

File No. 7725-3
7725A-3
7725B-3
7725C-3

Water Rights Program - File Documentation

NAME: Lenny Peterson

ADDRESS: Hitchcock SD

DATE: 7-23-14 **COUNTY:** Spink

RE: Notice of Transfer of Ownership

COMMENTS:

Water Permit No. 7725-3 held by Lenny Peterson appropriates 1.93 cubic feet of water per second (cfs) from one well to be completed into the Tulare:Western Spink Hitchcock Aquifer (60-100 feet deep) located in the approximate center of the SW 1/4 Section 7 for irrigation of 135 acres located in the SW 1/4 Section 7; all in T113N-R63W was approved July 1, 2013 and deferred the remaining portion requested on the application.

The remaining portion is 2.64 cfs diversion rate authority for irrigation of 185 acres located in the S 1/2 Section 7-T113N-R63W. On October 3, 2013 the Board denied this remaining portion. Lenny Peterson appealed that decision to circuit court and as of July 23, 2014 a judge's ruling has not been made.

On July 23, 2014 a Notice of Transfer was filed by Danny Peterson for the approved portion of Water Permit No. 7725-3.

Permit No. 7725-3 is being split into Permit No. 7725A-3 (approved portion) and Application No. 7725B-3 (denied portion under appeal).

Also, on July 23, 2014 Danny Peterson submitted an application to amend Permit No. 7725A-3 by transferring the irrigated acreage and point of diversion to other land. The application to amend will be Application No. 7725C-3. This application proposes to move the irrigated acreage and diversion point to the SW 1/4 Section 22-T114N-R63W.



Karen Schlaak
Water Rights Program

FORM 2: Application for irrigation in South Dakota
(type or print)*originally received email 10:50pm
Feb 8, 2013*Mail to:
PMB 2020
DENR - Water Rights
523 E Capitol Ave
Pierre, SD 57501-3182
ph. (605) 773-3352(office use only)
No. 7725-3 Hydrologic Unit 10160006
Basin James River
Newspaper Redfield Press & Plainsman**RECEIVED****FEB 28 2013****WATER RIGHTS
PROGRAM****Application For Permit To Appropriate Water For Irrigation**Type of Application: ☒ New ☐ Vested Right ☐ Amendment/Correction to Permit No. _____
(Use predates Mar 2, 1955)Description of amendment/correction: (i.e. change diversion point(s), add diversion point(s), change use, etc.)

1. Name to Appear on Irrigation Permit _____

(check one) ☒ Owner ☐ Tenant/lessee ☐ Owner's Legal Agent Lenny Peterson

(name and complete address if different than above name)

Mailing Address 19111 Maple Ave. Hitchcock SD 57348
(Address) (City) (State) (Zip Code)Home Phone 605-266-2793 Cell 605-354-4602 Email kpeterson@venturecomm.net2. Amount of water claimed 4.57 *CFS or **GPM ***AF Total Acreage 320
(*Cubic Feet per Second) (**Gallons per Minute) (***)Acre Feet - storage capacity of dam/dugout or annual use if applicable)3. Source of water supply Wells from the Tulare/Hitchcock West James Aquifer4. Location of point of diversion Center of quarters

(example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W)

County Beadle5. County or counties where water will be used Beadle6. Annual period during which water is to be used March through November7. List below each forty acre division, or lot, or fraction thereof and show number of acres to be irrigated in each.
(Attach sheet if more space is needed)

Land Description	Acres	Land Description	Acres
S 1/2 section 7-113N-63W	320		
<u>Johns</u>			

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

I, Lenny Peterson, the applicant, certify that I have read this application,
have examined the attached map, and that the matters stated are true.

SOUTH DAKOTA
WATER PERMIT NO. 7725-3 FOR IRRIGATION

Date of first receipt of application February 28, 2013.

The Water Management Board approved Water Permit No. 7725-3 on July 11, 2013 for Lenny Peterson, 19111 Maple Ave, Hitchcock SD 57348 authorizing the construction of the water use system and the placing of water to beneficial use subject to the following limitations, conditions and qualifications:

1. Water Permit No. 7725-3 appropriates 1.93 cubic feet of water per second (cfs) from one well to be completed into the Tulare:Western Spink Hitchcock Aquifer (60 - 100 feet deep) located in the approximate center of the SW ¼ Section 7 for irrigation of 135 acres located in the SW 1/4 Section 7; all in T113N-R63W.

The remaining 2.64 cfs diversion rate authority for irrigation of 185 acres located in the S 1/2 Section 7-T113N-R63W is deferred for further aquifer analysis.

2. The amount of the appropriation may not exceed 2 acre feet annually for each acre of land to which water is actually and beneficially applied for irrigation. The water is to be used during the following described annual period: March 1 – November 30.
3. The date from which applicant may claim right is February 28, 2013.
4. One-fifth of the construction is to be completed on or before January 11, 2016.
5. All construction is to be completed on or before July 11, 2018.
6. Water is to be put to beneficial use on or before July 11, 2022.
7. Water rights obtained in compliance with the laws of the State of South Dakota may not be unlawfully impaired by this appropriation.

QUALIFICATIONS

1. The well approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this Permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.
2. The well authorized by Permit No. 7725-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.
3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

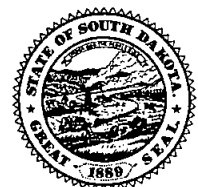
WATER MANAGEMENT BOARD

By: 

Jeanne Goodman, Chief Engineer
Water Rights Program
Department of Environment and Natural Resources

AUG 29 2013

date



SOUTH DAKOTA
REISSUED WATER PERMIT NO. 7725A-3
(OWNERSHIP CHANGE OF APPROVED PORTIONS OF WATER PERMIT NO. 7725-3)

Date of first receipt of Application No. 7725-3: February 28, 2013.

The Water Management Board approved portions of Water Permit No. 7725-3 on July 11, 2013, for Lenny Peterson, Hitchcock SD.

On July 23, 2014, an ownership change was filed transferring the approved portions of Water Permit No. 7725-3 to Danny Peterson, 38984 189th St, Hitchcock SD 57348. Water Permit No. 7725-3 is being divided into Water Permit No. 7725A-3 (approved portion) and Application No. 7725B-3 (denied portion currently under appeal) to reflect separate ownership.

Water Permit No. 7725A-3 authorizes 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. 7725A-3 appropriates 1.93 cubic feet of water per second (cfs) from one well to be completed into the Tulare:Western Spink Hitchcock Aquifer (60-100 feet deep) located in the approximate center of the SW ¼ Section 7 for irrigation of 135 acres located in the SW ¼ Section 7, all in T113N, R63W.
2. The amount of the appropriation may not exceed 2 acre feet annually for each acre of land to which water is actually and beneficially applied for irrigation. The water is to be used during the following described annual period: March 1 – November 30.
3. The date from which applicant may claim right is February 28, 2013.
4. One-fifth of the construction is to be completed on or before January 11, 2016.
5. All construction is to be completed on or before July 11, 2018.
6. Water is to be put to beneficial use on or before July 11, 2022.
7. Water rights obtained in compliance with the laws of the State of South Dakota may not be unlawfully impaired by this appropriation.

QUALIFICATIONS

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.

The well authorized by Permit No. 7725A-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with the 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.

continued

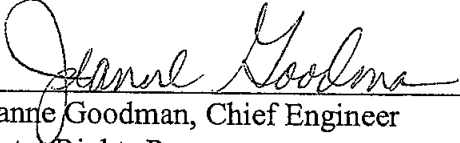
Page 2

Water Permit No. 7725A-3

Danny Peterson

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

WATER MANAGEMENT BOARD

By: 
Jeanne Goodman, Chief Engineer
Water Rights Program
Department of Environment and Natural Resources

AUG 04 2014

date





DEPARTMENT OF ENVIRONMENT
and NATURAL RESOURCES

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



AUG 04 2014

7725-3
7725A-3

Danny Peterson
38984 189th St
Hitchcock SD 57348

Dear Mr. Peterson:

Enclosed is your Reissued Water Permit No. 7725A-3.

On July 23, 2014, an ownership change was filed for the approved portions of Water Permit No. 7725-3 located in the SW ¼ Section 7, T113N, R63W. Based on the ownership change, Water Permit No. 7725-3 has been divided into No. 7725A-3 (approved portion) and Application No. 7725B-3 (denied portion currently under appeal).

Enclosed for your records is Receipt No. 06911 in the amount of \$50 which you paid for filing the ownership change. For informational purposes, the application you submitted to transfer the irrigated acreage and point of diversion now authorized under No. 7725A-3 to other land is currently under review.

If you have any questions, please contact our office.

Sincerely,

Jeanne Goodman, Chief Engineer
Water Rights Program
605 773-3352

enclosures

Supplemental Information

(type or print)

1. Well Information

(check one or both as applicable) ☒ Drilling new well(s) ☐ Using existing well(s)

a) If new wells, how many 2 Have test holes been drilled ☐ Yes ☒ No Drilled by _____
(if yes, please provide copies of logs)

b) If existing wells, how many _____ Provide copy of log(s), if available. Drilled by _____

c) Well Depth 60-100 Depth to Top of Water Bearing Material _____ Depth to Water from Surface _____

d) Distance to nearest existing domestic well:

On applicant's property _____ On property owned by others 1 mile approximately

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)

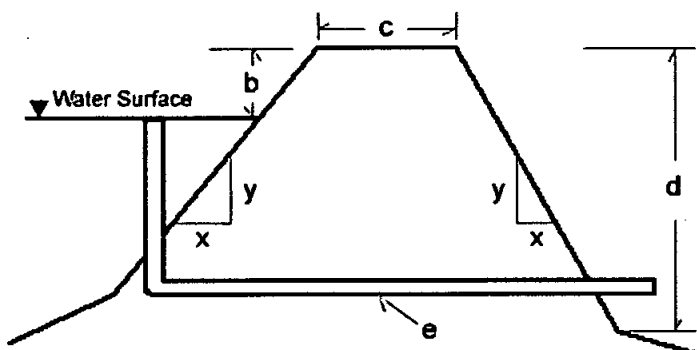
Upstream _____

Downstream _____

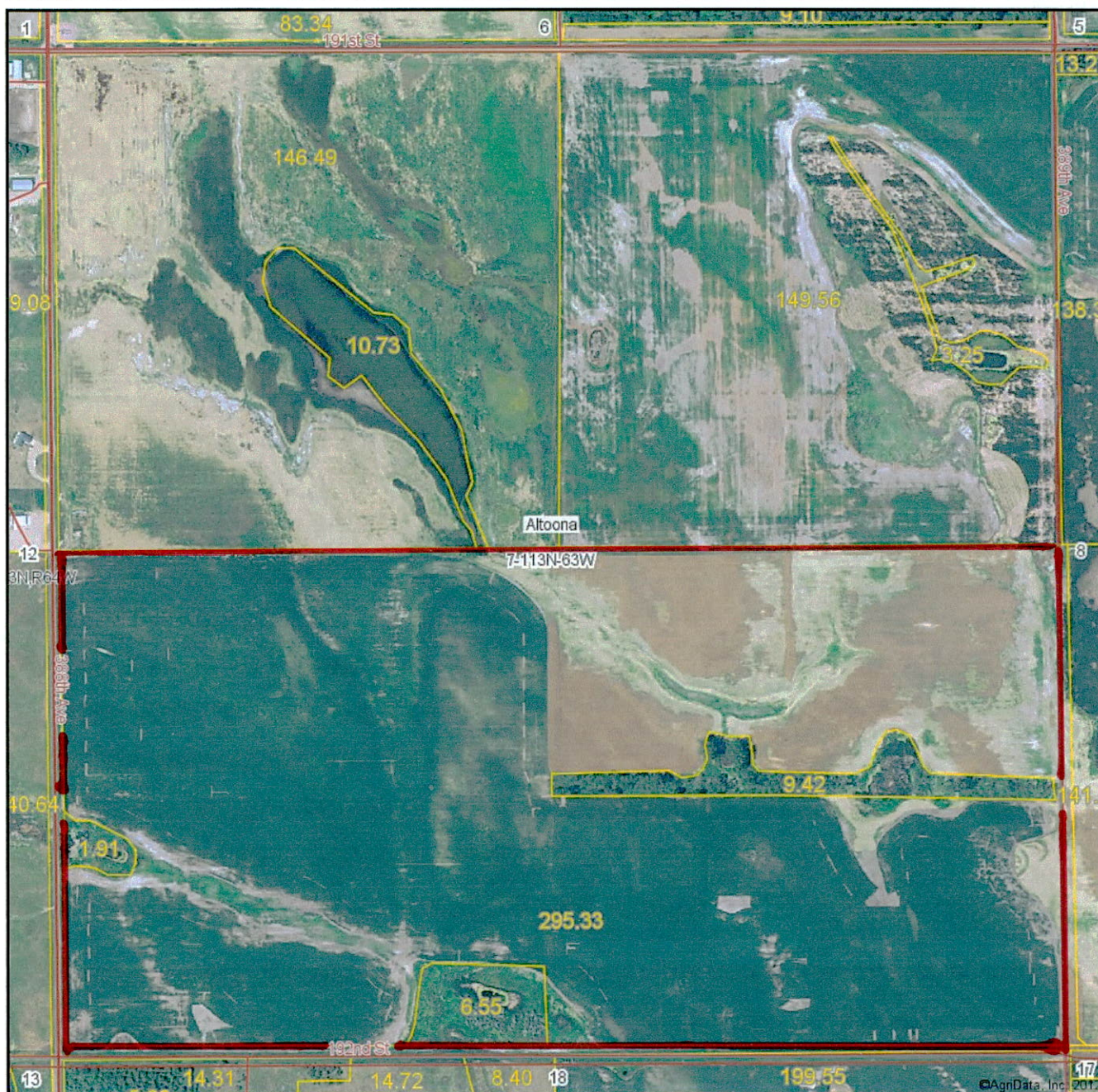
h) Surface Area of Impoundment _____

i) Storage _____ Acre Feet

j) Drainage Area Above Dam _____ Acres



Aerial Map



Maps provided by:

©AgriData, Inc. 2013
www.AgriDataInc.com7-113N-63W
Beadle County
South Dakota

2/10/2013

Field borders provided by Farm Service Agency as of 5/21/2008. [Aerial photography](#) provided by Aerial Photography Field Office.

RECEIPT

WATER RIGHTS PROGRAM

South Dakota Department of Environment and Natural Resources

Date 3/1, 2013

RECEIVED OF Peterson Farms 19111 Maple Ave Hitchcock SD 57348

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

Fee for Application for Permit No. <u>7725-3</u> to Appropriate Water, to construct and to put water to beneficial use	1150	00
Fee for Application for Permit No. _____ to Appropriate Water for Future use		
Fee to retain Future Use Permit No. _____ after period of seven years.		
Fee for Inspecting Constructed Works, confirming beneficial use and issuing Water License No. <u>7725-3</u>	200	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	1350 00

No. 06188

By

James E. Eide
Chief Engineer

FORM 2: Application for irrigation in South Dakota
(type or print)

email 10:50 PM Feb. 8 2013

Mail to:
PMB 2020
DENR - Water Rights
523 E Capitol Ave
Pierre, SD 57501-3182
ph. (605) 773-3352

(office use only)
No. _____ Hydrologic Unit _____
Basin _____
Newspaper _____

RECEIVED
FEB - 8 2013
WATER RIGHTS
PROGRAM

Application For Permit To Appropriate Water For Irrigation

Type of Application: ☒ New ☐ Vested Right ☐ Amendment/Correction to Permit No. _____
(Use predates Mar 2, 1955)

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

1. Name to Appear on Irrigation Permit Lenny Peterson

(check one) ☒ Owner ☐ Tenant/lessee ☐ Owner's Legal Agent

(name and complete address if different than above name)

Mailing Address 19111 Maple Ave. Hitchcock SD 57348
(Address) (City) (State) (Zip Code)

Home Phone 605-266-2793 Cell 605-354-4602 Email kpeterson@venturecomm.net

2. Amount of water claimed _____ *CFS or _____ **GPM _____ ***AF Total Acreage 1465
(*Cubic Feet per Second) (**Gallons per Minute) (***)Acre Feet - storage capacity of dam/dugout or annual use if applicable)

3. Source of water supply Well

4. Location of point of diversion Center of quarters

(example - 3 wells in SW1/4 NE1/4 section 12-T104N-R53W)

County Beadle

5. County or counties where water will be used Beadle and Spink

6. Annual period during which water is to be used May through August

7. List below each forty acre division, or lot, or fraction thereof and show number of acres to be irrigated in each.
(Attach sheet if more space is needed)

Land Description	Acres	Land Description	Acres
S 1/2 Section 7-113N-63W	320	S 1/2 NW 1/4 of Section 27-115N-63W	80
NW 1/4 Section 11-113N-64W	160	NW 1/4 17-113N-63W	160
E 1/2 Section 26-113N-63W	320	SW 1/4 21-114N-63W	160
SE 1/4 Section 26-114N-64W	105	SW 1/4 22-114N-63W	160

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

L

I, Lenny Peterson Lenny Peterson 2-8-13, the applicant, certify that I have read this application, have examined the attached map, and that the matters stated are true.



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

denr.sd.gov

February 19, 2013

Lenny Peterson
19111 Maple Avenue
Hitchcock SD 57348

Oscar Inc.
Floyd Peterson
209 27th Street NW
Huron SD 57350

Gentleman:

The Water Rights Program received a number of water permit applications for irrigation in Beadle and Spink County. The applications in their current form are not complete. Specifically each application will need to have the following:

1. Application filing and licensing fee associated with the number of acres proposed to be irrigated.
2. Amount of water claimed on Item No. 2 on each application.
3. Number of wells on Item No.3
4. Breakdown of acres under Item No. 7 by quarter-quarter
5. Completed Form 2A for proposed well construction
6. Submit a map referencing section corners with proposed well sites marked and the acres to be irrigated outlined.

Lenny has 2 applications filed from the Tulare:Western Spink Hitchcock Aquifer and four applications from the Tulare:East James Aquifer. Oscar has one application filed from the Tulare:Western Spink Hitchcock Aquifer.

State law states that if the chief engineer determines that the application is defective in form or incomplete, it shall be returned to the applicant with a statement of the corrections, amendments, or changes required within thirty days after its receipt. Sixty days from the date the application is returned shall be allowed for refile. If refiled, with corrections made as required with sixty days, the application shall take priority as of the date of the its original filing.

Please let me know if you have questions

Sincerely,

COPY

Eric Gronlund
Water Rights Program, DENR
605 773-3352



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

denr.sd.gov

May 24, 2013

Lenny Peterson
19111 Maple Avenue
Hitchcock SD 57348

Dear Mr. Peterson:

The Department of Environment and Natural Resources (DENR) received 42 applications seeking to irrigate a total of 8,207 acres of irrigation from the Tulare:Western Spink Hitchcock Aquifer. DENR evaluated whether unappropriated water is available from the aquifer. Based on priority of filing, the Chief Engineer recommends approval of ten applications, approval of a portion of the eleventh application and denial of the remaining 31 applications. For your information, the Report to the Chief Engineer on the applications for additional acres is attached.

Water Permit Application No. 7725-3 for irrigation use has been examined and found to comply with the South Dakota water laws and applicable rules. The Chief Engineer's recommendation is for APPROVAL of Application No. 7725-3 for 1.66 cubic feet of water per second for the irrigation of 116 acres. See attached recommendation.

Water Permit Application Nos. 7752-3, 7755-3, 7756-3 and 7757-3 for irrigation use have been examined and found to comply with the South Dakota water laws and applicable rules. The Chief Engineer's recommendation is for DENIAL of Application Nos. 7752-3, 7755-3, 7756-3 and 7757-3. For your information, the Chief Engineer's recommendations are enclosed.

State law provides that if the Chief Engineer recommends denial of an application, the applicant has 20 days from the date the recommendation is mailed to state in writing whether they intend to oppose the recommendation at a hearing before the Water Management Board. Failure to submit a statement of intent to oppose the recommendation to deny constitutes withdrawal of the application. If you choose to oppose the recommendation, DENR will provide notice of hearing to be published in accordance with state law (South Dakota Codified Law 46-2A-4) scheduling a hearing before the Water Management Board. The cost of publication will be the responsibility of the applicant.

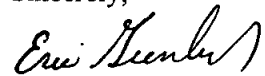
Failure to contact the Water Rights Program by June 13, 2013, will constitute withdrawal of the applications. If withdrawal occurs, the application filing fees will be refunded in its entirety. If the applications go to hearing before the Water Management Board and are denied, 75% of the application filing fee is refunded.

In the case of Application No. 7725-3 which is recommended for approval of 116 of the 320 requested acres, you also have the right to contest the Chief Engineer's recommendation and provide testimony at the hearing before the Water Management Board. Please let DENR know if you desire to contest this recommendation and then we will proceed to public notice.

The ten applications that are recommended for approval are to be public noticed for the July 10 – 11, 2013, meeting of the Water Management Board. If you oppose the Chief Engineer's recommendation, early submittal of the written statement to oppose the recommendation will enable the applications to be public noticed for the July 10 – 11, 2013, Water Management Board meeting. However, the applications for denial can not be taken out of order in which they were received. If DENR is unable to get the applications with denial recommendations public noticed for the July meeting the next meeting of the Board is October 2 – 3, 2013.

Please contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Eric Gronlund".

Eric Gronlund

Water Rights Program, DENR

605 773-3352

eric.gronlund@state.sd.us

enclosures



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. 7725-3, Lenny Peterson

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. 7725-3, Lenny Peterson, 19111 Maple Avenue, Hitchcock SD 57348.

The Chief Engineer is recommending APPROVAL of Application No. 7725-3 for 1.66 cubic feet of water per second and 116 acres because 1) there is reasonable probability that there is unappropriated water available for 116 acres of the applicant's proposed use, 2) based on prior approved water right permits and the priority of filing of other pending applications, there is not unappropriated water available from the Tulare:Western Spink / Hitchcock Aquifer for the applicant's proposed use for the remaining 2.91 cfs and 204 acres; 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 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. 7725-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.
3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

See report on application for additional information.


Jeanne Goodman, Chief Engineer
May 24, 2013

NOTE: The applicant at the time of hearing will have to identify the quarter section in Section 7, T113N, R63W where the well and acres will be located. The applicant will also need to identify how the irrigation system will be limited to 116 acres.

REPORT TO THE CHIEF ENGINEER
ON

WATER PERMIT APPLICATION NO. 7685-3
MICHAEL WATSON
WATER PERMIT APPLICATION NO. 7716-3
DENIS AND CRAIG SLEPIKAS
WATER PERMIT APPLICATION NO. 7719-3
MARSHALL BROTHERS
WATER PERMIT APPLICATION NOS. 7717-3, 7718-3, 7720-3 & 7721-3
TERRY WIETING
WATER PERMIT APPLICATION NOS. 7722-3, 7723-3 & 7724-3
BRENT AND LELAND KLEINSSASER
WATER PERMIT APPLICATION NOS. 7726-3, 7727-3, 7753-3, 7754-3 & 7759-3
OSCAR, INC.
WATER PERMIT APPLICATION NOS. 7725-3, 7752-3, 7755-3, 7756-3 & 7757-3
LENNY PETERSON
WATER PERMIT APPLICATION NOS. 7751-3 & 7758-3
BRAD PETERSON
WATER PERMIT APPLICATION NOS. 7731-3 & 7732-3
RIVERSIDE HUTTERIAN BRETHREN
WATER PERMIT APPLICATION NOS. 7733-3, 7734-3, 7735-3 & 7736-3
VANBUSKIRK FARMS
WATER PERMIT APPLICATION NOS. 7737-3, 7738-3, 7739-3, 7740-3, 7742-3, 7743-3,
7744-3, 7745-3 & 7746-3
BIXLER FARMS
WATER PERMIT APPLICATION NO. 7790-3,
MARTIN J. ANDERSON
WATER PERMIT APPLICATION NO. 7799-3,
RATHJEN FARMS
WATER PERMIT APPLICATION NO. 7822-3 & 7823-3
DARIN BINGER

APRIL 13, 2013

Water Permit Application No. 7685-3 proposes to appropriate water from one well completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.67 cubic feet of water per second (cfs). Water will be diverted from either an existing well authorized by Water Right No. 6175-3, located in the center of the NE¼ Section 11, T114N-R63W, or a new well to be located in the NW¼ SE¼ Section 11, T114N-R63W. This application proposes to irrigate 75 acres located in the N½ SE¼, SW¼ SE¼ Section 1, Section 11, T114N-R63W.

Water Permit Application No. 7716-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 2.28 cfs. Water is to be diverted from one well approximately 88 feet deep, located in the

approximate center of the NE ¼ Section 20, T112N-R61W. This application proposes to irrigate 160 acres located in the NE¼ Section 20, T112N-R61W.

Water Permit Application No. 7719-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.78 cfs. Water is to be diverted from one well approximately 70 feet deep, located in the approximate center of the NW¼ Section 4, T113N-R62W. This application proposes to irrigate 135 acres located in the NE¼ Section 4, T113N-R62W.

Water Permit Application No. 7717-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.78 cfs. Water is to be diverted from one well approximately 70 feet deep, located in the approximate center of the NE ¼ Section 10, T113N-R64W. This application proposes to irrigate 135 acres located in the NE¼ Section 10, T113N-R64W.

Water Permit Application No. 7718-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.78 cfs. Water is to be diverted from one well approximately 70 feet deep, located in the approximate center of the SE ¼ Section 9, T113N-R64W. This application proposes to irrigate 135 acres located in the SE¼ Section 9, T113N-R64W.

Water Permit Application No. 7720-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.78 cfs. Water is to be diverted from one well approximately 70 feet deep, located in the approximate center of the NE ¼ Section 25, T114N-R64W. This application proposes to irrigate 135 acres located in the NE¼ Section 25, T114N-R64W.

Water Permit Application No. 7721-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.33 cfs. Water is to be diverted from one well approximately 70 feet deep, located in the approximate center of the SW ¼ Section 18, T114N-R63W. This application proposes to irrigate 100 acres located in the SW¼ Section 18, T114N-R63W.

Water Permit Application No. 7722-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.78 cfs. Water is to be diverted from one well approximately 80 feet deep, located in the approximate center of the NE ¼ Section 4, T111N-R61W. This application proposes to irrigate 155 acres located in the NE¼ Section 4, T111N-R61W.

Water Permit Application No. 7723-3 proposes to appropriate water from two wells to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 3.56 cfs. Water is to be diverted from two wells approximately 80 feet deep, located in the approximate centers of the NW¼ Section 3, T111N-R61W and the SW ¼ Section 3, T111N-R61W. This application proposes to irrigate 300 acres located in the W½ Section 3, T111N-R61W.

Water Permit Application No. 7724-3 proposes to appropriate water from two wells to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 3.56 cfs. Water is to be diverted from two wells approximately 80 feet deep, located in the approximate centers of the SW¼ Section 4, T111N-R61W and the SE ¼ Section 4, T111N-R61W. This application proposes to irrigate 300 acres located in the S 1/2 Section 4, T111N-R61W.

Water Permit Application No. 7726-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 2.28 cfs. Water is to be diverted from one well approximately 60-100 feet deep, located in the approximate center of the SW ¼ Section 16, T114N-R62W. This application proposes to irrigate 160 acres located in the NE¼ Section 34, T114N-R62W.

Water Permit Application No. 7727-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 2.28 cfs. Water is to be diverted from one well approximately 60-100 feet deep, located in the approximate center of the NW ¼ Section 34, T113N-R64W. This application proposes to irrigate 160 acres located in the NW¼ Section 16, T113N-R64W.

Water Permit Application No. 7753-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.50 cfs. Water is to be diverted from one well approximately 60-100 feet deep, located in the approximate center of the SE¼ Section 26, T114N-R64W. This application proposes to irrigate 105 acres located in the SE ¼ Section 26, T114N-R64W.

Water Permit Application No. 7754-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.14 cfs. Water is to be diverted from one well approximately 60-100 feet deep, located in the S½ NW¼ Section 27, T115N-R63W. This application proposes to irrigate 80 acres located in the S½ NW¼ Section 27, T115N-R63W.

Water Permit Application No. 7759-3 proposes to appropriate water from two wells to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 4.57 cfs. Water is to be diverted from two wells approximately 60-100 feet deep, located in the approximate centers of the SW¼ Section 19, T114N-R63W and the SE ¼ Section 19, T114N-R63W. This application proposes to irrigate 320 acres located in the S½ Section 19, T114N-R63W.

Water Permit Application No. 7725-3 proposes to appropriate water from two wells to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 4.57 cfs. Water is to be diverted from two wells approximately 60-100 feet deep, located in the approximate centers of the SW¼ Section 7, T113N-R63W and the SE ¼ Section 7, T113N-R63W. This application proposes to irrigate 320 acres located in the S½ Section 7, T113N-R63W.

Water Permit Application No. 7752-3 proposes to appropriate water from two wells to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 4.57 cfs. Water is to be diverted from two wells approximately 60-100 feet deep, located in the approximate centers of the NE¼ Section 26, T113N-R63W and the SE ¼ Section 26, T113N-R63W. This application proposes to irrigate 320 acres located in the E½ Section 26, T113N-R63W.

Water Permit Application No. 7755-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 2.28 cfs. Water is to be diverted from one well approximately 60-100 feet deep, located in the approximate center of the NW¼ Section 17, T113N-R63W. This application proposes to irrigate 160 acres located in the NW¼ Section 17, T113N-R63W.

Water Permit Application No. 7756-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 2.28 cfs. Water is to be diverted from one well approximately 60-100 feet deep, located in the approximate center of the SW¼ Section 21, T114N-R63W. This application proposes to irrigate 160 acres located in the SW¼ Section 21, T114N-R63W.

Water Permit Application No. 7757-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 2.28 cfs. Water is to be diverted from one well approximately 60-100 feet deep, located in the approximate center of the SW¼ Section 22, T114N-R63W. This application proposes to irrigate 160 acres located in the SW¼ Section 22, T114N-R63W.

Water Permit Application No. 7751-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 2.28 cfs. Water is to be diverted from one well approximately 60-100 feet deep, located in the approximate center of the NW¼ Section 11, T113N-R64W. This application proposes to irrigate 160 acres located in the NW¼ Section 11, T113N-R64W.

Water Permit Application No. 7758-3 proposes to appropriate water from two wells to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 4.57 cfs. Water is to be diverted from two wells approximately 60-100 feet deep, located in the approximate centers of the NW¼ Section 30, T114N-R63W and NE¼ Section 30, T114N-R63W. This application proposes to irrigate 320 acres located in the N½ Section 30, T114N-R63W.

Water Permit Application No. 7731-3 proposes to appropriate water from two wells to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 3.86 cfs. Water is to be diverted from two wells approximately 85 feet deep, located in the approximate centers of the NW¼ Section 1, T113N-R62W and SW¼ Section 1, T113N-R62W. This application proposes to irrigate 270 acres located in the W½ Section 1, T113N-R62W.

Water Permit Application No. 7732-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.93

cfs. Water is to be diverted from one well approximately 80 feet deep, located in the SW¼ SE¼ Section 21, T112N-R61W. This application proposes to irrigate 135 acres located in the NE¼ Section 21, T112N-R61W.

Water Permit Application No. 7733-3 proposes to appropriate water from four wells to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 7.77 cfs. Water is to be diverted from four wells approximately 110 feet deep, located in the approximate centers of the SE¼ Section 4, T113N-R63W and SW¼ Section 4, T113N-R63W; and the approximate centers of the NE¼ Section 5, T113N-R63W and SE¼ Section 5, T113N-R63W. This application proposes to irrigate 544 acres located in the S½ Section 4, T113N-R63W and the E½ Section 5, T113N-R63W.

Water Permit Application No. 7734-3 proposes to appropriate water from five wells to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 14.0 cfs. Water is to be diverted from five wells approximately 110 feet deep, located in: 1) the approximate center of the NW¼ Section 32, T114N-R63W; 2) the approximate center of Section 31, T114N-R63W; 3) the approximate center of the SW¼ Section 30, T114N-R63W; 4) the approximate center of the NE¼ Section 36, T114N-R64W. This application proposes to irrigate 982 acres located in the NW¼ Section 32, T114N-R63W, Section 31, T114N-R64W, the SW¼ Section 30, T114N-R63W and the NE¼ Section 36, T114N-R64W.

Water Permit Application No. 7735-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.94 cfs. Water is to be diverted from one well approximately 110 feet deep, located in the approximate center of the NE¼ Section 36, T113N-R64W. This application proposes to irrigate 136 acres located in the NE¼ Section 36, T113N-R64W.

Water Permit Application No. 7736-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.94 cfs. Water is to be diverted from one well approximately 110 feet deep, located in the approximate center of the NW¼ Section 33, T114N-R63W. This application proposes to irrigate 136 acres located in the NW¼ Section 33, T114N-R63W.

Water Permit Application No. 7737-3 proposes to appropriate water from two wells to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 2.20 cfs. Water is to be diverted from two wells approximately 60 feet deep, located in the approximate centers of the SE¼ Section 25, T115N-R63W and SW¼ Section 25, T115N-R63W. This application proposes to irrigate 200 acres located in the S½ Section 25, T115N-R63W.

Water Permit Application No. 7738-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.78 cfs. Water is to be diverted from one well approximately 70 feet deep, located in the approximate center of the SW¼ Section 18, T114N-R62W. This application proposes to irrigate 150 acres located in the SW¼ Section 18, T114N-R62W.

Water Permit Application No. 7739-3 proposes to appropriate water from two wells to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 3.56 cfs. Water is to be diverted from two wells approximately 60 feet deep, located in the approximate centers of the SE¼ Section 24, T114N-R63W and NE¼ Section 24, T114N-R63W. This application proposes to irrigate 320 acres located in the E½ Section 24, T114N-R63W.

Water Permit Application No. 7740-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.78 cfs. Water is to be diverted from one well approximately 60 feet deep, located in the approximate center of the SW¼ Section 24, T115N-R63W. This application proposes to irrigate 150 acres located in the SW¼ Section 24, T115N-R63W.

Water Permit Application No. 7742-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.78 cfs. Water is to be diverted from one well approximately 60 feet deep, located in the approximate center of the NE¼ Section 14, T115N-R63W. This application proposes to irrigate 160 acres located in the NE¼ Section 14, T115N-R63W.

Water Permit Application No. 7743-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.78 cfs. Water is to be diverted from one well approximately 60 feet deep, located in the approximate center of the SW¼ Section 23, T114N-R63W. This application proposes to irrigate 160 acres located in the SW¼ Section 23, T114N-R63W.

Water Permit Application No. 7744-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.78 cfs. Water is to be diverted from one well approximately 60 feet deep, located in the approximate center of the SE¼ Section 22, T114N-R63W. This application proposes to irrigate 160 acres located in the SE¼ Section 22, T114N-R63W.

Water Permit Application No. 7745-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.78 cfs. Water is to be diverted from one well approximately 65 feet deep, located in the approximate center of the NW¼ Section 3, T114N-R63W. This application proposes to irrigate 160 acres located in the NW¼ Section 3, T114N-R63W.

Water Permit Application No. 7746-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.78 cfs. Water is to be diverted from one well approximately 60 feet deep, located in the approximate center of the NW¼ Section 6, T114N-R62W. This application proposes to irrigate 160 acres located in the NW¼, W ½ NE¼, N½SW¼ Section 6, T114N-R62W.

Water Permit Application No. 7790-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 1.86 cfs. Water is to be diverted from one well approximately 85 feet deep, located in the NW¼ SE¼

Section 18, T113N-R62W. This application proposes to irrigate 132 acres located in the SW¼, W ½ SE¼, Section 18, T113N-R62W.

Water Permit Application No. 7799-3 proposes to irrigate 36 new acres using a well authorized by Water Right No. 3172-3. Water Right No. 3172-3 authorizes a diversion rate of 1.78 cfs from a well 65 feet deep, completed into the Tulare: Western Spink/Hitchcock aquifer, located in the center of the NW¼ Section 20, T114N-R62W for the irrigation of 136 acres located in the NW¼ Section 20, T114N-R62W. This application proposes to irrigate 36 additional acres located in the N½ NW¼ and the N½ SW¼ Section 20, T114N-R62W from the existing well. This application, if approved, does not authorize any increase in the developed diversion rate. This application also clarifies the location of the existing 136 acres irrigated to include the N½ SW¼ Section 20, T114N-R62W.

Water Permit Application No. 7822-3 proposes to appropriate water from one well to be completed into the Tulare: Western Spink/Hitchcock aquifer at a maximum diversion rate of 2.00 cfs. Water is to be diverted from one well approximately 155 feet deep, located in the approximate center of the NE¼ Section 35, T115N-R65W. This application proposes to irrigate 135 acres located in the NE¼ Section 35, T115N-R65W.

Water Permit Application No. 7823-3 proposes to irrigate 25 new acres using a well authorized by Water Right No. 6142-3. Water Right No. 6142-3 authorizes a diversion rate of 2.22 cfs from a well completed into the Tulare: Hitchcock Aquifer, located in the NW¼ SE¼ Section 27, T115N-R65W for the irrigation of 240 acres located in the E½ Section 27, T115N-R65W. This application proposes to irrigate 25 additional acres located in the SE¼ Section 27, T115N-R65W from the existing well. This application, if approved, does not authorize any increase in the developed diversion rate.

AQUIFER: TULARE: WESTERN SPINK/HITCHCOCK

At the December 2002 Water Management Board Hearing, the Board determined that the Western Spink and Hitchcock management units of the Tulare aquifer would be considered collectively for water management purposes. At that hearing the Board deferred a number of permit applications for a five year period ending in December 2007. The Board was concerned that the aquifer may be fully appropriated based upon projected use (Goodman, 2007). A total of 37 applications proposing to irrigate 6,527 acres were deferred. At the December 2007 Water Management Board meeting the Board denied all of the deferred applications and deemed the aquifer fully appropriated. The Board found (Finding of Fact No. 41) that "The applicants wish to maintain a priority date based on the date they filed their applications, but there is no provision in the statutes to allow this."

Between 2002 and 2011 there were a number of water permit applications proposing appropriations from the Tulare: Western Spink/Hitchcock aquifer that were denied or withdrawn.

Six applications to appropriate water from the Tulare: Western Spink/Hitchcock aquifer (No. 7288-3, No. 7289-3, No. 7290-3, No. 7291-3, No. 7292-3 and No. 7293-3) were filed with the DENR-Water Rights Program in December 2011. Based on a DENR-Water Rights staff analysis

of the aquifer (Buhler, 2012a) and a stipulation between parties, Water Permit Application No. 7288-3 was withdrawn, and the appropriation requests of the five remaining applications were reduced. Following a July 11, 2012, hearing, the Water Management Board approved water permit applications totaling an amount of water approximately equal to the probable quantity of water remaining unappropriated from the aquifer based on the best information available at the time.

Three water permit applications proposing appropriations from the Tulare: Western Spink/Hitchcock aquifer (No. 7373-3, No. 7378-3 and No. 7379-3) were received in June 2012. The Chief Engineer recommended deferral of Water Permit Application No. 7373-3 and recommended denial of Application Nos. 7378-3 and 7379-3. Application Nos. 7378-3 and 7379-3 were ultimately withdrawn from consideration pursuant to SDCL 46-2A-3.

Twelve more water permit applications proposing appropriations from the Tulare: Western Spink/Hitchcock aquifer were received in December 2012. A January 2013, DENR-Water Rights Staff analysis of the Tulare: Western Spink/Hitchcock aquifer (Buhler, 2013) (see Appendix A), determined that unappropriated water was available from the aquifer to irrigate an additional 3,877 acres. At the March 2013, Water Management Board Meeting, the Board approved Water Permits No. 7373-3 authorizing the irrigation of 160 acres. The other twelve applications to authorize 1,971 acres were approved on May 2, 2013.

Between February 6, 2013, and April 10, 2013, there were 41 water permit applications submitted to the DENR-Water Rights Program proposing to irrigate additional acreage. These applications are shown in Table 1.

APPLICATION NO.	APPLICANT	RECIEVED	ACRES	RUNNING ACREAGE TOTAL
7685-3	MICHAEL WATSON	2/6/13	75	75
7716-3	DENIS AND CRAIG SLEPIKAS	2/8/13 8:30 AM	160	235
7717-3	TERRY WIETING	2/8/13 10:00 AM	135	370
7718-3	TERRY WIETING	2/8/13 10:00 AM	135	505
7719-3	MARSHALL BROTHERS	2/8/13 10:00 AM	135	640
7720-3	TERRY WIETING	2/8/13 10:00 AM	135	775
7721-3	TERRY WIETING	2/8/13 10:00 AM	100	875
7722-3	BRENT/LELAND KLEINSSASER	2/8/13 11:35 AM	155	1030
7723-3	BRENT/LELAND KLEINSSASER	2/8/13 11:35 AM	300	1330
7724-3	BRENT/LELAND KLEINSSASER	2/8/13 11:35 AM	300	1630
7725-3	LENNY PETERSON	2/8/13 10:50 PM	320	1950
7751-3	BRAD PETERSON	2/8/13 10:50 PM	160	2110
7752-3	LENNY PETERSON	2/8/13 10:50 PM	320	2430
7753-3	OSCAR INC	2/8/13 10:50 PM	105	2535
7754-3	OSCAR INC	2/8/13 10:50 PM	80	2615
7755-3	LENNY PETERSON	2/8/13 10:50 PM	160	2775
7756-3	LENNY PETERSON	2/8/13 10:50 PM	160	2935
7757-3	LENNY PETERSON	2/8/13 10:50 PM	160	3095
7726-3	OSCAR INC	2/8/13 11:00 PM	160	3255
7758-3	BRAD PETERSON	2/8/13 11:00 PM	320	3575
7759-3	OSCAR INC	2/8/13 11:00 PM	320	3895
7727-3	OSCAR INC	2/10/13 3:09 PM	160	4055
7731-3	RIVERSIDE COLONY	2/11/13	270	4325
7732-3	RIVERSIDE COLONY	2/11/13	135	4460
7733-3	VAN BUSKIRK FARMS LLP	2/15/13 12:15 PM	544	5004
7734-3	VAN BUSKIRK FARMS LLP	2/15/13 12:15 PM	982	5986
7735-3	VAN BUSKIRK FARMS LLP	2/15/13 12:15 PM	136	6122
7736-3	VAN BUSKIRK FARMS LLP	2/15/13 12:15 PM	136	6258
7737-3	BIXLER FARMS	2/19/13 3:30 PM	200	6458
7738-3	BIXLER FARMS	2/19/13 3:30 PM	150	6608
7739-3	BIXLER FARMS	2/19/13 3:30 PM	320	6928
7740-3	BIXLER FARMS	2/19/13 3:30 PM	150	7078
7742-3	BIXLER FARMS	2/19/13 3:30 PM	160	7238
7743-3	BIXLER FARMS	2/19/13 3:30 PM	160	7398
7744-3	BIXLER FARMS	2/19/13 3:30 PM	160	7558
7745-3	BIXLER FARMS	2/19/13 3:30 PM	160	7718
7746-3	BIXLER FARMS	2/19/13 3:30 PM	160	7878
7790-3	MARTIN J ANDERSON	3/13/2013	132	8010
7799-3	RATHJEN FARMS	3/19/13	36	8046
7822-3	DARIN BINGER	4/10/13	135	8181
7823-3	DARIN BINGER	4/10/13	25	8206

Table 1. Pending water permit applications proposing to appropriate water from the Tulare: Western Spink/Hitchcock aquifer

Based on the best information reasonably available, unappropriated water is available from the Tulare: Western Spink/Hitchcock aquifer to irrigate an additional 1,746 acres at the historic average irrigation application rate for the aquifer of 9.32 inches per year (Buhler, 2012).

There is a reasonable probability that unappropriated water is available from the Tulare: Western Spink/Hitchcock aquifer to support the appropriations proposed by Water Permit Application Nos. 7685-3, 7716-3, 7717-3, 7718-3, 7719-3, 7720-3, 7721-3, 7722-3, 7723-3 and 7724-3 that propose to irrigate a total of 1,630 acres.

The best available information indicates that approval of any of the permit applications received after Water Permit Application No. 7724-3 would cause the estimated average annual withdrawal from the Tulare: Western Spink /Hitchcock aquifer to exceed the estimated average annual recharge to the aquifer. South Dakota Codified Law (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." Therefore, pursuant to SDCL 46-2A-9, additional permits to appropriate water cannot be issued from the Tulare: Western Spink/Hitchcock aquifer since there is not a reasonable probability that there is unappropriated water available from the aquifer.

EXISTING WATER RIGHTS:

There have been 310 water permit applications to appropriate water from the Tulare: Western Spink/Hitchcock aquifer. The status of these applications is shown in table 2.

STATUS	NUMBER
CANCELLED	77
DENIED	37
INCORPORATED	46
LICENSED	129
PERMITTED	25
WITHDRAWN	9

Table 2. Status of Water Permit Applications filed from the Tulare: Western Spink/Hitchcock aquifer.

Where the aquifer is under unconfined conditions, drawdown created by pumping is not significant and does not extend very far from the individual production well (see Figure 9). Where the aquifer is under confined conditions water level fluctuations are more pronounced (see Figure 2). Well interference has never been a problem in this aquifer (Goodman, 2002).

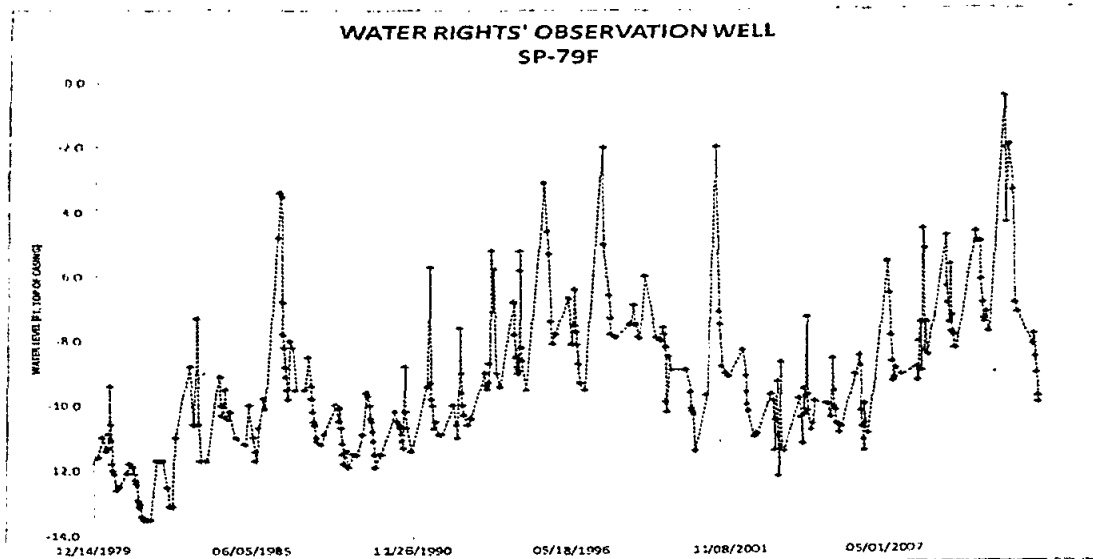


Figure 1. DENR-Water Rights' observation well completed into the unconfined portion of the Tulare:Western Spink/Hitchcock aquifer

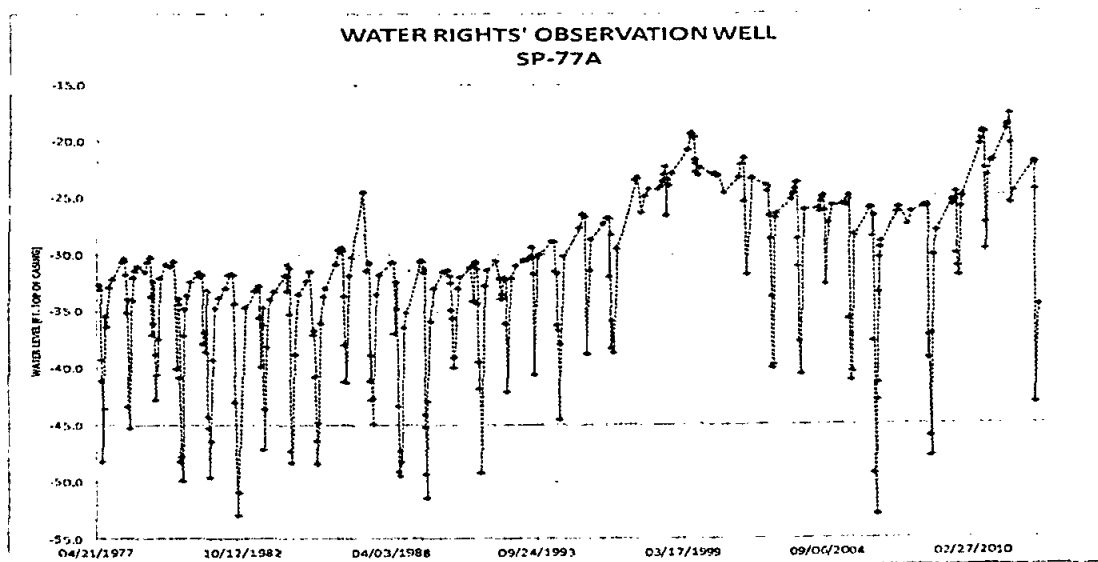


Figure 2. DENR-Water Rights' observation well completed into the confined portion of the Tulare:Western Spink/Hitchcock aquifer

Regardless, these permits, if approved should contain the standard permit qualification for most groundwater permits/rights which states:

"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".

CONCLUSIONS:

1. Based on the historic average irrigation application rate from the Tulare: Western Spink/Hitchcock aquifer (9.32 inches per year), and the current appropriations, there is a reasonable probability that unappropriated water is available to irrigate an additional 1,746 acres.
2. Water Permit Application Nos. 7685-3, 7716-3, 7717-3, 7718-3, 7719-3, 7720-3, 7721-3, 7722-3, 7723-3 and 7724-3 that propose to irrigate a total of 1,630 acres.
3. With approval of Water Permit Application Nos. 7685-3, 7716-3, 7717-3, 7718-3, 7719-3, 7720-3, 7721-3, 7722-3, 7723-3 and 7724-3, the amount of unappropriated water available from the Tulare: Western Spink/Hitchcock aquifer would be sufficient to irrigate 116 acres at the historic average irrigation application rate for the aquifer.
4. Additional irrigation withdrawals are not expected to impair existing users.



Ken Buhler
SD DENR-Water Rights Program

REFERENCES:

- Buhler, K.A., 2012, Report on Water Permit Application No. 7289-3, Bixler Farms; Nos. 7290-3 and 7291-3, Lee Gatzke; No. 7293-3, Jeffery Gatzke; and No. 7292-3, Allen Gatzke; April 25, 2012: SD DENR-Water Rights Program
- Buhler, K.A., 2013, Report to the Chief Engineer on Water Permit Application No. 7373-3, Terry Wieting, Water Permit Application No. 7551-3, Wayne Binger, and Water Permit Application Nos. 7570-3, 7571-3, 7572-3, 7573-3, 7574-3, 7575-3, 7637-3, 7638-3, 7639-3 & 7640-3, Bary Marshall- Marshall Bros., Water Permit Application No. 7620-3, Oscar Inc.; January 30, 2013: SD DENR-Water Rights Program
- Goodman, J.A., 2002, Report on Water Permit Nos 6330-3, 6331-3, 6332-3, 6336-3, 6337-3, 6338-3, 6339-3, 6340-3, 6343-3, 6344-3, 6345-3, 6346-3, 6348-3, 6353-3 for Water From the Tulare Hitchcock Aquifer and Water Permit Nos. 6333-3, 6334-3, 6347-3, 6351-3, 6352-3 for Water From the Tulare Western Spink Aquifer, September 10, 2002: SD DENR-Water Rights Program
- Goodman, J.A., 2007, Report on Deferred Water Permit Applications from the Tulare Hitchcock and Tulare Western Spink Aquifers in Spink, Hand and Beadle Counties, SD: December 5, 2007 Water Management Board Minutes, SD Department of Environment and Natural Resources-Water Rights Program,

REPORT TO THE CHIEF ENGINEER
ON

WATER PERMIT APPLICATION NO. 7373-3
TERRY WIETING

WATER PERMIT APPLICATION NO. 7551-3
WAYNE BINGER

WATER PERMIT APPLICATION NOS. 7570-3, 7571-3, 7572-3, 7573-3, 7574-3, 7575-3
7637-3, 7638-3, 7639-3, & 7640-3
GARY MARSHALL-MARSHALL BROS.

WATER PERMIT APPLICATION NO. 7620-3
OSCAR INC.

JANUARY 30, 2013

Water Permit Application No. 7373-3 proposes to appropriate water at a maximum diversion rate of 1.78 cubic feet of water per second (cfs) from two wells to be completed into the Tulare: Western Spink/Hitchcock aquifer. The wells are to be located in the S½ SW¼ Section 16, T113N-R62W and are expected to be approximately 75 feet deep. This application proposes to irrigate 160 acres located in the SW¼ Section 16, T113N-R62W.

Water Permit Application No. 7551-3 proposes to irrigate 90 additional acres from the well authorized by Water Right No. 470A-3. This application proposes to irrigate 90 acres located in the NE¼, N ½ SE¼ Section 36, T115N-R65W from the existing well with no increase to the developed diversion rate. Water Right No. 470A-3 authorizes 1.56 cubic feet of water per second (cfs) from one well completed into the Tulare: Western Spink/Hitchcock aquifer (130 feet deep) located in the NE¼ SE¼ Section 36 for irrigation of 136 acres located in the SE¼ Section 36, T115N-R65W.

Water Permit Application No. 7570-3 proposes to appropriate water at a maximum diversion rate of 3.56 cfs from two wells to be completed into the Tulare: Western Spink/Hitchcock aquifer. The wells are to be located in the center of the NW¼ and the center of the SW¼ Section 1, T113N-R64W and are expected to be approximately 80 feet deep. This application proposes to irrigate 280 acres located in the W ½ Section 1, T113N-R64W.

Water Permit Application No. 7571-3 proposes to appropriate water at a maximum diversion rate of 1.78 cfs from two wells to be completed into the Tulare: Western Spink/Hitchcock aquifer. The wells are to be located near the center of the SE¼ Section 4, T113N-R64W and are expected to be approximately 80 feet deep. This application proposes to irrigate 160 acres located in the SE¼ Section 4, T113N-R64W.

Water Permit Application No. 7572-3 proposes to appropriate water at a maximum diversion rate of 1.78 cubic feet of water per second (cfs) from a well to be completed into the Tulare: Western Spink/Hitchcock aquifer. The well is to be located in the center of the SW¼ Section 34,

T114N-R64W and is expected to be approximately 80 feet deep. This application proposes to irrigate 140 acres located in the SW 1/4 Section 34, T114N-R64W.

Water Permit Application No. 7573-3 proposes to appropriate water at a maximum diversion rate of 1.78 cfs from a well to be completed into the Tulare: Western Spink/Hitchcock aquifer. The well is to be located near the center of the NW 1/4 Section 27, T114N-R63W and is expected to be 80 feet deep. This application proposes to irrigate 160 acres located in the NW 1/4 Section 27, T114N-R63W.

Water Permit Application No. 7574-3 proposes to appropriate water at a maximum diversion rate of 1.78 cfs from a well to be completed into the Tulare: Western Spink/Hitchcock aquifer. The well is to be located in the center of the NE 1/4 Section 35, T114N-R64W and is expected to be approximately 80 feet deep. This application proposes to irrigate 160 acres located in the NE 1/4 Section 35, T114N-R64W.

Water Permit Application No. 7575-3 proposes to appropriate water at a maximum diversion rate of 3.56 cfs from two wells to be completed into the Tulare: Western Spink/Hitchcock aquifer. The wells are to be located in the centers of the SW 1/4 and SE 1/4 Section 36, T114N-R64W and are expected to be approximately 80 feet deep. This application proposes to irrigate 280 acres located in the S 1/2 Section 36, T114N-R64W.

Water Permit Application No. 7637-3 proposes to appropriate water at a maximum diversion rate of 1.78 cfs from a well to be completed into the Tulare: Western Spink/Hitchcock aquifer. The well is to be located in the center of the SE 1/4 Section 25, T114N-R64W and is expected to be approximately 80 feet deep. This application proposes to irrigate 135 acres located in the SE 1/4 Section 25, T114N-R64W.

Water Permit Application No. 7638-3 proposes to appropriate water at a maximum diversion rate of 1.78 cfs from a well to be completed into the Tulare: Western Spink/Hitchcock aquifer. The well is to be located in the center of the SE 1/4 Section 18, T114N-R63W and is expected to be approximately 80 feet deep. This application proposes to irrigate 135 acres located in the SE 1/4 Section 18, T114N-R63W.

Water Permit Application No. 7639-3 proposes to appropriate water at a maximum diversion rate of 1.78 cfs from a well to be completed into the Tulare: Western Spink/Hitchcock aquifer. The well is to be located in the center of the NW 1/4 Section 3, T114N-R64W and is expected to be approximately 80 feet deep. This application proposes to irrigate 135 acres located in the NW 1/4 Section 3, T114N-R64W.

Water Permit Application No. 7640-3 proposes to appropriate water at a maximum diversion rate of 1.78 cfs from two wells to be completed into the Tulare: Western Spink/Hitchcock aquifer. The wells are to be located near the center of the SW 1/4 Section 8, T113N-R62W and are expected to be approximately 80 feet deep. This application proposes to irrigate 160 acres located in the SW 1/4 Section 8, T113N-R62W.

Water Permit Application No. 7620-3 proposes to appropriate water at a maximum diversion rate of 1.94 cfs from a well to be completed into the Tulare: Western Spink/Hitchcock aquifer. The well is to be located in the center of the NE 1/4 Section 32, T115N-R63W and is expected to be approximately 60 feet deep. This application proposes to irrigate 136 acres located in the NE 1/4 Section 32, T115N-R63W.

AQUIFER: TULARE: WESTERN SPINK/HITCHCOCK

The Tulare: Western Spink/Hitchcock aquifer was basically considered fully appropriated in 2002 and the amount of development in the aquifer has not changed appreciably since 2003. A number of water permit applications were denied or withdrawn between 2002 and 2011. Six applications to appropriate water from the Tulare: Western Spink/Hitchcock aquifer (No. 7288-3, No. 7289-3, No. 7290-3, No. 7291-3, No. 7292-3 and No. 7293-3) were filed with the DENR-Water Rights Program in December 2011. Based on a DENR-Water Rights staff analysis of the aquifer (Buhler, 2012a) and a stipulation between parties, Water Permit Application No. 7288-3 was withdrawn and the appropriation requests of the five remaining applications were reduced. Following a July 11, 2012 hearing, the Water Management Board approved water permit applications totaling an amount of water approximately equal to the probable quantity of water remaining unappropriated from the aquifer.

Water Permit Application No. 7373-3, Terry Wieting, was received June 14, 2012, and Water Permit Application Nos. 7378-3 and 7379-3, Riverside Hutterian Brethren, were received June 29, 2012. Water Permit Application Nos. 7373-3, 7378-3 and 7379-3 proposed to irrigate an additional 565 acres from the Tulare: Western Spink/Hitchcock aquifer. Based on the 1979-2011 average annual irrigation application rate for the aquifer (i.e. 9.32 inches per acre per year) (Buhler, 2012a), the average annual withdrawal associated with these applications would be 438.8 acre-feet per year.

Based on the April 2012 analysis of the aquifer, the Chief Engineer recommended denial of Water Permit Application Nos. 7378-3 and 7379-3 because the best available information indicated that approval of these applications would cause the estimated average annual withdrawal from the Tulare: Western Spink/Hitchcock aquifer to exceed the estimated average recharge to the aquifer. South Dakota Codified Law (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." The applicant did not oppose the Chief Engineer's recommendation and pursuant to SDCL 46-2A-3 the applications were withdrawn from consideration.

The Chief Engineer recommended deferral of Water Permit Application No. 7373-3 pending the resolution of an existing water right (No. 282-3, Renae Veskrina Morog) appropriating water from the Tulare: Western Spink/Hitchcock aquifer that was scheduled for cancellation at the October 3, 2012 Water Management Board meeting. The water right was eventually cancelled due to forfeiture. The Chief Engineer has subsequently determined that since the availability of unappropriated water from an aquifer is based on actual use, the use or in this case nonuse of Water Right No. 282-3 was already considered when analyzing the availability of water from the Tulare: Western Spink/Hitchcock aquifer. Therefore, cancellation of the water right did not result in additional unappropriated water available from the aquifer.

At the time, the April 2012 analysis seemed plausible; however comparison of it with a similar analysis conducted later for the Tulare East James aquifer identified potential inconsistencies between the two analyses. The April 2012 analysis of the Tulare: Western Spink/Hitchcock aquifer appears to have been overly conservative. Two of the fundamental assumptions used in the analysis resulted in an extremely diminished volume of water that was available for

appropriation from the aquifer: 1) In computing the maximum number of acres that could be irrigated from the aquifer based on the average annual recharge and the average annual irrigation application rate, the analysis assumed the irrigation of 100 percent of permitted acreage when in fact, for various reasons, only a fraction of permitted acres are irrigated each year; and 2) In computing the amount that the average annual recharge to the aquifer has exceeded average annual discharge from the aquifer based on observation well data, the portion of the aquifer that was considered under unconfined conditions was estimated based primarily on 1984 data (Kuiper, 1984) which resulted in an overly contracted area.

AQUIFER CHARACTERISTICS:

Although additional data and closer scrutiny of the existing data will allow for improvements to the general deliniation of the Tulare: Western Spink/Hitchcock aquifer, alterations to the "Aquifer Characteristics" section of the April 2012 report to the Chief Engineer (Buhler, 2012a) are not warranted at this time. However, a cursory review of the data suggests that the areal extent of the aquifer as described in the report may have been optimistic.

SDCL 46-2A-9

Pursuant to SDCL 46-2A-9, 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.

WATER AVAILABILITY:

The probability of unappropriated water being available from the Tulare: Western Spink/Hitchcock aquifer can be evaluated by considering SDCL 46-6-3.1 which requires "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."

In applying SDCL 46-6-3.1, the Sixth Judicial Circuit Court ruled in 2005 that if the Water Management Board uses average annual recharge, then it should also use average annual withdrawals to determine if unappropriated water is available from the aquifer (*Hines v. South Dakota Dept. of Environ. and Nat'l. Resources, Hughes County 04-37* (Memorandum Decision, April 29, 2005)).

The availability of unappropriated water from the Tulare: Western Spink/Hitchcock aquifer was evaluated based on observation well data and through consideration of hydrologic budgets for the aquifer.

OBSERVATION WELL DATA:

The analysis of observation well data provides a qualitative means of assessing the aquifer and provides the best information available to evaluate the Tulare: Western Spink/Hitchcock aquifer. In addition, Administrative Rule of South Dakota Section 74:02:05:07 requires that "the Water Management Board shall rely upon the record of observation well measurements to determine

that the quantity of water withdrawn annually from the aquifer does not exceed the estimated average annual recharge to the aquifer.”

The DENR-Water Rights Program monitors 48 observation wells completed into the Tulare: Western Spink/Hitchcock aquifer. The analysis of the DENR-Water Rights Program observation well data provides the best information reasonably available to evaluate withdrawals from an aquifer as compared with recharge to the aquifer. Observation well data showing a steady, continual decline of the aquifer’s water level or artesian pressure could indicate that withdrawals from an aquifer were exceeding recharge. In addition, water level fluctuations in an aquifer dominated by the influences of well withdrawals, or a change in the configuration of the potentiometric surface could indicate that well withdrawals are a significant component in the system relative to recharge and/or natural discharge. Examination of the observation well data to consider long term water level trends, any influences of well withdrawals and the configuration of the potentiometric surface of the aquifer are discussed below.

Observation well water level trends:

A rising water level indicates that recharge to the aquifer exceeds withdrawals from the aquifer and conversely a declining water level is indicative of withdrawals exceeding recharge. An equation for this relationship is:

$$\Delta S = R - D$$

Where: ΔS = change in the volume of water in storage in the aquifer

R = Recharge

D = Discharge

The observation well data for the Tulare: Western Spink/Hitchcock aquifer has documented upward trending water levels throughout the aquifer. The average slope of linear trend lines for observation well hydrographs over the time period of January 2003 through October 2012 has been (+0.284 feet per year). The upward trending water levels indicate recharge to the Tulare: Western Spink/Hitchcock aquifer has been greater than the total of the discharges from the aquifer over the period of record.

An analysis of observation well hydrographs was used to quantify the change in volume of water in storage in the aquifer (i.e. the amount that recharge to the aquifer has exceeded discharge from the aquifer). The analysis involved identifying observation wells completed into the unconfined portion of the Tulare: Western Spink/Hitchcock aquifer and determining the annual change of the water level in each well. The amount of water represented by a change in water level was determined by multiplying the water level change by the aquifer’s specific yield (0.15) (Kuiper, 1984). The average change in storage was applied over the portion of the aquifer that is under unconfined conditions to determine the volume in acre-feet per year of the change in storage. In equation form:

$$\Delta V_{avg} = \Delta W_{at Lev_{avg}} * S_y * A$$

Where:

ΔV_{avg} = Average change in volume (ac-ft/yr)

$Wat Lev_{avg}$ = Average change in water level (ft/yr)

S_y = Specific Yield

A = Area (acres)

The average annual change in water level ($Wat Lev_{avg}$) in the Tulare: Western Spink/Hitchcock aquifer was determined through examination of DENR-Water Rights' observation well data. Five observation wells were used to analyze the Tulare: Western Spink/Hitchcock aquifer since they were the only ones that were in portions of the aquifer that remained unconfined for the entire period of record (Water Year 2003 through Water Year 2012) and the wells were determined to accurately reflect aquifer conditions. The results of the analysis are shown in Table 1.

ANNUAL WATER LEVEL CHANGE (ft)						
	SP-79F	SP-78B	SP-80B	SP-82E	SP-82G	AVE
2003	-0.32	-0.69	-1.12	-0.82	-0.87	-0.764
2004	0.62	-0.5	-0.79	0.45	-0.65	-0.174
2005	-0.18	-0.18	0.23	1.54	0.3	0.342
2006	0.16	-0.1	0.08	-1.09	0.35	-0.12
2007	1.67	1.81	2.21	2.77	2.2	2.132
2008	0.56	0	0.37	1.1	1.1	0.626
2009	0.32	0.99	1.02	-0.3	0.66	0.538
2010	1.23	2.46	1.58	0.7	1.44	1.482
2011	3.5	0.55	2.3	0	-0.7	1.13
2012	-3.1	-1.2	-2	-1.8	-2.1	-2.04
AVE	0.4460	0.3140	0.3880	0.2550	0.1730	0.3152

Table 1. Water Level change per year per observation well (Water Rights, 2013a).

To determine the area (A) of the Tulare: Western Spink/Hitchcock aquifer that was under unconfined conditions, ESRI @ArcMap™10.0 was used to generate a Triangulated Irregular Network (TIN) of the aquifer's potentiometric surface using October 2012 observation well readings. The TIN was converted to a raster file using a Natural Neighbors interpolation method. A second TIN was created using the elevation of the upper most aquifer material encountered in test holes drilled by the DENR-Geological Survey and DENR-Water Rights Program observation wells within the areal extent of the aquifer as defined in the April 2012 aquifer analysis. This TIN was also converted to a raster file using a Natural Neighbors interpolation method. ESRI @ArcMap™10.0 raster calculator was used to subtract the potentiometric surface raster from the "first aquifer material" raster and generate a raster where aquifer material occurred above the potentiometric surface. DENR-Geological Survey test holes (Lithologic Logs), DENR-Water Rights Program observation wells (Water Rights, 2013a), domestic wells (Water Rights, 2013b), and irrigation wells (Water Rights, 2013c) within and adjacent to this resultant raster were examined to determine if the aquifer material that was above the Tulare: Western Spink/Hitchcock potentiometric surface was actually part of the aquifer. Based on this analysis, the unconfined portion of the Tulare: Western Spink aquifer was determined to be 76,978 acres (see figure 1).

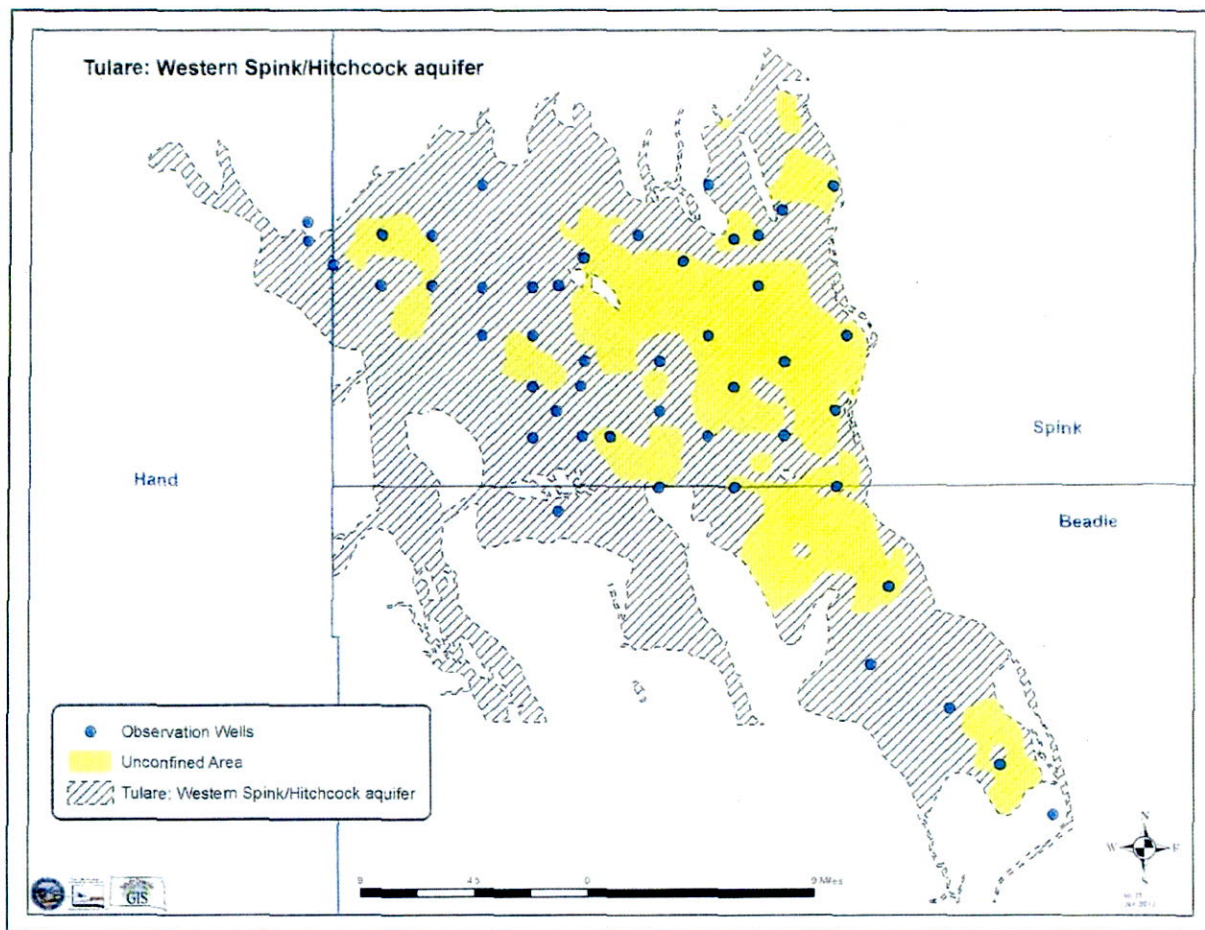


Figure 1. Areal extent of the Tulare: Western Spink/Hitchcock aquifer and the unconfined areas of the aquifer.

$$\Delta V_{avg} = \Delta W_{at Lev_{avg}} * S_y * A,$$

$$\Delta V_{avg} = 0.3152 \text{ ft/yr} * 0.15 * 76,978 \text{ acres}$$

$$\Delta V_{avg} = 3,639.5 \text{ ac-ft/yr}$$

Therefore, the observation well data indicates that the annual recharge to the aquifer exceeded discharge from the aquifer by an average of 3,640 acre-feet per year for the period since development has been static (2003-2012).

Water level fluctuations due to well withdrawals:

Observation well data documents that the development that has occurred from the Tulare: Western Spink/Hitchcock aquifer has had an inconsequential effect on the aquifer over the long term. Figures 2-6 show hydrographs for DENR-Water Rights Program observation wells completed into the aquifer and Figure 7 shows the location of these wells. The water level records for the observation wells document that climatic conditions greatly mask the temporal effects of well withdrawals. Therefore, recharge to and natural discharge from the Tulare: Western Spink/Hitchcock aquifer significantly exceeds pumping. Recognizing that natural

discharge from the aquifer can be captured for pumping. The hydrographs document that there is unappropriated water available from the aquifer to support these appropriations.

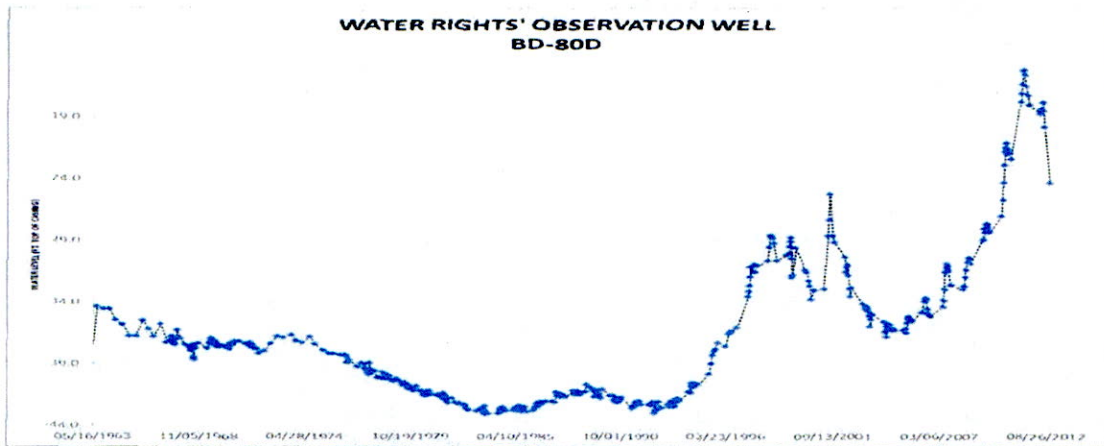


Figure 2. Hydrograph of DENR-Water Rights Program observation well completed into the Tulare: Western Spink/Hitchcock aquifer.

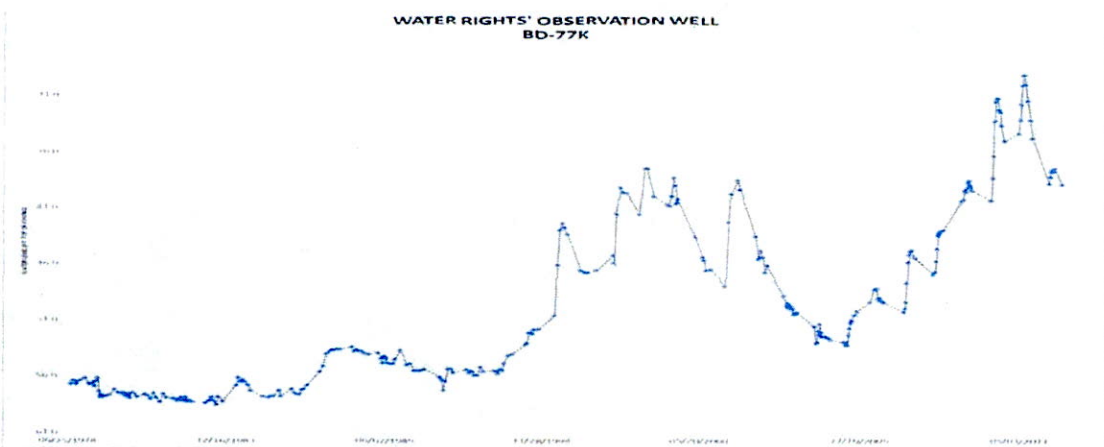


Figure 3. Hydrograph of DENR-Water Rights Program observation well completed into the Tulare: Western Spink/Hitchcock aquifer.

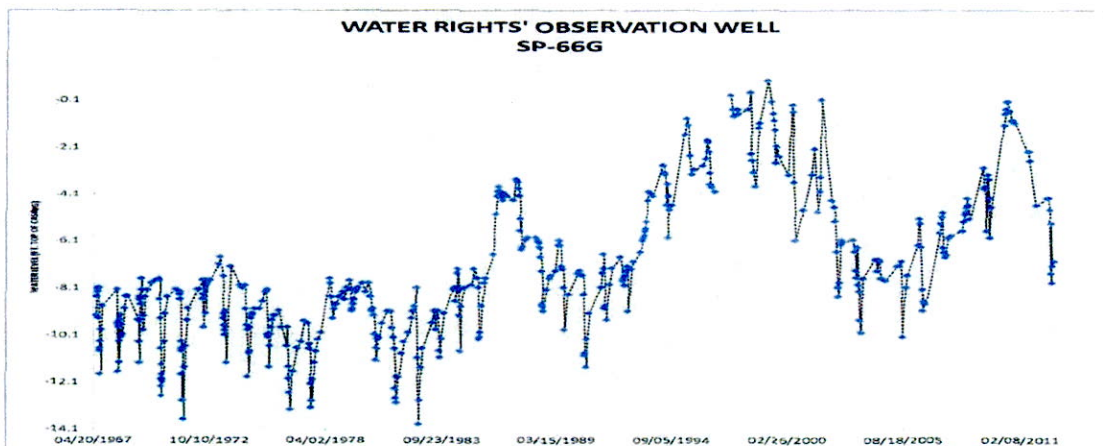


Figure 4. Hydrograph of DENR-Water Rights Program observation well completed into the Tulare: Western Spink/Hitchcock aquifer.

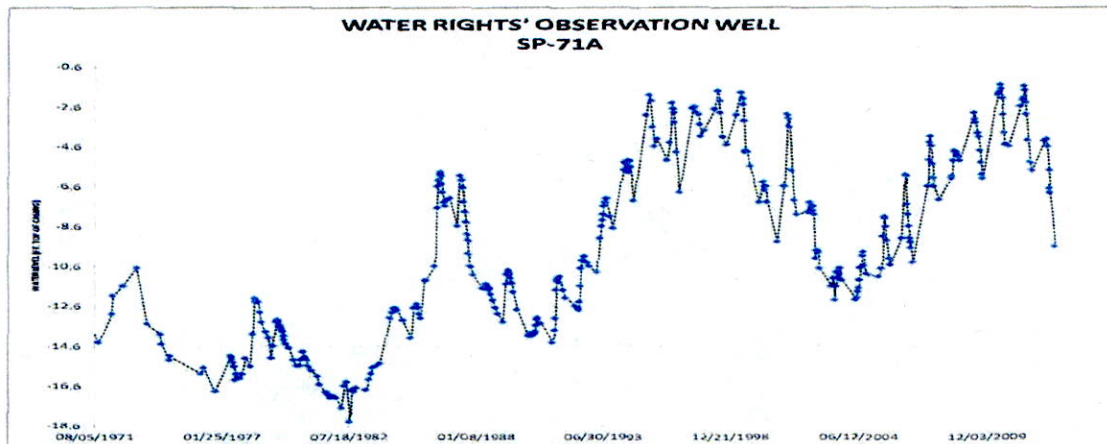


Figure 5. Hydrograph of DENR-Water Rights Program observation well completed into the Tulare: Western Spink/Hitchcock aquifer.

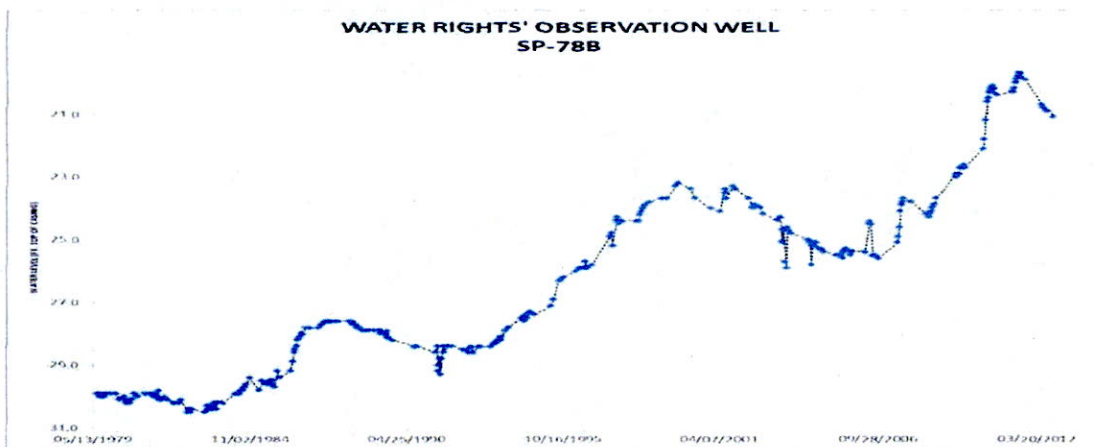


Figure 6. Hydrograph of DENR-Water Rights Program observation well completed into the Tulare: Western Spink/Hitchcock aquifer.

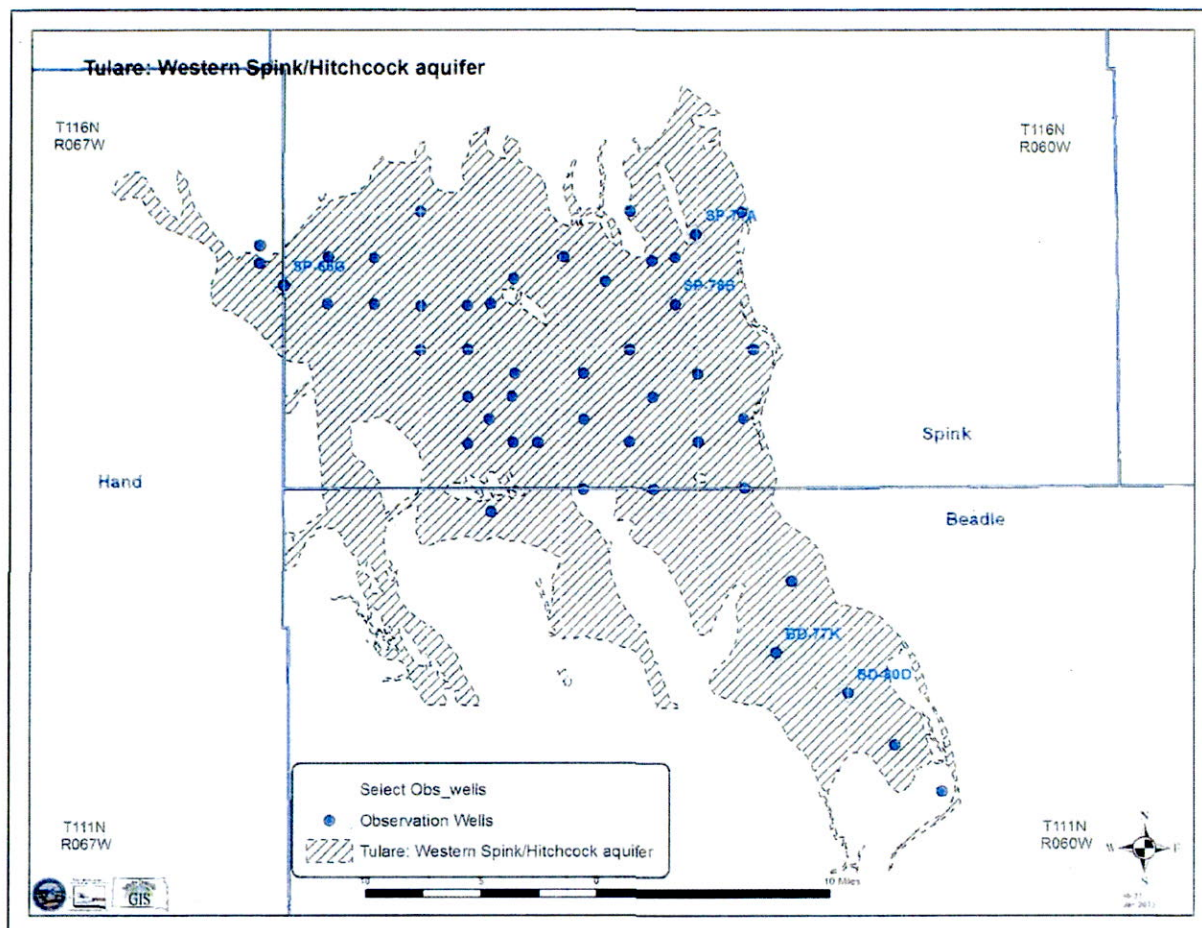


Figure 7. Location of DENR-Water Rights Program observation wells completed into the Tulare: Western Spink aquifer and wells shown in Figures 2-6.

Potentiometric Surface:

The potentiometric surface of the Tulare: Western Spink/Hitchcock aquifer was determined for two time periods based on the observation well measurements for October 1987 and for October 2012. A map showing the two potentiometric surfaces is shown in Figure 8. It is clear that although there are some nuances in the potentiometric surfaces, the surface is essentially unchanged; indicating that discharge is not exceeding recharge and unappropriated water is available from the aquifer.

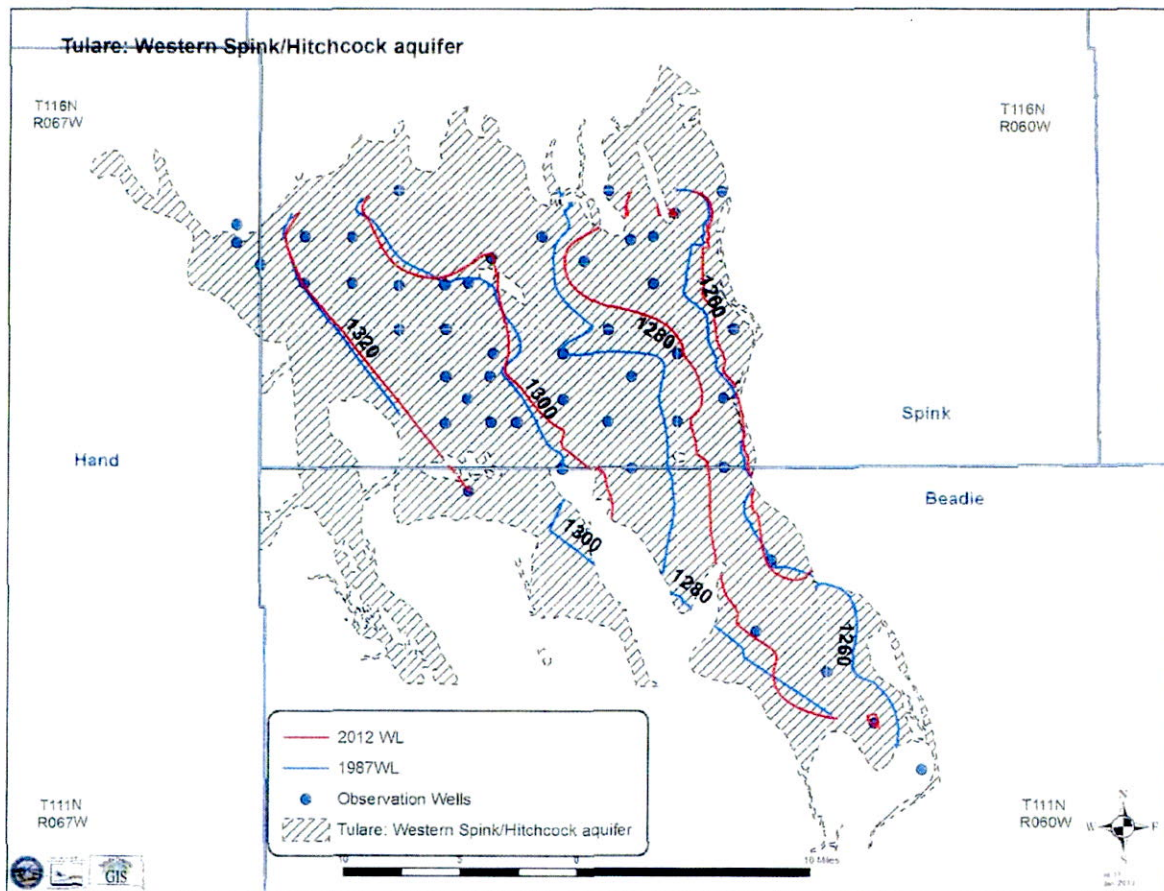


Figure 8. Comparison of the potentiometric surface of the Tulare: Western Spink/Hitchcock aquifer (October 1987 versus October 2012)

Regional flow net analysis using observation well data:

The recharge potential of the Tulare: Western Spink/Hitchcock aquifer was evaluated by interpreting a regional flow net analysis based on the September 2012 water level data from the DENR-Water Rights' Observation Well Network. A flow net analysis is a calculation of the amount of water flowing through the aquifer according to the equation:

$$Q = TIL$$

Where:

Q= flow in gallons per day

T= Transmissivity in gallons per day per foot

I= Hydraulic gradient in feet per mile

L= Cross sectional length in miles

The average hydraulic conductivity for the Tulare: Western Spink/Hitchcock aquifer was estimated based on the specific capacities of the 30 irrigation wells completed into the aquifer for which the data to allow these calculations was available (Water Rights, 2013b; Water Rights, 2013c). Transmissivity was calculated at each well using the wells' specific capacity ("Transmissivity from Specific Capacity"), and the transmissivity was divided by the aquifer

thickness at the well to determine an average hydraulic conductivity for the aquifer. The average hydraulic conductivity was calculated to be 1,982 gallons per day per square foot (gpd/ft²). The average transmissivity of the Tulare: Western Spink/Hitchcock aquifer of a cross section through which all of the flow of the aquifer must flow was determined by multiplying the average thickness of the cross section (36.3 feet) times the average hydraulic conductivity for the aquifer (1,982 gallons per day per square foot) to be 71,950 gallons per day per foot.

The hydraulic gradient for the Tulare: Western Spink/Hitchcock aquifer was estimated to average 4.26 feet per mile based on data from the DENR-Water Rights' Observation Well Network.

The cross section length of the Tulare: Western Spink/Hitchcock aquifer was determined to be approximately 25 miles based on the current aquifer delineation.

The amount of water moving through the Tulare: East James aquifer is estimated as follows:

$$\begin{aligned} Q &= ((71,950 \text{ gpd/ft}) \times (4.26 \text{ ft/mile}) \times (25 \text{ miles})) / (325,851 \text{ gallons/ac-ft}) \\ &= 23.5 \text{ ac-ft/day} \\ &= \underline{8,583 \text{ ac-ft/yr}} \end{aligned}$$

In order to sustain this estimated volume of groundwater moving through the aquifer, the recharge rate in inches per acre per year based on an area of the aquifer of approximately 263,000 acres would be 0.39 inches. This recharge rate cannot be considered "average annual recharge" since it used only 2012 data, and likely can be viewed as a minimum recharge rate; however the estimate does show the reasonableness of the average annual recharge estimate from Kuiper (1984).

HYDROLOGIC BUDGETS:

SDCL 46-6-3.1 and the availability of unappropriated water from the Tulare: Western Spink/Hitchcock aquifer can be evaluated by considering a hydrologic budget for the aquifer which compares the recharge to and discharge from the aquifer.

Recharge to the Tulare: Western Spink/Hitchcock aquifer occurs primarily through infiltration of precipitation where the outwash is at or near ground surface. The best information reasonably available to estimate the average annual recharge to the aquifer is from the groundwater flow model developed by Kuiper (1984). The model incorporated an average recharge rate throughout the aquifer although recharge generally occurs only in unconfined areas. The average annual recharge to the aquifer based on the groundwater flow model ranged from 0.41-1.66 inches per year with a "best fit" reflecting various simulations of 0.83 inches per year (Kuiper, 1984). Considering an areal extent of the Tulare: Western Spink/Hitchcock aquifer equal to 263,016 acres and applying a 0.83 inches per year recharge rate, the average annual recharge to the Tulare: Western Spink/Hitchcock aquifer is estimated to total 18,192 acre-feet per year.

Withdrawals from the Tulare: Western Spink/Hitchcock occur through natural discharge, domestic use and uses from appropriative rights/permits. Essentially all of the well withdrawals from the aquifer are for irrigation use. For the period of 1979 through 2011, irrigation pumpage

from the aquifer is shown in Table 2, and the average irrigation application rate over this period was 9.32 inches per acre per year (Buhler, 2012a).

REPORTED IRRIGATION PUMPING (1979-2011)	ACRE-FEET PER YEAR
Maximum	19397.25
Minimum	2200.29
Average	9725.6

Table 2. Reported irrigation pumping from the Tulare: Western Spink/Hitchcock aquifer for 1979-2011 (Buhler, 2012a)

Since 1979-2012 was a time period that included new development from the aquifer, the average irrigation pumpage for this time period is likely low. However, the average application rate for this time period can be considered reflective of the irrigation practices in the aquifer.

The time period of 2003-2011 reflects fully developed conditions in the aquifer. Irrigation pumpage for this time period is shown in Table 3. The average application rate for the 2003-2011 time period was 8.71 inches per year. The application rate for 2003-2011 likely is more reflective of the climatic conditions over the relatively short (nine year) period than actual irrigation practices in the aquifer.

REPORTED IRRIGATION PUMPING (2003-2011)	ACRE-FEET PER YEAR
Maximum	19397.25
Minimum	3007.9
Average	12286.8

Table 3. Reported irrigation pumping from the Tulare: Western Spink/Hitchcock aquifer for 2003-2011 (Water Rights, 2004-2012)

Two methods were used to evaluate the availability of unappropriated water with separate hydrologic budgets: 1) comparing estimated average annual recharge to the aquifer with the average annual reported well withdrawals over the time period the aquifer was fully developed; and 2) comparing the number of acres that can be irrigated based on the estimated average annual recharge to the aquifer to the number of acres currently authorized for irrigation by water rights/permits.

Irrigation Questionnaire Method:

The amount of unappropriated water that is available from the Tulare: Western Spink/Hitchcock aquifer was estimated by comparing the estimated average annual recharge rate to the average annual well withdrawal from 2003-2011. Since average annual recharge is estimated to be 18,192 ac-ft/yr and the average annual pumping was reported to be 12,286.8 ac-ft/yr, an average of 5,905 acre-feet of unappropriated water is available from the Tulare: Western Spink/Hitchcock aquifer based on this methodology.

Recharge to Acres Method:

The amount of unappropriated water that is available from the Tulare: Western Spink/Hitchcock aquifer was also estimated by comparing the maximum number of acres that could be irrigated from the aquifer based on the estimated average annual recharge and the average irrigation application rate, to the number of acres that are currently authorized for irrigation. The volume of water associated with the potential additional irrigable acres was converted to acre-feet per year based on the average irrigation application rate.

The maximum average annual irrigation withdrawal based on a recharge of 18,192 acre-feet per year and an application rate of 9.32 inches per year would allow for the irrigation of 23,423 acres. There are currently 23,648.8 acres authorized for irrigation from the aquifer with water rights/permits. Since 2003, the average percentage of authorized acres that have been irrigated annually ranged from a maximum of 85.58% to a minimum of 31.17% with an average of 69.02%. This irrigated to authorized percentage agrees fairly well with the same percentages calculated for Tulare: East James aquifer (i.e. Maximum=88.41%, Minimum=39.49%, Average=65.34%) (Buhler, 2012b), for the fully developed time period for that aquifer (1979-2011). Since on average, only 69.02% of authorized acres are irrigated annually, the number of acres that can be expected to be irrigated under current authorization is 23,648.8 acres * 69.02% or 16,322.4 acres. The difference between maximum allowable acres (23,423 acres) and expected irrigation acreage currently authorized (16,322.4 acres) shows that an additional 7,100 acres could be irrigated from the Tulare: Western Spink/Hitchcock aquifer. Assuming an average application rate of 9.32 inches per year applied to 7,100 acres equates to 5,514 ac-ft/yr.

In another format, the "recharge to acres method" compares the average acreage reported irrigated annually from 2003-2011 (15763.6 acres) plus 69.02% of the 810 acres added in 2012 (559.1 acres) with the maximum number that can be irrigated based on the recharge rate (23,423 acres) or 23,423 acres - (15763.6+559.1) = 7,100 acres.

WATER AVAILABILITY SUMMARY:

The DENR-Water Rights Program observation well data indicates that unappropriated water is available from the Tulare: Western Spink/Hitchcock aquifer. Analysis of the observation well data shows that from 2003-2012, recharge to the Tulare: Western Spink/Hitchcock aquifer has exceed discharge from the aquifer by an estimated 3,640 acre-feet per year. A comparison of the average annual pumpage reported from the aquifer from 2003-2011 with the estimated average annual recharge to the aquifer suggests that recharge exceeds pumping by 5,905 acre-feet. Comparing the number of acres that can be irrigated based on the average annual recharge rate suggests that recharge exceeds withdrawals from the aquifer by 5,514 ac-ft/yr.

The difference between the observation well method and budgeting methods for determining the amount of unappropriated water that is available from the aquifer is likely due to a number of factors. Budgeting methods resulted in greater amounts of unappropriated water available from the aquifer however: a) Irrigation questionnaire data is not available for 2012 at this time and it is likely that the 2012 data will increase the averages for the number of acres irrigated, amount of water pumped and the percentage of irrigated to permitted acres. Higher current use averages will reduce the amount of water available based on budgets; b) Budgeting methods are all dependent upon self-reporting by-way of annual irrigation questionnaires. Errors in the reporting

and/or interpretation of the irrigation questionnaires would influence the results; and c) the average annual growing season precipitation in this area for 2003-2011 was 21.19 inches per year, compared to the 20 year average growing season precipitation of 18.35 inches per year (Mathiowetz, 2012). The averages for the number of acres irrigated, amount of water pumped and the percentage of irrigated to permitted acres are likely low due to climatic conditions. Consequently, estimates based on budgets for the amount of water remaining available for appropriation and/or the number of additional acres that can be irrigated are likely too high. The observation well method: a) does reflect 2012 climatic conditions and b) is less influenced by short term trends, for example, the average water level fluctuation for observation wells was +0.315 feet per year for 2003-2012, compared with a +0.261 feet per year average for water years 1983-2012.

For the reasons listed above, and the fact that Administrative Rule of South Dakota Section 74:02:05:07 requires that "the Water Management Board shall rely upon the record of observation well measurements to determine that the quantity of water withdrawn annually from the aquifer does not exceed the estimated average annual recharge to the aquifer" the amount of unappropriated water available from the Tulare: Western Spink Hitchcock aquifer is estimated to be 3,640 acre-feet per year. Based on the historic average annual irrigation application rate of 9.32 inches per year, on average an additional 4,686 acres can be irrigated from the Tulare: Western Spink/Hitchcock aquifer.

EXISTING WATER RIGHTS:

There have been 310 water permit applications to appropriate water from the Tulare: Western Spink/Hitchcock aquifer. The status of these applications is shown in table 4.

STATUS	NUMBER
CANCELLED	77
DENIED	37
INCORPORATED	46
LICENSED	129
PERMITTED	13
WITHDRAWN	8

Table 4. Status of Water Permit Applications filed from the Tulare: Western Spink/Hitchcock aquifer .

Where the aquifer is under unconfined conditions, drawdown created by pumping is not significant and does not extend very far from the individual production well (see figure 9). Where the aquifer is under confined conditions water level fluctuations are more pronounced (see figure 10). Well interference has never been a problem in this aquifer (Goodman, 2002).

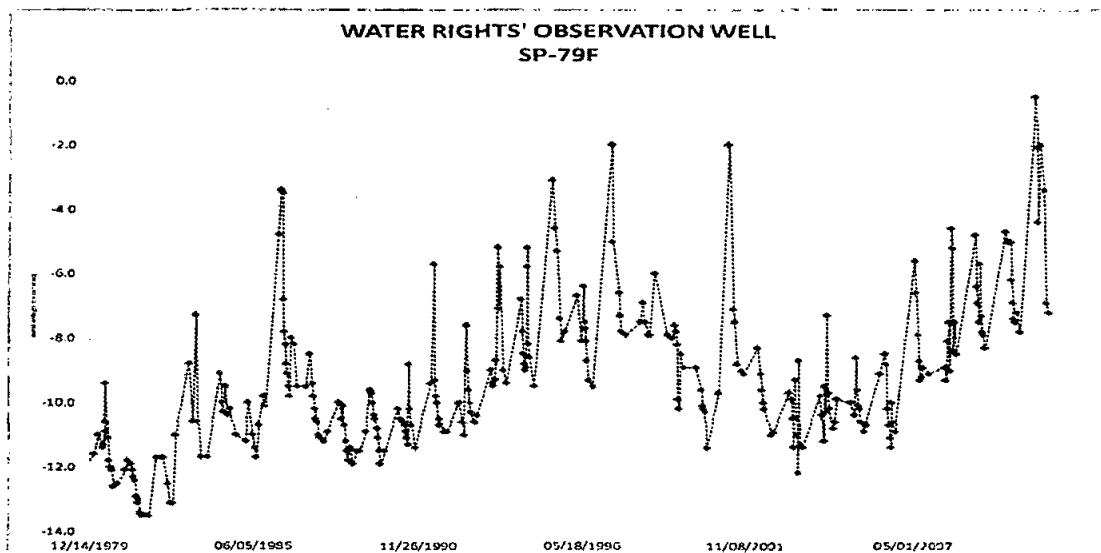


Figure 9. DENR-Water Rights' observation well completed into the unconfined portion of the Tulare:Western Spink/Hitchcock aquifer

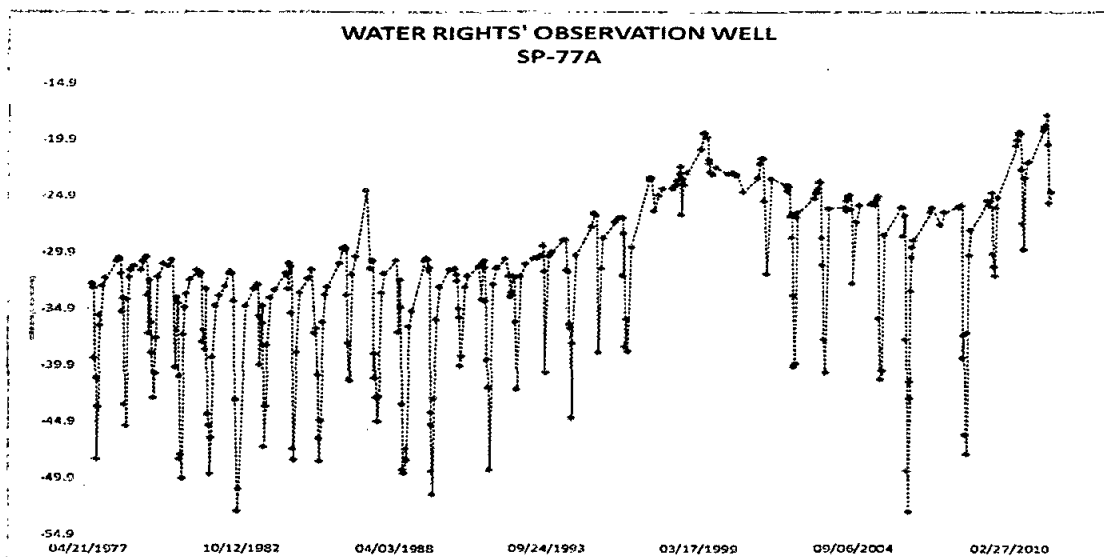


Figure 10. DENR-Water Rights' observation well completed into the confined portion of the Tulare:Western Spink/Hitchcock aquifer

Regardless, these permits, if approved should contain the standard permit qualification for most groundwater permits/rights which states:

"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".

CONCLUSIONS:

1. The best information currently available indicates the Tulare: Western Spink/Hitchcock aquifer underlies approximately 263,016 acres of Beadle, Spink, and Hand Counties.
2. The best information currently available identifies an average annual recharge rate to the Tulare: Western Spink/Hitchcock aquifer as 0.83 inches per year.
3. The volume of average annual recharge to the Tulare: Western Spink/Hitchcock aquifer based on an area of 263,016 acres and a recharge rate of 0.83 inches per year is approximately 18,192 acre-feet per year.
4. The average annual irrigation application rate for the Tulare: Western Spink/Hitchcock aquifer from 1979-2011 has been 9.32 inches per year.
5. The maximum average annual irrigation withdrawal based on a recharge of 18,192 acre-feet per year and an application rate of 9.32 inches per year would allow for the irrigation of 23,423 acres.
6. The best information available to determine the amount of unappropriated water available from the Tulare: Western Spink/Hitchcock aquifer is through analysis of observation well data.
7. The analysis of DENR-Water Rights' observation well data identifies that the over the period of record of 2003- 2011, average annual recharge to the aquifer has exceeded the average annual withdrawals from the aquifer by approximately 3,640 ac-ft/yr acre-feet per year.
8. The observation well data indicates that another 4,686 acres could have been irrigated over the time period of 2003- 2011, at an average application rate of 9.32 inches per year.
9. Since 810 additional acres were authorized in 2012, the actual number of additional acres that can be irrigated from the Tulare: Western Spink/Hitchcock aquifer is 3,877 acres.
10. The permit applications described on pages 1-3 of this report propose to irrigate a total of 2,131 acres.
11. Additional irrigation withdrawals are not expected to impair existing users.



Ken Buhler
SD DENR-Water Rights Program

REFERENCES:

- Buhler, K.A., 2012a, Report on Water Permit Application No. 7289-3, Bixler Farms; Nos. 7290-3 and 7291-3, Lee Gatzke; No. 7293-3, Jeffery Gatzke; and No. 7292-3, Allen Gatzke; April 25, 2012: SD DENR-Water Rights Program
- Buhler, K.A., 2012b, Report to the Chief Engineer on Water Permit Application No. 7295-3, William F. St. Clair; No. 7316-3, Van Buskirk Farms LLP; No. 7348-3, Michael Sentell; No. 7364-3, Wipf Acres LP; No. 7365-3, Huron Colony; No. 7366-3, Huron Colony; No. 7367-3, Huron Colony; No. 7368-3 Huron Colony; No. 7369-3 Huron Colony; and No. 7370-3 Huron Colony; August 23, 2012: SD DENR-Water Rights Program

Circuit Court of South Dakota, Sixth Judicial Circuit, 2005, April 29, 2005 Memorandum Decision
re: HU04-37 Hines v. SD Department of Environment and Natural Resources

Goodman, J.A., 2002, Report on Water Permit Nos 6330-3, 6331-3, 6332-3, 6336-3, 6337-3, 6338-3, 6339-3, 6340-3, 6343-3, 6344-3, 6345-3, 6346-3, 6348-3, 6353-3 for Water From the Tulare Hitchcock Aquifer and Water Permit Nos. 6333-3, 6334-3, 6347-3, 6351-3, 6352-3 for Water From the Tulare Western Spink Aquifer, September 10, 2002: SD DENR-Water Rights Program

Kuiper, L.K. 1984, Appraisal of the Water Resources of The Eastern Part of the Tulare Aquifer, Beadle, hand, and Spink Counties, South Dakota: U.S. Geological Survey Water-Resources Investigations Report 84-4078, 52 p.

Mathiowetz, A.W. 2012. Unpublished data. Pierre, SD.: South Dakota Department of Environment and Natural Resources Water Rights Programs.

“Transmissivity from Specific Capacity.” Aquifer Test Forum sponsored by HydroSOLVE, Inc.
28 January.2013< <http://www.aqtesolv.com/forum/transcap.asp>

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Water Rights, 2013a, Observation Well Files, SD DENR-Water Rights Program, Joe Foss Bldg, Pierre, SD.

Water Rights, 2013b, Water Well Completion Reports, SD DENR-Water Rights Program, Joe Foss Bldg, Pierre, SD.

Water Rights, 2013c, Water Right/Permit Files, SD DENR-Water Rights Program, Joe Foss Bldg, Pierre, SD.

WILKINSON & WILKINSON
ATTORNEYS AT LAW
103 JOLIET AVE., S.E. P.O. BOX 29
DE SMET, SOUTH DAKOTA 57231

TELEPHONE: 605 / 854-3378
TELEFAX: 605 / 854-9006

HARRY J. EGGEN (1922-1969)
ELLSWORTH F. WILKINSON (1923-2005)

TODD D. WILKINSON
MARCENE J. SMITH
GARY W. SCHUMACHER*
*ALSO LICENSED IN MINNESOTA

RECEIVED
JUN 14 2013
WATER RIGHTS
PROGRAM

June 12, 2013

Via facsimile (605) 773-4608 and
Original Sent by First Class Mail

Jeanne Goodman
Chief Engineer
Water Rights Program, SD DENR
Foss Building
523 East Capital
Pierre, South Dakota 57501

**RE: Water Permit Application Nos. 7726-3, 7727-3, 7753-3, 7754-3, &
7759-3 (Oscar, Inc.)
Water Permit Application Nos. 7725-3, 7752-3, 7755-3, 7756-3, &
7757-3 (Lenny Peterson)
Petition in Opposition**

Dear Ms. Goodman:

Oscar, Inc. and Lenny Peterson, as separate land owners and operators, are affected by the Report of the Chief Engineer, dated April 13, 2013, regarding the above-entitled Water Permit Applications for appropriation of water from the Tulare: Western Spink/Hitchcock Aquifer. This letter is intended as and constitutes a petition in opposition to denial of the full amount of the Water Permit Applications submitted by Oscar Inc. and Lenny Peterson; and is further intended as and constitutes a petition in opposition to the Chief Engineer's recommendation denying the full amount of said Water Permit Applications.

Please confirm receipt of this petition opposing denial of said applications and petition opposing the Chief Engineer's recommendations; and please inform me of the date, time, and location of the public hearing on said application; as well as any other information that needs to be submitted to your office(s) prior to the public hearing.

Thank you.

Sincerely,
WILKINSON & WILKINSON



Marcene J. Smith

cc: Diane Best (via facsimile and first class mail)
Craig Slepikas
Michael Watson
Marshall Brothers
Terry Wieting
Brent Kleinssaser
Riverside Hutterian Brethren
Vanbuskirk Farms
Bixler Farms
Martin J. Anderson
Rathjen Farms
Darin Binger
Lenny Peterson
Brad Peterson



**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.**

June 13, 2013

Gary Schumacher
Wilkinson & Wilkinson Law Office
PO Box 29
DeSmet SD 57231

Dear Mr. Schumacher:

Water Permit Application No. 7725-3 for irrigation use has been examined and found to comply with the South Dakota Water Laws and applicable rules. A notice has been sent to the Redfield Press printed at Redfield SD (Ph # 605-472-0822) and the Plainsman printed at Huron SD (Ph # 605-356-6401). You will need to contact the newspaper(s) and authorize publication of this notice. A copy of the notice is enclosed. The recommendation of the Chief Engineer and report on the application were sent previously to the applicant. 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(s) to authorize publication of your Notice and to arrange for payment. Early contact with the paper(s) can eliminate delays. Upon receiving authorization from you, the publisher has been instructed to publish your notice. The newspaper has also been instructed to send us the Proof of Publication. We must receive Proof of Publication before action can be taken on the application.

Sincerely,

Eric Gronlund
Natural Resources Engineer
(605) 773-3352
Enclosures

c: Lenny Peterson, 19111 Maple Ave, Hitchcock SD 57348



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

denr.sd.gov

June 13, 2013

Plainsman
PO Box 1278
Huron SD 57350

ATTENTION: Legal Public Notice

Enclosed is a Notice on Application No. 7725-3 to Appropriate Water. Please publish the notice once on June 19, 2013. 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 and arrange for payment. **Please BILL the APPLICANT for the cost of publication.** The APPLICANT is Lenny Peterson, 19111 Maple Ave, Hitchcock SD 57348 (Ph # 605-266-2793).

Please send the Water Rights Program an affidavit or the enclosed Proof of Publication form immediately.

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



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

denr.sd.gov

June 13, 2013

Redfield Press
PO Box 440
Redfield SD 57469

ATTENTION: Legal Public Notice

Enclosed is a Notice on Application No. 7725-3 to Appropriate Water. Please publish the notice once on June 19, 2013. The text of the notice can be e-mailed to your paper by contacting Karen Schlaak at (605) 773-3352.

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Sincerely,

Eric Gronlund
Natural Resources Engineer
605 773-3352

enclosures

Instruction to Newspaper – Publish the Notice on June 19, 2013. 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. 7725-3 to Appropriate Water

Notice is given that Lenny Peterson, 19111 Maple Avenue, Hitchcock SD 57348 has filed Application No. 7725-3 to appropriate 4.57 cubic feet of water per second from two wells to be completed into the Tulare:Western Spink Hitchcock Aquifer (60 - 100 feet deep) located in the approximate centers of the SW ¼ and SE ¼ Section 7 for irrigation of 320 acres located in the S ½ Section 7; all in T113N-R63W.

SDCL 46-2A-4(10) provides that "if the applicant does not contest the recommendation of the Chief Engineer and no petition to oppose the application is received, the Chief Engineer shall act on the application pursuant to the Chief Engineer's recommendation and no hearing may be held before the board, unless the Chief Engineer makes a finding that an application, even if uncontested, presents important issues of public policy or public interest that should be heard by the board." In this case, the Chief Engineer finds that this application presents important issues of public interest that should be heard by the Water Management Board.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 7725-3 for 1.66 cubic feet of water per second and 116 acres because 1) there is reasonable probability that there is unappropriated water available for 116 acres of the applicant's proposed use, 2) based on prior approved water right permits and the priority of filing other pending applications, there is not unappropriated water available from the Tulare:Western Spink/Hitchcock Aquifer for the applicant's proposed use for the remaining 2.91 cfs and 204 acres; 3) the proposed diversion for 1.66 cfs and 116 acres can be developed without unlawful impairment of existing rights, 4) the proposed use is a beneficial use and 5) it is in the public interest as recommended.

The Water Management Board will consider this application at 3:00 p.m. on July 10, 2013 in the Matthew Training Center, Joe Foss Bldg, 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.

Any interested person who intends to participate in the hearing shall file a petition to oppose or support the application and the petition shall be filed with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by July 1, 2013. The petition may be informal, but shall be in writing and shall 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 hearing is an adversary proceeding and any party has the right to be present at the hearing and to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised at the hearing and decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

The July 10, 2013 hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any person who has filed a petition to oppose or support the application. The request for an automatic delay must be filed by July 1, 2013. If an automatic delay is requested, the hearing will be rescheduled for a future Board meeting and personal notice will be provided to all petitioners regarding the time, date and location.

Contact Eric Gronlund by July 1, 2013 at the above Chief Engineer's address to request copies of the staff report, recommendation, application or other information. 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.

Under SDCL 1-26-17(7) notices must state that "if the amount in controversy exceeds \$2,500.00 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 to the agency no later than ten days after service of a notice of hearing issued pursuant to SDCL 1-26-17." This is a Notice of Hearing, service is being provided by publication, and the applicable date to give notice to the Chief Engineer is July 1, 2013. However, since this particular matter is a water permit application and not a monetary controversy in excess of \$2,500.00 or termination of a property right the Chief Engineer disputes the applicability of this provision and maintains that the hearing must be conducted by the Board.

As applicable, the following provides the legal authority and jurisdiction under which the hearing will be held and the particular statutes and rules pertaining to this application: SDCL 1-26-16 thru 1-26-28; SDCL 46-1-1 thru 46-1-9, 46-1-13 thru 46-1-16; 46-2-3.1, 46-2-9, 46-2-11, 46-2-17; 46-2A-1 thru 46-2A-12, 46-2A-14, 46-2A-15, 46-2A-20, 46-2A-21, 46-2A-23; 46-5-1.1, 46-5-2 thru 46-5-26, 46-5-30.2 thru 46-5-30.4, 46-5-31 46-5-32 thru 46-5-34.1, 46-5-38 thru 46-5-39, 46-5-46, 46-5-47, 46-5-49; 46-6-1 thru 46-6-3.1, 46-6-6.1, 46-6-10, 46-6-13, 46-6-14, 46-6-21, 46-6-26; and Board Rules ARSD 74:02:01:01 thru 74:02:01:25.02; 74:02:01:35.01.

Steven M. Pirner, Secretary, Department of Environment and Natural Resources. Published once at an approximate cost of _____.

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JUN 20 2013

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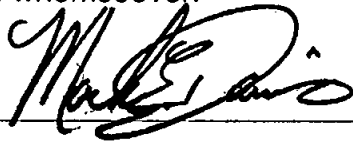
Affidavit of Publication

STATE OF SOUTH DAKOTA,
County of Spink: ss.

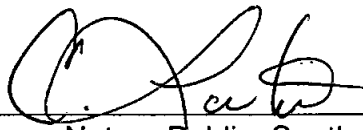
I, Mark E. Davis, of said County & State, being first duly sworn on oath, say that THE REDFIELD PRESS is a legal weekly newspaper as defined in Sec. 65.0508 South Dakota Code 1939, as amended by Chapter 298 of the Session of Laws of 1939, printed and published in the English language in the City of Redfield,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

#385 Notice

A printed copy of which is hereto attached, was printed and published in said newspaper in 1 issue, to wit: The first publication being made on June 19th, that Fifty-eight and .80/100 Dollars, insures to the benefit of the publisher of THE REDFIELD PRESS, that no agreement or understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever.



Subscribed and sworn to before me this 19th day of June, 2013.



Notary Public, South Dakota

My commission expires 04/06/2016.

Notice

#385

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Notice is given that Lenny Peterson, 19111 Maple Avenue, Hitchcock SD 57348 has filed Application No. 7725-3 to appropriate 4.57 cubic feet of water per second from two wells to be completed into the Tulare:Western Spink Hitchcock Aquifer (60 - 100 feet deep) located in the approximate centers of the SW 1/4 and SE 1/4 Section 7 for irrigation of 320 acres located in the S 1/2 Section 7; all in T113N-R63W.

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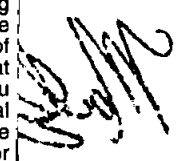
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Steven M. Pinner, Secretary
Department of Environment and
Natural Resources

Published at an approximate cost of
\$58.80. (June 19)



PRINTER'S AFFIDAVIT

STATE OF SOUTH DAKOTA,
COUNTY OF BEADLE: ss.

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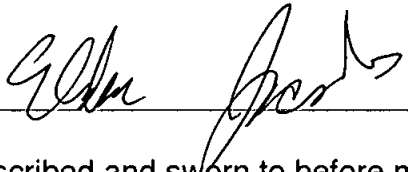
JUN 27 2013

WATER RIGHTS
PROGRAM

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

**SD DEPT OF ENVIORMENTAL – WATER
RIGHTS (PETERSON FARMS)**

was published for one day, in said newspaper, and not in any supplement of the said newspaper, the publication was of the 19TH day JUNE 2013 That the full EIGHTY-TWO & 86/100 dollars insures to the benefit of the publisher of said newspaper; that no agreement or understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever.



Subscribed and sworn to before me this 30TH day of JUNE 2013.


Notary Public, South Dakota

My term expires 10/25/2017

Legal # 826

F.P. 06-19-13

**NOTICE OF HEARING
ON APPLICATION**

NO. 7725-3 to

Appropriate Water

Notice is given that Lenny Peterson, 19111 Maple Avenue, Hitchcock SD 57348 has filed Application No. 7725-3 to appropriate 4.57 cubic feet of water per second from two wells to be completed into the Tulare: Western Spink Hitchcock Aquifer (60 - 100 feet deep) located in the approximate centers of the SW ¼ and SE ¼ Section 7 for irrigation of 320 acres located in the S ½ Section 7; all in T113N-R63W.

SDCL 46-2A-4(10) provides that "if the applicant does not contest the recommendation of the Chief Engineer and no petition to oppose the application is received, the Chief Engineer shall act on the application pursuant to the Chief Engineer's recommendation and no hearing may be held before the board, unless the Chief Engineer makes a finding that an application, even if uncontested, presents important issues of public policy or public interest that should be heard by the board." In this case, the Chief Engineer finds that this application presents important issues of public interest that should be heard by the Water Management Board.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 7725-3 for 1.66 cubic feet of water per second and 116 acres because 1) there is reasonable probability that there is unappropriated water available for 116 acres of the applicant's proposed use, 2) based on prior approved water right permits and the priority of filing other pending applications, there is not unappropriated water available from the Tulare: Western Spink/Hitchcock Aquifer for the applicant's proposed use for the remaining 2.91 cfs and 204 acres; 3) the proposed diversion for 1.66 cfs and 116 acres can be developed without unlawful impairment of existing rights, 4) the proposed use is a beneficial use and 5) it is in the public interest as recommended.

The Water Management Board will consider this application at 3:00 p.m. on July 10, 2013 in the Matthew Training Center, Joe Foss Bldg. 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.

Any interested person who intends to participate in the hearing shall file a petition to oppose or support the application and the petition shall be filed with BOTH the applicant and Chief Engineer. The applicant must also file a petition if opposed to the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605 773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by July 1, 2013. The petition may be informal, but shall be in writing and shall 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 hearing is an adversary proceeding and any party has the right to be present at the hearing and to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised at the hearing and decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

The July 10, 2013 hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any person

who has filed a petition to oppose or support the application. The request for an automatic delay must be filed by July 1, 2013. If an automatic delay is requested, the hearing will be rescheduled for a future Board meeting and personal notice will be provided to all petitioners regarding the time, date and location.

Contact Eric Gronlund by July 1, 2013 at the above Chief Engineer's address to request copies of the staff report, recommendation, application or other information. 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.

Under SDCL 1-26-17(7) notices must state that "if the amount in controversy exceeds \$2,500.00 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 to the agency no later than ten days after service of a notice of hearing issued pursuant to SDCL 1-26-17." This is a Notice of Hearing, service is being provided by publication, and the applicable date to give notice to the Chief Engineer is July 1, 2013. However, since this particular matter is a water permit application and not a monetary controversy in excess of \$2,500.00 or termination of a property right the Chief Engineer disputes the applicability of this provision and maintains that the hearing must be conducted by the Board.

As applicable, the following provides the legal authority and jurisdiction under which the hearing will be held and the particular statutes and rules pertaining to this application; SDCL 1-26-16 thru 1-26-28; SDCL 46-1-1 thru 46-1-9, 46-1-13 thru 46-1-16; 46-2-3.1, 46-2-9, 46-2-11, 46-2-17; 46-2A-1 thru 46-2A-12, 46-2A-14, 46-2A-15, 46-2A-20, 46-2A-21, 46-2A-23; 46-5-1.1, 46-5-2 thru 46-5-26, 46-5-30.2 thru 46-5-30.4, 46-5-31, 46-5-32 thru 46-5-34.1, 46-5-38 thru 46-5-39, 46-5-46, 46-5-47, 46-5-49; 46-6-1 thru 46-6-3.1, 46-6-6.1, 46-6-10, 46-6-13, 46-6-14, 46-6-21, 46-6-26; and Board Rules ARSD 74:02:01:01 thru 74:02:01:25.02; 74:02:01:35.01.

Steven M. Pirner,
Secretary, Department
of Environment and
Natural Resources.

No. 826 (adv.)

Published once at the
total approximate cost of
\$82.77.



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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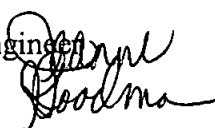
denr.sd.gov

July 18, 2013

NOTICE

TO: Lenny Peterson
19111 Maple Avenue
Hitchcock SD 57348

Raymond D. Rylance
Wiles & Rylance
3 East Kemp, Suite 200
Watertown, SD 57201

FROM: Jeanne Goodman, Chief Engineer
Water Rights Program 

SUBJECT: Partial Approval of Water Permit Application No. 7725-3 and Deferral of Water
Permit Application Nos. 7752-3, 7755-3, 7756-3, and 7757-3, Lenny Peterson

The Water Management Board approved a portion of Water Permit Application No. 7725-3 and deferred consideration of the remaining diversion rate authority and acres requested by the application. Specifically, the Board approved the appropriation of 1.93 cubic feet of water per second from the Tulare Western Spink Hitchcock Aquifer to irrigate 135 acres. At the time of hearing, Mr. Peterson designated the well to be located in the approximate center of the SW ¼ of Section 7-T113N-R63W to irrigate 135 acres in this same quarter section. DENR will proceed with issuance of the water permit. The deferred portion of Application No. 7725-3 is 2.64 cfs diversion rate authority for irrigation of 185 acres in the S ½ Section 7-T113N-R63W will be scheduled for the Board's October 3, 2013, meeting.

In addition, the Water Management Board deferred consideration of Water Permit Application Nos. 7752-3, 7755-3, 7756-3, and 7757-3 filed by Lenny Peterson to appropriate groundwater from the Tulare Western Spink Hitchcock Aquifer for irrigation.

Future notice will be provided scheduling consideration of the applications at the October 3, 2013, Board meeting. Please contact Eric Gronlund at (605) 773-3352 if you have questions about the deferral of the applications.

c: Diane Best, Assistant Attorney General

CERTIFICATION

I hereby certify that on July 18, 2013, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated July 18, 2013, regarding deferral of Water Permit Application Nos. 7725-3, 7752-3, 7755-3, 7756-3, and 7757-3, Lenny Peterson, as set forth below:

Lenny Peterson
19111 Maple Avenue
Hitchcock SD 57348

Raymond D. Rylance
Wiles & Rylance
3 East Kemp, Suite 200
Watertown, SD 57201

Diane Best, Assistant Attorney General
317 N Main Avenue
Sioux Falls SD 57104



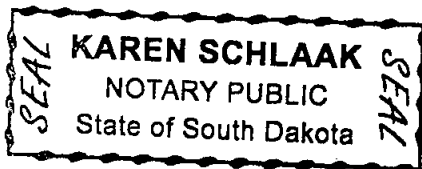
Gail Jacobson
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 18th day of July, 2013



Karen Schlaak
Notary Public
My Commission expires April 1, 2019





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

denr.sd.gov

AUG 29 2013

Lenny Peterson
19111 Maple Ave
Hitchcock SD 57348

Dear Mr. Peterson:

Enclosed is Water Permit No. 7725-3 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,

Jeanne Goodman, Chief Engineer
Water Rights Program
(605) 773-3352

enclosures



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

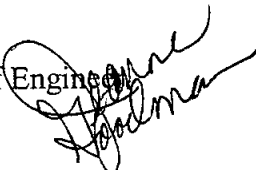
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182

denr.sd.gov

September 6, 2013

NOTICE

TO: Raymond D. Rylance
Wiles & Rylance
3 East Kemp, Suite 200
Watertown, SD 57201

FROM: Jeanne Goodman, Chief Engineer
Water Rights Program 

SUBJECT: Scheduling of Deferred Water Permit Applications from the Tulare:Western Spink /
Hitchcock Aquifer

At their July 11, 2013 meeting, the Water Management Board deferred consideration of the following water permit applications to appropriate groundwater from the Tulare Western Spink Hitchcock Aquifer for irrigation.

Nos. 7725-3 – Lenny Peterson (deferred portion)
Nos. 7752-3, 7755-3, 7756-3, 7757-3 – Lenny Peterson
Nos. 7726-3, 7727-3, 7753-3, 7754-3, 7759-3 – Oscar Inc
Nos. 7733-3, 7734-3, 7735-3, 7736-3 – Van Buskirk Farms LLP

The Water Management Board will conduct a hearing to consider these applications at 1:30 PM (Central Time) on Thursday, October 3, 2013, at the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre SD. Applicable provisions of the published notice of hearings on the applications will apply at the time of hearing. Future notice will be provided to all parties if there are changes to the hearing date or time.

Questions regarding the hearing process may be directed to Diane Best, Assistant Attorney General at (605) 367-5880 ext. 105 or diane.best@state.sd.us.

c: Diane Best, Assistant Attorney General

CERTIFICATION

I hereby certify that on September 6, 2013, I have personally hand delivered envelopes containing a Notice dated September 6, 2013, regarding scheduling the hearing on deferral of Water Permit Application as follows:

Nos. 7725-3 – Lenny Peterson (deferred portion)

Nos. 7752-3, 7755-3, 7756-3, 7757-3 – Lenny Peterson

Nos. 7726-3, 7727-3, 7753-3, 7754-3, 7759-3—Oscar Inc

Nos. 7733-3, 7734-3, 7735-3, 7736-3 – Van Buskirk Farms LLP

Hand Delivered in Redfield SD

Raymond D. Rylance

Wiles & Rylance

3 East Kemp, Suite 200

Watertown, SD 57201

Diane Best, Assistant Attorney General

317 N Main Avenue

Sioux Falls SD 57104

Eric Houlston

Eric Gronlund

Water Rights Program, DENR

STATE OF SOUTH DAKOTA)

) SS

COUNTY OF HUGHES

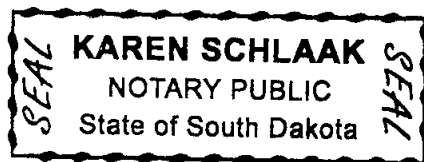
Sworn to, before me, this 6th day of Sept. 1853

Karen Schlaak

Karen Schlaak

Notary Public

My Commission expires April 1, 2019





**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

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

denr.sd.gov

October 4, 2013

NOTICE

TO: Raymond D. Rylance
Wiles & Rylance
3 East Kemp, Suite 200
Watertown, SD 57201

FROM: Jeanne Goodman, Chief Engineer
Water Rights Program

SUBJECT: Preparation of Findings of Fact, Conclusions of Law and Final Decision for Water Permit Applications from the Tulare:Western Spink/Hitchcock Aquifer

The Water Management Board directed Diane Best, Assistant Attorney General to prepare proposed Findings of Fact, Conclusions of Law and a Final Decision in the matter of the denial of Water Permit Application Nos. 7725-3 – Lenny Peterson (deferred portion); Nos. 7752-3, 7755-3, 7756-3, 7757-3 – Lenny Peterson; Nos. 7726-3, 7727-3, 7753-3, 7754-3, 7759-3– Oscar Inc.; and Nos. 7733-3, 7734-3, 7735-3, 7736-3 – Van Buskirk Farms LLP.

The Board will consider adoption of Findings, Conclusions and Final Decision at 10:30 AM, on Thursday, December 5, 2013, 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 November 8, 2013. 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 November 25, 2013. 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 December 5, 2013. The public hearing was completed on October 3, 2013. No additional testimony will be received.

If you have questions about the findings process, please contact Eric Gronlund at (605) 773-3352.

Enclosure

c: Jeff Hallem, Assistant Attorney General
Diane Best, Assistant Attorney General

CERTIFICATION

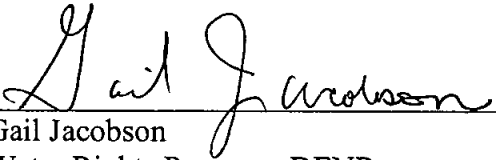
I hereby certify that on October 4, 2013, I have personally hand delivered envelopes containing a Notice dated October 4, 2013, regarding preparation of finding of fact, conclusions of law and final decision in the matter of the approval of Water Permit Application Nos. 7725-3 – Lenny Peterson (deferred portion); Nos. 7752-3, 7755-3, 7756-3, 7757-3 – Lenny Peterson; Nos. 7726-3, 7727-3, 7753-3, 7754-3, 7759-3– Oscar Inc.; and Nos. 7733-3, 7734-3, 7735-3, 7736-3 – Van Buskirk Farms LLP, as addressed below:

Raymond D. Rylance
Wiles & Rylance
3 East Kemp, Suite 200
Watertown, SD 57201

Diane Best, Assistant Attorney General
317 N Main Avenue
Sioux Falls SD 57104

Sent inter-office mail to:

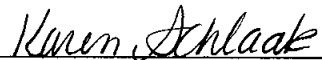
Jeff Hallem, Assistant Attorney General, 1302
East Highway 14, Suite 1
Pierre SD 57501-8501



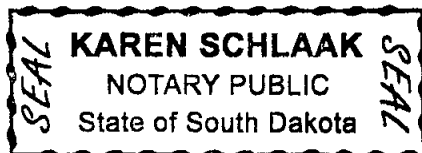
Gail Jacobson
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 4th day of October, 2013



Karen Schlaak
Notary Public
My Commission expires April 1, 2019





OFFICE OF ATTORNEY GENERAL

317 N. Main Avenue
Sioux Falls, South Dakota 57104
Phone (605) 367-5880
FAX (605) 367-5886
www.state.sd.us/atg

RECEIVED

NOV - 6 2013

WATER RIGHTS
PROGRAM

MARTY J. JACKLEY
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY

November 4, 2013

Leo Holzbauer
PO Box 877
Wagner, SD 57380

Chad Comes
PO Box 308
Madison, SD 57042

Jeff Hallem
Water Mgmt. Board Atty.
1302 E. Hwy 14, Ste.1
Pierre, SD 57501

Rodney Freeman, Jr.
PO Box 176
Huron, SD 57350

Peggy Dixon
3311 Hogan Court
Rapid City, SD 57702

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

Tim Bjork
112 W. Oak Street
Pierre, SD 57501

Jim Hutmacher
802 East 7th Street
Oacoma, SD 57365

Re: *Applications from the Tulare: Western Spink/Hitchcock Aquifer*

Dear Board Members and Board Counsel,

As directed by the Board at the October 3 hearing, I am enclosing proposed Findings of Fact, Conclusions of Law, and a Final Decision regarding the 14 applications for water permits from the Tulare: Western Spink/Hitchcock Aquifer. Consistent with the Board's practice, I am providing the Board's attorney with an electronic copy in Word format. This is for the Board's consideration at its meeting on December 5.

I am also providing a copy to Mr. Rylance via both email and regular mail.

Sincerely,

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

Diane Best
Assistant Attorney General
Counsel for Water Rights Program

cc: Ray Rylance

RECEIVED

NOV - 6 2013

WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA

SOUTH DAKOTA WATER MANAGEMENT BOARD

IN THE MATTER OF WATER)
PERMIT APPLICATION Nos.)
7725-3, 7752-3, 7755-3, 7756-3,)
and 7757-3, LENNY PETERSON)

IN THE MATTER OF WATER)
PERMIT APPLICATION Nos.)
7726-3, 7727-3, 7753-3, 7754-3,)
and 7759-3, OSCAR, INC.)

IN THE MATTER OF WATER)
PERMIT APPLICATION Nos.)
7733-3, 7734-3, 7735-3, and)
7736-3, VAN BUSKIRK FARMS,)
LLP)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the DENR proposed Findings of Fact, Conclusions of Law, and Final Order in the above matter 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 U.S. Mail at Sioux Falls, South Dakota on November 4, 2013:

Chad Comes
P.O. Box 308
Madison, SD 57042

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

Everett Hoyt
4422 Carriage Hills Drive
Rapid City, SD 57702

Leo Holzbauer
P.O. Box 877
Wagner, SD 57380

Peggy Dixon
3311 Hogan Court
Rapid City, SD 57702

Tim Bjork, Secretary
112 W. Oak Street
Pierre, SD 57501

Jim Hutmacher
802 E. 7th Street
Oacoma, SD 57365

Jeff Hallem, Asst. Attorney General
Office of Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501

Ray Rylance
Wiles & Rylance
3 East Kemp, Suite 200
Watertown, SD 57201

And that on the same date the original was filed with the Chief Engineer, Water Rights Program, Dept. of Environment and Natural Resources, at 523 East Capitol Avenue, Pierre, SD 57501-3181.



Diane Best
Assistant Attorney General

STATE OF SOUTH DAKOTA

SOUTH DAKOTA WATER MANAGEMENT BOARD

IN THE MATTER OF WATER)
PERMIT APPLICATION Nos. 7725-3,)
7752-3, 7755-3, 7756-3, and)
7757-3, LENNY PETERSON)

)
IN THE MATTER OF WATER)
PERMIT APPLICATION Nos. 7726-3,)
7727-3, 7753-3, 7754-3, and)
7759-3, OSCAR, INC.)

)
IN THE MATTER OF WATER)
PERMIT APPLICATION Nos. 7733-3,)
7734-3, 7735-3, and 7736-3, VAN)
BUSKIRK FARMS, LLP)

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL DECISION

Hearing was held on October 3, 2013, before Board members Chad Comes (Chair), Tim Bjork, Peggy Dixon, Everett Hoyt, Jim Hutmacher, and Leo Holzbauer. Rodney Freeman recused himself.

All applicants were represented by Ray Rylance. The Department of Environment and Natural Resources, Water Rights Program, and its Chief Engineer (jointly referred to as "DENR") was represented by Diane Best.

The Board, having considered the testimony and exhibits presented and all records and documents on file, and having entered its oral decision and rulings on the parties' submissions, now enters the following:

FINDINGS OF FACT

Background

1. This matter involves 14 applications to appropriate water from the Tulare: Western Spink/Hitchcock Aquifer, an aquifer that is used extensively for irrigation.

2. Irrigation development of the Tulare: Western Spink/Hitchcock Aquifer was basically static from 2002-2012. Although this Board deferred a large number of additional applications for a period of time starting in 2002, it ultimately denied them in 2008. (*In the Matter of Water Permit Applications from the Tulare Aquifer*, Findings of Fact, Conclusions of Law and Final Decision issued March 11, 2008). No other permits were issued until 2012.

3. After a group of applications was filed in December 2011, DENR Engineer Ken Buhler filed a report with the Chief Engineer on April 25, 2012. He concluded that sufficient water would be available to irrigate 733 more acres. The Chief Engineer subsequently entered into a stipulated settlement with the applicants and recommended that water permits should be granted to irrigate 810 acres. This Board approved the stipulation and authorized the permits for 810 acres in July 2012. (*In the Matter of Water Permit Application Nos. 7288-3, 7289-3, 7290-3, 7291-3, and 7292-3*, Findings of Fact waived).

4. Thirteen more applications were subsequently filed seeking water to irrigate 2,131 acres. On January 30, 2013, Ken Buhler filed another report with the Chief Engineer regarding those applications. The January 30, 2013, report examined water availability under various methods and concluded there was sufficient water available in the Tulare: Western Spink/Hitchcock Aquifer to support irrigation of 4,686 more acres than had been authorized for irrigation before any permits were issued in 2012 (also referred to herein as "acres remaining"). Of the 4,686 acres remaining, 810 acres had already been granted in July 2012. This was also more than enough to satisfy the requests then at issue for 2,131 acres (leaving enough

water available for 1,746 acres for which applications had not yet been filed). The Chief Engineer recommended approval of permits to irrigate the 2131 acres at issue.

5. Following contested case hearings on March 7, 2013, and May 2, 2013, this Board authorized issuance of permits for 2,131 acres. *Water Permit Application Nos. 7373-3 (Terry Wieting), 7551-3 (Wayne Binger), 7570-3 to 7575 and 7637-3 to 7640-3 (Marshall Bros.), and 7620-3 (Oscar Inc).* (Findings of Fact waived).

6. In the meantime, after the Buhler Report was filed on January 30, 2013 (and the Chief Engineer recommended approval of water permits to irrigate 2,131 acres), there were 41 applications filed. Ken Buhler filed another report on April 13, 2013, addressing the 41 applications. The April 13, 2013, report relies, in significant part, on the earlier January 30, 2013, report, and, to a certain extent, information contained in the earlier April 25, 2012, analysis. The April 13, 2013, report ultimately concluded that there was sufficient water available for the first 10 of the 41 applications, with enough water left over for 116 acres (not enough to fill any of the additional requested applications).

7. The Chief Engineer recommended granting the first 10 of the 41 applications in the order they were filed as well as a portion of the 11th application. She recommended denial of the rest.

8. Of the 41 applications, the initial 10 applications were heard and granted by this Board in July, 2013. There was no opposition.

9. Of the 41 applications, the 11th application filed was Application No. 7725-3 submitted by Lenny Peterson, and it sought to irrigate 320 acres. The 116 acres referenced in the Buhler Report would have been insufficient for this request. At hearing, however, Lenny Peterson asked the Board to split his request and grant a permit to irrigate 135 acres of the 320, enough to operate one center pivot. After inquiry by the Board, Buhler testified that an additional 19 acres was acceptable. The Board then authorized irrigation of 135 acres of the requested 320 acres for Application No. 7725-3.

10. The total of all of the 2012-2013 appropriations authorized by this Board from the Tulare: Western Spink/Hitchcock aquifer includes the full 4,686 acres addressed in the January 2013 Buhler Report as well as the additional 19 acres addressed in the July 2013 hearing (4,706 total acres).

11. In the meantime, of the 41 applications, 17 other applications were withdrawn. The applicants for those 17 permits did not seek hearing after they received the recommendation of denial. The 17 applications are considered to be withdrawn under SDCL 46-2A-3.

Current Applications

12. The contested case at issue pertains only to the 14 applications captioned above. This includes the deferred portion of Application 7725-3 for Lenny Peterson to irrigate 185 acres as well as 13 other applications that were recommended for denial in April 2013.

13. The 14 applications seek to appropriate sufficient water to irrigate a total of 3,608 acres in Beadle County. Each of the applications

seeks water from the Tulare: Western Spink /Hitchcock Aquifer. The quantity of water requested is 2 acre feet per acre per year (ac ft/year) at a maximum diversion rate of 1 cubic foot of water per second (cfs) per 70 acres.

14. The five applications filed by Lenny Peterson seek to irrigate 985 acres. The total maximum diversion rate would be 14.05 cfs.

15. The five applications filed by Oscar Inc. seek to irrigate 825 acres using 6 wells. The total maximum diversion rate would be 11.77 cfs.

16. The four applications filed by VanBuskirk Farms, LLP seek to irrigate 1,798 acres using 11 wells. The total maximum diversion rate would be 25.65 cfs.

17. Notice of Hearing for the 14 applications was published in the Redfield Press (weekly newspaper) and Huron Daily Plainsman (daily newspaper) the same day: June 19, 2013. The published Notice scheduled hearing for July 11, 2013, in Pierre. The published Notices also provided that petitions to intervene were to be filed by July 1, 2012. No petitions to intervene were filed.

18. Hearing on the 14 applications was delayed until October 2013 upon request of the Chief Engineer. The Applicants consented to the delay.

19. The Board considers whether (a) there is a reasonable probability unappropriated water is available for the proposed use; (b) the proposed diversion can be developed without unlawful impairment of existing rights; (c) the use would be a beneficial use; and (d) the use is in the public interest. The first factor is dispositive.

20. The area of the Tulare: Western Spink/Hitchcock Aquifer is 263,016 acres. This information is based on the April 25, 2012, Buhler Report which analyzed several state and federal government studies of the extent of the aquifer. It is the most current and best available information on the areal extent of the aquifer.

21. In considering water availability, this Board considers whether the quantity of water withdrawn annually from the groundwater source would exceed the quantity of the average estimated annual recharge of water to the groundwater source if the permit was granted. Such analysis is not required if the water source is older or lower than the greenhorn formation (not the case here) and the applicant is a public water system (not the case here). The analysis must be undertaken in this case.

22. DENR witness Ken Buhler, an expert with 28 years of experience in groundwater hydrology, testified that, based on the best available information, the quantity of water withdrawn annually from the Tulare: Western Spink/Hitchcock Aquifer would exceed the average estimated annual recharge if any of the 14 applications at issue was granted. The Board credits his testimony which examined the issue based on observation well data and on consideration of a water budget for the aquifer.

23. The term "acres remaining" in the various analyses means the total acreage that would be available for all the recent permit applications filed from December 2011 to the present (including the previous permits authorized by this Board in 2012-13).

24. Analysis of the observation well data provides a qualitative means of assessing the aquifer. In fact, the Board has promulgated a rule providing that it will rely on the record of observation well measurements as part of the evidence in examining the recharge/withdrawal issue.

25. The DENR Water Rights Program monitors 48 observation wells in the Tulare: Western Spink/Hitchcock Aquifer. The January 30, 2013, report shows five representative observation wells constructed during the period from 1966-1980 (and measured regularly since construction). Hydro-graphs from the wells show that the aquifer readily responds to climatic conditions and development has had an inconsequential effect on the aquifer.

26. The observation data documents the difference between average annual recharge and average annual withdrawal. If observation well data shows a steady, continual decline of the aquifer's water level or artesian pressure, such changes could indicate that withdrawals are exceeding recharge. Also, water level fluctuations in an aquifer dominated by the influence of well withdrawals, or a change in the configuration of the potentiometric surface, could indicate that well withdrawals are a significant component in the system relative to recharge and/or natural discharge. Observation well data was used in this proceeding to consider long term trends, any influences of well withdrawals, and the configuration of the potentiometric surface.

27. Hydrographs in the January 30, 2013, Buhler Report regarding observation well data for the Tulare: Western Spink/Hitchcock Aquifer

showed upward trending water levels. Based on the average slope of linear trend lines for hydrographs for the observation wells in the aquifer, recharge to the aquifer was greater than the total of the discharges from the aquifer over the period from 2003 to 2012 (the period of time during which the aquifer was fully developed and usage was not increasing).

28. DENR observation well data used in the January 30, 2013, report showed that well withdrawals from the Tulare: Western Spink/Hitchcock Aquifer had not had a long term effect on the amount of water in storage in the aquifer.

29. The observation well data also showed that the configuration of the potentiometric surface of the Tulare: Western Spink/Hitchcock aquifer had not changed significantly between 1987 and 2012. This showed that discharge was not exceeding recharge and unappropriated water was available as of 2012.

30. The January 30, 2013, Buhler Report also used information from five observation wells to quantify the change in volume of water in storage in the aquifer. Change in the volume of water in storage is equal to the difference between recharge and discharge. The five observation wells were the only observation wells that were in portions of the Tulare: Western Spink/Hitchcock aquifer that were under unconfined conditions for the entire period studied (2003-2012) and they accurately reflect aquifer conditions. Buhler examined the change in water level in each well for each year (and the aquifer's specific yield of 0.15) and then applied the information to the unconfined portion of the aquifer to determine the total

volume of the change in acre feet. The water level for the unconfined part of the aquifer increased an average of 0.3152 feet per year. As of 2012, there were 76,978 acres under unconfined conditions. Consequently, the analysis showed the annual change in volume is 3,639.5 ac-ft (76,978 acres x 0.31 feet x 0.15). This January 30, 2013, analysis shows that the average annual recharge to the aquifer exceeded the average annual discharge from the aquifer by an average of 3,640 ac-ft/yr for the period since development has been static (2003-2012). The 3,640 ac-ft/yr would be sufficient water to irrigate 4,686 acres using the historic average irrigation rate for this aquifer (9.32 inches).

31. The portion of the aquifer that is under unconfined conditions was estimated in the April 25, 2012, report as being much smaller than the 76,978 acres estimated in the January 30, 2013 report. At hearing, Buhler explained that during the period after the April 25, 2012, report was filed, he performed an exhaustive review of data to determine the unconfined portion of the aquifer. This included examining test hole logs, and well logs filed with the DENR for each well completed into the aquifer, including not only observation wells but also wells drilled for irrigators and domestic users. The data allowed him to examine the lithology reported for wells when they were constructed and assess the extent of the portion of the aquifer that was unconfined. This is the best available information showing the unconfined portion of the aquifer.

32. The analysis of the observation well data described in the foregoing Findings of Fact is the best information reasonably available to compare withdrawals from the aquifer against recharge to the aquifer.

33. The January 30, 2013, analysis also examined the recharge/withdrawal issue by considering various water budget analyses where reported irrigation use is compared with calculated recharge rates (as opposed to examining change of actual water in storage).

34. Recharge to the Tulare: Western Spink/Hitchcock aquifer is primarily through infiltration of precipitation where the outwash is at or near the surface. Past independent studies show that the recharge rate had been estimated for the unconfined and confined portions of the aquifer under various methods. This included an analysis of the unconfined portion of the aquifer alone, a regional flow net analysis, and a digital groundwater model. The recharge rate estimate is 0.83 inches per year.

35. The recharge estimate, when applied to the areal extent of the aquifer, results in total acre feet per year of recharge. Using the 263,016 acre areal extent of the aquifer and the 0.83 inch recharge rate, the average recharge would be 18,192 ac-ft/yr.

36. Buhler also used a regional flow net analysis to calculate recharge based on September 2012 water level data from the DENR Observation Well Network. A flow net analysis is a calculation of the amount of water flowing through the aquifer. Buhler relied on (a) the average transmissivity of the aquifer based on the calculated transmissivity of irrigation wells in the aquifer where the data to allow these calculations

was available (30 irrigation wells); (b) the hydraulic gradient for the aquifer based on the Observation Well Network; and (c) the distance of the appropriate cross section of the aquifer (25 miles). The volume of water moving through the aquifer is 8,583 ac-ft/yr or 0.39 inches per acre per year on an aquifer wide basis. This rate is not “average annual recharge” since it used only 2012 data and likely can be viewed as a minimum recharge rate. Independent studies over a period of years estimate the average annual recharge at 0.83 inches per acre per year.

37. Under the water budget method, average annual withdrawals were estimated and compared to the estimated average annual recharge sum. Almost all of the withdrawals are for irrigation. One water budget method would base withdrawals primarily on irrigation questionnaires (self-reporting by irrigators) for the period of record (1979 to most recent). Review of the questionnaires provides an application rate in inches of water per acre for the irrigation systems actually in use each year. The average annual application rate is 9.32 inches of water per acre on acres actually irrigated during 1979-2011. This average does not include any undeveloped and unused irrigation systems. When adding information from 2012 irrigation reports, the average irrigation application rate from 1979-2012 is 9.44 inches per acre.

38. By contrast, the average irrigation application rate was only 8.71 inches over the period of 2003-2011 when the aquifer was fully developed. In Buhler’s expert opinion, this 8.71 inch number reflects climate changes (wet conditions) during the period rather than the average

irrigation practices. Buhler found in the January 30, 2013, report that the best information available on the average irrigation application rate was the entire period of record of irrigation reporting for the aquifer (i.e. 1979 – 2011), which was 9.32 inches per acres.

39. In preparing his report in January 2013, Ken Buhler relied on the information available at the time for the period of record (1979-2011). This Board relied on the January 30, 2013 report (and therefore used the 9.32 inches) in previous rulings. By the time of the October 3, 2013 hearing on the present applications, additional information was available from the 2012 irrigation season, which showed an average application rate of 9.44 inches for the period from 1979-2012. Yet, the 9.44 inches would have supported irrigating even fewer acres than the 9.32 inches. The 9.32 inches is the more conservative and consistent number for this contested case.

40. At hearing neither of the parties relied on the 9.44 inch average application rate. DENR relied on the 9.32 inch application rate. The Applicants relied on the 8.71 inch application rate. The Board relies on the 9.32 inches as the best information reasonably available in this case.

41. As part of the water budget method focusing on irrigation questionnaires, the Buhler report also examined withdrawals in terms of “irrigation pumpage.” The “irrigation pumpage” is the total of all water use for irrigation from the aquifer for a year as reported on the irrigation questionnaires. Buhler examined the average irrigation pumpage for 1979-2011 and also for the shorter nine-year period of 2003-2011. Total irrigation pumpage averaged 9,725.6 ac-ft/yr for the period from 1979-2011

based on irrigation questionnaires. This is the period when the average irrigation application rate was 9.32 in/ac/yr. Yet, total irrigation pumpage averaged 12,286.8 ac-ft/yr for the nine-year period of 2003-2011 based on irrigation questionnaires. This is the nine year period when the average irrigation application rate was 8.71 in/ac/yr. The annual average quantity of water pumped from 1979-2011 was lower than for the period from 2003-2011 because there were fewer acres developed for irrigation in the early part of the period than the later period. It has only been since 2002 that the average irrigation pumpage has not been skewed by systems permitted but not completed.

42. The average annual irrigation pumpage derived from irrigation questionnaires for the nine-year period (12, 286 ac-ft/yr), compared with the estimated average annual recharge rate for the aquifer (18,192 ac-ft/yr), would result in 5,905 ac-ft/yr of unappropriated water available from the Tulare: Western Spink/Hitchcock Aquifer than had previously been available. Under this analysis, the volume would be sufficient to irrigate 7,603 more acres than were permitted for the period previous to 2012, using 9.32 inches of water per acre.

43. At hearing, 2012 irrigation questionnaire data was also used to update the foregoing water budget calculations. The total average annual well withdrawals (irrigation pumpage) from 2003-2012 was 13,138 acre feet/year. Using an average annual application rate of 9.44 (which includes 2012 data), the 13,138 acre feet/year would provide an annual volume of

water sufficient for irrigation of an additional 6,423 more acres than were permitted for the period previous to 2012.

44. Buhler did not rely on the foregoing water budget calculations, however, because there are more variables and more estimates than observation well data (which shows actual changes in water levels in observation wells due to actual pumping). The water budget estimates include a total pumping quantity based on self-reported pumping rates, days of pumping, application rate by irrigators, uncertainties in the aquifer area, and errors associated with the recharge. The nine-year period (2003-2011) is also a relatively short period and may be more reflective of climatic conditions (and lack of water use in response to wet climatic conditions) rather than averages over a longer period. A shorter period is less reliable than a longer period because an abnormal year would carry greater weight. The ten-year period (2003-2012) results in similar concerns.

45. Another type of water budget alternative is the “recharge to acres” method where the recharge rate is estimated for the aquifer and divided by the average application rate to obtain the “maximum allowable acreage.” The “maximum allowable acres” is then compared with “acres likely to be irrigated.” The number of acres likely to be irrigated under existing permits is the total acres permitted for irrigation multiplied by the percentage of permitted acres that have historically been irrigated since 2003 (not a percentage of average irrigation application rate or the number of acres in partially irrigated systems). This method would result in 7,100 “acres remaining” using 2003 to 2011 data. Using 2003 to 2012 data, the

method would provide for 5,563.8 “acres remaining”. This method is based on a combination of the estimated recharge rate, the average irrigation application rate reported by irrigators (in terms of inches per acre), and the average number of irrigated acres as a percent of total permitted acreage. This methodology then assumes the average application rate will continue to be used by existing irrigators. This use of several assumed or estimated variables compounds any errors in reporting. Further, the percent of permitted acres irrigated is highly variable since there is a small dataset (2003 – 2011) which varies greatly from year to year. The Board does not find this method to be useful or the best information available.

46. Another alternative is a variant of the “recharge to acres” method where the “maximum allowable acreage” is again calculated and compared with the average number of irrigated acres for the period of 2003-2011 and the acres likely to be irrigated under recently granted permits. This method assumes that the percentage of acres irrigated under the newly granted permits in 2012-13 would be the same as the percentage of irrigation systems historically used. It is not valid to assume that only a portion of the acres authorized for irrigation by newly granted water permits will be irrigated. Later analysis of 2012 irrigation use data demonstrated that, in fact, the percentage of acres irrigated of the total acres appropriated was 82.8% in 2012. This method, although speculative, would result in 7,100 “acres remaining” (2003-2011 data) or 5,953 “acres remaining” (2003-2012 data). Again, 4,706 acres have already been authorized for irrigation

in during 2012-2013. The Board does not, however, find this method to be useful or the best information reasonably available.

47. The number of “acres remaining” under the observation well data method is 4,686 acres (using 1979 to 2011 data averaging 9.32 inches per acre application rate) or 4,627 acres (using 1979 to 2012 data averaging 9.44 inches per acre application rate). The Board finds that the 4,686 acres is the most useful method and based on the best information available.

48. The Board already authorized permits for irrigation of 4,706 acres in 2012-2013. This acreage is comparable with the “acres remaining” under the observation well method.

49. Based on the best available information currently available, the average annual withdrawals from the Tulare: Western Spink/Hitchcock Aquifer is the same as average annual recharge when factoring in the withdrawals authorized in 2012-2013. If more permits were granted, it is probable that the quantity of water withdrawn annually from the aquifer would exceed the quantity of the average estimated annual recharge of water to the aquifer.

50. The evidence in the Buhler reports and the Buhler testimony demonstrates to this Board that the 14 applications should be denied on the basis of the recharge/withdrawal issue, whether considered along with other applications already granted (as was done in the report), or when considered separately (as was done at hearing).

51. Other factors in considering whether to grant water permits is whether the application, if granted, would interfere with existing water

rights, whether the application is a beneficial use, and whether the permit would be in the public interest. These factors need not be considered, however, because the permits should be denied based on the foregoing determination on the recharge/withdrawal analysis and water availability.

Based on the foregoing findings of fact, the Board makes the following:

CONCLUSIONS OF LAW

1. The Board has jurisdiction. The present applications are within the Board's responsibility over water appropriation and regulation in Title 46, including SDCL 46-2A-9.

2. Publication was properly made in the Redfield Press and the Huron Daily Plainsman pursuant to SDCL 46-2A-4. Notice of Hearing was properly given to the Applicants under SDCL 46-2A-4 and SDCL 1-26-17.

3. Under ARSD 74:02:01:12.04, the deadline for filing petitions to intervene in this matter was July 1, 2013. This intervention date was published as required by SDCL 46-2A-4. There were no intervenors.

4. The Chief Engineer recommended denial. The recommendation is not, however, binding on the Board. SDCL 46-2A-4(8).

5. 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 decisions as binding precedent (and this decision will not constitute binding precedent). *Interstate Telephone Cooperative, Inc. v. Public Utilities Commission*, 518 N.W.2d 749 (S.D. 1994).

6. The Applicants seek water at the maximum diversion rate generally authorized by law under SDCL 46-5-6.

7. Each Applicant has the burden to prove each of the elements in SDCL 46-2A-9 to obtain the permit requested. None of the Applicants met their burden of proof as to the first element. Water is not available when considering the standard required in SDCL 46-6-3.1. 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 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.”

8. The first element in SDCL 46-2A-9 is whether there is water available for the appropriation. Consideration of water availability 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 estimated annual recharge of water to the groundwater source.”

9. 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 for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the Greenhorn Formation and is not applicable here.

10. ARSD 74:02:05:07 requires that, in addition to any other data, the Water Management Board shall rely upon the record of observation well measurements to determine whether the quantity of water withdrawn annually from the aquifer exceeds the estimated average annual recharge of the aquifer.

11. The observation well method used by Ken Buhler uses the best available information to compare average annual recharge against average annual withdrawals as required by SDCL 46-6-3.1. This analysis includes hydrographs of several observation wells, measurements of changes in volume in representative observation wells in the aquifer, independent studies concerning the areal extent of the aquifer, detailed information and analysis of the size of the unconfined portion of the aquifer, and the 9.32 inch average application rate.

12. If more permits were granted, it is probable that the quantity of water withdrawn annually from the aquifer would exceed the quantity of the average estimated annual recharge of water to the aquifer. In light of SDCL 46-6-3.1 and the above Findings of Fact, there is not unappropriated water available for the proposed water use. Therefore, pursuant to SDCL 46-2A-9, additional permits to appropriate water cannot be issued from the Tulare: Western Spink/Hitchcock Aquifer. The aquifer is fully appropriated.

13. SDCL 46-2A-9 also requires consideration of whether the proposed water use would impair existing rights, whether the use of water would be a beneficial use (i.e. one that is reasonable and useful and beneficial to the appropriator and also consistent with the interest of the

public in the best utilization of water supplies under SDCL 46-1-6(3)), and whether the proposed water use is in the public interest. The Board need not reach these issues in this particular case because the first factor in SDCL 46-2A-9 has not been met. Water is not available in light of SDCL 46-6-3.1.

14. The Applicants failed to show that any of the 14 applications meet the standard in SDCL 46-2A-9 or SDCL 46-6-3.1 and each must be denied. Based on the foregoing Findings of Fact and Conclusions of Law, the Board enters the following:

FINAL DECISION AND ORDER

The 14 above-captioned water permit applications are hereby denied and the Tulare: Western Spink/Hitchcock Aquifer is fully appropriated.

Dated this _____ day of December, 2013.

BY THE BOARD:

Chad Comes, Chairman
South Dakota Water Management Board

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NOV 26 2013

WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA

SOUTH DAKOTA WATER MANAGEMENT BOARD

IN THE MATTER OF THE WATER	)	
PERMIT APPLICATION Nos. 7725-3,	)	OBJECTIONS TO FINDINGS OF
7752-3, 7755-3, 7756-3, and	)	FACT, CONCLUSIONS OF LAW
7757-3, LENNY PETERSON	)	AND FINAL DECISION
	)	
IN THE MATTER OF THE WATER	)	
PERMIT APPLICATION Nos. 7726-3,	)	
7727-3, 7753-3, 7754-3, AND	)	
7759-3, OSCAR, INC.	)	
	)	
IN THE MATTER OF THE WATER	)	
PERMIT APPLICATION Nos. 7733-3,	)	
7734-3, 7735-3, and 7736-3, VAN	)	
BUSKIRK FARMS, LLP	)	

COMES NOW, Lenny Peterson, Oscar, Inc., and Van Buskirk Farms, LLP, by and through their undersigned counsel of record, and respectfully submit the following Objections to the Water Management Board's proposed Findings of Fact, Conclusions of Law and Final Decision.

1. Object to Findings of Fact #'s 21, 22, 23, 24, 25, 26, 28, 31, 32, 40, 44, 47, 48, 49, and 50 as they are not supported by the evidence.

2. Object to the last three complete sentences in Finding of Fact #45 wherein it states "This use of several assumed or estimated variables compounds any errors in reporting. Further, the percent of permitted acres irrigated is highly variable since there is a small dataset (2003 – 2011) which varies greatly from year to year. The Board does not find this method to be useful or the best information available." It is not supported by the evidence.

3. Object to that portion of Finding of Fact #46 wherein it states as follows: "It is not valid to assume that only a portion of the acres authorized for irrigation by newly granted water permits will be irrigated. Later analysis of 2012 irrigation use data demonstrated that, in fact, the percentage of acres irrigated of the total acres

appropriated was 82.8% in 2012", and that portion of the next sentence wherein it states: "although speculative", and the last sentence of that paragraph where it states: "The Board does not, however, find this method to be useful or the best information reasonably available." It is not supported by the evidence.

4. Object to that portion of Finding of Fact #33 wherein it states "as opposed to examining change of actual water in storage". It is not supported by the evidence.

5. Object to that portion of Finding of Fact #38 starting with the second sentence that states "In Buhler's expert opinion" to the end of #38. It is not supported by the evidence.

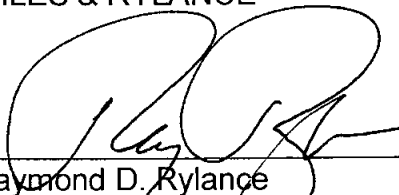
6. Object to that portion of Finding of Fact #39, starting with the third sentence, wherein it states "By the time of October 3, 2013 hearing" to the end of the paragraph. It is not supported by the evidence.

7. Object to the last sentence of Finding of Fact #41 wherein it states "It has only been since 2002 that the average irrigation pumpage has not been skewed by systems permitted but not completed". It is not supported by the evidence.

8. Object to Conclusions of Law #'s 6, 7, 8, 10, 11, 12, 13, and 14 as they are not supported by the Findings of Fact.

Dated this 22 day of November, 2013.

WILES & RYLANCE

A handwritten signature in black ink, appearing to read 'Ray D. Rylance', is written over a horizontal line.

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

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NOV 26 2013

WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA

SOUTH DAKOTA WATER MANAGEMENT BOARD

IN THE MATTER OF THE WATER	)	
PERMIT APPLICATION Nos. 7725-3,	)	PROPOSED FINDINGS OF
7752-3, 7755-3, 7756-3, and	)	FACT, CONCLUSIONS OF LAW
7757-3, LENNY PETERSON	)	AND FINAL DECISION
	)	
IN THE MATTER OF THE WATER	)	
PERMIT APPLICATION Nos. 7726-3,	)	
7727-3, 7753-3, 7754-3, AND	)	
7759-3, OSCAR, INC.	)	
	)	
IN THE MATTER OF THE WATER	)	
PERMIT APPLICATION Nos. 7733-3,	)	
7734-3, 7735-3, and 7736-3, VAN	)	
BUSKIRK FARMS, LLP	)	

Hearing was held on October 3, 2013, before Board members Chad Comes (Chair), Tim Bjork, Peggy Dixon, Everett Hoyt, Jim Hutmacher, and Leo Holzbauer. Rodney Freeman recused himself.

All applicants were represented by Ray Rylance. The Department of Environment and Natural Resources, Water Rights Program, and its Chief Engineer (jointly referred to as "DENR") was represented by Diane Best.

The Board, having considered the testimony and exhibits presented and all records and documents on file, and having entered its oral decision and rulings on the parties' submissions, now enters the following:

FINDINGS OF FACT

Background

1. This matter involves 14 applications to appropriate water from the Tulare: Western Spink/Hitchcock Aquifer, an aquifer that is used extensively for irrigation.

2. Irrigation development of the Tulare: Western Spink/Hitchcock Aquifer was basically static from 2002-2012. Although this Board deferred a large number of additional applications for a period of time starting in 2002, it ultimately denied them in 2008. (*In the Matter of Water Permit Applications from the Tulare Aquifer*, Findings of Fact, Conclusions of Law and Final Decision issued March 11, 2008). No other permits were issued until 2012.

3. After a group of applications was filed in December 2011, DENR Engineer Ken Buhler filed a report with the Chief Engineer on April 25, 2012. He concluded that sufficient water would be available to irrigate 733 more acres. The Chief Engineer subsequently entered into a stipulated settlement with the applicants and recommended that water permits should be granted to irrigate 810 acres. This Board approved the stipulation and authorized the permits for 810 acres in July 2012. (*In the Matter of Water Permit Application Nos. 7288-3, 7289-3, 7290-3, 7291-3, and 7292-3*, Findings of Fact waived).

4. Thirteen more applications were subsequently filed seeking water to irrigate 2,131 acres. On January 30, 2013, Ken Buhler filed another report with the Chief Engineer regarding those applications. The January 30, 2013, report examined water availability under various methods and concluded there was sufficient water available in the Tulare: Western Spink/Hitchcock Aquifer to support irrigation of 4,686 more acres than had been authorized for irrigation before any permits were issued in 2012 (also referred to herein as "acres remaining"). Of the 4,686 acres remaining, 810 acres had already been granted in July 2012. This was also more than enough to satisfy the requests then at issue for 2,131 acres (leaving enough water available for

1,746 acres for which applications had not yet been filed). The Chief Engineer recommended approval of permits to irrigate the 2131 acres at issue.

5. Following contested case hearings on March 7, 2013, and May 2, 2013, this Board authorized issuance of permits for 2,131 acres. *Water Permit Application Nos. 7373-3 (Terry Wieting), 7551-3 (Wayne Binger), 7570-3 to 7575 and 7637-3 to 7640-3 (Marshall Bros.), and 7620-3 (Oscar Inc).* (Findings of Fact waived).

6. In the meantime, after the Buhler Report was filed on January 30, 2013 (and the Chief Engineer recommended approval of water permits to irrigate 2,131 acres), there were 41 applications filed. Ken Buhler filed another report on April 13, 2013, addressing the 41 applications. The April 13, 2013, report relies, in significant part, on the earlier January 30, 2013, report, and, to a certain extent, information contained in the earlier April 25, 2012, analysis. The April 13, 2013, report ultimately concluded that there was sufficient water available for the first 10 of the 41 applications, with enough water left over for 116 acres (not enough to fill any of the additional requested applications).

7. The Chief Engineer recommended granting the first 10 of the 41 applications in the order they were filed as well as a portion of the 11th application. She recommended denial of the rest.

8. Of the 41 applications, the initial 10 applications were heard and granted by this Board in July, 2013. There was no opposition.

9. Of the 41 applications, the 11th application filed was Application No. 7725-3 submitted by Lenny Peterson, and it sought to irrigate 320 acres. The 116 acres referenced in the Buhler Report would have been insufficient for this request. At

hearing, however, Lenny Peterson asked the Board to split his request and grant a permit to irrigate 135 acres of the 320, enough to operate one center pivot. After inquiry by the Board, Buhler testified that an additional 19 acres was acceptable. The Board then authorized irrigation of 135 acres of the requested 320 acres for Application No. 7725-3.

10. The total of all of the 2012-2013 appropriations authorized by this Board from the Tulare: Western Spink/Hitchcock aquifer includes the full 4,686 acres addressed in the January 2013 Buhler Report as well as the additional 19 acres addressed in the July 2013 hearing (4,706 total acres).

11. In the meantime, of the 41 applications, 17 other applications were withdrawn. The applicants for those 17 permits did not seek hearing after they received the recommendation of denial. The 17 applications are considered to be withdrawn under SDCL 46-2A-3.

Current Applications

12. The contested case at issue pertains only to the 14 applications captioned above. This includes the deferred portion of Application 7725-3 for Lenny Peterson to irrigate 185 acres as well as 13 other applications that were recommended for denial in April 2013.

13. The 14 applications seek to appropriate sufficient water to irrigate a total of 3,608 acres in Beadle County. Each of the applications seeks water from the Tulare: Western Spink /Hitchcock Aquifer. The quantity of water requested is 2 acre feet per acre per year (ac ft/year) at a maximum diversion rate of 1 cubic foot of water per second (cfs) per 70 acres.

14. The five applications filed by Lenny Peterson seek to irrigate 985 acres. The total maximum diversion rate would be 14.05 cfs.

15. The five applications filed by Oscar Inc. seek to irrigate 825 acres using 6 wells. The total maximum diversion rate would be 11.77 cfs.

16. The four applications filed by VanBuskirk Farms, LLP seek to irrigate 1,798 acres using 11 wells. The total maximum diversion rate would be 25.65 cfs.

17. Notice of Hearing for the 14 applications was published in the Redfield Press (weekly newspaper) and Huron Daily Plainsman (daily newspaper) the same day: June 19, 2013. The published Notice scheduled hearing for July 11, 2013, in Pierre. The published Notices also provided that petitions to intervene were to be filed by July 1, 2012. No petitions to intervene were filed.

18. Hearing on the 14 applications was delayed until October 2013 upon request of the Chief Engineer. The Applicants consented to the delay.

19. The Board considers whether (a) there is a reasonable probability unappropriated water is available for the proposed use; (b) the proposed diversion can be developed without unlawful impairment of existing rights; (c) the use would be a beneficial use; and (d) the use is in the public interest. The first factor is dispositive.

20. The area of the Tulare: Western Spink/Hitchcock Aquifer is 263,016 acres. This information is based on the April 25, 2012, Buhler Report which analyzed several state and federal government studies of the extent of the aquifer. It is the most current and best available information on the areal extent of the aquifer.

21. The January 30, 2013 report by Ken Buhler states that 23,648 acres of farmland are authorized for irrigation as of that date.

22. Based on the January 30, 2013 report, an additional 3,896 acres were authorized for irrigation.

23. Which resulted in a total of 27,544 acres authorized for irrigation.

24. Ken Buhler testified that there was 3,640 acre feet of unappropriated water that would be available for irrigation.

25. Buhler states that the prior April, 2012 report on the Tulare: Western Spink/Hitchcock aquifer was overly conservative because it was assumed 100% irrigation of permitted acres are irrigated annually and the unconfined conditions of the aquifer were overly contracted.

26. The average annual recharge to the Tulare: Western Spink/Hitchcock aquifer is 18,192 acre feet per year, which is equivalent to 23,423 acres allowable for irrigation. Buhler testified that the irrigation questionnaire submitted by the irrigators on an annual basis is the best available evidence of the average annual water usage.

27. Hydrographs in the January 30, 2013, Buhler Report regarding observation well data for the Tulare: Western Spink/Hitchcock Aquifer showed upward trending water levels. Based on the average slope of linear trend lines for hydrographs for the observation wells in the aquifer, recharge to the aquifer was greater than the total of the discharges from the aquifer over the period from 2003 to 2012 (the period of time during which the aquifer was fully developed and usage was not increasing).

28. The observation well data also showed that the configuration of the potentiometric surface of the Tulare: Western Spink/Hitchcock aquifer had not changed significantly between 1987 and 2012. This showed that discharge was not exceeding recharge and unappropriated water was available as of 2012.

29. The January 30, 2013, analysis also examined the recharge/ withdrawal issue by considering various water budget analyses where reported irrigation use is compared with calculated recharge rates.

30. Recharge to the Tulare: Western Spink/Hitchcock aquifer is primarily through infiltration of precipitation where the outwash is at or near the surface. Past independent studies show that the recharge rate had been estimated for the unconfined and confined portions of the aquifer under various methods. This included an analysis of the unconfined portion of the aquifer alone, a regional flow net analysis, and a digital groundwater model. The recharge rate estimate is 0.83 inches per year.

31. The recharge estimate, when applied to the areal extent of the aquifer, results in total acre feet per year of recharge. Using the 263,016 acre areal extent of the aquifer and the 0.83 inch recharge rate, the average recharge would be 18,192 ac-ft/yr.

32. Buhler also used a regional flow net analysis to calculate recharge based on September 2012 water level data from the DENR Observation Well Network. A flow net analysis is a calculation of the amount of water flowing through the aquifer. Buhler relied on (a) the average transmissivity of the aquifer based on the calculated transmissivity of irrigation wells in the aquifer where the data to allow these calculations was available (30 irrigation wells); (b) the hydraulic gradient for the aquifer based on the Observation Well Network; and (c) the distance of the appropriate cross section of the aquifer (25 miles). The volume of water moving through the aquifer is 8,583 ac-ft/yr or 0.39 inches per acre per year on an aquifer wide basis. This rate is not "average annual recharge" since it used only 2012 data and likely can be viewed as a minimum recharge

rate. Independent studies over a period of years estimate the average annual recharge at 0.83 inches per acre per year.

33. Under the water budget method, average annual withdrawals were estimated and compared to the estimated average annual recharge sum. Almost all of the withdrawals are for irrigation. One water budget method would base withdrawals primarily on irrigation questionnaires (self-reporting by irrigators) for the period of record (1979 to most recent). Review of the questionnaires provides an application rate in inches of water per acre for the irrigation systems actually in use each year. The average annual application rate is 9.32 inches of water per acre on acres actually irrigated during 1979-2011. This average does not include any undeveloped and unused irrigation systems. When adding information from 2012 irrigation reports, the average irrigation application rate from 1979-2012 is 9.44 inches per acre.

34. The average irrigation application rate was only 8.71 inches over the period of 2003-2011 when the aquifer was fully developed.

35. In preparing his report in January 2013, Ken Buhler relied on the information available at the time for the period of record (1979-2011). This Board relied on the January 30, 2013 report (and therefore used the 9.32 inches) in previous rulings.

36. As part of the water budget method focusing on irrigation questionnaires, the Buhler report also examined withdrawals in terms of "irrigation pumpage." The "irrigation pumpage" is the total of all water use for irrigation from the aquifer for a year as reported on the irrigation questionnaires. Buhler examined the average irrigation pumpage for 1979-2011 and also for the shorter nine-year period of 2003-2011. Total irrigation pumpage averaged 9,725.6 ac-ft/yr for the period from 1979-2011 based on

irrigation questionnaires. This is the period when the average irrigation application rate was 9.32 in/ac/yr. Yet, total irrigation pumpage averaged 12,286.8 ac-ft/yr for the nine-year period of 2003-2011 based on irrigation questionnaires. This is the nine year period when the average irrigation application rate was 8.71 in/ac/yr. The annual average quantity of water pumped from 1979-2011 was lower than for the period from 2003-2011 because there were fewer acres developed for irrigation in the early part of the period than the later period.

37. The average annual irrigation pumpage derived from irrigation questionnaires for the nine-year period (12, 286 ac-ft/yr), compared with the estimated average annual recharge rate for the aquifer (18,192 ac-ft/yr), would result in 5,905 ac-ft/yr of unappropriated water available from the Tulare: Western Spink/Hitchcock Aquifer than had previously been available. Under this analysis, the volume would be sufficient to irrigate 7,603 more acres than were permitted for the period previous to 2012, using 9.32 inches of water per acre and 8,135 more acres using 8.71 inches of water per acre.

38. At hearing, 2012 irrigation questionnaire data was also used to update the foregoing water budget calculations. The total average annual well withdrawals (irrigation pumpage) from 2003-2012 was 13,138 acre feet/year. Using an average annual application rate of 9.44 (which includes 2012 data), the 13,138 acre feet/year would provide an annual volume of water sufficient for irrigation of an additional 6,423 more acres than were permitted for the period previous to 2012.

39. Since 2003, the average percentage of authorized acres that have been irrigated annually average 69.02%. This irrigated to authorized percentage agrees fairly well with the percentage calculated for the Tulare: East James Aquifer (65.34%).

40. Since on average, only 69.02% of authorized acres are irrigated annually, the number of acres that can be expected to be irrigated is 16,322.4 acres.

41. The difference between the allowable acres (23,423 acres) and the expected irrigation acres currently authorized (16,322.4 acres) shows that an additional 7,100 acres could be irrigated annually from the Tulare: Western Spink/Hitchcock aquifer.

42. In applying SDCL 46-6-3.1, the Sixth Judicial Circuit ruled in 2005 that if the Water Management Board uses average annual recharge, then it should use average annual withdrawal to determine if unappropriated water is available from the aquifer. *Hines v. South Dakota Department of Environment and Natural Resources*, Hughes County 04-37, Memorandum Decision April 29, 2005.

43. Another type of water budget alternative is the "recharge to acres" method where the recharge rate is estimated for the aquifer and divided by the average application rate to obtain the "maximum allowable acreage." The "maximum allowable acres" is then compared with "acres likely to be irrigated." The number of acres likely to be irrigated under existing permits is the total acres permitted for irrigation multiplied by the percentage of permitted acres that have historically been irrigated since 2003 (not a percentage of average irrigation application rate or the number of acres in partially irrigated systems). This method would result in 7,100 "acres remaining" using 2003 to 2011 data. Using 2003 to 2012 data, the method would provide for 5,563.8 "acres

remaining". This method is based on a combination of the estimated recharge rate, the average irrigation application rate reported by irrigators (in terms of inches per acre), and the average number of irrigated acres as a percent of total permitted acreage. This methodology then assumes the average application rate will continue to be used by existing irrigators.

44. Another alternative is a variant of the "recharge to acres" method where the "maximum allowable acreage" is again calculated and compared with the average number of irrigated acres for the period of 2003-2011 and the acres likely to be irrigated under recently granted permits. This method assumes that the percentage of acres irrigated under the newly granted permits in 2012-13 would be the same as the percentage of irrigation systems historically used. This method would result in 7,100 "acres remaining" (2003-2011 data) or 5,953 "acres remaining" (2003-2012 data). Again, 4,706 acres have already been authorized for irrigation in during 2012-2013.

45. Other factors in considering whether to grant water permits is whether the application, if granted, would interfere with existing water rights, whether the application is a beneficial use, and whether the permit would be in the public interest. The applications do not interfere with existing water rights, irrigation is a beneficial use and the permits are in the public interest.

46. Water is available in sufficient quantity to grant the applications for all 14 applications.

Based on the foregoing Findings of Fact, the Board makes the following:

CONCLUSIONS OF LAW

1. The Board has jurisdiction. The present applications are within the Board's responsibility over water appropriation and regulation in Title 46, including SDCL 46-2A-9.
2. Publication was properly made in the Redfield Press and the Huron Daily Plainsman pursuant to SDCL 46-2A-4. Notice of Hearing was properly given to the Applicants under SDCL 46-2A-4 and SDCL 1-26-17.
3. Under ARSD 74:02:01:12.04, the deadline for filing petitions to intervene in this matter was July 1, 2013. This intervention date was published as required by SDCL 46-2A-4. There were no intervenors.
4. The Chief Engineer recommended denial. The recommendation is not, however, binding on the Board. SDCL 46-2A-4(8).
5. 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 decisions as binding precedent (and this decision will not constitute binding precedent). *Interstate Telephone Cooperative, Inc. v. Public Utilities Commission*, 518 N.W.2d 749 (S.D. 1994).
6. The first element in SDCL 46-2A-9 is whether there is water available for the appropriation. Consideration of water availability includes consideration of the criteria in SDCL 46-6-3.1 and the *Hines v. South Dakota Department of Environment and Natural Resources*, Hughes County 04-37 Memorandum Decision dated April 29,

2005, wherein the Court said that the Water Management Board should use average annual recharge and average annual discharge to determine if unappropriated water is available. Water is available for all 14 applicants.

7. 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 for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the Greenhorn Formation and is not applicable here.

8. ARSD 74:02:05:07 requires that, in addition to any other data, the Water Management Board shall rely upon the record of observation well measurements to determine whether the quantity of water withdrawn annually from the aquifer exceeds the estimated average annual recharge of the aquifer. ARSD 74:02:05:07 is not the proper method for the Board to consider since the *Hines v. South Dakota Department of Environment and Natural Resources* decision.

9. The applications do not interfere with existing water rights, irrigation is a beneficial use, and the permits are in the public interest. The average annual recharge to the Tulare: Western Spink/Hitchcock Aquifer is greater than the average annual discharge in sufficient quantity to grant permits for all 14 applications.

FINAL DECISION AND ORDER

The 14 above-captioned water permit applications are hereby GRANTED TO
APPOPRIATE WATER FROM the Tulare: Western Spink/Hitchcock Aquifer.

Dated this _____ day of December, 2013.

BY THE BOARD:

Chad Comes, Chairman
South Dakota Water Management Board

STATE OF SOUTH DAKOTA
SOUTH DAKOTA WATER MANAGEMENT BOARD

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WATER RIGHTS
PROGRAM

IN THE MATTER OF THE WATER	)	
PERMIT APPLICATION Nos. 7725-3,	)	FINDINGS OF
7752-3, 7755-3, 7756-3, and	)	FACT, CONCLUSIONS OF LAW
7757-3, LENNY PETERSON	)	AND FINAL DECISION
	)	
IN THE MATTER OF THE WATER	)	
PERMIT APPLICATION Nos. 7726-3,	)	
7727-3, 7753-3, 7754-3, AND	)	
7759-3, OSCAR, INC.	)	
	)	
IN THE MATTER OF THE WATER	)	
PERMIT APPLICATION Nos. 7733-3,	)	
7734-3, 7735-3, and 7736-3, VAN	)	
BUSKIRK FARMS, LLP	)	

Hearing was held on October 3, 2013, before Board members Chad Comes (Chair), Tim Bjork, Peggy Dixon, Everett Hoyt, Jim Hutmacher, and Leo Holzbauer. Rodney Freeman recused himself.

All applicants were represented by Ray Rylance. The Department of Environment and Natural Resources, Water Rights Program, and its Chief Engineer (jointly referred to as "DENR") was represented by Diane Best.

The Board, having considered the testimony and exhibits presented and all records and documents on file, and having entered its oral decision and rulings on the parties' submissions, now enters the following:

FINDINGS OF FACT

Background

1. This matter involves 14 applications to appropriate water from the Tulare: Western Spink/Hitchcock Aquifer, an aquifer that is used extensively for irrigation.

2. Irrigation development of the Tulare: Western Spink/Hitchcock Aquifer was basically static from 2002-2012. Although this Board deferred a large number of additional applications for a period of time starting in 2002, it ultimately denied them in 2008. (*In the Matter of Water Permit Applications from the Tulare Aquifer*, Findings of Fact, Conclusions of Law and Final Decision issued March 11, 2008). No other permits were issued until 2012.

3. After a group of applications was filed in December 2011, DENR Engineer Ken Buhler filed a report with the Chief Engineer on April 25, 2012. He concluded that sufficient water would be available to irrigate 733 more acres. The Chief Engineer subsequently entered into a stipulated settlement with the applicants and recommended that water permits should be granted to irrigate 810 acres. This Board approved the stipulation and authorized the permits for 810 acres in July 2012. (*In the Matter of Water Permit Application Nos. 7288-3, 7289-3, 7290-3, 7291-3, and 7292-3*, Findings of Fact waived).

4. Thirteen more applications were subsequently filed seeking water to irrigate 2,131 acres. On January 30, 2013, Ken Buhler filed another report with the Chief Engineer regarding those applications. The January 30, 2013, report examined water availability under various methods and concluded there was sufficient water available in the Tulare: Western Spink/Hitchcock Aquifer to support irrigation of 4,686 more acres than had been authorized for irrigation before any permits were issued in 2012 (also referred to herein as "acres remaining"). Of the 4,686 acres remaining, 810 acres had already been granted in July 2012. This was also more than enough to satisfy the requests then at issue for 2,131 acres (leaving enough water available for

1,746 acres for which applications had not yet been filed). The Chief Engineer recommended approval of permits to irrigate the 2131 acres at issue.

5. Following contested case hearings on March 7, 2013, and May 2, 2013, this Board authorized issuance of permits for 2,131 acres. *Water Permit Application Nos. 7373-3 (Terry Wieting), 7551-3 (Wayne Binger), 7570-3 to 7575 and 7637-3 to 7640-3 (Marshall Bros.), and 7620-3 (Oscar Inc).* (Findings of Fact waived).

6. In the meantime, after the Buhler Report was filed on January 30, 2013 (and the Chief Engineer recommended approval of water permits to irrigate 2,131 acres), there were 41 applications filed. Ken Buhler filed another report on April 13, 2013, addressing the 41 applications. The April 13, 2013, report relies, in significant part, on the earlier January 30, 2013, report, and, to a certain extent, information contained in the earlier April 25, 2012, analysis. The April 13, 2013, report ultimately concluded that there was sufficient water available for the first 10 of the 41 applications, with enough water left over for 116 acres (not enough to fill any of the additional requested applications).

7. The Chief Engineer recommended granting the first 10 of the 41 applications in the order they were filed as well as a portion of the 11th application. She recommended denial of the rest.

8. Of the 41 applications, the initial 10 applications were heard and granted by this Board in July, 2013. There was no opposition.

9. Of the 41 applications, the 11th application filed was Application No. 7725-3 submitted by Lenny Peterson, and it sought to irrigate 320 acres. The 116 acres referenced in the Buhler Report would have been insufficient for this request. At

hearing, however, Lenny Peterson asked the Board to split his request and grant a permit to irrigate 135 acres of the 320, enough to operate one center pivot. After inquiry by the Board, Buhler testified that an additional 19 acres was acceptable. The Board then authorized irrigation of 135 acres of the requested 320 acres for Application No. 7725-3.

10. The total of all of the 2012-2013 appropriations authorized by this Board from the Tulare: Western Spink/Hitchcock aquifer includes the full 4,686 acres addressed in the January 2013 Buhler Report as well as the additional 19 acres addressed in the July 2013 hearing (4,706 total acres).

11. In the meantime, of the 41 applications, 17 other applications were withdrawn. The applicants for those 17 permits did not seek hearing after they received the recommendation of denial. The 17 applications are considered to be withdrawn under SDCL 46-2A-3.

Current Applications

12. The contested case at issue pertains only to the 14 applications captioned above. This includes the deferred portion of Application 7725-3 for Lenny Peterson to irrigate 185 acres as well as 13 other applications that were recommended for denial in April 2013.

13. The 14 applications seek to appropriate sufficient water to irrigate a total of 3,608 acres in Beadle County. Each of the applications seeks water from the Tulare: Western Spink /Hitchcock Aquifer. The quantity of water requested is 2 acre feet per acre per year (ac ft/year) at a maximum diversion rate of 1 cubic foot of water per second (cfs) per 70 acres.

14. The five applications filed by Lenny Peterson seek to irrigate 985 acres. The total maximum diversion rate would be 14.05 cfs.
15. The five applications filed by Oscar Inc. seek to irrigate 825 acres using 6 wells. The total maximum diversion rate would be 11.77 cfs.
16. The four applications filed by VanBuskirk Farms, LLP seek to irrigate 1,798 acres using 11 wells. The total maximum diversion rate would be 25.65 cfs.
17. Notice of Hearing for the 14 applications was published in the Redfield Press (weekly newspaper) and Huron Daily Plainsman (daily newspaper) the same day: June 19, 2013. The published Notice scheduled hearing for July 11, 2013, in Pierre. The published Notices also provided that petitions to intervene were to be filed by July 1, 2012. No petitions to intervene were filed.
18. Hearing on the 14 applications was delayed until October 2013 upon request of the Chief Engineer. The Applicants consented to the delay.
19. The Board considers whether (a) there is a reasonable probability unappropriated water is available for the proposed use; (b) the proposed diversion can be developed without unlawful impairment of existing rights; (c) the use would be a beneficial use; and (d) the use is in the public interest. The first factor is dispositive.
20. The area of the Tulare: Western Spink/Hitchcock Aquifer is 263,016 acres. This information is based on the April 25, 2012, Buhler Report which analyzed several state and federal government studies of the extent of the aquifer. It is the most current and best available information on the areal extent of the aquifer.
21. The January 30, 2013 report by Ken Buhler states that 23,648 acres of farmland are authorized for irrigation as of that date.

22. Based on the January 30, 2013 report, an additional 3,896 acres were authorized for irrigation.

23. Which resulted in a total of 27,544 acres authorized for irrigation.

24. Ken Buhler testified that there was 3,640 acre feet of unappropriated water that would be available for irrigation.

25. Buhler states that the prior April, 2012 report on the Tulare: Western Spink/Hitchcock aquifer was overly conservative because it was assumed 100% irrigation of permitted acres are irrigated annually and the unconfined conditions of the aquifer were overly contracted.

26. The average annual recharge to the Tulare: Western Spink/Hitchcock aquifer is 18,192 acre feet per year, which is equivalent to 23,423 acres allowable for irrigation. Buhler testified that the irrigation questionnaire submitted by the irrigators on an annual basis is the best available evidence of the average annual water usage.

27. Hydrographs in the January 30, 2013, Buhler Report regarding observation well data for the Tulare: Western Spink/Hitchcock Aquifer showed upward trending water levels. Based on the average slope of linear trend lines for hydrographs for the observation wells in the aquifer, recharge to the aquifer was greater than the total of the discharges from the aquifer over the period from 2003 to 2012 (the period of time during which the aquifer was fully developed and usage was not increasing).

28. The observation well data also showed that the configuration of the potentiometric surface of the Tulare: Western Spink/Hitchcock aquifer had not changed significantly between 1987 and 2012. This showed that discharge was not exceeding recharge and unappropriated water was available as of 2012.

29. The January 30, 2013, analysis also examined the recharge/ withdrawal issue by considering various water budget analyses where reported irrigation use is compared with calculated recharge rates.

30. Recharge to the Tulare: Western Spink/Hitchcock aquifer is primarily through infiltration of precipitation where the outwash is at or near the surface. Past independent studies show that the recharge rate had been estimated for the unconfined and confined portions of the aquifer under various methods. This included an analysis of the unconfined portion of the aquifer alone, a regional flow net analysis, and a digital groundwater model. The recharge rate estimate is 0.83 inches per year.

31. The recharge estimate, when applied to the areal extent of the aquifer, results in total acre feet per year of recharge. Using the 263,016 acre areal extent of the aquifer and the 0.83 inch recharge rate, the average recharge would be 18,192 ac-ft/yr.

32. Buhler also used a regional flow net analysis to calculate recharge based on September 2012 water level data from the DENR Observation Well Network. A flow net analysis is a calculation of the amount of water flowing through the aquifer. Buhler relied on (a) the average transmissivity of the aquifer based on the calculated transmissivity of irrigation wells in the aquifer where the data to allow these calculations was available (30 irrigation wells); (b) the hydraulic gradient for the aquifer based on the Observation Well Network; and (c) the distance of the appropriate cross section of the aquifer (25 miles). The volume of water moving through the aquifer is 8,583 ac-ft/yr or 0.39 inches per acre per year on an aquifer wide basis. This rate is not "average annual recharge" since it used only 2012 data and likely can be viewed as a minimum recharge

rate. Independent studies over a period of years estimate the average annual recharge at 0.83 inches per acre per year.

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34. The average irrigation application rate was only 8.71 inches over the period of 2003-2011 when the aquifer was fully developed.

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36. As part of the water budget method focusing on irrigation questionnaires, the Buhler report also examined withdrawals in terms of "irrigation pumpage." The "irrigation pumpage" is the total of all water use for irrigation from the aquifer for a year as reported on the irrigation questionnaires. Buhler examined the average irrigation pumpage for 1979-2011 and also for the shorter nine-year period of 2003-2011. Total irrigation pumpage averaged 9,725.6 ac-ft/yr for the period from 1979-2011 based on

irrigation questionnaires. This is the period when the average irrigation application rate was 9.32 in/ac/yr. Yet, total irrigation pumpage averaged 12,286.8 ac-ft/yr for the nine-year period of 2003-2011 based on irrigation questionnaires. This is the nine year period when the average irrigation application rate was 8.71 in/ac/yr. The annual average quantity of water pumped from 1979-2011 was lower than for the period from 2003-2011 because there were fewer acres developed for irrigation in the early part of the period than the later period.

37. The average annual irrigation pumpage derived from irrigation questionnaires for the nine-year period (12,286 ac-ft/yr), compared with the estimated average annual recharge rate for the aquifer (18,192 ac-ft/yr), would result in 5,905 ac-ft/yr of unappropriated water available from the Tulare: Western Spink/Hitchcock Aquifer than had previously been available. Under this analysis, the volume would be sufficient to irrigate 7,603 more acres than were permitted for the period previous to 2012, using 9.32 inches of water per acre and 8,135 more acres using 8.71 inches of water per acre.

38. At hearing, 2012 irrigation questionnaire data was also used to update the foregoing water budget calculations. The total average annual well withdrawals (irrigation pumpage) from 2003-2012 was 13,138 acre feet/year. Using an average annual application rate of 9.44 (which includes 2012 data), the 13,138 acre feet/year would provide an annual volume of water sufficient for irrigation of an additional 6,423 more acres than were permitted for the period previous to 2012.

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40. Since on average, only 69.02% of authorized acres are irrigated annually, the number of acres that can be expected to be irrigated is 16,322.4 acres.

41. The difference between the allowable acres (23,423 acres) and the expected irrigation acres currently authorized (16,322.4 acres) shows that an additional 7,100 acres could be irrigated annually from the Tulare: Western Spink/Hitchcock aquifer.

42. In applying SDCL 46-6-3.1, the Sixth Judicial Circuit ruled in 2005 that if the Water Management Board uses average annual recharge, then it should use average annual withdrawal to determine if unappropriated water is available from the aquifer. *Hines v. South Dakota Department of Environment and Natural Resources*, Hughes County 04-37, Memorandum Decision April 29, 2005.

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remaining". This method is based on a combination of the estimated recharge rate, the average irrigation application rate reported by irrigators (in terms of inches per acre), and the average number of irrigated acres as a percent of total permitted acreage. This methodology then assumes the average application rate will continue to be used by existing irrigators.

44. Another alternative is a variant of the "recharge to acres" method where the "maximum allowable acreage" is again calculated and compared with the average number of irrigated acres for the period of 2003-2011 and the acres likely to be irrigated under recently granted permits. This method assumes that the percentage of acres irrigated under the newly granted permits in 2012-13 would be the same as the percentage of irrigation systems historically used. This method would result in 7,100 "acres remaining" (2003-2011 data) or 5,953 "acres remaining" (2003-2012 data). Again, 4,706 acres have already been authorized for irrigation in during 2012-2013.

45. Other factors in considering whether to grant water permits is whether the application, if granted, would interfere with existing water rights, whether the application is a beneficial use, and whether the permit would be in the public interest. The applications do not interfere with existing water rights, irrigation is a beneficial use and the permits are in the public interest.

46. Water is available in sufficient quantity to grant the applications for all 14 applications.

Based on the foregoing Findings of Fact, the Board makes the following:

CONCLUSIONS OF LAW

1. The Board has jurisdiction. The present applications are within the Board's responsibility over water appropriation and regulation in Title 46, including SDCL 46-2A-9.
2. Publication was properly made in the Redfield Press and the Huron Daily Plainsman pursuant to SDCL 46-2A-4. Notice of Hearing was properly given to the Applicants under SDCL 46-2A-4 and SDCL 1-26-17.
3. Under ARSD 74:02:01:12.04, the deadline for filing petitions to intervene in this matter was July 1, 2013. This intervention date was published as required by SDCL 46-2A-4. There were no intervenors.
4. The Chief Engineer recommended denial. The recommendation is not, however, binding on the Board. SDCL 46-2A-4(8).
5. 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 decisions as binding precedent (and this decision will not constitute binding precedent). *Interstate Telephone Cooperative, Inc. v. Public Utilities Commission*, 518 N.W.2d 749 (S.D. 1994).
6. The first element in SDCL 46-2A-9 is whether there is water available for the appropriation. Consideration of water availability includes consideration of the criteria in SDCL 46-6-3.1 and the *Hines v. South Dakota Department of Environment and Natural Resources*, Hughes County 04-37 Memorandum Decision dated April 29,

2005, wherein the Court said that the Water Management Board should use average annual recharge and average annual discharge to determine if unappropriated water is available. Water is available for all 14 applicants.

7. 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 for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the Greenhorn Formation and is not applicable here.

8. ARSD 74:02:05:07 requires that, in addition to any other data, the Water Management Board shall rely upon the record of observation well measurements to determine whether the quantity of water withdrawn annually from the aquifer exceeds the estimated average annual recharge of the aquifer. ARSD 74:02:05:07 is not the proper method for the Board to consider since the *Hines v. South Dakota Department of Environment and Natural Resources* decision.

9. The applications do not interfere with existing water rights, irrigation is a beneficial use, and the permits are in the public interest. The average annual recharge to the Tulare: Western Spink/Hitchcock Aquifer is greater than the average annual discharge in sufficient quantity to grant permits for all 14 applications.

FINAL DECISION AND ORDER

The 14 above-captioned water permit applications are hereby GRANTED TO
APPOPRIATE WATER FROM the Tulare: Western Spink/Hitchcock Aquifer.

Dated this _____ day of December, 2013.

BY THE BOARD: ,

Chad Comes, Chairman
South Dakota Water Management Board

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WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA

SOUTH DAKOTA WATER MANAGEMENT BOARD

IN THE MATTER OF THE WATER)
PERMIT APPLICATION Nos. 7725-3,)
7752-3, 7755-3, 7756-3, and)
7757-3, LENNY PETERSON)

CERTIFICATE OF SERVICE

IN THE MATTER OF THE WATER)
PERMIT APPLICATION Nos. 7726-3,)
7727-3, 7753-3, 7754-3, AND)
7759-3, OSCAR, INC.)

IN THE MATTER OF THE WATER)
PERMIT APPLICATION Nos. 7733-3,)
7734-3, 7735-3, and 7736-3, VAN)
BUSKIRK FARMS, LLP)

I, Raymond D. Rylance, hereby certify that a true and correct copy of the Applicants' "OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION" as proposed by the Water Management Board, along with the Applicants' "PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION" were served upon the following:

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4422 Carriage Hills Dr
Rapid City, SD 57702

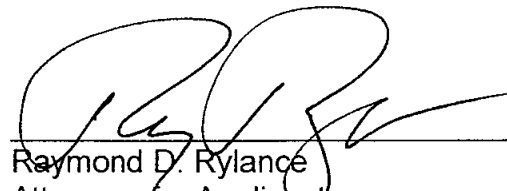
Tim Bjork
112 W Oak St
Pierre, SD 57501

Jim Hutmacher
802 E 7th St
Oacoma, SD 57365

by depositing the same in the United States Mail Service at Watertown, South Dakota,
with postage thereon fully prepaid, on the 22nd day of November, 2013.

Dated this 22 day of November, 2013.

WILES & RYLANCE

A handwritten signature in black ink, appearing to read 'RD Rylance', is written over a horizontal line.

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



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

denr.sd.gov

November 26, 2013

NOTICE

TO: Raymond D. Rylance
Wiles & Rylance
3 East Kemp, Suite 200
Watertown, SD 57201

FROM: *for* Jeanne Goodman, Chief Engineer *Eric Lund*
Water Rights Program

SUBJECT: Consideration of Findings of Fact, Conclusions of Law and Final Decision for Water Permit Applications from the Tulare:Western Spink/Hitchcock Aquifer

The Water Management Board meeting for Thursday, December 5, 2013, has been changed to a telephone conference call. The Board will now consider by telephone conference call the Findings of Fact, Conclusions of Law and a Final Decision in the matter of the denial of Water Permit Application Nos. 7725-3 – Lenny Peterson (deferred portion); Nos. 7752-3, 7755-3, 7756-3, 7757-3 – Lenny Peterson; Nos. 7726-3, 7727-3, 7753-3, 7754-3, 7759-3– Oscar Inc.; and Nos. 7733-3, 7734-3, 7735-3, 7736-3 – Van Buskirk Farms LLP.

To participate in the meeting connect to the conference as follows.

Meet Me Conference Information:

Date: 5 Dec. 2013 - Thursday
Start Time: 10:30 AM CST
Dial In Phone Number: 605-773-2323
Conference Password: 4450#

If you have a problem connecting to the conference call, please dial the conference operator at 605-773-3011.

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 December 5, 2013. The public hearing was completed on October 3, 2013. No additional testimony will be received.

If you have questions, please contact Eric Gronlund at (605) 773-3352.

c: Jeff Hallem, Assistant Attorney General
Diane Best, Assistant Attorney General

CERTIFICATION

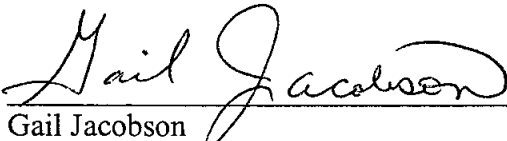
I hereby certify that on November 26, 2013, I have personally hand delivered envelopes containing a Notice dated November 26, 2013, regarding the hearing being held by telephone conference call on finding of fact, conclusions of law and final decision in the matter of the approval of Water Permit Application Nos. 7725-3 – Lenny Peterson (deferred portion); Nos. 7752-3, 7755-3, 7756-3, 7757-3 – Lenny Peterson; Nos. 7726-3, 7727-3, 7753-3, 7754-3, 7759-3– Oscar Inc.; and Nos. 7733-3, 7734-3, 7735-3, 7736-3 – Van Buskirk Farms LLP, as addressed below:

Raymond D. Rylance
Wiles & Rylance
3 East Kemp, Suite 200
Watertown, SD 57201

Diane Best, Assistant Attorney General
317 N Main Avenue
Sioux Falls SD 57104

Sent inter-office mail to:

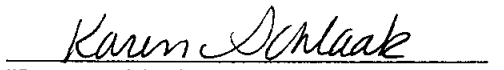
Jeff Hallem, Assistant Attorney General, 1302
East Highway 14, Suite 1
Pierre SD 57501-8501



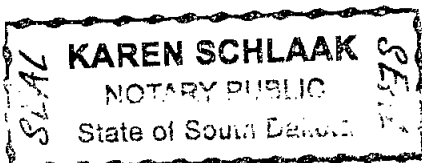
Gail Jacobson
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 26th day of November, 2013



Karen Schlaak
Notary Public
My Commission expires April 1, 2019





OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
Fax (605) 773-4106
TTY (605) 773-6585
www.state.sd.us/atg

MARTY J. JACKLEY
ATTORNEY GENERAL

RECEIVED

DEC - 2 2013

**WATER RIGHTS
PROGRAM**

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

November 27, 2013

Jeanne Goodman
DENR - Water Rights
Program
523 E. Capitol Ave.
Pierre, SD 57501

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

Ray Rylance
Wiles & Rylance
3 East Kemp, Suite 200
Watertown, SD 57201

Re: *In the Matter of Water Permit Application Nos. 7725-3, 7752-3, 7755-3, 7756-3 and 7757-5, Lenny Peterson*
In the Matter of Water Permit Application Nos. 7726-3, 7727-3, 7753-3, 7754-3, and 7759-3, Oscar, Inc.
In the Matter of Water Permit Application Nos. 7733-3, 7734-3, 7735-3 and 7736-3, Van Buskirk Farms, LLP

Dear Ms. Best and Parties:

Enclosed please find the proposed Water Management Board's Rulings on the Parties' Submissions and proposed Findings of Fact, Conclusions of Law and Final Decision that I have prepared in the above matter. The documents were prepared consistent with the statements made at the October 3, 2013 meeting of the South Dakota Water Management Board. The Board will consider these proposals at its December 5, 2013 meeting. It is within the Board's discretion whether oral arguments by the parties will be afforded prior to considering the matter.

Yours truly,

A handwritten signature in cursive script, appearing to read "Jeffrey P. Hallem".
Jeffrey P. Hallem
Assistant Attorney General

JPH/rar
Enclosures
cc w/encl: Water Management Board

STATE OF SOUTH DAKOTA
SOUTH DAKOTA WATER MANAGEMENT BOARD

IN THE MATTER OF WATER)
PERMIT APPLICATION Nos. 7725-3,)
7752-3, 7755-3, 7756-3, and)
7757-3, LENNY PETERSON)

IN THE MATTER OF WATER)
PERMIT APPLICATION Nos. 7726-3,)
7727-3, 7753-3, 7754-3, and)
7759-3, OSCAR, INC.)

IN THE MATTER OF WATER)
PERMIT APPLICATION Nos. 7733-3,)
7734-3, 7735-3, and 7736-3, VAN)
BUSKIRK FARMS, LLP)

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL DECISION

Hearing was held on October 3, 2013, before Board members Chad Comes (Chair), Tim Bjork, Peggy Dixon, Everett Hoyt, Jim Hutmacher, and Leo Holzbauer. Rodney Freeman recused himself.

All applicants were represented by Ray Rylance. The Department of Environment and Natural Resources, Water Rights Program, and its Chief Engineer (jointly referred to as "DENR") was represented by Diane Best.

The Board, having considered the testimony and exhibits presented and all records and documents on file, and having entered its oral decision and rulings on the parties' submissions, now enters the following:

FINDINGS OF FACT

Background

1. This matter involves 14 applications to appropriate water from the Tulare: Western Spink/Hitchcock Aquifer, an aquifer that is used extensively for irrigation.

2. Irrigation development of the Tulare: Western Spink/Hitchcock Aquifer was basically static from 2002-2012. Although this Board deferred a large number of additional applications for a period of time starting in 2002, it ultimately denied them in 2008. (*In the Matter of Water Permit Applications from the Tulare Aquifer*, Findings of Fact, Conclusions of Law and Final Decision issued March 11, 2008). No other permits were issued until 2012.

3. After a group of applications was filed in December 2011, DENR Engineer Ken Buhler filed a report with the Chief Engineer on April 25, 2012. He concluded that sufficient water would be available to irrigate 733 more acres. The Chief Engineer subsequently entered into a stipulated settlement with the applicants and recommended that water permits should be granted to irrigate 810 acres. This Board approved the stipulation and authorized the permits for 810 acres in July 2012. (*In the Matter of Water Permit Application Nos. 7288-3, 7289-3, 7290-3, 7291-3, and 7292-3*, Findings of Fact waived).

4. Thirteen more applications were subsequently filed seeking water to irrigate 2,131 acres. On January 30, 2013, Ken Buhler filed another report with the Chief Engineer regarding those applications. The January 30, 2013, report examined water availability under various methods and concluded there was sufficient water available in the Tulare: Western Spink/Hitchcock Aquifer to support irrigation of 4,686 more acres than had been authorized for irrigation before any permits were issued in 2012 (also referred to herein as "acres remaining"). Of the 4,686 acres remaining, 810 acres had already been granted in July 2012. This was also more than enough to satisfy the requests.

then at issue for 2,131 acres (leaving enough water available for 1,746 acres for which applications had not yet been filed). The Chief Engineer recommended approval of permits to irrigate the 2131 acres at issue.

5. Following contested case hearings on March 7, 2013, and May 2, 2013, this Board authorized issuance of permits for 2,131 acres. *Water Permit Application Nos. 7373-3 (Terry Wieting), 7551-3 (Wayne Binger), 7570-3 to 7575 and 7637-3 to 7640-3 (Marshall Bros.), and 7620-3 (Oscar Inc).* (Findings of Fact waived).

6. In the meantime, after the Buhler Report was filed on January 30, 2013 (and the Chief Engineer recommended approval of water permits to irrigate 2,131 acres), there were 41 applications filed. Ken Buhler filed another report on April 13, 2013, addressing the 41 applications. The April 13, 2013, report relies, in significant part, on the earlier January 30, 2013, report, and, to a certain extent, information contained in the earlier April 25, 2012, analysis. The April 13, 2013, report ultimately concluded that there was sufficient water available for the first 10 of the 41 applications, with enough water left over for 116 acres (not enough to fill any of the additional requested applications).

7. The Chief Engineer recommended granting the first 10 of the 41 applications in the order they were filed as well as a portion of the 11th application. She recommended denial of the rest.

8. Of the 41 applications, the initial 10 applications were heard and granted by this Board in July 2013. There was no opposition.

9. Of the 41 applications, the 11th application filed was Application No. 7725-3 submitted by Lenny Peterson, and it sought to irrigate 320 acres. The 116 acres referenced in the Buhler Report would have been insufficient for this request. At hearing, however, Lenny Peterson asked the Board to split his request and grant a permit to irrigate 135 acres of the 320, enough to operate one center pivot. After inquiry by the Board, Buhler testified that an additional 19 acres was acceptable. The Board then authorized irrigation of 135 acres of the requested 320 acres for Application No. 7725-3.

10. The total of all of the 2012-2013 appropriations authorized by this Board from the Tulare: Western Spink/Hitchcock aquifer includes the full 4,686 acres addressed in the January 2013 Buhler Report as well as the additional 19 acres addressed in the July 2013 hearing (4,706 total acres).

11. In the meantime, of the 41 applications, 17 other applications were withdrawn. The applicants for those 17 permits did not seek hearing after they received the recommendation of denial. The 17 applications are considered to be withdrawn under SDCL 46-2A-3.

Current Applications

12. The contested case at issue pertains only to the 14 applications captioned above. This includes the deferred portion of Application 7725-3 for Lenny Peterson to irrigate 185 acres as well as 13 other applications that were recommended for denial in April 2013.

13. The 14 applications seek to appropriate sufficient water to irrigate a total of 3,608 acres in Beadle County. Each of the applications seeks water

from the Tulare: Western Spink /Hitchcock Aquifer. The quantity of water requested is 2 acre feet per acre per year (ac ft/year) at a maximum diversion rate of 1 cubic foot of water per second (cfs) per 70 acres.

14. The five applications filed by Lenny Peterson seek to irrigate 985 acres. The total maximum diversion rate would be 14.05 cfs.

15. The five applications filed by Oscar Inc. seek to irrigate 825 acres using 6 wells. The total maximum diversion rate would be 11.77 cfs.

16. The four applications filed by VanBuskirk Farms, LLP seek to irrigate 1,798 acres using 11 wells. The total maximum diversion rate would be 25.65 cfs.

17. Notice of Hearing for the 14 applications was published in the Redfield Press (weekly newspaper) and Huron Daily Plainsman (daily newspaper) the same day: June 19, 2013. The published Notice scheduled hearing for July 11, 2013, in Pierre. The published Notices also provided that petitions to intervene were to be filed by July 1, 2012. No petitions to intervene were filed.

18. Hearing on the 14 applications was delayed until October 2013 upon request of the Chief Engineer. The Applicants consented to the delay.

19. The Board considers whether (a) there is a reasonable probability unappropriated water is available for the proposed use; (b) the proposed diversion can be developed without unlawful impairment of existing rights; (c) the use would be a beneficial use; and (d) the use is in the public interest. The first factor is dispositive.

20. The area of the Tulare: Western Spink/Hitchcock Aquifer is 263,016 acres. This information is based on the April 25, 2012, Buhler Report which analyzed several state and federal government studies of the extent of the aquifer. It is the most current and best available information on the areal extent of the aquifer.

21. In considering water availability, this Board considers whether the quantity of water withdrawn annually from the groundwater source would exceed the quantity of the average estimated annual recharge of water to the groundwater source if the permit was granted. Such analysis is not required if the water source is older or lower than the greenhorn formation (not the case here) and the applicant is a public water system (not the case here). The analysis must be undertaken in this case.

22. DENR witness Ken Buhler, an expert with 28 years of experience in groundwater hydrology, testified that, based on the best available information, the quantity of water withdrawn annually from the Tulare: Western Spink/Hitchcock Aquifer would exceed the average estimated annual recharge if any of the 14 applications at issue was granted. The Board credits his testimony which examined the issue based on observation well data and on consideration of a water budget for the aquifer.

23. The term “acres remaining” in the various analyses means the total acreage that would be available for all the recent permit applications filed from December 2011 to the present (including the previous permits authorized by this Board in 2012-13).

24. Analysis of the observation well data provides a qualitative means of assessing the aquifer. In fact, the Board has promulgated a rule providing that it will rely on the record of observation well measurements as part of the evidence in examining the recharge/withdrawal issue.

25. The DENR Water Rights Program monitors 48 observation wells in the Tulare: Western Spink/Hitchcock Aquifer. The January 30, 2013, report shows five representative observation wells constructed during the period from 1966-1980 (and measured regularly since construction). Hydro-graphs from the wells show that the aquifer readily responds to climatic conditions and development has had an inconsequential effect on the aquifer.

26. The observation data documents the difference between average annual recharge and average annual withdrawal. If observation well data shows a steady, continual decline of the aquifer's water level or artesian pressure, such changes could indicate that withdrawals are exceeding recharge. Also, water level fluctuations in an aquifer dominated by the influence of well withdrawals, or a change in the configuration of the potentiometric surface, could indicate that well withdrawals are a significant component in the system relative to recharge and/or natural discharge. Observation well data was used in this proceeding to consider long term trends, any influences of well withdrawals, and the configuration of the potentiometric surface.

27. Hydrographs in the January 30, 2013, Buhler Report regarding observation well data for the Tulare: Western Spink/Hitchcock Aquifer showed

upward trending water levels. Based on the average slope of linear trend lines for hydrographs for the observation wells in the aquifer, recharge to the aquifer was greater than the total of the discharges from the aquifer over the period from 2003 to 2012 (the period of time during which the aquifer was fully developed and usage was not increasing).

28. DENR observation well data used in the January 30, 2013, report showed that well withdrawals from the Tulare: Western Spink/Hitchcock Aquifer had not had a long term effect on the amount of water in storage in the aquifer.

29. The observation well data also showed that the configuration of the potentiometric surface of the Tulare: Western Spink/Hitchcock aquifer had not changed significantly between 1987 and 2012. This showed that discharge was not exceeding recharge and unappropriated water was available as of 2012.

30. The January 30, 2013, Buhler Report also used information from five observation wells to quantify the change in volume of water in storage in the aquifer. Change in the volume of water in storage is equal to the difference between recharge and discharge. The five observation wells were the only observation wells that were in portions of the Tulare: Western Spink/Hitchcock aquifer that were under unconfined conditions for the entire period studied (2003-2012) and they accurately reflect aquifer conditions. Buhler examined the change in water level in each well for each year (and the aquifer's specific yield of 0.15) and then applied the information to the unconfined portion of the

aquifer to determine the total volume of the change in acre feet. The water level for the unconfined part of the aquifer increased an average of 0.3152 feet per year. As of 2012, there were 76,978 acres under unconfined conditions. Consequently, the analysis showed the annual change in volume is 3,639.5 ac-ft ($76,978 \text{ acres} \times 0.31 \text{ feet} \times 0.15$). This January 30, 2013, analysis shows that the average annual recharge to the aquifer exceeded the average annual discharge from the aquifer by an average of 3,640 ac-ft/yr for the period since development has been static (2003-2012). The 3,640 ac-ft/yr would be sufficient water to irrigate 4,686 acres using the historic average irrigation rate for this aquifer (9.32 inches).

31. The portion of the aquifer that is under unconfined conditions was estimated in the April 25, 2012, report as being much smaller than the 76,978 acres estimated in the January 30, 2013 report. At hearing, Buhler explained that during the period after the April 25, 2012, report was filed, he performed an exhaustive review of data to determine the unconfined portion of the aquifer. This included examining test hole logs, and well logs filed with the DENR for each well completed into the aquifer, including not only observation wells but also wells drilled for irrigators and domestic users. The data allowed him to examine the lithology reported for wells when they were constructed and assess the extent of the portion of the aquifer that was unconfined. This is the best available information showing the unconfined portion of the aquifer.

32. The analysis of the observation well data described in the foregoing Findings of Fact is the best information reasonably available to compare withdrawals from the aquifer against recharge to the aquifer.

33. The January 30, 2013, analysis also examined the recharge/withdrawal issue by considering various water budget analyses where reported irrigation use is compared with calculated recharge rates.

34. Recharge to the Tulare: Western Spink/Hitchcock aquifer is primarily through infiltration of precipitation where the outwash is at or near the surface. Past independent studies show that the recharge rate had been estimated for the unconfined and confined portions of the aquifer under various methods. This included an analysis of the unconfined portion of the aquifer alone, a regional flow net analysis, and a digital groundwater model. The recharge rate estimate is 0.83 inches per year.

35. The recharge estimate, when applied to the areal extent of the aquifer, results in total acre feet per year of recharge. Using the 263,016 acre areal extent of the aquifer and the 0.83 inch recharge rate, the average recharge would be 18,192 ac-ft/yr.

36. Buhler also used a regional flow net analysis to calculate recharge based on September 2012 water level data from the DENR Observation Well Network. A flow net analysis is a calculation of the amount of water flowing through the aquifer. Buhler relied on (a) the average transmissivity of the aquifer based on the calculated transmissivity of irrigation wells in the aquifer where the data to allow these calculations was available (30 irrigation wells); (b)

the hydraulic gradient for the aquifer based on the Observation Well Network; and (c) the distance of the appropriate cross section of the aquifer (25 miles). The volume of water moving through the aquifer is 8,583 ac-ft/yr or 0.39 inches per acre per year on an aquifer wide basis. This rate is not “average annual recharge” since it used only 2012 data and likely can be viewed as a minimum recharge rate. Independent studies over a period of years estimate the average annual recharge at 0.83 inches per acre per year.

37. Under the water budget method, average annual withdrawals were estimated and compared to the estimated average annual recharge sum. Almost all of the withdrawals are for irrigation. One water budget method would base withdrawals primarily on irrigation questionnaires (self-reporting by irrigators) for the period of record (1979 to most recent). Review of the questionnaires provides an application rate in inches of water per acre for the irrigation systems actually in use each year. The average annual application rate is 9.32 inches of water per acre on acres actually irrigated during 1979-2011. This average does not include any undeveloped and unused irrigation systems. When adding information from 2012 irrigation reports, the average irrigation application rate from 1979-2012 is 9.44 inches per acre.

38. By contrast, the average irrigation application rate was only 8.71 inches over the period of 2003-2011 when the aquifer was fully developed. In Buhler’s expert opinion, this 8.71 inch number reflects climate changes (wet conditions) during the period rather than the average irrigation practices. Buhler found in the January 30, 2013, report that the best information

available on the average irrigation application rate was the entire period of record of irrigation reporting for the aquifer (i.e. 1979 – 2011), which was 9.32 inches per acres.

39. In preparing his report in January 2013, Ken Buhler relied on the information available at the time for the period of record (1979-2011). This Board relied on the January 30, 2013 report (and therefore used the 9.32 inches) in previous rulings. By the time of the October 3, 2013 hearing on the present applications, additional information was available from the 2012 irrigation season, which showed an average application rate of 9.44 inches for the period from 1979-2012. Yet, the 9.44 inches would have supported irrigating even fewer acres than the 9.32 inches. The 9.32 inches is the more conservative and consistent number for this contested case.

40. At hearing neither of the parties relied on the 9.44 inch average application rate. DENR relied on the 9.32 inch application rate. The Applicants relied on the 8.71 inch application rate. The Board relies on the 9.32 inches as the best information reasonably available in this case.

41. As part of the water budget method focusing on irrigation questionnaires, the Buhler report also examined withdrawals in terms of “irrigation pumpage.” The “irrigation pumpage” is the total of all water use for irrigation from the aquifer for a year as reported on the irrigation questionnaires. Buhler examined the average irrigation pumpage for 1979-2011 and also for the shorter nine-year period of 2003-2011. Total irrigation pumpage averaged 9,725.6 ac-ft/yr for the period from 1979-2011 based on

irrigation questionnaires. This is the period when the average irrigation application rate was 9.32 in/ac/yr. Yet, total irrigation pumpage averaged 12,286.8 ac-ft/yr for the nine-year period of 2003-2011 based on irrigation questionnaires. This is the nine year period when the average irrigation application rate was 8.71 in/ac/yr. The annual average quantity of water pumped from 1979-2011 was lower than for the period from 2003-2011 because there were fewer acres developed for irrigation in the early part of the period than the later period. It has only been since 2002 that the average irrigation pumpage has not been skewed by systems permitted but not completed.

42. The average annual irrigation pumpage derived from irrigation questionnaires for the nine-year period (12, 286 ac-ft/yr), compared with the estimated average annual recharge rate for the aquifer (18,192 ac-ft/yr), would result in 5,905 ac-ft/yr of unappropriated water available from the Tulare: Western Spink/Hitchcock Aquifer than had previously been available. Under this analysis, the volume would be sufficient to irrigate 7,603 more acres than were permitted for the period previous to 2012, using 9.32 inches of water per acre.

43. At hearing, 2012 irrigation questionnaire data was also used to update the foregoing water budget calculations. The total average annual well withdrawals (irrigation pumpage) from 2003-2012 was 13,138 acre feet/year. Using an average annual application rate of 9.44 (which includes 2012 data), the 13,138 acre feet/year would provide an annual volume of water sufficient

for irrigation of an additional 6,423 more acres than were permitted for the period previous to 2012.

44. Buhler did not rely on the foregoing water budget calculations, however, because there are more variables and more estimates than observation well data (which shows actual changes in water levels in observation wells due to actual pumping). The water budget estimates include a total pumping quantity based on self-reported pumping rates, days of pumping, application rate by irrigators, uncertainties in the aquifer area, and errors associated with the recharge. The nine-year period (2003-2011) is also a relatively short period and may be more reflective of climatic conditions (and lack of water use in response to wet climatic conditions) rather than averages over a longer period. A shorter period is less reliable than a longer period because an abnormal year would carry greater weight. The ten-year period (2003-2012) results in similar concerns.

45. Another type of water budget alternative is the “recharge to acres” method where the recharge rate is estimated for the aquifer and divided by the average application rate to obtain the “maximum allowable acreage.” The “maximum allowable acres” is then compared with “acres likely to be irrigated.” The number of acres likely to be irrigated under existing permits is the total acres permitted for irrigation multiplied by the percentage of permitted acres that have historically been irrigated since 2003 (not a percentage of average irrigation application rate or the number of acres in partially irrigated systems). This method would result in 7,100 “acres remaining” using 2003 to 2011 data.

Using 2003 to 2012 data, the method would provide for 5,563.8 “acres remaining”. This method is based on a combination of the estimated recharge rate, the average irrigation application rate reported by irrigators (in terms of inches per acre), and the average number of irrigated acres as a percent of total permitted acreage. This methodology then assumes the average application rate will continue to be used by existing irrigators. This use of several assumed or estimated variables compounds any errors in reporting. Further, the percent of permitted acres irrigated is highly variable since there is a small dataset (2003 – 2011) which varies greatly from year to year. The Board does not find this method to be useful or the best information available.

46. Another alternative is a variant of the “recharge to acres” method where the “maximum allowable acreage” is again calculated and compared with the average number of irrigated acres for the period of 2003-2011 and the acres likely to be irrigated under recently granted permits. This method assumes that the percentage of acres irrigated under the newly granted permits in 2012-13 would be the same as the percentage of irrigation systems historically used. It is not valid to assume that only a portion of the acres authorized for irrigation by newly granted water permits will be irrigated. Later analysis of 2012 irrigation use data demonstrated that, in fact, the percentage of acres irrigated of the total acres appropriated was 82.8% in 2012. This method, although speculative, would result in 7,100 “acres remaining” (2003-2011 data) or 5,953 “acres remaining” (2003-2012 data). Again, 4,706 acres have already been authorized for irrigation in during 2012-2013. The Board

does not, however, find this method to be useful or the best information reasonably available.

47. The number of “acres remaining” under the observation well data method is 4,686 acres (using 1979 to 2011 data averaging 9.32 inches per acre application rate) or 4,627 acres (using 1979 to 2012 data averaging 9.44 inches per acre application rate). The Board finds that the 4,686 acres is the most useful method and based on the best information available.

48. The Board already authorized permits for irrigation of 4,706 acres in 2012-2013. This acreage is comparable with the “acres remaining” under the observation well method.

49. Based on the best available information currently available, the average annual withdrawals from the Tulare: Western Spink/Hitchcock Aquifer is the same as average annual recharge when factoring in the withdrawals authorized in 2012-2013. If more permits were granted, it is probable that the quantity of water withdrawn annually from the aquifer would exceed the quantity of the average estimated annual recharge of water to the aquifer.

50. Buhler states that prior April 2012 report on the Tulare: Western Spink/Hitchcock aquifer was overly conservative because it assumed 100% irrigation of permitted acres are irrigated annually and that the unconfined conditions the aquifer were overly contracted.

51. In applying SDCL 46-6-3.1, a judge in the Sixth Judicial Circuit ruled in 2005 that if the Water Management Board uses average annual recharge, then it should use average annual withdrawal to determine if

unappropriated water is available from the aquifer. *Hines v. South Dakota Department of Environment and Natural Resources*, Hughes County 04-37, Memorandum Decision April 29, 2005.

52. The evidence in the Buhler reports and the Buhler testimony demonstrates to this Board that the 14 applications should be denied on the basis of the recharge/withdrawal issue, whether considered along with other applications already granted (as was done in the report), or when considered separately (as was done at hearing).

53. Other factors in considering whether to grant water permits is whether the application, if granted, would interfere with existing water rights, whether the application is a beneficial use, and whether the permit would be in the public interest. These factors need not be considered, however, because the permits should be denied based on the foregoing determination on the recharge/withdrawal analysis and water availability.

Based on the foregoing findings of fact, the Board makes the following:

CONCLUSIONS OF LAW

1. The Board has jurisdiction. The present applications are within the Board's responsibility over water appropriation and regulation in Title 46, including SDCL 46-2A-9.

2. Publication was properly made in the Redfield Press and the Huron Daily Plainsman pursuant to SDCL 46-2A-4. Notice of Hearing was properly given to the Applicants under SDCL 46-2A-4 and SDCL 1-26-17.

3. Under ARSD 74:02:01:12.04, the deadline for filing petitions to intervene in this matter was July 1, 2013. This intervention date was published as required by SDCL 46-2A-4. There were no intervenors.

4. The Chief Engineer recommended denial. The recommendation is not, however, binding on the Board. SDCL 46-2A-4(8).

5. 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 decisions as binding precedent (and this decision will not constitute binding precedent). *Interstate Telephone Cooperative, Inc. v. Public Utilities Commission*, 518 N.W.2d 749 (S.D. 1994).

6. The Applicants seek water at the maximum diversion rate generally authorized by law under SDCL 46-5-6.

7. Each Applicant has the burden to prove each of the elements in SDCL 46-2A-9 to obtain the permit requested. None of the Applicants met their burden of proof as to the first element. Water is not available when considering the standard required in SDCL 46-6-3.1. 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 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.”

8. The first element in SDCL 46-2A-9 is whether there is water available for the appropriation. Consideration of water availability 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 estimated annual recharge of water to the groundwater source.”

9. 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 for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the Greenhorn Formation and is not applicable here.

10. ARSD 74:02:05:07 requires that, in addition to any other data, the Water Management Board shall rely upon the record of observation well measurements to determine whether the quantity of water withdrawn annually from the aquifer exceeds the estimated average annual recharge of the aquifer.

11. The observation well method used by Ken Buhler uses the best available information to compare average annual recharge against average annual withdrawals as required by SDCL 46-6-3.1. This analysis includes hydrographs of several observation wells, measurements of changes in volume in representative observation wells in the aquifer, independent studies concerning the areal extent of the aquifer, detailed information and analysis of

the size of the unconfined portion of the aquifer, and the 9.32 inch average application rate.

12. If more permits were granted, it is probable that the quantity of water withdrawn annually from the aquifer would exceed the quantity of the average estimated annual recharge of water to the aquifer. In light of SDCL 46-6-3.1 and the above Findings of Fact, there is not unappropriated water available for the proposed water use. Therefore, pursuant to SDCL 46-2A-9, additional permits to appropriate water cannot be issued from the Tulare: Western Spink/Hitchcock Aquifer. The aquifer is fully appropriated.

13. SDCL 46-2A-9 also requires consideration of whether the proposed water use would impair existing rights, whether the use of water would be a beneficial use (i.e. one that is reasonable and useful and beneficial to the appropriator and also consistent with the interest of the public in the best utilization of water supplies under SDCL 46-1-6(3)), and whether the proposed water use is in the public interest. The Board need not reach these issues in this particular case because the first factor in SDCL 46-2A-9 has not been met. Water is not available in light of SDCL 46-6-3.1.

14. The Applicants failed to show that any of the 14 applications meet the standard in SDCL 46-2A-9 or SDCL 46-6-3.1 and each must be denied. Based on the foregoing Findings of Fact and Conclusions of Law, the Board enters the following:

FINAL DECISION AND ORDER

The 14 above-captioned water permit applications are hereby denied and the Tulare: Western Spink/Hitchcock Aquifer is fully appropriated.

Dated this _____ day of December, 2013.

BY THE BOARD:

Chad Comes, Chair
S.D. Water Management Board

STATE OF SOUTH DAKOTA
SOUTH DAKOTA WATER MANAGEMENT BOARD

IN THE MATTER OF WATER	)	
PERMIT APPLICATION Nos. 7725-3,	)	
7752-3, 7755-3, 7756-3, and	)	
7757-3, LENNY PETERSON	)	
	)	WATER MANAGEMENT BOARD'S
IN THE MATTER OF WATER	)	RULINGS ON PARTIES'
PERMIT APPLICATION Nos. 7726-3,	)	SUBMISSIONS
7727-3, 7753-3, 7754-3, and	)	
7759-3, OSCAR, INC.	)	
	)	
IN THE MATTER OF WATER	)	
PERMIT APPLICATION Nos. 7733-3,	)	
7734-3, 7735-3, and 7736-3, VAN	)	
BUSKIRK FARMS, LLP	)	

Pursuant to the direction of the Water Management Board, counsel for the Department of Environment and Natural Resources, Water Rights Program (DENR) submitted Proposed Findings of Fact, Conclusions of Law and Final Decision in the above-entitled matter. Subsequently, counsel for Applicants Lenny Peterson, Oscar, Inc. and Van Buskirk Farms, LLP submitted Objections to DENR's Proposed Findings of Fact, Conclusions of Law and Final Decision, as well as Applicants proposed Findings of Fact, Conclusions of Law and Final Decision. The Board, upon review of the submissions received, the administrative record, and having orally entered its decision, enters the following rulings:

A. DENR's proposed Findings of Fact Nos. 1-32 and 34-51 are accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision.

B. DENR's proposed Finding of Fact No. 33, is substantially accepted by the Board as consistent with and supported by the administrative record

and the Board's oral decision, as modified to remove of the parenthetical, as its inclusion is not essential to the Board's findings, conclusions and decision in this matter. The modified Finding of Fact shall read as follows:

33. The January 30, 2013, analysis also examined the recharge/withdrawal issue by considering various water budget analyses where reported irrigation use is compared with calculated recharge rates.

C. DENR's proposed Conclusions of Law Nos. 1-15 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.

D. DENR's proposed Final Decision and Order is accepted by the Board as consistent with and supported by the administrative record, the Board's oral decision and the Findings of Fact and Conclusions of Law adopted by the Board in the above rulings.

E. Applicants' Objection No. 1 to DENR's proposed Findings of Fact Nos. 21, 22, 23, 24, 25, 26, 28, 31, 32, 40, 44, 47, 48, 49, and 50 is denied. These proposed Findings of Fact are supported by evidence included in the administrative record to-wit: DENR expert witness Ken Buhler's testimony, reports and those exhibits Buhler prepared or relied upon. The Board finds Buhler is a credible expert witness. Further, Applicants have not submitted any expert opinions, documents or testimony to refute the findings that are being objected to. The evidence in the record supports the Board's finding, that relies in part upon Buhler's opinions, that the best information available to determine whether there is a reasonable probability of unappropriated water in

the Tulare: Western Spink/Hitchcock Aquifer is based upon observation well data and not the alternative methodology reviewed and rejected by Buhler involving water budget analyses based upon an irrigation questionnaires and average permitted acres irrigated to estimated recharge rates.

F. Applicants' Objection No. 2 to portions of DENR proposed Finding of Fact No. 45 is denied. The objected to portions of the Finding of Fact are supported by the evidence in the record. The water budget analysis addressed in the proposed Finding of Fact requires application of assumptions and estimates that compound any errors in reporting that are not present with the observation well data methodology. Further, the record supports the finding that the average permitted acres irrigated is not the best information available given the limited number of years the average is based upon; that it is skewed by a number of irrigators not irrigating any permitted acres; and that the climatic conditions during the period have resulted in permitted acres irrigated rates that vary greatly from year to year.

G. Applicants' Objection No. 3 to portions of DENR's proposed Finding of Fact No. 46 is denied. The objected to portions of the Finding of Fact are supported by evidence in the record. Applicants have not submitted any expert opinions, testimony and evidence that would support the assumption that for newly granted water permits, the average annual permitted acres irrigated would be comparable to the average that was developed from the 2003-2011 irrigation reports. The average developed is skewed by irrigators who did not irrigate their fields during the 2003-2011 timeframe. It is unreasonable to

assume Applicant's and others who have received permits to irrigate since 2011 will leave over 30% of their fields undeveloped or in CPR. Further, the record is undisputed that based upon the 2012 irrigation reports that the percentage of acres irrigated to total acres permitted was materially greater in 2012 than the 2003-2011 average. The 2012 irrigation use data supports the rejection of the methodology addressed in the objected to proposed Finding of Fact.

H. Applicants' Objection No. 4 to the portion of DENR proposed Finding of Fact No. 33 is accepted by the Board, but not for the reasons objected to by Applicant. The Board finds that the objected to parenthetical contains language that is not essential to the Board's Findings of Fact, Conclusions of Law, Final Decision and Order.

I. Applicants' Objection No. 5 to a portion of DENR proposed Finding of Fact No. 38 is denied. These portions of the DENR proposed Finding of Fact are supported by the evidence in the record, including Applicants' Exhibit A, Buhler's report to the State Engineer dated April 25, 2012, pps. 6-8. Further, Applicant has not presented any expert opinions, testimony or documents to the contrary.

J. Applicants' Objection No. 6 to the portion of DENR proposed Finding of Fact No. 39 is denied. The objected to portion of Finding of Fact No. 39 is supported by evidence in the record. During the October 3, 2013 hearing, Buhler updated his reports and opinions based upon irrigation reports for the 2012 irrigation season that were previously unavailable. There is

nothing in the record that conflicts with, disputes or puts in doubt the reliability of this additional information. Further, this information is relevant and pertinent to the Board's rejection of the water budget methodologies that are based in part upon the average permitted acres irrigated covering a short timeframe. The 2012 data demonstrates the material effects an additional year and additional permit holders deciding to irrigate new fields may have on the average.

K. Applicants' Objection No. 7 to the last sentence of DENR proposed Finding of Fact No. 41 is denied. The objected to portion of Finding of Fact No. 41 is supported by the evidence in the record. The evidence in part is included in the April 25, 2012 report of Ken Buhler to the State Engineer introduced by Applicant. Further, Applicant did not submit any expert opinions, testimony or documents that would refute the proposed Finding of Fact.

L. Applicants' Objection No. 8 to DENR's proposed Conclusions of Law Nos. 6, 7, 8, 10, 11, 12, 13 and 14 is denied. These Conclusions of Law are supported by the Findings of Fact adopted by the Board in the above rulings, which in turn are supported by the evidence submitted during the hearing.

M. Applicants' proposed Findings of Fact Nos. 1-20, 27, 28, 30, 31, 32, 33 and 38 are accepted by the Board as consistent with the Findings of Fact adopted by the Board in the above rulings.

N. Applicants' proposed Findings of Fact Nos. 29, 34, 35, 36, 37, 43 and 44 are rejected for the reasons that they are substantially included in the Findings of Facts and Conclusions of Law adopted by the Board and that the rejected Findings do not include additional findings which the Board has adopted and for which the Board has denied Applicants' objections thereto.

O. Applicants' proposed Findings of Fact Nos. 21, 22, 23, 24, 26, 39, 40, 41, 45 and 46 are rejected by the Board as contrary to the Findings of Fact adopted by the Board, the Board's rulings on Applicants' objections, and the Board's oral decision.

P. Applicants' proposed Finding of Fact No. 25 is accepted by the Board and will be included in the Board's Findings of Fact.

Q. Applicants' proposed Finding of Fact No. 42 is accepted by the Board as modified below to more accurately reflect the record. The modified finding will be included in the Board's Findings.

In applying SDCL 46-6-3.1, a judge in the Sixth Judicial Circuit ruled in 2005 that if the Water Management Board uses average annual recharge, then it should use average annual withdrawal to determine if unappropriated water is available from the aquifer. *Hines v. South Dakota Department of Environment and Natural Resources*, Hughes County 04-37, Memorandum Decision April 29, 2005.

R. Applicants' proposed Conclusions of Law Nos. 1-5 are accepted by the Board as consistent with the Conclusions of Law adopted by the Board in the above rulings.

S. Applicants' proposed Conclusions of Law Nos. 6-9 are rejected by the Board as inconsistent with the Board's oral decision, the Board's rulings on

Applicants' objections, and the Findings of Fact and Conclusions of Law adopted by the Board in the above rulings.

T. Applicants' proposed Final Decision and Order is rejected by the Board as inconsistent with its oral decision, the Board's rulings on Applicants' objections, and the Findings of Fact and Conclusions of Law adopted by the Board in the above rulings.

The Board's attorney is directed to prepare Findings of Fact, Conclusions of Law and Final Decision and Order consistent with the above rulings to be executed by the Chair of the Board or the Board's designee without further notice of hearing.

Dated this _____ day of December, 2013.

BY THE BOARD:

Chad Comes, Chair
S.D. Water Management Board

STATE OF SOUTH DAKOTA
SOUTH DAKOTA WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT)
APPLICATION Nos. 7725-3, 7752-3,)
7755-3, 7756-3, and 7757-3, LENNY)
PETERSON)
)
IN THE MATTER OF WATER PERMIT)
APPLICATION Nos. 7726-3, 7727-3,)
7753-3, 7754-3, and 7759-3, OSCAR,)
INC.)
)
IN THE MATTER OF WATER PERMIT)
APPLICATION Nos. 7733-3, 7734-3,)
7735-3, and 7736-3, VAN BUSKIRK)
FARMS, LLP)
)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the proposed Water Management Board's Rulings on the Parties' Submission and proposed Findings of Fact, Conclusions of Law, and Final Order in the above matter 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 U.S. Mail at Sioux Falls, South Dakota on November 27, 2013:

Chad Comes
P.O. Box 308
Madison, SD 57042

Peggy Dixon
3311 Hogan Court
Rapid City, SD 57702

Everett Hoyt
4422 Carriage Hills Dr
Rapid City, SD 57702

Jim Hutmacher
802 E. 7th Street
Oacoma, SD 57365

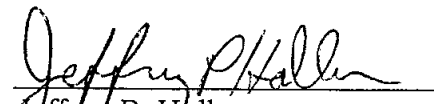
Leo Holzbauer
P.O. Box 877
Wagner, SD 57380

Tim Bjork, Secretary
112 W. Oak Street
Pierre, SD 57501

Ray Rylance
Wiles & Rylance
3 East Kemp, Suite 200
Watertown, SD 57201

Diane Best
Asst. Attorney General
317 N. Main
Sioux Falls, SD 57104

And that on the same date the original was filed with the Chief Engineer, Water Rights Program, Dept. of Environment and Natural Resources, at 523 East Capitol Avenue, Pierre, SD 57501-3181.


Jeffrey P. Hallem
Assistant Attorney General



**DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES**

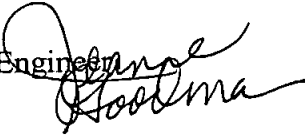
PMB 2020
JOE FOSS BUILDING
523 EAST CAPITOL
PIERRE, SOUTH DAKOTA 57501-3182

denr.sd.gov

December 10, 2013

NOTICE

TO: Ray Rylance
Wiles & Rylance
3 East Kemp, Suite 200
Watertown SD 57201

FROM: Jeanne Goodman, Chief Engineer
Water Rights Program 

SUBJECT: Adoption of Finding of Fact, Conclusion of Law and Final Decision in the matter
of Water Permit Applications from the Tulare:Western Spink/Hitchcock Aquifer

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 December 5, 2013, by the Water Management Board in the matter of denial of Water Permit Nos. 7725-3 - Lenny Peterson (deferred portion); Nos. 7752-3, 7755-3, 7756-3, 7757-3 - Lenny Peterson; Nos. 7726-3, 7727-3, 7753-3, 7754-3, 7759-3 - Oscar Inc.; and Nos. 7733-3, 7734-3, 7735-3, 7736-3 - VanBuskirk Farms LLP. 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

CERTIFICATION

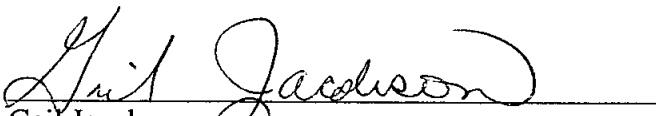
I hereby certify that on December 10, 2013, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated December 10, 2013, regarding adoption of finding of fact, conclusions of law and final decision for denial of Water Permit Application Nos. 7725-3 - Lenny Peterson (deferred portion); Nos. 7752-3, 7755-3, 7756-3, 7757-3 - Lenny Peterson; Nos. 7726-3, 7727-3, 7753-3, 7754-3, 7759-3 -Oscar Inc.; and Nos. 7733-3, 7734-3, 7735-3, 7736-3 - VanBuskirk Farms LLP, as addressed below:

Ray Rylance
Wiles & Rylance
3 East Kemp, Suite 200
Watertown SD 57201

Diane Best, Assistant Attorney General
317 North Main Avenue
Sioux Falls SD 57104

Sent Notice Inter-Office mail to:

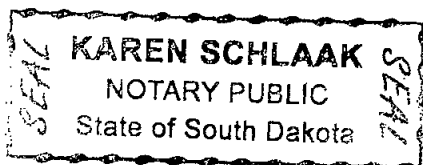
Jeff Hallem, Assistant Attorney General,
1302 E. Hwy 14, Suite 1 Pierre SD
57501-8501


Gail Jacobson
Water Rights Program, DENR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 10th day of December, 2013


Karen Schlaak
Notary Public
My Commission expires April 1, 2019



STATE OF SOUTH DAKOTA
SOUTH DAKOTA WATER MANAGEMENT BOARD

IN THE MATTER OF WATER) PERMIT APPLICATION Nos. 7725-3,) 7752-3, 7755-3, 7756-3, and) 7757-3, LENNY PETERSON)	)	
IN THE MATTER OF WATER) PERMIT APPLICATION Nos. 7726-3,) 7727-3, 7753-3, 7754-3, and) 7759-3, OSCAR, INC.)	)	WATER MANAGEMENT BOARD'S RULINGS ON PARTIES' SUBMISSIONS
IN THE MATTER OF WATER) PERMIT APPLICATION Nos. 7733-3,) 7734-3, 7735-3, and 7736-3, VAN) BUSKIRK FARMS, LLP)	)	

Pursuant to the direction of the Water Management Board, counsel for the Department of Environment and Natural Resources, Water Rights Program (DENR) submitted Proposed Findings of Fact, Conclusions of Law and Final Decision in the above-entitled matter. Subsequently, counsel for Applicants Lenny Peterson, Oscar, Inc. and Van Buskirk Farms, LLP submitted Objections to DENR's Proposed Findings of Fact, Conclusions of Law and Final Decision, as well as Applicants proposed Findings of Fact, Conclusions of Law and Final Decision. The Board, upon review of the submissions received, the administrative record, and having orally entered its decision, enters the following rulings:

A. DENR's proposed Findings of Fact Nos. 1-32 and 34-51 are accepted by the Board as consistent with and supported by the administrative record and the Board's oral decision.

B. DENR's proposed Finding of Fact No. 33, is substantially accepted by the Board as consistent with and supported by the administrative record

and the Board's oral decision, as modified to remove of the parenthetical, as its inclusion is not essential to the Board's findings, conclusions and decision in this matter. The modified Finding of Fact shall read as follows:

33. The January 30, 2013, analysis also examined the recharge/withdrawal issue by considering various water budget analyses where reported irrigation use is compared with calculated recharge rates.

C. DENR's proposed Conclusions of Law Nos. 1-15 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.

D. DENR's proposed Final Decision and Order is accepted by the Board as consistent with and supported by the administrative record, the Board's oral decision and the Findings of Fact and Conclusions of Law adopted by the Board in the above rulings.

E. Applicants' Objection No. 1 to DENR's proposed Findings of Fact Nos. 21, 22, 23, 24, 25, 26, 28, 31, 32, 40, 44, 47, 48, 49, and 50 is denied. These proposed Findings of Fact are supported by evidence included in the administrative record to-wit: DENR expert witness Ken Buhler's testimony, reports and those exhibits Buhler prepared or relied upon. The Board finds Buhler is a credible expert witness. Further, Applicants have not submitted any expert opinions, documents or testimony to refute the findings that are being objected to. The evidence in the record supports the Board's finding, that relies in part upon Buhler's opinions, that the best information available to determine whether there is a reasonable probability of unappropriated water in

the Tulare: Western Spink/Hitchcock Aquifer is based upon observation well data and not the alternative methodology reviewed and rejected by Buhler involving water budget analyses based upon an irrigation questionnaires and average permitted acres irrigated to estimated recharge rates.

F. Applicants' Objection No. 2 to portions of DENR proposed Finding of Fact No. 45 is denied. The objected to portions of the Finding of Fact are supported by the evidence in the record. The water budget analysis addressed in the proposed Finding of Fact requires application of assumptions and estimates that compound any errors in reporting that are not present with the observation well data methodology. Further, the record supports the finding that the average permitted acres irrigated is not the best information available given the limited number of years the average is based upon; that it is skewed by a number of irrigators not irrigating any permitted acres; and that the climatic conditions during the period have resulted in permitted acres irrigated rates that vary greatly from year to year.

G. Applicants' Objection No. 3 to portions of DENR's proposed Finding of Fact No. 46 is denied. The objected to portions of the Finding of Fact are supported by evidence in the record. Applicants have not submitted any expert opinions, testimony and evidence that would support the assumption that for newly granted water permits, the average annual permitted acres irrigated would be comparable to the average that was developed from the 2003-2011 irrigation reports. The average developed is skewed by irrigators who did not irrigate their fields during the 2003-2011 timeframe. It is unreasonable to

assume Applicant's and others who have received permits to irrigate since 2011 will leave over 30% of their fields undeveloped or in CPR. Further, the record is undisputed that based upon the 2012 irrigation reports that the percentage of acres irrigated to total acres permitted was materially greater in 2012 than the 2003-2011 average. The 2012 irrigation use data supports the rejection of the methodology addressed in the objected to proposed Finding of Fact.

H. Applicants' Objection No. 4 to the portion of DENR proposed Finding of Fact No. 33 is accepted by the Board, but not for the reasons objected to by Applicant. The Board finds that the objected to parenthetical contains language that is not essential to the Board's Findings of Fact, Conclusions of Law, Final Decision and Order.

I. Applicants' Objection No. 5 to a portion of DENR proposed Finding of Fact No. 38 is denied. These portions of the DENR proposed Finding of Fact are supported by the evidence in the record, including Applicants' Exhibit A, Buhler's report to the State Engineer dated April 25, 2012, pps. 6-8. Further, Applicant has not presented any expert opinions, testimony or documents to the contrary.

J. Applicants' Objection No. 6 to the portion of DENR proposed Finding of Fact No. 39 is denied. The objected to portion of Finding of Fact No. 39 is supported by evidence in the record. During the October 3, 2013 hearing, Buhler updated his reports and opinions based upon irrigation reports for the 2012 irrigation season that were previously unavailable. There is

nothing in the record that conflicts with, disputes or puts in doubt the reliability of this additional information. Further, this information is relevant and pertinent to the Board's rejection of the water budget methodologies that are based in part upon the average permitted acres irrigated covering a short timeframe. The 2012 data demonstrates the material effects an additional year and additional permit holders deciding to irrigate new fields may have on the average.

K. Applicants' Objection No. 7 to the last sentence of DENR proposed Finding of Fact No. 41 is denied. The objected to portion of Finding of Fact No. 41 is supported by the evidence in the record. The evidence in part is included in the April 25, 2012 report of Ken Buhler to the State Engineer introduced by Applicant. Further, Applicant did not submit any expert opinions, testimony or documents that would refute the proposed Finding of Fact.

L. Applicants' Objection No. 8 to DENR's proposed Conclusions of Law Nos. 6, 7, 8, 10, 11, 12, 13 and 14 is denied. These Conclusions of Law are supported by the Findings of Fact adopted by the Board in the above rulings, which in turn are supported by the evidence submitted during the hearing.

M. Applicants' proposed Findings of Fact Nos. 1-20, 27, 28, 30, 31, 32, 33 and 38 are accepted by the Board as consistent with the Findings of Fact adopted by the Board in the above rulings.

N. Applicants' proposed Findings of Fact Nos. 29, 34, 35, 36, 37, 43 and 44 are rejected for the reasons that they are substantially included in the Findings of Facts and Conclusions of Law adopted by the Board and that the rejected Findings do not include additional findings which the Board has adopted and for which the Board has denied Applicants' objections thereto.

O. Applicants' proposed Findings of Fact Nos. 21, 22, 23, 24, 26, 39, 40, 41, 45 and 46 are rejected by the Board as contrary to the Findings of Fact adopted by the Board, the Board's rulings on Applicants' objections, and the Board's oral decision.

P. Applicants' proposed Finding of Fact No. 25 is accepted by the Board and will be included in the Board's Findings of Fact.

Q. Applicants' proposed Finding of Fact No. 42 is accepted by the Board as modified below to more accurately reflect the record. The modified finding will be included in the Board's Findings.

In applying SDCL 46-6-3.1, a judge in the Sixth Judicial Circuit ruled in 2005 that if the Water Management Board uses average annual recharge, then it should use average annual withdrawal to determine if unappropriated water is available from the aquifer. *Hines v. South Dakota Department of Environment and Natural Resources*, Hughes County 04-37, Memorandum Decision April 29, 2005.

R. Applicants' proposed Conclusions of Law Nos. 1-5 are accepted by the Board as consistent with the Conclusions of Law adopted by the Board in the above rulings.

S. Applicants' proposed Conclusions of Law Nos. 6-9 are rejected by the Board as inconsistent with the Board's oral decision, the Board's rulings on

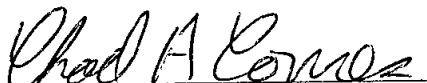
Applicants' objections, and the Findings of Fact and Conclusions of Law adopted by the Board in the above rulings.

T. Applicants' proposed Final Decision and Order is rejected by the Board as inconsistent with its oral decision, the Board's rulings on Applicants' objections, and the Findings of Fact and Conclusions of Law adopted by the Board in the above rulings.

The Board's attorney is directed to prepare Findings of Fact, Conclusions of Law and Final Decision and Order consistent with the above rulings to be executed by the Chair of the Board or the Board's designee without further notice of hearing.

Dated this 5th day of December, 2013.

BY THE BOARD:


Chad Comes, Chair
S.D. Water Management Board

STATE OF SOUTH DAKOTA
SOUTH DAKOTA WATER MANAGEMENT BOARD

IN THE MATTER OF WATER)
PERMIT APPLICATION Nos. 7725-3,)
7752-3, 7755-3, 7756-3, and)
7757-3, LENNY PETERSON)

IN THE MATTER OF WATER)
PERMIT APPLICATION Nos. 7726-3,)
7727-3, 7753-3, 7754-3, and)
7759-3, OSCAR, INC.)

IN THE MATTER OF WATER)
PERMIT APPLICATION Nos. 7733-3,)
7734-3, 7735-3, and 7736-3, VAN)
BUSKIRK FARMS, LLP)

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL DECISION

Hearing was held on October 3, 2013, before Board members Chad Comes (Chair), Tim Bjork, Peggy Dixon, Everett Hoyt, Jim Hutmacher, and Leo Holzbauer. Rodney Freeman recused himself.

All applicants were represented by Ray Rylance. The Department of Environment and Natural Resources, Water Rights Program, and its Chief Engineer (jointly referred to as "DENR") was represented by Diane Best.

The Board, having considered the testimony and exhibits presented and all records and documents on file, and having entered its oral decision and rulings on the parties' submissions, now enters the following:

FINDINGS OF FACT

Background

1. This matter involves 14 applications to appropriate water from the Tulare: Western Spink/Hitchcock Aquifer, an aquifer that is used extensively for irrigation.

2. Irrigation development of the Tulare: Western Spink/Hitchcock Aquifer was basically static from 2002-2012. Although this Board deferred a large number of additional applications for a period of time starting in 2002, it ultimately denied them in 2008. (*In the Matter of Water Permit Applications from the Tulare Aquifer*, Findings of Fact, Conclusions of Law and Final Decision issued March 11, 2008). No other permits were issued until 2012.

3. After a group of applications was filed in December 2011, DENR Engineer Ken Buhler filed a report with the Chief Engineer on April 25, 2012. He concluded that sufficient water would be available to irrigate 733 more acres. The Chief Engineer subsequently entered into a stipulated settlement with the applicants and recommended that water permits should be granted to irrigate 810 acres. This Board approved the stipulation and authorized the permits for 810 acres in July 2012. (*In the Matter of Water Permit Application Nos. 7288-3, 7289-3, 7290-3, 7291-3, and 7292-3*, Findings of Fact waived).

4. Thirteen more applications were subsequently filed seeking water to irrigate 2,131 acres. On January 30, 2013, Ken Buhler filed another report with the Chief Engineer regarding those applications. The January 30, 2013, report examined water availability under various methods and concluded there was sufficient water available in the Tulare: Western Spink/Hitchcock Aquifer to support irrigation of 4,686 more acres than had been authorized for irrigation before any permits were issued in 2012 (also referred to herein as "acres remaining"). Of the 4,686 acres remaining, 810 acres had already been granted in July 2012. This was also more than enough to satisfy the requests

then at issue for 2,131 acres (leaving enough water available for 1,746 acres for which applications had not yet been filed). The Chief Engineer recommended approval of permits to irrigate the 2131 acres at issue.

5. Following contested case hearings on March 7, 2013, and May 2, 2013, this Board authorized issuance of permits for 2,131 acres. *Water Permit Application Nos. 7373-3 (Terry Wieting), 7551-3 (Wayne Binger), 7570-3 to 7575 and 7637-3 to 7640-3 (Marshall Bros.), and 7620-3 (Oscar Inc).* (Findings of Fact waived).

6. In the meantime, after the Buhler Report was filed on January 30, 2013 (and the Chief Engineer recommended approval of water permits to irrigate 2,131 acres), there were 41 applications filed. Ken Buhler filed another report on April 13, 2013, addressing the 41 applications. The April 13, 2013, report relies, in significant part, on the earlier January 30, 2013, report, and, to a certain extent, information contained in the earlier April 25, 2012, analysis. The April 13, 2013, report ultimately concluded that there was sufficient water available for the first 10 of the 41 applications, with enough water left over for 116 acres (not enough to fill any of the additional requested applications).

7. The Chief Engineer recommended granting the first 10 of the 41 applications in the order they were filed as well as a portion of the 11th application. She recommended denial of the rest.

8. Of the 41 applications, the initial 10 applications were heard and granted by this Board in July 2013. There was no opposition.

9. Of the 41 applications, the 11th application filed was Application No. 7725-3 submitted by Lenny Peterson, and it sought to irrigate 320 acres. The 116 acres referenced in the Buhler Report would have been insufficient for this request. At hearing, however, Lenny Peterson asked the Board to split his request and grant a permit to irrigate 135 acres of the 320, enough to operate one center pivot. After inquiry by the Board, Buhler testified that an additional 19 acres was acceptable. The Board then authorized irrigation of 135 acres of the requested 320 acres for Application No. 7725-3.

10. The total of all of the 2012-2013 appropriations authorized by this Board from the Tulare: Western Spink/Hitchcock aquifer includes the full 4,686 acres addressed in the January 2013 Buhler Report as well as the additional 19 acres addressed in the July 2013 hearing (4,706 total acres).

11. In the meantime, of the 41 applications, 17 other applications were withdrawn. The applicants for those 17 permits did not seek hearing after they received the recommendation of denial. The 17 applications are considered to be withdrawn under SDCL 46-2A-3.

Current Applications

12. The contested case at issue pertains only to the 14 applications captioned above. This includes the deferred portion of Application 7725-3 for Lenny Peterson to irrigate 185 acres as well as 13 other applications that were recommended for denial in April 2013.

13. The 14 applications seek to appropriate sufficient water to irrigate a total of 3,608 acres in Beadle County. Each of the applications seeks water

from the Tulare: Western Spink /Hitchcock Aquifer. The quantity of water requested is 2 acre feet per acre per year (ac ft/year) at a maximum diversion rate of 1 cubic foot of water per second (cfs) per 70 acres.

14. The five applications filed by Lenny Peterson seek to irrigate 985 acres. The total maximum diversion rate would be 14.05 cfs.

15. The five applications filed by Oscar Inc. seek to irrigate 825 acres using 6 wells. The total maximum diversion rate would be 11.77 cfs.

16. The four applications filed by VanBuskirk Farms, LLP seek to irrigate 1,798 acres using 11 wells. The total maximum diversion rate would be 25.65 cfs.

17. Notice of Hearing for the 14 applications was published in the Redfield Press (weekly newspaper) and Huron Daily Plainsman (daily newspaper) the same day: June 19, 2013. The published Notice scheduled hearing for July 11, 2013, in Pierre. The published Notices also provided that petitions to intervene were to be filed by July 1, 2012. No petitions to intervene were filed.

18. Hearing on the 14 applications was delayed until October 2013 upon request of the Chief Engineer. The Applicants consented to the delay.

19. The Board considers whether (a) there is a reasonable probability unappropriated water is available for the proposed use; (b) the proposed diversion can be developed without unlawful impairment of existing rights; (c) the use would be a beneficial use; and (d) the use is in the public interest. The first factor is dispositive.

20. The area of the Tulare: Western Spink/Hitchcock Aquifer is 263,016 acres. This information is based on the April 25, 2012, Buhler Report which analyzed several state and federal government studies of the extent of the aquifer. It is the most current and best available information on the areal extent of the aquifer.

21. In considering water availability, this Board considers whether the quantity of water withdrawn annually from the groundwater source would exceed the quantity of the average estimated annual recharge of water to the groundwater source if the permit was granted. Such analysis is not required if the water source is older or lower than the greenhorn formation (not the case here) and the applicant is a public water system (not the case here). The analysis must be undertaken in this case.

22. DENR witness Ken Buhler, an expert with 28 years of experience in groundwater hydrology, testified that, based on the best available information, the quantity of water withdrawn annually from the Tulare: Western Spink/Hitchcock Aquifer would exceed the average estimated annual recharge if any of the 14 applications at issue was granted. The Board credits his testimony which examined the issue based on observation well data and on consideration of a water budget for the aquifer.

23. The term "acres remaining" in the various analyses means the total acreage that would be available for all the recent permit applications filed from December 2011 to the present (including the previous permits authorized by this Board in 2012-13).

24. Analysis of the observation well data provides a qualitative means of assessing the aquifer. In fact, the Board has promulgated a rule providing that it will rely on the record of observation well measurements as part of the evidence in examining the recharge/withdrawal issue.

25. The DENR Water Rights Program monitors 48 observation wells in the Tulare: Western Spink/Hitchcock Aquifer. The January 30, 2013, report shows five representative observation wells constructed during the period from 1966-1980 (and measured regularly since construction). Hydro-graphs from the wells show that the aquifer readily responds to climatic conditions and development has had an inconsequential effect on the aquifer.

26. The observation data documents the difference between average annual recharge and average annual withdrawal. If observation well data shows a steady, continual decline of the aquifer's water level or artesian pressure, such changes could indicate that withdrawals are exceeding recharge. Also, water level fluctuations in an aquifer dominated by the influence of well withdrawals, or a change in the configuration of the potentiometric surface, could indicate that well withdrawals are a significant component in the system relative to recharge and/or natural discharge. Observation well data was used in this proceeding to consider long term trends, any influences of well withdrawals, and the configuration of the potentiometric surface.

27. Hydrographs in the January 30, 2013, Buhler Report regarding observation well data for the Tulare: Western Spink/Hitchcock Aquifer showed

upward trending water levels. Based on the average slope of linear trend lines for hydrographs for the observation wells in the aquifer, recharge to the aquifer was greater than the total of the discharges from the aquifer over the period from 2003 to 2012 (the period of time during which the aquifer was fully developed and usage was not increasing).

28. DENR observation well data used in the January 30, 2013, report showed that well withdrawals from the Tulare: Western Spink/Hitchcock Aquifer had not had a long term effect on the amount of water in storage in the aquifer.

29. The observation well data also showed that the configuration of the potentiometric surface of the Tulare: Western Spink/Hitchcock aquifer had not changed significantly between 1987 and 2012. This showed that discharge was not exceeding recharge and unappropriated water was available as of 2012.

30. The January 30, 2013, Buhler Report also used information from five observation wells to quantify the change in volume of water in storage in the aquifer. Change in the volume of water in storage is equal to the difference between recharge and discharge. The five observation wells were the only observation wells that were in portions of the Tulare: Western Spink/Hitchcock aquifer that were under unconfined conditions for the entire period studied (2003-2012) and they accurately reflect aquifer conditions. Buhler examined the change in water level in each well for each year (and the aquifer's specific yield of 0.15) and then applied the information to the unconfined portion of the

aquifer to determine the total volume of the change in acre feet. The water level for the unconfined part of the aquifer increased an average of 0.3152 feet per year. As of 2012, there were 76,978 acres under unconfined conditions. Consequently, the analysis showed the annual change in volume is 3,639.5 ac-ft ($76,978 \text{ acres} \times 0.31 \text{ feet} \times 0.15$). This January 30, 2013, analysis shows that the average annual recharge to the aquifer exceeded the average annual discharge from the aquifer by an average of 3,640 ac-ft/yr for the period since development has been static (2003-2012). The 3,640 ac-ft/yr would be sufficient water to irrigate 4,686 acres using the historic average irrigation rate for this aquifer (9.32 inches).

31. The portion of the aquifer that is under unconfined conditions was estimated in the April 25, 2012, report as being much smaller than the 76,978 acres estimated in the January 30, 2013 report. At hearing, Buhler explained that during the period after the April 25, 2012, report was filed, he performed an exhaustive review of data to determine the unconfined portion of the aquifer. This included examining test hole logs, and well logs filed with the DENR for each well completed into the aquifer, including not only observation wells but also wells drilled for irrigators and domestic users. The data allowed him to examine the lithology reported for wells when they were constructed and assess the extent of the portion of the aquifer that was unconfined. This is the best available information showing the unconfined portion of the aquifer.

32. The analysis of the observation well data described in the foregoing Findings of Fact is the best information reasonably available to compare withdrawals from the aquifer against recharge to the aquifer.

33. The January 30, 2013, analysis also examined the recharge/withdrawal issue by considering various water budget analyses where reported irrigation use is compared with calculated recharge rates.

34. Recharge to the Tulare: Western Spink/Hitchcock aquifer is primarily through infiltration of precipitation where the outwash is at or near the surface. Past independent studies show that the recharge rate had been estimated for the unconfined and confined portions of the aquifer under various methods. This included an analysis of the unconfined portion of the aquifer alone, a regional flow net analysis, and a digital groundwater model. The recharge rate estimate is 0.83 inches per year.

35. The recharge estimate, when applied to the areal extent of the aquifer, results in total acre feet per year of recharge. Using the 263,016 acre areal extent of the aquifer and the 0.83 inch recharge rate, the average recharge would be 18,192 ac-ft/yr.

36. Buhler also used a regional flow net analysis to calculate recharge based on September 2012 water level data from the DENR Observation Well Network. A flow net analysis is a calculation of the amount of water flowing through the aquifer. Buhler relied on (a) the average transmissivity of the aquifer based on the calculated transmissivity of irrigation wells in the aquifer where the data to allow these calculations was available (30 irrigation wells); (b)

the hydraulic gradient for the aquifer based on the Observation Well Network; and (c) the distance of the appropriate cross section of the aquifer (25 miles). The volume of water moving through the aquifer is 8,583 ac-ft/yr or 0.39 inches per acre per year on an aquifer wide basis. This rate is not “average annual recharge” since it used only 2012 data and likely can be viewed as a minimum recharge rate. Independent studies over a period of years estimate the average annual recharge at 0.83 inches per acre per year.

37. Under the water budget method, average annual withdrawals were estimated and compared to the estimated average annual recharge sum. Almost all of the withdrawals are for irrigation. One water budget method would base withdrawals primarily on irrigation questionnaires (self-reporting by irrigators) for the period of record (1979 to most recent). Review of the questionnaires provides an application rate in inches of water per acre for the irrigation systems actually in use each year. The average annual application rate is 9.32 inches of water per acre on acres actually irrigated during 1979-2011. This average does not include any undeveloped and unused irrigation systems. When adding information from 2012 irrigation reports, the average irrigation application rate from 1979-2012 is 9.44 inches per acre.

38. By contrast, the average irrigation application rate was only 8.71 inches over the period of 2003-2011 when the aquifer was fully developed. In Buhler’s expert opinion, this 8.71 inch number reflects climate changes (wet conditions) during the period rather than the average irrigation practices. Buhler found in the January 30, 2013, report that the best information

available on the average irrigation application rate was the entire period of record of irrigation reporting for the aquifer (i.e. 1979 – 2011), which was 9.32 inches per acres.

39. In preparing his report in January 2013, Ken Buhler relied on the information available at the time for the period of record (1979-2011). This Board relied on the January 30, 2013 report (and therefore used the 9.32 inches) in previous rulings. By the time of the October 3, 2013 hearing on the present applications, additional information was available from the 2012 irrigation season, which showed an average application rate of 9.44 inches for the period from 1979-2012. Yet, the 9.44 inches would have supported irrigating even fewer acres than the 9.32 inches. The 9.32 inches is the more conservative and consistent number for this contested case.

40. At hearing neither of the parties relied on the 9.44 inch average application rate. DENR relied on the 9.32 inch application rate. The Applicants relied on the 8.71 inch application rate. The Board relies on the 9.32 inches as the best information reasonably available in this case.

41. As part of the water budget method focusing on irrigation questionnaires, the Buhler report also examined withdrawals in terms of “irrigation pumpage.” The “irrigation pumpage” is the total of all water use for irrigation from the aquifer for a year as reported on the irrigation questionnaires. Buhler examined the average irrigation pumpage for 1979-2011 and also for the shorter nine-year period of 2003-2011. Total irrigation pumpage averaged 9,725.6 ac-ft/yr for the period from 1979-2011 based on

irrigation questionnaires. This is the period when the average irrigation application rate was 9.32 in/ac/yr. Yet, total irrigation pumpage averaged 12,286.8 ac-ft/yr for the nine-year period of 2003-2011 based on irrigation questionnaires. This is the nine year period when the average irrigation application rate was 8.71 in/ac/yr. The annual average quantity of water pumped from 1979-2011 was lower than for the period from 2003-2011 because there were fewer acres developed for irrigation in the early part of the period than the later period. It has only been since 2002 that the average irrigation pumpage has not been skewed by systems permitted but not completed.

42. The average annual irrigation pumpage derived from irrigation questionnaires for the nine-year period (12, 286 ac-ft/yr), compared with the estimated average annual recharge rate for the aquifer (18,192 ac-ft/yr), would result in 5,905 ac-ft/yr of unappropriated water available from the Tulare: Western Spink/Hitchcock Aquifer than had previously been available. Under this analysis, the volume would be sufficient to irrigate 7,603 more acres than were permitted for the period previous to 2012, using 9.32 inches of water per acre.

43. At hearing, 2012 irrigation questionnaire data was also used to update the foregoing water budget calculations. The total average annual well withdrawals (irrigation pumpage) from 2003-2012 was 13,138 acre feet/year. Using an average annual application rate of 9.44 (which includes 2012 data), the 13,138 acre feet/year would provide an annual volume of water sufficient

for irrigation of an additional 6,423 more acres than were permitted for the period previous to 2012.

44. Buhler did not rely on the foregoing water budget calculations, however, because there are more variables and more estimates than observation well data (which shows actual changes in water levels in observation wells due to actual pumping). The water budget estimates include a total pumping quantity based on self-reported pumping rates, days of pumping, application rate by irrigators, uncertainties in the aquifer area, and errors associated with the recharge. The nine-year period (2003-2011) is also a relatively short period and may be more reflective of climatic conditions (and lack of water use in response to wet climatic conditions) rather than averages over a longer period. A shorter period is less reliable than a longer period because an abnormal year would carry greater weight. The ten-year period (2003-2012) results in similar concerns.

45. Another type of water budget alternative is the “recharge to acres” method where the recharge rate is estimated for the aquifer and divided by the average application rate to obtain the “maximum allowable acreage.” The “maximum allowable acres” is then compared with “acres likely to be irrigated.” The number of acres likely to be irrigated under existing permits is the total acres permitted for irrigation multiplied by the percentage of permitted acres that have historically been irrigated since 2003 (not a percentage of average irrigation application rate or the number of acres in partially irrigated systems). This method would result in 7,100 “acres remaining” using 2003 to 2011 data.

Using 2003 to 2012 data, the method would provide for 5,563.8 “acres remaining”. This method is based on a combination of the estimated recharge rate, the average irrigation application rate reported by irrigators (in terms of inches per acre), and the average number of irrigated acres as a percent of total permitted acreage. This methodology then assumes the average application rate will continue to be used by existing irrigators. This use of several assumed or estimated variables compounds any errors in reporting. Further, the percent of permitted acres irrigated is highly variable since there is a small dataset (2003 – 2011) which varies greatly from year to year. The Board does not find this method to be useful or the best information available.

46. Another alternative is a variant of the “recharge to acres” method where the “maximum allowable acreage” is again calculated and compared with the average number of irrigated acres for the period of 2003-2011 and the acres likely to be irrigated under recently granted permits. This method assumes that the percentage of acres irrigated under the newly granted permits in 2012-13 would be the same as the percentage of irrigation systems historically used. It is not valid to assume that only a portion of the acres authorized for irrigation by newly granted water permits will be irrigated. Later analysis of 2012 irrigation use data demonstrated that, in fact, the percentage of acres irrigated of the total acres appropriated was 82.8% in 2012. This method, although speculative, would result in 7,100 “acres remaining” (2003-2011 data) or 5,953 “acres remaining” (2003-2012 data). Again, 4,706 acres have already been authorized for irrigation in during 2012-2013. The Board

does not, however, find this method to be useful or the best information reasonably available.

47. The number of “acres remaining” under the observation well data method is 4,686 acres (using 1979 to 2011 data averaging 9.32 inches per acre application rate) or 4,627 acres (using 1979 to 2012 data averaging 9.44 inches per acre application rate). The Board finds that the 4,686 acres is the most useful method and based on the best information available.

48. The Board already authorized permits for irrigation of 4,706 acres in 2012-2013. This acreage is comparable with the “acres remaining” under the observation well method.

49. Based on the best available information currently available, the average annual withdrawals from the Tulare: Western Spink/Hitchcock Aquifer is the same as average annual recharge when factoring in the withdrawals authorized in 2012-2013. If more permits were granted, it is probable that the quantity of water withdrawn annually from the aquifer would exceed the quantity of the average estimated annual recharge of water to the aquifer.

50. Buhler states that prior April 2012 report on the Tulare: Western Spink/Hitchcock aquifer was overly conservative because it assumed 100% irrigation of permitted acres are irrigated annually and that the unconfined conditions the aquifer were overly contracted.

51. In applying SDCL 46-6-3.1, a judge in the Sixth Judicial Circuit ruled in 2005 that if the Water Management Board uses average annual recharge, then it should use average annual withdrawal to determine if

unappropriated water is available from the aquifer. *Hines v. South Dakota Department of Environment and Natural Resources*, Hughes County 04-37, Memorandum Decision April 29, 2005.

52. The evidence in the Buhler reports and the Buhler testimony demonstrates to this Board that the 14 applications should be denied on the basis of the recharge/withdrawal issue, whether considered along with other applications already granted (as was done in the report), or when considered separately (as was done at hearing).

53. Other factors in considering whether to grant water permits is whether the application, if granted, would interfere with existing water rights, whether the application is a beneficial use, and whether the permit would be in the public interest. These factors need not be considered, however, because the permits should be denied based on the foregoing determination on the recharge/withdrawal analysis and water availability.

Based on the foregoing findings of fact, the Board makes the following:

CONCLUSIONS OF LAW

1. The Board has jurisdiction. The present applications are within the Board's responsibility over water appropriation and regulation in Title 46, including SDCL 46-2A-9.

2. Publication was properly made in the Redfield Press and the Huron Daily Plainsman pursuant to SDCL 46-2A-4. Notice of Hearing was properly given to the Applicants under SDCL 46-2A-4 and SDCL 1-26-17.

3. Under ARSD 74:02:01:12.04, the deadline for filing petitions to intervene in this matter was July 1, 2013. This intervention date was published as required by SDCL 46-2A-4. There were no intervenors.

4. The Chief Engineer recommended denial. The recommendation is not, however, binding on the Board. SDCL 46-2A-4(8).

5. 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 decisions as binding precedent (and this decision will not constitute binding precedent). *Interstate Telephone Cooperative, Inc. v. Public Utilities Commission*, 518 N.W.2d 749 (S.D. 1994).

6. The Applicants seek water at the maximum diversion rate generally authorized by law under SDCL 46-5-6.

7. Each Applicant has the burden to prove each of the elements in SDCL 46-2A-9 to obtain the permit requested. None of the Applicants met their burden of proof as to the first element. Water is not available when considering the standard required in SDCL 46-6-3.1. 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 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.”

8. The first element in SDCL 46-2A-9 is whether there is water available for the appropriation. Consideration of water availability 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 estimated annual recharge of water to the groundwater source.”

9. 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 for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the Greenhorn Formation and is not applicable here.

10. ARSD 74:02:05:07 requires that, in addition to any other data, the Water Management Board shall rely upon the record of observation well measurements to determine whether the quantity of water withdrawn annually from the aquifer exceeds the estimated average annual recharge of the aquifer.

11. The observation well method used by Ken Buhler uses the best available information to compare average annual recharge against average annual withdrawals as required by SDCL 46-6-3.1. This analysis includes hydrographs of several observation wells, measurements of changes in volume in representative observation wells in the aquifer, independent studies concerning the areal extent of the aquifer, detailed information and analysis of

the size of the unconfined portion of the aquifer, and the 9.32 inch average application rate.

12. If more permits were granted, it is probable that the quantity of water withdrawn annually from the aquifer would exceed the quantity of the average estimated annual recharge of water to the aquifer. In light of SDCL 46-6-3.1 and the above Findings of Fact, there is not unappropriated water available for the proposed water use. Therefore, pursuant to SDCL 46-2A-9, additional permits to appropriate water cannot be issued from the Tulare: Western Spink/Hitchcock Aquifer. The aquifer is fully appropriated.

13. SDCL 46-2A-9 also requires consideration of whether the proposed water use would impair existing rights, whether the whether the use of water would be a beneficial use (i.e. one that is reasonable and useful and beneficial to the appropriator and also consistent with the interest of the public in the best utilization of water supplies under SDCL 46-1-6(3)), and whether the proposed water use is in the public interest. The Board need not reach these issues in this particular case because the first factor in SDCL 46-2A-9 has not been met. Water is not available in light of SDCL 46-6-3.1.

14. The Applicants failed to show that any of the 14 applications meet the standard in SDCL 46-2A-9 or SDCL 46-6-3.1 and each must be denied. Based on the foregoing Findings of Fact and Conclusions of Law, the Board enters the following:

FINAL DECISION AND ORDER

The 14 above-captioned water permit applications are hereby denied and the Tulare: Western Spink/Hitchcock Aquifer is fully appropriated.

Dated this 5th day of December, 2013.

BY THE BOARD:

A handwritten signature in cursive script, reading "Chad A. Comes", is written over a horizontal line.

Chad Comes, Chair
S.D. Water Management Board

WILES & RYLANCE

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

RECEIVED

JAN 09 2014

Dept. of Environment and
Natural Resources
Secretary's Office

January 8, 2014

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

Jeffrey Hallem, Assistant Attorney General
Natural Resources Section
Office of Attorney General
George S. Mickelson Criminal Justice Center
1302 E Hwy 14, Ste 1
Pierre, SD 57501

Diane Best, Assistant Attorney General
Office of Attorney General
Natural Resources Section
317 N Main Ave
Sioux Falls, SD 57104-6004

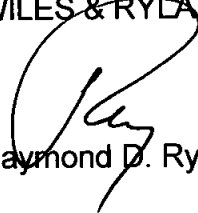
Re: Peterson, et al. v. Department of Environment & Natural Resources

Dear Folks:

Enclosed please find our Notice of Appeal and Certificate of Service in the above-entitled matter. This is intended as service upon you by United States Mail.

Very truly yours,

WILES & RYLANCE



Raymond D. Rylance

RDR:bjs
Enclosures

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

LENNY PETERSON, OSCAR, INC., and
VAN BUSKIRK FARMS, LLP,

Appellants,

vs.

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

Appellee.

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CIV. 14-

CERTIFICATE OF SERVICE

I, Raymond D. Rylance, one of the attorneys for the Appellants in the above-entitled matter, certify that a letter requesting a transcript of the hearing conducted before the Water Management Board on October 3, 2013, in Pierre, South Dakota, a true and correct copy of which is attached hereto, was served upon the interested parties herein by mailing a true and correct copy thereof by first class mail with postage prepaid to:

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

Jeffrey Hallem, Assistant Attorney General
Natural Resources Section
Office of Attorney General
George S. Mickelson Criminal Justice Center
1302 E Hwy 14, Ste 1
Pierre, SD 57501

Diane Best, Assistant Attorney General
Office of Attorney General
Natural Resources Section
317 N Main Ave
Sioux Falls, SD 57104-6004

on the 8th day of January, 2014.

WILES & RYLANCE

A large, stylized handwritten signature in black ink, appearing to read 'RD Rylance', is written over a horizontal line.

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

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

LENNY PETERSON, OSCAR, INC., and
VAN BUSKIRK FARMS, LLP,

Appellants,

vs.

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

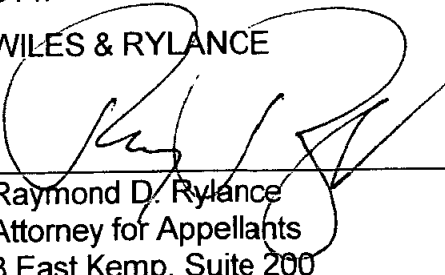
Appellee.

* CIV. 14-
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* NOTICE OF APPEAL
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COMES NOW, Appellants above-named, Lenny Peterson, Oscar, Inc., and Van Buskirk Farms, LLP, by and through their undersigned counsel of record, Raymond D. Rylance, of Wiles & Rylance, Watertown, South Dakota, pursuant to SDCL 1-26, appeal the Decision of the South Dakota Water Management Board, Department of Environment and Natural Resources, dated December 5, 2013, adopting the Findings of Fact and Conclusions of Law entered by the Water Management Board on December 5, 2013, on the Applications for Water Permits No. 7725-3, No. 7752-3, No. 7755-3, No. 7756-3, No. 7757-3, No. 7726-3, No. 7727-3, No. 7753-3, No. 7754-3, No. 7759-3, No. 7733-3, No. 7734-3, No. 7735-3, and No. 7736-3.

Dated this 8th day of January, 2014.

WILES & RYLANCE



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

CERTIFICATE OF SERVICE

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

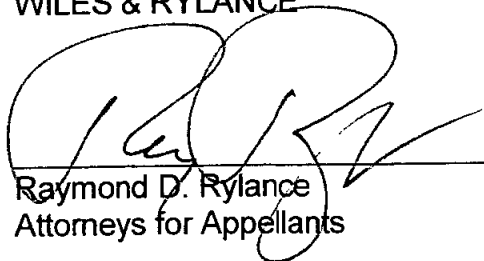
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317 N Main Ave
Sioux Falls, SD 57104-6004

by depositing the same in the United States Mail Service at Watertown, South Dakota, with postage thereon fully prepaid, on the 8th day of January, 2014.

WILES & RYLANCE



Raymond D. Rylance
Attorneys for Appellants

WILES & RYLANCE
ATTORNEYS AT LAW
3 East Kemp - Suite 200
P. O. Box 227
Watertown, South Dakota 57201-0227
(605) 886-5881

FACSIMILE
(605) 886-3934

E-MAIL:
rdr@wilesandrylance.com

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

January 8, 2014

Carla Bachand
Capital Reporting Service
1805 Sunrise Dr
Pierre, SD 57501-5750

Re: Peterson, Oscar, Inc. and Buskirk Farms, LLP/Water Management Board

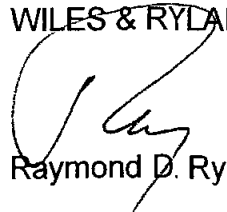
Dear Carla:

By this letter, we are requesting that you prepare a transcript of the hearing that was conducted before the Water Management Board on October 3, 2013, in Pierre, South Dakota. On page 2 of this letter, please acknowledge the receipt of our request for the preparation of the transcript, and forward the same to the Clerk of Courts of Hughes County. The original transcript should be filed with the Clerk of Courts of Hughes County within 30 days.

Thank you.

Very truly yours,

WILES & RYLANCE



Raymond D. Rylance

RDR:bjs

RECEIPT

RECEIVED FROM WILES & RYLANCE a letter dated January 8, 2014 requesting a transcript of the hearing that was conducted before the Water Management Board on October 3, 2013, in Pierre, South Dakota, on Lenny Peterson, Oscar, Inc. and Van Buskirk Farms, LLP Applications for Permit No. 7725-3, No. 7752-3, No. 7755-3, No. 7756-3, No. 7757-3, No. 7726-3, No. 7727-3, No. 7753-3, No. 7754-3, No. 7759-3, No. 7733-3, No. 7734-3, No. 7735-3, and No. 7736-3..

Dated this _____ day of January, 2014.

CAPITAL REPORTING SERVICE

By: _____
Carla Bachand

WILES & RYLANCE
ATTORNEYS AT LAW
3 East Kemp - Suite 200
P. O. Box 227
Watertown, South Dakota 57201-0227
(605) 886-5881

FACSIMILE
(605) 886-3934

E-MAIL:
rdr@wilesandrylance.com

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

January 13, 2014

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

Jeffrey Hallem, Assistant Attorney General
Natural Resources Section
Office of Attorney General
George S. Mickelson Criminal Justice Center
1302 E Hwy 14, Ste 1
Pierre, SD 57501

Diane Best, Assistant Attorney General
Office of Attorney General
Natural Resources Section
317 N Main Ave
Sioux Falls, SD 57104-6004

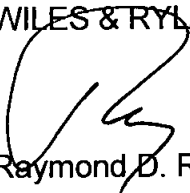
Re: Peterson, et al. v. Department of Environment & Natural Resources

Dear Folks:

Enclosed please find our Statement of Issues in the above-entitled matter. This is intended as service upon you by United States Mail.

Very truly yours,

WILES & RYLANCE



Raymond D. Rylance

RDR:bjs
Enclosures

RECEIVED
JAN 14 2014
Dept. of Environment and
Natural Resources
Secretary's Office

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF HUGHES)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

LENNY PETERSON, OSCAR, INC., and
VAN BUSKIRK FARMS, LLP,

Appellants,

vs.

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

Appellee.

* CIV. 14-
*
*
*
* STATEMENT OF ISSUES
*
*
*
*
*
*

COMES NOW, Appellants above-named, by and through their undersigned counsel of record, Raymond D. Rylance, of Wiles & Rylance, Watertown, South Dakota, and submits Appellants' Statement of Issues as follows:

Lenny Peterson applied for water permits #7725-3, 7752-3, 7755-3, 7756-3 and 7757-3. Peterson asserts that water is available to grant the permits.

Oscar, Inc. applied for water permits #7726-3, 7727-3, 7753-3, 7754-3 and 7759-3. Oscar, Inc. asserts that water is available to grant the permits.

Van Buskirk Farms, LLP applied for water permits #7733-3, 7734-3, 7735-3 and 7736-3. Van Buskirk Farms, LLP asserts that water is available to grant the permits.

The Water Management Board held that water was not available on all applications of Lenny Peterson, Oscar, Inc., and Van Buskirk Farms, LLP.

Dated this 13 day of January, 2014.

WILES & RYLANCE



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

CERTIFICATE OF SERVICE

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

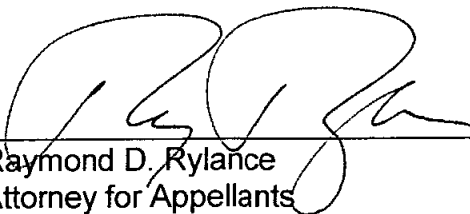
Steve Pirner, Secretary
Department of Environment
and Natural Resources
Joe Foss Building
523 E Capitol
Pierre, SD 57501-3182

Jeffrey Hallem, Assistant Attorney General
Natural Resources Section
Office of Attorney General
George S. Mickelson Criminal Justice Center
1302 E Hwy 14, Ste 1
Pierre, SD 57501

Diane Best, Assistant Attorney General
Office of Attorney General
Natural Resources Section
317 N Main Ave
Sioux Falls, SD 57104-6004

by depositing the same in the United States Mail Service at Watertown, South Dakota, with postage thereon fully prepaid, on the 13th day of January, 2014.

WILES & RYLANCE



Raymond D. Rylance
Attorney for Appellants



DEPARTMENT OF ENVIRONMENT
and NATURAL RESOURCES

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



February 7, 2014

NOTICE

TO: Raymond D. Rylance
Wiles & Rylance
3 East Kemp, Suite 200
Watertown, SD 57201

FROM: Jeanne Goodman, Chief Engineer
Water Rights Program
(605) 773-3352

SUBJECT: In the Matter of the Water Permit Applications from the Tulare Western Spink
Hitchcock Aquifer

Consistent with SDCL 1-26-33, the agency records for Water Permit Application Nos. 7725-3 – Lenny Peterson (deferred portion); Nos. 7752-3, 7755-3, 7756-3, 7757-3 – Lenny Peterson; Nos. 7726-3, 7727-3, 7753-3, 7754-3, 7759-3 – Oscar Inc.; and Nos. 7733-3, 7734-3, 7735-3, 7736-3 – Van Buskirk Farms LLP are being transmitted to the Sixth Judicial Circuit Court in Hughes County on February 7, 2014. A copy of the transmittal of record, chronological and alphabetical index of each agency record and exhibit list are enclosed.

enclosures

c: Diane Best, Assistant Attorney General



**DEPARTMENT OF ENVIRONMENT
and NATURAL RESOURCES**

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



February 7, 2014

Kelli Sitzman
Hughes County Clerk of Courts
PO Box 1238
Pierre SD 57501

Re: Transmittal of Record in the Matter of Water Permit Applications for Lenny Peterson,
Oscar, Inc. and Van Buskirk Farms LLP (Case No. 32CIV 14-9)

Dear Clerk:

Consistent with SDCL 1-26-33, I am transmitting the agency records for the above entitled matters to the Sixth Judicial Circuit Court in Hughes County.

This case involves the appeal of the Water Management Board's denial of Water Permit Application Nos. 7725-3 – Lenny Peterson (deferred portion); Nos. 7752-3, 7755-3, 7756-3, 7757-3 – Lenny Peterson; Nos. 7726-3, 7727-3, 7753-3, 7754-3, 7759-3 – Oscar Inc.; and Nos. 7733-3, 7734-3, 7735-3, 7736-3 – Van Buskirk Farms LLP

The following are enclosed:

1. agency records (administrative file for each application, transcript and exhibits)
2. transmittal of record
3. chronological index for each application
4. alphabetical index for each application
5. list of exhibits
6. transcript of October 3, 2013 hearing before the Water Management Board

Sincerely,

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

enclosures

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
	)	(32CIV 14-9)
IN THE MATTER OF WATER	)	
PERMIT APPLICATIONS FILED BY	)	
LENNY PETERSON, OSCAR, INC.	)	TRANSMITTAL OF RECORD
AND VAN BUSKIRK FARMS LLP	)	

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 Nos. 7725-3 (deferred portion), 7752-3, 7755-3, 7756-3 and 7757-3 for Lenny Peterson, Nos. 7726-3, 7727-3, 7753-3, 7754-3 and 7759-3 for Oscar, Inc. and Nos. 7733-3, 7734-3, 7735-3 and 7736-3 for Van Buskirk Farms LLP. Copies of the records are 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 October 3, 2013 hearing in the above entitled matter.

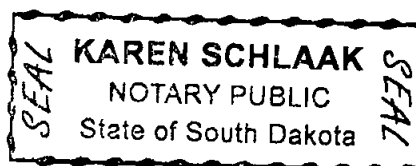
5. In addition, I have prepared a chronological and alphabetical index of the agency record for each application and a list of exhibits which are herewith transmitted to the above-captions reviewing court pursuant to SDCL 1-26-33. A copy of the indexes is also being sent to counsel for Lenny Peterson, Oscar Inc. and Van Buskirk Farms LLP on this date.

Dated this 7th day of February, 2014.


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

Subscribed and sworn to before me this
7th day of February, 2014


Karen Schlaak
Notary Public
My commission expires: April 1, 2019



Exhibits Introduced into Evidence

**in the matter of Water Permit Applications from the
Tulare:Western Spink/Hitchcock Aquifer**

Exhibit No.	Description
DENR-1A	DENR file on Water Permit Application No. 7725-3, Lenny Peterson
DENR-1B	DENR file on Water Permit Application No. 7726-3, Lenny Peterson
DENR-1C	DENR file on Water Permit Application No. 7727-3, Oscar, Inc.
DENR-1D	DENR file on Water Permit Application No. 7753-3, Oscar, Inc.
DENR-1E	DENR file on Water Permit Application No. 7754-3, Oscar, Inc.
DENR-1F	DENR file on Water Permit Application No. 7759-3, Oscar, Inc.
DENR-1G	DENR file on Water Permit Application No. 7733-3, VanBuskirk Farms LLP
DENR-1H	DENR file on Water Permit Application No. 7734-3, VanBuskirk Farms LLP
DENR-1I	DENR file on Water Permit Application No. 7735-3, VanBuskirk Farms LLP
DENR-1J	DENR file on Water Permit Application No. 7736-3, VanBuskirk Farms LLP
DENR-1K	DENR file on Water Permit Application No. 7752-3, Lenny Peterson
DENR-1L	DENR file on Water Permit Application No. 7755-3, Lenny Peterson
DENR-1M	DENR file on Water Permit Application No. 7756-3, Lenny Peterson
DENR-1N	DENR file on Water Permit Application No. 7757-3, Lenny Peterson
DENR-2	Vita – Ken Buhler
DENR-5	List with Application No, Applicant, Received, Acres & Running Acreage Total
DENR-6	List with Method, Observation Well Data & Water Budget
DENR-7	January 2013 Report Data Summary and January 2013 Report Data Summary with 2012 Irrigation Questionnaire Data Added
Exhibit A	Report to the Chief Engineer on Water Permit Application No. 7289-3, Bixler Farms, Nos. 7290-3 and 7291-3, Lee Gatzke, No. 7293-3, Jeffrey Gatzke and No. 7292-3, Allen Gatzke, April 25, 2012

STATE OF SOUTH DAKOTA

)

IN CIRCUIT COURT

: SS

COUNTY OF HUGHES

)

SIXTH JUDICIAL COURT

(32CIV14-9)

IN THE MATTER OF WATER PERMIT

)

APPLICATION NO. 7725-3

)

CHRONOLOGICAL

LENNY PETERSON

)

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18.	October 4, 2013	Notice from Jeanne Goodman for Preparation of Findings of Fact, Conclusions of Law and Final Decision (w/certificate of service)	58-59
19.	November 4, 2013	Letter from Diane Best to Water Management Board members transmitting Proposed Findings of Fact, Conclusions of Law and Final Decision (w/certificate of service and proposed findings attached)	60-82
20.	November 26, 2013	Objections to Proposed Findings of Fact, Conclusions of Law and Final Decision and Applicant's Proposed Findings of Fact, Conclusions of Law and Final Decision submitted by Raymond Rylance (w/certificate of service)	83-114
21.	November 26, 2013	Notice from Jeanne Goodman for Consideration of Findings of Fact, Conclusions of Law and Final Decision for Water Permit Applications from the Tulare:Western Spink/Hitchcock Aquifer (w/certificate of service)	115-116
22.	November 27, 2013	Letter from Jeffrey P Hallem transmitting proposed Findings of Fact, Conclusions of Law and Final Decision and Board Ruling (w/certificate of service)	117-146
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STATE OF SOUTH DAKOTA

COUNTY OF HUGHES

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: SS
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IN CIRCUIT COURT

SIXTH JUDICIAL COURT

(32CIV14-9)

IN THE MATTER OF WATER PERMIT
APPLICATION NO. 7725-3
LENNY PETERSON

)
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)

ALPHABETICAL
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12.	May 24, 2013	Letter to Lenny Peterson from Eric Gronlund	39-40
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STATE OF SOUTH DAKOTA

COUNTY OF HUGHES

)
: SS
)

IN CIRCUIT COURT

SIXTH JUDICIAL COURT

(32CIV14-9)

IN THE MATTER OF WATER PERMIT
APPLICATION NO. 7726-3
OSCAR INC.

)
)
)

CHRONOLOGICAL
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22.	December 10, 2013	Notice from Jeanne Goodman transmitting Water Management Board's Ruling on Parties Submissions and Adopted Findings of Fact, Conclusions of Law and Final Decision (w/certificate of service)	144-173
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STATE OF SOUTH DAKOTA

)

IN CIRCUIT COURT

: SS

COUNTY OF HUGHES

)

SIXTH JUDICIAL COURT

(32CIV14-9)

IN THE MATTER OF WATER PERMIT

)

APPLICATION NO. 7726-3

)

ALPHABETICAL

OSCAR INC

)

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SIXTH JUDICIAL COURT

(32CIV14-9)

IN THE MATTER OF WATER PERMIT

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APPLICATION NO. 7736-3

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CHRONOLOGICAL

VAN BUSKIRK FARMS LLP

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IN THE MATTER OF WATER PERMIT

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APPLICATION NO. 7752-3

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CHRONOLOGICAL

LENNY PETERSON

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APPLICATION NO. 7752-3

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IN THE MATTER OF WATER PERMIT
APPLICATION NO. 7753-3
OSCAR, INC.

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IN THE MATTER OF WATER PERMIT
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COUNTY OF HUGHES

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SIXTH JUDICIAL COURT

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(32CIV14-9)

IN THE MATTER OF WATER PERMIT

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APPLICATION NO. 7754-3

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IN THE MATTER OF WATER PERMIT

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APPLICATION NO. 7755-3

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IN THE MATTER OF WATER PERMIT

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APPLICATION NO. 7755-3

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APPLICATION NO. 7756-3

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IN THE MATTER OF WATER PERMIT
APPLICATION NO. 7759-3
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STATE OF SOUTH DAKOTA

)

IN CIRCUIT COURT

: SS.

COUNTY OF HUGHES

)

SIXTH JUDICIAL COURT

(32CIV14-9)

IN THE MATTER OF WATER PERMIT

)

APPLICATION NO. 7759-3

)

ALPHABETICAL

OSCAR, INC.

)

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CIRCUIT COURT OF SOUTH DAKOTA SIXTH JUDICIAL CIRCUIT

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Re: Hughes County Civ. No. 14-09 Lenny Peterson, Oscar, INC., and Van Buskirk Farms, LLP v. Department of Environment and Natural Resources (Water Rights Program)

Lenny Peterson, Oscar Inc., and Van Buskirk Farms ("Applicants") filed water permit applications with the South Dakota Department of Environment and Natural Resources ("DENR") Water Management Board ("Board"). The Board denied 14 water permits pertaining to Applicants, and Applicants appeal the denials to this Court.

BACKGROUND

This matter involved 14 applications to appropriate water from the Tulare: Western Spink/Hitchcock Aquifer, an aquifer that is used extensively for irrigation. The 14 applications in dispute are numbered:¹

¹ All 14 applications are maintained in 14 separate records, yet all 14 records contain several identical documents. To avoid repetition, this memorandum will refer to duplicative documents in only one of the application records, No. 7725-3. Where it is necessary to refer to another application

No. 7725-3, No. 7752-3, No. 7755-3, No. 7756-3, No. 7757-3, No. 7726-3, No. 7727-3, No. 7753-3, No. 7754-3, No. 7759-3, No. 7733-3, No. 7734-3, No. 7735-3, and No. 7736-3.

Background of the Aquifer

Irrigation development of the Tulare: Western Spink/Hitchcock Aquifer was basically static from 2002-2012. (FOF 2; R. at 157.) After a group of applications was filed in December of 2011, DENR Engineer Ken Buhler ("Buhler") filed a report with the Chief Engineer on April 25, 2012 concluding that the Aquifer contained sufficient water to irrigate 733 more acres. (FOF 3; R. at 157.) Subsequently, Buhler stipulated, and the Board approved, that water permits should be granted to irrigate 810 acres. (Id.)

On January 30, 2013, Buhler filed another report to address 13 more applications that were received which requested water to irrigate 2,131 acres. (FOF 4; R. at 157.) This report examined water availability under various methods and concluded there was sufficient water available in the Tulare: Western Spink/Hitchcock Aquifer to support irrigation of 4,686 more acres than had been authorized for irrigation before any permits were issued in 2012. (Id.) Of these 4,686 acres remaining, 810 acres had already been granted in July 2012, which left more than enough acres to satisfy the 13 applications requesting 2,131 acres. Buhler recommended granting the 13 applications. (Id.) Sometime after May 7, 2013, the Board granted these permits. (FOF 5; R. at 158.)

After Buhler's January 30, 2013 report, the Board received 41 more applications for permits. Buhler filed another report on April 13, 2013 addressing these 41 applications. (FOF 6; R. at 158.) Buhler concluded in this report that there was sufficient water available for the first 10 of the 41 applications, with enough water left over for 116 acres (not enough to fill any of the additional requested applications.) (Id.) The Board granted the first 10 applications in July 2013.

The 11th application was submitted by Lenny Peterson, Applicant, and it sought to irrigate 320 acres for which the 116 acres left over after the first 10 applications were filled would have been insufficient. (FOF 9; R. at 159.) Peterson asked the Board to split his request and grant a permit to irrigate 135 acres of the 320 acres he originally asked for so that he could operate one center pivot. (Id.) Buhler testified the additional 19 acres was acceptable, so the Board authorized irrigation of 135 acres of the 320 requested acres in application No. 7725-3.

In total, the 2012-2013 appropriations authorized by the Board from the Tulare: Western Spink/Hitchcock Aquifer included 4,706 acres.² Out of the remaining of the 41 applications, 17 were withdrawn without hearing, 10 were filled in full, and 14 are the subject of this appeal, including Peterson's application No. 7725-3 which was partially granted.

14 Applications

The 14 applications seek to appropriate water from the Tulare: Western Spink/Hitchcock Aquifer to irrigate a total of 3,608 acres in Beadle County, South Dakota. (FOF 13; R. at 160.) The quantity of water requested is 2 acre feet per acre per year (ac ft/yr) at a maximum diversion rate of 1 cubic foot of water per second (cfs) per 70 acres. (Id.)

Applicant Lenny Peterson submitted five applications to irrigate a total of 985 acres with a total maximum diversion rate of 14.05 cfs. (FOF 14; R. at 160.) Applicant Oscar Inc. submitted five applications to irrigate a total of 825 acres using 6 wells with a total maximum diversion rate of 11.77 cfs. (FOF 15; R. at 160.) Applicant VanBuskirk Farms submitted four applications to irrigate a total of 1,798 acres using 11 wells with a total maximum diversion rate of 25.65 cfs. (FOF 16; R. at 160.)

The Board held a hearing on these 14 applications on October 3, 2013 to determine whether there was sufficient water to fulfill these permits. At the hearing, DENR presented expert testimony from Buhler on the issue of whether the quantity of water withdrawn annually from the groundwater source would exceed the quantity of the average estimated annual recharge of water to the groundwater source if the permits were granted. Buhler testified that if the 14 remaining applications were granted, the annual withdraw from the Aquifer would exceed the average estimated annual recharge. (FOF 22; R. at 161.) The Board found that Buhler's opinion offered the "best available information" and denied all 14 applications.³ (COL 11 and 14; R. at 175-76.) Applicants' filed a Notice of Appeal on January 10, 2014.

QUESTION PRESENTED

- I. Whether the Board properly denied applications for the 14 water permits on the basis that water was not available to grant the permits to Applicants?

² All 4,686 acres authorized by Buhler's January 2013 Report in addition to the 19 extra acres appropriated to Peterson in July 2013.

³ Thirteen applications were denied in full. As discussed above, Lenny Peterson's application No. 7725-3 was partially granted. The remaining acres of the application were denied and have become the fourteenth application in this appeal.

LEGAL STANDARD

This court's review of a decision from an administrative agency is governed by SDCL 1-26-36, which sets forth the standard of review as follows:

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 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.

SDCL 1-26-36. Questions of fact are judged by the clearly erroneous standard while questions of law are fully reviewable [*i.e.*, de novo]. *Orth v. Stoebner & Permann. Const., Inc.*, 2006 SD 99, ¶ 27, 724 NW2d 586, 592 (*quoting Tischler v. United Parcel Service*, 1996 SD 98, ¶ 23, 552 NW2d 597, 602). Where a mixed question of law and fact is present,

the standard to be used depends on (1) whether its resolution requires consideration of underlying principles behind a rule of law, in which case we review it de novo,

or (2) whether the analysis is essentially factual, and thus is better decided by the agency of lower court, whereupon the clearly erroneous standard applies.

Rios v. South Dakota Dept. of Social Services, 420 N.W. 757, 759 (S.D. 1988) (citing *Permann v. South Dakota Dept. of Labor*, 411 N.W.2d 113, 118-19 (S.D. 1987)).

ANALYSIS

I. Whether the Board properly denied applications for the 14 water permits on the basis that water was not available to grant the permits to Applicants?

Applicants argue that the only issue on appeal is whether water is available in the Tulare: Western Spink/Hitchcock Aquifer to fulfill any or all of the 14 applications. Particularly, Applicants argue that the method the Department's expert, Ken Buhler, used to determine how much water is available was the wrong method. Applicants criticize Buhler's reliance on "the observation well method" and state that the "water budget methods" are more credible and precise. In oral arguments, Applicants allege that Buhler must use the water budget method. Applicants rely on the Board's decision in regards to applications submitted by Bixler, et al., in December of 2011, and a circuit court decision, *Hines v. the South Dakota DENR*, Hughes County CIV. 04-137, Memorandum Decision dated April 29, 2005. Further, Applicants criticize Buhler's use of the application rate 9.32 inches per year, a 32-year average, and argue that Buhler should have used an application rate of 8.71 inches per year, an 8-year average.

In order to obtain a water permit, an application must meet a statutory four part test:

A permit to appropriate water may be issued ***only if there is reasonable probability [1] that there is unappropriated water available for the applicant's proposed use***, [2] that the proposed diversion can be developed without unlawful impairment of existing rights and [3] that the proposed use is a beneficial use and [4] in the public interest.

SDCL 46-2A-9 (emphasis added). The first consideration, whether water is available for the appropriation, is guided by SDCL 46-6-3.1, which provides in pertinent part:

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

(Emphasis added.)

- a. **Whether Buhler applied the correct method based on the best information reasonably available in his determination that there was not water available for the 14 applications?**

First, as to the previous decisions by the Board in Bixler and the *Hines* Court, it is important to note that neither of these decisions is binding precedent on this Court. Further, to overturn the Board's denial of the applications, Applicants would need to demonstrate that the Board failed to rely on "the best information reasonably available." SDCL 46-6-3.1. However, Applicants did not call an expert, and the theories they presented to DENR's expert, Buhler, the only expert to testify, were rejected by Buhler. It is a well-established rule that:

[D]eference must be given to the [Agency] which had an opportunity to observe the experts' demeanors and weigh their credibility. The trier of fact is free to accept all of, part of, or none of, an expert's opinion. Furthermore, the reviewing agency is not required to accept the testimony of the claimant and is free to choose between conflicting testimony.

McKibben v. Horton Vehicle Components, Inc., 2009 S.D. 47, ¶ 11, 767 N.W.2d 890 (quoting *Shepherd v. Moorman Mfg.*, 467 N.W.2d 916, 919 (S.D. 1991)). In this case, the Board accepted and relied on the opinions of Buhler and found Buhler to be a credible witness. Applicants presented no "conflicting testimony" for the Board to judge. Even more, the Board had the opportunity to observe Applicants' attorney cross-examine Buhler on his methods, and still found "[t]he observation well method used by Ken Buhler uses the best available information to compare average annual recharge against average annual withdrawals as required by SDCL 46-6-3.1." (COL 11.) Absent any evidence to dispute the Board's conclusion, this Court cannot find the Board erred by not relying on "the best information reasonably available."

In fact, the Board is required to use the "observation well" method:

[T]he 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.

Administrative Rule 74:02:05:07. Buhler determined water availability by using the observation well data and considered addition data from the water budget for the aquifer. (FOF 21-22.) The Board relied on Buhler's testimony that the method he used was correct and took Buhler's recommendation in denying the applications. (Id.)

Applicants argue that the *Hines* Court *requires* the Board to use the "water budget" or hydrologic budget method⁴ to calculate the available water. To the contrary, the *Hines* case does not require the use of the water budget method, or prohibit the use of the "observation well" method. Instead, *Hines* provides guidelines that "[i]f the Board uses an average to calculate the average pumping rate, then the Board should use the average recharge rate." *Hines v. S.D. Dep't of Env't and Natural Res.*, HU04-37, Memorandum Decision, ¶ 15.⁵ Even though it is not mandatory authority for this Court, Buhler followed the guidelines provided in *Hines*.

Additionally, Buhler stated that he rejected the water budget method as not being the best information available. Buhler looked at the water budget data, but testified that there were issues in using water budget methods which is why he rejected those numbers. In reference to DENR Hearing Exhibit 6, which depicts a graph with all the different methods (observation well method on the left side, and water budget method on the right side of the chart), Buhler testified:

A: My point is as you move from left to right, you are increasing the number of variables. As you increase the number of variables, you increase uncertainty slash error.

(HT 30:25-31:3.) Therefore, the Board adopted the observation well method in accordance with Administrative Rule 74:02:05:07, and nothing in the record shows that this is *not* the best information available.

Applicants further argue that Buhler was wrong in rejecting the irrigation questionnaire method. Applicants argue that the irrigation questionnaire—one of the water budget methods—provides the most reliable information to calculate the application rates under the average annual recharge to average annual withdrawal method. However, as stated above, Buhler testified that the irrigation questionnaires and the recharge to acres are not reliable because they contain more

⁴ According to DENR Hearing Exhibit 6, the "water budget methods" include 3 separate methods: irrigation questionnaire, recharge to acres (1), and recharge to acres (2). Applicants individually criticize all three of these methods in their brief. For the purposes of this memorandum, the term water budget will refer to all three methods collectively.

⁵ In *Hines*, the Engineer used each individual year for the withdrawal amount, rather than an average withdrawal of the entire 24 years of available quantities. *Hines*, ¶ 15. Here, Buhler used the entire 32 years of available quantities to determine the average withdrawal, in conformity with the *Hines* court.

variables in the calculation of water availability. Without expert testimony to contradict Buhler's opinion as to the reliability of the irrigation questionnaires or expert testimony to opine as to the correct method, this Court cannot find error in the Board's reliance on Buhler's analysis.

b. Whether Buhler applied the correct average annual irrigation application rate of 9.32 inches per year?

Applicants criticize Buhler's observation well method also on the basis that he did not use the proper application rate to calculate the amount of water available.⁶ Applicants argue Buhler should have used an application rate of 8.71 inches per year as opposed to 9.32, which, using a different method, would have allowed an additional 5,015 to 7,100 acres to be appropriated instead of the 4,686 acres that Buhler's opinion allowed.

DENR argues that Applicants are applying incorrect numbers for these calculations and that there is no legitimate rationale to use a different calculation than what Buhler used. DENR contends that no witness ever testified that Applicants' calculations were the best data or that Buhler's calculations were improper. The only support for Applicants' allegations was made by Applicants' attorney in closing statements at the hearing, and therefore, DENR could not cross-examine anyone to confront this claim. Instead, DENR argues, and the Board found:

This January 30, 2013, analysis [using observation well data from five observation wells] shows that the average annual recharge to the aquifer exceeded the average annual discharge from the aquifer by an average of 3,640 ac-ft/yr for the period since development has been static (2003-2012). The 3,640 ac-ft/yr would be sufficient water to irrigate 4,686 acres using the historic average irrigation rate for this aquifer (9.32 inches).

The average annual application rate is 9.32 inches of water per acre on acres actually irrigated during 1979-

⁶ For this argument, Applicants contend:

In order to determine the number of acres that could be irrigated, the increase of 3,640 acre feet per year is multiplied times 12 and then divided by the application rate for the 2003 to 2011 time period, (8.7 inches per acre). Using these figures, we then are able to determine that 5,015 additional acres could have been irrigated during that same period and are available for appropriation. Buhler used 9.32 inches per acre/per year as an application rate for the time period from 1979 to 2012. That is not the proper application rate.

(Applicants' Brief at 6.) However, Applicants do not cite any source for this this contention.

2011. . . . By contrast, the average irrigation application rate was only 8.71 inches over the period of 2003-2011 when the aquifer was fully developed. In Buhler's expert opinion, this 8.71 inch number reflects climate change (wet conditions) during the period rather than the average irrigation practices. Buhler found in the January 30, 2013, report that the best information available on the average irrigation application rate was the entire period of record of irrigation reporting for the aquifer (i.e. 1979-2011), which was 9.32 inches per acres.

(FOF 30 and 37-38.)

Further, in regards to the application rates, Applicants argue that Buhler's testimony was contradictory and that he stated under cross-examination that the information from a fully developed aquifer from the years 2003 to 2011 was the best available data. Any contradiction, however, was cleared up during redirect examination. Applicants point to the following testimony to support this argument:

Q: And so when you say fully developed from 2003 to 2011, that means the information there should be reliable.

A: We are not building out any more.

Q: So it's the best available data.

A: Right, correct.

(HT 35:5-9.) However, Buhler never stated the *application rate* from this time period (2003-2011) was the best available data. Buhler later clarified that he continued to rely on data from the entire period, since 1979, to determine the application rate because it was the best information:

Q: [Counsel] asked you a couple of times if the 9.32 inches is the best available information on water pumped per acre. Do you recall that?

A: Yes.

Q: And your answer was?

A: For the time period of 1979 through 2011, it is the best available information.

Q: And what is the best – what method that you have used uses the best available information to analyze recharge withdrawal?

A: The observation well method most accurately describes, quantifies, the difference between average annual recharge and average annual withdrawal.

(HT 47:20-48:7.)

Even more, Applicants cross-examined Buhler on using the 8.71 application rate instead, and Buhler specifically rejected that rate:

A: I used the entire time period because we are seeing that the application rate hasn't changed; so we took the application rate back to the very first irrigation questionnaires we got. That's where 9.32 comes from.

Q: But 2003-2011 or '12 is the most current data, correct?

A: For amount of - -

Q: The application rate.

A: Our records show that the application rate hasn't changed with time, and so the application rate in general is the same in the 1980-ish as it is now, and therefore, we took the entire period of record to get the application rate.

(HT 39:6-18.) Buhler was unequivocal in his testimony that the application rate of 9.32, from data dating back to 1979, was the best information available.

The court must "give great weight to the findings made and inferences drawn by an agency on questions of facts." SDCL 1-26-36. Absent some showing from Applicants that Buhler's opinions are not the "best information reasonably available," this Court has no basis to determine that Buhler erred in his opinion or that the Board erred in relying upon that opinion. Applicants proffered no evidence and no expert testimony that the observation well method is the wrong method, or that Buhler used the wrong application rate. Not only was this the best information available to the Board, it was the *only* information available to the Board. Applicants do not meet their burden of showing the Board failed to rely on the best information reasonably available. This Court cannot reverse the decision for the Board absent such a showing.

CONCLUSION

For the foregoing reasons, the Board's decision is AFFIRMED.

Sincerely,



Mark Barnett
Circuit Court Judge