

MINUTES OF THE 193RD MEETING OF THE
WATER MANAGEMENT BOARD
FLOYD MATTHEW TRAINING CENTER
523 EAST CAPITAL AVE
PIERRE, SD

May 6 – 7, 2015

CALL TO ORDER: Chairman Comes called the meeting to order at 1:00 p.m.

APPLICATIONS: Water Permit Application No. 2676-2, Rapid City; Water Permit Applications from the Tulare: Western Spink Hitchcock Aquifer Nos. 7858-3 and 7859-3 Brad Peterson, 7860-3 Oscar Inc, 7894-3 Van Buskirk Farms; Water Permit Applications from the Tulare: East James Aquifer Nos. 7875-3, 7876-3, and 7877-3 Lenny Peterson, 7878-3, 7879-3, 7880-3, 7881-3, 7882-3, 7883-3, 7884-3 Oscar Inc, 8032-3, Arthur Olsen; Water Permit Application No. 8033-3, Arthur Olsen; Water Permit Application No. 2078A-3, Riverside Hutterian Brethren; Water Permit Application Nos. 7369A-3, 7369B-3, and 7369C-3, Huron Hutterian Brethren; Water Permit Application Nos. 7906A-3 and 8123-3, Huron Hutterian Brethren; Water Permit Application No. 8065-3, Hecla; Water Permit Application No. 2737-2, Summer Creek Inn.

The following were present at the meeting:

Board Members: Chad Comes, Jim Hutmacher, Peggy Dixon, and Tim Bjork. Rodney Freeman was absent on May 6 and present on May 7. Leo Holzbauer and Ev Hoyt were absent.

Department of Environment and Natural Resources (DENR): Jeanne Goodman, Eric Gronlund, Mark Rath, Adam Mathiowetz, Karen Schlaak, Ron Duvall, Ken Buhler, Tim Schaal, Mike DeFea and Lynn Beck – Water Rights Program; Jim Feeney - Division of Financial and Technical Assistance.

Attorney General's Office: Ann Mines-Bailey, Matt Naasz, and Jeff Hallem.

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

APPROVE March 4, 2015 MINUTES: Mr. Bjork stated on page 7, above the line half way down the page should read March 4th. Motion to approve the amended March 4, 2015, minutes by Hutmacher, seconded by Bjork. Hutmacher, Comes, Dixon and Bjork all voted in favor of the motion. Motion carried.

NEXT MEETING: July 8 – 9, 2015. Pierre.

STATUS AND REVIEW OF WATER RIGHTS LITIGATION: None.

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

WATER PERMIT APPLICATION NO. 2676-2, RAPID CITY:

Ms. Mines-Bailey stated Mr. Nyberg, counsel for Rapid City contacted her; the parties are still in the process of negotiating an agreement. They have requested a continuance of the hearing. There is a written stipulation signed by both parties requesting a postponement of the hearing.

Motion to grant a continuance by Bjork, seconded by Dixon. Hutmacher, Comes, Dixon and Bjork all voted in favor of the motion. Motion carried.

WATER PERMIT APPLICATION NOS. 8032-3 AND 8033-3, ARTHUR OLSEN:

Appearances:

Ann Miles-Bailey, appearing on behalf of the Chief Engineer and Water Rights Program.

Ray Rylance, appearing on behalf of Brad Peterson, Lenny Peterson, and Oscar Inc.

Joel Arends, appearing on behalf of Arthur Olsen.

Mr. Arends requested continuance on Water Permit Application No. 8032-3, Arthur Olsen. The request is being made because one of the critical witnesses is undergoing heart surgery today. Also, there will be a request made for the Chief Engineer to conduct an investigation of adjacent permits. The result of the investigation may have an impact on the board's decision.

Mr. Arends stated they would support the department presenting evidence supporting the denial of the permit but request to keep the record open, so that the witness may testify and the evidence on the investigation can be submitted at a later date.

Ms. Mines-Bailey asked which application the critical witness was to testify in.

Mr. Arends stated that Mr. Michael Sentell has given an affidavit in support of the argument for the tributary permit, which is Water Permit Application No. 8033-3. However, Mr. Sentell has additional testimony that was not put in the affidavit regarding Water Permit Application No. 8032-3 from the Tulare:East James aquifer.

Mr. Arends stated Mr. Sentell will testify that adjacent permits have not been used. They are believed to be abandoned or forfeited, as a result of that, there would be available water in the aquifer to be used for Mr. Olsen's permits. There is also concern about incorrect information being reported on the water use reports.

Mr. Rylance stated he objects to a continuance, it has been continued for seven to eight months and believes there was plenty of time to investigate.

Mr. Arends stated the first request for continuance was made by Mr. Rylance because his case on appeal was going to court. It was Mr. Rylance who prolonged the process. The second continuance came because there was a snow storm that made it impossible to drive

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from Sioux Falls to Pierre. Today a critical witness is having heart surgery. There have been good reasons why it has been continued in the past and today.

Mr. Comes stated if this proceeds there would be three separate records and three separate hearings. Is the continuance for all three applications?

Mr. Arends stated the continuance is only being asked on Water Permit Application No. 8032-3.

Ms. Mines-Bailey stated DENR is ready to proceed, while Mr. Arends does bear the burden of proof to show that water is available, this board has previously declared this aquifer to be fully appropriated.

Mr. Naasz stated what was previously provided to the board in these matters.

Ms. Mines-Bailey stated the applications from the Tulare: East James aquifer were filed by Mr. Rylance's clients in July and August of 2013. Lenny Peterson and a group were appealing denials of applications in the Tulare: Western Spink/Hitchcock aquifer. DENR entered into a stipulation with Mr. Rylance's clients, holding those applications until the appeal was concluded. In the meantime, Mr. Olsen filed his application on June 27, 2014. Mr. Olsen has also filed a petition opposing the applications of Mr. Rylance's clients. Mr. Rylance's clients would be first in priority based on filing dates of the applications if water was determined to be available.

Mr. Arends stated they are only asking for a continuance because the witness is not able to come to the hearing and that more testing will show there is available water.

Mr. Naasz stated that granting the continuance would result in continuing all the applications from the Tulare: East James Aquifer.

Mr. Bjork asked if the continuance is granted, the board can still hear arguments today.

Mr. Arends stated he is not prepared to argue the matter today. The other parties may continue, but without his witness he cannot.

Mr. Rylance stated he is opposed to leaving the record open as well as the continuance. If the board decides to grant the motion for continuance, he asks that all the applications be continued. It is important that the board hear all the applications at the same time.

Mr. Bjork asked if the continuance is granted or the record is left open, can a decision be made tomorrow on the random selection to create a priority list.

Mr. Rylance stated these applications do not have anything to do with the applications on the agenda for the random selection process.

Ms. Mines-Bailey stated it would not be appropriate to continue with the random selection process if this application is granted a continuance or left open.

Mr. Naasz stated the board may deny the continuance, if they choose. The Board may then hear the testimony and defer ruling on the question of whether or not the record will be left open, depending upon how the evidence comes in.

Mr. Rylance stated if the record stays open, depending on the evidence his position on the matter may change.

Motion to deny the Mr. Arends' request for continuance of Water Permit Application No. 8032-3, Arthur Olsen by Hutmacher, seconded by Bjork. Hutmacher, Comes, Dixon and Bjork all voted in favor of the motion. Motion carried.

WATER PERMIT APPLICATIONS FROM THE TULARE: EAST JAMES AQUIFER:

Application Nos. 7875-3, 7876-3 and 7877-3 for Lenny Peterson.

Application Nos. 7878-3, 7879-3, 7880-3, 7881-3, 7882-3, 7883-3, and 7884-3 for Oscar Inc.

Application No. 8032-3 for Arthur Olsen.

Appearances:

Ann Miles-Bailey, appearing on behalf of the Chief Engineer and Water Rights Program.

Ray Rylance, appearing on behalf of Brad Peterson, Lenny Peterson, and Oscar Inc.

Joel Arends, appearing on behalf of Arthur Olsen.

Mr. Rylance and Mr. Arends advised they did not have opening statements.

Ms. Mines-Bailey stated this aquifer came before the Water Management Board (WMB) in 2013. At that time the board declared that the aquifer was fully appropriated. The applications were received and reviewed. The evidence being presented today will show that nothing has changed; there is still no water available. DENR will be asking the board to accept the Chief Engineers recommendation for denial on all of the applications.

Mr. Arends stated Water Permit Application Nos. 8032-3 and 8033-3 were filed in 2014 after a bulk of other applications listed today. The proposed water source for Application No. 8032-3 is the Tulare:East James aquifer while No. 8033-3 proposes to use an unnamed tributary to the James River. The applications propose to irrigate the same land. The one application that is part of today's focus would draw water from the tributaries to the James River. We believe there is water available due to nonuse by other parties. There is a downstream water right held by Mr. Peterson, who is represented by Mr. Rylance. The testimony will show that there is water available which would allow the Olsen's to divert water

from the tributary. Additionally, the evidence will show that the senior water right is not being used. The water report usage to the WMB is being over stated.

Mr. Naasz stated that the board will hear evidence on Water Permit Application No. 8032-3 and will consider Water Permit Application No. 8033-3 from the unnamed tributary at a later time.

Mr. Arends stated he is still objecting to moving forward with Water Permit Application No. 8032-3 due to a key witness being ill. Moving forward today on this matter will impair the ability to make a case. That witness would testify regarding the nonuse of an adjacent landowner's permit and that there is more water available in the aquifer than what is being reported. Therefore, his petition in opposition constitutes the remainder of his objection to the applications from the Tulare:Western Spink/Hitchcock aquifer.

Ms. Ann Mines-Bailey proceeds with DENR's case.

DENR offered Exhibit 1, administrative records for Water Permit Application No. 7875-3, Lenny Peterson.

DENR offered Exhibit 2, administrative records for Water Permit Application No. 7876-3, Lenny Peterson.

DENR offered Exhibit 3, administrative records for Water Permit Application No. 7877-3, Lenny Peterson.

DENR offered Exhibit 4, administrative records for Water Permit Application No. 7878-3, Oscar Inc.

DENR offered Exhibit 5, administrative records for Water Permit Application No. 7879-3, Oscar Inc.

DENR offered Exhibit 6, administrative records for Water Permit Application No. 7880-3, Oscar Inc.

DENR offered Exhibit 7, administrative records for Water Permit Application No. 7881-3, Oscar Inc.

DENR offered Exhibit 8, administrative records for Water Permit Application No. 7882-3, Oscar Inc.

DENR offered Exhibit 9, administrative records for Water Permit Application No. 7883-3, Oscar Inc.

DENR offered Exhibit 10, administrative records for Water Permit Application No. 7884-3, Oscar Inc.

DENR offered Exhibit 11, administrative records for Water Permit Application No. 8032-3, Arthur Olsen.

All Exhibits were admitted into the record.

Ken Buhler was called to testify.

Mr. Buhler stated his education and professional background with DENR.

DENR offered Exhibit 12, Ken Buhler's curriculum vita, which was admitted into the record.

Ms. Mines-Bailey stated Water Permit Application Nos. 7875-3, 7876-3, 7877-3, 7878-3, 7879-3, 7880-3, 7881-3, 7882-3, 7883-3, and 7884-3 will be referred to as the Peterson applications from here forward.

Answering questions from Ms. Mines-Bailey, Mr. Buhler stated the Peterson applications were filed on July 22, 2013. Application No. 8032-3, by Mr. Olsen was filed June 27, 2014. The Peterson applications have not been brought before the board prior to today because there was a stipulation between parties that the applications should not be scheduled before the WMB until after the Lenny Peterson case on appeal was ruled on by the circuit court.

The Tulare: East James aquifer is on the east side of the James River and mostly located in Spink County. Wells in the aquifer are typically less than 130 feet deep with an average thickness of the aquifer around 37 feet. This is a glacial outwash aquifer. Water levels in this aquifer range from 50 feet up. There are 34 observation wells in this aquifer that are monitored by DENR.

Development of the East James management unit of the Tulare aquifer was essentially static from 1979-2012. During this 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 at the end of this period than there was at the beginning. Based on the estimated areal extent of the portion of the aquifer that is under unconfined conditions (22,377 acres) and the average annual water level change recorded in observation wells completed into unconfined portions of the aquifer over the time period (0.31 feet/year), it was concluded that recharge to the aquifer exceeded withdrawal from the aquifer by 1,045 acre-feet per year. Based on a 1979-2011 irrigation application rate of 7.68 inches per acre per year, 1,633 additional acres could be irrigated over the time period. Since 2012, new irrigation permits were approved from the Tulare: East James aquifer authorizing the irrigation of an additional 1,759 acres.

The next time a permit application from the aquifer was considered by the Board was July 2013. That was Application No. 7747-3 for Gordie Hofer". In the case of Mr. Hofer's application the Board found that unappropriated water was not available from the aquifer and the aquifer is still considered fully appropriated. The WMB issued Findings of Facts and Conclusions of Law in that matter. The board endorsed the observation well analysis, agreeing that this was the best information available in determining and assessing recharge

as it relates to withdrawal. The board found the Tulare: East James aquifer was fully appropriated.

DENR offered Exhibit 13, Findings of Facts and Conclusions of Law and Final Decision in the matter of Water Permit Application No. 7747-3, Gordie Hofer. The exhibit was admitted into the record.

Mr. Buhler stated in those Findings of Facts and Conclusions of Law the board approved the observation well methodology and declared the aquifer fully appropriated. In preparation for the hearing today, three additional years of observation well data were analyzed, as well as another three years of irrigation questionnaires. With the additional record taken into consideration, there is not unappropriated water available from the aquifer.

Mr. Buhler stated if there were abandoned or forfeited application permits, there would still not be water available. The use or non-use of permits in the aquifer is reflected in the observation wells water levels. The observation well data shows a comparison between recharge and withdrawal. The observation well data is the best information available for this aquifer. If these applications are granted withdrawal would exceed recharge.

Mr. Buhler stated the Chief Engineer is recommending denial of all the applications in this matter.

Answering questions from Mr. Rylance, Mr. Buhler stated the foundation for the information came from the August 23, 2012 report. The methods used to determine if water was available was the observation well method, and it was determined that no water was available.

Mr. Rylance stated on page 18 of the report on August 23, 2012, Mr. Buhler stated that an additional 1761 acres could be irrigated based on the estimated annual recharge rate. It appears there were two methods used.

Mr. Rylance stated prior to today's hearing did DENR go back and check the observation wells? And did it show any increase?

Mr. Buhler stated the last time the observation wells were checked was on September 8, 2014. There was no increase shown. Mr. Buhler then corrected his statement that one of the observation wells showed a higher water level. The level was at 16.8 feet, and in August 2012 it showed 19.5 feet. It came up 2.7 feet.

Mr. Rylance offered Exhibit A, Observation Well data for SP-77J, which was admitted into the record.

Mr. Rylance offered Exhibit B, Observation Well data for SP-79H, which was admitted into the record.

Mr. Buhler stated the depth of the well in August 2012 was 29.5 feet and on September 8, 2014 was 27.1 feet. The water level was higher in 2014.

Mr. Rylance asked if it was taken into consideration that some of the wells are increasing.

Mr. Buhler stated some of the wells did increase.

Mr. Rylance stated on page nine of the August 23rd report, there was a schedule put together indicating whether the whole aquifer was going up or down. Mr. Rylance asked whether there was another report done?

Answering questions from Mr. Rylance, Mr. Buhler stated another report was not done. However, an updated table was prepared. When comparing with page nine of the report, over the period from 1980 to 2011, the average water level increase was .31 feet per year. When the additional data is looked at, the average water level change from 1980 to 2014 indicated the average water level increased .24 feet per year. The last two years of the record cannot be isolated from the rest of the record and used to determine the availability of water.

Mr. Rylance offered Exhibit C, which is Administrative Rule of South Dakota 74:02:05:07, which was admitted into the record.

Mr. Buhler stated the rule was clarified by the courts.

Mr. Rylance asked when the reports are submitted, is it accurately reflected what the rule is?

Mr. Buhler advised he does believe so.

Mr. Rylance stated when he reads the rule it appears there is important information left out. At the end of the paragraph in the rule, Exhibit C, it states “the board shall rely upon the record of observation well measurements”. In all of the reports it fails to state “in addition to other data to determine the quantity of water withdrawn”. Why is the entire rule not in the report?

Mr. Buhler stated it was put in to add the observation well section of the reports to emphasize the observation well data.

Mr. Rylance asked how DENR chooses which observation wells are used in the determination. Are there wells that are not considered? Why aren't they considered?

Mr. Buhler stated wells that are used for the analysis are in the unconfined portion of the aquifer and have been there for the period of record. There are 34 observation wells total and nine are in the unconfined portion. There is one observation well in which no data is available from 2008 to 2010, which makes it an incomplete record. One of the observation wells is a poor well and is unresponsive and needs to be abandoned.

Mr. Rylance stated on previous testimony given before the board, it has been indicated that the irrigation questionnaires are unreliable. Why are they unreliable?

Mr. Buhler stated that questionnaires are filled out at the end of the season using memory from the prior irrigation season. Also, many irrigators do not know what they have out there,

what the pump is capable of diverting, or how many days it takes for the system to make a circle. Last, there are inaccuracies in reports that are received. DENR uses the best information available, but there are inaccuracies.

Mr. Rylance stated without the application rate it would be impossible to figure out how many acres might be available to irrigate, correct? If a farmer does not submit an irrigation questionnaire what happens?

Mr. Buhler advised that is correct. If someone fails to submit a questionnaire, the permit may be suspended or cancelled. The information obtained from permit holders is important.

Mr. Arends asked how DENR balances which data to use such as the test well data versus other data pursuant to the administrative rule. The rule requires that observation well and other data is used.

Mr. Buhler advised the observation well data is used based on years of data and experience.

Mr. Arends asked if the test wells ever over flow. And has the aquifer level increased or decreased since 2012? If there was an increase, was it due to climatic conditions?

Mr. Buhler stated there are some free flowing wells. The aquifer level has increased since 2012; the increase was likely caused by climate or other conditions. The increase is reflective of how withdrawals from the aquifer relate to recharge.

Mr. Arends advised earlier it was mentioned that there was a 2.7 foot difference between test well data that Mr. Rylance referred to. Mr. Arends asked if that is statistically significant? Overall is a 2.7 foot a significant increase?

Mr. Buhler stated a statistical significance was not evaluated. A 2.7 foot increase would not be significant. One of the observation wells in the aquifer, SP-77J, had a last water level reading was less than 17.8 feet. During 1993 and 1982, it was less than 33 feet. That is 16 to 17 feet of fluctuation between dry years and wet years. Within a season or year, example being SP-79G, water levels fluctuated three or four feet within the year.

Mr. Arends stated in the report to the Chief Engineer on Water Permit Application No. 8032-3, Arthur E. Olsen, dated August 20, 2014, referring to page one, beginning of the third paragraph, it states "the average 1979 through 2013 irrigation withdrawal from the aquifer is 6,903.46 acre feet per year". How was the number calculated? How much did that number weigh into the determination for denial?

Mr. Buhler stated that was taken from the irrigation questionnaires. The numbers reported did not weigh heavily in the decision for denial because the emphasis in the analysis was based on the observation well data. The 6,903.46 acre feet per year was used to compare with what has been used in the past. That number is not used as a baseline to determine what has been withdrawn from the aquifer.

Mr. Arends asked what other influences are there that play into the decision to use observation well data versus other data, besides experience.

Mr. Buhler stated DENR needs to evaluate the accuracy of the other data and compare that to the other data used or intend to use.

Mr. Arends stated earlier during questioning by Mr. Rylance, it was mentioned that there are accuracy issues in regards to self-reporting. What kind of issues have you encountered while with DENR? Is it possible that people are over or under reporting how much water they use? Would that over or under reporting change the level of the aquifer?

Mr. Buhler stated it is possible for permit holders to over or under report the water usage. There have been instances of that happening in this aquifer. The actual use or non-use by a permit holder, whether he reported it or did not report it is reflected in the observation well data.

Mr. Arends asked if there is a possibility that there is more water available than what is in the report?

Mr. Buhler stated he does not believe there is any water available. The use and non-use of water is reflected in the observation well water levels. Using the actual water levels of the observation wells determines what is available.

Mr. Arends asked what is the standard process for reporting the number of acres being irrigated under a permit?

Mr. Buhler stated every year irrigators receive an irrigation questionnaire where they report the number of acres, number of days pumped, the average number of hours pumped per day, and the average pump rate. This is all self-reported; along with that comes inaccuracies.

Mr. Arends stated looking at Mr. Olsen's report, in paragraph two, in 2012 another 1,700 acres became available based on the data. What explains how the almost 1,700 acres became available over the course of 2012?

Mr. Buhler stated it was not over a year, it was based on 1972 through 2012 data. In August 2012, DENR received a number of new permit applications. At that time DENR re-analyzed the information. The first review was in 2012, and the engineer that reviewed the information prior to 2012 did a great job of asking how can the water levels be rising but there is no available water. That question was finally answered in 2012. By looking at the observation well data, DENR was able to quantify what the water level rise meant. If the average annual withdrawal exceeds the recharge, it will deplete the amount of water in storage in the aquifer.

Ms. Mines-Bailey asked Mr. Buhler how many years of experience he had in reviewing water permit applications. In the years of experience, what is the best information available to the board today regarding the availability of unappropriated water?

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Answering questions from Ms. Mines-Bailey, Mr. Buhler advised he had over 29 years of experience. The best information available is that unappropriated water is not available from this aquifer. The information is coming from dedicated observation wells in the observation well network. While examining observation well data an entire period of record is used to make the determination. DENR looks at the data over an entire period of record because it accounts for droughts and wet seasons. Not all the permits issued in 2012 are fully developed which causes the observation well data to look as if there is water available. If these applications are granted, in whole or in part withdrawals will exceed recharge.

Answering questions from Mr. Hutmacher, Mr. Buhler stated there is no reason for DENR to not tell the board all of the facts or information.

Mr. Bjork stated maybe the board needs to define the aquifer and the aquifer head as well as where water is taken from. Just because there is more water this year, does not necessarily mean the water will be available next year. The discussion is primarily focused on the observation wells. Is there more to it than just looking at the observation wells?

Mr. Comes asked how often an aquifer should be revisited to determine if more water becomes available. Were reporting errors by irrigators intentional?

Mr. Buhler stated that five years is what is suggested by the new administrative rule. DENR has no way of proving if the errors were intended or accidental.

Mr. Hutmacher asked if it would help with future determination if there were water meters to measure total gallons and permit holders report their actual gallon usage. Would that help with data to tell if the aquifer was fully appropriated?

Mr. Buhler advised if there were meters to tell DENR exactly how much water was being used and exactly how many acres it was being used on, there would be a really good number for an application rate.

Mr. Rylance asked who determines what other data consists of?

Mr. Buhler stated the Chief Engineer would determine that based on DENR policy.

Ms. Mines-Bailey gave her closing argument, stating there is no water available at this time and asks the board to deny the permits per the Chief Engineer's recommendation.

Mr. Rylance gave his closing argument, stating one of the concerns with the latest report is there is not a good update on what has happened. The water levels are readily available and you can see what is there. Those water levels should be included in a report by the engineer, that there is an increase. Those were not used, so was the best of information used? What other data should be considered? When looking at withdrawal versus average recharge, it is close to what the observation wells show.

Mr. Arends gave his closing argument, stating the concern is with the lack of policy or process with regard to what other data is used. As it stands it was left up to Mr. Buhler because of his experience. He also shares the same concerns as Mr. Rylance in this matter.

Mr. Arends withdrew his motion to keep the record open and proceed with the next set of applications.

Motion to by Hutmacher to deny Water Permit Application Nos. 7875-3, 7876-3 and 7877-3 for Lenny Peterson, Water Permit Application Nos. 7878-3, 7879-3, 7880-3, 7881-3, 7882-3, 7883-3, and 7884-3 for Oscar Inc., and Water Permit Application No. 8032-3 for Arthur Olsen based on the recommendation of the chief engineer, seconded by Bjork. Hutmacher, Comes, Dixon and Bjork all voted in favor of the motion. Motion carried.

Prior to voting on the motion Mr. Bjork stated he has some trouble using averages but that the Board assures preservation of the resource unlike other states.

Mr. Naasz discussed dates for Finding of Facts and Conclusion of Law.

WATER PERMIT APPLICATIONS NO. 8033-3, ARTHUR OLSEN:

Appearances:

Ann Miles-Bailey, appearing on behalf of the Chief Engineer and Water Rights Program.

Ray Rylance, appearing on behalf of Lenny Peterson and Oscar Inc.

Joel Arends, appearing on behalf of Arthur Olsen.

Mr. Arends gave his opening statement. There is an unnamed tributary to the James River that flows adjacent to Mr. Olsen's property, as well as the intervener's property. There is only one other superior water permit on this tributary. It is a permit held by Oscar Inc, the intervenor, with a small storage dam to pump out of to irrigate 288 acres. There needs to be a determination made if there is surface run off water available and if approval of Mr. Olsen's application will impair any existing rights. Testifying today will be Dave Olsen, who runs the irrigation operation, as well as Mr. Olsen's wife.

Ms. Mines-Bailey offered DENR Exhibit 1, the administrative file for Water Permit Application No. 8033-3, Arthur Olsen, which was admitted into the record.

Ms. Mines-Bailey called Mark Rath to testify.

Mr. Rath stated his education and professional background with DENR.

Ms. Mines-Bailey offered DENR Exhibit 2, the curriculum vita for Mark Rath, which was admitted into the record.

Mr. Rath stated Application No. 8033-3 proposes to appropriate 8.85 cubic feet of water per second (cfs) from an unnamed tributary to the James River located in the SW 1/4 Section 2 and NW 1/4 Section 11 for irrigation of 620 acres located in the SW 1/4 Section 2 and E 1/2, NW 1/4, N 1/2 SW 1/4 Section 11; all in T114N-R62W. The water will be used for irrigation purposes.

The proposed project is located approximately 5 miles northeast of the town of Hitchcock in Spink County. The applicant proposes to irrigate 620 acres of land from an unnamed tributary to the James River at a diversion rate of up to 8.85 cfs. Currently there is one existing water right on this tributary, Water Right No. 6231-3, located approximately one mile downstream from this proposed project. Water Right No. 6231-3 is licensed to impound up to 5 acre-feet in a small dam located on the unnamed tributary and irrigate 288 acres at a diversion rate of 4.11 cfs.

On June 12, 2014, the SD DENR Water Rights Program received a petition from Mr. Dave Olsen, son of the applicant Arthur E. Olsen, requesting the Water Rights Program to investigate the status of the Water Right No. 6231-3 to determine whether the water right should be cancelled due to abandonment or forfeiture. Pursuant to South Dakota Codified Law (SDCL) 46-5-37.1., DENR investigated the status of Water Right No. 6231-3. A site investigation was made on July 21, 2014, verified the presence of the functionally required pump, motor, pipe and irrigation equipment that could be up and running within a very short period of time. Water Right No. 6231-3 qualifies for standby use for No. 6182-3 from the James River under Administrative Rule 74:02:01:37.02. Also, a review of the annual irrigation questionnaires indicates continuous use and a statement by the water right holder's grandson, they had in the past irrigated from the dam. Based upon the investigation of Water Right No. 6231-3 regarding whether it was abandoned or forfeited, the Chief Engineer declined to take the request to the Water Management Board for cancellation consideration.

A runoff analysis was completed by a Water Rights staff engineer for the small dam when Water Right No. 6231-3 was applied for in September of 2000. The analysis estimated the drainage area above the dam to be 5,800 acres and had a potential annual yield with a 50% chance of occurrence or 1 out of 2 years of yielding 130 acre-feet annually. At a 10% chance of occurrence, 1 out of 10 years, the estimated annual runoff yield is 725 acre-feet.

Water Right No. 6231-3 is authorized to use annually 2 acre-feet per irrigated acre for a total of 576 acre-feet. Application No. 8033-3 proposes to irrigate 620 acres with a total annual appropriation of 1240 acre-feet annually. The two combined would be 1816 acre-feet annual total appropriation. The existing water right would have senior claim to water that is flowing in the tributary before Mr. Olsen's project could pump. Based upon this, sufficient water is not going to be available except during extremely wet climatic conditions to supply the existing water right and this proposed project at the same time. Therefore, DENR does not recommend approval of this application because there is not reasonable probability water will be available for this project when water is needed for irrigation.

Mr. Arends referred to Mr. Rath's report, page two. He stated it appears that Oscar Inc.'s stand by permit is authorized a total of 576 acre feet. How many acre feet are available based on the run-off analysis?

Mr. Rath stated on a fifty percent probability, which is about once every two years, 130 acre foot would be available annually. Surface water sources, because of their nature, cannot be considered a reliable source. When an applicant chooses to obtain a water permit from surface water they must understand that there will be years the water may not be available. That is a risk they take. In this case, when Water Permit No. 6231-3 was approved, there was no one else with a senior water right. The board also considers downstream domestic use. Oscar Inc has property from the dam, where the pump site is located, to the James River. The only potential domestic use impairment would be their own.

Mr. Arends asked if it was possible that Mr. Olsen could capture 125 acre feet based on the one out of 10 year analysis.

Mr. Rath advised if this permit is granted and it was an extremely wet year, there was a probability that water could be available. There would be a potential to pump water when that water is available. The Oscar Inc water right is for irrigation using five acre feet of storage in a small dam. Excess water not diverted for irrigation goes through the spillway and to the James River.

Mr. Arends stated the board did not follow the standard the first time. The standard that is being imposed on Mr. Olsen now is the amount of water appropriated cannot exceed the request. Is there not a situation with Water Right No. 6231-3, when the amount of water they are allocated exceeds the run off analysis? Under that logic, Mr. Olsen should be able to get the rest of the available water.

Mr. Rath stated there will be times where water is available for the full 576 acre feet. The only way water is available for Mr. Olsen would be during a wet season when irrigation by Oscar Inc is not going to be used.

Mr. Arends asked in the experience in working with the James River, in the last 15 years, has a water right for irrigation ever been shut off?

Mr. Rath advised yes, permit holders were shut off in 2006. There is an automatic shut off on August 10 of every year on all James River permits. Based on the climatic conditions, 2006 was the only recent year that permit holders were shut off. From 1975 to 1992 there were numerous shut off orders as well.

Mr. Arends stated in the report, paragraph two, half way through, it states "based upon this, sufficient water is not going to be available except during extremely wet climatic conditions". What kind of science or methods is defined as extremely wet climatic conditions?

Mr. Rath stated DENR utilizes gaging stations and professional experience of monitoring runoff into the different watersheds.

Mr. Rylance objected to the questions being asked by Mr. Arends. Stating that it is not relevant to the fact if water is available or not.

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Mr. Arends stated under SDCL 46-2A-9, water availability and impairment of existing rights are elements for approving a permit and he should be allowed to present the facts surrounding each of the elements that he needs to prove.

Mr. Comes overruled the objection.

Mr. Arends confirmed that Mr. Rath has a copy of the investigation he conducted in front of him and asked him to look at the site map for July 21, 2014. How far away is the portable pump from the center pivot irrigation system? Was there an equivalent amount of pipe on site?

Mr. Rath stated it is around one half to three eights of a mile. The portable pump can be moved to the dam. The amount of pipe was not measured during the investigation. There is a possibility that there is a pipeline running from where the portable pump was located on the river to the center pivot.

Mr. Arends asked what the term immediate means in the report. Is there a possibility the standby permit was being used for irrigation?

Mr. Rath stated within a reasonable amount of time, about one day, someone could put together the components to pump. The permit was not being used for irrigation the day DENR was present.

Mr. Arends referred to a letter dated September 15, 2014, to him from Ms. Goodman.

Ms. Mines-Bailey stated the letter is not in the official record because it was in response to an investigation on Water Permit No. 6231-3 and not Water Permit Application No. 8033-3.

Mr. Rath stated although irrigation was not occurring the day he was there, and if irrigation did not occur during that current season, the equipment was available to be put together and therefore qualifies for stand-by purposes. The only thing that would disqualify it would be an unavailable pump or if irrigation equipment such as a center pivot or pipe was not available.

Mr. Arends asked questions, referring to the table labeled "The Review of the Annual Irrigation Questionnaires".

Answering questions from Mr. Arends, Mr. Rath stated table two is a summary of the irrigation questionnaires submitted by Oscar Inc. for Water Permit No. 6231-3. In a conversation with the permit holder's grandson, he stated when the pond and pumps were used for irrigation, the pump was on the north side of the dam, hooked into the pipes, and then able to irrigate.

Mr. Arends stated the administrative rule requires a functional pump.

Mr. Rath stated the pump was not running at the time of inspection.

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Mr. Rylance objected to the questions being asked, stating the issue before the board is if water is available or not. In the report it indicates that the chief engineer declined to submit the issue of abandonment of Water Right No. 6231-3 to the board.

Mr. Arends stated there is also a statement from the chief engineer, stating that evidence could be brought in front of the board other than what is included in the permit.

Mr. Comes overruled the objection.

Mr. Arends offered Exhibit A, a letter dated September 15, 2014, to Mr. Arends from the chief engineer, report of the investigation, and the petition to investigate so that the board has the full record.

Ms. Mines- Bailey stated she does not object to the submission of the letter; however, it would be more appropriate to submit the report of the investigation and the petition to investigate so that the board has the full record.

Mr. Rylance objects to all of Exhibit A, stating this is not an issue to come before the board at this time. It is not a cancellation hearing, so it is not relevant.

Mr. Arends stated he also has a statement from the chief engineer stating the following, "barring submittal of new evidence showing abandonment or forfeiture occurred the DENR declined to further investigate whether any portion of Water Right No. 6231-3 has been abandoned or forfeited." There is new evidence and it impacts element number three.

Ms. Mines-Bailey stated while there is a small relevance to whether or not there is an impact or unlawful impairment to a legal right, the matter of Water Right No. 6231-3 was not noticed for this hearing. It seems there is some relevance, but whether or not this right should be cancelled is not an issue to be taken up at this application hearing. The letter that Ms. Goodman sent stated "barring submission of new evidence to her", not to the board.

Mr. Comes stated Exhibit A will be admitted into the record.

Ms. Mines-Bailey stated if the letter is accepted into evidence, she will offer the report and petition to investigate.

Mr. Rylance objects to any evidence being submitted and stated this is not a cancellation hearing.

Mr. Arends stated he is not trying to have the permit cancelled; this is just evidence on element number three, an impairment of an existing right.

Ms. Mines-Bailey withdrew her request to admit the report and petition to investigate Water Right No. 6231-3.

Mr. Comes stated cancellation is not the type of action before the Board today.

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Answering questions from Mr. Arends, Mr. Rath stated he has reviewed Mr. Olsen's application, and it appears to meet the public interest criteria.

Answering questions from Mr. Rylance, Mr. Rath stated Oscar Inc. has used the equipment, and it would qualify as a stand-by permit. As to water availability, this is a five acre holding pond and Oscar Inc. is entitled to the first 576 acre feet that goes to the pond, when needed. It would be difficult to regulate if there was another permit involved.

Mr. Arends called Dave Olsen to testify.

Mr. Olsen was sworn into oath.

Answering questions from Mr. Arends, Mr. Olsen stated if the application is granted it will be used to irrigate dry land ground to raise crops. If the entire amount being asked for was not granted, a lower amount would be accepted. The stand-by pump has never been seen running, and he has lived there since 1997.

Mr. Olsen stated he owns property close to the permit location. No piping has been connected to the pump site or to any irrigation equipment.

Mr. Arends showed Mr. Olsen a copy of a document titled "The Report on Water Permit Application No. 8033-3".

Answering questions from Mr. Arends, Mr. Olsen stated he was present when Mr. Rath testified today and had read the report prior to the board meeting. The testimony was not consistent with what was on page two of the report. The discrepancy is whether there is use of the water since 2006. The James River has only been shut off one time since 2006, therefore it has only been needed one time as a stand-by source. The report shows that there is not enough water, but in the spring of the year the tributary flows. The proposal was to hold water, widen the channel on his property, and hold it for future use, not take from Oscar Inc.'s pond. In the spring of the year there is a large amount of run-off. The road for the tributary crossing is washed out often by heavy spring run-off. The Peterson's dam in the past has been destroyed by Mother Nature. The tributary overflows almost every spring, with the exception of this spring. Since the water permit was issued 15 years ago the land has changed; farming practices have eliminated the pot holes that filter the water. With the leveling and the clearing of land, there is nothing to hold the run off, and it rushes down to the James River.

Mr. Arends offered Exhibit B, a notarized statement by Mike Sentell.

Ms. Mines-Bailey objected to Exhibit B because the signed statement prevents other counsel from cross examining the witness.

Mr. Rylance also objects to Exhibit B.

Exhibit B was not admitted into the record.

Mr. Comes sustained the objections and advised it will stay in the record in case of an appeal in the matter.

Answering questions from Mr. Rylance, Mr. Olsen stated he is not an engineer, nor does he have a report from an engineer showing that there is more water available.

Mr. Rylance called Lenny Peterson to testify.

Mr. Peterson was sworn into oath.

Answering questions from Mr. Rylance, Mr. Peterson stated he is familiar with the Oscar Inc. permit. Since the permit has been granted the stand-by permit has been used. It was used in times of low and high water in the James River. High water meaning it will overtake the intake at the pump site. If there is too much water in the James River, the stand-by permit is used so the equipment will work. The piping which is about three 90 foot sections is to connect to the existing pipeline going to the pivot.

Answering questions from Mr. Arends, Mr. Peterson stated the permit was run depending on the water level in the James River. It was only run as often as needed. It is up to the board to determine the availability of water, not his. The availability depends on the year and how much Oscar Inc. will need to pump.

Mr. Arends offered his closing argument, stating there is water available. In 2000, the board deviated from the rules and gave the superior permit holder more water than what the run-off analysis said. The analysis was conducted in the same year as the superior permit holder, Oscar Inc filed the application. The testimony today shows the run-off analysis could have changed as a result of farming practices. Mr. Rath's report shows that there are 725 acre feet of water available, which would leave 125 acre feet available for use by his client. However, the board is being asked to go above and beyond that amount. The board went above and beyond for Oscar Inc. If the board uses the 725 acre foot figure they can give a couple hundred acre feet of water to Mr. Olsen without impairment to the existing right. The testimony given today is that the Oscar Inc. water right is a stand-by permit and does not run all the time.

Ms. Mines-Bailey gave her closing argument, stating under the statute the first consideration the board must make, is whether there is a reasonable probability of unappropriated water available. Mr. Rath testified that in one of every ten years there would be 725 acre feet of water coming down the stream. This is not a consistent number that occurs every year. Mr. Rath has been doing this for 25 years; in his testimony he states there is no water available.

Mr. Rylance gave his closing argument, stating that he agrees with DENR to deny the permit. There is no water available.

Motion to deny Water Permit Application No. 8033-3 by Hutmacher, seconded by Bjork.
Motion carried.

Mr. Comes stated he is not in favor of an approval because it has not been proven that there is water available. There also has been no proposal on how to bypass water to insure protection to downstream water rights.

Hutmacher, Comes, Dixon and Bjork all voted in favor of the motion to deny. Motion carried.

Mr. Naasz discussed dates for finding of facts and conclusion of law.

Recess at 6:55 p.m.

Reconvened at 8:00 a.m. on Thursday, May 7, 2015

**WATER PERMIT APPLICATIONS FROM THE TULARE: WESTERN SPINK HITCHCOCK
AQUIFER:**

Application Nos. 7858-3 and 7859-3, Brad Peterson.

Application No. 7860-3, Oscar Inc.

Application No. 7894-3, Van Buskirk Farms.

Appearances:

Ann Miles-Bailey, appearing on behalf of the Chief Engineer and Water Rights Program.

Ray Rylance, appearing on behalf of Lenny Peterson and Oscar Inc.

Mr. Freeman is present and recused himself from this matter.

Ms. Mines-Bailey called Ken Buhler to testify.

Mrs. Mines-Bailey offered the following exhibits:

DENR Exhibit 1, administrative record for Water Permit Application No. 7858-3, Brad Peterson.

DENR Exhibit 2, administrative record for Water Permit Application No. 7859-3, Brad Peterson.

DENR Exhibit 3, administrative record for Water Permit Application No. 7860-3, Oscar Inc.

DENR Exhibit 4, administrative record for Water Permit Application No. 7894-3, Van Buskirk Farms.

All exhibits were admitted into the record.

Mr. Buhler stated his education and professional background with DENR.

DENR offered Exhibit 5, Ken Buhler's curriculum vita, which was admitted into the record.

Answering questions from Ms. Mines-Bailey, Mr. Buhler stated the development of the Western Spink/Hitchcock management unit of the Tulare aquifer has been essentially static since 2003. During the period 2003 through 2012 irrigation development from the aquifer has been relatively stable and the water levels of observation wells completed into the aquifer documented that in general, there was more water in storage in the aquifer at the end of this period than there was at the beginning.

Based on the estimated areal extent of the portion of the aquifer that is under unconfined conditions (76,978 acres) and the average annual water level change recorded in observation wells completed into unconfined portions of the aquifer over the time period (0.3152 feet/year), it was concluded that recharge to the aquifer exceeded withdrawal from the aquifer by 3,640 acre-feet annually. Based on an average from 1979-2011 irrigation application rate is 9.32 inches per acre per year, another 4,686.69 acres on average could have been irrigated over the time period.

DENR offered Exhibit 6, an order signed by Judge Mark Barnett on August 21, 2014, which was admitted into the record.

Mr. Buhler stated 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. Several additional applications proposing to irrigate an additional 3,608 acres were recommended for denial because it was determined there would not be unappropriated water available. This argument was strengthened by looking at 2012 irrigation withdrawals. The irrigation application rate for 2012 was 13.16 inches per year. Therefore, the 1979-2012 average irrigation application rates were 9.44 in/ac/yr. In 2012, 82.78% of permitted acres were irrigated.

The best information available indicates that approval of any of these applications before the Board today will cause the estimated average annual withdrawal from the Tulare: Western Spink/Hitchcock aquifer to exceed the estimated average annual 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.

Answering questions from Mr. Rylance, Mr. Buhler stated there was additional data looked at since the January 2013 report, which is the base report being used for the information. The

information was updated from that report to the current time. The observation well data was looked at to determine whether or not water was available. In the January 2013 report, there were several different methods used, but the observation well method was chosen.

Mr. Rylance asked whether any of the observation well water levels went up. Mr. Buhler responded yes.

Answering questions from Ms. Mines-Bailey, Mr. Buhler stated the sources of data are the observation wells. That data represents all of the recharge and all of the withdrawals that have occurred in the aquifer. The water level records are actual readings that do not require a best guess of numbers with recharge or withdrawal. Everything is reflected in the observation well data.

Answering questions from Mr. Rylance, Mr. Buhler stated the observation well tells you what has been pumped because the amount of water stored in the aquifer changes based on recharge versus pumping. If the pumping is more than recharge, it will tell how the pumping compares to what the precipitation was.

Mr. Rylance called Matt Van Buskirk to testify.

Mr. Van Buskirk was sworn into oath.

Answering questions from Mr. Rylance, Mr. Van Buskirk stated the purpose for the application is for irrigation. In total the Van Buskirk family operates 7 irrigation systems. Every year an irrigation questionnaire is filled out. They are filled out by keeping records of each irrigation system on a daily basis. At the end of the year that documentation is used to fill out the questionnaire.

Ms. Mines-Bailey asked Mr. Van Buskirk whether he knows how all irrigators report their water use. Mr. Van Buskirk responded he does not know.

Mr. Rylance called Lenny Peterson to testify.

Mr. Peterson was sworn into oath.

Answering questions from Mr. Rylance, Mr. Peterson stated the Peterson family has a number of irrigation rigs in the area, close to 40 permits total. They have specific people who check on the irrigation systems to make sure they are running and working properly. Peterson tracks water use for each system. In the case of diesel motors the hours of operation tell how much the system is run. Mr. Peterson feels their irrigation water use reporting is accurate.

Mr. Rylance asked Mr. Peterson if he looked at observation well records. Mr. Peterson indicated he had since the information is available on-line. Mr. Rylance offered the following exhibits:

Exhibit A, the observation well data for SP-79F. Offered and admitted into the record.

Mr. Peterson testified from 2012 to 2014 there is a 0.30 foot gain in the water level.

Exhibit B, the observation well data for SP-78B. Offered and admitted into the record.

Mr. Peterson testified from 2012 to 2014 there is a 2.5 foot gain in the water level.

Exhibit C, the observation well data for SP-80B. Offered and admitted into the record.

Mr. Peterson testified from 2012 to 2014 there is a 0.60 foot gain in the water level.

Exhibit D, the observation well data for SP-82B. Offered and admitted into the record.

Mr. Peterson testified from 2012 to 2014 there is a 1.8 foot gain in the water level.

Exhibit E, the observation well data for SP-82G. Offered and admitted into the record.

Mr. Peterson testified the from 2012 to 2014 there is a 2.0 foot gain in the water level.

Exhibit K, the annual water level change reports from 2003 and 2012.

Ms. Mines-Bailey objected to Exhibit K.

Mr. Comes overruled the objection.

Exhibit J, data from the five observation wells with the average gain of 1.7 feet.

Mr. Peterson stated the five observation wells with a gain in water level come up to 1.7 feet. This equates to 5088 acre feet of water available, using Mr. Buhler's formula of 9.32 inches applied per acre to get water available for about 6,000 acres.

Exhibit F, the observation well data for BD-80D. Offered and admitted into the record.

Exhibit H, the observation well data for BD-77K. Offered and admitted into the record.

Exhibit G, the observation well data for SP-66G. Offered and admitted into the record.

Mr. Peterson testified that the reading in September 2012 was -7.0 feet, and the reading October 2014 was -3.4 feet.

Exhibit J, was offered into evidence.

Ms. Mines-Bailey objected to Exhibit J as cumulative and based on lack of foundation.

Mr. Comes overruled the objection and admitted Exhibit J into the record.

Exhibit I, the observation well data for SP-77A. Offered and admitted into the record.

Mr. Peterson testified that on October 20, 2012, the water level reading was -43.8 feet, and on October 16, 2014, the level was -26.6 feet.

Answering questions from Mr. Rylance, Mr. Peterson stated he believes there is more water available.

Answering questions from Ms. Mines-Bailey, Mr. Peterson stated his educational background is high school and architectural design at Springfield. His experience with the aquifers comes from his farming background. Referring to Exhibit K, the 0.30 in observation well SP-79F was the difference between 2013 and 2014, and it was a gain. In observation well SP-78B was the difference between 2013 and 2014 with the gain of 2.5. Referring to Exhibit J, the average increases between 2003 and 2014 was 0.44 feet.

Answering questions from Mr. Rylance, Mr. Peterson stated Mr. Buhler's formula was used to get his calculations. The only thing that was changed is the .441 factor; the rest Mr. Buhler used in his calculations as well.

Mr. Hutmacher asked when working on the formulas, why was 1979 to the current date used in the averages.

Mr. Peterson advised that Mr. Buhler only went back to 2003.

Mr. Hutmacher asked about when they write the hours down from the diesel motors, what type of meters are used to check the flow? When the pressure at the nozzles is changed, wouldn't that increase or decrease the flow?

Mr. Peterson stated there are no meters used. The pump will only pump so much; it runs at 45 pounds of pressure.

Mr. Hutmacher asked if an older line shaft pump has had sand pumped through it, would decrease the efficiency and the output?

Mr. Peterson stated it would.

Mr. Comes asked if the systems are checked daily?

Mr. Peterson stated yes they are checked daily.

Mr. Rylance gave his closing argument, stating there was evidence and information provided in Mr. Buhler's report, which is the basis for whether or not water is available. All of the observation well data for two years were looked at by Mr. Peterson. Mr. Peterson got a gain of 0.441 feet, using the same method as Mr. Buhler. Overall, we believe there are acres available to grant permits to the applications being presented today.

Ms. Mines-Bailey gave her closing argument, stating the evidence has shown that both Oscar Inc. and Van Buskirk farms were parties to the recent appeal to circuit court in this aquifer.

The Circuit Court ruled against the applications, stating that the Water Management Board properly applied the observation well method and properly determined that there is no unappropriated water available in this aquifer. Regardless, under that statute the applicants bear the burden, and that burden has not been met. Mr. Van Buskirk admitted that not everyone keeps track of the pumps the same and may not be as accurate. DENR asked that the board adopt the recommendation of the Chief Engineer and deny all the permit applications.

Mr. Rylance gave a rebuttal stating the last court decision that Ms. Mines-Bailey is referring to, does not adopt the observation well method as the only method that is available to be used. It did state there was no other evidence as to why Mr. Buhler should not use that method. The board can consider other methods even if they were not presented today.

Mr. Hutmacher stated the information provided by everyone was good, however adding those two years in would not affect if there is water available. This board needs to make sure the aquifers are not being over appropriated.

Motion by Hutmacher to deny Application Nos. 7858-3 and 7859-3, Brad Peterson; Application No. 7860-3, Oscar Inc.; and Application No. 7894-3, Van Buskirk Farms, as recommended by the chief engineer, seconded by Bjork. Hutmacher, Comes, Dixon and Bjork all voted in favor of the motion to deny. Motion carried.

Mr. Naasz discussed dates for Finding of Fact and Conclusions of Law.

UPDATES ON WATER RIGHTS PROGRAM ACTIVITIES:

North Dakota drainage to James River: Ms. Goodman stated the aerial photographs that were handed out are for a project called the Dickey-Sargent Joint Water Resources District project. This project is located near Oakes, North Dakota. The first aerial photo is a larger aerial map that shows the North Dakota/South Dakota state line and where Oakes is located. On the state line, there is a yellow triangle that is a gaging station operated by the United States Geological Survey (USGS) on the James River. The drainage project is located south and southeast of Oakes, North Dakota. This is a project to drain standing water on thousands of acres in that area. The drainage water then goes into the James River. It consists of two main drains that work together to drain the excess water.

The main line in the second photograph is a close up; the drain line is marked drain number 4029 and runs almost straight east and west and goes north for a little bit, then goes back west to the James River. The drain will be controlled by a lift station. There is a pump in the lift station that operates at about 20 cfs. Once this is constructed, that pump will operate if the flows at state line USGS gaging station are below 2,000 cfs or if the water in the drain is above 21 cfs. The second part of the project is the south to north lateral. The water will discharge flows above a certain elevation coming through that drain.

Mark Rath and Lynn Beck with Water Rights were contacted by the North Dakota State Water Commission. They are the agency in North Dakota that reviewed this application and

are responsible for the final approval. Mark and Lynn explained to the Commission that South Dakota's main concern is increased flows into the James River and a restricted channel in the upper part of the James River in South Dakota.

Also, the North Dakota Water Commission required the applicant to do some hydrologic modeling of the area. They took a 100 year storm or run-off event at the gaging station at the state line. The results showed there is a little under a half an inch rise in stage. The construction is to be completed in 2016. Lynn Beck is here and knows a lot of the details for the project if there are any specific questions.

Mr. Hutmacher asked if the pipe will be a ditch?

Ms. Goodman stated it would be an open drain.

Mr. Comes asked if there are any formal approvals that need to be obtained from the state of South Dakota?

Ms. Goodman stated there is nothing formal; there is no compact arrangement with the state of North Dakota. When North Dakota first received the application and the design of the drains, they contacted the Water Rights Program.

Mr. Comes asked if this is a similar situation as in South Dakota with Waubay with the closed basin and trying to find relief with that.

Ms. Beck stated it is not as large or as deep of a closed basin. Part of the concern is there is a rail road that runs across a water body and that has been compromised. It is a closed basin to a point.

Mr. Bjork asked what process needs to be done to drain a US Fish and Wildlife Service easement area. The EPA and the Corps of Engineers would be involved.

Ms. Goodman stated North Dakota has an agreement with the Fish and Wildlife Service with the easement, and there have been elevations set.

SD Geological Survey (SDGS) summer drilling:

Ms. Goodman stated on the spread sheet before the Board, there are two colors, a green on the left side and an orange on the right side, that represent the two drilling rigs the SDGS has currently operating. They are currently doing work with the South Dakota School of Mines near the Presho area looking at the shale. When that is complete they will take one of the rigs and go to Tripp County to pick up some replacement observation wells for Water Rights. There are some wells in Tripp and Turner County that need to be replaced. In Turner County and Bon Homme County, there needs to be new observation wells. In total there will be 9 weeks of working the rigs for Water Rights; they are also doing work in the Tulare aquifer.

DENR interactive databases:

Ms. Goodman stated DENR currently maintains several databases across the department using software called Fox Pro. A few years ago Microsoft told DENR they are no longer supporting Fox Pro. The Bureau of Information and Telecommunications (BIT) is working on converting the Fox Pro databases and are including the geographic information system applications to provide online access to DENR's customers.

Two DENR interactive maps have been completed in the last two years. One is an Oil and Gas interactive map, which provides links to files for 1,900 oil and gas wells as well as over 3,400 test holes and over 62,000 water well logs. The second map that has been completed and used in the last two years is a construction aggregate interactive map. There are over 4,600 active and reclaimed construction aggregate mines that the public has access to.

There are four new maps being added this year. One is a property search for spill sites where there has been regulated substances released, there are over 1,300 sites. There is a database, for above ground and underground storage tank that includes 5,000 closed and active regulated storage tanks. The recycling facilities are on another map; there are 156 different sites to determine what products that recycling center may take. The last one is the dry draw location notice, which Ron Duvall will demonstrate; this is a Water Rights database. There are over 97,000 filings for dry draw location notices.

Mr. Duvall demonstrated how the interactive map for the dry draw location notice database works.

Mr. Duvall stated it has been online prior to this, but there was no mapping aspect. When someone files a dry draw location notice, the person who owns the land at the time puts their name on the location notice form and sends it in to the county. It is recorded with the Register of Deeds and DENR then gets a copy of the notice. The person's name never changes in the database. The drawback of that is, if someone is searching in 2015 for something that was filed in 1940, searching by name is difficult. With the map as you zoom in to any area more and more features will become visible. You can set a radius of where you would like to search. If you know the general location, you can search all the dry draw location notices within that location. On this database you can see the feature on the ground instead of the dot.

Mr. Duvall showed some examples of how to search dry draw locations and edit the locations using the interactive map.

CONDUCT RANDOM SELECTION TO CREATE A PRIORITY LIST:

Mr. Duvall stated the purpose of today's agenda item is to prioritize a list of applications to appropriate water from two aquifers, the Tulare: East James aquifer and the Tulare: Western Spink/Hitchcock aquifer. The reason for the list is that, if water should become available at some point in the future from either of the aquifers, the priority list will determine the order in which water will be made available to the applicants. Once every five years, there will be a review of both the aquifers to see if there is additional water available.

Mr. Duvall stated the board and DENR were interested in coming up with a more equitable means of making water available to interested parties from water sources that are currently closed to further appropriation but may become open at some point. The legislature approved this process by enacting legislation which was then signed by the Governor and became law on July 1, 2014. The action being taken today is based on the legislation that is now state law, SDCL 46-2A.7 through 46-2A- 7.7.

Mr. Duvall stated that, concerning the Tulare: East James aquifer, the board found that aquifer fully appropriated in the process of denying an application. The board then adopted findings of fact, conclusions of law, and final decision indicating the aquifer was fully appropriated on October 3, 2013. The decision was not appealed. For the Tulare: Western Spink/Hitchcock aquifer, the board considered applications, denied them all based on water availability, and determined the aquifer was fully appropriated. The board adopted findings on December 5, 2013, and that board decision was appealed. The board's decision was upheld in Circuit Court by Judge Mark Barnett in a decision dated August 21, 2014. The decision of the judge was not appealed.

Mr. Duvall stated part of what was required for today's priority list creation, was publishing a notice in an official newspaper in each county in which the aquifer is located. If the official newspaper in the county was a weekly, then it was also published in the nearest daily newspaper. Both of the aquifers were published as separate notices in the following papers, once a week for two weeks: The Miller Press, The Redfield Press, Doland-Times Record, Huron Daily Plainsman, Aberdeen American News and Conde News. DENR was required to include in the publication, a notice of a 30 day application period for individuals to submit applications. The 30 day application period ended at noon on February 25, 2015. The notice indicated the board would create a priority list of all the applications submitted prior to the end of that 30 day application period. The law also required a notice be posted on the DENR website which it was. A list of qualifying applications has been prepared for each aquifer. This is the list that was provided to the board and members of the audience. For the Tulare: East James aquifer there are 14 applications, all for irrigation. For the Tulare: Western Spink/Hitchcock aquifer there are 28 applications, all for irrigation.

Mr. Duvall went over what each column means on the priority list sheet that was handed out.

Mr. Duvall asked the members of the audience if there is anyone that does not see their name on the list, or if there are any other issues before he moves forward.

No response.

Mr. Duvall demonstrated the process by which the applications would be prioritized. Each application was placed on an index card, inserted into a small plastic tube, and then drawn from an opaque container one at a time. The first application drawn has first priority and so on. It was also noted that once the priority list is established, the order of the applications cannot be changed, not even by an applicant with more than one application.

Mr. Comes conducted the random selection to create the following priority ranking.

Priority ranking for the Tulare: East James aquifer:

1. Water Permit Application No. 8088-3, Collins Hutterian Brethren Inc.
2. Water Permit Application No. 8090-3, LeAnne Bawek
3. Water Permit Application No. 8116-3, Camrose Colony
4. Water Permit Application No. 8112-3, Glendale Colony
5. Water Permit Application No. 8086-3, Gordie Hofer
6. Water Permit Application No. 8117-3, Camrose Colony
7. Water Permit Application No. 8087-3, Julie A Hengen Living Trust
8. Water Permit Application No. 8113-3, Glendale Colony
9. Water Permit Application No. 8119-3, Randy Kuehn
10. Water Permit Application No. 8089-3, Collins Hutterian Brethren Inc.
11. Water Permit Application No. 8114-3, Camrose Colony
12. Water Permit Application No. 8115-3, Camrose Colony
13. Water Permit Application No. 8140-3, Ronald Starr
14. Water Permit Application No. 8082-3, Larry R Lambert

Priority ranking for the Tulare: Western Spink Hitchcock aquifer:

1. Water Permit Application No. 8128-3, Riverside Hutterian Brethren Inc.
2. Water Permit Application No. 8101-3, Bixler Farms
3. Water Permit Application No. 8137-3, Ken and Jodi Hofer
4. Water Permit Application No. 8085-3, Riverside Hutterian Brethren
5. Water Permit Application No. 8120-3, Martin Anderson
6. Water Permit Application No. 8131-3, Scott Hamilton
7. Water Permit Application No. 8138-3, Ken and Jodi Hofer
8. Water Permit Application No. 8106-3, Bixler Land
9. Water Permit Application No. 8103-3, Bixler Land
10. Water Permit Application No. 8084-3, Riverside Hutterian Brethren
11. Water Permit Application No. 8105-3, Bixler Land
12. Water Permit Application No. 8129-3, Jeff Hamilton
13. Water Permit Application No. 8099-3, Bixler Farms
14. Water Permit Application No. 8111-3, Van Buskirk Farms LLP
15. Water Permit Application No. 8133-3, Scott Hamilton
16. Water Permit Application No. 8102-3, Bixler Land
17. Water Permit Application No. 8108-3, Van Buskirk Farms LLP
18. Water Permit Application No. 8110-3, Van Buskirk Farms LLP
19. Water Permit Application No. 8100-3, Bixler Farms
20. Water Permit Application No. 8121-3, Allen Gatzke/Jeffery Gatzke
21. Water Permit Application No. 8130-3, Jeff Hamilton
22. Water Permit Application No. 8107-3, Bixler Farms
23. Water Permit Application No. 8122-3, Allen Gatzke/Jeffery Gatzke
24. Water Permit Application No. 8083-3, Gary and Ruth Felderman
25. Water Permit Application No. 8109-3, Van Buskirk Farms LLP
26. Water Permit Application No. 8135-3, Loren or Cynthia Marzahn
27. Water Permit Application No. 8104-3, Bixler Farms

28. Water Permit Application No. 8132-3, Hamilton Family LLC

Mr. Duvall advised applicants on the priority list will be notified, and the list will be available to anyone upon request. The board directed an order be prepared detailing the priority ranking assigned to each application and placement of the order in the file for each application.

WATER PERMIT APPLICATION NO. 2078A-3, RIVERSIDE HUTTERIAN BRETHERN:

Appearances:

Ann Miles-Bailey, appearing on behalf of the Chief Engineer and Water Rights Program.

Ms. Miles-Bailey stated Riverside Colony had applied for Water Permit Application No. 8013-3, at the October 2014 hearing. During that hearing it was discovered there is a sixth well, which was not authorized and the applicant had been diverting at a greater rate than allowed under Water Right 2078-3. Because it has been previously determined that the aquifer is fully appropriated and because there is no unappropriated water available the application was denied. With this current application, the Colony now seeks to transfer only the acres and construct a new well. The colony is not asking for an increased diversion rate. As a result, the chief engineer is recommending approval of the application. The Colony did verbally commit to the chief engineer they will plug the sixth well that was being operated without authorization under Water Right 2078-3. It was not included in the recommendation of the chief engineer, however the Water Rights Program would ask the board that it be a condition if approved.

Ken Buhler gave his report.

Mr. Buhler stated Water Permit Application No. 2078A-3 proposes to amend Water Right No. 2078-3 by transferring the authority to irrigate 132 acres located in the NW $\frac{1}{4}$ Sec. 27, T112N-R61W to acreage located in the SW $\frac{1}{4}$ Sec. 17, T112N-R61W. This application also proposes to authorize the use of an additional well, located in the approximate center of the SW $\frac{1}{4}$ Sec. 17, T112N-R61W. The well is expected to be 102 feet deep and will be completed into the Tulare: Western Spink/Hitchcock aquifer. This application does not propose an increase of the diversion rate or total number of acres irrigated.

On April 25, 2014, Riverside Hutterian Brethren submitted Water Permit Application No. 8013-3 proposing to sever the authority to irrigate 132 acres located in NW $\frac{1}{4}$ Sec. 27, T112N-R61W, which was appropriated by Water Right No. 2078-3, and transfer that authority to acreage located in the SW $\frac{1}{4}$ Sec. 17, T112N-R61W. The application also proposed adding an additional well without transferring any diversion rate authority. The Water Management Board denied Water Permit No. 8013-3, essentially because the permit would potentially result in additional withdrawals from the Tulare: Western Spink/Hitchcock aquifer. Earlier, the Board found the Tulare: Western Spink/Hitchcock aquifer is fully appropriated, and the Board's decision was affirmed by the Sixth Judicial Court on August 21, 2014.

In the process of filing Water Permit Application No. 8013-3, the representative for Riverside Hutterian Brethren conveyed to DENR-Water Rights staff that a sixth well had been constructed and was 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 rate in excess of the rate authorized by Water Right No. 2078-3. The Riverside Hutterian Brethren's unauthorized increase of the diversion rate in excess of 8.69 cfs likely resulted in a larger average annual withdrawal from the Tulare: Western Spink/Hitchcock aquifer than was appropriated by Water Right No. 2078-3.

Water Permit Application No. 2078A-3 differs from Application No. 8013-3. In addition to transferring the authority to irrigate 132 acres appropriated by Water Right No. 2078-3 to different acreage, Application No. 2078A-3 also proposes to sever and transfer a portion of the diversion rate authority to a new well location.

At this time, the applicant's diversion rate capacity and ability to apply water to beneficial use appear to exceed the amounts authorized. The application indicates that "the nozzles on the center pivots will be reconfigured to 650 gpm each so that the 8.69 cfs (3900 gpm) diversion rate authorized by Water Right No. 2078-3 is not exceeded."

Mr. Buhler read Chief Engineer's recommendation.

Motion to approve Water Permit Application No. 2078A-3 subject to the qualifications of the Chief Engineer and the added qualification the unauthorized well be plugged by Freeman, seconded by Hutmacher. Hutmacher, Comes, Dixon, Freeman and Bjork all voted in favor of the motion to deny. Motion carried.

QUALIFICATIONS:

1. The wells approved under Water Right No. 2078-3 and Water Permit No. 2078A-3 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 new well authorized by Permit No. 2078A-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. A water meter with a readily accessible read out must be installed at the six well sites authorized under Water Right No. 2078-3 and Water Permit No. 2078A-3. Records must be kept for the meters and reported on the annual irrigation questionnaire.
4. Riverside Hutterian Brethren shall submit a plan with documentation to DENR for review and approval regarding how the diversion rate capacity from the six wells and ability to apply water to beneficial use is limited to 8.69 cubic feet of water per second

(3,900 gpm). DENR shall review the plan and approve the plan with or without modifications. If the plan or documentation is unacceptable, DENR will return to the permit holder with an explanation of insufficiencies. The well in the SW ¼ Section 17, T112N, R61W and the irrigation system in this quarter section shall not be constructed until DENR approval of the plan is granted.

5. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.
6. Permit No. 2078A-3 is subject to compliance with the Notice of Order to comply with Water Rights No. 2078-3 issued to Riverside Hutterian Brethren on February 4, 2015.
7. The unauthorized well located in the NE ¼ NE ¼ Section 28, T112N, R61W must be plugged in accordance to the Well Construction Standards ARSD 74:02:04 by June 1, 2015. Riverside Hutterian Brethren must notify the Chief Engineer when the well is plugged to allow an inspector access to verify the plugging is complete.

CANCELLATION CONSIDERATIONS:

Mr. Gronlund stated there are eight Water Permits or Water Rights scheduled for cancellation today. Notification went out in regards to the hearing to each of the permit or water right holders; there were no letters received in response. The recommendation is for cancellation of those.

Motion to approve the cancellation requests as recommended by DENR staff, shown on the table below, by Freeman, seconded by Bjork. Hutmacher, Comes, Dixon, Freeman and Bjork all voted in favor of the motion. Motion carried.

Water Permit No. 1733-1	Frawley Ranches Inc .	Non- Construction
Water Permit No. 1756-1	Frawley Ranches Inc.	Non- Construction
Water Right No. 2648-3	Alrinh Gretschmann	Abandonment/Forfeiture
Water Right No. 5213-3	City of Sioux Falls	Abandonment/Forfeiture
Water Right No. 5504-3	Restlawn Memory Gardens Inc.	Abandonment/Forfeiture
Water Permit No. 6805-3	Steckley's Wild Dakota Outfitters	Non- Construction
Water Permit No. 6957-3	Hoffman Harvesting Inc.	Non- Construction
Water Permit No. 7143-3	Sunset Harbor Association	Non- Construction

WATER PERMIT APPLICATION NOS. 7369A-3, 7969B-3, AND 7369C-3, HURON HUTTERIAN BRETHREN:

Ms. Mines-Bailey advised this is not a contested case hearing and can proceed informally.

Ken Buhler gave his report.

Mr. Buhler stated Water Permit No. 7369-3 currently authorizes the irrigation of 132 acres in the SW $\frac{1}{4}$ Sec. 19, T113N-R61W using water diverted from a well to be completed into Tulare: East James aquifer. At this time, the well has not been completed. Approval of Water Permit Application Nos. 7369A-3, 7369B-3, and 7369C-3 will transfer the acreage authorized for irrigation and the diversion rate authority, with the exception of 0.56 cfs, to other parcels. Irrigation from groundwater will no longer be authorized for this quarter section under Water Permit No. 7369-3. Water Right No. 7395-3 authorizes the irrigation of 132 acres in SW $\frac{1}{4}$ Sec. 19, T113N-R61W with the James River as a water source. The diversion rate authority of 0.56 cfs should be considered abandoned.

Application No. 7369A-3 proposes to transfer 45 acres and 0.22 cfs (100 gallons per minute) of diversion rate authority from Water Permit No. 7369-3 to a new location. Water Permit No. 3268C-3 appropriates 1.56 cfs from one well located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 19 to irrigate 113 acres located in the SW $\frac{1}{4}$ Section 18; all in T113N-R61W. The applicant proposes to replace the existing irrigation system authorized by No. 3268C-3 located in SW $\frac{1}{4}$ Section 18 with a cornering irrigation system capable of irrigating 158 acres at a diversion rate of 1.78 cfs (800 gpm). The 45 acres and 0.22 cfs diversion authority are being transferred to the SW $\frac{1}{4}$ Section 18, T113N, R61W to provide for the upgrade to the irrigation system. This application also proposes to change the location of the well authorized by Water Right No. 3268C-3 from the NW $\frac{1}{4}$ Section 19 to the approximate center of the SW $\frac{1}{4}$ Section 18-T113-R61W. No increase in the diversion rate or number of acres irrigated is authorized by these applications. Irrigation of the 158 acres of this quarter section using James River water as a source would also be authorized under Water Permit No. 7395-3 and Water Permit No. 7906A-3, if approved.

Application No. 7369B-3 proposes to transfer 1.0 cfs of diversion rate authority and 61 acres from Water Permit No. 7369-3 to a new location. Water Permit No. 6431A-3 appropriates 1.0 cfs from two wells completed into the Tulare:East James Aquifer located near in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 30 to irrigate 91 acres (81 acres by center pivot and 10 acres garden) located in the NW $\frac{1}{4}$, N $\frac{1}{2}$ NE $\frac{1}{4}$ Section 30; all in T113N-R61W. The application proposes to transfer 1.0 cfs of diversion rate authority from its current authorized location to the wells authorized by Water Permit No. 6431A-3. The application also proposes to transfer acres to allow the existing irrigation system authorized by Permit No. 6431A-3 to make a full rotation irrigating 129 acres and increase the size of a garden area located in the E $\frac{1}{2}$ NE $\frac{1}{4}$ Section 30-T113N-R61W to 23 acres. If approved, this application will allow for diversion of 2.0 cfs from the two wells authorized by Permit No. 6431A-3 for irrigation of a total of 152 acres. Irrigation of the 23 acres in the NE $\frac{1}{4}$ Sec. 30, T113N-R61W using James River water would be authorized under Water Permit No. 8123-3, if approved.

Application No. 7369C-3 proposes to transfer 26 acres from Water Permit No. 7369-3 to a new location. Water Permit No. 7368-3 appropriates 1.78 cfs from one well completed into the Tulare:East James Aquifer located in the center of the NW $\frac{1}{4}$ Section 19 for irrigation of 132 acres located in the NW $\frac{1}{4}$ Section 19; all in T113N-R61W. The applicant proposes to replace the existing irrigation system authorized by Water Permit No. 7368-3 with a corner

system capable of irrigating 158 acres. No increase in the diversion rate authority is requested. Irrigation of the 158 acres of this quarter section using James River water as a source would also be authorized under Water Permit No. 7395-3 and Water Permit No. 8123-3, if approved.

Development from the Tulare: East James aquifer dates back to the mid 1950's, and there are currently at least 114 irrigation wells producing from the aquifer. Well interference has never been an issue from the aquifer, and it is likely that diversions proposed by these applications can be completed without unlawfully impairing existing water rights. If the water levels in the Tulare: East James aquifer were to decline, owners of existing wells bear the responsibility of lowering the pump inlet in the well to below the top of the aquifer, if necessary. Increased lift would decrease the pump discharge, or require a larger pump or a different type of a pump to maintain the same output.

The Chief Engineer is recommending approval of all the applications.

Motion to approve Water Permit Application Nos. 7369-3, 7369B-3, and 7369C-3 with the qualifications and as recommended by the chief engineer by Freeman, seconded by Bjork. Hutmacher, Comes, Dixon, Freeman and Bjork all voted in favor of the motion. Motion carried.

QUALIFICATIONS:

Water Permit Application No. 7369A-3

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. 7369A-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.
4. Water Permit No. 7369A-3 incorporates Water Right No. 3268C-3.

Water Permit Application No. 7369B-3

1. The wells approved under this Water Permit Nos. 6431A-3 and 7369B-3 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. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.
3. Water Permit No. 7369B-3 incorporates Water Right No. 6431A-3.

Water Permit Application No. 7369C-3

1. The well approved under this Permit Nos. 7368-3 and 7369C-3 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. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.
3. Water Permit No. 7369C-3 incorporates Water Right No. 7368-3.
4. The new irrigation center pivot system with cornering ability capable of irrigation of 158 acres in the NW ¼ Section 19, T113N, R61W shall not be installed until Huron Hutterian Brethren obtains a water permit from the James River to irrigate the same 158 acres. Currently, Huron Hutterian Brethren holds Water Right No. 7395-3 which includes irrigation of 132 acres in this quarter section from the James River. Water Permit Application No. 8123-3 is pending with a deferral recommendation for 26 new acres to bring the permitted amount up to 158 acres in this quarter section.

WATER PERMIT APPLICATIONS NOS. 7906A-3 AND 8123-3, HURON HUTTERIAN BRETHREN:

Ms. Mines-Bailey advised this is not a contested case hearing and can proceed informally.

Lynn Beck was sworn into oath.

Ms. Beck gave her report on Water Permit Application No. 7906A-3.

Ms. Beck stated the Huron Hutterian Brethren, % Marvin Waldner, has filed Water Right Application No. 7906A-3 to amend Water Permit No. 7906-3 by transferring a portion of the irrigated acreage to other land. Water Permit Application No. 7906A-3 is located 15 miles north of Huron in Beadle County, SD.

Water Right No. 7906-3 authorizes irrigation of 191.78 acres located in the SE¼ Section 24 and NE¼ Section 25; all in T113N-R62W using the diversion rate authority and James River diversion point authorized by Water Right No. 7395-3. Water Right No. 7395-3 appropriates 7.13 cubic feet of water per second (cfs) from the James River located in the NE¼ NW¼ Section 24-T113N-R62W to irrigate 1,034 acres.

This application proposes to transfer 83.6 acres located in the NE¼ Section 25-T113N-R62W authorized by Water Permit No 7906-3 to the SW¼ Section 18-T113N-R61W (26 acres) and the N½ Section 24-T113N-R62W (57.6 acres). This leaves 106.1 acres in the SE¼ Section 24-T113N-R62W under Water Permit No. 7906-3. The annual period of use is from April 1 to October 31. This application, if approved, does not increase the developed diversion rate.

State Law (SDCL 46-5-34) allows an irrigation right to be severed from one parcel of land and simultaneously transferred to another parcel if it is impractical to use all or any part of the water beneficially or economically for irrigation on the current land. The justification for transferring the land is to accommodate replacement of old irrigation systems with cornering systems.

Ms. Beck stated that in 1965, the SD Water Rights Commission, predecessor to the SD Water Management Board, placed a 300 cfs diversion limit on the James River in South Dakota with a maximum combined diversion limit of 200 cfs from the North Dakota border to Huron SD. Presently there are 101 water rights with diversion from the James River totaling 300.07 cfs from the North Dakota border to the Yankton-Hutchinson County line. This application does not seek to increase the diversion rate or number of acres being irrigated. Therefore the total James River diversion will remain at the 300 cfs limit with no additional acres irrigated.

Motion to approve Water Permit Application No. 7906A-3 with the qualifications and as recommended by the chief engineer by Bjork, seconded by Freeman. Hutmacher, Comes, Dixon, Freeman and Bjork all voted in favor of the motion. 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 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.

Ms. Beck gave her report on Water Permit Application No. 8123-3.

Ms. Beck stated the Huron Hutterian Brethren, % Marvin Waldner, has filed Water Right Application No. 8123-3 to irrigate 50 new acres from the James River diversion point

authorized by Water Right No. 7395-3. Water Right No. 7395-3 appropriates 7.13 cubic feet of water per second (cfs) from the James River to irrigate 1,034 acres. This application, if approved, does not increase the developed diversion rate. Water Permit Application No. 8123-3 is located 15 miles north of Huron in Beadle County, SD.

This application proposes to irrigate 50 new acres of which 26 new acres will be located in the NW $\frac{1}{4}$ Section 19 and 24 new acres will be located in the E $\frac{1}{2}$ NE $\frac{1}{4}$ Section 30; all in T113N-R61W. Authorized irrigation from the James River under Water Right No. 7395-3 currently includes 132 acres in the NW $\frac{1}{4}$ Section 19.

The applicant proposes replacement of the irrigation system located in the NW $\frac{1}{4}$ Section 19 to accommodate a cornering system and increase the size and irrigation of a garden located in the E $\frac{1}{2}$ NE $\frac{1}{4}$ Section 30. These systems will utilize the diversion rate authority and James River diversion point authorized by Water Right No. 7395-3. Water Right No. 7395-3 appropriates 7.13 cubic feet of water per second (cfs) from the James River located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 24-T113N-R62W. The requested annual period of use is from April 1 to October 31.

Irrigation of 132 acres in the NW $\frac{1}{4}$ Section 19 and 10 acres in the N $\frac{1}{2}$ NE $\frac{1}{4}$ Section 30 is also authorized by Water Permit No. 7368-3 and 6431A-3 from the Tulare: East James Aquifer. There are pending applications to transfer acres to accommodate the cornering system and increase the garden area irrigation from the groundwater source.

The Chief Engineer is recommending deferral of this application for further study to evaluate the diversion rate status of water rights on the James River and evaluate if it is in the public interest to approve additional acres to be granted under the water right holder's existing diversion rate authority when the James River has reached the Water Management Board's established diversion rate limit.

The Water Management Board has placed a 300 cubic feet of water per second (cfs) diversion limit on the James River in South Dakota from the North Dakota border to the Yankton-Hutchinson County line. The James River diversion rate has reached the established 300 cfs limit in the described river segment, and there are currently two prior filed applications that are deferred.

Motion to defer Water Permit Application No. 8132-3, for one year as recommended by the chief engineer by Hutmacher, seconded by Freeman. Hutmacher, Comes, Dixon, Freeman and Bjork all voted in favor of the motion to defer. Motion carried.

WATER PERMIT APPLICATION NO. 8065-3, HELCA:

A transcript of this hearing was prepared and copy of the transcript may be obtained by contacting Carla Bachand, Capital Reporting Services, PO Box 903, Pierre, SD 57501, telephone number 605-224-7611.

Appearances:

Ann Miles-Bailey, appearing on behalf of the Chief Engineer and Water Rights Program.

Appearances Via Telephone:

Dana J Frohling, legal counsel for the City of Hecla.

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

DENR offered Exhibit 1, the administrative record for Water Permit Application No. 8065-3, which was admitted into the record.

DENR offered Exhibit 2, the curriculum vita for Adam Mathiowetz, which was admitted into the record.

Motion to approve Water Permit Application No. 8065-3 as recommended by the chief engineer by Freeman, seconded by Bjork. Hutmacher, Comes, Dixon, Freeman and Bjork all voted in favor of the motion. Motion carried.

Mr. Comes stated there needs to be a motion approving the priority list established through the random selection conducted previously for the 14 applications from the Tulare:East James aquifer and 28 applications from the Tulare Western Spink/Hitchcock aquifer. The motion should also authorize the board chairman to sign the order.

Motion to approve two separate priority lists based on aquifers and authorize board chair to sign the order by Freeman, seconded by Bjork. Hutmacher, Comes, Dixon, Freeman and Bjork all voted in favor of the motion. Motion carried.

The Board expressed its appreciation to Jeff Hallem for his years of service as legal counsel to the Water Management Board and wished him well on his retirement. Chairman Comes read into the record a letter from Board member Hoyt, who was not present, thanking Mr. Hallem for his valued legal counsel. A copy of the letter is in the record.

ADJOURN: Chairman Comes declared the meeting adjourned.

A court reporter was present for the meeting and transcript of the proceedings from May 6 & 7, 2015, 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 8th day of July.


Chairman, Water Management Board


Secretary, Water Management Board

ATTENDANCE SHEET
WATER MANAGEMENT BOARD

Date May 6, 2015

ITEM OF
INTEREST

CITY, STATE & ZIP

MAILING ADDRESS

NAME (PLEASE PRINT)

Tulay

WTD

3 E KEMP

RAY RICANCE

70/AM

~~SD~~ Hitchcock SD

19111 Maple

Lenny Peterson

11

Huron 57348

209-27th St N

Local Peterson

Pierre 57501

1120 N Central

Jeff Hallen

ATTENDANCE SHEET
WATER MANAGEMENT BOARD

Date May 7

ITEM OF
INTEREST

CITY, STATE & ZIP

MAILING ADDRESS

NAME (PLEASE PRINT)

Henry Peterson

Osval Peterson

Mother & Sara van Byskirk

James Feeney

Jim White

19111~~7~~ Maple

209-27th St NW

Box 72

1145 BEACH Circle N.E

Hitchcock SD

57348

Huron 57-350

Hitchcock SD

Jurson

Tulare

Tulare

Tulare

OVERSIGHT C.

ATTENDANCE SHEET
WATER MANAGEMENT BOARD

Date May 7

NAME (PLEASE PRINT)

MAILING ADDRESS

CITY, STATE & ZIP

ITEM OF INTEREST

Jeff Haller

Mary Duvall

Kevin Dettken

Gary Felderman

Jay Osterloh

Harvey Sakut

Don Weigel

Maureen Wolburn

Berra

Pierre

Doland SD

Doland

Healy SD

Neue SP

Clark Engineering
~~Handwritten~~

Furuch S. Pak 57350
Water Permit

Ag Office

Legis Oversight

Water Permit

~~Water Permit~~

8065-3

8065-3

8065-3

Water Permit