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July 7, 2015

**Via E-Mail and U.S. Mail**

Eric Gronlund  
DENR Water Rights Program  
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**Re: *In the Matter of the Application of the United Order  
of South Dakota, Application No. 2730-2***

Dear Eric:

For the above-referenced matter, please find enclosed an original document entitled *Linda Van Dyke Kilcoin's Response to Applicant's Motion in Limine*.

By copy of this letter, all interested parties have been served by e-mail or U.S. mail. If you have any questions or comments, please advise. Thank you.

Sincerely,

BANGS, McCULLEN, BUTLER,  
FOYE & SIMMONS, L.L.P.

Michael M. Hickey

MMH:ke  
Enclosure

Cc: **E-mail:** Jeanne Goodman; Matt Naasz; Ann F. Mines Bailey  
Rodney Freeman; Chad Comes, P.E.; Cheryl Schrempp Dupris;  
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**U.S. Mail:** William R. Hansen; Mr. and Mrs. David Albrecht;  
Toni Martin; Doug Leshner; Rick Fox; Dean and Delia Johnson;  
Karl & Suzanne Von Rump; and Client

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**STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES  
WATER MANAGEMENT BOARD**

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**IN THE MATTER OF THE WATER  
APPLICATION No. 2730-2, UNITED  
ORDER OF SOUTH DAKOTA.**

**Linda Van Dyke Kilcoin's  
Response to Applicant's  
Motion in Limine**

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Linda Van Dyke Kilcoin, through counsel, hereby responds to Plaintiff's Motion in Limine. Through this response, the parties will be referred to by name.

The United Order seeks to prohibit the introduction of evidence concerning the religion of the Applicant and its individual members, and the details of the organization of the Trust. For the reasons set forth below, Kilcoin resists this motion.

According to the documents produced in this proceeding, the United Order calls itself a common law trust. As set forth in Kilcoin's Motion to Dismiss, a common law trust is not an entity recognized under South Dakota law<sup>1</sup>. Under South Dakota law, a trust can only act through its trustees.

SDCL § 55-1A-32 sets forth the powers of a trustee which are applicable to a trust estate whether established by the terms of a will or other written instrument. SDCL § 55-1A-1. Those specific powers

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<sup>1</sup> Moreover a trust, whether common law or otherwise, is not considered a person under the definitions found in Title 46. See SDCL § 46-1-6 (15).

include the power to prosecute or defend actions, claims, or proceedings for the protection of trust assets. SDCL § 55-1A-32. Certainly, the present action constitutes a proceeding.

Clearly a common law trust does not have a religion. The trustees and the members of the trust may, however, be members of a particular religion. The past practices of those individuals, including their religion to the extent that it impacts their dealings with civil and legal authorities, is clearly relevant as to whether it is in the public interest to issue a permit.

The details of the common law trust are clearly relevant to the issues in the present case. The initial application submitted by the United Order on October 14, 2014, was signed by Mr. Seth Jeffs. That application sought water for the purpose of “suburban housing development.” Whether or not he was properly authorized by a majority of the trustees to act on behalf of the trust, as required by the trust document, is a question which must be resolved.

Mr. Jeffs has been convicted by the federal government of harboring a fugitive felon, Warren Jeffs. Mr. Jeff’s credibility can be impeached by his prior conviction, and Kilcoin should be entitled to inquire about that conviction and the circumstances surrounding the same.

On May 12, 2015, Kilcoin served Interrogatories and Requests for the Production of Documents on the Applicant. Interrogatories 4, 5 and 20 requested the Applicant to supply information about the number of persons being served by the Applicant as of October 14, 2014, the date of the application, and the date of May 12, 2015 (the date the interrogatories were served). The Applicant objected to these interrogatories and now seeks to prevent Kilcoin from even asking about the number of individuals using water.

In an effort to resolve this discovery dispute, Kilcoin offered to stipulate to a protective order. That offer was refused. The refusal to share this very basic and limited information is very disturbing and only heightens the anxiety within the surrounding community. Clearly, the number of individuals being served or potentially going to be served is relevant to an application to use water for a suburban housing development.

I could not find any definition of what constitutes a suburban housing development under our law. The term suburban housing would seem to suggest that people are going to live there and use the water being appropriated. Common sense would seem to suggest that the number of persons being served is relevant to such an application.

Additionally, according to Supplemental Report prepared by Ken Buhler, the current capacity of the onsite wastewater system is 126

individuals. If that is the capacity of the wastewater system, certainly the parties are entitled to know what is the number of people that system is now serving, or going to serve in the foreseeable future.

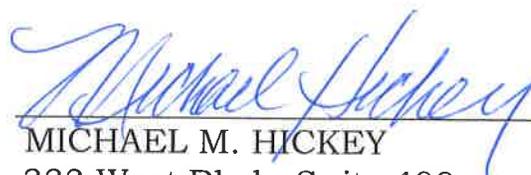
Lastly, one of the elements which the Board must determine is whether the proposed use is in the public interest. SDCL § 46-2A-9. It is submitted that the nature and character of the community intending to use the waters of the state falls within the purview of the public interest. Previously this Board has used this element to protect springs and prevent flooding of adjoining property. It is submitted that it should also apply this standard to review and determine the nature and character of the applicant.

WHEREFORE, Linda Van Dyke Kilcoin respectfully requests the Board to deny this Motion in Limine.

Dated this 7<sup>th</sup> day of July, 2015.

BANGS, McCULLEN, BUTLER,  
FOYE & SIMMONS, L.L.P.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of this legal document upon the persons herein next designated, all on the date below shown, by email or by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to said addressees, to wit:

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which are the last e-mail addresses and addresses of the addressees known to the subscriber.

Dated this 7<sup>th</sup> day of July, 2015.

  
MICHAEL M. HICKEY