

AMENDED MINUTES OF THE 190TH MEETING OF THE
WATER MANAGEMENT BOARD
FLOYD MATTHEW TRAINING CENTER
523 EAST CAPITAL AVE
PIERRE, SD

October 22 & 23, 2014

CALL TO ORDER: Chairman Chad Comes called the meeting to order at 8:30 a.m.

APPLICATIONS: Findings for Water Permit Application No. 7347-3, Michael Sentell; Findings for Water Permit Application No. 7983-3, Richard Beitelspacher; Cancellation Consideration of Water Right No. 1613-3, Rex Binger; Deferred Water Permit Application No. 7701-3, Cody Horstman; Deferred Water Permit Application Nos. 7921-3 and 7988-3, Owen and Lamont Peterson; Water Permit Application No. 8002-3, Todd Block; Water Permit Application Nos. 8006-3 and 8013-3, Riverside Hutterian Brethren; Water Permit Application No. 1589A-1, Elk Creek Water Trust; Water Permit Application No. 1942-1, James Chambliss; Water Permit Application No. 2633A-2, Southern Black Hills Water System.

The following were present at the meeting:

Board Members: Jim Hutmacher, Tim Bjork, Everett Hoyt, Rodney Freeman, Chad Comes, Peggy Dixon, and Leo Holzbauer. Tim Bjork was absent on October 23rd.

Department of Environment and Natural Resources (DENR): Ron Duvall, Mark Rath, Eric Gronlund, Jeanne Goodman, Adam Mathiowetz, Genny McMath, Karen Schlaak, Ken Buhler, Bracken Capen, Whitney Kilts, Brian Beel, Gail Jacobson – Water Rights; Bill Markley, Tom Brandner, Matt Hicks – Groundwater Quality.

Attorney General's Office: Jeff Hallem, counsel to the board, Ann Mines-Bailey and Matthew Naasz, counsel to the Water Rights Program.

Legislative Oversight Committee: Representative Mary Duvall and Senator Jim White.

ANNUAL ELECTION OF OFFICERS: Motion to approve Chad Comes as Board Chairman, Jim Hutmacher as Vice Chairman, and Leo Holzbauer as Secretary by Freeman, seconded by Bjork. Motion carried.

APPROVE July 10, 2014, MINUTES: Motion to approve amended minutes by Freeman, seconded by Bjork. Motion carried.

Mr. Holzbauer advised that the agenda does not reflect the proposal of rules for conflict of interest that was brought up by Mr. Hoyt during the July 2014 board meeting.

Mr. Hoyt stated that he would like to discuss the issue at the December 2014 board meeting.

Mr. Gronlund advised he will add the issue on the agenda.

TENTATIVE 2015 MEETING SCHEDULE: March 4-5, May 6-7, July 8-9, October 7-8, and December 2-3. Approved as the tentative schedule for 2015.

NEXT MEETING: December 3-4, 2014, in Pierre.

STATUS AND REVIEW OF WATER RIGHTS LITIGATION: Mr. Hallem stated the Peterson case was appealed to circuit court and heard by Judge Barnett, after argument by counsel from the Water Rights Program as well as Mr. Rylance. Judge Barnett stated that based upon the record, he agreed that Mr. Buhler did not make an error in his decision and the board's decision was accurate based on the information from Mr. Buhler's report. The time has passed for it to be appealed to the Supreme Court, so this is the final decision in the matter.

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

UPDATE ON WATER RIGHTS PROGRAM ACTIVITIES: Ms. Goodman stated there have been a couple of personnel changes within the program. Joe Stonesifer, who was a natural resources engineer, resigned his position with Water Rights in June of 2014 and accepted a position in the bridge division in the Department of Transportation. Whitney Kilts was recently hired to fill Joe's position. She is a graduate of SDSU with a bachelor's and master's degree in civil engineering. She will be working with ground water permits, as well as assisting Tim Schaal with dam safety inspections, and will likely testify before of the board in the future.

Nick Emme, a program assistant who worked on the observation well network, resigned his position in August, and accepted a position within the department for the Waste Management Program working on recycling issues. Just recently Water Rights hired Brian Beel to fill that position, and he will be working maintaining the observation well network. He is a graduate of the University of Missouri with a degree in Fish and Wildlife Management.

Ms. Goodman stated the next item is the Missouri River water levels. The water levels in the Missouri River mainstem dams have reached higher than normal elevations after an unusual amount of precipitation in August of this year. This caused significant run off into the upper state's reservoirs. For example, at Oahe Dam the water rose to a level that was just two feet below the level in May of 2011. Following the annual operating plan in the master manual procedures, the Corps of Engineers increased their projected releases from the mainstem dams from Fort Peck in Montana to Gavin's Point in South Dakota for September through December. This was done to meet the lower flood elevation levels by March 1, 2015. The water levels are currently dropping, and DENR will continue to monitor those water levels.

Ms. Goodman stated the third item that the board is being updated on today is a proposed US Forest Service ground water directive. DENR sent the Board a copy of the DENR comment letter to the US Forest Service regarding the new ground water directives. DENR has also been working with the Western States Water Council and the Western Governors Association on these directives to ensure that the Forest Service continues to work with the states.

Mr. Hoyt stated that it was indicated that in the recent past that South Dakota was the only state to have an anti-ground water mining law and asked if DENR believes it is appropriate

for the federal government to become involved in some instances in the southwest water situation.

Ms. Goodman advised that each situation will have its own set of circumstances. DENR's concern is whether the federal government should be involved in water appropriation or water use issues, which are the state's jurisdiction. The current state permitting system allows the Forest Service to intervene in the process.

Mr. Bjork asked what the Forest Service is trying to do.

Ms. Goodman stated that the proposed directives imply that the agency will be involved anytime there is a water permit application for water use. Forest Service will have approval authority if a special use permit is to be issued within Forest Service's land. If there is a water use involved, then their permitting process will have the ability to decide whether a state water use permit can be exercised or not.

Mr. Comes asked if DENR has any indication or feedback on what the US Forest Service is considering in responding to the comments provided by the states.

Ms. Goodman stated on a conference call recently setup by the Western States Water Council with the US Forest Service staff, we were advised they have a large number of comments to respond to, including South Dakota's. Forest Service is in the process of reviewing all of the comments and developing responses to those but have committed to Western States Water Council to work through them along with any other agency that might be interested in what the final directive may look like. They are researching to see how much change can be made and how much state input they can incorporate into the final rule. The directive has been advertised, and the comment period was extended until October 4, 2014.

Mr. Hutmacher stated that the Corp of Engineers is starting to charge for permits and inquired as to what the status is of surplus water and fees.

Ms. Goodman stated she could bring an update on that issue to the December 2014 meeting, as it has not been finalized and the discussion is ongoing.

Ms. Goodman stated the last item to bring to the board's attention is the 20 year limits on the Madison aquifer permits. South Dakota Codified Law (SDCL) 40-2A-20 limits the terms of water use from the Madison aquifer in certain western river counties to 20 years. SDCL 46-2A-21 allows cancellation or amendment of those permits after the 20 year limitation. There are now permits for the first time issued for the Madison aquifer, which have reached or will reach in a short period of time, the 20 year limitation. Staff is working on those permits, and the Board will see those coming before them at a future meeting.

**PRESENTATION OF RANDOM SELECTION PROCESS FOR IMPLEMENTATION HOUSE
BILL NO. 1015:**

Ms. Goodman stated House Bill (HB) 1015 is an act to create an equitable process to handle water right applications submitted for aquifers that are determined to be fully appropriated by the Water Management Board. This bill became effective on July 1, 2014, and modified language in the current SDCL 46-2A-7; it also added seven new sections. These sections were codified in 46-2A-7.1 through 46-2A-7.7. The board asked Water Rights staff to prepare a presentation of examples for a random selection process to be considered in the implementation of HB 1015, and staff is prepared to present those to the board today.

Ms. Goodman stated that the board was informed that there are three aquifers that are considered fully appropriated. Those three aquifers are Floyd Pearl Creek, Tulare Western Spink Hitchcock, and the Tulare East James. DENR originally intended to begin the implementation of HB 1015 with the Floyd Pearl Creek aquifer. However, in researching the records of the Water Management Board decision with this aquifer, DENR did not find a final decision being made that the aquifer is in fact fully appropriated. If the board recalls, the law does refer to implementing that law once the board has made a final decision. Any further action under HB 1015 for that aquifer will be delayed until another permit application is received and a final decision is made. The board has made a final decision on the Tulare Western Spink Hitchcock and the Tulare East James. The appeal process is complete for the Tulare Western Spink Hitchcock case. DENR anticipates proceeding with the public notice of the 30 day window during which applications will be accepted, according to HB 1015.

Mr. Duvall stated the staff intends to present three methods for consideration of random selection. He will do a general introduction as if the board were actually doing the hearing. This introduction will be similar for each method. Mark Rath, Adam Mathiowetz, and he each will present a specific method.

GENERAL INTRODUCTION

Mr. Duvall stated that today's agenda item is to prioritize a list of applications from the Blankety Blank aquifer, determined by the board to be fully appropriated, using a random selection process. The aquifer was determined to be fully appropriated in July of 2014. By statute once that went into effect the board is obligated to public notice a 30 day application window in which people can apply for permits from this aquifer. Notice of the board's decision was also included in the notice. A public notice was published in the X, Y, and Z newspapers and posted on the DENR website as required by the statute. In addition, DENR did a public service announcement. Following the public notice, five applications were received within the 30 day window to submit applications. The applications were determined to be complete by DENR. It should also be noted that after the 30 day window expired, two additional applications were submitted. Since they were submitted outside of the 30-day window, they do not qualify for today's random selection process. Those two applications as well as any others that are submitted in the future will be junior to the five applications that are the subject of today's hearing. A list of those five applications that were submitted is available on the registration table. As you look at the list, note that there is more than one application submitted by one person, and that is okay since it is for different pieces of land. The law does not allow more than one application for the same piece of property. On the list you will see an application number that is assigned to each applicant. That application number has no significance in the order of priority ranking. That application number simply identifies an

application with an applicant. There was a notice of today's hearing to those five applicants; they are not required to be here in order to participate in the process.

Mr. Duvall presented the first method.

Mr. Duvall stated each application on the list has a prepared index card. The index cards will be read through one at a time. As they are read aloud the Vice Chairman and the board secretary will keep track to ensure there is a card for every applicant on the list. After they are read and shown to the audience, they will be handed to the Vice Chairman. They will then roll the card and place it into the tube. The reason for the tubes is to ensure uniform size and so you cannot accidentally draw two at a time. The tubes and container the tubes are placed into are shown to the audience to ensure that there is nothing in them, and told they can come up to examine the inside of the container. After all the tubes are placed in the container, the Vice Chairman will mix them up. The tubes with the index cards are then drawn one at a time and assigned a ranking number, with the first tube drawn being number one. Once an application is assigned a ranking number that number is set, it cannot be changed or traded with another application.

The applications are then read back by the board secretary in order from highest ranking to the lowest ranking. An order shall be entered by the board concerning the ranking and be placed in the file for each applicant and be available for anyone who would like a copy. After the process is completed, five years from now, there will be a review of the aquifer to determine whether or not any additional water has become available. If it is determined that water is available, it will be made available to applicants in ranking order on the priority list. Some pros of this method are that it is understandable and a common practice for drawings and it is open to inspection. The primary con is the time consuming nature if there are numerous applications.

Mr. Hoyt stated if there is more water available, how the board will know the difference between priority dates in the records.

Mr. Duvall stated all applications will take a common priority the 30th day of the 30 day window for priority date, but the random priority ranking will document the priority order for all the applications with the common priority date.

Mr. Holzbauer asked if the land is sold and there is a water permit with a priority ranking number, will that ranking number stay with the land.

Mr. Duvall stated that the priority number will stay with that land if sold.

Mark Rath presented the second method.

Mr. Rath stated that this scenario is almost the same as the last, only using ping pong balls with one application number written on each ball. Some pros with this method is that it is easily understood by the public, the use of the container to mix the ping pong balls provides a randomness factor, it is transparent and open for inspection. Some of the cons are that it can be time consuming if there are several applications, prolonged drawing creates an

opportunity with things going wrong, and handling multiple ping pong balls can have the potential of having things not work out as well.

Adam Mathiowetz presented the third method.

Mr. Mathiowetz stated he is presenting a method using Microsoft Excel, using the random number generator. Mr. Mathiowetz handed out a sheet explaining the formula used in Excel to randomize the numbers. A random number generator equation has been set up in Excel, along with a list the applications submitted during the 30 day window and completed according to DENR rules. The documentation will be saved to a dedicated flash drive with a label so that DENR can have just those files, per aquifer, on a dedicated flash drive. There are two equations in the hand out; the first is the random number equation, which creates a random number between zero and one. The second is a ranking in order equation that takes the random number and assigns it a value.

Mr. Mathiowetz stated all applications will be read aloud to make sure they are all accounted for; this will be confirmed with the Board Vice Chairman and the Secretary. The Board Chairman will then roll two dice. The number shown on the dice will indicate how many times the F9 key is to be pressed, slowly, to randomize the numbers.

Mr. Mathiowetz stated the secretary will then read the application numbers in the ranking order. The list is then saved as a PDF file on the flash drive. Some pros of this method are that it is mathematically sound and fast. The cons are the “black box” manure and it not being readily open to inspection.

Ms. Dixon stated that some people may not believe or be comfortable with the technology, or when saving it to the flash drive people may think something was changed in the process.

Mr. Bjork stated as the process is developed we need to be respectful to the applicants. It will be a tough process no matter how the board chooses to proceed, but we need to make sure which ever method is selected, it is respectful.

Ms. Dixon stated they use ping pong balls for the lottery, and people are used to that method and seem to trust it.

Mr. Hoyt asked if there are other states that use this random selection process and does there seem to be a prevailing practice.

Ms. Goodman stated while going through these processes and talking about other methods DENR realized that the lottery does do a variety of things in different states. DENR did contact the South Dakota State Lottery office to ask questions and get recommendations. When jury panels are selected, that is also done in a random selection process. Water Rights staff attempted using a lottery wheel or drum, but it did not seem to mix the ping pong balls pr cards very well.

Ms. Mines-Bailey stated she did look in the law books, and nothing was found in case law that would endorse a particular method of random selection.

Ms. Goodman stated that a decision does not have to be made today. If there are further questions or ideas on things that DENR should look into, they are open to those thoughts or opinions.

Ms. Comes asked when the decision has to be made.

Ms. Goodman stated before the board would implement one of these methods, the presentation could be repeated. If a public notice is published after the December board meeting, DENR would ask that the board observe the different methods again at the March 2015 meeting. At that time the Board can direct DENR as to which method they prefer.

Mr. Duvall stated the process for any one particular aquifer is not being delayed. DENR does ask that they be notified a meeting in advance on which method they would like to use, so they can get everything set up. By law the board has two board meetings to do the ranking.

Mr. Hutmacher stated that the older generation may not trust the computer version of the random selection process.

Mr. Freeman stated that time should not be a critical factor, as far as how much time it will take to prepare and conduct the random selection process. The computer seems too complicated, and a lot of people may not understand that process.

Mr. Duvall stated the board does not have to make a decision today.

Ms. Goodman stated that, as a reminder, DENR can transfer ownership of a permit if the land is sold. DENR can also currently transfer a permit to other land if there are certain conditions met. Under this law there is a section that is very specific, and it states that no water permit application approved pursuant to this process may be transferred until the water has been placed to beneficial use as specified in the permit. If there is a permit application submitted for a certain quarter of land that water has to be put to beneficial use on those acres before it can be transferred.

Mr. Holzbauer asked if there will be a limited number of applicants for this selection method.

Ms. Goodman stated there is nothing under the law that would limit the number of applications, just that there cannot be two applications for the same piece of land.

ANNUAL APPOINTMENT OF PREHEARING OFFICER: Ms. Mines-Bailey stated the board can appoint who they would wish to have as the Pre-Hearing Chairman, to hear motions, and resolve discovery disputes as necessary.

Mr. Comes stated that Mr. Freeman is willing to serve as the Pre-Hearing Chairman for one more year. Mr. Freeman agreed.

Motion to appoint Rodney Freeman as the board's Pre-Hearing Chairman by Holzbauer, seconded by Hutmacher. Motion carried.

PERIODIC REVIEW OF CLASSIFICATIONS AND GROUND WATER QUALITY

STANDARDS, ARSD 74:54:01:04: Mr. Hicks stated periodically the classifications and standards are reviewed and updated as necessary, as required by state statute. Current administrative rule classifies ground water with less than 10,000 milligrams per liter concentration of total dissolved solids as having the beneficial use of drinking water. This coincides with the current Environmental Protection Agency definition of the underground source of drinking water. As a result South Dakota Ground Water Quality Standards is based on the Environmental Protection Agency (EPA) drinking water standards. The department has reviewed the state standards and the EPA's drinking water standards, compared the two, and deemed that there is no change needed. As a result no changes are being recommended.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION ON WATER PERMIT APPLICATION NO. 7347-3, MICHAEL SENTELL:

Appearances via telephone: Josh Finer, attorney for Michael Sentell, applicant.

Mr. Hallem stated what was previously provided to the board in this matter.

Motion to approve the rulings by Bjork, seconded by Hutmacher. Motion carried by roll call vote. Board members Bjork, Comes, Holzbauer, and Hutmacher all voted in favor of the motion. Board members Hoyt, Dixon, and Freeman were absent during the initial hearing and did not vote on the motion.

Motion to approve findings of facts, conclusions of law, and final decision by Hutmacher, seconded by Holzbauer. Motion carried by roll call vote. Board members Bjork, Comes, Holzbauer, and Hutmacher all voted in favor of the motion. Board members Hoyt, Dixon, and Freeman were absent during the initial hearing and did not vote on the motion.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION ON WATER PERMIT APPLICATION NO. 7983-3, RICHARD BEITELSPACHER:

Mr. Comes stated that Mr. Beitelspacher is present.

Mr. Hallem stated what was previously provided to the board in this matter.

Motion to approve rulings with corrections by Hutmacher, seconded by Bjork. Motion carried by roll call vote. Board members Bjork, Comes, Holzbauer, and Hutmacher all voted in favor of the motion. Board members Hoyt, Dixon, and Freeman were absent during the initial hearing and did not vote on the motion.

Motion to approve findings of facts, conclusions of law and final decision by Bjork, seconded by Holzbauer. Motion carried by roll call vote. Board members Bjork, Comes, Holzbauer, and Hutmacher all voted in favor of the motion. Board members Hoyt, Dixon, and Freeman were absent during the initial hearing and did not vote on the motion.

CANCELLATION FOR CONSIDERATION OF WATER RIGHT NO. 1613-3, REX BINGER:

Appearances: Ann Mines-Bailey on behalf of the Water Rights Program.
Rex Binger, the water right holder.

Mr. Hallem stated what was previously provided to the board in this matter.

Mr. Binger gave his opening statement.

Ms. Mines-Bailey offered DENR Exhibit 1, the agency file, which was admitted into the record.

Ron Duvall was called to testify.

Mr. Duvall went over his background with the Water Rights program.

Water Right No. 1613-3, Richard Jessen, was approved with a November 4, 1968, priority date for 1.85 cubic feet of water per second (cfs). An inspection completed in 1973 found towlines and gated pipe being used to irrigate 103 acres from an 83 feet deep well. Based on the inspection, a water license was issued April 6, 1973, for irrigation of 103 acres with a diversion rate of 1.85 cfs.

Answering questions from Ms. Mines-Bailey, Mr. Duvall stated that Water Right No. 1613-3 authorizes irrigation of SE ¼ Section 9, T115N, R65W from a well into the Tulare Western Spink Hitchcock Aquifer. Records on file with the Water Rights Program show that the land was purchased in 1987 from the Federal Land Bank, and DENR was informed the irrigation system had been removed from the property. Based on irrigation questionnaire findings, the last reported irrigation was 1977. The acreage was noted as being in the Conservation Reserve Program between 2001 and 2008. Based on this information the Chief Engineer is recommending cancellation of Water Right No. 1613-3 due to abandonment and/or forfeiture.

In 1993 Mr. Binger submitted an irrigation questionnaire indicating he had purchased the property covered by Water Right No. 1613-3 in 1987. Mr. Binger indicated prior to acquiring the property the irrigation system had been leased and was removed from the property. Further, Mr. Binger indicated he had not irrigated but may, if it got dry. This note on the irrigation questionnaire prompted a letter dated May 18, 1994, from Genny McMath with DENR that the water right may be subject to cancellation due to lack of use. The letter indicated that prior to scheduling the water right for cancellation DENR would like to hear from Mr. Binger on the matter. No response from Mr. Binger is noted in the water right file.

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In 2012, Mr. Binger indicated on his irrigation questionnaire a desire to transfer the acreage covered by the water right to other acreage more suitable for irrigation by means of a center pivot. This notation on Mr. Binger's irrigation questionnaire prompted another letter from DENR. In the letter, Mr. Binger was informed that he may apply for a permit to move the acreage but that the past history of nonuse would be reviewed and could be an issue in getting approval of a permit to move to another location.

Mr. Binger's irrigation questionnaires from 2008 through 2013 indicated sufficient moisture was available with the exception of the 2012 questionnaire which indicated "no water available." However, review of irrigation questionnaires found that neighboring irrigators did irrigate during most of the years from 2008 through 2013.

Based on the history of nonuse, referring to Appendix B in the report, Mr. Duvall testified that DENR's recommendation is this water right be cancelled for nonuse.

Ms. Mines-Bailey offered DENR Exhibit 2, findings of facts, conclusions of law, and final decision got cancellation of Water Right Filings No. 0138-2 and 0185-2 from the July 10, 1985, board meeting, which was admitted into the record.

Mr. Binger was administered oath.

Mr. Binger stated that the land authorized by this water right is not suitable ground to be irrigated. It consists of heavy clay, with rolling hills, and low spots. The four sections he farms within three miles of the headquarters is pastureland and corn ground consistently producing 150 bushels of corn. There are pivots located south and east of him that have been under water for years. The NW ¼ Section 30 Tulare Township that he proposed transferring the water right to is one of the most receptive to irrigation in the area. He also stated that he understands if the board has to cancel the permit.

Mr. Hallem stated that no conclusion can be drawn as to whether or not the aquifer will still be considered fully appropriated if Mr. Binger's water right is cancelled. Mr. Binger has the right to apply for a permit under the random selection process; he will have the same chances as everyone else that applies for a permit.

Motion to cancel Water Right No. 1613-3 as recommended by the chief engineer by Freeman, seconded by Bjork. Board members Bjork, Hoyt, Dixon, Freeman and Hutmacher all voted in favor of the motion. Board members Comes and Holzbauer voted against the motion. Motion carried by roll call vote.

Mr. Hallem stated this is a contested case proceeding, if Mr. Binger would like to pursue this by appealing the decision to circuit court, then they need to go through the process of findings of facts and conclusions of law. If Mr. Binger does not wish to pursue the matter an order would be entered cancelling the permit.

Mr. Binger stated he will waive findings of fact and conclusions of law.

CANCELLATION CONSIDERATIONS: Mr. Gronlund stated the board packet included the standard cancellation table. There are 18 Water Rights, or portions of water rights/permits that were scheduled for cancellation today. In each case, the board packet included a notice of cancellation that went to the water right holder. These are mostly cancellations that were brought about by staff contact with the water right holder. In each case a notice was sent, and there were no letters received in response.

Mr. Gronlund stated there are a couple of things on the cancellation table that he needs to bring to the boards attention. Vested Water Right No. 349-3 for the City of Watertown is for 0.89 cfs with 0.56 cfs scheduled for cancellation. A diversion rate of 0.33 csf will remain authorized. Water Right No. 5403-3 for Greg Oswald is for cancellation consideration of the irrigation component only. The commercial use will remain. There was an error in the table on Water Right No. 2729-3 for Leroy Gross; this was a Tulare East James aquifer water permit. The cfs amount is incorrect and should be listed as zero.

Mr. Gronlund stated there are also a number of James River permits on the cancellation table. That was the result of DENR to go out and look at the James River water rights since the Board established diversion limit is being approached.

Mr. Gronlund stated DENR is recommending cancellation of the 16 water rights in whole and a portion of the other two rights as previously explained.

Answering Mr. Holzbauer's question on Future Use Permit No. 902-2, Mr. Gronlund stated the state cement plant held a future use permit. The cement plant, under the Janklow administration, was sold to GCC Dacotah. Future use permits are only able to be held by certain public entities and not by a private entity. In 2000, there was still the state cement plant commission, so there was a state entity and it was determined the future use permit could be held under that commission's authority. In 2010 or 2011 there was legislation that passed that abolished the cement plant commission and dispersed all of the assets. There is no longer a commission, and based on that, there is not an entity capable of holding the future use permit. There was a conversation with GCC Dacotah to make them aware of the situation.

The following water rights/permits were recommended for cancellation for the reasons listed:

Future Use Permit No. 902-2, filed by the State Cement Plant; now owned by GCC Dacotah; abandonment.

Water Right No. 280-3 held by Robin and Wendie Barber; abandonment or forfeiture.

Vested Water Right No. 349-3 held by the City of Watertown; abandonment or forfeiture of 0.56 cfs of diversion rate authority with 0.33 cfs remaining.

Water Right No. 559-3A held by Ross Halter; abandonment or forfeiture.

Water Right No. 607-3 held by Erik Roth and Stacy Watenbach; abandonment or forfeiture.

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Water Right No. 608-3 held by Loren Roth; abandonment or forfeiture.

Water Right No. 690-3 held by Robin and Wendie Barber; abandonment or forfeiture.

Water Right No. 761-3 held by Paul Wedel; abandonment or forfeiture.

Water Right No. 2425-3 held by Karen Chester; abandonment or forfeiture.

Water Right No. 2729-3 held by Leroy Gross; abandonment.

Water Right No. 4066B-3 filed by Jon and Loren Locken; abandonment or forfeiture.

Water Right No. 4071-3 filed by Keith Kettering, now held by Keith W Kettering Family Trust, % Scott Kettering; abandonment or forfeiture.

Water Right No. 4589-3 filed by Ms. Wendell Sprang, now owned by Nelson and Hugh Miner; abandonment or forfeiture.

Water Right No. 5403-3 held by Greg Oswald; abandonment or forfeiture of the irrigation component while the commercial use is retained.

Vested Water Right No. 5385-3 held by Rodney Leyendecker; abandonment or forfeiture.

Water Right No. 5926-3 held by Skyline Heights Public Works Coop.; abandonment or forfeiture.

Water Permit No. 6063A-3 filed by Daniel Ulmer, now held by Ralph and Lucille Marquardt; non-construction.

Water Permit No. 6526-3 filed by Meyer Lamb Feeders, now owned by John Kapperman; abandonment or forfeiture.

Motion to cancel Division II Future Use Permit, as well as the Division III Water Permits, Water Rights, and Vested Water Rights as set forth in the table, adding that only .56 cfs of Vested Water Right 349-3 will be cancelled and Water Right 5403-3, only canceling the irrigation component made by Freeman, seconded by Hutmacher. Motion carried.

SEVEN YEAR REVIEW: Mr. Gronlund stated that the water permit table that was sent out with the board packet, included one Future Use Permit for the city of Mobridge that is subject to the seven year review state law requirement, along with a July 1, 2014, letter from the City of Mobridge. DENR made contact with the City of Mobridge; they submitted a response requesting to retain the future use permit. Future Use Permit 4290-3 reserves 1656 acre feet of water annually from the Missouri River, dating back to June of 1978. The city also provided pumping records that indicated in 2013 the maximum pumping volume was 908 acre feet. A board rule provides guidance on the amount of water that may be retained is two times the city's current pumping. DENR is recommending that this Future Use Permit 4290-3 remain in

effect for 1656 acre feet of water. No one petitioned to intervene. There is a fee of 10% to retain the permit; in this case it would be \$195.

Motion to retain Future Use Permit 4902-3, by Bjork, seconded by Holzbauer. Motion carried.

WATER PERMIT APPLICATION NO. 7701-3, CODY HORSTMAN:

Mr. Gronlund stated that in the board packet was a revised recommendation for denial, an email from Mr. Horstman, the original report from April 2013, and the notice of the board's July 2013 deferral. This is an application for 1.67 cfs from two wells to irrigate 160 acres in Douglas County. At the time that this application was filed in 2003, DENR was unable to determine the intended water source from the information available. Based on that the board deferred the application at the July 2013 meeting until a test hole was drilled; the applicant and was given a one year period to drill a test hole and the application brought back before the board.

Mr. Gronlund stated that DENR had not heard from Mr. Horstman at the end of one year so we initiated contact. Mr. Horstman then sent an email stating he did not want to go forward with the application and asked that the application be denied so he may receive 75% of his application filing fee back. DENR is recommending that the water permit application be denied.

Ms. Mines-Bailey offered DENR Exhibit 1, the agency file, which was admitted into the record.

Motion to deny Water Permit Application No. 7701-3 by Freeman, seconded by Bjork. Motion carried.

Mr. Hallem stated that because this is uncontested and Mr. Horstman is not present, there is no need for findings and conclusions needed and an order can be submitted.

DEFERRED WATER PERMIT APPLICATION NO'S. 7921-3 AND 7988-3, OWEN AMD LAMONT PETERSON:

Appearances: Ann Mines-Bailey, on behalf of the Water Rights Program.
Also present was John Dustman, engineer from Summit Envirosolutions Inc. who conducted the analysis of the aquifer pump test.

Mr. Hallem stated what was previously provided to the board in this matter.

Ms. Mines-Bailey offered DENR Exhibit 1, the agency file for Water Permit Application No. 7921-3, which was admitted into the record.

Ms. Mines-Bailey offered DENR Exhibit 2, the agency file for Water Permit Application No. 7988-3, which was admitted into the record.

Bracken Capen was called to testify.

Mr. Capen gave his educational and DENR employment background.

Mr. Capen stated Water Permit Application No. 7921-3 was submitted in November 2013. The application proposed to divert water at a maximum rate of 2.44 cubic feet per second (cfs) from a single well completed into the Prairie Coteau aquifer at a depth of approximately 226 feet. This well will be located in SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 8, T114W-R51N in Hamlin County and will be used to irrigate 316.5 acres in the E $\frac{1}{2}$ of the same section. The Water Management Board deferred the application to allow an aquifer pump test to be completed by the applicant in order to evaluate the availability of unappropriated water and potential impact to existing users.

Water Permit Application No. 7988-3 submitted in March 2014 proposes to divert water at a maximum rate of 1.78 cubic feet of water per second from one well to be completed into the Prairie Coteau Aquifer (240 feet deep) located in the center of the SE $\frac{1}{4}$ Section 9 for irrigation of 290 acres located in the S $\frac{1}{2}$ Section 9; all in T114N-R51W. The Water Management Board deferred the application on July 10, 2014, to allow an aquifer pump test to be completed in order to evaluate the availability of unappropriated water and potential impact to existing users.

Pursuant to SDCL 46-2A-9, a permit to appropriate water may be issued only if there is a reasonable probability that there is unappropriated water available for the applicant's proposed use, that the proposed diversion can be developed without unlawful impairment of existing rights, and that the proposed use is a beneficial use and in the public interest.

The Prairie Coteau aquifer consists of many hydraulically disconnected outwash deposits. The water permit application proposes to divert from one of these outwash deposits identified as the Prairie Coteau aquifer. At the time that the application was submitted, there was insufficient information about the characteristics of the outwash deposit to make an informed decision for approval or denial of the application. Since this information was unavailable, the application was deferred until the applicants were able to provide more information about the formation. The applicants chose to have an aquifer pump test performed, which was then analyzed by Summit EnviroSolutions, Inc.

At the time the initial report was written, it was unknown from the records available to the Water Rights Program whether any other wells were completed into the formation. Summit EnviroSolutions, Inc. determined that the Clairmont Colony maintains a well (CC4) completed into this portion of the aquifer located approximately two miles to the northeast. The Water Rights Program does not have a record of this well. However, given that CC4 did experience measurable drawdown as a result of the pump test and recovery after the test, it is assumed the well is indeed completed into the same portion of the Prairie Coteau aquifer.

A seven day aquifer pump test was conducted at a continuous flow rate of 730 gallons per minute (gpm) with measurement of water levels in three wells constructed in the same portion of the Prairie Coteau aquifer. The wells used for drawdown observations were located 100,

6,025, and 10,480 feet from the production well proposed by this application and are referred to in the text as TW1, JC1, and CC4, respectively. The production well used for pumping is referred to as PW1 and is within 100 feet of TW1. Given the measured drawdown and recovery in each of these, Summit Envirosolutions calculated the radius of the cone of depression or radius of influence to be approximately 11.4 miles. The aquifer pump test report supporting this radius of influence. was submitted to the Water Rights Program and the data

Values for the transmissivity, conductivity, and storativity were calculated in the report for the initial drawdown and the subsequent recovery using the Cooper-Jacob Drawdown and Theis Recovery methods. The values of these parameters are in general agreement for each method. Average transmissivity in the tests was found to be approximately 8,892 (ft²)/day, with hydraulic conductivity averaging 244 ft/day and storativity at 0.0014, respectively.

Summit Envirosolutions, Inc. used the slope created in the first 200 minutes of drawdown data, commonly known as “early time data”. Using the slope of the last of the drawdown data known as the “late time data” shows the calculated transmissivity drops to approximately 1,032 (ft²)/day, or less than one eighth of the originally calculated value. Early time data is typically considered to be less reliable than late time data due to the influence of water stored within the well bore. Early time data is generally reflective of the conditions within the well bore and the water being pumped directly from it. Late time data represents the conditions within the water bearing formation itself as at that point water is flowing directly from the aquifer to supply the desired flow rate.

In conclusion, there is a reasonable probability that this outwash deposit of the Prairie Coteau aquifer contains unappropriated water to supply the proposed annual diversion of 2.44 cfs for the irrigation of 316.5 acres. Recharge to this portion of the aquifer is expected to be sufficient to adequately supply all diversions completed into the formation. The South Dakota Water Rights Program does not currently have any observation wells completed into this portion of the aquifer. The applicant has agreed to construct an observation well completed into this portion of the aquifer as a condition for approval of Water Permit Application Nos. 7921-3 and 7988-3. Water levels in this observation well will be regularly monitored by the Water Rights Program. There is a reasonable probability that this proposed diversion can be made without adversely impacting existing water rights and domestic wells.

Mr. Capen stated that the chief engineer is recommending approval of Water Right Application No. 7921-3 because there is a reasonable probability that there is unappropriated water available for the applicants proposed use, the proposed diversion can be developed without unlawful impairment of existing rights, the proposed use is beneficial use, and it is in public interest.

Mr. Capen stated that there is a reasonable probability that both Water Right Applications Nos. 7921-3 and 7988-3 are proposing to withdraw out of the same formation. The aquifer pump test was done for Water Permit Application No. 7921-3 but did not confirm that Application 7988-3 proposes to direct from the same formation.

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Mr. Hoyt stated that the applicant chose the option of an aquifer pump test to get the information that the department needed. One of the qualifications is that at the applicant's expense they drill an observation well and make it a part of the report system. What is the expense associated with that.

Mr. Capen advised the aquifer pump test costs around \$20,000 to \$30,000. The construction of the observation well is not known. It would simply be drilled and cased; it would be expected it would be a minimal cost.

Mr. Holzbauer stated he has the same concerns as Mr. Hoyt.

Mr. Capen stated it is not common that a permit holder has to pay to have an observation well put in. It was only a qualification on this permit since there is so little information about this portion of the Prairie Coteau aquifer.

Mr. Bjork stated there may be more situations like this in the future; will this be a new requirement?

Mr. Capen advised that would have to be determined on a case by case basis.

Mr. Hallem stated the board has done this in the past; an example would be in the Madison Formation there was a requirement for Southern Black Hills Water System to drill an observation well several thousand feet. It is not a new requirement and has been done before.

Ms. Mines-Bailey asked if DENR discussed the observation well qualification with the Petersons.

Mr. Capen advised they were notified and agreed to the qualification.

Mr. Dustman was called to testify.

Mr. Dustman was administered oath.

Answering questions from Ms. Mines-Bailey, Mr. Dustman stated that he is a hydrogeologist for Summit EnviroSolutions in St. Paul Minnesota. It was his firm that performed the aquifer pump test analysis that is being used today, and he is the geologist that reviewed the data. The transducers to measure water levels were in the wells for a number of weeks before the pump was actually turned on. This was done so they could watch what the aquifer was doing in response to precipitation, temperature, and barometric pressure. Then the aquifer test was conducted; it was deemed a prolific aquifer.

Mr. Dustman stated that Mr. Capen was close in his estimate. When it is all done the cost will be closer to the \$30,000, for the actual performance of the test. While analyzing the data it was concluded that the aquifer could support the well for the life of the irrigation, and there would be no adverse effects to surrounding domestic users.

Mr. Dustman stated that the observation well cost is between \$7,000 and \$10,000 to construct. One of the big advantages that this project had, and was viewed as a standard way to assess an aquifer, was to install a test well in close proximity to the pumping well. Mr. Buhler and Mr. Capen correctly noted in their report sometimes it is difficult to judge how a well is doing when you are using water levels in the pumping well, because there is a lot going on down there. But because there was an observation well that was only 100 feet away, they were able to look at those levels in response to the pumping.

Motion to approve Water Permit Application No's. 7921-3 and 7988-3 based on the recommendations and qualifications by the chief engineer by Freeman, seconded by Bjork. Motion carried.

1. The well(s) 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(s) authorized by Permit Nos. 7921-3 and 788-3 shall be constructed by a licensed well driller and construction shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) from the producing formation to the surface pursuant to Section 74:02:04:28.
3. This permit is approved subject to the irrigation water use questionnaire being submitted each year.
4. The Permit holder for Water Permit Nos. 7921-3 and 7988-3 shall contract with a license well driller to construct an observation well that will become part of the South Dakota Department of Environment and Natural Resources Observation Well Network. The observation well must be completed into the same aquifer as the production wells and shall be located in the public right of way or a perpetual easement granted to the State of the purpose of maintain an observation well on property owned by the Permit holder. The observation well construction shall be coordinated with the DENR-Water Rights Program staff.

Mr. Hallem stated that DENR waived findings of facts and conclusions of law.

WATER PERMIT APPLICATION NO. 8002-3, TODD BLOCK:

Appearances: Ann Mines-Bailey, on behalf of the Water Rights Program.
Todd Block, applicant.
Larry Ewalt, intervener.

Mr. Hallem stated what was previously provided to the board in this matter.

Mr. Hallem explained the procedure for the hearing to both the applicant and the intervener.

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Mr. Block gave his opening statement, stating that Mr. Ewalt has his objection phrased two different ways. One objection states that if the permit goes through more chemical and fertilizer will go to his land. Mr. Block stated there is no intention to cause a run off with the irrigation system. The second objection was that pumping the water will affect Mr. Ewalt's dam/dugout. The water level will be lowered in the dugout in dried conditions.

Mr. Ewalt gave his opening statement, stating that his only concern is with the chemicals and silt running onto his property.

Ms. Mines-Bailey offered DENR Exhibit 1, the agency file, which was admitted into the record.

Adam Mathiowetz was called to testify.

Mr. Mathiowetz gave his educational and DENR employment background.

Ms. Mines-Bailey offered DENR Exhibit 2, Mr. Mathiowetz's resume, which was admitted into the record.

Ms. Mines-Bailey offered DENR Exhibit 3, a map of the well area in question, which was admitted into the record.

Mr. Mathiowetz stated that there is a correction to his report on page two, paragraph three, line four; it stated there is "1,760 feet above", which needs to be changed to 1,830 feet above. On page five, paragraph two, line five, it states "Water Rights, 2014A". That should say Water Rights, 2014C. On page six, conclusion one, it states "1.4 cfs". That should say 1.44 cfs.

Mr. Mathiowetz stated that Water Permit Application No. 8002-3 proposes to appropriate water at a maximum diversion rate of 1.44 cubic feet of water per second (cfs) from one well to be completed into the Coteau Lakes aquifer (approximately 109 feet deep) located in the NW ¼ NW ¼ Section 14; T123N-R55W. The water is to be used for irrigation of up to 120 acres located in the NW ¼ Section 14; T123N-R55W all in Day County. The Coteau Lakes aquifer as described by Hedges and others is a group of unconsolidated sand and gravel outwash deposits that are at or near ground surface in southeastern Marshall, eastern Day, and southwestern Roberts County.

Recharge to the Coteau Lakes aquifer is primarily by infiltration of rainfall and snowmelt, but at times it may be possible that adjacent lakes could recharge the aquifer. Hedges and others estimated recharge to the Coteau Lakes aquifer to be 4.5 inches per year using observation well analysis. That equates to an approximate recharge of 8,175 ac-ft per year (ac-ft/yr) for the portion of the aquifer this application proposes to use. Discharge from the Coteau Lakes aquifer occurs through evapotranspiration, seepage to lakes, and well withdrawals. Currently, there are three water rights/permits authorized to withdraw water from this portion of the aquifer, and all three are for irrigation. Historic irrigation water use from this portion of the Coteau Lakes aquifer is shown in Table 2 of the report. There was no irrigation development from this portion of the Coteau Lakes aquifer prior to 1983. The average annual use for

irrigation purposes from this particular portion of the aquifer is 49.6 ac-ft/yr. However, there were no irrigation withdrawals until 1994. The average annual withdrawal from 1994 to 2012 is 88.7 ac-ft/yr.

The estimated average annual withdrawal from this portion of the Coteau Lakes aquifer is 88.7 ac-ft/yr over the period of use. The estimated average annual recharge to this portion of the aquifer is 8,175 ac-ft/yr. That is significantly more recharge than withdrawals. Therefore, there is a reasonable probability that there is unappropriated water available for this proposed appropriation.

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 of the aquifer.

The nearest well authorized by a water right/permit is approximately five miles south of the proposed well site. There is one domestic well on file with the SD DENR-Water Rights Program within approximately two miles of the well this application proposes to use (Water Rights, 2014c). The nearest domestic well on file is approximately 0.8 miles northwest of the proposed well site. In the area of the proposed well site, the Coteau Lakes aquifer is generally under confined conditions; drawdown created from pumping the proposed well may extend some distance from the well. However, observation well DA-78C is within approximately 1.1 miles of nine irrigation wells. The most drawdown experienced in any irrigation season was 20 feet in the observation well. There was still approximately 30 feet of saturated thickness below the lowest recorded water level at DA-78C.

Since this portion of the Coteau Lakes aquifer is generally under confined conditions, drawdown may extend some distance from a pumped well. It may be possible that drawdown from this proposed diversion may be measurable in nearby domestic wells. However, the impact of drawdown is not expected to be significant due to the distance between wells.

SDCL 46-6-6.1 does not protect artesian head pressure as a means of delivery, and the Water Management Board has consistently recognized that to place water to maximum beneficial use a certain amount of drawdown may occur. In order to balance interests between irrigation use and delivery of water by artesian pressure, the Water Management Board defined an "adversely impacted domestic well" in ARSD 74:02:04:20(7) as:

"a well in which the pump intake was set at least 20 feet below the top of the aquifer at the time of construction or, if the aquifer is less than 20 feet thick, is as near to the bottom of the aquifer as is practical and the water level of the aquifer has declined to a level that the pump will no longer deliver sufficient water for the well owner's needs"

Depending on the specific characteristics of the Coteau Lakes aquifer at the well site proposed by this application, some existing well owners may need to lower their pumps to accommodate deeper water levels. However, when considering the statute (SDCL 46-6-6.1) and rule (ARSD 74:02:04:20(7)), well interference from the proposed diversion is not likely to

cause a significant impact. Therefore, there is a reasonable probability that any interference will not be adverse.

In conclusion, Mr. Mathiowetz testified this application proposes to appropriate water 1.44 cfs from the Coteau Lakes aquifer for the irrigation of 120 acres in Day County. The Coteau Lakes aquifer is the name of a collective group of disconnected outwash deposits surrounding the area lakes and lining shallow buried channels between the lakes. There is a reasonable probability that unappropriated water is available from this portion of the Coteau Lakes aquifer for this proposed appropriation. This portion of the Coteau Lakes aquifer is generally under confined conditions but can become unconfined during dry periods. There is a reasonable probability that the diversion proposed by this application will not adversely impact existing appropriative rights or domestic users.

Mr. Mathiowetz stated the chief engineer is recommending approval of Application No. 8002-3 because there is a reasonable probability that there is unappropriated water available for the applicants proposed use, the proposed diversion can be developed without unlawful impairment of existing rights, the proposed use is a beneficial use, and it is in the public interest with qualifications. The qualifications include that the well approved under this permit will be located near a domestic well 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 proper water rights, the well authorized by Permit No. 8002-3 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, with the well casing pressure grouted, and this permit would be approved subject to the irrigation water use questionnaire being submitted each year.

Answering questions from Mr. Ewalt, Mr. Mathiowetz advised in 1978 the aquifer was 20 feet lower than it is presently. A 20 foot level reduction in the observation well would also mean a 20 foot reduction in the lake, due to the hydraulic connection. If the lake were to drop, Mr. Block would also have a 20 foot reduction of water in his well at the requested diversion rate. Based on the well log, Mr. Block will not be able run his well. He has approximately 30 feet of saturated thickness at that point. He may be able to operate the well at a reduced rate but that is not known for sure.

Mr. Hutmacher asked if the City of Grenville has permitted wells.

Mr. Mathiowetz stated those wells are permitted under Water Permit No. 5023-3. They are completed below 1,400 feet mean sea elevation (fmsl). Mr. Block proposes to use aquifer material at 1800 fmsl; so the city's wells are several hundred feet lower and construction into a different aquifer.

Mr. Holzbauer stated that it was earlier mentioned that the only other well that was a problem, was an irrigation well in the area.

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Mr. Mathiowetz stated there are no problem wells in the area. There are several irrigation wells approximately five miles south and one well on record approximately one mile away that may be completed into the same formation.

Mr. Hoyt asked if Mr. Ewalt's dugouts are surface water and whether those dugouts are connected with an aquifer.

Mr. Mathiowetz stated he is uncertain of what Mr. Ewalt's water source is, since the depth of his dugouts is unknown. Furthermore, if the dugouts have a ground water component, they will not be affected by Mr. Block's diversion.

Mr. Block was administered oath.

Mr. Block stated the wells that are located in Grenville are not in use. The city is connected to WEB Rural Water System. The dugouts, that Mr. Ewalt pointed out earlier, are over full by several feet for many years. Even if the water table at those points goes back down to the original level, they both may be full of sediment. The irrigation will be put up to grow a better crop which in return will help his family and his upcoming son with the farming he wishes to do. If the well does pull from the aquifer that keeps Waubay Lake's level up, it would help because the lake is too high.

Answering questions from Ms. Mines-Bailey, Mr. Block stated he does not see any increase in run off as a result of his proposed irrigation permit. He does not want to take large volumes of water as pumping more water than needed is costly.

Answering questions from Mr. Hutmacher, Mr. Block stated he does not know what the elevation level difference is from the proposed well sight to the elevation of Mr. Ewalt's dugouts. A rough guess would be closer to a 300 foot difference.

Mr. Hoyt stated that earlier it was stated that not all of the drainage will flow towards Mr. Ewalt's land. Mr. Block showed the board on the map how the land is laid out and what way the run off would flow and predicted only 7-10 acres of the irrigated land flows toward Mr. Ewalt's property.

Mr. Block also showed Mr. Ewalt where the irrigators will sit on the land and where the run off would go.

Ms. Dixon asked if there is a benefit to irrigate to the point where run off occurs.

Mr. Block stated no, because it would cost extra money to pump extra water with no benefit. If they are aware that it is supposed to rain, the irrigators will not be run.

Mr. Ewalt was administered the oath.

Mr. Ewalt stated that due to the watershed from a portion of the proposed irrigated area flowing to his land, there is an increased possibility that he may lose more acres, which has already increased due to flooding. There is the increased potential for fertilizer and chemical

runoff onto his property. In the event of a dry cycle, the draw from the well may lower the water table, therefore depleting the dugouts in his pasture. As pointed out on the map previously, he believes the drainage runs through a small grove of trees. As far as the absorption and infiltration rates of the land, if there is not enough organic matter in the soil to absorb enough, and the soil conditions need to be right to be able to absorb the water.

Ms. Mines-Bailey stated that one of the concerns in his petition was regarding his dugouts; she asked if Mr. Ewalt could describe the construction of his dugouts, how deep the dugouts are, and the materials used during the construction process.

Mr. Ewalt stated they were dug at the edges of the sloughs at the time of construction. However, you can no longer see the sloughs. The depth of the dugouts is unknown; it was mostly dark materials used to construct the dugouts, not rock or gravel. They have never been cleaned. The dugouts have never been without water and they were built in the early 1970's.

Mr. Block asked if Mr. Ewalt remembers when the water was at its lowest in 1976, and if he remembers seeing the stock dam dry.

Mr. Ewalt stated that he has never seen the dugouts dry.

Mr. Hutmacher asked if Mr. Ewalt has any idea of the surface area that is covered by the dugouts.

Mr. Ewalt stated it is a very small amount of acreage; the dugouts are not that big, maybe 100 feet wide. They are now connected to the sloughs due to flooding in past years. The slough is roughly 10 to 15 feet deep.

Ms. Mines-Bailey called Mr. Mathiowetz as a rebuttal witness.

Answering questions from Ms. Mines-Bailey, Mr. Mathiowetz stated that he is aware of the elevation difference between the proposed well site and the dugouts. The difference in elevation is approximately 73 feet. With the dugouts at the edge of the slough, they are likely a surface water supplied dugout or an indirect connection with another surface water source. There would be no connection for water sources between the dugouts and the well proposed by the permit. It is not likely that Mr. Ewalt's dugouts are adequate wells as defined by South Dakota Water Law. Under water law there is protection for adequate wells against interference from other wells.

Mr. Block gave his closing statement, stating that he doesn't think well water will affect Mr. Ewalt's surface water level. There will also not be an excessive amount of water applied to create a run off situation.

Ms. Mines-Bailey gave closing statement, stating that under South Dakota law the board has four factors to consider when determining whether to grant an application for appropriation. The first being the availability of unappropriated water. The report to the chief engineer indicates that there is a little over 8,000 acre feet of unappropriated water available for this

application. The second is the unlawful impairment to existing rights; the testimony is that there will be no unlawful impairment to existing rights. The third is that it is of beneficial use; Mr. Block testified that he plans to use the water for the purpose of irrigating crops, which the board has traditionally found of beneficial use and in the public interest. Based on those factors the chief engineer has recommended approval of the application.

Mr. Ewalt gave his closing statement, stating that he is still concerned about the run off and its impacts.

Motion to approve Water Permit Application No. 8002-3, subject to the qualifications recommended by the chief engineer, by Hoyt, seconded by Freeman. Motion carried.

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. 8002-3 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.

Mr. Hallem stated that under South Dakota law findings of facts and conclusions of law need to be submitted by the parties. In the past when there has been an unrepresented individual, the Water Rights Program drafts proposed findings and conclusions of law. Those findings and conclusions need to be submitted at least 20 days prior to the next hearing, November 13, 2014. Ten days after that date both the applicant and intervener will have the opportunity to submit any comments, objections, or their own findings and conclusions. After that Mr. Hallem will prepare proposed rulings based on the submissions from all the parties as well as proposed findings of fact and conclusions of law to the board. It is asked it be provided by email in Word format. That will need to be submitted by a certain deadline.

WATER PERMIT APPLICATION NO. 8006-3, RIVERSIDE HUTTERIAN BRETHREN:

Appearances: Ann Mines-Bailey, on behalf of the Water Rights Program.
 Gregg Magera, attorney for Riverside Hutterian Brethren.

Mr. Comes asked if both Application No. 8006-3 and 8013-3 will be considered.

Ms. Mines-Bailey stated the Chief Engineer is recommending approval of Application No. 8006-3 from the James River because there is reasonable probability that there is

unappropriated water available for the applicant's proposed use, the proposed diversion can be developed without unlawful impairment of existing rights, the proposed use is a beneficial use and it is in the public interest. This is not a contested case, and the Board can proceed with it separate from Application 8013-3 with the following qualifications: Diversion of water from the James River shall be in accordance with the following criteria: this permit does not authorize diversion of water from the James River after August 10th of each calendar year unless written orders have been issued by the Chief Engineer; diversions under this permit are subject to senior water rights and any written orders issued by the Chief Engineer; this permit does not authorize diversions from James River when there is less than 20 cfs bypassing the USGS gaging station at Huron SD after pumping; and this Permit is approved subject to the irrigation water use questionnaire being submitted each year.

Motion to approve Water Permit Application No. 8006-3 subject to the stipulations entered into by the parties, as well as the qualifications in the chief engineer's recommendation by Freeman, seconded by Hutmacher. Motion carried.

QUALIFICATIONS:

1. Diversion of water from the James River shall be in accordance with the following criteria:
 - a) This permit does not authorize diversion of water from the James River after August 10th of each calendar year, unless written orders have been issued by the Chief Engineer. Diversions under this permit are subject to senior water rights and any written orders issued by the Chief Engineer.
 - b) This permit does not authorize diversions from the James River when there is less than 20 cfs bypassing the USGS gaging station at Huron SD after pumping.
2. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

WATER PERMIT APPLICATION NO. 8013-3, RIVERSIDE HUTTERIAN BRETHERN:

Appearances: Ann Mines-Bailey, on behalf of the Water Rights Program.
Gregg Magera, attorney for Riverside Hutterian Brethren.

Mr. Hallem stated what was previously provided to the board in this matter.

Mr. Magera gave his opening statement, stating that on behalf of the colony this is a complex issue, water is important to South Dakota and water is important to farming. Today the board will hear testimony as to why there is a need for the use of the water; there will also be clarifying testimony of the colony's use of water in the past. The applicant is requesting three things: to transfer a quarter of ground under an existing water right up into the southwest quarter of section 17; to recognize an additional well; and additional diversion rate authority.

Ms. Mines-Bailey gave her opening statement, stating that the colony is seeking an increased diversion rate from the Tulare Western Spink Hitchcock aquifer, which the board knows is fully appropriated. For that reason this matter has been brought before the board.

Ms. Mines-Bailey offered DENR Exhibit 1, the agency file, which was admitted into the record.

Ken Buhler was called to testify.

Mr. Buhler gave his educational and DENR employment background.

Ms. Mines-Bailey offered DENR Exhibit 2, Mr. Buhler's CV, which was admitted into the record.

Ms. Mines-Bailey offered DENR Exhibit 3, an aerial map of the area, which was admitted into the record.

Mr. Buhler stated Water Permit Application No. 8013-3 proposes to appropriate water from a well that is to be completed into the Tulare: Western Spink/Hitchcock aquifer. The well is expected to be approximately 102 feet deep and is to be located near the center of the SW $\frac{1}{4}$ of Section 17, T112N-R61W. Water is to be diverted from the well at a maximum diversion rate of 1.78 cubic feet of water per second (cfs). This application proposes to sever the authority to irrigate 132 acres located in NW $\frac{1}{4}$ Section 27, T112N-R61W, which is authorized by Water Right No. 2078-3, and transfer that authority to acreage located approximately two miles to the northwest to the SW $\frac{1}{4}$ Section 17, T112N-R61W.

Based on an inspection of works that was conducted pursuant to South Dakota Codified Law (SDCL) 46-5-30, the Chief Engineer issued Water License No. 2078-3 on August 2, 1979. The license granted Riverside Colony a water right to divert 8.69 cfs from five wells to irrigate 924 acres. The Report of Examination of Works and/or Application of Water to Beneficial Use indicated the system consisted of five center pivot systems to irrigate the seven quarter sections authorized for irrigation. Presumably, two of the center pivot systems were moved between four quarters and the seven quarters, could not be irrigated simultaneously.

The average annual irrigation application rate from the Tulare: Western Spink/Hitchcock aquifer from 1979-2011 has been 9.44 inches per acre. When the physical limitations of a system are not the controlling factor, the annual application rate is dictated by economics and climatic conditions. However, in the case of a system consisting of two center pivot irrigation systems operating independently using a single well, application rate is likely limited by the system.

In the process of filing Water Permit Application No. 8013-3, the applicant conveyed to DENR-Water Rights staff that a sixth well was also used to irrigate the acreage authorized by Water Right No. 2078-3. Review of the data provided through the annual irrigation questionnaires filed by the applicant confirms that the applicant has developed and operated with a diversion capacity in excess of the rate authorized by Water Right No. 2078-3. Neither

the additional well, nor any additional diversion rate associated with it was authorized as required by SDCL 46-5-30.2, which provides that:

“Neither a permit to appropriate water nor a license to appropriate water may become a right to use the water for any purpose or in any manner other than that specified on the permit or license, unless amended pursuant to the provisions of this title.”

The applicant's unauthorized increase of the diversion rate capacity in excess of 8.69 cfs has likely resulted in a larger average annual withdrawal from the Tulare: Western Spink/Hitchcock aquifer than was appropriated by Water Right No. 2078-3.

Development of the Western Spink/Hitchcock management unit of the Tulare aquifer was essentially static from 2003 to 2012. During that time period the water levels of observation wells completed into the aquifer documented that in general, there was more water in storage in the aquifer in 2012 than there was in 2003. Based on the average annual water level change recorded in observation wells it was concluded that recharge to the aquifer exceeded withdrawal from the aquifer by 3,640 acre-feet annually. Based on an average 1979-2011 irrigation application rate of 9.32 inches per acre per year; another 4,686.69 acres on average could have been irrigated over the time period. Since 2012, there have been a number of new irrigation permits approved from the Tulare: Western Spink/Hitchcock aquifer authorizing the irrigation of an additional 4,706 acres.

The best information available indicates that approval of Application No. 8013-3 would cause the estimated average annual withdrawal from the Tulare: Western Spink/Hitchcock aquifer to exceed the estimated average recharge to the aquifer. 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.

Based on the best information available regarding recharge to the Tulare: Western Spink/Hitchcock aquifer as it compares to withdrawals from the aquifer, along with the projected water use associated with acreage currently authorized for irrigation, the Water Management Board found the Tulare Western Spink/Hitchcock aquifer is fully appropriated [In the matter of Water Permit Application Nos. 7725-3, et al., Findings of Fact, Conclusions of Law and Final Decision issued December 5, 2013.] This decision had been appealed to the Sixth Judicial Court and upheld by Judge Barnett.

In conclusion, Water Permit Application No. 8013-3 proposes to appropriate water from a well that is to be completed into the Tulare: Western Spink/Hitchcock aquifer. Water Permit Application No. 8013-3 proposes to sever the authority to irrigate 132 acres appropriated by Water Right No. 2078-3, and transfer that authority to acreage located approximately two miles to the northwest. Water Right No. 2078-3 authorizes a diversion rate of 8.69 cfs from five wells completed into the Tulare: Western Spink/Hitchcock aquifer for the irrigation of 924

acres. Development subsequent to the issuance of Water Right No. 2078-3 resulted in the completion of an additional well and a total diversion rate in excess of that specified on the license. The increase of the diversion rate capacity in excess of 8.69 cfs has likely resulted in a larger average annual withdrawal from the Tulare: Western Spink/Hitchcock aquifer than was appropriated by Water Right No. 2078-3.

This application is proposing the authorization of an additional diversion rate for the 1.78 cfs. An increased diversion rate for the irrigation of the same number of acres will likely result in an increase of the average annual withdrawal from the Tulare: Western Spink/Hitchcock aquifer. The Water Management Board has found the Tulare Western Spink/Hitchcock aquifer is fully appropriated.

Mr. Buhler stated the Chief Engineer is recommending denial of Application No. 8013-3 because SDCL 46-6-3.1 states that the annual withdrawal of groundwater shall not exceed the average estimated annual recharge to the aquifer. The Water Management Board has found the Tulare:Western Spink/Hitchcock aquifer to be fully appropriated. Approval of Application 8013-3 for additional diversion rate authority will likely result in an increase of the average annual withdrawal from the Tulare: Western Spink/Hitchcock aquifer. It is not in the public interest to permit additional groundwater withdrawals in excess of the average annual recharge of the Tulare:Western Spink Hitchcock/Aquifer.

Answering questions from Mr. Magera, Mr. Buhler stated he did not personally inspect the irrigation system; a different member of the Water Rights staff did the inspection in 1978. He did review the water right and what it approved the colony to do. Water Permit No. 2078-3 authorized irrigation of 924 acres. This application, being a new application does not increase the acres to be irrigated; it stays at 924. The application requests an additional diversion of 1.78 cfs; the existing water right appropriates 8.69 cfs with equates to 3,900 gallons per minute. If 1.78 cfs is added, the total diversion rate maximum would be 10.74 cfs, which equates to 4,698 gallons per minute. The prior water right application from the James River was Water Permit Application No. 8006-3 dealing with a quarter of ground that this application which is being requesting to be transferred. Water Permit Application No. 8006-3 deals with taking water from the river to irrigate the SW ¼ Section 27. As part of the review, the irrigation questionnaires submitted by the colony dating back to 1979 were reviewed. There has not been an inspection relative to Water Permit Application No. 2078-3 since the original one in 1979, and it is not routinely done. To his knowledge, Mr. Buhler testified no one was questioning or contacting the colony about the information the colony provided in their irrigation questionnaires. The information for 2010 and 2011 reported no irrigation took place. Mr. Magera stated that the total is 15,000 gallons per minute over the last five year which would average 3,000 gallons per minute. Mr. Buhler agreed. When the physical limitations of an irrigation system are not a controlling factor, application rate, number of inches per acre applied is dictated by economics and climatic conditions. When the system does not contain enough water for the center pivot systems to operate independently, the system itself becomes the controlling factor. If the system is upgraded, then it is no longer the controlling factor and can put on more inches per acre. Transferring authorized acres from one location to the other, without transferring any of the wells or the diversion rates; results in adding a well and additional diversion rate authority.

Answering questions from Ms. Mines-Bailey, Mr. Buhler stated water cannot be saved to use in later years. Water rights are not for an average diversion rate; but are for a maximum diversion rate. In two of the five years in the averaging example the diversion rate exceeded the authorized maximum diversion rate. When the application was reviewed it was noted that it is seeking an increased diversion rate of 1.78 cfs. It will result in an increased withdrawal from an aquifer that has previously been deemed fully appropriated. The average annual withdrawals will exceed the recharge, and that is not allowed under South Dakota Water Law.

Mr. Magera asked when you consider if an aquifer is at the maximum diversion rate, is consideration given to the number of wells or the life expectancy of the number wells that are drawing from the aquifer.

Mr. Buhler stated it is not a consideration, because replacement wells can be approved.

Mr. Magera called John Waldner to testify.

Mr. Waldner affirmed the oath.

Mr. Waldner stated that the colony has been in existence since 1947. It currently has 32 families totaling 131 individuals. The bulk of the operation is farming and relies heavily on that for the existence of the colony. The colony is a communal group, and each member of the colony has a task to perform or a position. His position is general manager and has been in that role since 1982 and secretary/treasurer. He is responsible for the colony's operation, including irrigation of the crops. There is a foreman who runs the irrigation systems. The colony raises mostly corn and soybeans. This is an original water right application that was approved in the late 1970's. The application is requesting to transfer 132 acres from section 27 to section 17. It does not change the number of acres, only the land being irrigated.

Mr. Waldner stated that the colony was never aware that the sixth well was not approved or certified. It was put in years ago. This is why the colony wishes to get proper authorization for the well. No one ever told the colony the well was not approved. No additional acreage will be farmed. It is the colony's belief that there is water available that can be used by the colony. It is necessary for the colony to use irrigation for farming; it is of beneficial use to the colony and the community. It is also in the public interest.

Answering questions from Ms. Mines-Bailey, Mr. Waldner stated all six wells are currently being used to irrigate. The sixth well was put in to help with the irrigation; the colony is now asking to have the sixth well discontinued and moved to section 17.

Mr. Freeman stated if it is the colony's position that they will not be using more water, why does the colony need to increase the additional 1.78 cfs?

Mr. Waldner stated that the colony found out they were exceeding the diversion rate authority. The colony was unaware of that until this notice was sent out.

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Mr. Holzbauer stated the well, which is represented by the green dot, is the one for which the colony did not have a permit. He asked why when the questionnaire was filled out there should not have been a questionnaire for that well if there was no permit by DENR.

Mr. Waldner stated that well was built in the 1970's. When the questionnaire was filled out it was for all the wells. All the wells were in one permit; the colony did not know the sixth well was not included.

Ms. Mines-Bailey stated Mr. Waldner testified that there is water available in that aquifer. Does the colony have any scientific evidence to back up that statement?

Ms. Waldner stated that aquifer has always met its recharge.

Ms. Mines-Bailey recalled Mr. Buhler to testify.

Answering questions from Ms. Mines-Bailey, Mr. Buhler stated the inspection of these wells took place on December 20, 1978. The inspection reports have been reviewed; in the report five wells were listed. At the time of inspection, the well had a Detroit diesel four cylinder engine. The pump was a Western Land Rover, and it had a pumping capacity of 650 gallons per minute. Given the testimony, the other wells were run between 700 and 800 gallons per minute. This well was considered a weak well of the five wells, only being capable of 650 gallons per minute. This is why the colony had to alternate the pivot between the NW 1/4 of section 27 and the pivot in the NE 1/4. It is understood that the colony is asking that they be legally allowed to use all of the water that they have historically used. The colony is also asking for more water than they have historically used. If that application is granted it will result in an increase in withdrawal from the aquifer. Again, Mr. Buhler stated the colony is adding a well. The application does not call for the transfer of a well or transferring diversion authority, they are requesting another well. His opinion would not change if all of the wells in Sec 27 T112N-RGIW were below was kept in the original permit. The opinion could change if there was a transfer that resulted in no more diversion rate than 8.69 cfs. DENR's position still stands that there is no more unappropriated water in this aquifer.

Answering questions from Mr. Magera, Mr. Buhler stated he understood the testimony given by Mr. Waldner.

Mr. Freeman stated the colony's position is to have recognized what they have historically used for irrigation. However, what they have historically used has not been authorized by the board. They have exceeded what the board thought the colony was using.

Mr. Buhler advised it is correct that it was never authorized by the board, and they have exceeded what the board thought was being used.

Mr. Hoyt asked based on an examination of the irrigation questionnaires, when would the board have known that they have exceeded their authorized withdrawals. It was said that upon examination recently of the irrigation questionnaires it was discovered that there was an unauthorized sixth well. How did DENR find out they were exceeding withdrawal?

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Mr. Buhler advised that it never would have showed up in the irrigation reports, no matter the number of wells. DENR found out when Mr. Waldner came in to discuss a permit application. He stated there were six wells, not five.

Ms. Dixon asked if in the reporting of acreage on the questionnaires there could be overlap in what is reported?

Mr. Buhler stated that there could be overlap in the colony's reporting. When the board determined the aquifer was fully appropriated, the average application rate for the aquifer was 9.44 inches per acer, per year. The average application rate, represented in table three is 10.13 inches per acre, per year. Not every one of the pivots can be run independently under the existing Water Right, so it is system control versus economic and climate control.

Mr. Holzbauer asked if he understood correctly that the well, indicated by the green dot on the map would be transferred and the old well would be shut down.

Mr. Waldner stated that is correct.

Mr. Buhler stated that is correct, but the colony is getting rid of the weak well and putting in a good well which will pump more.

Ms. Mines-Bailey asked if Riverside has more than one water right for irrigation purposes.

Mr. Buhler stated the colony has more than one water right for irrigation. It is possible there could be confusion on an irrigation questionnaire when reporting on more than one water right.

Mr. Magera called Eric Gronlund to testify.

Answering questions from Mr. Magera, Mr. Gronlund stated the colony has contacted him in regards to Application No. 8013-3. Mr. Waldner came to the office in Pierre to discuss the application twice, once to file the application, and one other time to discuss the application. Mr. Waldner was the individual that made DENR aware of the sixth well; it was never referred to as a helper well.

Mr. Gronlund stated as he recalls the conversation when Mr. Waldner first came in, his plan was to file a twofold application, one being the James River application, which the board previously acted on, the other was to transfer acres. When helping fill out the application, it came up that there was a sixth well. Mr. Waldner was informed the original water right states only five wells. When asked the diversion that each well produces, Mr. Waldner stated between 750 and 800 gallons per minute. Riverside was authorized at 3900 gallons per minute under Water Right No. 2078-3, and they had been using between 4500 and 4800 gallons per minute. At that point, DENR discussed the colony's options. The options were to come in for the additional diversion rate authority to transfer acreage and an additional well or maintain the existing 8.69 cfs diversion authority rate and transfer acres. Mr. Gronlund testified that Mr. Waldner was forthcoming with information to DENR.

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Ms. Mines-Bailey asked why it is considered a new application. If Riverside Colony had chosen to transfer the acreage to the northern section and keep the diversion rate at 8.69 cfs, would this be a new application?

Mr. Gronlund stated it is considered a new application because of its additional diversion rate authority. If the diversion rate was kept the same, it would not be a new application. It would be considered an amendment. They have historically been diverting more water than permitted. The new application seeks more water, even more than diverted in the past.

Mr. Freeman asked when the board made the determination that the aquifer is fully appropriated, was it based on historical use or permitted use.

Mr. Gronlund stated that the prior determination was based on observation well records and water level fluctuations. If the colony was in fact pumping at a greater rate, those observation wells reflect pumping within the entire aquifer.

Mr. Holzbauer asked if the observation wells would reflect the colony's and everyone's historical pumping rate. Mr. Gronlund stated that is correct.

Mr. Magera gave his closing statement, stating that Mr. Freeman did correctly sum up the colony's application when stating that they are not seeking additional water than was historically used. There has been a time period of over 30 years that the diversion had taken place. The board's decision that the aquifer is fully appropriated took into consideration everyone's historical rates including the colony's. With reference to this application they are requesting approval to transfer the acreage, add the well so it can be appropriately recognized, then they would no longer use one well, and that well would then be transferred to section 17. It is believed that unappropriated water is available, since it has been used for 30 years.

Ms. Mines-Bailey gave her closing statement, stating that it is understood that the colony is seeking to use water that has been historically used. However, under South Dakota law this kind of an increase in diversion rate must be considered a new application. In SDCL 46-5-30.4 it states that a water right may not be amended if it seeks to increase the diversion or increase the volume of water used. DENR has to consider this a new application, per state law. Because it is a new application, DENR is guided by state law to determine if there is unappropriated water available, if it would unlawfully impair existing rights, it is of beneficial use, and if it is in the public interest. This aquifer has been determined, by the board, to be fully appropriated. There are currently five other applications pending for this aquifer that have been pending since 2013. The problem the board then faces, if they grant this application the board has to find unappropriated water and if unappropriated water is found, those five pending applications would have to be fulfilled first. And there simply is not enough water to do all of that. The chief engineer has recommended denial of this application due to the aquifer being fully appropriated and the five pending applications.

Mr. Freeman stated that if historically someone uses more water than allowed for 30 years, it does not grant any rights to the water. He inquired of Board counsel whether adverse position could apply.

Mr. Hallem stated dealing with land you cannot get adverse possession from the state. That is only with private individuals, not with the state. These are waters of the state, so technically you can never get a right through adverse possession.

Motion to deny Water Right Application No. 8013-3 by Freeman, seconded by Dixon. Motion carried.

Mr. Hoyt stated that he has no doubt that error was made in good faith and that it continued to be unobserved by the colony and by the state over this period of time. Unauthorized use does not ripen into an authorized use. Based on the two applications heard by the colony today the board has in the prior application granted an additional 1.78 cfs from the James River to irrigate one of those quarter sections. The colony will be irrigating those same lands from two water sources. The board is in a difficult position because there is no water available in this aquifer, and there are applications pending.

Mr. Hallem stated the department is the prevailing party; it would be their obligation to submit proposed findings of facts, conclusions of law, and final decision by November 13, 2014. Ten days after, Mr. Magera will have the opportunity to submit any objections or comments to the department.

Recess for the Day

Thursday, October 23, 2014

Reconvened at 8:30 a.m. (Board Member Tim Bjork is absent.)

WATER PERMIT APPLICATION NO. 1589A-1, ELK CREEK WATER TRUST:

Appearances: Matt Naasz, on behalf of the Water Rights Program.

Appearances via telephone: William Taylor, attorney for Elk Creek Water Trust, applicant.

Mr. Hallem stated what was previously provided to the board in this matter.

Mr. Naasz stated that the parties have reached a stipulation and given this morning's weather circumstances, Mr. Taylor will go first and explain the situation. (Mr. Taylor was unable to attend the meeting in person because of inclement weather.)

Mr. Taylor stated the stipulation that is before the board this morning has a long history. The Homestake Mining Company began appropriating water in the Black Hills in 1870's, before South Dakota was a state and before there were any laws regarding appropriation of water. Shortly after the turn of the 20th Century, South Dakota adopted a scheme of Water Rights based on a system of priority, first in time being first in right. In 1955, after decades of

litigation of the constitutionality of the retroactive application based on turn of the century water use legislation, the statutes were over hauled. It made a provision that long time water users could seek to vest and validate a water right. The Homestake Mining Company had developed, before the turn of the 20th century, an engineering marvel in the Black Hills that assembled and collated water from a variety of sources that was ultimately used in a hydroelectric plant to develop and produce electricity in the mines and to provide water resources for the mining operation. In the early 1990's, as Homestake wound down its interests in South Dakota, it applied to the Board to validate and vest a series of water rights with priority dates of 1877 and earlier that under lie this engineering marvel Homestake had constructed in the Black Hills. Homestake's approach was to seek validation based on the capacity of its system. Ranchers Pat and Tom Trask live near Elk Creek confluence with the Cheyenne River and Elk Creek. Elk Creek is one of the streams that Homestake appropriated from; its head waters are on Elk Mountain in the Black Hills. Homestake had a series of intakes near the five springs that are the head waters of Elk Creek, and they appropriated a majority of the water and routed it into their system. Vested Water Right Application No. 1589-1 was Homestake's application to claim those waters. As board member Freeman and others will remember, there was a long trial over the Homestake's right to vest its water rights. Ultimately the Board made a ruling; the ruling was appealed and was reversed by Judge Zinter in the spring of 1997. Negotiations after the judge reversed the Board's decision spanned a year, and an agreement was reached that Homestake's rights would be vested at a small portion of what Homestake solicited and that the Elk Creek Water Right would be assigned to a water trust that was created for the purposes of holding the water right. The water trust would convert the right to an in-stream flow for purposes of wildlife, recreation, and other public beneficial uses. The water trust was formed in the winter of 1999, and in the spring of 2000 the water trust filed transfer ownership of the water right vested in Homestake for Elk Creek to the trust.

Mr. Taylor stated that shortly after the transfer, the water trust submitted an application for a change of use from industrial and mining to the agreed upon use of an in-stream flow. The trust sought a use amendment for 1.41 cfs, flowing from the head waters on Elk Mountain in the Black Hills to the confluence of Elk Creek with the Cheyenne River, a distance of roughly 90 miles. In the course of the Homestake hearings in the middle 1990's, Homestake had moved to dismiss the Trask brothers' claims that they did not have standing because they lived east of the point near Piedmont where Interstate 90 crosses Elk Creek. Homestake maintained the position that there was a loss zone just upstream from the interstate or a little west of the interstate. The loss zone is essentially a limestone formation large enough to accommodate all of the flows from Elk Creek, and the loss zone fed the Madison aquifer. The argument was that Elk Creek disappeared east of the interstate. There is also a spring in the Elk Creek bed just east of the interstate, where a considerable volume of water resurges. The trust took the position that the loss zone did not feed the Madison aquifer but was simply an area where water flowed into the limestone and resurged on the downstream side at the springs just east of the interstate.

Mr. Taylor stated that issue was scientifically not resolved. There have been a number of studies in the Black Hills that demonstrate that there are loss zones in some of the Black Hills streams as the streams come out on the prairie. Elk Creek has never been studied for that particular point. In 2000, when the water trust applied for a 1.41 cfs in-stream flow from the

head waters of the creek to the confluence, the chief engineer was of the view that the flow below the loss zone near the interstate could not be proven to be water to be coming out of the Black Hills. Negotiations reached an impasse, at that time about two years had passed since Homestake had appropriated any waters from the head waters. The members of the trust, who all live close to the creek, made the visual observation that there had been a material increase in flows over the past two years. Their conclusion was the end of appropriations in the Black Hills had resulted in an increase flow below the loss zone, which was a non-scientific opinion. When negotiations reached an impasse the members of the trust decided that the course of action would be the date of application for a change of use was filed essentially froze the situation on the creek legally. So the members of the trust decided they would wait to see what happens and if flows in the creek continued that would be some evidence to support their view. The decision was made that they would wait 15 to 20 years if nothing else happened in the intervening period that required action. At that time it was anticipated that if someone applied for a water right that could have priority over the Elk Creek Water Trust application for change of use, that the trust would then take action. The Chambliss application for an irrigation permit from Elk Creek, which was filed earlier this year, was the first action in the intervening 13 and a half years that triggered activity on the part of the water trust. Therefore, the water trust intervened in the Chambliss application. Having in mind that by that intervention some resolution of the loss zone question would be required.

Mr. Taylor stated discussions were had with DENR through Mr. Naasz and through Mr. Gronlund. Mid-summer there was a conclusion reached that the water trust and DENR would stipulate to vest an in-stream flow in favor of the trust for 1.41 cfs with a priority date of 1887 from the head waters of the stream to the loss zone. It was agreed that a water right with a priority of 2000 would be established from below the loss zone to the confluence with the Cheyenne River with the priority date revisitable should the trust come back to the board and petition the board for a declaratory ruling and provide adequate proof to demonstrate that the water that goes into the ground at the loss zone resurges at the spring. That stipulation achieves the water trust goal of long term observation of the creek and in-stream flows and long term record keeping at the various gages that are on Elk Creek. DENR was concerned about what would happen, if the water trust in low water years made a call on irrigators to reduce irrigation in order to protect the in steam flow. If the water trust makes a call on any appropriator who is junior to the water trust 2000 priority date, then the water trust will bear the burden of proof. There are no current appropriators that are junior to the Elk Creek appropriation date. There are a dozen or so that are senior to the water trust, with water rights dating from the 1940's to the 1970's. The only time the water trust has an issue and the potential for it making a call will come into play is if there are new applications solicited from the creek. The Chambliss application being an example. As the board is aware the Chambliss application is being asked to be withdrawn.

Mr. Taylor stated in summary the Elk Creek Water Trust is asking the board to vest water, 1.41 cfs, from the head waters of the creek to the loss zone, with a priority date of 1877. And to validate 1.41 cfs of water from below the loss zone to the confluence of the Cheyenne River and Elk Creek with a priority date of 2000.

Mr. Naasz stated that Mr. Taylor correctly explained the situation.

Mr. Naasz stated Mr. Chambliss is withdrawing his application. Notice was provided to him indicating his request for withdrawal will be before the board. DENR is asking that the board make a motion accepting the withdrawal of the application.

Motion to accept the withdrawal of Water Permit Application No. 1942-1 and authorizes the chairman to sign the order by Freeman, seconded by Hutmacher. Motion carried.

WATER PERMIT APPLICATION NO. 2366A-2, SOUTHERN BLACK HILLS WATER SYSTEM:

Appearances: Ann Mines-Bailey, on behalf of the Water Rights Program.
Talbot Wieczorek, attorney for Southern Black Hills Water System, applicant.

Mr. Hallem stated what was previously provided to the board in this matter.

Ms. Mines-Bailey stated the chief engineer has recommended approval for the application seeking an extension in time to complete the construction. There are no interveners, so the board may move to accept the recommendation of the chief engineer.

Mr. Wieczorek stated on behalf of Southern Black Hill's Water System that they rely on the Chief Engineer's recommendation without the need to show evidence given the fact there has not been a withdrawal.

Mr. Hoyt stated in the recommendation by the chief engineer there is no recommendation of time frame. Should there be in the recommendation, something that indicates the completion date of the facilities.

Ms. Mines-Bailey stated the notice of publication indicates that the application seeks an extension of the statutory five year, which gives Southern Black Hills until March 11, 2019, to complete construction, which is included in the report. It is not specified in the recommendation of the chief engineer.

Motion to approve Water Permit Application No. 2366A-2, subject to the qualifications of the chief engineer, amending paragraph two of the recommendation to add an extension of time for completion of construction until March 11, 2019, and put to beneficial use by March 11, 2023, by Freeman, seconded by Hutmacher. Motion carried.

Ms. Mines-Bailey and Mr. Wieczorek agreed that they will waive findings of facts, conclusions of law and final decision.

QUALIFICATIONS:

1. In accordance with SDCL 46-1-14 and 46-2A-20, Permit No. 2633A-2 is issued for a twenty year term. Pursuant to SDCL 46-2A-21, the twenty year term may be deleted at any time during the twenty year period or following its expiration. If the twenty year

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term is not deleted at the end of the term, the permit may either be cancelled or amended with a new term limitation of up to twenty years. Permit No. 2633A-2 may also be cancelled for non-construction, forfeiture, abandonment or three permit violations pursuant to SDCL 46-1-12, 46-5-37.1 and ARSD 74:02:01:37.

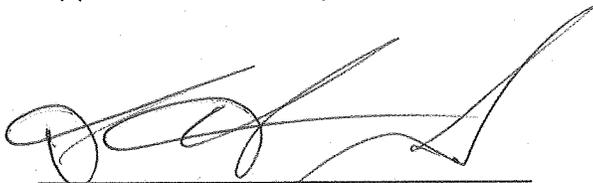
2. The well approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this Permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.
3. The well authorized by Permit No. 2633A-2 shall be constructed by a licensed well driller and construction 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.
4. The Applicant, Water Permit Holder, shall report to the Chief Engineer annually the amount of water withdrawn from the Madison aquifer.
5. The Applicant, Water Permit Holder, under this permit shall control withdrawals from the well so there is not a significant effect on the water flow from Beaver Creek Springs or a significant adverse effect on the water quality and character Beaver Creek Springs.

ADJOURN: Chairman Comes declared the meeting adjourned.

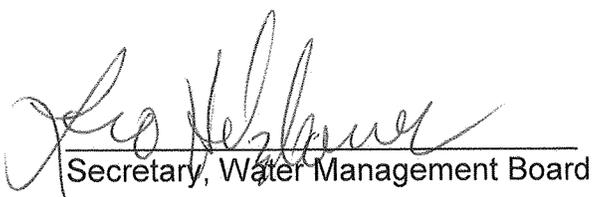
A court reporter was present for the meeting and transcript of the proceedings from October 22-23, 2014, may be obtained by contacting Carla Bachand, PO Box 903, Pierre, SD 57501-0903, telephone number (605) 224-7611.

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 3rd day of December.



Chairman, Water Management Board



Secretary, Water Management Board

ATTENDANCE SHEET
WATER MANAGEMENT BOARD
Date October 22, 2014

<u>NAME (PLEASE PRINT)</u>	<u>MAILING ADDRESS</u>	<u>CITY, STATE & ZIP</u>	<u>ITEM OF INTEREST</u>
Daniel Ostrom	1800 Espresso Millhill, SDSCA	57301	All
Jeff H. Binger	17843 377th Ave	Redfield 57469	water 1013-3 Permitting Construction
Holly Farris	800 Governors Drive	Pierre SD 57501	
JOHN LOTT	506FP 523 E CAPITOL	PIERRE	ALL
MATT HICKS	DENR GWA	Pierre	Standards
Mary Duvall	Box 453	Pierre	all
Jim WHITE	1145 BEACH CIRCLE	Huron	Sewer
Richard Bittelpruber	13418 328 Ave	Bowdle SD 57428	water 1983-3 Permitting
JOHN DUSTMAN	1217 BANDANA BLVD	ST PAUL MN 55108	7921488+3
Dave Gullickson	Box 99	Brookings SD 57006	605-690-9013
Mila Block	Box 13	Grosville SD 57579	6058802913
Todd Block	Box 114	Roslyn SD 57261	605-2372233
LARRY EWALY	43922 133rd ST	Webster SD 57274	WATER PERMIT Construction 8002
Bernst Waldy	410341 200 ST	HURON SD	8002-3 8006413-3
Jim Walker	40361 200th St	Huron S.D.	8006413-3

