by non-Indian stream withdrawals. In *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), the court upheld a lower court ruling requiring non-Indians to maintain a minimum stream flow necessary for the survival of a tribal fishery.

Similarly, the discharge of manure into waterways through runoff releases antibiotic resistant toxic bacteria (i.e. e.coli, yersinia, leptospora, cryptosporidium parvum, giardia lamblia), other pathogens, and excessive nutrients into groundwater and surface water is a public health threat. High concentrations of animal waste from this CAFO will emit hydrogen sulfide, ammonia, Volatile Organic Compounds, and other

gases and particulate matter that are known to cause a human health threat once released into the air. Hydrogen sulfide is a health threat that is irreversible, exposure causes sore throat, seizures, comas and even death. Farmworkers and neighbors of existing hog CAFOs report headaches, shortness of breath, wheezing, excessive coughing, and diarrhea. Ammonia is another byproduct of animal waste and has been linked to acid rain. In Oregon, for example, the Columbia River Gorge has seen unprecedented levels of acid rain in recent years which is likely linked to ammonia releases at Three-mile Canyon Farms which is the single largest source of air pollution in that state. The American Public Health Association issued a resolution urging federal, state, and local governments and public health agencies, "to impose a moratorium on new CAFO's" on November 11, 2003. The noxious odors of the CAFO in question will create an ongoing and persistent nuisance to the thousands of people living and working within 6 miles of the CAFO and associated manure fields, including the Head Start School, the Tribe's Fort Randall Casino, which is heavily dependent on tourism, and the Tribe's Travel Plaza.

Further, Petitioners submit that there is a high probability that water appropriated by this permit, and ground and surface waters of all properties and owners located on and adjacent to the CAFO and manure dumping fields in this area will be contaminated by excessive nutrients, heavy metals, VOC's, antibiotic resistant bacteria, ammonia, and hydrogen sulfide from runoff and airborne emissions. Polluted waters present a clear and present threat to public health, the environment, and the endangered species in the area including the federally protected eagle population of the Karl Mundt Wildlife Preserve (Preserve), in the immediate area and for downstream users.

In addition, the South Dakota Division of Wildlife Resources states that water

developments, such as the proposed use in this case, may proceed in the Basin only in accordance with federal and state laws.[1] An endangered species is one that is" in danger" of extinction throughout all or a large portion of it's habitat. Because the eagles in the Preserve are so rare, they are protected by state laws and the federal Endangered Species Act (ESA).[2] In passing the ESA, Congress reflected society's belief that rare species should be saved whenever possible.[3] Specifically, recovery of the endangered eagles requires that use and development of water from the Codell or Niobrara, or the shallow aquifer located in this area which are hydrologically connected to the Missouri River. In addition, minimum streamflows ensure and increase public recreation in the area. These activities generate a significant economic base in the communities of along the Missouri River, and elsewhere in the State of South Dakota.

Further, there is a daycare owned by a tribal member serving children ages 1 month to 4 years old within 1 mile of the CAFO site where 1 in 4 children are asthmatic. The CAFO's noxious fumes and odors will directly impact the health and well-being of these children and those who work in the daycare. The CAFO is also located within 4 miles of a federally funded Head Start School serving 3 and 4 year old children. The manure dumping locations surround this school and the Marty Indian School serving youth ages 6-18 years of age, as well as a Boys and Girls Club, Tribal Headquarters, and Nutrition programs. The odor from manure dumped on the fields and the CAFO itself will negatively impact the education, health and welfare of these residents.

Finally, this CAFO will produce less than 10 local jobs, and will result in the inability of landowners and residents to utilize surrounding lands for tourism, recreation, and homesites due to the water and air pollution and noxious odors emitted. Longview

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[1] South Dakota nonnative fish management questions and answers (UDWR Q&A)-http://wildlife.South Dakota.gov/fishing/nonnative/q_and_a.html.
[2] 16 U.S.C. § 1533.

Farms LLP principals are domiciled in Iowa and have no connection to the local economy. Longview Farms LLP has signed manure dumping agreements with local farmers releasing Longview Farms LLP from all liability for any impacts caused by runoff of manure into water and resultant water and air pollution. Longview Farms CAFO Application, Manure Application Agreements.

10. This Permit is not in accordance with SDCL §46-2A-9 and §46-1-4. §46-1-4 provides:

> Beneficial use of water resources--Prevention of waste--Right to water from natural stream or watercourse. 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. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of diversion of water.

Longview Farms LLP has not begun construction on Phase II facilities utilizing the full reservation requested, nor provided any time frame in which it intends to appropriate the full amount of water requested to be reserved. April 29, 2008 DENR CAFO Revised Plans and Specifications Review by DENR. (Attachment 3). DENR should not condone this type of speculation in water and must prevent such precedent, particularly in light of DENR's role as protector of South Dakota citizens. SDCL §46-1-4 requires 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." This requires the applicant to establish that it "can and will put the conditionally appropriated

[3] 16 U.S.C. § 1531, et seq.

water to beneficial use within a reasonable period of time." See e.g. Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights), 170 P.3d 307 (Colo. 2007).

These requirements are intended to ensure that the public's water resource is available to those who actually need water. David B. Schorr, Appropriation as Agrariaranism: Distributive Justice in the Creation of Property Rights, 33 Ecol. L.Q. 3,9,22 (2005).

In this case, in violation of the beneficial use doctrine and SDCL § 46-1-4 and §46-2A-9, the amount of water requested is for speculative purposes and is far in excess of that appropriate to the scale of the (CAFO) as described in the LVF Report. There is no finding by DENR that it reviewed the CAFO water requirements for existing operations, or the basis for determining that the amount reserved by this Permit will be used in a reasonable period of time. Data and information regarding the water requirements for the contemplated CAFO is needed before DENR can approve the Application.

11. Similarly, SDCL §46-1-4 requires that the State Engineer may not certify a water right until, among other things, that "the water resources of the state be put to beneficial use to the fullest extent of which they are capable." This requires the applicant to establish that it "can and will put the conditionally appropriated water to beneficial use within a reasonable period of time." *See e.g. Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights)*, 170 P.3d 307 (Colo. 200&). Similarly, the appropriator may not merely posses or waste the water. Water right holders who fail to show continuous beneficial use of the water may lose the water right through abandonment or forfeiture. SDCL § 4-1-4.

These requirements are intended to ensure that the public's water resource is

available to those who actually need water. David B. Schorr, Appropriation as Agrariaranism: Distributive Justice in the Creation of Property Rights, 33 Ecol. L.Q. 3,9,22 (2005). In South Dakota, the restriction on speculation and waste is enforced by a recognition that the approval of an application is "only a preliminary step which gives the applicant the authority to proceed and perfect, if possible, the proposed appropriation by actual diversion and application of the water to a beneficial use. *See Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.,* 104 South Dakota 202, 212--13, 135 P.2d 108, 113 (1943); *Little v. Greene & Weed Inv.,* 839 P.2d 791, 794 (South Dakota 1992).

The adoption of the Prior Appropriation Doctrine, by definition, required the appropriator to apply the water to beneficial use, thereby precluding speculative hoarding in hopes of future gain. Neuman, 28 Envtl. L. 919, 963-64. "Because actual, beneficial use was required, no one could acquire all of the water and thereby monopolize a scarce and valuable resource. Nor could anyone speculate by holding water without using it, and then make a steep profit by selling to those who need it." *Id.* at 964. *See High Plaints A & M. LLC v. Southeastern Colorado Water Conservancy Dist.*, 120 P.3d 710, 719 n.3 (Colo. 2005).

In this case, in violation of the beneficial use doctrine and SDCL §46-2A-9 and §46-1-4, the amount of water requested is far in excess of that generally required for a nuclear power plant of the kind described in the application. Data and information regarding the water requirements for existing nuclear power plants and the contemplated power plant is needed before the State Engineer can approve the Application.

12. This permit is not in the public interest. Petitioners have previously submitted an independent hydro-geological investigation of the specific area within which the proposed well is located indicating the existence of a shallow aquifer and unique geologic formation known as the Herrick formation, which is highly permeable, in this vicinity.

Rahn Report. This report is further supported by the Chief Engineer's determination that "In this area the Niobrara formation (also considered an aquifer) overlies the Codell aquifer." The Chief Engineer has not made any assessment of the impact of this proposed well on the Niobrara formation, the Herrick formation, or any other shallow aquifer located on top of the Codell aquifer, as required by S.D.C.L. 34A-3A-24. In State *ex. rel* Missouri Parks Assoc. *et. al* v. Missouri Dep't. of Nat'l. Resources, Case No. 07AC-CC00923, Cole County District Court, the District Court determined the potential for damage to unique geologic historic formations located near a proposed CAFO warranted denial of construction permits in order to protect the unique geologic structure and the public interest. Denial of the water permit to protect the unique geologic structure and the shallow aquifer located in this area, until and unless an investigation is conducted at the proposed location to determine, based upon fact rather than speculation, that there is no shallow aquifer or Herrick Formation, nor any potential damage to the Niobrara Formation, is warranted.

12. South Dakota has adopted the "public trust doctrine" in its laws regulating water useage. Under this doctrine, private landowners' common law rights to access water unrestricted on their lands was eliminated. SDCL 46-1-1 declares that:

> the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection.

SDCL 46-1-3 establishes the public trust doctrine and the obligation of the state to regulate water use to protect water, declaring, "that all water within the state is the property of the people of the state, but the right to use of water may be acquired by appropriation as provided by law." As in this case, therefore, the public trust doctrine

prohibits the granting of a water right that does not meet the beneficial use and public interest standard.

Indeed, the Public Trust doctrine requires the Applicant to meet a higher beneficial use and public interest standard before the water right can be granted. The South Dakota Supreme Court has recognized, the responsibility of state agencies under this public trust doctrine, under common law, and as codified, is broader than "mere compliance by [agencies] with their legislative authority. . . ." Parks v. Cooper, 2004 S.D. 27, ¶44, 676 N.W.2d 823, 838 (citing Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085, 1095 (1983)).

For the foregoing reasons, Petiioners submits this petition and urges that the permit:

1. Should be denied as unsupported by facts and evidence upon which to form a reasonable basis for concluding the requirements of any of the four criteria in SDCL Chapter 46-2A-9 have been met; or in the alternative

2. Deferred pursuant to SDCL § 46-2A-7 until an investigation of the impacts that the point of diversion will have on the existing (and prospective) instream flows in the area, senior water rights, domestic use, unique geologic and hydro-geologic structures, and the public health and welfare from the CAFO for which the water is requested; and the structure and finances of Longview Farms LLP to determine they are sufficiently financially responsible for and maintain liability for pollution of the area is completed; and

3. Pursuant to SDCL §46-2A-5, Petitioners further requests that the Chief Engineer postpone the date set for hearing on the Application for at least 20 days; and

4. That the Chief of Engineers refer this matter to a Hearing Examiner, pursuant to SDCL §1-26-18.3, as the damage from CAFO operations and the granting of this permit

for that purpose threatens to impair wells for domestic water supply by appropriation without investigation of aquifer recharge rates, cumulative withdrawals from the aquifer, and the risk of contamination of the aquifer from the CAFO operation, resulting in damages in excess of $2,500.00 to the Petitioner and any other Petitioners in this matter; and

5. That the Petition to Intervene be granted.

Respectfully Submitted this 27th day of September 2010.

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Summary of South Dakota Water Laws and Rules

Prepared by Water Rights Program

January 2008

The following is a summary of South Dakota water laws and rules. This summary is provided as a service of the Water Rights Program, Department of Environment and Natural Resources for the purpose of introducing the public to the water rights laws of South Dakota. The laws and rules may be downloaded at DENR's website at *http://www.state.sd.gov/denr/des/waterrights/WR_laws.htm.*

PLEASE NOTE: This summary is not a substitute for the South Dakota Codified Laws or Administrative Rules of South Dakota and is not intended to serve as legal advice. In the event there is a difference in interpretation between this document and South Dakota Codified Law and/or Administrative Rule, the law and/or rule controls.

ADMINISTRATIVE OVERVIEW

1) Water in South Dakota is owned by the people of the state and not by private individuals. The right to use water may be obtained under State Law.

   Reference: SDCL 46-1-1, 46-1-3, and 46-5-5.

2) South Dakota water rights are administered by a system commonly called the "Doctrine of Prior Appropriation." This means the first in time (senior priority) is the first in right, except for individual domestic use. Priority is established based on the date of filing the application. Uses of water developed prior to or under development as of March 2, 1955 (surface water) or February 28, 1955 (ground water) may qualify for a vested water right depending on the type of use involved.

   Reference: SDCL 46-1-9, 46-2A-9, 46-2A-12, 46-4-1, 46-4-2, 46-5-4, 46-5-7, 46-5-8, 46-5-34, 46-5-34.1, and 46-6-3.

3) Domestic use of water takes precedence over appropriative rights.

   Reference: SDCL 46-1-5, 46-1-6(7), and 46-1-6(14).

4) The seven member Water Management Board regulates water use, approves and denies permits, validates vested rights, cancels water right permits or rights, establishes ordinary high and low water marks for lakes as well as setting lake outlet elevations.

   Reference: SDCL 1-40-15, 43-17-21, 43-17-23 thru 43-17-25, 43-17-28, 46-2-9, 46-2-11, 46-2A-7, 46-2A-8, 46-2A-16, 46-4-2, and 46-5-8.1.

DOMESTIC WATER USE – no permit needed

1) The following domestic uses do not require a water right permit:

   a. Domestic use of water from other than a common water distribution system that does not exceed 25,920 gallons per day (which is 18 gpm pumped 24 hours per day) or a peak diversion rate of 25 gallons per minute (gpm) for:

1. Individual farm or ranch use including livestock water;
2. Individual household use for drinking, washing, sanitary, culinary, and other ordinary household purposes; and
3. Irrigation of a noncommercial family garden, trees, lawn, shrubbery, or orchard that is no larger in area than one acre. Lawn, tree, and garden watering within a city, town, or from other common water distribution systems is covered by the system water right.

   Note: Drip irrigation systems for noncommercial purposes and not exceeding 18 gpm do not need to be permitted even if the irrigated area exceeds one acre.

b. Water use from other than a common water distribution system that does not exceed 18 gallons per minute (gpm) for:

   1. Schools, parks and other public recreation areas;
   2. Geothermal heating or cooling of a single household. Most heat pump installations for household heating and cooling should not require more than 5 to 10 gpm; and
   3. Noncommercial on-farm alcohol production.

Reference: SDCL 46-1-6(7), 46-5-50 thru 46-5-52. Water Management Board Rules 74:02:01:01 and 74:02:01:03.

WATER RIGHT PERMITTING

1) Except for the previously described domestic water uses and water distribution systems (e.g. towns, rural water systems, subdivisions, and mobile home parks) that do not pump more than 18 gpm, all uses of water require a water right permit pursuant to procedures in SDCL Chapter 46-2A. Water uses supplied from a water distribution system do not need a separate permit. Examples of uses which require a permit are:

   a. Cities, towns, rural water systems, mobile home parks, subdivisions, and other common water distribution systems that pump more than 18 gpm. Those systems not pumping more than 18 gpm that may expand and increase pumping above 18 gpm, should obtain a water right permit to establish a priority date.

      Note: Certain water distribution systems that do not pump more than 18 gpm may still be subject to compliance with Safe Drinking Water Standards. SDCL Chapter 34A-3A. Water Management Board Rules Chapter 74:04:05.

   b. Domestic use for farm, ranch, household, and livestock use from other than a common water distribution system in excess of either 25,920 gallons per day (18 gpm continuously for a day) or 25 gpm (peak rate).

   c. Any well that is allowed to flow more than 18 gpm.

   d. Any dam or dugout on a dry draw or nonnavigable watercourse impounding more than 25 acre feet.

   e. Any dam constructed for any purpose on a stream considered navigable.

   f. Irrigation of more than one acre.

   g. Commercial use, even less than 18 gpm, when supplied from other than a common water distribution system to a truckstop, tourist attraction, eating, drinking, or lodging establishment, commercial campground and any other business. An existing business without a water right has no right to the use of

water. The commercial user without a water right is not entitled to receive protection in the event of well interference by a new or future user who has a water right. The new user with a water right will have the senior priority over an existing user without a water right.

h. Industrial, manufacturing, gravel washing and mining uses when supplied by other than a common water distribution system. Temporary water permits may be issued for temporary, short term projects. See Temporary Water Permitting.

i. Geothermal use of any amount of water from other than a common water distribution system, for businesses, churches, schools, or any other building, except for individual homes using 18 gpm or less.

j. Any use by a school, park, rest area or other public recreation area in excess of 18 gpm when supplied by other than a common water distribution system.

k. Any use by a hospital, nursing home or church when supplied by other than a common water distribution system.

Fees for permit applications are set by SDCL 46-2-13(2).

Depending on the type of use involved a person who applied water to a beneficial use for works constructed prior to or under construction as of March 2, 1955 (surface water) or February 28, 1955 (ground water), may qualify for a vested right pursuant to SDCL 46-1-9 or 46-6-1, if that vested water right has not been forfeited or abandoned. Vested water right claims may be filed or the chief engineer may require vested water right claims to be filed pursuant to SDCL 46-5-49 or 46-6-2.

Reference: SDCL 46-1-3, 46-1-6(3), 46-1-9, 46-1-15, 46-5-1.1, 46-5-6.2 thru 46-5-6.8, 46-5-8.2, 46-5-9, 46-5-10, 46-5-49 and 46-6-2. Water Management Board Rules ARSD 74:02:01:03.

2) Criteria for granting a water right permit as set forth in SDCL 46-2A-9:

a. Water must be available for the proposed use.

The water source, whether surface or ground water, needs to be capable of supporting the proposed water use. For ground water, the annual use from the water source may not exceed the average estimated annual recharge with some limited exceptions – please refer to "WELLS, Ground Water Management" for additional details.

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

Existing rights, including domestic uses of water, may not be unlawfully impaired regardless of whether the proposed source is surface or ground water. In order for a well to be protected it must meet the definition of an "adequate" well – please refer to "WELLS, Well Construction" for additional details.

c. The use of water must be a beneficial use.

Beneficial use is the use of water that is reasonable and useful and beneficial to the owner and consistent with the best utilization of water supplies. In general, beneficial uses of water include, but are not limited to: 1) domestic, 2) municipal, 3) rural water system, 4) irrigation, 5) suburban housing, 6) commercial, 7) industrial, 8) recreation, 9) fish and wildlife, and 10) institutional.

d. The use of water must be in the public interest.

Public interest is not specifically defined in water rights law and is a determination made by the Board based on testimony at the time of hearing. In making a public interest determination, the Board may recognize that some issues are within the jurisdiction of local, state and federal entities.

WATER RIGHT PERMIT ADMINISTRATION

1) After approval of a water right permit, the permit owner has five years to complete any construction. The owner then has an additional four years to put the water to beneficial use.

   A water right permit may be amended to extend the time for completion of construction or the time to put the water to beneficial use. The extension may be granted on account of delays due to physical or engineering difficulties, due to operation of law, or due to exigent circumstances identified by the Water Management Board. An application to amend a permit to extend the time for construction or the time to put the water to use needs to be made prior to expiration of the time period to be extended.

   Reference: SDCL 46-2A-1(2), 46-2A-8, and 46-5-26.

2) An existing water right permit or right may be amended. Amendment examples are: to change the use of water, to change place of use, to extend time for construction beyond five years, to change diversion points or to add diversion points. An amendment can not be granted to increase the rate of diversion or volume of water appropriated under the original permit or if an existing water right will be impaired. An application to increase the rate of diversion or volume of water will be treated as a new application and will be assigned a new priority date.

   The location of an existing diversion point may be moved or additional diversion points may be added without application or publication, if:

   a. The water source remains unchanged;

   b. No additional water is appropriated;

   c. If for irrigation purposes, no new land is irrigated; and

   d. The Chief Engineer makes a finding that the potential for interference with existing diversions is not increased.

   Reference: SDCL 46-2A-1(2), 46-2A-12, 46-5-13.1, 46-5-30.4, and 46-5-31.

3) Notice of any sale, grant, lease, conveyance or other transfer of a water right permit or right must be filed with the Chief Engineer of the Water Rights Program within 90 days. No assignment of a permit or right is binding, except upon the parties thereto, unless filed for record in the Water Rights Program.

   Reference: SDCL 46-5-30.3 and 46-5-32.

4) Water right permits can be cancelled for nonconstruction. However, the Board may reinstate any water right permit with a priority date after March 31, 1977, within three years after expiration of the original construction period if unappropriated water is available. A new priority date is assigned to a reinstated permit. A water right permit or right can be lost for any of the following three reasons:

   a. Abandonment - The water right permit or right owner has no intent to use water and abandons its use. Once a water right permit or right is abandoned, it can not be reclaimed under the original permit or right.

b. Forfeiture - Occurs by operation of law if water is not used for a three year period without legal excuse. A "legal excuse" would include, generally, the lack of water, but may include other reasons. Once a water right permit or right is forfeited, it can not be reclaimed under the original permit or right.

c. A third violation of a condition of a water right permit or right.

Reference: SDCL 46-1-12, 46-2A-8.1, 46-5-36, 46-5-37, and 46-5-37.1. Water Management Board rules ARSD 74:02:01:36 thru 74:02:01:41.

FUTURE USE PERMITTING

1) The following entities may reserve water for expected future needs pursuant to procedures in SDCL 46-2A:

   a. State institution;

   b. Municipality as defined in SDCL 9-1-1;

   c. The South Dakota conservancy district or water development districts as defined in SDCL 46A-2-4;

   d. Water user district as defined in SDCL 46A-9-2;

   e. Nonprofit rural water supply company as defined in SDCL 10-36A-1;

   f. Sanitary district as defined in SDCL Chapter 34A-5;

   g. Irrigation district as defined in SDCL 46A-4; or

   h. Water project district as defined in SDCL Chapter 46A-18.

   Approval of an application to appropriate water for future use is a reservation of a definite amount of water with a specific priority date. A future use permit does not grant authority to construct works or put the water to beneficial use. An additional application is required to construct works and put reserved water to beneficial use. The fee for a future use application is 10% of the usual fee for an application to construct works and put water to beneficial use.

   Future use permits are subject to review by the Water Management Board every seven years. If the future use permit is allowed to remain in effect after the seven year review, an additional 10% fee is required.

   Reference: SDCL 46-2-13(2), 46-5-38, and 46-5-38.1.

FLOOD CONTROL PERMITTING

1) Flood control permits are required pursuant to SDCL 46-2A for facilities constructed on a watercourse to control flooding. Emergency facilities may be constructed without a permit. However, the Chief Engineer of the Water Rights Program must be promptly notified. Flood control permits are not required for flood control facilities constructed on dry draws.

   Reference: SDCL 46-2A-11, 46-5-47, and 46-5-48.

TEMPORARY WATER PERMITTING

1) Temporary water permits may be issued by the Chief Engineer when limited amounts of public water are needed on a temporary basis. For example, permission may be granted to use water for highway and other construction projects and exploration drilling. A temporary permit is not valid after December 31 of the year in which the permit was issued and, under certain circumstances, a temporary permit may be rescinded. In

addition, a temporary permit is temporary permission to use public water and does not grant any right of priority for the temporary use.

Temporary permits may be granted to use water from either public or privately owned sources of water. Approval of a temporary permit does not grant trespass rights to access the water. Water may be obtained from municipalities and other permitted water distribution systems without a temporary permit.

Reference: SDCL 46-5-40.1. Water Management Board Rules ARSD 74:02:01:32 thru 74:02:01:34.02.

WELLS

1) Ground Water Management

a. An adversely impacted domestic well is a well in which the pump intake is at least 20 feet below the top of the aquifer or, if the aquifer is less than 20 feet thick, is as near to the bottom of the aquifer as is practical and the water level of the aquifer has declined to a level that the pump will no longer deliver sufficient water from the well owner's needs.

Reference: Water Management Board Rules ARSD 74:02:04:20(7)

b. South Dakota water laws do not allow the "mining" of ground water. "Mining" occurs when the quantity of water pumped annually from a ground water aquifer exceeds the estimated annual recharge to the aquifer. There are a few areas in South Dakota where additional water right permits are not being approved for this reason. A limited exception to "no mining" is made by SDCL 46-6-3.1 for water distribution systems. The Water Rights Program maintains more than 1,600 observation wells to monitor ground water levels.

Reference: SDCL 46-2-14 and 46-6-3.1.

c. South Dakota water law does not protect artesian head pressure as a means of diversion. In other words, a well owner is not necessarily guaranteed that water from a flowing well or from a pump placement that relies on head pressure will always be available. A pump must be capable of being placed 20 feet into the aquifer or set as near to the bottom of the aquifer as practical if the aquifer is less than 20 feet thick.

2) Well Construction

a. All wells must be completed in accordance with South Dakota Well Construction Standards. A well driller must be licensed to drill water wells in South Dakota. The driller is required by law to file a copy of a well completion report with the Water Rights Program within 30 days of completion of each well.

Reference: 46-2A-13, 46-6-9, and 46-6-11. Water Management Board Rules ARSD Chapter 74:02:04

b. Any person who performs work for compensation in the repair of wells or as a well pump installer must obtain either a well driller's license or a well pump installer's license.

Reference: 46-2A-13 and 46-6-9.2.

c. An adequate well is defined as a well constructed to allow various withdrawal methods to be used, to allow the inlet to the pump to be placed not less than 20 feet into the saturated aquifer or formation material when the well is constructed, or to allow the pump to be placed as near to the bottom of the aquifer as is practical if the aquifer thickness is less than 20 feet.

Reference: Water Management Board Rules ARSD 74:02:04:20(6)

3) Well Owner Responsibilities

a. The owner or equitable property holder is responsible for the well from the time the licensed well driller successfully completes the well in compliance with the Well Construction Standards ARSD Chapter 74:02:04. The owner shall keep the well capped or covered, in good repair, and in a sanitary condition.

Reference: Water Management Board Rules ARSD 74:02:04:74

b. All flowing wells must be controlled by the owner to produce only the amount of water needed and to prevent waste of water.

Reference: SDCL 46-2-18, 46-6-10, 46-6-14, 46-6-20, 46-6-21, 46-6-29, and 46-6-30. Water Management Board Rules ARSD 74:02:04:74.

c. When the owner of an existing well constructs a replacement well and does not plan to use the old well, the old well is considered abandoned and must be plugged. Other abandoned wells must also be plugged. If an old well is not to be abandoned or will be used, the well must still be valved and controlled, if flowing, or sealed and capped so that no leaking occurs either underground or at the surface.

Reference: SDCL 46-6-18 and 46-6-27.

DAMS OR DUGOUTS

1) Dams or dugouts of any size on a navigable watercourse or storing greater than 25 acre feet of water located on a dry draw or on a nonnavigable watercourse require a water right permit.

Reference: SDCL 46-4-1 and Water Management Board Rules ARSD 74:02:01:03.

2) Dams or dugouts storing 25 acre feet or less of water located on a dry draw or on a nonnavigable watercourse can be constructed without a water right permit provided a location notice is filed. However, the dam may not be constructed if it changes the course of the water, interferes with water rights, or wrongfully floods land owned by others.

Reference: SDCL 46-4-1.1, 46-4-3 and 46-5-2.

3) The owner of a dam or dugout storing 25 acre feet or less on a dry draw must file a location notice with the county Register of Deeds and the Water Management Board. Filing a location notice avails the owner of the rights provided in SDCL Chapter 46-4 including establishment of a priority date. The $10.00 filing fee is set by SDCL 46-2-13(1).

Reference: SDCL 46-4-3 thru 46-4-6.

4) The Board may not enforce limitations on domestic use of water from dry draw dams except in response to a written complaint from a person claiming interference with water permits or rights on the same watercourse.

Reference: SDCL 46-2-22

5) Water Management Board Safety of Dams Rules Chapter 74:02:08 apply to dams that are 25 feet or more in height (top of dam) or that store 50 acre-feet or more of water (maximum storage to top of dam.)

Reference: Water Management Board Safety of Dams Rule ARSD 74:02:08:01(7).

6) Beaver dams - No person owning land through which a watercourse passes may prohibit the removal of obstructions built by beavers in a watercourse, if the beavers have obstructed or interfered with the flow of water through the watercourse in a manner that floods land belonging to others or impairs existing water rights.

Reference: SDCL 46-5-1.2.

ORDINARY HIGH/LOW WATER MARKS AND LAKE OUTLET ELEVATIONS

1) The Water Management Board establishes ordinary high water marks (OHWM), ordinary low water marks (OLWM) and lake outlet elevations for public lakes.

State law provides that all navigable rivers and lakes are public highways within 50 feet landward from the water's nearest edge, provided that the outer boundary of such public highway may not expand beyond the OHWM and may not contract within the OLWM. Thus, the public has the right to use a strip of land up to 50 feet wide below the OHWM beginning at the water's edge or the OLWM. Further, while the public may use the 50 foot strip of land for only "public" purposes, the private adjoining landowner may use the land for any purpose not inconsistent with the rights of the public.

The meander line is a survey line and is usually not a property line nor is the title of an adjacent landowner limited to the meander line, except when the land title conveyance clearly states that the meander line is the property line. Subject to the preceding exception, the meander line defines neither the boundary of a lake or stream nor the extent of land area owned by the adjacent landowner. The meander line was established during early government surveys and used to determine the acres of land subject to sale.

Reference: SDCL 43-17-1 thru 43-17-4, and 43-17-20 thru 43-17-30.

Procedure for Hearings before the Water Management Board
January 2008

The Water Management Board's function is to regulate and control the development, conservation, and allocation of the use of water according to the principles of beneficial use and priority of appropriation. In this role, the Water Management Board conducts contested case hearings on water right permit applications. The Board is a citizen board consisting of seven members appointed by the Governor. They are from varying backgrounds and locations around the state. The Board has meetings approximately every two months.

This document is intended to acquaint participants in hearings of general procedures before the Board. South Dakota codified laws (SDCL) and administrative rules (ARSD) govern water rights. The laws and rules may be downloaded at DENR's website at *http://www.sd.gov/denr/denr.html*. Laws of interest include SDCL Chapters 46-1, 46-2, 46-2A, 46-4, 46-5 and 46-6. Administrative rules to review are ARSD 74:02:01.

Contested case hearings are conducted pursuant to procedures outlined in SDCL ch. 1-26. Only parties of record can participate in the hearing by presenting testimony, calling witnesses or cross-examining witnesses. The rules of civil procedures followed in South Dakota courts are generally followed in evidentiary proceedings before the Board. Parties include the applicant, the Department of Environment and Natural Resources and those individuals that have filed a petition to intervene as set forth in the public notice.

An individual may represent himself in a contested case before the Board or may be represented by legal counsel. Attorneys that intend to participate in the hearing must mail a Notice of Appearance to all other parties. Non-resident attorneys must be able to demonstrate compliance with the requirements set forth SDCL 16-18-2 to practice in South Dakota.

Burden of Proof

The applicant for a permit issued by the Water Management Board has the burden of proving that he is entitled to the permit. The applicant must therefore be prepared to present the permit application and the proposed operation to the Board at a contested case hearing. Petitioning Interveners must be prepared to present testimony and exhibits demonstrating why the permit should not be granted. Do not rely on the Department of Environment and Natural Resources (DENR) to carry the burden of proof. Although DENR makes a recommendation to the Board, this recommendation is in no way binding upon the Board. While a DENR expert will present their report and be subject to questioning by the Board and parties on the application, DENR is not an advocate for your position.

SDCL 46-2A-9 sets forth the four criteria that must be present in order to approve an application. They are:

1) A reasonable probability that unappropriated water is available for the proposed use;
2) The proposed diversion will not unlawfully impair existing rights;
3) The use is a beneficial use; and
4) The use is in the public interest.

Procedure

You or your legal counsel need to be at the hearing to present your position in a contested case hearing.

The Board Chairman runs the hearing. Address all questions and objections to the Chairman for a ruling. In some instances the Board will appoint a hearing officer to preside over prehearing conferences, prehearing motions and conduct the evidentiary hearing. An attorney from the Attorney General's office is seated with the Board to provide them legal advice. In addition, the Water Rights Program is represented by legal counsel. This is a legal proceeding so expect to swear an oath or affirmation to tell the truth when you approach the podium.

The following procedure is commonly followed:

1 Opening statements (parties may waive their opening statement)
   a. Applicant
   b. DENR – DENR will present a brief description of the application
   c. Petitioning Interveners

2. Evidentiary hearing
   a. DENR – staff present their report and the Chief Engineer's recommendation
   b. Applicant (applicant's opportunity to present testimony and call witnesses)
   c. Petitioning Interveners (opportunity to present testimony and call witnesses)

   Be prepared to explain your position on the application. The applicant needs to state what the proposed project is, the location of the project, timelines for the completed project, the beneficial uses for which the water is to be used, its benefits and why the permit is in the public interest. An opponent to the application needs to explain your opposition to the appropriation of water, where you live in proximity to the project, the adverse impact of the project, why the permit is not in the public interest and other relevant matters.

   Parties may call witnesses on their behalf. The Board oftentimes hears testimony from technical experts, neighbors or other witnesses regarding the proposal. Written endorsements are subject to the hearsay rule at the time of the hearing since the author can not be cross-examined. Therefore, written comments will usually be allowed only if there is no objection from any other party.

   Upon the conclusion of any witness's testimony, all parties will be afforded an opportunity in an orderly manner to cross-examine the witness regarding their testimony. Cross-examination is your opportunity to ask questions of the witness related to their direct testimony; it is not the appropriate time for you to provide your testimony. In addition, Board members may ask questions of the witness.

3. Rebuttal – parties are afforded an opportunity to present testimony rebutting a prior witness's testimony. Witnesses are again subject to cross-examination but only related to their rebuttal testimony.

4. Closing arguments (summation of your position)
   a. Applicant
   b. DENR
   c. Petitioning Interveners

5. Board decision.

The Board's decision-making process normally occurs in public in front of all concerned and on the record. Normally, the Board limits discussion to its members but may call on witnesses, lawyers or parties to clarify a point. In some instances the Board may recess for deliberation. Upon making a verbal decision, the Board will direct either the prevailing party or Water Rights Program's staff attorney to prepare proposed findings of fact, conclusions of laws and final decision. The non prevailing parties are given the opportunity to submit objections and their own proposed finding of fact conclusions of law and final decision. These proposals will be considered and ruled upon at the Board's next meeting. The findings are a record of the facts considered by the Board. In the event the Board's decision is appealed to court, the findings reflect the facts considered by the Board to arrive at a decision. The non-prevailing party may waive their rights to findings if they are satisfied the Board addressed their concerns or have no intention of appealing the decision.

Although hearings may sometimes be considered informal, it is an evidentiary hearing. Lawyers cannot testify or answer factual questions, cross-examination is allowed, copies of exhibits must be available for opposing counsel or parties.

Ex-parte Communication

It is improper for any party to a pending application or contested case proceeding to contact Board members prior to the hearing. To do so is ex-parte communication with the likely result being the Board member excusing himself from the proceeding. The Board is very careful to avoid even the appearance of discussing a contested case hearing that will come before it. Situations do arise where a party requests to have a Board ruling on a motion prior to the evidentiary hearing. If an applicant or party has an issue he wishes to raise prior to the hearing, please contact the Water Rights Program and they will put you in contact with either the Board's attorney or the Water Rights Program's attorney.

Exhibits

Exhibits are pictures, maps or documents you wish the Board to consider in conjunction with your testimony. Used effectively, exhibits greatly increase the interest and knowledge of the Board. Please have all exhibits you intend to present marked in advance of the hearing [example – Applicant Exhibit 1, 2 and 3 or Intervener (name) Exhibit 1, 2 and 3]. Provide enough copies of each exhibit for the Board, Water Rights Program, opposing counsel and other parties. The exchange of exhibits by parties prior to the hearing is encouraged. Be aware that someone may object to admission of an exhibit. The Board Chairman will rule whether the exhibit is admissible. All exhibits become part of the record and will not be returned.

Transcript

A court reporter is present at all contested case hearings. A party wishing to have a transcript of the hearing should make arrangements with the court reporter. DENR will tape the proceeding and will prepare minutes of the hearing.

Appeal of Board's Decision

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 from when the signed findings of fact, conclusions of law and final decision are mailed to parties. The notice of appeal must be in accordance with procedures established in SDCL 1-26-31.

The best advice is to come to the hearing prepared! If you have questions regarding the hearing process, please contact Eric Gronlund, Water Rights Program at (605) 773-3352.

PLEASE NOTE: This document is provided as a service of the Department of Environment and Natural Resources for the purpose of introducing the public to the procedure for hearings before the Water Management Board. It is not intended to reflect all procedures that may apply to the hearing or as legal advice. In the event there is a difference in interpretation between this document and the South Dakota Codified Law and/or Administrative Rule, the law and/or rule controls.

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November 8, 2010

Eric Gronlund
Water Rights Program
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RE: In the Matter of Water Permit Application No. 7206-3, Longview Farms, LLP

Dear Mr. Gronlund:

Enclosed please find the *Pre-Hearing Brief of the Yankton Sioux Tribe In the Matter of Water Permit Application No. 7206-3, Longview Farms, LLP*. Thank you.

Sincerely,

Rebecca L. Kidder
Attorney for Yankton Sioux Tribe

RLK/jh

encs.

cc: Diane Best
David Nadolski
Jeff Hallem
Patricia Mylott
Joan Olive
Eva Bruguier
Harold Shepherd
Robert Cournoyer
Rachel Bernie

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2010, I served a true and correct copy of the *Pre-Hearing Brief of the Yankton Sioux Tribe In the Matter of Water Permit Application No. 7206-3, Longview Farms, LLP* to the following parties:

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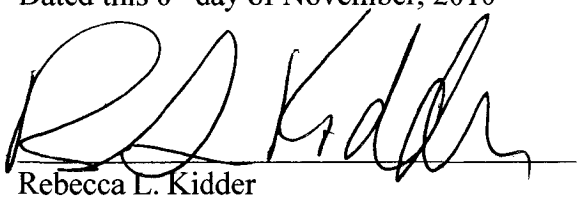
Dated this 8th day of November, 2010



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SOUTH DAKOTA WATER RIGHTS MANAGEMENT BOARD

In the Matter of Water Permit Application No. 7206-3, Longview Farms, LLP

JOINT PRE-HEARING BRIEF ON LEGAL ISSUES OF PETITIONER YANKTON SIOUX TRIBE AND INDIVIDUAL PETITIONERS REPRESENTED BY HAROLD SHEPHERD *Pro Hac Vice*

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INTRODUCTION

This Pre-Hearing Brief was requested by the Water Rights Management Board at the Pre-hearing conference held on October 6, 2010. At the Pre-hearing conference, legal counsel for the Board proposed that all parties file Pre-hearing Briefs on certain unique legal issues that may arise in the hearing on Water Permit Application 7206-3. Upon request for clarification made by legal counsel to the Tribe as to what matters were to be briefed, a request for briefing of the issue of the reserved water rights of the Yankton Sioux Tribe was made and agreed to. No further clarification was given.

The Procedural Order issued by the Board on October 18, 2010 specifies that "Briefs will address all legal issues intended to be raised during the contested case proceeding except those pertaining to the four-part standard under SDCL 46-2A-9." Petitioners respectfully submit that all of the issues raised in their original petition related directly to the requirements of SDCL 46-2A-9, including the issue of reserved water rights of the Yankton Sioux Tribe under the Winters Doctrine. This Brief addresses only those legal issues Petitioners intend to raise at hearing that the Petitioners believe the Board may not have been asked to consider in previous contested cases. In so doing, Petitioners do not waive the right to have any of their factual or legal arguments set forth in the Petitions submitted to the

Board and ruled upon after a full hearing on the evidence.

STATEMENT OF APPLICABLE LAWS

Any person intending to acquire a right to beneficial use of water is required to apply for a permit from the South Dakota Water Management Board, pursuant to SDCL 46-5-10. No person may utilize water for a purpose or in a manner other than specified in the permit or license, if one is granted by the Water Management Board. SDCL 46-5-30.2.

Under SDCL 46-6-3, groundwaters of the state may be appropriated, subject to vested rights and prior appropriations. An application to appropriate groundwater may not be approved if, "according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from the groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source." SDCL 46-6-3.1. SDCL 46-6-26 provides that the Water Management Board or chief engineer may deny or condition any permit as is determined necessary to protect domestic wells, municipal wells, or natural springs of this state.

SDCL 46-2A-9 sets forth the criteria for determining whether a permit can be issued to appropriate water, and includes four factors:

1) "if there is 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;

3) the proposed use is a beneficial use; and

4) the proposed use is in the public interest.

If the Water Management Board determines, based upon evidence presented at hearing, that the requirements for issuance of a permit have not been met, "or that the evidence is insufficient to support a determination, it shall disapprove the application or defer it for further study." SDCL 46-2A-7.

Only certain entities may reserve water for contemplated future needs, and Longview Farm LLP is not an entity entitled to apply for such a future use permit, under SDCL 46-5-38. Under SDCL 46-5-38, such future use permits are reviewed by the Board every seven years and are subject to cancellation if the Board determines the permit holder cannot demonstrate a reasonable need for a future use permit.

In examining whether a permit to appropriate water should be granted, SDCL 46-1-1, establishing the public trust doctrine, provides the standard for decision making, and specifies that, "the people of the state have a paramount interest in the use of all the water of the state."

STATEMENT OF LEGAL ISSUES BRIEFED

1. Whether, in determining there is a reasonable probability that there is unappropriated water available for the applicant's proposed use, the Board must require a determination by the Chief Engineers that the total withdrawals from a groundwater source not exceed the quantity of the average estimated annual recharge of water to the groundwater source under SDCL 46-6-3.1.

2. Whether, in determining that the proposed diversion can be developed without unlawful impairment of existing rights, the Board must require investigation and consideration of the reserved water rights of the Yankton Sioux Tribe and Individual Petitioners (Petitioners) in the groundwaters of the Codell, Niobrara, and other local aquifers and groundwaters.

3. In determining whether the proposed use is a beneficial use, whether the applicant must demonstrate what specific uses within the LCFO the water will be utilized for, must demonstrate the water is of sufficient quality for such proposed uses, and that the water will be used immediately.

4. Whether the Board may grant a water permit to Longview Farm if it is determined that the proposed use of water is for backup water supply in case of interruption of water supply from the Fort Randall Water District system, or whether such a use is a future use pursuant to SDCL 46-5-38.

5. Whether denial of the permit, or deferment for further study is necessary under SDCL 46-2A-7 to protect domestic wells including those of Individual Petitioners, municipal wells, or natural springs of this state pursuant to SDCL 46-6-26.

6. Whether the Chief Engineer is required to make a determination that the location of the well in question complies with the requirements of ARSD 74:02:04:23 (4) and ARSD 74:02:04:24 (1) and (2) relating to the location of wells in relation to pollution sources.

7. Whether this permit will comply with the requirements of ARSD 74:02:04:34.01 that no well may be constructed to allow production from

more than one aquifer.

8. Whether, in determining that the water permit application for a permit to withdraw water from the Codell aquifer meets the requirements of law in relation to impacts on the Codell aquifer, the Board is required to investigate and make determinations regarding the impact of this proposed water permit, and the operation of Longview Farm. Including production of pollution, on other shallower aquifers including the Niobrara formation, and unconfined shallow aquifers providing water supply to local springs and shallow wells used for domestic use, as defined in SDCL 34A-3A-24 and ARSD 74:02:04:20 (10) & (56).

STATEMENT OF PROCEDURAL FACTS

On June 23, 2008 the South Dakota Department of Environment and Natural Resources published Notice in one Wagner, South Dakota paper that it had received an application for a water rights permit from Longview Farms LLP care of Arlan Moss, a resident of Hull, Iowa. The notice stated, "The water is for commercial use in a livestock confinement operation." Petition for Declaratory Ruling (hereinafter "Dec. Pet."), Ex.1. On or before June 23, 2008 numerous organizations and residents affected by the Longview Farm Livestock Concentrated Feeding Operation (LCFO) filed timely protests to the issuance of a permit on several grounds, including that the permit was not in the public interest, and that granting the permit jeopardized the water supply of individuals and households who utilized groundwater in the area of the LCFO both from loss of water supply and from contamination of domestic water supply.

Longview Farm notified South Dakota DENR on August 20, 2008 that "Longview Farms, LLP intends to drill and case a test hole/well at their facility . . . . Dec. Pet. Ex. 2. Longview Farms LLP represented to South Dakota DENR that, "the facility will have a dual water supply system. Dec. Pet, Ex. 3 (Emphasis added).

On August 22, 2008, James A. Goodman, Natural Resources Engineer on behalf of Garland Eberle, Chief Engineer, issued a Letter to Longview Farm, LLP authorizing construction of a test well prior to the approval of a water permit. That letter included an unsolicited advisory opinion that, "[p]ursuant to SDCL 46-1-6(7) and ARSD 74:02:01:01(7), stock watering is a domestic use." Id.

On September 2, 2008, the Water Rights Management Board issued notice to all parties a hearing on the Permit Application was scheduled for October 2, 2008. Dec. Pet. Ex. 2. On August 28, 2008, the Yankton Sioux Tribe and Individual Petitioners in that Matter, were served with documents for the October 2, 2008 hearing, including notice that the DENR had issued approval of the drilling of a test well, and advisement to Longview Farm that us of up to 25, 920 gallons of water per day from the test pending the hearing on the water rights permit was authorized under South Dakota law and regulations. Id.

DENR notified Petitioners in Water Permit 7006-3 on August 26, 2008 for

the first time that it had received a request for a test well and that it had issued authorization for a test well and issued an advisory opinion on the applicability of domestic use provisions to Longview Farm, LLP's well. The South Dakota DENR had not provided any notice of Longview Farm's communication with DENR about a test well or removal of water as a domestic use prior to issuing the DENR letter of August 26, 2008 to any of the parties to the permit hearing scheduled for October 2, 2008.

On August 22, 2008, the Chief Engineer for South Dakota DENR issued a revised Report on Water Permit No. 7006-3, which indicated, "The water is for commercial use in a livestock confinement operation." Dec. Pet. Ex. 3.

Subsequent to the issuance of the South Dakota DENR Chief Engineer's unsolicited advisory opinion on domestic use eligibility, Longview Farm, LLP withdrew its Application for a Water Permit on September 10, 2008. The notice indicated that, "Water use from the well will be for livestock production and will not exceed reasonable domestic use as defined in ARSD 74:02:01:01(6)."

Many of the Petitioners in this matter filed a Petition for Declaratory Ruling with the Water Rights Management Board on August 29, 2008. The Department of Environment and Natural Resources required publication of Notice of the Declaratory Ruling hearing in ten South Dakota papers spanning the entire state

including the Rapid City Journal and the Pierre Capitol Journal. The Water Rights Management Board denied the Petition for Declaratory Ruling and issued its Findings of Fact and Conclusions of Law on March 13, 2009. Petitioners in that matter appealed to the First Judicial Circuit, and on June 24, 2010. At hearing, Longview Farms reiterated its prior position in front of the Water Rights Management Board that water from this well would be used only as a backup source of water in case water was unavailable from the Fort Randall Water District rural water supply system. Further, Longview Farm reiterated the position taken before the Water Rights Management Board that it had not determined whether the water quality was sufficient to permit use of water for watering livestock. The First Judicial Circuit Court of South Dakota issued a decision overruling this Board's determination that Longview Farm LLP was entitled to use of groundwater without a permit as a domestic use. In the Matter of the Petition for Declaratory Ruling Regarding the Applicability of Domestic Water Use for Longview Farm LLP's Well., Civ. No. 09-63 (2010).

On September 8, 2010 and September 15, 2010 the Department of Environment and Natural Resources published notice in the Wagner Post, of the DENR's recommendation to grant a water rights permit to Longview Farm LLP on application number 7206-3. The Notice was not published in the paper published

in the town closest to the location of this well, the Lake Andes Wave. The Notice indicated that the water would be used for "commercial use at a swine farrowing facility." Petitioners filed petitions in opposition to the grant of the permit on or before September 27, 2010.

ARGUMENT

Petitioner Yankton Sioux Tribe (Tribe), is responsible for protecting the health and welfare of the residents of the Yankton Sioux Reservation, including thousands of tribal members living within the Reservation located in Charles Mix County, South Dakota. Individual Petitioners Faith Spotted Eagle, Judy Honimichle, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins, are represented by Harold Shepherd whose admission Pro Hac Vice is pending before the South Dakota Courts. Individual Petitioners represented by Harold Shepherd include members of the Yankton Sioux Tribe. In addition, Petitioner Faith Spotted Eagle, Kipp Spotted Eagle Collins and Allen Hare are owners of wells utilized for domestic water supply and irrigation located upon Reservation lands and other lands adjacent to and surrounding the well location.

Further, members of the Tribe include children and families whose water supply for domestic use including livestock watering is ground water from wells and shallow groundwater from natural springs in Charles Mix County. That

ground water, even if not flowing from the deeper Codell aquifer, is protected water subject to the regulations and laws of South Dakota regulating use of the waters of the State pursuant to SDCL 46-6-3, 46-6-3.1 and 46-6-26.

I. The Waters of South Dakota are Protected by the State for the Benefit of Individual Residents by the Public Trust Doctrine.

South Dakota has adopted the "public trust doctrine" in its laws regulating water usage. Under this doctrine, private landowners' common law rights to access water unrestricted on their lands was eliminated. SDCL 46-1-1 declares that the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection.

SDCL 46-1-3 establishes the public trust doctrine and the obligation of the state to regulate water use to protect water, declaring, "that all water within the state is the property of the people of the state, but the right to use of water may be acquired by appropriation as provided by law." As the South Dakota Supreme Court has recognized, the responsibility of state agencies under this public trust doctrine, under common law, and as codified, is broader than "mere compliance by [agencies] with their legislative authority. . . ." Parks v. Cooper, 2004 S.D. 27, ¶44, 676 N.W.2d 823, 838 (citing Kootenai Envtl. Alliance v. Panhandle Yacht

Club, Inc., 105 Idaho 622, 671 P.2d 1085, 1095 (1983)). Under these provisions, the South Dakota Supreme Court has ruled that, "the use of water for domestic purposes is the highest use of water, and takes precedence if such use is consistent with the public interest pursuant to SDCL 46-1-2." Fraser v. Water Rights Commission, 294 N.W.2d 784, 788 (S.D. 1980)

The Tribe and individual Tribal member Petitioners' interests in the water are also protected by the Winters doctrine enunciated by the United States Supreme Court. Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable). It includes the amount of water required to make the Reservation viable. Arizona v. California, 373 U.S. 546, 599 (1963). Tribal federal treaty rights, including the treaty right to water, include protection from man made despoilation. See, United States v. State of Washington, 506 F. Supp. 187, 203 (D. Wa. 1980).

The purposes of the protections at the federal level and the state level are the same - to ensure that residents have access to clean, safe drinking water for their families and their homes. The waters of South Dakota do not belong to the State of South Dakota under Public Trust Doctrine- they belong to the people of South Dakota who entrust the State of South Dakota, and its agencies, to preserve such

waters for their benefit. All statutes regulating water usage, therefore, must be interpreted in accordance with these overarching principles and purposes, keeping in the forefront of our minds that the waters within South Dakota are to be protected and preserved for the benefit of South Dakota individual citizens.

II. Specific Legal Issues for the Board's Consideration at Hearing.

A. Whether, in determining there is a reasonable probability that there is unappropriated water available for the applicant's proposed use, the Board must require a determination by the Chief Engineers that the total withdrawals from a groundwater source not exceed the quantity of the average estimated annual recharge of water to the groundwater source under SDCL 46-6-3.1.

SDCL 46-6-3.1 requires that

> 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.

Pursuant to this specific requirement applicable to groundwater appropriation permits, the law requires a determination of the average estimated annual recharge rate of the Codell aquifer. Further, this law specifically requires examination of the best information reasonably available to determine the total quantity of water withdraw annually from the groundwater source. In this case, the best information reasonably available includes the most recent United States Geological Service Well Study. South Dakota law requires the collection, preservation and

publication of data with respect to underground waters as are required by the public interest, and directs the publication of rules by the Water Management Board on such collection, preservation and publication of data pursuant to SDCL 46-6-6. Under ARSD 74:02:05:07.

> In determining the availability of unappropriated water for an application for a permit to appropriate water, the board shall rely upon the record of observation well measurements in addition to other data to determine that the quantity of water withdrawn annually from the aquifer does not exceed the estimated average annual recharge to the aquifer.

The Chief Engineer's Report and Investigation in this matter appears to fall short of the legal requirements in three respects: 1) it does not include any determination of the annual recharge rate of the Codell aquifer; 2) it does not include examination of the best information available - the most recent USGS Well Survey which lists all wells withdrawing water from the Codell aquifer but rather, relies exclusively upon the Applicant's assertion that there are only two domestic wells in the area; and 3) the Chief Engineer's report notes that the observation wells established are so far away they are only representative of the entire aquifer, and at that, show "annual fluctuations that may be due to pumping." Quite simply, the Chief Engineer's report does not meet the legal or factual requirements necessary to determine that this water permit will comply with the requirements of SDCL 46-6-3.1, and consequently, the requirements of SDCL 46-2A-9.

B. Whether, in determining that the proposed diversion can be developed without unlawful impairment of existing rights, the Board must require investigation and consideration of the reserved water rights of the Yankton Sioux Tribe and Individual Petitioners in the groundwaters of the Codell, Niobrara, and other local aquifers and groundwaters.

This section of the Brief does not address other factual and legal issues that may be raised at hearing in relation to impairment of the existing rights of domestic water users of the Codell aquifer, Niobrara aquifers, or shallower aquifers and groundwater supply including natural springs that may be impacted by this water permit. It only addresses the precise issue Petitioners were asked to Brief by the Board of what, if any, water rights the Yankton Sioux Tribe has a right to protect and assert in this permit application hearing under the Winters Doctrine.

The Yankton Sioux Tribe and its members occupy the Yankton Sioux Indian Reservation, established by the Treaty of 1858 between the Yankton Sioux Tribe and the United States government. The Supreme Court ruled in South Dakota v. Yankton Sioux Tribe, 520 U.S. 329, 357 (1997) that the Yankton Sioux Reservation was diminished by Article I of the Act of 1894, 28 Stat. 314-318. In Yankton Sioux Tribe v. Gaffey, the United States Eighth Circuit Court of Appeals held that the Yankton Sioux Indian Reservation had not been disestablished and continues to exist. 188 F.3d 1010, 1030 (1999). In Yankton Sioux Tribe v.

Podhradsky, the United States Court of Appeals for the Eighth Circuit further ruled that the Yankton Sioux Indian Reservation is not disestablished and includes trust lands held for the benefit of the Tribe and/or individual tribal members. 606 F.3d 985 (8th Cir. 2010).

Indian Tribes in the United States who are located upon an Indian Reservation acknowledged and recognized by Treaty with the United States have a concomitant set of rights to waters flowing through, and beneath the surface of Reservation lands. The Yankton Sioux Indian Reservation is located within Charles Mix County, and includes lands overlying the Niobrara formation and the Codell aquifer, which are affected by the water permit filed for in this case.

Under federal law, it has been squarely recognized that the Tribe therefore has protected and vested water rights that may not be impaired by a system of water appropriation such as the system of water permitting adopted by the State of South Dakota. On behalf of its membership, The Yankton Sioux Tribe is the owner of reserved water rights upon its Reservation lands established by the Treaty of 1858 and as diminished by the Act of1894. See, Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable). The Tribe's rights to water from the Codell Aquifer are rights to sufficient water to

irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, and their "reasonably feasible" uses of such water. Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969). It includes the amount of water required to make the Reservation viable. Arizona v. California, 373 U.S. 546, 599 (1963).

In addition, as in this case, the Courts have found that if the suit is challenging the impact of a particular action on natural resources rights which are held for the benefit of tribal members, then individual members can file suit to protect such rights. See, Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969). In other words, under Sohappy, the granting a water permit violates Appellants' reserved water rights to the extent it threatens the amount of water they need to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, their "reasonably feasible" uses of such water. The courts have already determined that Tribes have the right to assert these rights on behalf of its members. See, United States v. Nebraska, 520 F.2d 676, 688 (9th Cir. 1975).

The Chief Engineer has not assessed the reserved water rights of the Yankton Sioux Tribe or determined the recharge rate of the Codell aquifer, nor the amount of unappropriated water within the Codell aquifer, and so has no

reasonable basis to conclude, without further investigation, that the water rights of the Yankton Sioux Tribe are not impaired by this permit. These reserved water rights are federally protected from impairment by off-reservation withdrawals from the Codell Aquifer, including Permit 7006-3. Winters v. United States, 207 U.S. at 576; Arizona v. California, 373 U.S. at 599; Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981).

As the Supreme Court has explained, in Winters v. United States, 207 U.S. 564, upstream diversions of water that are off-reservation may not impact a Tribe's rights to use of water that are reserved. To have reserved water rights, a Tribal Treaty with the United States setting apart lands as a Reservation is required, but specific water rights language in such treaty is not required. Id.

In Winters, the United States brought suit on behalf of the Gros Ventre and Assiniboine tribes of the Fort Belknap Reservation in Montana to halt upstream diversions by non-Indians who had been using the water running through the Tribe's land since 1900. The Fort Belknap Reservation was established under the terms of an 1888 treaty that generally described the purpose of the reservation as the provision of a permanent home for the tribes and to encourage the Indians to engage in agricultural pursuits. Id. at 656. The Treaty did not mention water rights. The non-Indian diverters contended that their diversions, which were prior in time

to those by the Indians, gave them a superior right. Mark A. McGinnis & Jason P. Alberts, "Southwest Water Decisions: The Law of Federal Reserved Water Rights," The Water Report: p. 2 (October 15, 2005). That argument was rejected by the Supreme Court, which stated,

> The case, as we view it turns on the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation.... The reservation was part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habit and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change in conditions. The lands were arid and without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government ... The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied and could not be.

207 U.S. at 575–76 (1908), citing, United States v. Rio Grande Dam and Irrigation. Company, 174 U.S. 690, 702 (1899).

After Winters the federal courts refined the definition of tribal sovereignty in relation to water rights, beginning with the U.S. Supreme Court's decision in Arizona v. California, 373 U.S. 546 (1963). In that case, the special master

appointed to resolve certain preliminary questions settled on the notion of quantifying reserved water rights based upon practicably irrigable acreage (PIA).

Under this test, an Indian tribe is legally entitled to as much water as is needed to irrigate all the PIA within its reservation. The water so reserved "was intended to satisfy the future as well as the present needs of the Indian Reservation." 373 U.S. at 600. In other words, the water was reserved "to make the Reservation viable." Id. at 599, cited with approval in, Montana v. United States, 450 U.S. 544, 566 n. 15 (1981).

Ultimately, this approach developed into the 'permanent homeland' concept, which originated in In Re General Adjudications of All Rights to use Water in the Gila River System and Source, 201 Ariz. 307, 315, 35 P.3d 68, 76 (2001) (Gila V). In that case, the Arizona Supreme Court, in keeping with the standard established in Arizona, Judge Goodfarb of the Maricopa County Superior Court held that all federal reserved rights for Indian reservations were to be measured based upon the PIA standard. Id. This standard provided that the tribes should get enough water to irrigate all land on the reservation that is: 1) arable; 2) physically irrigable; and 3) economically irrigable.

On review of Judge Goodfarb's decision, the Arizona Supreme Court rejected the PIA as the sole standard for determining the "essential purpose" of the

tribal reservation and instead found that such purpose "is to provide Native American people with a 'permanent home and abiding place, that is 'a livable' environment." Id. The court held that the general purpose of providing a home for Indians must be broadly construed to provide tribes with the ability to achieve self-determination and economic self-sufficiency, Id., and that limiting tribes to a PIA standard denies them the opportunity to evolve. This, in turn, limits them to an agrarian standard in a largely nonagrarian modern world. The Gila V court mandated that proposed uses be "reasonably feasible." Id. at 80. To determine if a use is reasonably feasible, a project must be: 1) achievable from a practical standpoint; and 2) economically sound. Id. at 81.

The Yankton Sioux Tribe has the right to protect its reserved treaty water rights from appropriation by others and from "man-made despoliation." See, United States v. State of Washington, 506 F. Supp. 187, 203 (D. Wa. 1980). See also, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984)(requiring revival of wetlands decimated by non-Indian stream withdrawals); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)(requiring maintenance of minimum stream flow for downstream tribal fishery).

The use of water for a LCFO on lands upland from and directly adjacent to tribal lands and water supplies, both surface and subsurface, and the location of

manure dumping fields adjacent to Reservation lands ensures runoff from the 976,200 cubic feet of liquid manure dumped annually could contaminate the Codell Aquifer and all surface waters on Reservation lands, resulting in impairment of the Tribe's and its tribal members' including the Tribe and Individual Petitioners currently appropriated water and its reserved water rights in addition to the water permit limiting the availability of water quantity.

Under SDCL 46-2A-9, Tribal reserved water rights and the water rights of Individual Petitioners must be considered an a determination made regarding whether the issuance of this water appropriation permit will impair the Yankton Sioux Tribe's reserved water rights. Until such time as the Applicant and the Chief Engineer have fully investigated this issue, this petition should be deferred for further study under SDCL 46-2A-7.

C. In determining whether the proposed use is a beneficial use, whether the applicant must demonstrate what specific uses within the LCFO the water will be utilized for, must demonstrate the water is of sufficient quality for such proposed uses, and that the water will be used immediately.

The Chief Engineer's Report to the Board recommending approval of the water permit lists the proposed use of water as "commercial use at a swine farrowing facility." However, neither the published notice of Application nor the Chief Engineer's report include any determination of what uses at the facility water

will be used for - whether it will be human consumption, human sanitation, animal sanitation, power washing the facility, or livestock watering. In this particular case, to determine the use is a beneficial use, it is important to require specific uses the water will be used for. Prior hearings before this Board include the testimony and statements of fact stipulated to by the Applicant that the water would be used as a backup water supply in case insufficient water is available from the Fort Randal Rural Water System. Further, prior statements of fact and testimony of the Applicant indicate the applicant has not determined whether the water is of sufficient quality to utilize for human consumption or livestock watering, and have further indicated the facility is not plumbed to permit separation of sanitation uses from livestock watering uses.

As the South Dakota courts have previously held, approval of a water permit to appropriate water from the Niobrara Chalk formation without giving consideration to maintenance of artesian head pressure and without giving consideration to whether the quality of water was suitable for the use proposed constitutes an abuse of discretion. Fraser v. Water Rights Commission of Dept. Of Natural Resource Development, 294 N.W.2d 784 (S.D. 1980).

It would be impossible for the Board to determine whether the water will be put to beneficial use in this instance without a determination of what specific uses

of water are proposed.

D. Whether the Board may grant a water permit to Longview Farm if it is determined that the proposed use of water is for backup water supply in case of interruption of water supply from the Fort Randall Water District system, or whether such a use is a future use pursuant to SDCL 46-5-38.

Because the Notice of Application and the Chief Engineer's Report do not specify whether the proposed water use is for a backup water supply only, it is impossible at this time to determine whether this is a legal issue. However, if the proposed use is solely as a backup water supply in the case that water from the Fort Randall Rural Water System is temporarily available, this would be a proposed future use. Applications for permits for future use of water are limited to a very specific group of applicants under SDCL 46-5-38. Longview Farm does not fall within the scope of the law as to applicants who are entitled to permits for reserved water for future need. Further, the application for a water permit was not filed as an application for reservation of water for future use under SDCL 46-2A-10.

Because the South Dakota system of allocation of water rights is based upon the concept of first in time first in right with respect to the issuance of water permits, subject to the limitations of domestic use and other vested rights, and the public trust doctrine, the reservation of water for future use is limited by the South Dakota legislature to ensure the waters within South Dakota are put to beneficial

use consistent with the public trust doctrine and preservation of domestic uses and other vested rightd. See e.g. Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights), 170 P.3d 307 (Colo. 2007).

The requirement to demonstrate the water will be put to a beneficial use is intended to ensure that the public's water resource is available to those who actually need water. David B. Schorr, Appropriation as Agrariaranism: Distributive Justice in the Creation of Property Rights, 33 Ecol. L.Q. 3,9,22 (2005).

In this case, SDCL § 46-1-4 and §46-2A-9, are intended to prevent speculative use of water, or reservation of rights to future use of water. There is no finding by the Chief Engineer in the Report on this Application that he reviewed the LCFO water requirements for existing operations, or the basis for determining that the amount reserved by this Permit will be used in a reasonable period of time. Data and information regarding the water requirements for the contemplated LCFO is needed before a water permit is issued to ensure the use is not simply for the purpose of future need, and to ensure the water is of sufficient quality to actually be utilized by the Applicant. The Chief Engineer's Report does note that the primary source of water is the Fort Randall Water District, and that the well in this case will be utilized as a "supplemental source" for the facility.

E. Whether denial of the permit, or deferment for further study is necessary under SDCL 46-2A-7 to protect domestic wells, municipal wells, or natural springs of this state pursuant to SDCL 46-6-26.

South Dakota law provides authority to the Water Management Board to deny permits or place conditions on the issuance of any water permit if the Board determines such denial or conditions are necessary to "protect domestic wells, municipal wells, or natural springs of this state." SDCL 46-6-26. Accordingly, one of the determinations of fact necessary to the approval of a water permit is whether the granting of the permit will result in impairment of currently existing domestic wells and/or natural springs including those of Individual Petitioners. The Chief Engineer's Report lists only the two domestic wells listed by the Applicant in the Report to the Board, neither of which includes individual Petitioners wells that will be impacted by issuance of the permit, and provides no assessment as to whether the granting of this permit will cause impairment to these two wells. Further, the Chief Engineer's Report does not give any indication that an independent investigation into the existence of domestic wells in the Codell aquifer, or the existence of natural springs in the area was performed. If the evidence at hearing demonstrates there are natural springs in the area of this proposed permit, and there are additional domestic wells in the Codell aquifer, or that the Chief Engineer did not assess the effect of this application on artesian head pressure for existing

domestic wells including those of Individual Petitioners, then the application should, at a minimum be deferred until an appropriate investigation is conducted into any impact this permit will have on the quantity or quality of water in existing domestic wells in the Codell aquifer and existing natural springs in the area. See, Fraser v. Water Rights Commission of Dept. Of Natural Resources Development. 294 N.W.2d 784 (1980 S.D.)(holding that failure to examine the impact of water permit on artesian head pressure is abuse of discretion); See also, Op. Atty. Gen. Opinion No. 89-22 (1989) (finding that state water law applies to both surface waters and groundwaters within the State.)

F. Whether the Chief Engineer is required to make a determination that the location of this well complies with the requirements of ARSD 74:02:04:23 (4) and ARSD 74:02:04:24 (1) and (2) relating to the location of wells in relation to pollution sources.

The Chief Engineer's Report does not include any determination as to whether the proposed well location meets the requirements of ARSD 74:02:04:23 (4) and ARSD 74:02:04:24 (1) and (2) relating to the location of wells in relation to pollution sources. In this case, Longview Farm's operations include pollution sources as defined under ARSD 74:02:04:20(38), which defines a "Pollution source" as

> anything that causes groundwater pollution, including the following: . . . (b) wastewater absorption, evapotranspiration, and graywater systems; (c) seepage pits, cesspools, NoDak systems, mounds, and pit

> privies as described by chapter 74:53:01; and (d) Barnyards, barn gutters, feedlots, animal pens, and farm silos.

Both the actual location of Longview Farm LCFO, and the location of all fields where manure is spread under the approved manure management permit issued by DENR are included within this definition of "Pollution source."

ARSD 74:02:04:24(2) requires that no well "supplied by aquifers whose top is more than 100 feet deep may be located no closer than 100 feet horizontally from a pollution source. . . ." Further, no well supplied by an aquifer less than 100 feet deep may be located closer than 150 feet from any pollution source. The Chief Engineer's Report does not indicate that any assessment of the location of this well in relation to pollution sources was conducted, nor that any determination was made based upon the location of manure management fields or the Longview Farm LCFO. In order to comply with ARSD 74:02:04:24, a determination of fact on this issue is necessary.

G. Whether this permit will comply with the requirements of ARSD 74:02:04:34.01 that no well may be constructed to allow production from more than one aquifer.

The Chief Engineer's Report indicates only that the permit will have to comply with South Dakota well construction standards, but does not indicate which standards will be applicable. In this instance, the Chief Engineer determined that there is a shallower aquifer present in the Niobrara formation, and at hearing,

evidence will indicate there is the presence of shallow groundwater within 100 feet of the land surface, which qualifies as an aquifer under ARSD 74:02:04:20 (10) within the Herrick formation. Water from this permit, according to the Chief Engineer's Report, is intended to withdraw water only from the Codell aquifer. However, in order to comply with the requirement of ARSD 74:02:04:34.1 that a well be constructed in a manner that it will not withdraw water from more than one aquifer, specific conditions on how a well is constructed should be required. ARSD 74:02:04:23 sets forth the intent of South Dakota well construction standards, and clarifies that the intent of the law is, in relevant part:

> (1) To protect the health of the public;
>
> (2) To provide water which is both bacteriologically safe and of reasonable quality and quantity for domestic use; . . .
> (4) To protect groundwater resources of the state from bacteriological and chemical contamination and from leakage between aquifers;
> (5) To prevent waste of groundwater.

In this case, any approval of a water permit should include specific well construction standards that must be followed to ensure there is no leakage from the shallower aquifers in this area, and to ensure that neither the Codell aquifer nor the other groundwaters in this area are bacteriologically contaminated by the operation of any well, or the operation of Longview Farm.

H. Whether, in determining that the water permit application for a permit to withdraw water from the Codell aquifer meets the requirements of law, the Board is required to investigate and make determinations regarding the impact of this proposed water permit, and the operation of Longview Farm on other groundwater and shallower aquifers, including the Niobrara formation, and unconfined shallow aquifers providing water supply to local springs and shallow wells used for domestic use, as defined in SDCL 34A-3A-24 and ARSD 74:02:04:20 (10) & (56).

The Chief Engineer's Report on this Permit Application includes only an assessment of impacts of the granting of this permit upon the Codell aquifer. It does not include any assessment of the existence of other more shallow aquifers and ground water in the area of the Codell aquifer or this Permit. Under SDCL 34A-3A-24,

> No concentrated animal feeding operation that includes a number of animals equal to or greater than one thousand animal units may be located over a shallow aquifer unless a groundwater discharge permit has been approved in accordance with chapter 34A-2. For purposes of this section, a shallow aquifer is any aquifer having the following characteristics:
>
> (1) The aquifer is within fifty feet or less below the land surface with fifteen feet or less of continuous, overlying, extremely low permeability geologic material, such as clayey till or shale. Weathered till or highly fractured weathered shale is not an extremely low permeability material for purposes of this section; or
>
> (2) The aquifer is greater than fifty feet but less than one hundred feet below the land surface with thirty feet or less of continuous overlying low to extremely low permeability geologic material that may be a combination of weathered and unweathered till, shale, or till and shale.
>
> This section does not apply to any concentrated animal feeding

> operation that was operating on or before July 1, 1997. This section does not limit or prohibit the expansion of any concentrated animal feeding operation that was operating on or before July 1, 1997.
>
> The provisions of this section do not apply to any county which has officially adopted a comprehensive plan and zoning ordinances pursuant to chapter 11-2 and wellhead protection ordinances pursuant to § 7-18-20.

In this instance, the evidence at hearing will demonstrate that there is a shallow aquifer within 100 feet of the surface of the ground located under Longview Farm, and that Longview Farm, under the requirements of this statute, is a LCFO subject to this restriction, and has not been required to obtain a groundwater discharge permit by DENR. Issuance of a water permit to a LCFO that is operating in violation of this statute would clearly not be in the public interest.

III. CONCLUSION

If the Water Management Board determines that the evidence presented at hearing is insufficient to demonstrate that the granting of this water permit complies with the applicable law, including the statutes and administrative rules set forth herein, then, under SDCL 46-2A-7, the Water Management Board is required to disapprove the permit or to defer it for further study.

Neither the application nor the Chief Engineer's Report demonstrate that the requirements of South Dakota law have been met. Unless evidence at hearing demonstrates compliance not only with SDCL 46-2A-9, but also with the other

statutes, legal decisions, and administrative rules cited herein, the Water Permit application should be at a minimum deferred for further study.

Respectfully Submitted this 8th day of November, 2010.

By: _____

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November 19, 2010

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Marty SD 57361

Sister Patricia Mylott
PO Box 217
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Joan Olive
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Ms. Bruguier, Sister Mylott and Ms. Olive:

The Water Management Board will conduct an evidentiary hearing to consider Application No. 7206-3 filed by LongView Farms LLP beginning at 8:30 AM on Thursday, December 2, 2010 in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre SD. The Board meeting will continue on the morning of Friday December 3rd if necessary to complete testimony.

Enclosed is a copy of the report, recommendation, affidavit of publication and petitions in the matter of Water Permit Application No. 7206-3. In addition, enclosed are: 1) a joint pre-hearing brief filed by Petitioner Yankton Sioux Tribe and individual petitioners represented by Harold Shepherd, 2) Applicant's response brief and 3) DENR's response brief. State law directs the Chief Engineer to provide Water Management Board members with a copy of all pleadings including petitions for each proceeding. This same information has been sent to the Board members in advance of the hearing.

Please contact me if you have any questions about the hearing process.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
605 773-3352

enclosure

REPORT ON WATER PERMIT APPLICATION NO. 7206-3
For Long View Farms
August 27, 2010

Application No. 7206-3 proposes to appropriate 0.067 cfs (30 gpm) from one well approximately 600 feet deep located in the SW ¼ NW ¼ of section 9, T95N R64W in Charles Mix County. The water will be used for commercial use at a swine farrowing facility.

AQUIFER – CODELL SANDSTONE (CDLL)

The Codell sandstone is a buried sedimentary rock member of the Carlile shale which consists of loose to tightly cemented very fine to coarse light brownish gray to dark greenish black and brown sand with clay (Kume, 1977). The aquifer is confined and under artesian conditions at this site. The Codell aquifer is known locally as the "sandrock" or the "soft water sand" (Kume, 1977). Data from the county study and Water Right well files indicate the top of the Codell sandstone should be approximately 1150 to 1200 feet msl. This would mean a well depth of at least 570 feet to 620 feet at this site to penetrate the Codell sandstone. The applicant indicates an expected depth of 600 feet. In this area the Niobrara formation (also considered and aquifer) overlies the Codell aquifer.

The Codell sandstone underlies 1,134 square miles (725,760 acres) of Charles Mix County and is estimated to contain 1.45 million acre-feet of recoverable water in storage (Hedges, 1982). The aquifer extends into Douglas and Hutchinson Counties to the north and into Bon Homme County to the east and into Nebraska to the south. A map of the Codell sandstone published by Hedges is included with this report (Hedges, 1982). Ground water movement is probably from northwest to southeast in the area of this application (Kume, 1977).

The Water Right Program monitors two observation wells completed into the Codell sandstone (DG-80F and HT-87D) but are located about 23 and 25 miles north and northeast of this site respectively. Water levels for these two wells show response to climatic conditions and annual fluctuations that may be due to pumping (Water Rights, 2010). However, because these wells are located so far from this site the record would only be representative of the entire aquifer and not show any aquifer response due to pumping from this site. Water levels for these two observation wells are included with this report for informational purposes.

The Corps of Engineers drilled an observation well in T95N R64W in the northeast corner of section 11 which is located about two miles east of this site. Kume published a hydrograph of the water levels beginning in 1952 and extending through 1970 (page 21, Figure 17) in Bulletin 22, Geology and Water Resources of Charles Mix and Douglas Counties. The Water Rights Program began monitoring this same well in 1982 and continued through 1993 when the monitoring well ceased to function properly. The Water Rights well name was CM-52A for this Corps of Engineer well and a hydrograph for the available record is included with this report. The entire water level record for the Codell indicates the aquifer is capable of sustaining additional withdrawals (Water Rights, 2010).

REVIEW OF EXISTING WATER PERMITS/RIGHTS

There are no nearby water permits/rights that obtain water from the Codell sandstone aquifer. There are domestic wells in the area which use the Codell as a source of water. The applicant indicates two sites with water well locations about 1.5 miles northwest and northeast of this site. At this distance and with the relatively small pumping rate drawdown is not expected to be significant nor cause any adverse impacts. At one time the City of Geddes, Town of Ravinia and the City of Lake Andes used wells from the Codell but now obtain water from the Missouri River or from rural water. Those wells are used as a backup water supply at this time. The only other Codell aquifer Water Right in Charles Mix County is for Clearfield Colony for domestic use.

CONCLUSIONS

1. Water is available from the Codell aquifer.
2. The aquifer is under artesian conditions at this site. Drawdown due to pumping can be expected to occur. However, drawdown is not expected to be significant at this pumping rate nor cause any adverse effects on existing water rights or on area domestic users.
3. The well authorized by this application must be constructed in accordance with SD Well Construction Rules. Also there is a collapsed well near this site that must be plugged in accordance with SD Well Construction Standards if that has not already been done.
4. Plans and specifications for this facility have been approved by the Department.
5. The primary source of water for this facility is from Randall Rural Water System and this well will be a supplemental source for the facility.

James A Goodman
Natural Resources Engineer

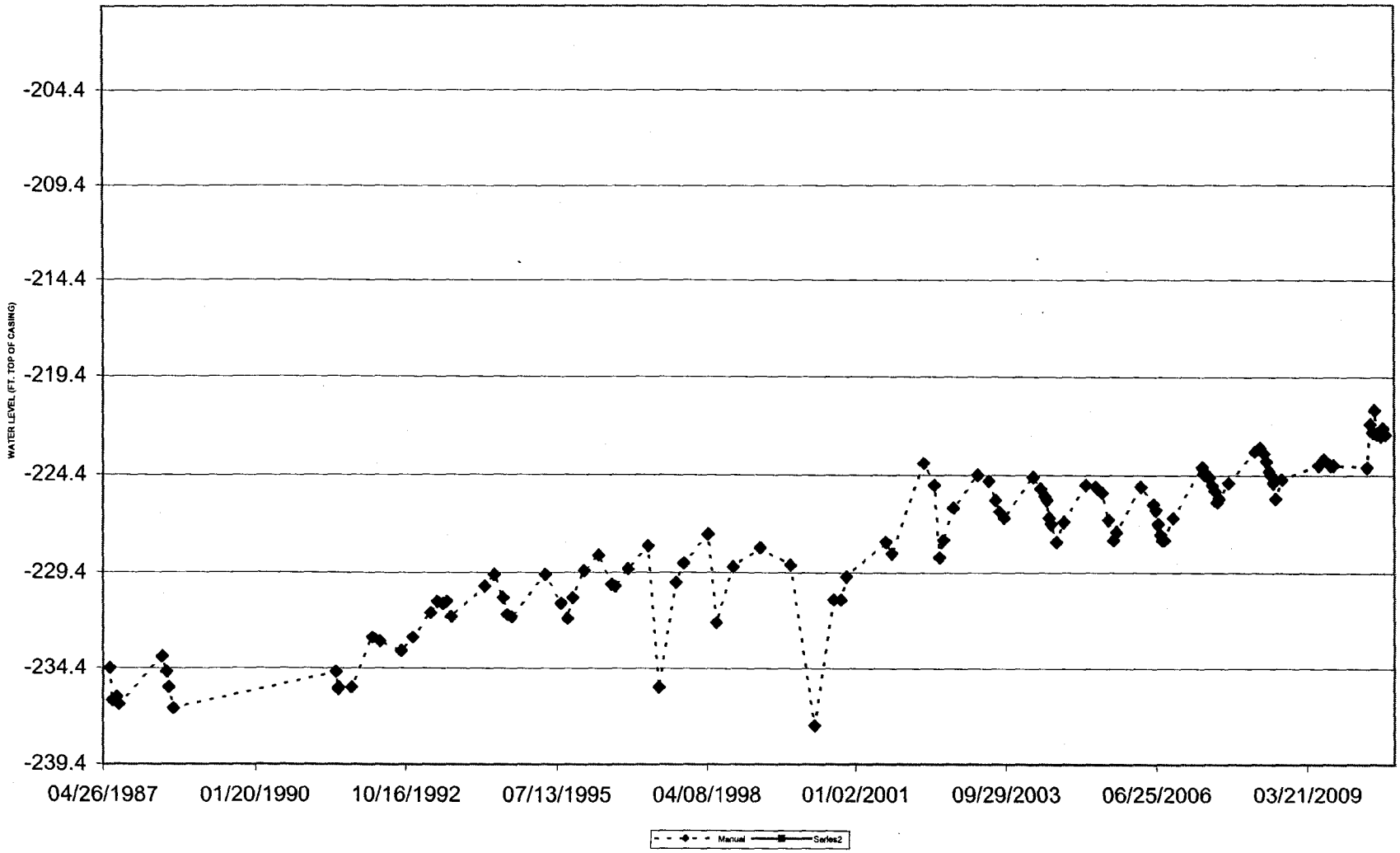
BIBLIOGRAPHY

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

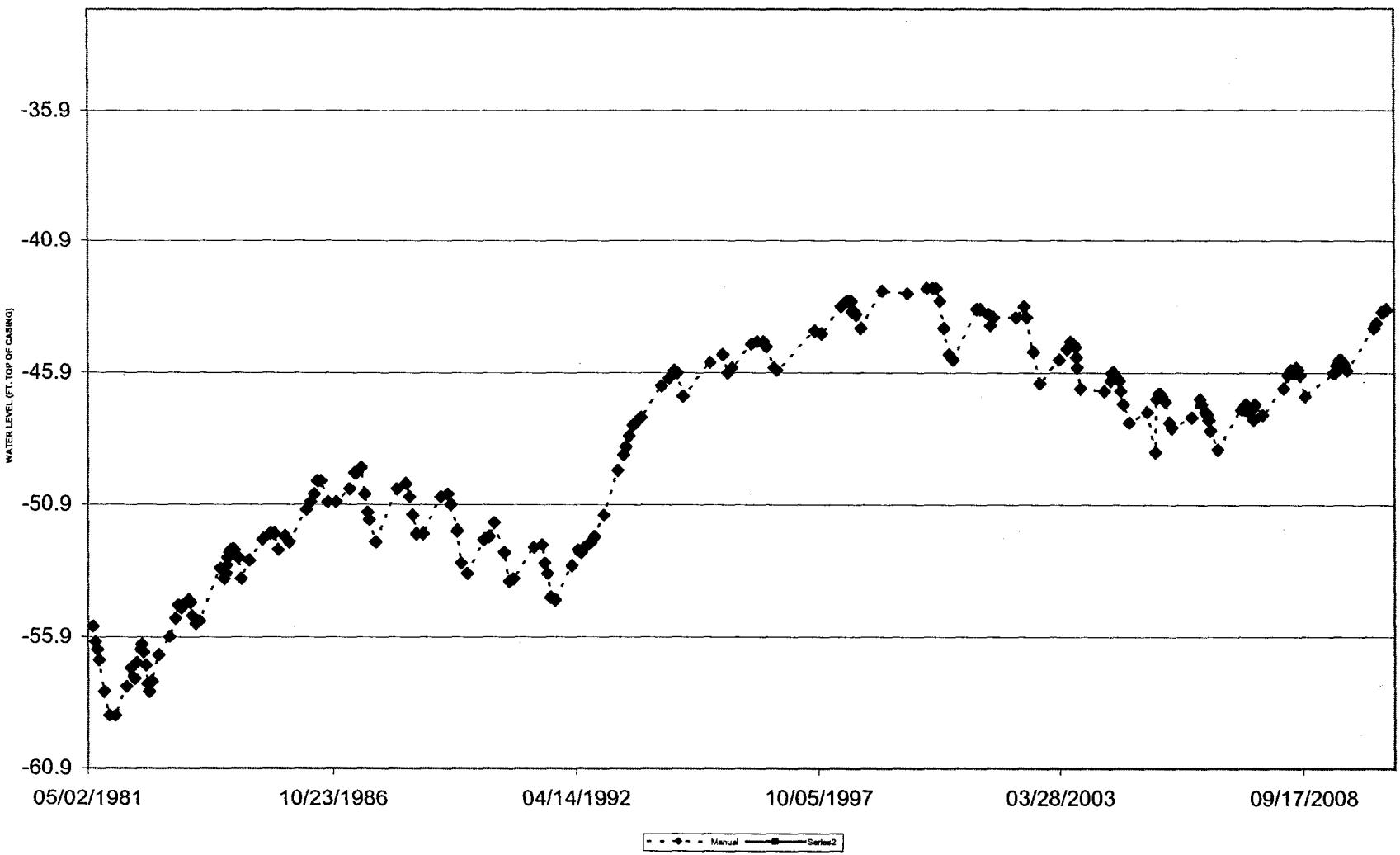
Kume, J., 1977, Geology and Water Resources of Charles Mix and Douglas Counties, South Dakota, Part II Water Resources, Bulletin 22, SD DENR, SDGS, Vermillion, SD, 57069.

Water Rights, 2010, Unpublished Observation Well Records for the Codell Aquifer, SD DENR, DES, Water Rights Program, Pierre, SD, 57501.

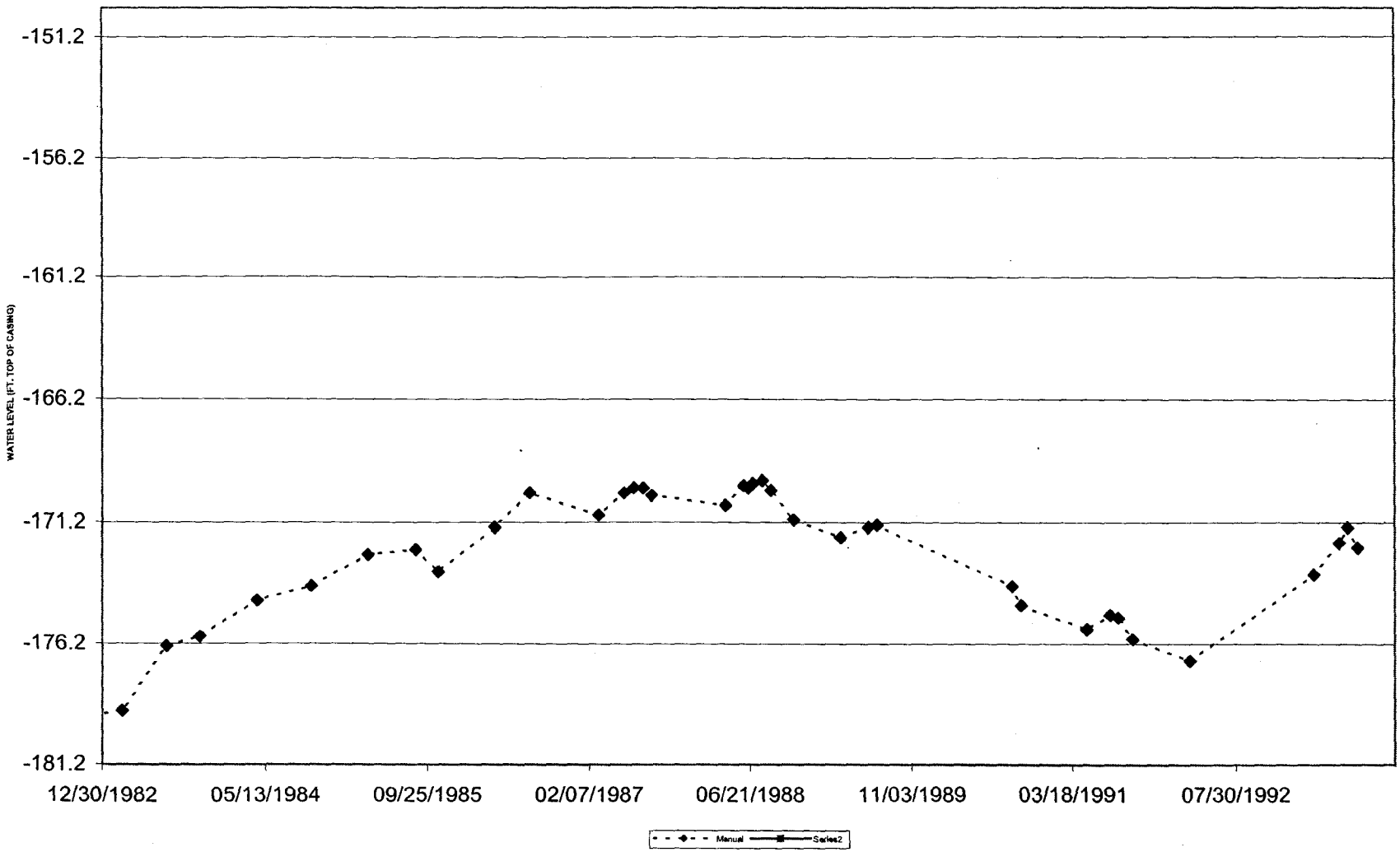
WATER RIGHTS' OBSERVATION WELL
HT-87D



WATER RIGHTS' OBSERVATION WELL
DG-80F



WATER RIGHTS' OBSERVATION WELL
CM-52A



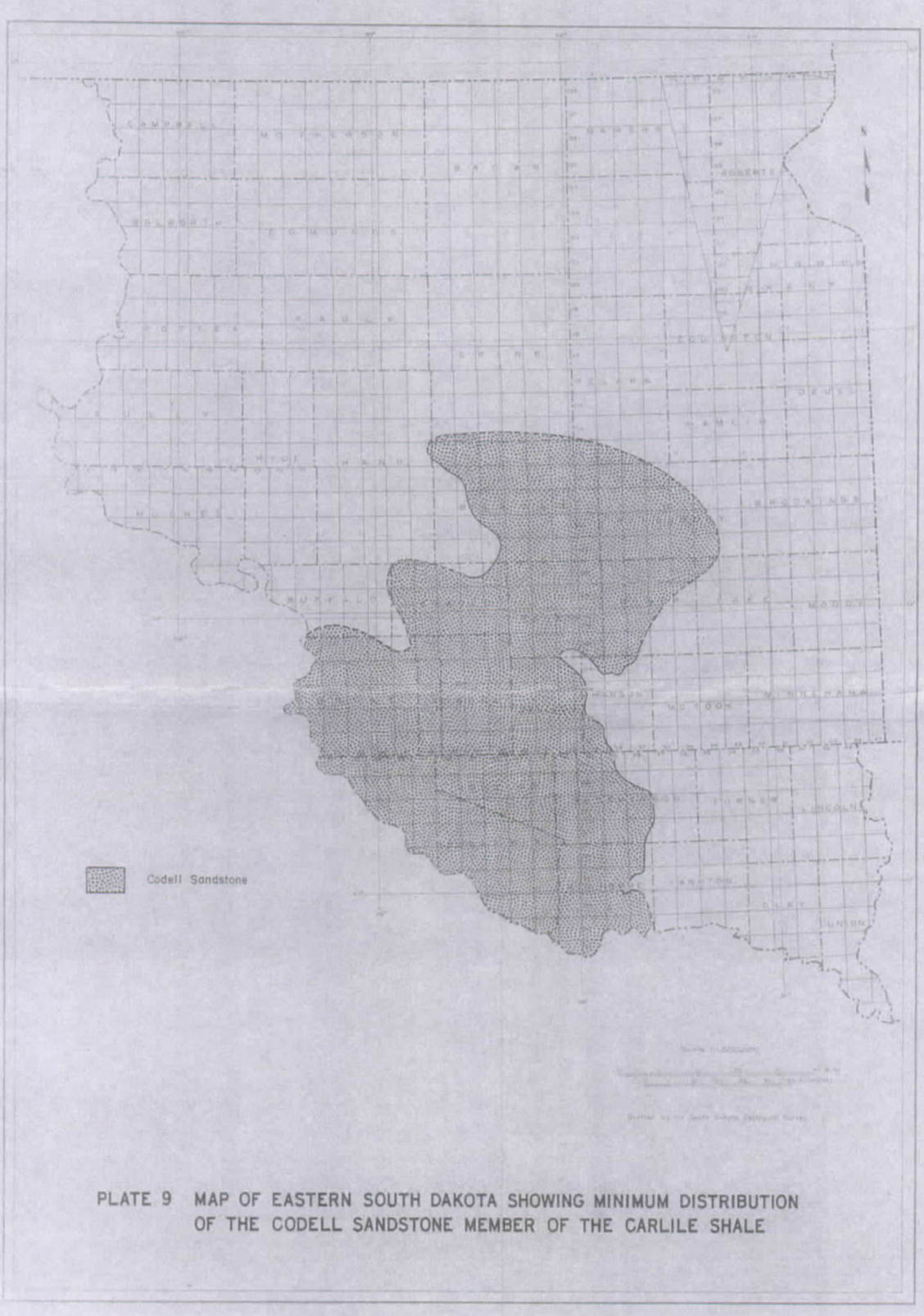


PLATE 9 MAP OF EASTERN SOUTH DAKOTA SHOWING MINIMUM DISTRIBUTION OF THE CODELL SANDSTONE MEMBER OF THE CARLILE SHALE

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RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT APPLICATION NO. 7206-3, Long View Farms, LLP

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. 7206-6, Long View Farms, LLP, 3172 320th Street, Hull IA 51239.

The Chief Engineer is recommending APPROVAL of Application No. 7206-3 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 well approved 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 well authorized by Permit No. 7206-3 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. Permit No. 7206-3 is subject to compliance with requirements of the Department's Water Pollution Control Permit issued pursuant to SDCL 34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

4. Permit No. 7206-3 is subject to compliance with all existing and applicable Water management Board Rules including but not limited to:

   a) Chapter 74:54:01 Ground Water Quality Standards,
   b) Chapter 74:54:02 Ground Water Discharge Permit,
   c) Chapter 74:51:01 Surface Water Quality Standards,
   d) Chapter 74:51:02 Uses Assigned to Lakes,
   e) Chapter 74:51:03 Uses Assigned to Streams, and
   f) Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions

See report on application for additional information.

Garland Erbele, Chief Engineer
September 1, 2010

Instruction to Newspaper - Publish first Notice on September 8, 2010 with the second publication 7 days later. The applicant is responsible for payment. The text of the notice can be e-mailed to your paper by contacting Karen Schlaak at (605) 773-3352 or email: Karen.schlaak@state.sd.us.

NOTICE OF HEARING on Application No. 7206-3 to Appropriate Water

Notice is given that Long View Farms, LLP c/o Arlan Moss, 3172 320th St, Hull IA 51239 has filed an application for a water permit to appropriate 0.067 cubic feet of water per second (30 gallons per minute) from one well to be completed into the Codell Aquifer (approximately 600 feet deep) located in SW ¼ NW ¼ Section 9-T95N-R64W for commercial use at a swine farrowing facility.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 7206-3 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.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by September 27, 2010. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 1:00 p.m. (CST) on October 6, 2010 in the Matthews Training Center, Joe Foss Building, 523 E. Capitol Ave, Pierre SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny this application based on the facts presented at the public hearing. The October 6, 2010 hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by September 27, 2010.

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 September 27, 2010, at the above Water Rights Program address to request copies of information pertaining to this application. Notice is given to individuals with disabilities that this hearing is being held in a physically accessible place. Please notify the Department of Environment and Natural Resources at least 48 hours before the hearing if you have a disability for which special arrangements must be made at the hearing. The telephone number for making arrangements is (605) 773-3352.

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 September 27, 2010.

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. Published twice at the total approximate cost of_____.

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WATER RIGHTS
PROGRAM

Affidavit of Publication

STATE OF SOUTH DAKOTA)

)SS

COUNTY OF CHARLES MIX)

Kim Johnson, of said County and State being first duly sworn on her oath says: That ***The Wagner Post*** is a legal newspaper of general circulation, printed and published in Wagner, in said County and State, by Kim Johnson, and has been such newspaper during the time herein mentioned; and that I, Kim Johnson, the undersigned, am office manager of said newspaper in charge of the advertising department thereof, and have personal knowledge of all the facts stated in this affidavit; a printed copy of which is hereunto attached, was printed and published in the regular and entire issue of said newspaper and not in supplement, once each week for 2 successive weeks.

1st publication made on 8 day of Sept., 2010

2nd publication made on 15 day of Sept., 2010

3rd publication made on _____ day of _____, 2010

4th publication made on _____ day of _____, 2010

5th publication made on _____ day of _____, 2010

That said newspaper is a legal newspaper, and has a bonafide circulation of more than two hundred copies weekly, and has been published within the County of Charles Mix for more than fifty-two successive weeks prior to the first publication of said notice, and is printed in an office maintained in Wagner, South Dakota, the place of publication of said newspaper. That the full amount of the fee for the publication of the annexed notice is

$165.34

Kim Johnson

Subscribed and sworn before me this 24 day of September, 2010.

Notary Public

My commission expires

My Comm. Expires 03-05-2012

Wednesday, September 15, 2010

PUBLIC NOTICES

NOTICE OF HEARING ON APPLICATION NO 7206-3 TO APPROPRIATE WATER

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Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 7206-3 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.

Any person interested in opposing or supporting this application must file a written petition with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605-773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by September 27, 2010. The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

The Water Management Board will consider this application at 1:00 p.m. (CST) on October 6, 2010 in the Matthews Training Center, Joe Foss Building, 523 E. Capitol Ave, Pierre, SD. The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny this application based on the facts presented at the public hearing. The October 6, 2010 hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any interested person opposing the application. The request for an automatic delay must be filed by September 27, 2010.

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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 September 27, 2010.

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.

Published twice at the total approximate cost of $165.34

Pub: September 8, 15, 2010

9-23-10

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WATER RIGHTS PROGRAM

Dear Chief Engineer,

I am writing to oppose approval of a commercial well permit to Long View Farms. I also am requesting an automatic delay of the hearing.

Long View Farms should not be allowed to have a commercial well (permit) for these reasons:

1) It is not in the public interest. Many people work and live near Long View Farms and the areas where hog waste is applied. These people are exposed to harmful toxins, bacteria, and viruses produced by this facility and distributed via the air and water run-off. The Native American community already carries a high disease burden and would thus be more vulnerable to the health hazards associated with large confinement facilities.

2) It is not a beneficial use of water. Annually millions of gallons of swine waste will be combined with the water pumped from the Coddell Aquifer and applied as fertilizer to the farm fields of a few farmers. Easy access to "free" public waters benefits the owners of Long View and the farmers who are in the manure management pla

Studies from other states where large animal confinements confirm that the run-off from these fields ends up polluting rivers, streams, lakes, and shallow aquifers, resulting in "water too dirty to drink without chemical treatment". LongView should have to pay to use rural water, rather than be encouraged and sanctioned to pollute public waters by approving a commerial well permit to allow them easy access to the Coddell Aquifer.

I hope you will do the right thing. Thank you for your thoughtful consideration.

Joan Olive

Joan Olive, M.S., Speech-Language Therapist
Marty Indian School

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Charles Abourezk
*Robin L. Zephier
George J. Nelson
Rebecca L. Kidder

*Also licensed in Colorado

ABOUREZK LAW FIRM

P.O. BOX 9460
RAPID CITY, SD 57709-9460
(2020 W. Omaha Street)
TEL: (605) 342-0097
FAX: (605) 342-5170

Mike Abourezk
**Alicia D. Garcia

**Also licensed in California

September 24, 2010

Chief Engineer, SD DENR
Water Rights Program
Foss Building
523 E. Capitol
Pierre, SD 57501

South Dakota Department of Environment and Natural Resources
Water Rights Management Board
c/o Mr. Eric Gronlund
PMB 2020, Joe Foss Building
523 East Capitol
Pierre, SD 57501

Dear Chief Engineer and Board:

Please find enclosed herewith a Notice of Appearance on behalf of the Yankton Sioux Tribe, and the Petition in Opposition to the Permit, Petition to Intervene, and Request for Extension of at least 20 days, in the Matter of Water Rights Application 7206-03. If you have any questions or concerns, please do not hesitate to contact me at your convenience.

Respectfully submitted,

Rebecca L. Kidder,
Abourezk & Zephier, P.C.
Attorney for the Yankton Sioux Tribe
2020 W. Omaha St.
P.O. Box 9460
Rapid City, SD 57709
(605) 342-0097

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of September, 2010, she mailed a true and correct copy of the foregoing **Notice of Appearance of Rebecca Kidder as Counsel to Petitioner Yankton Sioux Tribe** and **Petition in Opposition to Water Permit Application 7206-03 and Petition to Intervene** to:

Chief Engineer, SD DENR
Water Rights Program
Foss Building
523 E. Capitol
Pierre, SD 57501

South Dakota Department of Environment and Natural Resources
Water Rights Management Board
c/o Mr. Eric Gronlund
PMB 2020, Joe Foss Building
523 East Capitol
Pierre, SD 57501

Longview Farms LLP c/o
Arlen Moss
3172 320th St.
Hull, IA 51239

and that the same was provided by United States Mail, postage prepaid.

Rebecca L. Kidder

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SEP 27 2010
WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA)
)
BEFORE THE WATER MANAGEMENT)
BOARD

IN THE MATTER OF WATER RIGHTS)
PERMIT APPLICATION 7206-03)
BEFORE THE SOUTH DAKOTA)
WATER MANAGEMENT BOARD) **NOTICE OF APPEARANCE**
)

NOTICE IS HEREBY GIVEN that Rebecca Kidder hereby enters her Notice of Appearance as Counsel of record for the Yankton Sioux Tribe.

Dated this 24th day of September, 2010.

R Kidder

Rebecca Kidder, Attorney
Abourezk & Zephier, P.C.

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SEP 27 2010
WATER RIGHTS PROGRAM

OFFICE OF THE CHIEF ENGINEER
WATER RIGHTS PROGRAM
STATE OF SOUTH DAKOTA

In the Matter of Water Permit	)	Application No. 7206-3
	)	
Application 7206-03	)	PETITION IN OPPOSITION TO
	)	APPLICATION AND
	)	RECOMMENDATION, PETITION TO
	)	INTERVENE, AND REQUEST FOR
	)	HEARING EXTENSION OF AT LEAST
	)	20 DAYS

The Yankton Sioux Tribe, Petitioner, hereby submits this Petition in Opposition, Petition to Intervene, and Petition for a Hearing Extension of at least 20 days, pursuant to SDCL §46-2A-6, Application to Appropriate Water 7206-03 (Application) filed by Long View Farms LLP (LVF). The Yankton Sioux Tribe is a federally recognized Indian Tribe located within Charles Mix County, South Dakota. The Yankton Sioux Tribe files this Protest and Petition on its own behalf and on behalf of its individual tribal members. The Application – No. 7206-3 - requests approval for the diversion of 0.067 cubic feet of water per second from one well to be completed into the Codell Sandstone Aquifer for purposes of commercial use in a livestock confinement operation located directly adjacent to and abutting lands comprising the Yankton Sioux Indian Reservation, South Dakota. The diversion point will be located in SW ¼ NW ¼ Section 9,T. 95N, R64W.

The Yankton Sioux Tribe and its individual members include over 3,000 residents of Charles Mix County, South Dakota residing on and near Tribal Reservation lands adjacent to and near the Longview Farms LLP proposed well location and the CAFO site it serves. The Yankton Sioux Tribe and its individual members are owners of numerous wells utilized for domestic

water supply, livestock, and irrigation located upon Reservation lands and other lands adjacent to and surrounding the well location. These are primarily shallow water wells which will be impacted if the aquifer recharge is not commensurate with total withdrawals from the aquifer.

The Yankton Sioux Tribe on its own behalf and on behalf of its individual members files these petitions in opposition and to intervene for the following reasons:

1. This Application does not satisfy any of the four statutory criteria in SDCL Chapter 46-2A governing the approval of applications to appropriate water resources. The Chief Engineers' determinations on all four criteria are unsupported by factual data and evidence on the recharge rate of the aquifer, or existing wells and springs utilized for domestic use in the immediate vicinity of this proposed well. See, Recommendation of Chief Engineer for Water Permit Application No. 7206-3, Long View Farms, LLP.

2. SDCL §46-2A-9 dictates that 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. The application proposes to appropriate .067 cf/s from a well completed into the Codell Aquifer. SD DENR has not mapped the Codell Aquifer since 1982, despite the significant expansion of wells in the counties served by this aquifer. The only test wells DENR has investigated recently are 23 and 25 miles north and northeast of this location, which is too far from the present location to make a factual determination that this proposed well will have no impact on the existing domestic wells in close proximity to the location of this proposed well. Further, the Chief Engineer determined that the test well 23 and 25 miles north and northwest of the proposed location "show response to climatic conditions and annual fluctuations that may be due to pumping."

Further, the Chief Engineer relied solely upon the Applicant's report of two domestic wells in the immediate vicinity of this well, and has made no investigation of existing domestic wells in the vicinity of this proposed well. The Petitioner in this matter provided to the South Dakota DENR on June 2, 2009 and January 14, 2009 a report from Professor Perry Rahn that documents the presence of nine shallow wells and springs in the immediate vicinity of the proposed well. Attachment 1, Reports of Professor Perry Rahn. Therefore, the conclusion that there is a reasonable probability of the availability of water is not based upon a factual determination based upon the data, examination of the springs and well in the immediate vicinity of this proposed well, or determination of the recharge rate of the Codell or Niobrara, or the shallow aquifer located in this area located within the Herrick formation.

3. Granting this permit will result in "unlawful impairment of existing rights." The Chief Engineer determined that there:

> are no nearby water permits/rights that obtain water from the Codell sandstone aquifer. There are some domestic wells in the area that use the Codell aquifer. The applicant indicates two sites with water well locations about 1.5 miles northwest and northeast of this site. At this distance and with relatively small pumping rate drawdown is not expected to be significant nor cause any adverse impacts. At one time the City of Geddes, Town of Ravinia and City of Lake Andes used wells from the Codell but now obtain water from the Missouri River or from rural water. Those wells are used as a backup water supply at this time. The only other Codell aquifer Water Right in Charles Mix County is for Clearfield Colony for domestic use.

Report on Water Permit No. 7026-6, For Long View Farms LLP, p. 1 (August 27, 2010). (LVF Report)

The Chief Engineer, however, has not provided any basis for his assumption that there "should not be" interference with existing water rights or domestic wells. The Engineer does not provide any information as to the relationship of the location of water right points of diversion or domestic wells and the hydrological connectivity of the proposed well in the Application. In

addition, the Chief Engineer does not provide any data on the specific amount of water needed by all other pre-existing wells. The Chief Engineer points to no assessment of the depths of the thousands of wells in this aquifer to determine this permit will not impact pre-existing appropriations of water. There is simply no basis upon which to determine that "no -interference" with domestic water supply will occur. The United States Geological Survey has documented thousands of wells for domestic consumption in the Codell Aquifer Region. USGS Well Survey of Yankton Sioux Reservation, 2005; USGS 2007 Charles Mix County Well Survey. The Department was made aware of this information when the Tribe filed its Protest the Water Permit Application 7006-3, but has failed to investigate this information since that objection was filed on June 23, 2008. Until such time as the DENR has fully investigated the drawdown rates, capacity of the Codell aquifer, and the amount of water currently in use by domestic and other existing wells and natural shallow springs, given the sensitivity of the two test wells located 23 and 25 miles north and northeast of the proposed well location, the finding of the Chief Engineer that there is a reasonable probability that there will be no impairment of existing rights is unfounded.

4. The Yankton Sioux Tribe is the owner of reserved water rights upon its Reservation lands established by the Treaty of 1858 and as diminished by the Act of1894. See, Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable). The Tribe's rights to water from the Codell Aquifer are rights to sufficient water to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, and their "reasonably feasible" uses of such water. Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969). It

includes the amount of water required to make the Reservation viable. Arizona v. California, 373 U.S. 546, 599 (1963). The courts have already determined that Tribes have the right to assert these rights on behalf of its members. See, United States v. Nebraska, 520 F.2d 676, 688 (9th Cir. 1975). The Chief of Engineers has not assessed the reserved water rights of the Tribe or determined the amount of water in the aquifer, and so has no reasonable basis to conclude, without further investigation, that the federally protected water rights of the Yankton Sioux Tribe are not impaired by this permit. These reserved water rights are federally protected from impairment by off-reservation withdrawals from the Codell Aquifer, including Permit 7006-3. Winters v. United States, 207 U.S. at 576; Arizona v. California, 373 U.S. at 599; Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981). The Yankton Sioux Tribe has the right to protect its reserved treaty water rights from appropriation by others and from "man-made despoliation." See, United States v. State of Washington, 506 F.Supp. 187, 203 (D. Wa. 1980). See also, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984)(requiring revival of wetlands decimated by non-Indian stream withdrawals); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)(requiring maintenance of minimum stream flow for downstream tribal fishery).

The use of water for a CAFO on lands upland from and directly adjacent to tribal lands and water supplies, both surface and subsurface, and the location of manure dumping fields adjacent to Reservation lands ensures runoff from the 976,200 cubic feet of liquid manure dumped annually will contaminate the Codell Aquifer and all surface waters on Reservation lands, resulting in impairment of the Tribe's and its tribal members' currently appropriated water and its reserved water rights.

5. The use of water pursuant to this Permit is not in the public interest.

The discharge of manure into waterways through runoff releases antibiotic resistant toxic bacteria (i.e. e.coli, yersinia, leptospora, cryptosporidium parvum, giardia lamblia), other pathogens, and excessive nutrients into groundwater and surface water is a public health threat.

6. The use of the water from this Permit is not in the public interest. High concentrations of animal waste from this CAFO will emit hydrogen sulfide, ammonia, Volatile Organic Compounds, and other gases and particulate matter that are known to cause a human health threat once released into the air. Hydrogen sulfide is a health threat that is irreversible, exposure causes sore throat, seizures, comas and even death. Farmworkers and neighbors of existing hog CAFOs report headaches, shortness of breath, wheezing, excessive coughing, and diarrhea. Ammonia is another byproduct of animal waste and has been linked to acid rain. In Oregon, for example, the Columbia River Gorge has seen unprecedented levels of acid rain in recent years which is likely linked to ammonia releases at Three-mile Canyon Farms which is the single largest source of air pollution in that state. The American Public Health Association issued a resolution urging federal, state, and local governments and public health agencies, "to impose a moratorium on new CAFO's" on November 11, 2003. The noxious odors of the CAFO in question will create an ongoing and persistent nuisance to the thousands of people living and working within 6 miles of the CAFO and associated manure fields, including the Head Start School, the Tribe's Fort Randall Casino, which is heavily dependent on tourism, and the Tribe's Travel Plaza.

7. The permit is not in the public interest. Petitioners submit that there is a high probability that water appropriated by this permit, and ground and surface waters of all properties and owners located on and adjacent to the CAFO and manure dumping fields in this area will be contaminated by excessive nutrients, heavy metals, VOC's, antibiotic resistant bacteria, ammonia, and hydrogen sulfide from runoff and airborne emissions. Polluted waters present a clear and present threat to public health, the environment, and the endangered species in the area including the federally protected eagle population of the Karl Mundt Wildlife Preserve, in the immediate area and for downstream users.

8. This permit is not in the public interest. There is a daycare owned by a tribal member serving children ages 1 month to 4 years old within 1 mile of the CAFO site where 1 in 4 children are asthmatic. The CAFO's noxious fumes and odors will directly impact the health and well-being of these children and those who work in the daycare. The CAFO is also located within 4 miles of a federally funded Head Start School serving 3 and 4 year old children. The manure dumping locations surround this school and the Marty Indian School serving youth ages 6-18 years of age, as well as a Boys and Girls Club, Tribal Headquarters, and Nutrition programs. The odor from manure dumped on the fields and the CAFO itself will negatively impact the education, health and welfare of these residents.

9. The granting of this Permit is not in the public interest. This CAFO will produce less than 10 local jobs, and will result in the inability of landowners and residents to utilize surrounding lands for tourism, recreation, and homesites due to the water and air pollution and noxious odors emitted. Longview Farms LLP principals are domiciled in Iowa and have no

connection to the local economy. Longview Farms LLP has signed manure dumping agreements with local farmers releasing Longview Farms LLP from all liability for any impacts caused by runoff of manure into water and resultant water and air pollution. Longview Farms CAFO Application, Manure Application Agreements.

10. This Permit is not in accordance with SDCL §46-2A-9 and §46-1-4. The Chief Engineer's Report indicates that this well will be used only for backup water supply, and does not contain any statement of facts of the proposed use of water that would support a determination the water will be immediately used, or when it will be used, or that such use is necessary for operation of Longview Farm LLP.

The Chief Engineer should not condone this type of speculation in water and must prevent such precedent, particularly in light of DENR's role as protector of South Dakota citizens. SDCL §46-1-4 requires 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." This requires the applicant to establish that it "can and will put the conditionally appropriated water to beneficial use within a reasonable period of time." See e.g. Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights), 170 P.3d 307 (Colo. 2007).

These requirements are intended to ensure that the public's water resource is available to those who actually need water. David B. Schorr, Appropriation as Agrariaranism: Distributive Justice in the Creation of Property Rights, 33 Ecol. L.Q. 3,9,22 (2005).

In this case, in violation of the beneficial use doctrine and SDCL § 46-1-4 and §46-2A-9, the amount of water requested is for speculative purposes. There is no finding by the Chief Engineer that he reviewed the CAFO water requirements for existing operations, or the basis for determining that the amount reserved by this Permit will be used in a reasonable period of time.

11. This permit is not in the public interest. Petitioners have previously submitted an independent hydro-geological investigation of the specific area within which the proposed well is located indicating the existence of a shallow aquifer and unique geologic formation known as the Herrick formation, which is highly permeable, in this vicinity. Attachment 1, Rahn Reports. This report is further supported by the Chief Engineer's determination that "In this area the Niobrara formation (also considered an aquifer) overlies the Codell aquifer." The Chief Engineer has not made any assessment of the impact of this proposed well on the Niobrara formation, the Herrick formation, or any other shallow aquifer located on top of the Codell aquifer, as required by S.D.C.L. 34A-3A-24. In State *ex. rel* Missouri Parks Assoc. *et. al* v. Missouri Dep't. of Nat'l. Resources, Case No. 07AC-CC00923, Cole County District Court, the District Court determined the potential for damage to unique geologic historic formations located near a proposed CAFO warranted denial of construction permits in order to protect the unique geologic structure and the public interest. Denial of the water permit to protect the unique geologic structure and the shallow aquifer located in this area, until and unless an investigation is conducted at the proposed location to determine, based upon fact rather than speculation, that there is no shallow aquifer or Herrick Formation, nor any potential damage to the Niobrara Formation, is warranted.

For the foregoing reasons, Petitioner submits this petition and urges that the permit:

1. Should be denied as unsupported by facts and evidence upon which to form a reasonable basis for concluding the requirements of any of the four criteria in SDCL Chapter 46-2A-9 have been met; or in the alternative

2. Should be deferred pursuant to SDCL § 46-2A-7 until an investigation of the impacts that the point of diversion will have on the existing (and prospective) in-stream flows in the area, senior water rights, domestic use, unique geologic and hydro-geologic structures, and the public health and welfare from the CAFO for which the water is requested; and the structure and finances of Longview Farms LLP to determine they are sufficiently financially responsible for and maintain liability for pollution of the area and damage to domestic use of water is documented; and

3. Pursuant to SDCL §46-2A-5, Petitioner further requests that the Chief Engineer postpone the date set for hearing on the Application for at least 20 days; and

4. That the Petition to Intervene be granted.

Respectfully Submitted this 24th day of September 2010.

Rebecca Kidder, Attorney
Abourezk & Zephier PC
2020 W. Omaha St.
Rapid City, SD 57702
(605) 342-0097

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WATER RIGHTS
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Hydrogeology of the Ft. Randall Casino area, Charles Mix County, South Dakota

by
Perry H. Rahn, PhD, PE
1207 11th St.
Rapid City, SD, 57701

Prepared for:
Yankton Sioux Tribe
P. O. Box 248
Marty, SD 57361

November 25, 2008

PERRY H. RAHN
ASSOCIATION OF PROFESSIONAL GEOLOGICAL SCIENTISTS
CPGS
#3724

REGISTERED PROFESSIONAL ENGINEER
REG. NO.
4513
PERRY H.
RAHN, PH.D.
SOUTH
DAKOTA

Attachment

Introduction

The Yankton Sioux Tribe operates the Ft. Randall Casino in Charles Mix County, South Dakota. Currently a large hog farm, called Long View Farm, is being constructed approximately 3 miles southeast of the Casino. Figure 1 shows the location of the Ft. Randall Casino and the Long View Farm (NW ¼, Section 9, Township 95 North, Range 64 West).

This concentrated animal feeding operation (CAFO) involves the main feed lot as well as scattered lands within 4 miles where landowners have agreed to receive manure from the operation. Figure 2 shows the location of the main facility and the nearby manure spreading areas. Tracks of land owned or leased by the Yankton Sioux Tribe or tribal members are located in this 4 mile area.

Concern has been expressed by the Yankton Sioux Tribe and many landowners that ground water could be contaminated because of this CAFO. The purpose of this report is to examine the hydrogeology for this area, and to evaluate the potential for ground water contamination. This report does not address engineering projects related to this feedlot such as the animal waste management or the storm water pollution prevention systems. This report is a reconnaissance study of the geology and hydrology of the area with reference to the occurrence and flow of ground water that could be impacted by Long View Farm.

Possible Contaminants

Contaminants associated with CAFOs that could affect water supplies include nitrate, nitrite, ammonia, and

phosphate (Freeze and Cherry, 1979; Hallberg and Keeney, 1993). Pharmaceutical compounds may be present due to antimicrobials (Chlortetracycline and Tyrosin) or growth promoters used in feeds (E. Dreis, pers. comm., 10/6/08). These compounds are excreted by pigs, and if the pig manure is applied to the land as fertilizer, there is the potential for water contamination either from surface runoff or percolation to the water table. Antibiotic resistant genes have been traced from hog waste lagoons to ground water in a 2007 study in Illinois. The transmission of antibiotic resistant bacteria from CAFOs to humans is discussed by Groupman (2008).

Geology

The physiography of this area consists of a low Northwest-Southeast trending ridge separating the Missouri River valley from the Lake Andes-Red Lake valley containing Choteau Creek (Figure 1).

The bedrock geology consists of flat-lying Cretaceous sedimentary rocks (Hedges, 1975). Under the Ft. Randall Casino, the Pierre Shale extends from approximately 100 ft depth to 400 ft. The Niobrara Formation, referred to as the Niobrara aquifer by Kume (1972) underlies the Pierre Shale. The Codell aquifer ("sand rock") lies at approximately 600 ft depth. The Dakota aquifer is approximately 1,000 ft depth. The potentiometric surface of these aquifers generally flow westerly towards the Missouri River.

Shallow ground water is important to this study. Walker (1961) studied shallow ground water in the Wagner area,

but there is limited published information about the hydrogeology of surficial deposits in the Ft. Randall or Long View Farm area.

Flint (1950) shows a general map of the glacial deposits of eastern South Dakota. The exposed glacial deposits near the Ft. Randall Casino are shown as part of the James Lobe, late Wisconsin ("Cary") in age, roughly 10,000 to 25,000 years old.

A detailed geologic map of this area was published by the South Dakota Geologic Survey (Hedges, 1975). This map shows late Wisconsin stagnation drift covering earlier Pleistocene glacial and fluvial deposits. Figure 3 and 4 shows Qwlts (a variety of glacial till called "stagnation drift") and Qwlt ("glacially modified bedrock"). Stagnation till is loosely compacted ablation till that accumulates as the stagnant glacier melted, as opposed to compact lodgment till that is overridden and compacted by an active glacier. Figure 3 shows early Pleistocene Herrick Formation sand and gravels exposed near the Ft. Randall Casino. Figure 5 includes photographs by the author taken October 9-10, 2008, showing these exposures of the Herrick Formation.

Herrick Formation

Figure 5 shows the Herrick Formation exposed in a large pit (Wagner Building and Supply quarry) approximately ¼ mile Northwest of the Ft. Randall Casino. The sand and gravel is presently being quarried down to the elevation where it is saturated.

The presence of permeable deposits such as the Herrick Formation has legal relevance because a ground water discharge permit and ground water monitoring is required by SD DENR for new CAFOs located over shallow aquifers. Approximately 10 ft of till overlies the permeable Herrick sand and gravel at the Wagner Building and Supply quarry. The SD DENR uses 15 ft overburden thickness to evaluate regulations concerning feedlots located above shallow aquifers.

The Herrick Formation consists of non-glacial fluvial sand and gravel that is derived from western sources. Stevenson and Carlson (1951) mapped the Lake Andes area and show the "Herrick gravels" as early Pleistocene in age. Hedges (1975) found deposits of the Herrick Formation at scattered locations throughout Charles Mix and Douglas Counties. Green and Lillegraven describe a caribou antler found in the sand and gravel to be Kansan or Nebraskan age. Harksen and Macdonald (1969) found Herrick gravel to be equivalent to the Medicine Root Gravel which is early Pleistocene (Nebraskan glacial stage).

The Herrick Formation is a fluvial deposit. Flint (1951) and Hedges (1975) show the early Pleistocene streams (e.g. the ancestral White, Niobrara, and Cheyenne Rivers) flowed easterly from the Black Hills and Wyoming. Repeated glaciation covered these alluvial deposits and diverted the flow of these streams. Simpson (1960) describes the diversion of the ancestral White River in the Yankton area. Eventually the Missouri River developed its present location and now the streams in western South Dakota flow into it.

The Herrick Formation supplies municipal water to towns along Rt. 18 in the Burke, St. Charles, and Bonesteel area (Gries, 1996).

The Geologic Map of South Dakota (Martin et al., 2004) shows the Herrick gravel deposit as "To", the "Ogallala Group", Miocene to Pliocene in age. The Ogallala Formation, also called the High Plains aquifer, underlies parts of eight states from South Dakota to Texas. It is used extensively for irrigation in Texas and Kansas (Domenico and Schwartz, 1990; Anderson and Woosley, 2005).

The significance of the Herrick Formation to this study is that this thick permeable unit is exposed at the Ft. Randall Casino area and is thinly covered by glacial till. Although Jensen's (2008) map shows the Herrick Formation not extending under the Long View Farm, without detailed test drilling the areal extent (and proximity to the surface) of this permeable unit is not known.

Water Quality

There is some published water quality data for the Charles Mix County area. For example, Sando and Neitzert (2003) show the average total dissolved solids of Choteau Creek is approximately 1,500 mg/L, and the Missouri River is approximately 500 mg/L.

Kume (1977) shows the Choteau aquifer extending to 3 miles west of Wagner. The Choteau aquifer contains largely sodium sulfate ground water with an average total dissolved solids of 1,700 mg/L.

Table 1 shows data for three water samples collected by the author during October 9-10, 2008. The total dissolved

solids average 2,557 mg/L, which is higher than the Choteau aquifer. The nitrate at two locations is less than 1 mg/L, which is an indication of ground water chemistry of this area. The anomalously high nitrate at tributary to Sevenmile Creek is undoubtedly because the sample was not taken at the spring source, but was sampled approximately ½ mile downstream in a pasture where cattle were present.

Hydrologic measurements made October 9-10, 2008

The average annual precipitation of this area is approximately 22 inches (General Electric Co., 1980). May and June are the months of highest precipitation. In order to study the discharge of springs, the driest months of the year, typically September or October, are most useful because little if any surface water would be contributing to the spring discharge at this time. Rather, the discharge is representative of the ground water discharging from permeable deposits. Kume (1977) shows that September and October are generally the time of year when lowest water table conditions exist.

Conducting field measurement is handicapped by accessibility to private lands. Because of this, not all springs or wells were available for measurement on October 9-10.

Figure 6 is a copy of the USGS Wagner SW topographic map. The Ft. Randall Casino and Long View Farm is shown. On October 9-10, 2008, the author visited this area with Marilyn Bercier of the BIA, Richard Leasure of the Yankton Sioux Tribe, and Janet DeLoughery, a local

resident. Springs and static levels of water wells were made where landowners allowed access. Some water samples were collected.

Figure 7 shows: (1) the location and elevation of springs, and (2) the location and static level of shallow wells. The USGS topographic map "Wagner SW", at 1:24,000 scale, was used for land elevation. The source of the water table elevation data includes spring elevation or static level measured on October 9-10 (circled number on Figure 7). Additional springs are reportedly present at approximately the same elevation as the three springs measured on October 9-10; however, access to these additional springs was not available. Some data shown in Figure 7 are based on the static level of wells published in USGS or SDGS websites. Based on these elevations, a map of the water table was prepared. The water table map is similar to the general topography of the area.

Figure 8 is a geologic cross section though the Ft. Randall Casino showing the geology and water table, and the flow direction of the shallow ground water. The vertical exaggeration in Figure 8 is 11X.

Spring discharge was measured at three locations by a 90 degree V-notch weir (Figure 9). A general flow net (Figure 10) was prepared based on the water table map. Shallow ground water flow is generally NE, SE, and SW from Long View Farm.

Conclusion

From this study, the following conclusions can be drawn:

---Shallow ground water is present in sufficient quantity for domestic and livestock use.
---Shallow ground water flow from the Long View Farm disperses in nearly all directions away from the site.
---The background ground water quality is typical for this area.
---Shallow permeable geologic materials exist in this area. The stagnation till itself is fairly permeable, and may contain isolated unmapped outwash sand and gravel units. More importantly, the thick Herrick Formation sand and gravel is exposed close to the Ft. Randall Casino, and may extend under the till throughout a large part of the area impacted by this CAFO.

Future work in this area should include a comprehensive inventory and measurement of shallow wells and springs, including those on private lands. Future measurement of the discharge and chemistry of springs would add to the understanding of the hydrogeology of the area.

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Table 1. Water quality data (mg/L) for ground water samples collected October 10, 2008. Midcontinent Testing Laboratories, Rapid City, SD performed the analyses. The sample "Brad Irwin" was collected from a pipe at the spring source. The sample "Sevenmile Creek" was collected in a pasture of an eastern tributary approximately ½ mile below the spring complex. The sample "L. Kreeger" was collected from a shallow well. On October 16, 2008, Midcontinent Lab received a bacterial sample from L. Kreeger; their analyses indicate total coliform "present" but fecal coliform "absent".

Location	Time	TDS	Chloride	Nitrate (as Nitrogen)	Phosphate
Brad Irwin	8:30 am	2,630	17.8	0.657	0.010
Sevenmile Creek	10:00 am	2,720	55.0	29.1	<0.010
L. Kreeger	11:00 am	2,320	10.8	0.236	0.049

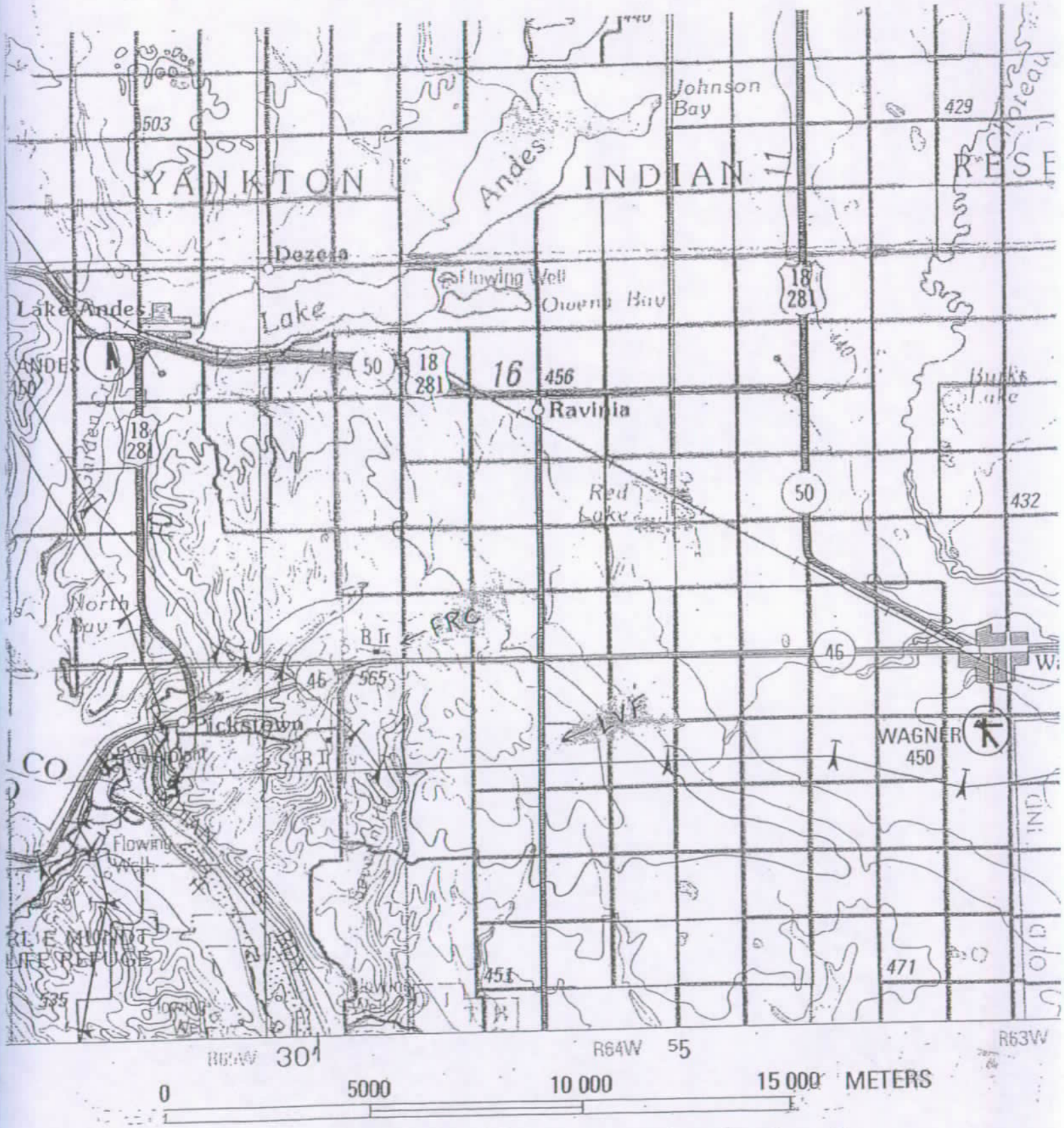


Figure 1. Map of Pickstown-Wagner area showing location of Long View Farm (LVF) and the Ft. Randall Casino (FRC). This map is from the USGS Mitchell (1990) quadrangle, contour interval 20 m. Original at 1:250,000 scale.

Figure 2. Road map of area near Long View farm (LVF). The shaded lands are proposed areas where manure is to be spread. From Eisenbraun and Associates (2007).

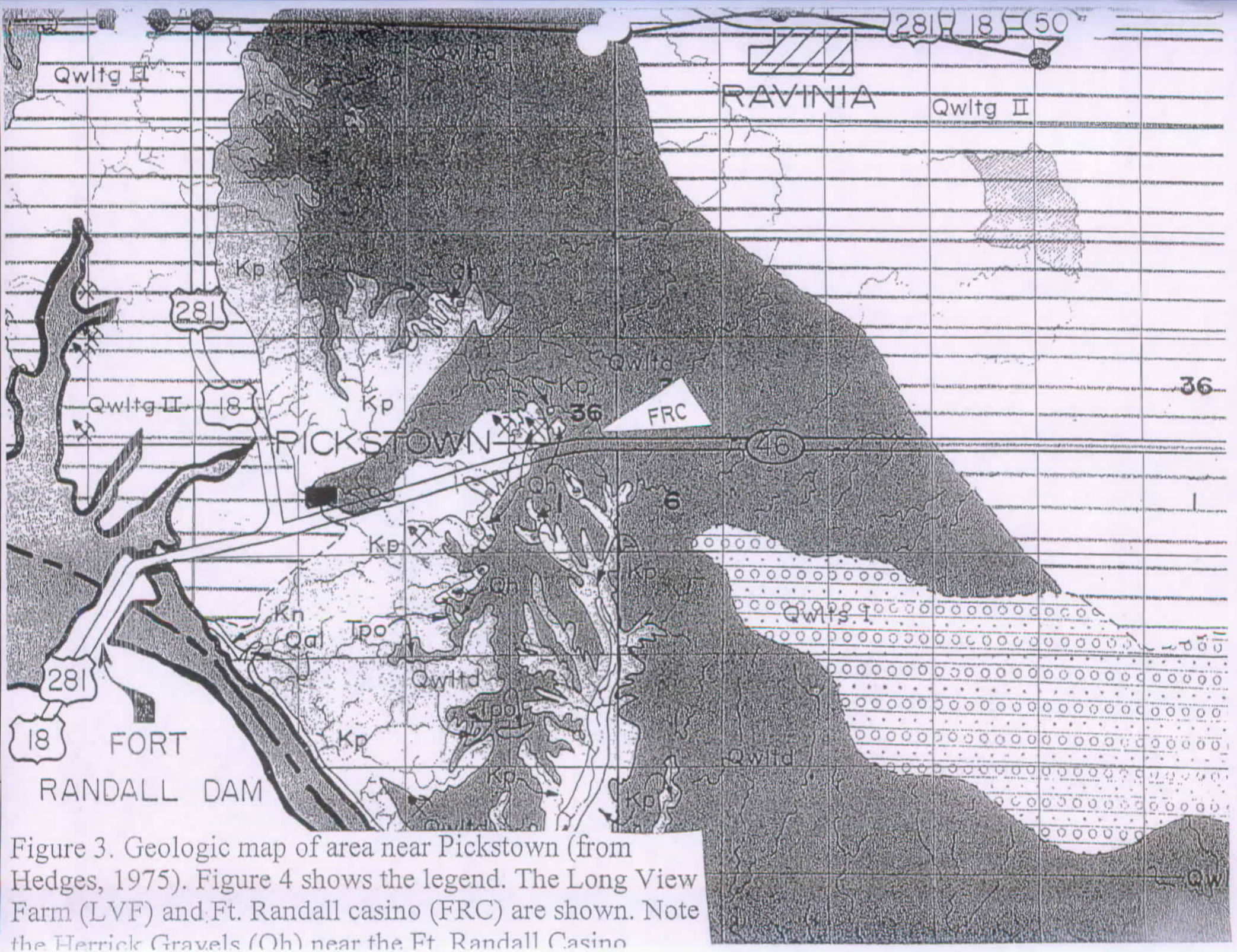


Figure 3. Geologic map of area near Pickstown (from Hedges, 1975). Figure 4 shows the legend. The Long View Farm (LVF) and Ft. Randall casino (FRC) are shown. Note the Herrick Gravels (Qh) near the Ft. Randall Casino

Alluvium—Black humic silty clay, stratified; sand and gravel; 0 to 15 feet thick along minor streams; up to 150 feet thick along Missouri River.

vium—Yellow to dark-gray silty clay or silt, poorly stratified; 0 to 10 feet thick.

Loess—Yellow silt or sandy silt, calcareous, 0 to 10 feet thick.

Terrace—Flat or sloping terrace along Missouri River, locally underlain with alluvium, till, outwash or loess; 0 to 90 feet thick.

Outwash terrace—Sand and gravel outwash terrace, some s[illegible] sand; iron-carbonate cementing common; 0 to 30 feet thick.

Valley outwash—Predominantly sand and gravel with some fine sand or silt; flat to nearly flat; 0 to 30 feet thick.

Collapsed outwash—Collapsed outwash deposits of variable texture; may contain some till. Qwloc I—Yellow silt and sandy silt, calcareous; local relief 10 to 20 feet; 0 to 15 feet thick. Qwloc II—Fine to coarse sand, relief 10 to 20 feet, 0 to 15 feet thick. Qwloc III—to coarse sand and gravel, maximum local relief 30 feet; 0 to [illegible] feet thick.

Undifferentiated outwash—Undifferentiated bodies of outwash material; Qwlou I—Mostly silt, clayey silt, and fine sand; 0 to 10 feet thick; Qwlou II—Coarse sand or sand and gravel; mostly ice contact origin, 0 to 20 feet thick.

Till (ground moraine)—Boulder-clay till, calcareous, oxidized portion yellow-brown to reddish-brown; unoxidized dark olive-gray to black; Qwltg I—low relief; Qwltg II—high relief.

Qwlts I

Till (stagnation drift)—Boulder-clay till, calcareous; varies locally from clay rich till to sandy gravelly till; Qwlts I—Low relief; Qwlts II—High relief; Qwlts III—Stagnation drift characterized by oblong to ovate disintegration ridges composed of till.

Qwlfd

Till (glacially modified bedrock)—Glacially modified stream-eroded bedrock topography, till generally less than 50 feet thick; [illegible]drock outcrops common; local relief highly variable, integrated [illegible]age.

Till (end moraine)—Boulder-clay till, calcareous; oxidized portion yellow to reddish brown, unoxidized portion dark-gray to black; forms discontinuous elongate ridge up to 15 feet high.

LATE WISCONSIN

QUATERNARY

Qh

Herrick gravel—Gravelly medium to coarse sand, stratified; quartz and feldspar dominant; pinkish color due to feldspar content; as much as 80 feet thick; western derived fluvial deposit; fossiliferous.

T_{po}

Ogallala undifferentiated—Light greenish-brown clay, silty clay and loose fine sand; a green massive orthoquartzite conglomerate as much as 6 feet thick locally present; sparsely fossiliferous; 40 feet thick.

Fort Randall Formation—Light brown to pink siltstones and clay; 5 foot zone of barite crystals or "rock rose" zone about 50 feet above base; sparsely fossiliferous; 60 to 120 feet thick.

K_p

Pierre Shale undifferentiated—Light gray to black marine claystone and shale; locally calcareous; marl and chalky zones occur throughout; manganese and iron-carbonate concretions common; bentonitic; about 600 feet thick.

Niobrara Marl—Light gray to dark bluish-gray limestone and marl; weathers to dark yellowish-orange; macrofossils include Ostrea and Inoceramus; microfossils predominantly Foraminifera; about 150 feet thick.

PLEISTOCENE — PRE-KANSAN — QUATERNARY

MIOCENE-PLIOCENE — OGALLALA — TERTIARY

FORT RANDALL FORMATION

UPPER CRETACEOUS — PIERRE SHALE — CRETACEOUS

NIOBRARA MARL

Geologic Contact dashed where approximately located

Lake

Meltwater channel

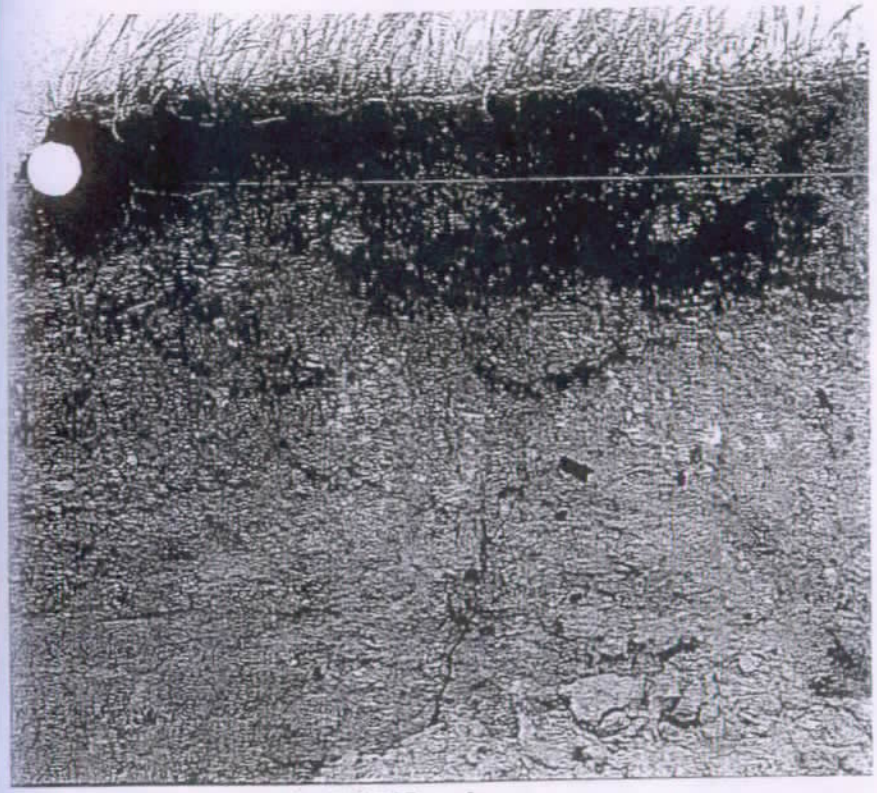
Ice-contact face

Intermittent lake or slough

Intermittent stream

Gravel pit

Figure 4. Legend for Figure 3 geologic map (from Hedges, 1975).



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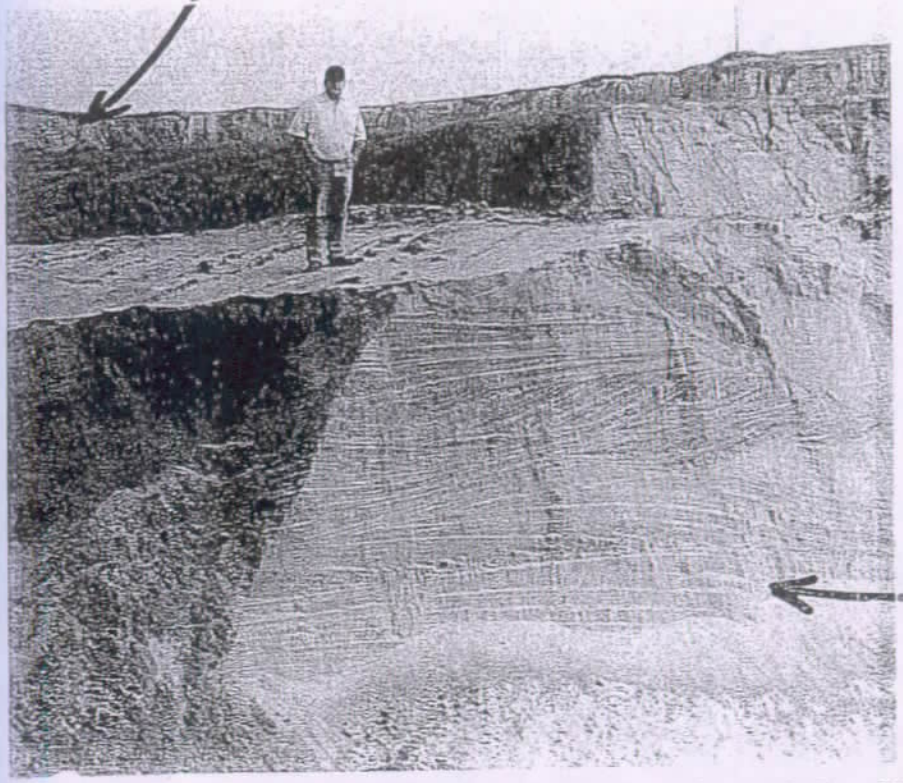

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Figure 5. Photographs of the Wagner Building and Supply Co. sand and gravel pit just NW of the Ft. Randall Casino. About 10 ft of till (Insert A) overlies about 40 ft of Herrick

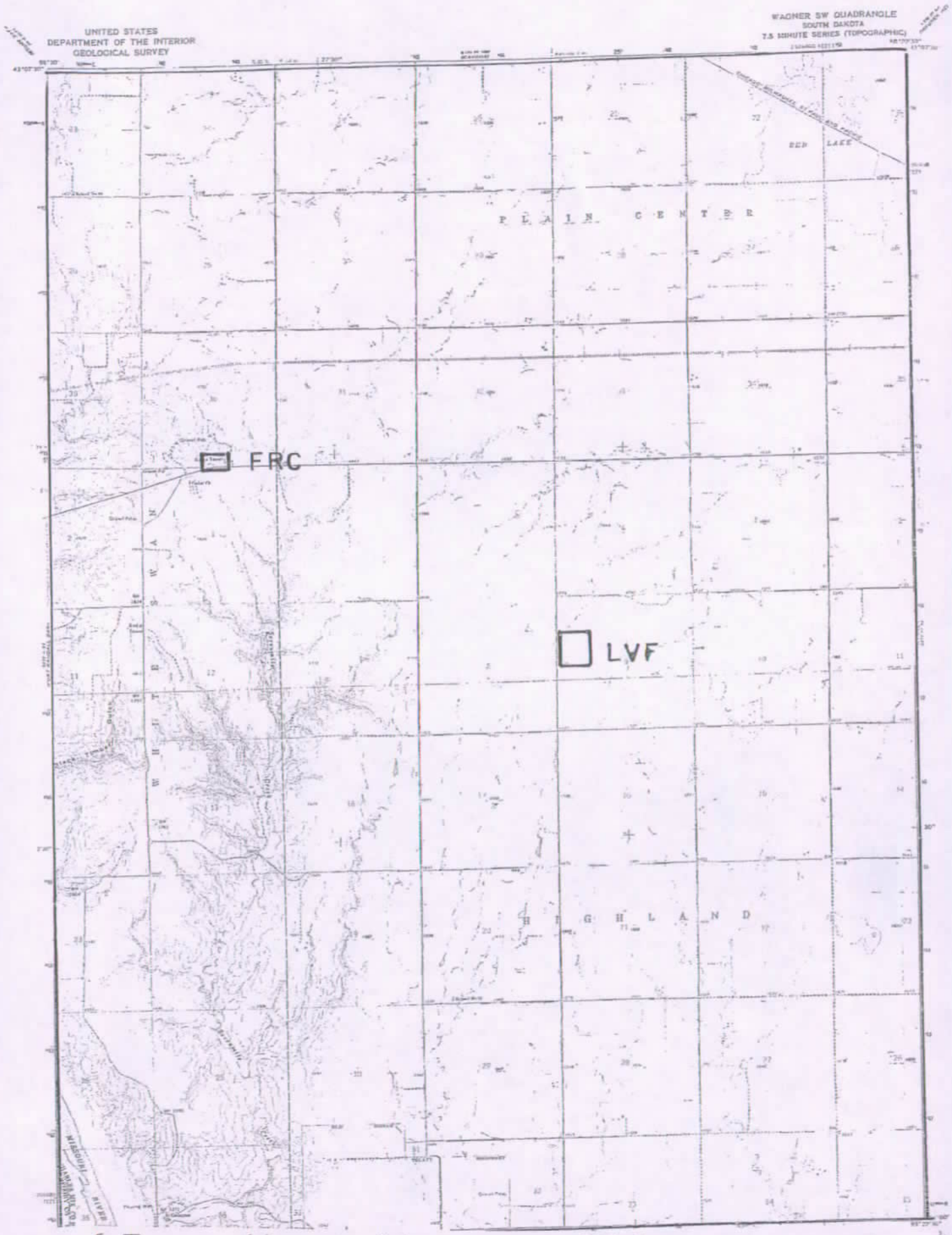


Figure 6. Topographic map of the area east of Pickstown. From USGS Wagner SW 7.5 minute quadrangle. Original at 1:24,000 scale. Contour interval 10 ft. Long View Farm

igure 7. Map of the water table (ft above sea level). Long

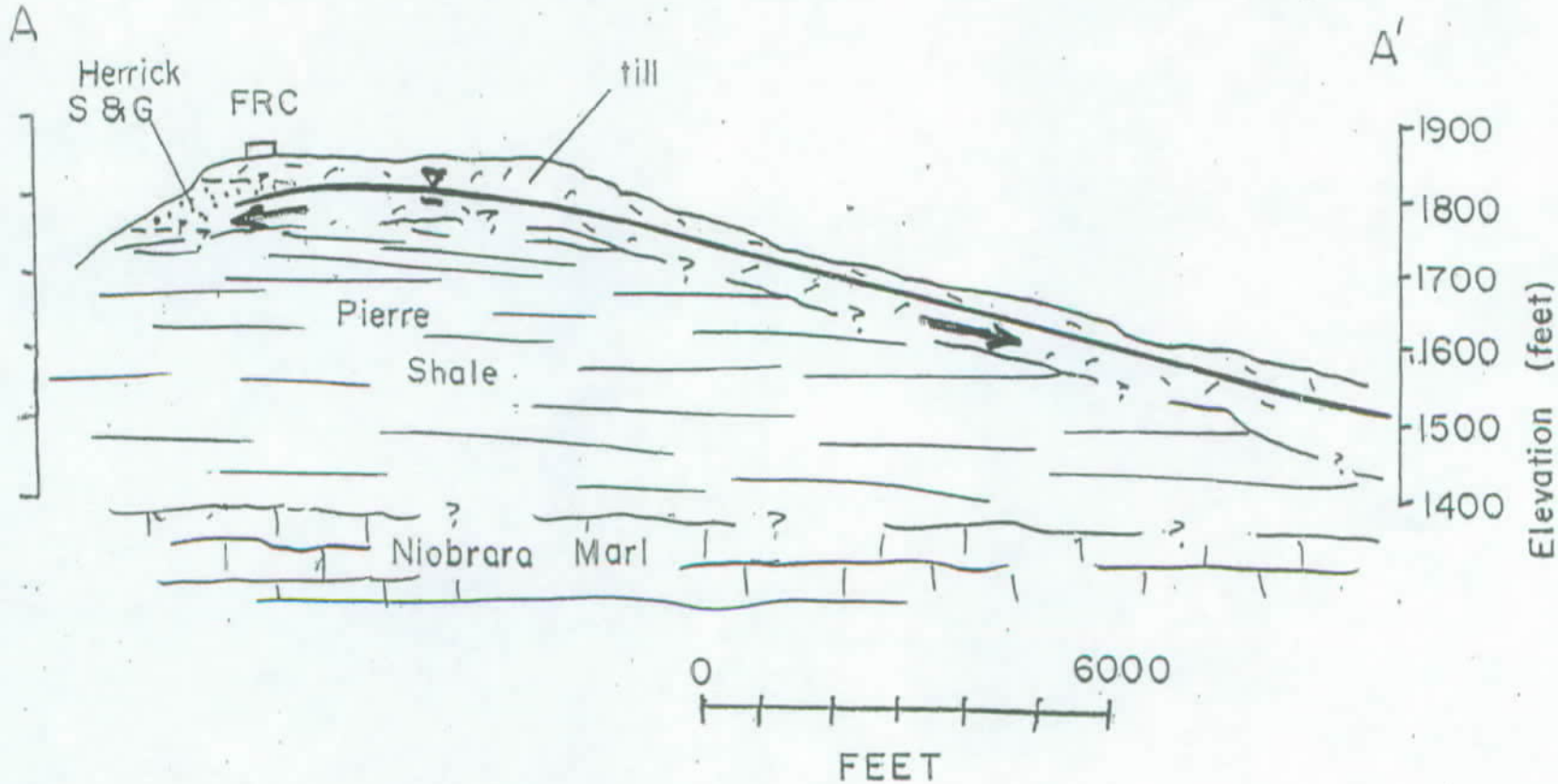


Figure 8. Geologic cross-section through Ft. Randall Casino. The location of A-A' is shown in Figure 10. The geologic contacts and position of water table are approximate. The general ground water direction is shown.

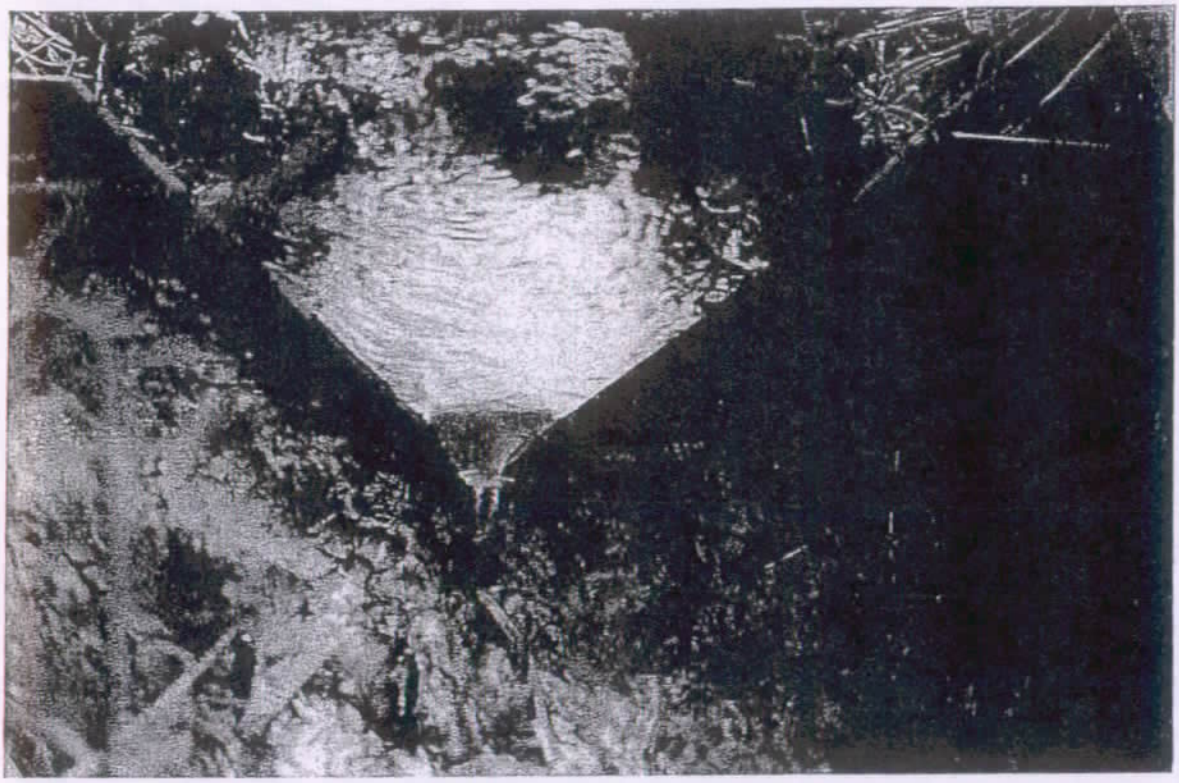
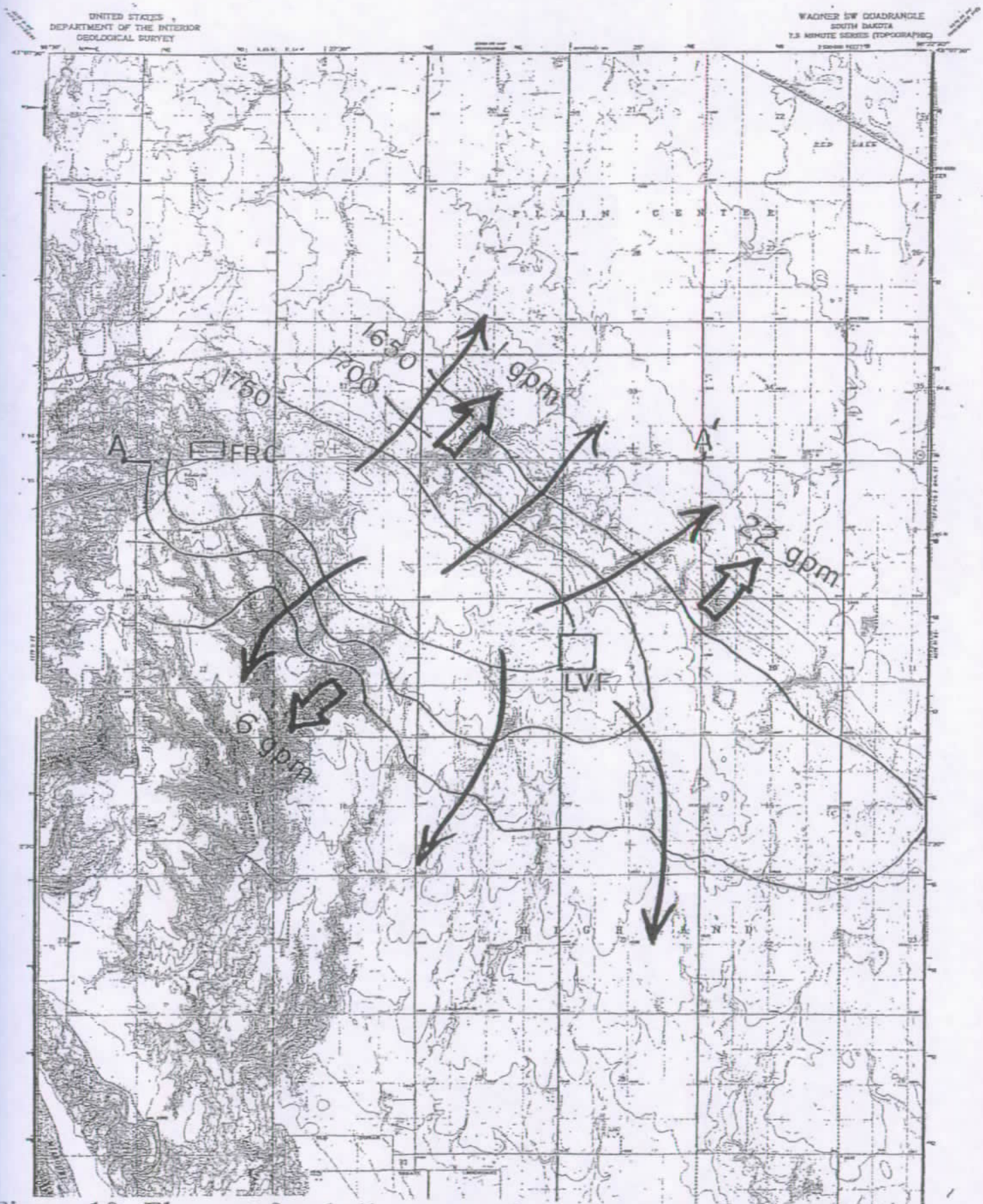


Figure 9. October 10, 2008, photograph of 6 gpm flowing through 90 degree V-notch weir. This measurement of spring discharge was made on a tributary to Sevenmile Creek (located by the 1600 ft data point on Figure 7).



gure 10. Flow net for shallow ground water near Long
v. v Farm. This map is based on the water table map
Figure 7). Spring discharge (gallons per minute) measured
October 9 and 10 is shown. The direction shallow ground

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

RECEIVED
MAR 17 2009

March 16, 2009

Rebecca L. Kidder
Abourezk Law Firm
P.O. Box 9460
Rapid City, SD 57709-9460

Dear Ms. Kidder:

This is in response to your January 14, 2009, letter to Kent Woodmansey. In your letter, you requested the Department of Environment and Natural Resources to reconsider its September 2007 assessment of the ground water conditions at the Long View Farm LLP site in Charles Mix County. Your request was based on a hydrology study by Perry H. Rahn, PhD, PE, which was included with your letter.

In your letter you also indicate your request is based on Administrative Rules of South Dakota (ARSD) 74:52:04:07(2) and (4). This rule allows modification of a permit or its revocation if information becomes available that the permittee failed to disclose all relevant facts or if there is a determination that the permitted activity actively endangers human health or the environment. You indicate that the department was aware of the presence of shallow ground water at the Long View Farm site because it was evident during site construction and because petitions filed with the department indicated as such.

To respond to your request, it is important to note that the department is required to determine the presence of shallow aquifers, not shallow ground water, at proposed concentrated animal feeding operations and land application sites. The presence of shallow ground water does not indicate the presence of a shallow aquifer. "Shallow aquifer" is a term statutorily defined in South Dakota Codified Law (SDCL) 34A-3A-24.

Sarah Speck with the Surface Water Quality Program did the department's initial assessment for the Long View Farm site to determine the presence of a shallow aquifer relative to the site. In light of your request, Derric Iles, State Geologist, South Dakota Geological Survey, reviewed Ms. Speck's assessment and Dr. Rahn's hydrology report. The summation of Mr. Iles' review is enclosed.

In short, Mr. Iles agrees with Ms. Speck's assessment of the lack of a shallow aquifer at the Long View Farm site in Charles Mix County. Therefore, the department's decision there is no requirement for ground water monitoring or a ground water discharge permit remains unchanged. Also, there is no need to modify or revoke the general permit coverage issued to Long View Farm.

Please contact me if you have questions regarding this letter.

Sincerely,

Jeanne Goodman, Administrator
Surface Water Quality Program

Enclosure

cc: Derric Iles, State Geologist
Yankton Sioux Tribe Business and Claims Committee
Roxanne Giedd, Deputy Attorney General

South Dakota Department of
Environment and Natural Resources
GEOLOGICAL SURVEY

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414 EAST CLARK STREET
VERMILLION, SD 57069–2390
605–677–5227
FAX 605–677–5895
INTERNET *www.state.sd.us/denr*

Memorandum

To: Jeanne Goodman
From: Derric L. Iles
Date: February 2, 2009
Re: Long View Farm in Charles Mix County

At your request, I have reviewed the following three documents.

1. A letter from Rebecca L. Kidder (Abourezk Law Firm) to Kent R. Woodmansey of the Department of Environment and Natural Resources (DENR) dated January 14, 2009
2. A memorandum from Sarah Speck (DENR) to Darold Krein (DENR) dated September 9, 2007
3. A report authored by Perry H. Rahn titled *Hydrogeology of the Ft. Randall Casino area, Charles Mix County, South Dakota* and dated November 25, 2008

My comments presented below are referenced to specific portions of the letter, memorandum, or report where appropriate.

<u>Kidder Letter, page 1, first and last paragraphs</u>
It is stated in the first paragraph that "*The report documents the presence of shallow groundwater near and under this CAFO and the manure management fields for Longview Farm LLP.*" In the last paragraph and last sentence on page 1 that continues onto page 2, it is stated that "*It is further evident in the hydrology report that prior studies of groundwater in Charles Mix County, which were relied upon in the hydrology report commissioned, documented the presence of shallow ground water as early as 1975.*" These two quoted sentences imply that the author of the letter believes that the presence of shallow ground water is significant and perhaps may have been unknown or overlooked as the permit for the CAFO was considered by the DENR. However, shallow ground water is the norm in most of the state east of the Missouri River and its likely presence at shallow depths near the CAFO is not a revelation. Shallow ground water may be present in permeable sediments (e.g., sands and gravels) and low-permeability sediments (e.g., clays) alike. An important aspect of the permitting process is to assess whether a shallow aquifer is present, not whether shallow ground water is present.

Kidder Letter, page 1, third paragraph

The first sentence of this paragraph states "*Our request is based upon South Dakota administrative regulations 74:52:04:07 (2) and (4) which allow modification of a permit or its revocation if information becomes available that the permittee failed to disclose fully all relevant facts, or if there is a determination that the permitted activity actively endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination, and additional South Dakota law and regulation as applicable to NPDES permitting.*" The implication here is that the permittee failed to fully disclose relevant facts during the permitting process or that some new information has been found that could be grounds for modification or revocation of the permit. I cannot speak to the former, but I did not find any information in the report prepared by Perry H. Rahn that would be grounds for modification or revocation of the permit.

Speck Memorandum, page 1, second paragraph

It is stated that "*According to aquifer studies of Charles Mix County, there are no shallow aquifers present at the facility location that meet the definition in SDCL 34A-3A-24. Three submitted on-site boring logs indicate a soil profile of 51 feet of weathered lean clay.*" This shows that DENR, in consideration of the permit application for the CAFO, determined that there are no shallow aquifers at the CAFO site (as defined in SDCL) and also shows that there was new, site-specific evidence provided by the permittee to demonstrate the lack of a shallow aquifer at the CAFO site.

Rahn Report, numbered page 3, Geology section, second paragraph

This paragraph briefly mentions three aquifers: the Niobrara Formation, the Codell Sandstone member of the Carlile Shale, and the Dakota Sandstone. It is stated that "*the potentiometric surface of these aquifers generally flow westerly towards the Missouri River.*" Potentiometric surfaces do not flow; rather, ground water flows. A map of a potentiometric surface can be used to help predict the potential direction(s) of ground-water flow. Two references for Mr. Rahn's information are listed in the paragraph as Kume (1972) and Hedges (1975). The Kume (1972) reference was superseded by a later report (Kume, 1977) that contains more, and more detailed, information related to water resources of Charles Mix County.

- None of the three references contains information on the potential ground-water flow directions in the Niobrara Formation so it is unknown on what Mr. Rahn based his opinion of flow direction in the Niobrara Formation.
- Figure 17 in Kume (1977) shows that the potential direction of ground-water flow in the general area of the Ft. Randall Casino and the CAFO, in the Codell aquifer, is to the south-southeast and not westerly as stated by Mr. Rahn. Neither of Mr. Rahn's stated references (Kume, 1972 and Hedges, 1975) contain information on the potential direction of ground-water flow in the Codell aquifer.
- Figure 4 in Kume (1972) and figure 20 in Kume (1977) show that the potential direction of ground-water flow in the area of the Ft. Randall Casino, in the Dakota aquifer, is likely

westerly as stated by Mr. Rahn but the potential direction of ground-water flow in the Dakota aquifer in the area of the CAFO likely different.

There was no explanation provided in Mr. Rahn's report regarding the significance of his stated westerly ground-water flow direction as related to the topic of the CAFO.

The references of Kume (1972, 1977) and Hedges (1975) are available for free download from the Geological Survey Program web site. The links to these references are provided below.

Kume (1972):

- http://jurassic2.sdgs.usd.edu/pubs/pdf/IP-02.pdf

Hedges (1975):

- http://jurassic2.sdgs.usd.edu/pubs/pdf/B-22(1)%20-%2049%20pages.pdf
- http://jurassic2.sdgs.usd.edu/pubs/pdf/B-22(1)%20-%20figures%202%20&%2011,%20plates%202,%203,%204%20&%205,%2011x17%20inches,%206%20pages.pdf
- http://jurassic2.sdgs.usd.edu/pubs/pdf/B-22(1)%20-%20plate%201,%2025x36%20inches.pdf
- http://jurassic2.sdgs.usd.edu/pubs/pdf/B-22(1)%20-%20plate%207,%2013x11%20inches.pdf

Kume (1977):

- http://jurassic2.sdgs.usd.edu/pubs/pdf/B-22(2).pdf

Rahn Report, numbered page 4, second full paragraph

It is stated that "*Figure 3 and 4 shows Qwlts (a variety of glacial till called "stagnation drift") and Qwlt ("glacially modified bedrock").*" Figures 3 and 4 are excerpts from Plate 1 in Hedges (1975). There is no unit labeled Qwlt on Plate 1. From the definition for Qwlt provided by Mr. Rahn, I suspect that he meant Qwltd instead of Qwlt. The complete definition for the geologic unit Qwltd on Plate 1 in Hedges (1975) is "Till (glacially modified bedrock)–Glacially modified stream-eroded bedrock topography, till generally less than 50 feet thick; bedrock outcrops common; local relief highly variable, integrated drainage."

Rahn Report, numbered page 5, first paragraph

It is stated that "*The presence of permeable deposits such as the Herrick Formation has legal relevance because a ground water discharge permit and ground water monitoring is required by SD DENR for new CAFOs located over shallow aquifers.*" I assume that the Herrick Formation referred to by Mr. Rahn is the same as the Herrick gravel identified in Hedges (1975). No information was provided by Mr. Rahn that would document the Herrick gravel to be present under the CAFO. Kume (1972, 1977) and Hedges (1975) did not show the Herrick gravel to be present under the CAFO. A more recent map prepared by the Geological Survey Program does not show a shallow aquifer (as defined in SDCL 34A-3A-24) to be present under the CAFO. This recent report (Jensen, 2008) is titled *First Occurrence of Aquifer Materials in Charles Mix County, South Dakota* and was published in 2008. This map was prepared specifically to provide

information regarding the depth to the first mappable aquifer unit/material. The reference of Jensen (2008) is available for free download from the Geological Survey Program web site (http://jurassic2.sdgs.usd.edu/pubs/pdf/AM-29_20080515.pdf).

Rahn Report, numbered page 6, second full paragraph
It is stated that "*The significance of the Herrick Formation to this study is that this thick permeable unit is exposed at the Ft. Randall Casino area and is thinly covered by glacial till. Although Jensen's (2008) map shows the Herrick Formation not extending under the Long View Farm, without detailed test drilling the areal extent (and proximity to the surface) of this permeable unit is not known*" The significance of a unit cropping out at land surface near the casino and being thinly covered by till is not clearly explained by Mr. Rahn. The implied meaning of these two quoted sentences seems to be that if the Herrick gravel that can be seen at land surface near the casino, it might also be present elsewhere where it cannot be seen. However, Kume (1972, 1977), Hedges (1975), and Jensen (2008), after consideration of all available test hole and well logs and other geologic information, did not interpret the Herrick gravel to be present beyond its present mapped extent. Additionally, there are three test holes that were drilled to 51 feet at the CAFO facility (Long View Farm) that document the absence of a shallow aquifer at the CAFO site. Results from these three test holes, which were submitted to DENR as part of the permit application, are consistent with the interpretations of Jensen, Hedges, and Kume. Mr. Rahn offered no evidence to bring these interpretations into doubt.

Rahn Report, numbered page 6, last full paragraph
It is stated that "*Kume (1977) shows the Choteau aquifer extending to 3 miles west of Wagner.*" Figure 15 in Kume (1977) actually shows the western boundary of the Choteau to be slightly greater than 5 miles due west of Wagner and about 3 miles to the southwest of Wagner.

Rahn Report, numbered page 6, last paragraph continuing onto page 7
It is stated that "*Table 1 shows data for three water samples collected by the author during October 9-10, 2008. The total dissolved solids average 2,557mg/L, which is higher than the Choteau aquifer.*" Table 1 indicates that one of these three samples was "*collected from a pipe at the spring source,*" one was "*collected in a pasture ..... approximately ½ mile below the spring complex,*" and one was "*collected from a shallow well.*" A reason for averaging the total dissolved contents of these three samples and then presenting the average concentration in the report was not provided by Mr. Rahn.

It is stated that "*The nitrate at two locations is less than 1 mg/L, which is an indication of ground water chemistry of this area.*" The significance of this statement is not clear. Any results of analyses of ground water from the area, whether the parameter is nitrate or something else, would be an indication of the chemical composition of water in the area.

Rahn Report, numbered page 8, first full paragraph

It is stated that "*Figure 7 shows: (1) the location and elevation of springs, and (2) the location and static level of shallow wells.*" There is no differentiation between springs and wells on figure 7. There are only Xs on the map which I presume represent the locations of springs and wells.

It is stated that "*The source of the water table elevation data includes spring elevation or static level measured on October 9-10 (circled number on Figure 7).*" There is no number on figure 7 which is circled.

It is stated that "*Additional springs are reportedly present at approximately the same elevation as the three springs measured on October 9-10 .....*" The locations of the three springs which were measured are not indicated.

It is stated that "*Some data shown in Figure 7 are based on the static level of wells published in USGS or SDGS websites. Based on these elevations, a map of the water table was prepared.*" Figure 7 is stated to have been developed using water levels from springs and wells measured by Mr. Rahn and from water levels from USGS or SDGS sources. The water levels from USGS and SDGS sources were not identified/provided in Mr. Rahn's report. Documentation must be available to justify using a particular well to represent the hydraulic conditions in a particular hydrostratigraphic unit; in this case, the water table in the shallow till. For example, it must be demonstrated that each well is completed at the appropriate depth and has a water level that is representative of the water table (unconfined hydraulic conditions) and not a water level that is representative of confined conditions. No information on well depths, well construction, or geologic conditions near each well was provided by Mr. Rahn. Additionally, water levels measured at springs may or may not be representative of the water table. For example, it would not be uncommon to have springs or seeps at several elevations on a hill slope in stagnation moraine. A change in the permeability of the moraine sediments could cause water migrating vertically downward toward the water table to be diverted to a hill slope at an elevation that is above the local water table. No documentation of geologic conditions or nearby water levels was provided for any of the spring sites discussed by Mr. Rahn. Thus, without further information it is not possible to adequately determine whether Mr. Rahn's representation of the water-table surface appropriately depicts the water table in the map area.

<u>Rahn Report, numbered page 9, points of conclusion</u>
It is stated that "*Shallow ground water is present in sufficient quantity for domestic and livestock use.*" To what area does this statement pertain? What is the significance of the statement? What evidence is there to substantiate this claim?

It is stated that "*Shallow ground water flow from the Long View Farm disperses in nearly all directions away from the site.*" It is my opinion that this statement is a bit too far reaching and generalized given the questions about the validity of the water table map and the lack of any site-specific evidence.

It is stated that "*The background ground water quality is typical for this area.*" It is not clear what the significance of this statement is or what constitutes "background ground water quality." Mr. Rahn offered only three water samples from disparate sources (a spring, from a pasture, and a well) and only provided data for total dissolved solids, chloride, nitrate as nitrogen, and phosphate. Additionally, there was insufficient discussion of the quality of water from samples, other than those three, to clearly establish what would commonly be expected as the quality of water from various sources.

It is stated that "*The stagnation till itself is fairly permeable, and may contain isolated unmapped outwash sand and gravel units.*" No evidence was provided by Mr. Rahn to support the generalized characterization of the permeability of this till unit as a whole. The occurrence of a spring is likely due to very localized geologic conditions and should not be used as a basis for characterizing and entire geomorphic unit as being fairly permeable.

It is also stated that "*More importantly, the thick Herrick Formation sand and gravel is exposed close to the Ft. Randall Casino, and may extend under the till throughout a large part of the area impacted by this CAFO.*" However, the four most comprehensive assessments of the area Kume (1972, 1977), Hedges (1975), and Jensen (2008) did not document the presence of shallow aquifer units (as defined in SDCL 34A-3A-24) in the area implied by Mr. Rahn. Additionally, Mr. Rahn did not provide any new evidence that would be cause for changing this interpretation. In fact, the only new subsurface information (three test holes to 51 feet) provided for the CAFO area was provided by the permittee for the CAFO facility and supports the interpretation that there is no shallow aquifer under the CAFO site.

DLI:co

RESPONSE TO DERRIC ILES' COMMENTS REGARDING REQUEST FOR MODIFICATION AND/OR RECONSIDERATION OF THE PERMITTING OF LONGVIEW FARM LLP

Prepared by Perry H. Rahn
May 26, 2009

I appreciate the careful review by Derric Isles on February 2, 2009, sent as a Memorandum to Jeanne Goodman. His comments primarily relate to my November 25, 2008, report "Hydrogeology of the Ft. Randall Casino area, Charles Mix County, South Dakota". My response to his comments is arranged according to his Memorandum.

Kidder Letter, page 1, first and last paragraph.
Iles confirms that "...shallow ground water is present" under and near Longview Farm.

Kidder Letter, page 1, third paragraph.
Iles states he "...did not find any information in the report prepared by Perry H. Rahn that would be grounds for modification or revocation of the permit". But my report shows ground water is utilized in this area by domestic wells, and springs discharge ground water away from the hill where the main CAFO facility is located. The permittee failed to disclosed all relevant hydrogeologic facts. The CAFO site has a unique hydrogeologic setting and requires special consideration concerning the modification or revocation of the permit.

Speck Memorandum, page 1, second paragraph.
The Memorandum from Sarah Speck to Darold Krein, dated September 9, 2007, describes water wells in this area. The memorandum states that three on-site boring logs were submitted by the permittee, indicating "...51 feet of weathered lean clay". The DENR concluded there were no shallow aquifers. Reliance upon the three soil borings to conclude there is no shallow aquifer present is inappropriate. Based on published documents available to me, it appears that only one of the soil borings went to 51 feet, while the other two went only to 30 feet. None of the soil borings went to 100 feet. No testing was done of the water table level as part of these three soil borings, although all borings indicate the soils are moist. If the water table is within 50 to 100 feet of the surface, and is in low permeability material, it is my understanding that is would meet the requirements of a protected aquifer.

My November 25, 2008 report shows the occurrence of ground water and the location of the water table by identifying and testing shallow wells, and measuring the discharge of springs on every side of the CAFO location. Figure 7 of my report documents, at every circled elevation on the map (shown as feet above sea level), the site of a spring or well and provides the elevation at which ground water occurs. Longview

Attachment

Farm LLP CAFO is located on the top of a low ridge, at an elevation of approximately 1770 ft. [Note: I understand that, through some computer function, the circles that I drew around the elevation number of Figure 7 did not reproduce on all the copies of my report. Because of this, a copy of Figure 7 is attached hereto which shows sites identified by the elevation number enclosed within a circle (to be precise, an "oval"). As shown in the attached Figure 7, ground water discharge as springs was documented at elevation 1730 ft north of the CAFO site, 1640 ft east of the CAFO site, 1665 ft south of the CAFO site, and at 1600 ft west of the CAFO site. In addition, the elevation at two spring elevations (taken from the topographic map) and the water table elevation (taken from static levels of the wells from public records) are shown on Figure 7 as "X" with elevation numbers. The static level on the well shown at 1735 ft above sea level on Figure 7 was measured on October 10, 2008. This is an abandoned well known locally as the old Morris Thompson place, now owned by Lynn Fisher. I measured a static level of 10 ft, and used the elevation of 1745 ft from the topographic map, thereby obtaining a ground water level of 1735 ft. These data, which were not previously available from general geological studies or hydrological studies of Charles Mix County, document a water table depth generally less than 35 ft throughout the area impacted by the CAFO operations.

<u>Rahn Report, numbered page 3, Geology section, second paragraph.</u>
I appreciate Iles' discovery of a typo in the sentence where the words "indicates ground water" were inadvertently left out. Iles identifies 3 issues with my report in this section. First, none of the references cited in my report identify ground water flow direction for the Niobrara formation, so there is no evidence upon which to determine ground water flow in this area. Second, Iles concludes from reviewing Figure 17 in the 1977 Kume report, that in this general area, ground water in the Codell aquifer flows south to southeasterly direction. Third, Iles concludes, based on review of Figure 4 in Kume (1972) that the ground water flow direction in the Dakota aquifer underlying the Fort Randall Casino area is likely westerly, but gives the opinion that in the area of the CAFO it is "...likely different". But all this discussion of hypothetical flow directions in these deep bedrock aquifers is irrelevant to the central issue, i.e. the shallow ground water conditions. As Iles points out, ground water flow direction in the Codell, Niobrara and Dakota aquifers does not affect a determination of DENR regarding the presence or lack thereof of shallow ground water or a shallow aquifer overlying these three bedrock aquifers in the area.

<u>Rahn Report, numbered page 4, second full paragraph.</u>
Iles found a typo on p. 4: the proper notation should be Qwltd (as shown correctly on Figure 3 and 4), and not as Qwlt. This comment is not relevant to the presence or lack thereof of a shallow aquifer protected under SDCL 34A-3A-24. The significance of this unit (stagnation drift), as documented by Hedges (1975), is confirmation of low permeability material. Further, Figure 5 in my report shows that just northeast of the Ft. Randall Casino, and northwest of the CAFO site, stagnation till lies on top of the Herrick Formation (extremely high permeability material). In addition, Plate 1 of Hedges (1975) documents the presence of stagnation drift in the area of the CAFO (a portion of Plate 1 is reproduced in my reports as Figure 3). Stagnation drift is a low permeability material under SDCL 34A-3A-24. If further documentation is necessary, I have determined,

through flow net analyses of this material, that it has a hydraulic conductivity of at least approximately 0.2 meters per day, roughly equivalent to published values of hydraulic conductivity for sandy till.

Rahn Report, numbered page 5, first paragraph.
Iles questions my use of the term "Herrick gravels" instead of the proper title "Herrick Formation". The term "Herrick gravels" was used by Gries (1996, p. 121).

Iles states that Kume (1972, 1977) and Hedges (1975) do not document the presence of Herrick Formation under the CAFO site, nor do they provide proof that it underlies the site. I made no borings at the precise CAFO location. Neither Kume nor Hedges made borings at the precise CAFO location to determine if the Herrick Formation underlies the site. Hedges (1975, Plate 1), shows Qh, the Herrick Formation (reproduced as Figure 3 in my report), in several locations both north, south, and east of the CAFO site. The presence of Herrick Formation near the Ft. Randall Casino is documented in my report (see Figure 5), and there is every reason to believe the Herrick Formation occurs under the areas impacted by this CAFO operation. The Herrick Formation certainly underlies, at less than 50 ft depth, some of the proposed manure spreading areas. I do not have access to the actual CAFO site, as DENR is aware. But DENR can perform testing at the CAFO site (as well as the area impacted by the manure spreading operations) pursuant to its regulatory authority and responsibility, which it has not done. In my report (p. 6, last full paragraph), I contend the Herrick Formation is present beyond the immediate mapped areas where it is exposed at the land surface. The three areas mapped by Hedges (see Figure 3 in my report) are simply areas where till was eroded off the Herrick Formation and it became exposed.

With respect to the Jensen (2008) report referenced by Iles to support his conclusion that there is no shallow aquifer at this location. It should be noted that Jensen (2008) actually infers the Herrick Formation in this area. His map legend includes a sand and gravel deposit and states: "First occurrence is generally below land surface; may not be uniform in depth and thickness and may be discontinuous in lateral extent." Additionally, Jensen's report is based upon a review of Hedges (1975) report. No study was conducted by Jensen at this CAFO location. To my knowledge, DENR has not made any spring discharge measurements near the CAFO location such as published in my report.

Rahn Report, numbered page 6, second full paragraph.
In the previous paragraphs I discuss the significance of the Herrick Formation. I respectfully disagree with Iles' interpretation that the Herrick Formation is not present beyond its present mapped extent.

Rahn Report, numbered page 6, last full paragraph.
Iles' comment about the distance to the Choteau aquifer is inconsequential and has no impact on the presence or lack thereof of a shallow aquifer or shallow ground water in this area.

Rahn Report, numbered page 6, last paragraph continuing onto page 7.
Iles questions why an average water quality, based on the three samples, was presented in my report. The rationale behind the inclusion of water quality data in my report was to

establish a baseline of water quality prior to operation of the CAFO. I was trying to encourage the local users of ground water to have water quality testing before the CAFO operation came into existence.

Iles is correct that the information on water quality is an indication of quality, not quantity or location of ground water. Water quality data was provided in my report so that a future study of water quality will have a historic reference, prior to the CAFO operation.

Rahn Report, numbered page 8, first full paragraph.

As discussed above, attached hereto is Figure 7 showing the spring and well locations and elevations. Iles indicates he disagrees with my conclusions concerning the water table elevation (e.g.; Figure 7, 8 and 10) because I did not provide data sets or detailed information on each well. Attached hereto is an example of well information that is available within USGS databases for examination.

Iles also casts doubt on my Figure 7, 8, and 10 based upon his theory that a "...change in the permeability of the moraine sediments could cause water migrating vertically downward toward the water table to be diverted to a hill slope at an elevation that is above the local water table." No citation to any literature is provided by Iles. My Figure 7 shows the location of springs and wells I measured in the field, and I stand by those measurements. Iles seems to be suggesting that the water table could be lower than the documented spring elevations and static water level in surrounding wells, but I think such a hypothesis is not tenable at this location. Iles' comment notwithstanding, I firmly believe my Figures 7 through 10 in my report are accurate depictions of the water table. Figure 7 shows an abandoned water well within one half mile of the CAFO site where a static level of 10 ft was obtained on October 10, 2008. At a minimum, with eight documented sites of ground water surrounding this CAFO on all sides, the water table is certainly much less than 100 feet below the CAFO site (elevation approximately 1770 ft). This documentation warrants further investigation by DENR. It should be noted that Iles does not reject my conclusions regarding the water table level, but simply states, "...without further information it is not possible to adequately determine whether Mr. Rahn's representation of the water-table surface appropriately depicts the water table in the map area."

Rahn Report, numbered page 9, points of conclusion.

Iles questions what area I am talking about, and what evidence is presented to support the conclusion that shallow ground water is present in sufficient quantities for domestic and livestock consumption. Figures 6, 7, and 10 show the area referenced in my report. This includes the CAFO facility as well as the manure management areas LVF has contracted for dumping of manure. This is apparent from my report, but is stated herein to clarify this issue. Hydrogeologic evidence is set forth in my report, including on-site investigation of shallow wells and springs at multiple locations on every side of the CAFO location. [Interestingly, Iles does not challenge my spring discharge measurements with the V-notched weir.] I did not have access to the actual CAFO site. Only DENR may access the CAFO site to conduct further investigation. DENR did not require soil borings to 100 feet, nor did DENR require water table measurements to be obtained onsite as part of the soil boring process. Neither Iles' memorandum nor any

DENR report provides any documentation supporting a conclusion that shallow ground water is not present in sufficient quantities for use for domestic and livestock purposes. The significance of my report is that (1) it documents the presence of shallow ground water that is susceptible to contamination from the CAFO that is used for human and livestock consumption, and (2) it documents the possible presence of the Herrick Formation, a shallow aquifer under the areas impacted by this project.

Iles offers the opinion that my statement that ground water flows in all directions away from the CAFO site is "...a bit too far reaching and generalized". It seems rather picayune to argue whether my Figure 10 shows arrows that point in all directions. Iles further opines upon the lack of "...site specific evidence" on the actual CAFO site (which is available only to DENR to test). He states that my conclusions are invalid unless the source data for USGS wells and geologic studies for each of the spring sites is provided to independently verify my conclusions. My original report and this "Response" are provided for DENR's consideration.

Iles objects to my conclusion that the water quality from the three samples I obtained is typical for this area. There are numerous water quality studies given in the references cited of my report. DENR is in possession of these references and could pursue this question, although I find such an endeavor to be beside the point.

Iles concludes, without any scientific citation, that the "...occurrence of a spring is likely due to localized geologic conditions" There are three springs that I measured on October 9-10, 2008; they are located to the east, south, and west of the CAFO. Their location and elevation is consistent with the static water level in surrounding wells, and therefore is not indicative of "localized" conditions. In other words, I believe my Figures 7 through 10 represent the true water table, not some perched conditions.

The soil borings taken on the CAFO site at 51 and 30 feet showed weathered clay with gravel deposits, which under SDCL 34A-3A-24 is defined as low permeability soils. This is consistent with Kume, Hedges, etc. There is no evidence cited by Iles or any evidence in the scientific literature that the area within 100 feet of the land surface is anything other than low permeability soils. Therefore, with a water table within 100 feet of the surface of the land, and low permeability materials overlying this water table, there is evidence of a shallow aquifer protected under SDCL 34A-3A-24 that merits further investigation by DENR. This is not just a flat terrain underlain by impermeable glacial till. It is a unique place.

In summary, it appears that the Iles memorandum was an assessment conducted to discredit my study, and not to evaluate my new hydrogeologic evidence that is specific to the CAFO operation. Iles has carefully reviewed my report, and I thank him for that. And he has improved the content of my report by discovering a few typos. But he made no effort to look at the significance of shallow ground water and the extent of a major aquifer under the areas impacted by this operation. Instead, he seems focused on justifying his decision that no further investigation is warranted.

Perry H. Rahn

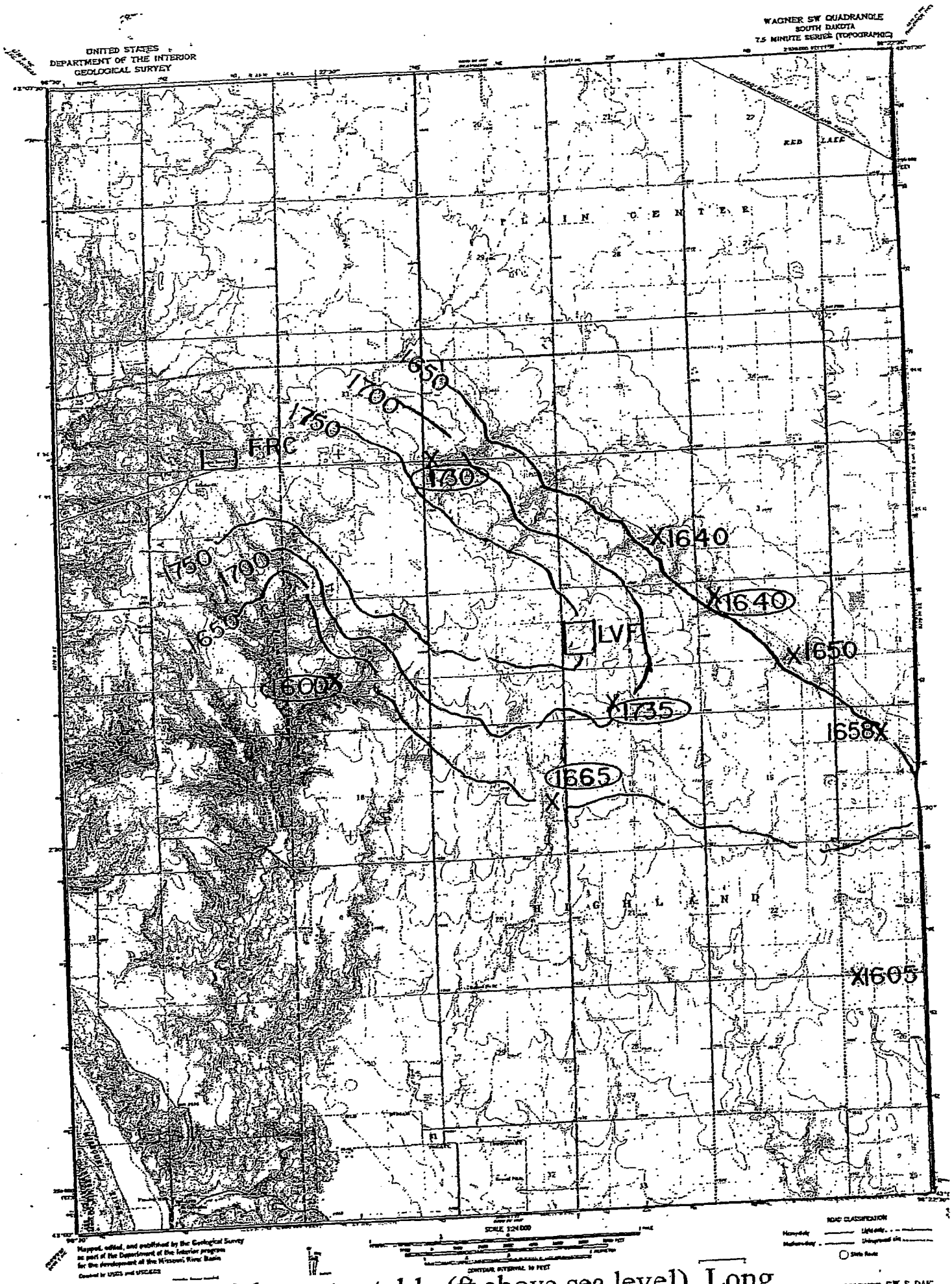

Figure 7. Map of the water table (ft above sea level). Long View Farm (LFF) and Ft. Randall Casino (FRC) are shown.

Sect 9

Record 229 of 780

Location Information

Legal Location:	SW SW SW SW SEC. 09, T. 095 N., R. 64 W.		
County:	CHARLES MIX	**Location:**	095N-64W-09CCCC
Basin:	MISSOURI	**Latitude:**	43 03' 12"
Hydrologic Unit Code:	10170101	**Longitude:**	98 25' 36"
Land Owner:		**Ground Surface Elev. (ft.):**	1725 T

Project Information

Project:	CHARLES MIX COUNTY STUDY		
Drill Date:	07/08/1969	**Geologist:**	
Company:	SDGS	**Geologist's Log:**	
Drilling Method:	AUGER	**Driller:**	J. KALISZEWSKI
Test Hole Number:	1-69	**Driller's Log:**	
Samples:		**Total Drill Hole Depth (ft.):**	118.0

Geophysical Information

Spontaneous Potential:		**Single Point Resistivity:**	
Natural Gamma:		**Extra:**	

DEPTH TO WATER ABOUT 35 FEET.

No

Elevation (ft.)	Depth (ft.)	Description
1725.0 - 1723.0	0.0 - 2.0	TOPSOIL
1723.0 - 1719.0	2.0 - 6.0	CLAY, SILTY
1719.0 - 1696.0	6.0 - 29.0	CLAY, BROWN, PEBBLY; SOME VERY FINE SAND FROM 24 TO 29 FEET
1696.0 - 1692.0	29.0 - 33.0	CLAY, GRAY, PEBBLY
1692.0 - 1681.0	33.0 - 44.0	CLAY, BROWN, PEBBLY
1681.0 - 1612.0	44.0 - 113.0	CLAY, GRAY, PEBBLY
1612.0 - 1607.0	113.0 - 118.0	MARL, SPECKLED

Record 231 of 780

Location Information

Legal Location:	NW NW NW SW SEC. 11, T. 095 N., R. 64 W.		
County:	CHARLES MIX	**Location:**	095N-64W-11CBBB
Basin:	MISSOURI	**Latitude:**	43 03' 35"

Sister Patricia Mylott
P.O. Box 217
Marty, SD 57361

RECEIVED
SEP 27 2010
WATER RIGHTS
PROGRAM

September 20, 2010

Chief Engineer
Water Rights Program
Foss Building
523 E. Capitol
Pierre, SD 57501

Dear Sir:

Long View Farms' application for a permit to appropriate 0.067 cubic feet per water from the Codell Aquifer is of great concern to me. Long View Farms will draw that much more water from the compromised aquifer.

I have been concerned about the pollution of our waters for quite a while. If water is drawn from the aquifer and then used for various purposes in the hog confinement area, it will return to the ground and eventually the aquifer, polluted.

I don't believe the holding receptacle for the hog waste is safe in the long term. According to Professor Thaler, the expert for Long View Farms, the gases emanating from the hog site are noxious even if not smelled . Many here believe they are causing and will cause or exacerbate health problems especially for children here. Many children have asthma. There is a day care center a mile and a half southwest of the hog containment facility. Marty Head Start moved to a new location, mostly because of this. I can get the statistics from Indian Health Service, if necessary.

We at Marty are offended by the pig smell often as we go past the confinement area. Sometimes the smell reaches us clear down to at Marty. Sometimes the smell is from local fields which take the hog waste and fertilize their fields with it. June 12 we had a bad flood here at Marty from which we are still cleaning up. I don't know if any waste from the confinement area got washed down to Marty but the fields south of the hog confinement area washed down to Marty all sorts of contaminants.

I don't know how Long View Farms got away with its water use considered residential.

Please give us who are opposed to the Hog Confinement operation more time before deciding to give or not give them more water from our precious aquifer. Please do not give them any more water. I would prefer the operation to be shut down permanently. It seems to me that they employ only about 8 people.

Sincerely yours,

Sr. Patricia Mylott

cc to Mr. Arlan Moss

RECEIVED
SEP 27 2010
WATER RIGHTS
PROGRAM

September 23, 2010

Dear Mr. Chief Engineer;

Hello! My name is Eva Bruguier; I am a resident of Marty, South Dakota, which is located about four (4) miles south of the Longview Hog Farm.

I am writing to you to voice my concerns about Longview Farms requesting a permit for a commercial well.

I oppose issuing a commercial permit to the Longview Farms for the following reasons:

1. It is not in the public interest.
2. It is harmful to the environment and health of those who live near it or where manure is being spread.
3. It will contaminate our water, which will make us sick.

I am also requesting an automatic delay of the hearing.

Sincerely,

Ms. Eva Bruguier
Ms. Eva Bruguier

RECEIVED
SEP 28 2010
WATER RIGHTS
PROGRAM

September 27, 2010

Chief Engineer
Water Rights Program
Foss Building
523 E. Capitol
Pierre, SD 57501

Long View Farms, LLP
c/o Arlan Moss
3172 320th St.
Hull, IA 51239

Re: Public Notice, Report, Recommendations and Notice Of Hearing on Application No. 7203 to Appropriate Water Filed by Long View Farm, LLP.

Dear Clerk of Court:

Please find enclosed for filing a Petition in Opposition to Application and Recommendation, Petition to Intervene, and Request for Hearing Extension of at Least 20 Days and Certification of Service in the above matter. If you have any questions or concerns, please contact me, at your convenience. Thank you.

Sincerely,

Faith Spotted Eagle

Faith Spotted Eagle
P.O. Box 667
Lake Andes, SD 57356
(605) 481-0416

cc: Parties on Services List
Judy Honimichle
Sharon Drapeau
Wesly Hare
Glenn Drapeau
Kip (Spotted Eagle) Collins

CERTIFICATE OF SERVICE

I hereby certify that I mailed, First Class, a copy of this Petition on September 27, 2010 to:

Chief Engineer
South Dakota DENR
Water Rights Program
Foss Building
523 E. Capitol
Pierre SD 57501

Longview Farms LLP c/o
Arlen Moss
3172 320th St.
Hull, IA 51239

Rebecca Kidder, Attorney
Abourezk & Zephier PC
2020 W. Omaha St.
Rapid City, SD 57702

Faith Spotted Eagle

Faith Spotte Eagle, Petitioner
P.O. Box 667
Lake Andes, SD 57356
(605) 481-0416

RECEIVED
SEP 2 8 2010
WATER RIGHTS PROGRAM

OFFICE OF THE CHIEF ENGINEER
WATER RIGHTS PROGRAM
STATE OF SOUTH DAKOTA

In the Matter of Water Permit	)	Application No. 7206-3
	)	
Application 7206-03	)	PETITION IN OPPOSITION TO
	)	APPLICATION AND
	)	RECOMMENDATION, PETITION TO
	)	INTERVENE, AND REQUEST FOR
	)	HEARING EXTENSION OF AT LEAST
	)	20 DAYS

Individual Petitioners Faith Spotted Eagle, Judy Honimichle, Sharon Drapeau, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins(Petitioners), hereby submit this Petition in Opposition, Petition to Intervene, and Petition for a Hearing Extension of at least 20 days, pursuant to SDCL §46-2A-6, Application to Appropriate Water 7206-03 (Application) filed by Long View Farms LLP (LVF). Petitioners are also members of the Yankton Sioux Tribe which is a federally recognized Indian Tribe located within Charles Mix County, South Dakota. The Application – No. 7206-3 - requests approval for the diversion of 0.067 cubic feet of water per second from one well to be completed into the Codell Sandstone Aquifer for purposes of commercial use in a livestock confinement operation located directly adjacent to and abutting lands comprising the Yankton Sioux Indian Reservation, South Dakota. The diversion point will be located in SW ¼ NW ¼ Section 9,T. 95N, R64W.

Petitioner Faith Spotted Eagle, Kipp Spotted Eagle Collens and Allen Hare are owners of numerous wells utilized for domestic water supply, livestock, and irrigation located upon Reservation lands and other lands adjacent to and surrounding the well

location. These are primarily shallow water wells which will be impacted if the aquifer recharge is not commensurate with total withdrawals from the aquifer.

Petitioners file this petition in opposition and to intervene for the following reasons:

1. This Application does not satisfy any of the four statutory criteria in SDCL Chapter 46-2A governing the approval of applications to appropriate water resources. The Chief Engineers' determinations on all four criteria are unsupported by factual data and evidence on the recharge rate of the aquifer, or existing wells and springs utilized for domestic use in the immediate vicinity of this proposed well. See, Recommendation of Chief Engineer for Water Permit Application No. 7206-3, Long View Farms, LLP.

2. SDCL §46-2A-9 dictates that 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..." The application proposes to appropriate .067 cf/s from a well completed into the Codell Aquifer. SD DENR has not mapped the Codell Aquifer since 1982, despite the significant expansion of wells in the counties served by this aquifer. The only test wells DENR has investigated recently are 23 and 25 miles north and northeast of this location, which is too far from the present location to make a factual determination that this proposed well will have no impact on the existing domestic wells in close proximity to the location of this proposed well. Further, the Chief Engineer determined that the test well 23 and 25 miles north and northwest of the proposed location "show response to climatic conditions and annual fluctuations that may be due to pumping."

Further, the Chief Engineer relied solely upon the Applicant's report of two domestic wells in the immediate vicinity of this well, and has made no investigation of existing domestic wells in the vicinity of this proposed well. Petitoner Yankton Souix

Tribe in this matter provided to the South Dakota DENR on June 2, 2009 and January 14, 2009 a report from Professor Perry Rahn that documents the presence of nine shallow wells and springs in the immediate vicinity of the proposed well. See In re: Application No. 7206-3 Yankton Souix Tribe Petition In Opposition to Application and Recommendations, Petitioner to Intervene, and Request for Hearing Extension of at Least 20 Days (September 25, 2010) (Tribe's Petition) Attachment 1, Reports of Professor Perry Rahn (Rahn Report). Therefore, the conclusion that there is a reasonable probability of the availability of water is not based upon a factual determination based upon the data, examination of the springs and well in the immediate vicinity of this proposed well, or determination of the recharge rate of the Codell or Niobrara, or the shallow aquifer located in this area located within the Herrick formation.

3. Granting this permit will result in "unlawful impairment of existing rights." SDCL 46-2A-9. The Chief Engineer determined that there:

> are no nearby water permits/rights that obtain water from the Codell sandstone aquifer. There are some domestic wells in the area that use the Codell aquifer. The applicant indicates two sites with water well locations about 1.5 miles northwest and northeast of this site. At this distance and with relatively small pumping rate drawdown is not expected to be significant nor cause any adverse impacts. At one time the City of Geddes, Town of Ravinia and City of Lake Andes used wells from the Codell but now obtain water from the Missouri River or from rural water. Those wells are used as a backup water supply at this time. The only other Codell aquifer Water Right in Charles Mix County is for Clearfield Colony for domestic use.

Report on Water Permit No. 7026-6, For Long View Farms LLP, p. 1 (August 27, 2010). (LVF Report)

The Chief Engineer, however, has not provided any basis for his assumption that there "should not be" interference with existing water rights or domestic wells. The Engineer does not provide any information as to the relationship of the location of water right points of diversion or domestic wells and the hydrological connectivity of the proposed well in the Application. In addition, the Chief Engineer does not provide any

data on the specific amount of water needed by all other pre-existing wells. The Chief Engineer points to no assessment of the depths of the thousands of wells in this aquifer to determine this permit will not impact pre-existing appropriations of water. There is simply no basis upon which to determine that "no -intereference" with domestic water supply will occur. The United States Geological Survey has documented thousands of wells for domestic consumption in the Codell Aquifer Region. USGS Well Survey of Yankton Sioux Reservation, 2005; USGS 2007 Charles Mix County Well Survey. The Department was made aware of this information when the Petitioners filed its Protest of the Water Permit Application 7006-3, but has failed to investigate this information since that objection was filed on June 23, 2008. Until such time as the DENR has fully investigated the drawdown rates, capacity of the Codell aquifer, and the amount of water currently in use by domestic and other existing wells and natural shallow springs, given the sensitivity of the two test wells located 23 and 25 miles north and northeast of the proposed well location, the finding of the Chief Engineer that there is a reasonable probability that there will be no impairment of existing rights is unfounded.

Similarly, when combined with the fact that climate change is increasing the risk of U.S. crop failures, depleting the nation's water resources, and contributing to outbreaks of invasive species and insects, the water right will directly and negatively affect agriculture and livestock in central South Dakota. According to a report compiled by 38 scientists with the U.S. Department of Agriculture, the effects of climate change and other problems for the agricultural and forestry industries will persist for at least the next 25 years. AP, Feds: Climate Change Will Threaten Livestock Water Supply for Years (May 28, 2008). According to the report, drought-strained forests in the West and Southeast are easy prey for tree-killing insects like bark beetles. Snow in the Western mountains is melting earlier, making it more difficult for managers overseeing a long-

established system of reservoirs and irrigation ditches that serve Western states. *Id.* Further, the Southeast does not have the same kind of storage system because rain historically has been more consistent. Current weather disruptions have the region struggling with drought. Rising carbon dioxide levels are changing the metabolism of grasses and shrubs on range land, decreasing the protein levels in plants eaten by cattle. Permits for industrial uses that consume large amounts of water like the one in question will exacerbate such impacts.

4. On behalf of its membership, the Yankton Sioux Tribe is the owner of reserved water rights upon its Reservation lands established by the Treaty of 1858 and as diminished by the Act of 1894. See, Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable). The Tribe's rights to water from the Codell Aquifer are rights to sufficient water to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, and their "reasonably feasible" uses of such water. Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969). It includes the amount of water required to make the Reservation viable. Arizona v. California, 373 U.S. 546, 599 (1963). The courts have already determined that Tribes have the right to assert these rights on behalf of its members. See, United States v. Nebraska, 520 F.2d 676, 688 (9th Cir. 1975). The Chief of Engineers has not assessed the reserved water rights of the Tribe or determined the amount of water in the aquifer, and so has no reasonable basis to conclude, without further investigation, that the federally protected water rights of the Yankton Sioux Tribe are not impaired by this permit. These reserved water rights are federally protected from impairment by off-reservation withdrawals from the Codell Aquifer, including Permit 7006-3. Winters v. United States, 207 U.S. at 576; Arizona v. California, 373 U.S. at 599; Colville

Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981). The Yankton Sioux Tribe has the right to protect its reserved treaty water rights from appropriation by others and from "man-made despoliation." See, United States v. State of Washington, 506 F.Supp. 187, 203 (D. Wa. 1980). See also, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984)(requiring revival of wetlands decimated by non-Indian stream withdrawals); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)(requiring maintenance of minimum stream flow for downstream tribal fishery).

The use of water for a CAFO on lands upland from and directly adjacent to tribal lands and water supplies, both surface and subsurface, and the location of manure dumping fields adjacent to Reservation lands ensures runoff from the 976,200 cubic feet of liquid manure dumped annually will contaminate the Codell Aquifer and all surface waters on Reservation lands, resulting in impairment of the Tribe's and its tribal members' currently appropriated water and its reserved water rights.

As in this case, the Courts have found that if the suit is challenging the impact of a particular action on natural resources rights which are held for the benefit of tribal members, then individual members can file suit to protect such rights. *See Sohappy v. Smith*, 302 F. Supp. 899, 904 (D. Or. 1969). In other words, under *Sohappy*, the Extension violates Appellants' reserved water rights to the extent it threatens the amount of water they need to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, their "reasonably feasible" uses of such water. In addition, the courts have determined that the Tribe has the right to assert these rights on behalf of its members. *See United States v. Nebraska*, 520 F.2d 676, 688 (9th Cir. 1975). This is important because the Yankton Souix Tribe (Tribe) has similarly protested the granting of the water right. See Tribe's Petition

The ability of Appellants and the Tribe to apply to apply treaty water rights to preventing environmental degradation from the Water Right is also support by existing federal case law. While the courts have never settled on the question of whether treaty rights may be used to protect environmental resources, they have addressed it in several key places. In a case that was ultimately overturned by the 9th circuit on procedural grounds, for example, after enumarting the list of human caused factors sponsored by governmental entities, that have resulted in the rapid decline of the Columbia River salmon, the U.S. District Court for the Western District of Washington held that "implicity incorporated in the treaties' fishing claus is the right to have the fishery habitat protected from man-made despolation." *United States v. State of Washington*, 506 F.Supp. 187, (Dist. WA 1980). In reaching this conclusion, the court made the logical assumption that the "most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken." *Id.* Similarly, other courts have recognized the tribal interests in protecting environmental resources. In *United States v. Washington*, Phase II, the initial lower court decision applied the "moderate living needs" standard. *See also, United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. Denied*, 467 U.S. 1252 (1984), requiring a revival of wetlands that had been desicatted by non-Indian stream withdrawals. In *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), the court upheld a lower court ruling requiring non-Indians to maintain a minimum stream flow necessary for the survival of a tribal fishery.

Similarly, the discharge of manure into waterways through runoff releases antibiotic resistant toxic bacteria (i.e. e.coli, yersinia, leptospora, cryptosporidium parvum, giardia lamblia), other pathogens, and excessive nutrients into groundwater and surface water is a public health threat. High concentrations of animal waste from this CAFO will emit hydrogen sulfide, ammonia, Volatile Organic Compounds, and other

gases and particulate matter that are known to cause a human health threat once released into the air. Hydrogen sulfide is a health threat that is irreversible, exposure causes sore throat, seizures, comas and even death. Farmworkers and neighbors of existing hog CAFOs report headaches, shortness of breath, wheezing, excessive coughing, and diarrhea. Ammonia is another byproduct of animal waste and has been linked to acid rain. In Oregon, for example, the Columbia River Gorge has seen unprecedented levels of acid rain in recent years which is likely linked to ammonia releases at Three-mile Canyon Farms which is the single largest source of air pollution in that state. The American Public Health Association issued a resolution urging federal, state, and local governments and public health agencies, "to impose a moratorium on new CAFO's" on November 11, 2003. The noxious odors of the CAFO in question will create an ongoing and persistent nuisance to the thousands of people living and working within 6 miles of the CAFO and associated manure fields, including the Head Start School, the Tribe's Fort Randall Casino, which is heavily dependent on tourism, and the Tribe's Travel Plaza.

Further, Petitioners submit that there is a high probability that water appropriated by this permit, and ground and surface waters of all properties and owners located on and adjacent to the CAFO and manure dumping fields in this area will be contaminated by excessive nutrients, heavy metals, VOC's, antibiotic resistant bacteria, ammonia, and hydrogen sulfide from runoff and airborne emissions. Polluted waters present a clear and present threat to public health, the environment, and the endangered species in the area including the federally protected eagle population of the Karl Mundt Wildlife Preserve (Preserve), in the immediate area and for downstream users.

In addition, the South Dakota Division of Wildlife Resources states that water

developments, such as the proposed use in this case, may proceed in the Basin only in accordance with federal and state laws.[1] An endangered species is one that is" in danger" of extinction throughout all or a large portion of it's habitat. Because the eagles in the Preserve are so rare, they are protected by state laws and the federal Endangered Species Act (ESA).[2] In passing the ESA, Congress reflected society's belief that rare species should be saved whenever possible.[3] Specifically, recovery of the endangered eagles requires that use and development of water from the Codell or Niobrara, or the shallow aquifer located in this area which are hydrologically connected to the Missouri River. In addition, minimum streamflows ensure and increase public recreation in the area. These activities generate a significant economic base in the communities of along the Missouri River, and elsewhere in the State of South Dakota.

Further, there is a daycare owned by a tribal member serving children ages 1 month to 4 years old within 1 mile of the CAFO site where 1 in 4 children are asthmatic. The CAFO's noxious fumes and odors will directly impact the health and well-being of these children and those who work in the daycare. The CAFO is also located within 4 miles of a federally funded Head Start School serving 3 and 4 year old children. The manure dumping locations surround this school and the Marty Indian School serving youth ages 6-18 years of age, as well as a Boys and Girls Club, Tribal Headquarters, and Nutrition programs. The odor from manure dumped on the fields and the CAFO itself will negatively impact the education, health and welfare of these residents.

Finally, this CAFO will produce less than 10 local jobs, and will result in the inability of landowners and residents to utilize surrounding lands for tourism, recreation, and homesites due to the water and air pollution and noxious odors emitted. Longview

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[1] South Dakota nonnative fish management questions and answers (UDWR Q&A)-http://wildlife.South Dakota.gov/fishing/nonnative/q_and_a.html.
[2] 16 U.S.C. § 1533.

Farms LLP principals are domiciled in Iowa and have no connection to the local economy. Longview Farms LLP has signed manure dumping agreements with local farmers releasing Longview Farms LLP from all liability for any impacts caused by runoff of manure into water and resultant water and air pollution. Longview Farms CAFO Application, Manure Application Agreements.

10. This Permit is not in accordance with SDCL §46-2A-9 and §46-1-4. §46-1-4 provides:

> Beneficial use of water resources--Prevention of waste--Right to water from natural stream or watercourse. 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. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of diversion of water.

Longview Farms LLP has not begun construction on Phase II facilities utilizing the full reservation requested, nor provided any time frame in which it intends to appropriate the full amount of water requested to be reserved. April 29, 2008 DENR CAFO Revised Plans and Specifications Review by DENR. (Attachment 3). DENR should not condone this type of speculation in water and must prevent such precedent, particularly in light of DENR's role as protector of South Dakota citizens. SDCL §46-1-4 requires 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." This requires the applicant to establish that it "can and will put the conditionally appropriated

[3] 16 U.S.C. § 1531, et seq.

water to beneficial use within a reasonable period of time." See e.g. Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights), 170 P.3d 307 (Colo. 2007).

These requirements are intended to ensure that the public's water resource is available to those who actually need water. David B. Schorr, Appropriation as Agrariaranism: Distributive Justice in the Creation of Property Rights, 33 Ecol. L.Q. 3,9,22 (2005).

In this case, in violation of the beneficial use doctrine and SDCL § 46-1-4 and §46-2A-9, the amount of water requested is for speculative purposes and is far in excess of that appropriate to the scale of the (CAFO) as described in the LVF Report. There is no finding by DENR that it reviewed the CAFO water requirements for existing operations, or the basis for determining that the amount reserved by this Permit will be used in a reasonable period of time. Data and information regarding the water requirements for the contemplated CAFO is needed before DENR can approve the Application.

11. Similarly, SDCL §46-1-4 requires that the State Engineer may not certify a water right until, among other things, that "the water resources of the state be put to beneficial use to the fullest extent of which they are capable." This requires the applicant to establish that it "can and will put the conditionally appropriated water to beneficial use within a reasonable period of time." *See e.g. Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights)*, 170 P.3d 307 (Colo. 200&). Similarly, the appropriator may not merely posses or waste the water. Water right holders who fail to show continuous beneficial use of the water may lose the water right through abandonment or forfeiture. SDCL § 4-1-4.

These requirements are intended to ensure that the public's water resource is

available to those who actually need water. David B. Schorr, Appropriation as Agrariaranism: Distributive Justice in the Creation of Property Rights, 33 Ecol. L.Q. 3,9,22 (2005). In South Dakota, the restriction on speculation and waste is enforced by a recognition that the approval of an application is "only a preliminary step which gives the applicant the authority to proceed and perfect, if possible, the proposed appropriation by actual diversion and application of the water to a beneficial use. *See Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.,* 104 South Dakota 202, 212--13, 135 P.2d 108, 113 (1943); *Little v. Greene & Weed Inv.,* 839 P.2d 791, 794 (South Dakota 1992).

The adoption of the Prior Appropriation Doctrine, by definition, required the appropriator to apply the water to beneficial use, thereby precluding speculative hoarding in hopes of future gain. Neuman, 28 Envtl. L. 919, 963-64. "Because actual, beneficial use was required, no one could acquire all of the water and thereby monopolize a scarce and valuable resource. Nor could anyone speculate by holding water without using it, and then make a steep profit by selling to those who need it." *Id.* at 964. *See High Plaints A & M. LLC v. Southeastern Colorado Water Conservancy Dist.*, 120 P.3d 710, 719 n.3 (Colo. 2005).

In this case, in violation of the beneficial use doctrine and SDCL §46-2A-9 and §46-1-4, the amount of water requested is far in excess of that generally required for a nuclear power plant of the kind described in the application. Data and information regarding the water requirements for existing nuclear power plants and the contemplated power plant is needed before the State Engineer can approve the Application.

12. This permit is not in the public interest. Petitioners have previously submitted an independent hydro-geological investigation of the specific area within which the proposed well is located indicating the existence of a shallow aquifer and unique geologic formation known as the Herrick formation, which is highly permeable, in this vicinity.

Rahn Report. This report is further supported by the Chief Engineer's determination that "In this area the Niobrara formation (also considered an aquifer) overlies the Codell aquifer." The Chief Engineer has not made any assessment of the impact of this proposed well on the Niobrara formation, the Herrick formation, or any other shallow aquifer located on top of the Codell aquifer, as required by S.D.C.L. 34A-3A-24. In State *ex. rel* Missouri Parks Assoc. *et. al* v. Missouri Dep't. of Nat'l. Resources, Case No. 07AC-CC00923, Cole County District Court, the District Court determined the potential for damage to unique geologic historic formations located near a proposed CAFO warranted denial of construction permits in order to protect the unique geologic structure and the public interest. Denial of the water permit to protect the unique geologic structure and the shallow aquifer located in this area, until and unless an investigation is conducted at the proposed location to determine, based upon fact rather than speculation, that there is no shallow aquifer or Herrick Formation, nor any potential damage to the Niobrara Formation, is warranted.

12. South Dakota has adopted the "public trust doctrine" in its laws regulating water useage. Under this doctrine, private landowners' common law rights to access water unrestricted on their lands was eliminated. SDCL 46-1-1 declares that:

> the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection.

SDCL 46-1-3 establishes the public trust doctrine and the obligation of the state to regulate water use to protect water, declaring, "that all water within the state is the property of the people of the state, but the right to use of water may be acquired by appropriation as provided by law." As in this case, therefore, the public trust doctrine

prohibits the granting of a water right that does not meet the beneficial use and public interest standard.

Indeed, the Public Trust doctrine requires the Applicant to meet a higher beneficial use and public interest standard before the water right can be granted. The South Dakota Supreme Court has recognized, the responsibility of state agencies under this public trust doctrine, under common law, and as codified, is broader than "mere compliance by [agencies] with their legislative authority. . . ." Parks v. Cooper, 2004 S.D. 27, ¶44, 676 N.W.2d 823, 838 (citing Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085, 1095 (1983)).

For the foregoing reasons, Petiioners submits this petition and urges that the permit:

1. Should be denied as unsupported by facts and evidence upon which to form a reasonable basis for concluding the requirements of any of the four criteria in SDCL Chapter 46-2A-9 have been met; or in the alternative

2. Deferred pursuant to SDCL § 46-2A-7 until an investigation of the impacts that the point of diversion will have on the existing (and prospective) instream flows in the area, senior water rights, domestic use, unique geologic and hydro-geologic structures, and the public health and welfare from the CAFO for which the water is requested; and the structure and finances of Longview Farms LLP to determine they are sufficiently financially responsible for and maintain liability for pollution of the area is completed; and

3. Pursuant to SDCL §46-2A-5, Petitioners further requests that the Chief Engineer postpone the date set for hearing on the Application for at least 20 days; and

4. That the Chief of Engineers refer this matter to a Hearing Examiner, pursuant to SDCL §1-26-18.3, as the damage from CAFO operations and the granting of this permit

for that purpose threatens to impair wells for domestic water supply by appropriation without investigation of aquifer recharge rates, cumulative withdrawals from the aquifer, and the risk of contamination of the aquifer from the CAFO operation, resulting in damages in excess of $2,500.00 to the Petitioner and any other Petitioners in this matter; and

5. That the Petition to Intervene be granted.

Respectfully Submitted this 27th day of September 2010.

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November 8, 2010

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RE: In the Matter of Water Permit Application No. 7206-3, Longview Farms, LLP

Dear Mr. Gronlund:

Enclosed please find the *Pre-Hearing Brief of the Yankton Sioux Tribe In the Matter of Water Permit Application No. 7206-3, Longview Farms, LLP*. Thank you.

Sincerely,

Rebecca L. Kidder
Attorney for Yankton Sioux Tribe

RLK/jh

encs.

cc: Diane Best
David Nadolski
Jeff Hallem
Patricia Mylott
Joan Olive
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2010, I served a true and correct copy of the *Pre-Hearing Brief of the Yankton Sioux Tribe In the Matter of Water Permit Application No. 7206-3, Longview Farms, LLP* to the following parties:

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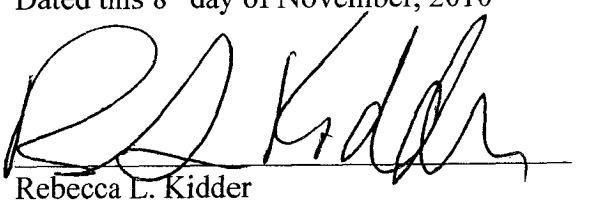
Dated this 8th day of November, 2010



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SOUTH DAKOTA WATER RIGHTS MANAGEMENT BOARD

In the Matter of Water Permit Application No. 7206-3, Longview Farms, LLP

JOINT PRE-HEARING BRIEF ON LEGAL ISSUES OF PETITIONER YANKTON SIOUX TRIBE AND INDIVIDUAL PETITIONERS REPRESENTED BY HAROLD SHEPHERD *Pro Hac Vice*

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INTRODUCTION

This Pre-Hearing Brief was requested by the Water Rights Management Board at the Pre-hearing conference held on October 6, 2010. At the Pre-hearing conference, legal counsel for the Board proposed that all parties file Pre-hearing Briefs on certain unique legal issues that may arise in the hearing on Water Permit Application 7206-3. Upon request for clarification made by legal counsel to the Tribe as to what matters were to be briefed, a request for briefing of the issue of the reserved water rights of the Yankton Sioux Tribe was made and agreed to. No further clarification was given.

The Procedural Order issued by the Board on October 18, 2010 specifies that "Briefs will address all legal issues intended to be raised during the contested case proceeding except those pertaining to the four-part standard under SDCL 46-2A-9." Petitioners respectfully submit that all of the issues raised in their original petition related directly to the requirements of SDCL 46-2A-9, including the issue of reserved water rights of the Yankton Sioux Tribe under the Winters Doctrine. This Brief addresses only those legal issues Petitioners intend to raise at hearing that the Petitioners believe the Board may not have been asked to consider in previous contested cases. In so doing, Petitioners do not waive the right to have any of their factual or legal arguments set forth in the Petitions submitted to the

Board and ruled upon after a full hearing on the evidence.

STATEMENT OF APPLICABLE LAWS

Any person intending to acquire a right to beneficial use of water is required to apply for a permit from the South Dakota Water Management Board, pursuant to SDCL 46-5-10. No person may utilize water for a purpose or in a manner other than specified in the permit or license, if one is granted by the Water Management Board. SDCL 46-5-30.2.

Under SDCL 46-6-3, groundwaters of the state may be appropriated, subject to vested rights and prior appropriations. An application to appropriate groundwater may not be approved if, "according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from the groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source." SDCL 46-6-3.1. SDCL 46-6-26 provides that the Water Management Board or chief engineer may deny or condition any permit as is determined necessary to protect domestic wells, municipal wells, or natural springs of this state.

SDCL 46-2A-9 sets forth the criteria for determining whether a permit can be issued to appropriate water, and includes four factors:

1) "if there is 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;

3) the proposed use is a beneficial use; and

4) the proposed use is in the public interest.

If the Water Management Board determines, based upon evidence presented at hearing, that the requirements for issuance of a permit have not been met, "or that the evidence is insufficient to support a determination, it shall disapprove the application or defer it for further study." SDCL 46-2A-7.

Only certain entities may reserve water for contemplated future needs, and Longview Farm LLP is not an entity entitled to apply for such a future use permit, under SDCL 46-5-38. Under SDCL 46-5-38, such future use permits are reviewed by the Board every seven years and are subject to cancellation if the Board determines the permit holder cannot demonstrate a reasonable need for a future use permit.

In examining whether a permit to appropriate water should be granted, SDCL 46-1-1, establishing the public trust doctrine, provides the standard for decision making, and specifies that, "the people of the state have a paramount interest in the use of all the water of the state."

STATEMENT OF LEGAL ISSUES BRIEFED

1. Whether, in determining there is a reasonable probability that there is unappropriated water available for the applicant's proposed use, the Board must require a determination by the Chief Engineers that the total withdrawals from a groundwater source not exceed the quantity of the average estimated annual recharge of water to the groundwater source under SDCL 46-6-3.1.

2. Whether, in determining that the proposed diversion can be developed without unlawful impairment of existing rights, the Board must require investigation and consideration of the reserved water rights of the Yankton Sioux Tribe and Individual Petitioners (Petitioners) in the groundwaters of the Codell, Niobrara, and other local aquifers and groundwaters.

3. In determining whether the proposed use is a beneficial use, whether the applicant must demonstrate what specific uses within the LCFO the water will be utilized for, must demonstrate the water is of sufficient quality for such proposed uses, and that the water will be used immediately.

4. Whether the Board may grant a water permit to Longview Farm if it is determined that the proposed use of water is for backup water supply in case of interruption of water supply from the Fort Randall Water District system, or whether such a use is a future use pursuant to SDCL 46-5-38.

5. Whether denial of the permit, or deferment for further study is necessary under SDCL 46-2A-7 to protect domestic wells including those of Individual Petitioners, municipal wells, or natural springs of this state pursuant to SDCL 46-6-26.

6. Whether the Chief Engineer is required to make a determination that the location of the well in question complies with the requirements of ARSD 74:02:04:23 (4) and ARSD 74:02:04:24 (1) and (2) relating to the location of wells in relation to pollution sources.

7. Whether this permit will comply with the requirements of ARSD 74:02:04:34.01 that no well may be constructed to allow production from

more than one aquifer.

8. Whether, in determining that the water permit application for a permit to withdraw water from the Codell aquifer meets the requirements of law in relation to impacts on the Codell aquifer, the Board is required to investigate and make determinations regarding the impact of this proposed water permit, and the operation of Longview Farm. Including production of pollution, on other shallower aquifers including the Niobrara formation, and unconfined shallow aquifers providing water supply to local springs and shallow wells used for domestic use, as defined in SDCL 34A-3A-24 and ARSD 74:02:04:20 (10) & (56).

STATEMENT OF PROCEDURAL FACTS

On June 23, 2008 the South Dakota Department of Environment and Natural Resources published Notice in one Wagner, South Dakota paper that it had received an application for a water rights permit from Longview Farms LLP care of Arlan Moss, a resident of Hull, Iowa. The notice stated, "The water is for commercial use in a livestock confinement operation." Petition for Declaratory Ruling (hereinafter "Dec. Pet."), Ex.1. On or before June 23, 2008 numerous organizations and residents affected by the Longview Farm Livestock Concentrated Feeding Operation (LCFO) filed timely protests to the issuance of a permit on several grounds, including that the permit was not in the public interest, and that granting the permit jeopardized the water supply of individuals and households who utilized groundwater in the area of the LCFO both from loss of water supply and from contamination of domestic water supply.

Longview Farm notified South Dakota DENR on August 20, 2008 that "Longview Farms, LLP intends to drill and case a test hole/well at their facility . . . . Dec. Pet. Ex. 2. Longview Farms LLP represented to South Dakota DENR that, "the facility will have a dual water supply system. Dec. Pet, Ex. 3 (Emphasis added).

On August 22, 2008, James A. Goodman, Natural Resources Engineer on behalf of Garland Eberle, Chief Engineer, issued a Letter to Longview Farm, LLP authorizing construction of a test well prior to the approval of a water permit. That letter included an unsolicited advisory opinion that, "[p]ursuant to SDCL 46-1-6(7) and ARSD 74:02:01:01(7), stock watering is a domestic use." Id.

On September 2, 2008, the Water Rights Management Board issued notice to all parties a hearing on the Permit Application was scheduled for October 2, 2008. Dec. Pet. Ex. 2. On August 28, 2008, the Yankton Sioux Tribe and Individual Petitioners in that Matter, were served with documents for the October 2, 2008 hearing, including notice that the DENR had issued approval of the drilling of a test well, and advisement to Longview Farm that us of up to 25, 920 gallons of water per day from the test pending the hearing on the water rights permit was authorized under South Dakota law and regulations. Id.

DENR notified Petitioners in Water Permit 7006-3 on August 26, 2008 for

the first time that it had received a request for a test well and that it had issued authorization for a test well and issued an advisory opinion on the applicability of domestic use provisions to Longview Farm, LLP's well. The South Dakota DENR had not provided any notice of Longview Farm's communication with DENR about a test well or removal of water as a domestic use prior to issuing the DENR letter of August 26, 2008 to any of the parties to the permit hearing scheduled for October 2, 2008.

On August 22, 2008, the Chief Engineer for South Dakota DENR issued a revised Report on Water Permit No. 7006-3, which indicated, "The water is for commercial use in a livestock confinement operation." Dec. Pet. Ex. 3.

Subsequent to the issuance of the South Dakota DENR Chief Engineer's unsolicited advisory opinion on domestic use eligibility, Longview Farm, LLP withdrew its Application for a Water Permit on September 10, 2008. The notice indicated that, "Water use from the well will be for livestock production and will not exceed reasonable domestic use as defined in ARSD 74:02:01:01(6)."

Many of the Petitioners in this matter filed a Petition for Declaratory Ruling with the Water Rights Management Board on August 29, 2008. The Department of Environment and Natural Resources required publication of Notice of the Declaratory Ruling hearing in ten South Dakota papers spanning the entire state

including the Rapid City Journal and the Pierre Capitol Journal. The Water Rights Management Board denied the Petition for Declaratory Ruling and issued its Findings of Fact and Conclusions of Law on March 13, 2009. Petitioners in that matter appealed to the First Judicial Circuit, and on June 24, 2010. At hearing, Longview Farms reiterated its prior position in front of the Water Rights Management Board that water from this well would be used only as a backup source of water in case water was unavailable from the Fort Randall Water District rural water supply system. Further, Longview Farm reiterated the position taken before the Water Rights Management Board that it had not determined whether the water quality was sufficient to permit use of water for watering livestock. The First Judicial Circuit Court of South Dakota issued a decision overruling this Board's determination that Longview Farm LLP was entitled to use of groundwater without a permit as a domestic use. In the Matter of the Petition for Declaratory Ruling Regarding the Applicability of Domestic Water Use for Longview Farm LLP's Well., Civ. No. 09-63 (2010).

On September 8, 2010 and September 15, 2010 the Department of Environment and Natural Resources published notice in the Wagner Post, of the DENR's recommendation to grant a water rights permit to Longview Farm LLP on application number 7206-3. The Notice was not published in the paper published

in the town closest to the location of this well, the Lake Andes Wave. The Notice indicated that the water would be used for "commercial use at a swine farrowing facility." Petitioners filed petitions in opposition to the grant of the permit on or before September 27, 2010.

ARGUMENT

Petitioner Yankton Sioux Tribe (Tribe), is responsible for protecting the health and welfare of the residents of the Yankton Sioux Reservation, including thousands of tribal members living within the Reservation located in Charles Mix County, South Dakota. Individual Petitioners Faith Spotted Eagle, Judy Honimichle, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins, are represented by Harold Shepherd whose admission Pro Hac Vice is pending before the South Dakota Courts. Individual Petitioners represented by Harold Shepherd include members of the Yankton Sioux Tribe. In addition, Petitioner Faith Spotted Eagle, Kipp Spotted Eagle Collins and Allen Hare are owners of wells utilized for domestic water supply and irrigation located upon Reservation lands and other lands adjacent to and surrounding the well location.

Further, members of the Tribe include children and families whose water supply for domestic use including livestock watering is ground water from wells and shallow groundwater from natural springs in Charles Mix County. That

ground water, even if not flowing from the deeper Codell aquifer, is protected water subject to the regulations and laws of South Dakota regulating use of the waters of the State pursuant to SDCL 46-6-3, 46-6-3.1 and 46-6-26.

I. The Waters of South Dakota are Protected by the State for the Benefit of Individual Residents by the Public Trust Doctrine.

South Dakota has adopted the "public trust doctrine" in its laws regulating water usage. Under this doctrine, private landowners' common law rights to access water unrestricted on their lands was eliminated. SDCL 46-1-1 declares that the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection.

SDCL 46-1-3 establishes the public trust doctrine and the obligation of the state to regulate water use to protect water, declaring, "that all water within the state is the property of the people of the state, but the right to use of water may be acquired by appropriation as provided by law." As the South Dakota Supreme Court has recognized, the responsibility of state agencies under this public trust doctrine, under common law, and as codified, is broader than "mere compliance by [agencies] with their legislative authority. . . ." Parks v. Cooper, 2004 S.D. 27, ¶44, 676 N.W.2d 823, 838 (citing Kootenai Envtl. Alliance v. Panhandle Yacht

Club, Inc., 105 Idaho 622, 671 P.2d 1085, 1095 (1983)). Under these provisions, the South Dakota Supreme Court has ruled that, "the use of water for domestic purposes is the highest use of water, and takes precedence if such use is consistent with the public interest pursuant to SDCL 46-1-2." Fraser v. Water Rights Commission, 294 N.W.2d 784, 788 (S.D. 1980)

The Tribe and individual Tribal member Petitioners' interests in the water are also protected by the Winters doctrine enunciated by the United States Supreme Court. Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable). It includes the amount of water required to make the Reservation viable. Arizona v. California, 373 U.S. 546, 599 (1963). Tribal federal treaty rights, including the treaty right to water, include protection from man made despoilation. See, United States v. State of Washington, 506 F. Supp. 187, 203 (D. Wa. 1980).

The purposes of the protections at the federal level and the state level are the same - to ensure that residents have access to clean, safe drinking water for their families and their homes. The waters of South Dakota do not belong to the State of South Dakota under Public Trust Doctrine- they belong to the people of South Dakota who entrust the State of South Dakota, and its agencies, to preserve such

waters for their benefit. All statutes regulating water usage, therefore, must be interpreted in accordance with these overarching principles and purposes, keeping in the forefront of our minds that the waters within South Dakota are to be protected and preserved for the benefit of South Dakota individual citizens.

II. Specific Legal Issues for the Board's Consideration at Hearing.

A. Whether, in determining there is a reasonable probability that there is unappropriated water available for the applicant's proposed use, the Board must require a determination by the Chief Engineers that the total withdrawals from a groundwater source not exceed the quantity of the average estimated annual recharge of water to the groundwater source under SDCL 46-6-3.1.

SDCL 46-6-3.1 requires that

> 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.

Pursuant to this specific requirement applicable to groundwater appropriation permits, the law requires a determination of the average estimated annual recharge rate of the Codell aquifer. Further, this law specifically requires examination of the best information reasonably available to determine the total quantity of water withdraw annually from the groundwater source. In this case, the best information reasonably available includes the most recent United States Geological Service Well Study. South Dakota law requires the collection, preservation and

publication of data with respect to underground waters as are required by the public interest, and directs the publication of rules by the Water Management Board on such collection, preservation and publication of data pursuant to SDCL 46-6-6. Under ARSD 74:02:05:07.

> In determining the availability of unappropriated water for an application for a permit to appropriate water, the board shall rely upon the record of observation well measurements in addition to other data to determine that the quantity of water withdrawn annually from the aquifer does not exceed the estimated average annual recharge to the aquifer.

The Chief Engineer's Report and Investigation in this matter appears to fall short of the legal requirements in three respects: 1) it does not include any determination of the annual recharge rate of the Codell aquifer; 2) it does not include examination of the best information available - the most recent USGS Well Survey which lists all wells withdrawing water from the Codell aquifer but rather, relies exclusively upon the Applicant's assertion that there are only two domestic wells in the area; and 3) the Chief Engineer's report notes that the observation wells established are so far away they are only representative of the entire aquifer, and at that, show "annual fluctuations that may be due to pumping." Quite simply, the Chief Engineer's report does not meet the legal or factual requirements necessary to determine that this water permit will comply with the requirements of SDCL 46-6-3.1, and consequently, the requirements of SDCL 46-2A-9.

B. Whether, in determining that the proposed diversion can be developed without unlawful impairment of existing rights, the Board must require investigation and consideration of the reserved water rights of the Yankton Sioux Tribe and Individual Petitioners in the groundwaters of the Codell, Niobrara, and other local aquifers and groundwaters.

This section of the Brief does not address other factual and legal issues that may be raised at hearing in relation to impairment of the existing rights of domestic water users of the Codell aquifer, Niobrara aquifers, or shallower aquifers and groundwater supply including natural springs that may be impacted by this water permit. It only addresses the precise issue Petitioners were asked to Brief by the Board of what, if any, water rights the Yankton Sioux Tribe has a right to protect and assert in this permit application hearing under the Winters Doctrine.

The Yankton Sioux Tribe and its members occupy the Yankton Sioux Indian Reservation, established by the Treaty of 1858 between the Yankton Sioux Tribe and the United States government. The Supreme Court ruled in South Dakota v. Yankton Sioux Tribe, 520 U.S. 329, 357 (1997) that the Yankton Sioux Reservation was diminished by Article I of the Act of 1894, 28 Stat. 314-318. In Yankton Sioux Tribe v. Gaffey, the United States Eighth Circuit Court of Appeals held that the Yankton Sioux Indian Reservation had not been disestablished and continues to exist. 188 F.3d 1010, 1030 (1999). In Yankton Sioux Tribe v.

Podhradsky, the United States Court of Appeals for the Eighth Circuit further ruled that the Yankton Sioux Indian Reservation is not disestablished and includes trust lands held for the benefit of the Tribe and/or individual tribal members. 606 F.3d 985 (8th Cir. 2010).

Indian Tribes in the United States who are located upon an Indian Reservation acknowledged and recognized by Treaty with the United States have a concomitant set of rights to waters flowing through, and beneath the surface of Reservation lands. The Yankton Sioux Indian Reservation is located within Charles Mix County, and includes lands overlying the Niobrara formation and the Codell aquifer, which are affected by the water permit filed for in this case.

Under federal law, it has been squarely recognized that the Tribe therefore has protected and vested water rights that may not be impaired by a system of water appropriation such as the system of water permitting adopted by the State of South Dakota. On behalf of its membership, The Yankton Sioux Tribe is the owner of reserved water rights upon its Reservation lands established by the Treaty of 1858 and as diminished by the Act of1894. See, Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable). The Tribe's rights to water from the Codell Aquifer are rights to sufficient water to

irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, and their "reasonably feasible" uses of such water. Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969). It includes the amount of water required to make the Reservation viable. Arizona v. California, 373 U.S. 546, 599 (1963).

In addition, as in this case, the Courts have found that if the suit is challenging the impact of a particular action on natural resources rights which are held for the benefit of tribal members, then individual members can file suit to protect such rights. See, Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969). In other words, under Sohappy, the granting a water permit violates Appellants' reserved water rights to the extent it threatens the amount of water they need to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, their "reasonably feasible" uses of such water. The courts have already determined that Tribes have the right to assert these rights on behalf of its members. See, United States v. Nebraska, 520 F.2d 676, 688 (9th Cir. 1975).

The Chief Engineer has not assessed the reserved water rights of the Yankton Sioux Tribe or determined the recharge rate of the Codell aquifer, nor the amount of unappropriated water within the Codell aquifer, and so has no

reasonable basis to conclude, without further investigation, that the water rights of the Yankton Sioux Tribe are not impaired by this permit. These reserved water rights are federally protected from impairment by off-reservation withdrawals from the Codell Aquifer, including Permit 7006-3. Winters v. United States, 207 U.S. at 576; Arizona v. California, 373 U.S. at 599; Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981).

As the Supreme Court has explained, in Winters v. United States, 207 U.S. 564, upstream diversions of water that are off-reservation may not impact a Tribe's rights to use of water that are reserved. To have reserved water rights, a Tribal Treaty with the United States setting apart lands as a Reservation is required, but specific water rights language in such treaty is not required. Id.

In Winters, the United States brought suit on behalf of the Gros Ventre and Assiniboine tribes of the Fort Belknap Reservation in Montana to halt upstream diversions by non-Indians who had been using the water running through the Tribe's land since 1900. The Fort Belknap Reservation was established under the terms of an 1888 treaty that generally described the purpose of the reservation as the provision of a permanent home for the tribes and to encourage the Indians to engage in agricultural pursuits. Id. at 656. The Treaty did not mention water rights. The non-Indian diverters contended that their diversions, which were prior in time

to those by the Indians, gave them a superior right. Mark A. McGinnis & Jason P. Alberts, "Southwest Water Decisions: The Law of Federal Reserved Water Rights," The Water Report: p. 2 (October 15, 2005). That argument was rejected by the Supreme Court, which stated,

> The case, as we view it turns on the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation.... The reservation was part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habit and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change in conditions. The lands were arid and without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government ... The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied and could not be.

207 U.S. at 575–76 (1908), citing, United States v. Rio Grande Dam and Irrigation. Company, 174 U.S. 690, 702 (1899).

After Winters the federal courts refined the definition of tribal sovereignty in relation to water rights, beginning with the U.S. Supreme Court's decision in Arizona v. California, 373 U.S. 546 (1963). In that case, the special master

appointed to resolve certain preliminary questions settled on the notion of quantifying reserved water rights based upon practicably irrigable acreage (PIA).

Under this test, an Indian tribe is legally entitled to as much water as is needed to irrigate all the PIA within its reservation. The water so reserved "was intended to satisfy the future as well as the present needs of the Indian Reservation." 373 U.S. at 600. In other words, the water was reserved "to make the Reservation viable." Id. at 599, cited with approval in, Montana v. United States, 450 U.S. 544, 566 n. 15 (1981).

Ultimately, this approach developed into the 'permanent homeland' concept, which originated in In Re General Adjudications of All Rights to use Water in the Gila River System and Source, 201 Ariz. 307, 315, 35 P.3d 68, 76 (2001) (Gila V). In that case, the Arizona Supreme Court, in keeping with the standard established in Arizona, Judge Goodfarb of the Maricopa County Superior Court held that all federal reserved rights for Indian reservations were to be measured based upon the PIA standard. Id. This standard provided that the tribes should get enough water to irrigate all land on the reservation that is: 1) arable; 2) physically irrigable; and 3) economically irrigable.

On review of Judge Goodfarb's decision, the Arizona Supreme Court rejected the PIA as the sole standard for determining the "essential purpose" of the

tribal reservation and instead found that such purpose "is to provide Native American people with a 'permanent home and abiding place, that is 'a livable' environment." Id. The court held that the general purpose of providing a home for Indians must be broadly construed to provide tribes with the ability to achieve self-determination and economic self-sufficiency, Id., and that limiting tribes to a PIA standard denies them the opportunity to evolve. This, in turn, limits them to an agrarian standard in a largely nonagrarian modern world. The Gila V court mandated that proposed uses be "reasonably feasible." Id. at 80. To determine if a use is reasonably feasible, a project must be: 1) achievable from a practical standpoint; and 2) economically sound. Id. at 81.

The Yankton Sioux Tribe has the right to protect its reserved treaty water rights from appropriation by others and from "man-made despoliation." See, United States v. State of Washington, 506 F. Supp. 187, 203 (D. Wa. 1980). See also, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984)(requiring revival of wetlands decimated by non-Indian stream withdrawals); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)(requiring maintenance of minimum stream flow for downstream tribal fishery).

The use of water for a LCFO on lands upland from and directly adjacent to tribal lands and water supplies, both surface and subsurface, and the location of

manure dumping fields adjacent to Reservation lands ensures runoff from the 976,200 cubic feet of liquid manure dumped annually could contaminate the Codell Aquifer and all surface waters on Reservation lands, resulting in impairment of the Tribe's and its tribal members' including the Tribe and Individual Petitioners currently appropriated water and its reserved water rights in addition to the water permit limiting the availability of water quantity.

Under SDCL 46-2A-9, Tribal reserved water rights and the water rights of Individual Petitioners must be considered an a determination made regarding whether the issuance of this water appropriation permit will impair the Yankton Sioux Tribe's reserved water rights. Until such time as the Applicant and the Chief Engineer have fully investigated this issue, this petition should be deferred for further study under SDCL 46-2A-7.

C. In determining whether the proposed use is a beneficial use, whether the applicant must demonstrate what specific uses within the LCFO the water will be utilized for, must demonstrate the water is of sufficient quality for such proposed uses, and that the water will be used immediately.

The Chief Engineer's Report to the Board recommending approval of the water permit lists the proposed use of water as "commercial use at a swine farrowing facility." However, neither the published notice of Application nor the Chief Engineer's report include any determination of what uses at the facility water

will be used for - whether it will be human consumption, human sanitation, animal sanitation, power washing the facility, or livestock watering. In this particular case, to determine the use is a beneficial use, it is important to require specific uses the water will be used for. Prior hearings before this Board include the testimony and statements of fact stipulated to by the Applicant that the water would be used as a backup water supply in case insufficient water is available from the Fort Randal Rural Water System. Further, prior statements of fact and testimony of the Applicant indicate the applicant has not determined whether the water is of sufficient quality to utilize for human consumption or livestock watering, and have further indicated the facility is not plumbed to permit separation of sanitation uses from livestock watering uses.

As the South Dakota courts have previously held, approval of a water permit to appropriate water from the Niobrara Chalk formation without giving consideration to maintenance of artesian head pressure and without giving consideration to whether the quality of water was suitable for the use proposed constitutes an abuse of discretion. Fraser v. Water Rights Commission of Dept. Of Natural Resource Development, 294 N.W.2d 784 (S.D. 1980).

It would be impossible for the Board to determine whether the water will be put to beneficial use in this instance without a determination of what specific uses

of water are proposed.

D. Whether the Board may grant a water permit to Longview Farm if it is determined that the proposed use of water is for backup water supply in case of interruption of water supply from the Fort Randall Water District system, or whether such a use is a future use pursuant to SDCL 46-5-38.

Because the Notice of Application and the Chief Engineer's Report do not specify whether the proposed water use is for a backup water supply only, it is impossible at this time to determine whether this is a legal issue. However, if the proposed use is solely as a backup water supply in the case that water from the Fort Randall Rural Water System is temporarily available, this would be a proposed future use. Applications for permits for future use of water are limited to a very specific group of applicants under SDCL 46-5-38. Longview Farm does not fall within the scope of the law as to applicants who are entitled to permits for reserved water for future need. Further, the application for a water permit was not filed as an application for reservation of water for future use under SDCL 46-2A-10.

Because the South Dakota system of allocation of water rights is based upon the concept of first in time first in right with respect to the issuance of water permits, subject to the limitations of domestic use and other vested rights, and the public trust doctrine, the reservation of water for future use is limited by the South Dakota legislature to ensure the waters within South Dakota are put to beneficial

use consistent with the public trust doctrine and preservation of domestic uses and other vested rightd. See e.g. Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights), 170 P.3d 307 (Colo. 2007).

The requirement to demonstrate the water will be put to a beneficial use is intended to ensure that the public's water resource is available to those who actually need water. David B. Schorr, Appropriation as Agrariaranism: Distributive Justice in the Creation of Property Rights, 33 Ecol. L.Q. 3,9,22 (2005).

In this case, SDCL § 46-1-4 and §46-2A-9, are intended to prevent speculative use of water, or reservation of rights to future use of water. There is no finding by the Chief Engineer in the Report on this Application that he reviewed the LCFO water requirements for existing operations, or the basis for determining that the amount reserved by this Permit will be used in a reasonable period of time. Data and information regarding the water requirements for the contemplated LCFO is needed before a water permit is issued to ensure the use is not simply for the purpose of future need, and to ensure the water is of sufficient quality to actually be utilized by the Applicant. The Chief Engineer's Report does note that the primary source of water is the Fort Randall Water District, and that the well in this case will be utilized as a "supplemental source" for the facility.

E. Whether denial of the permit, or deferment for further study is necessary under SDCL 46-2A-7 to protect domestic wells, municipal wells, or natural springs of this state pursuant to SDCL 46-6-26.

South Dakota law provides authority to the Water Management Board to deny permits or place conditions on the issuance of any water permit if the Board determines such denial or conditions are necessary to "protect domestic wells, municipal wells, or natural springs of this state." SDCL 46-6-26. Accordingly, one of the determinations of fact necessary to the approval of a water permit is whether the granting of the permit will result in impairment of currently existing domestic wells and/or natural springs including those of Individual Petitioners. The Chief Engineer's Report lists only the two domestic wells listed by the Applicant in the Report to the Board, neither of which includes individual Petitioners wells that will be impacted by issuance of the permit, and provides no assessment as to whether the granting of this permit will cause impairment to these two wells. Further, the Chief Engineer's Report does not give any indication that an independent investigation into the existence of domestic wells in the Codell aquifer, or the existence of natural springs in the area was performed. If the evidence at hearing demonstrates there are natural springs in the area of this proposed permit, and there are additional domestic wells in the Codell aquifer, or that the Chief Engineer did not assess the effect of this application on artesian head pressure for existing

domestic wells including those of Individual Petitioners, then the application should, at a minimum be deferred until an appropriate investigation is conducted into any impact this permit will have on the quantity or quality of water in existing domestic wells in the Codell aquifer and existing natural springs in the area. See, Fraser v. Water Rights Commission of Dept. Of Natural Resources Development. 294 N.W.2d 784 (1980 S.D.)(holding that failure to examine the impact of water permit on artesian head pressure is abuse of discretion); See also, Op. Atty. Gen. Opinion No. 89-22 (1989) (finding that state water law applies to both surface waters and groundwaters within the State.)

F. Whether the Chief Engineer is required to make a determination that the location of this well complies with the requirements of ARSD 74:02:04:23 (4) and ARSD 74:02:04:24 (1) and (2) relating to the location of wells in relation to pollution sources.

The Chief Engineer's Report does not include any determination as to whether the proposed well location meets the requirements of ARSD 74:02:04:23 (4) and ARSD 74:02:04:24 (1) and (2) relating to the location of wells in relation to pollution sources. In this case, Longview Farm's operations include pollution sources as defined under ARSD 74:02:04:20(38), which defines a "Pollution source" as

> anything that causes groundwater pollution, including the following: . . . (b) wastewater absorption, evapotranspiration, and graywater systems; (c) seepage pits, cesspools, NoDak systems, mounds, and pit

privies as described by chapter 74:53:01; and (d) Barnyards, barn gutters, feedlots, animal pens, and farm silos.

Both the actual location of Longview Farm LCFO, and the location of all fields where manure is spread under the approved manure management permit issued by DENR are included within this definition of "Pollution source."

ARSD 74:02:04:24(2) requires that no well "supplied by aquifers whose top is more than 100 feet deep may be located no closer than 100 feet horizontally from a pollution source. . . ." Further, no well supplied by an aquifer less than 100 feet deep may be located closer than 150 feet from any pollution source. The Chief Engineer's Report does not indicate that any assessment of the location of this well in relation to pollution sources was conducted, nor that any determination was made based upon the location of manure management fields or the Longview Farm LCFO. In order to comply with ARSD 74:02:04:24, a determination of fact on this issue is necessary.

G. Whether this permit will comply with the requirements of ARSD 74:02:04:34.01 that no well may be constructed to allow production from more than one aquifer.

The Chief Engineer's Report indicates only that the permit will have to comply with South Dakota well construction standards, but does not indicate which standards will be applicable. In this instance, the Chief Engineer determined that there is a shallower aquifer present in the Niobrara formation, and at hearing,

evidence will indicate there is the presence of shallow groundwater within 100 feet of the land surface, which qualifies as an aquifer under ARSD 74:02:04:20 (10) within the Herrick formation. Water from this permit, according to the Chief Engineer's Report, is intended to withdraw water only from the Codell aquifer. However, in order to comply with the requirement of ARSD 74:02:04:34.1 that a well be constructed in a manner that it will not withdraw water from more than one aquifer, specific conditions on how a well is constructed should be required. ARSD 74:02:04:23 sets forth the intent of South Dakota well construction standards, and clarifies that the intent of the law is, in relevant part:

> (1) To protect the health of the public;
>
> (2) To provide water which is both bacteriologically safe and of reasonable quality and quantity for domestic use; . . .
> (4) To protect groundwater resources of the state from bacteriological and chemical contamination and from leakage between aquifers;
> (5) To prevent waste of groundwater.

In this case, any approval of a water permit should include specific well construction standards that must be followed to ensure there is no leakage from the shallower aquifers in this area, and to ensure that neither the Codell aquifer nor the other groundwaters in this area are bacteriologically contaminated by the operation of any well, or the operation of Longview Farm.

H. Whether, in determining that the water permit application for a permit to withdraw water from the Codell aquifer meets the requirements of law, the Board is required to investigate and make determinations regarding the impact of this proposed water permit, and the operation of Longview Farm on other groundwater and shallower aquifers, including the Niobrara formation, and unconfined shallow aquifers providing water supply to local springs and shallow wells used for domestic use, as defined in SDCL 34A-3A-24 and ARSD 74:02:04:20 (10) & (56).

The Chief Engineer's Report on this Permit Application includes only an assessment of impacts of the granting of this permit upon the Codell aquifer. It does not include any assessment of the existence of other more shallow aquifers and ground water in the area of the Codell aquifer or this Permit. Under SDCL 34A-3A-24,

> No concentrated animal feeding operation that includes a number of animals equal to or greater than one thousand animal units may be located over a shallow aquifer unless a groundwater discharge permit has been approved in accordance with chapter 34A-2. For purposes of this section, a shallow aquifer is any aquifer having the following characteristics:
>
> (1) The aquifer is within fifty feet or less below the land surface with fifteen feet or less of continuous, overlying, extremely low permeability geologic material, such as clayey till or shale. Weathered till or highly fractured weathered shale is not an extremely low permeability material for purposes of this section; or
>
> (2) The aquifer is greater than fifty feet but less than one hundred feet below the land surface with thirty feet or less of continuous overlying low to extremely low permeability geologic material that may be a combination of weathered and unweathered till, shale, or till and shale.
>
> This section does not apply to any concentrated animal feeding

> operation that was operating on or before July 1, 1997. This section does not limit or prohibit the expansion of any concentrated animal feeding operation that was operating on or before July 1, 1997.
>
> The provisions of this section do not apply to any county which has officially adopted a comprehensive plan and zoning ordinances pursuant to chapter 11-2 and wellhead protection ordinances pursuant to § 7-18-20.

In this instance, the evidence at hearing will demonstrate that there is a shallow aquifer within 100 feet of the surface of the ground located under Longview Farm, and that Longview Farm, under the requirements of this statute, is a LCFO subject to this restriction, and has not been required to obtain a groundwater discharge permit by DENR. Issuance of a water permit to a LCFO that is operating in violation of this statute would clearly not be in the public interest.

III. CONCLUSION

If the Water Management Board determines that the evidence presented at hearing is insufficient to demonstrate that the granting of this water permit complies with the applicable law, including the statutes and administrative rules set forth herein, then, under SDCL 46-2A-7, the Water Management Board is required to disapprove the permit or to defer it for further study.

Neither the application nor the Chief Engineer's Report demonstrate that the requirements of South Dakota law have been met. Unless evidence at hearing demonstrates compliance not only with SDCL 46-2A-9, but also with the other

statutes, legal decisions, and administrative rules cited herein, the Water Permit application should be at a minimum deferred for further study.

Respectfully Submitted this 8th day of November, 2010.

By: _____

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From the offices of Eric R. Kerkvliet
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November 18, 2010

Garland Erbele, Chief Engineer
DENR Water Rights Program
Joe Foss Bldg.
523 E. Capitol Ave.
Pierre, SD 57501

Re: Longview Farm, LLP - Water Permit Application No. 7006-3
Our File No. 082073-00003

Greetings:

Enclosed for the record are the original *Applicant's Brief in Response to the Joint Pre-Hearing Brief of the Yankton Sioux Tribe and Individual Petitioners* and *Certificate of Service.*

Sincerely,

LYNN, JACKSON, SHULTZ & LEBRUN, PC

Eric R. Kerkvliet

Enclosures

cc: Arlan J. Moss

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STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONGVIEW FARMS, LLP	)))))	CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Applicant's Brief in Response to the Joint Pre-Hearing Brief of the Yankton Sioux Tribe and Individual Petitioners was served on 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 Sioux Falls, South Dakota, this 18th day of November, 2010:

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STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP	)))))	**APPLICANT'S BRIEF IN RESPONSE TO THE JOINT PRE-HEARING BRIEF OF THE YANKTON SIOUX TRIBE AND INDIVIDUAL PETITIONERS**

Comes now the Applicant, Longview Farm, LLP (herein referred to as "Longview"), by and through its attorneys, Eric R. Kerkvliet and Lynn, Jackson, Shultz & Lebrun, P.C., and submits this Brief in Response to the Joint Pre-Hearing Brief of the Yankton Sioux Tribe and Individual Petitioners.

FACTS

Longview seeks a water permit from the South Dakota Board of Water Management for its existing swine farrowing, breeding, and gestation operation. The operation has been approved by the South Dakota Department of Environment and Natural Resources (DENR) for coverage under the confined animal feeding operation (CAFO) permit. The primary water supply for the Longview facility is a rural water hookup and will be supplemented by the proposed onsite well with a maximum pump rate of 30 gallons per minute. Longview's water permit application seeks authority to appropriate water from the Codell aquifer.

The Chief Engineer has reviewed the application and has recommended approval of Longview's water permit, subject to the qualifications set forth in the Chief Engineer's Recommendation. After the Notice of Hearing on this application was published, the Yankton Sioux Tribe and several individual petitioners (collectively referred to herein as the "Petitioners") intervened and objected to this application.

Diane Best, on behalf of the DENR, has set forth in her brief a summary of the previous proceeding before the Water Management Board involving these same parties. Essentially, the Water Management Board ruled that Longview's proposed use of water was not a commercial use; therefore Longview would not need to obtain a water rights permit. Circuit Court Judge Bruce Anderson reversed the Water Management Board's decision, ruling that certain of Longview's uses would be considered commercial use, and, accordingly, Longview would need to obtain a permit to utilize its well water for those purposes. In a letter from Judge Anderson clarifying his decision, it was clarified that Longview would not need to obtain a water permit if it were to only use the well water to feed its animals. Because Longview seeks to use its well water for purposes beyond mere animal consumption, it is before this Board requesting a water permit.

AUTHORITIES AND ARGUMENT

I. According to the best information reasonably available, it is probable that Longview's quantity of water withdrawn annually from the Codell aquifer will not exceed the quantity of average estimated annual recharge of water to the Codell aquifer.

Petitioners have argued that the Chief Engineer failed to examine the best information reasonably available in making the determination that the Codell aquifer's average annual recharge rate will not be exceeded by Longview's withdrawals. Longview is confident that the testimony at hearing will demonstrate that the Chief Engineer considered the best information reasonably available regarding the annual recharge rate of the Codell aquifer.

SDCL §46-6-3.1 provides,

> ***No application to appropriate groundwater may be approved if, according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from a groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source.*** An

> application may be approved, however, for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the greenhorn formation in excess of the average estimated annual recharge for use by water distribution systems.

SDCL §46-6-3.1 (emphasis added). ARSD 74:02:05:07 provides,

> When regulating water withdrawals by large-capacity wells and in determining the availability of unappropriated water for an application for a permit to appropriate water, ***the board shall rely upon the record of observation well measurements*** in addition to other data to determine that the quantity of water withdrawn annually from the aquifer does not exceed the estimated average annual recharge to the aquifer.

ARSD 74:02:05:07 (emphasis added).

In making his recommendation, the Chief Engineer performed a careful analysis of existing wells in the Codell aquifer, including (but not limited to) observation well measurements, and of the proposed use by Longview. After performing this analysis, the Chief Engineer has recommended approval of the permit because, *inter alia*, (1) there is a reasonable probability that there is unappropriated water available for Longview's proposed use and (2) Longview's proposed diversion can be developed without unlawful impairment of existing water rights. In making these determinations, the Chief Engineer considered the best information reasonably available and determined that it is probable that the quantity of water withdrawn annually by Longview from the Codell aquifer will not exceed the quantity of the average estimated annual recharge of water to the Codell aquifer. The Chief Engineer has complied with his statutory duties, and James Goodman, on behalf of the Chief Engineer, will be available to testify at the evidentiary hearing before this Board. Longview is confident that the evidence presented at the hearing will demonstrate that the four criteria of SDCL §46-2A-9—including the two criteria set forth above—have been established to the satisfaction of the Board of Water Management.

II. This permit application should not be deferred for further study to determine the extent of the Yankton Sioux Tribe's water rights in the Codell aquifer.

Petitioners argue that Longview's permit application should be deferred for further study so that the Petitioners' water rights can be considered in order to determine whether Longview's proposed use will impair the Petitioners' water rights. Petitioners have cited the *Winters* Doctrine for the proposition that the Petitioners' water rights are prior to those of Longview and must be considered in order to determine whether Longview is entitled to a permit. It is undisputed that the *Winters* Doctrine has been applied to tribes' ***surface*** water rights. However, there is a split of authority among the courts of this nation as to whether the *Winters* Doctrine applies to ***groundwater***. See, e.g., *In re General Adjudication of All Rights to Use Water in Gila River System*, 989 P2d 739 (Ariz. 1999); *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P2d 76 (Wyo. 1988). The Supreme Court of Arizona[1] has held that the *Winters* Doctrine does apply to groundwater while the Supreme Court of Wyoming[2] has declined to so hold. In addition, the United States Supreme Court has had more than one chance to apply the *Winters* Doctrine to groundwater and has declined to do so.[3] The rationale for applying the *Winters* Doctrine to groundwater may be limited to those circumstances in which the reservation does not have a sufficient surface water source.[4] In addition, the Supreme Court of South Dakota has not addressed the issue of whether the *Winters* Doctrine applies to groundwater.

Until such time as a determination has been made by a court of competent jurisdiction that the Yankton Sioux Tribe—to the extent it has not bee diminished or disestablished—has

---

[1] *In re General Adjudication of All Rights to Use Water in Gila River System*, 989 P2d 739 (Ariz. 1999).
[2] *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P2d 76 (Wyo. 1988).
[3] See *U.S. v. Cappaert*, 426 US 128 (1976)(affirming the Ninth Circuit but declining to fully endorse the statement of the Ninth Circuit applying the *Winters* Doctrine to groundwater); *Wyoming v. U.S.*, 492 US 406 (1989).

Winters Doctrine rights that apply to groundwater and until such time as those rights are quantified, this Board—and the Chief Engineer—are unable to determine the extent to which the Yankton Sioux Tribe has rights to the Codell aquifer that are prior to the rights of Longview. If a court of competent jurisdiction determines that the Yankton Sioux Tribe's *Winters* Doctrine rights apply to groundwater, and if the Yankton Sioux Tribe's *Winters* Doctrine rights are quantified, then the Yankton Sioux Tribe—to the extent it exists and has not been diminished or disestablished and to the extent of the quantification—may have priority over Longview to the water in the Codell aquifer. Until that time, however, the Yankton Sioux Tribe does not have priority rights over Longview to water in the Codell aquifer, and this permit application should not be deferred for further study to determine the extent of the Yankton Sioux Tribe's water rights.

III. In determining whether the proposed use is a beneficial use, whether the applicant must demonstrate what specific uses within the LCFO the water will be utilized for, must demonstrate the water is of sufficient quality for such proposed uses, and that the water will be used immediately.

a. Longview does not need to demonstrate the specific uses within the facility for which the water will be utilized.

Petitioners have argued that, in order to determine whether Longview's proposed use is a beneficial use, Longview must present evidence as to the specific uses to which the well water will be utilized. The term "beneficial use" is defined by South Dakota statute 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 §46-1-6(3).*

[4] *In re General Adjudication of All Rights to Use Water in Gila River System*, 989 P2d 739 (Ariz. 1999).

Petitioners have failed to cite to any authority for their argument that specific uses must be considered in order to determine whether a proposed use is a beneficial use. Rather, in order to determine whether the proposed use is a beneficial use, the Water Management Board need only consider whether it complies with the definition of beneficial use set forth above. Longview will establish at hearing that the well water will be used at a swine farrowing facility, that the use is reasonable, useful, and beneficial to Longview, and that the use is consistent with the interests of the public in the best utilization of water supplies. Accordingly, the evidence will establish that Longview's use of the well water for their swine farrowing operation is a beneficial use, regardless of the specific ways in which Longview uses the well water in its facility.

b. Longview does not need to demonstrate that the water is of sufficient quality for proposed uses of the water.

Petitioners argue that Longview must demonstrate that the well water is of sufficient quality for its proposed uses. In support of this argument, Petitioners cite to *Fraser v. Water Rights Commission of Dept. of Natural Resource Development*, 294 NW2d 784 (SD 1980), which is inapplicable for the reasons set forth in the DENR's Brief. Longview will present testimony at hearing as to the anticipated uses of the well water, depending on the quality of the water in the Codell aquifer. As a practical matter, water from the Codell aquifer is generally of relatively high quality, and the water does not need to be of very high quality in order for Longview to use the well water for the power washing of the facility. The well water will need to be of high quality in order for Longview to feed the well water to its sows. However, there is nothing that obligates Longview to demonstrate that the water will be of sufficient quality for the proposed uses of the water.

c. Longview does not need to demonstrate that the well water will be used immediately.

Petitioners next argue that Longview's well water must be used immediately. This argument is contrary to the clear provisions of South Dakota law. SDCL §46-2A-8 provides,

> ***Any construction necessary to put the water to beneficial use shall be completed within five years of approval of the permit and the water shall be put to beneficial use within an additional four years.*** The Water Management Board may, in its discretion, approve any application for a lesser amount of water or may vary the periods of annual use and the permit to appropriate water shall be regarded as limited accordingly.

SDCL §46-2A-8 (emphasis added). Clearly, South Dakota law requires the construction necessary to put the water to beneficial use be completed within five years of approval of the permit, and the water must be put to beneficial use within four years thereafter. Petitioners have failed to cite to any authority that would require Longview to put the well water to immediate use. That being said, Longview will present testimony at hearing as to its anticipated timeframe of using the well water, which will be after approval of the water permit application and as soon as the collapsed well has been rehabilitated or a new well has been dug.

IV. Longview's proposed use of the water from the Codell aquifer is to supplement its rural water supply. Longview's proposed use is a beneficial use and is not a future use such that Longview would need to obtain a future use permit.

Petitioners have argued that if Longview's proposed use of well water is only to be used as a backup water supply, then the proposed use is a future use, which obligates Longview to obtain a future use permit. Because Longview's proposed use of well water is to supplement its rural water supply and because the proposed use is not solely a backup water supply, Petitioners' argument regarding future use is inapplicable. Even the Petitioners recognize that the Chief Engineer's report states that Longview's well water will be a supplemental source for the Longview facility—in addition to the water obtained from Longview's rural water supply.

Evidence will be presented by Longview at hearing that will demonstrate how Longview intends to use the water from the Codell aquifer. This use is not considered a future use, and the authorities cited by Petitioners are inapplicable to this situation.

V. Denial of the permit, or deferment for further study is not necessary to protect domestic wells, municipal wells, or natural springs of this state.

Petitioners argue that denial of the permit or deferment for further study is necessary to protect domestic wells, municipal wells, or natural springs of this state. In support of this argument, Petitioners cite SDCL §46-6-26, which is inapplicable to this water permit application for the reasons set forth in DENR's Brief.

In addition, the Chief Engineer has recommended that the Water Management Board determine that Longview's proposed diversion can be developed without unlawful impairment of existing water rights. In making this recommendation, the Chief Engineer has made a careful analysis of the proposed use and what impact, if any, the proposed use would have on existing domestic well users. Importantly, the Chief Engineer has recommended a qualification on Longview's water permit, which states,

> "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."

Recommendation of the Chief Engineer for Water Permit Application No. 7206-3, Longview Farm, LLP. Accordingly, the Chief Engineer has recognized that Longview's use of the well water is subject to the prior water rights of domestic well users.

The Water Management Board has the opportunity to make the ultimate determination of whether Longview's proposed diversion can be developed without unlawful impairment of

existing water rights. The Chief Engineer has fulfilled his duties, as required by law, and Longview is confident that the evidence presented at hearing will establish that Longview's proposed use of water can be developed without unlawful impairment of existing water rights, including the existing water rights, if any, of the Petitioners.

VI. Evidence at hearing will establish that Longview's proposed well will be constructed in accordance with well construction standards and that the proposed well will be at least 100 feet from a pollution source.

Petitioners argue that the Chief Engineer is required to make a determination that the location of Longview's well complies with the requirements of ARSD 74:02:04:23(4) and ARSD 74:02:04:24(1) and (2) relating to the location of wells in relation to pollution sources.

ARSD 74:02:04:23(4) provides, "The intent of the South Dakota well construction standards is as follows: ... (4) To protect the groundwater resources of the state from bacteriological and chemical contamination and from leakage between aquifers." *ARSD 74:02:04:23(4).* ARSD 74:02:04:24(1) and (2) provide,

> Except for monitoring wells installed to assess the extent of contamination, all wells shall be located as follow:
>
> > (1) Wells supplied by aquifers whose top is less than 100 feet deep may be located no closer than 150 feet horizontally from a pollution source, 75 feet horizontally from wastewater system components, or 30 feet horizontally from sewer lines as defined by subdivision 74:02:04:20(46);
> >
> > (2) Wells supplied by aquifers whose top is more than 100 feet deep may be located no closer than 100 feet horizontally from a pollution source, 50 feet horizontally from wastewater system components, or 30 feet horizontally from sewer lines as defined by subdivision 74:02:04:20(46);

ARSD 74:02:04:24. A pollution source is defined in ARSD 74:02:04:20(38), which provides that a pollution source is

> "anything that causes groundwater pollution, including the following:

(a) Wastes, point source, and pollutant as defined by SDCL 34A-2-2;
(b) Wastewater absorption, evapotranspiration, and graywater systems;
(c) Seepage pits, cesspools, NoDak systems, mounds, and pit privies as described by chapter 74:53:01; and
(d) Barnyards, barn gutters, feedlots, animal pens, and farm silos."

ARSD 74:02:04:20(38). The term "pollutant" is defined as "

> "any dredged spoil, solid waste, incinerator residue, sewage, sewage sludge, garbage, trash, munitions, chemical waste, biological material, radioactive material, heat, wrecked or discarded equipment, rock, sand, cellar dirt or any industrial, municipal or agricultural waste discharged into waters of the state. This term does not mean sewage from water craft; or water, gas or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the state after it is determined that such injection or disposal will not result in the degradation of ground or surface water resources."

SDCL §34A-2-2(5).

The Chief Engineer relies—justifiably—on other departments within the DENR to ensure that applicants such as Longview comply with CAFO permitting and wastewater management and pollution control standards. Evidence will be presented at hearing that Longview will comply with South Dakota's well construction standards, including the standards that seek to protect groundwater from contamination and from leakage between aquifers. In addition, evidence at hearing will establish that Longview's proposed well will appropriate water from the Codell aquifer, which is more than 100 feet deep. Longview will also establish at hearing that the proposed well will be located at least 100 feet from a pollution source.

VII. Construction of Longview's proposed well will comply with the Water Management Board Well Construction Rules, including the prohibition of ARSD 74:02:04:34.01 against constructing wells to allow production from more than one aquifer.

Petitioners argue that the Water Management Board should require that the construction of Longview's well comply with more specific conditions than those imposed in the Water

Management Board Well Construction Rules, which are set forth in Chapter 74:02:04 of South Dakota's Administrative Rules. Because the Water Management Board Well Construction Rules are sufficiently specific, no further specific conditions need be imposed upon the construction of Longview's well. Evidence at hearing will show that Longview's well will be constructed in compliance with the Water Management Board Well Construction Rules, which are set forth in Chapter 74:02:04 of South Dakota's Administrative Rules.

The recommendation of the Chief Engineer for Longview's water permit application states, in pertinent part,

> "The well authorized by Permit No. 7206-3 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."

Recommendation of Chief Engineer for Water Permit Application No. 7206-3, Longview Farm, LLP.

One of the Water Management Board Well Construction Rules is set forth in ARSD 74:02:04:34.01, which provides, "No well may be constructed to allow production from more than one aquifer unless approved by the chief engineer or the water management board." *ARSD 74:02:04:34.01.*

Longview intends to submit evidence at the hearing that the well will be constructed in accordance with the Water Management Board Well Construction Rules, including the requirement that the well be constructed to only allow production from the Codell aquifer. The Administrative Rules adopted by the Water Management Board are sufficiently specific, and the Water Management Board should not require additional specific conditions on how the well is to be constructed.

VIII. There is no shallow aquifer located under Longview's concentrated animal feeding operation; therefore, Longview has not been required to obtain a groundwater discharge permit. Evidence at hearing will demonstrate that Longview's proposed use of well water is in the public interest.

In support of the Petitioners eighth issue statement, Petitioners have argued that Longview Farm is located above a shallow aquifer and is operating without obtaining a groundwater discharge permit. Petitioners have argued, therefore, that the granting of a water rights permit to Longview would not be in the public interest because Longview has been operating in violation of SDCL §34A-3A-24. Because there is no shallow aquifer located under Longview's concentrated animal feeding operation, Longview has not been required to obtain a groundwater discharge permit, and evidence at hearing will demonstrate that Longview's proposed use of well water is in the public interest.

SDCL §34A-3A-24 provides, in pertinent part,

> "No concentrated animal feeding operation that includes a number of animals equal to or greater than one thousand animal units may be located over a shallow aquifer unless a groundwater discharge permit has been approved in accordance with chapter 34A-2. For purposes of this section, a shallow aquifer is any aquifer having the following characteristics:
>
> > (1) The aquifer is within fifty feet or less below the land surface with fifteen feet or less of continuous, overlying, extremely low permeability geologic material, such as clayey till or shale. Weathered till or highly fractured weathered shale is not an extremely low permeability material for purposes of this section; or
> >
> > (2) The aquifer is greater than fifty feet but less than one hundred feet below the land surface with thirty feet or less of continuous overlying low to extremely low permeability geologic material that may be a combination of weathered and unweathered till, shale, or till and shale.
>
> ..."

SDCL §34A-3A-24.

Contrary to the argument of the Petitioners, evidence at the hearing will show that there is no shallow aquifer located under Longview's facility. This determination has previously been made by the DENR's Surface Water Quality Program and has been affirmed by Derric Iles, State Geologist, South Dakota Geological Survey. Because there is no shallow aquifer located under Longview's facility, Longview is not required, pursuant to SDCL §34A-3A-24, to obtain a groundwater discharge permit. Accordingly, Longview is not operating in violation of SDCL §34A-3A-24, and evidence at hearing will demonstrate that Longview's proposed use of well water is within the public interest.

CONCLUSION

Evidence presented at the upcoming hearing will demonstrate that (1) there is a reasonable probability that unappropriated water is available for Longview's proposed use; (2) the proposed diversion will not unlawfully impair existing rights; (3) Longview's proposed use is a beneficial use; and (4) Longview's proposed use is in the public interest. Accordingly, at the conclusion of the evidentiary hearing, Longview will respectfully request that the Water Management Board grant its request for a water rights permit.

Dated this 18th day of November, 2010.

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Re: *In the Matter of Water Permit Application No. 7206-3, Longview Farms LLP*

Dear Water Management Board Members and Counsel:

Enclosed for your review is the DENR Response to the Joint Pre-Hearing Brief on Legal Issues of Petitioner Yankton Sioux Tribe and Individual Petitioners. I am also sending this Response to counsel for YST, the Individual Petitioners, and Applicant Longview Farms.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the DENR Response to Joint Prehearing Brief on Legal Issues of Petitioner Yankton Sioux Tribe and Individual Petitioners Represented by Harold Shepherd were served on 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 Sioux Falls, South Dakota, this 18th day of November, 2010:

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WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONGVIEW FARMS, LLP	)))))	RESPONSE TO JOINT PREHEARING BRIEF ON LEGAL ISSUES OF PETITIONER YANKTON SIOUX TRIBE AND INDIVIDUAL PETITIONERS REPRESENTED BY HAROLD SHEPHERD

The Department of Environment and Natural Resources, Water Rights Program (DENR) makes the following Response to the Joint Prehearing Brief on Legal Issues ("Jt. Prehearing Brf.") filed on November 8, 2010, Yankton Sioux Tribe ("YST") and the Individual Petitioners Represented by Harold Shepherd ("Shepherd Petitioners").

BACKGROUND

Longview is a swine farrowing enterprise located in Charles Mix County. It is currently operating and is using water from the Fort Randall Rural Water System.

Current Proceeding.

Longview requests a new permit to appropriate water from the Codell aquifer. The permit application seeks authority to appropriate 0.067 cfs (30 gpm) from one well in the Codell aquifer for commercial use at a swine farrowing facility. The Chief Engineer reviewed the application. His staff (Jim Goodman) reviewed whether water was available from the Codell aquifer for this application and whether the use would be likely to adversely impair existing rights.

The Chief Engineer recommends approval with several qualifications which will be more specifically described below. The Chief Engineer's recommendation is not binding. SDCL 46-2A-4(8).

After the Chief Engineer's review, the matter was advertised. Judy Honomichl, Faith Spotted Eagle, Sharon Drapeau, Glenn Drapeau, Kip (Spotted Eagle) Collins, and Wesly Hare intervened and they are all represented by Harold Shepherd. YST also intervened. In addition, there are three other individuals that filed letters: Sister Patricia Mylott of Yankton, Joan Olive of Spencer, Nebraska, and Eva Bruguier of Marty, South Dakota.

Hearing is scheduled for December 2, 2010. Jim Goodman will testify as to his analysis and the Chief Engineer's recommendation will be given. As required by law, the Board will need to hear this and other testimony and reach its decision. The burden of proof is on the Applicant to show that a permit is merited.

Ultimately, as described more fully below, the factors that this Board must consider will be those in SDCL 46-2A-9: (1) whether there is a reasonable probability that there is unappropriated water available for the Applicant's proposed use, (2) whether the proposed diversion can be developed without unlawful impairment of existing water rights, (3) whether the proposed use is a beneficial use, and (4) whether the proposed use is in the public interest. In addition, the Board must consider SDCL 46-6-3.1, i.e. whether issuance of this water permit would produce a situation where the total

quantity of water withdrawn annually from the Codell aquifer would exceed the average estimated annual recharge of water to the aquifer.

Previous Proceeding.

The Jt. Prehearing Brf. refers to testimony in previous proceedings before this Board. Although parties may use factual statements made at the previous hearing for evidence or impeachment in the upcoming hearing, the rest of the previous case (legal arguments and court rulings) is moot now. To clarify, a brief explanation is provided here.

In 2008 Longview applied for a water permit to appropriate water. While the application was pending, Longview hired a well driller and attempted to have the well drilled. Upon approval of the Chief Engineer, wells may be constructed as test wells while permits are pending. ARSD 74:02:04:21. Approval was granted, but the Chief Engineer's designee (Jim Goodman) cautioned that the test well could not be used as a production well for commercial purposes. The letter also stated that wells can be used for domestic use without need of a permit, i.e. a restatement of the general law on the domestic exemption in South Dakota.

Longview withdrew its request for a permit in the fall of 2008 and decided to rely on the "domestic" use exception which allows stock watering without a permit so long as the use does not exceed 18 gpm. This prompted YST and the Shepherd Petitioners to seek a declaratory ruling from this Board on the meaning and interpretation of statutes and rules interpreting the terms "domestic use" and "commercial use."

In the meantime, the driller attempted to drill the well, but it failed. But because Longview intended to get the well fixed or replaced, the "domestic use" issue was still a claim to be heard.[1]

The Board heard evidence on December 11, 2008, and ruled that the Longview use was, indeed, domestic use since it involved stock watering and was less than 18 gpm.

On appeal, the circuit court ruled that Longview's use for washing its facilities, for animal hygiene, and for restrooms for human use did not constitute "stock watering" and was not a domestic use under the "stock watering" provision. Although there are other "domestic use" provisions, none apply to these particular uses at this particular facility.

For the Board's convenience, the court ruling is attached as Exhibit A and the DENR requests administrative notice. The appeal did not involve the issue of whether the consumptive use of water by livestock in this operation constitutes domestic use. Exhibit B, a letter from the judge, clearly explains that to be the case. The DENR also requests administrative notice of Exhibit B.

Although the DENR provides the foregoing background, the "domestic use exemption" issue is largely moot because Longview has now applied for a permit from this Board instead.

SPECIFIC LEGAL ISSUES

A. Average Annual Use/Recharge.

[1] Longview has not yet had a second well drilled or attempted to have the well rehabilitated since 2008. That matter has been pending.

As the YST and Shepherd Petitioners state, consideration must be given to SDCL 46-6-3.1. (Jt. Prehearing Brf. at 13-14). SDCL 46-6-3.1 provides that a water permit cannot 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."

In other words, the Board must consider whether issuing the water permit would result in a situation where the total quantity of water withdrawn annually from the Codell aquifer would exceed the average estimated annual recharge of water to the aquifer. Unlike some other aquifers in South Dakota, there is no specific study that quantifies the exact amount of recharge in the Codell aquifer.

The Board must rely, as the statute states, on the "*best information reasonably available.*" The Chief Engineer's recommendation relies on an expert report prepared by Jim Goodman. Goodman relied on Kume, J. 1977 Geology and Water Resources of Charles Mix and Douglas Counties, South Dakota, Part II Water Resources, Bulletin 22, SD DENR, SDGS, Vermillion, South Dakota, and Hedges L.S. et al. 1982, Evaluation of Ground-Water Resources, Eastern South Dakota and Upper Big Sioux River, South Dakota and Iowa for U.S. Army Corp. of Engineers, SD DENR, SDGS, Vermillion, South Dakota. He also relied on DENR permit files, observation well records from the DENR's own observation wells, well completion reports submitted by well drillers, a database of all wells constructed by the state, and his own expertise

in analyzing the hydrology of the area. Goodman has also reviewed a number of USGS reports and surveys.

DENR submits that this review is proper and sufficient. In fact, ARSD 74:02:05:07, a rule promulgated by this Board, requires use of observation well measurements as part of the recharge analysis and that is precisely what Goodman has done. The observation wells include long-term records, including data dating from 1952 to the present. The data shows that this aquifer is capable of sustaining additional withdrawals without running afoul of SDCL 46-6-3.1

The DENR's observation well records are important because they are not used for producing water. They show the static water level and reflect a true measurement of levels in the aquifer unaffected by pumping or usage. The criteria of SDCL 46-6-3.1 can be fulfilled by analysis of the observation well data with consideration of head pressure as the Goodman report has done.

YST and the Shepherd Petitioners submit that there is a USGS survey of area wells that would be more relevant. The USGS sponsored an inventory of area wells in the 1970s and it has been published in various formats. That source was examined. It includes wells that were used for producing water. Some were measured and some were not. Those that were measured may have been measured during times when pumping had just occurred. Many were subject to a single measurement. Some may now have been abandoned. For those reasons, the USGS inventory source would be of lesser value in examining impairment or recharge issues than the state observation wells.

Further, material submitted with the YST Petition to Intervene (Rahn Report) appears to include a partial list of wells drilled by the state (both the DENR Water Rights Program and by the South Dakota Geological Survey). Wells drilled by the state were considered.

This is apparently going to be a competing issue of "*best information reasonably available.*" It is incumbent on the Board to consider the expert testimony of the witnesses at hearing and assess their reliability and credibility and make its determination.

B. The Winters Doctrine.

The Applicant's proposed water use would not take place on a reservation. But YST and its members claim that the use may affect water that they claim under *Winters v. United States*, 207 U.S. 564 (1908). (Jt. Prehearing Brf. at 16). The *Winters* case arose from a dispute concerning the Fort Belknap treaty in Montana. Even though the treaty contained no language regarding water rights, the Court read the 1888 treaty as impliedly reserving water to irrigate reservation lands to support the purpose of the treaty (converting the nomadic civilization to an agrarian one).

After *Winters*, reservations have routinely been held to come with reserved federal water rights. In appropriative rights states like South Dakota, the priority date for *Winters* rights is generally the date of creation of the reservation. *Arizona v. California*, 373 U.S. 546, 600 (1963). Unlike state appropriative water rights, however, the quantity of water for reserved rights does not depend on the amount actually used.

The *Winters* Doctrine has spawned a number of complex issues in courts including (a) the status of reserved water rights in disestablished[2] or diminished reservations, (b) whether the quantification should be based on the "practicably irrigable standard" or some other standard, and (c) whether or to what extent the doctrine applies to groundwater, including water drawn from a location not in Indian country.

As noted in the YST and Shepherd Petitioners' Brief, a number of cases have held the quantification is to be based on the amount of water needed to serve the reservation's "practicably irrigable acreage" (PIA). (Jt. Prehearing Brf. at 15-22). Yet, they also cite to an Arizona case using a more liberal standard. *In re General Adjudications of All Rights to Use Water in the Gila River System*, 201 Ariz. 307, 315, 35 P.3d 68, 76 (2001). The issue of whether groundwater is subject to this doctrine is not fully resolved. *See* Eric Spade, Comment, *Indian Reserved Water Rights Doctrine and the Groundwater Question*, 19 Am. Indian L. Rev. 403 (1994) (identifying the approaches taken in various courts).

The State of South Dakota and the Yankton Sioux Tribe have not engaged in negotiation or litigation regarding any other reserved water rights issues. Indeed, there is no South Dakota Supreme Court or federal case in South Dakota addressing reserved water rights for any of the tribes in South Dakota.

Adjudication of tribal reserved water rights can be expensive and time consuming and most often occur within a general adjudication of competing

[2] The State takes the position that *Bruguier v. Class*, 599 N.W.2d 364, 378 (S.D. 1999) found the Yankton reservation to be "terminated."

rights from a particular basin in state court, like the Gila River litigation noted above. There have also been a number of negotiated settlements throughout the West. The federal government is typically involved either as a trustee of Indian resources, as the administrator of irrigation or other water projects, or both. The settlement agreements are often lengthy and include a number of side issues for water planning and administration of water, including not only funding issues, but also fish and wildlife issues and water development projects, among other things.

The bottom line is that although the Yankton Sioux Tribe and/or its members may allege that they hold an unquantified volume of reserved water rights to groundwater in the Codell aquifer under *Winters v. United States*, 207 U.S. 564 (1908), such claims have not been lodged with any court, are not being negotiated, and have never been quantified in any context. The reserved water rights issue should not be addressed as a side issue in this particular water permit proceeding. If the *Winters* doctrine is later found, by a court of competent jurisdiction, to be applicable to groundwater and to the future claims of YST and/or its members with to the Codell aquifer, the water use of YST and/or its members may be senior in priority to this permit, but the extent of such rights, if any, are simply unknown at this point.

The DENR submits that it is not necessary to stop all water permitting in all areas where there might possibly be a use in the future under a *Winters* claim. Nor has that been a practice of the Board in the past. See *Matter of*

Ottertail Power Company on Behalf of Big Stone II (Dec. 4, 2007 Findings of Fact, Conclusions of Law and Final Decision, FOF 93, 94.

C. Scope, Suitability, and Timing of Use.

As YST and the Shepherd Petitioners state (Jt. Prehearing Brf. at 22), the proposed use for this permit is for commercial purposes for a swine farrowing facility. YST and the Shepherd Petitioners urge the Board to engage in a detailed analysis of the scope, suitability, and timing of use. *Id.* In large part this is a factual issue. In the previous declaratory ruling case, Longview provided some testimony that it may use groundwater from the Codell aquifer for consumption by sows, for cleaning the facility or for "standby" purposes. At that time, Longview was going to use 18 gpm. The current request is for 30 gpm. The DENR's current understanding is that the presently pending permit seeks the right to use the well water as supplemental water in the swine facility.

The Chief Engineer's review has not undertaken a detailed analysis of this (or other agricultural applications in the past) to break down the quantity of water among the various agricultural uses like animal consumption, animal sanitation, human sanitation, and standby purposes. There is a reason. These uses are all within the rubric of commercial use and would be subject to the varying management of the swine facility. More or less water may be required for various functions at various times. For example, hogs may need more water for consumption and cooling off in the summer. There may be seasonal differences in the needs for sanitation. As for using standby water,

the entire amount may be used if the Fort Randall system were to suffer a pipeline break or if there was a fire at the facility. In other words, it is not practical to parse out a 30 gpm water permit into smaller limited sums for each type of use.

YST and the Shepherd Petitioners also raise the issue of whether the water is suitable for its intended purpose. (Jt. Prehearing Brf. at 23) (citing *Fraser v. Water Rights Commission*, 294 N.W.2d 784 (S.D. 1980)). The *Fraser* case involved the soil/water compatibility process for irrigation permits. Before 1994, the State Conservation Commission was required to analyze and sign off on suitability of water for irrigation before the Water Management Board could even consider whether to grant a permit to use the water. *Id.* at 788. The soil/water process strictly applied to irrigation (i.e. sodium, electrical conductivity, soil absorption ratio, etc.). SDCL §§ 46-5-6.2 through 46-5-6.10 (repealed by SL 1994); ARSD ch. 12:08 (now repealed). These provisions have been repealed and there is no threshold suitability permit for irrigation. The Water Management Board would be able to examine soil/water suitability as part of its "beneficial use" analysis. The present application is not, however, an irrigation application.

Longview did provide testimony in the previous hearing that the water would be suitable for its purposes in running the farrowing facility. There was a question as to whether the water would be suitable for hog consumption for the farrowing sows. But if it was not suitable for that purpose Longview indicated that it would use the water for sanitation. Longview would need to

testify as to its current intentions in this regard. It seems implausible that the water would not at least be suitable for hog or barn sanitation.

Further, YST and the Shepherd Petitioners are concerned that the water will not be put to immediate use. Under SDCL 46-5-25 construction of water works must be diligently pursued. SDCL 46-2A-8 requires that the water structures must be completed within five years. Four more years are then allowed to actually put the water to beneficial use. SDCL 46-2A-8. These statutes apply to all permits. Due to the size of this system, this lengthy period may not be needed. If there is a reason to make the periods shorter, the Water Management Board certainly has authority to provide for lesser construction periods. SDCL 46-2A-8. The DENR knows of no such reason.

YST and the Shepherd Petitioners appear to be raising this "immediate use" issue since some of this 30 gpm might be used for "standby purposes." Allowing for "standby uses" is not a waiver or extension of the foregoing statutes on the time to construct waterworks. Even if Longview were to obtain a water permit for standby uses alone, it would be required to construct diversion works and maintain them in good working order. If that was not done, the water right would be subject to forfeiture for nonuse. ARSD 74:02:01:37.02 provides:

> A water supply maintained for either fire protection or standby purposes, or both, is not nonuse of a water permit, right, or vested right if the water diversion works are maintained in working condition for immediate use upon demand. Works to divert appropriated water must include wells equipped with functional motors, pumps, and appurtenances to convey water or functional motors, pumps, and appurtenances to convey water from a surface

source, as applicable. Wells that are capped, sealed, or plugged are not standby or fire protection works.

If Longview obtains the permit, it will be required to construct and maintain diversion works within statutory time periods and must maintain such works to keep its permit.

D. Future Use.

YST and the Shepherd Petitioners claim that the application to use water for standby purposes is essentially an illicit "future use application." (Jt. Prehearing Brf. at 24). It is not clear that all of the proposed use would, in fact, be for standby use. However, even if it were, such use would not be a "future use" situation. SDCL 46-5-38 allows certain government entities the option of obtaining a future use permit to "reserve" a quantity of water for future construction. The entities obtain a priority date and then have to file a water permit application later when they wish to construct diversion works. SDCL 46-5-38.1. It is clear that Longview is not entitled to a future use permit. And no request was filed for one. The permit request here would require construction of works, not reserve a priority date for construction at some distant time in the future. Indeed, as stated above, water permits authorizing standby uses must maintain diversion works in good working order or the water right may be forfeited for nonuse. ARSD 74:02:01:37.02. Importantly, standby use is a beneficial use. How else would fire control work? It is not a waste of water to make sure a water source is available to accommodate situations where pipelines freeze or other contingencies occur. The water is not wasted; it simply is not used until necessary.

E. Mine Dewatering Statutes/Impairment of Domestic Use.

YST and the Shepherd Petitioners assert that SDCL 46-6-26 is applicable. That statute, however, refers back to SDCL 46-6-24. When read together, these statutes provide that persons dewatering mines in formations lower than the greenhorn are liable if other wells are impaired – even if the wells that are impaired are themselves inadequate or otherwise fail to meet well construction standards. These unique statutes are different from the relative liability imposed for other water well use. In other situations a water user suffering from decreased water availability cannot look to a neighboring water user for satisfaction if his own well is not "adequate" i.e. installed low enough in the aquifer or is otherwise properly constructed. The liberal standard in SDCL 46-6-26 does not apply in the type of situation involved here. Moreover, the well involved here is not lower than the greenhorn, so the statute is inapplicable for that reason as well.

Also, contrary to the assertions by YST and the Shepherd Petitioners (Jt. Prehearing Brf. at 26), the Water Rights Program did look at whether nearby domestic wells would be affected. Goodman concluded in his report that due to the distance to known nearby wells and the low pumping rate (30 gpm or less), the likelihood was not considered significant or likely to cause adverse impacts.

The individual petitioners who are coming forward with assertions that their nearby wells will be impaired will have an opportunity to voice those concerns to the Board.

If the Board finds there are nearby domestic wells that would be adversely affected by pumping from the proposed well, then those domestic wells would be entitled to legal protection under South Dakota Law. They hold the priority right to use water. SDCL 46-1-5(1). Out of an abundance of caution, the Chief Engineer has specifically proposed a condition that protects adequate domestic wells:

> Condition 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.

F. Proximity to Pollution Sources.

YST and the Shepherd Petitioners claim the Chief Engineer did not look at the proximity of the proposed wells to pollution sources. (Jt. Prehearing Brf. at 26).

Here is how the process works. The Applicant has the responsibility to comply with the pollution control rules for this facility. In doing so, it must file plans and specifications and otherwise comply with the DENR groundwater and surface water pollution control rules. They include a requirement that wastewater containment structures cannot be constructed within 250 feet of a private water well or drinking water source, unless the well is owned by the producer in which case the setback is 150 feet. f the Applicant does not meet these and other pollution control criteria, it will not receive approval from that arm of the DENR.

In the meantime, the water permit is a separate process overseen by the Chief Engineer. The water rights rules provide that a well cannot be installed any closer than 100 feet horizontally of a pollution source, or 50 feet horizontally from wastewater system components. ARSD 74:02:04:24(2).

As seen, there is setback requirement in both sets of rules and it applies regardless of which structures are installed first. If the Applicant did not meet the rules pertaining to the distance requirements, the DENR groundwater pollution program would be responsible to enforce this law. Further, the failure to comply with those laws would be a violation of the water permit as well.

G. Well Construction Standards.

YST and the Shepherd Petitioners (Jt. Prehearing Brf. at 28) point out that the Applicant must comply with proper well construction standards so that water in the well does not migrate from one aquifer to another. That is correct. The Chief Engineer has proposed the following condition for that reason:

> Condition 2. The wells authorized by Permit No. 7178-3 shall be constructed by a licensed well driller and construction for 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.*

(Emphasis added.) In addition, the well driller that drills this well will need to be responsible to follow all applicable well construction standards. Petitioners argue that the specific well construction standards are not more specific. (Jt. Prehearing Brf. at 28). The above condition clearly addresses this issue. The

referenced rule specifies the material for the pressure grouting (bentonite or cement), and an Appendix to the rule actually includes a drawing to follow. Further, other rules specify the contents of the cement grout (ARSD 74:02:04:53) and if bentonite is chosen, ARSD 74:02:04:53.01 provides those standards. The minimum volumes for the grout are those found in Halliburton Cementing Tables, a standard reference for drillers. ARSD 74:02:04:55. The minimum hole size for grouting is ARSD 74:02:04:57. These and other technical requirements are used for drilling wells.

H. Groundwater Discharge Permit.

YST and the Shepherd Petitioners argue that the groundwater discharge statute (SDCL 34A-3A-24) might apply. (Jt. Prehearing Brf. at 30). This statute requires new concentrated feeding operations of over 1000 animal units to obtain a groundwater discharge permit if the facilities are 100 feet or less above an aquifer. The Codell aquifer is not a shallow aquifer within the meaning of this statute; it is over 550 feet from the surface.

But YST and the Shepherd Petitioners argue that the Chief Engineer should have looked further--at whether the animal waste in this facility will migrate to shallow aquifers in the area. (Jt. Prehearing Brf. at 31).

As described above, there is a two-part process for compliance with the environmental laws. It is clear that if a discharge permit were required, the DENR groundwater pollution program would address that issue during the review of the plans and specifications and other pollution control review.

In the situation at hand, the DENR employees responsible for pollution control conducted an extensive review of this issue and determined that a discharge permit was not required. There is not a shallow aquifer involved. After that, in response to the YST request to examine the issue more fully, the DENR officials in Pierre sent the matter to a hydrology expert at South Dakota Geological Survey in Vermillion. The head of that facility, Derric Iles, also found that there was not a shallow aquifer at the site. Yet a third review by another DENR program is not required.

As pointed out by YST and Shepherd Petitioners the Chief Engineer has noted that there is another aquifer that overlays the Codell aquifer: the Niobrara aquifer. The Niobrara aquifer is not a "shallow aquifer" at this location.

Dated this 18th day of November, 2010.

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Counsel for DENR/Chief Engineer

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From the offices of Eric R. Kerkvliet
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November 18, 2010

Garland Erbele, Chief Engineer
DENR Water Rights Program
Joe Foss Bldg.
523 E. Capitol Ave.
Pierre, SD 57501

Re: Longview Farm, LLP - Water Permit Application No. 7006-3
Our File No. 082073-00003

Greetings:

Enclosed for the record are the original *Applicant's Brief in Response to the Joint Pre-Hearing Brief of the Yankton Sioux Tribe and Individual Petitioners* and *Certificate of Service.*

Sincerely,

LYNN, JACKSON, SHULTZ & LEBRUN, PC

Eric R. Kerkvliet

Enclosures

cc: Arlan J. Moss

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WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONGVIEW FARMS, LLP	)))))	CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Applicant's Brief in Response to the Joint Pre-Hearing Brief of the Yankton Sioux Tribe and Individual Petitioners was served on 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 Sioux Falls, South Dakota, this 18th day of November, 2010:

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WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP	)))))	**APPLICANT'S BRIEF IN RESPONSE TO THE JOINT PRE-HEARING BRIEF OF THE YANKTON SIOUX TRIBE AND INDIVIDUAL PETITIONERS**

Comes now the Applicant, Longview Farm, LLP (herein referred to as "Longview"), by and through its attorneys, Eric R. Kerkvliet and Lynn, Jackson, Shultz & Lebrun, P.C., and submits this Brief in Response to the Joint Pre-Hearing Brief of the Yankton Sioux Tribe and Individual Petitioners.

FACTS

Longview seeks a water permit from the South Dakota Board of Water Management for its existing swine farrowing, breeding, and gestation operation. The operation has been approved by the South Dakota Department of Environment and Natural Resources (DENR) for coverage under the confined animal feeding operation (CAFO) permit. The primary water supply for the Longview facility is a rural water hookup and will be supplemented by the proposed onsite well with a maximum pump rate of 30 gallons per minute. Longview's water permit application seeks authority to appropriate water from the Codell aquifer.

The Chief Engineer has reviewed the application and has recommended approval of Longview's water permit, subject to the qualifications set forth in the Chief Engineer's Recommendation. After the Notice of Hearing on this application was published, the Yankton Sioux Tribe and several individual petitioners (collectively referred to herein as the "Petitioners") intervened and objected to this application.

Diane Best, on behalf of the DENR, has set forth in her brief a summary of the previous proceeding before the Water Management Board involving these same parties. Essentially, the Water Management Board ruled that Longview's proposed use of water was not a commercial use; therefore Longview would not need to obtain a water rights permit. Circuit Court Judge Bruce Anderson reversed the Water Management Board's decision, ruling that certain of Longview's uses would be considered commercial use, and, accordingly, Longview would need to obtain a permit to utilize its well water for those purposes. In a letter from Judge Anderson clarifying his decision, it was clarified that Longview would not need to obtain a water permit if it were to only use the well water to feed its animals. Because Longview seeks to use its well water for purposes beyond mere animal consumption, it is before this Board requesting a water permit.

AUTHORITIES AND ARGUMENT

I. According to the best information reasonably available, it is probable that Longview's quantity of water withdrawn annually from the Codell aquifer will not exceed the quantity of average estimated annual recharge of water to the Codell aquifer.

Petitioners have argued that the Chief Engineer failed to examine the best information reasonably available in making the determination that the Codell aquifer's average annual recharge rate will not be exceeded by Longview's withdrawals. Longview is confident that the testimony at hearing will demonstrate that the Chief Engineer considered the best information reasonably available regarding the annual recharge rate of the Codell aquifer.

SDCL §46-6-3.1 provides,

> ***No application to appropriate groundwater may be approved if, according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from a groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source.*** An

> application may be approved, however, for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the greenhorn formation in excess of the average estimated annual recharge for use by water distribution systems.

SDCL §46-6-3.1 (emphasis added). ARSD 74:02:05:07 provides,

> When regulating water withdrawals by large-capacity wells and in determining the availability of unappropriated water for an application for a permit to appropriate water, ***the board shall rely upon the record of observation well measurements*** in addition to other data to determine that the quantity of water withdrawn annually from the aquifer does not exceed the estimated average annual recharge to the aquifer.

ARSD 74:02:05:07 (emphasis added).

In making his recommendation, the Chief Engineer performed a careful analysis of existing wells in the Codell aquifer, including (but not limited to) observation well measurements, and of the proposed use by Longview. After performing this analysis, the Chief Engineer has recommended approval of the permit because, *inter alia*, (1) there is a reasonable probability that there is unappropriated water available for Longview's proposed use and (2) Longview's proposed diversion can be developed without unlawful impairment of existing water rights. In making these determinations, the Chief Engineer considered the best information reasonably available and determined that it is probable that the quantity of water withdrawn annually by Longview from the Codell aquifer will not exceed the quantity of the average estimated annual recharge of water to the Codell aquifer. The Chief Engineer has complied with his statutory duties, and James Goodman, on behalf of the Chief Engineer, will be available to testify at the evidentiary hearing before this Board. Longview is confident that the evidence presented at the hearing will demonstrate that the four criteria of SDCL §46-2A-9—including the two criteria set forth above—have been established to the satisfaction of the Board of Water Management.

II. This permit application should not be deferred for further study to determine the extent of the Yankton Sioux Tribe's water rights in the Codell aquifer.

Petitioners argue that Longview's permit application should be deferred for further study so that the Petitioners' water rights can be considered in order to determine whether Longview's proposed use will impair the Petitioners' water rights. Petitioners have cited the *Winters* Doctrine for the proposition that the Petitioners' water rights are prior to those of Longview and must be considered in order to determine whether Longview is entitled to a permit. It is undisputed that the *Winters* Doctrine has been applied to tribes' ***surface*** water rights. However, there is a split of authority among the courts of this nation as to whether the *Winters* Doctrine applies to ***groundwater***. See, e.g., *In re General Adjudication of All Rights to Use Water in Gila River System*, 989 P2d 739 (Ariz. 1999); *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P2d 76 (Wyo. 1988). The Supreme Court of Arizona[1] has held that the *Winters* Doctrine does apply to groundwater while the Supreme Court of Wyoming[2] has declined to so hold. In addition, the United States Supreme Court has had more than one chance to apply the *Winters* Doctrine to groundwater and has declined to do so.[3] The rationale for applying the *Winters* Doctrine to groundwater may be limited to those circumstances in which the reservation does not have a sufficient surface water source.[4] In addition, the Supreme Court of South Dakota has not addressed the issue of whether the *Winters* Doctrine applies to groundwater.

Until such time as a determination has been made by a court of competent jurisdiction that the Yankton Sioux Tribe—to the extent it has not bee diminished or disestablished—has

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[1] *In re General Adjudication of All Rights to Use Water in Gila River System*, 989 P2d 739 (Ariz. 1999).
[2] *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P2d 76 (Wyo. 1988).
[3] See *U.S. v. Cappaert*, 426 US 128 (1976)(affirming the Ninth Circuit but declining to fully endorse the statement of the Ninth Circuit applying the *Winters* Doctrine to groundwater); *Wyoming v. U.S.*, 492 US 406 (1989).

Winters Doctrine rights that apply to groundwater and until such time as those rights are quantified, this Board—and the Chief Engineer—are unable to determine the extent to which the Yankton Sioux Tribe has rights to the Codell aquifer that are prior to the rights of Longview. If a court of competent jurisdiction determines that the Yankton Sioux Tribe's *Winters* Doctrine rights apply to groundwater, and if the Yankton Sioux Tribe's *Winters* Doctrine rights are quantified, then the Yankton Sioux Tribe—to the extent it exists and has not been diminished or disestablished and to the extent of the quantification—may have priority over Longview to the water in the Codell aquifer. Until that time, however, the Yankton Sioux Tribe does not have priority rights over Longview to water in the Codell aquifer, and this permit application should not be deferred for further study to determine the extent of the Yankton Sioux Tribe's water rights.

III. In determining whether the proposed use is a beneficial use, whether the applicant must demonstrate what specific uses within the LCFO the water will be utilized for, must demonstrate the water is of sufficient quality for such proposed uses, and that the water will be used immediately.

a. Longview does not need to demonstrate the specific uses within the facility for which the water will be utilized.

Petitioners have argued that, in order to determine whether Longview's proposed use is a beneficial use, Longview must present evidence as to the specific uses to which the well water will be utilized. The term "beneficial use" is defined by South Dakota statute 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 §46-1-6(3).*

[4] *In re General Adjudication of All Rights to Use Water in Gila River System*, 989 P2d 739 (Ariz. 1999).

Petitioners have failed to cite to any authority for their argument that specific uses must be considered in order to determine whether a proposed use is a beneficial use. Rather, in order to determine whether the proposed use is a beneficial use, the Water Management Board need only consider whether it complies with the definition of beneficial use set forth above. Longview will establish at hearing that the well water will be used at a swine farrowing facility, that the use is reasonable, useful, and beneficial to Longview, and that the use is consistent with the interests of the public in the best utilization of water supplies. Accordingly, the evidence will establish that Longview's use of the well water for their swine farrowing operation is a beneficial use, regardless of the specific ways in which Longview uses the well water in its facility.

b. Longview does not need to demonstrate that the water is of sufficient quality for proposed uses of the water.

Petitioners argue that Longview must demonstrate that the well water is of sufficient quality for its proposed uses. In support of this argument, Petitioners cite to *Fraser v. Water Rights Commission of Dept. of Natural Resource Development*, 294 NW2d 784 (SD 1980), which is inapplicable for the reasons set forth in the DENR's Brief. Longview will present testimony at hearing as to the anticipated uses of the well water, depending on the quality of the water in the Codell aquifer. As a practical matter, water from the Codell aquifer is generally of relatively high quality, and the water does not need to be of very high quality in order for Longview to use the well water for the power washing of the facility. The well water will need to be of high quality in order for Longview to feed the well water to its sows. However, there is nothing that obligates Longview to demonstrate that the water will be of sufficient quality for the proposed uses of the water.

c. Longview does not need to demonstrate that the well water will be used immediately.

Petitioners next argue that Longview's well water must be used immediately. This argument is contrary to the clear provisions of South Dakota law. SDCL §46-2A-8 provides,

> ***Any construction necessary to put the water to beneficial use shall be completed within five years of approval of the permit and the water shall be put to beneficial use within an additional four years.*** The Water Management Board may, in its discretion, approve any application for a lesser amount of water or may vary the periods of annual use and the permit to appropriate water shall be regarded as limited accordingly.

SDCL §46-2A-8 (emphasis added). Clearly, South Dakota law requires the construction necessary to put the water to beneficial use be completed within five years of approval of the permit, and the water must be put to beneficial use within four years thereafter. Petitioners have failed to cite to any authority that would require Longview to put the well water to immediate use. That being said, Longview will present testimony at hearing as to its anticipated timeframe of using the well water, which will be after approval of the water permit application and as soon as the collapsed well has been rehabilitated or a new well has been dug.

IV. Longview's proposed use of the water from the Codell aquifer is to supplement its rural water supply. Longview's proposed use is a beneficial use and is not a future use such that Longview would need to obtain a future use permit.

Petitioners have argued that if Longview's proposed use of well water is only to be used as a backup water supply, then the proposed use is a future use, which obligates Longview to obtain a future use permit. Because Longview's proposed use of well water is to supplement its rural water supply and because the proposed use is not solely a backup water supply, Petitioners' argument regarding future use is inapplicable. Even the Petitioners recognize that the Chief Engineer's report states that Longview's well water will be a supplemental source for the Longview facility—in addition to the water obtained from Longview's rural water supply.

Evidence will be presented by Longview at hearing that will demonstrate how Longview intends to use the water from the Codell aquifer. This use is not considered a future use, and the authorities cited by Petitioners are inapplicable to this situation.

V. Denial of the permit, or deferment for further study is not necessary to protect domestic wells, municipal wells, or natural springs of this state.

Petitioners argue that denial of the permit or deferment for further study is necessary to protect domestic wells, municipal wells, or natural springs of this state. In support of this argument, Petitioners cite SDCL §46-6-26, which is inapplicable to this water permit application for the reasons set forth in DENR's Brief.

In addition, the Chief Engineer has recommended that the Water Management Board determine that Longview's proposed diversion can be developed without unlawful impairment of existing water rights. In making this recommendation, the Chief Engineer has made a careful analysis of the proposed use and what impact, if any, the proposed use would have on existing domestic well users. Importantly, the Chief Engineer has recommended a qualification on Longview's water permit, which states,

> "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."

Recommendation of the Chief Engineer for Water Permit Application No. 7206-3, Longview Farm, LLP. Accordingly, the Chief Engineer has recognized that Longview's use of the well water is subject to the prior water rights of domestic well users.

The Water Management Board has the opportunity to make the ultimate determination of whether Longview's proposed diversion can be developed without unlawful impairment of

existing water rights. The Chief Engineer has fulfilled his duties, as required by law, and Longview is confident that the evidence presented at hearing will establish that Longview's proposed use of water can be developed without unlawful impairment of existing water rights, including the existing water rights, if any, of the Petitioners.

VI. Evidence at hearing will establish that Longview's proposed well will be constructed in accordance with well construction standards and that the proposed well will be at least 100 feet from a pollution source.

Petitioners argue that the Chief Engineer is required to make a determination that the location of Longview's well complies with the requirements of ARSD 74:02:04:23(4) and ARSD 74:02:04:24(1) and (2) relating to the location of wells in relation to pollution sources.

ARSD 74:02:04:23(4) provides, "The intent of the South Dakota well construction standards is as follows: ... (4) To protect the groundwater resources of the state from bacteriological and chemical contamination and from leakage between aquifers." *ARSD 74:02:04:23(4).* ARSD 74:02:04:24(1) and (2) provide,

> Except for monitoring wells installed to assess the extent of contamination, all wells shall be located as follow:
>
> > (1) Wells supplied by aquifers whose top is less than 100 feet deep may be located no closer than 150 feet horizontally from a pollution source, 75 feet horizontally from wastewater system components, or 30 feet horizontally from sewer lines as defined by subdivision 74:02:04:20(46);
> >
> > (2) Wells supplied by aquifers whose top is more than 100 feet deep may be located no closer than 100 feet horizontally from a pollution source, 50 feet horizontally from wastewater system components, or 30 feet horizontally from sewer lines as defined by subdivision 74:02:04:20(46);

ARSD 74:02:04:24. A pollution source is defined in ARSD 74:02:04:20(38), which provides that a pollution source is

> "anything that causes groundwater pollution, including the following:

(a) Wastes, point source, and pollutant as defined by SDCL 34A-2-2;
(b) Wastewater absorption, evapotranspiration, and graywater systems;
(c) Seepage pits, cesspools, NoDak systems, mounds, and pit privies as described by chapter 74:53:01; and
(d) Barnyards, barn gutters, feedlots, animal pens, and farm silos."

ARSD 74:02:04:20(38). The term "pollutant" is defined as "

> "any dredged spoil, solid waste, incinerator residue, sewage, sewage sludge, garbage, trash, munitions, chemical waste, biological material, radioactive material, heat, wrecked or discarded equipment, rock, sand, cellar dirt or any industrial, municipal or agricultural waste discharged into waters of the state. This term does not mean sewage from water craft; or water, gas or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the state after it is determined that such injection or disposal will not result in the degradation of ground or surface water resources."

SDCL §34A-2-2(5).

The Chief Engineer relies—justifiably—on other departments within the DENR to ensure that applicants such as Longview comply with CAFO permitting and wastewater management and pollution control standards. Evidence will be presented at hearing that Longview will comply with South Dakota's well construction standards, including the standards that seek to protect groundwater from contamination and from leakage between aquifers. In addition, evidence at hearing will establish that Longview's proposed well will appropriate water from the Codell aquifer, which is more than 100 feet deep. Longview will also establish at hearing that the proposed well will be located at least 100 feet from a pollution source.

VII. Construction of Longview's proposed well will comply with the Water Management Board Well Construction Rules, including the prohibition of ARSD 74:02:04:34.01 against constructing wells to allow production from more than one aquifer.

Petitioners argue that the Water Management Board should require that the construction of Longview's well comply with more specific conditions than those imposed in the Water

Management Board Well Construction Rules, which are set forth in Chapter 74:02:04 of South Dakota's Administrative Rules. Because the Water Management Board Well Construction Rules are sufficiently specific, no further specific conditions need be imposed upon the construction of Longview's well. Evidence at hearing will show that Longview's well will be constructed in compliance with the Water Management Board Well Construction Rules, which are set forth in Chapter 74:02:04 of South Dakota's Administrative Rules.

The recommendation of the Chief Engineer for Longview's water permit application states, in pertinent part,

> "The well authorized by Permit No. 7206-3 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."

Recommendation of Chief Engineer for Water Permit Application No. 7206-3, Longview Farm, LLP.

One of the Water Management Board Well Construction Rules is set forth in ARSD 74:02:04:34.01, which provides, "No well may be constructed to allow production from more than one aquifer unless approved by the chief engineer or the water management board." *ARSD 74:02:04:34.01.*

Longview intends to submit evidence at the hearing that the well will be constructed in accordance with the Water Management Board Well Construction Rules, including the requirement that the well be constructed to only allow production from the Codell aquifer. The Administrative Rules adopted by the Water Management Board are sufficiently specific, and the Water Management Board should not require additional specific conditions on how the well is to be constructed.

VIII. There is no shallow aquifer located under Longview's concentrated animal feeding operation; therefore, Longview has not been required to obtain a groundwater discharge permit. Evidence at hearing will demonstrate that Longview's proposed use of well water is in the public interest.

In support of the Petitioners eighth issue statement, Petitioners have argued that Longview Farm is located above a shallow aquifer and is operating without obtaining a groundwater discharge permit. Petitioners have argued, therefore, that the granting of a water rights permit to Longview would not be in the public interest because Longview has been operating in violation of SDCL §34A-3A-24. Because there is no shallow aquifer located under Longview's concentrated animal feeding operation, Longview has not been required to obtain a groundwater discharge permit, and evidence at hearing will demonstrate that Longview's proposed use of well water is in the public interest.

SDCL §34A-3A-24 provides, in pertinent part,

> "No concentrated animal feeding operation that includes a number of animals equal to or greater than one thousand animal units may be located over a shallow aquifer unless a groundwater discharge permit has been approved in accordance with chapter 34A-2. For purposes of this section, a shallow aquifer is any aquifer having the following characteristics:
>
> > (1) The aquifer is within fifty feet or less below the land surface with fifteen feet or less of continuous, overlying, extremely low permeability geologic material, such as clayey till or shale. Weathered till or highly fractured weathered shale is not an extremely low permeability material for purposes of this section; or
> >
> > (2) The aquifer is greater than fifty feet but less than one hundred feet below the land surface with thirty feet or less of continuous overlying low to extremely low permeability geologic material that may be a combination of weathered and unweathered till, shale, or till and shale.
>
> ..."

SDCL §34A-3A-24.

Contrary to the argument of the Petitioners, evidence at the hearing will show that there is no shallow aquifer located under Longview's facility. This determination has previously been made by the DENR's Surface Water Quality Program and has been affirmed by Derric Iles, State Geologist, South Dakota Geological Survey. Because there is no shallow aquifer located under Longview's facility, Longview is not required, pursuant to SDCL §34A-3A-24, to obtain a groundwater discharge permit. Accordingly, Longview is not operating in violation of SDCL §34A-3A-24, and evidence at hearing will demonstrate that Longview's proposed use of well water is within the public interest.

CONCLUSION

Evidence presented at the upcoming hearing will demonstrate that (1) there is a reasonable probability that unappropriated water is available for Longview's proposed use; (2) the proposed diversion will not unlawfully impair existing rights; (3) Longview's proposed use is a beneficial use; and (4) Longview's proposed use is in the public interest. Accordingly, at the conclusion of the evidentiary hearing, Longview will respectfully request that the Water Management Board grant its request for a water rights permit.

Dated this 18th day of November, 2010.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

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Re: *In the Matter of Water Permit Application No. 7206-3, Longview Farms LLP*

Dear Water Management Board Members and Counsel:

Enclosed for your review is the DENR Response to the Joint Pre-Hearing Brief on Legal Issues of Petitioner Yankton Sioux Tribe and Individual Petitioners. I am also sending this Response to counsel for YST, the Individual Petitioners, and Applicant Longview Farms.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the DENR Response to Joint Prehearing Brief on Legal Issues of Petitioner Yankton Sioux Tribe and Individual Petitioners Represented by Harold Shepherd were served on 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 Sioux Falls, South Dakota, this 18th day of November, 2010:

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STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONGVIEW FARMS, LLP	)))))	RESPONSE TO JOINT PREHEARING BRIEF ON LEGAL ISSUES OF PETITIONER YANKTON SIOUX TRIBE AND INDIVIDUAL PETITIONERS REPRESENTED BY HAROLD SHEPHERD

The Department of Environment and Natural Resources, Water Rights Program (DENR) makes the following Response to the Joint Prehearing Brief on Legal Issues ("Jt. Prehearing Brf.") filed on November 8, 2010, Yankton Sioux Tribe ("YST") and the Individual Petitioners Represented by Harold Shepherd ("Shepherd Petitioners").

BACKGROUND

Longview is a swine farrowing enterprise located in Charles Mix County. It is currently operating and is using water from the Fort Randall Rural Water System.

Current Proceeding.

Longview requests a new permit to appropriate water from the Codell aquifer. The permit application seeks authority to appropriate 0.067 cfs (30 gpm) from one well in the Codell aquifer for commercial use at a swine farrowing facility. The Chief Engineer reviewed the application. His staff (Jim Goodman) reviewed whether water was available from the Codell aquifer for this application and whether the use would be likely to adversely impair existing rights.

The Chief Engineer recommends approval with several qualifications which will be more specifically described below. The Chief Engineer's recommendation is not binding. SDCL 46-2A-4(8).

After the Chief Engineer's review, the matter was advertised. Judy Honomichl, Faith Spotted Eagle, Sharon Drapeau, Glenn Drapeau, Kip (Spotted Eagle) Collins, and Wesly Hare intervened and they are all represented by Harold Shepherd. YST also intervened. In addition, there are three other individuals that filed letters: Sister Patricia Mylott of Yankton, Joan Olive of Spencer, Nebraska, and Eva Bruguier of Marty, South Dakota.

Hearing is scheduled for December 2, 2010. Jim Goodman will testify as to his analysis and the Chief Engineer's recommendation will be given. As required by law, the Board will need to hear this and other testimony and reach its decision. The burden of proof is on the Applicant to show that a permit is merited.

Ultimately, as described more fully below, the factors that this Board must consider will be those in SDCL 46-2A-9: (1) whether there is a reasonable probability that there is unappropriated water available for the Applicant's proposed use, (2) whether the proposed diversion can be developed without unlawful impairment of existing water rights, (3) whether the proposed use is a beneficial use, and (4) whether the proposed use is in the public interest. In addition, the Board must consider SDCL 46-6-3.1, i.e. whether issuance of this water permit would produce a situation where the total

quantity of water withdrawn annually from the Codell aquifer would exceed the average estimated annual recharge of water to the aquifer.

Previous Proceeding.

The Jt. Prehearing Brf. refers to testimony in previous proceedings before this Board. Although parties may use factual statements made at the previous hearing for evidence or impeachment in the upcoming hearing, the rest of the previous case (legal arguments and court rulings) is moot now. To clarify, a brief explanation is provided here.

In 2008 Longview applied for a water permit to appropriate water. While the application was pending, Longview hired a well driller and attempted to have the well drilled. Upon approval of the Chief Engineer, wells may be constructed as test wells while permits are pending. ARSD 74:02:04:21. Approval was granted, but the Chief Engineer's designee (Jim Goodman) cautioned that the test well could not be used as a production well for commercial purposes. The letter also stated that wells can be used for domestic use without need of a permit, i.e. a restatement of the general law on the domestic exemption in South Dakota.

Longview withdrew its request for a permit in the fall of 2008 and decided to rely on the "domestic" use exception which allows stock watering without a permit so long as the use does not exceed 18 gpm. This prompted YST and the Shepherd Petitioners to seek a declaratory ruling from this Board on the meaning and interpretation of statutes and rules interpreting the terms "domestic use" and "commercial use."

In the meantime, the driller attempted to drill the well, but it failed. But because Longview intended to get the well fixed or replaced, the "domestic use" issue was still a claim to be heard.[1]

The Board heard evidence on December 11, 2008, and ruled that the Longview use was, indeed, domestic use since it involved stock watering and was less than 18 gpm.

On appeal, the circuit court ruled that Longview's use for washing its facilities, for animal hygiene, and for restrooms for human use did not constitute "stock watering" and was not a domestic use under the "stock watering" provision. Although there are other "domestic use" provisions, none apply to these particular uses at this particular facility.

For the Board's convenience, the court ruling is attached as Exhibit A and the DENR requests administrative notice. The appeal did not involve the issue of whether the consumptive use of water by livestock in this operation constitutes domestic use. Exhibit B, a letter from the judge, clearly explains that to be the case. The DENR also requests administrative notice of Exhibit B.

Although the DENR provides the foregoing background, the "domestic use exemption" issue is largely moot because Longview has now applied for a permit from this Board instead.

SPECIFIC LEGAL ISSUES

A. Average Annual Use/Recharge.

[1] Longview has not yet had a second well drilled or attempted to have the well rehabilitated since 2008. That matter has been pending.

As the YST and Shepherd Petitioners state, consideration must be given to SDCL 46-6-3.1. (Jt. Prehearing Brf. at 13-14). SDCL 46-6-3.1 provides that a water permit cannot 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."

In other words, the Board must consider whether issuing the water permit would result in a situation where the total quantity of water withdrawn annually from the Codell aquifer would exceed the average estimated annual recharge of water to the aquifer. Unlike some other aquifers in South Dakota, there is no specific study that quantifies the exact amount of recharge in the Codell aquifer.

The Board must rely, as the statute states, on the "*best information reasonably available.*" The Chief Engineer's recommendation relies on an expert report prepared by Jim Goodman. Goodman relied on Kume, J. 1977 Geology and Water Resources of Charles Mix and Douglas Counties, South Dakota, Part II Water Resources, Bulletin 22, SD DENR, SDGS, Vermillion, South Dakota, and Hedges L.S. et al. 1982, Evaluation of Ground-Water Resources, Eastern South Dakota and Upper Big Sioux River, South Dakota and Iowa for U.S. Army Corp. of Engineers, SD DENR, SDGS, Vermillion, South Dakota. He also relied on DENR permit files, observation well records from the DENR's own observation wells, well completion reports submitted by well drillers, a database of all wells constructed by the state, and his own expertise

in analyzing the hydrology of the area. Goodman has also reviewed a number of USGS reports and surveys.

DENR submits that this review is proper and sufficient. In fact, ARSD 74:02:05:07, a rule promulgated by this Board, requires use of observation well measurements as part of the recharge analysis and that is precisely what Goodman has done. The observation wells include long-term records, including data dating from 1952 to the present. The data shows that this aquifer is capable of sustaining additional withdrawals without running afoul of SDCL 46-6-3.1

The DENR's observation well records are important because they are not used for producing water. They show the static water level and reflect a true measurement of levels in the aquifer unaffected by pumping or usage. The criteria of SDCL 46-6-3.1 can be fulfilled by analysis of the observation well data with consideration of head pressure as the Goodman report has done.

YST and the Shepherd Petitioners submit that there is a USGS survey of area wells that would be more relevant. The USGS sponsored an inventory of area wells in the 1970s and it has been published in various formats. That source was examined. It includes wells that were used for producing water. Some were measured and some were not. Those that were measured may have been measured during times when pumping had just occurred. Many were subject to a single measurement. Some may now have been abandoned. For those reasons, the USGS inventory source would be of lesser value in examining impairment or recharge issues than the state observation wells.

Further, material submitted with the YST Petition to Intervene (Rahn Report) appears to include a partial list of wells drilled by the state (both the DENR Water Rights Program and by the South Dakota Geological Survey). Wells drilled by the state were considered.

This is apparently going to be a competing issue of "*best information reasonably available.*" It is incumbent on the Board to consider the expert testimony of the witnesses at hearing and assess their reliability and credibility and make its determination.

B. The Winters Doctrine.

The Applicant's proposed water use would not take place on a reservation. But YST and its members claim that the use may affect water that they claim under *Winters v. United States*, 207 U.S. 564 (1908). (Jt. Prehearing Brf. at 16). The *Winters* case arose from a dispute concerning the Fort Belknap treaty in Montana. Even though the treaty contained no language regarding water rights, the Court read the 1888 treaty as impliedly reserving water to irrigate reservation lands to support the purpose of the treaty (converting the nomadic civilization to an agrarian one).

After *Winters*, reservations have routinely been held to come with reserved federal water rights. In appropriative rights states like South Dakota, the priority date for *Winters* rights is generally the date of creation of the reservation. *Arizona v. California*, 373 U.S. 546, 600 (1963). Unlike state appropriative water rights, however, the quantity of water for reserved rights does not depend on the amount actually used.

The *Winters* Doctrine has spawned a number of complex issues in courts including (a) the status of reserved water rights in disestablished[2] or diminished reservations, (b) whether the quantification should be based on the "practicably irrigable standard" or some other standard, and (c) whether or to what extent the doctrine applies to groundwater, including water drawn from a location not in Indian country.

As noted in the YST and Shepherd Petitioners' Brief, a number of cases have held the quantification is to be based on the amount of water needed to serve the reservation's "practicably irrigable acreage" (PIA). (Jt. Prehearing Brf. at 15-22). Yet, they also cite to an Arizona case using a more liberal standard. *In re General Adjudications of All Rights to Use Water in the Gila River System*, 201 Ariz. 307, 315, 35 P.3d 68, 76 (2001). The issue of whether groundwater is subject to this doctrine is not fully resolved. *See* Eric Spade, Comment, *Indian Reserved Water Rights Doctrine and the Groundwater Question*, 19 Am. Indian L. Rev. 403 (1994) (identifying the approaches taken in various courts).

The State of South Dakota and the Yankton Sioux Tribe have not engaged in negotiation or litigation regarding any other reserved water rights issues. Indeed, there is no South Dakota Supreme Court or federal case in South Dakota addressing reserved water rights for any of the tribes in South Dakota.

Adjudication of tribal reserved water rights can be expensive and time consuming and most often occur within a general adjudication of competing

[2] The State takes the position that *Bruguier v. Class*, 599 N.W.2d 364, 378 (S.D. 1999) found the Yankton reservation to be "terminated."

rights from a particular basin in state court, like the Gila River litigation noted above. There have also been a number of negotiated settlements throughout the West. The federal government is typically involved either as a trustee of Indian resources, as the administrator of irrigation or other water projects, or both. The settlement agreements are often lengthy and include a number of side issues for water planning and administration of water, including not only funding issues, but also fish and wildlife issues and water development projects, among other things.

The bottom line is that although the Yankton Sioux Tribe and/or its members may allege that they hold an unquantified volume of reserved water rights to groundwater in the Codell aquifer under *Winters v. United States*, 207 U.S. 564 (1908), such claims have not been lodged with any court, are not being negotiated, and have never been quantified in any context. The reserved water rights issue should not be addressed as a side issue in this particular water permit proceeding. If the *Winters* doctrine is later found, by a court of competent jurisdiction, to be applicable to groundwater and to the future claims of YST and/or its members with to the Codell aquifer, the water use of YST and/or its members may be senior in priority to this permit, but the extent of such rights, if any, are simply unknown at this point.

The DENR submits that it is not necessary to stop all water permitting in all areas where there might possibly be a use in the future under a *Winters* claim. Nor has that been a practice of the Board in the past. See *Matter of*

Ottertail Power Company on Behalf of Big Stone II (Dec. 4, 2007 Findings of Fact, Conclusions of Law and Final Decision, FOF 93, 94.

C. Scope, Suitability, and Timing of Use.

As YST and the Shepherd Petitioners state (Jt. Prehearing Brf. at 22), the proposed use for this permit is for commercial purposes for a swine farrowing facility. YST and the Shepherd Petitioners urge the Board to engage in a detailed analysis of the scope, suitability, and timing of use. *Id.* In large part this is a factual issue. In the previous declaratory ruling case, Longview provided some testimony that it may use groundwater from the Codell aquifer for consumption by sows, for cleaning the facility or for "standby" purposes. At that time, Longview was going to use 18 gpm. The current request is for 30 gpm. The DENR's current understanding is that the presently pending permit seeks the right to use the well water as supplemental water in the swine facility.

The Chief Engineer's review has not undertaken a detailed analysis of this (or other agricultural applications in the past) to break down the quantity of water among the various agricultural uses like animal consumption, animal sanitation, human sanitation, and standby purposes. There is a reason. These uses are all within the rubric of commercial use and would be subject to the varying management of the swine facility. More or less water may be required for various functions at various times. For example, hogs may need more water for consumption and cooling off in the summer. There may be seasonal differences in the needs for sanitation. As for using standby water,

the entire amount may be used if the Fort Randall system were to suffer a pipeline break or if there was a fire at the facility. In other words, it is not practical to parse out a 30 gpm water permit into smaller limited sums for each type of use.

YST and the Shepherd Petitioners also raise the issue of whether the water is suitable for its intended purpose. (Jt. Prehearing Brf. at 23) (citing *Fraser v. Water Rights Commission*, 294 N.W.2d 784 (S.D. 1980)). The *Fraser* case involved the soil/water compatibility process for irrigation permits. Before 1994, the State Conservation Commission was required to analyze and sign off on suitability of water for irrigation before the Water Management Board could even consider whether to grant a permit to use the water. *Id.* at 788. The soil/water process strictly applied to irrigation (i.e. sodium, electrical conductivity, soil absorption ratio, etc.). SDCL §§ 46-5-6.2 through 46-5-6.10 (repealed by SL 1994); ARSD ch. 12:08 (now repealed). These provisions have been repealed and there is no threshold suitability permit for irrigation. The Water Management Board would be able to examine soil/water suitability as part of its "beneficial use" analysis. The present application is not, however, an irrigation application.

Longview did provide testimony in the previous hearing that the water would be suitable for its purposes in running the farrowing facility. There was a question as to whether the water would be suitable for hog consumption for the farrowing sows. But if it was not suitable for that purpose Longview indicated that it would use the water for sanitation. Longview would need to

testify as to its current intentions in this regard. It seems implausible that the water would not at least be suitable for hog or barn sanitation.

Further, YST and the Shepherd Petitioners are concerned that the water will not be put to immediate use. Under SDCL 46-5-25 construction of water works must be diligently pursued. SDCL 46-2A-8 requires that the water structures must be completed within five years. Four more years are then allowed to actually put the water to beneficial use. SDCL 46-2A-8. These statutes apply to all permits. Due to the size of this system, this lengthy period may not be needed. If there is a reason to make the periods shorter, the Water Management Board certainly has authority to provide for lesser construction periods. SDCL 46-2A-8. The DENR knows of no such reason.

YST and the Shepherd Petitioners appear to be raising this "immediate use" issue since some of this 30 gpm might be used for "standby purposes." Allowing for "standby uses" is not a waiver or extension of the foregoing statutes on the time to construct waterworks. Even if Longview were to obtain a water permit for standby uses alone, it would be required to construct diversion works and maintain them in good working order. If that was not done, the water right would be subject to forfeiture for nonuse. ARSD 74:02:01:37.02 provides:

> A water supply maintained for either fire protection or standby purposes, or both, is not nonuse of a water permit, right, or vested right if the water diversion works are maintained in working condition for immediate use upon demand. Works to divert appropriated water must include wells equipped with functional motors, pumps, and appurtenances to convey water or functional motors, pumps, and appurtenances to convey water from a surface

source, as applicable. Wells that are capped, sealed, or plugged are not standby or fire protection works.

If Longview obtains the permit, it will be required to construct and maintain diversion works within statutory time periods and must maintain such works to keep its permit.

D. Future Use.

YST and the Shepherd Petitioners claim that the application to use water for standby purposes is essentially an illicit "future use application." (Jt. Prehearing Brf. at 24). It is not clear that all of the proposed use would, in fact, be for standby use. However, even if it were, such use would not be a "future use" situation. SDCL 46-5-38 allows certain government entities the option of obtaining a future use permit to "reserve" a quantity of water for future construction. The entities obtain a priority date and then have to file a water permit application later when they wish to construct diversion works. SDCL 46-5-38.1. It is clear that Longview is not entitled to a future use permit. And no request was filed for one. The permit request here would require construction of works, not reserve a priority date for construction at some distant time in the future. Indeed, as stated above, water permits authorizing standby uses must maintain diversion works in good working order or the water right may be forfeited for nonuse. ARSD 74:02:01:37.02. Importantly, standby use is a beneficial use. How else would fire control work? It is not a waste of water to make sure a water source is available to accommodate situations where pipelines freeze or other contingencies occur. The water is not wasted; it simply is not used until necessary.

E. Mine Dewatering Statutes/Impairment of Domestic Use.

YST and the Shepherd Petitioners assert that SDCL 46-6-26 is applicable. That statute, however, refers back to SDCL 46-6-24. When read together, these statutes provide that persons dewatering mines in formations lower than the greenhorn are liable if other wells are impaired – even if the wells that are impaired are themselves inadequate or otherwise fail to meet well construction standards. These unique statutes are different from the relative liability imposed for other water well use. In other situations a water user suffering from decreased water availability cannot look to a neighboring water user for satisfaction if his own well is not "adequate" i.e. installed low enough in the aquifer or is otherwise properly constructed. The liberal standard in SDCL 46-6-26 does not apply in the type of situation involved here. Moreover, the well involved here is not lower than the greenhorn, so the statute is inapplicable for that reason as well.

Also, contrary to the assertions by YST and the Shepherd Petitioners (Jt. Prehearing Brf. at 26), the Water Rights Program did look at whether nearby domestic wells would be affected. Goodman concluded in his report that due to the distance to known nearby wells and the low pumping rate (30 gpm or less), the likelihood was not considered significant or likely to cause adverse impacts.

The individual petitioners who are coming forward with assertions that their nearby wells will be impaired will have an opportunity to voice those concerns to the Board.

If the Board finds there are nearby domestic wells that would be adversely affected by pumping from the proposed well, then those domestic wells would be entitled to legal protection under South Dakota Law. They hold the priority right to use water. SDCL 46-1-5(1). Out of an abundance of caution, the Chief Engineer has specifically proposed a condition that protects adequate domestic wells:

> Condition 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.

F. Proximity to Pollution Sources.

YST and the Shepherd Petitioners claim the Chief Engineer did not look at the proximity of the proposed wells to pollution sources. (Jt. Prehearing Brf. at 26).

Here is how the process works. The Applicant has the responsibility to comply with the pollution control rules for this facility. In doing so, it must file plans and specifications and otherwise comply with the DENR groundwater and surface water pollution control rules. They include a requirement that wastewater containment structures cannot be constructed within 250 feet of a private water well or drinking water source, unless the well is owned by the producer in which case the setback is 150 feet. f the Applicant does not meet these and other pollution control criteria, it will not receive approval from that arm of the DENR.

In the meantime, the water permit is a separate process overseen by the Chief Engineer. The water rights rules provide that a well cannot be installed any closer than 100 feet horizontally of a pollution source, or 50 feet horizontally from wastewater system components. ARSD 74:02:04:24(2).

As seen, there is setback requirement in both sets of rules and it applies regardless of which structures are installed first. If the Applicant did not meet the rules pertaining to the distance requirements, the DENR groundwater pollution program would be responsible to enforce this law. Further, the failure to comply with those laws would be a violation of the water permit as well.

G. Well Construction Standards.

YST and the Shepherd Petitioners (Jt. Prehearing Brf. at 28) point out that the Applicant must comply with proper well construction standards so that water in the well does not migrate from one aquifer to another. That is correct. The Chief Engineer has proposed the following condition for that reason:

> Condition 2. The wells authorized by Permit No. 7178-3 shall be constructed by a licensed well driller and construction for 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.*

(Emphasis added.) In addition, the well driller that drills this well will need to be responsible to follow all applicable well construction standards. Petitioners argue that the specific well construction standards are not more specific. (Jt. Prehearing Brf. at 28). The above condition clearly addresses this issue. The

referenced rule specifies the material for the pressure grouting (bentonite or cement), and an Appendix to the rule actually includes a drawing to follow. Further, other rules specify the contents of the cement grout (ARSD 74:02:04:53) and if bentonite is chosen, ARSD 74:02:04:53.01 provides those standards. The minimum volumes for the grout are those found in Halliburton Cementing Tables, a standard reference for drillers. ARSD 74:02:04:55. The minimum hole size for grouting is ARSD 74:02:04:57. These and other technical requirements are used for drilling wells.

H. Groundwater Discharge Permit.

YST and the Shepherd Petitioners argue that the groundwater discharge statute (SDCL 34A-3A-24) might apply. (Jt. Prehearing Brf. at 30). This statute requires new concentrated feeding operations of over 1000 animal units to obtain a groundwater discharge permit if the facilities are 100 feet or less above an aquifer. The Codell aquifer is not a shallow aquifer within the meaning of this statute; it is over 550 feet from the surface.

But YST and the Shepherd Petitioners argue that the Chief Engineer should have looked further--at whether the animal waste in this facility will migrate to shallow aquifers in the area. (Jt. Prehearing Brf. at 31).

As described above, there is a two-part process for compliance with the environmental laws. It is clear that if a discharge permit were required, the DENR groundwater pollution program would address that issue during the review of the plans and specifications and other pollution control review.

In the situation at hand, the DENR employees responsible for pollution control conducted an extensive review of this issue and determined that a discharge permit was not required. There is not a shallow aquifer involved. After that, in response to the YST request to examine the issue more fully, the DENR officials in Pierre sent the matter to a hydrology expert at South Dakota Geological Survey in Vermillion. The head of that facility, Derric Iles, also found that there was not a shallow aquifer at the site. Yet a third review by another DENR program is not required.

As pointed out by YST and Shepherd Petitioners the Chief Engineer has noted that there is another aquifer that overlays the Codell aquifer: the Niobrara aquifer. The Niobrara aquifer is not a "shallow aquifer" at this location.

Dated this 18th day of November, 2010.

Diane Best
Assistant Attorney General
300 N. Dakota Ave., Suite 403
Sioux Falls, SD 57104
Telephone: (605) 367-5880
Counsel for DENR/Chief Engineer

pld1116_db(dh)

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Mike Abourezk
**Alicia D. Garcia

**Also licensed in California

RECEIVED
NOV 23 2010
WATER RIGHTS PROGRAM

November 22, 2010

Stanley County Clerk of Courts
P.O. Box 1238
Pierre, SD 57501-1238

Re: Pro Hac Vice Admission of Harold Shepherd in Proceedings Before the South Dakota Water Rights Management Board

Dear Clerk of Courts:

Enclosed for filing please find the following original documents:

1. Motion of Harold Shepherd for Admission Pro Hac Vice in South Dakota Water Rights Management Board Proceedings;

2. Motion for Admission of Harold Shepherd Pro Hac Vice of Rebecca L. Kidder, Abourezk & Zephier, PC;

3. A Proposed Order for Admission;

4. A Check for $200.00 in accordance with SDCL 16-18-2; and

5. A Copy of the Water Rights Management Board Order on Proceedings, and a Copy of the Petitions filed in the above encaptioned matter. These are provided as background information for the Court

Due to difficulties encountered in mailing the documents from Alaska, I have completed service of the above documents on the parties to this action. Please let me know if you have any questions or concerns.

Sincerely,

Rebecca L. Kidder
Abourezk & Zephier, P.C.

RLK
enclosures

cc: Harold Shepherd, Center for Water Rights Advocacy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of November, 2010 she mailed a true and correct copy of the **Motion for Admission Pro Hac Vice of Harold Shepherd, Motion of Rebecca L. Kidder for Admission of Harold Shepherd Pro Hac Vice, and Proposed Order**, on the following:

Diane Best
Assistant Attorney General
for the State of South Dakota,
Counsel to SD DENR Water
Rights Program
300 N. Dakota Ave. Ste 403
Sioux Falls, SD 57104

David Nadolski
Lynn, Jackson, Shultz & LeBrun
P.O. Box 1920
Sioux Falls, SD 57101

Sister Patricia Mylott
P.O. Box 217
Marty, SD 57361

Eric Gronlund, Water Rights Program
SD DENR, Foss Bldg.
523 E. Capitol Ave.
Pierre, SD 57501

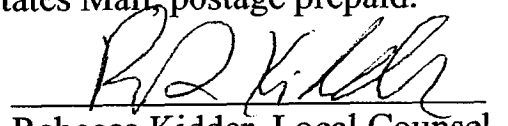
Ms. Eva Brugier
P.O. Box 274
Marty, SD 57361

Rodney Freeman
SD Water Rights Management Board
Pre-Hearing Chairman
P.O. Box 176
Huron, SD 57350

Joan Olive
Box 72
Spencer, NE 68777

Jeffrey Hallem
SD Water Rights Management Board Attorney
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501

and that the same was provided by United States Mail, postage prepaid.



Rebecca Kidder, Local Counsel
Abourezk & Zephier, P.C.
P.O. Box 9460
Rapid City, SD 57709

RECEIVED
NOV 23 2010
WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA	)	IN DISTRICT COURT
	)	
COUNTY OF HUGHES	)	SIXTH JUDICIAL DISTRICT
	)	
	)	
In the Matter of Water Permit Application No. 7203-3 Longview Farms LLP	)	**MOTION OF HAROLD SHEPHERD FOR ADMISSION PRO HAC VICE**
	)	

Comes now, Harold Shepherd, and moves this Court for An Order for Admission *Pro Hac Vice* in the above encaptioned matter, and being first duly sworn, declares and states as follows:

1) I am currently an Attorney with the Center for Water Advocacy whose address is P.O. Box 2069, 3734 Ben Walters Ln, Homer, Alaska 99603.

2) My current personal address is 53243 McNeil Canyon Rd, Homer, Alaska 99603.

3) Ms. Rebecca L. Kidder, Abourezk & Zephier, PC, 2020 W. Omaha St., P.O. Box 9460, Rapid City, SD 57709 will serve as local counsel in the above encaptioned matter. Ms. Kidder's Affidavit in Support of this Motion is attached.

4) I am an inactive member in good standing of the bar of the state of Oregon and an active member in good standing of the bar of the state of Washington.

5) I have not been the subject of disciplinary action by the bar or courts of Oregon or Washington or of any state during the preceding five years;

6) I have not been denied admission to the courts of any state or to any federal court during the preceding five years;

7) I am familiar with the rules of the State Bar of South Dakota governing the conduct of members of the State Bar of South Dakota, and will at all times abide by and comply with the same so long as the hearing in this matter is pending, and I have not withdrawn as counsel therein;

8) I am appearing on behalf of individual petitioners including: Faith Spotted Eagle; Sharon Drapeau; Glenn Drapeau; Judy Honimichle; Kip (Spotted Eagle); and Wesly Hare in this matter without additional compensation being paid for such appearance. The South Dakota members who are parties to this action will be paying actual travel expenses

incurred only.

Further Your Affiant Saith Not.

Respectfully submitted this 13th day of Nov, 2010.

Harold Shepherd,
Staff Attorney
The Center for Water Advocacy
P.O. Box 2069
3734 Ben Walters Ln
Homer, AK 99603
(907)235-4068, ex. 30
(c)(541)377-0960
hshepherd@uci.net

Subscribed and sworn to before me this 13th day of November, 2010.

Notary Public
SHIRLEE JACOBSEN
State of Alaska
My Commission Expires Apr 14, 2014

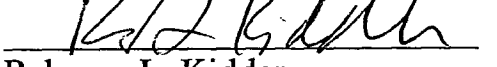
Shirlee Jacobsen
Notary Public, Alaska
(Seal)
My commission Expires: 4-14-14

STATE OF SOUTH DAKOTA	)	IN DISTRICT COURT
	)	
COUNTY OF STANLEY	)	SIXTH JUDICIAL DISTRICT

In the Matter of Water Permit Application No. 7203-3 Longview Farms, LLP	))))	Motion for Admission of Harold Shepherd Pro Hac Vice

The undersigned hereby respectfully moves this Court for Pro Hac Vice Admission of Mr. Harold Shepherd in the above captioned matter, in accordance with S.D.C.L. §16-18-2. I find the applicant to be a reputable attorney and therefore recommend his admission to practice before the Water Rights Management Board in the administrative proceeding and before any subsequent proceedings in this court.

Dated this 22nd day of November, 2010.



Rebecca L. Kidder
Abourezk & Zephier, P.C.
2020 W. Omaha St.
PO Box 9460
Rapid City, SD 57709-9460
(605)342-0097

STATE OF SOUTH DAKOTA	)	IN DISTRICT COURT
	)	
COUNTY OF HUGHES	)	SIXTH JUDICIAL DISTRICT
	)	
In the Matter of Water Permit Application No. 7203-3 Longview Longview Farms LLP	)	**PROPOSED ORDER**

This matter came before the Court upon motion and affidavit. The Court being fully advised in the premises, it is hereby

ORDERED that Harold Shepherd may be admitted *Pro Hac Vice* to represent Petitioners in the above-captioned matter before the South Dakota Water Rights Management Board.

Dated this _____day of _____, 2010.

BY THE COURT:

ATTEST:
CLERK OF COURTS
BY: _____
Deputy Clerk

_____
Honorable _____

(SEAL)

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
denr.sd.gov

October 18, 2010

NOTICE

TO: Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239
and Parties of Record (see attached list)

FROM: Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Procedural Order and Schedule of Hearing for Water Permit Application No. 7206-3, Long View Farms LLP

On October 6, 2010, the Water Management Board established a Procedural Order in the matter of Water Permit Application No. 7206-3. The Procedural Order is attached.

Water Permit Application No. 7206-3 seeks to appropriate 30 gallons per minute from one well to be completed into the Codell Aquifer located in the SW ¼ NW ¼ Section 9, T95N, R64W for commercial use at a swine farrowing facility in Charles Mix County. In response to the public notice a number of petitions to intervene were filed.

The Board established a briefing schedule in the procedural order as follows:

Intervenor's Opening Briefs	November 8, 2010
Applicant's and Department's Reply Briefs	November 18, 2010
Intervenor's Reply Briefs	November 29, 2010

All briefs are to be filed with all parties (or counsel for those who are represented by counsel) by US Postal Service. In addition, the Board directed that briefs be sent electronically to Jeff Hallem, Board Attorney at jeff.hallem@state.sd.us and Eric Gronlund, Water Rights Program at eric.gronlund@state.sd.us. These gentlemen will forward the filings to Board members prior to the hearing.

The Water Management Board will conduct an evidentiary hearing to consider Application No. 7206-3 beginning at 8:30 AM on Thursday, December 2, 2010 in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre SD. The Board meeting will continue on the morning of Friday December 3rd if necessary to complete testimony. Parties should plan accordingly. Future notice will be provided to all parties if there are changes to the hearing time or date.

Enclosed is a copy of the report, recommendation, affidavit of publication and petitions in the matter of Water Permit Application No. 7206-3. State law directs the Chief Engineer to provide Water Management Board members with a copy of all pleadings including petitions for each proceeding. This same information will be sent to the Board members in advance of the hearing. In addition, enclosed are two documents intended to acquaint parties with the hearing process entitled "Procedure for Hearings before the Water Management Board" and "Summary of South Dakota Water Laws and Rules". You are encouraged to review these documents prior to the hearing.

Applicable provisions of the notice of hearing published September 8 and 15, 2010 in the Wagner Post will still apply at the hearing.

Please contact Eric Gronlund at (605) 773-3352, if you have any questions.

enclosures

c: Diane Best, Assistant Attorney General
Harold Shepherd, PO Box 398, Moab UT 84532-0298

PARTIES OF RECORD

WATER PERMT APPLICATION No. 7206-3, Long View Farms LLP

Applicant

Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239

represented by:

Dave Nadolski and Eric Kerkvliet, Attorneys
Lynn, Jackson, Shultz & Lebrun
PO Box 1920
Sioux Falls SD 57101

Petitioners

Yankton Sioux Tribe
Represented by:
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Faith Spotted Eagle
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(returned by USPS as undeliverable)

Sharon Drapeau
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Glenn Drapeau
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Pickstown SD 57367

Kip (Spotted Eagle) Collins
PO Box 667
Lake Andes SD 57356

CERTIFICATION

I hereby certify that on October 18, 2010, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated October 18, 2010, regarding Procedural Order, Briefing Schedule and Hearing for Water Right Permit Application No. 7206-3, as addressed below:

Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239

Dave Nadolski, Attorney
PO Box 1920
Sioux Falls SD 57101

Sister Patricia Mylott
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Gail Jacobson
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 19th day of October, 2010.

Karen Schlaak
Notary Public
My Commission expires April 1, 2013

SEAL KAREN SCHLAAK NOTARY PUBLIC State of South Dakota SEAL

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF APPLICATION NO. 7203-3, LONG VIEW FARM, LLP	)))	PROCEDURAL ORDER

On September 30, 2010, the Department of Environment and Natural Resources, Water Rights Program, filed its Motion for Procedural Order. The motion was heard before the Board on October 6, 2010. As a result of the hearing in the above-referenced matter, the Board hereby ORDERS as follows:

1. The request for appointment of a hearing examiner under SDCL 1-26-18.3 is denied.

2. This Order, consistent with the Board's Appointment of Prehearing Chairman Order of October 6, 2010, approves the appointment of board member Rodney Freeman, Jr. to act as a Prehearing Chairman in this matter for purposes of acting on procedural motions and discovery disputes. Any dispositive motion made before the Prehearing Chairman may result in a recommendation, but the Board itself will act on all dispositive motions.

3. Any attorney who has not yet appeared on behalf of any party but intends to participate in the evidentiary hearing in the above-entitled matter must mail a Notice of Appearance to all other parties within ten days following this Order. Nonresident counsel must be able to demonstrate compliance with the pro hac vice requirement of SDCL 16-18-2 at the time of hearing.

4. Unless modified by the Prehearing Chairman, witness lists and exhibit lists are to be exchanged ten days before hearing.

5. For the exchange of exhibits, each party shall provide a copy of each exhibit intended to be produced at hearing in this matter (except for the agency file which may be viewed in the offices of the Water Rights Program, Department of Environment and Natural Resources, at any time). Maps, schematics, and other large-scale exhibits may be provided to the other parties in reduced form.

6. Witness lists are to be provided to all other parties. The name, address, and a short statement of anticipated testimony is to be included for each witness. Further, in order to expedite the proceeding, the Water Management Board encourages the parties to discuss whether there are exhibits to which they can stipulate to admission without foundation. Unless otherwise expressly stipulated, stipulating to admission will not restrict the scope of cross-examination by a party with respect to the subject matter of the exhibit or the credibility or accuracy of the exhibit.

7. Original pleadings are to be filed with Eric Gronlund, Water Rights Program, DENR, Foss Building, 523 East Capitol Avenue, Pierre, South Dakota 57501 by fax or first class mail. One copy of each pleading is to be sent or faxed to the Prehearing Chairman at Post Office Box 176, Huron, South Dakota 57350, rfreeman.huronlaw@midconetwork.com, or (605)352-2205, and to board counsel Jeffrey Hallem at 1302 East Highway 14, Suite 1, Pierre, South Dakota 57501-8501, Jeff.Hallem@state.sd.us, or (605) 773-4106 (fax) as well as to all parties listed on the attached service list, including counsel for the

Water Rights Program. Electronic or facsimile service of documents is encouraged.

8. Prehearing briefs will be submitted by the parties. Intervenors' opening briefs will be due on or before November 8, 2010. Applicant's and the Department's responses will be due on or before November 18, 2010. Intervenors' reply briefs will be due on or before November 29, 2010. Briefs will be filed electronically and by mail to Eric Gronlund, Eric.Gronlund@state.sd.us, and electronically to board counsel. Briefs will address all legal issues intended to be raised during the contested case proceeding except those pertaining to the four-part standard under SDCL 46-2A-9.

9. The Prehearing Chairman shall issue such further orders as are appropriate to implement this Order.

Dated this 14th day of October, 2010.

BY THE BOARD:

Tim Bjork, Chairman

pld_DB_Water Board – Long View Farms - Procedural Order (br)

RECEIVED
SEP 2 8 2010
WATER RIGHTS PROGRAM

OFFICE OF THE CHIEF ENGINEER
WATER RIGHTS PROGRAM
STATE OF SOUTH DAKOTA

In the Matter of Water Permit	)	Application No. 7206-3
	)	
Application 7206-03	)	PETITION IN OPPOSITION TO
	)	APPLICATION AND
	)	RECOMMENDATION, PETITION TO
	)	INTERVENE, AND REQUEST FOR
	)	HEARING EXTENSION OF AT LEAST
	)	20 DAYS

Individual Petitioners Faith Spotted Eagle, Judy Honimichle, Sharon Drapeau, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins(Petitioners), hereby submit this Petition in Opposition, Petition to Intervene, and Petition for a Hearing Extension of at least 20 days, pursuant to SDCL §46-2A-6, Application to Appropriate Water 7206-03 (Application) filed by Long View Farms LLP (LVF). Petitioners are also members of the Yankton Sioux Tribe which is a federally recognized Indian Tribe located within Charles Mix County, South Dakota. The Application – No. 7206-3 - requests approval for the diversion of 0.067 cubic feet of water per second from one well to be completed into the Codell Sandstone Aquifer for purposes of commercial use in a livestock confinement operation located directly adjacent to and abutting lands comprising the Yankton Sioux Indian Reservation, South Dakota. The diversion point will be located in SW ¼ NW ¼ Section 9,T. 95N, R64W.

Petitioner Faith Spotted Eagle, Kipp Spotted Eagle Collens and Allen Hare are owners of numerous wells utilized for domestic water supply, livestock, and irrigation located upon Reservation lands and other lands adjacent to and surrounding the well

location. These are primarily shallow water wells which will be impacted if the aquifer recharge is not commensurate with total withdrawals from the aquifer.

Petitioners file this petition in opposition and to intervene for the following reasons:

1. This Application does not satisfy any of the four statutory criteria in SDCL Chapter 46-2A governing the approval of applications to appropriate water resources. The Chief Engineers' determinations on all four criteria are unsupported by factual data and evidence on the recharge rate of the aquifer, or existing wells and springs utilized for domestic use in the immediate vicinity of this proposed well. See, Recommendation of Chief Engineer for Water Permit Application No. 7206-3, Long View Farms, LLP.

2. SDCL §46-2A-9 dictates that 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..." The application proposes to appropriate .067 cf/s from a well completed into the Codell Aquifer. SD DENR has not mapped the Codell Aquifer since 1982, despite the significant expansion of wells in the counties served by this aquifer. The only test wells DENR has investigated recently are 23 and 25 miles north and northeast of this location, which is too far from the present location to make a factual determination that this proposed well will have no impact on the existing domestic wells in close proximity to the location of this proposed well. Further, the Chief Engineer determined that the test well 23 and 25 miles north and northwest of the proposed location "show response to climatic conditions and annual fluctuations that may be due to pumping."

Further, the Chief Engineer relied solely upon the Applicant's report of two domestic wells in the immediate vicinity of this well, and has made no investigation of existing domestic wells in the vicinity of this proposed well. Petitoner Yankton Souix

Tribe in this matter provided to the South Dakota DENR on June 2, 2009 and January 14, 2009 a report from Professor Perry Rahn that documents the presence of nine shallow wells and springs in the immediate vicinity of the proposed well. See In re: Application No. 7206-3 Yankton Souix Tribe Petition In Opposition to Application and Recommendations, Petitioner to Intervene, and Request for Hearing Extension of at Least 20 Days (September 25, 2010) (Tribe's Petition) Attachment 1, Reports of Professor Perry Rahn (Rahn Report). Therefore, the conclusion that there is a reasonable probability of the availability of water is not based upon a factual determination based upon the data, examination of the springs and well in the immediate vicinity of this proposed well, or determination of the recharge rate of the Codell or Niobrara, or the shallow aquifer located in this area located within the Herrick formation.

3. Granting this permit will result in "unlawful impairment of existing rights." SDCL 46-2A-9. The Chief Engineer determined that there:

> are no nearby water permits/rights that obtain water from the Codell sandstone aquifer. There are some domestic wells in the area that use the Codell aquifer. The applicant indicates two sites with water well locations about 1.5 miles northwest and northeast of this site. At this distance and with relatively small pumping rate drawdown is not expected to be significant nor cause any adverse impacts. At one time the City of Geddes, Town of Ravinia and City of Lake Andes used wells from the Codell but now obtain water from the Missouri River or from rural water. Those wells are used as a backup water supply at this time. The only other Codell aquifer Water Right in Charles Mix County is for Clearfield Colony for domestic use.

Report on Water Permit No. 7026-6, For Long View Farms LLP, p. 1 (August 27, 2010). (LVF Report)

The Chief Engineer, however, has not provided any basis for his assumption that there "should not be" interference with existing water rights or domestic wells. The Engineer does not provide any information as to the relationship of the location of water right points of diversion or domestic wells and the hydrological connectivity of the proposed well in the Application. In addition, the Chief Engineer does not provide any

data on the specific amount of water needed by all other pre-existing wells. The Chief Engineer points to no assessment of the depths of the thousands of wells in this aquifer to determine this permit will not impact pre-existing appropriations of water. There is simply no basis upon which to determine that "no -intereference" with domestic water supply will occur. The United States Geological Survey has documented thousands of wells for domestic consumption in the Codell Aquifer Region. USGS Well Survey of Yankton Sioux Reservation, 2005; USGS 2007 Charles Mix County Well Survey. The Department was made aware of this information when the Petitioners filed its Protest of the Water Permit Application 7006-3, but has failed to investigate this information since that objection was filed on June 23, 2008. Until such time as the DENR has fully investigated the drawdown rates, capacity of the Codell aquifer, and the amount of water currently in use by domestic and other existing wells and natural shallow springs, given the sensitivity of the two test wells located 23 and 25 miles north and northeast of the proposed well location, the finding of the Chief Engineer that there is a reasonable probability that there will be no impairment of existing rights is unfounded.

Similarly, when combined with the fact that climate change is increasing the risk of U.S. crop failures, depleting the nation's water resources, and contributing to outbreaks of invasive species and insects, the water right will directly and negatively affect agriculture and livestock in central South Dakota. According to a report compiled by 38 scientists with the U.S. Department of Agriculture, the effects of climate change and other problems for the agricultural and forestry industries will persist for at least the next 25 years. AP, Feds: Climate Change Will Threaten Livestock Water Supply for Years (May 28, 2008). According to the report, drought-strained forests in the West and Southeast are easy prey for tree-killing insects like bark beetles. Snow in the Western mountains is melting earlier, making it more difficult for managers overseeing a long-

established system of reservoirs and irrigation ditches that serve Western states. *Id.* Further, the Southeast does not have the same kind of storage system because rain historically has been more consistent. Current weather disruptions have the region struggling with drought. Rising carbon dioxide levels are changing the metabolism of grasses and shrubs on range land, decreasing the protein levels in plants eaten by cattle. Permits for industrial uses that consume large amounts of water like the one in question will exacerbate such impacts.

4. On behalf of its membership, the Yankton Sioux Tribe is the owner of reserved water rights upon its Reservation lands established by the Treaty of 1858 and as diminished by the Act of 1894. See, Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable). The Tribe's rights to water from the Codell Aquifer are rights to sufficient water to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, and their "reasonably feasible" uses of such water. Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969). It includes the amount of water required to make the Reservation viable. Arizona v. California, 373 U.S. 546, 599 (1963). The courts have already determined that Tribes have the right to assert these rights on behalf of its members. See, United States v. Nebraska, 520 F.2d 676, 688 (9th Cir. 1975). The Chief of Engineers has not assessed the reserved water rights of the Tribe or determined the amount of water in the aquifer, and so has no reasonable basis to conclude, without further investigation, that the federally protected water rights of the Yankton Sioux Tribe are not impaired by this permit. These reserved water rights are federally protected from impairment by off-reservation withdrawals from the Codell Aquifer, including Permit 7006-3. Winters v. United States, 207 U.S. at 576; Arizona v. California, 373 U.S. at 599; Colville

Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981). The Yankton Sioux Tribe has the right to protect its reserved treaty water rights from appropriation by others and from "man-made despoliation." See, United States v. State of Washington, 506 F.Supp. 187, 203 (D. Wa. 1980). See also, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984)(requiring revival of wetlands decimated by non-Indian stream withdrawals); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)(requiring maintenance of minimum stream flow for downstream tribal fishery).

The use of water for a CAFO on lands upland from and directly adjacent to tribal lands and water supplies, both surface and subsurface, and the location of manure dumping fields adjacent to Reservation lands ensures runoff from the 976,200 cubic feet of liquid manure dumped annually will contaminate the Codell Aquifer and all surface waters on Reservation lands, resulting in impairment of the Tribe's and its tribal members' currently appropriated water and its reserved water rights.

As in this case, the Courts have found that if the suit is challenging the impact of a particular action on natural resources rights which are held for the benefit of tribal members, then individual members can file suit to protect such rights. *See Sohappy v. Smith*, 302 F. Supp. 899, 904 (D. Or. 1969). In other words, under *Sohappy*, the Extension violates Appellants' reserved water rights to the extent it threatens the amount of water they need to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, their "reasonably feasible" uses of such water. In addition, the courts have determined that the Tribe has the right to assert these rights on behalf of its members. *See United States v. Nebraska*, 520 F.2d 676, 688 (9th Cir. 1975). This is important because the Yankton Souix Tribe (Tribe) has similarly protested the granting of the water right. See Tribe's Petition

The ability of Appellants and the Tribe to apply to apply treaty water rights to preventing environmental degradation from the Water Right is also support by existing federal case law. While the courts have never settled on the question of whether treaty rights may be used to protect environmental resources, they have addressed it in several key places. In a case that was ultimately overturned by the 9th circuit on procedural grounds, for example, after enumarting the list of human caused factors sponsored by governmental entities, that have resulted in the rapid decline of the Columbia River salmon, the U.S. District Court for the Western District of Washington held that "implicity incorporated in the treaties' fishing claus is the right to have the fishery habitat protected from man-made despolation." *United States v. State of Washington*, 506 F.Supp. 187, (Dist. WA 1980). In reaching this conclusion, the court made the logical assumption that the "most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken." *Id.* Similarly, other courts have recognized the tribal interests in protecting environmental resources. In *United States v. Washington*, Phase II, the initial lower court decision applied the "moderate living needs" standard. *See also, United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. Denied*, 467 U.S. 1252 (1984), requiring a revival of wetlands that had been desicatted by non-Indian stream withdrawals. In *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), the court upheld a lower court ruling requiring non-Indians to maintain a minimum stream flow necessary for the survival of a tribal fishery.

Similarly, the discharge of manure into waterways through runoff releases antibiotic resistant toxic bacteria (i.e. e.coli, yersinia, leptospora, cryptosporidium parvum, giardia lamblia), other pathogens, and excessive nutrients into groundwater and surface water is a public health threat. High concentrations of animal waste from this CAFO will emit hydrogen sulfide, ammonia, Volatile Organic Compounds, and other

gases and particulate matter that are known to cause a human health threat once released into the air. Hydrogen sulfide is a health threat that is irreversible, exposure causes sore throat, seizures, comas and even death. Farmworkers and neighbors of existing hog CAFOs report headaches, shortness of breath, wheezing, excessive coughing, and diarrhea. Ammonia is another byproduct of animal waste and has been linked to acid rain. In Oregon, for example, the Columbia River Gorge has seen unprecedented levels of acid rain in recent years which is likely linked to ammonia releases at Three-mile Canyon Farms which is the single largest source of air pollution in that state. The American Public Health Association issued a resolution urging federal, state, and local governments and public health agencies, "to impose a moratorium on new CAFO's" on November 11, 2003. The noxious odors of the CAFO in question will create an ongoing and persistent nuisance to the thousands of people living and working within 6 miles of the CAFO and associated manure fields, including the Head Start School, the Tribe's Fort Randall Casino, which is heavily dependent on tourism, and the Tribe's Travel Plaza.

Further, Petitioners submit that there is a high probability that water appropriated by this permit, and ground and surface waters of all properties and owners located on and adjacent to the CAFO and manure dumping fields in this area will be contaminated by excessive nutrients, heavy metals, VOC's, antibiotic resistant bacteria, ammonia, and hydrogen sulfide from runoff and airborne emissions. Polluted waters present a clear and present threat to public health, the environment, and the endangered species in the area including the federally protected eagle population of the Karl Mundt Wildlife Preserve (Preserve), in the immediate area and for downstream users.

In addition, the South Dakota Division of Wildlife Resources states that water

developments, such as the proposed use in this case, may proceed in the Basin only in accordance with federal and state laws.[1] An endangered species is one that is" in danger" of extinction throughout all or a large portion of it's habitat. Because the eagles in the Preserve are so rare, they are protected by state laws and the federal Endangered Species Act (ESA).[2] In passing the ESA, Congress reflected society's belief that rare species should be saved whenever possible.[3] Specifically, recovery of the endangered eagles requires that use and development of water from the Codell or Niobrara, or the shallow aquifer located in this area which are hydrologically connected to the Missouri River. In addition, minimum streamflows ensure and increase public recreation in the area. These activities generate a significant economic base in the communities of along the Missouri River, and elsewhere in the State of South Dakota.

Further, there is a daycare owned by a tribal member serving children ages 1 month to 4 years old within 1 mile of the CAFO site where 1 in 4 children are asthmatic. The CAFO's noxious fumes and odors will directly impact the health and well-being of these children and those who work in the daycare. The CAFO is also located within 4 miles of a federally funded Head Start School serving 3 and 4 year old children. The manure dumping locations surround this school and the Marty Indian School serving youth ages 6-18 years of age, as well as a Boys and Girls Club, Tribal Headquarters, and Nutrition programs. The odor from manure dumped on the fields and the CAFO itself will negatively impact the education, health and welfare of these residents.

Finally, this CAFO will produce less than 10 local jobs, and will result in the inability of landowners and residents to utilize surrounding lands for tourism, recreation, and homesites due to the water and air pollution and noxious odors emitted. Longview

[1] South Dakota nonnative fish management questions and answers (UDWR Q&A)-http://wildlife.South Dakota.gov/fishing/nonnative/q_and_a.html.
[2] 16 U.S.C. § 1533.

Farms LLP principals are domiciled in Iowa and have no connection to the local economy. Longview Farms LLP has signed manure dumping agreements with local farmers releasing Longview Farms LLP from all liability for any impacts caused by runoff of manure into water and resultant water and air pollution. Longview Farms CAFO Application, Manure Application Agreements.

10. This Permit is not in accordance with SDCL §46-2A-9 and §46-1-4. §46-1-4 provides:

> Beneficial use of water resources--Prevention of waste--Right to water from natural stream or watercourse. 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. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of diversion of water.

Longview Farms LLP has not begun construction on Phase II facilities utilizing the full reservation requested, nor provided any time frame in which it intends to appropriate the full amount of water requested to be reserved. April 29, 2008 DENR CAFO Revised Plans and Specifications Review by DENR. (Attachment 3). DENR should not condone this type of speculation in water and must prevent such precedent, particularly in light of DENR's role as protector of South Dakota citizens. SDCL §46-1-4 requires 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." This requires the applicant to establish that it "can and will put the conditionally appropriated

[3] 16 U.S.C. § 1531, et seq.

water to beneficial use within a reasonable period of time." See e.g. Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights), 170 P.3d 307 (Colo. 2007).

These requirements are intended to ensure that the public's water resource is available to those who actually need water. David B. Schorr, Appropriation as Agrariaranism: Distributive Justice in the Creation of Property Rights, 33 Ecol. L.Q. 3,9,22 (2005).

In this case, in violation of the beneficial use doctrine and SDCL § 46-1-4 and §46-2A-9, the amount of water requested is for speculative purposes and is far in excess of that appropriate to the scale of the (CAFO) as described in the LVF Report. There is no finding by DENR that it reviewed the CAFO water requirements for existing operations, or the basis for determining that the amount reserved by this Permit will be used in a reasonable period of time. Data and information regarding the water requirements for the contemplated CAFO is needed before DENR can approve the Application.

11. Similarly, SDCL §46-1-4 requires that the State Engineer may not certify a water right until, among other things, that "the water resources of the state be put to beneficial use to the fullest extent of which they are capable." This requires the applicant to establish that it "can and will put the conditionally appropriated water to beneficial use within a reasonable period of time." *See e.g. Pagoas Area Water and Sanitation District v. Trout Unlimited (In re Application for Water Rights)*, 170 P.3d 307 (Colo. 200&). Similarly, the appropriator may not merely posses or waste the water. Water right holders who fail to show continuous beneficial use of the water may lose the water right through abandonment or forfeiture. SDCL § 4-1-4.

These requirements are intended to ensure that the public's water resource is

available to those who actually need water. David B. Schorr, Appropriation as Agrariaranism: Distributive Justice in the Creation of Property Rights, 33 Ecol. L.Q. 3,9,22 (2005). In South Dakota, the restriction on speculation and waste is enforced by a recognition that the approval of an application is "only a preliminary step which gives the applicant the authority to proceed and perfect, if possible, the proposed appropriation by actual diversion and application of the water to a beneficial use. *See Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.*, 104 South Dakota 202, 212--13, 135 P.2d 108, 113 (1943); *Little v. Greene & Weed Inv.*, 839 P.2d 791, 794 (South Dakota 1992).

The adoption of the Prior Appropriation Doctrine, by definition, required the appropriator to apply the water to beneficial use, thereby precluding speculative hoarding in hopes of future gain. Neuman, 28 Envtl. L. 919, 963-64. "Because actual, beneficial use was required, no one could acquire all of the water and thereby monopolize a scarce and valuable resource. Nor could anyone speculate by holding water without using it, and then make a steep profit by selling to those who need it." *Id.* at 964. *See High Plaints A & M. LLC v. Southeastern Colorado Water Conservancy Dist.*, 120 P.3d 710, 719 n.3 (Colo. 2005).

In this case, in violation of the beneficial use doctrine and SDCL §46-2A-9 and §46-1-4, the amount of water requested is far in excess of that generally required for a nuclear power plant of the kind described in the application. Data and information regarding the water requirements for existing nuclear power plants and the contemplated power plant is needed before the State Engineer can approve the Application.

12. This permit is not in the public interest. Petitioners have previously submitted an independent hydro-geological investigation of the specific area within which the proposed well is located indicating the existence of a shallow aquifer and unique geologic formation known as the Herrick formation, which is highly permeable, in this vicinity.

Rahn Report. This report is further supported by the Chief Engineer's determination that "In this area the Niobrara formation (also considered an aquifer) overlies the Codell aquifer." The Chief Engineer has not made any assessment of the impact of this proposed well on the Niobrara formation, the Herrick formation, or any other shallow aquifer located on top of the Codell aquifer, as required by S.D.C.L. 34A-3A-24. In State *ex. rel* Missouri Parks Assoc. *et. al* v. Missouri Dep't. of Nat'l. Resources, Case No. 07AC-CC00923, Cole County District Court, the District Court determined the potential for damage to unique geologic historic formations located near a proposed CAFO warranted denial of construction permits in order to protect the unique geologic structure and the public interest. Denial of the water permit to protect the unique geologic structure and the shallow aquifer located in this area, until and unless an investigation is conducted at the proposed location to determine, based upon fact rather than speculation, that there is no shallow aquifer or Herrick Formation, nor any potential damage to the Niobrara Formation, is warranted.

12. South Dakota has adopted the "public trust doctrine" in its laws regulating water useage. Under this doctrine, private landowners' common law rights to access water unrestricted on their lands was eliminated. SDCL 46-1-1 declares that:

> the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection.

SDCL 46-1-3 establishes the public trust doctrine and the obligation of the state to regulate water use to protect water, declaring, "that all water within the state is the property of the people of the state, but the right to use of water may be acquired by appropriation as provided by law." As in this case, therefore, the public trust doctrine

prohibits the granting of a water right that does not meet the beneficial use and public interest standard.

Indeed, the Public Trust doctrine requires the Applicant to meet a higher beneficial use and public interest standard before the water right can be granted. The South Dakota Supreme Court has recognized, the responsibility of state agencies under this public trust doctrine, under common law, and as codified, is broader than "mere compliance by [agencies] with their legislative authority. . . ." Parks v. Cooper, 2004 S.D. 27, ¶44, 676 N.W.2d 823, 838 (citing Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085, 1095 (1983)).

For the foregoing reasons, Petiioners submits this petition and urges that the permit:

1. Should be denied as unsupported by facts and evidence upon which to form a reasonable basis for concluding the requirements of any of the four criteria in SDCL Chapter 46-2A-9 have been met; or in the alternative

2. Deferred pursuant to SDCL § 46-2A-7 until an investigation of the impacts that the point of diversion will have on the existing (and prospective) instream flows in the area, senior water rights, domestic use, unique geologic and hydro-geologic structures, and the public health and welfare from the CAFO for which the water is requested; and the structure and finances of Longview Farms LLP to determine they are sufficiently financially responsible for and maintain liability for pollution of the area is completed; and

3. Pursuant to SDCL §46-2A-5, Petitioners further requests that the Chief Engineer postpone the date set for hearing on the Application for at least 20 days; and

4. That the Chief of Engineers refer this matter to a Hearing Examiner, pursuant to SDCL §1-26-18.3, as the damage from CAFO operations and the granting of this permit

for that purpose threatens to impair wells for domestic water supply by appropriation without investigation of aquifer recharge rates, cumulative withdrawals from the aquifer, and the risk of contamination of the aquifer from the CAFO operation, resulting in damages in excess of $2,500.00 to the Petitioner and any other Petitioners in this matter; and

5. That the Petition to Intervene be granted.

Respectfully Submitted this 27th day of September 2010.

Faith Spotted Eagle, Petitioner
P.O. Box 667
Lake Andes, SD 57356
(605) 481-0416

On behalf of:

Judy Honimichle, Petitioner
c/o Fort Randall Casino
38538 Sd Highway 46
Lake Andes, SD 57356-7011
(605) 487-7871
(605)487-7871

Sharon Drapeau, Petitioner
General Delivery
Marty, SD 57361

Wesly Hare, Petitioner
General Delivery
Marty, SD 57361
(605)491-3383

Glenn Drapeau
General Delivery
Lake Andes, SD 57356

Kip (Spotted Eagle) Collins
P.O. Box 667
Lake Andes, SD 57356
(605) 481-0416

CERTIFICATE OF SERVICE

I hereby certify that I mailed, First Class, a copy of this Petition on September 27, 2010 to:

Chief Engineer
South Dakota DENR
Water Rights Program
Foss Building
523 E. Capitol
Pierre SD 57501

Longview Farms LLP c/o
Arlen Moss
3172 320th St.
Hull, IA 51239

Rebecca Kidder, Attorney
Abourezk & Zephier PC
2020 W. Omaha St.
Rapid City, SD 57702

Faith Spotted Eagle

Faith Spotte Eagle, Petitioner
P.O. Box 667
Lake Andes, SD 57356
(605) 481-0416

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Charles Abourezk
*Robin L. Zephier
George J. Nelson
Rebecca L. Kidder

*Also licensed in Colorado

ABOUREZK LAW FIRM

P.O. BOX 9460
RAPID CITY, SD 57709-9460
(2020 W. Omaha Street)
TEL: (605) 342-0097
FAX: (605) 342-5170

Mike Abourezk
**Alicia D. Garcia

**Also licensed in California

November 22, 2010

Eric Gronlund, Water Rights Program
SD DENR, Foss Bldg.
523 E. Capitol Ave.
Pierre, SD 57501

Re: In the Matter of Water Permit No. 7203-3, Longview Farms LLP

Dear Mr. Gronlund:

Please find enclosed herewith the Exhibit List, Witness List, and Exhibits of the Petitioner Yankton Sioux Tribe and the Witness List of Individual Petitioners for whom I am acting as Local Counsel. Mr. Shepherd's Pro Hac Vice Application is still pending with the Court.

In addition, I am enclosing Notice of Appearance as Local Counsel for Individual Petitioners.

We have PDF's all but Exhibit 8 which is too large to PDF to you.

If you have any questions or concerns, please do not hesitate ot contact me at your convenience.

Sincerely,

Rebecca Kidder

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of November, 2010 she mailed a true and correct copy of the *Witness List, Exhibit List, and Exhibits of Petition Yankton Sioux Tribe*, on the following:

Diane Best
Assistant Attorney General
for the State of South Dakota,
Counsel to SD DENR Water
Rights Program
300 N. Dakota Ave. Ste 403
Sioux Falls, SD 57104

David Nadolski
Lynn, Jackson, Shultz & LeBrun
P.O. Box 1920
Sioux Falls, SD 57101

Sister Patricia Mylott
P.O. Box 217
Marty, SD 57361

Eric Gronlund, Water Rights Program
SD DENR, Foss Bldg.
523 E. Capitol Ave.
Pierre, SD 57501

Ms. Eva Brugier
P.O. Box 274
Marty, SD 57361

Rodney Freeman
SD Water Rights Management Board
Pre-Hearing Chairman
P.O. Box 176
Huron, SD 57350

Joan Olive
Box 72
Spencer, NE 68777

Jeffrey Hallem
SD Water Rights Management Board Attorney
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501

and that the same was provided by United States Mail, postage prepaid.

Rebecca Kidder, Local Counsel
Abourezk & Zephier, P.C.
P.O. Box 9460
Rapid City, SD 57709

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Witness List of Petitioner Yankton Sioux Tribe

1. **Dr. Perry Rahn,**
South Dakota School of Mines and Technology,
Geology Dept.
501 E. St. Joseph St.
Rapid City, SD 57701

Dr. Rahn is a Hydrogeologist who will testify as an expert witness regarding the unique hydrological and geological conditions in the area of the proposed water permit, and his findings related to this Water Permit Application. Dr. Rahn's CV and Reports ar eincluded as Exhibits.

2. **Richard Leasure,**
Director Yankton Sioux Tribe Environmental Protection Department
P.O. Box 248
Marty, SD 57361

Mr. Leasure is expected to testify regarding his observations on the impact of the CAFO on the local community and environment, and the Yankton Sioux Tribe's location.

3. **John Stone, Former Vice-Chairman Yankton Sioux Tribe, Former Employee Yankton Sioux Tribe Environmental Protection Department**
P.O. Box 248
Marty, SD 57361

Mr. Stone is expected to testify regarding his observations on the impact of the CAFO on the local community and environment, the Yankton Sioux Tribe's location, economic impacts of the CAFO on the community, Health statistics, and employment and community information related to whether the granting of the water permit is in the public interest.

Witness List of Individual Petitioners Faith Spotted Eagle, Judy Honomichl, Sharon Drapeau, Wesley Hare, Glenn Drapeau, Kip Spotted Eagle Collins

1. Faith Spotted Eagle
   P.O. Box 667
   Lake Andes, SD 57356
   (605) 481-0416

Ms. Spotted Eagle is expected to testify regarding her observations on the impact of the CAFO on the local community and environment, and the impact of the proposed permit on her water well and water rights.

2. Sharon Drapeau, Petitioner
   General Delivery
   Marty, SD 57361

Ms. Drapeau Eagle is expected to testify regarding her observations on the impact of the CAFO on the local community and environment, and the impact of the proposed permit on her water well and water rights.

3. Wesly Hare, Petitioner
   General Delivery
   Marty, SD 57361
   (605)491-3383

Mr. Hare is expected to testify regarding her observations on the impact of the CAFO on the local community and environment and the impact of the proposed permit on his water well and water rights.

4. Kip (Spotted Eagle) Collins
   P.O. Box 667
   Lake Andes, SD 57356
   (605) 481-0416

Mr. Spotted Eagle is expected to testify regarding her observations on the impact of the CAFO on the local community and environment and the impact of the proposed permit on his water well and water rights.

Petitioner Yankton Sioux Tribe Exhibit List

Exhibit Number	Exhibit Description
1	2008 Map of Trust lands on the Yankton Indian Reservation Near Long View Farms and Manure Management Areas, John Stone, Yankton Sioux Tribe environmental Protection Department.
2	Curriculum Vitae of Dr. Perry Rahn
3	Hydrogeology of the Ft. Randall Casino area, Charles Mix County, South Dakota, November 25, 2008, Dr. Perry Rahn
4	Response to Derric Iles' Comments Regarding Request for Modification and/or Reconsideration of the Permitting of Longview Farm, LLP, Prepared by Dr. Perry Rahn
5	Flow Net Analysis, Dr. Perry Rahn
6	Yankton Sioux Tribe Wells in the USGS ground-water database with the historical boundary area
7	South Dakota Water Well Completion Reports, Charles Mix County 2008
8	South Dakota DENR September 16, 2008 Long View Farm, LLP Notification of Certificate of Compliance
9	South Dakota DENR September 16, 2008 Longview Farm, LLP Notification of Approval of Changes in As-Built Drawings
10	Long View Farm, LLP April 17, 2009 AWMS Computations for Deep Pit Swine Productions Operations
11	South Dakota DENR April 29, 2008 Long View Farm, LLP Approval of Manure Management System Revised Plans and Specifications
12	South Dakota DENR Internal Memorandum of September 9, 2007 from Sarah Speck to Harold Krein on Longview Farm Animal Waste Management System Plans and Specifications, Charles Mix County
13	Izaak Walton League of America January 1980-December 2005 Fish Kills and Manure Spills Report
14	Map of Longview Farm, LLP in Relation to Karl Mundt National Wildlife Refuge

15 Steve Wing et. al, Air Pollution and Odor in Communities Near Industrial Swine Operations," Environmental Health Perspectives, October 2008

16 Burkholder et. al, "Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality," Environmental Health Perspectives, February 2007

17 Heederick et. al, "Health Effects of Airborne Exposures from Concentrated Animal Feeding Operations," Environmental Health Perspective, February 2007

18 Bureau of Indian Affairs 2005 Labor Force Report, Yankton Sioux Agency

19 April 24, 2008 Correspondence from Mike Horned Eagle, Wagner Service Unit Indian Health Service on Health Characteristics of Wagner Service Unit User Population

20 Charles Mix County NRCS Compiled Soils and DENR Well Log Map

Charles Abourezk
*Robin L. Zephier
George J. Nelson
Rebecca L. Kidder

*Also licensed in Colorado

ABOUREZK LAW FIRM

P.O. BOX 9460
RAPID CITY, SD 57709-9460
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TEL: (605) 342-0097
FAX: (605) 342-5170

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Mike Abourezk
**Alicia D. Garcia

**Also licensed in California

November 22, 202010

South Dakota Department of Environment and Natural Resources
Water Rights Management Board
c/o Mr. Eric Gronlund
PMB 2020, Joe Foss Building
523 East Capitol
Pierre, SD 57501

Dear Board:

Please find enclosed herewith a Notice of Appearance as Local Counsel on behalf of In the Matter of Water Permit Application No. 7203-3 Longview Farms, LLP. Mr. Shepherd's Application for Admission Pro Hac Vice is pending at this time with the Sixth Judicial Circuit to appear in this matter as Counsel that is pending at this time. If you have any questions or concerns, please do not hesitate to contact me at your convenience.

Respectfully Submitted this 22nd day of November, 2010

By: RL Kidder

Rebecca L. Kidder,
Abourezk & Zephier, P.C.
Attorney for the Yankton Sioux Tribe
2020 W. Omaha St.
P.O. Box 9460
Rapid City, SD 57709

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of November, 2010 she mailed a true and correct copy of theNotic eof Appearance of Rebecca Kidder as Local Counsel, on the following:

Diane Best
Assistant Attorney General
for the State of South Dakota,
Counsel to SD DENR Water
Rights Program
300 N. Dakota Ave. Ste 403
Sioux Falls, SD 57104

David Nadolski
Lynn, Jackson, Shultz & LeBrun
P.O. Box 1920
Sioux Falls, SD 57101

Sister Patricia Mylott
P.O. Box 217
Marty, SD 57361

Ms. Eva Brugier
P.O. Box 274
Marty, SD 57361

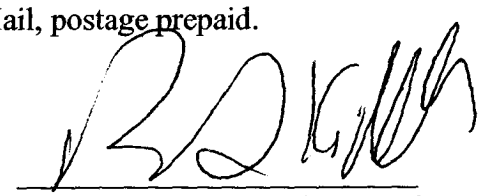
Joan Olive
Box 72
Spencer, NE 68777

Eric Gronlund, Water Rights Program
SD DENR, Foss Bldg.
523 E. Capitol Ave.
Pierre, SD 57501

Rodney Freeman
SD Water Rights Management Board
Pre-Hearing Chairman
P.O. Box 176
Huron, SD 57350

Jeffrey Hallem
SD Water Rights Management Board Attorney
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501

and that the same was provided by United States Mail, postage prepaid.



Rebecca Kidder, Local Counsel
Abourezk & Zephier, P.C.
P.O. Box 9460
Rapid City, SD 57709

STATE OF SOUTH DAKOTA)
)
BEFORE THE WATER MANAGEMENT BOARD)

IN THE MATTER OF Water Permit Application)
No. 7203-3 Longview Farms, LLP Before)
THE SOUTH DAKOTA WATER) **NOTICE OF APPEARANCE**
MANAGEMENT BOARD)
)

NOTICE IS HEREBY GIVEN that Rebecca Kidder hereby enters her Notice of Appearance as Local Counsel of record for the following Parties to these Actions:

Gary Drapeau
Faith Spotted Eagle
Wesley Hare, Jr.
Sharon Drapeau
Judy Honomichl
Kip Spotted Eagle Collins

Mr. Harold Shepherd has made application for admission pro hac vice in this matter on before the Sixth Judicial Circuit.

Dated this 22nd day of November, 2010.

Rebecca Kidder, Attorney
Abourezk & Zephier, P.C.

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LAW OFFICES
Lynn, Jackson, Shultz & Lebrun, P.C.
LAWYERS ALSO ADMITTED IN MINNESOTA, IOWA, NEBRASKA AND WYOMING
www.lynnjackson.com
Member of Lex Mundi
A Global Association of 125 Independent Law Firms
REPLY TO: Sioux Falls 605-332-5999

FIRST BANK & TRUST FINANCIAL CENTRE
110 N. MINNESOTA AVENUE
SUITE 400
P.O. BOX 2700
SIOUX FALLS, SD 57101-2700
605-332-5999
FAX 605-332-4249

FIRST NATIONAL BANK BUILDING
909 ST. JOSEPH STREET
SUITE 800
P.O. BOX 8250
RAPID CITY, SD 57709-8250
605-342-2592
FAX 605-342-5185

From the offices of Eric R. Kerkvliet
e-mail address: ekerkvliet@lynnjackson.com

November 22, 2010

Garland Erbele, Chief Engineer
DENR Water Rights Program
Joe Foss Bldg.
523 E. Capitol Ave.
Pierre, SD 57501

Re: Longview Farm, LLP - Water Permit Application No. 7006-3
Our File No. 082073-00003

Greetings:

Enclosed for the record is the original *Applicant's Witness and Exhibit List.*

Sincerely,

LYNN, JACKSON, SHULTZ & LEBRUN, PC

Eric R. Kerkvliet
ERK/kab
Enclosures
cc: Arlan J. Moss

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Applicant's Witness and Exhibit List was served on 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 Sioux Falls, South Dakota, this 22nd day of November, 2010:

Chad Comes, PE
Box 308
Madison, SD 57042

Tim Bjork
112 W. Oak St.
Pierre, SD 57501

Leo Holzbauer
P.O. Box 877
Wagner, SD 57380

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

Jim Hutmacher
802 E. Seventh St.
Oacoma, SD 57365

Bernita Loucks
219 42nd St.
Rapid City, SD 57702-2123

Jeffrey P. Hallem
Assistant Attorney General
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501

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

Rebecca Kidder
Attorney at Law
P.O. Box 9460
Rapid City, SD 57709-9460

Diane Best
Assistant Attorney General
3009 North Dakota Ave., Suite 403
Sioux Falls, SD 57104

Harold Shepherd, Staff Attorney
Center for Water Advocacy
P.O. Box 2069
3734 Ben Walters Ln.
Homer, AK 99603

Sister Patricia Mylott
P.O. Box 217
Marty, SD 57361

Joan Olive
P.O. Box 72
Spencer, NE 68777

Eva Bruguier
P.O. Box 274
Marty, SD 57361

And was also sent electronically to the following:

Jeff.Hallem@state.sd.us

rebasgarden@yahoo.com

ekerkvliet@lynnjackson.com

dnadolski@lynnjackson.com

waterlaw@uci.net

eric.gronlund@state.sd.us.

rfreeman.huronlaw@midconetwork.com

diane.best@state.sd.us

And that on the same day the original was filed for record with:

Garland Erbele, Chief Engineer
DENR Water Rights Program
Joe Foss Bldg.
523 E. Capitol Ave.
Pierre, SD 57501

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

Eric R. Kerkvliet

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SOUTH DAKOTA WATER RIGHTS MANAGEMENT BOARD

In the Matter of Water Permit Application No. 7206-3, Longview Farms, LLP

APPLICANT'S WITNESS AND EXHIBIT LIST

Comes now the Applicant, Longview Farms, LLP (herein referred to as "Longview"), by and through its attorneys, Eric R. Kerkvliet and Lynn, Jackson, Shultz & Lebrun, P.C., and submits this Witness and Exhibit List.

WITNESSES AND SUMMARY OF EXPECTED TESTIMONY

Applicant anticipates calling the following witnesses to testify at trial:

1. Arlan Moss
2. Todd Van Maanen
3. Jim Hutmacher

Applicant also reserves the right to call witnesses identified or called by the South Dakota Department of Environment and Natural Resources. Applicant also reserves the right to call the Petitioners adversely and any witnesses listed or called by the Petitioners. Applicant also reserves the right to call any rebuttal witnesses not named herein, if necessary.

The following is a brief summary of the anticipated testimony of each of Applicant's witnesses:

I. Arlan Moss
Longview Farm, LLP
3172 320th Street
Hull, IA 51239

Arlan Moss will testify as to a description of the Longview facility, including (but not limited to) its dual plumbing and water storage systems. Arlan Moss will also testify as to the intended uses of the well water. In addition, Arlan Moss will have testimony relating to Longview's position that its proposed use of water is a beneficial use and in the public interest, including (but not limited to) the economic impact that the Longview facility has had on the local economy. Arlan Moss may also have testimony relating to Longview's position that there is a reasonable probability that unappropriated water is available for the proposed use and that the proposed diversion can be developed without unlawful impairment of existing rights. Arlan Moss may also have testimony rebutting the allegations set forth in the petitions of the Yankton Sioux Tribe and the Individual Petitioners.

II. Todd Van Maanen
Eisenbraun & Associates
215 Walnut Street
Yankton, SD 57078

Todd Van Maanen will testify as to a description of the Longview facility, including (but not limited to) its dual plumbing and water storage systems. Todd Van Maanen will also testify as to the intended uses of the well water. In addition, Todd Van Maanen will testify as to Longview's wastewater management system, the permitting process that Longview has gone through, the lack of a shallow aquifer beneath the Longview facility, and the distance of Longview's well from pollution sources. Todd Van Maanen will also testify as to the steps taken by Longview to eliminate or substantially reduce water and air pollution in operating the facility and the application of manure. Todd Van Maanen will have testimony relating to Longview's position that its proposed use of water is a beneficial use and in the public interest, including (but not limited to) the Longview facility's pollution prevention measures. Todd Van Maanen may also have testimony relating to Longview's position that there is a reasonable probability that unappropriated water is available for the proposed use and that the proposed diversion can be developed without unlawful impairment of existing rights. Todd Van Maanen may also have testimony rebutting the allegations set forth in the petitions of the Yankton Sioux Tribe and the Individual Petitioners.

III. Jim Hutmacher
Hutmacher Drilling, Inc.
305 Morrow Avenue
Oacoma, SD 57365

Jim Hutmacher will testify that he was hired to drill the well for Longview, that he is a licensed well driller and that he has experience in drilling wells in South Dakota. Jim Hutmacher will testify that he drilled a previous well, which subsequently collapsed, on the Longview facility, that he completed a well log for that well, and that there is no shallow aquifer located beneath the Longview facility. Jim Hutmacher will also testify that he is familiar with the Water Management Board Well Construction Rules and that Longview's well will be drilled in compliance with those rules, including the requirement that the well water is only pulled from the Codell aquifer. Jim Hutmacher may also have testimony relating to Longview's position that there is a reasonable probability that unappropriated water is available for the proposed use and that the proposed diversion can be developed without unlawful impairment of existing rights. Jim Hutmacher may also have testimony rebutting the allegations set forth in the petitions of the Yankton Sioux Tribe and the Individual Petitioners.

EXHIBIT LIST

Applicant may offer the following exhibits at hearing:

1. Longview's Water Rights Permit Application
2. Affidavit of Publication and Public Notice (Wagner Post)
3. September 1, 2010 letter from Eric Gronlund (DENR Natural Resources Engineer) to Arlan Moss
4. September 1, 2010 letter from Eric Gronlund (DENR Natural Resources Engineer) to Wagner Post with Notice of Hearing
5. Recommendation of Chief Engineer for Water Permit Application No. 7206-3 with enclosures
6. March 16, 2009 letter from Jeanne Goodman (Administrator of DENR Surface Water Quality Program) to Rebecca Kidder with Memorandum from Derric Iles (Geologist, DENR Geological Survey) to Jeanne Godoman
7. South Dakota Water Well Completion Report of Hutmacher Drilling, Inc.
8. Payroll Summary of Longview Farm, LLP
9. Summary of Amounts Paid to Vendors in Charles Mix County
10. Longview's Randall Community Water District's Water Usage Records
11. April 29, 2008 letter from Kent Woodmansey (DENR, Surface Water Quality Program) to Lyndon Moss (Longview)
12. September 16, 2008 letter from Kent Woodmansey (DENR, Surface Water Quality Program) to Lyndon Moss (Longview)
13. January 26, 2010 letter from Kent Woodmansey (DENR, Surface Water Quality Program) to Lyndon Moss (Longview)
14. Soil Boring Logs
15. Documents on file with the DENR relating to Longview's CAFO permitting process (which are available from the DENR Surface Water Quality Program)

Applicant reserves the right to offer any documents identified by the South Dakota DENR, the Yankton Sioux Tribe, or the Individual Petitioners. Applicant also reserves the right to offer any documents to be used as rebuttal evidence.

Dated this 22nd day of November, 2010.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

Eric R. Kerkvliet
P.O. Box 2700
Sioux Falls SD 57101-2700
Phone: (605) 332-5999
Fax: (605) 332-4249
ekerkvliet@lynnjackson.com
Attorneys for Applicant

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STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONGVIEW FARMS, LLP	])]]]	DENR WITNESS AND EXHIBIT LIST

Pursuant to the Boards' Procedural Order, the Department of Environment and Natural Resources, Water Rights Program (DENR) hereby files its list of witness and exhibits.

WITNESS LIST

James A. Goodman, P.E. Natural Resources Engineering Director-Water Rights Program, Foss Building, 523 E. Capitol Ave., Pierre, SD. Jim Goodman is an expert in hydrology. He will testify as to (a) his review of the water permit application, (b) whether there is a reasonable probability that there is unappropriated water available for the applicant's proposed use, (c) whether the proposed diversion can be developed without impairment of existing rights, (d) whether, according to the best information available, the quantity of water withdrawn annually from the Codell aquifer exceeds or will exceed the quantity of the average estimated annual recharge to the Codell aquifer if the proposed use is authorized and (e) the hydrology and geology of the area in which Longview's proposed well is to be located.

Chief Engineer Garland Erbele. Foss Building, 523 E. Capitol Ave., Pierre, SD. The Chief Engineer may testify as to the basis for his recommendation of approval (and proposed qualifications) of permit application 7206-3.

Derric Iles, State Geologist. Ackley-Lawrence Science Center , USD, 414 E. Clark Street, Vermillion, SD. Derric Iles is an expert in hydrology and geology. He may testify as to whether the Applicant's swine facility is located over a shallow aquifer as described in SDCL 34A-3A-24 and will address the hydrology and geology of the area in which Longview's facilities are located.

Jeanne Goodman, P.E., Administrator of South Dakota Surface Water Quality Program, Foss Building, 523 E. Capitol Ave., Pierre, SD. Ms. Goodman will testify as to the DENR requirements for swine facilities including the nature and background of the pollution control requirements for surface water and groundwater.

Kent Woodmansey, P.E., Natural Resources Engineering Director-Surface Water Quality Program, Foss Building, 523 E. Capitol Ave., Pierre, SD. Kent Woodmansey is the DENR employee who handles pollution control permitting for animal waste facilities. He may testify about the approval issued by the DENR for Longview's plans and specifications and about Longview's coverage under the DENR General Pollution Control Permit for Concentrated Animal Feeding Operations.

Darold Krein. Foss Building, 523 E. Capitol Ave., Pierre, SD. Darold Krein is the DENR employee who performed the engineering review of Longview's application for coverage under the General Pollution Control Permit for Concentrated Animal Feeding Operations. He may testify at hearing about his engineering review.

Eric Gronlund, Natural Resources Engineer, Foss Building, 523 E. Capitol Ave., Pierre, SD. Eric Gronlund is the Water Rights Program employee who maintains the agency file and ensures that procedural requirements are met for water permit applications. He may testify as to about the procedure and agency file in Water Permit Application No. 7206-3.

Other Witnesses. The DENR may call the foregoing witnesses as well as additional witnesses if necessary for rebuttal. In addition, the DENR may call witnesses listed by others.

DENR EXHIBIT LIST

The DENR Exhibit list is attached. As shown on the exhibit list, copies of the exhibits have either been previously provided or are being mailed to the parties of record on this date.

Dated this 22nd day of November, 2010

Diane Best

Diane Best
Assistant Attorney General
300 N. Dakota Ave., Suite 403
Sioux Falls, SD 57104
Telephone: (605) 367-5880
Counsel for DENR/Chief Engineer

DENR Exhibit List

Matter of Permit Application No. 7206-3, Longview Farms

Exh	***Description***	***Disclosed***	***Admitted /Refused***
A	Memorandum Decision and Order (Judicial Notice Requested)	Attached to DENR Response & provided to all parties on 11-19-2010	
B	July 12, 2010 Letter to David Nadolski, et. al. from Hon. Bruce V. Anderson (Judicial Notice Requested)	Attached to DENR Response & provided to all parties on 11-19-2010	
1	Agency file 7206-3 including the application, public notices, affidavits of publication, procedural notices, petitions to intervene, briefs and other pleadings.	Emailed by DENR (Gronlund) to Longview & YST on 11-15-2010; emailed and returned undelivered to Harold Shepherd; available in the DENR offices.	
2	James Goodman CV	Emailed to Longview & YST and mailed by First Class Mail to Shepherd,Brugier, Myott, and Olive on 11-22-2010	
3	August 20, 2007 Affidavit of Publication (General Permit)	Same as above.	
4	General Water Pollution Control Permit for Concentrated Animal Feeding Operations (2003) http://denr.sd.gov/des/sw/IPermits/E0447V3-AllAnimalGPermit.pdf	Provided link to Longview & YST on 11-22-2010; mailed by First Class Mail to Shepherd, Brugier, Myott, and Olive on 11-22-2010	
5	10 Most Asked Questions about the State General Permit Process for Concentrated Animal Feeding Operations http://denr.sd.gov/des/sw/cafoFAQ.aspx	Emailed to Longview & YST on 11-22-2010; mailed by First Class Mail to Shepherd, Brugier, Myott, and Olive on 11-22-2010	
6	September 10, 2007 Letter to Lyndon Moss from Kent Woodmansey	Same as above.	
7	September 16, 2008 Letter to Lyndon Moss from Kent Woodmansey	Same as above.	

8	January 26, 2010 Letter to Lyndon Moss from Kent Woodmansey	Same as above.	
9	Longview Farms Site Location Map July 16, 2007	Same as above.	
10	Longview Farms Site Map, March 24, 2008 (aerial)	Same as above.	
11	September 9, 2007 Memo from Sara Speck to Darold Krein	Same as above.	
12	March 16, 2009 letter from Jeanne Goodman to Rebecca Kidder	Same as above.	
13	January 14, 2009 letter from Rebecca Kidder to Kent Woodmansey	Same as above.	
14	February 2, 2009 Memorandum from Derric Iles to Jeanne Goodman	Same as above.	

The DENR will also offer exhibits for cross-examination and rebuttal as deemed necessary.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the DENR Witness and Exhibit List was served on 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 Sioux Falls, SD this 22nd day of November, 2010:

Chad Comes, PE
Box 308
Madison, SD 57042

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112 W. Oak St.
Pierre, SD 57501

Leo Holzbauer
P.O. Box 877
Wagner, SD 57380

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

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Oacoma, SD 57365

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Rapid City, SD 57702-2123

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And was also sent electronically to the following:

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ekerkvliet@lynnjackson.com

dnadolski@lynnjackson.com

waterlaw@uci.net

eric.gronlund@state.sd.us.

rfreeman.huronlaw@midconetwork.com

And that on the same day the original was filed for record with:

Eric Gronlund
DENR Water Rights Program
Joe Foss Bldg.
523 E. Capitol Ave.
Pierre, SD 57501

Diane Best

Diane Best
Assistant Attorney General
300 N. Dakota Ave., Suite 403
Sioux Falls, SD 57104
Telephone: (605) 367-5880
Counsel for DENR/Chief Engineer

Charles Abourezk
*Robin L. Zephier
George J. Nelson
Rebecca L. Kidder

*Also licensed in Colorado

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WATER RIGHTS PROGRAM

Mike Abourezk
**Alicia D. Garcia

**Also licensed in California

November 29, 2010

South Dakota Department of Environment and Natural Resources
Water Rights Management Board
c/o Mr. Eric Gronlund
PMB 2020, Joe Foss Building
523 East Capitol
Pierre, SD 57501

Dear Board:

Please find enclosed herewith a Notice of Appearance as Local Counsel on behalf the Individual Petitioners represented also by Mr. Harold Shepherd whose admission pro hac vice is pending, as well as Notice of Appearance on behalf of the Yankton Sioux Tribe In the Matter of Water Permit Application No. 7203-3 Longview Farms, LLP.

Also please find enclosed the Notice of Withdrawal as Legal Counsel of Ms. Rebecca Kidder in this matter. If you have any questions or concerns, please do not hesitate to contact me at your convenience.

Respectfully Submitted this 29th day of November, 2010

By: _____
Charles Abourezk
Abourezk & Zephier, P.C.
Attorney for the Yankton Sioux Tribe
2020 W. Omaha St.
P.O. Box 9460
Rapid City, SD 57709

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of November, 2010 he mailed a true and correct copy of the Notice of Appearance of Charles Abourezk as Legal Counsel to the Yankton Sioux Tribe and as Local Counsel, and Notice of Withdrawal of Legal Counsel Rebecca Kidder on the following:

Diane Best
Assistant Attorney General
for the State of South Dakota,
Counsel to SD DENR Water
Rights Program
300 N. Dakota Ave. Ste 403
Sioux Falls, SD 57104

David Nadolski
Lynn, Jackson, Shultz & LeBrun
P.O. Box 1920
Sioux Falls, SD 57101

Sister Patricia Mylott
P.O. Box 217
Marty, SD 57361

Eric Gronlund, Water Rights Program
SD DENR, Foss Bldg.
523 E. Capitol Ave.
Pierre, SD 57501

Ms. Eva Brugier
P.O. Box 274
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Rodney Freeman
SD Water Rights Management Board
Pre-Hearing Chairman
P.O. Box 176
Huron, SD 57350

Joan Olive
Box 72
Spencer, NE 68777

Jeffrey Hallem
SD Water Rights Management Board Attorney
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501
and that the same was provided by United States Mail, postage prepaid.

Charles Abourezk
Abourezk & Zephier, P.C.
P.O. Box 9460
Rapid City, SD 57709

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WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA)
)
BEFORE THE WATER MANAGEMENT BOARD)

IN THE MATTER OF Water Permit Application No. 7203-3 Longview Farms, LLP Before THE SOUTH DAKOTA WATER MANAGEMENT BOARD

NOTICE OF WITHDRAWAL
AS LEGAL COUNSEL

NOTICE IS HEREBY GIVEN that Rebecca L. Kidder hereby withdraws as Legal Counsel to the Yankton Sioux Tribe and Local Counsel to Individual Petitioners as she is no longer employed by Abourezk & Zephier, P.C. who is General Counsel to the Yankton Sioux Tribe.

Dated this 29th day of November, 2010.

Rebecca L. Kidder, Attorney
Fredericks, Peebles & Morgan, LLP
2040 W. Main St., Ste. 110
Rapid City, SD 57702
(605) 791-1515

STATE OF SOUTH DAKOTA)
)
BEFORE THE WATER MANAGEMENT BOARD)

IN THE MATTER OF Water Permit Application No. 7203-3 Longview Farms, LLP Before THE SOUTH DAKOTA WATER MANAGEMENT BOARD

NOTICE OF APPEARANCE

NOTICE IS HEREBY GIVEN that Charles Abourezk hereby enters his Notice of Appearance as Local Counsel of record for the following Parties to these Actions:

Gary Drapeau
Faith Spotted Eagle
Wesley Hare, Jr.
Sharon Drapeau
Judy Honomichl
Kip Spotted Eagle Collins

Mr. Harold Shepherd has made application for admission pro hac vice in this matter on before the Sixth Judicial Circuit.

Mr. Abourezk also enters his Notice of Appearance as Legal Counsel to the Yankton Sioux Tribe in this matter.

Dated this 29th day of November, 2010.

Charles Abourezk, Attorney
Abourezk & Zephier, P.C.
2020 W. Omaha St.
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WATER RIGHTS PROGRAM

Mike Abourezk
**Alicia D. Garcia

**Also licensed in California

November 29, 2010

South Dakota Department of Environment and Natural Resources
Water Rights Management Board
c/o Mr. Eric Gronlund
PMB 2020, Joe Foss Building
523 East Capitol
Pierre, SD 57501

Dear Board:

Please find enclosed herewith the Joint Reply Brief of the Yankton Sioux Tribe and Individual Petitioners Represented by Harold Shepherd in this matter for the Board's consideration. Please let me know immediately if you have any questions or anything appears to be missing. Thank you very much.

Respectfully Submitted this 29th day of November, 2010

By: _____
Charles Abourezk
Abourezk & Zephier, P.C.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of November, 2010 he mailed a true and correct copy of the Joint Reply Brief of the Yankton Sioux Tribe and individual Petitioners Represented by Harold Shepherd on the following:

Diane Best
Assistant Attorney General
for the State of South Dakota,
Counsel to SD DENR Water
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Jeffrey Hallem
SD Water Rights Management Board Attorney
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and that the same was provided by United States Mail, postage prepaid.

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SOUTH DAKOTA WATER RIGHTS MANAGEMENT BOARD

In the Matter of Water Permit Application No. 7206-3, Longview Farms, LLP

PRE-HEARING REPLY BRIEF ON LEGAL ISSUES OF PETITIONER YANKTON SIOUX TRIBE AND INDIVIDUAL PETITIONERS REPRESENTED BY HAROLD SHEPHERD PRO HAC VICE

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Attorney for Individual Petitioners Judy Honomichl, Faith Spotted eagle, Sharon Drapeau, Glenn Drapeau, Kip (Spotted Eagle) Collins, and Wesley Hare

INTRODUCTION

The Intervenors in this matter set forth eight legal issues for the Board's consideration in addition to the legal issues inherent in any application for a water permit. Petitioner and DENR in this matter filed separate briefs, which each respond to some of the issues briefed. In order to provide clarity, this Brief shall maintain the original structure of eight (8) Issues that were Briefed and respond to the arguments made by DENR and the Applicant on each of those legal issues.

1.Whether in determining whether there is a reasonable probability that there is unappropriated water available for the applicant's proposed use, the Board must require a determination by the Chief Engineer that the total withdrawals from a groundwater source not exceed the quantity of the average estimated annual recharge of water to the groundwater source under SDCL 46-6-3.1.

The Applicant in this matter simply argues that DENR relied upon the best information reasonably available in determining water is available, but does not specifically respond to whether DENR must determine the recharge rate of this aquifer in making this determination. DENR acknowledges that it did not make any estimate of the annual recharge rate, nor was it able to therefore compare that recharge rate to withdrawals from the aquifer in making its determination that there is reasonable probability of water availability. In fact, South Dakota law is very clear under SDCL 46-6-3.1 that the annual recharge rate of a groundwater source must be estimated as part of the process of determining water availability.

Second, DENR indicates it relied upon an Expert Report prepared by Jim Goodman. Intervenors have not received a copy of this report. In fact, the Chief Engineer's recommendation gives no indication that an assessment of the total withdrawals from the Codell aquifer nor the

recharge rate were considered in this matter. Instead, the Chief Engineer's report relies exclusively upon the applicant's indication there are two domestic wells within one and a half miles of their proposed well site, and upon two observation wells twenty-five and twenty-six miles away. The burden is upon the applicant to demonstrate there is reasonable probability that water is available based upon the recharge rate and current withdrawals from the aquifer. In this case, DENR has not substantiated its determination water is available because it has not investigated either the recharge rate of the aquifer, nor the current total withdrawals from the aquifer.

Intervenors submit the issue is not an issue of which information is the "best available," but rather, the issue is whether DENR has in fact based its determination on mere speculation or actual data. The observation wells, while important information, as the Chief Engineer's report notes, show declining water levels in the summer months due to draw down on the aquifer, and are twenty-five and twenty-six miles away. These are reasons why additional data is necessary to determine the recharge rate and the total withdrawals from the aquifer – elements necessary to determine whether granting this permit would result in impairment of the recharge of this aquifer.

2. Whether, in determining that the proposed diversion can be developed without unlawful impairment of existing rights, the Board must require investigation and consideration of the reserved water rights of the Yankton Sioux Tribe and individual petitioners in the groundwaters of the Codell, Niobrara and other local aquifers and groundwater.

Applicant and DENR appear to disagree as to whether the Intervenors must have quantified their rights in some type of water settlement in order to have water rights that are vested. As the State indicates in its Brief, there is no legal dispute that Tribes have reserved water rights that do not have to be quantified in order to be vested. See, Winters v. United

States, 207 U.S. 564 (1908). DENR and the Petitioners argue that the Board should properly disregard all reserved water rights until such time as the Yankton Sioux Tribe or its members file suit against the State of South Dakota to enforce water rights. Quite simply, this is what has generated the litigation cited to by both parties – a State's decision to grant appropriations of water to other parties on-reservation or off-reservation that interfere with the water rights of a Tribe. As the State recognizes in its briefing, the date such rights vest ifs the date a Reservation is created – in this case in 1858. These rights are therefore senior to any rights of the Petitioners in this matter. Just as with Domestic Use of the groundwater, which takes priority over this Water Permit, at a minimum the Board should recognize that the reserved water rights of the Tribe and its members take priority over this permit as such rights are vested prior in time. 1 None of the parties in this action dispute that South Dakota has adopted the "public trust doctrine" in its laws regulating water usage. South Dakota has clearly determined that land ownership alone does not entitle anyone to use the waters underlying that land, but rather, under the public trust doctrine, now codified in South Dakota law, rights to appropriate water are granted by the issuance of water permits. Water permits are the general rule in South Dakota and not the exception. Parks v. Cooper, 676 N.W.2d 823, 838 (S.D. 2004); SDCL§46-5-10; SDCL §46-5-46.

As the South Dakota Supreme Court explained, in recounting the entire history of water law in South Dakota, in Parks v. Cooper, "'South Dakota is largely a semi-arid state. The Legislature was fully justified in finding that the public welfare requires the maximum protection and utilization of its water supply.'" Id. (citing Knight v. Grimes, 127 N.W.2d 708, 711 (S.D. 1964). The South Dakota Supreme Court has ruled that, "the use of water for domestic purposes

is the highest use of water, and takes precedence . . . ." Fraser v. Water Rights Commission, 294 N.W.2d 784, 788 (S.D. 1980).

DENR claims that the "Applicant's proposed use would not take place on a reservation. But YST and its members claim that the use may affect water that they claim under Winters v. United States, 207 U.S. 564 (1908)." (DENR Resp. Brf. at 7). DENR, however, fails to cite any precedent for it's apparent claim that simply because the wells are not located on the Yankton Reservation, that Petitioner's reserved water rights are not affected, and none exists. In fact, other state Courts have found that protection of Tribal water rights from off-reservation water diversions is one of the basis of the Winters doctrine. The Court in Gila River noted, in fact, that under the state's system of equal rights to pump as much groundwater as can be put to reasonable use , some Indian reservations have been entirely "dewatered" by off-reservation pumping. Gila River, at 748.

In addition, DENR claims that petitioners maintain that federal courts have held the quantification of Winters Rights "is to be based on the amount of water needed to serve the reservation's 'practicably irrigable acreage. . . .'" Yet, they also cite an Arizona case using a more liberal standard. The issue of whether ground water is subject to this doctrine is not fully resolved." (DENR Resp. Brf. at 8, citing, Jt. Prehearing Brf. At 15-22; In re General Adjudications of All Rights to Use Water in the Gila River Adjudication, 201 Ariz. 307, 315, 35 P.3d 68, 76 (2001)).

The Gila River decision, however, is directly applicable to the water right permit in question, as illustrated by the fact that the Court in that case determined that regardless of conflicting state laws, federal law authorized the government to reserve a right to groundwater if

and to the extent that groundwater may be necessary to accomplish the purpose of a federal reservation. In re General Adjudications of All Rights to Use Water in the Gila River System, 989 P.3d 68, 739, 747 (Ariz. 1999). Basing its decision on the U.S. Supreme Court's definition of reserved water rights as "an exception to Congress' deference to state water law. . . ." Id. at 747. The Court found that, unlike state law, federal reserved water rights do not differentiate surface water and groundwater, recognizing them as integral parts of the hydrologic cycle when addressing the diversion of protected waters. Id.

In addition, whether the PIA standard applies to ground water is irrelevant to the issue of whether the granting of the water right permit in question in this case will impact Petitioner's Winter's Reserved water rights. The U.S. Supreme Court, in fact, determines that the "essential purpose" of the tribal reservation "is to provide Native American people with a 'permanent home and abiding place, that is a, livable' environment." 207 U.S. at 575–76 (1908), citing, United States v. Rio Grande Dam and Irrigation. Company, 174 U.S. 690, 702 (1899). As such due to the impacts on ground water and water quality that will occur as a direct result of the issuance of the water right permit in question, it is clear that not only will such issuance violate the "abiding place" and "livable environment" standard but the public welfare standard under the State Water Code.

DENR maintains that although Petitioners may allege that they hold an unquantified volume of reserved water rights to groundwater in the Codell aquifer under Winters v. United States, 207 U.S. 564 (1908), such claims have not been lodged with any court after being negotiated, and have never been quantified in any context. The reserved water rights issue should not be addressed as a side issue in this particular water permit proceeding. (DENR Resp. Brf. at

9). This argument, however, flies in the very face of the Winters Reserved water rights doctrine. Indeed, the term "reserved" implies that, as in this case, in order for water to be available for Indian Tribes to use it must be set aside before it is used for other purposes. Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable).

Indeed, other state Court's have found that a state court cannot decline to extend the federal reserved water rights doctrine to ground water if deference to state law would frustrate or impair the federal purpose of the reservation by defeating federal rights. Gila River, 989 P.2d at 747. Intervenors in this case respectfully ask the Board to acknowledge and recognize the reserved water rights of the Tribe, and to order the Chief Engineer to consider such rights in its determination as to whether there is water available for this water permit.

3. In determining whether the proposed use is a beneficial use, whether the applicant must demonstrate what specific uses within the LCFO the water will be utilized for, must demonstrate whether the water is of sufficient quality for such proposed uses, and that the water will be used immediately.

The State and Applicant indicate they are not required to indicate what the water will be used for, and attempt to distinguish Fraser v. Water Rights Commission, 294 N.W.2d 784 (S.D. 1980), which held that the issue of whether the water a permit is applied for is actually useable for the purposes intended is a criteria that must be considered in determining whether a permit should be granted. Similarly, in this instance, Longview Farm LLP is required by law to determine they actually will use the water when the well is constructed. Evidence at hearing will establish the quantity of water necessary to operate this facility. If the water Longview Farm LLP is requesting to appropriate is not of sufficient quality to provide water for watering animals, this

reduces the amount of water they would be able to use from this well. Certainly, applicants for water permits are required to demonstrate by a preponderance of the evidence they actually will use the water they want to appropriate.

Without a demonstration by the Applicant that they actually have a need for the water, which cannot be demonstrated without a demonstration that the water is of sufficient quality to meet the needs of the Applicant, the Applicant has not demonstrated that water will be put to beneficial use.

DENR raises the issue related to Petitioner's request that the Board analyze the Scope Suitability and Time of Use prior to issuance of the Permit, (DENR Resp. Brf. at 10) but appear to never actually refute that such analysis is necessary. Indeed, DENR merely illustrates the need for such analysis by stating that "in the previous declaratory ruling case Longview provided testimony that it may use ground water from the Codell Aquifer for consumption by sows, for cleaning the facility of for standby purposes . . . . DENR's current understanding is that the presently pending permit seeks the right to use the well water as supplemental water in the swine facility." Id.

The fact, therefore, that Longview has not been clear about its intended use of the water and that even DENR is not certain as to how and when the water will be use raises the hazard that Longview intends to use the water for speculative purposes. In order that the water in this case, be applied for beneficial uses and not for speculative purposes, the Board engage in an analysis of the scope, suitability and timing of use before issuance of the permit. The need for proper analysis by the Board in this case is, further illustrated by DENR's admission that the "Chief Engineer's review has not undertaken a detailed analysis of this...to break down the

quantity of water among the various agricultural uses like animal consumption, animal sanitation, human sanitation, and standby purposes." Id.

4. Whether the Board may grant a permit to Longview Farm if it is determined that the proposed use of water is for backup water supply from the Fort Randall water District system, or whether such a use is a future use pursuant to SDCL 46-5-38.

DENR responds to Petitioners' argument "that the application to use water for standby purposes is essentially an illicit 'future use application,'" by maintaining that it "is not clear that all of the proposed use would, in fact, be for standby use." DENR Resp. Br. at 13. The fact that Longview has not provided clear information as to what it's intended use of the water under the Permit, however, is exactly the type of problem that Petitioners are concerned with and the kind of speculation that is prohibited under the Water Code. Longview Farm LLP is simply not entitled to reserve water it has not demonstrated it has a need for, and can utilize as soon as a well is constructed. DENR, at a minimum, must require Applicants to provide evidence they have a need for the water that is a present day need or a need at a minimum that exists at the time the well is completed. Even if Applicant in this case has five years to build the well, the Applicant must provide evidence that it has a present day need for that water and is not simply reserving water to itself for some speculative purpose in case of water shortage in the future.

Even DENR concedes that "SDCL 46-5-38 allows certain government entities the option of obtaining a future use permit to 'reserve' a quantity of water for future use." Further, DENR admits that Longview's use of the water under the Permit is not a beneficial use by stating that "[i]mportantly standby use is a beneficial use. How else would fire control work?" Id. However, it is clear that fire control is strictly a government function and Longview has never indicated that it intends to use the water for fire control. It is clear, therefore, that this section does not apply in

this case since the Applicant is not a government entity. Indeed, DENR admits that SDCL 46-5-38 does not apply to Longview by stating that "it is clear that Longview is not entitled to a future use permit." Id.

5. Whether denial of the permit, or deferment for further study is necessary under SDCL 46-2A-7 to protect domestic wells including those of Individual Petitioners, municipal wells, or natural springs of this state pursuant to SDCL 46-6-26.

DENR takes the position that SDCL 46-6-26 does not apply to the granting of water permit applications. However, nothing in SDCL 46-6-26 indicates it is contingent upon SDCL 46-6-24. Further, under South Dakota Law, under the public trust doctrine, this Board and DENR have an obligation to protect all of the waters within the State of South Dakota. This includes naturally occurring springs. Further, there can be no dispute that domestic use takes precedence over commercial use in South Dakota. Therefore, impairment of domestic use from domestic wells and naturally occurring springs in South Dakota must be protected. If granting this water permit results in impairment of these waters from pollution or from lessened quantities of water availability, then the permit should not be granted.

The Chief Engineer's restriction that if a domestic well is impaired, withdrawals shall be controlled by Longview Farm LLP so there is not a reduction in needed water. However, if a well is impaired from contamination, nothing can undo that contamination resulting from the operation of Longview Farm, LLP. Further, if the use of water results in reduction of water in wells or springs, there is no guarantee this can be reversed. Further, this places the burden on the domestic user to prove an impairment. Unless the Applicant demonstrates there will be no impairment, no permit should be issued.

6. Whether the Chief Engineer is required to make a determination that the location of the well in question complies with the requirements of ARSD 74:02:04:23(4) and ARSD 74:02:04:24 (1) and (2) relating to the location of wells in relation to pollution sources.

DENR responds in this instance that the groundwater pollution program would have to make this determination as to whether Longview Farm LLP was in compliance with applicable regulations. However, this does not relieve the Applicant from demonstrating compliance as a condition of receiving a permit. The Applicant should be required to demonstrate by a preponderance of the evidence they meet the regulatory requirements.

7. Well Construction Standards.

So long as the Applicant and DENR can demonstrate the well will be grouted from top to bottom, and that this will prevent withdrawal of water from more than one source, this concern will be addressed.

8. Groundwater Discharge Permit.

DENR and the Applicant simply argue in response to the concerns of Intervenors that contamination of shallow groundwater is likely from the operation of Longview Farm LLP and therefore issuance of a water permit is not in the public interest, that the Water Board and the Chief Engineer may rely exclusively on the determinations of the DENR water pollution control division. DENR indicates the water pollution control division conducted an extensive evaluation of this application and determined no pollution control permit was necessary.

However, mere reliance on the determination of another division of DENR, without presenting the basis of that determination, where no public hearing was held, no investigation of the actual conditions on site prior to the determination was conducted does not constitute a basis

for the Board to determine that it has no authority, nor is required to examine evidence submitted by Intervenors regarding whether this permit is in the public interest. If the evidence at hearing demonstrates that there is high potential for contamination of shallow groundwater, or even if the Board only determines that neither DENR nor the applicant have demonstrated by a preponderance of the evidence that there is no shallow aquifer or shallow groundwater underlying this facility, then this permit should be, at a minimum, deferred for further investigation until such a determination can be conclusively made.

Dated this 29th day of November, 2010.

Respectfully Submitted,

Charles Abourezk
Attorney for Yankton Sioux Tribe
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Rapid City, SD 57709
(605) 342-0097

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
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December 9 2010

NOTICE

TO: Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239
and Parties of Record (see attached list)

FROM: Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Continuance and Rescheduling of Hearing for Water Permit Application No. 7206-3, Long View Farms LLP

Water Permit Application No. 7206-3 seeks to appropriate 30 gallons per minute from one well to be completed into the Codell Aquifer located in the SW ¼ NW ¼ Section 9, T95N, R64W for commercial use at a swine farrowing facility in Charles Mix County.

A hearing before the Water Management Board was scheduled for December 2 and 3, 2010 in Pierre. However, Prehearing Chairman Rodney Freeman issued an order granting continuance of the hearing based on a request from Yankton SiouxTribe's new counsel Charles Abourezk. Attached is the order granting continuance.

The Water Management Board will now conduct an evidentiary hearing to consider Application No. 7206-3 beginning at 8:30 AM on Thursday, March 10, 2011 in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre SD. The Board meeting will continue on the morning of Friday March 11th if necessary to complete testimony. Parties should plan accordingly. Future notice will be provided to all parties if there are changes to the hearing time or date.

Please contact Eric Gronlund at (605) 773-3352, if you have any questions.

enclosures

c: Diane Best, Assistant Attorney General

PARTIES OF RECORD

WATER PERMT APPLICATION No. 7206-3, Long View Farms LLP

Applicant

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Sister Patricia Mylott
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CERTIFICATION

I hereby certify that on December 9, 2010, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated December 9, 2010, regarding a Continuance and Rescheduling Hearing for Water Right Permit Application No. 7206-3, as addressed below:

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Gail Jacobson
Gail Jacobson
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 9th day of December, 2010.

Karen Schlaak
Karen Schlaak
Notary Public
My Commission expires April 1, 2013

SEAL KAREN SCHLAAK NOTARY PUBLIC State of South Dakota SEAL

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF APPLICATION NO. 7203-3, LONG VIEW FARM, LLP	)))	ORDER GRANTING CONTINUANCE

On November 30, 2010, Intervenor Yankton Sioux Tribe's new counsel Charles Abourezk requested a continuance of the contested case proceeding scheduled for December 2 and 3. Counsel was recently notified that Rebecca Kidder, who had been representing the Yankton Sioux Tribe, was unable to continue representation and that he would need additional time to prepare.

The request was heard by Prehearing Chairman Freeman by conference call on November 30, 2010. Participating on the call were Charles Abourezk; Harold Shepherd, counsel for six individual Intervenors; Eric Kerkvliet, counsel for Applicant; Diane Best, counsel for DENR, State Engineer Garland Erberle and Water Rights Program staff person Eric Gronlund; and Board Counsel Jeffrey Hallem.

After hearing arguments of counsel and determining that the request for continuance was made for good cause, it is hereby

ORDERED that the request for continuance is granted and that the contested case proceeding is continued to the Board's March meeting.

Dated this 6th day of December, 2010.

Rodney Freeman, Jr.
Prehearing Chairman

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PROGRAM

January 18, 2011

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Re: Longview Hearing

Dear Counsel and Interested Parties:

Attached is the DENR Disclosures and Revised Exhibit List in the Longview matter. This includes exhibits the DENR will rely on at the hearing on March 10. You should now have a copy of each exhibit on the list. If you have not received copies, please let me know.

Also, if you intend to present any additional exhibits or witnesses at hearing (other than the ones previously disclosed) I ask that you disclose those matters soon and no later than 10 days before hearing. Further, I would assume there are no undisclosed experts or expert reports; the time for disclosing those should be long past.

Finally, I usually point out to people involved in these Water Management Board hearings that in addition to giving the parties copies of the exhibits in advance, it is prudent to bring ten copies to the hearing for

the Board. The Board consists of seven members and has its own attorney and secretary who all ask for copies.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General
Counsel for DENR/Chief Engineer

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF CHARLES MIX)

IN THE CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

CIV. 11-146

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP

APPLICANT'S BRIEF IN RESPONSE TO THE OPENING BRIEFS OF THE YANKTON SIOUX TRIBE AND INDIVIDUAL APPELLANTS

Comes now the Applicant, Longview Farm, LLP (herein referred to as "Longview"), by and through its attorneys, Eric R. Kerkvliet and Lynn, Jackson, Shultz & Lebrun, P.C., and submits this Brief in Response to the Opening Briefs of the Yankton Sioux Tribe and Individual Appellants.

JURISDICTIONAL STATEMENT, ISSUES PRESENTED, STATEMENT OF THE CASE, AND STATEMENT OF FACTS

Longview relies on the jurisdictional statement, issues presented, statement of the case, and statement of facts set forth the DENR Brief.

LEGAL ARGUMENT

Longview relies on the arguments set forth in the DENR Brief with regard to all of the issues presented by the Yankton Sioux Tribe other than the issue as to whether the proposed diversion is a beneficial use and in the public interest.

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

The Yankton Sioux Tribe claims that water from the Codell aquifer is not useful to Longview because there is already an adequate water source through the Randall Rural Water District. The term "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

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with the interests of the public of this state in the best utilization of water supplies." *SDCL §46-1-6(3)*. It is undisputed that Longview seeks to supplement its rural water supply by accessing the Codell aquifer. Longview's water storage system is a large cement reservoir divided into two separate parcels by a cement wall, which holds approximately 3 days of water supply. Finding of Fact (FOF) 24, Hearing Transcript (HT) 115-117. Longview's facility is equipped with a dual plumbing system which would allow Longview to use either rural water or well water at almost any point in the Longview facility. FOF 25, HT 115-117. Longview made a commitment to its neighbors and to the Randall Rural Water District that it would apply for and obtain a well water permit to reduce the amount of water necessary to be obtained from the Randall Rural Water District. FOF 28, HT 116. If Longview is granted a well permit, it is anticipated that Longview's use of Randall Rural Water District water will decrease, and it is in Longview's economic interest to use more well water and less rural water. FOF 30. A supplemental water supply is obviously useful and beneficial to Longview even if it is only to supplement their rural water supply. Having an additional source of water is beneficial to Longview in that one source of water would be available if another source of water was unavailable, which is obviously useful to Longview to provide water to the animals regardless of whether rural water is available.

Contrary to the argument of the Yankton Sioux Tribe, the addition of Longview's well does contribute to the economic benefit as well water is less costly than rural water, which incentivizes Longview to use less rural water and more well water. It is axiomatic that the well water is beneficial and useful to Longview, which is why the Water Management Board issued a finding of fact indicating that "[t]he water from the proposed well will undoubtedly be beneficial to the Longview facility, regardless of how the water is used within the facility." FOF 67. It was certainly not clearly erroneous for the Water Management Board to issue this finding of fact. A

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water use is not non-beneficial simply because it is a supplement to another water source, and the Yankton Sioux Tribe fails to cite to any authority for this novel argument.

The Yankton Sioux Tribe cites to *Fraser v. Water Rights Commission*, 294 NW2d 784 (SD 1980) for an argument that consideration must be given to the quality of the water in order to determine whether the proposed use is a beneficial use. *Fraser* is inapposite, however, as this matter does not involve an irrigation permit where water quality may be an issue. As a practical matter, it is undisputed that it is unlikely that the quality of water from the Codell aquifer would not be of sufficiently high quality to be able to be used for power washing Longview's facilities. FOF 68, HT 117. In addition, "[t]he quality of water within the Codell aquifer is of relatively high quality, and it is expected that the water from the Codell aquifer will, at a minimum, be sufficiently high to use to power wash the facilities." FOF 69, HT 117. If the well water quality is high enough, it would be used for feeding Longview's pregnant and nursing sows. FOF 70, HT 117.

The Yankton Sioux Tribe also claims that Longview's proposed use of water is not in the public interest because it is to be used to sustain a confined animal feeding operation (CAFO). The Yankton Sioux Tribe claims that "there is no evidence that the well is in the public interest." *Brief of Appellant Yankton Sioux Tribe*, p. 19. To the contrary, there is a plethora of evidence in the record before the Water Management Board that the proposed use is in the public interest. The following findings of fact adopted by the Water Management Board summarize the testimony presented at hearing and constitute a summary of the wealth of evidence that was submitted to the Water Management Board with regard to the public interest factor:

> 71. From inception of Longview's facility to November of 2010, Longview has paid Charles Mix County vendors a total of $2,523,316.79.

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72. Longview currently has 13 employees with a starting wage of $9.50 per hour for the first 90 days of employment with a dramatic increase in wages after 90 days. The managers of Longview's facility make much more than the hourly employees, and all employees are provided full health and dental benefits at no cost to the employee.

73. From inception of Longview's facility through November of 2010, Longview has paid its employees more than $700,000 in wages and benefits.

74. Longview has had a significant, positive impact on the economy of Charles Mix County.

75. The Longview facility has potential for employment of Yankton Sioux tribal members. In fact, Yankton Sioux tribal members have held positions of employment at the Longview facility in the past.

76. In addition to the potential for employment, there is potential for Yankton Sioux tribal members to sell feed to the Longview facility (in addition to other opportunities).

77. In general, confined animal feeding operations that comply with the permitting requirements set forth by the DENR are considered to be beneficial and in the public interest of the State of South Dakota.

78. Specifically, Longview has complied with all of the permitting requirements set forth by the DENR and the Longview facility is in the public interest of the State of South Dakota. Further, the water use for this facility is a beneficial use in terms of the best utilization of the water supply.

Testimony presented at hearing supports the above findings of fact such that the findings of fact are not clearly erroneous. See, e.g., HT 114-124. The Yankton Sioux Tribe's claim that there is no evidence that Longview's proposed use is in the public interest is simply incorrect.

II. Individual Appellants have waived their right to appeal the decision of the Water Management Board by failing to attend the hearing.

Individual Appellants have attempted to raise several of the same issues raised by the Yankton Sioux Tribe; however, the Individual Appellants failed to attend the hearing before the Water Management Board in mid-July of 2011. The Individual Appellants' failure to attend the hearing or to participate in any way—after receiving notice of said hearing—constitutes a waiver

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of the Individual Appellants' right to issue the Water Management Board's decision. It is well settled in South Dakota that an issue not raised at trial is not preserved for appeal. *City of Colton v. Corbly*, 318 NW2d 136 (SD 1982)(holding that issue not raised before trial court is not preserved for appeal); *Pearson v. Adams*, 279 NW2d 674 (SD 1979)(stating that "[w]e have repeatedly said that questions not raised or preserved in the trial court will not be considered on appeal."); *Mash v.Cutler*, 488 NW2d 642 (SD 1992)(holding that mitigation of damages issue was not raised at trial so as to be preserved for appeal). In *Mash*, the Supreme Court stated that the failure to plead or raise the affirmative defense of mitigation of damages constitutes a waiver to present that issue before the South Dakota Supreme Court. The Supreme Court further stated the well settled rule that the failure to present proposed findings of fact or object or otherwise indicate disagreement with the trial court's findings constitutes a waiver of the party's ability to question the sufficiency of the evidence to support the findings made. The Supreme Court stated that it would not review a matter unless a proper objection had been made before the trial court, reasoning that the trial court must be given an opportunity to correct its mistakes.

Accordingly, it is well settled that the Individual Appellants are not able to question the sufficiency of the evidence to support the findings made by the Water Management Board. However, courts in other states have held that the failure to attend a hearing constitutes a waiver of that person's right to appeal an adverse decision. In *Brown v. Arkansas State Heating, Ventilation, Air Conditioning and Refrigeration*, 984 SW2d 402 (Ark. 1999), the Supreme Court of Arkansas relied on the Arkansas Administrative Procedures Act in holding that the appellant's failure to attend the hearing constituted a waiver of the appellant's right to appeal. In so holding, the Supreme Court of Arkansas reasoned:

> The requirement that arguments, evidence, and objections must be presented to the agency before which the matter is being presented is to allow the agency to

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> apply its special knowledge and expertise, and to build a record which appellate courts may review. We do not review agency actions to determine the absence of error, but review those alleged errors which have been objected to and preserved for our review.
>
> We require a person represented at a hearing to make proper objections for the purpose of allowing the agency to correct the alleged error, and for the purpose of preserving the argument for review. It would be inconsistent and unjust for us to allow another person to ignore the proceeding, fail to attend or object, and thereafter be allowed to obtain a full review of the proceeding to determine whether any error might have been objected to or preserved if someone had been there to do so. The issue is not whether appellant waived his rights to procedural rules, but whether appellant complied with the well-established principles of law which apply to preserving issues for appeal.

Brown, 984 SW2d at 404 (internal citations omitted). In *In re D'Avila's Estate*, 217 Cal.App.2d 123 (Cal.App. 1963), the California Court of Appeals relied on the well settled rule that questions not raised in the trial court will not be considered on appeal. The court went on to state that the failure to appear at the hearing and to object constitutes a waiver of any objection thereto and the appellant is estopped from urging any error on appeal.

Longview respectfully requests that this Court adopt the reasoning of the above decisions and hold that the Individual Appellants have waived their right to appeal the Water Management Board's decision. Not only did the Individual Appellants fail to object to testimony, findings, and conclusions, the Individual Appellants failed to attend the hearing altogether. By doing so, Individual Appellants have failed to preserve any issue for appeal, and Individual Appellants should be estopped from attempting to appeal the Water Management Board's decision. As the Supreme Court of Arkansas reasoned, "[i]t would be inconsistent and unjust for us to allow another person to ignore the proceeding, fail to attend or object, and thereafter be allowed to obtain a full review of the proceeding". *Brown*, 984 SW2d at 404. However, this is exactly what Individual Appellants are attempting to do. If the Individual Appellants are claiming error on behalf of the Water Management Board, they should have been in attendance at the hearing and

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should have allowed the Water Management Board to apply its special knowledge and expertise and to build a record which this appellate court could review. Individual Appellants' failure to do so constitutes a waiver of their right to appeal, and Longview respectfully requests that this Court disregard the attempted appeal of the Individual Appellants. See also, *SDCL §1-26-17(6)* (indicating that due process rights are forfeited if not exercised at the administrative hearing).

CONCLUSION

Because the Water Management Board did not err in concluding that (1) there is a reasonable probability that there is unappropriated water available for Longview'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) the proposed use is in the public interest, Longview respectfully requests that this Court affirm the decision of the Water Management Board granting Longview's well water permit application.

Dated this 2nd day of March, 2012.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

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RE: Longview Brief

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Civ. No. 11-146

SOUTH DAKOTA FIRST JUDICIAL CIRCUIT COURT

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP

ON APPEAL FROM THE SOUTH DAKOTA
WATER MANAGEMENT BOARD

BRIEF OF APPELLANT YANKTON SIOUX TRIBE

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PRELIMINARY STATEMENT

The administrative agency from which this appeal is taken is the South Dakota Water Management Board (Board).

There are two appellants. Yankton Sioux Tribe (YST) and a group of individual tribal members are the appellants. The Appellees are Longview Farm, LLP (Longview) and the Department of Environment and Natural Resources, Water Rights Program (DENR).

Documents in the certified record will be referred to as "AR", followed by the appropriate page number. The transcript of the evidentiary hearing held July 13-15, 2011 will be referred to as "HT" followed by the appropriate page number. Exhibits will be referred to as APP (Applicant), DENR, or YST Ex. followed by the exhibit number.

JURISDICTIONAL STATEMENT

This is an appeal of the Board's decision granting Longview's application for a permit to drill a water well on its facility located in Charles Mix County, South Dakota. The Board's Findings of Fact, Conclusions of Law and Final Decision is dated October 5, 2011. Notice of Appeal was served by first class mail on November 4, 2011, pursuant to ARSD 74:02:01:46 and SDCL §1-26-31.

STATEMENT OF ISSUES ON APPEAL

1. Whether the Board erred when it determined that the average estimated annual recharge exceeded the annual withdrawals for the Codell Aquifer without hearing any evidence of withdrawal or average estimated annual recharge amounts?

   The Board decided that the recharge exceeded the withdrawals.

2. Whether the Board erred when it determined that the proposed diversion could be developed without unlawful impairment of existing rights without hearing any evidence about the existing rights of the Yankton Sioux Tribe?

The Board decided that the Longview's proposed diversion could be developed without impairment of existing rights.

3. Whether the Board erred when it determined that Longview's proposed water use is a beneficial use and in the public interest?

   The Board decided that the proposed use is a beneficial use and in the public interest.

4. Whether the Board erred when it determined that an adequate investigation had been done to establish the location of existing wells and natural springs near the Longview site?

   The Board decided that the Longview well would not harm existing wells.

5. Whether the Board erred when it determined that Longview's permit complied with the requirements of ARSD 74:02:04:34.01 that no well may be constructed to allow production from more than one aquifer?

   The Board determined that the Longview does not draw from more than on aquifer.

6. Whether the Board erred when it determined that the Longview site including its manure fields is not located over a shallow aquifer?

   The Board determined that Longview's CAFO and its manure fields are not located over a shallow aquifer.

STATEMENT OF THE CASE AND FACTS

After this court's June 24, 2010 ruling that Longview must have a water rights permit in order to drill a well into the Codell aquifer, Longview submitted its application for a permit on July 6, 2010. APP Ex. 1. A hearing was held on Longview's application July 13- 15, 2011. The Board entered its Findings of Fact, Conclusions of Law and Final Decision on October 5, 2011, granting Longview's application. AR 722-754 YST served its Notice of Appeal on November 4, 2011. AR 804-838.

The applicant in this matter is Longview, owned by Iowa resident Arlan Moss (Moss) and eleven other Iowa residents. Moss has farmed his whole life starting officially in 1972 in a partnership with his father and brother in Sioux County, Iowa. Moss and his family formed a sub-chapter S Corporation in 1976 which is now owned by Moss and his wife. Moss ran a dairy operation until 2000 and since has run a hog operation. HT 129-130.

Moss joined other area farmers in Sioux County, Iowa to form the Longview Partnership to build a facility for a feeder pig operation, since he had lost his feeder pig supplier, Land-O-Lakes. Moss looked at building his facility in Iowa, but because Sioux County is the number one producer of hogs in the state, the concentration level is high and with the high traffic flow comes a variety of diseases. The disease can be controlled in a finishing unit such as Moss' Sioux County Iowa facility, but not so for a farrowing operation. The finishing operation can be completely emptied of hogs every four or five months and sanitized. However, a farrowing unit always has hogs on site so can never be emptied and completely sanitized. Therefore, the farrowing unit requires strict adherence to bio security measures, because the risk of disease in a farrowing operation could lead to substantial financial loss. One of the major factors is to be isolated from other farm animals to help limit the spread of disease. HT 130-132.

Longview purchased the Charles Mix County property as a result of communications with SDSU professor, Dr. Bob Thaler, who was one of Moss' son's instructors. Dr. Thaler's parents sold the property to Longview. HT 133.

The Longview facility manure management system is for a housed lot feeding a maximum 7,620 head of production swine, all weighing 55 pounds or more. Longview uses two deep pits for manure storage that are designed for 365 days of liquid manure storage. DENR Ex. 6.

Longview's nutrient management system includes the application of manure two times per year in the spring and fall on neighboring crop land with the use of a five mile long drag hose system. HT 121-122,159. Marty, South Dakota the site of YST's tribal headquarters is approximately four and a half miles from the Longview site. AR 726.

Longview's proposed well is to draw from the Codell Aquifer some 600 feet from the land surface. The only two monitoring wells for the Codell Aquifer are twenty-three and twenty-five miles form the Longview site. There was a monitoring well two miles from the site, but it quit functioning properly in 1993. APP Ex. 5.

The DENR recommended approval of Longview's application. APP Ex. 5

STANDARD OF REVIEW

SDCL § 1-26-36 provides:

> The Court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decision are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedures;
> (4) Affected by other error of law;
> (5) Clearly erroneous in light of the entire evidence in the record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

The reviewing court gives great weight to the findings and inferences made by the agency on factual questions. *Woodstock v. City of Lake Preston*, 2005 SD 95. Insurance Division's factual findings and credibility determinations are reviewed under the clearly erroneous standard and will be reversed only if the Supreme Court is definitely and firmly convinced a mistake has been made. *In Re Tinklenberg,* 2006 SD 52. If an administrative agency makes factual determinations on the basis of documentary evidence, those determinations are reviewed de novo. *Meligan v. Dept. of Revenue and Regulation,* 2006 SD 26.

ARGUMENT

YST is responsible for protecting the health and welfare of the residents of the Yankton Sioux Reservation, including thousands of tribal members living within the Reservation located in Charles Mix County, South Dakota.

Tribal families rely on ground water wells and shallow groundwater from natural springs in Charles Mix County. That ground water, even if not flowing from the deeper Codell aquifer, is protected water subject to regulations under the laws of South Dakota. SDCL §§§ 46-6-3, 46-6-3.1 and 46-6-26.

South Dakota has adopted the "public trust doctrine" regarding water usage, which eliminated private landowners' common law rights of unrestricted access to water on their lands. The people of the state have a paramount interest in the use of all the water of the state and the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection. SDCL § 46-1-1.

All water within the state is the property of the people of the state, but the right to use of water may be acquired by appropriation as provided by law. SDCL § 46-1-3.

SDCL § 46-1-3 establishes the public trust doctrine and the obligation of the state to protect and regulate the use of water.

The South Dakota Supreme Court has recognized, that the responsibility of state agencies under this public trust doctrine, under common law, and as codified, is broader than "mere compliance by [agencies] with their legislative authority. . . ." Parks v. Cooper, 2004 S.D. 27, ¶44, (citing Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1095 (1983)). Under these provisions, the South Dakota Supreme Court has ruled that the use of water for domestic purposes is the highest use of water, and takes precedence over other use as long as the domestic use is consistent with the public interest pursuant to SDCL § 46-1-2. Fraser v. Water Rights Commission, 294 N.W.2d 784, 788 (S.D. 1980)

YST and its members' water interests are also protected by the Winters doctrine. Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable). It includes the amount of water required to make the Reservation viable. Arizona v. California, 373 U.S. 546, 599 (1963). Tribal federal treaty rights, including the treaty right to water, include protection from man made despoilation. See, United States v. State of Washington, 506 F. Supp. 187, 203 (D. Wa. 1980).

The purposes of the protections at the federal level and the state level are the same; to ensure that residents and their families have clean and safe drinking water in their homes. The waters of South Dakota do not belong to the State of South Dakota under the Public Trust Doctrine. They belong to the people of South Dakota who entrust the State of South Dakota, and its agencies, to preserve such waters for their benefit. The statutes, therefore, must be interpreted

in accordance with these overarching principles and purposes, assuring that the waters be protected and preserved for the benefit of the individual citizens.

1. **The Board erred when it determined that the average estimated annual recharge exceeded the annual withdrawals from the Codell aquifer without hearing any evidence of withdrawal or average estimated annual recharge amounts.**

SDCL § 46-6-3.1 requires that

> 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.

This statute requires a determination of the average estimated annual recharge rate of the Codell aquifer and examination of the best information reasonably available to determine the total quantity of water withdrawn annually from the groundwater source. In this case, the best information reasonably available includes the most recent United States Geological Service Well Study. South Dakota law requires the collection, preservation and publication of data with respect to underground waters as are required by the public interest, and directs the publication of rules by the Water Management Board on such collection, preservation and publication of data pursuant to SDCL § 46-6-6. Under ARSD 74:02:05:07.

> In determining the availability of unappropriated water for an application for a permit to appropriate water, the board shall rely upon the record of observation well measurements in addition to other data to determine that the quantity of water withdrawn annually from the aquifer does not exceed the estimated average annual recharge to the aquifer.

The Chief Engineer's Report and Investigation in this matter appears to fall short of the legal requirements in three respects:

1. It does not include any determination of the annual recharge rate of the Codell aquifer;

2 It does not include examination of the best information available - the most recent USGS Well Survey which lists all wells withdrawing water from the Codell aquifer but rather, relies exclusively upon the Applicant's assertion that there are only two domestic wells in the area; and

3. The Chief Engineer's report notes that the observation wells established are so far away they are only representative of the entire aquifer, and at that, show "annual fluctuations that may be due to pumping."

Quite simply, the Chief Engineer's report does not meet the legal or factual requirements necessary to determine that this water permit will comply with the requirements of SDCL § 46-6-3.1, and consequently, the requirements of SDCL § 46-2A-9.

Engineer Goodman, who prepared the report on the Codell aquifer relied upon by Chief Engineer Erbele, testified:

HT 33-34

Q. Mr. Goodman, do you know the quantity of water withdrawn annually from the Codell aquifer?

A. No.

Q. Do you know the amount of the annual recharge for the Codell aquifer?

A. No.

HT 40-41

Q. Am I understanding you right that you are reluctant to rely on the monitoring wells that are 23 or 25 miles away from the Longview site?

A. I'm not reluctant because they are very good records. What my reluctance is, is it representing that site? I think it's representing the aquifer very well, those two monitor sites, but because I don't have anything very near the site, I can't testify to exactly what's going on there. I think they are representative of what's going on there, but I can't say for sure.

Chief Engineer, Garland Erbele and Todd Van Maanen, the engineer hired by Longview to assist in the environmental permitting process and the site design, both testified that they were unaware of the recharge rate or the withdrawal usage rate for the Codell aquifer. HT 181, 336-337.

DENR and Longview rely on the monitoring wells, two twenty five miles from the site and one that has been inoperable since 1993 and the thirty gallon per minute usage rate as the evidence to satisfy the statutory and regulative laws and rules requiring determination of quantities for withdrawals and recharge rates. However, all witnesses seem to agree that the draw down near the usage site is different than the draw down twenty five miles from the usage site. No evidence was presented as to usage near the monitoring wells that are twenty five miles from the Longview site located in Douglas and Hutchinson Counties. Perhaps there are no wells in the area of the monitoring wells drawing from the Codell aquifer.

Dr. Perry Rahn, YST's geological and hydrology expert, opined that the monitoring wells were inadequate to establish compliance with the statutory provisions on withdrawal and recharge quantities:

HT 217-218

Q. With respect to the monitoring wells 23 and 25 miles away from the Longview site, is that adequate to make a determination as to the recharge and withdrawals of the Codell aquifer in the area of the Longview site?

A. No.

Q. Why?

A. It's too far away.

Q. Why? What's the factual basis to know that those aren't adequate to make a proper analysis?

A. I haven't done the math on that, but your cone of depression from a 30 gallons a minute well is not going to go out 25 miles and be measurable on one of their observation wells. I think that's rather absurd.

Q. What would be reasonable to determine the rate of recharge, if there is anything?

A. Well, that's a good question certainly, and I think it's up to the applicant to come up with that. They should hire a consultant to evaluate that.

Longview's water permit application can not be approved, if it is probable that the quantity of water withdrawn exceeds the estimated annual recharge. Neither Longview nor DENR have presented any evidence of withdrawal or recharge quantities for any location within the Codell aquifer, let alone at the site of the Longview facility. Longview's refusal to present evidence or reliance on useless evidence on this issue does not pass statutory muster. What we do know for sure is that Longview's water use will cause a draw down of the Codell aquifer at the Longview site. Without any evidence of the recharge quantities, one can only conclude that the withdrawals will exceed the recharge. Longview's application should be denied under SDCL § 46-6-3.1.

2. The Board erred when it determined that the proposed diversion could be developed without unlawful impairment of existing rights without hearing any evidence about the existing rights of the Yankton Sioux Tribe.

The Yankton Sioux Tribe and its members occupy the Yankton Sioux Indian Reservation, established by the Treaty of 1858 between the Yankton Sioux Tribe and the United States government. The Supreme Court ruled in South Dakota v. Yankton Sioux Tribe, 520 U.S. 329, 357 (1997) that the Yankton Sioux Reservation was diminished by Article I of the Act of 1894, 28

Stat. 314-318. In Yankton Sioux Tribe v. Gaffey, the United States Eighth Circuit Court of Appeals held that the Yankton Sioux Indian Reservation had not been disestablished and continues to exist. 188 F.3d 1010, 1030 (1999). In Yankton Sioux Tribe v. Podhradsky, the United States Court of Appeals for the Eighth Circuit further ruled that the Yankton Sioux Indian Reservation is not disestablished and includes trust lands held for the benefit of the Tribe and/or individual tribal members. 606 F.3d 985 (8th Cir. 2010).

Indian Tribes in the United States who are located upon an Indian Reservation acknowledged and recognized by Treaty with the United States have a concomitant set of rights to waters flowing through, and beneath the surface of Reservation lands. The Yankton Sioux Indian Reservation is located within Charles Mix County, and includes lands overlying the Niobrara formation and the Codell aquifer, which are affected by the water permit filed for in this case.

Under federal law, it has been squarely recognized that the Tribe has protected and vested water rights that may not be impaired by water appropriation such as the system of water permitting adopted by the State of South Dakota. On behalf of its membership, The Yankton Sioux Tribe is the owner of reserved water rights upon its Reservation lands established by the Treaty of 1858 and as diminished by the Act of1894. See, Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable).

The Tribe's rights to water from the Codell aquifer are rights to sufficient water to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, and their "reasonably feasible" uses of such water. Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969).

It includes the amount of water required to make the Reservation viable. Arizona v. California, 373 U.S. 546, 599 (1963).

In addition, as in this case, the Courts have found that if the suit is challenging the impact of a particular action on natural resources rights which are held for the benefit of tribal members, then individual members can file suit to protect such rights. See, Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969). Per Sohappy, the granting of a water permit violates reserved water rights to the extent it threatens the amount of water the tribe needs to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, their "reasonably feasible" uses of such water. The courts have already determined that Tribes have the right to assert these rights on behalf of its members. See, United States v. Nebraska, 520 F.2d 676, 688 (9th Cir. 1975).

The Chief Engineer has not assessed the reserved water rights of the Yankton Sioux Tribe or determined the recharge rate of the Codell aquifer, nor the amount of unappropriated water within the Codell aquifer, and so has no reasonable basis to conclude, without further investigation, that the water rights of the Yankton Sioux Tribe are not impaired by this permit. Regarding YST 's existing water rights Chief Engineer Garland testified:

HT 334-334

A. ...Very briefly, the Winters doctrine is a Supreme Court decision that basically said that in the United States, when they established the reservations, whether it was stated so on the reservation or not, the tribe and the reservation has a use for the water that they need – has a right to the use of water they need to make that reservation effective.

The initial means of quantifying that water was something called a PIA, stands for practicable irrigable acreage, and it was a standard that basically said whatever irrigable lands you have on your reservation, the amount of

quantity of water that it takes to irrigate that land is the quantity of water that would be reserved for the tribe. Since then I think some of the courts have expanded that a little bit into more of a homeland standard, basically stating whatever kind of water needs the reservation may have is the quantity of water that would be reserved for the tribe.

Regardless, the Supreme Court has also found that the priority date of those Winter rights are the date that the reservation is formed; so I'm not sure the date that the Yankton Sioux Tribe reservation was formed, but it would be senior to this right and protected under our state law. We acknowledge they exist. Whether or not at some point down the road they are actually quantified remains to be seen.

.....

Q. And do you make any recommendation to the board with respect to that?

A. DENR acknowledges that those rights exist, there's no question about that. Should the board choose to I believe feel that that's a matter they would like to either address through the findings of fact or attach as a condition to the permit, either one of those would be acceptable to DENR.

Engineer Goodman, Arlan Moss and Engineer Woodmansey acknowledge that they did not consider the existing rights of the YST in processing Longview's water permit application. HT 35-37, 91, 136.

These reserved water rights are federally protected from impairment by off-reservation withdrawals from the Codell aquifer, including Permit 7006-3. Winters v. United States, 207 U.S. at 576; Arizona v. California, 373 U.S. at 599; Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981).

As the Supreme Court explained in Winters, upstream diversions of water that are off-reservation may not impact a Tribe's rights to use of water that are reserved. To have reserved water rights, a Tribal Treaty with the United States setting apart lands as a Reservation is required, but specific water rights language in such treaty is not required. Id.

In Winters, the United States brought suit on behalf of the Gros Ventre and Assiniboine tribes of the Fort Belknap Reservation in Montana to halt upstream diversions by non-Indians who had been using the water running through the Tribe's land since 1900. The Fort Belknap Reservation was established under the terms of an 1888 treaty that generally described the purpose of the reservation as the provision of a permanent home for the tribes and to encourage the Indians to engage in agricultural pursuits. Id. at 656. The Treaty did not mention water rights. The non-Indian diverters contended that their diversions, existed before establishment of the tribe's water rights. Mark A. McGinnis & Jason P. Alberts, "Southwest Water Decisions: The Law of Federal Reserved Water Rights," The Water Report: p. 2 (October 15, 2005). That argument was rejected by the Supreme Court:

> The case, as we view it turns on the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation.... The reservation was part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habit and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change in conditions. The lands were arid and without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government ... The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied and could not be.

207 U.S. at 575–76 (1908), citing, United States v. Rio Grande Dam and Irrigation. Company, 174 U.S. 690, 702 (1899).

After Winters the federal courts refined the definition of tribal sovereignty in relation to water rights, beginning with the U.S. Supreme Court's decision in Arizona v. California, 373 U.S. 546 (1963). In that case, the special master appointed to resolve certain preliminary questions

settled on the notion of quantifying reserved water rights based upon practicably irrigable acreage (PIA).

Under this test, an Indian tribe is legally entitled to as much water as is needed to irrigate all the PIA within its reservation. The water so reserved "was intended to satisfy the future as well as the present needs of the Indian Reservation." 373 U.S. at 600. In other words, the water was reserved "to make the Reservation viable." Id. at 599, cited with approval in, Montana v. United States, 450 U.S. 544, 566 n. 15 (1981).

The PIA water rights standard was expanded in In Re General Adjudications of All Rights to use Water in the Gila River System and Source, 201 Ariz. 307, 315, (2001) (Gila V). The Arizona Supreme Court rejected the PIA as the sole standard for determining the "essential purpose" of the tribal reservation and instead found that such purpose "is to provide Native American people with a 'permanent home and abiding place, that is 'a livable' environment." Id. The court held that the general purpose of providing a home for Indians must be broadly construed to provide tribes with the ability to achieve self-determination and economic self-sufficiency, Id., and that limiting tribes to a PIA standard denies them the opportunity to evolve. This, in turn, limits them to an agrarian standard in a largely nonagrarian modern world. The Gila V court mandated that proposed uses be "reasonably feasible." Id. at 80. To determine if a use is reasonably feasible, a project must be: 1) achievable from a practical standpoint; and 2) economically sound. Id. at 81.

The Yankton Sioux Tribe has the right to protect its reserved treaty water rights from appropriation by others and from "man-made despoliation." See, United States v. State of Washington, 506 F. Supp. 187, 203 (D. Wa. 1980). See also, United States v. Adair, 723 F.2d

1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984)(requiring revival of wetlands decimated by non-Indian stream withdrawals); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)(requiring maintenance of minimum stream flow for downstream tribal fishery).

The use of water for a LCFO on lands upland from and directly adjacent to tribal lands and water supplies, both surface and subsurface, and the location of manure dumping fields adjacent to Reservation lands ensuring runoff from the 976,200 cubic feet of liquid manure being dumped annually risks contamination of the Codell aquifer and surface waters on Reservation lands. Endangering the reservation water supply most certainly impairs the Tribe's and its members' appropriated water and reserved water rights.

Under SDCL § 46-2A-9, Tribal reserved water rights must be considered before issuing this permit. Until such time as the Applicant and the Chief Engineer have fully investigated this issue, the Longview application should be rejected or at least deferred for further study under SDCL § 46-2A-7.

3. The Board erred when it determined that the proposed use is a beneficial use and in the public interest.

SDCL § 46-2A-9 provides:

A permit to appropriate water may be issued only if there is a 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 interests.

SDCL § 46-2A-9 also requires that the permit constitute a "beneficial use." Under SDCL § 46-1-6(3), a "beneficial use" is:

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.

A two-part analysis is required to determine "beneficial use." First, the use must be "reasonable, useful, and beneficial to the appropriator." Secondly, SDCL § 46-1-6(3) requires that the use must be in the public interest to be deemed a "beneficial use." In re Water Right ClaimNo. 1927-2, 524 N.W.2d 855, 858 (S.D. 1994).

Well water from the Codell aquifer is not useful to Longview because there is already an adequate water source through the Randall Water District. Longview has a cistern system of water storage that allows three days of storage. Longview has been operating since September of 2008 without any water supply issues.

Furthermore, the use of water to sustain this CAFO is not in the public interest. Although there is some economic benefit generated by having this CAFO, the addition of a well does not add to that economic benefit. The well will only have the affect of drawing down the groundwater and increasing the risk of contamination since the well will be surrounded by large amounts of swine manure. Chief Engineer Garland responded to questioning on the public interest aspects:

HT 338

Q. With respect to the public interest matter that you addressed, what interest does it serve for the Yankton Sioux Tribe to have this water permit issued that sustains this CAFO?

A. The matter of public interest is – I am limited in my determination of public interest to the extent that the board in the past has found something to be in the public interest. That is typically a matter that we reserve for the board and that's one of the considerations they need to make in their determination on this permit I did not – to the extent that the use of the water may impact the reservation or not impact the reservation, I looked at that aspect of it, but in terms of the public interest to the tribe as a whole, that is a matter for the board.

Q. And you are not aware of any interest that it serves for the Yankton Sioux Tribe; is that correct?

A. I could speculate, but yeah.

Q. That's correct?

A. I think it is. I don't know, I mean you are asking me to – there's potential for employment, there's potential for, you know, for members of the tribe to sell feed to the facility, there's those kind of opportunities, but again, that's not something I look at. That's really a matter for the board to determine.

There are additional concerns as to the benefit of the Longview well from the standpoint of whether the water can even be used for the intended purposes and how the well may affect other wells in the vicinity.

Moss acknowledges that the water may not be of sufficient quality to use for power washing or sanitation, indicating that some water is so rough that it's even hard on the equipment. HT 117. Longview and DENR witnesses acknowledge that they did not investigate the existence of domestic wells in the vicinity of the Longview site, so Longview and DENR can't say that the Longview well won't affect other existing wells. HT 40, 94-95, 179-181. Perry Rahn testified that he located a well just a half a mile away from Longview with a water table just ten feet down and also a near-by spring. HT 213, YST Ex. 3. James Goodman testified that there are two or three hundred wells running in Charles Mix County at this time. HT 28. Tribal member John Stone testified that as an employee of the tribe's environmental program in 2005 he did a wells inventory locating 5 to 600 wells in the Marty area including 200 that were not registered through the USGS. HT 262.

South Dakota courts have previously held, approval of a water permit to appropriate water

from the Niobrara Chalk formation without giving consideration to maintenance of artesian head pressure and without giving consideration to whether the quality of water was suitable for the use proposed constitutes an abuse of discretion. Fraser v. Water Rights Commission of Dept. Of Natural Resource Development, 294 N.W.2d 784 (S.D. 1980).

Longview's well is not reasonable, useful or beneficial and there is no evidence that the well is in the public interest. The well unnecessarily risks contamination of a groundwater source and is not necessary in the operation of the CAFO. The application should be rejected pursuant to SDCL § 46-2A-9 because the proposed use is not a beneficial use.

4. The Board erred when it determined that an adequate investigation had been done to establish the location of existing wells and natural springs near the Longview site.

South Dakota law provides authority to the Water Management Board to deny permits or place conditions on the issuance of any water permit if the Board determines such denial or conditions are necessary to "protect domestic wells, municipal wells, or natural springs of this state." SDCL § 46-6-26. Accordingly, one of the determinations of fact necessary to the approval of a water permit is whether the granting of the permit will result in impairment of existing domestic wells and/or natural springs including those of Individual Petitioners. The Chief Engineer's Report lists only the two domestic wells listed by the Applicant in the Report to the Board, neither of which includes individual Petitioners wells that will be impacted by issuance of the permit, and provides no assessment as to whether the granting of this permit will cause impairment to these two wells. Further, the Chief Engineer's Report does not give any indication that an independent investigation into the existence of domestic wells in the Codell aquifer, or the existence of natural springs in the area was performed. To the contrary, as indicated above, the

record establishes that no investigation has been done, even though there is evidence reflecting the existence of wells and springs in the area.

Since there is evidence of natural springs and domestic wells and that the Chief Engineer did not assess the effect of this application on artesian head pressure for existing domestic wells including those of Individual Petitioners, then the application should, at a minimum be deferred until an appropriate investigation is conducted into any impact this permit will have on the quantity or quality of water in existing domestic wells in the Codell aquifer and existing natural springs in the area. See, Fraser v. Water Rights Commission of Dept. Of Natural Resources Development. 294 N.W.2d 784 (1980 S.D.)(holding that failure to examine the impact of water permit on artesian head pressure is abuse of discretion); See also, Op. Atty. Gen. Opinion No. 89-22 (1989) (finding that state water law applies to both surface waters and groundwaters within the State.)

5. The Board erred when it determined that Longview's permit complied with the requirements of ARSD 74:02:04:34.01 that no well may be constructed to allow production from more than one aquifer.

ARSD 74:02:04:34.01 provides:

No well may be constructed to allow production from more than one aquifer unless approved by the chief engineer or the water management board.

Engineer Goodman explained that the Longview well could be producing from both the Codell and Niobrara aquifers since there could be flow between the two aquifers:

HT 37-38.

Q. Is there flow between the Niobrara and the Codell?

A. There could be. I don't have any information at this site to say, but there

could be. It would depend on the water levels of the two formations. Depending on those water levels, the potential then would be one way or the other. However, based on looking at the Codell and the Niobrara and the Choteau and the pumping records from some of the nearby irrigation, you get fluctuations in some of the Niobrara wells and the Choteau when they pump. You don't get them necessarily in the Codell. The elevations, just because of the topography, could be very close so there's very little head difference between the formations to drive water between them. Do you see what I mean?

Q. I don't completely understand, but what you are saying is that you can't say that there isn't flow between the two aquifers; is that correct?

A. You can say that, yeah.

Q. So there is flow between the two aquifers?

A. No, the question you said, you can say.

Q. I guess let – I didn't ask a very good question. So it's clear to me, is there flow between the Codell and the Niobrara?

A. There certainly could be yes.

In order to comply with the requirement of ARSD 74:02:04:34.1 that a well be constructed in a manner that it will not withdraw water from more than one aquifer, specific conditions on how a well is constructed should be required. ARSD 74:02:04:23 sets forth the intent of South Dakota well construction standards, and clarifies the intent of the law:

(1) To protect the health of the public;
(2) To provide water which is both bacteriologically safe and of reasonable quality and quantity for domestic use; . . .
(4) To protect groundwater resources of the state from bacteriological and chemical contamination and from leakage between aquifers;
(5) To prevent waste of groundwater.

In this case, since Goodman concedes that there could be flow between the Niobrara and the Codell aquifers at the Longview site, any approval of a water permit should include specific well

construction standards ensuring no leakage from the Niobrara in this area, and to ensure that neither the Codell aquifer nor the other groundwaters in this area are bacteriologically contaminated by the operation of the Longview Farm. If there is no way to prevent the Longview well from producing from both the Niobrara and the Codell aquifers then the permit application should be denied.

6. The Board erred when it determined that the Longview site including its manure fields is not located over a shallow aquifer.

SDCL § 34A-3A-24 provides:

> No concentrated animal feeding operation that includes a number of animals equal to or greater than one thousand animal units may be located over a shallow aquifer unless a groundwater discharge permit has been approved in accordance with chapter 34A-2. For purposes of this section, a shallow aquifer is any aquifer having the following characteristics:
>
> (1) The aquifer is within fifty feet or less below the land surface with fifteen feet or less of continuous, overlying, extremely low permeability geologic material, such as clayey till or shale. Weathered till or highly fractured weathered shale is not an extremely low permeability material for purposes of this section; or
>
> (2) The aquifer is greater than fifty feet but less than one hundred feet below the land surface with thirty feet or less of continuous overlying low to extremely low permeability geologic material that may be a combination of weathered and unweathered till, shale, or till and shale.
>
> This section does not apply to any concentrated animal feeding operation that was operating on or before July 1, 1997. This section does not limit or prohibit the expansion of any concentrated animal feeding operation that was operating on or before July 1, 1997.
>
> The provisions of this section do not apply to any county which has officially adopted a comprehensive plan and zoning ordinances pursuant to chapter 11-2 and wellhead protection ordinances pursuant to § 7-18-20.

Expert Rahn testified to the existence of the Herrick formation which is exposed near the

Ft. Randall Casino just miles from the Longview site. Neither he, nor any of the other witnesses could specify the boundaries or exact location of the Herrick formation in this area. The Herrick formation is an aquifer and part of the Oglala formation. HT 35, 206, 311-312, Furthermore, Rahn described the ablation till made from a melting glacier beneath the Longview site as more permeable than the lodgment till made by an advancing glacier. HT 209. Dr. Rahn described the permeability of ablation till as having an hydraulic conductivity of .2 meters per day, which is much less permeable than the Madison aquifer but more permeable than the lodgment till. HT 214, 223.

It is undisputed that the Longview operation manure is spread throughout a five mile radius from the Longview structures. The only boring sites relied upon to determine the content of the subsurface material were the three boring holes drilled directly adjacent to the structures. The evidence shows that it is not unusual to have variable subsurface materials over a five mile stretch. HT 59.

Longview and the DENR did not perform the necessary investigation to assure that the Herrick formation is not beneath and within the entire outside boundaries of this CAFO and sufficiently close to the surface to constitute a shallow aquifer. Nor has there been an adequate analysis of whether materials having a .2 meters per day hydraulic conductivity could constitute a shallow aquifer. This evidence is significant because it involves the potential contamination of domestic water supplies.

Longview should not be allowed to just go through the motions with respect to the water permit process. It is sensible and reasonable to require Longview to take the necessary steps to establish their hog manure will not contaminate shallow groundwater and aquifers. The permit

should be denied until the necessary testing is done and establishes that the manure and accompanying chemicals and pathogens are not infiltrating water supplies.

CONCLUSION

The Board's decision granting Longview's application should be reversed because:

1. There is no evidence to support the board's finding that the average estimated annual recharge exceeds the annual withdrawals from the Codell aquifer at the site of the Longview facility;

2. The lack of investigation into the water rights of the YST precludes the board's finding that Longview's proposed use would not impair YST's existing rights;

3. The board's finding that the proposed use is a beneficial use is clearly erroneous;

4. The board's finding that there are only two domestic wells near Longview is clearly erroneous since the evidence showed that there was a total lack of proper research to make that determination. Under SDCL § 46-6-26 the application should be denied in the interest of protecting domestic wells and natural springs;

5. The Board's finding that the Longview well produces from only the Codell aquifer is clearly erroneous;

6. The Board's finding that there are no shallow aquifers beneath the Longview CAFO is clearly erroneous because there was inadequate investigatory evidence to make such a finding with respect to the entire subsurface of the exterior boundaries of the Longview facility and its manure fields.

Dated this 23rd day of January, 2011.

Respectfully submitted,

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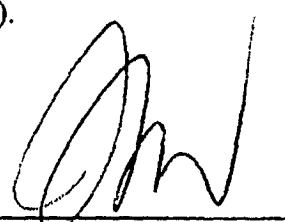
REQUEST FOR ORAL ARGUMENT

Appellant Yankton Sioux Tribe request thirty minutes for oral argument in this matter pursuant to SDCL §1-26-35 and SDCL §1-26-33.3(7).

Dated this 23rd day of January, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2012, I cause to be served by first class mail, postage prepaid, a true and correct copy of the *Brief of Appellant Yankton Sioux Tribe* to the following parties:

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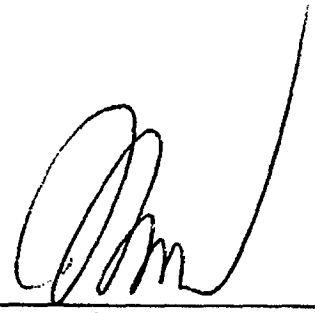

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PROGRAM

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONGVIEW FARMS, LLP	])]]]]	AMENDED CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the DENR Witness and Exhibit List was served on 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 Sioux Falls, SD on January 18, 2011:

Charles Abourzek
Attorney at Law
P.O. Box 9460
Rapid City, SD 57709-9460

Eric Kerkvliet
David L. Nadolski
Attorney at Law
P.O. Box 2700
Sioux Falls, SD 57101-2700

Harold Shepherd, Staff Attorney
Center for Water Advocacy
P.O. Box 2069
3734 Ben Walters Ln.
Homer, AK 99603

Sister Patricia Mylott
PO Box 217
Marty, SD 57361

Joan Olive
PO Box 72
Spencer, NE 68777

Eva Bruguier
PO Box 274
Marty, SD 57361

And that on the same day the original was filed for record with:

Eric Gronlund
DENR Water Rights Program
Joe Foss Bldg.
523 E. Capitol Ave.
Pierre, SD 57501

And that copies were sent electronically to the following on January 20, 2011:

Jeff.Hallem@state.sd.us

rebasgarden@yahoo.com

ekerkvliet@lynnjackson.com

dnadolski@lynnjackson.com

waterlaw@uci.net

eric.gronlund@state.sd.us.

rfreeman.huronlaw@midconetwork.com

Diane Best
Assistant Attorney General
300 N. Dakota Ave., Suite 403
Sioux Falls, SD 57104
Telephone: (605) 367-5880
Counsel for DENR/Chief Engineer

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STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONGVIEW FARMS, LLP	])]]]	DENR DISCLOSURES AND REVISED EXHIBIT LIST

The Department of Environment and Natural Resources, Water Rights Program (DENR) makes the following disclosures:

1. The DENR Witness and Exhibit List was filed on November 22, 2010 and exhibits were provided to all parties. On November 23, 2010, the DENR disclosed an additional exhibit (Exhibit 15- CV of Derric Iles) to attorneys Harold Shepherd, Rebecca Kidder and Eric Kerkvliet. To ensure that Ex. 15 is received by the remaining parties it is enclosed.

2. In its previous briefing, the DENR referred to the expert report of DENR witness Jim Goodman. This report was previously provided to the parties, including the Notice of Hearing sent by the DENR to all parties on October 18, 2010. Intervenor's Prehearing Reply Brief, however, asserts that it did not receive the report. Accordingly, the Goodman Report is marked as Exhibit 16 and included in this disclosure.

3. The DENR is adding an additional map entitled "SD DENR Permitted CAFOs-November 12, 2010" and it is enclosed and listed as Exh.20.

4. This disclosure also confirms that the agency file (through November 15, 2010) was provided to attorneys Eric Kerkvliet and Rebecca Kidder on November 15, 2010 and to attorney Harold Shepherd on November 26, 2010.

Since then, pleadings and Notices were filed by various parties and the various certificates of services for those documents show that all parties received copies. If any party seeks to examine the contents of this file, it is available at the offices of the DENR. The updated file, with all pleadings through March 10, will be introduced as Exhibit 1 at the hearing on March 10 (DENR Exh. 1).

5. Consistent with the above, the DENR Exhibit List is revised and is attached.

Dated this 18th day of January, 2011

Diane Best
Assistant Attorney General
300 N. Dakota Ave., Suite 403
Sioux Falls, SD 57104
Telephone: (605) 367-5880
Counsel for DENR/Chief Engineer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the DENR Disclosures and Revised Exhibit List (and Exhibits 15, 16, and 20) was served on 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 Sioux Falls, SD this 18th January, 2011:

Charles Abourzek
Attorney at Law
P.O. Box 9460
Rapid City, SD 57709-9460

Sister Patricia Mylott
PO Box 217
Marty, SD 57361

Harold Shepherd, Staff Attorney
Center for Water Advocacy
P.O. Box 2069
3734 Ben Walters Ln.
Homer, AK 99603

Eric Kerkvliet
David L. Nadolski
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And was also sent electronically to the following:

Jeff.Hallem@state.sd.us

ekerkvliet@lynnjackson.com

dnadolski@lynnjackson.com

waterlaw@uci.net

eric.gronlund@state.sd.us.

rfreeman.huronlaw@midconetwork.com

And that on the same day the original was filed for record with:

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Diane Best

Diane Best
Assistant Attorney General
300 N. Dakota Ave., Suite 403
Sioux Falls, SD 57104
Telephone: (605) 367-5880
Counsel for DENR/Chief Engineer

DENR Exhibit List ***(revisions in bold)***

Matter of Permit Application No. 7206-3, Longview Farms

Exh	*Description*	*Disclosed*	*Admitted/ Refused*
A	Memorandum Decision and Order (Judicial Notice Requested)	Attached to DENR Response & provided to all parties on 11-19-10	
B	July 12, 2010 Letter to David Nadolski, et. al. from Hon. Bruce V. Anderson (Judicial Notice Requested)	Attached to DENR Response & provided to all parties on 11-19-10	
1	Agency file 7206-3 including the application, public notices, affidavits of publication, procedural notices, petitions to intervene, briefs and other pleadings.	Agency file as of Dec. 15 emailed by DENR (Gronlund) to Longview & YST on 11-15-2010; ***emailed and received by Harold Shepherd on November 26, 2010; (subsequent pleadings have been submitted & included in the agency file & are available at the offices of the DENR)***	
2	James Goodman CV	Emailed to Longview & YST and mailed by First Class Mail to Shepherd, Brugier, Mylott, and Olive on 11-22-2010	
3	August 20, 2007 Affidavit of Publication (General Permit)	Same as above	
4	General Water Pollution Control Permit for Concentrated Animal Feeding Operations (2003) http://denr.sd.gov/des/sw/IPermits/D0447V1-AllAnimalGPermit.pdf	Provided link to Longview and YST on 11-22-2010; mailed by First Class Mail to Shepherd, Brugier, Mylott, and Olive on 11-22-2010	
5	10 Most Asked Questions about the State General Permit Process for Concentrated Animal Feeding Operations http://denr.sd.gov/des/sw/cafoFAQ.aspx	Emailed to Longview & YST on 11-22-2010; mailed by First Class Mail to Shepherd, Brugier, Mylott, and Olive on 11-22-2010	
6	September 10, 2007 Letter to Lyndon Moss from Kent Woodmansey.	Same as above	
7	September 16, 2008 Letter to L. Moss from Kent Woodmansey	Same as above	

8	January 26, 2010 Letter to Lyndon Moss from Kent Woodmansey	Same as above.	
9	Longview Farms Site Location Map July 16, 2007	Same as above	
10	Longview Farms Site Map, March 24, 2008 (aerial)	Same as above	
11	September 9, 2007 Memo from Sara Speck to Darold Krein	Same as above	
12	March 16, 2009 letter from Jeanne Goodman to Rebecca Kidder	Same as above	
13	January 14, 2009 letter from Rebecca Kidder to Kent Woodmansey	Same as above	
14	February 2, 2009 Memorandum from Derric Iles to Jeanne Goodman	Same as above	
15	***Derric Iles CV***	***Emailed to Longview & YST on 11-23-2010; mailed by First Class Mail to all parties by First Class mail on 1-18-2011***	
16	**Goodman Report**	***Mailed by First Class Mail to all parties on 1-18-2011***	
20	***SD DENR Permitted CAFOs***	***Mailed by First Class Mail to all parties on 1-18-2011***	

The DENR will also offer exhibits for re-direct, cross-examination and surrebuttal as deemed necessary.

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EXHIBIT
DENR
15

Derric L. Iles

931 Crestview Drive
Vermillion, South Dakota 57069

Phone: (605) 624-5278
Email: Derric.Iles@usd.edu

Work Experience

Jan. 1998 – Present **State Geologist and Administrator**, *Geological Survey Program, South Dakota Department of Environment and Natural Resources, Vermillion, South Dakota*

- Plan, organize, and direct the activities of the South Dakota Geological Survey.
- Administer activities conducted by the South Dakota Geological Survey staff that use technical and scientific expertise to locate, describe, map, and evaluate the natural resources of South Dakota.
- Provide scientific advice and expertise to the South Dakota Department of Environment and Natural Resources, other governmental agencies, consultants, and the public.

1986 – 1993 **Adjunct Instructor**, *Department of Earth Sciences and Physics, University of South Dakota, Vermillion, South Dakota*

- Taught a 3-credit Environmental Earth Science course.
- Taught introductory earth science laboratories.

Feb. 1986 – Dec. 1998 **Hydrologist**, *Geological Survey Program, South Dakota Department of Environment and Natural Resources, Vermillion, South Dakota*

- Designed and directed hydrogeologic investigations focused on water quantity, water quality, and the vulnerability of certain aquifers to surface sources of contamination.
- Planned and directed research on the movement of ground water through low permeability glacial till. Utilized test drilling, well installation, laboratory and field testing of sediment permeability, general water chemistry, stable isotopes, lithologic description, water levels, and hydraulic gradients to characterize hydrogeologic conditions.
- Directed drilling, well installation, and water sampling activities.
- Produced maps and written scientific reports.
- Reviewed and evaluated consultants' reports on hydrogeologic characterizations of future landfill sites. Assisted consultants in preparing work plans to gather hydrogeologic information necessary for the permitting process related to solid waste disposal facilities in low-permeability geologic settings.
- Designed and implemented a statewide ground water quality monitoring network for South Dakota that is focused on long-term monitoring of the ambient quality of water in 25 of the state's surface aquifers.
- Provided expert witness testimony regarding the hydrology and geology of potential landfill sites on behalf of the South Dakota Department of Environment and Natural Resources.

Nov. 1984 – Jan. 1986 **Senior Hydrogeologist/Project Manager**, *Soil Exploration Company, Twin City Testing Corporation, Huntingdon Engineering and Environmental Inc., St. Paul, Minnesota*

- Designed and directed investigations of sites having petroleum contamination in the subsurface. Field methods employed were drilling of test holes, installation of monitoring wells, collection of sediment and ground water samples, and collection of water level data.
- Project sites ranged geographically from West Virginia to California and encompassed bedrock, alluvial, and glacial geologic settings.

- Hired and directed subcontractors for project sites remote from the Minneapolis, Minnesota, area.
- Evaluated aquifer test data to assist in the understanding of subsurface hydrologic conditions.
- Used geologic, hydrologic, and contaminant data to interpret subsurface conditions, and to predict future environmental impacts of contamination.
- Designed and implemented remedial action at project sites to mitigate environmental impacts and to protect human health and safety.
- Prepared maps, cross sections, and written reports.

June 1977 – Oct. 1984 **Geologist/Hydrologist**, *Geological Survey Program, South Dakota Department of Environment and Natural Resources, Vermillion, South Dakota*

- Compiled and evaluated existing hydrologic and geologic information in preparation for the planning of drilling and well installation projects.
- Planned field investigations based on existing information. Investigations were conducted in (1) highly variable glacial sediments (including buried and surficial glacial outwash aquifers), (2) Cretaceous age geologic units of Niobrara Formation, Carlile Shale, Greenhorn Formation, Graneros Shale, Dakota Formation, and Split Rock Creek Formation, and (3) Precambrian age Sioux Quartzite.
- Directed drilling and well installation for ground-water resource investigations wherein the extent, thickness, and water quality of various aquifers were studied. Investigations were performed to locate new or supplemental sources of drinking water for cities and rural water systems. Drilling and well depths ranged from very shallow to greater than 800 feet. The primary drilling method employed was the forward mud rotary method. Auger drilling (solid stem and hollow stem) was also used but to a much lesser extent.
- Planned and directed drilling and well installation activities to characterize the hydrogeology at potential or existing landfill sites.
- Planned and directed the investigation of sites contaminated with petroleum products (gasoline, diesel, fuel oil). Directed test drilling, well installation, and performed sampling of water and contaminants.
- Spent extensive time in the field with drilling projects as the well-site geologist and project director; logged and interpreted drill cuttings.
- Performed and interpreted results of geophysical logging of test holes (single-point resistivity, spontaneous potential, and natural gamma) to define subsurface geology.
- Used isotopic analysis of ground water to interpret paleo-hydrogeologic environment and age of the ground water.
- Interpreted surface and subsurface geology and hydrology in order to construct aquifer maps. The process included reconstruction of geologic history and an evaluation of all available hydrologic parameters.
- Developed wells, commonly using compressed air, and sampled wells for water quality analysis using a variety of methods (air lift, bailer, centrifugal pump, bladder pump).
- Collected water levels and used them to construct water table maps and potentiometric surface maps.
- Prepared maps, cross sections, and written reports for projects lasting a few months to several years.
- Made presentations of project results to city councils, rural water system boards of directors, consultants, other government officials, and the general public.

Education

1975-1977	**Master of Science, Geology**, *Iowa State University, Ames, Iowa*
1971-1975	**Bachelor of Arts, Geology**, *University of Northern Iowa, Cedar Falls, Iowa*

Additional Training

- 24-hour Mine Safety & Health Administration training, November 2006 and January 2009
- Legal Arena, SD Bureau of Personnel training
- various OSHA 8-hour refresher courses for hazardous materials
- Source Water Protection Workshop, December 1997
- Introduction to ArcView, March 1997
- Recognizing & Identifying Hazardous Materials Train-the-Trainer Course, December 1990
- Introduction to AutoCAD, August 1990
- Wellhead Protection Area Delineation, October 1988
- Sampling for Hazardous Materials (165.9), August 1988
- Safety at Hazardous Materials Sites: A Hands-On Workshop, May 1998
- Risk Based Corrective Action Training, December 1995
- Drug and Alcohol Detection Training Course for Supervisors, June 1995
- Personnel Protection and Safety (165.2), March 1988
- Incident Mitigation & Treatment Methods, September 1986
- Intermediate Hazmat Safety, April 1985

Memberships

American Institute of Professional Geologists, CPG 10986
Association of American State Geologists
National Ground Water Association

Awards

2005	John Paul Gries "Geologist of the Year" Award, *American Institute of Professional Geologists, South Dakota Section*
2001	Agency Person of the Year Award, *Black Hills Resource Conservation and Development, Inc.*
1998	Environmental Achievement Award, *U.S. Environmental Protection Agency, Region 8*

Publications/Reports

Iles, D.L. and Barari, A., 1978, *Ground-water study for the city of Redfield*: South Dakota Geological Survey Open-File Report UR-22, 23 P.

Iles, D.L. 1979, *Ground-water study for southern Union County*: South Dakota Geological Survey Open-File Report UR-28, 63p.

Iles, D.L., 1979, *Ground-water study for the city of Huron*: South Dakota Geological Survey Open-File Report UR-24, 37 p.

Iles, D.L. 1979, *Sanitary landfill investigations for the city of Huron*: South Dakota Geological Survey Open-File Report UR-26, 30 p.

Ludvigson, G.A. McKay, R.M., Iles, D.L., and Bretz, R.F., 1981, *Lithostratigraphy and sedimentary petrology of the Split Rock Creek Formation, late Cretaceous, of southeastern South Dakota*, in Brenner and others, *Cretaceous stratigraphy and sedimentation in northwest Iowa, northeast Nebraska, and southeast South Dakota*: Iowa Geological Survey Guidebook Series 4.

Hedges, L.S., Burch, S.L., Iles, D.L. Barari, R.A., and Schoon, R.A., 1982, *Evaluation of ground-water resources in eastern South Dakota and upper Big Sioux River, South Dakota and Iowa, Task 1: Bedrock topography and distribution; Task 2: Extent of aquifers; Task 3: Ground-water storage; Task 4: Computerized data base*: Department of Water and Natural Resources, Division of Geological Survey, Vermillion, South Dakota, Prepared for Planning Division, U.S. Army Corps of Engineers, Omaha, Nebraska, Contract DACW 45-80-C-0185.

Iles, D.L. 1984, *Platte petroleum spill*: (revised 1989), South Dakota Geological Survey Open-File Report UR-39, 38p.

Iles, D.L. 1984, *Pleistocene recharge to the Dakota Formation in Lincoln County, South Dakota*, in *Proceedings of the First C.V. Theis Conferences on Geohydrology; Geohydrology of the Dakota Aquifer*: held October 5-6, 1982, Lincoln, Nebraska, p. 135-146; published by the National Water Well Association.

Hedges, L.S., Burch, S.L., and Iles, D.L., 1985, *Evaluation of groundwater resources eastern South Dakota and upper Big Sioux River South Dakota and Iowa, Task 6: Average annual ground-water use in eastern South Dakota*: Department of Water and Natural Resources, Division of Geological Survey, Vermillion, South Dakota, Prepared for Planning Division, U.S. Army Corps of Engineers, Omaha, Nebraska, Contract DACW 45-80-C-0185.

Allen, J.C., Iles, D.L., and Petres, A.K., 1985, *Analysis of groundwater and streamflow data western Dakotas region of South Dakota, Tasks 3A. B. C. and 4A. B.: Groundwater resource inventory*: Department of Water and Natural Resources, Division of Geological Survey, Vermillion, South Dakota, Prepared for Planning Division, U.S. Army Corps of Engineers, Omaha, Nebraska, Contract DACW 45-82-C-0151.

Hedges, L.S., Burch, S.L., and Iles, D.L., 1985, *Evaluation of groundwater resources eastern South Dakota and upper Big Sioux River South Dakota and Iowa, Task 11: Artificial recharge potential*: Department of Water and Natural Resources, Division of Geological Survey, Vermillion, South Dakota, Prepared for Planning Division, U.S. Army Corps of Engineers, Omaha, Nebraska, Contract DACW 45-80-C-0185.

Iles, D.L. 1986, *Gregory petroleum leak*: South Dakota Geological Survey Open-File Report UR-38, 21 p.

Iles, D.L. 1986, *Tripp petroleum leak*: South Dakota Geological Survey Open-File Report UR-37, 17 p.

Iles, D.L., 1988, *Investigation of petroleum contamination at Washington High School, Sioux Falls, South Dakota*: South Dakota Geological Survey Open-File Report UR-53, 27 p.

Iles, D.L. and Dawson, P.M., 1988, *Hydrogeologic investigation for an alternate water source for the Brookings-Deuel Rural Water System near Clear Lake, South Dakota*: South Dakota Geological Survey Open-File Report UR-51, 79 p.

Iles, D.L., Meyer, M.R., Baron, L.R. and Markley, W.E., 1988, *Assessment of hydrogeologic and ground water contamination data in the vicinity of the Hayward Elementary School, West 12th Street, Sioux Falls, South Dakota*: South Dakota Geological Survey Open-File Report UR-44, 231 p.

Barari, A., Cowman, T.C., and Iles, D.L. 1988, *Evaluation of data on nitrate concentrations in the Big Sioux aquifer*: South Dakota Geological Survey Open-File Report UR-54, 30 p.

Iles, D.L., 1989, *Investigation of the Sioux Falls sanitary landfill*: South Dakota Geological Survey Open-File Report UR-58, 69p.

Barari, A., Iles, D.L., and Cowman, T.C., 1989, *Assessment of water resources and conceptual evaluation of a regional water supply for southeastern South Dakota*: South Dakota Geological Survey Open-File Report UR-60, 18 p.

Barari, A., Cowman, T.C., and Iles, D.L., 1989, *A summary of current hydrologic conditions in the Dolton aquifer*: South Dakota Geological Survey Open-File Report UR-59, 11 p.

Frykman, L.J., and Iles, D.L., 1990, *Hydrologic investigation of the Dakota Formation to identify additional municipal well sites for the city of Canton, South Dakota*: South Dakota Geological Survey Open-File Report UR-62, 79 p.

Iles, D.L. and Frykman, L.J., 1991, *Hydrogeology of the southern Skunk Creek management unit of the Big Sioux aquifer*: South Dakota Geological Survey Open-File Report UR-63, 171 p.

Iles, D.L., Hammond, P.D., and Schulz, L.D., 1992, *Effects of sampling methods on inorganic water chemistry results* in *Proceedings of National Groundwater Sampling Symposium*: held November 30, 1992, Washington, DC, p. 41-68; published by Grundfos Pumps Corporation, Environmental Products Division.

Barari, A., Iles, D.L., and Cowman, T.C., 1993, *Wellhead protection and monitoring options for the Sioux Falls airport wellfield, South Dakota* in Moore, B.A., editor, *Case studies in wellhead protection area delineation and monitoring*: Environmental Monitoring Systems Laboratory, Office of Research and Development, U.S. Environmental Protection Agency, Las Vegas, Nevada, Contract number 68-CO-0049.

Holly, D.E., Iles, D.L., and Barari, A., 1993, *Ground-water study for the TM Rural Water District in the vicinities of Dolton and Parker, South Dakota*: South Dakota Geological Survey Open-File Report UR-65, 112 p.

Iles, D.L., 1996, *Investigation of the Dakota Formation for the Lincoln County Rural Water System*: South Dakota Geological Survey Open-File Report UR-71, 12 p.

Iles, D.L., Barari, A., and Hedges, L.S., 1996, *Ground-water movement within till in Lincoln County, South Dakota*: South Dakota Geological Survey Open-File Report BAS-04, 82 p.

Frykman, L.J., and Iles, D.L., 1996, *Investigation of nitrate-nitrogen contamination in ground water in the vicinity of Alcester, South Dakota*: South Dakota Geological Survey Open-File Report UR-76, 50 p.

Davis, R.K., Iles, D.L., Schaefer, V.R., Kortran, J.M., Koch, B., and Peterson, E.W., 1997, *Hydrogeology and hydrochemistry of clayey till at the Sioux Falls landfill, Sioux Falls, South Dakota*: South Dakota Geological Survey Open-File Report BAS-09, 186 p.

EXHIBIT DENR 16

PENGAD 800-631-6989

REPORT ON WATER PERMIT APPLICATION NO. 7206-3
For Long View Farms
August 27, 2010

Application No. 7206-3 proposes to appropriate 0.067 cfs (30 gpm) from one well approximately 600 feet deep located in the SW ¼ NW ¼ of section 9, T95N R64W in Charles Mix County. The water will be used for commercial use at a swine farrowing facility.

AQUIFER – CODELL SANDSTONE (CDLL)

The Codell sandstone is a buried sedimentary rock member of the Carlile shale which consists of loose to tightly cemented very fine to coarse light brownish gray to dark greenish black and brown sand with clay (Kume, 1977). The aquifer is confined and under artesian conditions at this site. The Codell aquifer is known locally as the "sandrock" or the "soft water sand" (Kume, 1977). Data from the county study and Water Right well files indicate the top of the Codell sandstone should be approximately 1150 to 1200 feet msl. This would mean a well depth of at least 570 feet to 620 feet at this site to penetrate the Codell sandstone. The applicant indicates an expected depth of 600 feet. In this area the Niobrara formation (also considered and aquifer) overlies the Codell aquifer.

The Codell sandstone underlies 1,134 square miles (725,760 acres) of Charles Mix County and is estimated to contain 1.45 million acre-feet of recoverable water in storage (Hedges, 1982). The aquifer extends into Douglas and Hutchinson Counties to the north and into Bon Homme County to the east and into Nebraska to the south. A map of the Codell sandstone published by Hedges is included with this report (Hedges, 1982). Ground water movement is probably from northwest to southeast in the area of this application (Kume, 1977).

The Water Right Program monitors two observation wells completed into the Codell sandstone (DG-80F and HT-87D) but are located about 23 and 25 miles north and northeast of this site respectively. Water levels for these two wells show response to climatic conditions and annual fluctuations that may be due to pumping (Water Rights, 2010). However, because these wells are located so far from this site the record would only be representative of the entire aquifer and not show any aquifer response due to pumping from this site. Water levels for these two observation wells are included with this report for informational purposes.

The Corps of Engineers drilled an observation well in T95N R64W in the northeast corner of section 11 which is located about two miles east of this site. Kume published a hydrograph of the water levels beginning in 1952 and extending through 1970 (page 21, Figure 17) in Bulletin 22, Geology and Water Resources of Charles Mix and Douglas Counties. The Water Rights Program began monitoring this same well in 1982 and continued through 1993 when the monitoring well ceased to function properly. The Water Rights well name was CM-52A for this Corps of Engineer well and a hydrograph for the available record is included with this report. The entire water level record for the Codell indicates the aquifer is capable of sustaining additional withdrawals (Water Rights, 2010).

REVIEW OF EXISTING WATER PERMITS/RIGHTS

There are no nearby water permits/rights that obtain water from the Codell sandstone aquifer. There are domestic wells in the area which use the Codell as a source of water. The applicant indicates two sites with water well locations about 1.5 miles northwest and northeast of this site. At this distance and with the relatively small pumping rate drawdown is not expected to be significant nor cause any adverse impacts. At one time the City of Geddes, Town of Ravinia and the City of Lake Andes used wells from the Codell but now obtain water from the Missouri River or from rural water. Those wells are used as a backup water supply at this time. The only other Codell aquifer Water Right in Charles Mix County is for Clearfield Colony for domestic use.

CONCLUSIONS

1. Water is available from the Codell aquifer.
2. The aquifer is under artesian conditions at this site. Drawdown due to pumping can be expected to occur. However, drawdown is not expected to be significant at this pumping rate nor cause any adverse effects on existing water rights or on area domestic users.
3. The well authorized by this application must be constructed in accordance with SD Well Construction Rules. Also there is a collapsed well near this site that must be plugged in accordance with SD Well Construction Standards if that has not already been done.
4. Plans and specifications for this facility have been approved by the Department.
5. The primary source of water for this facility is from Randall Rural Water System and this well will be a supplemental source for the facility.

James A Goodman
Natural Resources Engineer

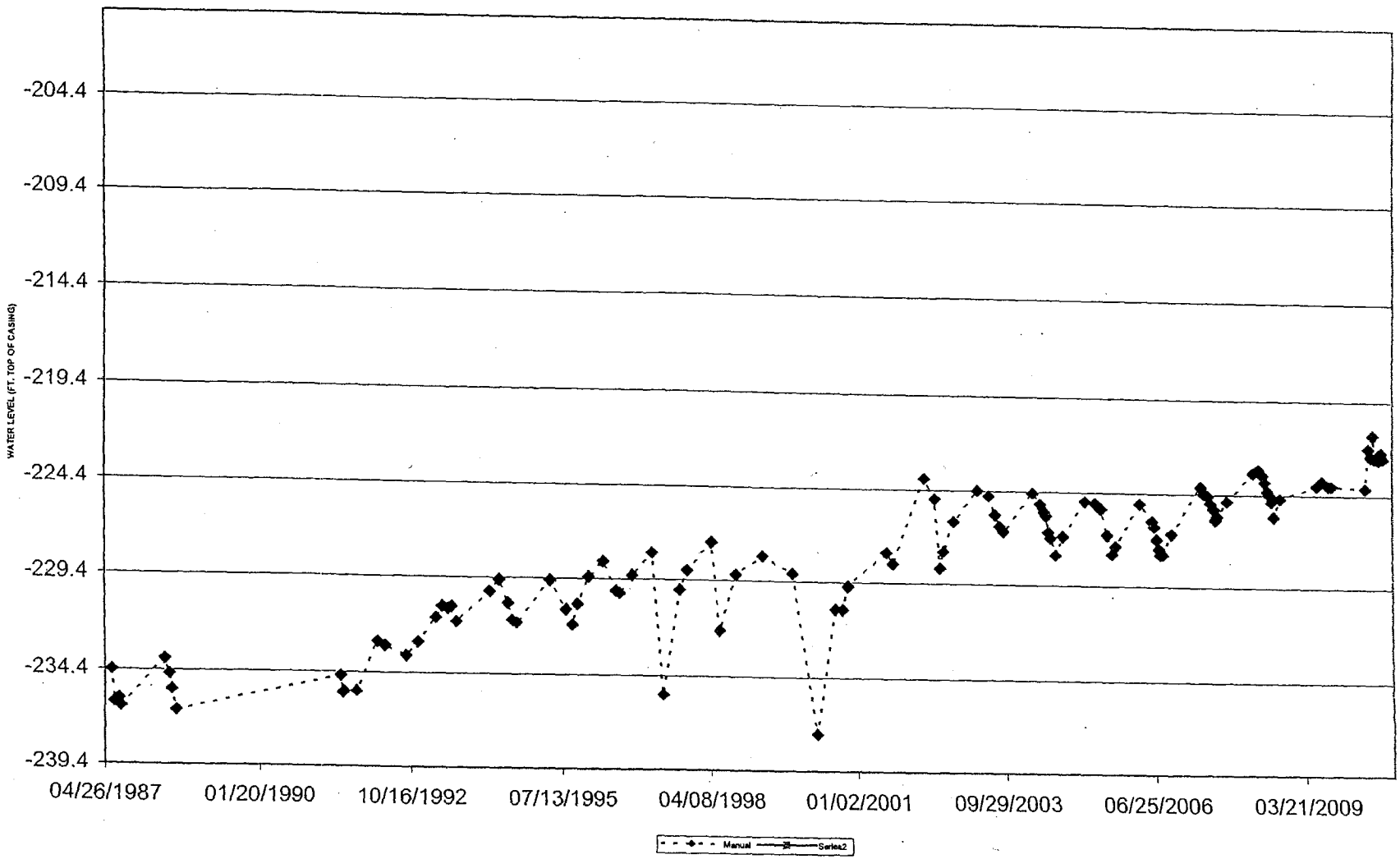
BIBLIOGRAPHY

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

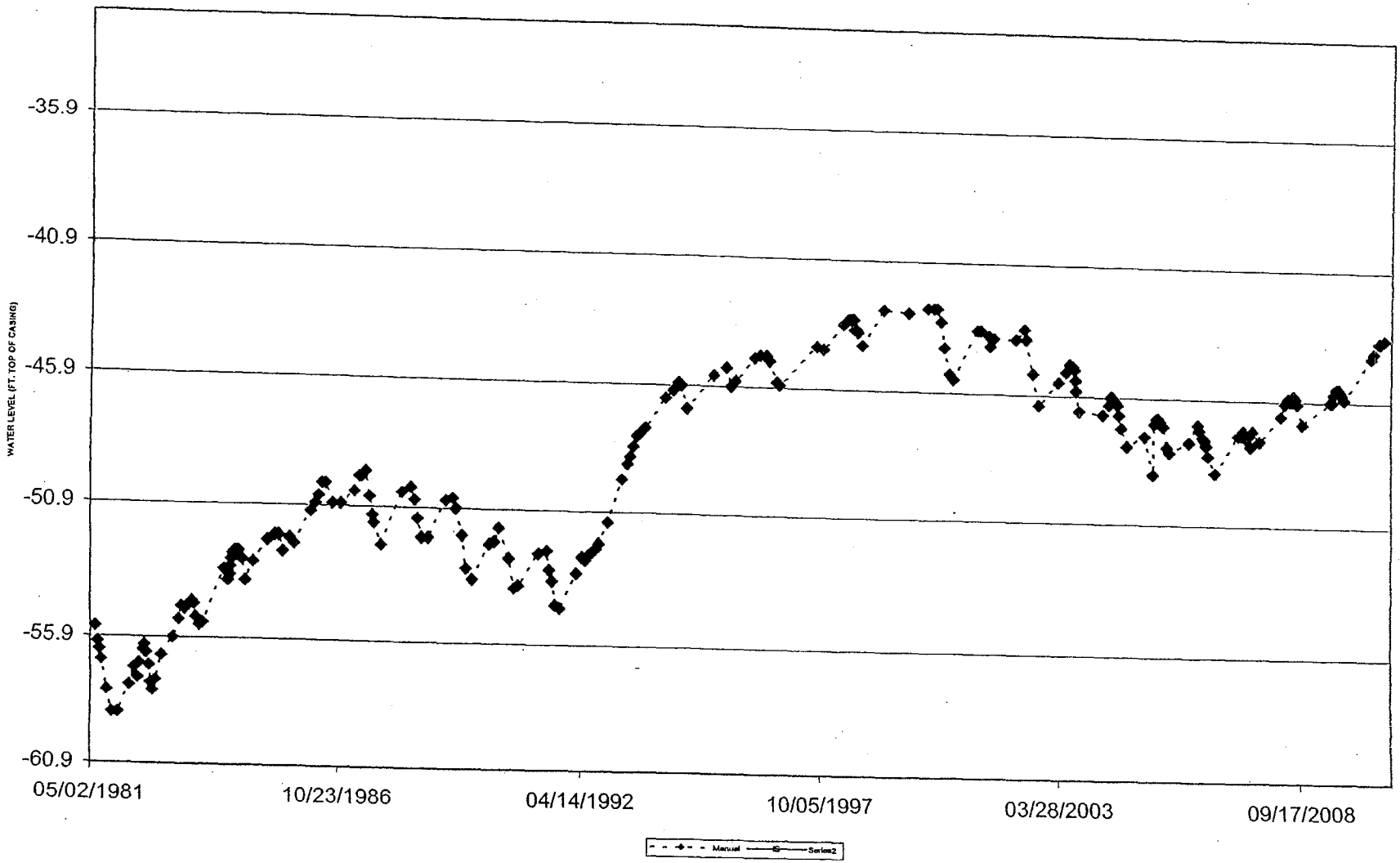
Kume, J., 1977, Geology and Water Resources of Charles Mix and Douglas Counties, South Dakota, Part II Water Resources, Bulletin 22, SD DENR, SDGS, Vermillion, SD, 57069.

Water Rights, 2010, Unpublished Observation Well Records for the Codell Aquifer, SD DENR, DES, Water Rights Program, Pierre, SD, 57501.

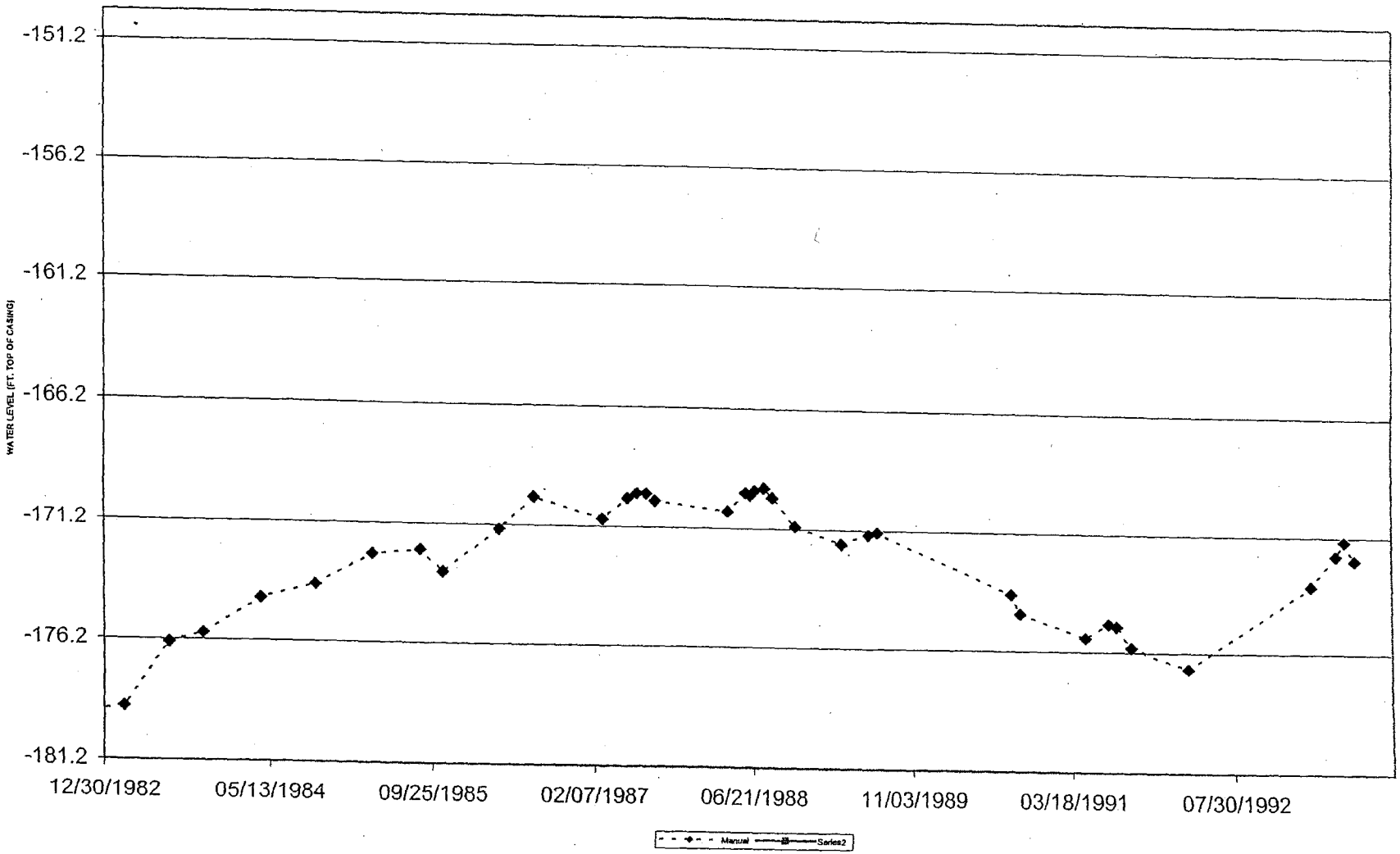
WATER RIGHTS' OBSERVATION WELL
HT-87D



WATER RIGHTS' OBSERVATION WELL
DG-80F



WATER RIGHTS' OBSERVATION WELL
CM-52A



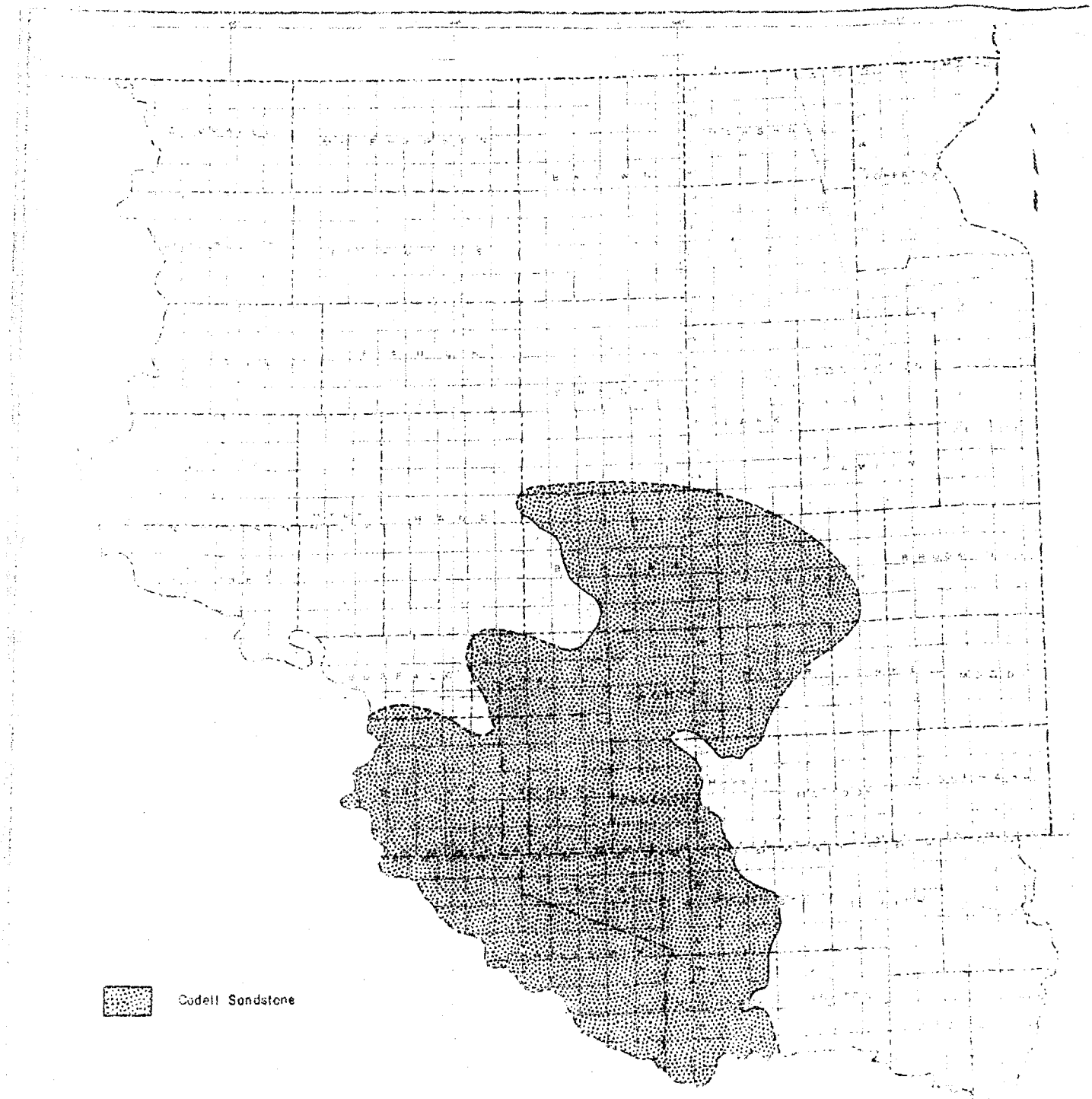


PLATE 9 MAP OF EASTERN SOUTH DAKOTA SHOWING MINIMUM DISTRIBUTION OF THE CODELL SANDSTONE MEMBER OF THE CARLILE SHALE

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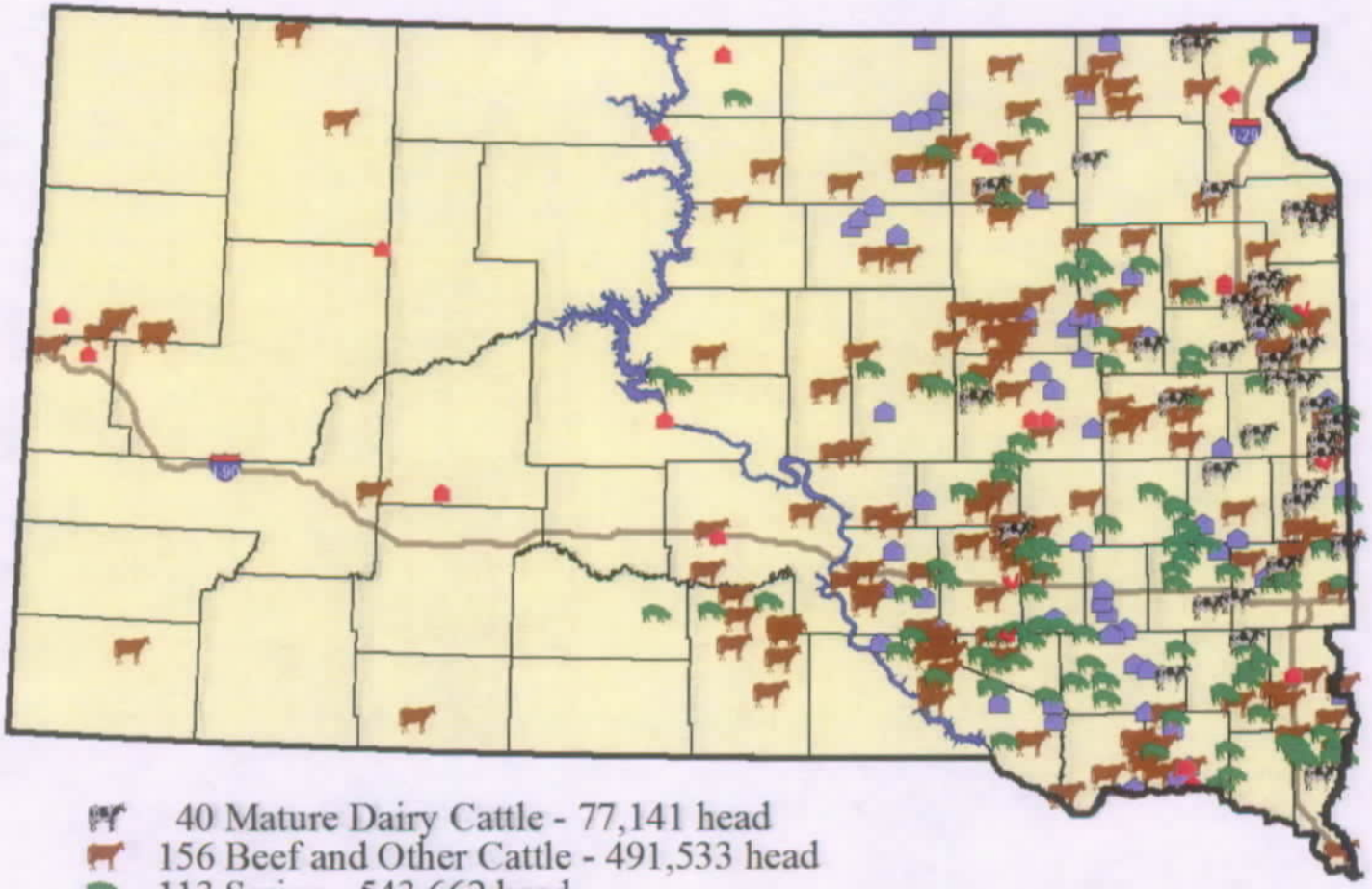
DENR Ex. 20

SD DENR Permitted CAFOs - November 12, 2010



40 Mature Dairy Cattle - 77,141 head
156 Beef and Other Cattle - 491,533 head
113 Swine - 543,662 head
6 Poultry - 4,074,500 head
64 Multi Animals - 3,214,242 head
18 Livestock Auctions
3 CAFOs Located in Another State with Land Application Areas in SD

400 Total Permits

Charles Abourezk
*Robin L. Zephier
Jon J. LaFleur
George J. Nelson

*Also licensed in Colorado

ABOUREZK LAW FIRM

P.O. BOX 9460
RAPID CITY, SD 57709-9460
(2020 W. Omaha Street)
TEL: (605) 342-0097
FAX: (605) 342-5170

RECEIVED
JAN 2 5 2011
WATER RIGHTS PROGRAM

Mike Abourezk
**Alicia D. Garcia

**Also licensed in California

January 24, 2011

Eric Gronlund
Water Rights Program
PMB 2020
Joe Foss Building
523 East Capitol
Pierre, SD 57501

Re: In the Matter of Water Permit Application No. 7206-3, Longview Farms, LLP

Dear Mr. Gronlund:

Enclosed is my Notice of Appearance in the Longview matter. Thank you.

Sincerely,

Jon J. LaFleur
Attorney for Yankton Sioux Tribe

JJL/nm
Enclosure
cc: Diane Best
Harold Shepherd
Eric Kerkvliet
David Nadolski
Jeff Hallem
Rodney Freeman
Sister Patricia Mylott
Joan Olive
Eva Bruguier
Robert Cournoyer
Rachel Bernie

RECEIVED
JAN 2 5 2011
WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONGVIEW FARMS, LLP	]	NOTICE OF APPEARANCE

NOTICE IS HEREBY GIVEN that Jon J. LaFleur enters his appearance as the attorney of record for the Yankton Sioux Tribe, in the above-captioned matter.

Dated this 24th day of January, 2011.

Jon J. LaFleur
Attorney for Yankton Sioux Tribe
Abourezk & Zephier, P.C.
P.O. Box 9460
Rapid City, SD 57709-9460
(605) 342-0097

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2011, I served a true and correct copy of the Notice of Appearance to the following parties:

Electronically and First Class Mail Postage Prepaid to:

Diane Best
Assistant Attorney General
300 N. Dakota Avenue, Suite 403
Sioux Falls, SD 57104
diane.best@state.sd.us

Harold Shepherd, Staff Attorney
Center of Water Advocacy
P.O. Box 2069
Homer, AK 99603
waterlaw@uci.net

Eric Gronlund
Water Rights Program
PMB 2020
Joe Foss Building
523 East Capitol
Pierre, SD 57501
eric.gronlunch@state.sd.us

Eric Kerkvliet
David Nadolski
Lynn, Jackson, Shultz & LeBrun
P.O. Box 1920
Sioux Falls, SD 57101
ekerkvliet@lynnjackson.com
dnadolski@lynnjackson.com

Electronically only to:

Jeff Hallem
jeff.hallem@state.sd.us

Rodney Freeman
rfreeman.huronlaw@midconetwork.com

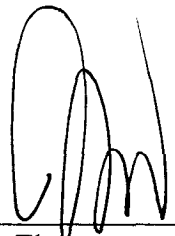
First Class Mail Postage Prepaid only to:

Sister Patricia Mylott
PO Box 217
Marty, SD 57361

Joan Olive
PO Box 72
Spencer, NE 68777

Eva Bruguier
PO Box 274
Marty, SD 57361

Dated this 24th day of January, 2011.



Jon J. LaFleur
Attorney for Yankton Sioux Tribe
Abourezk & Zephier, P.C.
P.O. Box 9460
Rapid City, SD 57709
(605) 342-0097

RECEIVED
JAN 3 1 2011
WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

In the Matter of the Application No. 7203-3, Long View Farms, LLP	)	MOTION TO WITHDRAW AS COUNSEL

Harold Shepherd, Attorney for Individual Petitioners, Faith Spotted Eagle, Judy Honimichle, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins, hereby, moves to withdraw as counsel in this matter. This motion is based on the attached Declaration of Harold Shepherd and the following points and authorities:

1) Mr. Shepherd's recent move to Alaska has made it logistically difficult for him to adequately represent the Individual Petitioners in this matter.

2) Mr. Shepherd's recent move to Alaska has increased travel and other costs for him to attend the hearing scheduled for March 10, 2011 and, otherwise, effectively represent the Individual Petitioners in this matter.

3) Mr. Shepherd will be on inactive status with the Washington State Bar starting in February 1, 2011 and will, therefore, no longer be eligible to appear before the Board *Pro-Hac-Vice* in this matter as required by the laws of the State of South Dakota.

The current addresses and contact information for the Individual Petitioners is as follows:

Faith Spotted Eagle
P.O. Box 667

Lake Andes, SD 57356
(605) 481-0416

Judy Honimichle
c/o Fort Randall Casino
38538 Sd Highway 46
Lake Andes, SD 57356-7011
(605) 487-7871
(605)487-7871

Sharon Drapeau
General Delivery
Marty, SD 57361

Wesly Hare
General Delivery
Marty, SD 57361
(605)491-3383

Glenn Drapeau
General Delivery
Lake Andes, SD 57356

Kip (Spotted Eagle) Collins
P.O. Box 667
Lake Andes, SD 57356
(605) 481-0416

Wherefore, Attorney for Individual Petitioners respectfully requests that the Board grant the motion to withdraw as counsel.

DATED Januray 25th, 2011

Harold Shepherd, WSBA No. 33456
Attorney for Individual Petitioners

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

In the Matter of the Application No. 7203-3, Long View Farms, LLP	)	DECLARATION OF HAROLD SHEPHERD

I Harold Shepherd, hereby, declare the following

1) I currently, reside in Homer, Alaska.

2) That I moved from Moab, Utah to Homer during the fall of 2010.

3) My recent move to Alaska has made it logistically difficult for me to adequately represent the Individual Petitioners in this matter.

4) My recent move to Alaska has increased travel and other costs for me to attend the hearing scheduled for March 10, 2011 and, otherwise, effectively represent the Individual Petitioners in this matter.

5) I will be on inactive status with the Washington State Bar starting in February 1, 2011 and will, therefore, no longer be eligible to appear before the Board *Pro-Hac-Vice* in this matter as required by the laws of the State of South Dakota.

6) I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

Dated 1/25/11

Harold Shepherd
Declarant

PROPOSED ORDER

This matter came before the Water Rights Management Board upon motion and declaration. The Board being fully advised in the premises, it is hereby

ORDERED that the request of Harold Shepherd to withdraw as counsel for Individual Petitioners, Faith Spotted Eagle, Judy Honimichle, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins is hereby:

_____ Granted.

_____ Denied

Order Prepared by,

Harold Shepherd
Attorney for Individual Petitioners

Dated this _____day of _____, 2011.

BY THE WATER RIGHTS MANAGEMENT BOARD:

_____
Board Chairman

ATTEST:
CLERK OF COURTS
BY: _____
Deputy Clerk

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2011, I caused the original pleading to be served by first class mail, postage prepaid, and e-mail, a true and correct copy of the Attorney for Individual Appellants' Faith Spotted Eagle, Sharon, Drapeau, Evelyn Black Moon, Wesley Hare, and Judy Honimichle Motion to Withdraw as Counsel to the following:

South Dakota DENR
Water Rights Management Board
c/o Eric Gronlund
PMB 2020
Water Rights Program
DENR
523 E. Capital Ave.
Pierre, SD 57501

I hereby certify that on this 25th day of January, 2011, I caused to be served by first class mail, postage prepaid, and e-mail, a true and correct copy of the Attorney for Individual Appellants' Faith Spotted Eagle, Sharon, Drapeau, Evelyn Black Moon, Wesley Hare, and Judy Honimichle Motion to Withdraw as Counsel to the following parties:

Diane Best and John Guhin
Assistant Attorney Generals for the State of South Dakota,
Counsel to SD DENR Water Rights Program
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501

David Nadolski
Eric Kerkvliet
Lynn, Jackson, Shultz & LeBrun
P.O. Box 1920
Sioux Falls, SD 57101

Jon Lafleur, Abourezk & Zephier, PC
2020 W. Omaha St.
P.O. Box 9460
Rapid City, SD 57702

Jeff Hallen
Ass't. Att'y Gen'l. For SD
Water Rights Management Board
Pierre, SD 57501-8501

Garland Eberle
Chief Engineer
South Dakota DENR
PMB 2020
Joe Foss Building
523 E. Capitol
Pierre, SD 57501

and that the same was provided by United States Mail, postage prepaid.

Harold Shepherd

STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL

300 N. Dakota Avenue, Suite 403
Sioux Falls, South Dakota 57104-6032
Phone (605) 367-5880
FAX (605) 367-5886
www.state.sd.us/atg

MARTY J. JACKLEY
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY

February 15, 2011

Rodney Freeman, Jr.
PO Box 176
Huron, SD 57350
rfreeman.huronlaw@midconetwork.com

Jeff Hallem
Counsel for WMB
1302 E. HWY 14, Suite 1
Pierre, SD 57501
Jeff.hallem@state.sd.us

Re: *Water Permit Application No. 7206-3, Matter of Longview Farms*

Dear Mr. Freeman and Mr. Hallem,

I am sending this letter via email in response to Mr. Hallem's email. (attached). This concerns a Request for Continuance made via email by Ms. Spotted Eagle This response is sent by email to the other persons listed on the Hallem email. Also, there are three parties for which I do not have email addresses and am sending the responses to them via First Class mail.

The DENR does not object to this particular continuance, but is likely to resist requests for delay in the future if any are requested. If a delay were to be granted, the Chief Engineer would schedule it for the Board's next regular meeting on May 4-5.

To clarify the history, this hearing was initially scheduled for October. An automatic statutory delay (SDCL 46-2A-5) was requested by YST and several petitioners including Ms. Spotted Eagle. The matter was scheduled for the Board's December meeting. Two days before the Board's December hearing, the matter was delayed by YST due to a change in YST's counsel. This was found to be unavoidable and not due to any fault of YST or counsel. This current request would be the third delay and is due to withdrawal of Harold Shepherd, counsel for Ms. Spotted Eagle and others.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General

Diane Best Ltr. 02/15/2011

Copies to:
Garland Erbele, Chief Engineer
Foss Building
523 E. Capitol Ave.
Pierre, SD 57501
Garland.erbele@state.sd.us
(via email only)

Eric Kerkvliet
David L. Nadolski
Counsel for Longview Farms
P.O. Box 2700
Sioux Falls, SD 57101-2700
ekerkvliet@lynnjackson.com
dnaolski@lynnjackson.com
(via email only)

Kip (Spotted Eagle) Collins
P.O. Box 667
Lake Andes, SD 57356
keyawitko2676@yahoo.com
(via email only)

Glenn Drapeau
General Delivery
Lake Andes, SD 57356
lemndrps@yahoo.com
(via email only)

Jim Dougherty
jimdougherty@aol.com
(via email only)

Eva Bruguier
PO Box 274
Marty, SD 57361
(First Class Mail)

Sister Patricia Mylott
PO Box 217
Marty, SD 57361
(First Class Mail)

Faith Spotted Eagle
PO Box 677
Lake Andes, SD 57356
eagletrax@hotmail.com
(via email only)

Charles Abourzek
Jon LeFleur
Counsel for Yankton Sioux Tribe
P.O. Box 9460
Rapid City, SD 57709-9460
jlafleur@rushmore.com
abourc@rushmore.com
(via email only)

Judy Honimichle
c/o Fort Randall Casino
38538 SD Highway 46
Lake Andes, SD 57356-7011
mjhonomichl@yahoo.com
(via email only)
Sharon Drapeau
General Delivery
Marty, SD 57361
sharon_d99@yahoo.com
(via email only)

Wesly Hare
General Delivery
Marty, SD 57361
(First Class Mail)

Joan Olive
PO Box 72
Spencer, NE 68777
(First Class Mail)

Best, Diane

From: Hallem, Jeff

Sent: Tuesday, February 15, 2011 1:20 PM

To: 'Faith Spotted Eagle'; rfreeman.huronlaw@midconetwork.com; Jim Dougherty; Sharon Drapeau; Glenn Drapeau; Kip Spotted EagleCollins; mabel honomichl; Best, Diane; Gronlund, Eric; 'ekerkvliet@lynnjackson.com'; 'Jon LaFleur'; Erbele, Garland

Subject: RE: Longview Farms

Prehearing Chairman Freeman and myself received the below e-mail from Faith Spotted Eagle. The e-mail was sent on behalf of those Intervenors that were represented by Harold Shepherd. Prehearing Chairman Freeman has determined to treat the e-mail as a motion to continue the hearing that is currently scheduled for March 10, 2011. This hearing was previously continued from December 2 and 3, 2011, at the request of Intervenor Yankton Sioux Tribe. Prehearing Chairman requests responses from all other parties to Faith Spotted Eagle's motion for continuance. To be considered, responses must be sent no later than 6:00 p.m. Thursday, February 17, 2011. Responses should be sent via e-mail to all individuals listed on the e-mail. Upon receipt and review of all responses received, the Prehearing Chairman will make his determination and notify the parties.

Jeffrey P. Hallem
Assistant Attorney General
Office of the Attorney General
1302 E. Hwy. 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Facsimile: (605) 773-4106
Jeff.Hallem@state.sd.us

Confidentiality Notice

This message is being sent by or on behalf of the South Dakota Attorney General's Office. It is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, attorney-client privileged, confidential, or otherwise legally exempt from disclosure. If you are not the named addressee, you are not authorized to read, print, retain, copy, or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately by telephone at (605) 773-3215 or by reply transmission by e-mail, and delete all copies of the message.

-----Original Message-----
From: Faith Spotted Eagle [mailto:eagletrax@hotmail.com]
Sent: Tuesday, February 15, 2011 10:05 AM
To: rfreeman.huronlaw@midconetwork.com; Hallem, Jeff; Jim Dougherty; Sharon Drapeau; Glenn Drapeau; Kip Spotted EagleCollins; mabel honomichl
Subject: FW: Longview Farms

Mr. Freeman, I was advised by Diane Best to contact you regarding my request to extend the hearing date of March 10, re myself and others as plaintiffs. We were represented by Harold Sheppard, and he had to withdraw. We have not yet found an attorney but we wish to go forward, we are raising funds, can you extend the date. I am not an attorney and do not know your processes. We are seeking a attorney. Please advise.

Subject: RE: Longview Farms
Date: Mon, 14 Feb 2011 12:57:11 -0600
From: Diane.Best@state.sd.us

To: Diane.Best@state.sd.us; eagletrax@hotmail.com

Faith, did you get the contact list I sent to you on Friday?
Are you going to file a motion or did you find an attorney?
Diane

-----Original Message-----

From: Best, Diane
Sent: Friday, February 11, 2011 1:26 PM
To: 'eagletrax@hotmail.com'
Subject: Longview Farms

<< File: Longview Farms Application.doc >>
Attached is the mailing list for Longview Farms.
Please send your letter to Mr. Freeman since he is the hearing examiner.
If you wish, you can do so via email.
You will also need to provide a copy to all the parties and also send a copy to the Chief Engineer for the file.

LAW OFFICES

Lynn, Jackson, Shultz & Lebrun, P.C.

LAWYERS ALSO ADMITTED IN MINNESOTA, IOWA, NEBRASKA AND WYOMING
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P.O. BOX 2700
SIOUX FALLS, SD 57101-2700
605-332-5999
FAX 605-332-4249

REPLY TO: Sioux Falls 605-332-5999

FIRST NATIONAL BANK BUILDING
909 ST. JOSEPH STREET
SUITE 800
P.O. BOX 8250
RAPID CITY, SD 57709-8250
605-342-2592
FAX 605-342-5185

From the offices of Eric R. Kerkvliet
e-mail address: ekerkvliet@lynnjackson.com

February 16, 2011

Rodney Freeman, Jr.
Attorney at Law
P.O. Box 176
Huron, SD 57350-0176
rfreeman.huronlaw@midconetwork.com

Jeff Hallem
Counsel for WMB
1302 E. HWY 14, Suite 1
Pierre, SD 57501
Jeff.hallem@state.sd.us

RE: Water Permit Application No. 7206-3, Matter of Longview Farms

Dear Mr. Freeman and Mr. Hallem:

Longview Farm, LLP ("Longview") objects to the request by Ms. Spotted Eagle for a continuance of the upcoming hearing for several reasons. Longview filed its water permit application in July of 2010, and the hearing on Longview's water permit application was originally scheduled for October. The Yankton Sioux Tribe and several petitioners, including Ms. Spotted Eagle, requested an automatic delay of the hearing, which was then rescheduled for December. A few days before the December hearing, the Yankton Sioux Tribe requested a continuance, which was granted. Counsel for Longview suggested a special meeting date in January so that this matter could be heard prior to the regularly scheduled March hearing. The South Dakota DENR objected to this request as the South Dakota legislature would be in session during January, and the matter was scheduled for the regular March hearing date.

Now, several weeks prior to the March hearing date, the individual petitioners have requested an additional continuance. Counsel for DENR has indicated that the next regularly scheduled hearing date is May 4-5. One of the main reasons in objecting to the request for continuance is that early May is in the middle of planting season for the representatives of Longview, which will need to be present at the hearing to testify.

Longview submitted the current water permit application in July of 2010 and have been awaiting a decision by the South Dakota Water Management Board so that they can construct a well. Representatives of Longview promised their neighbors and the Randall Community Water District that they would seek a water permit to use a well on their property. Delaying this hearing for an additional two months only serves to hinder Longview's ability to fulfill their promise to drill a well on their property.

Finally, the interests of the Yankton Sioux Tribe and the individual petitioners are similar and the Yankton Sioux Tribe has been adequately represented by counsel throughout the entire proceedings before the Water Management Board and the Circuit Court. The individual petitioners will not be unfairly prejudiced by the denial of their request for a continuance.

Longview respectfully requests that Ms. Spotted Eagle's request for a continuance be denied.

Sincerely,

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

Eric R. Kerkvliet

cc: Garland Erbele, Chief Engineer
Foss Building
523 E. Capitol Ave.
Pierre, SD 57501
Garland.erbele@state.sd.us
(via email only)

Diane Best, Assistant Attorney General
Office of Attorney General
300 North Dakota Ave.
Sioux Falls, SD 57104
Diane.Best@state.sd.us
(via email only)

Kip (Spotted Eagle) Collins
PO Box 667
Lake Andes, SD 57356
keyawitko2676@yahoo.com
(via email only)

Glenn Drapeau
General Delivery
Lake Andes, SD 57356
lemndrps@yahoo.com
(via email only)

Jim Dougherty
jimdougherty@aol.com
(via email only)

Eva Bruguier
PO Box 274
Marty, SD 57361
(first class mail)

Sister Patricia Mylott
PO Box 217
Marty, SD 57361
(first class mail)

Faith Spotted Eagle
PO Box 677
Lake Andes, SD 57356
eagletrax@hotmail.com
(via email only)

Charles Abourzek/Jon LeFleur
Counsel for Yankton Sioux Tribe
PO Box 9460
Rapid City, SD 57709-9460
jlafleur@rushmore.com
abourc@rushmore.com
(via email only)

Judy Honimichle
c/o Fort Randall Casino
38538 SD Highway 46
Lake Andes, SD 57356-7011
mjhonomichl@yahoo.com
(via email only)

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

February 22, 2011

NOTICE

TO: Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239
and Parties of Record (see attached list)

FROM: Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Continuance of Hearing for Water Permit Application No. 7206-3, Long View Farms LLP

Water Permit Application No. 7206-3 seeks to appropriate 30 gallons per minute from one well to be completed into the Codell Aquifer located in the SW ¼ NW ¼ Section 9, T95N, R64W for commercial use at a swine farrowing facility in Charles Mix County.

Prehearing Chairman Rodney Freeman issued an order granting motion for continuance of the hearing filed by Intervenor Faith Spotted Eagle. Attached is the order granting the continuance. Please note there was an error in the heading on the Order and the referenced water permit application number should be No. 7206-3.

The Water Management Board will now conduct an evidentiary hearing to consider Application No. 7206-3 at their July 13 – 14, 2011 meeting. Future notice will be provided to all parties of the time and location of the hearing.

Please contact Eric Gronlund at (605) 773-3352, if you have any questions.

enclosures

c: Diane Best, Assistant Attorney General

PARTIES OF RECORD

WATER PERMT APPLICATION No. 7206-3, Long View Farms LLP

Applicant

Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239

represented by:

Eric Kerkvliet, Attorney
Dave Nadolski
Lynn, Jackson, Shultz & Lebrun
PO Box 1920
Sioux Falls SD 57101

Petitioners

Yankton Sioux Tribe
Represented by:
Jon LaFleur, Attorney
Abourezk & Zephier, PC
PO Box 9460
Rapid City SD 57709

Sister Patricia Mylott
PO Box 217
Marty SD 57361

Joan Olive
Box 72
Spencer NE 68777

Ms. Eva Bruguier
PO Box 274
Marty SD 57361

Faith Spotted Eagle
PO Box 667
Lake Andes SD 57356

Judy Honimichle
c/o Fort Randall Casino
38538 SD Hwy 46
Lake Andes SD 57356-7011
(returned by USPS as undeliverable)

Sharon Drapeau
General Delivery
Marty SD 57361

Wesly Hare
General Delivery
Marty SD 57361

Glenn Drapeau
General Delivery
Lake Andes SD 57356

Kip (Spotted Eagle) Collins
PO Box 667
Lake Andes SD 57356

CERTIFICATION

I hereby certify that on February 22, 2011, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated February 22, 2011, regarding a Continuance for Water Right Permit Application No. 7206-3, as set for on the attached parties of record and addressed below:

Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239

Diane Best, Assistant Attorney General
300 N. Dakota Avenue, Suite 403
Sioux Falls SD 57104

Sent Notice Inter-office Mail to:

Jeff Hallem Assistant Attorney General, 1302 E Hwy 14, Suite 1, Pierre SD 57501-8501

Gail Jacobson
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 22nd day of February, 2011

Patty McQuay
Notary Public
My Commission Expires September 6, 2016

PATTY R. MCQUAY NOTARY PUBLIC SEAL SOUTH DAKOTA MY COMMISSION EXPIRES 09-06-2016

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7203-3, LONGVIEW FARMS, LLP	)))	ORDER GRANTING MOTION FOR CONTINUANCE

Intervenor Faith Spotted Eagle, on her behalf and behalf of Intervenors Judy Honomichl, Sharon Drapeau, Glenn Drapeau, Kip (Spotted Eagle) Collins, and Wesley Hare, Jr., brought a motion before Prehearing Chairman Rodney Freeman, Jr. to continue the hearing in the above matter, currently scheduled for March 10, 2011. The reason stated for the continuance was the withdrawal of their counsel, Harold Shepherd. The Prehearing Chairman was notified of Mr. Shepherd's withdrawal on January 25, 2011.

Following receipt of the motion, the Prehearing Chairman requested responses from the parties. Responses were received from counsel representing Applicant, Intervenor Yankton Sioux Tribe and the Department of Environment and Natural Resources, Water Rights Program (DENR). Neither DENR nor the Tribe objected to the continuance. The Applicant objected, but its only stated prejudice to a continuance was its desire to fulfill a promise Applicant made to its neighbors and Randall Community Water District to drill a well on its property.

Based upon a review of the motion, responses, and with full knowledge of the administrative record in this matter, the Prehearing Chairman concludes that Intervenors have stated good cause for a continuance and that Applicant

has not stated any actual prejudice that will result from delay. Therefore, the motion for continuance is hereby granted.

Counsel for Yankton Sioux Tribe stated he was not available for a hearing on Applicant's water permit application at the Board's scheduled meeting in May. Counsel for Applicant stated that representatives from Applicant would also be unable to attend the May meeting due to crop planting. Therefore it is hereby ORDERED:

That the hearing on Water Permit Application No. 7203-3, Longview Farms, LLP, is continued to the Water Management Board's July meeting, currently scheduled for July 13 and 14, 2011. If counsel are unavailable for those dates, Eric Gronlund should be notified so the full Board may take up the issue of scheduling a different hearing date at its March meeting.

Dated this 18th day of February, 2011.

Rodney Freeman, Jr.
Prehearing Chairman

LAW OFFICES

Lynn, Jackson, Shultz & Lebrun, P.C.

LAWYERS ALSO ADMITTED IN MINNESOTA, IOWA, NEBRASKA AND WYOMING
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REPLY TO: Sioux Falls 605-332-5999

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909 ST. JOSEPH STREET
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P.O. BOX 8250
RAPID CITY, SD 57709-8250
605-342-2592
FAX 605-342-5185

From the offices of Eric R. Kerkvliet
e-mail address: ekerkvliet@lynnjackson.com

February 25, 2011

Rodney Freeman, Jr.
Attorney at Law
P.O. Box 176
Huron, SD 57350-0176
rfreeman.huronlaw@midconetwork.com

Jeff Hallem
Counsel for WMB
1302 E. HWY 14, Suite 1
Pierre, SD 57501
Jeff.hallem@state.sd.us

VIA U.S. MAIL and EMAIL

RE: Water Permit Application No. 7206-3, Matter of Longview Farms

Dear Mr. Freeman and Mr. Hallem:

Longview Farm, LLP ("Longview") respectfully requests the Prehearing Chairman reconsider the decision granting Ms. Spotted Eagle's request for a continuance and the scheduling of this matter for hearing in July of 2011.

On January 25, 2010, Harold Shepherd, attorney for the individual petitioners (including Ms. Spotted Eagle), notified the parties that he was withdrawing as counsel for the individual petitioners. On February 15, 2010, Ms. Spotted Eagle made a request for a continuance, which was granted by the Prehearing Chairman. The water permit application that is currently under consideration was filed in July of 2010, which is an entire year prior to the date currently set for the evidentiary hearing.

Because Longview is prejudiced by this extended delay, it respectfully requests the Prehearing Chairman reconsider the decision to grant Ms. Spotted Eagle's request for continuance so that this matter can be heard prior to July of 2011.

Longview desires to use its well as a water source in addition to the Randall Community Water District and as an emergency backup in the event of a Randall Community Water District failure. Any failure of Longview's rural water supply would be devastating to Longview and the postponing of the evidentiary hearing only serves to delay the ruling by the Water Management Board, while increasing the likelihood that Longview would be without a backup water supply for the next several months.

In sum, Longview respectfully requests a telephonic hearing with the Water Management Board and opposing counsel during the regularly scheduled March Water Management Board meeting so that an evidentiary hearing can be scheduled for late March or early April. Scheduling the evidentiary hearing for late March or early April would cause the least amount of prejudice to Longview, while giving Ms. Spotted Eagle and the individual petitioners ample time to hire an attorney to assist them and the Yankton Sioux Tribe in opposing Longview's application for a water permit.

In the alternative, Longview respectfully requests a determination by the Prehearing Chairman that either (1) Longview has exhausted all administrative remedies with regard to the scheduling of the evidentiary hearing and the Order Granting Motion for Continuance is a final decision of the Water Management Board, or (2) the Order Granting Motion for Continuance is a procedural ruling that is immediately reviewable pursuant to SDCL §1-26-30. Either determination would allow Longview to appeal the decision of the Prehearing Chairman to the Circuit Court.

Respectfully submitted,

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

Eric R. Kerkvliet

cc: Garland Erbele, Chief Engineer
Foss Building
523 E. Capitol Ave.
Pierre, SD 57501
Garland.erbele@state.sd.us
(via email only)

Diane Best, Assistant Attorney General
Office of Attorney General
300 North Dakota Ave.
Sioux Falls, SD 57104
Diane.Best@state.sd.us
(via email only)

Kip (Spotted Eagle) Collins
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keyawitko2676@yahoo.com
(via email only)

Jim Dougherty
jimdougherty@aol.com
(via email only)

Glenn Drapeau
General Delivery
Lake Andes, SD 57356
lemndrps@yahoo.com
(via email only)

Eva Bruguier
PO Box 274
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(first class mail)

Sister Patricia Mylott
PO Box 217
Marty, SD 57361
(first class mail)

Faith Spotted Eagle
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Lake Andes, SD 57356
eagletrax@hotmail.com
(via email only)

Charles Abourzek/Jon LeFleur
Counsel for Yankton Sioux Tribe
PO Box 9460
Rapid City, SD 57709-9460
jlafleur@rushmore.com
abourc@rushmore.com
(via email only)

Judy Honimichle
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mjhonomichl@yahoo.com
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Sharon Drapeau
General Delivery
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Sharon_d99@yahoo.com
(via email only)

Wesly Hare
General Delivery
Marty, SD 57361
(first class mail)

Joan Olive
PO Box 72
Spencer, NE 68777
(first class mail)

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP	)))))	ORDER SCHEDULING LONGVIEW FARMS, LLP'S REQUEST TO RECONSIDER ORDER GRANTING MOTION FOR CONTINUANCE

Applicant, Longview Farms, LLP, has made a request for the Prehearing Chairman to reconsider his Order Granting Motion for Continuance dated February 18, 2011, in the above-entitled matter. The Prehearing Chairman finds that Longview's request for an earlier hearing date is reasonable, but that he does not have the ability to set an alternative hearing date for the application without input from the full Board. Therefore, finding the request is for good cause, it is hereby

ORDERED, that a hearing on Applicant Longview Farms, LLP's request for setting of an alternative hearing date for its Application is scheduled to be heard by the entire Water Management Board on March 9, 2011, at 11:00 a.m. Central Time at the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre, South Dakota. To participate, parties may be present in person or may participate through phone by accessing the dial-in number (605) 773-2307 and conference password number 3606.

Dated this 28th day of February, 2011.

Rodney Freeman, Jr.
Prehearing Chairman

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

March 1, 2011

NOTICE

TO: Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239
and Parties of Record (see attached list)

FROM: Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Order Scheduling LongView Farms, LLP's Request to Reconsider Order Granting Motion for Continuance

Prehearing Chairman Rodney Freeman issued the attached order scheduling LongView Farm LLP's request to reconsider order granting motion for continuance in the matter of Water Permit Application No. 7206-3. The Water Management Board will consider this matter on March 9, 2011 at 11:00 AM Central Time. Parties may participate in person or by phone as set forth in the order.

enclosure

c: Water Management Board
Diane Best, Assistant Attorney General, 300 N. Dakota Ave., Suite 403 Sioux Falls SD 57104
Jeff Hallem, Assistant Attorney General, 1302 E Hwy 14, Suite 1, Pierre SD 57501-8501

PARTIES OF RECORD

WATER PERMT APPLICATION No. 7206-3, Long View Farms LLP

Applicant

Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239

represented by:

Eric Kerkvliet, Attorney
Dave Nadolski
Lynn, Jackson, Shultz & Lebrun
PO Box 1920
Sioux Falls SD 57101

Petitioners

Yankton Sioux Tribe
Represented by:
Jon LaFleur, Attorney
Abourezk & Zephier, PC
PO Box 9460
Rapid City SD 57709

Sister Patricia Mylott
PO Box 217
Marty SD 57361

Joan Olive
Box 72
Spencer NE 68777

Ms. Eva Bruguier
PO Box 274
Marty SD 57361

Faith Spotted Eagle
PO Box 667
Lake Andes SD 57356

Judy Honimichle
c/o Fort Randall Casino
38538 SD Hwy 46
Lake Andes SD 57356-7011
(returned by USPS as undeliverable)

Sharon Drapeau
General Delivery
Marty SD 57361

Wesly Hare
General Delivery
Marty SD 57361

Glenn Drapeau
General Delivery
Lake Andes SD 57356

Kip (Spotted Eagle) Collins
PO Box 667
Lake Andes SD 57356

CERTIFICATION

I hereby certify that on March 1, 2011, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated March 1, 2011, Prehearing Chairman Freeman's Order regarding applicant's request to reconsider in the matter of Water Right Permit Application No. 7206-3, as set for on the attached parties of record and addressed below:

Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239

Chad Comes PE
PO Box 308
Madison SD 57042

Rodney Freeman Jr
PO Box 176
Huron SD 57350

Everett Hoyt
4422 Carriage Hills Dr
Rapid City SD 57702

Jim Hutmacher
802 E 7th Street
Oacoma SD 57365

Diane Best, Assistant Attorney General
300 N. Dakota Avenue, Suite 403
Sioux Falls SD 57104

Leo Holzbauer
PO Box 877
Wagner SD 57380

Bernita Loucks
255 Texas Street #F 332
Rapid City SD 57701

Tim Bjork
112 W Oak Street
Pierre SD 57501

Sent Notice Inter-office Mail to:

Jeff Hallem Assistant Attorney General, 1302 E Hwy 14, Suite 1, Pierre SD 57501-8501

Gail Jacobson
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 1st day of March, 2011

Karen Schlaak
Notary Public
My Commission expires April, 2013

SEAL KAREN SCHLAAK NOTARY PUBLIC State of South Dakota SEAL

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP	)))))	ORDER SCHEDULING LONGVIEW FARMS, LLP'S REQUEST TO RECONSIDER ORDER GRANTING MOTION FOR CONTINUANCE

Applicant, Longview Farms, LLP, has made a request for the Prehearing Chairman to reconsider his Order Granting Motion for Continuance dated February 18, 2011, in the above-entitled matter. The Prehearing Chairman finds that Longview's request for an earlier hearing date is reasonable, but that he does not have the ability to set an alternative hearing date for the application without input from the full Board. Therefore, finding the request is for good cause, it is hereby

ORDERED, that a hearing on Applicant Longview Farms, LLP's request for setting of an alternative hearing date for its Application is scheduled to be heard by the entire Water Management Board on March 9, 2011, at 11:00 a.m. Central Time at the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre, South Dakota. To participate, parties may be present in person or may participate through phone by accessing the dial-in number (605) 773-2307 and conference password number 3606.

Dated this 28th day of February, 2011.

Rodney Freeman, Jr.
Prehearing Chairman

PROPOSED ORDER

This matter came before the Water Rights Management Board upon motion and declaration. The Board being fully advised in the premises, it is hereby

ORDERED that the request of Harold Shepherd to withdraw as counsel for Individual Petitioners, Faith Spotted Eagle, Judy Honimichle, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins is hereby:

✓ Granted.

_____ Denied

Order Prepared by,

Harold Shepherd
Attorney for Individual Petitioners

Dated this 9 day of March, 2011.

BY THE WATER RIGHTS MANAGEMENT BOARD:

Board Chairman

ATTEST:
CLERK OF COURTS
BY: _____
Deputy Clerk

(SEAL)

RECEIVED
MAR 16 2011
WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP	)))))	ORDER AFFIRMING PREHEARING CHAIRMAN'S FEBRUARY 18, 2011, ORDER GRANTING MOTION FOR CONTINUANCE

This matter comes before the Water Management Board on Applicant Longview Farms, LLP's request for a reconsideration of Prehearing Chairman Freeman's February 18, 2011, Order Granting Motion for Continuance, regarding a continuance request made by Intervenor Faith Spotted Eagle on her behalf and other individual intervenor's following the withdrawal of their legal counsel, Harold Shepherd. A hearing on Applicant's reconsideration request was held on March 9, 2011, at which a quorum of the Board was present. Appearing at the hearing in person or by conference phone were counsel of record for Applicant, Intervenor Yankton Sioux Tribe and DENR Water Rights Program. No individual intervenor appeared, despite notice and opportunity to appear by conference phone.

During the hearing, the Board heard comments from counsel regarding the Prehearing Chairman's Order which continued the hearing on Application No. 7206-3 Longview Farms, LLP to July 13 and 14, 2011. There was no assertion by Applicant that any of the continuances granted in this matter lacked good cause. Further, based upon comments received, the Board was unable to reschedule its May meeting to accommodate schedules of the parties. Therefore, it is hereby

ORDERED, that the Prehearing Chairman's February 18, 2011, Order Granting Motion for Continuance is affirmed in all respects.

Dated this 14 day of March, 2011.

BY THE BOARD:

Tim Bjork, Chairman
South Dakota Water Management Board

Pld JPH Order Affirming Prehearing Chairman's Feb 18 Order Granting Motion 03.10.2011 (ms)

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

March 22, 2011

NOTICE

TO: Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239
and Parties of Record (see attached list)

FROM: Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Water Permit Application No. 7206-3, LongView Farms LLP

The Water Management Board met on March 9, 2011 to consider LongView Farms request to reconsider order granting motion for continuance and Harold Shepherd's motion to withdraw as counsel.

The attached order affirms the Prehearing Chairman's February 18, 2011 order granting the motion for continuance on Water Permit Application No. 7206-3 to the Water Management Board's July meeting.

The Board granted Mr. Shepherd's motion to withdraw as counsel for individual petitioners. This order is also attached.

The Water Management Board will now conduct an evidentiary hearing to consider Application No. 7206-3 at their July 13 – 14, 2011 meeting. There is the possibility that the hearing may continue on Friday, July 15th if necessary to conclude testimony. Parties shall plan accordingly. Future notice will be provided to all parties of the time and location of the hearing.

Please contact Eric Gronlund at (605) 773-3352, if you have any questions.

enclosures

c: Diane Best, Assistant Attorney General
Harold Shepherd, Center for Water Advocacy,3734 Ben Walters Ln Homer, AK 99603

PARTIES OF RECORD

WATER PERMT APPLICATION No. 7206-3, Long View Farms LLP

Applicant

Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239

represented by:

Eric Kerkvliet, Attorney
Dave Nadolski, Attorney
Lynn, Jackson, Shultz & Lebrun
PO Box 1920
Sioux Falls SD 57101

Petitioners

Yankton Sioux Tribe
Represented by:
Jon LaFleur, Attorney
Abourezk & Zephier, PC
PO Box 9460
Rapid City SD 57709

Sister Patricia Mylott
PO Box 217
Marty SD 57361

Joan Olive
Box 72
Spencer NE 68777

Ms. Eva Bruguier
PO Box 274
Marty SD 57361

Faith Spotted Eagle
PO Box 667
Lake Andes SD 57356

Judy Honimichle
c/o Fort Randall Casino
38538 SD Hwy 46
Lake Andes SD 57356-7011
(returned by USPS as undeliverable)

Sharon Drapeau
General Delivery
Marty SD 57361

Wesly Hare
General Delivery
Marty SD 57361

Glenn Drapeau
General Delivery
Lake Andes SD 57356

Kip (Spotted Eagle) Collins
PO Box 667
Lake Andes SD 57356

CERTIFICATION

I hereby certify that on March 22, 2011, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated March 22, 2011, regarding a Water Right Permit Application No. 7206-3, as set forth on the attached parties of record and addressed below:

Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239

Harold Shepherd, Director
Center for Water Advocacy
3734 Ben Walters Ln
Homer, AK 99603

Diane Best, Assistant Attorney General
300 N. Dakota Avenue, Suite 403
Sioux Falls SD 57104

Gail Jacobson
Gail Jacobson
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 22nd day of March, 2011

Karen Schlaak
Karen Schlaak
Notary Public
My Commission expires April 1, 2013

SEAL KAREN SCHLAAK NOTARY PUBLIC State of South Dakota SEAL

PROPOSED ORDER

This matter came before the Water Rights Management Board upon motion and declaration. The Board being fully advised in the premises, it is hereby

ORDERED that the request of Harold Shepherd to withdraw as counsel for Individual Petitioners, Faith Spotted Eagle, Judy Honimichle, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins is hereby:

✓ Granted.

_____ Denied

Order Prepared by,

_____
Harold Shepherd
Attorney for Individual Petitioners

Dated this 9 day of March, 2011.

BY THE WATER RIGHTS MANAGEMENT BOARD:

_____
Board Chairman

ATTEST:
CLERK OF COURTS
BY: _____
Deputy Clerk

(SEAL)

RECEIVED
MAR 16 2011
WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP	)))))	ORDER AFFIRMING PREHEARING CHAIRMAN'S FEBRUARY 18, 2011, ORDER GRANTING MOTION FOR CONTINUANCE

This matter comes before the Water Management Board on Applicant Longview Farms, LLP's request for a reconsideration of Prehearing Chairman Freeman's February 18, 2011, Order Granting Motion for Continuance, regarding a continuance request made by Intervenor Faith Spotted Eagle on her behalf and other individual intervenor's following the withdrawal of their legal counsel, Harold Shepherd. A hearing on Applicant's reconsideration request was held on March 9, 2011, at which a quorum of the Board was present. Appearing at the hearing in person or by conference phone were counsel of record for Applicant, Intervenor Yankton Sioux Tribe and DENR Water Rights Program. No individual intervenor appeared, despite notice and opportunity to appear by conference phone.

During the hearing, the Board heard comments from counsel regarding the Prehearing Chairman's Order which continued the hearing on Application No. 7206-3 Longview Farms, LLP to July 13 and 14, 2011. There was no assertion by Applicant that any of the continuances granted in this matter lacked good cause. Further, based upon comments received, the Board was unable to reschedule its May meeting to accommodate schedules of the parties. Therefore, it is hereby

ORDERED, that the Prehearing Chairman's February 18, 2011, Order Granting Motion for Continuance is affirmed in all respects.

Dated this 14 day of March, 2011.

BY THE BOARD:

Tim Bjork, Chairman
South Dakota Water Management Board

Pld JPH Order Affirming Prehearing Chairman's Feb 18 Order Granting Motion 03.10.2011 (ms)

Gronlund, Eric

From: Martin, Nicole <nmartin@azlaw.pro>
Sent: Monday, June 27, 2011 5:29 PM
To: Gronlund, Eric; Best, Diane; ekerkvliet@lynnjackson.com; dnadolski@lynnjackson.com; jeff.hallem@state.sd.ud; rfreeman.huronlaw@midconetwork.com
Cc: Lafleur, Jon
Subject: FW: Longview Farms Matter
Attachments: 20110627153222592.pdf

Attached is correspondence from Attorney Jon LaFleur, together with the document referenced therein. If you have any trouble opening the attachment, please let me know.

Thank you,

Nicole Martin
Legal Assistant to Jon J. LaFleur
Abourezk & Zephier, P.C.
2020 W. Omaha Street
P.O. Box 9460
Rapid City, South Dakota 57709-9460
605.342.0097
605.342.5170 (Fax)
nmartin@azlaw.pro

THIS E-MAIL MESSAGE CONTAINS ATTORNEY-GENERATED PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED SOLELY FOR THE ADDRESSEE ABOVE. IF YOU RECEIVED THIS E-MAIL MESSAGE IN ERROR, PLEASE DELETE IT IMMEDIATELY AND CONTACT THE SENDER.

Charles Abourezk
*Robin L. Zephier
Jon J. LaFleur
George J. Nelson

*Also licensed in Colorado

ABOUREZK LAW FIRM

P.O. BOX 9460
RAPID CITY, SD 57709-9460
(2020 W. Omaha Street)
TEL: (605) 342-0097
FAX: (605) 342-5170

Mike Abourezk
**Alicia D. Garcia

**Also licensed in California

June 27, 2011

Eric Gronlund
Water Rights Program
PMB 2020
Joe Foss Building
523 East Capitol
Pierre, SD 57501

Re: In the Matter of Water Permit Application No. 7206-3, Longview Farms, LLP

Dear Mr. Gronlund:

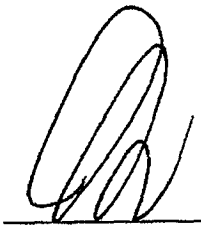
Enclosed is the Revised Exhibit List of Petitioner Yankton Sioux Tribe in the Longview matter. The additional exhibits reflect demonstrative exhibits expected to be used by Yankton Sioux Tribe witness, Dr. Perry Rahn. Thank you.

Sincerely,

Jon J. LaFleur
Attorney for Yankton Sioux Tribe

JJL/nm
Enclosure
cc: Diane Best
Eric Kerkvliet/David Nadolski
Jeff Hallem
Rodney Freeman
Sister Patricia Mylott
Joan Olive
Eva Bruguier
Faith Spotted Eagle
Judy Honimichle
Sharon Drapeau
Wesly Hare
Glenn Drapeau
Kip (Spotted Ealge) Collins
Robert Cournoyer
Rachel Bernie

Dated this 27th day of June, 2011.



Jon J. LaFleur
Attorney for Yankton Sioux Tribe
Abourezk & Zephier, P.C.
P.O. Box 9460
Rapid City, SD 57709-9460
(605) 342-0097

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2011, I served a true and correct copy of the Revised Exhibit List of Petitioner Yankton Sioux Tribe to the following parties:

Electronically and First Class Mail Postage Prepaid to:

Diane Best
Assistant Attorney General
300 N. Dakota Avenue, Suite 403
Sioux Falls, SD 57104
diane.best@state.sd.us

Eric Gronlund
Water Rights Program
PMB 2020
Joe Foss Building
523 East Capitol
Pierre, SD 57501
eric.gronlunch@state.sd.us

Eric Kerkvliet
David Nadolski
Lynn, Jackson, Shultz & LeBrun
P.O. Box 1920
Sioux Falls, SD 57101
ekerkvliet@lynnjackson.com
dnadolski@lynnjackson.com

Electronically only to:

Jeff Hallem
jeff.hallem@state.sd.us

Rodney Freeman
rfreeman.huronlaw@midconetwork.com

First Class Mail Postage Prepaid only to:

Sister Patricia Mylott
PO Box 217
Marty, SD 57361

Joan Olive
PO Box 72
Spencer, NE 68777

Eva Bruguier
PO Box 274
Marty, SD 57361

Faith Spotted Eagle
P.O. Box 667
Lake Andes, SD 57356

Judy Honimichle
c/o Fort Randall Casino
38538 SD Hwy. 46
Lake Andes, SD 57356

Sharon Drapeau
General Delivery
Marty, SD 57361

Wesly Hare
General Delivery
Marty, SD 57361

Glenn Drapeau
General Delivery

Lake Andes, SD 57356

Kip (Spotted Eagle) Collins
P.O. Box 667
Lake Andes, SD 57356

Dated this 21st day of June, 2011.

Jon J. LaFleur
Attorney for Yankton Sioux Tribe
Abourezk & Zephier, P.C.
P.O. Box 9460
Rapid City, SD 57709
(605) 342-0097

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONGVIEW FARMS, LLP	]]]]]	REVISED EXHIBIT LIST OF PETITIONER YANKTON SIOUX TRIBE

Following is the Exhibit List of Petition Yankton Sioux Tribe. Revisions to the Exhibit List are in bold lettering and reflect demonstrative exhibits expected to be used by Yankton Sioux Tribe witness, Dr. Perry Rahn.

Exhibit Number	**Exhibit Description**
1	2008 Map of Trust lands on the Yankton Indian Reservation Near Long View Farms and Manure Management Areas, John Stone, Yankton Sioux Tribe environmental Protection Department.
2	Curriculum Vitae of Dr. Perry Rahn
3	Hydrogeology of the Ft. Randall Casino area, Charles Mix County, South Dakota, November 25, 2008, Dr. Perry Rahn
4	Response to Derric Iles' Comments Regarding Request for Modification and/or Reconsideration of the Permitting of Longview Farm, LLP, Prepared by Dr. Perry Rahn
5	Flow Net Analysis, Dr. Perry Rahn
6	Yankton Sioux Tribe Wells in the USGS ground-water database with the historical boundary area
7	South Dakota Water Well Completion Reports, Charles Mix County 2008
8	South Dakota DENR September 16, 2008 Long View Farm, LLP Notification of Certificate of Compliance
9	South Dakota DENR September 16, 2008 Longview Farm, LLP Notification of Approval of Changes in As-Built Drawings
10	Long View Farm, LLP April 17, 2009 AWMS Computations for Deep Pit Swine Productions Operations

11 South Dakota DENR April 29, 2008 Long View Farm, LLP Approval of Manure Management System Revised Plans and Specifications

12 South Dakota DENR Internal Memorandum of September 9, 2007 from Sarah Speck to Harold Krein on Longview Farm Animal Waste Management System Plans and Specifications, Charles Mix County

13 Izaak Walton League of America January 1980-December 2005 Fish Kills and Manure Spills Report

14 Map of Longview Farm, LLP in Relation to Karl Mundt National Wildlife Refuge

15 Steve Wing et. al, Air Pollution and Odor in Communities Near Industrial Swine Operations," Environmental Health Perspectives, October 2008

16 Burkholder et. al, "Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality," Environmental Health Perspectives, February 2007

17 Heederick et. al, "Health Effects of Airborne Exposures from Concentrated Animal Feeding Operations," Environmental Health Perspective, February 2007

18 Bureau of Indian Affairs 2005 Labor Force Report, Yankton Sioux Agency

19 April 24, 2008 Correspondence from Mike Horned Eagle, Wagner Service Unit Indian Health Service on Health Characteristics of Wagner Service Unit User Population

20 Charles Mix County NRCS Compiled Soils and DENR Well Log Map

21 SDGS Map

22 Preglacial Streams Map

23 Land Application Sites for Long View Farm, LLP Manure Areas

24 S.D. Academy of Science Antimicrobial Activity of Native South Dakota Plant Extracts on Escherichia Coli

25 Ablation/Lodgement Tills

26 Definition of Aquifer

27 Glossary of Geology

28 Codell SS. Map

29 Generalized Stratigraphic Column Listing Geologic Formations and some of their Water-Bearing Characteristics

Martin, J.E., J. Foster Sawyer, M.D. Fahrenbach, D.W. Tomhave, and L.D. Schulz, 2004, Geologic map of South Dakota: South Dakota Geological Survey.

Qlls = Illinoian glaciofluvial moraine

To = Ogallala Group (includes Herrick and northern derived gravels)

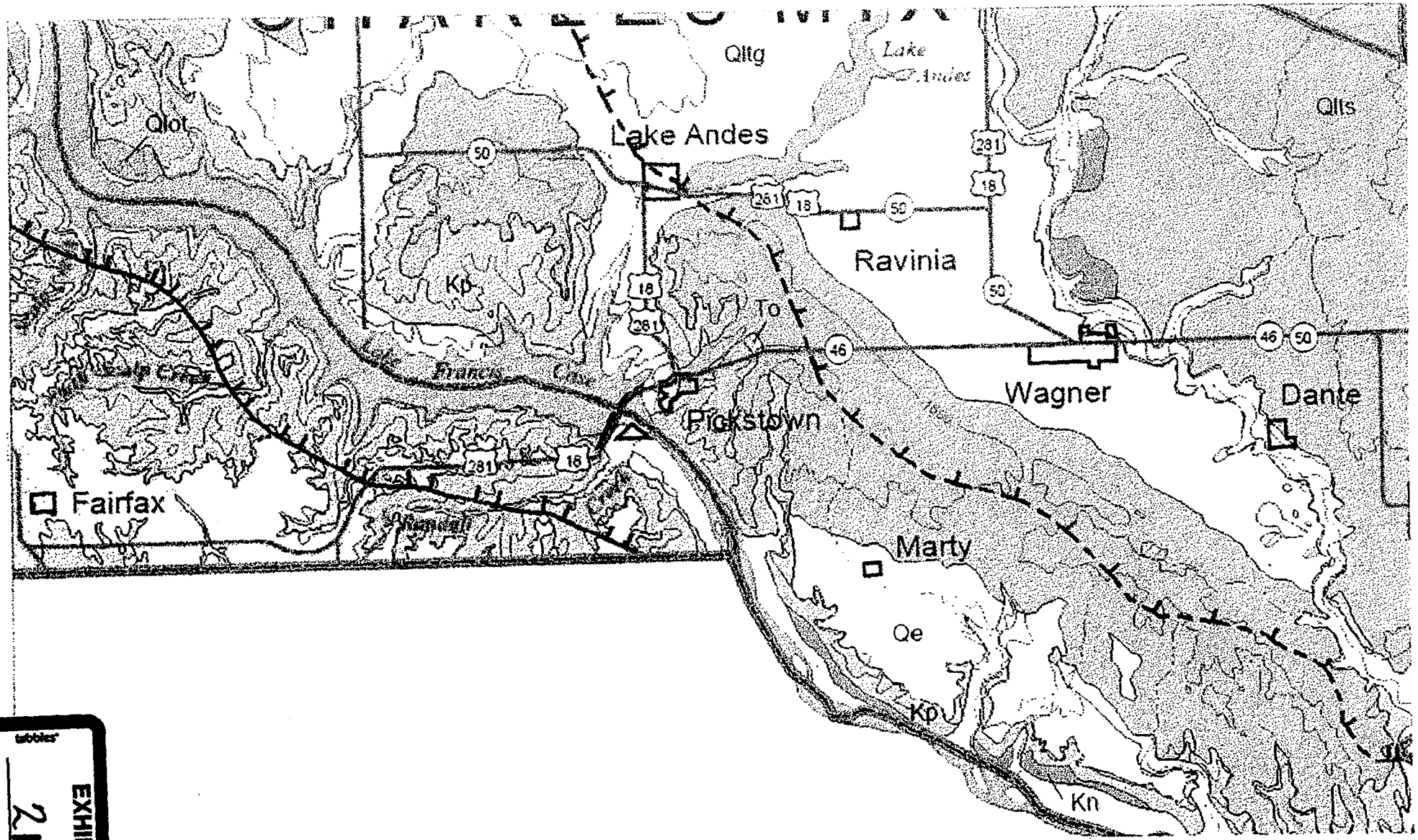
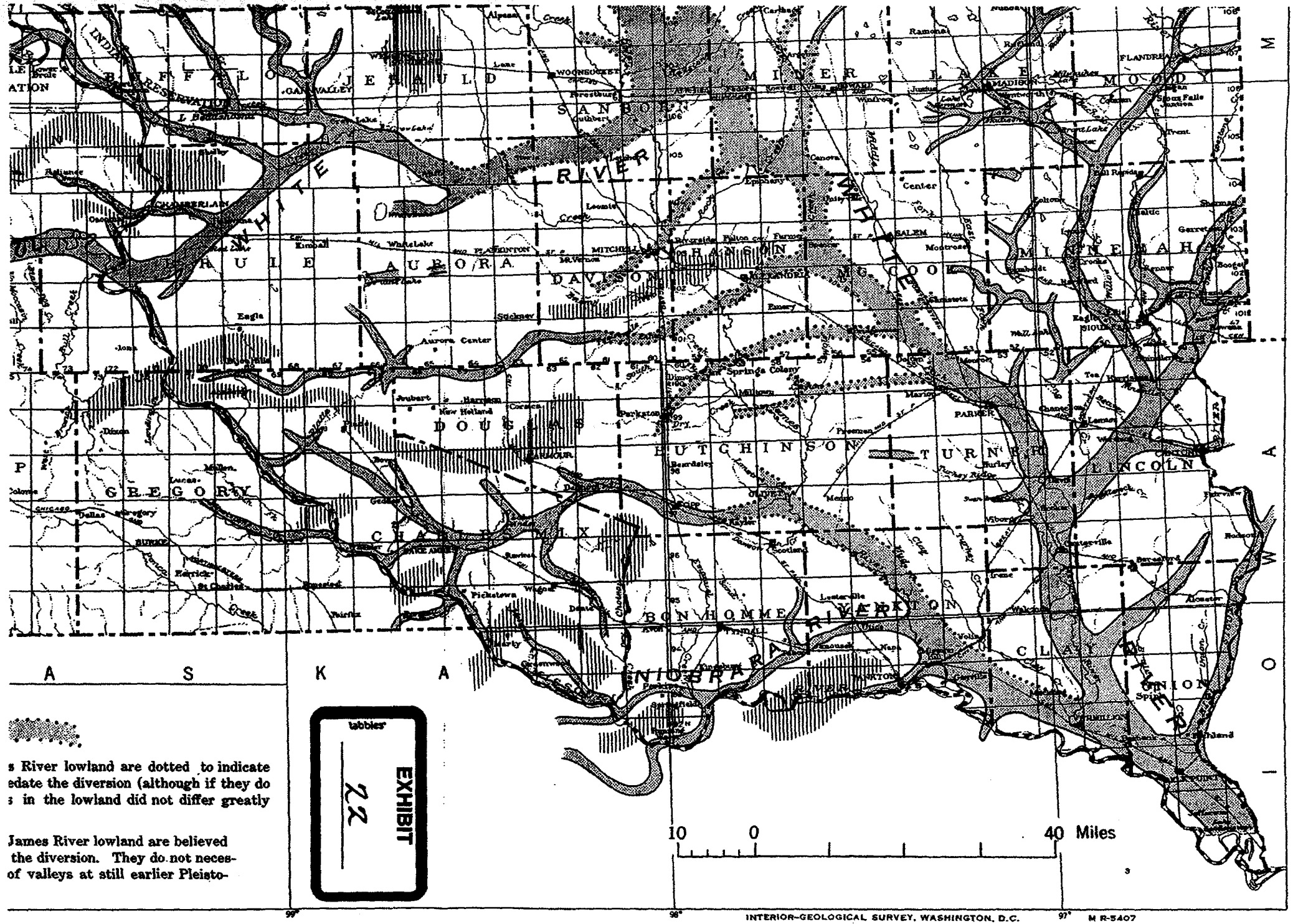


EXHIBIT 21



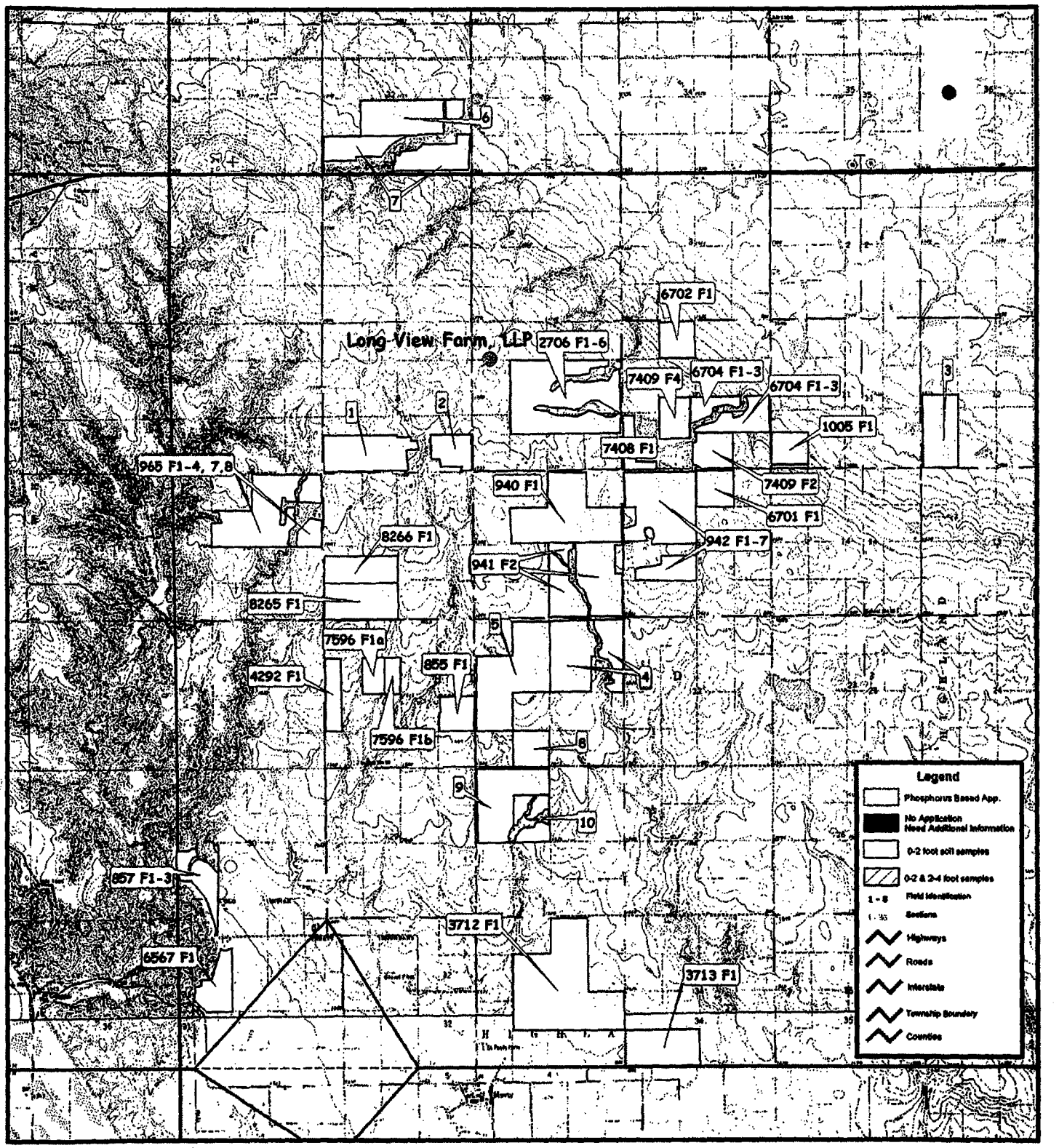
AP SHOWING ELEMENTS OF THE INFERRED PREDIVERSION
DRAINAGE SYSTEM OF EASTERN SOUTH DAKOTA (Flint 1955)

EXHIBIT

23

FACILITY: Long View Farm, LLP

Land Application Sites for Long View Farm, LLP



Scale

0.05 0.1 0.2 0.3 0.4 Miles

FACILITY NAME: Long View Farm, LLP	PERMIT NUMBER: SD6-0100410
LEGAL DESCRIPTION: Northwest 1/4 of Section 9, Township 95 North, Range 64 West	
COUNTY: Charles Mix	DATE: 04/10/2008 1:17:09 PM
Note: Field Locations are approximate within the 1/4 section and should be verified with field maps submitted by the producer.	

ANTIMICROBIAL ACTIVITY OF NATIVE SOUTH DAKOTA PLANT EXTRACTS ON *ESCHERICHIA COLI*

Gitanjali NandaKafle and Neil Reese*
Dept. of Biology & Microbiology
South Dakota State University
Brookings, SD 57006
*neil.reese@sdstate.edu

ABSTRACT

Certain *Escherichia coli (E.coli)* are the primary cause of lethal diarrhea in weaned pigs. United States swine producers face huge losses due to bacterial infections. Our study was aimed mainly at investigating the antimicrobial effect of native South Dakota plants on *E. coli* for use as a source of new natural antibiotics. Some native plants have the potential to provide new classes of antibiotics with low cytotoxicity that may allow regional swine producers to protect young pigs from lethal diarrhea. We conducted our experiments by using twelve plants previously screened in our lab that had antimicrobial effects on *E.coli*. We treated *E.coli* with plant extracts from both dried as well as fresh plants. Our results indicate that fresh plant extracts were much more effective than those from dried plants. For our experiment, plant materials were extracted with methanol and dried by using a rotary evaporator and then resolubilized with 70% ethanol. Growth of *E.coli* was assayed using standard disk susceptibility tests and micro-dilution protocols. After determining Minimal Inhibitory Concentration (MIC), we plated cultures on blood agar Petri plates to determine whether the extracts were bactericidal or bacteriostatic. All experiments were conducted in triplicate. Out of the 12 plants collected in SD, only four, *Clematis ligusticifolia, Monarda fistulosa, Centurea stoebe* and *Rhus aromatica* showed strong enough antimicrobial effects in *E.coli* cultures to warrant further study.

EXHIBIT
24

Flint, R. F., 1957, Glacial and Pleistocene Geology: John Wiley & Sons, New York, 553 p.

EXHIBIT 25

Charles C. Bradley

FIG 5–8. "Ideal" drumlin molded in glacial drift, near Madison, Wisconsin. View over part of the drumlin field shown in fig 5–9. The effective glacier ice moved toward the southwest.

Classification by origin. A simple provisional classification of tills based on their occurrence and origin (fig 7–12) may be suggested:[15]

1. *Lodgment till,* deposited from drift in transport in the base—specifically the under surface—of a glacier. Slow pressure melting of the flowing ice frees drift particles and allows them to be plastered, one by one and under pressure, on to the subglacial floor and there *lodged* (in Chamberlin's words) in the accumulating drift. No size sorting is involved, but stones tend to lodge with their long axes paralleling the direction of flow. Crushing and abrasion of particles is intense, and the till is compact and may acquire fissile structure as it is built up. The deposition of lodgment till could occur anywhere beneath the zone of ablation and probably also upstream from the firn limit; given time enough, such till could be built up to any thickness.

2. *Ablation till,* deposited from drift in transport within or upon the terminal area of a shrinking glacier. The drift is let down on to the ground as the thin inclosing ice melts inward from terminus, top, and base, and hence is loose, noncompact, and nonfissile, and probably lacks a fabric. In places fine-grained particles may be absent, having been washed away by trickling meltwater during the settling process. The long axes of boulders and cobbles

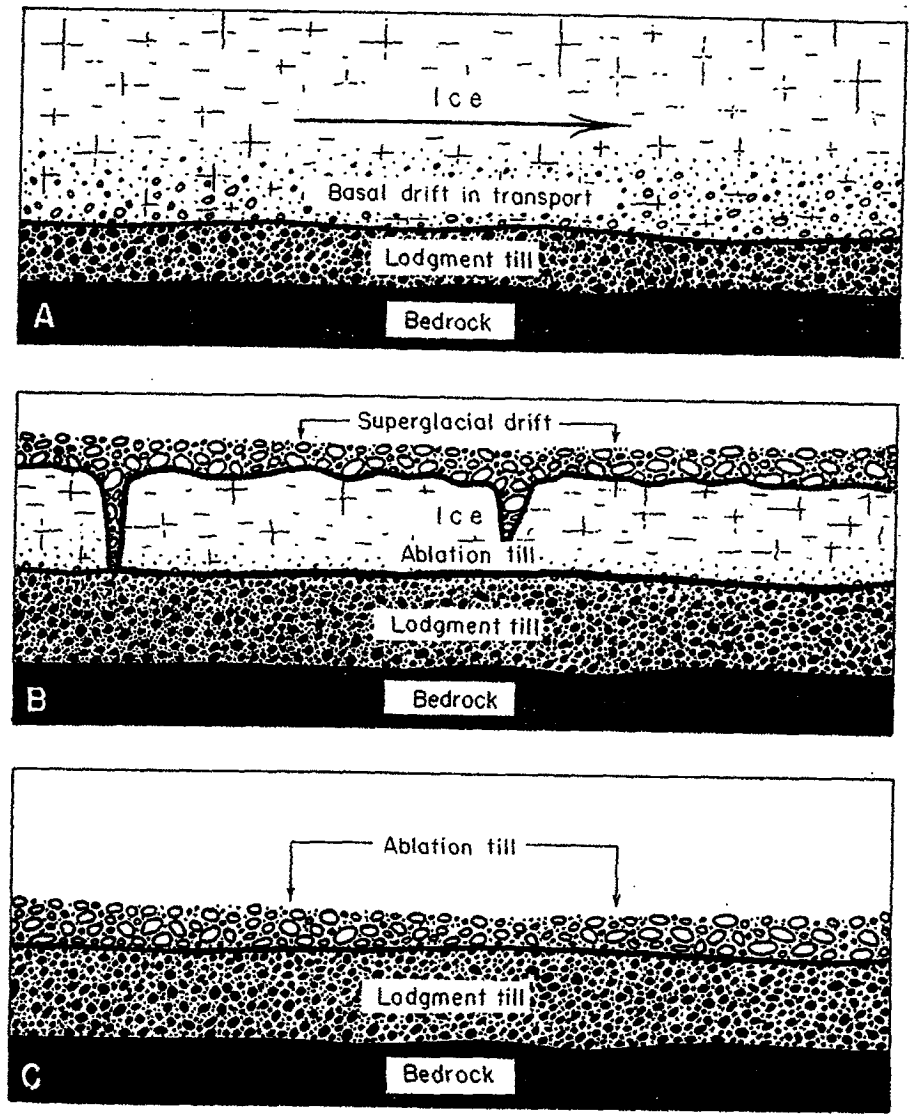


FIG 7–12. Origin of lodgment till and ablation till. A. Basal drift in transport lodges over bedrock to form lodgment till. B. Later, thin ice near the glacier margin wastes away beneath a cover of superglacial drift, from which trickling water has removed the finer particles. Ablation till is being deposited from basal zone of ice. C. Postglacial condition. The superglacial drift forms a thin layer of ablation till over the lodgment till.

Definition of aquifer

Rahn (1996): a permeable unit.

Glossary of geology: A body of rock that is sufficiently permeable to conduct ground water and to yield economically significant quantities to wells and springs.

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Glossery of Geology (1974 ed.)

More permeable →

aquifer A body of rock that contains sufficient saturated permeable material to conduct ground water and to yield economically significant quantities of ground water to wells and springs. The term was originally defined by Meinzer (1923, p.30) as any water-bearing formation.

aquitard A *confining bed* that retards but does not prevent the flow of water to or from an adjacent aquifer; a *leaky confining bed*. It does not readily yield water to wells or springs, but may serve as a storage unit for ground water.

← Less permeable

aquiclude A body of relatively impermeable rock that is capable of absorbing water slowly but functions as an upper or lower boundary of an aquifer and does not transmit ground water rapidly enough to supply a well or spring.

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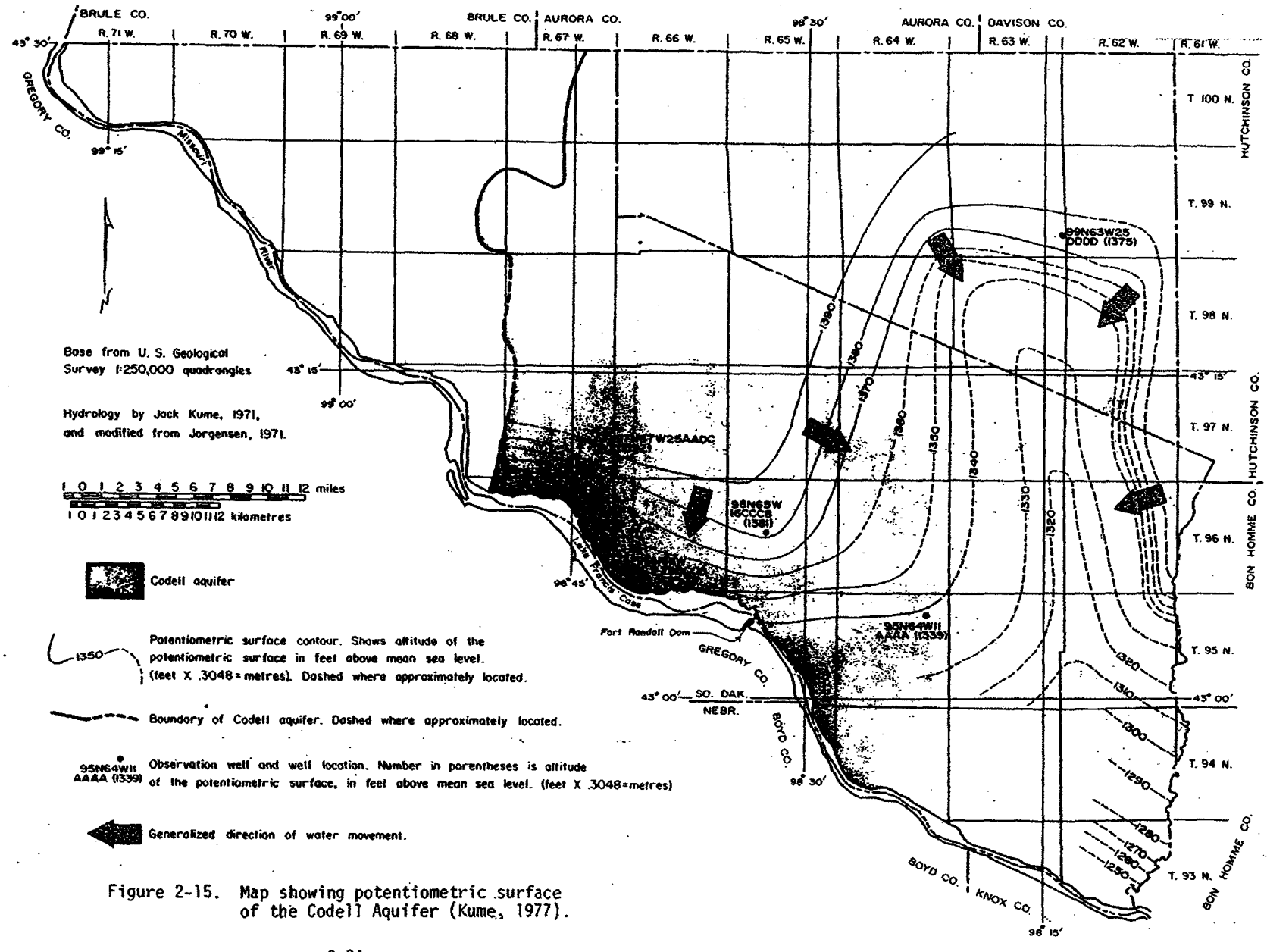

Figure 2-15. Map showing potentiometric surface of the Codell Aquifer (Kume, 1977).

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TABLE 2-2. GENERALIZED STRATIGRAPHIC COLUMN LISTING GEOLOGIC FORMATIONS AND SOME OF THEIR WATER-BEARING CHARACTERISTICS (Kume, 1977)

SYSTEM	FORMATION OR DEPOSIT	THICKNESS[1] ft (m)	MATERIAL	REMARKS
QUATERNARY	Alluvium	0-50 (0-15)	Sand, medium, silt, and clay. Locally may contain gravel, cobbles, or boulders, generally brown to gray	Missouri R sands constitute an important, large source of soft to very hard, fresh water. Alluvium in small stream valleys yields very small to small supplies of very hard, fresh to slightly saline water.
QUATERNARY — Drift	Till and undifferentiated drift	0-450 (0-137): 0-380 (0-116)	Clay and silt, heterogeneous mixture of coarse material in a matrix of silt or clay, brown to gray. Undifferentiated drift includes till and relatively fine-grained, poorly sorted, water-laid material	Relatively impermeable to slightly permeable owing to gravel lenses in the till which yield very small supplies of very hard, fresh to slightly saline water
QUATERNARY — Drift	Outwash and other fluvioglacial deposits	0-240 (0-73)	Gravel, sand, silt, and clay, stratified, waterlaid beds, brown to gray. Mostly beds of sandy gravel, clayey or silty sand, and sand and silty clay	Constitutes the most important source of water in the drift and yields very small to large supplies of soft to very hard, fresh to slightly saline water. Water occurs under both artesian and water-table conditions
TERTIARY	Ogallala undifferentiated	0-50 (0-15)	Gravel and sand, stratified beds, brown	Locally it may be a minor aquifer, generally it occurs above the water table
TERTIARY	Fort Randall Formation	0-120 (0-37)	Clay, sandy, buff, pink to gray. Sand, fine, green, pink to gray.	Locally it may be a minor aquifer, generally it occurs above the water table
CRETACEOUS	Pierre Shale	0-600 (0-183)	Shale, light-gray calcareous to blue-black or black non-calcareous. Commonly contains thin layers of bentonite. Marl, light gray	Relatively too impermeable to serve as a source of water except that it may yield small quantities of water from fractured or weathered shale
CRETACEOUS	Niobrara Marl	0-164 (0-50)	Shale, calcareous, medium gray, tan or light-gray, commonly contains abundant microfossils. Marl, light to dark gray, speckled. Limestone, white to orange yellow	Artesian aquifer which yields very small supplies of moderately hard, slightly saline water. Supplies stock and domestic water—62 wells in Douglas County and 20 wells in Charles Mix County.
CRETACEOUS	Codell Sandstone Member	800-250 (30-76): 0-20 (0-6)	Shale, non-calcareous, dark grayish black.	Relatively too impermeable to serve as a source of water.
CRETACEOUS	Codell Sandstone Member	800-250 (30-76): 0-55 (0-17)	Sandstone, loose to tightly cemented, very fine to coarse, light brownish gray, dark greenish black, and brown. Locally clayey.	Artesian aquifer which yields very small to moderately small supplies of soft to moderately hard, slightly saline water. 2nd most important aquifer in bedrock
CRETACEOUS	Carlile Shale	800-250 (30-76)	Shale, non-calcareous, light gray and light blue to black, pyrite and marcasite common. Locally contains thin beds or lenses of sandstone below the Codell.	Generally to impermeable to serve as a source of ground water except for those thin beds or lenses of sandstone that are permeable and might yield very small supplies of soft, slightly saline water under artesian pressure
CRETACEOUS	Greenhorn Limestone	25-60 (8-18)	Shale, fossiliferous, locally may contain beds and lenses of sandstone. Limestone, light and dark gray	May be a potential, minor aquifer, but is not used in this area as a source of water.
CRETACEOUS	Graneros Shale	50-90 (15-27)	Shale, dark-colored, non-calcareous, pyrite, marcasite and calcareous concretions common. Locally may contain thin beds or lenses of loose to tightly-cemented sandstone	Generally too impermeable to serve as a source of ground water except for thin beds of permeable sandstone which might yield water
CRETACEOUS	Dakota Formation	88-450 (27-137)	Sandstone, interbedded tan to white, and shale, dark colored. Sandstone, loose to well-cemented, very fine to coarse, quartz sand, calcium carbonate cement.	Most important aquifer in the bedrock, permeable sandstone beds under artesian head. Aquifer yields moderate to large supplies of very hard, slightly saline water.
CRETACEOUS	Skull Creek Shale	0-50 (0-15)	Shale, gray to varicolored	Generally too impermeable to serve as a source of ground water
CRETACEOUS	Fall River Sandstone	0-50 (0-15)	Sandstone, very fine to coarse, tan to white.	An aquifer, but no wells reported; some may be reported as in Dakota aquifer.
PRECAMBRIAN	Sioux Quartzite	+3,787 (+1,154)	Pudstone, pyrophyllite, hard, dense, purple to red, pink orthoquartzite.	Relatively impermeable, but locally may yield water from fractures or joints.
PRECAMBRIAN	Granite and other crystalline rocks		Biotite and hornblende granite, red to dark-gray, granite, light colored, and mica schist, gray.	Relatively impermeable, but locally may yield water from fractures or joints.

[1] Based on interpretation and projection of data from electric logs, drillers logs, and test holes.

Charles Abourezk
*Robin L. Zephier
Jon J. LaFleur
George J. Nelson

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WATER RIGHTS PROGRAM

Mike Abourezk
**Alicia D. Garcia

**Also licensed in California

June 27, 2011

Eric Gronlund
Water Rights Program
PMB 2020
Joe Foss Building
523 East Capitol
Pierre, SD 57501

Re: In the Matter of Water Permit Application No. 7206-3, Longview Farms, LLP

Dear Mr. Gronlund:

Enclosed is the Revised Exhibit List of Petitioner Yankton Sioux Tribe in the Longview matter. The additional exhibits reflect demonstrative exhibits expected to be used by Yankton Sioux Tribe witness, Dr. Perry Rahn. Thank you.

Sincerely,

Jon J. LaFleur
Attorney for Yankton Sioux Tribe

JJL/nm
Enclosure
cc: Diane Best
Eric Kerkvliet/David Nadolski
Jeff Hallem
Rodney Freeman
Sister Patricia Mylott
Joan Olive
Eva Bruguier
Faith Spotted Eagle
Judy Honimichle
Sharon Drapeau
Wesly Hare
Glenn Drapeau
Kip (Spotted Ealge) Collins
Robert Cournoyer
Rachel Bernie

RECEIVED
JUN 2 8 2011
WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONGVIEW FARMS, LLP	]	REVISED EXHIBIT LIST OF PETITIONER YANKTON SIOUX TRIBE

Following is the Exhibit List of Petition Yankton Sioux Tribe. Revisions to the Exhibit List are in bold lettering and reflect demonstrative exhibits expected to be used by Yankton Sioux Tribe witness, Dr. Perry Rahn.

Exhibit Number	**Exhibit Description**
1	2008 Map of Trust lands on the Yankton Indian Reservation Near Long View Farms and Manure Management Areas, John Stone, Yankton Sioux Tribe environmental Protection Department.
2	Curriculum Vitae of Dr. Perry Rahn
3	Hydrogeology of the Ft. Randall Casino area, Charles Mix County, South Dakota, November 25, 2008, Dr. Perry Rahn
4	Response to Derric Iles' Comments Regarding Request for Modification and/or Reconsideration of the Permitting of Longview Farm, LLP, Prepared by Dr. Perry Rahn
5	Flow Net Analysis, Dr. Perry Rahn
6	Yankton Sioux Tribe Wells in the USGS ground-water database with the historical boundary area
7	South Dakota Water Well Completion Reports, Charles Mix County 2008
8	South Dakota DENR September 16, 2008 Long View Farm, LLP Notification of Certificate of Compliance
9	South Dakota DENR September 16, 2008 Longview Farm, LLP Notification of Approval of Changes in As-Built Drawings
10	Long View Farm, LLP April 17, 2009 AWMS Computations for Deep Pit Swine Productions Operations

11	South Dakota DENR April 29, 2008 Long View Farm, LLP Approval of Manure Management System Revised Plans and Specifications
12	South Dakota DENR Internal Memorandum of September 9, 2007 from Sarah Speck to Harold Krein on Longview Farm Animal Waste Management System Plans and Specifications, Charles Mix County
13	Izaak Walton League of America January 1980-December 2005 Fish Kills and Manure Spills Report
14	Map of Longview Farm, LLP in Relation to Karl Mundt National Wildlife Refuge
15	Steve Wing et. al, Air Pollution and Odor in Communities Near Industrial Swine Operations," Environmental Health Perspectives, October 2008
16	Burkholder et. al, "Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality," Environmental Health Perspectives, February 2007
17	Heederick et. al, "Health Effects of Airborne Exposures from Concentrated Animal Feeding Operations," Environmental Health Perspective, February 2007
18	Bureau of Indian Affairs 2005 Labor Force Report, Yankton Sioux Agency
19	April 24, 2008 Correspondence from Mike Horned Eagle, Wagner Service Unit Indian Health Service on Health Characteristics of Wagner Service Unit User Population
20	Charles Mix County NRCS Compiled Soils and DENR Well Log Map
21	**SDGS Map**
22	**Preglacial Streams Map**
23	**Land Application Sites for Long View Farm, LLP Manure Areas**
24	**S.D. Academy of Science Antimicrobial Activity of Native South Dakota Plant Extracts on Escherichia Coli**
25	**Ablation/Lodgement Tills**
26	**Definition of Aquifer**
27	**Glossary of Geology**
28	**Codell SS. Map**
29	**Generalized Stratigraphic Column Listing Geologic Formations and some of their Water-Bearing Characteristics**

Dated this 27th day of June, 2011.

Jon J. LaFleur
Attorney for Yankton Sioux Tribe
Abourezk & Zephier, P.C.
P.O. Box 9460
Rapid City, SD 57709-9460
(605) 342-0097

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2011, I served a true and correct copy of the Revised Exhibit List of Petitioner Yankton Sioux Tribe to the following parties:

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Water Rights Program
PMB 2020
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Pierre, SD 57501
eric.gronlunch@state.sd.us

Eric Kerkvliet
David Nadolski
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ekerkvliet@lynnjackson.com
dnadolski@lynnjackson.com

Electronically only to:

Jeff Hallem
jeff.hallem@state.sd.us

Rodney Freeman
rfreeman.huronlaw@midconetwork.com

First Class Mail Postage Prepaid only to:

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Joan Olive
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Faith Spotted Eagle
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Lake Andes, SD 57356

Judy Honimichle
c/o Fort Randall Casino
38538 SD Hwy. 46
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Sharon Drapeau
General Delivery
Marty, SD 57361

Wesly Hare
General Delivery
Marty, SD 57361

Glenn Drapeau
General Delivery

Lake Andes, SD 57356

Kip (Spotted Eagle) Collins
P.O. Box 667
Lake Andes, SD 57356

Dated this 21st day of June, 2011.

Jon J. LaFleur
Attorney for Yankton Sioux Tribe
Abourezk & Zephier, P.C.
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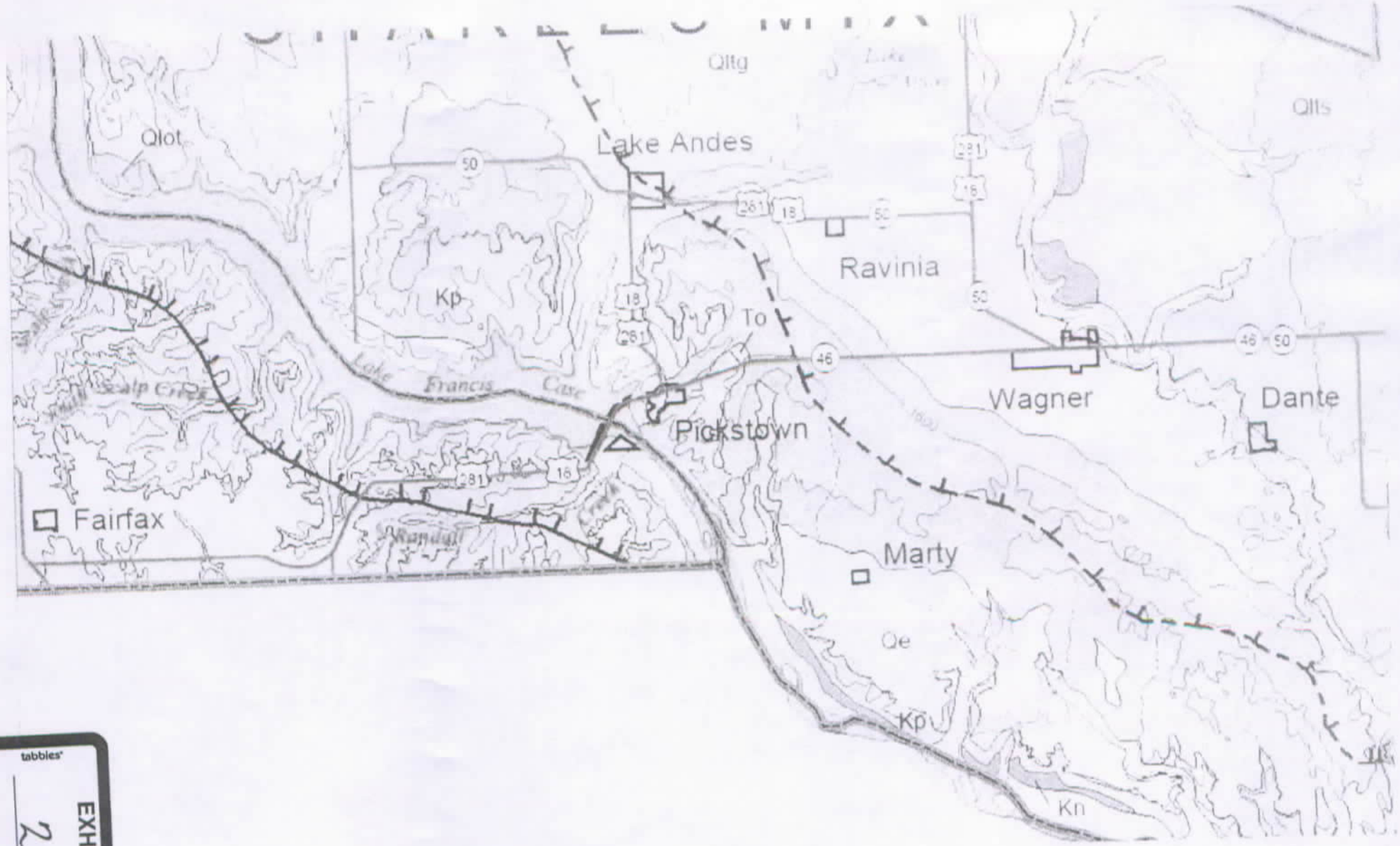
Rapid City, SD 57709
(605) 342-0097

Martin, J.E., J. Foster Sawyer, M.D. Fahrenbach, D.W. Tomhave, and L.D. Schulz, 2004, Geologic map of South Dakota: South Dakota Geological Survey

To = Oligocene Chamberlain Pasture, Titanothere, and Leptomeryx (Prairie Springs)



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MAP SHOWING ELEMENTS OF THE INFERRED PREDIVERSION DRAINAGE SYSTEM OF EASTERN SOUTH DAKOTA (Flint, 1955)

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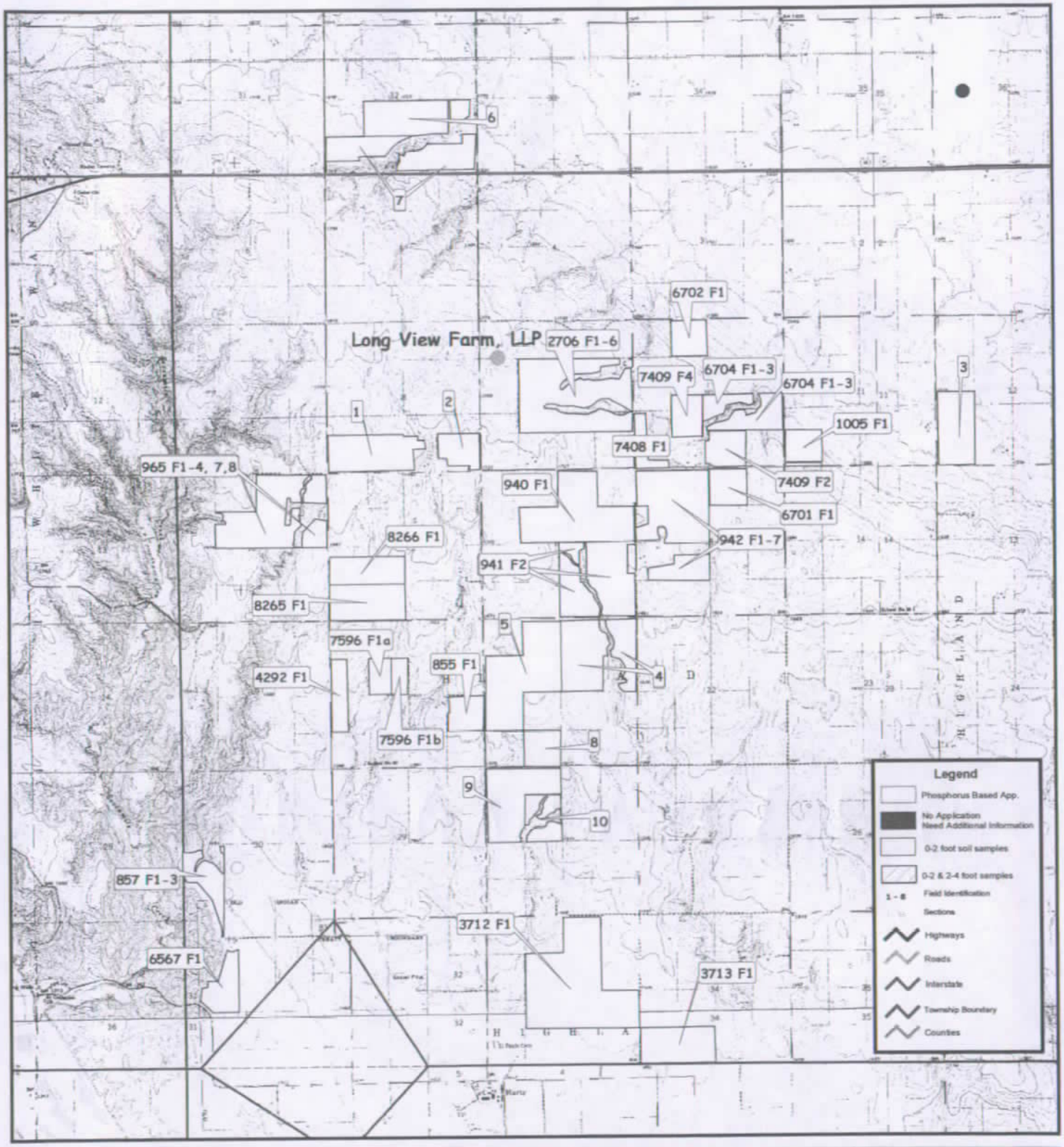
FACILITY: Long View Farm, LLP

Land Application Sites for Long View Farm, LLP



Scale

0.05 0.1 0.2 0.3 0.4 Miles

FACILITY NAME: Long View Farm, LLP	PERMIT NUMBER: SDG-0100410
LEGAL DESCRIPTION: Northwest 1/4 of Section 9, Township 95 North, Range 64 West	
COUNTY: Charles Mix	DATE: 04/10/2008 1:17:09 PM
Note: Field Locations are approximate within the 1/4 section and should be verified with field maps submitted by the producer.	

ANTIMICROBIAL ACTIVITY OF NATIVE SOUTH DAKOTA PLANT EXTRACTS ON *ESCHERICHIA COLI*

Gitanjali NandaKafle and Neil Reese*
Dept. of Biology & Microbiology
South Dakota State University
Brookings, SD 57006
*neil.reese@sdstate.edu

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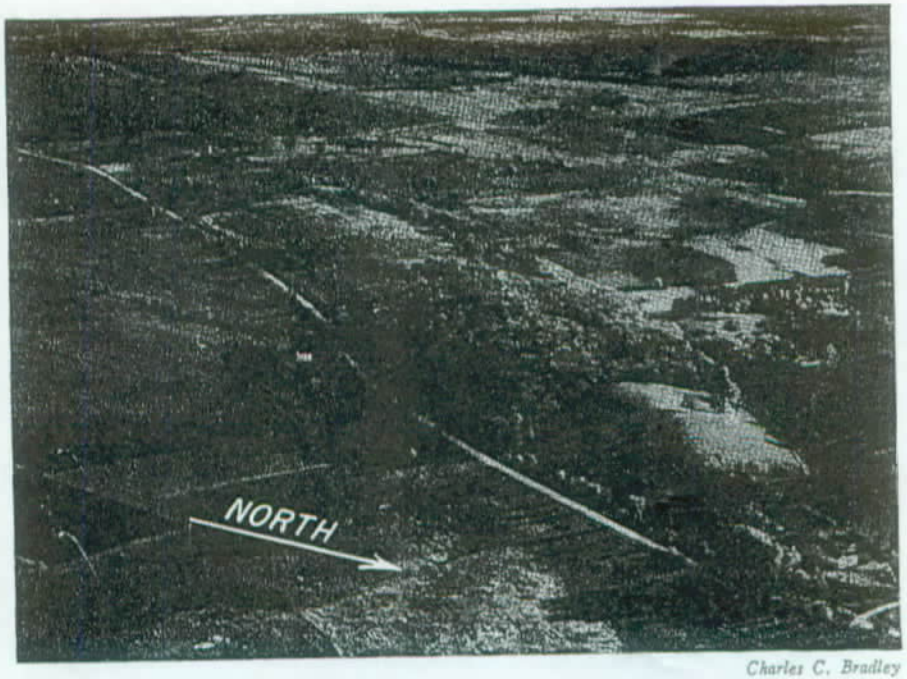

Charles C. Bradley

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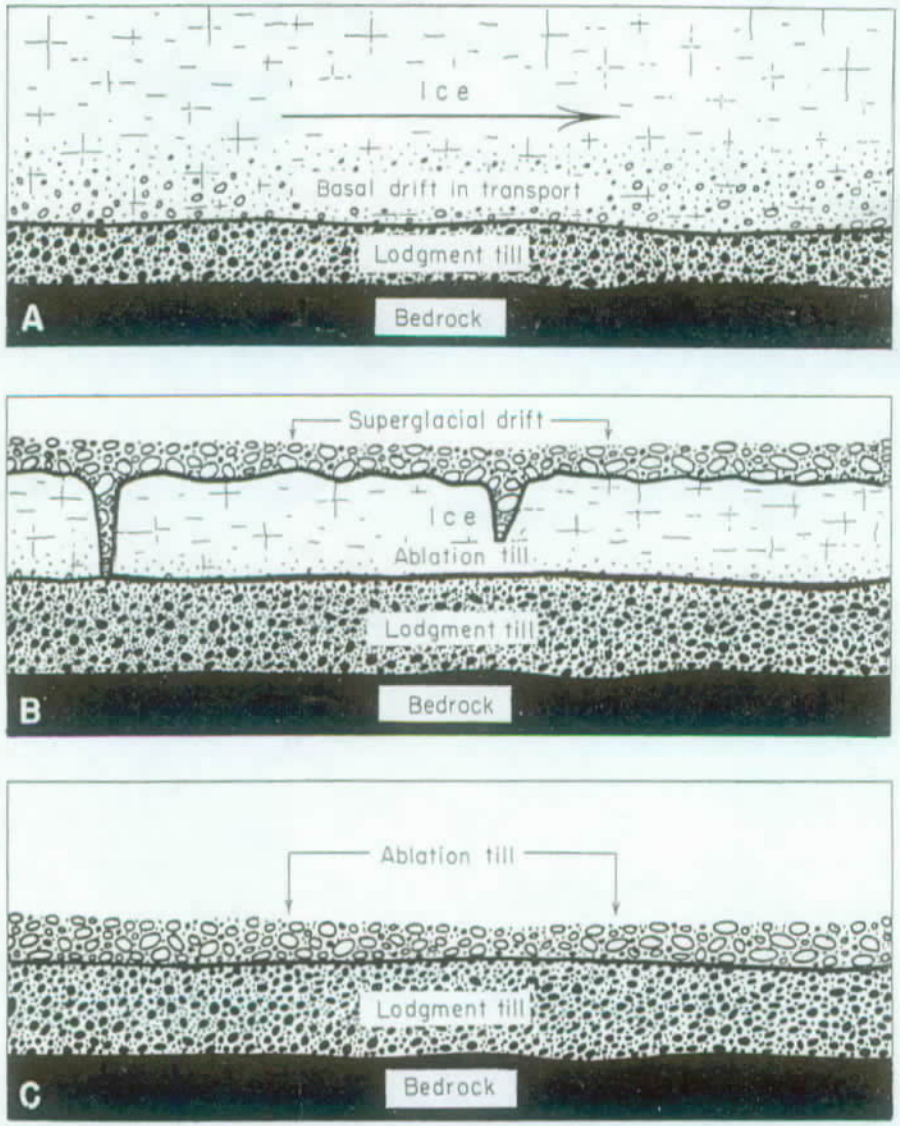

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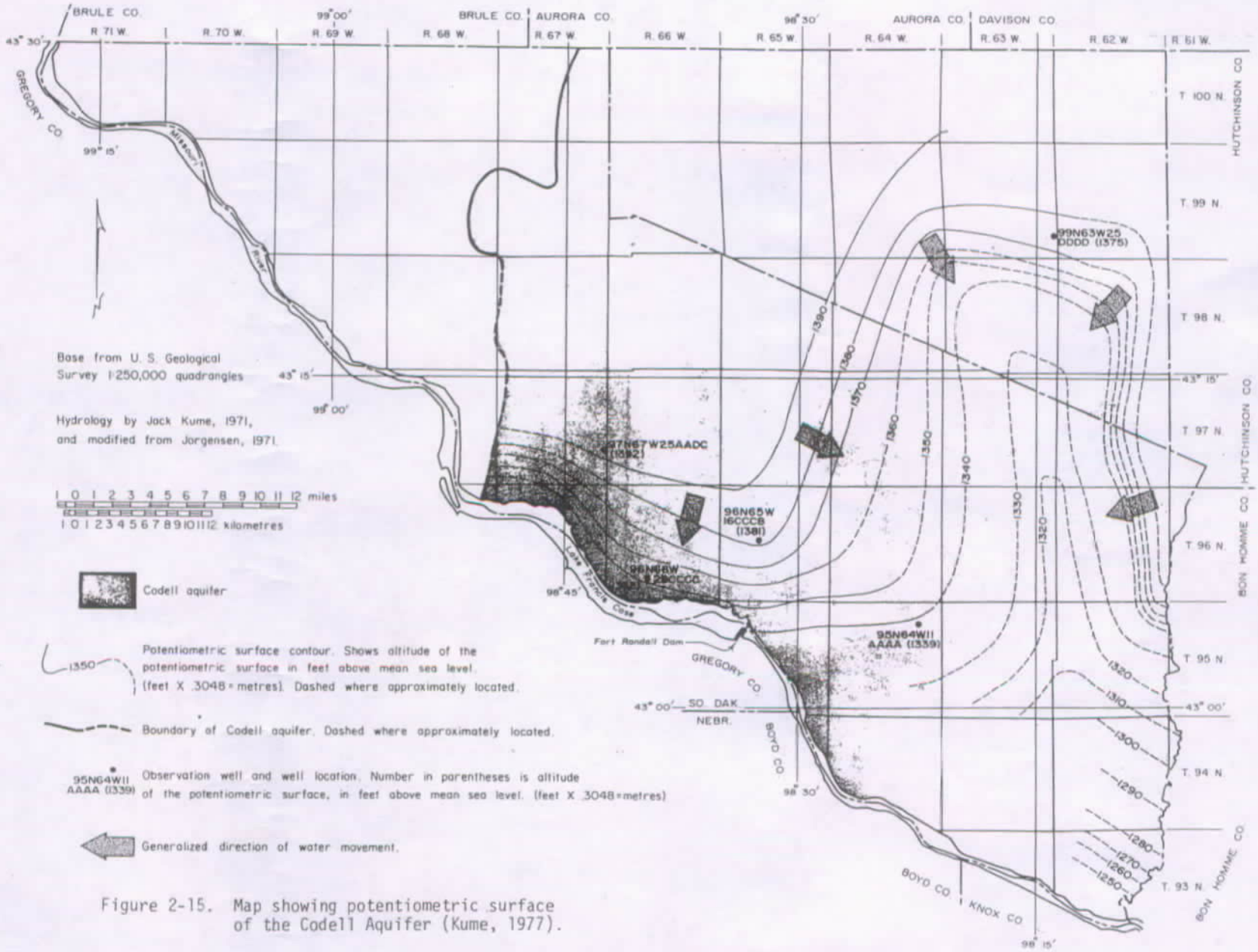

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	Niobrara Marl	0-164 (0-50)	Shale, calcareous, medium gray, tan or light-gray, commonly contains abundant microfossils Marl, light to dark gray, speckled Limestone, white to orange yellow	Artesian aquifer which yields very small supplies of moderately hard, slightly saline water Supplies stock and domestic water—52 wells in Douglas County and 20 wells in Charles Mix County
	Carlile Shale: Shale	100-250 (30-76): 0-20 (0-6)	Shale, non-calcareous, dark greenish black	Relatively too impermeable to serve as a source of water
	Carlile Shale: Codell Sandstone Member	100-250 (30-76): 0-55 (0-17)	Sandstone, loose to tightly cemented, very fine to coarse, light brownish gray, dark greenish black, and brown Locally clayey	Artesian aquifer which yields very small to moderately small supplies of soft to moderately hard, slightly saline water 2nd most important aquifer in bedrock
	Carlile Shale	100-250 (30-76)	Shale, non-calcareous, light gray and light blue to black, pyrite and marcasite common Locally contains thin beds or lenses of sandstone below the Codell	Generally to impermeable to serve as a source of ground water except for those thin beds or lenses of sandstone that are permeable and might yield very small supplies of soft, slightly saline water under artesian pressure
	Greenhorn Limestone	25-60 (8-18)	Shale, fossiliferous, locally may contain beds and lenses of sandstone Limestone, light and dark gray	May be a potential, minor aquifer, but is not used in this area as a source of water
	Graneros Shale	50-90 (15-27)	Shale, dark-colored, non-calcareous, pyrite, marcasite and calcareous concretions common Locally may contain thin beds or lenses of loose to tightly-cemented sandstone	Generally too impermeable to serve as a source of ground water except for thin beds of permeable sandstone which might yield water
	Dakota Formation	88-450 (27-137)	Sandstone, interbedded tan to white, and shale, dark colored Sandstone, loose to well-cemented, very fine to coarse, quartz sand, calcium carbonate cement	Most important aquifer in the bedrock, permeable sandstone beds under artesian head Aquifer yields moderate to large supplies of very hard, slightly saline water
	Skull Creek Shale	0-50 (0-15)	Shale, gray to varicolored	Generally too impermeable to serve as a source of ground water
	Fall River Sandstone	0-50 (0-15)	Sandstone, very fine to coarse, tan to white	An aquifer, but no wells reported; some may be reported as in Dakota aquifer
PRECAMBRIAN	Sioux Quartzite	+3,787 (+1,154)	Piedstone, pyrophyllite, hard, dense, purple to red, pink orthoquartzite	Relatively impermeable, but locally may yield water from fractures or joints
	Granite and other crystalline rocks		Biotite and hornblende granite, red to dark-gray, granite, light colored, and mica schist, gray	Relatively impermeable, but locally may yield water from fractures or joints

[1] Based on interpretation and projection of data from electric logs, drillers logs, and test holes.

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

June 29, 2011

NOTICE

TO: Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239
and Parties of Record (see attached list)

FROM: Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Water Permit Application No. 7206-3, LongView Farms LLP

Water Permit Application No. 7206-3 seeks to appropriate 30 gallons per minute from one well to be completed into the Codell Aquifer located in the SE ¼ NW ¼ Section 9, T95N, R64W for commercial use at a swine farrowing facility in Charles Mix County

The Water Management Board will conduct an evidentiary hearing to consider Application No. 7206-3 beginning at 1:00 PM CDT on Wednesday, July 13, 2011 in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre SD. The time is an estimate and may be delayed due to prior agenda items. The hearing will continue on Thursday, July 14th and may continue on Friday, July 15th to complete testimony. Parties should plan accordingly.

DENR has compiled a packet of material that includes staff report, recommendation, affidavit of publication, petitions, various notices and briefs filed in the matter of Water Permit Application No. 7206-3. State law directs the Chief Engineer to provide Water Management Board members with a copy of all pleadings including petitions. This packet will be sent to the Board in advance of the hearing. Although all the documents included in the packet have previously been sent to parties, counsel for Long View Farms and the Yankton Sioux Tribe are also being sent this packet. If any party desires a packet prior to the hearing, please contact Eric Gronlund at (605) 773-3352 or email eric.gronlund@state.sd.us. In addition, a few packets will be available day of the hearing in the meeting room.

The post office has returned previous mailings to a few of the individual petitioners as undeliverable. Please look over the parties of record list and if you see an address that is incorrect, please make that individual aware of the hearing time and location and notify DENR so we make sure they get notification.

Please contact Diane Best, Assistant Attorney General at (605) 367-5880 or Eric Gronlund, Water Rights Program at (605) 773-3352, if you have any questions regarding the hearing.

c: Diane Best, Assistant Attorney General

PARTIES OF RECORD

WATER PERMT APPLICATION No. 7206-3, Long View Farms LLP

Applicant

Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239

represented by:

Eric Kerkvliet, Attorney
Dave Nadolski, Attorney
Lynn, Jackson, Shultz & Lebrun
PO Box 1920
Sioux Falls SD 57101

Petitioners

Yankton Sioux Tribe
Represented by:
Jon LaFleur, Attorney
Abourezk & Zephier, PC
PO Box 9460
Rapid City SD 57709

Sister Patricia Mylott
PO Box 217
Marty SD 57361

Joan Olive
Box 72
Spencer NE 68777

Ms. Eva Bruguier
PO Box 274
Marty SD 57361

Faith Spotted Eagle
PO Box 667
Lake Andes SD 57356

Judy Honimichle
c/o Fort Randall Casino
38538 SD Hwy 46
Lake Andes SD 57356-7011
(returned by USPS as undeliverable)

Sharon Drapeau
601 White Swan Rd
Lake Andes SD 57356

Wesly Hare
General Delivery
Marty SD 57361

Glenn Drapeau
General Delivery
Lake Andes SD 57356

Kip (Spotted Eagle) Collins
PO Box 667
Lake Andes SD 57356

CERTIFICATION

I hereby certify that on June 29, 2011, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated June 29, 2011, regarding a Water Right Permit Application No. 7206-3, as set forth on the attached parties of record and addressed below:

Arlan Moss
Long View Farms LLP
3172 320th Street
Hull IA 51239

Diane Best, Assistant Attorney General
300 N. Dakota Avenue, Suite 403
Sioux Falls SD 57104

NOTE: Not sent to Judy Honimichle. Previous mailings have been returned by US Postal Service as undeliverable.

Gail Jacobson

Gail Jacobson
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 29th day of June, 2011

Karen Schlaak

Karen Schlaak
Notary Public
My Commission expires April 1, 2013

SEAL KAREN SCHLAAK NOTARY PUBLIC State of South Dakota SEAL

STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL

300 N. Dakota Avenue, Suite 403
Sioux Falls, South Dakota 57104-6032
Phone (605) 367-5880
FAX (605) 367-5886
www.state.sd.us/atg

MARTY J. JACKLEY
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY

RECEIVED
JUL - 8 2011
WATER RIGHTS
PROGRAM

July 7, 2011

James Goodman
1201 Woodriver Drive
Pierre, SD 57501

Re: *Matter of Water Permit Application No. 7206-3, Longview Farms, LLP*

Dear Mr. Goodman,

Enclosed is a subpoena for your appearance at the upcoming hearing on the Longview matter. Please sign the admission of service and get it back to me.

You have told me that you are scheduled for jury duty during this time. Unfortunately I cannot schedule your testimony around that. This Water Board matter has been rescheduled twice already. It is to be heard before six board members, involves several parties, and is likely to last three days. Your appearance is necessary. It is not my desire to discourage jury duty, but this matter is unavoidable.

Sincerely,

Diane Best
Assistant Attorney General

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

RECEIVED
JUL - 8 2011
WATER RIGHTS PROGRAM

IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONGVIEW FARMS, LLP	])]]	SUBPOENA

TO: JAMES GOODMAN, 1201 Woodriver Drive, Pierre, SD 57501

You are commanded to appear before the SOUTH DAKOTA WATER MANAGEMENT BOARD at the Mathews Training Center, 523 E. Capitol Ave., Pierre, SD at 1 pm on Wednesday July 13, 2011, and then and there give testimony for the South Dakota Department of Environment and Natural Resources in the above matter. The hearing is expected to last until the afternoon of July 15 and your appearance will be required until released by Hearing Chairman Rodney Freeman. This subpoena is issued pursuant to SDCL 1-26-19.1.

Dated this 7th day of July, 2011.

Diane Best
Assistant Attorney General
300 N. Dakota Avenue, #403
Sioux Falls, SD 57104
Telephone: (605) 367-5880

STATE OF SOUTH DAKOTA	)	
	)	ADMISSION OF SERVICE
COUNTY OF HUGHES	)	

I, JAMES GOODMAN, hereby admit service of the above subpoena on this _____ day of July, 2011.

James Goodman

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 19, 2011

NOTICE

TO: Eric Kerkvliet
Lynn Jackson Shultz & Lebrun
PO Box 2700
Sioux Falls SD 57104

Jon LaFleur, Attorney
Abourezk & Zephier, PC
PO Box 9460
Rapid City SD 57709

FROM: Garland Erbele, Chief Engineer
Water Rights Program

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

The Water Management Board directed Eric Kerkvliet to prepare proposed Findings of Fact, Conclusions of Law and a Final Decision in the matter of the approval of Water Permit Application No. 7206-3 filed by Long View Farms LLP. The Board will consider adoption of Findings, Conclusions and Final Decision at 1:00 PM, on October 5, 2011, in the Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol Avenue, Pierre SD. Notice will be provided if there is a change in the hearing date or time.

The Board requested that a copy of the proposed Findings, Conclusions and Final Decision be mailed to each Board member and parties by September 15, 2011. Written objections or comments in support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision are to be mailed to each Board member, the Board attorney (mailing list enclosed) and parties of record by September 26, 2011. Board counsel requests that the draft findings or alternative findings be provided in a WORD format file via email to *jeff.hallem@state.sd.us*.

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 5, 2011. The public hearing was completed on July 15, 2011. No additional testimony will be received.

If you have questions about the findings process, please contact Diane Best at (605) 367-5880.

Enclosure

c: Jeff Hallem, Assistant Attorney General
Diane Best, Assistant Attorney General

CERTIFICATION

I hereby certify that on July 19, 2011, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated July 19, 2011, regarding preparation of findings of fact, conclusions of law and final decision in the matter of Water Right Permit Application No. 7206-3, as set forth on the attached parties of record and addressed below:

Eric Kerkvliet
Lynn Jackson Shultz & Lebrun
PO Box 2700
Sioux Falls SD 57104

Jon LaFleur, Attorney
Abourezk & Zephier, PC
PO Box 9460
Rapid City SD 57709

Diane Best, Assistant Attorney General
300 N. Dakota Avenue, Suite 403
Sioux Falls SD 57104

Gail Jacobson

Gail Jacobson
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 19th day of July, 2011

Karen Schlaak

Karen Schlaak
Notary Public
My Commission expires April 1, 2013

SEAL KAREN SCHLAAK NOTARY PUBLIC State of South Dakota SEAL

WATER MANAGEMENT BOARD MEMBERS

Chad Comes PE **Vice-Chairman**
PO Box 308
Madison SD 57042

Leo Holzbauer
PO Box 877
Wagner SD 57380

Rodney Freeman Jr **Chairman**
PO Box 176
Huron SD 57350

Bernita Loucks **Secretary**
255 Texas St # F 332
Rapid City SD 57701

Everett Hoyt
4422 Carriage Hills Dr
Rapid City SD 57702

Tim Bjork
112 W Oak St
Pierre SD 57501

Jim Hutmacher
802 E 7th Street
Oacoma SD 57365

BOARD ATTORNEY

Jeff Hallem, Assistant Attorney General
Natural Resources Section
Office of Attorney General
George S Mickelson Criminal Justice Center
1302 E Hwy 14, Suite 1
Pierre, SD 57501

WATER RIGHTS PROGRAM

Department of Environment and
Natural Resources
Garland Erbele Chief Engineer
Water Rights Program
523 East Capitol Ave
Pierre SD 57501-3181

STAFF ATTORNEY

Diane Best - Assistant Attorney General
Office of Attorney General
Natural Resources Section
317 N Main
Sioux Falls SD 57104-6004

Gronlund, Eric

From: Best, Diane
Sent: Wednesday, July 27, 2011 8:49 AM
To: 'Faith Spotted Eagle'; Harold Shepherd
Cc: eric.gronlund@state.sd.us.; Eric Kerkvliet; 'Jon LaFleur'
Subject: RE: Longview Farms
Attachments: 7-13-2011email.pdf

Good morning.

You sent me an email message on July 13 that you were still looking for a lawyer. It is attached.
The reason you were unable to reach me then is that I was at the hearing and was not reviewing emails.

The Board heard the evidence from the parties that appeared, including YST, and rendered an oral determination at the close of evidence.
It voted to grant the permit. The next step is that the Board will deliberate on written Findings of Fact and Conclusions of Law at its next meeting on October 5.

After the hearing the Chief Engineer's office was required to send a notice to all persons that appeared and presented evidence. The Notice provided deadlines for submission of Findings of Fact and Conclusions of Law.
Under Board rule if people don't appear at the hearing, they give up the right to get further notices after the hearing, so it would not have automatically gone to you. http://legis.state.sd.us/rules/DisplayRule.aspx?Rule=74:02:01:12.02 However, by copy of this email I'm asking the Chief Engineer's office to send the Notice to you. It was just sent out last week and the deadlines are down the road a few months.

Mr. Shepherd or your new counsel will, I assume, advise you as to the necessity for participating in the process regarding Findings of Fact and Conclusions of Law. I am sending a copy of this email to all parties so that they can include you on any mailings they might make regarding the process pertaining to Findings of Fact and Conclusions of Law.

I intend to file both this email and the previous one in the record.

Plase note that I represent the Chief Engineer, Faith. I cannot speak for Longview or the Board itself on any procedural matters.

As an aside, Faith, your prior email refers to the CAFO at issue as being on the YST reservation. You are entitled to your opinion, but I do not agree with that statement.

-----Original Message-----
From: Faith Spotted Eagle [mailto:eagletrax@hotmail.com]
Sent: Tuesday, July 26, 2011 8:25 PM
To: Best, Diane; Harold Shepherd
Subject: Longview Farms

Diane, I sent you a message that I could not obtain a lawyer to appear on the 13th of July on our behalf, but have a lawyer for any appeals? Can you let me know what happened.

Best, Diane

From: Faith Spotted Eagle [eagletrax@hotmail.com]
Sent: Wednesday, July 13, 2011 8:47 AM
To: Harold Shephard; Tom Goldtooth; Harold Shepherd; caitlin@womensearthalliance.org; Best, Diane
Subject: RE: Longview Exhibits

Ms. Best, I have tried reaching you via phone to no avail. This note is to let you know that I will not be able to appear at the DENR hearing today re: the CAFO permit request on the Yankton Reservation. I have not been able to find an attorney, but will still be looking, and will act accordingly to the turnout of the hearing today. Thank you.

To: waterlaw@uci.net; eagletrax@hotmail.com; ien@igc.org; hshepherd@uci.net; caitlin@womensearthalliance.org
Date: Fri, 24 Jun 2011 14:11:07 -0700
Subject: Re: Re: Longview Exhibits
From: waterlaw@uci.net

Caitlin:
I would be available for a call sometime next week.
Harold

On Thu 23/06/11 1:57 PM , Caitlin Sislin caitlin@womensearthalliance.org sent:

Hal,

Thank you for the clarification! I was under the impression that this was a public comment hearing.

Would you and Faith have time for a call with NRDC? They don't think they can represent you in this short timeframe, but may be able to engage later on, or connect you with others who can represent you. In general I fear that this short timeframe will preclude most lawyers from joining the case, but several are interested in exploring the possibility of future representation. I'm sorry I couldn't find someone to take the case at this time.

Thanks,
Caitlin

Caitlin Sislin | North America Director | Women's Earth Alliance
caitlin@womensearthalliance.org | www.womensearthalliance.org
cell 510.541.0271 | office 510.859.9101
2150 Allston Way, Ste. 460 Berkeley, CA 94704

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From: H Shepherd CWA <waterlaw@uci.net>

Reply-To: <waterlaw@uci.net>
Date: Thu, 23 Jun 2011 11:57:38 -0700
To: Faith Spotted Eagle <eagletrax@hotmail.com>, Tom Goldtooth < ien@igc.org>, Harold Shephard <waterlaw@uci.net>, Harold Shepherd <hshepherd@uci.net>, Caitlin Sislin <caitlin@womensearthalliance.org>
Subject: Re: Re: Longview Exhibits

Caitlin:
It looks like my e-mail from yesterday, did not go out to the larger group. Here it is again. Sorry for the delay.
Hal

Faith and all:
I have not be able to review all of this e-mail thread yet and so I may be missing something but I believe there may have been some confusion related to the nature of the upcoming hearing before the state Water Rights Board which is a constested case, evidentary hearing to challenge the issuance of a water right permit to LVF. It is not a hearing established to take public comment on the permit so, unless I missed something or there has been a separate hearing established to take public comment, the Board would not be accepting public comments at the hearing in question. Beyond that I am glad to assist in research, drafting testimoney and/or comments in any way I can. As for the answers to the questions below:
1) Longview filed it's permit application sometime last fall (I will look for the exact date but Faith Probably as it the application as I forwarded her the file) :
2) Yes notice was published sometime during September 2011 (I believe). (A copy of the notice would be in the file that Faith has);
3) Yes the Yankton Sioux Tribal members did file protest of the application and so did the Tribe itself which is what the upcoming hearing is regarding.
I will try to respond with more detailed dates if I can find that information. Let me know if you have any more questions. Thanks.
Hal Shepherd
Laoch Consulting
P.O. Box 15332
Fritz Creek, AK 99603
(907)299-8821

On Thu 23/06/11 11:04 AM , Caitlin Sislin caitlin@womensearthalliance.org sent:

Hi all,

Any responses to these questions? Thanks for your help.

I am going to introduce you to Albert Huang at NRDC via email, who is interested in learning more about the case and thinking about what, if anything, NRDC can do here.

Thanks!
Caitlin

Molly from ELPC just wrote me with the following questions – can someone please provide this information so I can pass it on to her?

1. When did Long View Farms file its water permit application?
2. Was notice of the permit application published, and if so, when?
3. Have Faith or her group filed anything with the Water Management Board relating to LVF's permit application.

Thanks,
Caitlin

———

Caitlin Sislin | North America Director | Women's Earth Alliance
caitlin@womensearthalliance.org | www.womensearthalliance.org
cell 510.541.0271 | office 510.859.9101
2150 Allston Way, Ste. 460 Berkeley, CA 94704

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From: Caitlin Sislin < caitlin@womensearthalliance.org>
Date: Tue, 21 Jun 2011 13:52:07 -0700
To: Faith Spotted Eagle <eagletrax@hotmail.com>, Tom Goldtooth < ien@igc.org>, Harold Shephard <waterlaw@uci.net>, Harold Shepherd <hshepherd@uci.net>
Subject: Re: Longview Exhibits

Hi Harold and all,

Just to clarify, ELPC won't be able to prepare the comments themselves – I am still looking for an advocate to do this. They are able to help with the procedural aspects, and to edit/ provide feedback on comments. So, Harold, I thought you might have something relatively boilerplate/ easy to put together (cut and paste from prior submissions, etc) that the ELPC folks could edit. I know you're no longer engaged in this matter, so it may not be appropriate. And, as I mentioned, I am still looking for an advocate who can prepare these comments.

Thanks,
Caitlin

Caitlin Sislin | North America Director | Women's Earth Alliance
caitlin@womensearthalliance.org | www.womensearthalliance.org
cell 510.541.0271 | office 510.859.9101
2150 Allston Way, Ste. 460 Berkeley, CA 94704

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From: Faith Spotted Eagle <eagletrax@hotmail.com>
Date: Tue, 21 Jun 2011 14:21:12 -0500
To: Caitlin Sislin <caitlin@womensearthalliance.org>, Tom Goldtooth < ien@igc.org>, Harold Shephard <waterlaw@uci.net>, Harold Shepherd < hshepherd@uci.net>
Subject: RE: Longview Exhibits

thanks Caitlin, and others. I am sending this note below to Harold Shepherd to see if Harold can contact The Environmental Law and Policy Ctr in Chicago to guide them for our comments, see below. Harold can you help with that? We can't find an attorney. Sad tale.

Date: Tue, 21 Jun 2011 12:13:08 -0700
Subject: Re: Longview Exhibits
From: caitlin@womensearthalliance.org
To: eagletrax@hotmail.com; ien@igc.org

Hi Faith,

The Speer Law Firm is unable to take the case at this time because of their trial schedule, but they are interested in revisiting the matter later. They said they may be able to represent you at a later time on a nuisance claim, or to challenge the permit if it is issued.

Molly Quinn from the Environmental Law and Policy Center in Chicago, said the following:

"We're happy to research the format and rules for providing comments to the South Dakota Water Resources Board. We're not able to actually prepare the oral or written comments though. If the group wants to prepare comments, we would probably be able to review them and provide feedback before the hearing."

So they will be able to provide information on the format for the comments, the timing, etc. If I can find another advocate to write comments that you can read aloud, ELPC will review and provide feedback. Do you think this is something Harold would do?

I think we can piece something together in this way, and then hopefully get you a firm commitment from a lawyer after the hearing.

I will keep you posted on what I hear from around our networks.

Best,
Caitlin

Caitlin Sislin | North America Director | Women's Earth Alliance
caitlin@womensearthalliance.org | www.womensearthalliance.org
cell 510.541.0271 | office 510.859.9101
2150 Allston Way, Ste. 460 Berkeley, CA 94704

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From: Faith Spotted Eagle <eagletrax@hotmail.com>
Date: Tue, 21 Jun 2011 13:57:58 -0500
To: Tom Goldtooth <ien@igc.org>, Caitlin Sislin <caitlin@womensearthalliance.org >
Subject: RE: Longview Exhibits

thank you Caitlin, can you please check with the Spier Law Firm and see what they have decided, I didn't keep their e-mail. I believe his name was Britt?

Date: Tue, 21 Jun 2011 12:16:37 -0500
To: caitlin@womensearthalliance.org; eagletrax@hotmail.com
From: ien@igc.org

Subject: Re: Longview Exhibits

I initially scouted around, but waited to see whether your efforts might produce any response. Let me dig deep into the "rollerdex" and renew my scouting efforts.

Tom G.

At 12:02 PM 6/21/2011, Caitlin Sislin wrote:

Hi Faith,

As I emailed you before, I haven't had any success in finding an attorney for this matter, though I have reached out to all my contacts and several new ones (many of the contacts I reached out to, sent the matter out to their contacts, whom I don't know). I sincerely apologize for this lack of support coming forward. As I indicated at the beginning, unfortunately I can never promise that our organization will be able to coordinate advocacy support. I think the problem for most groups was the short time frame before the hearing.

But, as I said, all is not lost even if there is not an attorney to represent you at the hearing. The Speer Law Firm as well as other groups have indicated an interest in representing you at a later date.

What I am now doing is looking for someone to create comments for you to read into the record at the hearing.

Tom, are there any attorneys that you know that might be able to jump on board at this late date?

I will keep looking and keep in touch.

My apologies again.

Kind regards,
Caitlin

Caitlin Sislin | North America Director | Women's Earth Alliance

caitlin@womensearthalliance.org | **www.womensearthalliance.org**

cell 510.541.0271 | office 510.859.9101
2150 Allston Way, Ste. 460 Berkeley, CA 94704

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From: Faith Spotted Eagle <eagletrax@hotmail.com >

Date: Tue, 21 Jun 2011 11:25:42 -0500
To: Caitlin Sislin < caitlin@womensearthalliance.org>, Tom Goldtooth <ien@igc.org>, Sharon Drapeau <sharon_d99@yahoo.com>, mabel honomichl <mjhonomichl@yahoo.com>, Allan Hare < wesleyaharej@yahoo.com >, Glenn Drapeau <lemndrps@yahoo.com>, Kip Spotted EagleCollins <keyawitko2676@yahoo.com >
Subject: FW: Longview Exhibits

Tom and Caitlin, I got this from the State of SD and we still don't have an attorney, is there any hope for help from IEN and the Spier Law firm, I am thinking that Spier has declined? I sent Britt Spier copy of the pleadings, info and haven'theard back. July 14 is approaching and this is an important water rights issue, can anyone help Tom?

Subject: RE: Longview Exhibits
Date: Tue, 21 Jun 2011 10:16:33 -0500
From: Diane.Best@state.sd.us
To: Diane.Best@state.sd.us; EKerkvliet@lynnjackson.com ; DNadolski@lynnjackson.com; jlafleur@rushmore.com; abourc@rushmore.com ; eagletrax@hotmail.com
CC: Eric.Gronlund@state.sd.us

See my email below concerning stipultions of exhibits.

-----Original Message-----

From: Best, Diane **Sent:** Monday, February 14, 2011 1:24 PM**To:** Best, Diane; 'Eric Kerkvliet'; 'hshepherd@uci.net'; 'waterlaw@uci.net'; 'Dave Nadolski'; Jon LaFleur; 'abourc@rushmore.com'; 'eagletrax@hotmail.com'**Cc:** Gronlund, Eric **Subject:** Longview Exhibits Good afternoon. I'm sending this to all the parties for which I have email on this Longview matter.The Longview hearing was previously scheduled for early December. We exchanged exhbits among the lawyers. I asked if all the parties would be willing to indicate in advance which exhibits they would object to at hearing.As I recall, the lawyers agreed to that procedure and, of course, that is the usual practice. I sent an email out stating which exhibits I would not object to be being used as evidence. According to my file, I was the only one that did so. Iwould like to get back on track with this process.In the meantime, the lawyer who agreed to that procedure for YST withdrew. Charlie and Jon, can you tell me if you can stipulate to any exhibits? Now Harold Shepherd is withdrawing, too. I've heard from Ms. Spotted Eagle who tells me she has not received a file and is looking for an attorney. I'm emailing her too so she knows the status. Harold, perhaps the exhibits I gave you are winging their way to her or to someone else in that group? Also see my other emails below. Diane -----Original Message-----

From: Best, Diane **Sent:** Monday, November 29, 2010 1:04 PM**To:** Best, Diane; 'Eric Kerkvliet'; 'Rebecca Kidder'; 'hshepherd@uci.net'; 'waterlaw@uci.net'; 'Dave Nadolski' **Cc:** Guhin, John; Gronlund, Eric**Subject:** RE: Longview Exhibits DENR will stipulate to the following exhibits: Stipulate toYST Exhibits- 2, 7, 8, 9, 11,19As for Exhibit 10 we would stipulate to the deep pit computations part of the exhibit. But the Exhibit 10 that was provided is also appears to include draft storm water prevention plan material. I'll need to reserve on stipulating to that part of the exhibit. Exhibit 12 is incomplete and we would therefore object. The same memorandum (a complete one) is in the DENR list as Exhibit 11 We object to Exhibit 13. Note that it does not include any fish kill data for SD-is this missing a page? We object to Exhibits 15 through 17.As for the rest, we may not necessarily object to once the witnesses have provided the foundation, but we would need to reserve on those until the foundation is in. Longview Exhibits-We will stipulate to all.Shepherd Exhibits-Harold told me on the phone that he

will just use the YST exhibits and doesn't have a separate group. I hope I have that right. -----Original Message-----

From: Best, Diane **Sent:** Saturday, November 27, 2010 3:16 PM**To:** 'Eric Kerkvliet'; 'Rebecca Kidder'; 'hshepherd@ucl.net'; 'waterlaw@ucl.net'; Dave Nadolski **Cc:** Guhin, John; Gronlund, Eric**Subject:** Longview Exhibits The Board's procedural schedule did not indicate how many copies of exhibits need to be provided to the Board at next week's hearing. As far as I know there will be six board members, and board counsel who would need copies. The Board secetary will need the original. I generally have around 10 copies on hand, considering that the witness will need to have a copy to look at as well and there is always a need for a few extras. We have already exchanged copies among the parties for direct, so so I assume we won't need to also bring copies for all parties, unless there are cross x or rebuttal exhibits. The procedural order requires us to consult and stipulate on exhibits to the extent practical. My plan would be to send you an email on Monday telling you what exhibits I will stipulate to. Would you each do the same for the exhibits the state has sent to you? There are three parties who are not represented by counsel as far as I know (Brugier, Olive, and Mylott). I have received no exhibits from them. Have you? Finally, Harold Shepherd and I talked on Wednesday about the time frame for this hearing. It starts on Thursday at 8:30. Right now it looks like it will take the full two days. I wonder if we can't agree to tighten it up by limiting opening statements to 10 minutes? And limiting the foundational time on these experts somewhat. Perry Rahn and Jim Goodman has appeared a number of times before the Board and the CV's will be coming in anyway.

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~~~~~~~~~~~~~~~~~~~~~~~~~

Tom B.K. Goldtooth
Executive Director
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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 27, 2011

Faith Spotted Eagle
PO Box 667
Lake Andes SD 57356

Dear Ms. Spotted Eagle:

Pursuant to Diane Best's July 27th email, please find attached the notice sent to parties regarding preparation of findings of fact, conclusions of law and final decision in the matter of Water Permit Application No. 7206-3 filed by LongView Farms.

Sincerely,

Eric Gronlund
Water Rights Program, DENR
605 773-3352

enclosure

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182
www.state.sd.us/denr

July 19, 2011

NOTICE

TO: Eric Kerkvliet
Lynn Jackson Shultz & Lebrun
PO Box 2700
Sioux Falls SD 57104

Jon LaFleur, Attorney
Abourezk & Zephier, PC
PO Box 9460
Rapid City SD 57709

FROM: Garland Erbele, Chief Engineer
Water Rights Program

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

The Water Management Board directed Eric Kerkvliet to prepare proposed Findings of Fact, Conclusions of Law and a Final Decision in the matter of the approval of Water Permit Application No. 7206-3 filed by Long View Farms LLP. The Board will consider adoption of Findings, Conclusions and Final Decision at 1:00 PM, on October 5, 2011, in the Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol Avenue, Pierre SD. Notice will be provided if there is a change in the hearing date or time.

The Board requested that a copy of the proposed Findings, Conclusions and Final Decision be mailed to each Board member and parties by September 15, 2011. Written objections or comments in support of the proposed Findings, Conclusions and Final Decision, or alternative Findings, Conclusions and Final Decision are to be mailed to each Board member, the Board attorney (mailing list enclosed) and parties of record by September 26, 2011. Board counsel requests that the draft findings or alternative findings be provided in a WORD format file via email to *jeff.hallem@state.sd.us*.

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 5, 2011. The public hearing was completed on July 15, 2011. No additional testimony will be received.

If you have questions about the findings process, please contact Diane Best at (605) 367-5880.

Enclosure

c: Jeff Hallem, Assistant Attorney General
Diane Best, Assistant Attorney General

CERTIFICATION

I hereby certify that on July 19, 2011, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated July 19, 2011, regarding preparation of findings of fact, conclusions of law and final decision in the matter of Water Right Permit Application No. 7206-3, as set forth on the attached parties of record and addressed below:

Eric Kerkvliet
Lynn Jackson Shultz & Lebrun
PO Box 2700
Sioux Falls SD 57104

Jon LaFleur, Attorney
Abourezk & Zephier, PC
PO Box 9460
Rapid City SD 57709

Diane Best, Assistant Attorney General
300 N. Dakota Avenue, Suite 403
Sioux Falls SD 57104

Gail Jacobson

Gail Jacobson
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 19th day of July, 2011

Karen Schlaak

Karen Schlaak
Notary Public
My Commission expires April 1, 2013

SEAL KAREN SCHLAAK NOTARY PUBLIC State of South Dakota SEAL

WATER MANAGEMENT BOARD MEMBERS

Chad Comes PE **Vice-Chairman**
PO Box 308
Madison SD 57042

Leo Holzbauer
PO Box 877
Wagner SD 57380

Rodney Freeman Jr **Chairman**
PO Box 176
Huron SD 57350

Bernita Loucks **Secretary**
255 Texas St # F 332
Rapid City SD 57701

Everett Hoyt
4422 Carriage Hills Dr
Rapid City SD 57702

Tim Bjork
112 W Oak St
Pierre SD 57501

Jim Hutmacher
802 E 7th Street
Oacoma SD 57365

BOARD ATTORNEY

Jeff Hallem, Assistant Attorney General
Natural Resources Section
Office of Attorney General
George S Mickelson Criminal Justice Center
1302 E Hwy 14, Suite 1
Pierre, SD 57501

WATER RIGHTS PROGRAM

Department of Environment and
Natural Resources
Garland Erbele Chief Engineer
Water Rights Program
523 East Capitol Ave
Pierre SD 57501-3181

STAFF ATTORNEY

Diane Best - Assistant Attorney General
Office of Attorney General
Natural Resources Section
317 N Main
Sioux Falls SD 57104-6004

LAW OFFICES

Lynn, Jackson, Shultz & Lebrun, P.C.

LAWYERS ALSO ADMITTED IN MINNESOTA, IOWA, NEBRASKA AND WYOMING
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RECEIVED
SEP 16 2011
WATER RIGHTS PROGRAM

From the offices of Eric R. Kerkvliet
e-mail address: ekerkvliet@lynnjackson.com

September 15, 2011

Mr. Garland Erbele, Chief Engineer
DENR Water Rights Program
Joe Foss Bldg.
523 E. Capitol Ave.
Pierre, SD 57501

Re: Longview Farm, LLP – Water Permit Application No. 7206-3
Our File No. 082073-00003

Dear Mr. Erbele:

Enclosed, for filing, is the original of the Applicant's Proposed Findings of Fact and Conclusions of Law.

Sincerely,

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

Eric R. Kerkvliet

Enclosure

cc: Arlan Moss
Diane Best
Jon LaFleur
Jeffrey Hallem
Joan Olive
Sister Patricia Mylott
Eva Bruguier
Faith Spotted Eagle
Judy Honimichle
Sharon Drapeau
Wesly Hare
Glenn Drapeau
Kip (Spotted Eagle) Collins

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Longview's Proposed Findings of Fact and Conclusions of Law was served on 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 Sioux Falls, South Dakota, this 15th day of September, 2011:

Chad Comes, PE
Box 308
Madison, SD 57042

Tim Bjork
112 W. Oak St.
Pierre, SD 57501

Leo Holzbauer
P.O. Box 877
Wagner, SD 57380

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

Jim Hutmacher
802 E. Seventh St.
Oacoma, SD 57365

Bernita Loucks
255 Texas St. #F332
Rapid City, SD 57701

Jeffrey P. Hallem
Assistant Attorney General
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501

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

Jon LaFleur
Attorney at Law
P.O. Box 9460
Rapid City, SD 57709-9460

Diane Best
Assistant Attorney General
317 N. Main Ave.
Sioux Falls, SD 57104-6004

Joan Olive
P.O. Box 72
Spencer, NE 68777

Sister Patricia Mylott
P.O. Box 217
Marty, SD 57361

Eva Bruguier
P.O. Box 274
Marty, SD 57361

Faith Spotted Eagle
PO Box 667
Lake Andes, SD 57356

Judy Honimichle
c/o Fort Randall Casino
38538 SD Hwy 46
Lake Andes, SD 57356-7011

Sharon Drapeau
General Delivery
Marty, SD 57361

Wesly Hare
General Delivery
Marty, SD 57361

Glenn Drapeau
General Delivery
Lake Andes, SD 57356

Kip (Spotted Eagle) Collins
PO Box 667
Lake Andes, SD 57356

And was also sent electronically to the following:

Jeff.Hallem@state.sd.us

jlafleur@rushmore.com

eric.gronlund@state.sd.us.

rfreeman.huronlaw@midconetwork.com

diane.best@state.sd.us

And that on the same day the original was mailed for filing to:

Garland Erbele, Chief Engineer
DENR Water Rights Program
Joe Foss Bldg.
523 E. Capitol Ave.
Pierre, SD 57501

Dated this 15th day of September, 2011.

Eric R. Kerkvliet

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP	))))))	**APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Comes now the Applicant, Longview Farms, LLP (herein referred to as "Longview"), by and through its attorneys, Eric R. Kerkvliet and Lynn, Jackson, Shultz & Lebrun, P.C., and submits its proposed Findings of Fact and Conclusions of Law:

This matter came on for hearing before the South Dakota Board of Water Management (Board members Rodney Freeman (Chairman), Bernita Loucks, Chad Comes, Leo Holzbauer, Everett Hoyt, and Tim Bjork) on July 13, 14, and 15, 2011, at Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol Avenue, in Pierre, South Dakota. Longview appeared through its corporate representative, Arlan Moss, and through its attorney, Eric R. Kerkvliet, of Lynn, Jackson, Shultz and Lebrun, P.C. Diane Best, Assistant Attorney General, appeared on behalf of the Chief Engineer of the Water Rights program. Petitioner, Yankton Sioux Tribe, was present through its designated representative, John Stone, and was also represented by Jon LaFleur, of Abourezk & Zephier, PC. None of the Individual Petitioners that had previously appeared were present for the hearing before the Water Management Board.

The South Dakota Board of Water Management having heard all the evidence and considered and reviewed all of the documents introduced into evidence, and the Board being fully advised as to the premises, the Board hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Longview previously made application to the Board of Water Management for a well water permit but withdrew its application, relying on the domestic use exception, which allows stock watering without a permit as long as the use does not exceed 18 gallons per minute.

2. After Longview withdrew its application, the Yankton Sioux Tribe and the Individual Petitioners brought a declaratory ruling action before the Water Management Board in which they sought to determine whether Longview's proposed uses of the well water were considered a commercial use rather than a domestic use such that a well water permit would be required.

3. In the meantime, Longview's well driller drilled the well but it failed shortly after drilling was completed. Because Longview intended to rehabilitate or replace the well, the domestic use issue was still heard by the Board of Water Management.

4. The Board of Water Management determined that Longview's proposed uses of the well water were considered domestic because the water was to be used by Longview for stock watering and because the proposed use was for equal to or less than 18 gallons of water per minute.

5. The Yankton Sioux Tribe and the Individual Petitioners appealed the decision of the Board of Water Management to Circuit Court in Charles Mix County. Circuit Court Judge Bruce Anderson determined that Longview's use for washing its facilities, for animal hygiene, and for restrooms for human use did not constitute "stock watering" and was not a domestic use. Judge Anderson did explain that the consumptive use by the livestock did constitute "stock watering" such that a well water permit would not be required for that proposed use.

6. Longview is now before this Board seeking a well water permit, and, in this permit application, Longview seeks to appropriate .067 cubic feet of well water per second, which is approximately 30 gallons of water per minute.

7. The Chief Engineer of the Water Rights Program recommends approval of Longview's permit subject to certain conditions.

8. Notice of Longview's permit application was advertised in The Wagner Post on September 8, 2010 and on September 15, 2010.

9. The Notice provided that petitions to intervene were to be filed by September 27, 2010 and that hearing would be held on October 6, 2010 in Pierre.

10. Eva Bruguier, Faith Spotted Eagle, Judy Honimichle, Sharon Drapeau, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins (collectively, the "Individual Petitioners"), Sister Patricia Mylott, Joan Olive and the Yankton Sioux Tribe filed timely petitions to intervene.

11. The Individual Petitioners asked for delay under the statutory automatic delay provisions and the evidentiary hearing was delayed.

12. The Board issued a Procedural Order on October 14, 2010. The Order appointed Board Member Rodney Freeman to hear any prehearing motions.

13. The Board set the evidentiary hearing before the Board for December 2, 2010. All parties were provided with the Notice.

14. On November 29, 2010, legal counsel for the Yankton Sioux Tribe withdrew and its new counsel requested a continuance. The continuance was granted and hearing was scheduled for March 10, 2011.

15. On February 15, 2011, one of the Individual Petitioners, Faith Spotted Eagle, requested a continuance since Harold Shepherd, counsel for the Individual Petitioners, had notified her that he was withdrawing from the case. Ms. Spotted Eagle represented that additional time was necessary to seek different legal counsel.

16. On February 18, 2011, Board Hearing Chairman Rodney Freeman issued an Order continuing the hearing and it was scheduled for July 13, 2011, subject to confirmation at the next Board meeting. The Order was provided to all parties including each of the Individual petitioners. Mr. Shepherd formally filed his withdrawal on February 25, 2011.

17. On March 22, 2011, the Chief Engineer's office issued a Notice stating that the full Board had affirmed the Freeman Order and confirmed that the evidentiary hearing would be held on July 13-14 in Pierre. The Notice was provided to all parties including each of the Individual Petitioners.

18. On June 29, 2011, the DENR issued another Notice that stated that the evidentiary hearing would be held at 1:00 pm on Wednesday July 13 at the Mathews Training Center in Pierre. The Notice was provided to all parties including each of the Individual Petitioners.

19. At the July 13-15, 2011, hearing, Longview, the DENR, and the Yankton Sioux Tribe appeared and presented evidence regarding Longview's water permit application.

20. Despite (1) having filed petitions to intervene; (2) having successfully moved for a continuance of the hearing until the July 13-15 hearing date to allow them to hire an attorney to represent them at the hearing; and (3) having received sufficient notice of the rescheduled hearing date, none of the Individual Petitioners appeared or presented any evidence.

21. Joan Olive and Sister Patricia Mylott (who each separately intervened) did not appear at hearing and filed no response to any motions in this proceeding.

22. Longview's proposed well site is approximately 4 ½ miles north of Marty and about 6 to 6 ½ miles southwest of Wagner and approximately 5 ½ miles south of Ravinia in Charles Mix County. The proposed well site is located in the southwest quarter of the northwest quarter of Section 9, Township 95 North, Range 64 West of the 5th P.M. in Charles Mix County.

23. Longview's facility consists of three connected buildings (a farrowing barn, a breeding and gestation barn, and a gilt development unit) as well as a separate machine

shed/compost building.

24. Longview's water storage system is a large cement reservoir divided into two separate parcels by a cement wall, which holds approximately 3 days of water supply.

25. Longview's facility is equipped with a dual plumbing system which would allow Longview to use either rural water or well water at almost any point in the Longview facility.

26. Since inception of the Longview facility, the sole source of water to the Longview facility has been from the Randall Rural Water District, which obtains its water from the Missouri River.

27. Applicant Exhibit No. 10 summarizes the amount of water used by Longview from Randall Rural Water District since inception of the facility.

28. Longview made a commitment to its neighbors and to the Randall Rural Water District that it would apply for and obtain a well water permit to reduce the amount of water necessary to be obtained from the Randall Rural Water District.

29. Longview seeks a well water permit to supplement the water obtained from the Randall Rural Water District.

30. If Longview is granted a well permit, it is anticipated that Longview's use of Randall Rural Water District water will decrease, and it is in Longview's economic interest to use more well water and less rural water.

31. The Water Management Board considers whether (1) there is a reasonable probability that there is unappropriated water available for Longview's proposed use; (2) the proposed diversion can be developed without unlawful impairment of existing rights; (3) the proposed use would be a beneficial use; and (4) the use would be in the public interest.

32. It is anticipated that the well as constructed or rehabilitated will have a maximum pumping rate of 15-18 gallons per minute.

33. Longview will be licensed for the maximum pumping rate of the well as constructed; therefore, Longview anticipates being licensed for between 15-18 gallons per minute, depending on the actual maximum pumping rate after the well is constructed or rehabilitated.

34. A request for water with an expected maximum pumping rate of 15-18 gallons per minute (which is the maximum pumping rate for domestic wells)—or even a pumping rate of 30 gallons per minute—is a relatively insignificant amount of water in determining whether there is a reasonable probability of unappropriated water available from the Codell aquifer and whether the proposed use will unlawfully impair existing rights.

35. In considering whether (1) there is a reasonable probability that water is available for Longview's proposed use and (2) the proposed use will not unlawfully impair existing water rights, the Board relies on the testimony of DENR expert witnesses Jim Goodman and Garland Erbele regarding the size and extent of the Codell Aquifer, its lithology, and the history of water withdrawals and discharges and the history of permits from

this aquifer.

36. The Codell sandstone aquifer is a buried sedimentary rock and a member of the Carlile shale. It consists of loosely to tightly cemented very fine to coarse light brownish gray to dark greenish black and brown sand. The Codell aquifer is under artesian conditions at Longview's site.

37. In order to penetrate the Codell aquifer at Longview's site, the well (when drilled or rehabilitated) would be approximately 570 to 620 feet below the surface.

38. The Codell Aquifer underlies approximately 1,134 square miles in Charles Mix County and has an estimated storage of approximately 1.45 million acre feet of recoverable water in Charles Mix County.

39. The Codell Aquifer is fairly large; it extends to the north into Douglas County, to the east into Hutchinson County, to the southeast into Bon Homme County and to the south into Nebraska.

40. Water movement within the Codell aquifer in the area of the Longview application is likely from the northwest to the southeast towards the Missouri River.

41. A monitoring well was located approximately 2 ½ miles from Longview's site; however the well collapsed in 1993. According to this monitoring well, there was very little change in the water levels of the Codell aquifer from 1952 to 1992.

42. There are two monitoring wells approximately 23 and 25 miles north and northeast of Longview's site into Douglas County to the north and Hutchinson County to the east.

43. These two monitoring wells are representative of the conditions of the Codell aquifer as a whole.

44. The Douglas County monitoring well shows that the Codell aquifer responds very well to climatic conditions and does appear to have some annual fluctuations.

45. The Hutchinson County monitoring well shows that there have been rising conditions over the period of the hydrograph.

46. According to the two hydrographs from the two monitoring wells, the Codell aquifer does recharge and there have been no major changes in the water levels of the Codell aquifer over the last several years.

47. Considering the historical records of the three monitoring wells into the Codell aquifer witness Goodman testified about, there has been very little change in the water levels of the Codell aquifer and it is capable of sustaining additional withdrawals.

48. Other than domestic use, there is very little appropriation of water out of the Codell aquifer.

49. At one time, the towns of Geddes, Ravinia, and Lake Andes all used the Codell aquifer as a water supply. However, they have abandoned those wells and switched to rural

water.

50. The only Codell aquifer water permit in Charles Mix County is the Clearfield Colony, and its use is for domestic use. The Clearfield Colony is located approximately 20-25 miles north and east of Longview's site. There are no appropriative water permits or rights in the Codell aquifer near the Longview site.

51. A little drawdown could be expected from the pumping at Longview's site; however because the pumping rate is only 30 gallons per minute, this well would expect to produce between one to three gallons per minute per foot of draw down. In other words, at 30 gallons per minute, there would be between 10-30 feet of drawdown in the production well. That drawdown would not extend very far away from the production well and it would not be expected to have any adverse impact on the Codell aquifer.

52. The Yankton Sioux Tribe submitted USGS records showing domestic wells from the Codell and various other aquifers throughout Charles Mix County. This evidence has been considered. Having reviewed the USGS records submitted by the Yankton Sioux Tribe, the testimony of witness Goodman concerning the observation wells in the Codell Aquifer, and all other testimony presented, the Board finds that there is a reasonable probability of unappropriated water available in the Codell aquifer for the water permit request at issue, notwithstanding any existing uses for domestic purposes. According to Longview's test hole data, there is approximately 32 feet of Codell sandstone at Longview's site (from 573 feet to 605 feet) and there is a static water level of 470 feet below the land surface, which is consistent with the conclusions of the Chief Engineer's office that there is water available.

53. The maximum pumping rate for the well that was drilled was approximately 15 gallons per minute, and a similar maximum pumping rate is expected when the well is constructed or rehabilitated.

54. The Chief Engineer reviewed the best information reasonably available to determine whether the proposed use would exceed the annual recharge rate of the Codell aquifer pursuant to SDCL §46-6-3.1.

55. It can be determined whether an aquifer level is declining without doing a recharge study by observing the history of water levels in a particular aquifer. If the overall water level of the aquifer was declining the hydrographs from the DENR observation wells would show a decline regardless of climate. That is not the case here.

56. There are approximately 1600 observation wells throughout the State of South Dakota that are observed to monitor the water levels in the aquifers in South Dakota.

57. It would cost an inordinate amount of money and time to do a recharge study for each individual aquifer within the State of South Dakota.

58. According to the two observation wells into the Codell aquifer, which are representative of the Codell aquifer as a whole, there is more water in the aquifer at the present time than there was 20 years ago.

59. The hydrographs of the Codell aquifer considered by the Chief Engineer's office and the DENR are the best information reasonably available to determine whether

annual withdrawals from the aquifer would exceed the average annual recharge of the aquifer.

60. The Greenhorn formation is stratigraphically below the Codell aquifer in the area of Longview's facility.

61. The only two known wells in proximity to Longview's facility were to the north of the Longview facility.

62. Drawdown is not expected to be significant at Longview's maximum pumping rate, nor is it anticipated that Longview's proposed use will cause any adverse effects on existing water rights or on area domestic users.

63. The Yankton Sioux Tribe currently obtains its water supply from the Missouri River.

64. The Randall Rural Water District also obtains its water from the Missouri River.

65. If Longview is granted a permit to obtain water from the Codell aquifer, and, as a result, uses less water from the Randall Rural Water District, then theoretically there is more Missouri River water available to the Yankton Sioux Tribe.

66. It is unclear how many wells the Yankton Sioux Tribe has into the Codell aquifer and the Yankton Sioux Tribe's designated representative was unable to answer questions as to how many wells the Yankton Sioux Tribe has into the Codell aquifer.

67. In addition to the foregoing evidence, the interests of the Yankton Sioux Tribe have been considered in determining whether there will be an unlawful impairment of existing rights. This Board finds, based on the entirety of the evidence presented, that there will not be an unlawful impairment of existing rights, including those of the Yankton Sioux Tribe.

68. The water from the proposed well will undoubtedly be beneficial to the Longview facility, regardless of how the water is used within the facility.

69. Water does not need to be of very high quality for the water to be beneficial to Longview, because even relatively low quality water is capable of being used for power washing the facilities.

70. The quality of water within the Codell aquifer is of relatively high quality, and it is expected that the water from the Codell aquifer will, at a minimum, be of sufficiently high quality to use to power wash the facilities.

71. Depending on the quality of the well water obtained from the Codell aquifer, the water may be able to be used to feed Longview's pregnant and nursing sows.

72. From the inception of Longview's facility to November of 2010, Longview has paid Charles Mix County vendors a total of $2,523,316.79.

73. Longview currently has 13 employees with a starting wage of $9.50 per hour for the first 90 days of employment with a dramatic increase in wages after 90 days. The managers of Longview's facility make much more than the hourly employees, and all

employees are provided full health and dental benefits at no cost to the employee.

74. From inception of Longview's facility through November of 2010, Longview has paid its employees more than $700,000 in wages and benefits.

75. Longview has had a significant, positive impact on the economy of Charles Mix County.

76. The Longview facility has potential for employment of Yankton Sioux tribal members. In fact, Yankton Sioux tribal members have held positions of employment at the Longview facility in the past.

77. In addition to the potential for employment, there is potential for Yankton Sioux tribal members to sell feed to the Longview facility (in addition to other opportunities).

78. In general, confined animal feeding operations that comply with the permitting requirements set forth by the DENR are considered to be beneficial and in the public interest of the State of South Dakota.

79. Specifically, Longview has complied with all of the permitting requirements set forth by the DENR and the Longview facility is in the public interest of the State of South Dakota. Further, the water use for this facility is a beneficial use in terms of the best utilization of the water supply.

80. Longview's facility is a zero discharge facility.

81. The soil characteristics in their native state at the Longview facility meet South Dakota's minimum liner standards for earthen nutrient storage systems.

82. Because of the favorable geologic characteristics and because Longview chose to construct a concrete wastewater management system in addition, the Longview facility essentially has a dual containment system for animal waste.

83. The animal waste storage facility is a 10 feet deep reinforced concrete structure with adequate storage for a year's worth of nutrient production from the animals in Longview's facility.

84. The proposed site for the well is approximately 280 feet from the nearest manure storage facility, which exceeds the 150 foot standard required by the DENR.

85. Because there is no shallow well beneath the Longview facility, there is no requirement that Longview obtain a groundwater discharge permit or that there be groundwater monitoring near the Longview facility.

86. Longview's nutrient management system and its application of manure to fields with manure easements has complied with the DENR's requirements.

87. Longview has obtained a DENR Water Pollution Control Permit and has complied with all of the requirements in obtaining and maintaining that permit through the DENR.

88. Longview has complied with all of the rules and regulations regarding ground

water quality and surface water quality.

89. The licensed well driller for Longview is Jim Hutmacher, who is familiar with the Water Management Board well construction rules.

90. The construction or rehabilitation of Longview's well will be done in compliance with the Water Management Board's well construction rules, including the requirement that the well only obtain water from the Codell aquifer and not any other aquifer.

91. A Yankton Sioux Tribe witness stated at hearing that there are abandoned or other domestic wells near the Longview site but was unable to state exactly how far they were from the Longview manure containment system or land application areas, if they were still being used or could be plugged, and who they belonged to. The DENR Water Pollution Control Permit requires that manure containment systems and land application sites must be 1,000 feet away from a public water supply, 250 feet from a neighbor's well, and 150 feet from the producer's own well. Longview's design engineer stated that he had examined aerial photography with the applicant and was unaware of any wells within these buffer distances. There is insufficient evidence to conclude that the containment system or land application areas violate the distance requirements. Regardless, if the Yankton Sioux Tribe later provides information to Longview or Longview otherwise finds these wells and they are within the buffer areas, Longview must make arrangements to meet the DENR Water Pollution Control Permit requirements by seeing that abandoned wells are properly plugged, changing its land application sites, or undertaking whatever means is necessary to meet the buffer requirements. Further, denial of the permit would not resolve the issue if any such wells are discovered. Longview holds an ongoing obligation to comply with the terms of its DENR Water Pollution Control Permit regardless of whether the requested water permit is granted or not.

92. In its design and construction of the Longview facility, Longview has complied with all of the DENR requirements with regard to permitting for confined animal feeding operations.

93. Longview's manure storage system complies with DENR's regulations regarding confined animal feeding operations.

94. Longview's nutrient management system complies with DENR's regulations regarding confined animal feeding operations.

95. Longview has obtained coverage under the DENR Water Pollution Control Permit. The analysis and review by the DENR for this program is complete and final. It is not subject to review by this Board. The fact that the coverage has been obtained does, however, provide evidence that the Longview's use is beneficial and in the public interest.

96. There is a public process allowing for written comments from members of the public as part of the DENR Water Pollution Control Permit process. However, the Yankton Sioux Tribe and the Individual Petitioners failed to file any comments or objections to Longview obtaining coverage under the DENR Water Pollution Control Permit

97. The only incident that could even be considered a violation of the DENR's requirements as to the Water Pollution Control Permit is the leaking of approximately 100 gallons of manure due to the nicking of a hose carrying manure to one of the fields in which

the manure is applied.

98. The manure spill was promptly cleaned up and there was no pollution as a result of the manure spill. The area in which the spill occurred was dry at the time.

99. Longview's facility was designed to control odor emissions in that there is sufficient ventilation, a negative pressure system, a concrete design for the nutrient storage below the facility rather than an open earthen lagoon, and Longview frequently power washes its facilities to reduce dust particles that have the potential to carry odor.

100. In addition, in applying the manure from the Longview facility, the applicators spike in the manure to maximize the nutrient value of the manure, which has an ancillary benefit of reducing odor potential in comparison to spreading manure on the surface of the fields.

101. Jim Hutmacher completed a water well completion report for the well that was drilled, and the water well completion report was admitted as Applicant Exhibit No. 7.

102. The only other aquifer underlying Longview's site is the Niobrara formation, which overlies the Codell aquifer at Longview's site, and the top of the Niobrara formation is approximately 450 feet below the surface at the Longview site.

103. The most shallow aquifer at the location of the drilled well by Mr. Hutmacher is the Niobrara formation, which is 450 feet deep at the top of the formation.

104. At the location of the drilled well, there was no shallow aquifer (aquifer within 100 feet of the land surface). Rather, clay constituted all of the material within 100 feet of the surface at the location of the drilled well.

105. Longview, through its engineering firm—Eisenbraun & Associates—and the engineering firm's subcontractor, performed three soil borings at the Longview facility.

106. Two soil borings were drilled to 30 feet and one soil boring was drilled to 51 feet.

107. The three soil borings established that there was no aquifer within the depth of the soil borings.

108. Neither the Niobrara aquifer nor the Codell aquifer is within 100 feet of the surface at the Longview facility.

109. There is enough information to determine whether the Herrick formation or the Herrick aquifer is underlying the Longview facility, and, based upon all of the available information, the Herrick formation or the Herrick aquifer does not underlie the Longview facility.

110. There is no map of any geologist that shows the Herrick formation is present below the Longview facility.

111. Dr. Perry Rahn is unaware of any map that would show the presence of a shallow aquifer within 100 feet of the surface at the Longview facility's location.

112. The State Geologic Survey has completed a map which indicates the first occurrence of aquifer materials within Charles Mix County, South Dakota. In creating this map, the State Geologic Survey considered all of the available test hole and well data, all of the available surface and subsurface geologic mapping data, and all of the published and unpublished reports that were available.

113. With the State Geologic Survey completing the first occurrences map, Derric Iles has reviewed enough information to determine whether there is a shallow aquifer underlying the Longview facility.

114. There is no shallow aquifer beneath the Longview facility.

115. There is no evidence that the area within 100 feet of the land surface near the Longview facility is anything other than low permeability soils.

116. The Chief Engineer recommends approval of Longview's well permit application with the following conditions:

a. The well approved will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under Permit No. 7206-3 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.

b. The well authorized by Permit No. 7206-3 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.

c. Permit No. 7206-3 is subject to compliance with requirements of the DENR's Water Pollution Control Permit issued pursuant to SDCL §34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

d. Permit No. 7206-3 is subject to compliance with all existing and applicable Water Management Board Rules including (but not limited to):

    a. Chapter 74:54:01 Ground Water Quality Standards;
    b. Chapter 74:54:02 Ground Water Discharge Permit;
    c. Chapter 74:51:01 Surface Water Quality Standards;
    d. Chapter 74:51:02 Uses Assigned to Lakes;
    e. Chapter 74:51:03 Uses Assigned to Streams; and
    f. Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions.

117. The Board adopts the recommendation of the Chief Engineer with its proposed conditions.

118. Having considered the experience of Jim Goodman, his demeanor while testifying, and the actual testimony of Jim Goodman, the Board finds that the testimony of Jim

Goodman is credible. Mr. Goodman is an expert with extensive experience in evaluating water permit applications and the effects of pumping and other water use on aquifers, and groundwater hydrology in South Dakota. He relied on his own experience as well as studies and mapping of the Codell aquifer by the United States Geological Survey and the South Dakota Geological Survey, observation well data compiled by the DENR, and well logs and other records maintained or routinely used by the DENR.

119. Having had an opportunity to observe the demeanor and hear the testimony of John Stone (who is the designated representative to testify on behalf of the Yankton Sioux Tribe), including his admitted misstatement of fact, his vagueness in responses, the fact that he was unable to answer underlying questions to support his assertions, and his evasiveness in answering questions, the Board determines that John Stone is not a credible witness.

120. Derric Iles, the State Geologist and Administrator of the Geological Survey Program, has excellent credentials and expertise. Derric Iles has studied the aquifers, aquifer maps, well data, and hydrology of Charles Mix County extensively. His testimony is credible and reliable.

121. Derric Iles presented unbiased factual interpretations, after considering the available data, and he is considered a third party independent of the Chief Engineer.

122. Having had an opportunity to observe the demeanor and hear the testimony of Derric Iles while testifying, the Board finds the testimony of Derric Iles to be extremely credible.

123. Having had an opportunity to observe the demeanor and hear the testimony of Derric Iles and Perry Rahn, the Board finds that the testimony of Perry Rahn is less credible than that of Derric Iles.

124. In making the determination in the foregoing finding, the Board considers the vagueness and ambiguities in responses of Perry Rahn and the preciseness in responses of Derric Iles, as well as the impeachment of and inconsistencies within Perry Rahn's testimony.

125. Any Finding of Fact improperly designated as a Conclusion of Law shall be included within these Findings of Fact.

CONCLUSIONS OF LAW

1. The South Dakota Board of Water Management has jurisdiction over the parties and subject matter of this lawsuit.

2. The site for this application is not within the Yankton Sioux Reservation and is owned by Longview, which is a South Dakota limited liability partnership that is clearly not a tribal member or tribal entity. The water source for this application is the Codell aquifer which overlies this area outside the Yankton Sioux Reservation in South Dakota.

3. Publication was properly made in The Wagner Post pursuant to SDCL §46-2A-4.

4. Under ARSD 74:02:01:12.04, the deadline for filing petitions to intervene in this

matter was September 27, 2010. This intervention date was published as required by SDCL §46-2A-4.

5. The Yankton Sioux Tribe, the Individual Petitioners, Sister Patricia Mylott, and Joan Olive timely filed petitions to intervene.

6. Notice of hearing was properly given pursuant to SDCL §46-2A-4 and SDCL §1-26-17.

7. The present application falls within the Board's responsibility over water appropriation and regulation in Title 46, more specifically SDCL §46-2A-9.

8. Each of the elements in SDCL §46-2A-9 must be proven in order for this Board to grant Permit Application No. 7206-3.

9. The Chief Engineer has recommended approval and Jim Goodman and Garland Erbele testified in support of the recommendation. This recommendation is not, however, binding on the Board. *SDCL §46-2A-4(8)*. Likewise, references to past recommendations of the Chief Engineer are not binding on the Board.

10. SDCL §46-2A-9 provides that a permit to appropriate water may be issued "only if there is reasonable probability that there is unappropriated water available for 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." *SDCL §46-2A-9.*

11. The first element in SDCL §46-2A-9 is whether there is water available for the appropriation. The Codell aquifer is large and capable of sustaining additional withdrawals, as explained in the Findings of Fact.

12. Consideration of water availability also includes consideration of the criteria in SDCL §46-6-3.1 pertaining to recharge/withdrawal: whether "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 annual recharge of water to the groundwater source." *SDCL §46-6-3.1.*

13. Although there is an exception to the recharge/withdrawal consideration in SDCL §46-6-3.1, it applies only to applications filed by public water supply systems and is not applicable here.

14. Annual recharge to the Codell aquifer has not been and is not likely to be quantified in the near future. The Codell aquifer is a confined aquifer. The criteria of SDCL §46-6-3.1 can be fulfilled by analysis of the observation well data.

15. The observation well data considered by the Chief Engineer and the DENR is the best information reasonably available to determine whether the quantity of water withdrawn

annually from the Codell aquifer will exceed the quantity of the average annual recharge of water to the Codell aquifer.

16. In determining whether the water withdrawn annually from the Codell aquifer will exceed the quantity of the average annual recharge of water to the Codell aquifer, the observation wells are instructive as to the water levels of the entire Codell aquifer.

17. According to the best information reasonably available, the quantity of water withdrawn annually from the Codell aquifer will not exceed the quantity of the average annual recharge of water to the groundwater source if this permit is granted.

18. Given the foregoing Findings of Fact and Conclusions of Law, the Board concludes that there is sufficient water available for the proposed water use.

19. As a second element of SDCL §46-2A-9, the appropriator must demonstrate that the proposed diversion can be developed without unlawful impairment of existing rights.

20. The proposal here would not impair existing water rights, including those of the Yankton Sioux Tribe, as is addressed at length in the Findings of Fact and as set forth in the following Conclusions of Law.

21. Domestic water users and those users with prior water rights hold priority over the present Application and their uses would take precedence if there is an actual adverse impairment of an adequate well.

22. Domestic uses of water are those defined in SDCL §46-1-6(7). The rights of domestic user are unlikely to be impaired by the present Application but, out of an abundance of caution, this Board imposes a condition on the permit to protect domestic users.

23. The Winters Doctrine provides that the priority date for the determination of whether tribes have surface water rights is the creation of the reservation. *Winters v. United States*, 207 US 564 (1908).

24. However, there is a split of authority as to whether the Winters Doctrine applies to ground water. *In re General Adjudication of All Rights to Use Water in Gila River System*, 989 P2d 739 (Ariz. 1999); *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P2d 76 (Wyo. 1988). The Supreme Court of Arizona has held that the Winters Doctrine does apply to ground water while the Supreme Court of Wyoming has declined to so hold.

25. The United States Supreme Court has had more than one opportunity to hear the issue and apply the Winters Doctrine to ground water rights of Indian tribes but has failed to do so. *U.S. v. Cappaert*, 426 US 128 (1976)(affirming the Ninth Circuit but declining to fully endorse the statement of the Ninth Circuit applying the Winters Doctrine to ground water); *Wyoming v. U.S.*, 492 US 406 (1989).

26. The Supreme Court of South Dakota has not addressed the issue of whether the Winters Doctrine applies to ground water.

27. Until a court of competent jurisdiction determines that the Yankton Sioux Tribe has Winters Doctrine rights that apply to ground water and until such time as those rights are quantified, the Chief Engineer and the Water Management Board are unable to determine the extent to which the Yankton Sioux Tribe has rights to the Codell aquifer that would be superior rights to those of Longview.

28. If a court of competent jurisdiction determines that the Winters Doctrine applies to groundwater claims of the Yankton Sioux Tribe and if those rights are quantified, the Yankton Sioux Tribe's priority date for its rights would date back to the treaty establishing the Yankton Sioux Tribe's reservation. This Board does not purport to adjudicate the question of whether the Yankton Sioux Reservation's diminished status would affect the quantification of the Winters rights. Such a right, if any, would be senior in priority to the present application.

29. The application, when conditioned as recommended by the Chief Engineer, would not impair existing rights.

30. The third element in SDCL §46-2A-9 is whether the use of water would be a beneficial use.

31. In this context, a beneficial use of water is one that is reasonable and useful and beneficial to the appropriator and that is consistent with the interest of the public in the best utilization of water supplies. *SDCL §46-1-6(3).*

32. As set forth in the following Conclusions of Law, Application No. 7206-3 would be a beneficial use of water under each part of this definition.

33. The use of water, as requested, would undoubtedly be useful and beneficial to the appropriator, because the water will be used in Longview's confined animal feeding operation.

34. It is unnecessary to determine the specific uses to which Longview will put the well water within Longview's facility as long as the water is beneficial to Longview's confinement facility.

35. The proposed use of well water by Longview is reasonable.

36. The other part of the beneficial use test is whether the water use is in the interest of the public in terms of the best utilization of water supplies. *SDCL §46-1-6(3).*

37. The Board considers several factors in determining whether the water use is in the interest of the public in terms of the best utilization of water supplies, including:

a. In general, confined animal feeding operations are in public interest of the State of South Dakota.

b. Water should be put to the maximum beneficial use given the arid climate in South Dakota. *SDCL §46-1-4.*

c. Reserving water in an aquifer and keeping it from being applied to maximum beneficial use is generally inconsistent with SDCL §46-1-4.

38. Based on the evidence submitted (and as addressed elsewhere in these Findings and Conclusions) the Longview facility is currently in compliance with the DENR environmental permitting requirements and continued compliance will be required.

39. Longview meets the beneficial use criteria.

40. As a fourth element of SDCL §46-2A-9, the appropriator must demonstrate that the proposed use is in the public interest. The public interest element requires weighing the general public interest in the local economy associated with farming and irrigation along with any other economic, recreational, wildlife, ecological, public health, or other issues presented.

41. Longview's facility has already had a substantial economic impact on the Charles Mix County economy, including the purchasing of more than $2.5 million worth of goods and services from Charles Mix County vendors and also paying more than $700,000 to employees of Longview.

42. Based on the evidence submitted, Longview has complied with all of the requirements imposed upon it by the DENR, including requirements regarding ground water quality, surface water quality, nutrient management plans, waste management facilities, and set back requirements from potential pollution sources.

43. The production of livestock is in the public interest of the State of South Dakota.

44. In considering the public interest factors of economic impact and the production of livestock, the Board concludes that the present application is in the public interest.

45. The application meets the public interest criteria.

46. Longview currently holds coverage under the DENR's Water Pollution Control Permit issued pursuant to SDCL §34A-2-36 or 34A-2-112 for its operation. The coverage under the Water Pollution Control Permit has previously been subject to public comment as well as review and analysis by DENR. The DENR's coverage decision is final and not subject to review by this Board. Longview must, however, continue to maintain its coverage under the Water Pollution Control Permit and comply with its requirements. As conditioned below, a violation of the Water Pollution Control Permit is a violation of the permit authorized by these Findings of Fact and Conclusions of Law.

47. The term "aquifer" is defined as "a geologic formation, a group of geologic formations, or part of a geologic formation that contains sufficient saturated permeable material

to yield quantities of groundwater to wells and springs." *ARSD 74:02:04:20(10).*

48. The term "shallow aquifer" is defined as "any aquifer having the following characteristics:

(1) The aquifer is within fifty feet or less below the land surface with fifteen feet or less of continuous, overlying, extremely low permeability geologic material, such as clayey till or shale. Weathered till or highly fractured weathered shale is not an extremely low permeability material for purposes of this section; or

(2) The aquifer is greater than fifty feet but less than one hundred feet below the land surface with thirty feet or less of continuous overlying low to extremely low permeability geologic material that may be a combination of weathered and unweathered till, shale, or till and shale."

SDCL §34A-3A-24.

49. There is no shallow aquifer beneath the surface of the Longview facility.

50. The Board is an administrative agency with quasi-judicial authority to consider the factors in SDCL §46-2A-9, including public interest. As such, the Board holds authority to consider each case on its merit, and is not bound to accept prior public interest decisions as binding precedent (and this decision will not constitute binding precedent). *Interstate Telephone Cooperative, Inc. v. Public Utilities Commission*, 518 NW2d 749 (SD 1994).

51. Based on the entirety of the record, Application No. 7206-3 meets the standard in SDCL §46-2A-9 and should be granted, subject to the recommendations proposed by the Chief Engineer.

52. Any Conclusions of Law improperly designated as a Finding of Fact shall be included within these Conclusions of Law.

FINAL DECISION AND ORDER

Application No. 7206-3 is granted subject to the following permit qualifications:

a. The well approved will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under Permit No. 7206-3 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.

b. The well authorized by Permit No. 7206-3 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.

c. Permit No. 7206-3 is subject to compliance with requirements of the DENR's Water Pollution Control Permit issued pursuant to SDCL §34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

d. Permit No. 7206-3 is subject to compliance with all existing and applicable Water Management Board Rules including (but not limited to):

    a. Chapter 74:54:01 Ground Water Quality Standards;
    b. Chapter 74:54:02 Ground Water Discharge Permit;
    c. Chapter 74:51:01 Surface Water Quality Standards;
    d. Chapter 74:51:02 Uses Assigned to Lakes;
    e. Chapter 74:51:03 Uses Assigned to Streams; and
    f. Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions.

Dated this _____ day of September, 2011.

BY THE BOARD:

_____

Rodney Freeman, Chairman
South Dakota Water Management Board

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WATER RIGHTS PROGRAM

September 21, 2011

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Re: *In the Matter of Water Permit Application No. 7006-3, Longview Farms, LLP*

Dear Board Members and Board Counsel.

This letter responds to the proposed Findings of Fact, Conclusions of Law, and Final Decision drafted by Longview's counsel. The DENR and Chief Engineer have no objection or other comments on these proposals and urge the Board to adopt this proposal as drafted. A copy of this letter is being sent to all persons who intervened as set forth in the attached certificate of service.

Sincerely,

Diane Best

Diane Best
Assistant Attorney General
Counsel for DENR

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SEP 22 2011
WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP	)))	CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of her September 21, 2011 letter to the WMB was served on 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 Sioux Falls, South Dakota, this 21st day of September, 2011:

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Garland Erbele, Chief Engineer
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And emailed the above referenced letter to the following on the same date:

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WATER RIGHTS PROGRAM

Mike Abourezk
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September 26, 2011

Eric Gronlund
Water Rights Program
PMB 2020
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523 East Capitol
Pierre, SD 57501

Re: In the Matter of Water Permit Application No. 7206-3, Longview Farms, LLP

Dear Mr. Gronlund:

Enclosed is the Petitioner Yankton Sioux Tribe's Objections to Applicant's Proposed Findings of Fact and Conclusions of Law and Petitioner Yankton Sioux Tribe's Additional Proposed Findings of Fact and Conclusions of Law in the Longview matter. Thank you.

Sincerely,

Jon J. LaFleur
Attorney for Yankton Sioux Tribe

JJL/nm
Enclosure
cc: Diane Best
Eric Kerkvliet/David Nadolski
Jeff Hallem
Rodney Freeman
Sister Patricia Mylott
Joan Olive
Eva Bruguier
Faith Spotted Eagle
Judy Honimichle
Sharon Drapeau
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Kip (Spotted Ealge) Collins
B&C Committee

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WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONGVIEW FARMS, LLP	]	PETITIONER YANKTON SIOUX TRIBE'S OBJECTIONS TO APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 5 for the reason that Judge Anderson determined that Longview was a commercial operation and that as a commercial operation it was required to get a water permit for its intended use of well water.

2. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 28 for the reason that Longview did not make a commitment to the Yankton Sioux Tribe to apply for and obtain a water permit. Longview had little contact with Yankton Sioux Tribe and in no way considered Yankton Sioux Tribe's existing water rights.

3. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 34 for the reason that neither Longview nor DENR's witnesses researched or investigated the existing water rights of Yankton Sioux Tribe. No witness for Longview or DENR testified as to the practicable irrigable acres owned by Yankton Sioux Tribe, nor did they do any investigation as to the specific number of wells using the Codell aquifer by Yankton Sioux Tribal members.

4. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 35 for the reason that neither expert Goodman nor Erbele testified that they did any research or investigation into the water rights of the Yankton Sioux Tribe and neither testified that they were able to determine the annual usage from the Codell aquifer or the recharge rate for the Codell aquifer.

5. Petitioner Yankton Sioux Tribe objections to Longview's Proposed Finding of

Fact No. 41 for the reason that data from the monitoring well two and a half miles from Longview's site is approximately twenty years old and is not reliable evidence to support present day conditions for the Codell Aquifer.

6. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 43 for the reason that the two monitoring wells that are twenty-three and twenty-five miles away from Longview's site are not reliable to establish conditions near the Longview site.

7. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 44 for the reason that the Douglas County monitoring well is not reliable to show conditions at the Longview site since it is over twenty miles away from the Longview site.

8. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 45 for the reason that the Hutchington County monitoring well is not reliable to show conditions at the Longivew site since it is over twenty miles away from the Longview site.

9. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 46 for the reason that the two monitoring wells in Douglas and Hutchington County are not reliable to establish that the Codell aquifer recharges and that there have not been major changes in the water levels over the last several years since those two monitoring wells are over twenty miles from the Longview site.

10. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 47 for the reason that the two monitoring wells are not reliable evidence as to the present condition of the Codell aquifer at the Longview site. These monitoring wells do not establish the annual usage from the Codell aquifer nor do they establish the estimated recharge rate.

11. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 48 for the reason that there has been no evidence to establish that the recharge for the Codell

aquifer will exceed the usage from the Codell aquifer once Longview initiates its well useage.

12. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 50 for the reason that Longview did not present any evidence of wells on the Yankton Sioux Tribe into the Codell aquifer nor did Longivew consider Yankton Sioux Tribe's water rights in the Codell aquifer near the Longview site. Each witness presented by Longview and DENR denied that they did any investigation into Yankton Sioux Tribe's water rights into the Codell aquifer.

13. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 51 for the reason that neither Longview nor DENR presented any evidence as to the annual usage out of the Codell aquifer nor any evidence of the estimated annual recharge rate for the Codell aquifer.

14. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 52 for the reason that there was no evidence presented establishing the annual usage from the Codell aquifer nor the estimated annual recharge rate for the Codell aquifer.

15. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 54 for the reason that there was no reliable evidence as to the annual usage from the Codell aquifer near the Longview site nor was there any reliable evidence as to the estimated recharge rate for the Codell aquifer near the Longview site. Longview and DENR used unreliable evidence from monitoring wells that were over twenty miles from the Longview site or had not been in operation since 1992.

16. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 55 for the reason that there was no evidence presented establishing the annual usage from the Codell aquifer nor establishing the estimated annual recharge rate for the Codell aquifer.

Longview relies on data from monitoring wells more than twenty miles from the Longview site and from a monitoring well that ceased providing data in 1992. There was no evidence presented at the hearing as to the annual usage out of the Codell aquifer nor was there any evidence presented as to the estimated annual recharge rate fro the Codell aquifer. The monitoring wells relied upon by Longview that were over twenty miles from Longivew did not establish the annual usage from the Codell aquifer nor did the wells establish the estimated annual recharge rate for the Codell aquifer.

17. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 57 for the reason that it is irrelevant in that South Dakota law requires a determination of the annual usage from the Codell aquifer and the estimated annual recharge rate for the Codell aquifer. Neither Longview nor the DENR provided any evidence as to the usage from the Codell aquifer or the estimated recharge rate. Longview and DENR instead presented evidence from unreliable monitoring wells from which one could not establish usage rate or recharge rates.

18. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 58 for the reason that the two wells into the Codell aquifer were not reliable to establish annual usage or recharge rates.

19. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 59 for the reason that the hydrographs of the Codell aquifer did not establish annual usage nor did the hydrographs establish the estimated annual recharge rate for the Codell aquifer.

20. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 62 for the reason that it is not relevant. The relevant fact is the estimated usage and the estimated annual recharge rate for the Codell aquifer. Longview did not present reliable evidence that the quantity of water to be withdrawn from the Codell aquifer will not exceed the estimated

annual recharge of water to the Codell aquifer. Under SDCL § 46-6-3.1, an application to appropriate ground water may not be approved unless reliable evidence has been presented as to the annual usage and estimated annual recharge. Furthermore, Longview and DENR did not present any evidence as to wells owned by Yankton Sioux Tribal members into the Codell aquifer so it is not a fair conclusion that there will not be adverse affects on existing water rights for Yankton Sioux Tribal members.

21. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 65 for the reason that the amount of water available from the Missouri River is not relevant to Longivew's application to appropriate ground water from the Codell aquifer. The fact that Yankton Sioux Tribe uses water from the Randall Rural Water District does not preclude tribal members having wells into the Codell aquifer.

22. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 66 for the reason that it was Longview's burden to establish that its application to appropriate water did not impair existing water rights. Because Longview did not investigate Yankton Sioux Tribe's water rights Longview was unable to establish that its intended use of ground water did not impair Yankton Sioux Tribe's existing water rights.

23. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 67 for the reason that there was no evidence presented by Longview nor DENR as to wells into the Codell aquifer located on the Yankton Sioux Tribe nor was there evidence presented as to the number of practicable irrigable acres. All witnesses that testified on behalf of Longview and DENR denied that they researched or investigated Yankton Sioux Tribe's existing water rights.

24. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact

No. 72 through 78 for the reason that Longview's concentrated animal feeding operation is not beneficial to Yankton Sioux Tribe in that the intended use of the water will impair Yankton Sioux Tribe's existing water rights and does not provide economical benefit to the Yankton Sioux Tribe.

25. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 79 for the reason that Longview's intended use of ground water at the Longview facility is not in the public interest of the Yankton Sioux Tribe. The Longview CAFO is not in the interest of the Yankton Sioux Tribe because of the odor generated from the facility and because the manure spreading practice risks contamination of the ground water used by the Yankton Sioux tribal members. Evidence of this includes the flooding that occurred in June 2010 in Marty, South Dakota, where corn stalks flooded into the town of Marty, from which it can be inferred that the manure in the fields likewise was washed into the Marty locale and other areas of the Yankton Sioux Tribe Reservation.

26. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 85 for the reason that there is a shallow aquifer beneath the Longview facility requiring Longview to obtain a groundwater discharge permit.

27. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 91 for the reason that neither Longview nor DENR researched or investigated whether there were wells within the boundary requirements for the manure application. Examining aerial photography is not sufficient to establish whether any wells were within the required distances. Longview has the burden to establish that there were not wells within the distance requirements.

28. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 95 for the reason that Longview's proposed use of water at their CAFO facility is not

beneficial and in the public interest of the Yankton Sioux Tribe.

29. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 104 for the reason that there is a shallow aquifer below the Longview site as established by the testimony of Yankton Sioux Tribe expert, Perry Rahn. Dr. Rahn testified that the Herrick formation is a shallow aquifer in the area of the Longview site and also that Stagnation Till which is loosely compacted ablation till accumulated as the stagnant glacier melted and likewise constitutes a shallow aquifer in the area of the Longview facility.

30. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 105 through 107 for the reason that the three soil borings were not sufficient to establish the existence or nonexistence of shallow aquifers near the Longview facility including the farm acreage where Longview spreads its manure.

31. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 109 for the reason that there is not evidence to establish that the Herrick formation does not underlie the Longview facility including the fields where Longview spreads its manure.

32. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 110 through 115 for the reason that there are shallow aquifers in the area and underneath the Longview facility and its manure fields and the pertinent question is not whether there are maps showing these shallow aquifers, but whether the shallow aquifers actually exist beneath the Longview facility or its manure fields.

33. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 118 for the reason that expert Goodman acknowledged that he did not investigate or research Yankton Sioux Tribe's existing water rights and did not determine the annual usage from the Codell aquifer nor the estimated recharge rate for the Codell aquifer. Expert Jim Goodman

acknowledged that in his report that the monitoring wells over twenty miles from the Longview facility were not reliable to determine the condition of the Codell aquifer below the Longview facility and also acknowledged that the monitoring well that ceased operation in 1992 was not reliable data either. Expert Goodman acknowledge that flow between the Niobrara and Codell aquifers and that therefore, that the proposed Longview well would be producing from two different aquifers in violation of ARSD 74:02:04:34.01.

34. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 119 for the reason that Jon Stone credibly testified to his background in environmental safety concerns. Stone's testimony established that there was considerable risk of contamination to Yankton Sioux tribal member's wells from Longview's manure spreading system and also that the odor generated from the facility was causing significant impact to Yankton Sioux tribal members.

35. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 120 through 122 for the reason that expert Illes failed to present evidence that he researched or investigated Yankton Sioux Tribe's existing water rights and failed to establish any monitoring wells in the area of the Longview facility that could substantiate that there were not shallow aquifers underneath the Longview facility or its manure fields.

36. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Finding of Fact No. 123 and 124 for the reason that Dr. Rahn has excellent credentials and expertise, is more credible than Derek Illes and offered substantial evidence of shallow aquifers underneath the Longview facility and manure fields. Dr. Rahn also testified to the lack of evidence presented by Longview and DENR to establish the annual usage from the Codell aquifer and the estimated annual recharge rate.

37. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of Law No. 2 for the reason that at least a portion of Longview's site and/or manure fields is within the boundary of the Yankton Sioux Tribe and also for the reason that the Codell aquifer, at least in part, lies beneath the Yankton Sioux Resveration.

38. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of Law No. 11 for the reason that there was no investigation or research by Longview nor DENR to determine the annual withdrawals from the Codell aquifer nor the estimated annual recharge rate. Furthermore, Longview did not investigate or research whether Longview's proposed use of the ground water would impair existing water rights of the Yankton Sioux Tribe nor did they determine the practicable irrigable acreage within the boundaries of the Yankton Sioux Reservation.

39. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of Law No. 14 for the reason that expert Jim Goodman testified that the Niobrara and Codell exchange flow and therefore, the Codell aquifer is not a confined aquifer. SDCL § 46-6-3.1 cannot be fulfilled by analysis of the observation well data since the well data available is unreliable. SDCL § 46-6-3.1 requires that there be reliable evidence as to the annual usage, the annual withdrawals from the Codell aquifer, as well as the estimated annual recharge rate for the Codell aquifer. Neither Longview nor DENR provided any evidence as to the annual usage, withdrawals or estimated annual recharge rate.

40. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of Law No. 15 for the reason that the observation well data is not probative to determine the annual withdrawal from the Codell aquifer nor is the data probative on the estimated annual estimated recharge rate for the Codell aquifer.

41. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of Law No. 16 for the reason that there was no evidence presented to determine the annual withdrawl from the Codell aquifer nor the estimated annual recharge rate. Wells that are over twenty miles away from the Longview site do not provide probative data to determine withdrawal rates or annual estimated recharge rates for the Codell aquifer at the Longview site. A well that has not been in operation since 1992 does not provide probative data to determine the annual withdrawal from the Codell aquifer or the annual estimated recharge rate for the Codell aquifer.

42. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of Law No. 17 for the reason that there was insufficient evidence to prove that the annual withdrawals from the Codell aquifer will be less than the estimated annual recharge rate.

43. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of Law No. 18 for the reason that Longview has failed to prove that the estimated annual recharge rate exceeds the annual withdrawal from the Codell aquifer.

44. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of Law No. 19 and 20 for the reason that neither Longview nor DENR provided any evidence that they researched or investigated Yankton Sioux Tribe's existing water rights and therefore, failed to prove that Yankton Sioux Tribe's existing water rights would be impaired.

45. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of Law No. 22 for the reason that neither Longview nor DENR investigated the domestic wells on the Yankton Sioux Reservation and therefore, can not determine if Yankton Sioux Tribe's water rights would be impaired by the intended use by Longview to support Longview's CAFO.

46. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of

Law No. 24 through 29 for the reason that the Winter Doctrine applies to ground water and Longview and DENR failed to investigate or research and failed to present any evidence as to whether Yankton Sioux Tribe's existing water rights were impaired by Longview's proposed use of groundwater to sustain Longview's CAFO.

47. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of Law No. 32 for the reason that Longview's intended use of water is not in any way beneficial to the Yankton Sioux Tribe and impairs Yankton Sioux Tribe's prior existing water rights.

48. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of Law No. 34 for the reason that if the use of water intended by Longview is a backup use than this would be an improper future use of water to which Longview is not eligible.

49. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of Law No. 35 through 37 for the reason that Longview's proposed use of groundwater is not reasonable or in the interest of the public from the standpoint of the Yankton Sioux Tribe since Longview failed to consider Yankton Sioux Tribe's prior existing water rights and failed to determine whether the Codell aquifer's annual recharge rate exceeds the annual withdrawals.

50. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of Law No. 41 for the reason that the economic impact is not the sole factor to be considered when determining whether the proposed water usage is in the public interest. Longview's proposed use for its CAFO facility is not in the public interest from the standpoint of the Yankton Sioux Tribe due to the risk of contamination from the manure spreading and the odor generated by the facility. Furthermore, it is not in the public interest to the Yankton Sioux Tribe from the standpoint that Longview failed to consider Yankton Sioux Tribe's existing water rights.

51. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of

Law No. 44 for the reason that Longview's CAFO is not in the public interest of the Yankton Sioux Tribe because Longview did not consider Yankton Sioux Tribe's existing water rights, did not prove that the recharge rate for the Codell aquifer exceeds the annual withdrawals and did not consider the risk of contamination from the manure spreading and the odor generated by the facility.

52. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of Law No. 49 for the reason that there is a shallow aquifer beneath the surface of the Longview facility and/or the fields in which it spreads its manure.

53. Petitioner Yankton Sioux Tribe objects to Longview's Proposed Conclusion of Law No. 51 for the reason that Application Number 7206-3 does not meet the standard in SDCL § 46-2A-9 for all reasons herein previously given.

Dated this 26th day of September, 2011.

Jon J. LaFleur
Attorney for Yankton Sioux Tribe
Abourezk & Zephier, P.C.
P.O. Box 9460
Rapid City, SD 57709-9460
(605) 342-0097

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2011, I served a true and correct copy of the Petitioner Yankton Sioux Tribe's Objections to Applicant's Proposed Findings of Fact and Conclusions of Law to the following parties:

Electronically and First Class Mail Postage Prepaid to:

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Dated this 26th day of September, 2011.

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STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONGVIEW FARMS, LLP	]]]]]	PETITIONER YANKTON SIOUX TRIBE'S ADDITIONAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW the Petitioner, Yankton Sioux Tribe, by and through its attorneys, Jon J. LaFleur and Abourezk & Zephier, P.C., and submit its additional proposed findings of fact and conclusions of law:

FINDINGS OF FACT

1. Longview's concentrated animal feeding operation is located over a shallow aquifer.

2. Longview's proposed diversion of ground water unlawfully impairs Yankton Sioux Tribe's existing water rights.

3. Longview's proposed use of ground water is not a beneficial use.

4. Longview's proposed use is not in the public interest.

5. DENR expert, James Goodman, testified that there is flow between the Niobrara and Codell aquifers and therefore, the Longview well will be producing from two different aquifers in violation of ARSD 74:02:04:34.01.

6. No evidence was presented to establish the annual withdrawals from the Codell aquifer nor the estimated annual recharge rate for the Codell aquifer.

7. No evidence was presented to determine the practicable irrigable acres on the Yankton Sioux Indian Reservation.

8. Neither Longview nor the DENR investigated to determine what wells on the Yankton Sioux Tribe Indian Reservation were near the Longview CAFO so that Longview failed to meet its burden to determine that domestic wells were not at risk of being contaminated by the Longview CAFO and its manure fields.

9. Longview did not establish that the proposed well was beneficial since Longview has been using Randall River Water District for its supply of water from the time of Longview's inception and such water has been adequate to meet Longview's needs.

CONCLUSIONS OF LAW

1. This water permit should not be issued because Longview failed to prove that there is a reasonable probability that there is unappropriated water available, that the proposed diversion can be developed without unlawful impairment of existing rights and the proposed use is a of beneficial use and in the public interest.

2. Longview's proposed use of water from the Codell aquifer is for backup water supply and therefore, is an improper future use pursuant to SDCL § 46-5-38.

3. Denial of the water permit or deferment of the water permit is necessary for further study under SDCL § 46-2A-7, to protect domestic wells.

4. The chief engineer is required to make a determination that the location of wells in the area of the Longview site complies with the requirements of ARSD 74:02:04:23(4) and ARSD 74:02:04:24(1)(n)(2), relating to the location of wells in relation to pollution sources.

5. The Longview permit request does not comply with the requirements of ARSD 74:02:04:34.01, that no well may be constructed to allow production from more than one aquifer.

6. The Longview application for a water permit should be denied because Longview failed to meet its burden of proof to establish the annual withdrawals from the Codell aquifer and the estimated recharge rate of the Codell aquifer.

7. The Longview application for a water permit should be denied because Longview failed to meet its burden to prove that the proposed diversion would not unlawfully impair Yankton Sioux Tribe's existing water rights.

8. Any Conclusions of Law improperly designated as a Finding of Fact shall be included within these Conclusions of Law.

Dated this 26th day of September, 2011.

Jon J. LaFleur
Attorney for Yankton Sioux Tribe
Abourezk & Zephier, P.C.
P.O. Box 9460
Rapid City, SD 57709-9460
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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2011, I served a true and correct copy of the Petitioner Yankton Sioux Tribe's Additional Proposed Findings of Fact and Conclusions of Law to the following parties:

Electronically and First Class Mail Postage Prepaid to:

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Kip (Spotted Eagle) Collins
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Dated this 26th day of September, 2011.

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RECEIVED
SEP 27 2011
WATER RIGHTS
PROGRAM

September 26, 2011

Eric Gronlund
Water Rights Program
PMB 2020
Joe Foss Building
523 East Capitol
Pierre, SD 57501

Re: In the Matter of Water Permit Application No. 7206-3, Longview Farms, LLP

Dear Mr. Gronlund:

Enclosed is the Certificate of Service for Petitioner Yankton Sioux Tribe's Objections to Applicant's Proposed Findings of Fact and Conclusions of Law and Petitioner Yankton Sioux Tribe's Additional Proposed Findings of Fact and Conclusions of Law in the Longview matter. Thank you.

Sincerely,

Jon J. LaFleur
Attorney for Yankton Sioux Tribe

JJL/nm
Enclosure
cc: Bernita Loucks
Chad Comes, PE
Tim Bjork
Leo Holzbauer
Everett Hoyt

RECEIVED
SEP 27 2011
WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONGVIEW FARMS, LLP	]	CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2011, I served a true and correct copy of the Petitioner Yankton Sioux Tribe's Objections to Applicant's Proposed Findings of Fact and Conclusions of Law and Petitioner Yankton Sioux Tribe's Additional Proposed Findings of Fact and Conclusions of Law to the following parties:

First Class Mail Postage Prepaid only to:

Bernita Loucks
225 Texas Street, #F332
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Leo Holzbauer
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Wagner, SD 57380

Everett Hoyt
4422 Carriage Hills Drive
Rapid City, SD 57702

Dated this 26th day of September, 2011.

Jon J. LaFleur
Attorney for Yankton Sioux Tribe
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September 29, 2011

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Diane Best
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Garland Erbele, Chief Engineer
Water Rights Program DENR
523 East Capitol Ave.
Pierre, SD 57501

Eric Kerkvliet
Attorney at Law
P.O. Box 2700
Sioux Falls, SD 57104

Re: *In the Matter of the Water Permit Application No. 7206-3*
Longview Farms, LLP

Dear Counsel and Chief Engineer Erbele:

Enclosed please find the proposed *Applicant's Proposed Findings of Fact and Conclusions of Law; Petitioner Yankton Sioux Tribe's Additional Proposed Findings of Fact and Conclusions of Law; and Petitioner Yankton Sioux Tribe's Objections to Applicant's Proposed Findings of Fact and Conclusions of Law*, together with proposed *Findings of Fact, Conclusions of Law, and Final Decision* that I have prepared for the Board's consideration in the above-entitled matter. These documents were prepared consistent with the directions given by the Water Management Board. Currently, the Board is scheduled to consider these proposals on Wednesday, October 5, 2011. It is within the Board's discretion whether oral arguments by the parties will be afforded prior to considering the matter.

Very truly yours,

Jeffrey P. Hallem
Assistant Attorney General

JPH/rar
Enclosures
cc: Water Management Board Members
Non-participating Parties

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Water Management Board's Rulings on Applicant's Proposed Findings of Fact and Conclusions of Law; DENR Response to Applicant's Propsed Findings of Fact, Conclusions of Law, and Final Decision; and Intervenors Objections to Proposed Findings of Fact and Conclusions of Law and Proposed Decision* and *Findings of Fact, Conclusions of Law and Final Decision* was served on 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 Sioux Falls, South Dakota, this 29th day of September, 2011:

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And was also sent electronically by email to the following:

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And that on the same day the original was mailed for filing to :

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DENR Water Rights Program
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Pierre, SD 57501

Jeffrey P. Hallem

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 7206-3,)
LONGVIEW FARMS, LLP)

WATER MANAGEMENT BOARD'S RULINGS ON APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW; PETITIONER YANKTON SIOUX TRIBE'S ADDITIONAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW; AND PETITIONER YANKTON SIOUX TRIBE'S OBJECTIONS TO APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to directions of the Water Management Board, counsel for Applicant submitted Applicant's Proposed Findings of Fact and Conclusions of Law in the above-captioned matter. Subsequently, counsel for Department of Environment and Natural Resources, Water Rights Program (DENR) submitted a letter in support of Applicant's proposal. Intervenor Yankton Sioux Tribe, the only Intervenor that appeared at the hearing, submitted Petitioner Yankton Sioux Tribe's Additional Proposed Findings of Fact and Conclusions of Law; and Petitioner Yankton Sioux Tribe's Objections to Applicant's Proposed Findings of Fact and Conclusions of Law. The Board, upon review of the parties submissions and the administrative record, and having orally entered its decision, hereby enters the following rulings:

A. Applicant's proposed Findings of Fact Nos. 1-15, 18-31, 33, 34, 36-52, 54-60, 62-64, 66-84, 86-112, 114-125 are accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision.

B. Applicant's proposed Finding of Fact No. 16 is accepted by the Board as consistent with and supported by the administrative record and the Board's oral

decision, as corrected as follows to more accurately reflect the record: delete "Hearing" and insert "Prehearing" and capitalize the "P" of "petitioners."

C. Applicant's proposed Finding of Fact No. 17 is substantially accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as modified below to fully reflect the record:

> 17. On March 14, 2011, the Board issued an Order Affirming Prehearing Chairman's February 18, 2011, Order, Granting Motion for Continuance. On March 22, 2011, the Chief Engineer issued notice of the Board's March 14, 2011, Order and confirmed that the evidentiary hearing would be held on July 13-14 in Pierre. A copy of the Board's March 14, 2011, Order was attached. The notice was provided to all parties, including each of the Individual Petitioners.

D. Applicant's proposed Findings of Fact Nos. 32 and 53 are substantially accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as combined and modified below to more accurately reflect the record:

> 32. Before it failed, the maximum pumping rate for the well that Longview drilled at the permit application site was approximately 15 gallons per minute. It is anticipated that the well, as constructed or rehabilitated at the permit application site, will have a maximum pumping rate of approximately 15-18 gallons per minute.

E. Applicant's proposed Finding of Fact No. 35 is substantially accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as modified as follows to include State Geologist Derric Iles, whose testimony the Board also relied upon: after "Jim Goodman" insert ", Derric Iles."

F. Applicant's proposed Finding of Fact No. 61 is substantially accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as modified below to accurately reflect the record:

61. DENR knew of only two wells that were located in the proximity of Longview's facility. These wells are located about 1.5 miles northwest and northeast of the site.

G. Applicant's proposed Finding of Fact No. 65 is rejected by the Board as duplicative of other findings and speculative.

H. Applicant's proposed Finding of Fact No. 85 is accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as corrected as follows: delete "well" and insert "aquifer."

I. Applicant's proposed Finding of Fact No. 113 is substantially accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as modified as follows to more accurately reflect the record: after "map," insert "DENR expert witness, State Geologist."

J. Applicant's proposed Conclusions of Law Nos. 1-8 and 10-52 are accepted by the Board as consistent with and supported by the administrative record, the Board's oral decision, and the findings of fact adopted by the Board in the above rulings.

K. Applicant's proposed Conclusion of Law No. 9 is accepted by the Board as consistent with and supported by the administrative record, the Board's oral decision, and the findings of fact adopted by the Board in the above rulings, as modified as follows to more fully reflect the Board's findings of fact and conclusions of law: after "Goodman" insert ", Derric Iles".

L. Applicant's proposed Final Decision is accepted by the Board as consistent with and supported by the administrative record, the Boards oral decision, and the findings of fact and conclusions of law adopted by the Board in the above rulings.

M. Intervenors additional proposed Findings of Fact Nos. 1 and 2 are rejected by the Board as contrary to the administrative record, the Board's oral decision and the findings of fact adopted by the Board in the above rulings. The record does not support findings that Applicant's facility is located over a shallow aquifer, or the de minimis amount of water sought by Applicant unlawfully impairs Intervenor's existing water rights, which have not been determined or quantified.

N. Intervenor's additional proposed Findings of Fact Nos. 3, 4 and 9 are rejected by the Board as contrary to the Board's oral decision and the findings of fact adopted by the Board in the above rulings.

O. Intervenor's additional proposed Finding of Fact No. 5 is rejected by the Board as contrary to the Board's oral decision and the findings of fact adopted by the Board in the above rulings. That record establishes that Applicant's proposed well will be withdrawing water from only the Codell aquifer. Mr. Goodman's testimony, admitting there is a possibility of some interconnectivity between the Niobrara and Codell aquifers, does not support the proposed finding.

P. Intervenor's additional proposed Findings of Fact Nos. 6 and 7 are rejected, as those findings are not necessary to the Board's final decision. The fact the estimated annual recharge rate for the Codell aquifer, the total annual withdrawal from the aquifer, and the number of irrigable acres on the Yankton Sioux Reservation were not established at the hearing does not affect the Board's findings of fact and conclusions of law. The Board's findings and conclusions that there is a reasonable probability that there is unappropriated water available, and the proposed diversion of water can be developed without unlawful impairment of existing water rights, including any quantifiable rights to the water in the Codell

aquifer Intervenor may ultimately be able to establish, are supported by the data from the monitoring wells, evidence submitted regarding withdrawals from the Codell aquifer, the reports and testimony of DENR exper witnesses and the de minimis amount of water sought under the Application.

Q. Intervenor's additional proposed Finding of Fact No. 8 is rejected by the Board. The record does not support a finding that there are in fact such wells in the proximate vicinity of Applicant's facility or the fields where manure is spread. Further, even if supported, the additional proposed finding of fact does not alter the Board's findings of fact and conclusions of law that issuance of the permit is in the public interest.

R. Intervenor's additional proposed Conclusions of Law Nos. 1, 2, 3, 4, 5, 6 and 7 are rejected by the Board as contrary to the Board's oral decision and the findings of fact and conclusions of law adopted in the above rulings. Further, Nos. 3 and 4 are attempts to impose requirements that are not part of a determination of whether a water permit should be granted. In addition, given the de minimis amount of water to be diverted, the permit conditions imposed by the Board are sufficient to protect adequate domestic wells.

S. Intervenor's objections to Applicant's proposed Findings of Fact Nos. 1-20, 22-36 are rejected by the Board as contrary to the Board's oral decision, the Board's adopted findings of fact and rulings on Intervenors additional proposed findings of fact set forth above.

T. Intervenor's objections to Applicant's proposed Finding of Fact No. 21 is accepted by the Board to the extent and for reasons set forth in Ruling G above.

U. Intervenor's objections to Applicant's proposed Conclusions of Law Nos. 37-53 are rejected by the Board as contrary to the Board's oral decision, the Board's adopted findings of fact, conclusions of law and rulings on Intervenor's additional proposed findings of fact and conclusions of law set forth above.

The Board's attorney is directed to prepare a Findings of Fact, Conclusions of Law and Final Decision consistent with the above rulings to be executed by the chairman of the Board or the Board's designee without further notice or hearing.

Dated this _____ day of _____, 2011.

BY THE BOARD:

_____

Rodney Freeman, Jr.
Chairman, Water Management Board

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7203-3, LONGVIEW FARMS, LLP	))))	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION

This matter came on for hearing before the South Dakota Board of Water Management (Board members Rodney Freeman (Chairman), Bernita Loucks, Chad Comes, Leo Holzbauer, Everett Hoyt, and Tim Bjork) on July 13, 14, and 15, 2011, at Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol Avenue, in Pierre, South Dakota. Longview appeared through its corporate representative, Arlan Moss, and through its attorney, Eric R. Kerkvliet, of Lynn, Jackson, Shultz and Lebrun, P.C. Diane Best, Assistant Attorney General, appeared on behalf of the Chief Engineer of the Water Rights program. Petitioner, Yankton Sioux Tribe, was present through its designated representative, John Stone, and was also represented by Jon LaFleur, of Abourezk & Zephier, PC. None of the Individual Petitioners that had previously appeared were present for the hearing before the Water Management Board.

The South Dakota Board of Water Management having heard all the evidence and considered and reviewed all of the documents introduced into evidence, and the Board being fully advised as to the premises, the Board hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Longview previously made application to the Board of Water Management for a well water permit but withdrew its application, relying on the domestic use exception, which allows stock watering without a permit as long as the use does not exceed 18 gallons per minute.

2. After Longview withdrew its application, the Yankton Sioux Tribe and the Individual Petitioners brought a declaratory ruling action before the Water Management Board in which they sought to determine whether Longview's proposed uses of the well water were considered a commercial use rather than a domestic use such that a well water permit would be required.

3. In the meantime, Longview's well driller drilled the well but it failed shortly after drilling was completed. Because Longview intended to rehabilitate or replace the well, the domestic use issue was still heard by the Board of Water Management.

4. The Board of Water Management determined that Longview's proposed uses of the well water were considered domestic because the water was to be used by Longview for stock watering and because the proposed use was for equal to or less than 18 gallons of water per minute.

5. The Yankton Sioux Tribe and the Individual Petitioners appealed the decision of the Board of Water Management to Circuit Court in Charles Mix County. Circuit Court Judge Bruce Anderson determined that Longview's use for washing its facilities, for animal hygiene, and for restrooms for human use did not constitute "stock watering" and was not a domestic use. Judge

Anderson did explain that the consumptive use by the livestock did constitute "stock watering" such that a well water permit would not be required for that proposed use.

6. Longview is now before this Board seeking a well water permit, and, in this permit application, Longview seeks to appropriate .067 cubic feet of well water per second, which is approximately 30 gallons of water per minute.

7. The Chief Engineer of the Water Rights Program recommends approval of Longview's permit subject to certain conditions.

8. Notice of Longview's permit application was advertised in The Wagner Post on September 8, 2010 and on September 15, 2010.

9. The Notice provided that petitions to intervene were to be filed by September 27, 2010 and that hearing would be held on October 6, 2010 in Pierre.

10. Eva Bruguier, Faith Spotted Eagle, Judy Honimichle, Sharon Drapeau, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins (collectively, the "Individual Petitioners"), Sister Patricia Mylott, Joan Olive and the Yankton Sioux Tribe filed timely petitions to intervene.

11. The Individual Petitioners asked for delay under the statutory automatic delay provisions and the evidentiary hearing was delayed.

12. The Board issued a Procedural Order on October 14, 2010. The Order appointed Board Member Rodney Freeman to hear any prehearing motions.

13. The Board set the evidentiary hearing before the Board for December 2, 2010. All parties were provided with the Notice.

14. On November 29, 2010, legal counsel for the Yankton Sioux Tribe withdrew and its new counsel requested a continuance. The continuance was granted and hearing was scheduled for March 10, 2011.

15. On February 15, 2011, one of the Individual Petitioners, Faith Spotted Eagle, requested a continuance since Harold Shepherd, counsel for the Individual Petitioners, had notified her that he was withdrawing from the case. Ms. Spotted Eagle represented that additional time was necessary to seek different legal counsel.

16. On February 18, 2011, Board Prehearing Chairman Rodney Freeman issued an Order continuing the hearing and it was scheduled for July 13, 2011, subject to confirmation at the next Board meeting. The Order was provided to all parties including each of the Individual Petitioners. Mr. Shepherd formally filed his withdrawal on February 25, 2011.

17. On March 14, 2011, the Board issued an Order Affirming Prehearing Chairman's February 18, 2011, Order, Granting Motion for Continuance. On March 22, 2011, the Chief Engineer issued notice of the Board's March 14, 2011, Order and confirmed that the evidentiary hearing would be held on July 13-14 in Pierre. A copy of the Board's March 14, 2011, Order was attached. The notice was provided to all parties, including each of the Individual Petitioners.

18. On June 29, 2011, the DENR issued another Notice that stated that the evidentiary hearing would be held at 1:00 pm on Wednesday July 13 at the Mathews Training Center in Pierre. The Notice was provided to all parties including each of the Individual Petitioners.

19. At the July 13-15, 2011, hearing, Longview, the DENR, and the Yankton Sioux Tribe appeared and presented evidence regarding Longview's water permit application.

20. Despite (1) having filed petitions to intervene; (2) having successfully moved for a continuance of the hearing until the July 13-15 hearing date to allow them to hire an attorney to represent them at the hearing; and (3) having received sufficient notice of the rescheduled hearing date, none of the Individual Petitioners appeared or presented any evidence.

21. Joan Olive and Sister Patricia Mylott (who each separately intervened) did not appear at hearing and filed no response to any motions in this proceeding.

22. Longview's proposed well site is approximately 4 ½ miles north of Marty and about 6 to 6 ½ miles southwest of Wagner and approximately 5 ½ miles south of Ravinia in Charles Mix County. The proposed well site is located in the southwest quarter of the northwest quarter of Section 9, Township 95 North, Range 64 West of the 5th P.M. in Charles Mix County.

23. Longview's facility consists of three connected buildings (a farrowing barn, a breeding and gestation barn, and a gilt development unit) as well as a separate machine shed/compost building.

24. Longview's water storage system is a large cement reservoir divided into two separate parcels by a cement wall, which holds approximately 3 days of water supply.

25. Longview's facility is equipped with a dual plumbing system which would allow Longview to use either rural water or well water at almost any point in the Longview facility.

26. Since inception of the Longview facility, the sole source of water to the Longview facility has been from the Randall Rural Water District, which obtains its water from the Missouri River.

27. Applicant Exhibit No. 10 summarizes the amount of water used by Longview from Randall Rural Water District since inception of the facility.

28. Longview made a commitment to its neighbors and to the Randall Rural Water District that it would apply for and obtain a well water permit to reduce the amount of water necessary to be obtained from the Randall Rural Water District.

29. Longview seeks a well water permit to supplement the water obtained from the Randall Rural Water District.

30. If Longview is granted a well permit, it is anticipated that Longview's use of Randall Rural Water District water will decrease, and it is in Longview's economic interest to use more well water and less rural water.

31. The Water Management Board considers whether (1) there is a reasonable probability that there is unappropriated water available for Longview's proposed use; (2) the proposed diversion can be developed without

unlawful impairment of existing rights; (3) the proposed use would be a beneficial use; and (4) the use would be in the public interest.

32. Before it failed, the maximum pumping rate for the well that Longview drilled at the permit application site was approximately 15 gallons per minute. It is anticipated that the well, as constructed or rehabilitated at the permit application site, will have a maximum pumping rate of 15-18 gallons per minute.

33. Longview will be licensed for the maximum pumping rate of the well as constructed; therefore, Longview anticipates being licensed for between 15-18 gallons per minute, depending on the actual maximum pumping rate after the well is constructed or rehabilitated.

34. A request for water with an expected maximum pumping rate of 15-18 gallons per minute (which is the maximum pumping rate for domestic wells)—or even a pumping rate of 30 gallons per minute—is a relatively insignificant amount of water in determining whether there is a reasonable probability of unappropriated water available from the Codell aquifer and whether the proposed use will unlawfully impair existing rights.

35. In considering whether (1) there is a reasonable probability that water is available for Longview's proposed use and (2) the proposed use will not unlawfully impair existing water rights, the Board relies on the testimony of DENR expert witnesses Jim Goodman, Derric Iles and Garland Erbele regarding the size and extent of the Codell aquifer, its lithology, and the history

of water withdrawals and discharges and the history of permits from this aquifer.

36. The Codell sandstone aquifer is a buried sedimentary rock and a member of the Carlile shale. It consists of loosely to tightly cemented very fine to coarse light brownish gray to dark greenish black and brown sand. The Codell aquifer is under artesian conditions at Longview's site.

37. In order to penetrate the Codell aquifer at Longview's site, the well (when drilled or rehabilitated) would be approximately 570 to 620 feet below the surface.

38. The Codell aquifer underlies approximately 1,134 square miles in Charles Mix County and has an estimated storage of approximately 1.45 million acre feet of recoverable water in Charles Mix County.

39. The Codell aquifer is fairly large; it extends to the north into Douglas County, to the east into Hutchinson County, to the southeast into Bon Homme County and to the south into Nebraska.

40. Water movement within the Codell aquifer in the area of the Longview application is likely from the northwest to the southeast towards the Missouri River.

41. A monitoring well was located approximately 2 ½ miles from Longview's site; however the well collapsed in 1993. According to this monitoring well, there was very little change in the water levels of the Codell aquifer from 1952 to 1992.

42. There are two monitoring wells approximately 23 and 25 miles north and northeast of Longview's site into Douglas County to the north and Hutchinson County to the east.

43. These two monitoring wells are representative of the conditions of the Codell aquifer as a whole.

44. The Douglas County monitoring well shows that the Codell aquifer responds very well to climatic conditions and does appear to have some annual fluctuations.

45. The Hutchinson County monitoring well shows that there have been rising conditions over the period of the hydrograph.

46. According to the two hydrographs from the two monitoring wells, the Codell aquifer does recharge and there have been no major changes in the water levels of the Codell aquifer over the last several years.

47. Considering the historical records of the three monitoring wells into the Codell aquifer witness Goodman testified about, there has been very little change in the water levels of the Codell aquifer and it is capable of sustaining additional withdrawals.

48. Other than domestic use, there is very little appropriation of water out of the Codell aquifer.

49. At one time, the towns of Geddes, Ravinia, and Lake Andes all used the Codell aquifer as a water supply. However, they have abandoned those wells and switched to rural water.

50. The only Codell aquifer water permit in Charles Mix County is the Clearfield Colony, and its use is for domestic use. The Clearfield Colony is located approximately 20-25 miles north and east of Longview's site. There are no appropriative water permits or rights in the Codell aquifer near the Longview site.

51. A little drawdown could be expected from the pumping at Longview's site; however because the pumping rate is only 30 gallons per minute, this well would expect to produce between one to three gallons per minute per foot of draw down. In other words, at 30 gallons per minute, there would be between 10-30 feet of drawdown in the production well. That drawdown would not extend very far away from the production well and it would not be expected to have any adverse impact on the Codell aquifer.

52. The Yankton Sioux Tribe submitted USGS records showing domestic wells from the Codell and various other aquifers throughout Charles Mix County. This evidence has been considered. Having reviewed the USGS records submitted by the Yankton Sioux Tribe, the testimony of witness Goodman concerning the observation wells in the Codell aquifer, and all other testimony presented, the Board finds that there is a reasonable probability of unappropriated water available in the Codell aquifer for the water permit request at issue, notwithstanding any existing uses for domestic purposes. According to Longview's test hole data, there is approximately 32 feet of Codell sandstone at Longview's site (from 573 feet to 605 feet) and there is a static .

water level of 470 feet below the land surface, which is consistent with the conclusions of the Chief Engineer's office that there is water available.

53. The maximum pumping rate for the well that was drilled was approximately 15 gallons per minute, and a similar maximum pumping rate is expected when the well is constructed or rehabilitated.

54. The Chief Engineer reviewed the best information reasonably available to determine whether the proposed use would exceed the annual recharge rate of the Codell aquifer pursuant to SDCL § 46-6-3.1.

55. It can be determined whether an aquifer level is declining without doing a recharge study by observing the history of water levels in a particular aquifer. If the overall water level of the aquifer was declining the hydrographs from the DENR observation wells would show a decline regardless of climate. That is not the case here.

56. There are approximately 1600 observation wells throughout the State of South Dakota that are observed to monitor the water levels in the aquifers in South Dakota.

57. It would cost an inordinate amount of money and time to do a recharge study for each individual aquifer within the State of South Dakota.

58. According to the two observation wells into the Codell aquifer, which are representative of the Codell aquifer as a whole, there is more water in the aquifer at the present time than there was 20 years ago.

59. The hydrographs of the Codell aquifer considered by the Chief Engineer's office and the DENR are the best information reasonably available to

determine whether annual withdrawals from the aquifer would exceed the average annual recharge of the aquifer.

60. The Greenhorn formation is stratigraphically below the Codell aquifer in the area of Longview's facility.

61. DENR knew of only two wells that were located in the proximity of Longview's facility. These wells are located about 1.5 miles northwest and northeast of the site.

62. Drawdown is not expected to be significant at Longview's maximum pumping rate, nor is it anticipated that Longview's proposed use will cause any adverse effects on existing water rights or on area domestic users.

63. The Yankton Sioux Tribe currently obtains its water supply from the Missouri River.

64. The Randall Rural Water District also obtains its water from the Missouri River.

65. It is unclear how many wells that Yankton Sioux Tribe has into the Codell aquifer and the Yankton Sioux Tribe's designated representative was unable to answer questions as to how many wells the Yankton Sioux Tribe has into the Codell aquifer.

66. In addition to the foregoing evidence, the interests of the Yankton Sioux Tribe have been considered in determining whether there will be an unlawful impairment of existing rights. This Board finds, based on the entirety of the evidence presented, that there will not be an unlawful impairment of existing rights, including those of the Yankton Sioux Tribe.

67. The water from the proposed well will undoubtedly be beneficial to the Longview facility, regardless of how the water is used within the facility.

68. Water does not need to be of very high quality for the water to be beneficial to Longview, because even relatively low quality water is capable of being used for power washing the facilities.

69. The quality of water within the Codell aquifer is of relatively high quality, and it is expected that the water from the Codell aquifer will, at a minimum, be of sufficiently high quality to use to power wash the facilities.

70. Depending on the quality of the well water obtained from the Codell aquifer, the water may be able to be used to feed Longview's pregnant and nursing sows.

71. From the inception of Longview's facility to November of 2010, Longview has paid Charles Mix County vendors a total of $2,523,316.79.

72. Longview currently has 13 employees with a starting wage of $9.50 per hour for the first 90 days of employment with a dramatic increase in wages after 90 days. The managers of Longview's facility make much more than the hourly employees, and all employees are provided full health and dental benefits at no cost to the employee.

73. From inception of Longview's facility through November of 2010, Longview has paid its employees more than $700,000 in wages and benefits.

74. Longview has had a significant, positive impact on the economy of Charles Mix County.

75. The Longview facility has potential for employment of Yankton Sioux tribal members. In fact, Yankton Sioux tribal members have held positions of employment at the Longview facility in the past.

76. In addition to the potential for employment, there is potential for Yankton Sioux tribal members to sell feed to the Longview facility (in addition to other opportunities).

77. In general, confined animal feeding operations that comply with the permitting requirements set forth by the DENR are considered to be beneficial and in the public interest of the State of South Dakota.

78. Specifically, Longview has complied with all of the permitting requirements set forth by the DENR and the Longview facility is in the public interest of the State of South Dakota. Further, the water use for this facility is a beneficial use in terms of the best utilization of the water supply.

79. Longview's facility is a zero discharge facility.

80. The soil characteristics in their native state at the Longview facility meet South Dakota's minimum liner standards for earthen nutrient storage systems.

81. Because of the favorable geologic characteristics and because Longview chose to construct a concrete wastewater management system in addition, the Longview facility essentially has a dual containment system for animal waste.

82. The animal waste storage facility is a 10 feet deep reinforced concrete structure with adequate storage for a year's worth of nutrient

production from the animals in Longview's facility.

83. The proposed site for the well is approximately 280 feet from the nearest manure storage facility, which exceeds the 150 foot standard required by the DENR.

84. Because there is no shallow aquifer beneath the Longview facility, there is no requirement that Longview obtain a groundwater discharge permit or that there be groundwater monitoring near the Longview facility.

85. Longview's nutrient management system and its application of manure to fields with manure easements has complied with the DENR's requirements.

86. Longview has obtained a DENR Water Pollution Control Permit and has complied with all of the requirements in obtaining and maintaining that permit through the DENR.

87. Longview has complied with all of the rules and regulations regarding ground water quality and surface water quality.

88. The licensed well driller for Longview is Jim Hutmacher, who is familiar with the Water Management Board well construction rules.

89. The construction or rehabilitation of Longview's well will be done in compliance with the Water Management Board's well construction rules, including the requirement that the well only obtain water from the Codell aquifer and not any other aquifer.

90. A Yankton Sioux Tribe witness stated at hearing that there are abandoned or other domestic wells near the Longview site but was unable to

state exactly how far they were from the Longview manure containment system or land application areas, if they were still being used or could be plugged, and who they belonged to. The DENR Water Pollution Control Permit requires that manure containment systems and land application sites must be 1,000 feet away from a public water supply, 250 feet from a neighbor's well, and 150 feet from the producer's own well. Longview's design engineer stated that he had examined aerial photography with the applicant and was unaware of any wells within these buffer distances. There is insufficient evidence to conclude that the containment system or land application areas violate the distance requirements. Regardless, if the Yankton Sioux Tribe later provides information to Longview or Longview otherwise finds these wells and they are within the buffer areas, Longview must make arrangements to meet the DENR Water Pollution Control Permit requirements by seeing that abandoned wells are properly plugged, changing its land application sites, or undertaking whatever means is necessary to meet the buffer requirements. Further, denial of the permit would not resolve the issue if any such wells are discovered. Longview holds an ongoing obligation to comply with the terms of its DENR Water Pollution Control Permit regardless of whether the requested water permit is granted or not.

91. In its design and construction of the Longview facility, Longview has complied with all of the DENR requirements with regard to permitting for confined animal feeding operations.

92. Longview's manure storage system complies with DENR's regulations regarding confined animal feeding operations.

93. Longview's nutrient management system complies with DENR's regulations regarding confined animal feeding operations.

94. Longview has obtained coverage under the DENR Water Pollution Control Permit. The analysis and review by the DENR for this program is complete and final. It is not subject to review by this Board. The fact that the coverage has been obtained does, however, provide evidence that the Longview's use is beneficial and in the public interest.

95. There is a public process allowing for written comments from members of the public as part of the DENR Water Pollution Control Permit process. However, the Yankton Sioux Tribe and the Individual Petitioners failed to file any comments or objections to Longview obtaining coverage under the DENR Water Pollution Control Permit

96. The only incident that could even be considered a violation of the DENR's requirements as to the Water Pollution Control Permit is the leaking of approximately 100 gallons of manure due to the nicking of a hose carrying manure to one of the fields in which the manure is applied.

97. The manure spill was promptly cleaned up and there was no pollution as a result of the manure spill. The area in which the spill occurred was dry at the time.

98. Longview's facility was designed to control odor emissions in that there is sufficient ventilation, a negative pressure system, a concrete design for

the nutrient storage below the facility rather than an open earthen lagoon, and Longview frequently power washes its facilities to reduce dust particles that have the potential to carry odor.

99. In addition, in applying the manure from the Longview facility, the applicators spike in the manure to maximize the nutrient value of the manure, which has an ancillary benefit of reducing odor potential in comparison to spreading manure on the surface of the fields.

100. Jim Hutmacher completed a water well completion report for the well that was drilled, and the water well completion report was admitted as Applicant Exhibit No. 7.

101. The only other aquifer underlying Longview's site is the Niobrara formation, which overlies the Codell aquifer at Longview's site, and the top of the Niobrara formation is approximately 450 feet below the surface at the Longview site.

102. The most shallow aquifer at the location of the drilled well by Mr. Hutmacher is the Niobrara formation, which is 450 feet deep at the top of the formation.

103. At the location of the drilled well, there was no shallow aquifer (aquifer within 100 feet of the land surface). Rather, clay constituted all of the material within 100 feet of the surface at the location of the drilled well.

104. Longview, through its engineering firm—Eisenbraun & Associates—and the engineering firm's subcontractor, performed three soil borings at the Longview facility.

105. Two soil borings were drilled to 30 feet and one soil boring was drilled to 51 feet.

106. The three soil borings established that there was no aquifer within the depth of the soil borings.

107. Neither the Niobrara aquifer nor the Codell aquifer is within 100 feet of the surface at the Longview facility.

108. There is enough information to determine whether the Herrick formation or the Herrick aquifer is underlying the Longview facility, and, based upon all of the available information, the Herrick formation or the Herrick aquifer does not underlie the Longview facility.

109. There is no map of any geologist that shows the Herrick formation is present below the Longview facility.

110. Dr. Perry Rahn is unaware of any map that would show the presence of a shallow aquifer within 100 feet of the surface at the Longview facility's location.

111. The State Geologic Survey has completed a map which indicates the first occurrence of aquifer materials within Charles Mix County, South Dakota. In creating this map, the State Geologic Survey considered all of the available test hole and well data, all of the available surface and subsurface geologic mapping data, and all of the published and unpublished reports that were available.

112. With the State Geologic Survey completing the first occurrences map, DENR expert witness, State Geologist Derric Iles has reviewed enough information to determine whether there is a shallow aquifer underlying the Longview facility.

113. There is no shallow aquifer beneath the Longview facility.

114. There is no evidence that the area within 100 feet of the land surface near the Longview facility is anything other than low permeability soils.

115. The Chief Engineer recommends approval of Longview's well permit application with the following conditions:

a. The well approved will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under Permit No. 7206-3 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.

b. The well authorized by Permit No. 7206-3 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.

c. Permit No. 7206-3 is subject to compliance with requirements of the DENR's Water Pollution Control Permit issued pursuant to SDCL §34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

d. Permit No. 7206-3 is subject to compliance with all existing and applicable Water Management Board Rules including (but not limited to):

a. Chapter 74:54:01 Ground Water Quality Standards;

b. Chapter 74:54:02 Ground Water Discharge Permit;

c. Chapter 74:51:01 Surface Water Quality Standards;

d. Chapter 74:51:02 Uses Assigned to Lakes;

e. Chapter 74:51:03 Uses Assigned to Streams; and

f. Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions.

116. The Board adopts the recommendation of the Chief Engineer with its proposed conditions.

117. Having considered the experience of Jim Goodman, his demeanor while testifying, and the actual testimony of Jim Goodman, the Board finds that the testimony of Jim Goodman is credible. Mr. Goodman is an expert with extensive experience in evaluating water permit applications and the effects of pumping and other water use on aquifers, and groundwater hydrology in South Dakota. He relied on his own experience as well as studies and mapping of the Codell aquifer by the United States Geological Survey and the South Dakota Geological Survey, observation well data compiled by the DENR, and well logs and other records maintained or routinely used by the DENR.

118. Having had an opportunity to observe the demeanor and hear the testimony of John Stone (who is the designated representative to testify on

behalf of the Yankton Sioux Tribe), including his admitted misstatement of fact, his vagueness in responses, the fact that he was unable to answer underlying questions to support his assertions, and his evasiveness in answering questions, the Board determines that John Stone is not a credible witness.

119. Derric Iles, the State Geologist and Administrator of the Geological Survey Program, has excellent credentials and expertise. Derric Iles has studied the aquifers, aquifer maps, well data, and hydrology of Charles Mix County extensively. His testimony is credible and reliable.

120. Derric Iles presented unbiased factual interpretations, after considering the available data, and he is considered a third party independent of the Chief Engineer.

121. Having had an opportunity to observe the demeanor and hear the testimony of Derric Iles while testifying, the Board finds the testimony of Derric Iles to be extremely credible.

122. Having had an opportunity to observe the demeanor and hear the testimony of Derric Iles and Perry Rahn, the Board finds that the testimony of Perry Rahn is less credible than that of Derric Iles.

123. In making the determination in the foregoing finding, the Board considers the vagueness and ambiguities in responses of Perry Rahn and the preciseness in responses of Derric Iles, as well as the impeachment of and inconsistencies within Perry Rahn's testimony.

124. Any Finding of Fact improperly designated as a Conclusion of Law shall be included within these Findings of Fact.

CONCLUSIONS OF LAW

1. The South Dakota Board of Water Management has jurisdiction over the parties and subject matter of this lawsuit.

2. The site for this application is not within the Yankton Sioux Reservation and is owned by Longview, which is a South Dakota limited liability partnership that is clearly not a tribal member or tribal entity. The water source for this application is the Codell aquifer which overlies this area outside the Yankton Sioux Reservation in South Dakota.

3. Publication was properly made in *The Wagner Post* pursuant to SDCL § 46-2A-4.

4. Under ARSD 74:02:01:12.04, the deadline for filing petitions to intervene in this matter was September 27, 2010. This intervention date was published as required by SDCL § 46-2A-4.

5. The Yankton Sioux Tribe, the Individual Petitioners, Sister Patricia Mylott, and Joan Olive timely filed petitions to intervene.

6. Notice of hearing was properly given pursuant to SDCL § 46-2A-4 and SDCL § 1-26-17.

7. The present application falls within the Board's responsibility over water appropriation and regulation in Title 46, more specifically SDCL § 46-2A-9.

8. Each of the elements in SDCL § 46-2A-9 must be proven in order for this Board to grant Permit Application No. 7206-3.

9. The Chief Engineer has recommended approval and Jim Goodman, Derric Iles and Garland Erbele testified in support of the recommendation. This recommendation is not, however, binding on the Board. *SDCL § 46-2A-4(8).* Likewise, references to past recommendations of the Chief Engineer are not binding on the Board.

10. SDCL § 46-2A-9 provides that a permit to appropriate water may be issued "only if there is reasonable probability that there is unappropriated water available for 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." *SDCL § 46-2A-9.*

11. The first element in SDCL § 46-2A-9 is whether there is water available for the appropriation. The Codell aquifer is large and capable of sustaining additional withdrawals, as explained in the Findings of Fact.

12. Consideration of water availability also includes consideration of the criteria in SDCL § 46-6-3.1 pertaining to recharge/withdrawal: whether "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 annual recharge of water to the groundwater source." *SDCL § 46-6-3.1.*

13. Although there is an exception to the recharge/withdrawal consideration in SDCL § 46-6-3.1, it applies only to applications filed by public water supply systems and is not applicable here.

14. Annual recharge to the Codell aquifer has not been and is not likely to be quantified in the near future. The Codell aquifer is a confined aquifer. The criteria of SDCL § 46-6-3.1 can be fulfilled by analysis of the observation well data.

15. The observation well data considered by the Chief Engineer and the DENR is the best information reasonably available to determine whether the quantity of water withdrawn annually from the Codell aquifer will exceed the quantity of the average annual recharge of water to the Codell aquifer.

16. In determining whether the water withdrawn annually from the Codell aquifer will exceed the quantity of the average annual recharge of water to the Codell aquifer, the observation wells are instructive as to the water levels of the entire Codell aquifer.

17. According to the best information reasonably available, the quantity of water withdrawn annually from the Codell aquifer will not exceed the quantity of the average annual recharge of water to the groundwater source if this permit is granted.

18. Given the foregoing Findings of Fact and Conclusions of Law, the Board concludes that there is sufficient water available for the proposed water use.

19. As a second element of SDCL § 46-2A-9, the appropriator must demonstrate that the proposed diversion can be developed without unlawful impairment of existing rights.

20. The proposal here would not impair existing water rights, including those of the Yankton Sioux Tribe, as is addressed at length in the Findings of Fact and as set forth in the following Conclusions of Law.

21. Domestic water users and those users with prior water rights hold priority over the present Application and their uses would take precedence if there is an actual adverse impairment of an adequate well.

22. Domestic uses of water are those defined in SDCL § 46-1-6(7). The rights of domestic user are unlikely to be impaired by the present Application but, out of an abundance of caution, this Board imposes a condition on the permit to protect domestic users.

23. The Winters Doctrine provides that the priority date for the determination of whether tribes have surface water rights is the creation of the reservation. *Winters v. United States*, 207 US 564 (1908).

24. However, there is a split of authority as to whether the Winters Doctrine applies to ground water. *In re General Adjudication of All Rights to Use Water in Gila River System*, 989 P2d 739 (Ariz. 1999); *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P2d 76 (Wyo. 1988). The Supreme Court of Arizona has held that the Winters Doctrine does apply to ground water while the Supreme Court of Wyoming has declined to so hold.

25. The United States Supreme Court has had more than one opportunity to hear the issue and apply the Winters Doctrine to ground water rights of Indian tribes but has failed to do so. *U.S. v. Cappaert*, 426 US 128 (1976)(affirming the Ninth Circuit but declining to fully endorse the statement

of the Ninth Circuit applying the Winters Doctrine to ground water); *Wyoming v. U.S.*, 492 US 406 (1989).

26. The Supreme Court of South Dakota has not addressed the issue of whether the Winters Doctrine applies to ground water.

27. Until a court of competent jurisdiction determines that the Yankton Sioux Tribe has Winters Doctrine rights that apply to ground water and until such time as those rights are quantified, the Chief Engineer and the Water Management Board are unable to determine the extent to which the Yankton Sioux Tribe has rights to the Codell aquifer that would be superior rights to those of Longview.

28. If a court of competent jurisdiction determines that the Winters Doctrine applies to groundwater claims of the Yankton Sioux Tribe and if those rights are quantified, the Yankton Sioux Tribe's priority date for its rights would date back to the treaty establishing the Yankton Sioux Tribe's reservation. This Board does not purport to adjudicate the question of whether the Yankton Sioux Reservation's diminished status would affect the quantification of the Winters rights. Such a right, if any, would be senior in priority to the present application.

29. The application, when conditioned as recommended by the Chief Engineer, would not impair existing rights.

30. The third element in SDCL § 46-2A-9 is whether the use of water would be a beneficial use.

31. In this context, a beneficial use of water is one that is reasonable and useful and beneficial to the appropriator and that is consistent with the interest of the public in the best utilization of water supplies. *SDCL § 46-1-6(3).*

32. As set forth in the following Conclusions of Law, Application No. 7206-3 would be a beneficial use of water under each part of this definition.

33. The use of water, as requested, would undoubtedly be useful and beneficial to the appropriator, because the water will be used in Longview's confined animal feeding operation.

34. It is unnecessary to determine the specific uses to which Longview will put the well water within Longview's facility as long as the water is beneficial to Longview's confinement facility.

35. The proposed use of well water by Longview is reasonable.

36. The other part of the beneficial use test is whether the water use is in the interest of the public in terms of the best utilization of water supplies. *SDCL § 46-1-6(3).*

37. The Board considers several factors in determining whether the water use is in the interest of the public in terms of the best utilization of water supplies, including:

a. In general, confined animal feeding operations are in public interest of the State of South Dakota.

b. Water should be put to the maximum beneficial use given the arid climate in South Dakota. *SDCL § 46-1-4.*

c. Reserving water in an aquifer and keeping it from being applied to

maximum beneficial use is generally inconsistent with SDCL § 46-1-4.

38. Based on the evidence submitted (and as addressed elsewhere in these Findings and Conclusions) the Longview facility is currently in compliance with the DENR environmental permitting requirements and continued compliance will be required.

39. Longview meets the beneficial use criteria.

40. As a fourth element of SDCL § 46-2A-9, the appropriator must demonstrate that the proposed use is in the public interest. The public interest element requires weighing the general public interest in the local economy associated with farming and irrigation along with any other economic, recreational, wildlife, ecological, public health, or other issues presented.

41. Longview's facility has already had a substantial economic impact on the Charles Mix County economy, including the purchasing of more than $2.5 million worth of goods and services from Charles Mix County vendors and also paying more than $700,000 to employees of Longview.

42. Based on the evidence submitted, Longview has complied with all of the requirements imposed upon it by the DENR, including requirements regarding ground water quality, surface water quality, nutrient management plans, waste management facilities, and set back requirements from potential pollution sources.

43. The production of livestock is in the public interest of the State of South Dakota.

44. In considering the public interest factors of economic impact and the production of livestock, the Board concludes that the present application is in the public interest.

45. The application meets the public interest criteria.

46. Longview currently holds coverage under the DENR's Water Pollution Control Permit issued pursuant to SDCL § 34A-2-36 or 34A-2-112 for its operation. The coverage under the Water Pollution Control Permit has previously been subject to public comment as well as review and analysis by DENR. The DENR's coverage decision is final and not subject to review by this Board. Longview must, however, continue to maintain its coverage under the Water Pollution Control Permit and comply with its requirements. As conditioned below, a violation of the Water Pollution Control Permit is a violation of the permit authorized by these Findings of Fact and Conclusions of Law.

47. The term "aquifer" is defined as "a geologic formation, a group of geologic formations, or part of a geologic formation that contains sufficient saturated permeable material to yield quantities of groundwater to wells and springs." *ARSD 74:02:04:20(10).*

48. The term "shallow aquifer" is defined as "any aquifer having the following characteristics:

(1) The aquifer is within fifty feet or less below the land surface with fifteen feet or less of continuous, overlying, extremely low permeability geologic material, such as clayey till or shale.

Weathered till or highly fractured weathered shale is not an extremely low permeability material for purposes of this section; or

(2) The aquifer is greater than fifty feet but less than one hundred feet below the land surface with thirty feet or less of continuous overlying low to extremely low permeability geologic material that may be a combination of weathered and unweathered till, shale, or till and shale."

SDCL § 34A-3A-24.

49. There is no shallow aquifer beneath the surface of the Longview facility.

50. The Board is an administrative agency with quasi-judicial authority to consider the factors in SDCL § 46-2A-9, including public interest. As such, the Board holds authority to consider each case on its merit, and is not bound to accept prior public interest decisions as binding precedent (and this decision will not constitute binding precedent). *Interstate Telephone Cooperative, Inc. v. Public Utilities Commission,* 518 NW2d 749 (SD 1994).

51. Based on the entirety of the record, Application No. 7206-3 meets the standard in SDCL § 46-2A-9 and should be granted, subject to the recommendations proposed by the Chief Engineer.

52. Any Conclusions of Law improperly designated as a Finding of Fact shall be included within these Conclusions of Law.

FINAL DECISION

Application No. 7206-3 is granted subject to the following permit qualifications:

a. The well approved will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under Permit No. 7206-3 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.

b. The well authorized by Permit No. 7206-3 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.

c. Permit No. 7206-3 is subject to compliance with requirements of the DENR's Water Pollution Control Permit issued pursuant to SDCL §34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

d. Permit No. 7206-3 is subject to compliance with all existing and applicable Water Management Board Rules including (but not limited to):

a. Chapter 74:54:01 Ground Water Quality Standards;
b. Chapter 74:54:02 Ground Water Discharge Permit;
c. Chapter 74:51:01 Surface Water Quality Standards;
d. Chapter 74:51:02 Uses Assigned to Lakes;
e. Chapter 74:51:03 Uses Assigned to Streams; and

f. Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions.

Dated this _____ day of September, 2011.

BY THE BOARD:

_____

Rodney Freeman, Chairman
South Dakota Water Management Board

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Longview's Proposed Findings of Fact and Conclusions of Law was served on 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 Sioux Falls, South Dakota, this 29th day of September, 2011:

Chad Comes, PE
Box 308
Madison, SD 57042

Tim Bjork
112 W. Oak St.
Pierre, SD 57501

Leo Holzbauer
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Sister Patricia Mylott
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And was also sent electronically to the following:

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And that on the same day the original was mailed for filing to:

Garland Erbele, Chief Engineer
DENR Water Rights Program
Joe Foss Bldg.
523 E. Capitol Ave.
Pierre, SD 57501

Jeffrey P. Hallem

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION

This matter came on for hearing before the South Dakota Board of Water Management (Board members Rodney Freeman (Chairman), Bernita Loucks, Chad Comes, Leo Holzbauer, Everett Hoyt, and Tim Bjork) on July 13, 14, and 15, 2011, at Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol Avenue, in Pierre, South Dakota. Longview appeared through its corporate representative, Arlan Moss, and through its attorney, Eric R. Kerkvliet, of Lynn, Jackson, Shultz and Lebrun, P.C. Diane Best, Assistant Attorney General, appeared on behalf of the Chief Engineer of the Water Rights program. Petitioner, Yankton Sioux Tribe, was present through its designated representative, John Stone, and was also represented by Jon LaFleur, of Abourezk & Zephier, PC. None of the Individual Petitioners that had previously appeared were present for the hearing before the Water Management Board.

The South Dakota Board of Water Management having heard all the evidence and considered and reviewed all of the documents introduced into evidence, and the Board being fully advised as to the premises, the Board hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Longview previously made application to the Board of Water Management for a well water permit but withdrew its application, relying on the domestic use exception, which allows stock watering without a permit as long as the use does not exceed 18 gallons per minute.

2. After Longview withdrew its application, the Yankton Sioux Tribe and the Individual Petitioners brought a declaratory ruling action before the Water Management Board in which they sought to determine whether Longview's proposed uses of the well water were considered a commercial use rather than a domestic use such that a well water permit would be required.

3. In the meantime, Longview's well driller drilled the well but it failed shortly after drilling was completed. Because Longview intended to rehabilitate or replace the well, the domestic use issue was still heard by the Board of Water Management.

4. The Board of Water Management determined that Longview's proposed uses of the well water were considered domestic because the water was to be used by Longview for stock watering and because the proposed use was for equal to or less than 18 gallons of water per minute.

5. The Yankton Sioux Tribe and the Individual Petitioners appealed the decision of the Board of Water Management to Circuit Court in Charles Mix County. Circuit Court Judge Bruce Anderson determined that Longview's use for washing its facilities, for animal hygiene, and for restrooms for human use did not constitute "stock watering" and was not a domestic use. Judge

Anderson did explain that the consumptive use by the livestock did constitute "stock watering" such that a well water permit would not be required for that proposed use.

6. Longview is now before this Board seeking a well water permit, and, in this permit application, Longview seeks to appropriate .067 cubic feet of well water per second, which is approximately 30 gallons of water per minute.

7. The Chief Engineer of the Water Rights Program recommends approval of Longview's permit subject to certain conditions.

8. Notice of Longview's permit application was advertised in The Wagner Post on September 8, 2010 and on September 15, 2010.

9. The Notice provided that petitions to intervene were to be filed by September 27, 2010 and that hearing would be held on October 6, 2010 in Pierre.

10. Eva Bruguier, Faith Spotted Eagle, Judy Honimichle, Sharon Drapeau, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins (collectively, the "Individual Petitioners"), Sister Patricia Mylott, Joan Olive and the Yankton Sioux Tribe filed timely petitions to intervene.

11. The Individual Petitioners asked for delay under the statutory automatic delay provisions and the evidentiary hearing was delayed.

12. The Board issued a Procedural Order on October 14, 2010. The Order appointed Board Member Rodney Freeman to hear any prehearing motions.

13. The Board set the evidentiary hearing before the Board for December 2, 2010. All parties were provided with the Notice.

14. On November 29, 2010, legal counsel for the Yankton Sioux Tribe withdrew and its new counsel requested a continuance. The continuance was granted and hearing was scheduled for March 10, 2011.

15. On February 15, 2011, one of the Individual Petitioners, Faith Spotted Eagle, requested a continuance since Harold Shepherd, counsel for the Individual Petitioners, had notified her that he was withdrawing from the case. Ms. Spotted Eagle represented that additional time was necessary to seek different legal counsel.

16. On February 18, 2011, Board Prehearing Chairman Rodney Freeman issued an Order continuing the hearing and it was scheduled for July 13, 2011, subject to confirmation at the next Board meeting. The Order was provided to all parties including each of the Individual Petitioners. Mr. Shepherd formally filed his withdrawal on February 25, 2011.

17. On March 14, 2011, the Board issued an Order Affirming Prehearing Chairman's February 18, 2011, Order, Granting Motion for Continuance. On March 22, 2011, the Chief Engineer issued notice of the Board's March 14, 2011, Order and confirmed that the evidentiary hearing would be held on July 13-14 in Pierre. A copy of the Board's March 14, 2011, Order was attached. The notice was provided to all parties, including each of the Individual Petitioners.

18. On June 29, 2011, the DENR issued another Notice that stated that the evidentiary hearing would be held at 1:00 pm on Wednesday July 13 at the Mathews Training Center in Pierre. The Notice was provided to all parties including each of the Individual Petitioners.

19. At the July 13-15, 2011, hearing, Longview, the DENR, and the Yankton Sioux Tribe appeared and presented evidence regarding Longview's water permit application.

20. Despite (1) having filed petitions to intervene; (2) having successfully moved for a continuance of the hearing until the July 13-15 hearing date to allow them to hire an attorney to represent them at the hearing; and (3) having received sufficient notice of the rescheduled hearing date, none of the Individual Petitioners appeared or presented any evidence.

21. Joan Olive and Sister Patricia Mylott (who each separately intervened) did not appear at hearing and filed no response to any motions in this proceeding.

22. Longview's proposed well site is approximately 4 ½ miles north of Marty and about 6 to 6 ½ miles southwest of Wagner and approximately 5 ½ miles south of Ravinia in Charles Mix County. The proposed well site is located in the southwest quarter of the northwest quarter of Section 9, Township 95 North, Range 64 West of the 5th P.M. in Charles Mix County.

23. Longview's facility consists of three connected buildings (a farrowing barn, a breeding and gestation barn, and a gilt development unit) as well as a separate machine shed/compost building.

24. Longview's water storage system is a large cement reservoir divided into two separate parcels by a cement wall, which holds approximately 3 days of water supply.

25. Longview's facility is equipped with a dual plumbing system which would allow Longview to use either rural water or well water at almost any point in the Longview facility.

26. Since inception of the Longview facility, the sole source of water to the Longview facility has been from the Randall Rural Water District, which obtains its water from the Missouri River.

27. Applicant Exhibit No. 10 summarizes the amount of water used by Longview from Randall Rural Water District since inception of the facility.

28. Longview made a commitment to its neighbors and to the Randall Rural Water District that it would apply for and obtain a well water permit to reduce the amount of water necessary to be obtained from the Randall Rural Water District.

29. Longview seeks a well water permit to supplement the water obtained from the Randall Rural Water District.

30. If Longview is granted a well permit, it is anticipated that Longview's use of Randall Rural Water District water will decrease, and it is in Longview's economic interest to use more well water and less rural water.

31. The Water Management Board considers whether (1) there is a reasonable probability that there is unappropriated water available for Longview's proposed use; (2) the proposed diversion can be developed without

unlawful impairment of existing rights; (3) the proposed use would be a beneficial use; and (4) the use would be in the public interest.

32. Before it failed, the maximum pumping rate for the well that Longview drilled at the permit application site was approximately 15 gallons per minute. It is anticipated that the well, as constructed or rehabilitated at the permit application site, will have a maximum pumping rate of 15-18 gallons per minute.

33. Longview will be licensed for the maximum pumping rate of the well as constructed; therefore, Longview anticipates being licensed for between 15-18 gallons per minute, depending on the actual maximum pumping rate after the well is constructed or rehabilitated.

34. A request for water with an expected maximum pumping rate of 15-18 gallons per minute (which is the maximum pumping rate for domestic wells)—or even a pumping rate of 30 gallons per minute—is a relatively insignificant amount of water in determining whether there is a reasonable probability of unappropriated water available from the Codell aquifer and whether the proposed use will unlawfully impair existing rights.

35. In considering whether (1) there is a reasonable probability that water is available for Longview's proposed use and (2) the proposed use will not unlawfully impair existing water rights, the Board relies on the testimony of DENR expert witnesses Jim Goodman, Derric Iles and Garland Erbele regarding the size and extent of the Codell aquifer, its lithology, and the history

of water withdrawals and discharges and the history of permits from this aquifer.

36. The Codell sandstone aquifer is a buried sedimentary rock and a member of the Carlile shale. It consists of loosely to tightly cemented very fine to coarse light brownish gray to dark greenish black and brown sand. The Codell aquifer is under artesian conditions at Longview's site.

37. In order to penetrate the Codell aquifer at Longview's site, the well (when drilled or rehabilitated) would be approximately 570 to 620 feet below the surface.

38. The Codell aquifer underlies approximately 1,134 square miles in Charles Mix County and has an estimated storage of approximately 1.45 million acre feet of recoverable water in Charles Mix County.

39. The Codell aquifer is fairly large; it extends to the north into Douglas County, to the east into Hutchinson County, to the southeast into Bon Homme County and to the south into Nebraska.

40. Water movement within the Codell aquifer in the area of the Longview application is likely from the northwest to the southeast towards the Missouri River.

41. A monitoring well was located approximately 2 ½ miles from Longview's site; however the well collapsed in 1993. According to this monitoring well, there was very little change in the water levels of the Codell aquifer from 1952 to 1992.

42. There are two monitoring wells approximately 23 and 25 miles north and northeast of Longview's site into Douglas County to the north and Hutchinson County to the east.

43. These two monitoring wells are representative of the conditions of the Codell aquifer as a whole.

44. The Douglas County monitoring well shows that the Codell aquifer responds very well to climatic conditions and does appear to have some annual fluctuations.

45. The Hutchinson County monitoring well shows that there have been rising conditions over the period of the hydrograph.

46. According to the two hydrographs from the two monitoring wells, the Codell aquifer does recharge and there have been no major changes in the water levels of the Codell aquifer over the last several years.

47. Considering the historical records of the three monitoring wells into the Codell aquifer witness Goodman testified about, there has been very little change in the water levels of the Codell aquifer and it is capable of sustaining additional withdrawals.

48. Other than domestic use, there is very little appropriation of water out of the Codell aquifer.

49. At one time, the towns of Geddes, Ravinia, and Lake Andes all used the Codell aquifer as a water supply. However, they have abandoned those wells and switched to rural water.

50. The only Codell aquifer water permit in Charles Mix County is the Clearfield Colony, and its use is for domestic use. The Clearfield Colony is located approximately 20-25 miles north and east of Longview's site. There are no appropriative water permits or rights in the Codell aquifer near the Longview site.

51. A little drawdown could be expected from the pumping at Longview's site; however because the pumping rate is only 30 gallons per minute, this well would expect to produce between one to three gallons per minute per foot of draw down. In other words, at 30 gallons per minute, there would be between 10-30 feet of drawdown in the production well. That drawdown would not extend very far away from the production well and it would not be expected to have any adverse impact on the Codell aquifer.

52. The Yankton Sioux Tribe submitted USGS records showing domestic wells from the Codell and various other aquifers throughout Charles Mix County. This evidence has been considered. Having reviewed the USGS records submitted by the Yankton Sioux Tribe, the testimony of witness Goodman concerning the observation wells in the Codell aquifer, and all other testimony presented, the Board finds that there is a reasonable probability of unappropriated water available in the Codell aquifer for the water permit request at issue, notwithstanding any existing uses for domestic purposes. According to Longview's test hole data, there is approximately 32 feet of Codell sandstone at Longview's site (from 573 feet to 605 feet) and there is a static

water level of 470 feet below the land surface, which is consistent with the conclusions of the Chief Engineer's office that there is water available.

53. The maximum pumping rate for the well that was drilled was approximately 15 gallons per minute, and a similar maximum pumping rate is expected when the well is constructed or rehabilitated.

54. The Chief Engineer reviewed the best information reasonably available to determine whether the proposed use would exceed the annual recharge rate of the Codell aquifer pursuant to SDCL § 46-6-3.1.

55. It can be determined whether an aquifer level is declining without doing a recharge study by observing the history of water levels in a particular aquifer. If the overall water level of the aquifer was declining the hydrographs from the DENR observation wells would show a decline regardless of climate. That is not the case here.

56. There are approximately 1600 observation wells throughout the State of South Dakota that are observed to monitor the water levels in the aquifers in South Dakota.

57. It would cost an inordinate amount of money and time to do a recharge study for each individual aquifer within the State of South Dakota.

58. According to the two observation wells into the Codell aquifer, which are representative of the Codell aquifer as a whole, there is more water in the aquifer at the present time than there was 20 years ago.

59. The hydrographs of the Codell aquifer considered by the Chief Engineer's office and the DENR are the best information reasonably available to

determine whether annual withdrawals from the aquifer would exceed the average annual recharge of the aquifer.

60. The Greenhorn formation is stratigraphically below the Codell aquifer in the area of Longview's facility.

61. DENR knew of only two wells that were located in the proximity of Longview's facility. These wells are located about 1.5 miles northwest and northeast of the site.

62. Drawdown is not expected to be significant at Longview's maximum pumping rate, nor is it anticipated that Longview's proposed use will cause any adverse effects on existing water rights or on area domestic users.

63. The Yankton Sioux Tribe currently obtains its water supply from the Missouri River.

64. The Randall Rural Water District also obtains its water from the Missouri River.

65. It is unclear how many wells that Yankton Sioux Tribe has into the Codell aquifer and the Yankton Sioux Tribe's designated representative was unable to answer questions as to how many wells the Yankton Sioux Tribe has into the Codell aquifer.

66. In addition to the foregoing evidence, the interests of the Yankton Sioux Tribe have been considered in determining whether there will be an unlawful impairment of existing rights. This Board finds, based on the entirety of the evidence presented, that there will not be an unlawful impairment of existing rights, including those of the Yankton Sioux Tribe.

67. The water from the proposed well will undoubtedly be beneficial to the Longview facility, regardless of how the water is used within the facility.

68. Water does not need to be of very high quality for the water to be beneficial to Longview, because even relatively low quality water is capable of being used for power washing the facilities.

69. The quality of water within the Codell aquifer is of relatively high quality, and it is expected that the water from the Codell aquifer will, at a minimum, be of sufficiently high quality to use to power wash the facilities.

70. Depending on the quality of the well water obtained from the Codell aquifer, the water may be able to be used to feed Longview's pregnant and nursing sows.

71. From the inception of Longview's facility to November of 2010, Longview has paid Charles Mix County vendors a total of $2,523,316.79.

72. Longview currently has 13 employees with a starting wage of $9.50 per hour for the first 90 days of employment with a dramatic increase in wages after 90 days. The managers of Longview's facility make much more than the hourly employees, and all employees are provided full health and dental benefits at no cost to the employee.

73. From inception of Longview's facility through November of 2010, Longview has paid its employees more than $700,000 in wages and benefits.

74. Longview has had a significant, positive impact on the economy of Charles Mix County.

75. The Longview facility has potential for employment of Yankton Sioux tribal members. In fact, Yankton Sioux tribal members have held positions of employment at the Longview facility in the past.

76. In addition to the potential for employment, there is potential for Yankton Sioux tribal members to sell feed to the Longview facility (in addition to other opportunities).

77. In general, confined animal feeding operations that comply with the permitting requirements set forth by the DENR are considered to be beneficial and in the public interest of the State of South Dakota.

78. Specifically, Longview has complied with all of the permitting requirements set forth by the DENR and the Longview facility is in the public interest of the State of South Dakota. Further, the water use for this facility is a beneficial use in terms of the best utilization of the water supply.

79. Longview's facility is a zero discharge facility.

80. The soil characteristics in their native state at the Longview facility meet South Dakota's minimum liner standards for earthen nutrient storage systems.

81. Because of the favorable geologic characteristics and because Longview chose to construct a concrete wastewater management system in addition, the Longview facility essentially has a dual containment system for animal waste.

82. The animal waste storage facility is a 10 feet deep reinforced concrete structure with adequate storage for a year's worth of nutrient

production from the animals in Longview's facility.

83. The proposed site for the well is approximately 280 feet from the nearest manure storage facility, which exceeds the 150 foot standard required by the DENR.

84. Because there is no shallow aquifer beneath the Longview facility, there is no requirement that Longview obtain a groundwater discharge permit or that there be groundwater monitoring near the Longview facility.

85. Longview's nutrient management system and its application of manure to fields with manure easements has complied with the DENR's requirements.

86. Longview has obtained a DENR Water Pollution Control Permit and has complied with all of the requirements in obtaining and maintaining that permit through the DENR.

87. Longview has complied with all of the rules and regulations regarding ground water quality and surface water quality.

88. The licensed well driller for Longview is Jim Hutmacher, who is familiar with the Water Management Board well construction rules.

89. The construction or rehabilitation of Longview's well will be done in compliance with the Water Management Board's well construction rules, including the requirement that the well only obtain water from the Codell aquifer and not any other aquifer.

90. A Yankton Sioux Tribe witness stated at hearing that there are abandoned or other domestic wells near the Longview site but was unable to

state exactly how far they were from the Longview manure containment system or land application areas, if they were still being used or could be plugged, and who they belonged to. The DENR Water Pollution Control Permit requires that manure containment systems and land application sites must be 1,000 feet away from a public water supply, 250 feet from a neighbor's well, and 150 feet from the producer's own well. Longview's design engineer stated that he had examined aerial photography with the applicant and was unaware of any wells within these buffer distances. There is insufficient evidence to conclude that the containment system or land application areas violate the distance requirements. Regardless, if the Yankton Sioux Tribe later provides information to Longview or Longview otherwise finds these wells and they are within the buffer areas, Longview must make arrangements to meet the DENR Water Pollution Control Permit requirements by seeing that abandoned wells are properly plugged, changing its land application sites, or undertaking whatever means is necessary to meet the buffer requirements. Further, denial of the permit would not resolve the issue if any such wells are discovered. Longview holds an ongoing obligation to comply with the terms of its DENR Water Pollution Control Permit regardless of whether the requested water permit is granted or not.

91. In its design and construction of the Longview facility, Longview has complied with all of the DENR requirements with regard to permitting for confined animal feeding operations.

92. Longview's manure storage system complies with DENR's regulations regarding confined animal feeding operations.

93. Longview's nutrient management system complies with DENR's regulations regarding confined animal feeding operations.

94. Longview has obtained coverage under the DENR Water Pollution Control Permit. The analysis and review by the DENR for this program is complete and final. It is not subject to review by this Board. The fact that the coverage has been obtained does, however, provide evidence that the Longview's use is beneficial and in the public interest.

95. There is a public process allowing for written comments from members of the public as part of the DENR Water Pollution Control Permit process. However, the Yankton Sioux Tribe and the Individual Petitioners failed to file any comments or objections to Longview obtaining coverage under the DENR Water Pollution Control Permit

96. The only incident that could even be considered a violation of the DENR's requirements as to the Water Pollution Control Permit is the leaking of approximately 100 gallons of manure due to the nicking of a hose carrying manure to one of the fields in which the manure is applied.

97. The manure spill was promptly cleaned up and there was no pollution as a result of the manure spill. The area in which the spill occurred was dry at the time.

98. Longview's facility was designed to control odor emissions in that there is sufficient ventilation, a negative pressure system, a concrete design for

the nutrient storage below the facility rather than an open earthen lagoon, and Longview frequently power washes its facilities to reduce dust particles that have the potential to carry odor.

99. In addition, in applying the manure from the Longview facility, the applicators spike in the manure to maximize the nutrient value of the manure, which has an ancillary benefit of reducing odor potential in comparison to spreading manure on the surface of the fields.

100. Jim Hutmacher completed a water well completion report for the well that was drilled, and the water well completion report was admitted as Applicant Exhibit No. 7.

101. The only other aquifer underlying Longview's site is the Niobrara formation, which overlies the Codell aquifer at Longview's site, and the top of the Niobrara formation is approximately 450 feet below the surface at the Longview site.

102. The most shallow aquifer at the location of the drilled well by Mr. Hutmacher is the Niobrara formation, which is 450 feet deep at the top of the formation.

103. At the location of the drilled well, there was no shallow aquifer (aquifer within 100 feet of the land surface). Rather, clay constituted all of the material within 100 feet of the surface at the location of the drilled well.

104. Longview, through its engineering firm—Eisenbraun & Associates—and the engineering firm's subcontractor, performed three soil borings at the Longview facility.

105. Two soil borings were drilled to 30 feet and one soil boring was drilled to 51 feet.

106. The three soil borings established that there was no aquifer within the depth of the soil borings.

107. Neither the Niobrara aquifer nor the Codell aquifer is within 100 feet of the surface at the Longview facility.

108. There is enough information to determine whether the Herrick formation or the Herrick aquifer is underlying the Longview facility, and, based upon all of the available information, the Herrick formation or the Herrick aquifer does not underlie the Longview facility.

109. There is no map of any geologist that shows the Herrick formation is present below the Longview facility.

110. Dr. Perry Rahn is unaware of any map that would show the presence of a shallow aquifer within 100 feet of the surface at the Longview facility's location.

111. The State Geologic Survey has completed a map which indicates the first occurrence of aquifer materials within Charles Mix County, South Dakota. In creating this map, the State Geologic Survey considered all of the available test hole and well data, all of the available surface and subsurface geologic mapping data, and all of the published and unpublished reports that were available.

112. With the State Geologic Survey completing the first occurrences map, DENR expert witness, State Geologist Derric Iles has reviewed enough information to determine whether there is a shallow aquifer underlying the Longview facility.

113. There is no shallow aquifer beneath the Longview facility.

114. There is no evidence that the area within 100 feet of the land surface near the Longview facility is anything other than low permeability soils.

115. The Chief Engineer recommends approval of Longview's well permit application with the following conditions:

a. The well approved will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under Permit No. 7206-3 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.

b. The well authorized by Permit No. 7206-3 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.

c. Permit No. 7206-3 is subject to compliance with requirements of the DENR's Water Pollution Control Permit issued pursuant to SDCL §34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

d. Permit No. 7206-3 is subject to compliance with all existing and applicable Water Management Board Rules including (but not limited to):

a. Chapter 74:54:01 Ground Water Quality Standards;

b. Chapter 74:54:02 Ground Water Discharge Permit;

c. Chapter 74:51:01 Surface Water Quality Standards;

d. Chapter 74:51:02 Uses Assigned to Lakes;

e. Chapter 74:51:03 Uses Assigned to Streams; and

f. Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions.

116. The Board adopts the recommendation of the Chief Engineer with its proposed conditions.

117. Having considered the experience of Jim Goodman, his demeanor while testifying, and the actual testimony of Jim Goodman, the Board finds that the testimony of Jim Goodman is credible. Mr. Goodman is an expert with extensive experience in evaluating water permit applications and the effects of pumping and other water use on aquifers, and groundwater hydrology in South Dakota. He relied on his own experience as well as studies and mapping of the Codell aquifer by the United States Geological Survey and the South Dakota Geological Survey, observation well data compiled by the DENR, and well logs and other records maintained or routinely used by the DENR.

118. Having had an opportunity to observe the demeanor and hear the testimony of John Stone (who is the designated representative to testify on

behalf of the Yankton Sioux Tribe), including his admitted misstatement of fact, his vagueness in responses, the fact that he was unable to answer underlying questions to support his assertions, and his evasiveness in answering questions, the Board determines that John Stone is not a credible witness.

119. Derric Iles, the State Geologist and Administrator of the Geological Survey Program, has excellent credentials and expertise. Derric Iles has studied the aquifers, aquifer maps, well data, and hydrology of Charles Mix County extensively. His testimony is credible and reliable.

120. Derric Iles presented unbiased factual interpretations, after considering the available data, and he is considered a third party independent of the Chief Engineer.

121. Having had an opportunity to observe the demeanor and hear the testimony of Derric Iles while testifying, the Board finds the testimony of Derric Iles to be extremely credible.

122. Having had an opportunity to observe the demeanor and hear the testimony of Derric Iles and Perry Rahn, the Board finds that the testimony of Perry Rahn is less credible than that of Derric Iles.

123. In making the determination in the foregoing finding, the Board considers the vagueness and ambiguities in responses of Perry Rahn and the preciseness in responses of Derric Iles, as well as the impeachment of and inconsistencies within Perry Rahn's testimony.

124. Any Finding of Fact improperly designated as a Conclusion of Law shall be included within these Findings of Fact.

CONCLUSIONS OF LAW

1. The South Dakota Board of Water Management has jurisdiction over the parties and subject matter of this lawsuit.

2. The site for this application is not within the Yankton Sioux Reservation and is owned by Longview, which is a South Dakota limited liability partnership that is clearly not a tribal member or tribal entity. The water source for this application is the Codell aquifer which overlies this area outside the Yankton Sioux Reservation in South Dakota.

3. Publication was properly made in *The Wagner Post* pursuant to SDCL § 46-2A-4.

4. Under ARSD 74:02:01:12.04, the deadline for filing petitions to intervene in this matter was September 27, 2010. This intervention date was published as required by SDCL § 46-2A-4.

5. The Yankton Sioux Tribe, the Individual Petitioners, Sister Patricia Mylott, and Joan Olive timely filed petitions to intervene.

6. Notice of hearing was properly given pursuant to SDCL § 46-2A-4 and SDCL § 1-26-17.

7. The present application falls within the Board's responsibility over water appropriation and regulation in Title 46, more specifically SDCL § 46-2A-9.

8. Each of the elements in SDCL § 46-2A-9 must be proven in order for this Board to grant Permit Application No. 7206-3.

9. The Chief Engineer has recommended approval and Jim Goodman, Derric Iles and Garland Erbele testified in support of the recommendation. This recommendation is not, however, binding on the Board. *SDCL § 46-2A-4(8).* Likewise, references to past recommendations of the Chief Engineer are not binding on the Board.

10. SDCL § 46-2A-9 provides that a permit to appropriate water may be issued "only if there is reasonable probability that there is unappropriated water available for 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." *SDCL § 46-2A-9.*

11. The first element in SDCL § 46-2A-9 is whether there is water available for the appropriation. The Codell aquifer is large and capable of sustaining additional withdrawals, as explained in the Findings of Fact.

12. Consideration of water availability also includes consideration of the criteria in SDCL § 46-6-3.1 pertaining to recharge/withdrawal: whether "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 annual recharge of water to the groundwater source." *SDCL § 46-6-3.1.*

13. Although there is an exception to the recharge/withdrawal consideration in SDCL § 46-6-3.1, it applies only to applications filed by public water supply systems and is not applicable here.

14. Annual recharge to the Codell aquifer has not been and is not likely to be quantified in the near future. The Codell aquifer is a confined aquifer. The criteria of SDCL § 46-6-3.1 can be fulfilled by analysis of the observation well data.

15. The observation well data considered by the Chief Engineer and the DENR is the best information reasonably available to determine whether the quantity of water withdrawn annually from the Codell aquifer will exceed the quantity of the average annual recharge of water to the Codell aquifer.

16. In determining whether the water withdrawn annually from the Codell aquifer will exceed the quantity of the average annual recharge of water to the Codell aquifer, the observation wells are instructive as to the water levels of the entire Codell aquifer.

17. According to the best information reasonably available, the quantity of water withdrawn annually from the Codell aquifer will not exceed the quantity of the average annual recharge of water to the groundwater source if this permit is granted.

18. Given the foregoing Findings of Fact and Conclusions of Law, the Board concludes that there is sufficient water available for the proposed water use.

19. As a second element of SDCL § 46-2A-9, the appropriator must demonstrate that the proposed diversion can be developed without unlawful impairment of existing rights.

20. The proposal here would not impair existing water rights, including those of the Yankton Sioux Tribe, as is addressed at length in the Findings of Fact and as set forth in the following Conclusions of Law.

21. Domestic water users and those users with prior water rights hold priority over the present Application and their uses would take precedence if there is an actual adverse impairment of an adequate well.

22. Domestic uses of water are those defined in SDCL § 46-1-6(7). The rights of domestic user are unlikely to be impaired by the present Application but, out of an abundance of caution, this Board imposes a condition on the permit to protect domestic users.

23. The Winters Doctrine provides that the priority date for the determination of whether tribes have surface water rights is the creation of the reservation. *Winters v. United States,* 207 US 564 (1908).

24. However, there is a split of authority as to whether the Winters Doctrine applies to ground water. *In re General Adjudication of All Rights to Use Water in Gila River System,* 989 P2d 739 (Ariz. 1999); *In re General Adjudication of All Rights to Use Water in the Big Horn River System,* 753 P2d 76 (Wyo. 1988). The Supreme Court of Arizona has held that the Winters Doctrine does apply to ground water while the Supreme Court of Wyoming has declined to so hold.

25. The United States Supreme Court has had more than one opportunity to hear the issue and apply the Winters Doctrine to ground water rights of Indian tribes but has failed to do so. *U.S. v. Cappaert,* 426 US 128 (1976)(affirming the Ninth Circuit but declining to fully endorse the statement

of the Ninth Circuit applying the Winters Doctrine to ground water); *Wyoming v. U.S.*, 492 US 406 (1989).

26. The Supreme Court of South Dakota has not addressed the issue of whether the Winters Doctrine applies to ground water.

27. Until a court of competent jurisdiction determines that the Yankton Sioux Tribe has Winters Doctrine rights that apply to ground water and until such time as those rights are quantified, the Chief Engineer and the Water Management Board are unable to determine the extent to which the Yankton Sioux Tribe has rights to the Codell aquifer that would be superior rights to those of Longview.

28. If a court of competent jurisdiction determines that the Winters Doctrine applies to groundwater claims of the Yankton Sioux Tribe and if those rights are quantified, the Yankton Sioux Tribe's priority date for its rights would date back to the treaty establishing the Yankton Sioux Tribe's reservation. This Board does not purport to adjudicate the question of whether the Yankton Sioux Reservation's diminished status would affect the quantification of the Winters rights. Such a right, if any, would be senior in priority to the present application.

29. The application, when conditioned as recommended by the Chief Engineer, would not impair existing rights.

30. The third element in SDCL § 46-2A-9 is whether the use of water would be a beneficial use.

31. In this context, a beneficial use of water is one that is reasonable and useful and beneficial to the appropriator and that is consistent with the interest of the public in the best utilization of water supplies. *SDCL § 46-1-6(3).*

32. As set forth in the following Conclusions of Law, Application No. 7206-3 would be a beneficial use of water under each part of this definition.

33. The use of water, as requested, would undoubtedly be useful and beneficial to the appropriator, because the water will be used in Longview's confined animal feeding operation.

34. It is unnecessary to determine the specific uses to which Longview will put the well water within Longview's facility as long as the water is beneficial to Longview's confinement facility.

35. The proposed use of well water by Longview is reasonable.

36. The other part of the beneficial use test is whether the water use is in the interest of the public in terms of the best utilization of water supplies. *SDCL § 46-1-6(3).*

37. The Board considers several factors in determining whether the water use is in the interest of the public in terms of the best utilization of water supplies, including:

a. In general, confined animal feeding operations are in public interest of the State of South Dakota.

b. Water should be put to the maximum beneficial use given the arid climate in South Dakota. *SDCL § 46-1-4.*

c. Reserving water in an aquifer and keeping it from being applied to

maximum beneficial use is generally inconsistent with SDCL § 46-1-4.

38. Based on the evidence submitted (and as addressed elsewhere in these Findings and Conclusions) the Longview facility is currently in compliance with the DENR environmental permitting requirements and continued compliance will be required.

39. Longview meets the beneficial use criteria.

40. As a fourth element of SDCL § 46-2A-9, the appropriator must demonstrate that the proposed use is in the public interest. The public interest element requires weighing the general public interest in the local economy associated with farming and irrigation along with any other economic, recreational, wildlife, ecological, public health, or other issues presented.

41. Longview's facility has already had a substantial economic impact on the Charles Mix County economy, including the purchasing of more than $2.5 million worth of goods and services from Charles Mix County vendors and also paying more than $700,000 to employees of Longview.

42. Based on the evidence submitted, Longview has complied with all of the requirements imposed upon it by the DENR, including requirements regarding ground water quality, surface water quality, nutrient management plans, waste management facilities, and set back requirements from potential pollution sources.

43. The production of livestock is in the public interest of the State of South Dakota.

44. In considering the public interest factors of economic impact and the production of livestock, the Board concludes that the present application is in the public interest.

45. The application meets the public interest criteria.

46. Longview currently holds coverage under the DENR's Water Pollution Control Permit issued pursuant to SDCL § 34A-2-36 or 34A-2-112 for its operation. The coverage under the Water Pollution Control Permit has previously been subject to public comment as well as review and analysis by DENR. The DENR's coverage decision is final and not subject to review by this Board. Longview must, however, continue to maintain its coverage under the Water Pollution Control Permit and comply with its requirements. As conditioned below, a violation of the Water Pollution Control Permit is a violation of the permit authorized by these Findings of Fact and Conclusions of Law.

47. The term "aquifer" is defined as "a geologic formation, a group of geologic formations, or part of a geologic formation that contains sufficient saturated permeable material to yield quantities of groundwater to wells and springs." *ARSD 74:02:04:20(10).*

48. The term "shallow aquifer" is defined as "any aquifer having the following characteristics:

(1) The aquifer is within fifty feet or less below the land surface with fifteen feet or less of continuous, overlying, extremely low permeability geologic material, such as clayey till or shale.

Weathered till or highly fractured weathered shale is not an extremely low permeability material for purposes of this section; or

(2) The aquifer is greater than fifty feet but less than one hundred feet below the land surface with thirty feet or less of continuous overlying low to extremely low permeability geologic material that may be a combination of weathered and unweathered till, shale, or till and shale."

SDCL § 34A-3A-24.

49. There is no shallow aquifer beneath the surface of the Longview facility.

50. The Board is an administrative agency with quasi-judicial authority to consider the factors in SDCL § 46-2A-9, including public interest. As such, the Board holds authority to consider each case on its merit, and is not bound to accept prior public interest decisions as binding precedent (and this decision will not constitute binding precedent). *Interstate Telephone Cooperative, Inc. v. Public Utilities Commission*, 518 NW2d 749 (SD 1994).

51. Based on the entirety of the record, Application No. 7206-3 meets the standard in SDCL § 46-2A-9 and should be granted, subject to the recommendations proposed by the Chief Engineer.

52. Any Conclusions of Law improperly designated as a Finding of Fact shall be included within these Conclusions of Law.

FINAL DECISION

Application No. 7206-3 is granted subject to the following permit qualifications:

a. The well approved will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under Permit No. 7206-3 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.

b. The well authorized by Permit No. 7206-3 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.

c. Permit No. 7206-3 is subject to compliance with requirements of the DENR's Water Pollution Control Permit issued pursuant to SDCL §34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

d. Permit No. 7206-3 is subject to compliance with all existing and applicable Water Management Board Rules including (but not limited to):

a. Chapter 74:54:01 Ground Water Quality Standards;
b. Chapter 74:54:02 Ground Water Discharge Permit;
c. Chapter 74:51:01 Surface Water Quality Standards;
d. Chapter 74:51:02 Uses Assigned to Lakes;
e. Chapter 74:51:03 Uses Assigned to Streams; and

f. Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions.

Dated this 5 day of ~~September~~ October, 2011.

BY THE BOARD:

Rodney Freeman, Chairman
South Dakota Water Management Board

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 7206-3,)
LONGVIEW FARMS, LLP)

WATER MANAGEMENT BOARD'S RULINGS ON APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW; PETITIONER YANKTON SIOUX TRIBE'S ADDITIONAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW; AND PETITIONER YANKTON SIOUX TRIBE'S OBJECTIONS TO APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to directions of the Water Management Board, counsel for Applicant submitted Applicant's Proposed Findings of Fact and Conclusions of Law in the above-captioned matter. Subsequently, counsel for Department of Environment and Natural Resources, Water Rights Program (DENR) submitted a letter in support of Applicant's proposal. Intervenor Yankton Sioux Tribe, the only Intervenor that appeared at the hearing, submitted Petitioner Yankton Sioux Tribe's Additional Proposed Findings of Fact and Conclusions of Law; and Petitioner Yankton Sioux Tribe's Objections to Applicant's Proposed Findings of Fact and Conclusions of Law. The Board, upon review of the parties submissions and the administrative record, and having orally entered its decision, hereby enters the following rulings:

A. Applicant's proposed Findings of Fact Nos. 1-15, 18-31, 33, 34, 36-52, 54-60, 62-64, 66-84, 86-112, 114-125 are accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision.

B. Applicant's proposed Finding of Fact No. 16 is accepted by the Board as consistent with and supported by the administrative record and the Board's oral

decision, as corrected as follows to more accurately reflect the record: delete "Hearing" and insert "Prehearing" and capitalize the "P" of "petitioners."

C. Applicant's proposed Finding of Fact No. 17 is substantially accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as modified below to fully reflect the record:

> 17. On March 14, 2011, the Board issued an Order Affirming Prehearing Chairman's February 18, 2011, Order, Granting Motion for Continuance. On March 22, 2011, the Chief Engineer issued notice of the Board's March 14, 2011, Order and confirmed that the evidentiary hearing would be held on July 13-14 in Pierre. A copy of the Board's March 14, 2011, Order was attached. The notice was provided to all parties, including each of the Individual Petitioners.

D. Applicant's proposed Findings of Fact Nos. 32 and 53 are substantially accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as combined and modified below to more accurately reflect the record:

> 32. Before it failed, the maximum pumping rate for the well that Longview drilled at the permit application site was approximately 15 gallons per minute. It is anticipated that the well, as constructed or rehabilitated at the permit application site, will have a maximum pumping rate of approximately 15-18 gallons per minute.

E. Applicant's proposed Finding of Fact No. 35 is substantially accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as modified as follows to include State Geologist Derric Iles, whose testimony the Board also relied upon: after "Jim Goodman" insert ", Derric Iles."

F. Applicant's proposed Finding of Fact No. 61 is substantially accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as modified below to accurately reflect the record:

61. DENR knew of only two wells that were located in the proximity of Longview's facility. These wells are located about 1.5 miles northwest and northeast of the site.

G. Applicant's proposed Finding of Fact No. 65 is rejected by the Board as duplicative of other findings and speculative.

H. Applicant's proposed Finding of Fact No. 85 is accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as corrected as follows: delete "well" and insert "aquifer."

I. Applicant's proposed Finding of Fact No. 113 is substantially accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as modified as follows to more accurately reflect the record: after "map," insert "DENR expert witness, State Geologist."

J. Applicant's proposed Conclusions of Law Nos. 1-8 and 10-52 are accepted by the Board as consistent with and supported by the administrative record, the Board's oral decision, and the findings of fact adopted by the Board in the above rulings.

K. Applicant's proposed Conclusion of Law No. 9 is accepted by the Board as consistent with and supported by the administrative record, the Board's oral decision, and the findings of fact adopted by the Board in the above rulings, as modified as follows to more fully reflect the Board's findings of fact and conclusions of law: after "Goodman" insert ", Derric Iles".

L. Applicant's proposed Final Decision is accepted by the Board as consistent with and supported by the administrative record, the Boards oral decision, and the findings of fact and conclusions of law adopted by the Board in the above rulings.

M. Intervenors additional proposed Findings of Fact Nos. 1 and 2 are rejected by the Board as contrary to the administrative record, the Board's oral decision and the findings of fact adopted by the Board in the above rulings. The record does not support findings that Applicant's facility is located over a shallow aquifer, or the de minimis amount of water sought by Applicant unlawfully impairs Intervenor's existing water rights, which have not been determined or quantified.

N. Intervenor's additional proposed Findings of Fact Nos. 3, 4 and 9 are rejected by the Board as contrary to the Board's oral decision and the findings of fact adopted by the Board in the above rulings.

O. Intervenor's additional proposed Finding of Fact No. 5 is rejected by the Board as contrary to the Board's oral decision and the findings of fact adopted by the Board in the above rulings. That record establishes that Applicant's proposed well will be withdrawing water from only the Codell aquifer. Mr. Goodman's testimony, admitting there is a possibility of some interconnectivity between the Niobrara and Codell aquifers, does not support the proposed finding.

P. Intervenor's additional proposed Findings of Fact Nos. 6 and 7 are rejected, as those findings are not necessary to the Board's final decision. The fact the estimated annual recharge rate for the Codell aquifer, the total annual withdrawal from the aquifer, and the number of irrigable acres on the Yankton Sioux Reservation were not established at the hearing does not affect the Board's findings of fact and conclusions of law. The Board's findings and conclusions that there is a reasonable probability that there is unappropriated water available, and the proposed diversion of water can be developed without unlawful impairment of existing water rights, including any quantifiable rights to the water in the Codell

aquifer Intervenor may ultimately be able to establish, are supported by the data from the monitoring wells, evidence submitted regarding withdrawals from the Codell aquifer, the reports and testimony of DENR exper witnesses and the de minimis amount of water sought under the Application.

Q. Intervenor's additional proposed Finding of Fact No. 8 is rejected by the Board. The record does not support a finding that there are in fact such wells in the proximate vicinity of Applicant's facility or the fields where manure is spread. Further, even if supported, the additional proposed finding of fact does not alter the Board's findings of fact and conclusions of law that issuance of the permit is in the public interest.

R. Intervenor's additional proposed Conclusions of Law Nos. 1, 2, 3, 4, 5, 6 and 7 are rejected by the Board as contrary to the Board's oral decision and the findings of fact and conclusions of law adopted in the above rulings. Further, Nos. 3 and 4 are attempts to impose requirements that are not part of a determination of whether a water permit should be granted. In addition, given the de minimis amount of water to be diverted, the permit conditions imposed by the Board are sufficient to protect adequate domestic wells.

S. Intervenor's objections to Applicant's proposed Findings of Fact Nos. 1-20, 22-36 are rejected by the Board as contrary to the Board's oral decision, the Board's adopted findings of fact and rulings on Intervenors additional proposed findings of fact set forth above.

T. Intervenor's objections to Applicant's proposed Finding of Fact No. 21 is accepted by the Board to the extent and for reasons set forth in Ruling G above.

U. Intervenor's objections to Applicant's proposed Conclusions of Law Nos. 37-53 are rejected by the Board as contrary to the Board's oral decision, the Board's adopted findings of fact, conclusions of law and rulings on Intervenor's additional proposed findings of fact and conclusions of law set forth above.

The Board's attorney is directed to prepare a Findings of Fact, Conclusions of Law and Final Decision consistent with the above rulings to be executed by the chairman of the Board or the Board's designee without further notice or hearing.

Dated this 5th day of October, 2011.

BY THE BOARD:

Rodney Freeman, Jr.
Chairman, Water Management Board

DEPARTMENT of ENVIRONMENT and NATURAL RESOURCES
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October 7, 2011

NOTICE

TO:

Eric Kerkvliet
Lynn Jackson Shultz & Lebrun
PO Box 2700
Sioux Falls SD 57104

Jon LaFleur, Attorney
Abourezk & Zephier, PC
PO Box 9460
Rapid City SD 57709

Faith Spotted Eagle
PO Box 667
Lake Andes SD 57356

Glenn Drapeau
General Delivery
Lake Andes SD 57356

FROM: Garland Erbele, Chief Engineer
Water Rights Program

SUBJECT: Adoption of Finding of Fact, Conclusion of Law and Final Decision in the matter of Water Permit Application No. 7206-3

This is to notify you that the Water Management Board's Ruling and the Final Decision, including Findings of Fact and Conclusions of Law, were adopted October 5, 2011, by the Water Management Board in the matter of Water Permit No. 7206-3, LongView Farms. The Board ruling and signed Findings of Fact, Conclusions of Law and Final Decision are enclosed.

South Dakota statutes provide that decisions of the Board may be appealed to the Courts pursuant to the procedures established in SDCL 1-26-31 and 1-26-32.

Enclosures

c: Jeff Hallem, Assistant Attorney General
Diane Best, Assistant Attorney General
Thomasina Real Bird, 1500 Plaza Drive, Louisville CO 80027
Non-participating Parties

CERTIFICATION

I hereby certify that on October 7, 2011, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated October 7, 2011, regarding adoption of findings of fact, conclusions of law and final decision in the matter of Water Right Permit Application No. 7206-3, as set forth on the attached parties of record and addressed below:

Eric Kerkvliet
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Sent inter-office mail to

Jeff Hallem, Assistant Attorney General,
1302 E. Hwy 14, Suite 1, Pierre SD
57501-8501

Gail Jacobson

Gail Jacobson
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 11th day of October, 2011

Karen Schlaak

Karen Schlaak
Notary Public
My Commission expires April 1, 2013

SEAL KAREN SCHLAAK SEAL
NOTARY PUBLIC
State of South Dakota

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP	))))	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION

This matter came on for hearing before the South Dakota Board of Water Management (Board members Rodney Freeman (Chairman), Bernita Loucks, Chad Comes, Leo Holzbauer, Everett Hoyt, and Tim Bjork) on July 13, 14, and 15, 2011, at Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol Avenue, in Pierre, South Dakota. Longview appeared through its corporate representative, Arlan Moss, and through its attorney, Eric R. Kerkvliet, of Lynn, Jackson, Shultz and Lebrun, P.C. Diane Best, Assistant Attorney General, appeared on behalf of the Chief Engineer of the Water Rights program. Petitioner, Yankton Sioux Tribe, was present through its designated representative, John Stone, and was also represented by Jon LaFleur, of Abourezk & Zephier, PC. None of the Individual Petitioners that had previously appeared were present for the hearing before the Water Management Board.

The South Dakota Board of Water Management having heard all the evidence and considered and reviewed all of the documents introduced into evidence, and the Board being fully advised as to the premises, the Board hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Longview previously made application to the Board of Water Management for a well water permit but withdrew its application, relying on the domestic use exception, which allows stock watering without a permit as long as the use does not exceed 18 gallons per minute.

2. After Longview withdrew its application, the Yankton Sioux Tribe and the Individual Petitioners brought a declaratory ruling action before the Water Management Board in which they sought to determine whether Longview's proposed uses of the well water were considered a commercial use rather than a domestic use such that a well water permit would be required.

3. In the meantime, Longview's well driller drilled the well but it failed shortly after drilling was completed. Because Longview intended to rehabilitate or replace the well, the domestic use issue was still heard by the Board of Water Management.

4. The Board of Water Management determined that Longview's proposed uses of the well water were considered domestic because the water was to be used by Longview for stock watering and because the proposed use was for equal to or less than 18 gallons of water per minute.

5. The Yankton Sioux Tribe and the Individual Petitioners appealed the decision of the Board of Water Management to Circuit Court in Charles Mix County. Circuit Court Judge Bruce Anderson determined that Longview's use for washing its facilities, for animal hygiene, and for restrooms for human use did not constitute "stock watering" and was not a domestic use. Judge

Anderson did explain that the consumptive use by the livestock did constitute "stock watering" such that a well water permit would not be required for that proposed use.

6. Longview is now before this Board seeking a well water permit, and, in this permit application, Longview seeks to appropriate .067 cubic feet of well water per second, which is approximately 30 gallons of water per minute.

7. The Chief Engineer of the Water Rights Program recommends approval of Longview's permit subject to certain conditions.

8. Notice of Longview's permit application was advertised in The Wagner Post on September 8, 2010 and on September 15, 2010.

9. The Notice provided that petitions to intervene were to be filed by September 27, 2010 and that hearing would be held on October 6, 2010 in Pierre.

10. Eva Bruguier, Faith Spotted Eagle, Judy Honimichle, Sharon Drapeau, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins (collectively, the "Individual Petitioners"), Sister Patricia Mylott, Joan Olive and the Yankton Sioux Tribe filed timely petitions to intervene.

11. The Individual Petitioners asked for delay under the statutory automatic delay provisions and the evidentiary hearing was delayed.

12. The Board issued a Procedural Order on October 14, 2010. The Order appointed Board Member Rodney Freeman to hear any prehearing motions.

13. The Board set the evidentiary hearing before the Board for December 2, 2010. All parties were provided with the Notice.

14. On November 29, 2010, legal counsel for the Yankton Sioux Tribe withdrew and its new counsel requested a continuance. The continuance was granted and hearing was scheduled for March 10, 2011.

15. On February 15, 2011, one of the Individual Petitioners, Faith Spotted Eagle, requested a continuance since Harold Shepherd, counsel for the Individual Petitioners, had notified her that he was withdrawing from the case. Ms. Spotted Eagle represented that additional time was necessary to seek different legal counsel.

16. On February 18, 2011, Board Prehearing Chairman Rodney Freeman issued an Order continuing the hearing and it was scheduled for July 13, 2011, subject to confirmation at the next Board meeting. The Order was provided to all parties including each of the Individual Petitioners. Mr. Shepherd formally filed his withdrawal on February 25, 2011.

17. On March 14, 2011, the Board issued an Order Affirming Prehearing Chairman's February 18, 2011, Order, Granting Motion for Continuance. On March 22, 2011, the Chief Engineer issued notice of the Board's March 14, 2011, Order and confirmed that the evidentiary hearing would be held on July 13-14 in Pierre. A copy of the Board's March 14, 2011, Order was attached. The notice was provided to all parties, including each of the Individual Petitioners.

18. On June 29, 2011, the DENR issued another Notice that stated that the evidentiary hearing would be held at 1:00 pm on Wednesday July 13 at the Mathews Training Center in Pierre. The Notice was provided to all parties including each of the Individual Petitioners.

19. At the July 13-15, 2011, hearing, Longview, the DENR, and the Yankton Sioux Tribe appeared and presented evidence regarding Longview's water permit application.

20. Despite (1) having filed petitions to intervene; (2) having successfully moved for a continuance of the hearing until the July 13-15 hearing date to allow them to hire an attorney to represent them at the hearing; and (3) having received sufficient notice of the rescheduled hearing date, none of the Individual Petitioners appeared or presented any evidence.

21. Joan Olive and Sister Patricia Mylott (who each separately intervened) did not appear at hearing and filed no response to any motions in this proceeding.

22. Longview's proposed well site is approximately 4 ½ miles north of Marty and about 6 to 6 ½ miles southwest of Wagner and approximately 5 ½ miles south of Ravinia in Charles Mix County. The proposed well site is located in the southwest quarter of the northwest quarter of Section 9, Township 95 North, Range 64 West of the 5th P.M. in Charles Mix County.

23. Longview's facility consists of three connected buildings (a farrowing barn, a breeding and gestation barn, and a gilt development unit) as well as a separate machine shed/compost building.

24. Longview's water storage system is a large cement reservoir divided into two separate parcels by a cement wall, which holds approximately 3 days of water supply.

25. Longview's facility is equipped with a dual plumbing system which would allow Longview to use either rural water or well water at almost any point in the Longview facility.

26. Since inception of the Longview facility, the sole source of water to the Longview facility has been from the Randall Rural Water District, which obtains its water from the Missouri River.

27. Applicant Exhibit No. 10 summarizes the amount of water used by Longview from Randall Rural Water District since inception of the facility.

28. Longview made a commitment to its neighbors and to the Randall Rural Water District that it would apply for and obtain a well water permit to reduce the amount of water necessary to be obtained from the Randall Rural Water District.

29. Longview seeks a well water permit to supplement the water obtained from the Randall Rural Water District.

30. If Longview is granted a well permit, it is anticipated that Longview's use of Randall Rural Water District water will decrease, and it is in Longview's economic interest to use more well water and less rural water.

31. The Water Management Board considers whether (1) there is a reasonable probability that there is unappropriated water available for Longview's proposed use; (2) the proposed diversion can be developed without

unlawful impairment of existing rights; (3) the proposed use would be a beneficial use; and (4) the use would be in the public interest.

32. Before it failed, the maximum pumping rate for the well that Longview drilled at the permit application site was approximately 15 gallons per minute. It is anticipated that the well, as constructed or rehabilitated at the permit application site, will have a maximum pumping rate of 15-18 gallons per minute.

33. Longview will be licensed for the maximum pumping rate of the well as constructed; therefore, Longview anticipates being licensed for between 15-18 gallons per minute, depending on the actual maximum pumping rate after the well is constructed or rehabilitated.

34. A request for water with an expected maximum pumping rate of 15-18 gallons per minute (which is the maximum pumping rate for domestic wells)—or even a pumping rate of 30 gallons per minute—is a relatively insignificant amount of water in determining whether there is a reasonable probability of unappropriated water available from the Codell aquifer and whether the proposed use will unlawfully impair existing rights.

35. In considering whether (1) there is a reasonable probability that water is available for Longview's proposed use and (2) the proposed use will not unlawfully impair existing water rights, the Board relies on the testimony of DENR expert witnesses Jim Goodman, Derric Iles and Garland Erbele regarding the size and extent of the Codell aquifer, its lithology, and the history

of water withdrawals and discharges and the history of permits from this aquifer.

36. The Codell sandstone aquifer is a buried sedimentary rock and a member of the Carlile shale. It consists of loosely to tightly cemented very fine to coarse light brownish gray to dark greenish black and brown sand. The Codell aquifer is under artesian conditions at Longview's site.

37. In order to penetrate the Codell aquifer at Longview's site, the well (when drilled or rehabilitated) would be approximately 570 to 620 feet below the surface.

38. The Codell aquifer underlies approximately 1,134 square miles in Charles Mix County and has an estimated storage of approximately 1.45 million acre feet of recoverable water in Charles Mix County.

39. The Codell aquifer is fairly large; it extends to the north into Douglas County, to the east into Hutchinson County, to the southeast into Bon Homme County and to the south into Nebraska.

40. Water movement within the Codell aquifer in the area of the Longview application is likely from the northwest to the southeast towards the Missouri River.

41. A monitoring well was located approximately 2 ½ miles from Longview's site; however the well collapsed in 1993. According to this monitoring well, there was very little change in the water levels of the Codell aquifer from 1952 to 1992.

42. There are two monitoring wells approximately 23 and 25 miles north and northeast of Longview's site into Douglas County to the north and Hutchinson County to the east.

43. These two monitoring wells are representative of the conditions of the Codell aquifer as a whole.

44. The Douglas County monitoring well shows that the Codell aquifer responds very well to climatic conditions and does appear to have some annual fluctuations.

45. The Hutchinson County monitoring well shows that there have been rising conditions over the period of the hydrograph.

46. According to the two hydrographs from the two monitoring wells, the Codell aquifer does recharge and there have been no major changes in the water levels of the Codell aquifer over the last several years.

47. Considering the historical records of the three monitoring wells into the Codell aquifer witness Goodman testified about, there has been very little change in the water levels of the Codell aquifer and it is capable of sustaining additional withdrawals.

48. Other than domestic use, there is very little appropriation of water out of the Codell aquifer.

49. At one time, the towns of Geddes, Ravinia, and Lake Andes all used the Codell aquifer as a water supply. However, they have abandoned those wells and switched to rural water.

50. The only Codell aquifer water permit in Charles Mix County is the Clearfield Colony, and its use is for domestic use. The Clearfield Colony is located approximately 20-25 miles north and east of Longview's site. There are no appropriative water permits or rights in the Codell aquifer near the Longview site.

51. A little drawdown could be expected from the pumping at Longview's site; however because the pumping rate is only 30 gallons per minute, this well would expect to produce between one to three gallons per minute per foot of draw down. In other words, at 30 gallons per minute, there would be between 10-30 feet of drawdown in the production well. That drawdown would not extend very far away from the production well and it would not be expected to have any adverse impact on the Codell aquifer.

52. The Yankton Sioux Tribe submitted USGS records showing domestic wells from the Codell and various other aquifers throughout Charles Mix County. This evidence has been considered. Having reviewed the USGS records submitted by the Yankton Sioux Tribe, the testimony of witness Goodman concerning the observation wells in the Codell aquifer, and all other testimony presented, the Board finds that there is a reasonable probability of unappropriated water available in the Codell aquifer for the water permit request at issue, notwithstanding any existing uses for domestic purposes. According to Longview's test hole data, there is approximately 32 feet of Codell sandstone at Longview's site (from 573 feet to 605 feet) and there is a static

water level of 470 feet below the land surface, which is consistent with the conclusions of the Chief Engineer's office that there is water available.

53. The maximum pumping rate for the well that was drilled was approximately 15 gallons per minute, and a similar maximum pumping rate is expected when the well is constructed or rehabilitated.

54. The Chief Engineer reviewed the best information reasonably available to determine whether the proposed use would exceed the annual recharge rate of the Codell aquifer pursuant to SDCL § 46-6-3.1.

55. It can be determined whether an aquifer level is declining without doing a recharge study by observing the history of water levels in a particular aquifer. If the overall water level of the aquifer was declining the hydrographs from the DENR observation wells would show a decline regardless of climate. That is not the case here.

56. There are approximately 1600 observation wells throughout the State of South Dakota that are observed to monitor the water levels in the aquifers in South Dakota.

57. It would cost an inordinate amount of money and time to do a recharge study for each individual aquifer within the State of South Dakota.

58. According to the two observation wells into the Codell aquifer, which are representative of the Codell aquifer as a whole, there is more water in the aquifer at the present time than there was 20 years ago.

59. The hydrographs of the Codell aquifer considered by the Chief Engineer's office and the DENR are the best information reasonably available to

determine whether annual withdrawals from the aquifer would exceed the average annual recharge of the aquifer.

60. The Greenhorn formation is stratigraphically below the Codell aquifer in the area of Longview's facility.

61. DENR knew of only two wells that were located in the proximity of Longview's facility. These wells are located about 1.5 miles northwest and northeast of the site.

62. Drawdown is not expected to be significant at Longview's maximum pumping rate, nor is it anticipated that Longview's proposed use will cause any adverse effects on existing water rights or on area domestic users.

63. The Yankton Sioux Tribe currently obtains its water supply from the Missouri River.

64. The Randall Rural Water District also obtains its water from the Missouri River.

65. It is unclear how many wells that Yankton Sioux Tribe has into the Codell aquifer and the Yankton Sioux Tribe's designated representative was unable to answer questions as to how many wells the Yankton Sioux Tribe has into the Codell aquifer.

66. In addition to the foregoing evidence, the interests of the Yankton Sioux Tribe have been considered in determining whether there will be an unlawful impairment of existing rights. This Board finds, based on the entirety of the evidence presented, that there will not be an unlawful impairment of existing rights, including those of the Yankton Sioux Tribe.

67. The water from the proposed well will undoubtedly be beneficial to the Longview facility, regardless of how the water is used within the facility.

68. Water does not need to be of very high quality for the water to be beneficial to Longview, because even relatively low quality water is capable of being used for power washing the facilities.

69. The quality of water within the Codell aquifer is of relatively high quality, and it is expected that the water from the Codell aquifer will, at a minimum, be of sufficiently high quality to use to power wash the facilities.

70. Depending on the quality of the well water obtained from the Codell aquifer, the water may be able to be used to feed Longview's pregnant and nursing sows.

71. From the inception of Longview's facility to November of 2010, Longview has paid Charles Mix County vendors a total of $2,523,316.79.

72. Longview currently has 13 employees with a starting wage of $9.50 per hour for the first 90 days of employment with a dramatic increase in wages after 90 days. The managers of Longview's facility make much more than the hourly employees, and all employees are provided full health and dental benefits at no cost to the employee.

73. From inception of Longview's facility through November of 2010, Longview has paid its employees more than $700,000 in wages and benefits.

74. Longview has had a significant, positive impact on the economy of Charles Mix County.

75. The Longview facility has potential for employment of Yankton Sioux tribal members. In fact, Yankton Sioux tribal members have held positions of employment at the Longview facility in the past.

76. In addition to the potential for employment, there is potential for Yankton Sioux tribal members to sell feed to the Longview facility (in addition to other opportunities).

77. In general, confined animal feeding operations that comply with the permitting requirements set forth by the DENR are considered to be beneficial and in the public interest of the State of South Dakota.

78. Specifically, Longview has complied with all of the permitting requirements set forth by the DENR and the Longview facility is in the public interest of the State of South Dakota. Further, the water use for this facility is a beneficial use in terms of the best utilization of the water supply.

79. Longview's facility is a zero discharge facility.

80. The soil characteristics in their native state at the Longview facility meet South Dakota's minimum liner standards for earthen nutrient storage systems.

81. Because of the favorable geologic characteristics and because Longview chose to construct a concrete wastewater management system in addition, the Longview facility essentially has a dual containment system for animal waste.

82. The animal waste storage facility is a 10 feet deep reinforced concrete structure with adequate storage for a year's worth of nutrient

production from the animals in Longview's facility.

83. The proposed site for the well is approximately 280 feet from the nearest manure storage facility, which exceeds the 150 foot standard required by the DENR.

84. Because there is no shallow aquifer beneath the Longview facility, there is no requirement that Longview obtain a groundwater discharge permit or that there be groundwater monitoring near the Longview facility.

85. Longview's nutrient management system and its application of manure to fields with manure easements has complied with the DENR's requirements.

86. Longview has obtained a DENR Water Pollution Control Permit and has complied with all of the requirements in obtaining and maintaining that permit through the DENR.

87. Longview has complied with all of the rules and regulations regarding ground water quality and surface water quality.

88. The licensed well driller for Longview is Jim Hutmacher, who is familiar with the Water Management Board well construction rules.

89. The construction or rehabilitation of Longview's well will be done in compliance with the Water Management Board's well construction rules, including the requirement that the well only obtain water from the Codell aquifer and not any other aquifer.

90. A Yankton Sioux Tribe witness stated at hearing that there are abandoned or other domestic wells near the Longview site but was unable to

state exactly how far they were from the Longview manure containment system or land application areas, if they were still being used or could be plugged, and who they belonged to. The DENR Water Pollution Control Permit requires that manure containment systems and land application sites must be 1,000 feet away from a public water supply, 250 feet from a neighbor's well, and 150 feet from the producer's own well. Longview's design engineer stated that he had examined aerial photography with the applicant and was unaware of any wells within these buffer distances. There is insufficient evidence to conclude that the containment system or land application areas violate the distance requirements. Regardless, if the Yankton Sioux Tribe later provides information to Longview or Longview otherwise finds these wells and they are within the buffer areas, Longview must make arrangements to meet the DENR Water Pollution Control Permit requirements by seeing that abandoned wells are properly plugged, changing its land application sites, or undertaking whatever means is necessary to meet the buffer requirements. Further, denial of the permit would not resolve the issue if any such wells are discovered. Longview holds an ongoing obligation to comply with the terms of its DENR Water Pollution Control Permit regardless of whether the requested water permit is granted or not.

91. In its design and construction of the Longview facility, Longview has complied with all of the DENR requirements with regard to permitting for confined animal feeding operations.

92. Longview's manure storage system complies with DENR's regulations regarding confined animal feeding operations.

93. Longview's nutrient management system complies with DENR's regulations regarding confined animal feeding operations.

94. Longview has obtained coverage under the DENR Water Pollution Control Permit. The analysis and review by the DENR for this program is complete and final. It is not subject to review by this Board. The fact that the coverage has been obtained does, however, provide evidence that the Longview's use is beneficial and in the public interest.

95. There is a public process allowing for written comments from members of the public as part of the DENR Water Pollution Control Permit process. However, the Yankton Sioux Tribe and the Individual Petitioners failed to file any comments or objections to Longview obtaining coverage under the DENR Water Pollution Control Permit

96. The only incident that could even be considered a violation of the DENR's requirements as to the Water Pollution Control Permit is the leaking of approximately 100 gallons of manure due to the nicking of a hose carrying manure to one of the fields in which the manure is applied.

97. The manure spill was promptly cleaned up and there was no pollution as a result of the manure spill. The area in which the spill occurred was dry at the time.

98. Longview's facility was designed to control odor emissions in that there is sufficient ventilation, a negative pressure system, a concrete design for

the nutrient storage below the facility rather than an open earthen lagoon, and Longview frequently power washes its facilities to reduce dust particles that have the potential to carry odor.

99. In addition, in applying the manure from the Longview facility, the applicators spike in the manure to maximize the nutrient value of the manure, which has an ancillary benefit of reducing odor potential in comparison to spreading manure on the surface of the fields.

100. Jim Hutmacher completed a water well completion report for the well that was drilled, and the water well completion report was admitted as Applicant Exhibit No. 7.

101. The only other aquifer underlying Longview's site is the Niobrara formation, which overlies the Codell aquifer at Longview's site, and the top of the Niobrara formation is approximately 450 feet below the surface at the Longview site.

102. The most shallow aquifer at the location of the drilled well by Mr. Hutmacher is the Niobrara formation, which is 450 feet deep at the top of the formation.

103. At the location of the drilled well, there was no shallow aquifer (aquifer within 100 feet of the land surface). Rather, clay constituted all of the material within 100 feet of the surface at the location of the drilled well.

104. Longview, through its engineering firm—Eisenbraun & Associates—and the engineering firm's subcontractor, performed three soil borings at the Longview facility.

105. Two soil borings were drilled to 30 feet and one soil boring was drilled to 51 feet.

106. The three soil borings established that there was no aquifer within the depth of the soil borings.

107. Neither the Niobrara aquifer nor the Codell aquifer is within 100 feet of the surface at the Longview facility.

108. There is enough information to determine whether the Herrick formation or the Herrick aquifer is underlying the Longview facility, and, based upon all of the available information, the Herrick formation or the Herrick aquifer does not underlie the Longview facility.

109. There is no map of any geologist that shows the Herrick formation is present below the Longview facility.

110. Dr. Perry Rahn is unaware of any map that would show the presence of a shallow aquifer within 100 feet of the surface at the Longview facility's location.

111. The State Geologic Survey has completed a map which indicates the first occurrence of aquifer materials within Charles Mix County, South Dakota. In creating this map, the State Geologic Survey considered all of the available test hole and well data, all of the available surface and subsurface geologic mapping data, and all of the published and unpublished reports that were available.

112. With the State Geologic Survey completing the first occurrences map, DENR expert witness, State Geologist Derric Iles has reviewed enough information to determine whether there is a shallow aquifer underlying the Longview facility.

113. There is no shallow aquifer beneath the Longview facility.

114. There is no evidence that the area within 100 feet of the land surface near the Longview facility is anything other than low permeability soils.

115. The Chief Engineer recommends approval of Longview's well permit application with the following conditions:

a. The well approved will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under Permit No. 7206-3 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.

b. The well authorized by Permit No. 7206-3 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.

c. Permit No. 7206-3 is subject to compliance with requirements of the DENR's Water Pollution Control Permit issued pursuant to SDCL §34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

d. Permit No. 7206-3 is subject to compliance with all existing and applicable Water Management Board Rules including (but not limited to):

a. Chapter 74:54:01 Ground Water Quality Standards;

b. Chapter 74:54:02 Ground Water Discharge Permit;

c. Chapter 74:51:01 Surface Water Quality Standards;

d. Chapter 74:51:02 Uses Assigned to Lakes;

e. Chapter 74:51:03 Uses Assigned to Streams; and

f. Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions.

116. The Board adopts the recommendation of the Chief Engineer with its proposed conditions.

117. Having considered the experience of Jim Goodman, his demeanor while testifying, and the actual testimony of Jim Goodman, the Board finds that the testimony of Jim Goodman is credible. Mr. Goodman is an expert with extensive experience in evaluating water permit applications and the effects of pumping and other water use on aquifers, and groundwater hydrology in South Dakota. He relied on his own experience as well as studies and mapping of the Codell aquifer by the United States Geological Survey and the South Dakota Geological Survey, observation well data compiled by the DENR, and well logs and other records maintained or routinely used by the DENR.

118. Having had an opportunity to observe the demeanor and hear the testimony of John Stone (who is the designated representative to testify on

behalf of the Yankton Sioux Tribe), including his admitted misstatement of fact, his vagueness in responses, the fact that he was unable to answer underlying questions to support his assertions, and his evasiveness in answering questions, the Board determines that John Stone is not a credible witness.

119. Derric Iles, the State Geologist and Administrator of the Geological Survey Program, has excellent credentials and expertise. Derric Iles has studied the aquifers, aquifer maps, well data, and hydrology of Charles Mix County extensively. His testimony is credible and reliable.

120. Derric Iles presented unbiased factual interpretations, after considering the available data, and he is considered a third party independent of the Chief Engineer.

121. Having had an opportunity to observe the demeanor and hear the testimony of Derric Iles while testifying, the Board finds the testimony of Derric Iles to be extremely credible.

122. Having had an opportunity to observe the demeanor and hear the testimony of Derric Iles and Perry Rahn, the Board finds that the testimony of Perry Rahn is less credible than that of Derric Iles.

123. In making the determination in the foregoing finding, the Board considers the vagueness and ambiguities in responses of Perry Rahn and the preciseness in responses of Derric Iles, as well as the impeachment of and inconsistencies within Perry Rahn's testimony.

124. Any Finding of Fact improperly designated as a Conclusion of Law shall be included within these Findings of Fact.

CONCLUSIONS OF LAW

1. The South Dakota Board of Water Management has jurisdiction over the parties and subject matter of this lawsuit.

2. The site for this application is not within the Yankton Sioux Reservation and is owned by Longview, which is a South Dakota limited liability partnership that is clearly not a tribal member or tribal entity. The water source for this application is the Codell aquifer which overlies this area outside the Yankton Sioux Reservation in South Dakota.

3. Publication was properly made in *The Wagner Post* pursuant to SDCL § 46-2A-4.

4. Under ARSD 74:02:01:12.04, the deadline for filing petitions to intervene in this matter was September 27, 2010. This intervention date was published as required by SDCL § 46-2A-4.

5. The Yankton Sioux Tribe, the Individual Petitioners, Sister Patricia Mylott, and Joan Olive timely filed petitions to intervene.

6. Notice of hearing was properly given pursuant to SDCL § 46-2A-4 and SDCL § 1-26-17.

7. The present application falls within the Board's responsibility over water appropriation and regulation in Title 46, more specifically SDCL § 46-2A-9.

8. Each of the elements in SDCL § 46-2A-9 must be proven in order for this Board to grant Permit Application No. 7206-3.

9. The Chief Engineer has recommended approval and Jim Goodman, Derric Iles and Garland Erbele testified in support of the recommendation. This recommendation is not, however, binding on the Board. *SDCL § 46-2A-4(8).* Likewise, references to past recommendations of the Chief Engineer are not binding on the Board.

10. SDCL § 46-2A-9 provides that a permit to appropriate water may be issued "only if there is reasonable probability that there is unappropriated water available for 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." *SDCL § 46-2A-9.*

11. The first element in SDCL § 46-2A-9 is whether there is water available for the appropriation. The Codell aquifer is large and capable of sustaining additional withdrawals, as explained in the Findings of Fact.

12. Consideration of water availability also includes consideration of the criteria in SDCL § 46-6-3.1 pertaining to recharge/withdrawal: whether "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 annual recharge of water to the groundwater source." *SDCL § 46-6-3.1.*

13. Although there is an exception to the recharge/withdrawal consideration in SDCL § 46-6-3.1, it applies only to applications filed by public water supply systems and is not applicable here.

14. Annual recharge to the Codell aquifer has not been and is not likely to be quantified in the near future. The Codell aquifer is a confined aquifer. The criteria of SDCL § 46-6-3.1 can be fulfilled by analysis of the observation well data.

15. The observation well data considered by the Chief Engineer and the DENR is the best information reasonably available to determine whether the quantity of water withdrawn annually from the Codell aquifer will exceed the quantity of the average annual recharge of water to the Codell aquifer.

16. In determining whether the water withdrawn annually from the Codell aquifer will exceed the quantity of the average annual recharge of water to the Codell aquifer, the observation wells are instructive as to the water levels of the entire Codell aquifer.

17. According to the best information reasonably available, the quantity of water withdrawn annually from the Codell aquifer will not exceed the quantity of the average annual recharge of water to the groundwater source if this permit is granted.

18. Given the foregoing Findings of Fact and Conclusions of Law, the Board concludes that there is sufficient water available for the proposed water use.

19. As a second element of SDCL § 46-2A-9, the appropriator must demonstrate that the proposed diversion can be developed without unlawful impairment of existing rights.

20. The proposal here would not impair existing water rights, including those of the Yankton Sioux Tribe, as is addressed at length in the Findings of Fact and as set forth in the following Conclusions of Law.

21. Domestic water users and those users with prior water rights hold priority over the present Application and their uses would take precedence if there is an actual adverse impairment of an adequate well.

22. Domestic uses of water are those defined in SDCL § 46-1-6(7). The rights of domestic user are unlikely to be impaired by the present Application but, out of an abundance of caution, this Board imposes a condition on the permit to protect domestic users.

23. The Winters Doctrine provides that the priority date for the determination of whether tribes have surface water rights is the creation of the reservation. *Winters v. United States,* 207 US 564 (1908).

24. However, there is a split of authority as to whether the Winters Doctrine applies to ground water. *In re General Adjudication of All Rights to Use Water in Gila River System,* 989 P2d 739 (Ariz. 1999); *In re General Adjudication of All Rights to Use Water in the Big Horn River System,* 753 P2d 76 (Wyo. 1988). The Supreme Court of Arizona has held that the Winters Doctrine does apply to ground water while the Supreme Court of Wyoming has declined to so hold.

25. The United States Supreme Court has had more than one opportunity to hear the issue and apply the Winters Doctrine to ground water rights of Indian tribes but has failed to do so. *U.S. v. Cappaert,* 426 US 128 (1976)(affirming the Ninth Circuit but declining to fully endorse the statement

of the Ninth Circuit applying the Winters Doctrine to ground water); *Wyoming v. U.S.*, 492 US 406 (1989).

26. The Supreme Court of South Dakota has not addressed the issue of whether the Winters Doctrine applies to ground water.

27. Until a court of competent jurisdiction determines that the Yankton Sioux Tribe has Winters Doctrine rights that apply to ground water and until such time as those rights are quantified, the Chief Engineer and the Water Management Board are unable to determine the extent to which the Yankton Sioux Tribe has rights to the Codell aquifer that would be superior rights to those of Longview.

28. If a court of competent jurisdiction determines that the Winters Doctrine applies to groundwater claims of the Yankton Sioux Tribe and if those rights are quantified, the Yankton Sioux Tribe's priority date for its rights would date back to the treaty establishing the Yankton Sioux Tribe's reservation. This Board does not purport to adjudicate the question of whether the Yankton Sioux Reservation's diminished status would affect the quantification of the Winters rights. Such a right, if any, would be senior in priority to the present application.

29. The application, when conditioned as recommended by the Chief Engineer, would not impair existing rights.

30. The third element in SDCL § 46-2A-9 is whether the use of water would be a beneficial use.

31. In this context, a beneficial use of water is one that is reasonable and useful and beneficial to the appropriator and that is consistent with the interest of the public in the best utilization of water supplies. *SDCL § 46-1-6(3).*

32. As set forth in the following Conclusions of Law, Application No. 7206-3 would be a beneficial use of water under each part of this definition.

33. The use of water, as requested, would undoubtedly be useful and beneficial to the appropriator, because the water will be used in Longview's confined animal feeding operation.

34. It is unnecessary to determine the specific uses to which Longview will put the well water within Longview's facility as long as the water is beneficial to Longview's confinement facility.

35. The proposed use of well water by Longview is reasonable.

36. The other part of the beneficial use test is whether the water use is in the interest of the public in terms of the best utilization of water supplies. *SDCL § 46-1-6(3).*

37. The Board considers several factors in determining whether the water use is in the interest of the public in terms of the best utilization of water supplies, including:

a. In general, confined animal feeding operations are in public interest of the State of South Dakota.

b. Water should be put to the maximum beneficial use given the arid climate in South Dakota. *SDCL § 46-1-4.*

c. Reserving water in an aquifer and keeping it from being applied to

maximum beneficial use is generally inconsistent with SDCL § 46-1-4.

38. Based on the evidence submitted (and as addressed elsewhere in these Findings and Conclusions) the Longview facility is currently in compliance with the DENR environmental permitting requirements and continued compliance will be required.

39. Longview meets the beneficial use criteria.

40. As a fourth element of SDCL § 46-2A-9, the appropriator must demonstrate that the proposed use is in the public interest. The public interest element requires weighing the general public interest in the local economy associated with farming and irrigation along with any other economic, recreational, wildlife, ecological, public health, or other issues presented.

41. Longview's facility has already had a substantial economic impact on the Charles Mix County economy, including the purchasing of more than $2.5 million worth of goods and services from Charles Mix County vendors and also paying more than $700,000 to employees of Longview.

42. Based on the evidence submitted, Longview has complied with all of the requirements imposed upon it by the DENR, including requirements regarding ground water quality, surface water quality, nutrient management plans, waste management facilities, and set back requirements from potential pollution sources.

43. The production of livestock is in the public interest of the State of South Dakota.

44. In considering the public interest factors of economic impact and the production of livestock, the Board concludes that the present application is in the public interest.

45. The application meets the public interest criteria.

46. Longview currently holds coverage under the DENR's Water Pollution Control Permit issued pursuant to SDCL § 34A-2-36 or 34A-2-112 for its operation. The coverage under the Water Pollution Control Permit has previously been subject to public comment as well as review and analysis by DENR. The DENR's coverage decision is final and not subject to review by this Board. Longview must, however, continue to maintain its coverage under the Water Pollution Control Permit and comply with its requirements. As conditioned below, a violation of the Water Pollution Control Permit is a violation of the permit authorized by these Findings of Fact and Conclusions of Law.

47. The term "aquifer" is defined as "a geologic formation, a group of geologic formations, or part of a geologic formation that contains sufficient saturated permeable material to yield quantities of groundwater to wells and springs." *ARSD 74:02:04:20(10).*

48. The term "shallow aquifer" is defined as "any aquifer having the following characteristics:

(1) The aquifer is within fifty feet or less below the land surface with fifteen feet or less of continuous, overlying, extremely low permeability geologic material, such as clayey till or shale.

Weathered till or highly fractured weathered shale is not an extremely low permeability material for purposes of this section; or

(2) The aquifer is greater than fifty feet but less than one hundred feet below the land surface with thirty feet or less of continuous overlying low to extremely low permeability geologic material that may be a combination of weathered and unweathered till, shale, or till and shale."

SDCL § 34A-3A-24.

49. There is no shallow aquifer beneath the surface of the Longview facility.

50. The Board is an administrative agency with quasi-judicial authority to consider the factors in SDCL § 46-2A-9, including public interest. As such, the Board holds authority to consider each case on its merit, and is not bound to accept prior public interest decisions as binding precedent (and this decision will not constitute binding precedent). *Interstate Telephone Cooperative, Inc. v. Public Utilities Commission*, 518 NW2d 749 (SD 1994).

51. Based on the entirety of the record, Application No. 7206-3 meets the standard in SDCL § 46-2A-9 and should be granted, subject to the recommendations proposed by the Chief Engineer.

52. Any Conclusions of Law improperly designated as a Finding of Fact shall be included within these Conclusions of Law.

FINAL DECISION

Application No. 7206-3 is granted subject to the following permit qualifications:

a. The well approved will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under Permit No. 7206-3 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.

b. The well authorized by Permit No. 7206-3 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.

c. Permit No. 7206-3 is subject to compliance with requirements of the DENR's Water Pollution Control Permit issued pursuant to SDCL §34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

d. Permit No. 7206-3 is subject to compliance with all existing and applicable Water Management Board Rules including (but not limited to):

a. Chapter 74:54:01 Ground Water Quality Standards;
b. Chapter 74:54:02 Ground Water Discharge Permit;
c. Chapter 74:51:01 Surface Water Quality Standards;
d. Chapter 74:51:02 Uses Assigned to Lakes;
e. Chapter 74:51:03 Uses Assigned to Streams; and

f. Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions.

Dated this 5 day of ~~September~~ October, 2011.

BY THE BOARD:

Rodney Freeman, Chairman
South Dakota Water Management Board

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT	)
APPLICATION NO. 7206-3,	)
LONGVIEW FARMS, LLP	)

WATER MANAGEMENT BOARD'S RULINGS ON APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW; PETITIONER YANKTON SIOUX TRIBE'S ADDITIONAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW; AND PETITIONER YANKTON SIOUX TRIBE'S OBJECTIONS TO APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to directions of the Water Management Board, counsel for Applicant submitted Applicant's Proposed Findings of Fact and Conclusions of Law in the above-captioned matter. Subsequently, counsel for Department of Environment and Natural Resources, Water Rights Program (DENR) submitted a letter in support of Applicant's proposal. Intervenor Yankton Sioux Tribe, the only Intervenor that appeared at the hearing, submitted Petitioner Yankton Sioux Tribe's Additional Proposed Findings of Fact and Conclusions of Law; and Petitioner Yankton Sioux Tribe's Objections to Applicant's Proposed Findings of Fact and Conclusions of Law. The Board, upon review of the parties submissions and the administrative record, and having orally entered its decision, hereby enters the following rulings:

A. Applicant's proposed Findings of Fact Nos. 1-15, 18-31, 33, 34, 36-52, 54-60, 62-64, 66-84, 86-112, 114-125 are accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision.

B. Applicant's proposed Finding of Fact No. 16 is accepted by the Board as consistent with and supported by the administrative record and the Board's oral

decision, as corrected as follows to more accurately reflect the record: delete "Hearing" and insert "Prehearing" and capitalize the "P" of "petitioners."

C. Applicant's proposed Finding of Fact No. 17 is substantially accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as modified below to fully reflect the record:

> 17. On March 14, 2011, the Board issued an Order Affirming Prehearing Chairman's February 18, 2011, Order, Granting Motion for Continuance. On March 22, 2011, the Chief Engineer issued notice of the Board's March 14, 2011, Order and confirmed that the evidentiary hearing would be held on July 13-14 in Pierre. A copy of the Board's March 14, 2011, Order was attached. The notice was provided to all parties, including each of the Individual Petitioners.

D. Applicant's proposed Findings of Fact Nos. 32 and 53 are substantially accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as combined and modified below to more accurately reflect the record:

> 32. Before it failed, the maximum pumping rate for the well that Longview drilled at the permit application site was approximately 15 gallons per minute. It is anticipated that the well, as constructed or rehabilitated at the permit application site, will have a maximum pumping rate of approximately 15-18 gallons per minute.

E. Applicant's proposed Finding of Fact No. 35 is substantially accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as modified as follows to include State Geologist Derric Iles, whose testimony the Board also relied upon: after "Jim Goodman" insert ", Derric Iles."

F. Applicant's proposed Finding of Fact No. 61 is substantially accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as modified below to accurately reflect the record:

61. DENR knew of only two wells that were located in the proximity of Longview's facility. These wells are located about 1.5 miles northwest and northeast of the site.

G. Applicant's proposed Finding of Fact No. 65 is rejected by the Board as duplicative of other findings and speculative.

H. Applicant's proposed Finding of Fact No. 85 is accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as corrected as follows: delete "well" and insert "aquifer."

I. Applicant's proposed Finding of Fact No. 113 is substantially accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision, as modified as follows to more accurately reflect the record: after "map," insert "DENR expert witness, State Geologist."

J. Applicant's proposed Conclusions of Law Nos. 1-8 and 10-52 are accepted by the Board as consistent with and supported by the administrative record, the Board's oral decision, and the findings of fact adopted by the Board in the above rulings.

K. Applicant's proposed Conclusion of Law No. 9 is accepted by the Board as consistent with and supported by the administrative record, the Board's oral decision, and the findings of fact adopted by the Board in the above rulings, as modified as follows to more fully reflect the Board's findings of fact and conclusions of law: after "Goodman" insert ", Derric Iles".

L. Applicant's proposed Final Decision is accepted by the Board as consistent with and supported by the administrative record, the Boards oral decision, and the findings of fact and conclusions of law adopted by the Board in the above rulings.

M. Intervenors additional proposed Findings of Fact Nos. 1 and 2 are rejected by the Board as contrary to the administrative record, the Board's oral decision and the findings of fact adopted by the Board in the above rulings. The record does not support findings that Applicant's facility is located over a shallow aquifer, or the de minimis amount of water sought by Applicant unlawfully impairs Intervenor's existing water rights, which have not been determined or quantified.

N. Intervenor's additional proposed Findings of Fact Nos. 3, 4 and 9 are rejected by the Board as contrary to the Board's oral decision and the findings of fact adopted by the Board in the above rulings.

O. Intervenor's additional proposed Finding of Fact No. 5 is rejected by the Board as contrary to the Board's oral decision and the findings of fact adopted by the Board in the above rulings. That record establishes that Applicant's proposed well will be withdrawing water from only the Codell aquifer. Mr. Goodman's testimony, admitting there is a possibility of some interconnectivity between the Niobrara and Codell aquifers, does not support the proposed finding.

P. Intervenor's additional proposed Findings of Fact Nos. 6 and 7 are rejected, as those findings are not necessary to the Board's final decision. The fact the estimated annual recharge rate for the Codell aquifer, the total annual withdrawal from the aquifer, and the number of irrigable acres on the Yankton Sioux Reservation were not established at the hearing does not affect the Board's findings of fact and conclusions of law. The Board's findings and conclusions that there is a reasonable probability that there is unappropriated water available, and the proposed diversion of water can be developed without unlawful impairment of existing water rights, including any quantifiable rights to the water in the Codell

aquifer Intervenor may ultimately be able to establish, are supported by the data from the monitoring wells, evidence submitted regarding withdrawals from the Codell aquifer, the reports and testimony of DENR exper witnesses and the de minimis amount of water sought under the Application.

Q. Intervenor's additional proposed Finding of Fact No. 8 is rejected by the Board. The record does not support a finding that there are in fact such wells in the proximate vicinity of Applicant's facility or the fields where manure is spread. Further, even if supported, the additional proposed finding of fact does not alter the Board's findings of fact and conclusions of law that issuance of the permit is in the public interest.

R. Intervenor's additional proposed Conclusions of Law Nos. 1, 2, 3, 4, 5, 6 and 7 are rejected by the Board as contrary to the Board's oral decision and the findings of fact and conclusions of law adopted in the above rulings. Further, Nos. 3 and 4 are attempts to impose requirements that are not part of a determination of whether a water permit should be granted. In addition, given the de minimis amount of water to be diverted, the permit conditions imposed by the Board are sufficient to protect adequate domestic wells.

S. Intervenor's objections to Applicant's proposed Findings of Fact Nos. 1-20, 22-36 are rejected by the Board as contrary to the Board's oral decision, the Board's adopted findings of fact and rulings on Intervenors additional proposed findings of fact set forth above.

T. Intervenor's objections to Applicant's proposed Finding of Fact No. 21 is accepted by the Board to the extent and for reasons set forth in Ruling G above.

U. Intervenor's objections to Applicant's proposed Conclusions of Law Nos. 37-53 are rejected by the Board as contrary to the Board's oral decision, the Board's adopted findings of fact, conclusions of law and rulings on Intervenor's additional proposed findings of fact and conclusions of law set forth above.

The Board's attorney is directed to prepare a Findings of Fact, Conclusions of Law and Final Decision consistent with the above rulings to be executed by the chairman of the Board or the Board's designee without further notice or hearing.

Dated this 5th day of October, 2011.

BY THE BOARD:

Rodney Freeman, Jr.
Chairman, Water Management Board

Charles Abourezk
*Robin L. Zephier
Jon J. LaFleur
George J. Nelson

*Also licensed in Colorado

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**Alicia D. Garcia

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RECEIVED
NOV 07 2011
WATER RIGHTS PROGRAM

November 4, 2011

Clerk of Courts
Charles Mix County First Judicial Circuit
400 Main Street
Lake Andes, SD 57356-0640

Re: Notice of Appeal *In the Matter of the Permit Application No. 7206-3, Longview Farms, LLP*

Dear Clerk:

Enclosed please find an original and two copies of the Notice of Appeal of Yankton Sioux Tribe. By copy of this letter, I am serving a copy of the same on all interested parties and this is intended as service by mail upon them.

I have also enclosed our check in the amount of $70.00 for the filing fee.

Thank you, and please let me know if you have any questions.

Sincerely,

Jon J. LaFleur
Abourezk & Zephier, P.C.
Counsel to Yankton Sioux Tribe

JJL/nm
Enclosures
cc w/enc: Ms. Diane Best
Mr. Garland Eberle
Mr. Jeff Hallem
Mr. Eric Gronlund
Mr. Eric Kirkvliet/Mr. David Nadolski
B & C Committee

RECEIVED
NOV 07 2011
WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) §	
COUNTY OF CHARLES MIX	)	FIRST JUDICIAL CIRCUIT

In the Matter of Water Permit Application No.7206-3, Longview Farms, LLP	)	
	)	**NOTICE OF APPEAL**
Yankton Sioux Tribe,	)	
Petitioner.	)	

Comes now Jon J. LaFleur, Counsel to Yankton Sioux Tribe, whose headquarters are on the Yankton Indian Reservation in Charles Mix County, South Dakota, and hereby files Notice of Appeal of the State of South Dakota Water Management Board's Findings of Fact, Conclusions of Law and Final Decision *In the Matter of the Permit Application No. 7206-3, Longview Farms, LLP*, dated October 5, 2011, pursuant to SDCL § 1-26-31, 1-26-31.1(1) and ARSD 74:02:01:49. A copy of the Findings of Fact, Conclusions of Law and Final Decision is attached hereto for reference. A Statement of Issues on Appeal shall be filed within the time limits prescribed by SDCL § 1-26-31.4.

Dated this 4th day of November, 2011.

Respectfully submitted,

Jon J. LaFleur, Counsel
Abourezk & Zephier, P.C.
2020 W. Omaha St.
P.O. Box 9460
Rapid City, SD 57709-9460
(605) 342-0097

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2011, I cause to be served by first class mail, postage prepaid, a true and correct copy of the *Notice of Appeal* to the following parties:

Ms. Diane Best
Assistant Attorney General
Counsel to DENR
Office of Attorney General
317 N. Main Avenue
Sioux Falls, SD 57104-6004

Mr. Jeff Hallem
Assistant Attorney General
Counsel to Water Rights Management Board
Office of the Attorney General
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Pierre, SD 57501-8501

Mr. Eric Kirkvliet
Mr. David Nadolski
Lynn, Jackson, Shultz & LeBrun
Counsel to Longview Farm LLP
P.O. Box 2700
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Mr. Garland Eberle, Chief Engineer
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Mr. Eric Gronlund
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STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP	))))	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION

This matter came on for hearing before the South Dakota Board of Water Management (Board members Rodney Freeman (Chairman), Bernita Loucks, Chad Comes, Leo Holzbauer, Everett Hoyt, and Tim Bjork) on July 13, 14, and 15, 2011, at Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol Avenue, in Pierre, South Dakota. Longview appeared through its corporate representative, Arlan Moss, and through its attorney, Eric R. Kerkvliet, of Lynn, Jackson, Shultz and Lebrun, P.C. Diane Best, Assistant Attorney General, appeared on behalf of the Chief Engineer of the Water Rights program. Petitioner, Yankton Sioux Tribe, was present through its designated representative, John Stone, and was also represented by Jon LaFleur, of Abourezk & Zephier, PC. None of the Individual Petitioners that had previously appeared were present for the hearing before the Water Management Board.

The South Dakota Board of Water Management having heard all the evidence and considered and reviewed all of the documents introduced into evidence, and the Board being fully advised as to the premises, the Board hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Longview previously made application to the Board of Water Management for a well water permit but withdrew its application, relying on the domestic use exception, which allows stock watering without a permit as long as the use does not exceed 18 gallons per minute.

2. After Longview withdrew its application, the Yankton Sioux Tribe and the Individual Petitioners brought a declaratory ruling action before the Water Management Board in which they sought to determine whether Longview's proposed uses of the well water were considered a commercial use rather than a domestic use such that a well water permit would be required.

3. In the meantime, Longview's well driller drilled the well but it failed shortly after drilling was completed. Because Longview intended to rehabilitate or replace the well, the domestic use issue was still heard by the Board of Water Management.

4. The Board of Water Management determined that Longview's proposed uses of the well water were considered domestic because the water was to be used by Longview for stock watering and because the proposed use was for equal to or less than 18 gallons of water per minute.

5. The Yankton Sioux Tribe and the Individual Petitioners appealed the decision of the Board of Water Management to Circuit Court in Charles Mix County. Circuit Court Judge Bruce Anderson determined that Longview's use for washing its facilities, for animal hygiene, and for restrooms for human use did not constitute "stock watering" and was not a domestic use. Judge

Anderson did explain that the consumptive use by the livestock did constitute "stock watering" such that a well water permit would not be required for that proposed use.

6. Longview is now before this Board seeking a well water permit, and, in this permit application, Longview seeks to appropriate .067 cubic feet of well water per second, which is approximately 30 gallons of water per minute.

7. The Chief Engineer of the Water Rights Program recommends approval of Longview's permit subject to certain conditions.

8. Notice of Longview's permit application was advertised in The Wagner Post on September 8, 2010 and on September 15, 2010.

9. The Notice provided that petitions to intervene were to be filed by September 27, 2010 and that hearing would be held on October 6, 2010 in Pierre.

10. Eva Bruguier, Faith Spotted Eagle, Judy Honimichle, Sharon Drapeau, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins (collectively, the "Individual Petitioners"), Sister Patricia Mylott, Joan Olive and the Yankton Sioux Tribe filed timely petitions to intervene.

11. The Individual Petitioners asked for delay under the statutory automatic delay provisions and the evidentiary hearing was delayed.

12. The Board issued a Procedural Order on October 14, 2010. The Order appointed Board Member Rodney Freeman to hear any prehearing motions.

13. The Board set the evidentiary hearing before the Board for December 2, 2010. All parties were provided with the Notice.

14. On November 29, 2010, legal counsel for the Yankton Sioux Tribe withdrew and its new counsel requested a continuance. The continuance was granted and hearing was scheduled for March 10, 2011.

15. On February 15, 2011, one of the Individual Petitioners, Faith Spotted Eagle, requested a continuance since Harold Shepherd, counsel for the Individual Petitioners, had notified her that he was withdrawing from the case. Ms. Spotted Eagle represented that additional time was necessary to seek different legal counsel.

16. On February 18, 2011, Board Prehearing Chairman Rodney Freeman issued an Order continuing the hearing and it was scheduled for July 13, 2011, subject to confirmation at the next Board meeting. The Order was provided to all parties including each of the Individual Petitioners. Mr. Shepherd formally filed his withdrawal on February 25, 2011.

17. On March 14, 2011, the Board issued an Order Affirming Prehearing Chairman's February 18, 2011, Order, Granting Motion for Continuance. On March 22, 2011, the Chief Engineer issued notice of the Board's March 14, 2011, Order and confirmed that the evidentiary hearing would be held on July 13-14 in Pierre. A copy of the Board's March 14, 2011, Order was attached. The notice was provided to all parties, including each of the Individual Petitioners.

18. On June 29, 2011, the DENR issued another Notice that stated that the evidentiary hearing would be held at 1:00 pm on Wednesday July 13 at the Mathews Training Center in Pierre. The Notice was provided to all parties including each of the Individual Petitioners.

19. At the July 13-15, 2011, hearing, Longview, the DENR, and the Yankton Sioux Tribe appeared and presented evidence regarding Longview's water permit application.

20. Despite (1) having filed petitions to intervene; (2) having successfully moved for a continuance of the hearing until the July 13-15 hearing date to allow them to hire an attorney to represent them at the hearing; and (3) having received sufficient notice of the rescheduled hearing date, none of the Individual Petitioners appeared or presented any evidence.

21. Joan Olive and Sister Patricia Mylott (who each separately intervened) did not appear at hearing and filed no response to any motions in this proceeding.

22. Longview's proposed well site is approximately 4 ½ miles north of Marty and about 6 to 6 ½ miles southwest of Wagner and approximately 5 ½ miles south of Ravinia in Charles Mix County. The proposed well site is located in the southwest quarter of the northwest quarter of Section 9, Township 95 North, Range 64 West of the 5th P.M. in Charles Mix County.

23. Longview's facility consists of three connected buildings (a farrowing barn, a breeding and gestation barn, and a gilt development unit) as well as a separate machine shed/compost building.

24. Longview's water storage system is a large cement reservoir divided into two separate parcels by a cement wall, which holds approximately 3 days of water supply.

25. Longview's facility is equipped with a dual plumbing system which would allow Longview to use either rural water or well water at almost any point in the Longview facility.

26. Since inception of the Longview facility, the sole source of water to the Longview facility has been from the Randall Rural Water District, which obtains its water from the Missouri River.

27. Applicant Exhibit No. 10 summarizes the amount of water used by Longview from Randall Rural Water District since inception of the facility.

28. Longview made a commitment to its neighbors and to the Randall Rural Water District that it would apply for and obtain a well water permit to reduce the amount of water necessary to be obtained from the Randall Rural Water District.

29. Longview seeks a well water permit to supplement the water obtained from the Randall Rural Water District.

30. If Longview is granted a well permit, it is anticipated that Longview's use of Randall Rural Water District water will decrease, and it is in Longview's economic interest to use more well water and less rural water.

31. The Water Management Board considers whether (1) there is a reasonable probability that there is unappropriated water available for Longview's proposed use; (2) the proposed diversion can be developed without

unlawful impairment of existing rights; (3) the proposed use would be a beneficial use; and (4) the use would be in the public interest.

32. Before it failed, the maximum pumping rate for the well that Longview drilled at the permit application site was approximately 15 gallons per minute. It is anticipated that the well, as constructed or rehabilitated at the permit application site, will have a maximum pumping rate of 15-18 gallons per minute.

33. Longview will be licensed for the maximum pumping rate of the well as constructed; therefore, Longview anticipates being licensed for between 15-18 gallons per minute, depending on the actual maximum pumping rate after the well is constructed or rehabilitated.

34. A request for water with an expected maximum pumping rate of 15-18 gallons per minute (which is the maximum pumping rate for domestic wells)—or even a pumping rate of 30 gallons per minute—is a relatively insignificant amount of water in determining whether there is a reasonable probability of unappropriated water available from the Codell aquifer and whether the proposed use will unlawfully impair existing rights.

35. In considering whether (1) there is a reasonable probability that water is available for Longview's proposed use and (2) the proposed use will not unlawfully impair existing water rights, the Board relies on the testimony of DENR expert witnesses Jim Goodman, Derric Iles and Garland Erbele regarding the size and extent of the Codell aquifer, its lithology, and the history

of water withdrawals and discharges and the history of permits from this aquifer.

36. The Codell sandstone aquifer is a buried sedimentary rock and a member of the Carlile shale. It consists of loosely to tightly cemented very fine to coarse light brownish gray to dark greenish black and brown sand. The Codell aquifer is under artesian conditions at Longview's site.

37. In order to penetrate the Codell aquifer at Longview's site, the well (when drilled or rehabilitated) would be approximately 570 to 620 feet below the surface.

38. The Codell aquifer underlies approximately 1,134 square miles in Charles Mix County and has an estimated storage of approximately 1.45 million acre feet of recoverable water in Charles Mix County.

39. The Codell aquifer is fairly large; it extends to the north into Douglas County, to the east into Hutchinson County, to the southeast into Bon Homme County and to the south into Nebraska.

40. Water movement within the Codell aquifer in the area of the Longview application is likely from the northwest to the southeast towards the Missouri River.

41. A monitoring well was located approximately 2 ½ miles from Longview's site; however the well collapsed in 1993. According to this monitoring well, there was very little change in the water levels of the Codell aquifer from 1952 to 1992.

42. There are two monitoring wells approximately 23 and 25 miles north and northeast of Longview's site into Douglas County to the north and Hutchinson County to the east.

43. These two monitoring wells are representative of the conditions of the Codell aquifer as a whole.

44. The Douglas County monitoring well shows that the Codell aquifer responds very well to climatic conditions and does appear to have some annual fluctuations.

45. The Hutchinson County monitoring well shows that there have been rising conditions over the period of the hydrograph.

46. According to the two hydrographs from the two monitoring wells, the Codell aquifer does recharge and there have been no major changes in the water levels of the Codell aquifer over the last several years.

47. Considering the historical records of the three monitoring wells into the Codell aquifer witness Goodman testified about, there has been very little change in the water levels of the Codell aquifer and it is capable of sustaining additional withdrawals.

48. Other than domestic use, there is very little appropriation of water out of the Codell aquifer.

49. At one time, the towns of Geddes, Ravinia, and Lake Andes all used the Codell aquifer as a water supply. However, they have abandoned those wells and switched to rural water.

50. The only Codell aquifer water permit in Charles Mix County is the Clearfield Colony, and its use is for domestic use. The Clearfield Colony is located approximately 20-25 miles north and east of Longview's site. There are no appropriative water permits or rights in the Codell aquifer near the Longview site.

51. A little drawdown could be expected from the pumping at Longview's site; however because the pumping rate is only 30 gallons per minute, this well would expect to produce between one to three gallons per minute per foot of draw down. In other words, at 30 gallons per minute, there would be between 10-30 feet of drawdown in the production well. That drawdown would not extend very far away from the production well and it would not be expected to have any adverse impact on the Codell aquifer.

52. The Yankton Sioux Tribe submitted USGS records showing domestic wells from the Codell and various other aquifers throughout Charles Mix County. This evidence has been considered. Having reviewed the USGS records submitted by the Yankton Sioux Tribe, the testimony of witness Goodman concerning the observation wells in the Codell aquifer, and all other testimony presented, the Board finds that there is a reasonable probability of unappropriated water available in the Codell aquifer for the water permit request at issue, notwithstanding any existing uses for domestic purposes. According to Longview's test hole data, there is approximately 32 feet of Codell sandstone at Longview's site (from 573 feet to 605 feet) and there is a static

water level of 470 feet below the land surface, which is consistent with the conclusions of the Chief Engineer's office that there is water available.

53. The maximum pumping rate for the well that was drilled was approximately 15 gallons per minute, and a similar maximum pumping rate is expected when the well is constructed or rehabilitated.

54. The Chief Engineer reviewed the best information reasonably available to determine whether the proposed use would exceed the annual recharge rate of the Codell aquifer pursuant to SDCL § 46-6-3.1.

55. It can be determined whether an aquifer level is declining without doing a recharge study by observing the history of water levels in a particular aquifer. If the overall water level of the aquifer was declining the hydrographs from the DENR observation wells would show a decline regardless of climate. That is not the case here.

56. There are approximately 1600 observation wells throughout the State of South Dakota that are observed to monitor the water levels in the aquifers in South Dakota.

57. It would cost an inordinate amount of money and time to do a recharge study for each individual aquifer within the State of South Dakota.

58. According to the two observation wells into the Codell aquifer, which are representative of the Codell aquifer as a whole, there is more water in the aquifer at the present time than there was 20 years ago.

59. The hydrographs of the Codell aquifer considered by the Chief Engineer's office and the DENR are the best information reasonably available to

determine whether annual withdrawals from the aquifer would exceed the average annual recharge of the aquifer.

60. The Greenhorn formation is stratigraphically below the Codell aquifer in the area of Longview's facility.

61. DENR knew of only two wells that were located in the proximity of Longview's facility. These wells are located about 1.5 miles northwest and northeast of the site.

62. Drawdown is not expected to be significant at Longview's maximum pumping rate, nor is it anticipated that Longview's proposed use will cause any adverse effects on existing water rights or on area domestic users.

63. The Yankton Sioux Tribe currently obtains its water supply from the Missouri River.

64. The Randall Rural Water District also obtains its water from the Missouri River.

65. It is unclear how many wells that Yankton Sioux Tribe has into the Codell aquifer and the Yankton Sioux Tribe's designated representative was unable to answer questions as to how many wells the Yankton Sioux Tribe has into the Codell aquifer.

66. In addition to the foregoing evidence, the interests of the Yankton Sioux Tribe have been considered in determining whether there will be an unlawful impairment of existing rights. This Board finds, based on the entirety of the evidence presented, that there will not be an unlawful impairment of existing rights, including those of the Yankton Sioux Tribe.

67. The water from the proposed well will undoubtedly be beneficial to the Longview facility, regardless of how the water is used within the facility.

68. Water does not need to be of very high quality for the water to be beneficial to Longview, because even relatively low quality water is capable of being used for power washing the facilities.

69. The quality of water within the Codell aquifer is of relatively high quality, and it is expected that the water from the Codell aquifer will, at a minimum, be of sufficiently high quality to use to power wash the facilities.

70. Depending on the quality of the well water obtained from the Codell aquifer, the water may be able to be used to feed Longview's pregnant and nursing sows.

71. From the inception of Longview's facility to November of 2010, Longview has paid Charles Mix County vendors a total of $2,523,316.79.

72. Longview currently has 13 employees with a starting wage of $9.50 per hour for the first 90 days of employment with a dramatic increase in wages after 90 days. The managers of Longview's facility make much more than the hourly employees, and all employees are provided full health and dental benefits at no cost to the employee.

73. From inception of Longview's facility through November of 2010, Longview has paid its employees more than $700,000 in wages and benefits.

74. Longview has had a significant, positive impact on the economy of Charles Mix County.

75. The Longview facility has potential for employment of Yankton Sioux tribal members. In fact, Yankton Sioux tribal members have held positions of employment at the Longview facility in the past.

76. In addition to the potential for employment, there is potential for Yankton Sioux tribal members to sell feed to the Longview facility (in addition to other opportunities).

77. In general, confined animal feeding operations that comply with the permitting requirements set forth by the DENR are considered to be beneficial and in the public interest of the State of South Dakota.

78. Specifically, Longview has complied with all of the permitting requirements set forth by the DENR and the Longview facility is in the public interest of the State of South Dakota. Further, the water use for this facility is a beneficial use in terms of the best utilization of the water supply.

79. Longview's facility is a zero discharge facility.

80. The soil characteristics in their native state at the Longview facility meet South Dakota's minimum liner standards for earthen nutrient storage systems.

81. Because of the favorable geologic characteristics and because Longview chose to construct a concrete wastewater management system in addition, the Longview facility essentially has a dual containment system for animal waste.

82. The animal waste storage facility is a 10 feet deep reinforced concrete structure with adequate storage for a year's worth of nutrient

production from the animals in Longview's facility.

83. The proposed site for the well is approximately 280 feet from the nearest manure storage facility, which exceeds the 150 foot standard required by the DENR.

84. Because there is no shallow aquifer beneath the Longview facility, there is no requirement that Longview obtain a groundwater discharge permit or that there be groundwater monitoring near the Longview facility.

85. Longview's nutrient management system and its application of manure to fields with manure easements has complied with the DENR's requirements.

86. Longview has obtained a DENR Water Pollution Control Permit and has complied with all of the requirements in obtaining and maintaining that permit through the DENR.

87. Longview has complied with all of the rules and regulations regarding ground water quality and surface water quality.

88. The licensed well driller for Longview is Jim Hutmacher, who is familiar with the Water Management Board well construction rules.

89. The construction or rehabilitation of Longview's well will be done in compliance with the Water Management Board's well construction rules, including the requirement that the well only obtain water from the Codell aquifer and not any other aquifer.

90. A Yankton Sioux Tribe witness stated at hearing that there are abandoned or other domestic wells near the Longview site but was unable to

state exactly how far they were from the Longview manure containment system or land application areas, if they were still being used or could be plugged, and who they belonged to. The DENR Water Pollution Control Permit requires that manure containment systems and land application sites must be 1,000 feet away from a public water supply, 250 feet from a neighbor's well, and 150 feet from the producer's own well. Longview's design engineer stated that he had examined aerial photography with the applicant and was unaware of any wells within these buffer distances. There is insufficient evidence to conclude that the containment system or land application areas violate the distance requirements. Regardless, if the Yankton Sioux Tribe later provides information to Longview or Longview otherwise finds these wells and they are within the buffer areas, Longview must make arrangements to meet the DENR Water Pollution Control Permit requirements by seeing that abandoned wells are properly plugged, changing its land application sites, or undertaking whatever means is necessary to meet the buffer requirements. Further, denial of the permit would not resolve the issue if any such wells are discovered. Longview holds an ongoing obligation to comply with the terms of its DENR Water Pollution Control Permit regardless of whether the requested water permit is granted or not.

91. In its design and construction of the Longview facility, Longview has complied with all of the DENR requirements with regard to permitting for confined animal feeding operations.

92. Longview's manure storage system complies with DENR's regulations regarding confined animal feeding operations.

93. Longview's nutrient management system complies with DENR's regulations regarding confined animal feeding operations.

94. Longview has obtained coverage under the DENR Water Pollution Control Permit. The analysis and review by the DENR for this program is complete and final. It is not subject to review by this Board. The fact that the coverage has been obtained does, however, provide evidence that the Longview's use is beneficial and in the public interest.

95. There is a public process allowing for written comments from members of the public as part of the DENR Water Pollution Control Permit process. However, the Yankton Sioux Tribe and the Individual Petitioners failed to file any comments or objections to Longview obtaining coverage under the DENR Water Pollution Control Permit

96. The only incident that could even be considered a violation of the DENR's requirements as to the Water Pollution Control Permit is the leaking of approximately 100 gallons of manure due to the nicking of a hose carrying manure to one of the fields in which the manure is applied.

97. The manure spill was promptly cleaned up and there was no pollution as a result of the manure spill. The area in which the spill occurred was dry at the time.

98. Longview's facility was designed to control odor emissions in that there is sufficient ventilation, a negative pressure system, a concrete design for

the nutrient storage below the facility rather than an open earthen lagoon, and Longview frequently power washes its facilities to reduce dust particles that have the potential to carry odor.

99. In addition, in applying the manure from the Longview facility, the applicators spike in the manure to maximize the nutrient value of the manure, which has an ancillary benefit of reducing odor potential in comparison to spreading manure on the surface of the fields.

100. Jim Hutmacher completed a water well completion report for the well that was drilled, and the water well completion report was admitted as Applicant Exhibit No. 7.

101. The only other aquifer underlying Longview's site is the Niobrara formation, which overlies the Codell aquifer at Longview's site, and the top of the Niobrara formation is approximately 450 feet below the surface at the Longview site.

102. The most shallow aquifer at the location of the drilled well by Mr. Hutmacher is the Niobrara formation, which is 450 feet deep at the top of the formation.

103. At the location of the drilled well, there was no shallow aquifer (aquifer within 100 feet of the land surface). Rather, clay constituted all of the material within 100 feet of the surface at the location of the drilled well.

104. Longview, through its engineering firm—Eisenbraun & Associates—and the engineering firm's subcontractor, performed three soil borings at the Longview facility.

105. Two soil borings were drilled to 30 feet and one soil boring was drilled to 51 feet.

106. The three soil borings established that there was no aquifer within the depth of the soil borings.

107. Neither the Niobrara aquifer nor the Codell aquifer is within 100 feet of the surface at the Longview facility.

108. There is enough information to determine whether the Herrick formation or the Herrick aquifer is underlying the Longview facility, and, based upon all of the available information, the Herrick formation or the Herrick aquifer does not underlie the Longview facility.

109. There is no map of any geologist that shows the Herrick formation is present below the Longview facility.

110. Dr. Perry Rahn is unaware of any map that would show the presence of a shallow aquifer within 100 feet of the surface at the Longview facility's location.

111. The State Geologic Survey has completed a map which indicates the first occurrence of aquifer materials within Charles Mix County, South Dakota. In creating this map, the State Geologic Survey considered all of the available test hole and well data, all of the available surface and subsurface geologic mapping data, and all of the published and unpublished reports that were available.

112. With the State Geologic Survey completing the first occurrences map, DENR expert witness, State Geologist Derric Iles has reviewed enough information to determine whether there is a shallow aquifer underlying the Longview facility.

113. There is no shallow aquifer beneath the Longview facility.

114. There is no evidence that the area within 100 feet of the land surface near the Longview facility is anything other than low permeability soils.

115. The Chief Engineer recommends approval of Longview's well permit application with the following conditions:

a. The well approved will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under Permit No. 7206-3 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.

b. The well authorized by Permit No. 7206-3 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.

c. Permit No. 7206-3 is subject to compliance with requirements of the DENR's Water Pollution Control Permit issued pursuant to SDCL §34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

d. Permit No. 7206-3 is subject to compliance with all existing and applicable Water Management Board Rules including (but not limited to):

a. Chapter 74:54:01 Ground Water Quality Standards;

b. Chapter 74:54:02 Ground Water Discharge Permit;

c. Chapter 74:51:01 Surface Water Quality Standards;

d. Chapter 74:51:02 Uses Assigned to Lakes;

e. Chapter 74:51:03 Uses Assigned to Streams; and

f. Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions.

116. The Board adopts the recommendation of the Chief Engineer with its proposed conditions.

117. Having considered the experience of Jim Goodman, his demeanor while testifying, and the actual testimony of Jim Goodman, the Board finds that the testimony of Jim Goodman is credible. Mr. Goodman is an expert with extensive experience in evaluating water permit applications and the effects of pumping and other water use on aquifers, and groundwater hydrology in South Dakota. He relied on his own experience as well as studies and mapping of the Codell aquifer by the United States Geological Survey and the South Dakota Geological Survey, observation well data compiled by the DENR, and well logs and other records maintained or routinely used by the DENR.

118. Having had an opportunity to observe the demeanor and hear the testimony of John Stone (who is the designated representative to testify on

behalf of the Yankton Sioux Tribe), including his admitted misstatement of fact, his vagueness in responses, the fact that he was unable to answer underlying questions to support his assertions, and his evasiveness in answering questions, the Board determines that John Stone is not a credible witness.

119. Derric Iles, the State Geologist and Administrator of the Geological Survey Program, has excellent credentials and expertise. Derric Iles has studied the aquifers, aquifer maps, well data, and hydrology of Charles Mix County extensively. His testimony is credible and reliable.

120. Derric Iles presented unbiased factual interpretations, after considering the available data, and he is considered a third party independent of the Chief Engineer.

121. Having had an opportunity to observe the demeanor and hear the testimony of Derric Iles while testifying, the Board finds the testimony of Derric Iles to be extremely credible.

122. Having had an opportunity to observe the demeanor and hear the testimony of Derric Iles and Perry Rahn, the Board finds that the testimony of Perry Rahn is less credible than that of Derric Iles.

123. In making the determination in the foregoing finding, the Board considers the vagueness and ambiguities in responses of Perry Rahn and the preciseness in responses of Derric Iles, as well as the impeachment of and inconsistencies within Perry Rahn's testimony.

124. Any Finding of Fact improperly designated as a Conclusion of Law shall be included within these Findings of Fact.

CONCLUSIONS OF LAW

1. The South Dakota Board of Water Management has jurisdiction over the parties and subject matter of this lawsuit.

2. The site for this application is not within the Yankton Sioux Reservation and is owned by Longview, which is a South Dakota limited liability partnership that is clearly not a tribal member or tribal entity. The water source for this application is the Codell aquifer which overlies this area outside the Yankton Sioux Reservation in South Dakota.

3. Publication was properly made in *The Wagner Post* pursuant to SDCL § 46-2A-4.

4. Under ARSD 74:02:01:12.04, the deadline for filing petitions to intervene in this matter was September 27, 2010. This intervention date was published as required by SDCL § 46-2A-4.

5. The Yankton Sioux Tribe, the Individual Petitioners, Sister Patricia Mylott, and Joan Olive timely filed petitions to intervene.

6. Notice of hearing was properly given pursuant to SDCL § 46-2A-4 and SDCL § 1-26-17.

7. The present application falls within the Board's responsibility over water appropriation and regulation in Title 46, more specifically SDCL § 46-2A-9.

8. Each of the elements in SDCL § 46-2A-9 must be proven in order for this Board to grant Permit Application No. 7206-3.

9. The Chief Engineer has recommended approval and Jim Goodman, Derric Iles and Garland Erbele testified in support of the recommendation. This recommendation is not, however, binding on the Board. *SDCL § 46-2A-4(8).* Likewise, references to past recommendations of the Chief Engineer are not binding on the Board.

10. SDCL § 46-2A-9 provides that a permit to appropriate water may be issued "only if there is reasonable probability that there is unappropriated water available for 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." *SDCL § 46-2A-9.*

11. The first element in SDCL § 46-2A-9 is whether there is water available for the appropriation. The Codell aquifer is large and capable of sustaining additional withdrawals, as explained in the Findings of Fact.

12. Consideration of water availability also includes consideration of the criteria in SDCL § 46-6-3.1 pertaining to recharge/withdrawal: whether "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 annual recharge of water to the groundwater source." *SDCL § 46-6-3.1.*

13. Although there is an exception to the recharge/withdrawal consideration in SDCL § 46-6-3.1, it applies only to applications filed by public water supply systems and is not applicable here.

14. Annual recharge to the Codell aquifer has not been and is not likely to be quantified in the near future. The Codell aquifer is a confined aquifer. The criteria of SDCL § 46-6-3.1 can be fulfilled by analysis of the observation well data.

15. The observation well data considered by the Chief Engineer and the DENR is the best information reasonably available to determine whether the quantity of water withdrawn annually from the Codell aquifer will exceed the quantity of the average annual recharge of water to the Codell aquifer.

16. In determining whether the water withdrawn annually from the Codell aquifer will exceed the quantity of the average annual recharge of water to the Codell aquifer, the observation wells are instructive as to the water levels of the entire Codell aquifer.

17. According to the best information reasonably available, the quantity of water withdrawn annually from the Codell aquifer will not exceed the quantity of the average annual recharge of water to the groundwater source if this permit is granted.

18. Given the foregoing Findings of Fact and Conclusions of Law, the Board concludes that there is sufficient water available for the proposed water use.

19. As a second element of SDCL § 46-2A-9, the appropriator must demonstrate that the proposed diversion can be developed without unlawful impairment of existing rights.

20. The proposal here would not impair existing water rights, including those of the Yankton Sioux Tribe, as is addressed at length in the Findings of Fact and as set forth in the following Conclusions of Law.

21. Domestic water users and those users with prior water rights hold priority over the present Application and their uses would take precedence if there is an actual adverse impairment of an adequate well.

22. Domestic uses of water are those defined in SDCL § 46-1-6(7). The rights of domestic user are unlikely to be impaired by the present Application but, out of an abundance of caution, this Board imposes a condition on the permit to protect domestic users.

23. The Winters Doctrine provides that the priority date for the determination of whether tribes have surface water rights is the creation of the reservation. *Winters v. United States*, 207 US 564 (1908).

24. However, there is a split of authority as to whether the Winters Doctrine applies to ground water. *In re General Adjudication of All Rights to Use Water in Gila River System*, 989 P2d 739 (Ariz. 1999); *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P2d 76 (Wyo. 1988). The Supreme Court of Arizona has held that the Winters Doctrine does apply to ground water while the Supreme Court of Wyoming has declined to so hold.

25. The United States Supreme Court has had more than one opportunity to hear the issue and apply the Winters Doctrine to ground water rights of Indian tribes but has failed to do so. *U.S. v. Cappaert*, 426 US 128 (1976)(affirming the Ninth Circuit but declining to fully endorse the statement

of the Ninth Circuit applying the Winters Doctrine to ground water); *Wyoming v. U.S.*, 492 US 406 (1989).

26. The Supreme Court of South Dakota has not addressed the issue of whether the Winters Doctrine applies to ground water.

27. Until a court of competent jurisdiction determines that the Yankton Sioux Tribe has Winters Doctrine rights that apply to ground water and until such time as those rights are quantified, the Chief Engineer and the Water Management Board are unable to determine the extent to which the Yankton Sioux Tribe has rights to the Codell aquifer that would be superior rights to those of Longview.

28. If a court of competent jurisdiction determines that the Winters Doctrine applies to groundwater claims of the Yankton Sioux Tribe and if those rights are quantified, the Yankton Sioux Tribe's priority date for its rights would date back to the treaty establishing the Yankton Sioux Tribe's reservation. This Board does not purport to adjudicate the question of whether the Yankton Sioux Reservation's diminished status would affect the quantification of the Winters rights. Such a right, if any, would be senior in priority to the present application.

29. The application, when conditioned as recommended by the Chief Engineer, would not impair existing rights.

30. The third element in SDCL § 46-2A-9 is whether the use of water would be a beneficial use.

31. In this context, a beneficial use of water is one that is reasonable and useful and beneficial to the appropriator and that is consistent with the interest of the public in the best utilization of water supplies. *SDCL § 46-1-6(3).*

32. As set forth in the following Conclusions of Law, Application No. 7206-3 would be a beneficial use of water under each part of this definition.

33. The use of water, as requested, would undoubtedly be useful and beneficial to the appropriator, because the water will be used in Longview's confined animal feeding operation.

34. It is unnecessary to determine the specific uses to which Longview will put the well water within Longview's facility as long as the water is beneficial to Longview's confinement facility.

35. The proposed use of well water by Longview is reasonable.

36. The other part of the beneficial use test is whether the water use is in the interest of the public in terms of the best utilization of water supplies. *SDCL § 46-1-6(3).*

37. The Board considers several factors in determining whether the water use is in the interest of the public in terms of the best utilization of water supplies, including:

a. In general, confined animal feeding operations are in public interest of the State of South Dakota.

b. Water should be put to the maximum beneficial use given the arid climate in South Dakota. *SDCL § 46-1-4.*

c. Reserving water in an aquifer and keeping it from being applied to

maximum beneficial use is generally inconsistent with SDCL § 46-1-4.

38. Based on the evidence submitted (and as addressed elsewhere in these Findings and Conclusions) the Longview facility is currently in compliance with the DENR environmental permitting requirements and continued compliance will be required.

39. Longview meets the beneficial use criteria.

40. As a fourth element of SDCL § 46-2A-9, the appropriator must demonstrate that the proposed use is in the public interest. The public interest element requires weighing the general public interest in the local economy associated with farming and irrigation along with any other economic, recreational, wildlife, ecological, public health, or other issues presented.

41. Longview's facility has already had a substantial economic impact on the Charles Mix County economy, including the purchasing of more than $2.5 million worth of goods and services from Charles Mix County vendors and also paying more than $700,000 to employees of Longview.

42. Based on the evidence submitted, Longview has complied with all of the requirements imposed upon it by the DENR, including requirements regarding ground water quality, surface water quality, nutrient management plans, waste management facilities, and set back requirements from potential pollution sources.

43. The production of livestock is in the public interest of the State of South Dakota.

44. In considering the public interest factors of economic impact and the production of livestock, the Board concludes that the present application is in the public interest.

45. The application meets the public interest criteria.

46. Longview currently holds coverage under the DENR's Water Pollution Control Permit issued pursuant to SDCL § 34A-2-36 or 34A-2-112 for its operation. The coverage under the Water Pollution Control Permit has previously been subject to public comment as well as review and analysis by DENR. The DENR's coverage decision is final and not subject to review by this Board. Longview must, however, continue to maintain its coverage under the Water Pollution Control Permit and comply with its requirements. As conditioned below, a violation of the Water Pollution Control Permit is a violation of the permit authorized by these Findings of Fact and Conclusions of Law.

47. The term "aquifer" is defined as "a geologic formation, a group of geologic formations, or part of a geologic formation that contains sufficient saturated permeable material to yield quantities of groundwater to wells and springs." *ARSD 74:02:04:20(10)*.

48. The term "shallow aquifer" is defined as "any aquifer having the following characteristics:

(1) The aquifer is within fifty feet or less below the land surface with fifteen feet or less of continuous, overlying, extremely low permeability geologic material, such as clayey till or shale.

Weathered till or highly fractured weathered shale is not an extremely low permeability material for purposes of this section; or

(2) The aquifer is greater than fifty feet but less than one hundred feet below the land surface with thirty feet or less of continuous overlying low to extremely low permeability geologic material that may be a combination of weathered and unweathered till, shale, or till and shale."

SDCL § 34A-3A-24.

49. There is no shallow aquifer beneath the surface of the Longview facility.

50. The Board is an administrative agency with quasi-judicial authority to consider the factors in SDCL § 46-2A-9, including public interest. As such, the Board holds authority to consider each case on its merit, and is not bound to accept prior public interest decisions as binding precedent (and this decision will not constitute binding precedent). *Interstate Telephone Cooperative, Inc. v. Public Utilities Commission*, 518 NW2d 749 (SD 1994).

51. Based on the entirety of the record, Application No. 7206-3 meets the standard in SDCL § 46-2A-9 and should be granted, subject to the recommendations proposed by the Chief Engineer.

52. Any Conclusions of Law improperly designated as a Finding of Fact shall be included within these Conclusions of Law.

FINAL DECISION

Application No. 7206-3 is granted subject to the following permit qualifications:

a. The well approved will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under Permit No. 7206-3 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.

b. The well authorized by Permit No. 7206-3 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.

c. Permit No. 7206-3 is subject to compliance with requirements of the DENR's Water Pollution Control Permit issued pursuant to SDCL §34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

d. Permit No. 7206-3 is subject to compliance with all existing and applicable Water Management Board Rules including (but not limited to):

a. Chapter 74:54:01 Ground Water Quality Standards;
b. Chapter 74:54:02 Ground Water Discharge Permit;
c. Chapter 74:51:01 Surface Water Quality Standards;
d. Chapter 74:51:02 Uses Assigned to Lakes;
e. Chapter 74:51:03 Uses Assigned to Streams; and

f. Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions.

Dated this 5 day of ~~September~~ October, 2011.

BY THE BOARD:

Rodney Freeman, Chairman
South Dakota Water Management Board

STATE OF SOUTH DAKOTA

BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF APPLICATION NO. 7203-3, LONG VIEW FARM, LLP	)))	PROCEDURAL ORDER

On September 30, 2010, the Department of Environment and Natural Resources, Water Rights Program, filed its Motion for Procedural Order. The motion was heard before the Board on October 6, 2010. As a result of the hearing in the above-referenced matter, the Board hereby ORDERS as follows:

1. The request for appointment of a hearing examiner under SDCL 1-26-18.3 is denied.

2. This Order, consistent with the Board's Appointment of Prehearing Chairman Order of October 6, 2010, approves the appointment of board member Rodney Freeman, Jr. to act as a Prehearing Chairman in this matter for purposes of acting on procedural motions and discovery disputes. Any dispositive motion made before the Prehearing Chairman may result in a recommendation, but the Board itself will act on all dispositive motions.

3. Any attorney who has not yet appeared on behalf of any party but intends to participate in the evidentiary hearing in the above-entitled matter must mail a Notice of Appearance to all other parties within ten days following this Order. Nonresident counsel must be able to demonstrate compliance with the pro hac vice requirement of SDCL 16-18-2 at the time of hearing.

4. Unless modified by the Prehearing Chairman, witness lists and exhibit lists are to be exchanged ten days before hearing.

5. For the exchange of exhibits, each party shall provide a copy of each exhibit intended to be produced at hearing in this matter (except for the agency file which may be viewed in the offices of the Water Rights Program, Department of Environment and Natural Resources, at any time). Maps, schematics, and other large-scale exhibits may be provided to the other parties in reduced form.

6. Witness lists are to be provided to all other parties. The name, address, and a short statement of anticipated testimony is to be included for each witness. Further, in order to expedite the proceeding, the Water Management Board encourages the parties to discuss whether there are exhibits to which they can stipulate to admission without foundation. Unless otherwise expressly stipulated, stipulating to admission will not restrict the scope of cross-examination by a party with respect to the subject matter of the exhibit or the credibility or accuracy of the exhibit.

7. Original pleadings are to be filed with Eric Gronlund, Water Rights Program, DENR, Foss Building, 523 East Capitol Avenue, Pierre, South Dakota 57501 by fax or first class mail. One copy of each pleading is to be sent or faxed to the Prehearing Chairman at Post Office Box 176, Huron, South Dakota 57350, rfreeman.huronlaw@midconetwork.com, or (605)352-2205, and to board counsel Jeffrey Hallem at 1302 East Highway 14, Suite 1, Pierre, South Dakota 57501-8501, Jeff.Hallem@state.sd.us, or (605) 773-4106 (fax) as well as to all parties listed on the attached service list, including counsel for the

Water Rights Program. Electronic or facsimile service of documents is encouraged.

8. Prehearing briefs will be submitted by the parties. Intervenors' opening briefs will be due on or before November 8, 2010. Applicant's and the Department's responses will be due on or before November 18, 2010. Intervenors' reply briefs will be due on or before November 29, 2010. Briefs will be filed electronically and by mail to Eric Gronlund, Eric.Gronlund@state.sd.us, and electronically to board counsel. Briefs will address all legal issues intended to be raised during the contested case proceeding except those pertaining to the four-part standard under SDCL 46-2A-9.

9. The Prehearing Chairman shall issue such further orders as are appropriate to implement this Order.

Dated this 14th day of October, 2010.

BY THE BOARD:

Tim Bjork, Chairman

pld_DB_Water Board – Long View Farms - Procedural Order (br)

Charles Abourezk
*Robin L. Zephier
Jon J. LaFleur
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ABOUREZK LAW FIRM

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NOV 16 2011
WATER RIGHTS PROGRAM

November 15, 2011

Clerk of Courts
Charles Mix County First Judicial Circuit
400 Main Street
Lake Andes, SD 57356-0640

Re: Statements of Issues on Appeal *In the Matter of the Permit Application No. 7206-3, Longview Farms, LLP*

Dear Clerk:

Enclosed please find the original and a copy of the Statement of Issues on Appeal of Yankton Sioux Tribe. By copy of this letter, I am serving a copy of the same on all interested parties and this is intended as service by mail upon them.

Thank you, and please let me know if you have any questions.

Sincerely,

Jon J. LaFleur
Abourezk & Zephier, P.C.
Counsel to Yankton Sioux Tribe

JJL/nm
Enclosures
cc w/enc: Ms. Diane Best
Mr. Garland Eberle
Mr. Jeff Hallem
Mr. Eric Gronlund
Mr. Eric Kirkvliet/Mr. David Nadolski
Faith Spotted Eagle
B & C Committee

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) §	
COUNTY OF CHARLES MIX	)	FIRST JUDICIAL CIRCUIT

In the Matter of Water Permit Application No.7206-3, Longview Farms, LLP	)))	**STATEMENT OF ISSUES ON APPEAL**
Yankton Sioux Tribe, Appellant.	)))	

Comes now Jon J. LaFleur, Counsel to Yankton Sioux Tribe, and hereby files this Statement of Issues in the State of South Dakota Water Management Board's Findings of Fact, Conclusions of Law and Final Decision *In the Matter of the Permit Application No. 7206-3, Longview Farms, LLP*, pursuant to SDCL § 1-26-31.4.

1. **Court or Agency of Origin**: This matter arose before the South Dakota Water Rights Management Board.

2. **Jurisdictional Statement**: This is an Appeal of a Ruling and Final Decision issued by the South Dakota Water rights Management Board pursuant to SDCL § 46-2-5(4) and ARSD 74:02:01:46. The date of the Final Decision is October 5, 2011. This appeal is filed pursuant to ARSD 74:02:01:46 and SDCL § 1-26-31.

3. **Statement of Issues on Appeal:**

   1) Whether the Board erred when it determined that the average estimated annual recharge exceeded the annual withdrawals for the Codell aquifer without hearing any evidence of withdrawal or average estimated annual recharge amounts?

   2) Whether the Board erred when it determined that the proposed diversion could be

developed without unlawful impairment of existing rights without hearing any evidence about the existing rights of the Yankton Sioux Tribe?

3) Whether the Board erred when it determined that the proposed use is a beneficial use?

4) Whether the Board erred when it determined that the proposed use is in the public interest?

5) Whether the Board erred when it determined that an adequate investigation had been done to establish the location of existing wells and natural springs near the Longview site to address contamination concerns?

6) Whether the Board erred when it determined that the Longview well complies with the requirements of ARSD 74:02:04:03 and ARSD 74:02:04:24(1) and (2) relating to the location of wells in relation to pollution sources?

7) Whether the Board erred when it determined that Longview's permit complied with the requirements of ARSD 74:02:04:34.01 that no well may be constructed to allow production from more than one aquifer?

8) Whether the Board erred when it determined that the Longview site including its manure fields is not located over a shallow aquifer?

WHEREFORE, Appellant respectfully requests that the Court Grant its Appeal on these issues and reverse the decision of the South Dakota Water Rights Management Board by declaring that Long View Farm LLP failed to meet it's burden of proof on its application for a water permit.

Dated this 15th day of November, 2011.

Respectfully submitted,

Jon J. LaFleur, Counsel
Abourezk & Zephier, P.C.
2020 W. Omaha St.
P.O. Box 9460
Rapid City, SD 57709-9460
(605) 342-0097

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2011, I cause to be served by first class mail, postage prepaid, a true and correct copy of the *Statement of Issues on Appeal* to the following parties:

Ms. Diane Best
Assistant Attorney General
Counsel to DENR
Office of Attorney General
317 N. Main Avenue
Sioux Falls, SD 57104-6004

Mr. Jeff Hallem
Assistant Attorney General
Counsel to Water Rights Management Board
Office of the Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501

Mr. Eric Kirkvliet
Mr. David Nadolski
Lynn, Jackson, Shultz & LeBrun
Counsel to Longview Farm LLP
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Faith Spotted Eagle
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Lake Andes, SD 58356

Mr. Garland Eberle, Chief Engineer
Water Rights Program DENR
PMB 2020
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Pierre, SD 57501-3182

Mr. Eric Gronlund
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JAN 24 2012
WATER RIGHTS
PROGRAM

January 23, 2012

Clerk of Courts
Charles Mix County First Judicial Circuit
400 Main Street
Lake Andes, SD 57356-0640

Re: *Matter of Water Permit Application No. 7206-3, Longview Farms, L.L.P.* (Charles Mix Civ. 11-146)

Dear Clerk:

Enclosed please find the original and a courtesy copy of the Brief of Appellant Yankton Sioux Tribe. By copy of this letter, I am serving a copy of the same on all interested parties and this is intended as service by mail upon them.

Thank you, and please let me know if you have any questions.

Sincerely,

Jon J. LaFleur
Abourezk & Zephier, P.C.
Counsel to Yankton Sioux Tribe

JJL/nm
Enclosures
cc w/enc.: Diane Best
Garland Eberle
Jeff Hallem
Eric Gronlund
Eric Kirkvliet/David Nadolski
Thomasina Real Bird
Faith Spotted Eagle
B & C Committee

RECEIVED
JAN 24 2012
WATER RIGHTS PROGRAM

Civ. No. 11-146

SOUTH DAKOTA FIRST JUDICIAL CIRCUIT COURT

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP

ON APPEAL FROM THE SOUTH DAKOTA
WATER MANAGEMENT BOARD

BRIEF OF APPELLANT YANKTON SIOUX TRIBE

Jon J. LaFleur, Counsel
Abourezk & Zephier, P.C.
2020 W. Omaha St.
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PRELIMINARY STATEMENT

The administrative agency from which this appeal is taken is the South Dakota Water Management Board (Board).

There are two appellants. Yankton Sioux Tribe (YST) and a group of individual tribal members are the appellants. The Appellees are Longview Farm, LLP (Longview) and the Department of Environment and Natural Resources, Water Rights Program (DENR).

Documents in the certified record will be referred to as "AR", followed by the appropriate page number. The transcript of the evidentiary hearing held July 13-15, 2011 will be referred to as "HT" followed by the appropriate page number. Exhibits will be referred to as APP (Applicant), DENR, or YST Ex. followed by the exhibit number.

JURISDICTIONAL STATEMENT

This is an appeal of the Board's decision granting Longview's application for a permit to drill a water well on its facility located in Charles Mix County, South Dakota. The Board's Findings of Fact, Conclusions of Law and Final Decision is dated October 5, 2011. Notice of Appeal was served by first class mail on November 4, 2011, pursuant to ARSD 74:02:01:46 and SDCL §1-26-31.

STATEMENT OF ISSUES ON APPEAL

1. Whether the Board erred when it determined that the average estimated annual recharge exceeded the annual withdrawals for the Codell Aquifer without hearing any evidence of withdrawal or average estimated annual recharge amounts?

   The Board decided that the recharge exceeded the withdrawals.

2. Whether the Board erred when it determined that the proposed diversion could be developed without unlawful impairment of existing rights without hearing any evidence about the existing rights of the Yankton Sioux Tribe?

The Board decided that the Longview's proposed diversion could be developed without impairment of existing rights.

3. Whether the Board erred when it determined that Longview's proposed water use is a beneficial use and in the public interest?

   The Board decided that the proposed use is a beneficial use and in the public interest.

4. Whether the Board erred when it determined that an adequate investigation had been done to establish the location of existing wells and natural springs near the Longview site?

   The Board decided that the Longview well would not harm existing wells.

5. Whether the Board erred when it determined that Longview's permit complied with the requirements of ARSD 74:02:04:34.01 that no well may be constructed to allow production from more than one aquifer?

   The Board determined that the Longview does not draw from more than on aquifer.

6. Whether the Board erred when it determined that the Longview site including its manure fields is not located over a shallow aquifer?

   The Board determined that Longview's CAFO and its manure fields are not located over a shallow aquifer.

STATEMENT OF THE CASE AND FACTS

After this court's June 24, 2010 ruling that Longview must have a water rights permit in order to drill a well into the Codell aquifer, Longview submitted its application for a permit on July 6, 2010. APP Ex. 1. A hearing was held on Longview's application July 13- 15, 2011. The Board entered its Findings of Fact, Conclusions of Law and Final Decision on October 5, 2011, granting Longview's application. AR 722-754 YST served its Notice of Appeal on November 4, 2011. AR 804-838.

The applicant in this matter is Longview, owned by Iowa resident Arlan Moss (Moss) and eleven other Iowa residents. Moss has farmed his whole life starting officially in 1972 in a partnership with his father and brother in Sioux County, Iowa. Moss and his family formed a sub-chapter S Corporation in 1976 which is now owned by Moss and his wife. Moss ran a dairy operation until 2000 and since has run a hog operation. HT 129-130.

Moss joined other area farmers in Sioux County, Iowa to form the Longview Partnership to build a facility for a feeder pig operation, since he had lost his feeder pig supplier, Land-O-Lakes. Moss looked at building his facility in Iowa, but because Sioux County is the number one producer of hogs in the state, the concentration level is high and with the high traffic flow comes a variety of diseases. The disease can be controlled in a finishing unit such as Moss' Sioux County Iowa facility, but not so for a farrowing operation. The finishing operation can be completely emptied of hogs every four or five months and sanitized. However, a farrowing unit always has hogs on site so can never be emptied and completely sanitized. Therefore, the farrowing unit requires strict adherence to bio security measures, because the risk of disease in a farrowing operation could lead to substantial financial loss. One of the major factors is to be isolated from other farm animals to help limit the spread of disease. HT 130-132.

Longview purchased the Charles Mix County property as a result of communications with SDSU professor, Dr. Bob Thaler, who was one of Moss' son's instructors. Dr. Thaler's parents sold the property to Longview. HT 133.

The Longview facility manure management system is for a housed lot feeding a maximum 7,620 head of production swine, all weighing 55 pounds or more. Longview uses two deep pits for manure storage that are designed for 365 days of liquid manure storage. DENR Ex. 6.

Longview's nutrient management system includes the application of manure two times per year in the spring and fall on neighboring crop land with the use of a five mile long drag hose system. HT 121-122,159. Marty, South Dakota the site of YST's tribal headquarters is approximately four and a half miles from the Longview site. AR 726.

Longview's proposed well is to draw from the Codell Aquifer some 600 feet from the land surface. The only two monitoring wells for the Codell Aquifer are twenty-three and twenty-five miles form the Longview site. There was a monitoring well two miles from the site, but it quit functioning properly in 1993. APP Ex. 5.

The DENR recommended approval of Longview's application. APP Ex. 5

STANDARD OF REVIEW

SDCL § 1-26-36 provides:

> The Court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decision are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedures;
> (4) Affected by other error of law;
> (5) Clearly erroneous in light of the entire evidence in the record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

The reviewing court gives great weight to the findings and inferences made by the agency on factual questions. *Woodstock v. City of Lake Preston*, 2005 SD 95. Insurance Division's factual findings and credibility determinations are reviewed under the clearly erroneous standard and will be reversed only if the Supreme Court is definitely and firmly convinced a mistake has been made. *In Re Tinklenberg,* 2006 SD 52. If an administrative agency makes factual determinations on the basis of documentary evidence, those determinations are reviewed de novo. *Meligan v. Dept. of Revenue and Regulation,* 2006 SD 26.

ARGUMENT

YST is responsible for protecting the health and welfare of the residents of the Yankton Sioux Reservation, including thousands of tribal members living within the Reservation located in Charles Mix County, South Dakota.

Tribal families rely on ground water wells and shallow groundwater from natural springs in Charles Mix County. That ground water, even if not flowing from the deeper Codell aquifer, is protected water subject to regulations under the laws of South Dakota. SDCL §§§ 46-6-3, 46-6-3.1 and 46-6-26.

South Dakota has adopted the "public trust doctrine" regarding water usage, which eliminated private landowners' common law rights of unrestricted access to water on their lands. The people of the state have a paramount interest in the use of all the water of the state and the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection. SDCL § 46-1-1.

All water within the state is the property of the people of the state, but the right to use of water may be acquired by appropriation as provided by law. SDCL § 46-1-3.

SDCL § 46-1-3 establishes the public trust doctrine and the obligation of the state to protect and regulate the use of water.

The South Dakota Supreme Court has recognized, that the responsibility of state agencies under this public trust doctrine, under common law, and as codified, is broader than "mere compliance by [agencies] with their legislative authority. . . ." Parks v. Cooper, 2004 S.D. 27, ¶44, (citing Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1095 (1983)). Under these provisions, the South Dakota Supreme Court has ruled that the use of water for domestic purposes is the highest use of water, and takes precedence over other use as long as the domestic use is consistent with the public interest pursuant to SDCL § 46-1-2. Fraser v. Water Rights Commission, 294 N.W.2d 784, 788 (S.D. 1980)

YST and its members' water interests are also protected by the Winters doctrine. Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable). It includes the amount of water required to make the Reservation viable. Arizona v. California, 373 U.S. 546, 599 (1963). Tribal federal treaty rights, including the treaty right to water, include protection from man made despoilation. See, United States v. State of Washington, 506 F. Supp. 187, 203 (D. Wa. 1980).

The purposes of the protections at the federal level and the state level are the same; to ensure that residents and their families have clean and safe drinking water in their homes. The waters of South Dakota do not belong to the State of South Dakota under the Public Trust Doctrine. They belong to the people of South Dakota who entrust the State of South Dakota, and its agencies, to preserve such waters for their benefit. The statutes, therefore, must be interpreted

in accordance with these overarching principles and purposes, assuring that the waters be protected and preserved for the benefit of the individual citizens.

1. **The Board erred when it determined that the average estimated annual recharge exceeded the annual withdrawals from the Codell aquifer without hearing any evidence of withdrawal or average estimated annual recharge amounts.**

SDCL § 46-6-3.1 requires that

> 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.

This statute requires a determination of the average estimated annual recharge rate of the Codell aquifer and examination of the best information reasonably available to determine the total quantity of water withdrawn annually from the groundwater source. In this case, the best information reasonably available includes the most recent United States Geological Service Well Study. South Dakota law requires the collection, preservation and publication of data with respect to underground waters as are required by the public interest, and directs the publication of rules by the Water Management Board on such collection, preservation and publication of data pursuant to SDCL § 46-6-6. Under ARSD 74:02:05:07.

> In determining the availability of unappropriated water for an application for a permit to appropriate water, the board shall rely upon the record of observation well measurements in addition to other data to determine that the quantity of water withdrawn annually from the aquifer does not exceed the estimated average annual recharge to the aquifer.

The Chief Engineer's Report and Investigation in this matter appears to fall short of the legal requirements in three respects:

1. It does not include any determination of the annual recharge rate of the Codell aquifer;

2 It does not include examination of the best information available - the most recent USGS Well Survey which lists all wells withdrawing water from the Codell aquifer but rather, relies exclusively upon the Applicant's assertion that there are only two domestic wells in the area; and

3. The Chief Engineer's report notes that the observation wells established are so far away they are only representative of the entire aquifer, and at that, show "annual fluctuations that may be due to pumping."

Quite simply, the Chief Engineer's report does not meet the legal or factual requirements necessary to determine that this water permit will comply with the requirements of SDCL § 46-6-3.1, and consequently, the requirements of SDCL § 46-2A-9.

Engineer Goodman, who prepared the report on the Codell aquifer relied upon by Chief Engineer Erbele, testified:

HT 33-34

Q. Mr. Goodman, do you know the quantity of water withdrawn annually from the Codell aquifer?

A. No.

Q. Do you know the amount of the annual recharge for the Codell aquifer?

A. No.

HT 40-41

Q. Am I understanding you right that you are reluctant to rely on the monitoring wells that are 23 or 25 miles away from the Longview site?

A. I'm not reluctant because they are very good records. What my reluctance is, is it representing that site? I think it's representing the aquifer very well, those two monitor sites, but because I don't have anything very near the site, I can't testify to exactly what's going on there. I think they are representative of what's going on there, but I can't say for sure.

Chief Engineer, Garland Erbele and Todd Van Maanen, the engineer hired by Longview to assist in the environmental permitting process and the site design, both testified that they were unaware of the recharge rate or the withdrawal usage rate for the Codell aquifer. HT 181, 336-337.

DENR and Longview rely on the monitoring wells, two twenty five miles from the site and one that has been inoperable since 1993 and the thirty gallon per minute usage rate as the evidence to satisfy the statutory and regulative laws and rules requiring determination of quantities for withdrawals and recharge rates. However, all witnesses seem to agree that the draw down near the usage site is different than the draw down twenty five miles from the usage site. No evidence was presented as to usage near the monitoring wells that are twenty five miles from the Longview site located in Douglas and Hutchinson Counties. Perhaps there are no wells in the area of the monitoring wells drawing from the Codell aquifer.

Dr. Perry Rahn, YST's geological and hydrology expert, opined that the monitoring wells were inadequate to establish compliance with the statutory provisions on withdrawal and recharge quantities:

HT 217-218

Q. With respect to the monitoring wells 23 and 25 miles away from the Longview site, is that adequate to make a determination as to the recharge and withdrawals of the Codell aquifer in the area of the Longview site?

A. No.

Q. Why?

A. It's too far away.

Q. Why? What's the factual basis to know that those aren't adequate to make a proper analysis?

A. I haven't done the math on that, but your cone of depression from a 30 gallons a minute well is not going to go out 25 miles and be measurable on one of their observation wells. I think that's rather absurd.

Q. What would be reasonable to determine the rate of recharge, if there is anything?

A. Well, that's a good question certainly, and I think it's up to the applicant to come up with that. They should hire a consultant to evaluate that.

Longview's water permit application can not be approved, if it is probable that the quantity of water withdrawn exceeds the estimated annual recharge. Neither Longview nor DENR have presented any evidence of withdrawal or recharge quantities for any location within the Codell aquifer, let alone at the site of the Longview facility. Longview's refusal to present evidence or reliance on useless evidence on this issue does not pass statutory muster. What we do know for sure is that Longview's water use will cause a draw down of the Codell aquifer at the Longview site. Without any evidence of the recharge quantities, one can only conclude that the withdrawals will exceed the recharge. Longview's application should be denied under SDCL § 46-6-3.1.

2. The Board erred when it determined that the proposed diversion could be developed without unlawful impairment of existing rights without hearing any evidence about the existing rights of the Yankton Sioux Tribe.

The Yankton Sioux Tribe and its members occupy the Yankton Sioux Indian Reservation, established by the Treaty of 1858 between the Yankton Sioux Tribe and the United States government. The Supreme Court ruled in South Dakota v. Yankton Sioux Tribe, 520 U.S. 329, 357 (1997) that the Yankton Sioux Reservation was diminished by Article I of the Act of 1894, 28

Stat. 314-318. In Yankton Sioux Tribe v. Gaffey, the United States Eighth Circuit Court of Appeals held that the Yankton Sioux Indian Reservation had not been disestablished and continues to exist. 188 F.3d 1010, 1030 (1999). In Yankton Sioux Tribe v. Podhradsky, the United States Court of Appeals for the Eighth Circuit further ruled that the Yankton Sioux Indian Reservation is not disestablished and includes trust lands held for the benefit of the Tribe and/or individual tribal members. 606 F.3d 985 (8th Cir. 2010).

Indian Tribes in the United States who are located upon an Indian Reservation acknowledged and recognized by Treaty with the United States have a concomitant set of rights to waters flowing through, and beneath the surface of Reservation lands. The Yankton Sioux Indian Reservation is located within Charles Mix County, and includes lands overlying the Niobrara formation and the Codell aquifer, which are affected by the water permit filed for in this case.

Under federal law, it has been squarely recognized that the Tribe has protected and vested water rights that may not be impaired by water appropriation such as the system of water permitting adopted by the State of South Dakota. On behalf of its membership, The Yankton Sioux Tribe is the owner of reserved water rights upon its Reservation lands established by the Treaty of 1858 and as diminished by the Act of1894. See, Winters v. United States, 207 U.S. 564, 576 (1908) (The power of the United States to reserve water rights to a Tribe and exempt them from appropriation under the state laws is undeniable).

The Tribe's rights to water from the Codell aquifer are rights to sufficient water to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, and their "reasonably feasible" uses of such water. Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969).

It includes the amount of water required to make the Reservation viable. Arizona v. California, 373 U.S. 546, 599 (1963).

In addition, as in this case, the Courts have found that if the suit is challenging the impact of a particular action on natural resources rights which are held for the benefit of tribal members, then individual members can file suit to protect such rights. See, Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969). Per Sohappy, the granting of a water permit violates reserved water rights to the extent it threatens the amount of water the tribe needs to irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, their "reasonably feasible" uses of such water. The courts have already determined that Tribes have the right to assert these rights on behalf of its members. See, United States v. Nebraska, 520 F.2d 676, 688 (9th Cir. 1975).

The Chief Engineer has not assessed the reserved water rights of the Yankton Sioux Tribe or determined the recharge rate of the Codell aquifer, nor the amount of unappropriated water within the Codell aquifer, and so has no reasonable basis to conclude, without further investigation, that the water rights of the Yankton Sioux Tribe are not impaired by this permit. Regarding YST 's existing water rights Chief Engineer Garland testified:

HT 334-334

A. ...Very briefly, the Winters doctrine is a Supreme Court decision that basically said that in the United States, when they established the reservations, whether it was stated so on the reservation or not, the tribe and the reservation has a use for the water that they need – has a right to the use of water they need to make that reservation effective.

The initial means of quantifying that water was something called a PIA, stands for practicable irrigable acreage, and it was a standard that basically said whatever irrigable lands you have on your reservation, the amount of

quantity of water that it takes to irrigate that land is the quantity of water that would be reserved for the tribe. Since then I think some of the courts have expanded that a little bit into more of a homeland standard, basically stating whatever kind of water needs the reservation may have is the quantity of water that would be reserved for the tribe.

Regardless, the Supreme Court has also found that the priority date of those Winter rights are the date that the reservation is formed; so I'm not sure the date that the Yankton Sioux Tribe reservation was formed, but it would be senior to this right and protected under our state law. We acknowledge they exist. Whether or not at some point down the road they are actually quantified remains to be seen.

.....

Q. And do you make any recommendation to the board with respect to that?

A. DENR acknowledges that those rights exist, there's no question about that. Should the board choose to I believe feel that that's a matter they would like to either address through the findings of fact or attach as a condition to the permit, either one of those would be acceptable to DENR.

Engineer Goodman, Arlan Moss and Engineer Woodmansey acknowledge that they did not consider the existing rights of the YST in processing Longview's water permit application. HT 35-37, 91, 136.

These reserved water rights are federally protected from impairment by off-reservation withdrawals from the Codell aquifer, including Permit 7006-3. Winters v. United States, 207 U.S. at 576; Arizona v. California, 373 U.S. at 599; Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981).

As the Supreme Court explained in Winters, upstream diversions of water that are off-reservation may not impact a Tribe's rights to use of water that are reserved. To have reserved water rights, a Tribal Treaty with the United States setting apart lands as a Reservation is required, but specific water rights language in such treaty is not required. Id.

In Winters, the United States brought suit on behalf of the Gros Ventre and Assiniboine tribes of the Fort Belknap Reservation in Montana to halt upstream diversions by non-Indians who had been using the water running through the Tribe's land since 1900. The Fort Belknap Reservation was established under the terms of an 1888 treaty that generally described the purpose of the reservation as the provision of a permanent home for the tribes and to encourage the Indians to engage in agricultural pursuits. Id. at 656. The Treaty did not mention water rights. The non-Indian diverters contended that their diversions, existed before establishment of the tribe's water rights. Mark A. McGinnis & Jason P. Alberts, "Southwest Water Decisions: The Law of Federal Reserved Water Rights," The Water Report: p. 2 (October 15, 2005). That argument was rejected by the Supreme Court:

> The case, as we view it turns on the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation.... The reservation was part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habit and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change in conditions. The lands were arid and without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government ... The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied and could not be.

207 U.S. at 575–76 (1908), citing, United States v. Rio Grande Dam and Irrigation. Company, 174 U.S. 690, 702 (1899).

After Winters the federal courts refined the definition of tribal sovereignty in relation to water rights, beginning with the U.S. Supreme Court's decision in Arizona v. California, 373 U.S. 546 (1963). In that case, the special master appointed to resolve certain preliminary questions

settled on the notion of quantifying reserved water rights based upon practicably irrigable acreage (PIA).

Under this test, an Indian tribe is legally entitled to as much water as is needed to irrigate all the PIA within its reservation. The water so reserved "was intended to satisfy the future as well as the present needs of the Indian Reservation." 373 U.S. at 600. In other words, the water was reserved "to make the Reservation viable." Id. at 599, cited with approval in, Montana v. United States, 450 U.S. 544, 566 n. 15 (1981).

The PIA water rights standard was expanded in In Re General Adjudications of All Rights to use Water in the Gila River System and Source, 201 Ariz. 307, 315, (2001) (Gila V). The Arizona Supreme Court rejected the PIA as the sole standard for determining the "essential purpose" of the tribal reservation and instead found that such purpose "is to provide Native American people with a 'permanent home and abiding place, that is 'a livable' environment." Id. The court held that the general purpose of providing a home for Indians must be broadly construed to provide tribes with the ability to achieve self-determination and economic self-sufficiency, Id., and that limiting tribes to a PIA standard denies them the opportunity to evolve. This, in turn, limits them to an agrarian standard in a largely nonagrarian modern world. The Gila V court mandated that proposed uses be "reasonably feasible." Id. at 80. To determine if a use is reasonably feasible, a project must be: 1) achievable from a practical standpoint; and 2) economically sound. Id. at 81.

The Yankton Sioux Tribe has the right to protect its reserved treaty water rights from appropriation by others and from "man-made despoliation." See, United States v. State of Washington, 506 F. Supp. 187, 203 (D. Wa. 1980). See also, United States v. Adair, 723 F.2d

1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984)(requiring revival of wetlands decimated by non-Indian stream withdrawals); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)(requiring maintenance of minimum stream flow for downstream tribal fishery).

The use of water for a LCFO on lands upland from and directly adjacent to tribal lands and water supplies, both surface and subsurface, and the location of manure dumping fields adjacent to Reservation lands ensuring runoff from the 976,200 cubic feet of liquid manure being dumped annually risks contamination of the Codell aquifer and surface waters on Reservation lands. Endangering the reservation water supply most certainly impairs the Tribe's and its members' appropriated water and reserved water rights.

Under SDCL § 46-2A-9, Tribal reserved water rights must be considered before issuing this permit. Until such time as the Applicant and the Chief Engineer have fully investigated this issue, the Longview application should be rejected or at least deferred for further study under SDCL § 46-2A-7.

3. The Board erred when it determined that the proposed use is a beneficial use and in the public interest.

SDCL § 46-2A-9 provides:

> A permit to appropriate water may be issued only if there is a 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 interests.

SDCL § 46-2A-9 also requires that the permit constitute a "beneficial use." Under SDCL § 46-1-6(3), a "beneficial use" is:

> 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.

A two-part analysis is required to determine "beneficial use." First, the use must be "reasonable, useful, and beneficial to the appropriator." Secondly, SDCL § 46-1-6(3) requires that the use must be in the public interest to be deemed a "beneficial use." In re Water Right ClaimNo. 1927-2, 524 N.W.2d 855, 858 (S.D. 1994).

Well water from the Codell aquifer is not useful to Longview because there is already an adequate water source through the Randall Water District. Longview has a cistern system of water storage that allows three days of storage. Longview has been operating since September of 2008 without any water supply issues.

Furthermore, the use of water to sustain this CAFO is not in the public interest. Although there is some economic benefit generated by having this CAFO, the addition of a well does not add to that economic benefit. The well will only have the affect of drawing down the groundwater and increasing the risk of contamination since the well will be surrounded by large amounts of swine manure. Chief Engineer Garland responded to questioning on the public interest aspects:

HT 338

Q. With respect to the public interest matter that you addressed, what interest does it serve for the Yankton Sioux Tribe to have this water permit issued that sustains this CAFO?

A. The matter of public interest is – I am limited in my determination of public interest to the extent that the board in the past has found something to be in the public interest. That is typically a matter that we reserve for the board and that's one of the considerations they need to make in their determination on this permit I did not – to the extent that the use of the water may impact the reservation or not impact the reservation, I looked at that aspect of it, but in terms of the public interest to the tribe as a whole, that is a matter for the board.

Q. And you are not aware of any interest that it serves for the Yankton Sioux Tribe; is that correct?

A. I could speculate, but yeah.

Q. That's correct?

A. I think it is. I don't know, I mean you are asking me to – there's potential for employment, there's potential for, you know, for members of the tribe to sell feed to the facility, there's those kind of opportunities, but again, that's not something I look at. That's really a matter for the board to determine.

There are additional concerns as to the benefit of the Longview well from the standpoint of whether the water can even be used for the intended purposes and how the well may affect other wells in the vicinity.

Moss acknowledges that the water may not be of sufficient quality to use for power washing or sanitation, indicating that some water is so rough that it's even hard on the equipment. HT 117. Longview and DENR witnesses acknowledge that they did not investigate the existence of domestic wells in the vicinity of the Longview site, so Longview and DENR can't say that the Longview well won't affect other existing wells. HT 40, 94-95, 179-181. Perry Rahn testified that he located a well just a half a mile away from Longview with a water table just ten feet down and also a near-by spring. HT 213, YST Ex. 3. James Goodman testified that there are two or three hundred wells running in Charles Mix County at this time. HT 28. Tribal member John Stone testified that as an employee of the tribe's environmental program in 2005 he did a wells inventory locating 5 to 600 wells in the Marty area including 200 that were not registered through the USGS. HT 262.

South Dakota courts have previously held, approval of a water permit to appropriate water

from the Niobrara Chalk formation without giving consideration to maintenance of artesian head pressure and without giving consideration to whether the quality of water was suitable for the use proposed constitutes an abuse of discretion. Fraser v. Water Rights Commission of Dept. Of Natural Resource Development, 294 N.W.2d 784 (S.D. 1980).

Longview's well is not reasonable, useful or beneficial and there is no evidence that the well is in the public interest. The well unnecessarily risks contamination of a groundwater source and is not necessary in the operation of the CAFO. The application should be rejected pursuant to SDCL § 46-2A-9 because the proposed use is not a beneficial use.

4. The Board erred when it determined that an adequate investigation had been done to establish the location of existing wells and natural springs near the Longview site.

South Dakota law provides authority to the Water Management Board to deny permits or place conditions on the issuance of any water permit if the Board determines such denial or conditions are necessary to "protect domestic wells, municipal wells, or natural springs of this state." SDCL § 46-6-26. Accordingly, one of the determinations of fact necessary to the approval of a water permit is whether the granting of the permit will result in impairment of existing domestic wells and/or natural springs including those of Individual Petitioners. The Chief Engineer's Report lists only the two domestic wells listed by the Applicant in the Report to the Board, neither of which includes individual Petitioners wells that will be impacted by issuance of the permit, and provides no assessment as to whether the granting of this permit will cause impairment to these two wells. Further, the Chief Engineer's Report does not give any indication that an independent investigation into the existence of domestic wells in the Codell aquifer, or the existence of natural springs in the area was performed. To the contrary, as indicated above, the

record establishes that no investigation has been done, even though there is evidence reflecting the existence of wells and springs in the area.

Since there is evidence of natural springs and domestic wells and that the Chief Engineer did not assess the effect of this application on artesian head pressure for existing domestic wells including those of Individual Petitioners, then the application should, at a minimum be deferred until an appropriate investigation is conducted into any impact this permit will have on the quantity or quality of water in existing domestic wells in the Codell aquifer and existing natural springs in the area. See, Fraser v. Water Rights Commission of Dept. Of Natural Resources Development. 294 N.W.2d 784 (1980 S.D.)(holding that failure to examine the impact of water permit on artesian head pressure is abuse of discretion); See also, Op. Atty. Gen. Opinion No. 89-22 (1989) (finding that state water law applies to both surface waters and groundwaters within the State.)

5. The Board erred when it determined that Longview's permit complied with the requirements of ARSD 74:02:04:34.01 that no well may be constructed to allow production from more than one aquifer.

ARSD 74:02:04:34.01 provides:

No well may be constructed to allow production from more than one aquifer unless approved by the chief engineer or the water management board.

Engineer Goodman explained that the Longview well could be producing from both the Codell and Niobrara aquifers since there could be flow between the two aquifers:

HT 37-38.

Q. Is there flow between the Niobrara and the Codell?

A. There could be. I don't have any information at this site to say, but there

could be. It would depend on the water levels of the two formations. Depending on those water levels, the potential then would be one way or the other. However, based on looking at the Codell and the Niobrara and the Choteau and the pumping records from some of the nearby irrigation, you get fluctuations in some of the Niobrara wells and the Choteau when they pump. You don't get them necessarily in the Codell. The elevations, just because of the topography, could be very close so there's very little head difference between the formations to drive water between them. Do you see what I mean?

Q. I don't completely understand, but what you are saying is that you can't say that there isn't flow between the two aquifers; is that correct?

A. You can say that, yeah.

Q. So there is flow between the two aquifers?

A. No, the question you said, you can say.

Q. I guess let – I didn't ask a very good question. So it's clear to me, is there flow between the Codell and the Niobrara?

A. There certainly could be yes.

In order to comply with the requirement of ARSD 74:02:04:34.1 that a well be constructed in a manner that it will not withdraw water from more than one aquifer, specific conditions on how a well is constructed should be required. ARSD 74:02:04:23 sets forth the intent of South Dakota well construction standards, and clarifies the intent of the law:

(1) To protect the health of the public;
(2) To provide water which is both bacteriologically safe and of reasonable quality and quantity for domestic use; . . .
(4) To protect groundwater resources of the state from bacteriological and chemical contamination and from leakage between aquifers;
(5) To prevent waste of groundwater.

In this case, since Goodman concedes that there could be flow between the Niobrara and the Codell aquifers at the Longview site, any approval of a water permit should include specific well

construction standards ensuring no leakage from the Niobrara in this area, and to ensure that neither the Codell aquifer nor the other groundwaters in this area are bacteriologically contaminated by the operation of the Longview Farm. If there is no way to prevent the Longview well from producing from both the Niobrara and the Codell aquifers then the permit application should be denied.

6. The Board erred when it determined that the Longview site including its manure fields is not located over a shallow aquifer.

SDCL § 34A-3A-24 provides:

> No concentrated animal feeding operation that includes a number of animals equal to or greater than one thousand animal units may be located over a shallow aquifer unless a groundwater discharge permit has been approved in accordance with chapter 34A-2. For purposes of this section, a shallow aquifer is any aquifer having the following characteristics:
>
> (1) The aquifer is within fifty feet or less below the land surface with fifteen feet or less of continuous, overlying, extremely low permeability geologic material, such as clayey till or shale. Weathered till or highly fractured weathered shale is not an extremely low permeability material for purposes of this section; or
>
> (2) The aquifer is greater than fifty feet but less than one hundred feet below the land surface with thirty feet or less of continuous overlying low to extremely low permeability geologic material that may be a combination of weathered and unweathered till, shale, or till and shale.
>
> This section does not apply to any concentrated animal feeding operation that was operating on or before July 1, 1997. This section does not limit or prohibit the expansion of any concentrated animal feeding operation that was operating on or before July 1, 1997.
>
> The provisions of this section do not apply to any county which has officially adopted a comprehensive plan and zoning ordinances pursuant to chapter 11-2 and wellhead protection ordinances pursuant to § 7-18-20.

Expert Rahn testified to the existence of the Herrick formation which is exposed near the

Ft. Randall Casino just miles from the Longview site. Neither he, nor any of the other witnesses could specify the boundaries or exact location of the Herrick formation in this area. The Herrick formation is an aquifer and part of the Oglala formation. HT 35, 206, 311-312, Furthermore, Rahn described the ablation till made from a melting glacier beneath the Longview site as more permeable than the lodgment till made by an advancing glacier. HT 209. Dr. Rahn described the permeability of ablation till as having an hydraulic conductivity of .2 meters per day, which is much less permeable than the Madison aquifer but more permeable than the lodgment till. HT 214, 223.

It is undisputed that the Longview operation manure is spread throughout a five mile radius from the Longview structures. The only boring sites relied upon to determine the content of the subsurface material were the three boring holes drilled directly adjacent to the structures. The evidence shows that it is not unusual to have variable subsurface materials over a five mile stretch. HT 59.

Longview and the DENR did not perform the necessary investigation to assure that the Herrick formation is not beneath and within the entire outside boundaries of this CAFO and sufficiently close to the surface to constitute a shallow aquifer. Nor has there been an adequate analysis of whether materials having a .2 meters per day hydraulic conductivity could constitute a shallow aquifer. This evidence is significant because it involves the potential contamination of domestic water supplies.

Longview should not be allowed to just go through the motions with respect to the water permit process. It is sensible and reasonable to require Longview to take the necessary steps to establish their hog manure will not contaminate shallow groundwater and aquifers. The permit

should be denied until the necessary testing is done and establishes that the manure and accompanying chemicals and pathogens are not infiltrating water supplies.

CONCLUSION

The Board's decision granting Longview's application should be reversed because:

1. There is no evidence to support the board's finding that the average estimated annual recharge exceeds the annual withdrawals from the Codell aquifer at the site of the Longview facility;

2. The lack of investigation into the water rights of the YST precludes the board's finding that Longview's proposed use would not impair YST's existing rights;

3. The board's finding that the proposed use is a beneficial use is clearly erroneous;

4. The board's finding that there are only two domestic wells near Longview is clearly erroneous since the evidence showed that there was a total lack of proper research to make that determination. Under SDCL § 46-6-26 the application should be denied in the interest of protecting domestic wells and natural springs;

5. The Board's finding that the Longview well produces from only the Codell aquifer is clearly erroneous;

6. The Board's finding that there are no shallow aquifers beneath the Longview CAFO is clearly erroneous because there was inadequate investigatory evidence to make such a finding with respect to the entire subsurface of the exterior boundaries of the Longview facility and its manure fields.

Dated this 23rd day of January, 2011.

Respectfully submitted,

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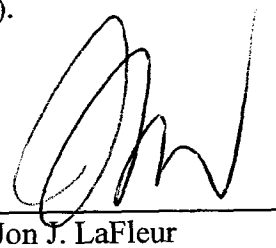
REQUEST FOR ORAL ARGUMENT

Appellant Yankton Sioux Tribe request thirty minutes for oral argument in this matter pursuant to SDCL §1-26-35 and SDCL §1-26-33.3(7).

Dated this 23rd day of January, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2012, I cause to be served by first class mail, postage prepaid, a true and correct copy of the *Brief of Appellant Yankton Sioux Tribe* to the following parties:

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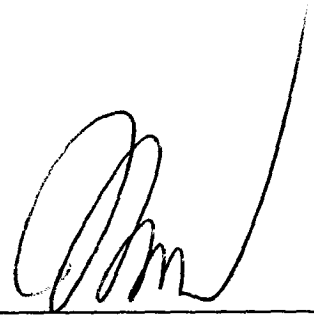

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STATE OF SOUTH DAKOTA) :SS **COUNTY OF CHARLES MIX**)		**IN THE CIRCUIT COURT** **FIRST JUDICIAL CIRCUIT**
IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP	* * * * * * * * * * * *	CIV. 11-146 **APPELLANTS FAITH SPOTTED EAGLE, GLENN DRAPEAU, EVA BRUGUIER, JUDY HONIMICHLE, SHARON DRAPEAU, WESLY HARE, AND KIP SPOTTED EAGLE COLLINS OPENING BRIEF**

COMES NOW, Appellants Faith Spotted Eagle, Glenn Drapeau, Eva Bruguier, Judy Honimichle, Sharon Drapeau, Wesly Hare, and Kip Spotted Eagle Collins (collectively "Individual Appellants"), by and through Fredericks Peebles & Morgan LLP, and hereby file this *Opening Brief*. In support thereof, the Individual Appellants state the following:

STATEMENT OF THE CASE

The nature of this case involves a new application submitted by Longview Farms, LLP ("Longview"), which operates a Livestock Concentrated Feeding Operation ("LCFO") in Charles Mix County, to the South Dakota Water Management Board (the "Board") to appropriate water from the Codell aquifer and Niobrara formation.

The procedural status of the case leading up to this appeal begins on June 23, 2008, when the South Dakota Department of Environment and Natural Resources ("DENR") published a *Notice* in a Wagner, South Dakota paper that it has received an application for a water rights permit from Longview, care of Arlan Moss, a resident of Hull, Iowa. The notice states, "The

water is for commercial use in a livestock confinement operation." *Petition for Declaratory Ruling* ("Dec. Pet"), Ex 1 attached to *Pre-Hearing Brief of the Yankton Sioux Tribe in the Matter of Water Permit Application No 7206-3* ("YST Pre-Hearing Brief").

On or before June 23, 2008, numerous organizations and residents affected by the Longview's LCFO timely filed protests to the issuance of a permit on several grounds, including that the permit was not in the public interest, and that granting the permit jeopardized the water supply of individuals and households who utilized groundwater in the area of the LCFO both from loss of water supply and from contamination of domestic water supply.

On August 20, 2008, Longview notified South Dakota DENR that "Longview Farms, LLP intends to drill and case a test hole/well at their facility . . . . *Dec. Pet.*, Ex. 2, attached to *YST Pre-Hearing Brief.* Longview represented to South Dakota DENR that, "the facility will have a dual water supply system." *Dec. Pet.*, Ex. 3, attached to *YST Pre-Hearing Brief.*

On August 22, 2008, James A. Goodman, Natural Resources Engineer on behalf of Garland Eberle, Chief Engineer, issued a *Letter* to Longview authorizing construction of a test well prior to the approval of a water permit. The *Letter* included an unsolicited advisory opinion that, "[p]ursuant to SDCL 46-1-6(7) and [Administrative Rules of South Dakota ("ARSD")] ARSD 74:02:01:01(7), stock watering is a domestic use." *Id.*

On August 22, 2008, the Chief Engineer for South Dakota DENR issued a revised *Report* on Water Permit No. 7006-3, which indicated, "[t]he water is for commercial use in a livestock confinement operation." *Dec. Pet.*, Ex. 3, attached to *YST Pre-Hearing Brief.*

On August 26, 2008, DENR notified individual petitioners in that matter for the first time that it has received a request for a test well and that it has issued authorization for a test well and

issued an advisory opinion on the applicability of domestic use provisions to Longview's well. The South Dakota DENR has not provided notice of Longview's communications with DENR about a test well or removal of water as a domestic use prior to issuing the DENR letter of august 26, 2008, to any of the parties to the permit hearing scheduled for October 2, 2008.

On August 28, 2008, the Yankton Sioux Tribe and Individual Petitioners in that matter, were served with documents for the October 2, 2008 hearing, including notice that the DENR has issued approval of the drilling of a test well, and advisement to Longview that use of up to 25,920 gallons of water per day from the test pending the hearing on the water rights permit was authorized under South Dakota law and regulations. *Dec. Pet.*, Ex. 2, attached to *YST Pre-Hearing Brief.*

On August 29, 2008, many of the petitioners in this matter filed a *Petition for Declaratory Ruling* with the Board. The DENR required publication of a notice of the declaratory ruling hearing in ten South Dakota papers spanning the entire state including the Rapid City Journal and the Pierre Capitol Journal.

On September 2, 2008, the Water Rights Management Board issued notice to all parties a hearing on the Permit Application was scheduled for October 2, 2008. *Id.*

On September 10, 2008, subsequent to the issuance of the South Dakota DENR Chief Engineer's unsolicited advisory opinion on domestic use eligibility, Longview withdrew its application for a water permit. The notice indicated: "Water use from the well will be for livestock production and will not exceed reasonable domestic use as defined in ARSD 74:02:01:01(6)."

On March 13, 2009, the Board denied the *Petition for Declaratory Ruling* and issued its *Findings of Fact and Conclusions of Law* on March 13, 2009. Petitioners in that matter appealed to the First Judicial Circuit. At the hearing, Longview reiterated its prior position that water from this well would be used only as a backup source of water in case water was unavailable from the Fort Randall Water District rural water supply system. Further Longview reiterates the position taken before the Board that is had not determined whether the water quality was sufficient to permit use of water for watering livestock.

The First Judicial Circuit Court of South Dakota issued a decision overruling the Board's determination that Longview was entitled to use of groundwater without a permit as a domestic use. *In the Matter of the Petition for Declaratory Ruling Regarding the Applicability of Domestic Water Use for Longview Farm LLP's Well*, CIV. No. 09-63 (2010).

On September 8, 2010, and September 15, 2010, the DENR published notice in the Wagner Post, of DENR's recommendation to grant a water rights permit to Longview on application number 7206-3. The Notice was not published in the paper closest to the location of the proposed well, the Lake Andes Wave. The Notice indicated that the water would be used for "commercial use at a swine farrowing facility."

On or before September 27, 2010, petitioners filed petitions in opposition to the grant of the permit.

On July 13 - 15, 2011, a hearing was held on Longview's application no. 72-06-3, following the submission of pre-hearing briefs by the parties.

On October 7, 2011, the Chief Engineer provided notice that the Board's Ruling and *Final Decision* including *Findings of Fact and Conclusions of Law* ("Final Decision") were adopted on October 5, 2011.

On or before November 7, 2011, Appellants Faith Spotted Eagle, Glenn Drapeau, Eva Bruguier, Judy Honimichle, Sharon Drapeau, Wesly Hare, and Kip Spotted Eagle Collins and the Yankton Sioux Tribe filed *Notices of Appeal* in the First Judicial Court. The appeals were administratively combined into one docket.

STATEMENT OF THE ISSUES

1. Whether the Board erred in that the Yankton Sioux Tribe and its members, including Appellants, do not hold priority for groundwater rights under *Winters v. U.S.*, 207 U.S. 564 (1908).

2. Whether the Board erred in that the proposed diversion can be developed without unlawful impairment of existing rights.

3. Whether the Board erred in that it is probable that the quantity of water withdrawn annually from the groundwater source will exceed the quantity of the average annual recharge of water to the groundwater source for Longview's proposed use.

4. Whether the Board erred in that the use of water would be a beneficial use.

5. Whether the Board erred in that the water use is in the interest of the public in terms of the best utilization of water supplies.

6. Whether the Board erred in that there is not a shallow aquifer beneath the Longview facility or within 100 feet of the land surface.

7. Whether the Board erred in that there is no requirement that Longview obtain a groundwater discharge permit or that there be required groundwater monitoring near the facility.

8. Whether the Board erred in that Longview is in compliance with DENR requirements and any other rules and regulations regarding groundwater quality and surface water quality, confined animal feeding operations, manure storage system, nutrient management system.

STANDARD OF REVIEW

Findings of fact by the Board are reviewed under the clearly erroneous standard. *DeKay v. U.S. Fish & Wildlife Serv.*, 524 N.W. 2d 855 (S.D. 1994). "The decision is to be upheld unless the reviewing Court is left with a definite and firm conviction that a mistake has been committed." *Id.*, citing *Fraser v. Water Rights Comm'n*, 294 N.W. 2d 784 (S.D. 1980). "Mixed questions of fact and law are reviewed for error without deference." *Permann v. Dept. of Labor, Unemp. Ins. Div.*, 411 N.W. 2d 113, 119 (S.D. 1987).

SUMMARY OF THE ARGUMENT

Yankton Sioux Tribe and its members, including Appellants, hold priority for groundwater rights under *Winters v. U.S.*, 207 U.S. 564 (1908)("Winters" or "Winters Doctrine"). The proposed use cannot be developed without impairment of existing rights of the Yankton Sioux Tribe and its members. Additional facts are required to determine whether under the proposed use the quantity of water withdrawn annually from the groundwater source will exceed the quantity of the average annual recharge and whether the Tribe and its members own wells from the Niobrara formation or Codell aquifer. The findings do not support a finding or conclusion that proposed use by Longview is not a beneficial use. More facts are required to

determine what the specific proposed use is because the specific proposed use affects whether the use can be considered beneficial. Additional fact finding is required in order to determine whether the application meets the statutory requirements.

ARGUMENT

South Dakota Codified Law ("SDCL") 46-5-10 provides that any person intending to acquire a right to beneficial use of water is required to apply for a permit from the Board. No person may utilize water for a purpose or in a manner other than specified in the permit or license, if one is granted by the Board. SDCL 46-5-30.2.

While ground waters of the state may be appropriated, the appropriation is subject to vested rights and prior appropriations. SDCL 46-6-3. An application to appropriate groundwater may not be approved if, "according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from the groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source." SCDL 46-6-3.1. The Board or chief engineer may deny or condition any permit as is determined necessary to protect domestic wells, municipal wells, or natural springs of the state. SDCL 46-6-26.

SDCL 46-2A-9 sets forth the criteria for determining whether a permit can be issued to appropriate water:

> 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.

Id.

THE YANKTON SIOUX TRIBE AND ITS MEMBERS HOLD PRIORITY FOR GROUNDWATER RIGHTS UNDER THE WINTERS DOCTRINE

The first issue the Court must consider is whether the Yankton Sioux Tribe and its members, including Appellants, hold priority for groundwater rights under *Winters*.

In *Winters*, the Supreme Court established the doctrine of implied reservation of water. *Id.* at 576. Later the Court held that the *Winters* Doctrine of reserved water rights "vests on the date of the reservation and is superior to the rights of future appropriators." *Cappaert v. U.S.*, 426 U.S. 128, 138 (1976), citing *Winters*, 207 U.S. 564. "When the Federal Government reserved land, by implication it reserved water rights sufficient to accomplish the purposes of the reservation." *Cappaert* 426 U.S. at 139.

The United States Supreme Court held the implied reservation of water rights, such as the *Winters* Doctrine, applies to groundwater. *Cappaert*, 426 U.S. at 143-144. In *Cappaert*, the Court considered the hydrologic cycle and the interrelatedness of groundwater and surface water. *Id.*, citing *C.Corker, Groundwater Law, Management and Administration, National Water Commission Legal Study* No. 6, p. xxiv (1971). Central to its determination that groundwater is subject to implied reservation of water rights was the fact that the state at issue in *Cappaert* appeared to "recognize the potential interrelationship between surface and groundwater" since it applied its state law of prior appropriation to both. *Id.* at 143. "[T]he reserved rights are open-ended and do not depend on actual use to be maintained." *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1326 (E.D. Wash. 1978). The reserved rights "must be made available despite inequities to the non-reserved users. *Colville*, 460 F. Supp. at 1326, citing *Cappaert*, 426 U.S. at 138. Under the *Winters* Doctrine of reserved water rights, "tribal

members own the reserved water from the time of the creation of the reservation; at the time a tribal member acquires an allotment, his reserved rights become appurtenant to his land." *Colville*, 460 F. Supp. at 1320, citing *U.S. v. Preston*, 352 F.2d 352, 358 (9th Cir. 1965). These reserved water rights are federally protected from impairment by off-reservation withdrawals, including the proposed use in this case. *Winters* 207 U.S. at 576; *Arizona v. California*, 373 U.S. 546, 599 (1963); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981). "state courts, as much as federal courts, have a solemn obligation to follow federal law. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983)(stating "state-court decisions alleged to abridge Indian water rights protected by federal law can expect to receive; if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.")

The Yankton Sioux Tribe and its members occupy the Yankton Sioux Indian Reservation, established by the Treaty of 1858. The Supreme Court ruled in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998) that the Yankton Sioux Reservation was diminished by Article I of the Act of 1894, 28 Stat. 314-318. In *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1030 (8th Cir. 1999), the United States Court of Appeals for the Eighth Circuit held that the Yankton Sioux Reservation had not been disestablished and continues to exist.

In *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 3024 (2011), the United States Court of Appeals for the Eighth Circuit held that the Yankton Sioux Reservation was not disestablished and includes trust lands held for the benefit of the Tribe and/or individual tribal members.

Like the state law reviewed in *Cappaert*, South Dakota's law regarding use of water of the state lists groundwater as a type of water eligible for public use or public protection. SDCL 46-1-1. *See also,* SDCL 34A-2-2(12) (defining all waters of the state as "all waters within the jurisdiction of this state, including . . . surface and underground [.]") South Dakota law recognizes the interrelatedness of groundwater in the hydrologic cycle and in fact defined underground water as a "water of the state". "[S]tate water rights law encompasses both surface waters, some of which are navigable and some non-navigable, and ground waters, none of which are navigable." 1989-1990 Op. Atty. Gen. S.D. 75 (July 25, 1989)(internal citations omitted.)

The Yankton Sioux Tribe and its members and beneficiaries, hold priority for groundwater rights under the *Winters* Doctrine, which must be followed by state courts. The *Decision* (including the findings of fact and conclusion of law) issued by the Board must be vacated in this regard and remanded for further consideration consistent with this priority and overturned to the extent they were issued in error.

THE PROPOSED DIVERSION CANNOT BE DEVELOPED WITHOUT UNLAWFUL IMPAIRMENT OF EXISTING RIGHTS

The next issue the Court must consider is whether the proposed diversion can be developed without unlawful impairment of existing rights.

The South Dakota Supreme Court has held that, "the use of water for domestic purposes is the highest use of water, and takes precedence if such use is consistent with the public interest pursuant to SDCL 46-1-2." *Fraser v. Water Rights Comm'n*, 294 N.W.2d 784, 788 (S.D. 1980). In addition to domestic use, the Tribe and its members' interests are protected by the *Winters*

Doctrine discussed above. The *Winters* Doctrine includes the amount of water required to make a reservation viable. *Arizona* 373 U.S. at 599.

In addition, the Yankton Sioux Tribe and its members have the right to protect their reserved treaty water rights from appropriation by others and from "man-made despoliation." *See, U.S. v. Adair*, 723 F. 2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984)(requiring revival of wetlands decimated by non-Indian stream withdrawals); *U.S. v. Anderson*, 736 F.2d 1358 (9th Cir. 1984)(requiring maintenance of minimum stream flow for downstream tribal fishery). The Tribe's treaty rights include rights to waters flowing through, and beneath the surface of its lands. *Winters* 207 U.S. at 212 (to have reserved water rights, a treaty with the United States setting apart lands as a reservation is required, but specific water rights language is not required.) *Id.*

Because Longview did not have any water rights that vested in 1858, the date the Yankton Sioux Reservation was established, any rights it seeks are subject to existing rights of the Tribe and members under the *Winters* Doctrine and treaties.

ADDITIONAL FACTS ARE REQUIRED TO DETERMINE WHETHER UNDER THE PROPOSED USE THE QUANTITY OF WATER WITHDRAWN ANNUALLY FROM THE GROUNDWATER SOURCE WILL EXCEED THE QUANTITY OF THE AVERAGE ANNUAL RECHARGE

The next issue the Court must consider is the probably that the quantity of water withdrawn annually from the groundwater source will exceed the quantity of the average annual recharge water to the groundwater source for Longview's proposed use.

The "mining" of ground water is not permitted under South Dakota Water laws. SDCL 46-6-3.1 provides:

> No application to appropriate groundwater may be approved if, according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from a groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source.

Id. Additionally, SDCL 46-2-14 provides that, "The Water Management Board may establish experimental and observation stations, including observation wells and stream gauging stations, wherever they may be beneficial."

The State maintains more than 1,600 observation wells to monitor ground water levels. *Decision*, p. 11, ¶ 56. However, there is no such observation well data since 1993 when the monitoring well located 2 ½ miles from Longview's site collapsed. *Decision*, p. 8, ¶ 41. The next nearest monitoring wells are approximately 23 and 25 miles north and northeast of Longview's site. *Decision*, p. 9, ¶ 42. The data relied on by the Board is from wells that are 23 and 25 miles away and the date from the collapsed well is nearly 20 years old. Because the monitoring wells are so far away from Longview's site, they are only representative of the entire aquifer and not representative of the conditions immediately surrounding Longview's proposed well.

The Yankton Sioux Reservation overlies the Niobrara formation and the Codell aquifer, which are affected by the water permit requested by Longview. The Board erred in reaching findings and conclusions despite admissions that it is not clear how many wells the Yankton Sioux Tribe has into the Codell aquifer. *Decision*, p. 12, ¶ 65. The Niobrara formation is 450 feet deep at the top of the formation and is the most shallow aquifer at the location of the test well. *Decision*, p. 18, ¶102. The Board did not include specific findings with regard to the water

levels or recharge rate of the Niobrara formation even though the formation is directly underlying Longview's site. *Decision*, p. 18, ¶ 101.

The requirements of SDCL 46-6-3.1 and SDCL 46-2A-9 are not fulfilled. It was an error for the Board to reach its Decision without ordering a new monitoring well be drilled to replace the collapsed well and without reaching specific findings regarding the Niobrara formation water levels, recharge rate, or the number of wells the Yankton Sioux Tribe and members have into the Codell aquifer.

THE PROPOSED USE IS NOT A BENEFICIAL USE

The next issue the Court must consider is whether the proposed use of water would be a beneficial use. SDCL 46-1-6(3) defines "'[b]eneficial use,'" 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[.]".

The Board found that "it is unnecessary to determine the specific uses to which Longview will put the well water within Longview's facility as long as the water is beneficial to Longview's confinement facility." *Decision*, p. 28, ¶ 34. This finding is in error because the second half of the definition of beneficial use requires the use be "consistent with the interests of the public of [the State of South Dakota] in the best utilization of water supplies." In accordance with this definition, the Board must examine the specific use to determine whether the use is consistent with the interests of the public and whether it is the best utilization of water supplies. The Decision contains many possible proposed uses for the water depending on the quality of the water, and the Board failed to examine each of those proposed uses to determine whether they fit within the terms as defined by SDCL 46-1-6(3).

The Board's findings and conclusions with regard to beneficial use were in error and this case must be remanded to the Board for a hearing and further deliberations about whether the proposed use is beneficial and specifically to make a finding of the specific uses to which Longview will put the well water within its facility and whether those specific uses are consistent with the interest of the public and are the best utilization of water supplies.

THIS MATTER MUST BE REMANDED TO THE BOARD FOR ADDITIONAL FACT-FINDING AND CONCLUSIONS

In reaching its decision, the Board did not have sufficient information to supports its findings or it failed to make specific findings regarding the following issues: whether there is a shallow aquifer beneath the Longview facility or within 100 feet of the land surface; whether there is no requirement that Longview obtain a groundwater discharge permit or that there be a required groundwater monitoring station near the facility; and whether Longview is in compliance with DENR requirements and any other rules and regulations regarding groundwater quality and surface water quality, confined animal feeding operations, manure storage system, and nutrient management system.

CONCLUSION

WHEREFORE, Individual Appellants request this honorable Court grant the following relief:

1. Vacate and remand the Decision issued by the Board in this matter;
2. Vacate and remand for further consideration (including hearing and briefing) the findings and conclusions challenged herein; and
3. Any other such relief as this Court deems just and proper.

Respectfully submitted this 23rd day of January, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January, 2012, the original of the foregoing **APPELLANTS FAITH SPOTTED EAGLE, GLENN DRAPEAU, EVA BRUGUIER, JUDY HONIMICHLE, SHARON DRAPEAU, WESLY HARE, AND KIP SPOTTED EAGLE COLLINS OPENING BRIEF** was filed with the Office of the Clerk of Charles Mix County Circuit Court; and a true and correct copy of the same was served upon the following via first class mail, postage pre-paid:

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF CHARLES MIX	)	FIRST JUDICIAL CIRCUIT
IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONG VIEW FARMS, L.L.P.	)))	(CIV 11-146) DENR BRIEF

PRELIMINARY STATEMENT

This appeal is from a South Dakota Water Management Board ("Board") decision. Appellee Longview Farms, L.L.P. ("Longview") sought and received a water permit from the Board. Yankton Sioux Tribe ("YST") intervened against Longview and participated at the Board hearing. Appellants Faith Spotted Eagle *et al.* intervened but did not attend the Board hearing or submit proposed Findings of Fact or Conclusions of Law. The Department of Environment and Natural Resources, Water Rights Program ("DENR") is an Appellee, having recommended approval of the Longview permit.

The agency record is cited as "AR" followed by the page number. The July 13, 2011, transcript is referred to as "HT." Findings of Fact and Conclusions of Law are referred to as "FOF" and "COL."

JURISDICTIONAL STATEMENT

The Court has jurisdiction under SDCL 1-26-30.2 and SDCL 1-26-31.

ISSUES PRESENTED

I

WHETHER THE BEST EVIDENCE REASONABLY AVAILABLE WAS PRESENTED AS TO WHETHER THE PROPOSED PERMIT WOULD CAUSE ANNUAL WITHDRAWALS FROM THE CODELL AQUIFER TO EXCEED ANNUAL RECHARGE.

The Board considered the best evidence reasonably available and found that the proposed permit would not cause the total annual withdrawals to exceed the aquifer's annual recharge.

II

WHETHER THE PROPOSED DIVERSION WOULD IMPAIR EXISTING RIGHTS (INCLUDING YST CLAIMS TO GROUNDWATER UNDER *Winters v. United States,* 207 U.S. 564 (1908)).

The Board held the diversion can be developed without impairing existing rights, and *Winters* claims to groundwater, if any are ultimately held to exist, would be entitled to priority.

III

WHETHER THE PROPOSED DIVERSION IS A BENEFICIAL USE AND IN THE PUBLIC INTEREST.

The Board held the proposed diversion of water is a beneficial use and in the public interest.

IV

WHETHER SDCL 46-6-26 APPLIES AND REQUIRES INVESTIGATION OF WELLS AND NATURAL SPRINGS

SDCL 46-6-26 does not apply; it is undisputed that the aquifer at issue is not the type of aquifer addressed in SDCL 46-6-26.

V

WHETHER THE PROPOSED WELL WOULD PRODUCE WATER FROM MORE THAN ONE AQUIFER AT THE SAME TIME.

The Board authorized the proposed well from the Codell Aquifer and imposed stringent well construction requirements so that the well does not interconnect with any other aquifer.

VI

WHETHER THE LONGVIEW SITE IS LOCATED OVER A SHALLOW AQUIFER.

The Board considered all expert testimony and held that the Longview site is not located over a shallow aquifer.

STATEMENT OF THE CASE

A. *Prior Case*

In 2008 the Board issued a declaratory ruling, finding that Longview's use of water for a swine operation was a domestic use. The Circuit Court overturned the Board decision and ruled that Longview's use of water for washing its facilities, for animal hygiene, and for workers' restrooms was not a domestic use under the "stock watering" provision and required a water permit. The 2008 case is final. The present case is a separate case arising from Longview's new water permit application.

B. *Current Proceeding*

Longview filed its application for a water permit in July 2010. AR 1-10. The DENR, headed by Chief Engineer Garland Erbele, reviewed the application. AR 11-17. The Chief Engineer is the trained licensed professional engineer with authority to review and making nonbinding recommendations to the Board. SDCL 46-2A-2; SDCL 46-2A-3. On August 27 James Goodman, a registered professional engineer in the DENR, issued a report reviewing the application and the aquifer involved (Codell Aquifer) and discussing the hydrology and the availability of water. AR 11-16. The Chief Engineer recommended approval subject to the following qualifications:

> The well approved 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.
>
> The well authorized by Permit No. 7206-3 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.

Permit No. 7206-3 is subject to compliance with requirements of the Department's Water Pollution Control Permit issued pursuant to SDCL §§ 34A-2-36 or 34A-2-112 for concentrated animal feeding operations.

Permit No. 7206-3 is subject to compliance with all existing and applicable Water Management Board Rules, including but not limited to:

Chapter 74:54:01 Ground Water Quality Standards;
Chapter 74:54:02 Ground Water Discharge Permit;
Chapter 74:51:01 Surface Water Quality Standards;
Chapter 74:51:02 Uses Assigned to Lakes;
Chapter 74:51:03 Uses Assigned to Streams; and
Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions.

AR 17.

Hearing was set for October 6. Notice was published on September 8 and September 15, 2010, in the Wagner Post. AR 92-93. The notice established a deadline for intervention and provided that if any party sought a delay, the hearing would automatically be delayed. *Id.* On September 2, 2010, the Notice was mailed to Longview and to counsel for the parties that had participated in the 2008 proceeding: Rebecca Kidder (counsel for YST) and Harold Shepherd (counsel for Judy Honimichl, Faith Spotted Eagle, Sharon Drapeau, Glenn Drapeau, Kip (Spotted Eagle) Collins, and Wesly Hare). AR 29.

On September 24, 2010, YST intervened. AR 40-52. On September 27, a *pro se* petition was filed jointly by Faith Spotted Eagle, Judy Honimichl, Sharon Drapeau, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins. AR 94-110. Timely petitions to intervene were also filed *pro se* by Ms. Joan Olive, Sr.

Patricia Mylott, and Ms. Eva Bruguier. AR 38-39, 90-91. Each petitioner sought an automatic delay of the evidentiary hearing.

The evidentiary hearing was delayed. AR 111. A procedural order was established naming Board member Rodney Freeman as Prehearing Chairman to resolve prehearing disputes. AR 123, 219-21. On October 18, 2010, the Procedural Order was sent to all parties along with a copy of the Goodman Report, the Chief Engineer's Recommendation, the affidavit of publication, each of the petitions to intervene, and documents entitled "Procedure for Hearings before the Water Management Board" and "Summary of South Dakota Water Laws and Rules." AR 123-221.

On November 22 Harold Shepherd sought admission *pro hac vice* as counsel for the six petitioners (Spotted Eagle, *et al.*). AR 451-54. YST attorney Kidder filed a Notice of Appearance as local counsel for them. AR 484.

On November 29 attorney Kidder withdrew. AR 502. Charles Abourezk filed a Notice of Appearance on behalf of YST (and as local counsel for Spotted Eagle, *et al.*) and requested a delay of the evidentiary hearing. AR 503, 521. Prehearing Chairman Freeman granted the request and a notice was issued scheduling the evidentiary hearing for March 10, 2011. AR 518-21.

On January 24, 2011 Jon LaFleur filed a Notice of Appearance for YST. AR 543.

On January 25 Harold Shepherd withdrew as counsel for Spotted Eagle, *et al.* AR 546-549. Ms. Spotted Eagle filed an e-mail request, seeking a delay to find new counsel. AR 554-55. Prehearing Chairman Freeman granted the

continuance and the hearing was rescheduled for July 13-14, 2011. AR 561-62. Notice was sent to all parties. AR 558-62. Over Longview's objection, the full Board affirmed the July 13 hearing date and an order was sent to all parties on March 22. AR 563-75. On June 29 DENR sent a notice to all of the parties[1] reminding them of the July 13-14 hearing date. AR 611-13.

Hearing was held from July 13-15. The DENR, Longview, and YST appeared and presented testimony. The other intervenors did not appear.

At the end of the hearing, the Board voted to grant the application, subject to qualifications recommended by the Chief Engineer. HT 371, 377.

Following hearing, undersigned counsel received an e-mail that Faith Spotted Eagle had sent on July 13 stating that Spotted Eagle would be unable to attend the hearing. AR 619-27. Ms. Spotted Eagle did not seek a delay and, in any event, the e-mail was discovered after the hearing. AR 619. Spotted Eagle had previously e-mailed Prehearing Chairman Freeman, Board Counsel, and other parties (AR 554-55), but did not sent this particular email to them.

Notices were subsequently sent to all parties, including Ms. Spotted Eagle (and other individuals who intervened but did not appear) explaining that each party was entitled to file proposed Findings of Fact and Conclusions of Law and scheduling final Board consideration for October 5, 2011. AR 628-30. Longview filed its proposals on September 15 and sent them to the same individuals. AR 632-52. DENR filed a response on September 21 and mailed it to the same people. AR 653-55. YST filed its responses on September 26. AR

[1] This notice was not sent to Judy Honimichle since previous notices had been returned by the U.S. Postal Service as undeliverable. AR 613.

656-77. Neither Ms. Spotted Eagle nor any of the other parties filed objections or proposed Findings of Fact or Conclusions of Law.

Board Counsel sent proposed rulings to the Board (and the parties) on September 29. AR 681-721. The Board issued its final decision on October 5 and Final Notice was given on October 7. AR 761.

STATEMENT OF FACTS

Longview's application seeks authority to appropriate 30 gallons per minute (gpm) from the Codell Sandstone Aquifer ("Codell") for use at a swine farrowing operation. AR 1-10.

Longview had a well drilled in 2008, but it collapsed. HT 49. Under the present application Longview will either have the 2008 well redrilled and cased with stainless steel or it will permanently plug the 2008 well[2] and drill a new one. HT 50-52, 55, 58. Based on the 2008 experience, it is possible that the proposed water well will only produce around 15 gpm when completed. HT 60. The completed well would ultimately be licensed for the rate that the well produces, up to the 30 gpm. AR 812-13(FOF 33-34).

The Codell is confined and under artesian conditions at the proposed well location. AR 11 (Goodman report). To use water, the well would need to be 570-620 feet deep. *Id.* The aquifer contains around 1.45 million acre-feet of recoverable water and extends into Douglas, Hutchinson and Bon Homme Counties and into Nebraska. *Id.*

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[2] Following the collapse, the well was temporarily plugged pending the outcome of the new application. HT 330,339.

The Longview well would be about 4.5 miles north of Marty. AR 5. There are no nearby water permits/water rights that obtain water from the Codell. AR 12. In fact, the only other water right from the Codell in Charles Mix County is for the Clearfield Colony about 20-25 miles away from the Longview site. AR 12; HT 24. At one time Geddes, Ravinia, and Lake Andes used Codell wells, but they now get water from the Randall Rural Water System ("Randall"). HT 24, 32. Randall uses water from the Missouri River. HT 343.

While there is only one other permit from the Codell in Charles Mix County, there are many domestic wells throughout the county. HT 28. Two Codell domestic wells lie about 1.5 miles northwest and northeast of the Longview site. AR 5.

Longview currently relies solely on water from Randall. HT 115-16. The proposed use from the Codell would offset part of the Randall use. HT 122-23. Longview has a dual plumbing system whereby water from Randall can be used together with water obtained from the proposed well. *Id.* Longview's system includes a 70,000 gallon cistern that holds a three-day supply. *Id.* By using the cistern, the system would routinely use both well water and rural water. *Id.* The three-day supply would avoid risk if Randall should shut down, or during extreme hot days calling for large amounts of water. HT 115-17, 126. Longview can refill the tank or cistern during off-peak hours. HT 126. The cistern would also enable Longview to limit its use of water from the Codell to mitigate effects to domestic users if necessary. *Id.*

At the time of hearing in mid-2011, Longview had been in operation for about 2.5 years. HT 118. It has 13 employees and its lowest wage is $9.50 per hour, plus benefits, including health care. Id. Longview purchases materials in Charles Mix County, having paid over $2.5 million to the local co-op and other vendors over a two-year period. HT 120-21.

Based on expert evidence concerning the Codell, the Board concluded that there is water available in the aquifer for Longview's water use. AR 812-17 (FOF 33-62); AR 829-30(COL 10-18). As part of this analysis, the Board determined that, based on the best information reasonably available, the quantity of water withdrawn from the Codell Aquifer annually would not exceed the quantity of the average annual recharge of water to the aquifer. AR 816-17 (FOF 54-62); AR 829-30 (COL12-17).

The Board also found that the proposed water use would not be likely to impair existing rights (particularly when qualified as proposed by the Chief Engineer). AR 814-17 (FOF 48-66); AR 830-32(COL 19-29). The Board further found that the water use is in the public interest, and is a beneficial use of water. AR 818-23(FOF 67-99); AR 832-35(COL 30-45). The Board authorized the permit. AR 836-38(COL 51; Final Decision). Additional facts are set forth below as they apply to the issues raised.

LEGAL ARGUMENT

Standard of Review

The standard of review is in SDCL 1-26-36. To prevail, Appellants must show that their substantial rights were prejudiced *and* that one of the six

violations in SDCL 1-26-36 occurred. *Ashland v. South Dakota Department of Labor Unemployment Ins. Div.*, 321 N.W.2d 103, 105 (S.D. 1982). Although both YST and Spotted Eagle, *et al.* claim tribal reserved water rights are affected, their rights have not prejudiced; qualifications placed on the permit would protect such claimed rights. That issue is addressed more fully in Issue II below.

The second part of the standard hinges on whether the issue being considered is a question of law or fact. Questions of law are fully reviewable. *Island v. Department of Corrections,* 1996 S.D. 28, 545 N.W.2d 201 (1996). Mixed questions of fact and law that "require the application of a legal standard" are fully reviewable. *Abild v. Gateway 2000, Inc.*, 1996 S.D. 50, 547 N.W.2d 556 (1996). If, however, the issue involves a question of fact or is "essentially factual," it is reviewed under the "clearly erroneous" standard. *Rios v. South Dakota Department of Social Services*, 420 N.W.2d 757 (S.D. 1988). Questions that are "essentially factual" are those that involve the exercise of judgment about values underlying legal principles. *Id.* Factual issues are subject to the "clearly erroneous" standard and the agency's determinations are given great weight. *Fair v. Nash Finch Co.*, 2007 S.D. 16, 728 N.W.2d 623. Findings must be reviewed in light of the totality of the evidence in the record. *Matter of Ottertail Power Company*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602. A court is not to overturn the Board's findings unless it is "definitely and firmly convinced that a mistake has been made." *Id.*

I

THE BOARD PROPERLY CONSIDERED THE BEST EVIDENCE REASONABLY AVAILABLE AND HELD THAT THE PROPOSED PERMIT WOULD NOT CAUSE THE TOTAL ANNUAL WITHDRAWALS TO EXCEED THE CODELL'S ANNUAL RECHARGE.

YST claims the Board failed to consider the "best evidence reasonably available" to examine recharge to the Codell.[3] This is a factual issue. As such, the Board's findings cannot be overturned unless the Court is "definitely and firmly convinced that a mistake has been made." *Ottertail*, 2008 S.D. 5 at ¶ 26, 744 N.W.2d at 602.

More specifically, SDCL 46-6-3.1 provides that a water permit cannot 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."[4] (emphasis added). The Board found that it considered the best evidence reasonably available. AR 816 (FOF 59). The Board then considered all evidence submitted by the several experts and

[3] Appellants Spotted Eagle, *et al.* also raised this issue. Under SDCL 1-26-17(6), they forfeited their due process rights when they failed to appear at hearing and that includes their right to appeal. See also, *Brown v. Arkansas State Hearing, Ventilation Air Conditioning and Refrigeration* 984 S.W.2d 402 (Ark. 1999). When considering that they presented no evidence whatsoever and failed to file proposed Findings of Fact, they cannot complain that not enough evidence was presented or that the Board ruled on the wrong evidence. And at a minimum, they are bound to the Board Findings of Fact since they failed to file proposed Findings. *Enger v. FMC*, 2000 S.D. 48, 609 N.W.2d 132.

[4] Only one South Dakota Supreme Court case has addressed SDCL 46-6-3.1. The Court found an exemption applied and did not consider the "best available information" issue. *Matter of South Lincoln Rural Water System*, 295 N.W.2d 743, 746 (1980).

concluded that granting the permit would not cause the total quantity of water withdrawn from the aquifer to exceed the average annual recharge. AR 830(COL 16).

DENR expert Goodman and Chief Engineer Erbele testified about the Codell. Goodman has over 35 years of experience in groundwater issues and holds a degree in geological engineering from the School of Mines. DENR Ex. 2. Both he and Chief Engineer Erbele testified about the size and extent of the Codell, its lithology[5], and history of water withdrawals and discharges, including the extent of use of the aquifer and recharge. HT 331-36 (Erbele); HT 17-46 (Goodman).

Data from two DENR observation wells was considered. Using long term water levels from observation wells is a common way to look at whether an aquifer is being mined without spending an inordinate amount of money doing recharge studies for each individual aquifer. HT 288.

The data from the two DENR wells is representative of the overall level of the aquifer over time. HT 23-24. Use of the observation wells is not only common and practical, it comports with the Board's administrative rule requiring observation well data to be used for this purpose:

> 74:02:05:07. When regulating water withdrawals by large-capacity wells and in determining the availability of unappropriated water for an application for a permit to appropriate water, the board shall rely upon the record of observation well measurements in addition to other data to determine that the quantity of water withdrawn

[5] Lithology is a description of the dominant characteristics of the rock units or sediment layers below the surface and their makeup i.e. clay, sand, boulders, etc. HT 287

annually from the aquifer does not exceed the estimated average annual recharge to the aquifer.

Observation well records are important because they are used only for measurements and not producing water. They show the static water level and reflect a true measurement of water levels. There are over 25 years of measurements. AR 13-14 (Goodman Report). Data from the wells show response to climatic conditions and annual fluctuation due to pumping. AR 11. The records show the aquifer is not subject to an overall decline over the period of record. *Id.* One of the wells shows a general rise in water levels since it was drilled in 1987. AR 13. These well are 23 and 25 miles from the Longview site, but they are representative of the situation in the aquifer as a whole. HT 23-24. The question at issue is the effect on the aquifer as a whole, and this observation well data is valuable for that purpose.

In addition to the DENR wells, DENR relied on a Corps of Engineers observation well about two miles east of the Longview site. HT 22-23. The Corps measured it from 1952 to 1970 and turned it over to the state for monitoring from 1982-1993. *Id.* There was very little change in the measurements for this well between 1952 and the period from 1982-1993. *Id.* The water level record, including the DENR observation wells and the Corps well, shows the Codell is capable of sustaining additional withdrawals. AR 11.

Goodman also reviewed the extent of water use from the Codell Aquifer. HT 24; AR 11. There is only one other permit for this aquifer in Charles Mix County, and it is Clearfield Colony. HT 24. Geddes, Ravinia and Lake Andes

once used the Codell, but no longer do so. AR 12; HT 24, 32. There is little water use from the Codell other than domestic use. HT 24.

There may be 200-300 domestic wells in Charles Mix County in this aquifer. HT 28. Domestic uses are generally smaller uses, i.e., less than 18 gpm. SDCL 46-1-6 (7). Because permits are not required for domestic wells (SDCL 46-5-8), use is not reported to the DENR. HT 46. However, the Randall water system was installed within the last 20 years and it also provides water to subscribers in Charles Mix County. HT 24, 32. The overall domestic use from the Codell is relatively insignificant in terms of the quantity of water. HT 24, 28. If there was extensive demand on the aquifer due to large numbers of domestic wells, the usage would show up in the observation wells as an ongoing general decline regardless of climate. That has not occurred. AR 11.

That is not to say that domestic use is disregarded.[6] Goodman reviewed a survey of well data for Charles Mix County. This information was collected in the 1960s and 1970s as part of the work done for the "county studies" or geology reports for various counties undertaken by the United States Geological Survey (USGS) and published by the South Dakota Geological Survey. HT 21, 30. This data includes a list of wells, locations, depths, geologic formations,

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[6] Domestic use "is the highest use and takes precedence over all appropriative rights if it is exercised in a manner consistent with public interest." SDCL 46-1-5. The Longview water use must be curtailed if it causes adverse impairment in adequate domestic wells. The permit requires as follows: "The well owner under Permit No. 7206-3 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." AR 837 (Final Decision).

and, water level measurements if taken at the time of the survey. *Id.* This data is also in a 1995 report published by Kathy Nietzert. Id.

The YST petition to intervene referred to information on domestic wells. AR 46. It was the same data obtained in the 1960s and 1970s that was published by the USGS. HT 30,31. Goodman had reviewed the data in developing his report (albeit in a different format). *Id.* In reviewing the data in the format referenced by YST, he did not find anything to change his opinions. *Id.* At hearing YST also submitted an exhibit using part of the USGS data addressed above. YST Ex. 6. The exhibit does not show the source of the water for any of the listed wells (i.e. whether they are from the Codell) and does not quantify the extent to which they are used at present. *Id.*

There is no specific study quantifying the annual recharge in the Codell. HT 342-43. As noted above, a recharge study would be very expensive and it is common to use observation wells instead. Id., HT 288. But the Codell has otherwise been studied in detail. Goodman relied on two studies: Hedges, L.S. et al., 1982, *Evaluation of Ground-Water Resources Eastern South Dakota and Upper Big Sioux River, South Dakota and Iowa,* a study for the Army Corps of Engineers by the South Dakota Geological Survey; and Kume, J., 1977, *Geology and Water Resources of Charles Mix and Douglas Counties, South Dakota,* Part II Water Resources, Bulletin 22, South Dakota Geological Survey. AR 12. The 1960's and 1970's data referenced above was gathered as part of these studies. HT 21, 30. YST witness Rahn acknowledged that the Hedges report is "a great report by the state survey, I credit them for that." HT 221.

Rahn himself relied on the Hedges and Kume reports and stated found them to be "quite valid." *Id.*

These studies examine the areal extent, depth, and quantity of water in the aquifer. Based on the Kume study, the Codell Aquifer begins 570 to 620 feet below the surface. HT 21. The Codell underlies about 1,134 square miles in Charles Mix County and has an estimated storage of about 1.45 million acre feet of recoverable water. *Id.* The aquifer extends into Douglas, Hutchinson, and Bon Homme counties and into Nebraska. HT 21-22; AR 16 (aquifer map).

By contrast, the Longview request is for 30 gpm, basically the same amount that would be used in a farm well. HT 332. The Chief Engineer testified that the 30 gpm is almost insignificant when considering an aquifer that extends over four counties and into Nebraska. *Id.*

Goodman concluded that the aquifer is capable of sustaining additional withdrawals. AR 11. Chief Engineer Erbele agreed that the withdrawal of water would not exceed the recharge rate. HT 336. Both testified that they had considered and presented the best information reasonably available to the Board. HT 28-29, 33 (Goodman); HT 336, 340 (Erbele).

The Board properly found the foregoing information to be the best information reasonably available. AR 816-17(FOF 54, 59). The Board further found "it would cost an inordinate amount of money and time to do a recharge study for each individual aquifer within the State of South Dakota." AR 816(FOF 57).

YST seeks to require a heavier burden, but the "best information reasonably available" standard applies under SDCL 46-6-3.1. This standard is also consistent with the mission of the water rights law which is to put water to the maximum beneficial use[7] given the arid climate in South Dakota. SDCL § 46-1-4. Reserving water in an aquifer and keeping it from being applied to maximum beneficial use (as the YST is suggesting) is inconsistent with SDCL § 46-1-4. See also, AR 833 (COL 37). The Board's decision should be affirmed.

II

THE PROPOSED DIVERSION CAN BE DEVELOPED WITHOUT IMPAIRMENT OF RIGHTS (INCLUDING *WINTERS* RIGHTS).

YST claims that its water rights were not sufficiently reviewed and protected.[8] The YST rights were, however, reviewed, considered, and protected.

A. *Impairment of Existing Water Uses*

DENR witness Goodman explained that the tribes generally do not obtain permits from the state, so when he reviewed the application he considers not only any records and permits filed with the state, but also any information that he can get from the tribe. HT 36. After he filed his report, YST intervened and

[7] Under SDCL 46-1-6(3) beneficial use is "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 interest of the public of this state in the best utilization of water supplies." The Board weighed the competing evidence and found that the application of water use for Longview is a beneficial use.
[8] Appellants Spotted Eagle, *et al.* raised essentially the same issue (Spotted Eagle Issues 1 and 2). Like the foregoing issue, these Spotted Eagle claims should be barred or limited due to their default or waiver. See footnote 3.

referred to data[9] and Goodman considered it. HT 31. Goodman also considered the studies and well data referenced above. HT 24, 30-31; AR 11-12.

Goodman also reviewed the 2008 driller's log from the well that had been drilled by Longview's driller. HT 31. Although the well collapsed, the log provides data about the lithology and water pressure at the site. HT 21, 37. It shows that the Codell is a formation 32 feet thick at this site. HT 31. The water rises in the well casing about 100 feet under its own pressure (from 573 below the surface to 470 feet below the surface). *Id.*

The Longview well itself would produce about one to three gpm per foot of drawdown. HT 25. That means the "the worst you would expect is 30 feet of drawdown in the production well, maybe 10 feet, somewhere between 30 and 10. That would not extend very far away from the production well" and he "would not anticipate anything adverse happening at all" to other water users in the area. HT 25 (Goodman).

While James Goodman, a credible professional with many years of experience, found that there would *not* be impacts on area wells (and the Chief Engineer agreed), the Chief Engineer also acted out of an abundance of caution and proposed a qualification that protects adequate domestic wells:

> The well approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. .The well owner under this Permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.

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[9] The data is the USGS list of wells addressed above and it was duplicative of other information that Goodman had already reviewed. HT 31.

AR 17.

The Chief Engineer testified that the effects on area wells were considered, including any potential impact on the reservation. HT 331. The qualifications that he recommended would protect existing and future domestic wells both on and off tribal property.

The Board accepted this approach. It found that there would not be an impairment of existing rights, but also adopted the proposed domestic use qualification. AR 837 (Final Decision). Under SDCL 46-1-14, the Board may issue any permit or license "subject to terms, conditions, restrictions, qualifications, quantifications or limitations" which it considers "necessary to protect the public interest and which are related to matters within the jurisdiction of the board." *See also DeKay v. United States Fish and Wildlife Service,* 94 SDO 1075, 1078, 524 N.W.2d 855 (S.D. 1994) (holding that claims of damage to property were "misplaced" in light of a water permit qualification protecting against such an event). The qualification protects adequate domestic wells from interference (no matter how unlikely), effectively resolving any claims of impairment to existing nearby wells.

Further, neither of the Appellants advanced any credible testimony that any other wells in the area will be affected, let alone adversely impaired. Spotted Eagle, *et al.* fail to present any testimony whatsoever.

YST claimed in its Petition to Intervene that there was information on the number of wells that DENR had not reviewed. AR 46. But once YST provided this reference, Goodman reviewed it and found it was the same as information

he already had and that the wells involved would not be impaired by the Longview use. HT 30, 31.

At hearing YST witnesses testified that they had conducted field visits and had found other wells. Dr. Rahn found an abandoned well one-half mile from the proposed site. HT 213, 241. He did not even suggest that Longview's well would draw down water in this abandoned well or that it was in the Codell aquifer. Dr. Rahn also found springs, but they are from "stagnation moraine" not the Codell. HT 210.

Tribal official John Stone testified that he had found 200 wells that were not on anybody's database, i.e., undocumented unregistered wells. HT 255. The majority are abandoned. HT 281. He did not have his well inventory sheets with him to say where they were. HT 267-68.[10] He testified that the tribe itself owns 37,600 acres (the entire area of the current reservation) and that it has about twelve wells, some of which are used and some of which are not. HT 271, 275-77. He refused to answer how many of these wells obtain water from the Codell. HT 276-77. DENR submits that if the well inventory sheets or Stone's knowledge of the tribe's water use would have supported the YST position, Stone would have been more forthcoming. The adverse inference rule applies. It should be inferred that the well inventory data and the information concerning the extent of use of YST's wells, which was within the sole possession of YST's witness and not disclosed prior to hearing, would not

[10] Stone did not testify as to hydrology or the impacts of Longview's proposed water use on these other wells. His testimony related to the proximity of the wells to Longview's waste system.

support the YST position. *Matters v. Custer County*, 95 SDO 589, 538 N.W.2d 533 (S.D. 1995).

B. *Winters Rights*

Appellants also claim that the Board failed to consider Indian reserved water rights[11] under *Winters v. United States*, 207 U.S. 564 (1908).

By way of background, *Winters* arose from a dispute concerning the Fort Belknap treaty in Montana. Even though the treaty contained no language regarding water rights, the Court read the 1888 treaty as impliedly reserving surface water to irrigate reservation lands to support the purpose of the treaty (converting the nomadic civilization to an agrarian one). *Id.*

After *Winters* was issued, reservations have routinely been held to come with reserved federal water rights to surface water. In appropriative rights states like South Dakota, the priority date for *Winters* rights is generally the date of creation of the reservation, regardless of the date the water is put to beneficial use. *Arizona v. California*, 373 U.S. 546, 600 (1963).

Insofar as the YST is concerned, there was an 1858 treaty and a later 1894 agreement. The latest federal court decision indicates that the reservation has been severely diminished. *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010). The latest state court decision goes further and indicates disestablishment. *Bruguier v. Class*, 599 N.W.2d 364, 378 (S.D.

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[11] To clarify, Longview's swine facility is not on an Indian reservation. *Yankton Sioux Tribe Head Start Concerned Parents v. Longview Farms*, No. 08-4058 (D.S.D. Memorandum Opinion and Order filed March 31, 2009). YST lacks jurisdiction to regulate the hog facility. *Id.* And YST does not purport to do so in this case.

1999). The United States Supreme Court has declined the opportunity to finally resolve the question but both the Eighth Circuit and State Supreme Court agree that most land within the former Yankton Reservation boundaries is not, today, reservation or "Indian country." Although there has been extensive litigation regarding these matters, this litigation has not involved the status of tribal reserved water rights under *Winters*. *Id.*

YST's reserved water rights have not been quantified. HT 335. The Board held, however, that to the extent that there are reserved water rights for the YST under the *Winters* doctrine, they would hold a senior priority date:

> If a court of competent jurisdiction determines that the Winters Doctrine applies to groundwater claims of the Yankton Sioux Tribe and if those rights are quantified, the Yankton Sioux Tribes' priority date for its rights would date back to the treaty establishing the Yankton Sioux Tribe's reservation. This Board does not purport to adjudicate the question of whether the Yankton Sioux Reservation's diminished status would affect the quantification of the Winters Rights. Such a right, if any, would be senior in priority to the present application.

AR 832 (COL 28).

The Board properly recognized that the reserved water rights issue should not be addressed in this proceeding which applies only to a single off-reservation groundwater use of up to 30 gpm by a non-member. This ruling is appropriate for several reasons.

First, there is a separate process for YST to quantify its reserved water rights if it chooses to do so. SDCL provides for adjudications of competing rights to water. SDCL ch. 46-10. Generally such adjudications involve considering all the competing rights from an entire water basin. YST has not

asked for or attempted to initiate such an adjudication. In the present matter YST really seeks to stop the Longview operation, but does not seek an adjudication of its own reserved water rights.

Indeed, these adjudications are costly and time consuming. South Dakota initiated an adjudication of the waters in the Missouri River basin in 1980 but for budget reasons the case was dismissed in 1983. Guhin, John P., *Law of the Missouri,* 30 S.D. L. Rev. 346, 471 n.772 (1985); *In re: General Adjudication of All Rights to Use Water and Water Rights on Missouri River, State of South Dakota* (6th Judicial Circuit October 5, 1983) (Civ. 80-100).

Second, an alternative would be to quantify the tribal reserved water rights through a settlement process. There have been settlements elsewhere. *Indian Reserved Water Rights,* 9 Am. Indian L. Rev. 435-36. The federal government is typically involved as a trustee of Indian resources, as the administrator of irrigation or other water projects, or both. *Id.* The settlements themselves are often complex and include a number of side issues for water planning and administration of water, including economic development packages. *Id.* at 437. These settlement agreements generally follow the bringing of an action in court to adjudicate all of the waters in a basin or area and generally call for approval by Congress as a predicate to their effectiveness. Id. No settlement has been sought by YST. As stated, YST is not seeking certainty in its own water rights in this case, but is attempting to use its possible claims (albeit unquantified) to defeat Longview's use of only 15-30 gpm from an abundant groundwater supply.

Third, quantifying YST's claims is not a small matter and would not automatically result in tribal control of the Codell. The *Winters* Doctrine has spawned a number of complex issues in courts elsewhere that have not been decided in South Dakota. Among the many issues are: (a) whether or to what extent the doctrine applies to groundwater; (b) the status of reserved water rights within the remaining "Indian country" in disestablished or diminished reservations; (c) the method of quantification for the water at issue and (d) the extent and nature of any reserved water right.

The issue of whether groundwater is subject to the reserved water rights doctrine has not been uniformly addressed elsewhere. *See* Eric Spade, Comment, *Indian Reserved Water Rights Doctrine and the Groundwater Question,* 19 Am. Indian L. Rev. 403 (1994).

For example, *Winters* rights do not apply to groundwater in Wyoming. *In Re Rights to Use Water in Big Horn River,* 753 P.2d 76, 99 (Wyo. 1988), *aff'd,* 492 U.S. 406 (1989). In Arizona, groundwater rights may be used to satisfy at least some *Winters* claims because "some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping of underground water." *In Re General Adjudication of All Rights to use Water in the Gila River System* 989 P.2d 739, 745-47 (Ariz. 1999). In other words, the Arizona court held that a reserved water right to groundwater may be found *only* if other waters are inadequate to accomplish the purpose of the reservation. The closest U.S. Supreme Court decision to address this issue was *Cappaert v. United States,* 426 U.S. 128, 142 (1976) and the Court did not

address the question of whether groundwater itself is subject to the *Winters* doctrine. Based on the foregoing, the claims of YST to groundwater are not certain. Indeed, due to the abundance of water in the Missouri River to satisfy any *Winters* rights held by YST, the YST claims to groundwater are very uncertain.

Another issue is the status of reserved water rights (or the applicability of treaty-based priority dates) insofar as diminished or disestablished reservations are involved. This depends on the treaty or federal agreements, surplus lands acts or other applicable federal statutes as well as the title history of the land at issue (i.e. whether the water claim is derived from title to land held by the tribe or tribal members pursuant to a treaty or allotment act). *See, e.g., In Re Rights to Use Water in Big Horn River*, 899 P.2d 848, 854, 855 (Wyo. 1999).

Yet another issue is the method for quantifying the tribal water right at issue. As YST's brief recognizes, courts have held the quantification is to be based on the amount of water needed to serve the reservation's "practicably irrigable acreage" (PIA). YST Brief at 11. YST also refers to another Gila River adjudication decision using a more liberal standard. *In Re General Adjudications of All Rights to use Water in the Gila River System*, 201 Ariz. 307, 315, 35 P.3d 68, 76 (2001). The reason for using this standard in Arizona was that "the PIA standard works to the advantage of tribes inhabiting alluvial plains or other relatively flat lands adjacent to stream courses" as opposed to "tribes inhabiting mountainous or other agriculturally marginal terrains." *In*

Re Gila River System, 35 P.3d at 78. Charles Mix County, of course, lies along the Missouri River and YST does not inhabit mountainous or agriculturally marginal terrain. The PIA standard, not that set forth in *Gila River,* presumably applies. Regardless, YST offered no testimony as to how much water it uses or would use under either standard.

The Board properly issued the Longview permit, but held that the permit was junior to YST *Winters* rights, to the extent that such *Winters* rights are later held to exist. AR 831-832 (COL 23-28). To do otherwise would be to call a halt to all appropriations in this area and initiate time consuming litigation of all waters in the basin to resolve the YST single issue.

YST claims that all appropriations must be halted based on *Sohappy v. Smith,* 302 F. Supp. 899 (D. Ore. 1969). *Sohappy* concerned the extent to which Oregon could regulate hunting and fishing on the Columbia River by tribal members in light of the members' treaty rights to hunt and fish--and whether such state regulations were discriminatory. The permit at issue here does not regulate tribal members, interpret treaty rights, or deal with hunting or fishing. *Sohappy* does not concern water rights.

Likewise, this is not a situation where the State discriminates against tribal members. The DENR considered and addressed protection for all domestic wells including those of tribal members, and it subordinated Longview's permit to YST *Winters* rights to the extent such *Winters* rights are later held to exist.

Likewise the permit for Longview is not uniquely unfavorable to tribal members. There are water permits to use groundwater for many agricultural uses in South Dakota. DENR witness Goodman has testified in 50-60 hearings involving groundwater permits in South Dakota for agricultural purposes, including irrigation, dairies, feedlots, and swine operations. DENR Ex 2. These enterprises are located all over South Dakota. *Id.* And hogs are nothing unusual. YST itself once owned a pork packing plant. *State v. Winckler*, 260 N.W.2d 356 (S.D. 1977).

Further, DENR did not favor Longview to the detriment of YST regarding pollution control. All concentrated animal operations in South Dakota that have a threshold number of animals must obtain coverage under the DENR general permit, a separate process from the water permit process. HT 71-72. There are 405 such entities throughout the state. HT 81 (Woodmansey).[12] These environmental rules apply to all of them. HT 81; DENR Ex. 4 (60 pages of permitting requirements); DENR Ex. 5 (summary).

Longview has been subject to vigorous review under this general permit process. This process includes DENR review of the plans and specifications for the animal waste system. HT 76. The waste storage facility must be sufficient to store all the manure and wastewater at the facility for a minimum of 270 days. DENR Ex. 5, p. 2. Longview must file and receive approval from the DENR to apply manure to nearby lands. DENR Ex. 5, p. 8. Both the waste

[12] DENR Ex. 21 is a map of the facilities as of November 2010. There were five additional new facilities between November 2010 and the hearing in July 2011.

storage facility and manure application sites must be distanced from nearby wells. The waste facilities (lagoons) and manure application areas must be at least 250 feet from private wells and 140 feet from the producer's own well. *Id.*

The General Permit process includes a public notice and comment procedure,[13] inspection of manure pits and facilities during construction, and periodic inspections on an ongoing basis. HT 72-78, 89-90. These and other stringent requirements are detailed in DENR Exs. 4, 5.[14] The head of this program, Kent Woodmansey, testified Longview is in compliance. HT 87-88.[15] The Board did not discriminate against YST.

III

THE PROPOSED DIVERSION IS A BENEFICIAL USE AND IN THE PUBLIC INTEREST.

YST claims that the proposed diversion is not beneficial or in the public interest.[16] DENR relies on Longview to address those issues. In addition to the Longview response, the DENR offers the following.

A. *Consideration of YST Rights*

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[13] The General Permit coverage for the Longview site was advertised in the Wagner Post (DENR Ex. 3) and no written comments were filed. HT 76,77.

[14] During this process the DENR also reviews whether a groundwater discharge permit is required. That criteria is addressed separately in Issue VI.

[15] This approval applies separately from the water permit and Longview may continue to operate under these requirements regardless of whether it continues to purchase water from the Randall system or whether the present permit is upheld.

[16] Spotted Eagle, *et al.* raise similar claims in their fourth and fifth issues, but have forfeited or waived the arguments as discussed in footnote 3.

Among its claims, YST argues that the effect of the Longview project on YST water rights was not considered. YST Brief at 18. The issue of whether the YST water rights were sufficiently protected is addressed in Issue II.

B. *Artesian Head Pressure*

YST claims artesian head pressure should have been considered in light of *Fraser v. Water Rights Commission*, 294 N.W.2d 784 (S.D. 1980).

By way of background, SDCL 46-6-6.1 authorizes the Board to promulgate rules pertaining to large capacity wells for the purpose of "ensuring or protecting water for reasonable domestic use, *without the necessity of requiring maintenance of artesian head pressure in a domestic use well*" and "for minimum construction standards for all wells in South Dakota which standards shall be based upon the ability of a well to produce water *independent of artesian head pressure.*" This law essentially provides that well rules for all sizes of wells [17] should address the ability of wells to produce water *independent of artesian head pressure.*

This statute addresses the practice of domestic water users who obtain water by means of an artesian well flowing to the surface without relying on pumps or who barely tap into an aquifer and rely on water pressure to bring water up to their well or pump. SDCL 46-6-6.1 does not guarantee a domestic user the right to continue to use pressure in this way to deliver the water.

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[17] Wells producing more than 18 gpm are large capacity wells. SDCL 46-1-13(13). Once built, the Longview well may produce less than 18 gpm and the provision pertaining to "all wells" could apply. Either way, rules providing for regulation "independent of artesian head pressure" should be applicable in light of SDCL 46-6-6.1.

Domestic users cannot be denied a water supply but may have to pump water to bring it to the surface. In other words, the law does not guarantee artesian head pressure as a means of delivery of water.

Consistent with SDCL 46-6-6.1 the Board promulgated rules defining "adequate well" and "adversely impacted domestic well." They state:

> (6) "Adequate well," a well constructed or rehabilitated to allow various withdrawal methods to be used, to allow the inlet to the pump to be placed not less than 20 feet into the saturated aquifer or formation material when the well is constructed, or to allow the pump to be placed as near to the bottom of the aquifer as is practical if the aquifer thickness is less than 20 feet;
>
> (7) "Adversely impacted domestic well," a well in which the pump intake was set at least 20 feet below the top of the aquifer at the time of construction or, if the aquifer is less than 20 feet thick, is as near to the bottom of the aquifer as is practical and the water level of the aquifer has declined to a level that the pump will no longer deliver sufficient water for the well owner's needs;

ARSD 74:02:04:20. These rules provide that domestic water users are protected from interference by other users so long as their wells are adequately installed in the aquifer and not dependent solely on artesian head pressure.

In 1980 the Supreme Court held that the Water Commission (predecessor to the Board) was *not* required to "absolutely protect artesian pressure for domestic uses" but "*reasonable* domestic use must be assured before irrigation is allowed." *Fraser*, 294 N.W.2d at 789. (Emphasis added). This balancing is a part of the public interest consideration. *Id.*

The Board did consider artesian head pressure in domestic wells in this case. More specifically, the pressure in the Codell Aquifer in this area is sufficient to cause water to come up in the well casing about 100 feet under its

own pressure (from 573 below the surface up to 470 feet below the surface). HT 31. The worst scenario would be 30 feet of drawdown in the Longview well itself and the result of that drawdown would not extend very far away from the Longview well. HT 25.

Goodman, a scientist with over 35 years in groundwater analysis, reviewed the application (and the information referred to previously) in light of the artesian pressure at issue and testified that he "would not anticipate anything adverse happening at all" to other water users in the area. HT 25 Moreover, Longview's well may only produce 15-18 gpm and the drawdown would be less. The Board properly found that there would be no impairment of existing rights, and within that analysis considered the head pressure issue.

Neither of the appellants advanced any credible testimony that *any* other wells in the area will be affected by a loss of head pressure. As stated previously, Goodman reviewed the same information referenced by YST in its Petition to Intervene. HT 30, 31. At hearing two YST witnesses testified that they had conducted field visits and had found other wells, but the majority are abandoned. HT 213, 241, 281. Neither witness identified the source of these wells (what aquifer they were drawing water from), let alone their head pressure or the effect Longview's use would have. HT 212, 255-277. Witness Stone refused to answer questions about tribally owned water wells. HT 276-77.

Finally, to the extent there are adequately constructed wells nearby that use water from the Codell, Longview must mitigate adverse effects that it causes to them, so long as they are adequately placed into the aquifer and do

not rely solely on head pressure as a means of delivery pursuant to ARSD 74:02:04:20(6).

C. *Risk of Groundwater Contamination*

At the end of its public interest/beneficial use argument, YST noted (in a single sentence) that the Longview facility presents "an unnecessary risk of contamination to groundwater." YST Brief at 19. The YST groundwater contamination issues are addressed in Issue V (well construction requirements) and Issue VI (shallow aquifer/groundwater discharge issue). Further, the proposed use is regulated under the South Dakota water pollution control laws and Longview has adhered to those requirements. HT 87. There is not an unnecessary risk of pollution.

IV

SDCL 46-6-26 DOES NOT APPLY.

YST asserts that SDCL 46-6-26[18] applies and requires more study of existing wells or springs in the area. YST is mistaken as to the applicability of SDCL 46-6-26. It refers back to SDCL 46-6-24.[19] When read together, these

---

[18] 46-6-26 provides that: The Water Management Board or chief engineer pursuant to § 46-1-16 may deny or condition any permit in conformity with § 46-6-24 as is determined necessary to protect domestic wells, municipal wells, or natural springs of this state.

[19] 46-6-24 provides that: The failure of a well to meet standards established pursuant to § 46-6-6.1 is not a defense in any action or proceeding regarding damage, loss of water production or quality, replacement cost, or increased operating expenses incurred by a municipal or domestic use well located in a formation *older than or stratigraphically lower than the greenhorn formation* caused by any person using or withdrawing groundwater for *mine dewatering* in a formation older than or stratigraphically lower than the greenhorn formation (emphasis added).

statutes provide that persons constructing wells *in locations older or lower than the greenhorn formation* and using them for *mine dewatering* are liable if other wells are impaired—even if the impaired wells were not adequately constructed.

The Codell Aquifer is stratigraphically *above* the Greenhorn Aquifer. HT 29 (Goodman). YST's expert acknowledges that to be the case. HT 216. The Board found accordingly. AR 733 (FOF 60). Also, Longview does not seek to use its well for mine dewatering. The stringent liability rule in SDCL 46-6-24 and SDCL 46-6-26 does not apply.

In the absence of the requirement in SDCL 46-6-24, claims of impairment may be defended by showing that the claimant does not have an adequately constructed well. In other words, the water user suffering from decreased water availability cannot look to a neighboring water user for satisfaction if his or her own well is not "adequate," i.e., installed low enough in the aquifer or otherwise properly constructed, and if there is no causal relationship between the two water uses. The Board concluded as follows:

> Domestic water users and those users with prior water rights hold priority over the present Application and their uses would take precedence *if there is an actual adverse impairment of an adequate well.*

AR 831 (COL 21) (emphasis added). The Board properly conditioned the permit so as to protect domestic users against a reduction in water supply if domestic users have adequate wells. AR 837 (Final Decision).

YST also claims DENR did not undertake an exhaustive review of existing rights or springs. As addressed, DENR did consider existing water permits and existing domestic wells. AR 1-12. And if there is any undocumented well or

spring in the immediate area of the Longview site, the Board's "domestic use" condition would protect wells or springs that are used for domestic uses.

In sum, the stringent conditions of SDCL 46-6-24 are not required, more exhaustive review of area wells and springs is not required, and the Board properly protected domestic uses.

V

THE PROPOSED WELL IS SUBJECT TO STRINGENT WELL CONSTRUCTION STANDARDS SO THAT THE WELL WOULD NOT INTERCONNECT WITH OTHER AQUIFERS.

This is a factual issue for which the clearly erroneous standard applies. The issue is whether the well authorized by the permit would be constructed into more than one aquifer. It will not be. Longview must comply with proper well construction standards so well water does not migrate from one aquifer to another. Board rules prohibit wells from being constructed in more than one aquifer. ARSD 74:02:04:34.01. The Board imposed the following condition:

> The well authorized by Permit No. 7206-3 shall be constructed by a licensed well driller and construction for 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.*

AR 837 (Final Decision) (emphasis added). The rule requires bentonite or cement grouting and an Appendix includes a schematic to follow. ARSD 4:02:04:28. The driller will use cement. HT *51.* The specifications for the cement grout is established by rule (ARSD 74:02:04:53) and must be followed. The minimum volumes are those in Halliburton Cementing Tables, a standard driller reference. ARSD 74:02:04:55. The minimum hole size for grouting is in

ARSD 74:02:04:57. These and other technical requirements are used for drilling wells so a well does not serve as a conduit between two aquifers.

YST cites to testimony about exchange of water between aquifers. YST Brief at 21. The referenced testimony simply states that there are two aquifers that may have a natural relationship between each other—*not* that the proposed water well is expected to create such a situation. HT 37-38.

Incredibly, YST argues well construction standards should be followed. That is precisely what the Board ordered. The casing must be pressure grouted around the outside. ARSD 74:02:04:28. The driller intends to do exactly that; he will pump cement around the entire casing from top to bottom. HT 51. There will be no ability for water from the another aquifer to infiltrate the inside of the casing of the well in the Codell. Id. The well will not serve as a conduit from one aquifer to another.

VI

THE LONGVIEW SITE IS NOT LOCATED OVER A SHALLOW AQUIFER.

Appellants argue that the Longview site is located over a shallow aquifer. The Board found that it is not. This is another factual issue for which the "clearly erroneous" standard applies. SDCL § 1-26-36.[20]

A. *Background*

Longview is subject to stringent pollution control requirements. HT 72-78. In addition to the General Permit requirements addressed above, operators

[20] Spotted Eagle, *et al.* have forfeited or waived any such arguments regarding this issue as discussed in footnote 3.

of large confinement operations must obtain a groundwater discharge permit if their facility is over a shallow aquifer. SDCL 34A-3A-24.[21]

In 2007 DENR pollution control officials found that no such shallow aquifer existed under the Longview site. DENR Ex. 11. Upon inquiry by YST, DENR sought and received an independent review from State Geologist Derric Iles. DENR Ex. 14; HT 288-97. He reviewed the material submitted by YST as well as all available information on both the surface and subsurface geology in the Longview Farm area. Id. He concluded that is not a shallow aquifer under Longview's operation. He reviewed geologic mapping, reports and underlying test hole data from the geologic mapping for all the area below the Longview operation including the area below the structural facilities i.e. the barns as well as the land where manure is applied. HT 311-13. Id. DENR did not require a groundwater discharge permit. Longview Ex. 6.

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[21]34A-3A-24. No concentrated animal feeding operation that includes a number of animals equal to or greater than one thousand animal units may be located over a shallow aquifer unless a groundwater discharge permit has been approved in accordance with chapter 34A-2. For purposes of this section, a shallow aquifer is any aquifer having the following characteristics:

(1) The aquifer is within fifty feet or less below the land surface with fifteen feet or less of continuous, overlying, extremely low permeability geologic material, such as clayey till or shale. Weathered till or highly fractured weathered shale is not an extremely low permeability material for purposes of this section; or

(2) The aquifer is greater than fifty feet but less than one hundred feet below the land surface with thirty feet or less of continuous overlying low to extremely low permeability geologic material that may be a combination of weathered and unweathered till, shale, or till and shale. . . .

In the meantime, Longview applied for the present water permit. The Chief Engineer recommended a qualification stating that Longview is subject to compliance with all environmental laws including the groundwater discharge permit requirement. AR 17. While there is no shallow aquifer under Longview's present operations, this would require Longview to obtain a groundwater discharge permit if it changed its plan and operated over a shallow aquifer. The Board found there is no shallow aquifer under the Longview site. AR 823-25 (FOF 102-114). It also adopted the Chief Engineer's recommended qualification. AR 837 (Final Decision).

B. *Shallow Aquifer Evidence*

There are two aquifers below the Longview site, the Codell and Niobrara Aquifers. YST witness Rahn acknowledges that the Codell and Niobrara aquifers are deeper than 100 feet. HT 222 (Rahn testimony). They are around 600 feet and 450 feet below the surface respectively. HT 52,54 (Hutmacher).

It is also undisputed that the there is no shallow aquifer in the area of Longview's breeding and gestation buildings. The driller's log for the 2008 well that collapsed shows there is no shallow aquifer at the well site and the experts agree, including YST's witness. HT 232 (Rahn); HT 302 (Iles); HT 52 (Hutmacher). Indeed, YST witness Rahn does not dispute the lack of a shallow aquifer in the area of Longview's buildings and animal waste system at all, but claims there is not enough evidence to tell if there is a shallow aquifer in the area where animal waste will be spread on the ground. HT 241.

In Rahn's view, either "ablation till" or the Herrick formation might lie under the manure application areas. HT 206, 211. Rahn admits there is no map showing any aquifer within 100 feet of the surface in this area. HT 233.

Rahn does not know the dimensions of the Herrick formation, except to note that it is near the Casino, several miles from the Longview site. HT 206, 208. The independent reports of geologists Kume and Hedges do not show the Herrick in the Longview area. HT 226 (Rahn), 299 (Iles). These reports are more detailed than the Rahn review, are based on on-site test holes and wells, and simply do not show the Herrick in this area. HT 299. Rahn acknowledges the Hedges report is "a great report." HT 221. Further, the underlying data for the Hedges report includes test drilling in the region and this data does not show that the Herrick is under or near the Longview facility, except the outcrops near the surface by the casino that Dr. Rahn referred to. HT 303.

Dr. Rahn also testified that the soils in this area near the casino are "ablation till" left behind by glacial activity. HT 211,222-24. At hearing he testified that this till is permeable and would constitute an "aquitard" or is so permeable that it can contain a sufficient quantity of water to constitute an aquifer. HT 215. His report, however, refers to ablation till as having "low permeability." HT 223. He admits that he testified in another proceeding that there are different kinds of till, but that "ablation till" is "virtually impermeable." HT 225. Rahn also presented a one-page net flow analysis to the Board to "quantify this permeability" of the soil in this area, but admitted he used "just a typical number" for the depth of the formation and it was not

tied to any particular measurement. HT 230. There is no evidence (except Rahn's inconsistent testimony) that the area in question is anything other than low permeability soils, i.e. not an aquifer. HT 302-303

The Board found Rahn's testimony to be vague and ambiguous as opposed to the more reliable and specific testimony of State Geologist Iles.[22] AR 827-28 (FOF 119-23).

Derric Iles used a "first occurrence" map created by the State Geologic Survey to graphically show that there is no shallow aquifer beneath the Longview facility or the manure land application sites. HT 292-97, Ex. 21. This map was created independent of the Longview application; it is one of a series created for counties in eastern South Dakota. HT 292-94, 300-01. It shows the first aquifer below the surface for all areas in the county. DENR Ex. 21. The depth categories on the map match the depth categories in SDCL 34A-3A-24. HT 296. If the first aquifer below the surface is 50 feet or less the map shows one color; if the first aquifer below the surface is 50-100 feet, a different color is used. *Id.* The map is one that a layman can read, but that scientists spent considerable time creating. HT 293-94. The map is based on all available test hole and well reports, published and unpublished reports, other maps, and underlying groundwater studies. HT 292-93. The map shows the first aquifer below the surface for several miles around the Longview site as a very dark green i.e. the Niobrara aquifer at a depth of more than 100 feet below the surface. Ex. 21.

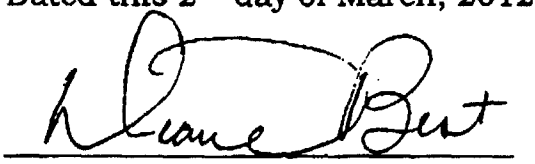
[22] Rahn acknowledges that Derric Iles is an authority on the geology of the eastern part of the state of South Dakota. HT 221.

Iles not only reviewed the map, he evaluated all data available to him as the State Geologist. HT 292,297. He reviewed mapping and studies completed by Kume and Hedges, test hole data and other information such as the 2008 driller's log, soil borings completed by Longview's consultant, and information that YST witness Rahn provided. HT 292, 297-308. He concluded that "when you look at all of the surface and subsurface geologic maps that are available for this particular area, and you look at all the test hole and well data that are available for this area, there can be no other conclusion drawn except that there is not a shallow aquifer under the Longview facility as per the definition of shallow aquifer [in SDCL 34A-3A-24]." HT 297. There is no shallow aquifer under the present Longview operation and the Board ruled properly.

SUMMARY

Based on the foregoing arguments and authorities as well as the Brief submitted by Longview, the DENR submits that the Board's determination should be affirmed.

Dated this 2nd day of March, 2012.



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Re: *Matter of Water Permit Application 7206-3, Long View Farms, L.L.P. (Charles Mix Civ. 11-146)*

Dear Counsel,

Enclosed is a copy of the DENR's Brief in the above referenced matter.

Sincerely,

Diane Best

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March 2, 2012

Honorable Bruce Anderson
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Re: *Matter of Water Permit Application 7206-3, Long View Farms, L.L.P. (Charles Mix Civ. 11-146)*

Dear Judge Anderson,

Enclosed for your consideration is the original DENR Brief in the above referenced matter.

Sincerely,

Diane Best

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Re: *Matter of Water Permit Application 7206-3, Long View Farms, L.L.P. (Charles Mix Civ. 11-146)*

Dear Ms. Pfeffer,

Enclosed for filing is the Certificate of Service showing service of the DENR Brief in the above referenced administrative appeal. Consistent with the usual practice, I sent the original Brief to Judge Anderson and have not filed it with your office.

Sincerely,

Diane Best
Assistant Attorney General

cc:
Jon LaFleur
Eric Kerkvliet
David Nadolski
Thomasina Real Bird
Tracy Zephier

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF CHARLES MIX	)	FIRST JUDICIAL CIRCUIT
IN THE MATTER OF WATER PERMIT APPLICATION No. 7206-3, LONG VIEW FARMS, L.L.P.	)))	(CIV 11-146) CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the DENR Brief *In the Matter of Water Permit Application No. 7206-3, Long View Farms, L.L.P.* was served upon each of the following by enclosing the same in envelopes with first class postage, prepaid and affixed thereto, and depositing said envelopes in the United States mail, at Sioux Falls, South Dakota, on this 2nd day of March, 2012:

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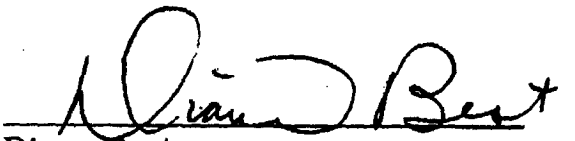

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STATE OF SOUTH DAKOTA COUNTY OF CHARLES MIX	) : SS)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
IN THE MATTER OF WATER PERMIT APPLICATION NO. 7206-3, LONGVIEW FARMS, LLP		CIV. 11-146 **MEMORANDUM DECISION**

The court has under consideration an appeal from the Water Management Board's (WMB) decision granting water permit application no. 7206-3.[1] Several individuals[2] and the Yankton Sioux Tribe (YST) (Intervenors) formally intervened in the permit process opposing the application. The WMB held a hearing on July 13-15, 2011. Following a three day hearing and after receiving a significant amount of evidence on the matter, the WMB voted unanimously to approve the permit application. Intervenors now appeal that decision to this court pursuant to SDCL § 1-26-30.2.[3] The court held oral arguments for this appeal on April 23, 2012 at the Charles Mix County Courthouse. Appearing on behalf of Longview Farms, LLP was its attorney, Eric Kerkvliet of Lynn, Jackson, Shultz & Lebrun from Sioux Falls, SD. Appearing on behalf of the DENR was Diane Best, South Dakota Assistant Attorney General. Appearing on behalf of the YST and individual Intervenors was attorney Tracey Zephier of Fredericks, Peebles & Morgan from Rapid City, SD.

STANDARD OF REVIEW

[1] The WMB is a quasi-judicial and quasi-legislative board within the Department of Environment and Natural Resources (DENR) consisting of seven members appointed by the governor.
[2] Individual intervenors are: Faith Spotted Eagle, Glenn Drapeau, Eva Bruguier, Judy Honimichle, Sharon Drapeau, Wesley Hare, and Kip Spotted Eagle Collins.
[3] SDCL § 1-26-30.2 states, "An appeal shall be allowed in the circuit court to any party in a contested case from a final decision, ruling, or action of an agency."

The standard of review for an agency's decision is governed by SDCL § 1-26-36. This court is to give great weight to the WMB's findings of fact. *Fair v. Nash Finch Co.*, 2007 SD 16, 728 N.W.2d 623. The statute also states,

> The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in light of the entire evidence in the record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

BACKGROUND

Longview's quest to provide water for its livestock confinement feeding operation (LCFO) began back in 2008. Longview initially applied for a water permit, but hence withdrew its application after Intervenors requested a hearing. Longview then notified the WMB that it would instead construct a well at the same site it applied for a permit, but would instead limit its use so as not to exceed reasonable domestic use. The WMB ruled that Longview's use of water for its swine farrowing facility constituted a domestic use. A well was constructed on site, but collapsed and became inoperable. The YST and some of the same intervenors challenged this action with the WMB and filed a contested case. The WMB held a hearing and ruled that since Longview would use less water than what was considered reasonable domestic use, that they were not required to obtain a commercial permit to appropriate groundwater for their facility. Intervenors and the YST appealed that decision. In June 2010, this court entered its

memorandum decision, which held that Longview's proposed water usage did not constitute domestic use. Longview is currently operational, and receives water from the Randall Rural Water District.

Longview subsequently sent a water permit application to the Water Rights Program (WRP) on July 8, 2010. In the letter accompanying the application, Todd Van Maanen, Vice President of Eisenbraun & Associates, Inc., indicated that the facility currently uses rural water, which will be supplemented by the proposed onsite well. The maximum pumping rate was stated as 30 gallons per minute. The source of water listed on the application is the Codell Aquifer. The description of the project provided: "The facility is a swine farrowing operation which produces piglets for finishing at other off-site locations. Longview farms is a zero-discharge CAFO [Concentrated Animal Feeding Operation] permitted by SD DENR."[4]

After receiving the permit application, James Goodman, Natural Resources Engineer, issued a two-page report. Goodman provided details about the Codell Aquifer, and reviewed existing water permits/rights.[5] He explained that the WRP monitors two observation wells in the Codell Aquifer, DG-80F and HT-87D. The wells are located about 23 and 25 miles from the proposed well site. Goodman explained, "because these wells are located so far from this site the record would only be representative of the entire aquifer and not show any aquifer response due to pumping from this site. Water levels for these two observation wells are included with this report for informational purposes." A third observation well, CM-52A, was drilled by the Corps of Engineers. According to Goodman, the WRP monitored this well from 1982 through 1993 when the well "ceased to function properly." The report explains, "The entire water level record

[4] The applicant is listed on the application as "Long View Farms, LLP." References made in the parties' briefs, and other materials state "Longview Farms, LLP." For this reason, the court will use "Longview" throughout this decision.

[5] Goodman states in his report that the Codell Aquifer is estimated to contain 1.45 million acre-feet of recoverable water in storage.

for the Codell indicates the aquifer is capable of sustaining additional withdrawals (Water Rights, 2010)." Goodman also indicated that there are no nearby water permits, but there are some domestic wells that use water from the Codell Aquifer. Goodman concluded that there is water available from the aquifer, and that drawdown is not expected to be significant. Moreover, he explained that the well is to be constructed in accordance with SD rules, and that the plans for the facility have been approved by the DENR. He also pointed out that this water well is supplemental to the rural water system currently in place.

Goodman also testified at the hearing in this matter that in doing his analysis for approval of a water permit as per SDCL § 46-6-3.1,[6] that it is not necessary for his agency to know how much water each well is using from the aquifer. He testified that the state agency does not collect information from domestic wells, but does collect information from irrigators, rural water systems, and other large users. He testified that they may also collect usage information from municipalities. His final expert opinion was that there was sufficient water in the Codell Aquifer available for appropriation according to South Dakota law.

On September 1, 2010, the DENR's Chief Engineer, Garland Erbele, recommended approval of the permit based on four criteria: "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[.]"[7] The Legal Public Notices were made in the Wagner Post in September 2010.[8]

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[6] SDCL § 46-6-3.1 provides that no application may be approved if 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.

[7] The qualifications were that the well owner should not impair domestic wells, the well shall be constructed by a licensed well driller and shall comply with WMB rules, the permit is subject to the DENR's Water Pollution Control Permit, and the permit is subject to all WMB rules.

[8] Whether the WMB provided adequate notice is not an issue in this appeal.

In a letter dated September 23, 2010, Joan Olive intervened in the water permit application.

In a letter dated September 24, 2010, then-attorney for the YST, Rebecca Kidder with Abourezk & Zephier, sent several filings, including a Notice of Appearance, a Petition in Opposition to the Permit, Petition to Intervene, and a Request for Extension of at least 20 days. The YST argued in its petition that the Chief Engineer's determinations on all four criteria in SDCL 46-2A-9 are "unsupported by factual data and evidence." The petition went on to explain the inadequacy, in YST's view, of the WRP's decision regarding SDCL § 46-2A-9.[9] Moreover, the YST argued that granting the permit violates its reserved water rights under the United States Supreme Court's ruling in *Winters v. United States*, 207 U.S. 564 (1908). In addition to all the materials listed above that were sent in by the YST, also included was a report from Dr. Perry H. Rahn, a Registered Professional Engineer and member of the Association of Professional Geological Scientists. The report is dated November 25, 2008 and is entitled, "Hydrogeology of the Ft. Randall Casino area, Charles Mix County, South Dakota." On February 2, 2009, Derric L. Iles of the DENR Geological Survey issued a memorandum in response to Rahn's report. On May 26, 2009, Rahn responded to Iles's memorandum.

In a letter dated September 20, 2010, Sister Patricia Mylott sent the Chief Engineer a letter expressing her concerns with the Longview Farms operation. Her concerns included pollution of waters, noxious gases, and potential health problems for children at a nearby daycare and the Marty Head Start program. Eva Bruguier sent the Chief Engineer a letter on September 23, 2010 also expressing concerns with the operation.

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[9] SDCL § 46-2A-9 states,

> 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.

On September 27, 2010, Faith Spotted Eagle sent the Chief Engineer a Petition in Opposition to Application and Recommendation, Petition to Intervene, and Request for Hearing Extension of at least 20 days. The petition appears to be identical to the petition filed by the YST. The petition identifies individual petitioners Faith Spotted Eagle, Judy Honomichl, Sharon Drapeau, Wesly Hare, Glenn Drapeau, and Kip (Spotted Eagle) Collins.

A Procedural Order was issued on October 14, 2010. The order denied the request for an appointment of a hearing examiner under SDCL § 1-26-18.3. Board member Rodney Freeman, Jr. was appointed to act as Prehearing Chairman to act on procedural motions and discovery disputes. Details for exchanging exhibit and witness lists were also included. The order also contained a briefing schedule.

On November 9, 2010, the YST and the individual petitions filed a joint pre-hearing brief. The brief includes arguments relating to the tribe's *Winters* doctrine rights, the requirements of SDCL §§ 46-6-3.1, 46-2A-7, and 46-6-26, the location of the well, various administrative rules, and assessment of the existence of shallow aquifers. Longview also submitted a pre-hearing brief addressing many of the issues brought up by the YST and individual petitioners. The DENR also issued a brief in response to the YST and Individual Petitioners' brief.

The evidentiary hearing was originally scheduled before the WMB on December 2 and 3, 2010. The YST obtained new counsel, Charles Abourezk, and requested a continuance. The request was granted by Freeman, and the hearing was continued to the WMB's March 10, 2011 meeting. On January 25, 2011, Jon LaFleur, another lawyer in the same firm as Abourezk, filed a notice of appearance.[10] Due to an out of state lawyer's removal from representing the

[10] The YST and Individual Petitioners are represented in this appeal by Tracey Zephier from Rapid City, SD of Fredericks Peebles & Morgan LLP.

individual petitioners, the hearing was again continued until the WMB's July 13-14, 2011 meeting. Longview resisted this continuance, but Freeman affirmed the continuance.

The WMB held a three-day hearing on July 13-15, 2011 in Pierre, South Dakota. At the hearing, Diane Best represented the DENR, Eric Kerkvliet represented Longview, and Jon LaFleur represented the YST. Individual Petitioners were not represented by counsel at the hearing. The following individuals testified: Jim Goodman, Jim Hutmacher, Kent Woodmansey, Arlan Moss, Todd Van Maanen, Dr. Perry Rahn, Richard Leasure, John Stone, Derric Iles, and Garland Erbele. On July 15, 2011, at the conclusion of the hearing, the WMB voted unanimously to approve the water permit. Kerkvliet was directed to prepare Findings of Fact (FOF), Conclusions of Law (COL), and a Final Decision. In documents dated September 15, 2011, Kerkvliet filed his proposed FOF, COL, and Final Decision. The DENR had no objection to the proposals. The YST had several objections to the proposed FOF and COL, and also proposed its own FOF and COL. WMB Chairman Freeman accepted the vast majority of the proposed FOF and COL, and made changes to others. Ultimately, the WMB entered 124 FOF and 52 COL on October 5, 2011, along with a final decision granting application no. 7206-3, subject to certain qualifications.[11]

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[11] The permit application qualifications are:

a. The well approved will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under Permit No. 7206-3 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.
b. The well authorized by Permit No. 7206-3 shall be constructed by a licensed well driller and construction of the well and installation of the pumps 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.
c. Permit No. 7206-3 is subject to compliance with requirements of the DENR's Water Pollution Control Permit issued pursuant to SDCL §34A-2-36 or 34A-2-112 for concentrated animal feeding operations.
d. Permit No. 7206-3 is subject to compliance with all existing and applicable Water Management Board Rules including (but not limited to):
    a. Chapter 74:54:01 Ground Water Quality Standards;
    b. Chapter 74:54:02 Ground Water Discharge Permit;
    c. Chapter 74:51:01 Surface Water Quality Standards;

The YST filed a Notice of Appeal on November 4, 2011. YST's Statement of Issues on Appeal was filed November 17, 2011.

Individual appellants filed a brief dated January 23, 2012. They did not comply with the statutory requirements contained in SDCL § 1-26-31, and they did not appear at the WMB hearing. Appellees cite cases that stand for the proposition that an issue not raised below is waived for purposes of appeal. The court finds, however, that the interests of both YST and individual appellants are substantially the same. The issues identified by both parties are nearly identical as well. Therefore, the court finds it unnecessary to decide whether individual appellants waived their right to this appeal.

ANALYSIS AND DECISION

1) Did the WMB err when it granted the permit without determining precisely that the average estimated annual recharge exceeded the annual withdrawals for the Codell aquifer without hearing any evidence of withdrawal or average estimated annual recharge amounts?

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 systems.

YST argues, "This statute requires a determination of the average estimated annual recharge rate of the Codell aquifer and examination of the best information reasonably available to determine the total quantity of water withdrawn annually from the groundwater source." Moreover, the YST points to South Dakota Administrative Rule 74:02:05:07, which states:

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d. Chapter 74:51:02 Uses Assigned to Lakes;
e. Chapter 74:51:03 Uses Assigned to Streams; and
f. Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions.

> When regulating water withdrawals by large-capacity wells and in determining the availability of unappropriated water for an application for a permit to appropriate water, the board shall rely upon the record of observation well measurements in addition to other data to determine that the quantity of water withdrawn annually from the aquifer does not exceed the estimated average annual recharge to the aquifer.

The YST argues that the Chief Engineer's Report and Investigation falls short in three respects:

1. It does not include any determination of the annual recharge rate of the Codell aquifer;
2. It does not include examination of the best information available-the most recent USGS Well Survey which lists all wells withdrawing water from the Codell aquifer but rather, relies exclusively upon the Applicant's assertion that there are only two domestic wells in the area; and
3. The Chief Engineer's report notes that the observation wells established are so far away they are only representative of the entire aquifer, and at that, show "annual fluctuations that may be due to pumping."

Engineer Goodman testified at the hearing as follows:

> Q. Mr. Goodman, do you know the quantity of water withdrawn annually from the Codell aquifer?
> A. No.
> Q. Do you know the amount of the annual recharge for the Codell aquifer?
> A. No.
> ***
> Q. Am I understanding you right that you are reluctant to rely on the monitoring wells that are 23 or 25 miles away from the Longview site?
> A. I'm not reluctant because they are very good records. What my reluctance is, is it representing that site? I think it's representing the aquifer very well, those two monitor sites, but because I don't have anything very near the site, I can't testify to exactly what's going on there. I think they are representative of what's going on there, but I can't say for sure.

WMB Hearing Transcript, 33-34 and 40-41. Moreover, Chief Engineer Erbele and Todd Van Maanen, Longview's hired engineer, both testified they were unaware of the recharge rate or withdrawal usage rate for the Codell aquifer. *Id.* at 181, 336-37. Dr. Rahn disagreed that the two monitoring wells were adequate to satisfy the statutory requirements for the Longview site. In conclusion, the YST argues that the permit application should be denied because neither

appellee has "presented any evidence of withdrawal or recharge quantities for any location within the Codell aquifer, let alone at the site of the Longview facility."

The DENR argues that the WMB satisfied the requirements of SDCL § 46-6-3.1. It argues that the board considered the best information reasonably available, which is what the statute requires. It considered Goodman and Erbele's analysis of the size and extent of the Codell aquifer, its lithology, the history of withdrawals and discharges, and the two observation wells. The DENR argues that the use of observation wells was common, practical, important, and comported with administrate rule 74:02:05:07. The DENR admits there is no study quantifying the annual recharge in the aquifer, but argues that it would be expensive to do such a study and is common to use well observation data instead. Moreover, the DENR argues the amount of water being permitted is the same as a farm well and is "almost insignificant."

In deciding this case this court has also considered the memorandum decision issued by Circuit Judge Sean O'Brien in, *In the Matter of Water Permit Application No. 7239-3* Hanson County, Civ. No. 11-54. In that case, the applicant was requesting permission to appropriate more than 700,000 gallons per day from the Floyd East James Aquifer for a 7,000 head large scale dairy operation. In that case, the circuit court reversed the WMB due to the fact that WMB had not complied with SDCL § 46-6-3.1 since there was no way to determine, based upon the evidence presented, that there was a probability that the quantity of water withdrawn from the aquifer would exceed the quantity of water of the average estimated annual recharge to the aquifer. Much like in this case, the experts, many of the same witnesses, could not establish the rate of withdraw or average annual estimated recharge of the aquifer. Judge O'Brien in *In the Matter of Water Permit Application No. 7239-3, by Hanson County Dairy* case, remanded the matter to the WMB for this reason. The circuit court's decision in *In re Water Permit*

Application No. 7239-3, by Hanson County Dairy, is not binding on this court, but does provide persuasive authority.

It has been argued by the appellants in this case that in order to comply with the requirements of South Dakota statutes that a recharge study of the Codell aquifer or more precise or specific evidence of withdraw and recharge rates of the aquifer is required before the WMB can make a proper determination under SDCL § 46-6-3.1 This is essentially to determine if there is "a probability" of the withdrawals exceeding recharges under SDCL § 46-6-3.1.

It is important to note that in deciding whether or not it is probable that the quantity of water withdrawn will exceed the quantity of the average estimated annual recharge is to be based according to the best information reasonably available. The evidence as well as argument in this case shows that recharge studies of aquifers can be done. However, they are time consuming and very expensive. Nothing in South Dakota law requires a recharge study of an aquifer before a commercial water appropriation permit can be granted. Rather, the law requires that this decision be based on the "best information reasonably available".

At oral argument in this case the court inquired as to whether or not it was the legislature's intent when using the phrase "best information reasonably available" to mean historical data available from prior study and analysis of the aquifer and its usage, or if that language was intended to include future study and analysis of the aquifer, possibly based on new technologies available. The answer? It depends. The language of the statute itself does not indicate to the court that it is a requirement that any particular study nor other effort to obtain additional information on the aquifer and its recharge rate is required to grant a permit. It is this court's interpretation of the statute that the language requires the WMB to use any and all information available upon which the state engineer can make an informed scientific opinion.

This may include the requirement of a recharge study by the Chief Engineer or the WMB in cases where there is a lack of good information on an aquifer or the applicant is proposing a permit to appropriate a large quantity of water, such as in the Hanson County case decided by Judge O'Brien, where the dairy will appropriate over 255 million gallons annually.

In this case, WMB heard three days of testimony. Much of that testimony came from expert witnesses who had extensive knowledge and experience in the areas of groundwater, surface water, and geology. Evidence produced by the applicant and the DENR indicated that the water levels in the Codell aquifer have been rising over the last 20 years. This case initially came before this court on an appeal from the WMB when they determined that a permit was not necessary because Longview Farms' water usage would be less than what the legislature and the agency have determined to be reasonable domestic use. Consequently, when an expert or scientist for the State of South Dakota determines compliance with SDCL § 46-6-3.1 they take into consideration the best information reasonably available concerning the current usage of the aquifer, its recharge, and the proposed use by the specific applicant before them.

In this case, Longview Farms proposed appropriation of water of up to 30 gallons per minute was characterized by various expert witnesses as "insignificant". This quantity of water must be considered against all of the other evidence that was available to the experts to determine if there was a probability that the quantity of water withdrawn annually would exceed the quantity of the average estimated annual recharge. Longview's proposed appropriation of approximately 43,000 gallons of water per day is insignificant when compared to the case in Hanson County where they propose to appropriate over 700,000 gallons per day.

WMB is a governmental agency charged with considering these water permit applications by the State of South Dakota. The court can only assume that these board members

have some experience in the various issues that come before them. They have the authority, and it is their duty, to judge the credibility of the evidence and the witnesses that comes before them. Before this court can overturn their decision, this court must be convinced that the WMB was clearly erroneous in their factual findings or made an error of law. The findings in this case indicate that the WMB found the Longview witnesses and the DENR witnesses to be highly credible. Based upon the credentials this court has reviewed with respect to these witnesses, this court cannot find that the WMB was clearly erroneous in that finding. The WMB also found that the various witnesses for Longview and DENR relied on the best information reasonably available and used good science and methodology in reaching their conclusions. This court is unable to determine that the WMB was clearly erroneous in such findings.

The various appellants called Dr. Perry Rahn as their expert witness. Based upon this court's review of Dr. Rahn's credentials, he is highly qualified on the issues of geology and hydrogeology. Dr. Rahn is a professor emeritus of the South Dakota School of Mines and has many years of experience academically, as a consultant, and in industry with respect to water. The WMB found that he was not credible in this particular case. The court has reviewed the WMB's findings concerning Dr. Rahn's credibility and cannot say that the WMB was clearly erroneous in their findings. On this issue, Dr. Rahn had a primary criticism of the state's witnesses in that they made the determination under SDCL § 46-6-3.1 without knowing what amount of water was appropriated from the aquifer annually and without knowing its rate of recharge. The WMB addressed these issues in FOF #55-58. Pursuant to South Dakota Administrative Rule 74:02:05:07, the WMB was allowed to rely upon the record of observation well measurements in addition to other data to determine this issue. Nothing in South Dakota law requires the WMB to order a recharge study as a precondition to granting a water permit

under the circumstances of this case. Rather, they are to base their decision on the best information reasonably available.

The YST argues that the DENR Chief Engineer failed to examine the most recent USGS Well Survey as part of the "best information available" in doing his analysis. This survey was admitted into evidence as Exhibit #6 before the WMB. The court has reviewed this exhibit extensively. This exhibit is an inventory of wells prepared by the USGS based upon a 2005 inventory. It identifies each well and provides a location, its primary use, its depth, as well as the name of the owner, type of casing, and casing length. It does not indicate if any particular well is currently in use. The exhibit does not provide any useful information that would benefit the Chief Engineer or the WMB in determining the rate of withdraw or recharge of the aquifer. It does provide a list of wells which are currently drawing or which could potentially draw water from the aquifer in the future. Based upon this court's review of the names of the owners and the court's familiarity with the local area, the wells on the list include municipalities, irrigators, commercial users, and domestic users. As testified to by the Chief Engineer, his office has a good understanding of the primary significant commercial, irrigation and municipal users of the aquifer as well as the quantity of their annual usage. He did not feel that the domestic users were significant. Since the USGS information was insufficient to erode the credibility of the state's expert witnesses in any meaningful way, this court cannot find that the WMB was clearly erroneous on this issue.

The YST also argues that the Chief Engineer's report notes that the observation wells are 23 and 25 miles away and are only representative of the entire aquifer, and that they may show that annual fluctuations may be due to pumping. This court is reasonably certain that appropriating water from the aquifer, especially during the irrigation season, will cause annual

fluctuations in the aquifer. However, this alone does not erode the expert witnesses' opinion that the quantity of water withdrawn will not exceed the quantity of the average estimated annual recharge. The WMB did not err in this regard.

As to issue 1, this court is not able to find where the WMB made any factual determination that was clearly erroneous. Based upon this court's review of the record, it is the court's determination that the WMB appropriately applied the appropriate law. Consequently, as to this issue, the WMB is affirmed.

2) Whether the Board erred when it determined that the proposed diversion could be developed without unlawful impairment of existing rights without hearing any evidence about the existing rights of the Yankton Sioux Tribe?

Under SDCL § 46-2A-9, there are four considerations the WMB must make before issuing a water permit: (1) there must be a 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) the proposed use is in the public's interest. The YST's second issue on this appeal involves the second consideration of SDCL § 46-2A-9, and the tribe's *Winters* doctrine rights. As to this issue, the YST asserts that it is "the owner of reserved water rights upon its Reservation lands[.]" Brief to Appellant YST, page 11 (citing *Winters v. United States*, 207 U.S. 564, 576 (1908). More specifically, the tribe asserts that its rights to water from the Codell aquifer are those to "irrigate their 1) arable; 2) physically irrigable; and 3) economically irrigable lands or otherwise, and their 'reasonably feasible' uses of such water." Brief to Appellant YST, page 11 (citing *Sohappy v. Smith*, 302 F.Supp. 899, 904 (D. Or. 1969)). The tribe argues that since the DENR has not assessed the water rights of the YST, and has not determined the recharge rate of the aquifer, nor the amount of unappropriated water available, the WMB has no basis to conclude

the YST's water rights are not impaired by this permit. Finally, the tribe argues that risks of contaminating the aquifer through the proximity of this CAFO and the location of manure fields impair the tribe's water rights. SDCL § 46-2A-9 requires consideration of the tribe's reserved water rights, according to the YST.

Various findings of fact and conclusions of law from the WMB pertain to this issue. The WMB found that drawdown is not expected to be significant considering Longview's maximum pumpage rate is 30 gpm. WMB FOF 62. Its actual usage will be less than that. WMB Hearing Transcript, 118 and 127. Additionally, the license to pump water will only allow Longview to appropriate water to the extent it is put to beneficial use. SDCL § 46-5-30.1. The fact that the YST and the Randall Rural Water District both obtain their water supplies from the Missouri River supports the board's conclusion that the second prong of SDCL § 46-2A-9 was satisfied. There was some testimony that there are undocumented wells on tribal land, but no evidence was received to substantiate those claims. Finally, the fact that the YST's *Winters* Doctrine rights supersede all other uses was conceded by the state at the hearing. Longview explained that there is some divergent case law dealing with *Winters* rights, specifically involving the quantification of such rights, and whether the rights apply to groundwater.

The court finds that YST had an opportunity to submit further evidence on the location of existing wells at the WMB hearing. A tribal member testified at the hearing, and indicated he knew where various wells were located. He did not provide more specifics. Moreover, the proposed usage for this well is roughly equivalent to a domestic well's usage rate. It was uncontroverted that the Codell aquifer underlies roughly 1,134 square miles, and contains approximately 1.45 million acre-feet of recoverable water.

As to the tribe's *Winters* doctrine rights, no court has yet determined such rights. The state conceded that the tribe's rights will supersede Longview's rights. This water permit appeal is not the proper time for this court to establish the YST's *Winters* rights. In addition, it is unclear whether *Winters* applies to groundwater, and how exactly to quantify the tribe's rights to either surface water or groundwater. The court finds that the WMB did not err in this regard as granting this permit will not impair existing water rights from the Codell aquifer as there is a plethora of available water compared to Longview's relatively minimal usage.

The WMB in Conclusion of Law #28, determined that Longview's right to appropriate water would be subservient to the YST's *Winters* doctrine rights. The WMB further concluded that the WMB was not the appropriate forum to adjudicate the existence, or quantification of those rights. This court agrees. Typically, these rights would be established and quantified in a federal court. The YST has never endeavored to establish the existence or quantification of its *Winters* doctrine rights. The fact that the YST has never sought to establish these rights cannot and should not prohibit other entities from obtaining permission to appropriate water. If such were the case, YST could leave the existence of its *Winters* doctrine rights open in perpetuity and essentially trump the rights of all other potential users of the aquifer, even those living many miles away from the reservation. This court has not been provided any legal authority from either party indicating the law allows this.

In this case, the WMB appropriately declined any invitation to establish or quantify the tribe's rights, but found that once the tribe's *Winters* doctrine rights are established and quantified, that those rights would have a higher priority and pre-date Longview's rights. The WMB did not err in this regard.

3) Whether the Board erred when it determined that Longview's proposed water use is a beneficial use and in the public interest?

This third issue involves the third and fourth requirements of SDCL § 46-2A-9. A "beneficial use" is defined in SDCL § 46-1-6(3) 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[.]" The YST argues that granting this water permit is not useful to Longview because it already receives well water from the Randall Water District, and has a three-day storage capacity. Moreover, Longview has been operational since September 2008. Secondly, the public interest is not served by this water permit, according to the tribe, because "The well will only have the affect (sic) of drawing down the groundwater and increasing the risk of contamination since the well will be surrounded by large amounts of swine manure." The tribe also points to evidence of water quality and the location of nearby domestic wells.

The WMB found that the water will "undoubtedly be beneficial to the Longview facility, regardless of how the water is used within the facility." WMB FOF 67. The board also found that the quality of the water is not of great concern because the water will be used mostly for washing the facilities. If the water is of sufficient quality, it may be used for feeding pregnant and nursing sows. As for the public interest served, the board made several findings involving the economic impact of Longview's facility. Longview paid local vendors over $2.5 million from the inception of the facility until November 2010. WMB FOF 71 and Longview Exhibit 9. Longview employs 13 people, and has paid over $700,000 in wages and benefits between inception and November 2010. WMB FOF 72-73. The board also made findings related to employment of YST members. WMB FOF 75-76. Finally, the board found that, in general, when a CAFO complies with permitting requirements, it is beneficial and in the public interest of

South Dakota. WMB FOF 77. The board ultimately concluded that Longview met the beneficial use criteria.

Many of the YST's concerns have to deal with the potential of groundwater contamination due to manure management, or the odor that the facility emits. These concerns, while potentially substantial, are not considerations for granting or denying a water permit. Longview has gone through the process of obtaining a general water pollution control permit. *See* Longview Exhibits 11-13. The definition of a beneficial use balances the benefits to the appropriator of the water with that of the public. This balancing should be specific to the water permit considerations, and the court should not consider extraneous issues when performing this balancing test. There are other permitting processes that contemplate those concerns. Intervenors intimate that because Longview already receives water from the Randall Rural Water District that this additional water source will not be beneficial to them. However, there was testimony that this additional source will not only be a backup should something happen to the rural water source, but also will be used as a primary source for washing facilities. The court finds it not only beneficial to Longview, but also the public in general to have an additional water source. Having a separate water source insures Longview from drastic losses should something occur that may limit water availability from the Randall Rural Water District. The court finds that the WMB did not err in finding this water permit application is beneficial to the Longview facility.

Secondly, there was substantial evidence relating to the public interest served by the facility. There is economic benefit to the public both in terms of employment, and the facility's use of local resources. The court is mindful that this prong of the analysis should be looked at from a broader perspective than perhaps the tribe would like it to. The benefits to the state as a

whole are significant. The WMB found in FOF #77, that in general CAFOs that comply with state environmental rules are considered to be beneficial and in the public interest of the State of South Dakota. Engineer Goodman testified, "The Board has consistently held that operations such as this for confined animal feeding operations, or in this case a sow breeding operation, that they are a beneficial use in terms of the best utilization of water." WMB Hearing Transcript, 9.

The Chief Engineer also testified that, "The Water Management Board always considers the public interest. When I review something, if it's public interest, and I very seldom, if ever, say anything about it on the report or on the witness stand, it's the fact that the board has in the past determined that a permit or an application like this was in the public interest before, but it's left to the board to decide that."

In rendering its decision, the WMB did not cite any specific authority for their FOF #78. This court can only presume that the WMB's finding is based on a broad state policy outlined in SDCL §§ 45-5A-1, 34A-2-104, and 34A-2B-1[12]. SDCL § 21-10-25.1 lays down a state policy to

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[12] **45-5A-1. Legislative findings**
The Legislature finds the following:
(1) It is necessary for the state to protect the public welfare of South Dakota which is largely dependent on agriculture, and to protect the economic well-being of individuals engaged in agricultural production;
(2) Exploration for and development of mineral and oil and gas reserves in this state may interfere with the use, agricultural or otherwise, of the surface of certain land;
(3) Surface owners should be justly compensated for injury to their persons or property and interference with the use of their property occasioned by mineral and oil and gas development.
34A-2-104. Legislative findings--Declaration of public policy
The Legislature finds that groundwater is a resource of immeasurable value to public health and welfare, critical for the provision of water supply needs for domestic, agricultural, industrial, mining, recreational and other beneficial uses of water, and that pollution of groundwater of this state from both point and nonpoint sources constitutes a menace to public health, welfare and the environment, and that there has been an increasing awareness on the part of the public, local governments and the state that groundwater must be protected, that once groundwater is polluted, it is extremely difficult and expensive to clean up, that both strong enforcement and public education are important and necessary components of the state strategy for minimizing and reducing potential pollution sources, and that effective preventive measures and swift response to releases of pollutants minimize groundwater pollution. It is hereby declared to be the public policy of this state to conserve the groundwaters of the state and to protect, maintain and improve the quality thereof for present and future beneficial uses through the prevention of pollution, correction of groundwater pollution problems and close control of limited degradation perimeters permitted for necessary economic or social development.
SL 1998, ch 216, § 1, provides:

protect agricultural operations from nuisance suits and that it is the policy of the state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. While the Intervenors may dispute just how relevant the economic impact is to them specifically, this court fails to see where the WMB either made a finding that was clearly erroneous or otherwise erred as a matter of law given the state's strong agricultural support as laid out by these statutes. The court concludes that the WMB did not err in finding that the water permit is in the public interest.

4) Whether the Board erred when it determined that an adequate investigation had been done to establish the location of existing wells and natural springs near the Longview site?

According to SDCL § 46-6-26, the WMB may, pursuant to § 46-1-16, "deny or condition any permit in conformity with § 46-6-24 as is determined necessary to protect domestic wells, municipal wells, or natural springs of this state." The YST argues that this statute requires a determination of "whether the granting of the permit will result in impairment of existing

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"Agriculture and livestock production are vitally important industries to the State of South Dakota. Agriculture and livestock production in South Dakota are responsible for supplying food products necessary for the well being of the people of this state, this nation and other nations. Agriculture and livestock production are also necessary for the economic development of this state and of the nation. Livestock production is a valuable component of value-added agriculture, especially related to corn, soybean, and other crop production in South Dakota. Manure from livestock production is a valuable resource to the state, as it is rich in nutrients that are essential for maximizing crop production, and can greatly decrease the need for commercial fertilizers. However, these same nutrients and other constituents in manure can cause pollution in the waters of the state if not properly contained and managed. Agriculture, livestock production, and all of the people in this state need a clean and safe environment in which to exist, grow, and prosper. Therefore, the Legislature finds that it is the policy of the State of South Dakota to encourage the development of agricultural and livestock production as an industry and to encourage the use of manure as a valuable nutrient resource to maximize crop production, but to provide the proper safeguards necessary to protect the environment, natural resources, public health, welfare, and safety of South Dakota, especially as related to the proper containment and management of manure from livestock operations. To that end, the Legislature hereby adopts this Act providing for an environmental livestock cleanup fund to ensure that funds are available for proper cleanups of manure and its constituents in those cases where the manure has been mismanaged and poses a threat to the environment or public welfare instead of being used as a valuable nutrient resource."S D C L § 34A-2B-1, SD ST § 34A-2B-1

domestic wells and/or natural springs including those of Individual Petitioners." The Chief Engineer's report cited the two domestic wells, each located 20+ miles away from the Longview site. Also, the YST states that "the Chief Engineer's Report does not give any indication that an independent investigation into the existence of domestic wells in the Codell aquifer, or the existence of natural springs in the area was performed." The tribe asserts that the application should, at the least, be deferred until such an investigation is conducted.

The DENR argues that SDCL § 46-6-26 does not apply. When read in its entirety, the statute refers to SDCL § 46-6-24, which involves only "a municipal or domestic use well located in a formation older than or stratigraphically lower than the greenhorn formation." The parties do not dispute that the Codell aquifer is stratigraphically higher than the greenhorn formation, and WMB FOF 60 states the same. Furthermore, qualification #1 of the Chief Engineer's recommendation, which the WMB adopted, states,

> The well approved will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under Permit No. 7206-3 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.

John Stone, former vice-chairman and member of the YST, testified at the WMB hearing.[13] When a well is constructed on a reservation, or tribal land, in all likelihood it is not

[13] It was unclear from the WMB hearing transcript whether Stone was testifying on behalf of the YST. The following discussion took place when Longview's attorney attempted to determine if Stone was representing the tribe:

> Q: Mr. Stone, are you the representative of the [YST] to testify here today?
> A: Pardon?
> Q: Are you here officially on behalf of the [YST] testifying here today?
> A: Yes. I'm a Yankton Sioux tribal member; I have every right to be here.
> Q: And you are the designated representative to testify today?
> A: Like I said, I'm a Yankton Sioux tribal member; I have every right to protect my land and environment.
> Q: Right, I'm just wondering if you are the designated representative of the [YST] to testify today.
> A: As a tribal member, I have the right to testify on behalf of any issues of the [YST].
> Q: Yeah, I just wanted to know if you are the designated person to testify.
> A: I'm a Yankton Sioux tribal member; I have the right to testify and be involved in any matters of the [YST]. I'm a corporate shareholder of the YST, which gives me the ability to represent.
> Mr. Kerkvliet: Mr. Chairman, could you ask him to answer my question?

registered with the state of South Dakota. Stone testified that he is aware of 200 undocumented, unregistered wells, in addition to those listed in Exhibit 6.[14] WMB Hearing Transcript 255. Stone explained, "I have come across these [200 wells], as well as being a lifetime resident of the area, a hunter, a fisherman, a sight seer, a bird watcher, I make my way around the reservation." *Id.* Later in his testimony, Stone admitted that the "majority" of the 200 undocumented wells are abandoned. *Id.* at 281. Stone was unsure if those wells have been properly sealed.

John Stone's testimony regarding the 200 undocumented wells raises a concern. The majority of these undocumented wells are abandoned, but he was unsure if they have been properly sealed. As a WMB member noted, these abandoned wells could be causing contamination of the aquifer.

The court concludes that the DENR is correct in its assertion that SDCL § 46-6-26 does not apply in this case because the formation we are dealing with, the Codell aquifer, is not stratigraphically lower than the Greenhorn formation. The court finds that the DENR performed the requisite analysis for determining the location of neighboring wells. The tribe made assertions that wells were located near the Longview site, but failed to provide timely documented proof of such an assertion. The testimony of Mr. Stone was also vague and the WMB had the discretion to give that testimony the weight they thought it was entitled. This court cannot step into the shoes of the WMB and assign greater weight or credibility to testimony that they considered. The court holds that the WMB did not err regarding the tribe's issue four, and reiterates that there are adequate safeguards in the law and the permit qualifications to

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Chairman Freeman: Yeah, Mr. Hallem.
Mr. Hallem: What he means by a designated person is were you authorized to come here by the tribe to be their spokesperson?
A: I am here to be a witness. Yes.
WMB Hearing Transcript 270-71.

[14] Exhibit 6 is a listing of all the wells in the United States Geological Survey database for Charles Mix County.

protect the rights of domestic well users. This court would highly recommend to the YST that all of their wells be documented, inventoried and registered with the State or a federal agency so that in future cases they can establish their rights in this regard.

5) Whether the Board erred when it determined that Longview's permit complied with the requirements of ARSD 74:02:04:34.01 that no well may be constructed to allow production from more than one aquifer?

South Dakota Administrative Rule 74:02:04:34.01 states, "No well may be constructed to allow production from more than one aquifer unless approved by the chief engineer or the water management board." The tribe points to testimony from Jim Goodman, an engineer with the WRP, wherein he stated that there certainly could be flow between the Codell and Niobrara aquifers. WMB hearing transcript, 37-38. The YST argues that if the Longview application is granted, the well construction standards should ensure that there is "no leakage from the Niobrara in this area, and to ensure that neither the Codell aquifer nor the other groundwaters in this area are bacteriologically contaminated by the operation of the Longview farm." If this is not possible, the YST argues that the permit should be denied.

In the Chief Engineer's recommendation, which the WMB adopted, qualification #2 states, "The well authorized by Permit No. 7206-3 shall be constructed by a licensed well driller and construction of the well and installation of the pumps 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." Longview has to comply with various administrative rules. The very rule the tribe refers to is a *condition* of the permit. The testimony from Goodman that YST refers explains the relationship between the two aquifers. His testimony does not say that the well will draw from two aquifers. The court finds that the construction standards for developing the well have in place sufficient safeguards to ensure the well does not

draw from more than one aquifer. The court holds that the WMB did not err when it decided this issue because there are standards, namely South Dakota Administrative Rule 74:02:04:34.01, which Longview must follow when constructing its well. In addition, it has not been shown that the WMB was clearly erroneous when it found that the well would not be constructed to allow production from more than one aquifer.

6) Whether the Board erred when it determined that the Longview site including its manure fields is not located over a shallow aquifer?

SDCL § 34A-3A-24 states,

> No concentrated animal feeding operation that includes a number of animals equal to or greater than one thousand animal units may be located over a shallow aquifer unless a groundwater discharge permit has been approved in accordance with chapter 34A-2. For purposes of this section, a shallow aquifer is any aquifer having the following characteristics:
>
> (1) The aquifer is within fifty feet or less below the land surface with fifteen feet or less of continuous, overlying, extremely low permeability geologic material, such as clayey till or shale. Weathered till or highly fractured weathered shale is not an extremely low permeability material for purposes of this section; or
>
> (2) The aquifer is greater than fifty feet but less than one hundred feet below the land surface with thirty feet or less of continuous overlying low to extremely low permeability geologic material that may be a combination of weathered and unweathered till, shale, or till and shale.
>
> This section does not apply to any concentrated animal feeding operation that was operating on or before July 1, 1997. This section does not limit or prohibit the expansion of any concentrated animal feeding operation that was operating on or before July 1, 1997.
>
> The provisions of this section do not apply to any county which has officially adopted a comprehensive plan and zoning ordinances pursuant to chapter 11-2 and wellhead protection ordinances pursuant to § 7-18-20.

The tribe points to its expert witness's testimony concerning the aquifer formations underneath the Longview site. Dr. Rahn, when testifying before the WMB, explained that he believed there is an "aquitard" below the Longview site due to the presence of groundwater. WMB Hearing Transcript page 227. Rahn also testified that he had monitoring well logs and cross-sections that indicate there is an aquitard under the Longview site, but that he didn't remember if he brought

them to the hearing. *Id.* The tribe argues that the DENR and Longview failed to "perform the necessary investigation to ensure that the Herrick formation is not beneath and within the entire outside boundaries of this CAFO and sufficiently close to the surface to constitute a shallow aquifer." More testing should be performed to ensure that the manure, chemicals, and pathogens are not contaminating the water supply, according to the YST.

The WMB made several findings and received a substantial amount of evidence concerning the issue of a shallow aquifer below the Longview site. *See* FOF 100-113 and COL 47-49. The well that was originally drilled at the site and subsequently collapsed was drilled by Jim Hutmacher.[15] He completed a water well completion report, which indicates that the only other aquifer underlying the site is the Niobrara formation. *See* Applicant Exhibit 7. The Niobrara formation is approximately 450 feet below the surface. Moreover, Longview's engineering firm, Eisenbraun & Associates, drilled three soil borings on the site, two at 30 feet and one at 51 feet. Neither boring indicated a shallow aquifer below the site. *See* Longview Exhibit 14.

Sarah Speck with the Surface Water Quality Program performed the initial assessment for the Longview site in regard to shallow aquifers. She determined that there was not a shallow aquifer below the site. When the intervenors and their expert voiced concerns, Derric Iles, the State Geologist reviewed Speck's report. Iles reviewed Rahn's report, Speck's report, and Attorney Kidder's 1-24-09 letter to Kent Woodmansey of the DENR. Iles refutes many of Rahn's findings. For one, Iles explains the difference between the presence of groundwater and the presence of a shallow aquifer. Iles testified at the hearing that there is enough information available to determine if there is a shallow aquifer at the Longview location, and he stated there is not a shallow aquifer. WMB Hearing Transcript 296-97. The court finds that the greater

[15] Hutmacher is a member of the WMB, but recused himself from the Longview proceedings.

weight of the evidence indicates there is not a shallow aquifer below the Longview site. Therefore, the court holds that the WMB did not err when it determined there was not a shallow aquifer below the Longview site.

For all of the reasons set forth above, the court affirms the WMB's decision to grant water permit application no. 7206-3 to Longview Farms, LLP. Therefore, the court does not enter its own Findings of Fact or Conclusions of Law. *See* SDCL 1-26-36.

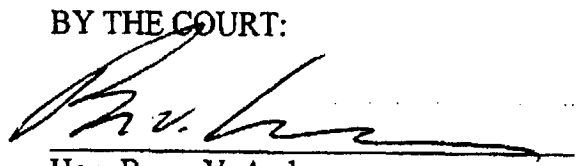
ORDER

Based upon the court's memorandum decision, IT IS HEREBY

ORDERED, that the Water Management Board's Findings of Fact, Conclusions of Law, and Decision to grant Water Permit Application No. 7206-3 are hereby AFFIRMED.

Dated this 17th day of May, 2012.

BY THE COURT:



Hon. Bruce V. Anderson
Circuit Court Judge

ATTEST:

Clerk of Courts

7206-3 SD EForm - 1621LD V1

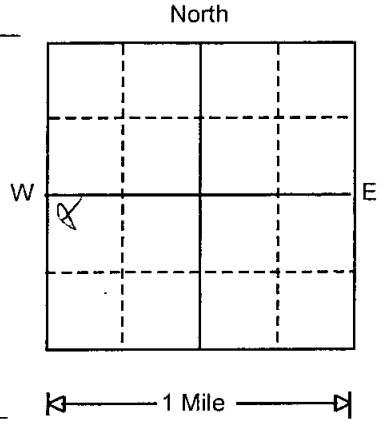
SOUTH DAKOTA WATER WELL COMPLETION REPORT

11-02

Location SW ¼ NW ¼ Sec 9 Twp 95N Rg 64W

County Charles Mix

Please mark well location with an "X"



Well Completion Date

May 9th, 2013

Distance to nearest potential pollution source (septic tank, abandoned well, feed lot, etc.)?

155.0 ft. from pit (identify source)

PROPOSED USE:

☑ Domestic/Stock ☐ Municipal ☐ Business ☐ Test holes
☐ Irrigation ☐ Industrial ☐ Institutional ☐ Monitoring well

METHOD OF DRILLING:

Forward Rotary

CASING DATA: ☑ Steel ☐ Plastic ☐ Other

If other describe

PIPEWEIGHT	DIAMETER	FROM	TO	HOLE DIAMETER
32.0 LB/FT	8.63 IN	1.0 FT	586.0 FT	12.25 IN
15.5 LB/FT	5.00 IN	560.0 FT	584.0 FT	7.88 IN
LB/FT	IN	FT	FT	IN

GROUTING DATA:

Grout Type	No. of Sacks	Grout Weight	From	To
cement	260	15.1 Lb/gal	0.0 Ft	586.0 Ft
		Lb/gal	Ft	Ft

Describe grouting procedure

Pressure grouted through casing

SCREEN: ☐ Perforated pipe ☑ Manufactured

Diameter 5.00 Inches Length 20.0 Feet

Material stainless steel

Slot Size .025 Set From 584.0 Feet to 604.0 Feet

Other information sand packed with 10/20 silica sand to 567 ft

WAS A PACKER OR SEAL USED? ☐ Yes ☑ No

If so, what material?

Describe packer(s) and location

DISINFECTION: Was well disinfected upon completion?

☑ Yes, How? chlorine solution

☐ No, Why Not?

Lab to which water quality sample sent for analysis

state

Well Owner: Arlan Moss

Business Name: Longview Farms

Address: 3172 320th St

City, State, Zip: Hull IA 51239

WELL LOG:

FORMATION	DEPTH FROM	DEPTH TO
Clay, Yellow	0	34
Clay, Blue	34	110
Pierre	110	450
Niobrara	450	555
Carlile	555	574
Codell Sandstone	573	605
Carlile	605	610

STATIC WATER LEVEL 470.0 FEET

If flowing: closed in pressure PSI

GPM flow through Inch pipe

Controlled by ☐ Valve ☐ Reducers ☐ Other

Reduced flow rate GPM

Can well be completely shut in?

WELL TEST DATA:

☑ Pumped Describe: Air Developed

☐ Bailed

☑ Other

Pumping Level Below Land Surface

555.0 Ft. After 4.0 Hrs. pumped 9.0 GPM

585.0 Ft. After 6.0 Hrs. pumped 15.0 GPM

If pump installed, pump rate: 15.0 GPM

REMARKS

RECEIVED
AUG 28 2013
WATER RIGHTS PROGRAM

This well was drilled under license # 213 and this report is true and accurate.

Drilling firm: Hutmacher Drilling Inc

Signature of License Representative:

Signature of Well Owner or Equitable Property Holder:

Date: