MINUTES OF THE 188th MEETING OF THE
WATER MANAGEMENT BOARD
VIA TELECONFERENCE at the
FLOYD MATTHEW TRAINING CENTER
523 EAST CAPITAL AVE
PIERRE, SD

May 7, 2014

CALL TO ORDER: Chairman Comes called the meeting to order at 10:01 a.m. A quorum was present.

The following were present via teleconference at the meeting:

Board Members: Tim Bjork, Rodney Freeman, Chad Comes, Everett Hoyt, Peggy Dixon, and Leo Holzbauer. Jim Hutmacher was absent.

Attorney General's Office: Jeff Hallem.

Legislative Oversight Committee: Senator Chuck Welke.

Other parties: Jay Gilbertson, East Dakota Water Development District; Jeff DeVille, City of Watertown; Reed Bixler, applicant and his legal counsel, Ray Rylance.

The following were present at the Training Center for the meeting:

Department of Environment and Natural Resources (DENR): Adam Mathiowetz, Ron Duvall, Karen Schlaak, Joe Stonesifer, Eric Gronlund, and Jeanne Goodman.

Attorney General's Office: Ann Mines and Matt Naasz.

Legislative Oversight Committee: Representative Mary Duvall.

Other parties: Bob Mercer.

MARCH 6, 2014, MINUTES:
Mr. Comes advised there is a misspelled word on page 15 of the minutes for March 6, 2014; "Hinrs" needs to be changed to "Hines" in reference to the Hines decision.

Mr. Hoyt advised another misspelled word in the third paragraph from the end; "council" should read "counsel" in the first and second lines of the paragraph.

Motion to approve minutes with changes as stated above by Freeman, seconded by Hoyt. Motion carried.

NEXT MEETING: July 9-10, 2014 in Pierre. Mr. Hoyt advised he will not be present.

STATUS AND REVIEW OF WATER RIGHTS LITIGATION: Mr. Hallem stated the only litigation currently pending is the Peterson appeal and that is in the briefing stage. A decision will not be made before the July meeting.

ADMINISTER OATH TO DENR STAFF: The court reporter administered the oath to the DENR Staff who intend to testify during the meeting.

CANCELLATION CONSIDERATIONS:

Mr. Gronlund stated that the board packet included a table on the cancellations scheduled for today. Also in the packet is the notice scheduling today's hearing that was sent to all the permit holders, along with the chief engineer's recommendation. There are 20 water rights or permits scheduled for cancellation today. DENR did not receive any response to the notice of today's hearing. DENR does make every effort to personally contact the permit holders to discuss and try to answer any questions prior to scheduling the water right for cancellation.

Mr. Gronlund asked the board to note the cancellation consideration for Oaklane Colony. With respect to Water Right 2813-3, only a portion of the water right will be cancelled. The water right was for two quarter sections and the colony built a dairy on one of the quarter sections and ceased irrigation. If the board does cancel that portion, that water right will be reissued for 1.77 cfs for irrigation of 124 acres.

Motion to cancel the water rights and permits as listed and as recommended by the chief engineer by Hoyt, seconded by Bjork. Motion carried.

WATER PERMIT APPLICATION NO. 4134A-3, BIXLER FARMS:

Ms. Mines stated Mr. Buhler is not present today and Mr. Gronlund will be testifying on his behalf.

Ms. Mines offered DENR Exhibit 1, the agency file, which was accepted into the record.

Appearances:

Ms. Mines and Mr. Naasz, representing the chief engineer and the Water Rights Program.

Mr. Rylance, counsel for Reed Bixler.

Reed Bixler, water permit applicant.

Mr. Hallem went over what was received by the board prior to this matter.

Mr. Gronlund presented Ken Buhler's staff report.

Mr. Gronlund stated Application No. 4134A-3 proposes to amend Water Right No. 4134-3 by transferring the acreage authorized for irrigation and point of diversion to new locations. Water Right No. 4134-3, held by Richard Boomsma authorizes the diversion of water from one well located in the SW¼ SE¼ Section 10, T113N-R64W at a maximum rate of 1.33 cubic feet of water per second (cfs). The water right authorizes the irrigation of 128 acres located in the SE¼ Section 10, T113N-R64W. The diversion point proposed by Application No. 4134A-3 is to be a well located in the SW¼ SE¼ Section 25, T115N-R63W. Application No. 4134A-3 proposes a permit authorizing the irrigation of 128 acres located in the E½ SW¼, SE¼ Section 25, T115N-R63W. The water source for this irrigation system is the Tulare: Western Spink/Hitchcock aquifer and no increase in the diversion rate or number of acres irrigated are requested by this application.

The application proposes to move the irrigation and diversion approximately 12 miles to the northeast into Spink County (seven miles NE of the town of Hitchcock). The aquifer remains the TWSH aquifer and no increase in diversion rate or number of acres are requested. Water Right No. 4134-3 was approved in 1979 and licensed in 1982 based on the level of development.

SDCL 46-5-34 provides the statutory authority allowing an irrigation water right to be severed from one parcel of land and simultaneously transferred to another parcel if it becomes impracticable to use all or any part of the water beneficially or economically for irrigation on the current land. The land where the water right is currently appurtenant is owned by Mr. Boomsma. Mr. Boomsma submitted a letter expressing his desire to transfer this water right to Bixler Farms. The letter also provides an explanation for some periods of nonuse such as wet conditions in the 1990's and enrollment in CRP.

Bixler Farms filed the application stating the basis for the transfer is the enrollment in CRP since the ground has become inundated with water due to its pot hole nature.

DENR's review included looking at past water use under Water Right No. 4134-3, FSA aerial photos and the potential for well interference. Well interference has not been an issue from the TWSH aquifer. The aquifer is under unconfined conditions in this area and drawdown from this proposed diversion is not expected to adversely impact existing users.

The FSA aerials from 2004, 2008, 2010 and 2012 were reviewed. The maps confirm that this quarter section could be characterized as having pot holes with portions of the quarter section inundated with water.

Table 1 on Page 2 of Mr. Buhler's report represents the irrigation questionnaire reporting since 1985. This shows that 1988 was the last time the land authorized by Water Right No. 4134-3 was irrigated. The table shows 2 four year periods of no irrigation without an explanation (1989 – 1992 and 1994 – 1997) and an 8 year period the land was in CRP.

The period of the early 1990's to mid-1990's were historically known as a wet period in South Dakota and the Board has in the past determined in this area that legal excuse exists. Administrative rule provides for legal excuse when water use under existing climatic conditions would result in a waste of water.

Further the Beadle County FSA office was contacted to confirm the period the land was enrolled in CRP. The actual dates of enrollment were 1997 through 2006. 46-5-37.2 provides that land placed in an acreage reserve program is an exception to the 3 year forfeiture for nonuse statute as long as the source is not fully appropriated and does not prevent approval of new permits from the source.

When a matter of forfeiture for nonuse arises, the burden of proof lies with the state. In this case, based on the past climatic conditions, comments on submitted irrigation questionnaires, review of FSA aerial photos, and a period of enrollment in CRP, the state did not believe it could meet the burden needed in order to bring the matter before the Board for cancellation. Therefore, DENR feels that legal excuse likely exists for the periods greater than three years.

The Chief Engineer's recommendation is for approval with the standard well interference, well construction and irrigation questionnaire qualification. The application was public noticed in the Redfield Press and Huron Plainsman and no petitions to intervene were filed.

Responding to questions from Ms. Mines, Mr. Gronlund stated based on the assessment the FSS aerial photos, the land authorized for irrigation is not conducive to irrigation. The application does not increase in the number of acres, it does not impair any existing rights, and it is deemed of beneficial use.

Responding to a question from Mr. Hoyt, Mr. Gronlund stated DENR does not get involved in the financial considerations between landowners when a water right is transferred to a different person. DENR only follows the statute as far as allowing the transfer.

Mr. Rylance stated he agrees with the chief engineer's report and recommends that the board approve the water permit.

In response to Mr. Hoyt, Mr. Rylance stated that Mr. Bixler did not buy the permit from the previous holder. The previous holder is a friend of the family and the permit is to be transferred without any financial consideration.

Mr. Hoyt stated the fear is that water rights can be sold once obtained.

In response, Mr. Freeman stated that it is not relevant at this point in time, not only to this case, but future cases. The legislature would need to tell the board that it is a relevant consideration.

Mr. Hallem stated there is no prohibition for consideration; it will be considered the same as other licenses. The parties are allowed to do a transfer under agreements they have and whether or not there was consideration will not be an issue for the board. If there is a secondary market, that will be an issue for the legislature to decide whether or not that is something that should be addressed or left to the individual parties.

Motion to approve Water Permit Application No. 4134A-3, subject to the qualifications of the chief engineer by Freeman, seconded by Holzbauer. Motion carried.

Mr. Rylance stated he will waive finding of facts and conclusions of law.

GENERAL DISCUSSION OF IMPLEMENTATION OF HOUSE BILL NO. 1015:

Ms. Goodman stated Secretary Pirner appeared before the board during the March board meeting to go through the department's legislation and gave a brief discussion on House Bill (HB) 1015. Shortly after the March board meeting the governor signed the bill and it will become effective as of July 1, 2014. The bill creates an equitable process to handle water right applications submitted for aquifers determined to be fully appropriated.

Ms. Goodman stated the presentation she will go through is available on the department's website if anyone would like to view it and follow along. Starting with step one the board will determine if an aquifer is fully appropriated. The legislation requires that within 30 days of the final decision that the aquifer is fully appropriated or for aquifers determined fully appropriated prior to July 1, 2014, when the legislation goes into effect, there will need to be a public notice. The public notice states the board's decision of a fully appropriated aquifer as well as provides a 30 day period in which the department will accept applications for future appropriations if water is determined to become available for that aquifer. In the meantime, any applications that are submitted prior to the board's final decision that the aquifer is fully appropriated will not be included in the process but handled as all applications are handled now.

Mr. Hoyt asked if the applicant, in an event of a denial, is free to avail themselves to the new process.

Ms. Goodman answered that the applicant of a denied application may submit the application during the 30 day window when public noticed under this new law.

Ms. Goodman stated that the second step in the process is that the Water Rights Program will accept applications during that 30 day period. All applications submitted within the 30 days will be given a priority of the 30th day. As legislation indicates, no more than one application will be accepted for the same acreage. This is to avoid one person from submitting several applications for the same acreage in the hopes of having a better opportunity to be higher on a priority list. Any application that is submitted after the board's final decision and prior to the 30 day period will be given a priority date of the 30th day. If DENR receives applications that are determined to be incomplete, those applications will be returned to the applicant giving them 30 days to respond and complete the application. If that application is returned complete within that timeline, that application will also be given a priority date of the 30th day. Any applications that are received after the 30 days will be given a priority of the date that they are received and will not be part of a random priority draw.

Ms. Goodman stated that step three is for the board to create a priority list of all the accepted applications. The legislation requires that no later than the second regularly scheduled board meeting after that 30 day window in which applications are accepted, the board will hold a meeting to determine a priority based on a random selection process. That random process,

to be approved by the board, can be conducted a number of ways. DENR will present the board with options to be considered. The random selection process in the development of the priority list will be included as an agenda item at the October board meeting. From there the board can take the information and consider several things as they make a decision on a final random selection process. Following a discussion, DENR will have the board select a process via motion and a roll call vote. As the board is considering and choosing a process, a number of things should be considered, including the number of applications, public input, board member acceptability, legal acceptance, and ease of documentation. Once the random selection process is decided, a priority list will be made with the applications that have been submitted and accepted.

Mr. Rylance asked about applications that are in process and turned down prior to the 30 day notice and the 30 day window.

Ms. Goodman advised any applications that are received before the board makes a final decision that an aquifer is fully appropriated will be handled as all applications are now and will be recommended for approval, denial, or deferral. After the board makes the final decision on the fully appropriated designation and before the 30 day window, those applications will be received and held with a priority date of the 30th day of the window.

Mr. Hallem stated if there is an appeal like there currently is in the Peterson case regarding whether the aquifer is fully appropriated whether DENR will look at the board's final decision?

Ms. Goodman answered DENR believes so.

Ms. Goodman stated that step four states the process for applications after they are in a priority list and will be held for five years. During this time the Water Rights Program will conduct a review of that fully appropriated aquifer. That review is going to include a number things, including staff looking at all permits and licenses in the aquifer, review to determine those permits that can be licensed, allowing the last application to be developed and determining if cancellations of permits or licenses are possible for non-use. If necessary, DENR can conduct additional hydrogeologic studies. The annual irrigation questionnaire will be reviewed as well. Once the five year review is done, there will be a public notice scheduling hearing before the board to hear the results of that five year review. The public notice will be in the area that the aquifer occurs and all the applications on that priority list will be notified. Those applicants will be required to do two things, respond to the Water Rights Program with their desire to maintain eligibility and submit a 10 percent fee of the original filing fee to maintain eligibility.

Ms. Goodman stated the last step of the process is the board holding the five year review hearing. During that time the DENR staff will present what they have done during the review and the results of that review. The board will then decide whether there is unappropriated water available based on the information presented. If there is water available the board can approve applications in the order on the developed priority list. Any remaining applications that are still on the list after all the water is appropriated will go back and be held for another five years. However, if it is determined that there is remaining water available after all the

applications have been satisfied, then DENR will open up the aquifer for general appropriation, as DENR does on applications now.

Ms. Goodman stated as the legislation was drafted DENR had thoughts regarding speculation with someone filing applications for lands that are not irrigable or the aquifer is not present at that sight. The legislation does include that no transfer of a permit issued under this process is allowed until the water is placed to beneficial use as specified in the permit.

Mr. Bjork asked what will prevent someone from applying for a permit with the intent of selling it to another landowner to transfer to other land.

Ms. Goodman stated if someone files an application for a section of land it will first have to be developed on the originally permitted land prior to transferring it.

Mr. Freeman asked if that is allowed by statute, since there is three years to develop it.

Mr. Hallem stated section eight of the bill specifically addresses needing to develop at original site and this section is the controlling provision.

Ms. Goodman stated because the bill goes in to effect on July 1, 2014, and DENR does have aquifers that have been determined to be fully appropriated, DENR will first public notice the Floyd:Pearl Creek aquifer. DENR anticipates in that public notice identifying the 30 day window within which DENR will accept applications as August 1 through September 1. This is longer than 30 days but the last two days of the month are on a weekend. DENR will come before the board at the October meeting to demonstrate proposed random selection processes. The board will have an opportunity to informally, without any applications, see how a random process will work. At that meeting, a decision will be made on which process the board prefers. At the December board meeting, DENR will come before the board prepared to go through that process with the applications that have been received, and have the board develop a priority list for the Floyd:Pearl Creek aquifer. At the July 2014 meeting, with the effectiveness of HB1015, DENR will begin implementation and review of the Floyd: Pearl Creek aquifer. The review will continue until July 2019 when the five year period is completed. A review before the board will be public noticed notifying all the applicants of the five year review and the results. In December of 2019, the board will conduct their five year review hearing. As Mr. Hallem mentioned, there is an appeal pending on the Tulare:Western Spink Hitchcock aquifer. DENR believes the next item in the schedule for implementation of HB1015 will include the Tulare:Western Spink Hitchcock and the Tulare:East James aquifers after the final decision is made on the appeal.

Mr. Hallem stated there will be a number of formats that DENR may be presenting; all those will have a cost associated. Equipment will need to be purchased for the random selection. Mr. Hallem asked if there was a determination on how to proceed with the cost of some of the items that will need to be purchased.

Ms. Dixon asked if DENR was aware of the randomizer in Excel that can be used.

Ms. Goodman stated that DENR has looked at that option as well as others.

Mr. Comes stated he agrees with Ms. Dixon, it would appear that a development of an Excel spread sheet may be suitable.

Mr. Bjork inquired regarding Ms. Goodman's comment about wanting to talk about the process before the October meeting.

Ms. Goodman advised her question was if the board agreed that DENR should have a discussion at the October board meeting on the different types of random selection processes along with a demonstration. DENR has discussed having the board look at all the options, make a decision and direct the staff as to what, if anything needs to be purchased. If that is done at the October meeting, it would be ready for the December meeting when the list would be completed.

Mr. Hoyt asked if DENR and other board members feel the statutes are sufficient and clear enough setting out a procedure to follow. Or does the board need to consider adopting any further rules.

Mr. Hallem advised Mr. Hoyt that a rule is not necessary. From a policy stand point, once the board decides upon the random selection process by a motion and directs that it will be placed on the DENR website, and be included in all materials to all applicants, that will suffice.

Ms. Goodman stated she agrees with Mr. Hallem, adding that the legislation did not have any implementing authority for rule making for the board. DENR believes that the statute was developed with the intent that will work with the current water law.

Mr. Comes stated on the presentation given by Ms. Goodman, on the last slide dealing with step three there was a bullet that stated when choosing a process what the board may consider, and it listed a number of items. Mr. Comes asked if DENR anticipates identifying a couple of random selection processes and providing commentary on each process related to legal acceptance and ease of documentation. This may include providing for the board pros and cons of those two areas and any others DENR might see.

Ms. Goodman stated the staff could include that as part of the presentation in the October meeting. DENR could also offer its opinion on public perception for the board's consideration as well.

Mr. Hoyt advised he noticed that the Board of Minerals and Environment (BME) adopted conflict of interest rules and suggested that the Water Management board review what the BME board has done and whether or not it would be appropriate for this board to adopt the same rules for actual and potential conflicts.

Mr. Bjork advised he agrees with Mr. Hoyt.

Mr. Comes stated that should be put on the agenda for the July meeting.

Ms. Goodman stated that will be added to the agenda.

ADJOURN: Chairman Comes declared the meeting adjourned at 11:08 a.m.

A court reporter was present for the meeting and transcript of the proceedings for the proceedings from May 7th, 2014, may be obtained by contacting Carla Bachand, PO Box 903, Pierre, SD 57501-0903, telephone number (605) 224-7611.

The meeting was also digitally recorded and a copy of the recording is available on the department's website at http://denr.sd.gov/boards/schedule.aspx.

Approved this 10th day of July.

Chad A Comes

Chairman, Water Management Board

Leo Heyloner

Secretary, Water Management Board