

**WATER MANAGEMENT BOARD**  
**October 13, 2016**  
**Floyd Matthew Training Center**  
**Joe Foss Building**  
**523 E Capitol Avenue**  
**Pierre SD**

Scheduled hearing times are Central Time

**AGENDA**

Scheduled times are estimates only. Agenda items may be delayed due to prior scheduled items.

- 10:00 AM Call to Order
  - Conflicts Disclosures and Requests for State Board Waivers
  - July 6 -7, 2016, Board Minutes
  - November 30 and December 1, 2016 Meeting Location (Pierre suggested)
  - 2017 Tentative Meeting Schedule: March 1 – 2    May 3 – 4    July 12 – 13
  - October 4 – 5    December 6 - 7
  - Status and Review of Water Rights Litigation – Matt Naasz
  - Administer Oath to Department of Environment and Natural Resources Staff
  - Update on DENR Activities
    - 200<sup>th</sup> meeting of Water Management Board
    - Livestreaming of Board meetings
    - Big Sioux Basin Hydrology Model
  - Annual Appointment of Prehearing Officer – Ann Mines-Bailey
- 10:30 AM Findings of Fact, Conclusions of Law and Final Decision in matter of Water Permit Application No. 2745-2, Croell Redi Mix
  - Cancellation Considerations – Eric Gronlund
  - Seven Year Review of Future Use Permit No. 5875-3, Volga – Eric Gronlund
  - Deferred Water Permit Application No. 8127-3, Teton LLC – Eric Gronlund
  - George Ferebee’s Petition for Declaratory Ruling that Local Governments are Bound by Administrative Rule of South Dakota 74:53:01:04
  - George Ferebee’s Petition for Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18

**LUNCH**

- 1:00 PM Water Permit Application No. 8232-3, Barry & Robin Vculek – Ken Buhler

**ADJOURN**

Board members are reminded that effective July 1, 2016 members are subject to SDCL 3 – 23-1 to 3-23-5 (Disclosure Laws) which address the disclosure of any conflicts of interest a member may have regarding contracts with the State of South Dakota. Board members should report any potential conflicts to the board and seek a waiver where appropriate.

Notice is given to individuals with disabilities that this meeting is being held in a physically accessible location. Please notify the Department of Environment and Natural Resources at (605) 773-3296 at least 48 hours before the meeting if you have a disability for which special arrangement must be made.

# WATER MANAGEMENT BOARD MEETING

## OCTOBER 13, 2016

<b>Qualifications:</b> wi - well interference wcr - well construction rules iq - irrigation questionnaire lf - low flow
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No.	Name	Address	County	Amount	Use	Source	Qualifications
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### Water Permit Applications to be Considered as Scheduled

8127-3	Teton LLC	Pipestone MN	GT	0.56 cfs	commercial	Granite Wash Aquifer	withdrawal
8232-3	Barry & Robin Vculek	Oakes ND	MP	2.79 cfs	no add'l ac	1 well-Spring Cr:McPherson	wi, iq, 1 special

### Unopposed New Water Permit Applications Issued Based on the Chief Engineer Recommendations

1961-1	Statham Real Estate	Spearfish	BU	1.22 cfs	65 acres	1 well-Inyan Kara Aquifer	wi, wcr, iq, 1 special
2746A-2	Forrest Stewart	Cody NE	BT	no add'l	no add'l ac	3 wells-Ogallala Aquifer	wi, wcr, iq, 3 special
2752-2	Southern Black Hills Water	Hot Springs	CU	170 AF	RWS	1 well-Inyan Kara Aquifer	wi, 2 special
2753-2	Camp Bob Marshall	Custer	CU	0.025 cfs	institutional	1 well-Precambrian Rock	wi, 1 special
2754-2	Steve Simunek	Oral	FR	0.10 cfs	commercial	1 well-Inyan Kara Aquifer	wi, wcr, 1 special
2755-2	Riverwalk Landing LLC	Pierre	ST	0.044 cfs	1.04 acre	Missouri River	iq
2756-2	Chad Gollnick	Rapid City	PE	0.033 cfs	commercial	1 well-Minnekahta Aquifer	wi, 2 special
6703-3	Todd Worrell	St. Louis MO	AU	150 AF	REC, FWP	1 well-Niobrara Aquifer	wi, wcr, 3 special
8216-3	B & K Dairy Farms LLC	Farmington CA	TU	460 AF	commercial	2 wells-Niobrara Aquifer	wi, wcr, 4 special
8222-3	Southeast Farmers Coop	Burbank	UN	0.167 cfs	commercial	1 well-Lower Vermillion Miss	wi, wcr, 2 special
8224-3	Buhler Farms LLC	Delmont	DG	1.92 cfs	135 acres	1 well-Choteau West Aquifer	wi, wcr, iq
8225-3	Ralland Janssen	Castlewood	HM	1.89 cfs	152 acres	1 well-Big Sioux:Brookings	wi, iq
8227-3	Teton LLC	Pipestone MN	GT	23.63 AF	commercial	2 wells-Veblen Aquifer	wi, 5 special
8228-3	B & B Washout	Corsica	DG	18.5 AF	commercial	1 well-Dakota Aquifer	wi, 3 special
8230-3	Cedar Grove Colony	Platte	BL	85.07 AF	no add'l ac	runoff	1 special
8231-3	Jeffrey T Juffer	Wagner	CM	1.78 cfs	104 acres	1 well-Choteau West Aquifer	wi, wcr, iq, 1 special
8233-3	Randy & Valerie Svendsen	Yankton	YA	no add'l	140 acres	1 well-Lower James Missouri	wi, iq
8234-3	Midwest Tri-State NAVHDA	Harrisburg	MA	30 AF	commercial	Skunk Creek	3 special

### Readvertisement

1435-3	City of Waubay	Waubay	DA	0.46 cfs	municipal	2 wells-Prairie Choteau	none
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### Future Use Review

5875-3	City of Volga	Volga	BG	572 AF	municipal	Big Sioux:Brookings Aquifer	none
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**CANCELLATIONS – October 13, 2016**

Number	Original Owner	Present Owner(s) & Other Persons Notified	County	Amount C.F.S.	Use	Reason	Source	Date Notified	Letters
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**DIVISION I WATER PERMITS**

PE 1347-1	Veldon Blair & Sons	Ed Blair	MD	120 acre feet	IRR	A/F	runoff	9-06-16	
PE 1375-1	Earl Bachand	Benny Bachand	MD	0.31	IRR	NC	runoff	8-31-16	

**DIVISION II WATER RIGHT**

RT 1515-2	Jake Ring & Sons Inc	Torey Ring w/Jake Ring & Sons Inc	MT	1.11	IRR	A/F	ground water – two wells (Arikaree)	8-29-16	
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**DIVISION III WATER PERMIT AND WATER RIGHTS**

RT 1479-3	Billy Rumbolz	Randal L Rumbolz	DN	1.30	IRR	A/F	ground water – one well (Niobrara)	9-01-16	
RT 4692-3	Jon Reiners	Don Boyd w/Pine Knoll Inc	LN	1.22	IRR	A/F	ground water – one well (Pleistocene series)	9-01-16	
PE 7260-3	Brandner Brothers	same (% Pete Brandner)	CA	0.89	COM	NC	ground water – one well (Inyan Kara)	8-31-16	

**ABBREVIATIONS**

N/C = NON-CONSTRUCTION	A/F = ABANDONMENT OR FORFEITURE	A = ABANDONMENT	F = FORFEITURE
FL = WATER RIGHT FILING	VR = VESTED WATER RIGHT	PE = WATER PERMIT	RT = WATER RIGHT
IRR = IRRIGATION	POW= POWER GENERATION	COM = COMMERCIAL	MUN = MUNICIPAL
INS = INSTITUTIONAL	GWR = GROUND WATER REMEDIATION	DOM = DOMESTIC	IND = INDUSTRIAL

MINUTES OF THE 199<sup>TH</sup> MEETING OF THE  
WATER MANAGEMENT BOARD  
FLOYD MATTHEW TRAINING CENTER  
523 EAST CAPITOL AVE  
PIERRE, SD

July 6 – 7, 2016

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

**APPLICATIONS:** Water Permit Application No. 2751-2, City of Custer; Water Permit Application Nos. 8047-3 and 8048-3, Rockport Hutterian Brethren; Water Permit Application No. 8123-3, Huron Hutterian Brethren; Water Permit Application No. 8200-3, Don Schaefer; and Water Permit Application No. 2745-2, Croell Redi Mix

The following were present at the meeting:

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

**Department of Environment and Natural Resources (DENR):** Jeanne Goodman, Eric Gronlund, Tim Schaal, Lynn Beck, Ron Duvall, Ken Buhler, Kelli Buscher.

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

**Legislative Oversight Committee:** Representative Mary Duvall.

**Public:**

Application No. 2751-2, city of Custer: Chris Beesley, Bob Morrison, Mayor Jared Carson, David LaFrance.

Application Nos. 8047-3 and 8048-3: Donny Wipf and Brian Wipf.

Application No. 8200-3: Frank Zweber.

Application No. 2745-2: Tom Brady, Brian Marchant, Kyle Frisinger, Matt McPhee, Steve Iverson, Mike Hickey, Don Burger, Duane Abata, Arden Davis.

**ELECTION OF OFFICERS:** Jim Hutmacher, Chairman; Tim Bjork, Vice Chairman; Leo Holzbauer, Secretary.

Motion to approve Election of Officers by Freeman, seconded by Comes. Motion carried by unanimously.

**HOUSE BILL 1214 AND BOARD MEMBER CONFLICT WAIVER REQUESTS**

Board counsel Matt Naasz discussed the new law that went into effect July 1<sup>st</sup> and the process in which Board members will need to file conflict waiver requests.

**APPROVE May 5, 2016, MINUTES:** Motion to approve by Bjork, seconded by Freeman. Motion carried unanimously.

**NEXT MEETING:** October 12 – 13, 2016 in 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.

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**UPDATE ON DENR ACTIVITIES:**

- US EPA Approval of South Dakota Water Quality Standards Revisions
- Status of Stream Flows and Shut Off Orders

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**WATER PERMIT APPLICATION NO. 2751-2, CITY OF CUSTER:**

Appearances:

Ann Mines-Bailey, on behalf of the chief engineer and the Water Rights Program.

Chris Beesley, Attorney for the City of Custer.

Tim Schaal gave his report.

Mr. Schaal stated that Water Permit Application No. 2751-2 is for reconstruction of Custer West Dam originally authorized by Water Right No. 298-2. Water Right No. 298-2 authorizes impoundment of 30 acre-feet of water by a dam on French Creek located in the NE ¼ SE ¼ Section 27-T3S-R4E. This application is proposing to reconstruct the dam and increase the storage capacity an additional 47.5 acre-feet with water to be impounded in the N ½ SE ¼ Section 27-T3S-R4E. This application requests impoundment of sufficient water to maintain water to the outlet elevation of 5,348 feet mean sea level with a total storage capacity of 77.5 acre-feet. The water will be used for recreational, fish and wildlife propagation and fire suppression purposes.

Water Right No. 298-2 was issued to the City of Custer in 1943 for 30 acre-feet of storage in the Custer West Dam. It appears that the dam was originally constructed by the Department of Game, Fish and Parks for the City. The current outlet structure has been in disrepair and the reservoir drained for several years. The capacity of the

existing dam at some time was increased to approximately 60 acre-feet. The repair of the existing dam will not change the current elevation of the primary spillway and the increase in storage capacity to 77.5 acre-feet is the result of several excavated "dug out" areas in the lake bed. The reconstructed dam will be classified as a small size, Category 1, High Hazard dam. The dam has been designed by Banner Associates, Inc. The plans and specifications have been reviewed and will be approved; however, reconstruction of the dam cannot begin until Water Permit Application No. 2751-2 is approved.

The dam will be 13 feet high with a normal storage capacity of 77.5 acre-feet with a reservoir level at the primary spillway elevation, and a maximum storage capacity of 125 acre-feet with a reservoir level at the top of dam elevation. A Category 1, High Hazard dam of this size is required to have a minimum spillway design capable of passing 50 percent of the Probable Maximum Flood (PMF), unless the owner can provide information and justification to show that the proposed design flow can be stored, passed through, or passed over the dam without failure of the dam.

The dam is located on French Creek and has a drainage area of 23,280 acres or 36.4 square miles. The dam will have 12 feet by 8 feet concrete drop inlet structure with an inlet elevation of 5348 fmsl and 5 feet of available freeboard, with 8 feet by 5 feet box culvert barrel as the primary spillway structure. The primary spillway is designed to pass the 10 year event peak inflow of 792 cfs utilizing the 2 feet of freeboard between the primary and secondary spillways. The secondary spillway will be a 200 feet wide concrete ogee structure with a crest elevation of 5350 fmsl. The ogee structure will also have a type III stilling basin, which is designed with energy dissipation blocks. The secondary spillway is designed to pass a 100 year event peak inflow of 2971 cfs utilizing two of the available three feet of freeboard between the spillway crest and top of dam elevation. The remainder of the dam, approximately 70 feet, will be designed to overtop using an anchored articulating concrete mat as the overtopping protection. The overtopping protection is designed to withstand a 50 percent PMF flood event.

The Custer West Dam is located in the SE ¼ of Section 27-T3S-R4E on French Creek. The Department of Game, Fish & Parks owns Stockade Lake Dam, which is located in Custer State Park about five miles downstream of the Custer West Dam. The Department of Game Fish and Parks filed a vested water right claim for Stockade Lake in 1961 seeking a 1933 priority date.

Ms. Mines-Bailey stated when the board packet was sent out; DENR had not received the Affidavit of Publication from the Public Notice. That has been received and is on file.

Mr. Beesley called Jared Carson, Mayor of Custer to testify.

Mayor Carson was sworn in.

Mayor Carson stated the permit is in the public interest and is of beneficial use. The lake is used for recreational purposes and the extra 47.5 acre-feet of water would be

critical for fire protection, if needed. The only letters that have been received by the City have been in support of this permit.

Mr. Beesley called David LaFrance, Engineer to testify.

Mr. LaFrance was sworn in.

Mr. LaFrance gave his educational background.

Mr. LaFrance stated he is in favor of the approval with the plans that have been presented with the project. The project will be valuable for the growing fish habitat and recreational use.

Mr. Comes asked if there is any flood protection benefit with the dam in place.

Mr. LaFrance stated the amount of storage in the facility is small compared to the drainage area.

Mr. Holzbauer asked how high the dam is currently.

Mr. LaFrance stated the dam is currently 20 feet high. The new dam will be lower, at 13 feet.

Mr. Beesley stated they are requesting the permit be approved, as the chief engineer has recommended.

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

Motion to approve Water Permit Application No. 2751-2, subject to the qualifications of the chief engineer by Freeman, seconded by Holzbauer. Motion carried unanimously.

QUALIFICATIONS:

1. Water Permit No. 2751-2 and Water Right No. 298-2, combined, authorize an impoundment with a storage capacity of 77.5 acre feet of water and sufficient water annually to maintain the water level to the outlet elevation at 5,348 feet mean sea level.
2. Low flows as needed for downstream domestic use, including livestock water and prior water rights must be by-passed.

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**CANCELLATION CONSIDERATIONS:**

Mr. Gronlund stated a table of water permit/rights scheduled for cancellation is part of the Board packet.

Mr. Gronlund stated there are 14 Water Permits/Water Rights that are scheduled to be cancelled today. There were no letters received in response to the notices of cancellations. The recommendation is for cancellation of all the Water Rights/Permits.

Mr. Gronlund stated Water Permit 6-3, in Division III, dates back to 1907 and was for an old hydroelectric dam on the Big Sioux River. Contact was made with current owners, who stated there is no longer a hydroelectric plant in existence. DENR also public noticed today's hearing. DENR is recommending cancellation of all Water Permits/Water Rights.

Motion to approve Cancellation Considerations by Freeman, seconded by Bjork. Motion carried unanimously.

US561-2A	Mike Pflaum w/Badlands National Park	Abandonment or Forfeiture
PE 2391-2	Magellan Midstream Partners LP	Abandonment
FU 2472-2	South Dakota Conservancy District	Abandonment
PE 2494-2	Dallas Schott; Harvey McPherson	Non-Construction
PE 2575-2	Fall River Feedyard LLC	Non-Construction
PE 2682-2	Kent Weber	Abandonment or Forfeiture
PE 6-3	Chris Klein; William Klein	Abandonment or Forfeiture
RT 9-3A	City of Huron	Abandonment or Forfeiture
RT 37A-3	City of Huron	Abandonment or Forfeiture
RT 1390-3	George Turner	Abandonment or Forfeiture
RT 1939-3	Kathleen A Trapp and Larry Trapp	Abandonment or Forfeiture
RT 3760-3	Guy Trenhalle	Abandonment
RT 5284-3	Mike Wojciechowski	Abandonment or Forfeiture
PE 6600-3	Mark Rilling	Abandonment or Forfeiture

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**SEVEN YEAR REVIEW OF FUTURE USE PERMITS:**

Mr. Gronlund went over which permits are up for review.

Future use permits scheduled for seven year review are:

- No. 1442-2, Wester River Water Development District – 5,515 acre feet from Missouri River
- No. 2560-2, Fall River Water User District – 358 acre feet from Madison aquifer
- No. 449-3, City of Sioux Falls – 5,430 acre feet from Big Sioux: Southern Skunk Creek aquifer

- Nos. 3981-3 & 3981A-3, City of Sioux Falls – 30,000 acre feet from Big Sioux River
- No. 4673-3, City of Elk Point – 378 acre feet from Missouri River
- No. 5155-3, Lincoln County RWS – 440 acre feet from Dakota aquifer

Motion to allow Future Use Permits to remain in effect by Freeman, seconded by Bjork.  
Motion carried unanimously.

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**DEFERRED WATER APPLICATION NOS. 8047-3 AND 8048-3, ROCKPORT HUTTERIAN BRETHREN:**

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

Lynn Beck gave her report.

Water Permit Application No. 8047-3 proposes to appropriate 2.96 cubic feet of water per second (cfs) from an existing James River diversion point located in the NW  $\frac{1}{4}$  NE  $\frac{1}{4}$  Section 6-T101N-R58W to irrigate 332 acres located in the S  $\frac{1}{2}$  NW  $\frac{1}{4}$ , S  $\frac{1}{2}$  NE  $\frac{1}{4}$ , S  $\frac{1}{2}$  Section 36-T102N-R59W and the SW  $\frac{1}{4}$  NW  $\frac{1}{4}$ , W  $\frac{1}{2}$  SW  $\frac{1}{4}$  Section 31-T102N-R58W.

Water Permit Application No. 8048-3 proposes to appropriate 5.35 cfs from an existing James River diversion point located in the NW  $\frac{1}{4}$  NE  $\frac{1}{4}$  Section 6-T101N-R58W to irrigate 469 acres located in the N  $\frac{1}{2}$  Section 36 and the SW  $\frac{1}{4}$ , SE  $\frac{1}{4}$  Section 35; all in T102N-R59W.

Ms. Beck stated since the board approved the cancellation of water rights 9-3A and 37A-3 an additional 6.84 cfs of diversion from the James River would be made available anywhere from the North Dakota (ND) boarder to the Yankton County line. With the 1.71 cfs currently available, the total diversion available for appropriation from the James River is now 8.55 cfs.

Ms. Beck stated the purpose of this study is to analyze the appropriation limits for the James River as adopted by the Water Resources Commission (predecessor to the Water Management Board) and the Water Management Board at the April 1980, May 1987, and May 2007 Board Meetings. In addition, the study shows if future appropriations of water from the James River should also be administered as stated in the Board's decisions or if changes are warranted.

During the 1960's the Water Resources Commission (predecessor to the Water Management Board) set a river diversion limit of 300 cfs) and an August 10 cutoff date for appropriations from the James River. It was also determined that there should be a 20 cfs of water by-pass at Huron, South Dakota (SD) to provide for downstream

domestic use. The diversion limit was further defined as a combined 200 cfs of water above Huron to the North Dakota/South Dakota border and a combined 300 cfs of water approved above the SD Hutchinson/Yankton (HT/YA) County line to the North Dakota/South Dakota border.

The Commission set 300 cfs limit was reached in 1968, and applications were deferred until 1975 when cancellations and underdeveloped appropriations allowed for deferred applications to be approved until the 300 cfs limit was reached. Applications were once again deferred until 1979 when a similar situation allowed James River diversions to be approved. In 1980 appropriations on the James River were once again opened and based on studies of actual irrigation development and use, it was projected that a maximum of 50 percent of permitted acres' were irrigated at any one time. In 1987, a recommendation was made to the Water Management Board to change the qualifications on those active water permits upstream of Huron, SD requiring alignment with the August 10 cut-off date and the 20 cfs by-pass at the Third Street Dam, and for those water permits downstream of Huron, SD to include the August 10 cutoff date.

In 2003, Water Rights Program Staff completed on-site surveys of James River water rights that had reported non-use for periods greater than three years. These surveys resulted in forfeiture for non-use of twenty-four James River water rights. To date the Water Rights Program periodically reviews James River water rights for non-use status and possible cancellation. As of the date of this report, the James River is within 1.71cfs of being fully appropriated.

Previous to 2007, the James River historical appropriations contained a variety of shut-off and by-pass qualifications adopted at different times. In 2007, the Water Management Board adopted a set of qualifications for James River diversions in order to bring the shut-off and bypass qualifications of active permits in line with the intentions of the Board as adopted at the April 1980 and May 1987 Board meetings. Future appropriations of water from the James River are also administered according to the qualifications adopted in 2007. The 20 cfs by-pass limit is applied at one of three US Geological Survey (USGS) gaging stations depending on the location of the diversion from the James River: gage at Ashton, SD, gage at Huron, SD, and gage near Scotland, SD.

Ms. Beck stated past inspections of James River water permits/rights have resulted in updates to the number of permits and amounts of water appropriated from the river. Presently there are ninety-nine water rights on the James River reach from the ND border to the SD HT/YA county line with 298.29 cfs total diversions. These water rights are for direct diversion of water from the James River for irrigation and other uses during the normal irrigation season. The James River reach from Huron, SD to the ND border presently has sixty-seven water rights with 186.11 cfs total diversions. This leaves thirty-two water rights with 112.18 cfs direct diversion from the James River on the stretch below Huron to the HT/YA County line. Currently 1.71 cfs is available for appropriation on the James River from the ND border to the HT/YA County line, and for appropriation above the USGS gage at Huron due to the 200 cfs limit.

Currently there are three Board deferred water permit applications, two for diversion of water from the James River and one for irrigation of additional acres with no additional diversion rate authority from the James River:

- Water Permit Application 8047-3 requesting the diversion of 2.96 cfs from the James River to irrigate 332 acres of land.
- Water Permit Application 8048-3 requesting the diversion of 5.35 cfs from the James River to irrigate 469 acres of land.
- Water Permit Application 8123-3 requesting to irrigate and additional 50 acres of land with no additional diversion from the James River.

Currently 298.29 cfs is appropriated on the James River from the ND border to the HT/YA County line, of which, 186.11 cfs is appropriated above the USGS gage at Huron and 112.18 cfs is appropriated below Huron to the HT/YA County line.

In 2007, a study was conducted by Water Rights Staff in order to bring James River water permits/rights in line with a common August 10th shut-off date and 20 cfs by-pass requirement. The study determined the probability that additional water would be available during the irrigation season until August 10 of each year. The James River was divided into three river reaches between USGS gaging stations, ND border to the USGS gage at Ashton, SD; USGS gage at Ashton, SD to the USGS gage at Huron, SD; and USGS gage at Huron, SD to USGS gage near Scotland, SD. The water appropriated for irrigation and other uses for each of the three river reaches was calculated. Once these values were obtained, a formula for actual water use at the current appropriation was developed.

Stated under Historical Summary of James River Water Permits/Rights in the report, the actual irrigation development and use on the James River in 1980 was found to be a maximum of 50 percent of permitted acres irrigated at any one time. This conclusion was reached after Water Rights Staff conducted detailed hydrographic surveys of the availability of water in the river and studies of the anticipated effects of approving water permits based on projected development and use by appropriators. A similar study was conducted in 2007 by reviewing irrigation questionnaires from 1996 to 2006. The 2007 study indicated that the 50 percent value was still appropriate. Since reporting for other uses is limited, 100 percent pumping for non-irrigation uses is assumed. In addition 20 cfs component for domestic use was added. The resulting formula for maximum use is as follows:

$$0.5(\text{IRR cfs}) + 1.0(\text{OTH cfs}) + 20 \text{ cfs} \quad \text{IRR - irrigation use} \quad \text{OTH-other}$$

Similarly for this study, pumping from 1996 through 2014 was examined to determine if the 50 percent value for irrigation development and use is still applicable today. The

James River was looked at as a whole from the ND border to the HT/YA County line. As expected the heaviest pumping months were found to be July and August.

The higher percent of irrigation appropriations pumped ranges from 44 percent to 57 percent in eight out of 19 years. Therefore, it is assumed that the 50 percent value is still applicable today. Since reporting for other uses is limited, 100 percent pumping is assumed. In addition, 20 cfs for domestic use was added. The resulting formula for maximum use is as follows:

$$0.5(\text{IRR cfs}) + 1.0(\text{OTH cfs}) + 20 \text{ cfs} \quad \text{1RR- irrigation use} \quad \text{OTH - other uses}$$

The chance that water will still be available April 1 through August 10 was calculated using James River flows based on 50 or more years of USGS stream flow data for each of the three river reaches.

By August 10th there is a 25 percent chance that 6 cfs or less is available in the reach from the ND border to the Ashton gage; 11 cfs or less is available in the reach from Ashton gage to the gage at Huron; 9 cfs or less is available in the reach from the Huron gage to the Scotland gage. Conversely, there is a 75 percent chance that the above flows or greater are available.

Water Rights files show that there have been at least 12 shut-off orders issued on the James River since 1965. This represents 25.5 percent of the years from 1965 to present. Total appropriation of water from the James River during years that shutoff orders have been issued has ranged from 255 cfs to 300 cfs, full appropriation.

At current appropriation limits there is a 75 percent chance that water will be available through August 10. It is appropriate when protecting existing water rights to take into account the percent chance of water availability. Maintaining a 75 percent chance of having available water is appropriate.

To facilitate the judicious administration of the use of James River water, the protection of the instream beneficial uses of the river for recreational use and as a fishery, to maintain good quality water as well as sufficient quantity and velocity of water, continuation of the appropriation limits set by the Water Resources Commission (predecessor to the Water Management Board) and the Water Management Board in the 1960's, 1987, and 2007, is recommended.

Prior to today, 1.71 cfs of diversion from the James River was available from the ND boarder to the HT/YA county line. Today the Board cancelled Water Rights 9-3A and 37A-3 increasing the amount of diversion available from the James River from the ND border to the HT/YA county line to 8.55 cfs.

Motion to approve Water Permit Application Nos. 8047-3 and 8048-3, subject to the qualifications of the chief engineer by Freeman, seconded by Comes. Motion carried unanimously.

QUALIFICATIONS:

1. Diversion of water from the James River shall be in accordance with the following criteria:
    - a. This permit does not authorize diversion of water from the James River after August 10th of each calendar year, unless written orders have been issued by the Chief Engineer. Diversions under this permit are subject to senior water rights and any written orders issued by the Chief Engineer.
    - b. This permit does not authorize diversions from the James River when there is less than 20 cfs bypassing the USGS gaging station at Huron, SD after pumping.
  2. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.
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**DEFERRED WATER APPLICATION NO. 8123-3, HURON HUTTERIAN BRETHERN:**

Water Permit Application No. 8123-3 proposes to irrigate 50 new acres from the James River diversion point authorized by Water Right 7395-3 (described above). Twenty six of the new acres will be located in the NW ¼ Section 19 and 24 new acres will be located in the E ½ NE ¼ Section 30; all in T113N-R61W. The applicant proposes replacement of the irrigation system to accommodate a cornering system and will increase irrigation of a garden area. These systems will utilize the existing diversion rate authority authorized under Water Right No. 7395-3.

Motion to approve Water Permit Application No. 8123-3, subject to the qualifications of the chief engineer by Comes, seconded by Dixon. Motion carried unanimously.

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 Scotland SD after pumping.

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

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**DISMISSAL OF REQUEST TO AMEND ADMINISTRATIVE RULES OF SOUTH DAKOTA CHAPTER 74:02:10, FENCES CROSSING NAVIGABLE STREAMS:**

Ron Duvall was sworn in.

Mr. Duvall stated Gary Bussmus petitioned the South Dakota Water Management Board last year to have Firesteel Creek removed from the list of stream where gates are required in fences crossing the stream. At their December 2015 meeting, the Board adopted a rule that would eliminate the requirement for gates in fences crossing Firesteel Creek from the Loomis Road (405th Avenue) upstream to the Davison/Aurora County line. However, the Legislative Rules Review Committee reverted the rule adoption process back to the Board for another hearing. The committee decided the board had not adequately considered all comments during its hearing process.

Then in the 2016 Legislative Session, House Bill No. 1082 was introduced to codify the list of navigable streams requiring gates. In addition, the bill repealed the sections of codified law that allowed a person to file a petition with the Board requesting that a stream or portion of a stream be added or deleted where gates are required in fences crossing the stream and that gave the board's rulemaking authority. This legislation passed both the Senate and House of Representatives and was signed by the Governor Dugaard.

This new law went into effect on July 1, 2016. The Water Management Board no longer has authority to act on Mr. Bussmus' petition or conduct rule-making regarding where gates are required in fences crossing a stream. Even if the board had reconsidered the matter and adopted a rule removing the gate requirement prior to July 1, 2016, the rule would be repealed by the law effective July 1, 2016. The Legislature will now have that authority through the legislative process.

Motion to dismiss the request to amend Administrative Rules of South Dakota Chapter 74:02:10, due to the matter now being controlled by the Legislature by Freeman, seconded by Bjork. Motion carried unanimously.

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**WATER PERMIT APPLICATION NO. 8200-3, DON SCHAEFER:**

Water Permit Application No. 8200-3 proposes to appropriate 2.28 cubic feet of water per second (cfs) from three wells to be completed into the Hoven South Management Unit of the Bowdle Aquifer (50 feet deep) located in the NE ¼ Section 21 for irrigation of 160 acres located in the NE ¼ Section 21; all in T120N-R74W.

Ms. Mines-Bailey stated on July 5, 2016, DENR staff received a phone call from Mr. Schaefer indicating he wishes to withdraw his application. DENR asked that request be made in writing. Mr. Schaefer's wife filed via email, a request to withdraw the application.

Petitioner Frank Zweber was present at the hearing.

Motion to authorize withdrawal of Water Permit Application No. 8200-3 by Bjork, seconded by Freeman. Motion carried unanimously.

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**WATER PERMIT APPLICATION NO. 2745-2, CROELL REDI MIX:**

Water Permit Application No. 2745-2 proposes to appropriate 19.6 acre feet of water annually at a maximum diversion rate of 0.33 cubic feet of water per second from one well to be completed into the Deadwood Aquifer (1150 feet deep) located in the NE  $\frac{1}{4}$  SW  $\frac{1}{4}$  Section 9, T1S-R7E for industrial and domestic use located in portions of the S  $\frac{1}{2}$  NE  $\frac{1}{4}$ , SE  $\frac{1}{4}$  NW  $\frac{1}{4}$ , that portion of the NE  $\frac{1}{4}$  SW  $\frac{1}{4}$  lying north of Highway 16, and that portion of the SE  $\frac{1}{4}$  lying north of Highway 16 in Section 9, T1S-R7E and that portion of the S  $\frac{1}{2}$  NW  $\frac{1}{4}$  lying west of Highway 16 and the portion of the SW  $\frac{1}{4}$  lying north and west of Highway 16 in Section 10, T1S-R7E.

A transcript was ordered for this application and may be obtained by contacting Carla Bachand, PO Box 903, Pierre, SD 57501-0903, telephone number (605) 224-7611.

Motion to approve Water Permit Application No. 2745-2, subject to the qualifications of the chief engineer by Freeman, seconded by Dixon. Comes, Freeman, Dixon, Holzbauer, and Hutmacher voted in favor of the motion. Bjork voted against the motion. Motion carried by roll call vote.

Mr. Naasz set September 22, 2016, as the date for proposed findings of facts, conclusions of law and a final decision to be submitted and September 30, 2016 for written objections or comments in support of proposed findings to be submitted. Adoption of the proposed findings will be scheduled for the Board's October meeting.

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**ADJOURN:** Chairman Hutmacher declared the meeting adjourned.

A court reporter was present for the meeting, and a transcript of the proceedings from July 6-7, 2016, 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 11<sup>th</sup> day of October.

\_\_\_\_\_  
Chairman, Water Management Board

\_\_\_\_\_  
Secretary, Water Management Board

Draft

**CANCELLATION CONSIDERATIONS  
OCTOBER 13, 2016 WMB MEETING**



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

JOE FOSS BUILDING  
523 EAST CAPITOL  
PIERRE SOUTH DAKOTA 57501-3182  
<http://denr.sd.gov>

August 29, 2016

NOTICE OF CANCELLATION

TO: Ed Blair, 19599 Bear Butte Rd, <sup>Vale</sup> Sturgis SD 57788

FROM: Ron Duvall, Water Rights Permitting Administrator  
for Jeanne Goodman, Chief Engineer  
Water Rights Program

SUBJECT: Cancellation of Water Permit No. 1347-1

Water Permit No. 1347-1 authorizes diversion of water from runoff into a storage dam for irrigation purposes. The land to be irrigated is located in the SW ¼ Section 14, T7N, R5E. On August 10, 2016, Steve Quissell with our program contacted you to set up a licensing investigation of the area. You indicated the water use system has not been maintained and is no longer functional for irrigation purposes. The Chief Engineer of the Water Rights Program is recommending cancellation of Water Permit No. 1347-1 due to abandonment and/or forfeiture.

The Water Management Board will consider cancellation of Water Permit No. 1347-1 at 10:30 am, Thursday, October 13, 2016 (Central Time) in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol, Pierre, SD (*the agenda time is an estimate and the actual time of hearing may be later*).

The recommendation of the Chief Engineer is not final or binding upon the Board. The Board is authorized to 1) cancel, 2) cancel portions of, 3) delay action on, or 4) take no action on Water Permit No. 1347-1 based upon facts presented at the public hearing. Our records show you to be the owner of property covered by this water permit. If you wish to oppose the cancellation and if you intend to participate in the hearing before the Board and present evidence or cross-examine witnesses according to SDCL 1-26, you must file a written petition with the Chief Engineer by October 3, 2016. The petition may be informal, but it must include a statement describing the reasons for your opposition to the cancellation, and your signature and mailing address or your legal counsel if legal counsel is obtained.

The hearing will be conducted pursuant to the provisions of SDCL 46-1-1 thru 46-1-10, 46-1-14 thru 46-1-15; 46-2-3.1, 46-2-9, 46-2-11, 46-2-17; 46-5-36, 46-5-37, 46-5-37.1; 46-2A-1 thru 46-2A-7; and Board Rules ARSD 74:02:01:36 thru 74:02:01:41. These are contested cases pursuant to procedures contained in SDCL 1-26.

August 29, 2016

Ed Blair

Page 2

This hearing is an adversarial proceeding. Any party has the right to be present or to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

The time of the hearing will be automatically extended for at least twenty days upon your written request to the Chief Engineer after a petition has been filed to oppose the cancellation. If an extension is requested, the hearing on the cancellation will be continued until the next regular Board Meeting. Any request for extension must be filed with the Chief Engineer by October 3, 2016.

Prior to October 3, 2016, contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) if assistance is needed with the following: 1) further information on the proposed cancellation; 2) to assure access to the meeting room for the handicapped; or 3) to obtain an interpreter for the hearing impaired.

According to SDCL 1-26-18.3, parties to a contested case may use the Office of Hearing Examiners to conduct a hearing if either a property right is being terminated or the dollar amount in controversy exceeds \$2,500.00. If you choose to use the Office of Hearing Examiners rather than the hearing procedure described above, then you need to notify the Chief Engineer (Water Rights Program, 523 E. Capitol Avenue, Pierre SD) by September 8, 2016.



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

JOE FOSS BUILDING  
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PIERRE SOUTH DAKOTA 57501-3182  
<http://denr.sd.gov>

RECOMMENDATION OF CHIEF ENGINEER

FOR WATER PERMIT NO. 1347-1, VELDON BLAIR & SONS

Pursuant to SDCL 46-2A-2 and 46-5-37.1, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Water Permit No. 1347-1. The land is now owned by Ed Blair.

The Chief Engineer is recommending cancellation of the above water permit due to abandonment and/or forfeiture.

On August 10, 2016, Steve Quissell with the Program contacted the current owner to set up a licensing investigation of the area described in the water permit. Mr. Blair indicated the system was never of much value due to lack of water. As a result, the system was not maintained and is currently not functional as a water spreading system. The dam can function as a stock water pond but is very limited due to water quality issues.

RON DUVALL, Water Rights Permitting Administrator  
for Jeanne Goodman, Chief Engineer  
August 29, 2016

**Note:**

Cancellation of the water permit does not prohibit a new application for this project in the future.



DEPARTMENT of ENVIRONMENT  
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<http://denr.sd.gov>

August 31, 2016

NOTICE OF CANCELLATION

TO: Benny Bachand, 20172 139<sup>th</sup> Ave, Sturgis SD 57785

FROM: Ron Duvall, Water Rights Permitting Administrator  
for Jeanne Goodman, Chief Engineer  
Water Rights Program

SUBJECT: Cancellation of Water Permit No. 1375-1

Water Permit No. 1375-1, listed in the name of Earl Bachand, authorizes diversion of runoff water through a water spreading system for irrigation of 28 acres in the W ½ NE ¼ Section 22, T6N, R7E in Meade County. On August 8<sup>th</sup> and August 30<sup>th</sup>, 2016, Steve Quissell with our program contacted you regarding the irrigation project and the status of any development. You confirmed the project was never constructed. The time limit for completion of works, as stated on the permit, expired in March, 1992. The Chief Engineer of the Water Rights Program is recommending cancellation of Water Permit No. 1375-1 due to non-construction.

The Water Management Board will consider cancellation of Water Permit No. 1375-1 at 10:30 am, Thursday, October 13, 2016 (Central Time) in the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol, Pierre, SD (*the agenda time is an estimate and the actual time of hearing may be later*).

The recommendation of the Chief Engineer is not final or binding upon the Board. The Board is authorized to 1) cancel, 2) cancel portions of, 3) delay action on, or 4) take no action on Water Permit No. 1375-1 based upon facts presented at the public hearing. Our records show you to be the owner of property covered by this water permit. If you wish to oppose the cancellation and if you intend to participate in the hearing before the Board and present evidence or cross-examine witnesses according to SDCL 1-26, you must file a written petition with the Chief Engineer by October 3, 2016. The petition may be informal, but it must include a statement describing the reasons for your opposition to the cancellation, and your signature and mailing address or your legal counsel if legal counsel is obtained.

The hearing will be conducted pursuant to the provisions of SDCL 46-1-1 thru 46-1-10, 46-1-14 thru 46-1-15; 46-2-3.1, 46-2-9, 46-2-11, 46-2-17; 46-5-36, 46-5-37, 46-5-37.1; 46-2A-1 thru 46-2A-7; and Board Rules ARSD 74:02:01:36 thru 74:02:01:41. These are contested cases pursuant to procedures contained in SDCL 1-26.

August 31, 2016  
Benny Bachand  
Page 2

This hearing is an adversarial proceeding. Any party has the right to be present or to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

The time of the hearing will be automatically extended for at least twenty days upon your written request to the Chief Engineer after a petition has been filed to oppose the cancellation. If an extension is requested, the hearing on the cancellation will be continued until the next regular Board Meeting. Any request for extension must be filed with the Chief Engineer by October 3, 2016.

Prior to October 3, 2016, contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) if assistance is needed with the following: 1) further information on the proposed cancellation; 2) to assure access to the meeting room for the handicapped; or 3) to obtain an interpreter for the hearing impaired.

According to SDCL 1-26-18.3, parties to a contested case may use the Office of Hearing Examiners to conduct a hearing if either a property right is being terminated or the dollar amount in controversy exceeds \$2,500.00. If you choose to use the Office of Hearing Examiners rather than the hearing procedure described above, then you need to notify the Chief Engineer (Water Rights Program, 523 E. Capitol Avenue, Pierre SD) by September 12, 2016.



DEPARTMENT of ENVIRONMENT  
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RECOMMENDATION OF CHIEF ENGINEER

FOR WATER PERMIT NO. 1375-1, EARL BACHAND

Pursuant to SDCL 46-2A-2 and 46-5-37.1, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Water Permit No. 1375-1, now owned by Benny Bachand.

The Chief Engineer is recommending cancellation of the above water permit due to non-construction.

The time limit for completion of works as outlined in the permit expired in 1992. Steve Quissell with the Water Rights Program spoke with Mr. Bachand on August 8<sup>th</sup> and August 30<sup>th</sup>, 2016 concerning the existence of a water use system on the property. Mr. Bachand confirmed nothing had ever been developed.

RON DUVALL, Water Rights Permitting Administrator  
for Jeanne Goodman, Chief Engineer  
August 31, 2016

**Note:**

Cancellation of the water permit does not prohibit a new application for this project in the future.



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

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August 29, 2016

NOTICE OF CANCELLATION

TO: Torey Ring, Jake Ring & Sons Inc., 24904 273<sup>rd</sup> St, Norris SD 57560

FROM: Ron Duvall, Water Rights Permitting Administrator  
for Jeanne Goodman, Chief Engineer  
Water Rights Program

SUBJECT: Cancellation of Water Right No. 1515-2

Water Right No. 1515-2 authorizes diversion of water from ground water (two wells, Arikaree Formation) for irrigation of 132 acres in the SW  $\frac{1}{4}$  Section 21, T40N, R32W in Mellette County. On the 2015 irrigation questionnaire you reported the center pivot had been sold along with the pumps and motors to the wells. On July 20, 2016, Mike DeFea with our program contacted you regarding your irrigation questionnaire and intent towards the water right. During the conversation you confirmed you no longer intended to irrigate. Based on this information, the Chief Engineer of the Water Rights Program is recommending cancellation of Water Right No. 1515-2 due to abandonment and/or forfeiture.

The Water Management Board will consider cancellation of Water Right No. 1515-2 at 10:30 am, Thursday, October 13, 2016 (Central Time) in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol, Pierre, SD (*the agenda time is an estimate and the actual time of hearing may be later*).

The recommendation of the Chief Engineer is not final or binding upon the Board. The Board is authorized to 1) cancel, 2) cancel portions of, 3) delay action on, or 4) take no action on Water Right No. 1515-2 based upon facts presented at the public hearing. Our records show you to be the owner of property covered by this water right. If you wish to oppose the cancellation and if you intend to participate in the hearing before the Board and present evidence or cross-examine witnesses according to SDCL 1-26, you must file a written petition with the Chief Engineer by October 3, 2016. The petition may be informal, but it must include a statement describing the reasons for your opposition to the cancellation, and your signature and mailing address or your legal counsel if legal counsel is obtained.

The hearing will be conducted pursuant to the provisions of SDCL 46-1-1 thru 46-1-10, 46-1-14 thru 46-1-15; 46-2-3.1, 46-2-9, 46-2-11, 46-2-17; 46-5-36, 46-5-37, 46-5-37.1; 46-2A-1 thru 46-2A-7; and Board Rules ARSD 74:02:01:36 thru 74:02:01:41. These are contested cases pursuant to procedures contained in SDCL 1-26.

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The time of the hearing will be automatically extended for at least twenty days upon your written request to the Chief Engineer after a petition has been filed to oppose the cancellation. If an extension is requested, the hearing on the cancellation will be continued until the next regular Board Meeting. Any request for extension must be filed with the Chief Engineer by October 3, 2016.

Prior to October 3, 2016, contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) if assistance is needed with the following: 1) further information on the proposed cancellation; 2) to assure access to the meeting room for the handicapped; or 3) to obtain an interpreter for the hearing impaired.

According to SDCL 1-26-18.3, parties to a contested case may use the Office of Hearing Examiners to conduct a hearing if either a property right is being terminated or the dollar amount in controversy exceeds \$2,500.00. If you choose to use the Office of Hearing Examiners rather than the hearing procedure described above, then you need to notify the Chief Engineer (Water Rights Program, 523 E. Capitol Avenue, Pierre SD) by September 8, 2016.



DEPARTMENT of ENVIRONMENT  
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RECOMMENDATION OF CHIEF ENGINEER

FOR WATER RIGHT NO. 1515-2, JAKE RING & SONS INC

Pursuant to SDCL 46-2A-2 and 46-5-37.1, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Water Right No. 1515-2.

The Chief Engineer is recommending cancellation of the above water right due to abandonment and/or forfeiture.

The 2015 irrigation questionnaire submitted by Torey Ring on behalf of Jake Ring & Sons Inc., indicated they had sold the center pivot and the well pipes and motors. On July 20, 2016, Mike DeFea with the Water Rights Program contacted Mr. Ring regarding the questionnaire and their intent towards the water right. Mr. Ring discussed the factors involving their decision to remove and sell the system. He indicated one of the factors was the deterioration of the wells and the inability of them to produce enough water to operate the system.

RON DUVALL, Water Rights Permitting Administrator  
for Jeanne Goodman, Chief Engineer  
August 29, 2016

**Note:**

Cancellation of the water right does not prohibit a new application for this project in the future.



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

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September 1, 2016

NOTICE OF CANCELLATION

TO: Randal L Rumbolz, 27013 407<sup>th</sup> Ave, Dimock SD 57331

FROM: Ron Duvall, Water Rights Permitting Administrator  
for Jeanne Goodman, Chief Engineer  
Water Rights Program

SUBJECT: Cancellation of Water Right No. 1479-3

Water Right No. 1479-3, listed in the name of Billy Rumbolz, authorizes diversion of ground water for irrigation of the SW ¼ Section 20, T101N, R60W in Davison County. In 2015, you were contacted regarding past irrigation questionnaires which indicated the land in Section 20 was no longer irrigated. At that time, you confirmed the land was no longer irrigated and the use of water had been abandoned. The Chief Engineer of the Water Rights Program is recommending cancellation of Water Right No. 1479-3 due to abandonment and/or forfeiture.

The Water Management Board will consider cancellation of Water Right No. 1479-3 at 10:30 am, Thursday, October 13, 2016 (Central Time) in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol, Pierre, SD (*the agenda time is an estimate and the actual time of hearing may be later*).

The recommendation of the Chief Engineer is not final or binding upon the Board. The Board is authorized to 1) cancel, 2) cancel portions of, 3) delay action on, or 4) take no action on Water Right No. 1479-3 based upon facts presented at the public hearing. Our records show you to be the owner of property covered by this water right. If you wish to oppose the cancellation and if you intend to participate in the hearing before the Board and present evidence or cross-examine witnesses according to SDCL 1-26, you must file a written petition with the Chief Engineer by October 3, 2016. The petition may be informal, but it must include a statement describing the reasons for your opposition to the cancellation, and your signature and mailing address or your legal counsel if legal counsel is obtained.

The hearing will be conducted pursuant to the provisions of SDCL 46-1-1 thru 46-1-10, 46-1-14 thru 46-1-15; 46-2-3.1, 46-2-9, 46-2-11, 46-2-17; 46-5-36, 46-5-37, 46-5-37.1; 46-2A-1 thru 46-2A-7; and Board Rules ARSD 74:02:01:36 thru 74:02:01:41. These are contested cases pursuant to procedures contained in SDCL 1-26.

September 1, 2016  
Randal L Rumbolz  
Page 2

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The time of the hearing will be automatically extended for at least twenty days upon your written request to the Chief Engineer after a petition has been filed to oppose the cancellation. If an extension is requested, the hearing on the cancellation will be continued until the next regular Board Meeting. Any request for extension must be filed with the Chief Engineer by October 3, 2016.

Prior to October 3, 2016, contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) if assistance is needed with the following: 1) further information on the proposed cancellation; 2) to assure access to the meeting room for the handicapped; or 3) to obtain an interpreter for the hearing impaired.

According to SDCL 1-26-18.3, parties to a contested case may use the Office of Hearing Examiners to conduct a hearing if either a property right is being terminated or the dollar amount in controversy exceeds \$2,500.00. If you choose to use the Office of Hearing Examiners rather than the hearing procedure described above, then you need to notify the Chief Engineer (Water Rights Program, 523 E. Capitol Avenue, Pierre SD) by September 12, 2016.



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

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RECOMMENDATION OF CHIEF ENGINEER  
FOR WATER RIGHT NO. 1479-3, BILLY D RUMBOLZ

Pursuant to SDCL 46-2A-2 and 46-5-37.1, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Water Right No. 1479-3 now owned by Randal L Rumbolz.

The Chief Engineer is recommending cancellation of the above water right due to abandonment and/or forfeiture.

Records on file with the Program indicate the land was last irrigated in 1996. A notation made on the 2013 and 2014 irrigation questionnaires stated the use had been abandoned in 2013. In 2015, you acknowledged irrigation was no longer taking place on the property.

RON DUVALL, Water Rights Permitting Administrator  
for Jeanne Goodman, Chief Engineer  
September 1, 2016

Notes:

**Cancellation of the water right does not prohibit a new application for this project in the future.**

**Cancellation consideration of Water Right No. 1479-3 references only the land in Section 20 and does not pertain to the water right you hold for land in the SE ¼ Section 19, T101N, R60W.**



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

JOE FOSS BUILDING  
523 EAST CAPITOL  
PIERRE SOUTH DAKOTA 57501-3182  
<http://denr.sd.gov>

September 1, 2016

NOTICE OF CANCELLATION

TO: Don Boyd, Pine Knoll Inc., 4504 W 12<sup>th</sup> St, Sioux Falls SD 57107

FROM: Ron Duvall, Water Rights Permitting Administrator  
for Jeanne Goodman, Chief Engineer  
Water Rights Program

SUBJECT: Cancellation of Water Right No. 4692-3

Water Right No. 4692-3, listed in the name of Jon Reiners, authorizes diversion of ground water to irrigate 135 acres in the W ½ Section 8, T98N, R51W in Lincoln County. In April, 2016, Genny McMath with our program contacted you in regard to ownership and use of water as authorized under the water right. At that time, you confirmed you had purchased the land at auction. It is our understanding no irrigation system was present on the property and the former owner had the irrigation well plugged. The Chief Engineer of the Water Rights Program is recommending cancellation of Water Right No. 4692-3 due to abandonment and/or forfeiture.

The Water Management Board will consider cancellation of Water Right No. 4692-3 at 10:30 am, Thursday, October 13, 2016 (Central Time) in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol, Pierre, SD (*the agenda time is an estimate and the actual time of hearing may be later*).

The recommendation of the Chief Engineer is not final or binding upon the Board. The Board is authorized to 1) cancel, 2) cancel portions of, 3) delay action on, or 4) take no action on Water Right No. 4692-3 based upon facts presented at the public hearing. Our records show you to be the owner of property covered by this water right. If you wish to oppose the cancellation and if you intend to participate in the hearing before the Board and present evidence or cross-examine witnesses according to SDCL 1-26, you must file a written petition with the Chief Engineer by October 3, 2016. The petition may be informal, but it must include a statement describing the reasons for your opposition to the cancellation, and your signature and mailing address or your legal counsel if legal counsel is obtained.

The hearing will be conducted pursuant to the provisions of SDCL 46-1-1 thru 46-1-10, 46-1-14 thru 46-1-15; 46-2-3.1, 46-2-9, 46-2-11, 46-2-17; 46-5-36, 46-5-37, 46-5-37.1; 46-2A-1 thru 46-2A-7; and Board Rules ARSD 74:02:01:36 thru 74:02:01:41. These are contested cases pursuant to procedures contained in SDCL 1-26.

September 1, 2016

Don Boyd

Page 2

This hearing is an adversarial proceeding. Any party has the right to be present or to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

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Prior to October 3, 2016, contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) if assistance is needed with the following: 1) further information on the proposed cancellation; 2) to assure access to the meeting room for the handicapped; or 3) to obtain an interpreter for the hearing impaired.

According to SDCL 1-26-18.3, parties to a contested case may use the Office of Hearing Examiners to conduct a hearing if either a property right is being terminated or the dollar amount in controversy exceeds \$2,500.00. If you choose to use the Office of Hearing Examiners rather than the hearing procedure described above, then you need to notify the Chief Engineer (Water Rights Program, 523 E. Capitol Avenue, Pierre SD) by September 12, 2016.



**DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES**

JOE FOSS BUILDING  
523 EAST CAPITOL  
PIERRE SOUTH DAKOTA 57501-3182  
<http://denr.sd.gov>

**RECOMMENDATION OF CHIEF ENGINEER**

**FOR WATER RIGHT NO. 4692-3. JON REINERS**

Pursuant to SDCL 46-2A-2 and 46-5-37.1, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Water Right No. 4692-3 with land now owned by Don Boyd, Pine Knoll, Inc.

The Chief Engineer is recommending cancellation of the above water right due to *abandonment and/or* forfeiture.

On April 13, 2016, Genny McMath with the Water Rights Program spoke with Don Boyd concerning Water Right No. 4692-3. Mr. Boyd confirmed ownership of the land. The land was purchased at auction with no irrigation system on site. Mr. Boyd indicated the former owner had tried to sell the well separately and ended up having the well plugged instead of letting it go with the land.

A handwritten signature in black ink, appearing to read "Ron Duvall".

RON DUVALL, Water Rights Permitting Administrator  
for Jeanne Goodman, Chief Engineer  
September 1, 2016

**Note:**

Cancellation of the water permit does not prohibit a new application for this project in the future.



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

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523 EAST CAPITOL  
PIERRE SOUTH DAKOTA 57501-3182  
<http://denr.sd.gov>

August 31, 2016

NOTICE OF CANCELLATION

TO: Pete Brandner, Brandner Brothers, 1103 Main St N, Herreid, SD 57632

FROM: Ron Duvall, Water Rights Permitting Administrator  
for Jeanne Goodman, Chief Engineer  
Water Rights Program

SUBJECT: Cancellation of Water Permit No. 7260-3

Water Permit No. 7260-3 authorizes diversion of ground water (Inyan Kara Aquifer) for commercial purposes at a truck wash. On August 30, 2016, Mike DeFea with the Water Rights Program contacted you for the purpose of setting up a licensing investigation. You indicated the well and truck wash had not been constructed. The Chief Engineer of the Water Rights Program is recommending cancellation of Water Permit No. 7260-3 due to non-construction. Although the time limit for completion of works is not up until September 19, 2016, you confirmed you no longer had any intent to develop the project at the authorized location.

The Water Management Board will consider cancellation of Water Permit No. 7260-3 at 10:30 am, Thursday, October 13, 2016 (Central Time) in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol, Pierre, SD (*the agenda time is an estimate and the actual time of hearing may be later*).

The recommendation of the Chief Engineer is not final or binding upon the Board. The Board is authorized to 1) cancel, 2) cancel portions of, 3) delay action on, or 4) take no action on Water Permit No. 7260-3 based upon facts presented at the public hearing. Our records show you to be the owner of property covered by this water permit. If you wish to oppose the cancellation and if you intend to participate in the hearing before the Board and present evidence or cross-examine witnesses according to SDCL 1-26, you must file a written petition with the Chief Engineer by October 3, 2016. The petition may be informal, but it must include a statement describing the reasons for your opposition to the cancellation, and your signature and mailing address or your legal counsel if legal counsel is obtained.

The hearing will be conducted pursuant to the provisions of SDCL 46-1-1 thru 46-1-10, 46-1-14 thru 46-1-15; 46-2-3.1, 46-2-9, 46-2-11, 46-2-17; 46-5-36, 46-5-37, 46-5-37.1; 46-2A-1 thru 46-2A-7; and Board Rules ARSD 74:02:01:36 thru 74:02:01:41. These are contested cases pursuant to procedures contained in SDCL 1-26.

This hearing is an adversarial proceeding. Any party has the right to be present or to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

The time of the hearing will be automatically extended for at least twenty days upon your written request to the Chief Engineer after a petition has been filed to oppose the cancellation. If an extension is requested, the hearing on the cancellation will be continued until the next regular Board Meeting. Any request for extension must be filed with the Chief Engineer by October 3, 2016.

Prior to October 3, 2016, contact the Water Rights Program, Joe Foss Building, 523 E Capitol, Pierre, SD (605-773-3352) if assistance is needed with the following: 1) further information on the proposed cancellation; 2) to assure access to the meeting room for the handicapped; or 3) to obtain an interpreter for the hearing impaired.

According to SDCL 1-26-18.3, parties to a contested case may use the Office of Hearing Examiners to conduct a hearing if either a property right is being terminated or the dollar amount in controversy exceeds \$2,500.00. If you choose to use the Office of Hearing Examiners rather than the hearing procedure described above, then you need to notify the Chief Engineer (Water Rights Program, 523 E. Capitol Avenue, Pierre SD) by September 12, 2016.



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

JOE FOSS BUILDING  
523 EAST CAPITOL  
PIERRE SOUTH DAKOTA 57501-3182  
<http://denr.sd.gov>

**RECOMMENDATION OF CHIEF ENGINEER**

**FOR WATER PERMIT NO. 7260-3, BRANDNER BROTHERS**

Pursuant to SDCL 46-2A-2 and 46-5-37.1, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Water Permit No. 7260-3.

The Chief Engineer is recommending cancellation of the above water permit due to non-construction.

The date for completion of works as specified on the permit expires on September 19, 2016. On August 30, 2016, Mike DeFea with the Water Rights Program spoke with Pete Brandner concerning the water permit. Mr. Brandner indicated the project has not been constructed and they no longer intend to develop at the permitted location.

RON DUVALL, Water Rights Permitting Administrator  
for Jeanne Goodman, Chief Engineer  
August 31, 2016

**Note:**

Cancellation of the water permit does not prohibit a new application for this project in the future.



CERTIFICATION

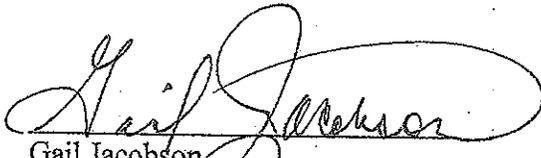
I hereby certify that on August 31, 2016, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelope(s) containing a Notice dated August 31, 2016 regarding cancellations addressed as stated below:

**Water Permit No. 7260-3**

Pete Brandner, Brandner Brothers, 1103 Main St N, Herreid, SD 57632

**Water Permit No. 1375-1**

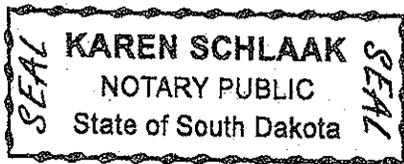
Benny Bachand, 20172 139<sup>th</sup> Ave, Sturgis SD 57785

  
Gail Jacobson  
Secretary/Water Rights

STATE OF SOUTH DAKOTA     )  
  ) SS  
COUNTY OF HUGHES         )

Sworn to, before me, this 31<sup>st</sup> day of August, 2016.

Karen Schlaak  
Karen Schlaak  
Notary Public  
My Commission expires April 1, 2019





**SEVEN YEAR REVIEW - FUTURE USE PERMITS  
OCTOBER 13, 2016 WMB MEETING**



PO Box 217, Volga, South Dakota 57071 605.627.9113

RECEIVED  
AUG - 2 2016  
WATER RIGHTS  
PROGRAM

July 29, 2016

Karen Schlaak  
Water Rights Program  
SD-DENR  
Joe Foss Building  
523 East Capitol  
Pierre, SD 57501-3182

Dear Ms. Schlaak:

This letter is in regards to the Future Use Water Permit number 5875-3, held by the City of Volga.

It is the City of Volga's intention to retain the 572 acre-feet which remains in reserve under the future use permit. Our city continues to grow in population with three new developments built in the last 4 years comprising of about 70 homes. More developments are also planned in the future. Additionally, commercial and industrial businesses are looking to relocate within the City. South Dakota Soybean Processing Plant uses about half of our daily water consumption, and any future expansion would require a larger amount of water.

With these things in mind, the City of Volga may need to tap into this reserve in the near future. Continuation of our permit helps us ensure that our water capacity remains at a sufficient level. Thank you for your consideration.

Sincerely,

Jameson Berreth  
Volga City Administrator



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

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

denr.sd.gov

RECOMMENDATION OF CHIEF ENGINEER FOR FUTURE USE WATER PERMIT  
NO. 5875-3, City of Volga SD

Pursuant to SDCL 46-2A-2, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Future Use Water Permit No. 5875-3, City of Volga, c/o Jameson Berreth, City Administrator, PO Box 217, Volga SD 57071.

The Chief Engineer is recommending that Future Use Permit No. 5875-3 REMAIN in EFFECT for 572 acre-feet annually because 1) there is reasonable probability that there may be development of the water reserved under Permit No. 5875-3, 2) the City has demonstrated a reasonable need for the water reserved by Permit No. 5875-3, 3) the proposed use will be a beneficial use and 4) it is in the public interest

Maintaining the effectiveness of Future Use Permit No. 5875-3 is subject to payment of the \$105.00 fee pursuant to SDCL 46-2-13(2) within 60 days of notice to the City after the Board hearing.

  
Jeanne Goodman, Chief Engineer  
August 30, 2016

RECEIVED

SEP 23 2016

Form 8

WATER RIGHTS PROGRAM

**PROOF OF PUBLICATION**

STATE OF SOUTH DAKOTA )  
County of Brookings ) SS

I, Katherine Foiles

certify that the attached printed Notice was taken

from the September 8, 2016

Brookings Register

printed and published in Brookings, SD

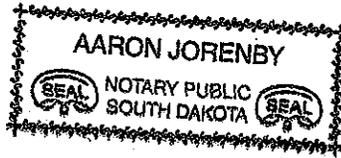
County of Brookings and

state of South Dakota. The notice was published

in the newspaper on the following date:

September 8, 2016

Cost of Printing \$41.44



[Handwritten Signature]  
(Signature)

Circulation Director  
(Title)

8/31/16  
(Date Signed)

[Handwritten Signature]  
Aaron Jorenby  
Business Mgr.

Legal 556-1x 9/6  
**NOTICE OF HEARING  
TO REVIEW FUTURE  
USE WATER PERMIT  
NO 5875-3**

Notice is given that the Water Management Board will review Future Use Permit No. 5875-3 held by the City of Volga, c/o Jameson Berreth, City Administrator, PO Box 217, Volga, SD, 57071 for progress made in the development of the water reserved by the Permit and future plans for development of the water reserved by Permit No. 5875-3. This permit was approved 2009 and currently reserves 572 acre feet from groundwater (Big Sioux Brookings Aquifer) located in the N 1/2 SW 1/4, SW 1/4 SW 1/4 Section 22-T110N-R51W. Pursuant to SDCL 46-

2A-2 the Chief Engineer of the Water Rights Program recommends that Permit No. 5875-3 REMAIN in EFFECT for 572 acre-feet annually because: 1) the reserved water may be developed; 2) there is need for the reserved water; 3) the proposed use will be a beneficial use; and 4) it is in the public interest.

The Water Management Board will conduct the hearing to review Future Use Permit No. 5875-3 at 10:30 am on October 13, 2016 at Floyd Matthew Training Center, Joe Foss Bldg, 523 E Capitol, Pierre, SD.

The recommendation of the Chief Engineer is not final or binding upon the Board and the Board is authorized to 1) allow the permit to remain in effect; 2) amend the permit by adding qualifications; 3) cancel the permit for no development or no planned future development; or 4) take no action after it reaches a conclusion based upon facts presented at the public hearing.

Any interested person who may be affected by a Board decision and who intends to participate in the hearing before the Board and present evidence or cross-examine witnesses according to SDCL 1-26 must file a written petition with BOTH the permit owner and the Chief Engineer by October 3, 2016. The Chief Engineer's address is Water Rights Program, Joe Foss Building, 523 E Capitol Ave, Pierre, SD 57501 (605-773-3352) and the permit holder's mailing address is given above. The petition may be informal, but it must include a statement describing the petitioner's interest in the future use permit, the reasons for petitioner's opposition to, or support of, continuing the future use permit, and the signature and mailing address of the petitioner or his legal counsel if legal counsel is obtained. The permit owner need not file a petition.

The hearing to review Future Use Permit No. 5875-3 will be conducted pursuant to the provisions of SDCL 46-1-14, 46-2-5, 46-2-9, 46-2-11, 46-5-38.1 Board Rules ARSD 74:02:01:25:01 thru 74:02:01:25:03 and contested case procedures contained in SDCL 1-26.

This hearing is an adversary proceeding. The permit owner or any person after filing a petition has the right to be present or to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

Any person wishing a copy of the Chief Engineer's recommendation, further information on this permit, to assure access to the hearing by the handicapped or obtain an interpreter for the hearing impaired may contact Eric Gronlund, Water Rights Program, (605-773-3352) by October 3, 2016. The time of the hearing will be automatically delayed for at least 20 days upon written request of the permit owner or any person who has filed a petition to oppose or support continuance of the Future Use Permit. The request for a delay must be filed with the Chief Engineer by October 3, 2016.

According to SDCL 1-26-18.3, parties to a contested case may use the Office of Hearing Examiners to conduct a hearing if either a property right is being terminated or the dollar amount in controversy exceeds \$2,500.00. If any party chooses to

use the Office of Hearing Examiners rather than the hearing procedure described above, then you need to notify the Chief Engineer (Water Rights Program, 523 E Capitol Ave, Pierre, SD) by September 19, 2016. Steven M. Pirner, Secretary, Department of Environment and Natural Resources. Published once at the total approximate cost of \$41.44.

RECEIVED

AUG - 3 2016

WATER RIGHTS  
PROGRAM



July 28, 2016

SD Water Right Program  
c/o Eric Gronlund  
Foss Building, 523 E. Capitol  
Pierre, South Dakota 57501

RE: Teton, LLC (Application No. 8127-3), Grant County, SD  
SE Project No. Y12222.D01

Dear Mr. Gronlund:

As you are aware, the Water Management Board has deferred Teton, LLC's Application No. 8127-3 from the Granite Wash aquifer pending additional information to be submitted by the applicant. This letter has served as official notice that Teton, LLC shall formally withdraw the application.

Teton, LLC shall continue to pursue approval of Water Permit Application No. 8227-3 to obtain the water needed for the operation. If you have any questions, please contact us.

Sincerely,  
Eisenbraun & Associates, Inc.

A handwritten signature in black ink, appearing to read 'Todd Van Maanen', with a long horizontal flourish extending to the right.

Todd Van Maanen, PE  
Project Engineer

Cc: Sean Simpson



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

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

denr.sd.gov

August 22, 2016

NOTICE

TO: Dr. Luke Minion  
PO Box 188  
Pipestone MN 56164

FROM: Jeanne Goodman, Chief Engineer  
Water Rights Program

SUBJECT: Hearing on Withdrawal of Water Permit Application No. 8127-3, Teton LLC

Water Permit Application No. 8127-3 proposed to appropriate 0.056 cfs from one well to be completed into the Granite Wash Aquifer (approximately 294 feet deep) located in the NW ¼ SW ¼ Section 16, T121N, R47W in Grant County, South Dakota. On July 8, 2015, the Water Management Board deferred the application to allow Teton LLC to provide more information necessary to adequately determine if there is unappropriated water available and if the potential effect of pumping will adversely impact existing water users.

On August 3, 2016, Todd Van Maanen, engineering consultant submitted a letter stating Teton LLC's intent to formally withdraw the application.

The Water Management Board will consider the withdrawal of Application No. 8127-3 at 10:00 AM, Thursday, October 13, 2016 in the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre SD. The agenda time is an estimate and may be delayed as a result of prior agenda items.

The action to withdraw Application No. 8127-3 does not affect Teton's existing Water Permit No. 8066-3 appropriating water from the Veblen aquifer or the pending Application No. 8227-3 to increase the annual volume of water from the wells completed into the Veblen aquifer.

Please contact Eric Gronlund at (605) 773-3352 if you have questions about scheduling withdrawal of Application No. 8127-3.

c: Ann Mines, Assistant Attorney General  
Todd Van Maanen, Stockwell Engineering, 215 Walnut Street, Yankton SD 57078  
Sean Simpson, PO Box 188, Pipestone MN 56164



**DECLARATORY RULING ON**

**ARSD 74:53:01:04**

RECEIVED

MAY 11 2016

Dept. of Environment and  
Natural Resources  
Secretary's Office

11495 Gillette Prairie Rd  
Hill City, SD 57745  
May 9, 2016

SD DENR  
Joe Foss Building  
523 E. Capitol  
Pierre, SD 57501

Dear Secretary Pirner:

Thank you so very much for your May 3<sup>rd</sup> letter. Quite impressive. Thank you for identifying the applicable South Dakota Administrative Rule for requesting a *declaratory ruling*. Also, thanks for providing "your" *position* on *occupying* the field circumscribed by ARSD 74:53:01.

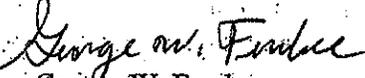
In your letter you point out that the South Dakota Water Management Board promulgated rules regulating "Individual and Small On-Site Wastewater Systems" (ARSD chapter 74:53:01) under authority granted by the South Dakota Legislature in SDCL 34A-2-93. In your next paragraph you state: "We [presumably you and your staff] are not aware of any law that would prohibit local governments from adopting its [sic] own requirements for the design, construction, or operation of septic systems within its [sic] jurisdiction ... ." You continue with a pronouncement (declaration of sorts) regarding ordinance stringency.

First question (request): Are you *aware* of any *law* that *allows* local governments to *adopt* requirements for the design, construction, or *operation* of septic systems within that government's jurisdiction? If so, please provide, with particularity. Second question (request): Will you please share with me, which legislative enactments, if any, and/or promulgated provisions, if any, that give local units of government the authority to regulate "Individual and Small On-Site Wastewater Systems?" My research thus far on both questions, which are essentially the same, has yielded an empty hand. Looking forward to your specificity.

I am looking forward to your information for at least two reasons: (1) I can discontinue my search, and (2) We (the involved government and South Dakota citizens) can move on to other relevant matters. Identifying the appropriate authority(ies), with specificity, just might bring an end to some of the uncertainty and, of course, some of the misperceptions.

Back to "ordinance" *stringency*. For now, I intend to hold on that matter. Seems to me that we should first reconcile our apparent differences regarding regulatory authority as suggested above. In other words, let's nail down the authority for "Individual and Small On-Site Wastewater Systems."

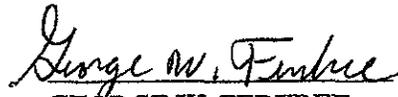
Sincerely,

  
George W. Ferebee

cc: South Dakota Attorney General Jackley

**PETITION**  
**FOR**  
**DECLARATORY RULING**

- (1) The authority by which the petition is presented: SDCL 1-26-15 & ARSD 74:02:01:46
- (2) The name of person submitting the petition: George W. Ferebee
- (3) The requested action and reasons for the action: Declare that local units of government (cities and counties) are bound by ARSD 74:53:01:04. Reason for *Petition*: To eliminate the existing controversy.

  
GEORGE W. FEREBEE  
11495 Gillette Prairie Rd  
Hill City, SD 57745  
(605) 574-2637

Administrative Rule of South Dakota

**74:53:01:04. Existing systems not affected by this chapter -- Exceptions.** On-site wastewater systems existing prior to February 28, 1975, are not subject to this chapter unless the systems are changed, the systems cause the groundwater to become polluted, or the systems are allowing wastewater to surface. Abandoned wastewater systems are not exempt from this chapter and shall be abandoned in accordance with § 74:53:01:11.

June 16  
L20994944

**NOTICE OF HEARING ON  
PETITION FOR A  
DECLARATORY RULING  
THAT LOCAL GOVERNMENTS  
ARE BOUND BY  
ADMINISTRATIVE RULE OF  
SOUTH DAKOTA 74:53:01:04**

Notice is given that a petition for declaratory ruling has been filed with the Water Management Board pursuant to South Dakota Codified Law (SDCL) 1-26-15 and Administrative Rule of South Dakota (ARSD) 74:02:01:46 by George W. Ferebee, 11495 Gillette Prairie Road, Hill City SD 57745. Mr. Ferebee requests the Board declare that local units of government (cities and counties) are bound by ARSD 74:53:01:04. The reason cited in the petition for submitting the declaratory ruling request is to eliminate the existing controversy.

ARSD 74:53:01:04 reads "On-site wastewater systems existing prior to February 28, 1975, are not subject to this chapter unless the systems are changed, the systems cause the groundwater to become polluted, or the systems are allowing wastewater to surface. Abandoned wastewater systems are not exempt from this chapter and shall be abandoned in accordance with ARSD 74:53:01:11"

The applicable statutes and administrative rules are SDCL 34A-2-93, 34A-2-20 and 34A-2-21 and ARSD 74:53:01:04.

The petition for a declaratory ruling will be considered by the Water Management Board at 8:30 AM on Wednesday, July 6, 2016 at the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre SD. The agenda time is an estimate and may be delayed due to prior agenda items. The board may issue one of the following decisions regarding the petition for a declaratory ruling after all the evidence is taken at the hearing: 1) declare that local units of government (cities and counties) are bound by ARSD 74:53:01:04, 2) take other action as the Board deems warranted after hearing the evidence presented, 3) defer action, or 4) take no action.

Any interested person who intends to participate in the hearing by presenting evidence or cross-examining witnesses according to SDCL 1-26 shall file by June 27, 2016, a written petition to oppose or support the declaratory ruling request to declare that local

governments (cities and counties) are bound by ARSD 74:53:01:04. The petition shall be filed with the Chief Engineer and Mr. Ferebee. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E. Capitol, Pierre SD 57501 (605) 773-3352" and Mr. Ferebee's address is given above. The petition may be informal but must include a statement describing the petitioner's interest in the petition for a declaratory ruling, the petitioner's reasons for opposing or supporting the petition for declaratory ruling, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained. Mr. Ferebee is a party to the hearing and need not file a petition to intervene. The July 6, 2016 hearing date will be automatically delayed for at least 20 days upon written request of Mr. Ferebee or any person who has filed a timely petition to oppose or support the request for declaratory ruling. The request for an automatic delay must be filed by June 27, 2016.

This hearing is an adversary proceeding. Any person filing a petition, including Mr. Ferebee has the right to be represented by a lawyer. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Cir-

# Affidavit of Publication

STATE OF SOUTH DAKOTA

County of Pennington SS:

RECEIVED

JUL - 5 2016

WATER RIGHTS PROGRAM

Carina Tyler being first duly sworn, upon his/her oath says: That he/she is now and was at all time hereinafter mentioned, an employee of the RAPID CITY JOURNAL, a corporation of Rapid City, South Dakota, the owner and publisher of the RAPID CITY JOURNAL, a legal and daily newspaper printed and published in Rapid City, in said County of Pennington, and has full and personal knowledge of all the facts herein stated as follows: that said newspaper is and at all of the times herein mentioned has been a legal and daily newspaper with a bonafide paid circulation of at least Two Hundred copies daily, and has been printed and published in the English language, at and within an office maintained by the owner and publisher thereof, at Rapid City, in said Pennington County, and has been admitted to the United States mail under the second class mailing privilege for at least one year prior to the publication herein mentioned; that the advertisement, a printed copy of which, taken from said Rapid City Journal, the paper in which the same was published, is attached to this sheet and made a part of this affidavit, was published in said paper once each

day for 1 successive day, the first publication there of being on the 16 day of June 2016 that the fees charged for the publication there of are 114 dollars and 81 cents.

*Carina Tyler*

Subscribed and sworn to before me this 23 day of June, 2016.

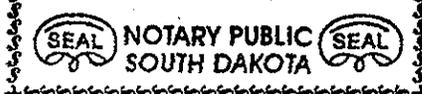
*Dustin Rice*

Notary public

DUSTIN RICE

7/1/20

My commission expires





RECEIVED

JUN 27 2016

Form 8

WATER RIGHTS PROGRAM

PROOF OF PUBLICATION

STATE OF SOUTH DAKOTA )  
County of Brown ) SS

I, Mary Bostin

certify that the attached printed Notice was taken

from the Aberdeen News

printed and published in Aberdeen

County of Brown and

state of South Dakota. The notice was published

in the newspaper on the following date:  
June 16, 2016

Cost of Printing <sup>\$1</sup> 88.02

Mary Bostin  
(Signature)

Adv. Billing Specs  
(Title)

June 16, 2016  
(Date Signed)

(No. 2133536)  
(June 16, 2016-11)

NOTICE OF HEARING ON PETITION FOR A DECLARATORY RULING THAT LOCAL GOVERNMENTS ARE BOUND BY ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53:01:04

Notice is given that a petition for declaratory ruling has been filed with the Water Management Board pursuant to South Dakota Codified Law (SDCL) 1-26-15 and Administrative Rule of South Dakota (ARSD) 74:02:01:46 by George W. Ferebee, 11496 Gillett's Prairie Road, Hill City, SD 57745. Mr. Ferebee requests the Board declare that local units of government (cities and counties) are bound by ARSD 74:53:01:04. The reason cited in the petition for submitting the declaratory ruling request is to eliminate the existing controversy.

ARSD 74:53:01:04 reads "On-site wastewater systems existing prior to February 28, 1975 are not subject to this chapter unless the systems are changed; the systems cause the groundwater to become polluted, or the systems are allowing wastewater to surface. Abandoned wastewater systems are not exempt from this chapter and shall be abandoned in accordance with ARSD 74:53:01:11."

The applicable statutes and administrative rules are SDCL 34A-2-93, 34A-2-20 and 34A-2-21 and ARSD 74:53:01:04.

The petition for a declaratory ruling will be considered by the Water Management Board at 8:30 AM on Wednesday, July 6, 2016 at the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Ave-

nue, Pierre, SD. The agenda time is an estimate and may be delayed due to prior agenda items. The board may issue one of the following decisions regarding the petition for a declaratory ruling after all the evidence is taken at the hearing: 1) declare that local units of government (cities and counties) are bound by ARSD 74:53:01:04; 2) take other action as the Board deems warranted after hearing the evidence presented; 3) defer action; or 4) take no action.

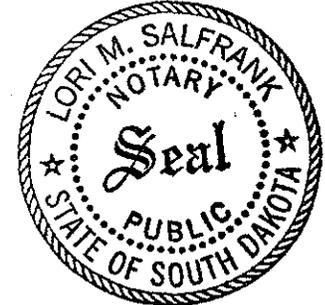
Any interested person who intends to participate in the hearing by presenting evidence or cross-examining witnesses according to SDCL 1-26, shall file by June 27, 2016, a written petition to oppose or support the declaratory ruling request to declare that local governments (cities and counties) are bound by ARSD 74:53:01:04. The petition shall be filed with the Chief Engineer and Mr. Ferebee. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre, SD 57504 (605) 773-3352"; and Mr. Ferebee's address is given above. The petition may be informal but must include a statement describing the petitioner's interest in the petition for a declaratory ruling, the petitioner's reasons for opposing or supporting the petition for declaratory ruling, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained. Mr. Ferebee is a party to the hearing and need not file a petition to intervene. The July 6, 2016, hearing date will be automatically delayed for at least 20 days upon written request of Mr. Ferebee or any person who has filed a timely petition to oppose or support the request for declaratory ruling. The request for an automatic delay must be filed by June 27, 2016.

This hearing is an adversary proceeding. Any person filing a petition including Mr. Ferebee has the right to be represented by a lawyer. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by June 27, 2016, at the above Water Rights Program address to request copies of information pertaining to this

petition for declaratory ruling. The declaratory ruling, public notice and any subsequent filings may also be found on D-E-N-R's website at <http://denr.sd.gov/des/wr/pubnotice.aspx>. Please notify the Department of Environment and Natural Resources at least 48 hours before the hearing if you have a disability for which special arrangements must be made at the hearing.

According to SDCL 1-26-18.3 in any contested case if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request no later than ten days after service of a notice of hearing issued pursuant to SD 22B-17. If you choose to use the Office of Hearing Examiners rather than the hearing procedure before the Water Management Board set forth above, you need to notify the Chief Engineer (Water Rights Program), 523 E Capitol Avenue, Pierre SD by June 27, 2016.

This petition for a declaratory ruling is made pursuant to Board General Rules, Sections 74:02:01:46 through 74:02:01:49. The Board has legal authority and jurisdiction to consider this matter pursuant to SDCL 46-2-5, 46-2-9 and 34A-2-93. Steven M. Pirner, Secretary, Department of Environment and Natural Resources, Published once at an approximate total cost of \$88.02.



CUSTOMER NUMBER:	078400	<b>Argus Leader</b>	
AD ORDER NUMBER:	1345909	P.O. Box 677349, Dallas, TX 75267-7349	
	6/16, 2016		\$122.46 Pd

George Ferebee  
11495 Gillette Prairie Rd  
Hill City, SD 57745

**RECEIVED**  
**JUN 20 2016**

DETACH THIS STUB AND RETURN WITH PAYMENT WATER RIGHTS PROGRAM PAYMENT DUE UPON RECEIPT

AFFIDAVIT OF PUBLICATION  
Customer Number: 078400  
Invoice Number: 1345909

## Argus Leader AFFIDAVIT OF PUBLICATION

STATE OF SOUTH DAKOTA  
COUNTY OF MINNEHAHA } ss

Linda Schulte being duly sworn, says: That The Argus Leader is, and during all the times hereinafter mentioned was, a daily legal newspaper as defined by SDCL 17-2-21, as amended published at Sioux Falls, Minnehaha County, South Dakota; that affiant is and during all of said times, was an employee of the publisher of such newspaper and has personal knowledge of the facts stated in this affidavit; that the notice, order or advertisement, a printed copy of which is hereto attached, was published in said newspaper upon

Thursday	the	16	day of	June	2016
_____	the	_____	day of	_____	2016
_____	the	_____	day of	_____	2016
_____	the	_____	day of	_____	2016
_____	the	_____	day of	_____	2016
_____	the	_____	day of	_____	2016
_____	the	_____	day of	_____	2016
_____	the	_____	day of	_____	2016

and that \$122.46 Pd was charged for publishing the same including a \$10.00 affidavit fee.

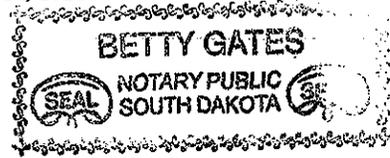
*Linda Schulte*

Subscribed and sworn to before me 6/16/2016

*Betty Gates*

Notary Public, South Dakota

My Commission expires March 11, 2022



**NOTICE OF HEARING ON PETITION FOR A DECLARATORY RULING THAT LOCAL GOVERNMENTS ARE BOUND BY ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53:01:04**

Notice is given that a petition for declaratory ruling has been filed with the Water Management Board pursuant to South Dakota Codified Law (SDCL) 1-26-15 and Administrative Rule of South Dakota (ARSD) 74:02:01:46-37; George W. Ferebee, 11495 Gillette Prairie Road, Hill City, SD 57745. Mr. Ferebee requests the Board declare that local units of government (cities and counties) are bound by ARSD 74:53:01:04. The reason cited in the petition for submitting the declaratory ruling request is to eliminate the existing controversy.

ARSD 74:53:01:04 reads "Onsite wastewater systems existing prior to February 28, 1975, are not subject to this chapter unless the systems are changed, the systems cause the groundwater to become polluted, or the systems are allowing wastewater to surface. Abandoned wastewater systems are not exempt from this chapter and shall be abandoned in accordance with ARSD 74:53:01:11."

The applicable statutes and administrative rules are SDCL 34A-2-9, 34A-2-20 and 34A-2-21 and ARSD 74:53:01:04.

The petition for a declaratory ruling will be considered by the Water Management Board at 8:30 AM on Wednesday, July 6, 2016 at the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre, SD. The agenda time is an estimate and may be delayed due to prior agenda items. The board may issue one of the follow-

ing decisions regarding the petition for a declaratory ruling after all the evidence is taken at the hearing: 1) declare that local units of government (cities and counties) are bound by ARSD 74:53:01:04; 2) take other action as the Board deems warranted after hearing the evidence presented; 3) determine or 4) take no action.

Any interested person who intends to participate in the hearing by presenting evidence or cross-examining witnesses according to SDCL 1-26 shall file by June 27, 2016 a written petition to oppose or support the declaratory ruling request to declare that local governments (cities and counties) are bound by ARSD 74:53:01:04. The petition shall be filed with the Chief Engineer and Mr. Ferebee. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre, SD 57501 (605) 773-3352" and Mr. Ferebee's address is given above. The petition may be informal but must include a statement describing the petitioner's interest in the petition for a declaratory ruling, the petitioner's reasons for opposing or supporting the petition for declaratory ruling, and the signature and mailing address of the petitioner or the petitioner's legal counsel; if legal counsel is obtained, Mr. Ferebee is a party to the hearing and need not file a petition to intervene. The July 6, 2016 hearing date will be automatically delayed for at least 20 days upon written request of Mr. Ferebee or any person who has filed a timely petition to oppose or support the request for declaratory ruling. The request for an automatic delay must be filed by June 27, 2016.

This hearing is an adversary proceeding. Any person filing a petition, including Mr. Ferebee, has the right to be represented by a lawyer. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by June 27, 2016 at the above Water Rights Program address to request

copies of information pertaining to this petition for declaratory ruling. The declaratory ruling, public notice and any subsequent filings may also be found on DENR's website at <http://denr.sd.gov/des/wr/pubnotice.aspx>. Please notify the Department of Environment and Natural Resources at least 48 hours before the hearing if you have a disability for which special arrangements must be made at the hearing.

According to SDCL 1-26-18.3, in any contested case, if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request no later than ten days after service of a notice of hearing issued pursuant to § 1-26-17. If you choose to use the Office of Hearing Examiners rather than the hearing procedure before the Water Management Board set forth above, you need to notify the Chief Engineer (Water Rights Program, 523 E. Capitol Avenue, Pierre, SD) by June 27, 2016.

This petition for a declaratory ruling is made pursuant to Board General Rules Sections 74:02:01:46 through 74:02:01:49. The Board has legal authority and jurisdiction to consider this matter pursuant to SDCL 44-2-5, 44-2-9, and 34A-2-93. Steven M. Pirner, Secretary, Department of Environment and Natural Resources. 1345909 June 16, 2016

**Petition in Opposition to George Ferebee's Petition for Declaratory  
Ruling on ARSD 74:53:01:04**

1. Petitioner: Pennington County Board of Commissioners
2. Petitioner's interest in Ferebee's petition for declaratory ruling: Petitioner is the governing body of a county that would be affected by the declaratory ruling that Ferebee is requesting.
3. Petitioner's reasons for opposing Ferebee's petition for declaratory ruling: Petitioner opposes Ferebee's petition for multiple reasons.
  - a. First, ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order *pertaining to a submitted factual situation within the board's jurisdiction.*" Ferebee has not submitted a factual situation. Rather, he is requesting a blanket ruling declaring that "local governments (cities and counties) are bound by ARSD 74:53:01:04." Therefore, without a submitted factual situation, no declaratory ruling can be made.
  - b. Second, in Title 7 that contains many of the powers of counties, the South Dakota Legislature specifically gave counties the statutory authority to regulate and prevent waste in water; regulate and compel the cleansing, abatement, and removal of any sewer, cesspool, or unwholesome or nauseous thing or place; and declare and abate public nuisances. These powers are not limited to systems, structures, or pollution of a certain date. ARSD 74:53:01:04 in no way prohibits localities from passing ordinances regulating on-site wastewater systems above and beyond their regulation by the State in the administrative rule. Subsections 14 and 15 of SDCL 7-8-20 provide county commissioners with the power to regulate waste in water and the cleansing or abatement of such.

SDCL 7-8-20 provides in relevant part: In addition to others specified by law, the board of county commissioners shall have power: . . .

(14) To enact ordinances to regulate and prevent the placing of ashes, dirt, garbage or any offensive matter in any highway or public ground or in any body or stream of water within the county, but outside of an incorporated municipality or outside of the one mile limits of any incorporated municipality;

(15) To enact ordinances to regulate and compel the cleansing, abatement or removal of any sewer, cesspool or any unwholesome or nauseous thing or place[.]

Furthermore, SDCL 7-8-33 allows county commissioners to declare and abate public nuisances:

The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality. For purposes of this section only, the feeding, breeding, or raising of livestock or the operations of a livestock sales barn, is not presumed, by that fact alone, to be a nuisance.

Simply put, a nuisance is an act or omission which "endangers the comfort, repose, health, or safety of others." SDCL 21-10-1. It is clear that an on-site wastewater system of any age may be in danger of contaminating water and endangering the health of others. Water has no bounds, so contamination of water is felt widespread throughout a community and by many, many people. Furthermore, SDCL 34A-2-1 and 34A-2-21 specify that the pollution of the waters of the state constitutes a public nuisance and may be abated as such. A county also has an extremely broad power to regulate the use of land and structures in order to promote health, safety, and welfare – which in turn means on-site wastewater systems – pursuant to SDCL 11-2-13.

- c. Third, on April 15, 2008, the Board of Commissioners approved a Resolution for the Protection of Water Resources in Pennington County. The Board recognized that implementation of water protection programs to preserve and protect drinking water resources in Pennington County would avoid unnecessary costs in the future and protect the health, safety, and general welfare of the public. Due to the unique geology, the interconnection of ground and surface water, and increasing population in un-sewered areas of the Black Hills and surrounding areas, Pennington County has enacted sections of the Pennington County Zoning Ordinance to address siting and function of on-site wastewater treatment systems to protect drinking water resources and to promote clean water resources and protect public health and the environment.
  - d. Finally, this appears to be a collateral attack by Ferebee against local regulation of onsite wastewater treatment systems regarding Ferebee's Pennington County Zoning Ordinance violation that is currently being litigated.
4. Mailing address: Pennington County Board of Commissioners, 130 Kansas City Street, Rapid City, SD 57701
  5. Petitioner's legal counsel: Jay Alderman, Chief Civil Deputy State's Attorney; Kinsley Groote, Civil Deputy State's Attorney; Michael Hofmann, Civil Deputy State's Attorney
  6. The Pennington County Board of Commissioners requests a continuance of the hearing (from the July 6, 2016 meeting presumably to the October 5, 2016 meeting).
  7. ---Copy of Motion made by Pennington County Board of Commissioners on 6/21/16---
- PETITIONS FOR DECLARATORY RULINGS – SD DENR WATER MANAGEMENT BOARD:** MOVED by Buskerud and seconded by Trautman to direct the States Attorney's Office to file a petition in opposition to the two Declaratory Ruling Petitions regarding Administrative Rule. It was further moved to authorize the Chairman's signature and request an automatic continuance. The motion carried 4-0 on a roll call vote: Buskerud – yes, Ferebee – abstained, Hadcock – yes, Trautman – yes, Petersen – yes.

Signature: \_\_\_\_\_

Lyndell Petersen, Pennington County Board of Commissioners Chairman

Date: \_\_\_\_\_

6/21/2016

RICHARD A. CUTLER  
KENT R. CUTLER  
STEVEN J. SARBACKER  
MICHAEL D. BORNTZ \*  
TRENT A. SWANSON \*  
RYAN J. TAYLOR °  
KIMBERLY R. WASSINK  
MEREDITH A. MOORE  
NATHAN S. SCHOEN \*\*\*  
NICHOLE J. MOHNING \*  
DANIEL J. DOYLE  
ALEX S. HALBACH \*  
ROBERT D. TRZYNSKA  
ERIC E. ERICKSON  
JOSEPH P. HOGUE °  
JONATHAN A. HEBER  
BRENDAN F. PONS

**CUTLER LAW FIRM, LLP**  
**ATTORNEYS AT LAW**

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POST OFFICE BOX 1400  
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JEAN BROCKMUELLER, CPA (Inactive)  
BUSINESS MANAGER

\*Also licensed to practice  
in Minnesota  
\*Also licensed to practice  
in Iowa  
\*Also licensed to practice  
in Nebraska  
\*Also licensed to practice  
in Kansas  
\*Also licensed as a Certified  
Public Accountant (inactive)

RECEIVED

JUN 27 2016

WATER RIGHTS  
PROGRAM

June 23, 2016

Water Rights Program  
Attn: Chief Engineer  
Foss Building  
523 E. Capitol  
Pierre, SD 57501

Mr. George W. Ferebee  
11495 Gillette Prairie Road  
Hill City, SD 57745

Re: *Petitions in Opposition of (i) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04; and, (ii) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18*

Dear Chief Engineer Goodman and Mr. Ferebee:

Please be advised that our firm represents the South Dakota Association of County Commissioners ("SDACC") and the South Dakota Municipal League ("SDML"). Enclosed please find petitions from the SDACC and SDML in opposition to: i) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04; and, (ii) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 (collectively the "Ferebee Petitions"). Please accept this letter, and the enclosed petitions, as notice by the SDACC and SDML of their opposition to the Ferebee Petitions and as a request that such hearing currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Should you have any questions regarding this petition or the request for delay, please do not hesitate to contact me at (605) 271-4938; at the address above, or via email at [erice@cutlerlawfirm.com](mailto:erice@cutlerlawfirm.com).

Sincerely,

CUTLER LAW FIRM, LLP



Eric E. Erickson  
For the Firm

EEE/nmw

Enclosures

cc: SDACC, SDML

**PETITION IN OPPOSITION OF GEORGE FEREBEE'S PETITION FOR A  
DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE  
RULE OF SOUTH DAKOTA 74:53:01:18**

1. **PETITIONER:** South Dakota Association of County Commissioners ("SDACC").

2. **PETITIONERS INTEREST IN THE PETITION FOR A DECLARATORY RULING:**

The SDACC is an association authorized by state law that represents all of South Dakota's sixty-six (66) counties. The SDACC has a stated purpose of "securing concerted action among the counties in behalf of such matters, measures and county affairs as the associations deem to be beneficial to and in the common interest of the counties." SDCL § 7-7-28. Many of the SDACC's member-counties, including without limitation Pennington County, have enacted ordinances that regulate the operation of cesspools and pit privies, including cesspools and pit privies constructed prior to February 28, 1975. This matter is of the utmost interest to the SDACC as the authority of its member-counties to regulate the operation of cesspools and pit privies, including systems existing prior to February 28, 1975, is necessary for the health, safety, and welfare of the general public.

3. **PETITIONER'S REASON FOR OPPOSING GEORGE FEREBEE'S PETITION FOR A DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53:01:18:**

The SDACC opposes George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 for multiple reasons, including, but not limited to:

State law provides counties with broad authority to regulate activities such as cesspools and pit privies. In addition to other authority provided in state law, SDCL §§ 7-8-20 and 7-8-33 provide counties with the authority to regulate activities such as the operation of cesspools and pit privies and do not limit such authority to only those cesspools and pit privies constructed after February 28, 1975. In particular, SDCL § 7-8-33 provides, in part, "The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality...." Additionally, SDCL § 7-8-20 provides, in relevant part, the county commissioners with the power to:

(14) To enact ordinances to regulate and prevent the placing of ashes, dirt, garbage or any offensive matter in any highway or public ground or in any body or stream of water within the county, but outside of an incorporated municipality or outside of the one mile limits of any incorporated municipality;

(15) To enact ordinances to regulate and compel the cleansing, abatement or removal of any sewer, cesspool or any unwholesome or nauseous thing or place;

The authority of counties to regulate such activities is not precluded by state law or ARSD 74:53:01:18. For the foregoing reasons, and additional authority as may later be supplemented, the SDACC gives this written petition in opposition of George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18.

4. MAILING ADDRESS OF LEGAL COUNSEL FOR THE SDACC:

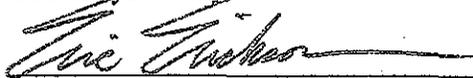
Cutler Law Firm, LLP  
Attn: Eric E. Erickson  
P.O. Box 1400  
Sioux Falls, SD 57101-1400  
Phone: (605) 271-4938  
Email: erice@cutlerlawfirm.com

5. REQUEST FOR A DELAY OF HEARING:

Petitioner respectfully requests that the hearing to consider George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18, currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Dated this 23<sup>rd</sup> of June, 2016.

CUTLER LAW FIRM, LLP  
Attorneys at Law



Eric E. Erickson  
100 N. Phillips Ave., 9th Floor  
P.O. Box 1400  
Sioux Falls, South Dakota 57101-1400  
Telephone (605) 335-4950  
Facsimile (605) 335-4961  
*Attorney for Petitioner*

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1. **PETITIONER:** South Dakota Municipal League ("SDML").

2. **PETITIONERS INTEREST IN THE PETITION FOR A DECLARATORY RULING:**

The SDML was organized in 1934 as a non-partisan, non-profit association of incorporated municipalities in South Dakota. Many of the SDML's member-municipalities, including without limitation Rapid City, have enacted ordinances that regulate the operation of cesspools and pit privies, including cesspools and pit privies constructed prior to February 28, 1975. This matter is of the utmost interest to the SDML as the authority of its member-municipalities to regulate the operation of cesspools and pit privies, including systems existing prior to February 28, 1975, is necessary for the health, safety, and welfare of the general public.

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The SDML opposes George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 for multiple reasons, including, but not limited to:

State law provides municipalities with broad authority to regulate activities such as cesspools and pit privies. In addition to other authority provided in state law, SDCL §§ 9-32-6 and 9-32-8 provide municipalities with the authority to regulate activities such as the operation of cesspools and pit privies and do not limit such authority to only those cesspools and pit privies constructed after February 28, 1975. In particular, SDCL § 9-32-6 provides, "Every municipality shall have power to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof." Additionally, SDCL § 9-32-8 provides, "Every municipality shall have power to prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of the limits of the municipality."

The foregoing authority of municipalities to regulate such activities is not precluded by ARSD 74:53:01:18. For the aforementioned reasons, and additional authority as may later be supplemented, the SDML gives this written petition in opposition of George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18.

4. **MAILING ADDRESS OF LEGAL COUNSEL FOR THE SDML:**

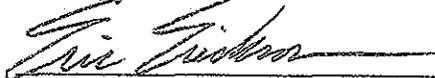
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CUTLER LAW FIRM, LLP  
Attorneys at Law



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P.O. Box 1400  
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Facsimile (605) 335-4961  
*Attorney for Petitioner*

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The foregoing authority of municipalities to regulate such activities is not precluded by ARSD 74:53:01:04. For the aforementioned reasons, and additional authority as may later be supplemented, the SDML gives this written petition in opposition of George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04.

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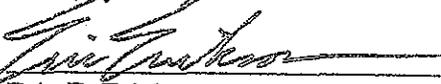
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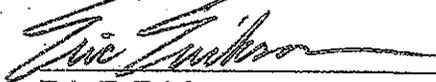
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Attorneys at Law



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P.O. Box 1400  
Sioux Falls, South Dakota 57101-1400  
Telephone (605) 335-4950  
Facsimile (605) 335-4961  
*Attorney for Petitioner*



**CITY OF RAPID CITY**  
**RAPID CITY, SOUTH DAKOTA 57701-2724**

**RECEIVED**  
**JUN 27 2016**  
**WATER RIGHTS**  
**PROGRAM**

**Office of the City Attorney**  
300 Sixth Street  
Rapid City, South Dakota 57701-2724  
Telephone: 605-394-4140  
FAX: 605-394-6633  
E-mail: attorney@rcgov.org  
[www.rcgov.org/attorney/attorneyhomepage.htm](http://www.rcgov.org/attorney/attorneyhomepage.htm)

June 24, 2016

Ms. Jeanne Goodman, Chief Engineer  
Water Rights Program  
523 E. Capitol  
Pierre, SD 57501

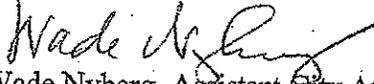
RE: City of Rapid City Petitions in Opposition  
George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:04  
George Ferebee Petition for Decalaratory Ruling ARSD 74:53:01:18

Dear Ms. Goodman

Enclosed for filing in the above matters is the City of Rapid City's Petition in Opposition to George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:04 and the City's Petition in Opposition to George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:18. As is noted in the Petitions, the City is requesting the Water Management Board delay the matter at least 20 days in order for the City to more fully respond.

Thank you for your assistance.

Sincerely,

  
Wade Nyberg, Assistant City Attorney

cc: Mr. George Ferebee  
Mr. Jay Alderman

SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

---

CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION  
FOR DECLARATORY RULING ON ARSD 74:53:01:18

---

Comes now, the City of Rapid City, by and through its attorneys of record, and submits the following as its Petition in Opposition to George Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:18 as follows:

1. Petitioner City of Rapid City is a South Dakota municipality and is represented by counsel identified below.
2. Petitioner is interested in Mr. Ferebee's petition for declaratory ruling as Petitioner is a municipality sought to be bound by the declaratory ruling requested.
  - a. The Water Management Board has no legal authority to issue the declaratory ruling requested by petitioner. ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order pertaining to a submitted factual situation within the board's jurisdiction." First, Mr. Ferebee has not presented a factual situation. His request is about the general applicability of this rule, as applied to every locality in the state. Second, the Board has no jurisdiction to declare localities "bound" by a rule that applies to specific factual situations. It is unclear what a declaration that localities are "bound" by a rule that describes which types of wastewater systems are subject to agency administrative rules would even mean. It seems that Mr. Ferebee is seeking a declaratory ruling regarding local governments' ability to legislate in this area; this subject matter is clearly beyond the scope of the Board's

authority. Mr. Ferebee is attempting to suggest that ARSD 74:53:01:18 preempts local legislative enactments regarding cesspools or pit privies. Preemption is a legal doctrine, suitable for interpretation by court of law through a declaratory action, a remedy available to Mr. Ferebee under SDCL 1-26-14. The request presented by Mr. Ferebee is both lacking a required factual basis and beyond the jurisdiction of the Board, and thus should be denied.

- b. The South Dakota State Legislature has granted municipalities the authority “to protect public groundwater supplies from pollution” (SDCL 9-12-17); “to do what may be necessary or expedient for the promotion of health or the suppression of disease” (SDCL 9-32-1); “to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof” (SDCL 9-32-6); “to prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of the limits of the municipality” (SDCL 9-32-8); and “to declare what shall constitute a nuisance and prevent, abate, and remove the same” (SDCL 9-29-13). Nowhere in these statutes does it state that such authority is subject to an agency’s administrative rules. These direct grants of authority contradict Mr. Ferebee’s assertion that municipalities are prohibited from legislating in this area.

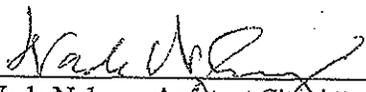
It is not hard to imagine how a cesspool or pit privy, of any age, may become a threat to either groundwater or the water supply of a municipality, a contributor to the spread of disease, or simply a nuisance. To date, no South Dakota court has declared a municipality’s regulation of such invalid due to state preemption.

Furthermore, if a municipality should overstep its granted authority, the separation of powers doctrine dictates that a court of law must be the authority to declare such regulation invalid.

3. Petitioner's mailing address is City of Rapid City, 300 Sixth Street, Rapid City, SD 57701
4. Petitioner's legal counsel is Wade Nyberg, Assistant City Attorney.
5. The City of Rapid City respectfully requests that Mr. Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:18 be denied; in the alternative, the City requests that the hearing on the Petition be continued for at least 20 days to give the City time to fully prepare its response.

Dated at Rapid City, South Dakota, this 24th day of June, 2016.

**CITY OF RAPID CITY**

  
\_\_\_\_\_  
Wade Nyberg, Assistant City Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that I sent a true and correct copy of the above CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION FOR DECLARATORY RULING ON ARSD 74:53:10:18 by US Mail, postage prepaid, to the following :

Chief Engineer  
Water Rights Program  
Foss Building  
523 E Capitol  
Pierre, SD 57501

Mr. George Ferebee  
11495 Gillette Prairie Rd  
Hill City, SD 57545

Mr. Jay Alderman  
Pennington County States Attorney  
130 Kansas City Street, Ste. 300  
Rapid City, SD 57701-2818

  
\_\_\_\_\_  
Wade Nyberg

SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

---

CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION  
FOR DECLARATORY RULING ON ARSD 74:53:01:04

---

Comes now, the City of Rapid City, by and through its attorneys of record, and submits the following as its Petition in Opposition to George Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:04 as follows:

1. Petitioner City of Rapid City is a South Dakota municipality and is represented by counsel identified below.
2. Petitioner is interested in Mr. Ferebee's petition for declaratory ruling as Petitioner is a municipality sought to be bound by the declaratory ruling requested.
3. Petitioner opposes Mr. Ferebee's petition for declaratory ruling for the following reasons:
  - a. The Water Management Board has no legal authority to issue the declaratory ruling requested by petitioner. ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order pertaining to a submitted factual situation within the board's jurisdiction." First, Mr. Ferebee has not presented a factual situation. His request is about the general applicability of this rule, as applied to every locality in the state. Second, the Board has no jurisdiction to declare localities "bound" by a rule that applies to specific factual situations. It is unclear what a declaration that localities are "bound" by a rule that describes which types of wastewater systems are subject to agency administrative rules would even mean. It seems that Mr. Ferebee is seeking a declaratory ruling regarding local governments' ability to

legislate in this area; this subject matter is clearly beyond the scope of the Board's authority. Mr. Ferebee is attempting to suggest that ARSD 74:53:01:04 preempts local legislative enactments regarding certain on-site wastewater systems. Preemption is a legal doctrine, suitable for interpretation by court of law through a declaratory action, a remedy available to Mr. Ferebee under SDCL 1-26-14. The request presented by Mr. Ferebee is both lacking a required factual basis and beyond the jurisdiction of the Board, and thus should be denied.

- b. The South Dakota State Legislature has granted municipalities the authority "to protect public groundwater supplies from pollution" (SDCL 9-12-17); "to do what may be necessary or expedient for the promotion of health or the suppression of disease" (SDCL 9-32-1); "to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof" (SDCL 9-32-6); "to prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of the limits of the municipality" (SDCL 9-32-8); and "to declare what shall constitute a nuisance and prevent, abate, and remove the same" (SDCL 9-29-13). Nowhere in these statutes does it state that such authority is subject to an agency's administrative rules. These direct grants of authority contradict Mr. Ferebee's assertion that municipalities are prohibited from legislating in this area.

Furthermore, it is not hard to imagine how a cesspool or pit privy, of any age, may become a threat to either groundwater or the water supply of a municipality, a contributor to the spread of disease, or simply a nuisance. To date, no South Dakota

court has declared a municipality's regulation of such invalid due to state preemption. Furthermore, if a municipality should overstep its granted authority, the separation of powers doctrine dictates that a court of law must be the authority to declare such regulation invalid.

4. Petitioner's mailing address is City of Rapid City, 300 Sixth Street, Rapid City, SD 57701
5. Petitioner's legal counsel is Wade Nyberg, Assistant City Attorney.
6. The City of Rapid City respectfully requests that Mr. Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:04 be denied; in the alternative, the City requests that the hearing on the Petition be continued for at least 20 days to give the City time to fully prepare its response.

Dated at Rapid City, South Dakota, this 24th day of June, 2016.

**CITY OF RAPID CITY**

  
\_\_\_\_\_  
Wade Nyberg, Assistant City Attorney

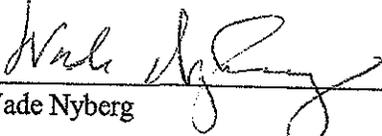
**CERTIFICATE OF SERVICE**

I hereby certify that I sent a true and correct copy of the above CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION FOR DECLARATORY RULING ON ARSD 74:53:10:04 by US Mail, postage prepaid, to the following :

Chief Engineer  
Water Rights Program  
Foss Building  
523 E Capitol  
Pierre, SD 57501

Mr. George Ferebee  
11495 Gillette Prairie Rd  
Hill City, SD 57545

Mr. Jay Alderman  
Pennington County States Attorney  
130 Kansas City Street, Ste. 300  
Rapid City, SD 57701-2818

  
\_\_\_\_\_  
Wade Nyberg



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

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

June 29, 2016

denr.sd.gov

NOTICE

TO: George Ferebee  
11495 Gillette Prairie Rd  
Hill City SD 57745

Eric E Erickson  
Cutler Law Firm LLP  
PO Box 1400  
Sioux Falls SD 57101-1400

Lyndell Petersen, Chairman  
Pennington County Commission  
130 Kansas City Street  
Rapid City SD 57701

Wade Nyberg  
City of Rapid City  
300 Sixth Street  
Rapid City SD 57701-2724

FROM: Jeanne Goodman, Chief Engineer  
Water Rights Program 

SUBJECT: Automatic Delay of Hearing on Petition for Declaratory Ruling that Local Governments are Bound by Administrative Rule of South Dakota 74:53:01:04

Petitions were filed in response to the public notice scheduling a hearing before the Water Management Board on Mr. Ferebee's Petition for Declaratory Ruling that Local Governments are Bound by Administrative Rule of South Dakota 74:53:01:04. Mr. Ferebee requests the Board declare that local units of government (cities and counties) are bound by ARSD 74:53:01:04.

The notice published in the Aberdeen American News, Argus Leader and Rapid City Journal scheduled a July 6, 2016, hearing before the Water Management Board. The submitted petitions included a formal request for postponement of the July 6, 2016, hearing date. The petitions are enclosed. Therefore, the hearing on declaratory ruling request is automatically delayed pursuant to SDCL 46-2A-4 and ARSD 74:02:01:48 and will not be held on July 6, 2016.

The hearing to consider this declaratory ruling request will now be scheduled for the October 5 and 6, 2016, Water Management Board meeting tentatively to be held in Pierre. Future notice of the date, time and place of the hearing will be provided to all parties of record.

Please contact Eric Gronlund at (605) 773-3352, if you have any questions.

enclosure

c: Ann Mines-Bailey, Assistant Attorney General  
Ellie Bailey, Assistant Attorney General  
Kinsley P. Groote, Deputy State's Attorney, 130 Kansas City St., Suite 300  
Rapid City, SD 57701

CERTIFICATION

I hereby certify that on June 29, 2016, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated June 29, 2016, regarding automatic delay of the July 6, 2016, hearing on the Petition for Declaratory Ruling that Local Governments are Bound by Administrative Rule of South Dakota 74:53:01:04, as addressed below:

George Ferebee  
11495 Gillette Prairie Rd  
Hill City SD 57745

Lyndell Petersen, Chairman  
Pennington County Commission  
130 Kansas City Street  
Rapid City SD 57701

Kinsley P. Groote, Deputy State's Attorney  
Pennington County State's Attorney's Office  
130 Kansas City St., Suite 300  
Rapid City, SD 57701

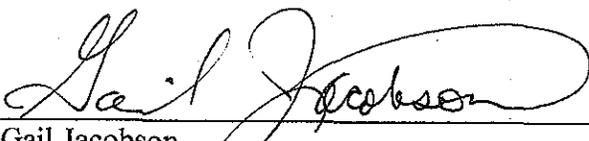
Eric E Erickson  
Cutler Law Firm LLP  
PO Box 1400  
Sioux Falls SD 57101-1400

Wade Nyberg  
City of Rapid City  
300 Sixth Street  
Rapid City SD 57701-2724

Sent Inter-office to:

Ann Mines-Bailey, Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre SD 57501-8501

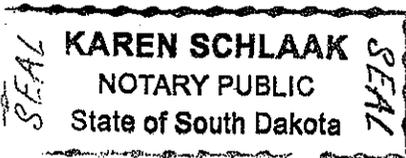
Ellie Bailey, Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre SD 57501-8501

  
\_\_\_\_\_  
Gail Jacobson  
Water Rights Program, DENR

STATE OF SOUTH DAKOTA     )  
  )   SS  
COUNTY OF HUGHES         )

Sworn to, before me, this 27<sup>th</sup> day of June, 2016

  
\_\_\_\_\_  
Karen Schlaak  
Notary Public  
My Commission expires April 1, 2019



**Petition in Opposition to George Ferebee's Petition for Declaratory  
Ruling on ARSD 74:53:01:04**

1. Petitioner: Pennington County Board of Commissioners
2. Petitioner's interest in Ferebee's petition for declaratory ruling: Petitioner is the governing body of a county that would be affected by the declaratory ruling that Ferebee is requesting.
3. Petitioner's reasons for opposing Ferebee's petition for declaratory ruling: Petitioner opposes Ferebee's petition for multiple reasons.
  - a. First, ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order *pertaining to a submitted factual situation within the board's jurisdiction.*" Ferebee has not submitted a factual situation. Rather, he is requesting a blanket ruling declaring that "local governments (cities and counties) are bound by ARSD 74:53:01:04." Therefore, without a submitted factual situation, no declaratory ruling can be made.
  - b. Second, in Title 7 that contains many of the powers of counties, the South Dakota Legislature specifically gave counties the statutory authority to regulate and prevent waste in water; regulate and compel the cleansing, abatement, and removal of any sewer, cesspool, or unwholesome or nauseous thing or place; and declare and abate public nuisances. These powers are not limited to systems, structures, or pollution of a certain date. ARSD 74:53:01:04 in no way prohibits localities from passing ordinances regulating on-site wastewater systems above and beyond their regulation by the State in the administrative rule. Subsections 14 and 15 of SDCL 7-8-20 provide county commissioners with the power to regulate waste in water and the cleansing or abatement of such.

SDCL 7-8-20 provides in relevant part: In addition to others specified by law, the board of county commissioners shall have power: . . .

(14) To enact ordinances to regulate and prevent the placing of ashes, dirt, garbage or any offensive matter in any highway or public ground or in any body or stream of water within the county, but outside of an incorporated municipality or outside of the one mile limits of any incorporated municipality;

(15) To enact ordinances to regulate and compel the cleansing, abatement or removal of any sewer, cesspool or any unwholesome or nauseous thing or place[.]

Furthermore, SDCL 7-8-33 allows county commissioners to declare and abate public nuisances:

The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality. For purposes of this section only, the feeding, breeding, or raising of livestock or the operations of a livestock sales barn, is not presumed, by that fact alone, to be a nuisance.

Simply put, a nuisance is an act or omission which "endangers the comfort, repose, health, or safety of others." SDCL 21-10-1. It is clear that an on-site wastewater system of any age may be in danger of contaminating water and endangering the health of others. Water has no bounds, so contamination of water is felt widespread throughout a community and by many, many people. Furthermore, SDCL 34A-2-1 and 34A-2-21 specify that the pollution of the waters of the state constitutes a public nuisance and may be abated as such. A county also has an extremely broad power to regulate the use of land and structures in order to promote health, safety, and welfare – which in turn means on-site wastewater systems – pursuant to SDCL 11-2-13.

- c. Third, on April 15, 2008, the Board of Commissioners approved a Resolution for the Protection of Water Resources in Pennington County. The Board recognized that implementation of water protection programs to preserve and protect drinking water resources in Pennington County would avoid unnecessary costs in the future and protect the health, safety, and general welfare of the public. Due to the unique geology, the interconnection of ground and surface water, and increasing population in un-sewered areas of the Black Hills and surrounding areas, Pennington County has enacted sections of the Pennington County Zoning Ordinance to address siting and function of on-site wastewater treatment systems to protect drinking water resources and to promote clean water resources and protect public health and the environment.
  - d. Finally, this appears to be a collateral attack by Ferebee against local regulation of onsite wastewater treatment systems regarding Ferebee's Pennington County Zoning Ordinance violation that is currently being litigated.
4. Mailing address: Pennington County Board of Commissioners, 130 Kansas City Street, Rapid City, SD 57701
  5. Petitioner's legal counsel: Jay Alderman, Chief Civil Deputy State's Attorney; Kinsley Groote, Civil Deputy State's Attorney; Michael Hofmann, Civil Deputy State's Attorney
  6. The Pennington County Board of Commissioners requests a continuance of the hearing (from the July 6, 2016 meeting presumably to the October 5, 2016 meeting).
  7. ---Copy of Motion made by Pennington County Board of Commissioners on 6/21/16---  
**PETITIONS FOR DECLARATORY RULINGS – SD DENR WATER MANAGEMENT BOARD:** MOVED by Buskerud and seconded by Trautman to direct the States Attorney's Office to file a petition in opposition to the two Declaratory Ruling Petitions regarding Administrative Rule. It was further moved to authorize the Chairman's signature and request an automatic continuance. The motion carried 4-0 on a roll call vote: Buskerud – yes, Ferebee – abstained, Hadcock – yes, Trautman – yes, Petersen – yes.

Signature: \_\_\_\_\_

Lyndell Petersen, Pennington County Board of Commissioners Chairman

Date: \_\_\_\_\_

6/21/2016

RICHARD A. CUTLER  
KENT R. CUTLER  
STEVEN J. SARBACKER  
MICHAEL D. BORNITZ \*  
TRENT A. SWANSON \*  
RYAN J. TAYLOR °  
KIMBERLY R. WASSINK  
MEREDITH A. MOORE  
NATHAN S. SCHOEN \*\*  
NICHOLE J. MOHNING %  
DANIEL J. DOYLE  
ALEX S. HALBACH \*  
ROBERT D. TRZYNKA  
ERIC E. ERICKSON  
JOSEPH P. HOGUE °  
JONATHAN A. HEBER  
BRENDAN F. PONS

**CUTLER LAW FIRM, LLP**  
**ATTORNEYS AT LAW**

100 NORTH PHILLIPS AVENUE, 9TH FLOOR  
POST OFFICE BOX 1400  
SIOUX FALLS, SOUTH DAKOTA 57101-1400  
TELEPHONE (605) 335-4950  
www.cutlerlawfirm.com

JEAN BROCKMUELLER, CPA (Inactive)  
BUSINESS MANAGER

\*Also licensed to practice  
in Minnesota  
\*Also licensed to practice  
in Iowa  
\*Also licensed to practice  
in Nebraska  
%Also licensed to practice  
in Kansas  
°Also licensed as a Certified  
Public Accountant (Inactive)

RECEIVED

JUN 27 2016

WATER RIGHTS  
PROGRAM

June 23, 2016

Water Rights Program  
Attn: Chief Engineer  
Foss Building  
523 E. Capitol  
Pierre, SD 57501

Mr. George W. Ferebee  
11495 Gillette Prairie Road  
Hill City, SD 57745

Re: *Petitions in Opposition of (i) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04; and, (ii) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18*

Dear Chief Engineer Goodman and Mr. Ferebee:

Please be advised that our firm represents the South Dakota Association of County Commissioners ("SDACC") and the South Dakota Municipal League ("SDML"). Enclosed please find petitions from the SDACC and SDML in opposition to: i) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04; and, (ii) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 (collectively the "Ferebee Petitions"). Please accept this letter, and the enclosed petitions, as notice by the SDACC and SDML of their opposition to the Ferebee Petitions and as a request that such hearing currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Should you have any questions regarding this petition or the request for delay, please do not hesitate to contact me at (605) 271-4938, at the address above, or via email at [erice@cutlerlawfirm.com](mailto:erice@cutlerlawfirm.com).

Sincerely,

CUTLER LAW FIRM, LLP



Eric E. Erickson  
For the Firm

EEE/nmw  
Enclosures  
cc: SDACC, SDML

**PETITION IN OPPOSITION OF GEORGE FEREBEE'S PETITION FOR A  
DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE  
RULE OF SOUTH DAKOTA 74:53:01:18**

1. **PETITIONER:** South Dakota Association of County Commissioners ("SDACC").
2. **PETITIONERS INTEREST IN THE PETITION FOR A DECLARATORY RULING:**

The SDACC is an association authorized by state law that represents all of South Dakota's sixty-six (66) counties. The SDACC has a stated purpose of "securing concerted action among the counties in behalf of such matters, measures and county affairs as the associations deem to be beneficial to and in the common interest of the counties." SDCL § 7-7-28. Many of the SDACC's member-counties, including without limitation Pennington County, have enacted ordinances that regulate the operation of cesspools and pit privies, including cesspools and pit privies constructed prior to February 28, 1975. This matter is of the utmost interest to the SDACC as the authority of its member-counties to regulate the operation of cesspools and pit privies, including systems existing prior to February 28, 1975, is necessary for the health, safety, and welfare of the general public.

3. **PETITIONER'S REASON FOR OPPOSING GEORGE FEREBEE'S PETITION FOR A DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53:01:18:**

The SDACC opposes George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 for multiple reasons, including, but not limited to:

State law provides counties with broad authority to regulate activities such as cesspools and pit privies. In addition to other authority provided in state law, SDCL §§ 7-8-20 and 7-8-33 provide counties with the authority to regulate activities such as the operation of cesspools and pit privies and do not limit such authority to only those cesspools and pit privies constructed after February 28, 1975. In particular, SDCL § 7-8-33 provides, in part, "The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality...." Additionally, SDCL § 7-8-20 provides, in relevant part, the county commissioners with the power to:

- (14) To enact ordinances to regulate and prevent the placing of ashes, dirt, garbage or any offensive matter in any highway or public ground or in any body or stream of water within the county, but outside of an incorporated municipality or outside of the one mile limits of any incorporated municipality;

(15) To enact ordinances to regulate and compel the cleansing, abatement or removal of any sewer, cesspool or any unwholesome or nauseous thing or place;

The authority of counties to regulate such activities is not precluded by state law or ARSD 74:53:01:18. For the foregoing reasons, and additional authority as may later be supplemented, the SDACC gives this written petition in opposition of George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18.

**4. MAILING ADDRESS OF LEGAL COUNSEL FOR THE SDACC:**

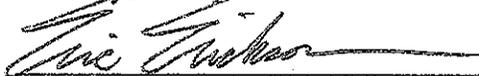
Cutler Law Firm, LLP  
Attn: Eric E. Erickson  
P.O. Box 1400  
Sioux Falls, SD 57101-1400  
Phone: (605) 271-4938  
Email: erice@cutlerlawfirm.com

**5. REQUEST FOR A DELAY OF HEARING:**

Petitioner respectfully requests that the hearing to consider George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18, currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Dated this 23<sup>rd</sup> of June, 2016.

CUTLER LAW FIRM, LLP  
Attorneys at Law



Eric E. Erickson  
100 N. Phillips Ave., 9th Floor  
P.O. Box 1400  
Sioux Falls, South Dakota 57101-1400  
Telephone (605) 335-4950  
Facsimile (605) 335-4961  
*Attorney for Petitioner*

**PETITION IN OPPOSITION OF GEORGE FEREBEE'S PETITION FOR A  
DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE  
RULE OF SOUTH DAKOTA 74:53:01:18**

1. **PETITIONER:** South Dakota Municipal League ("SDML").

2. **PETITIONERS INTEREST IN THE PETITION FOR A DECLARATORY RULING:**

The SDML was organized in 1934 as a non-partisan, non-profit association of incorporated municipalities in South Dakota. Many of the SDML's member-municipalities, including without limitation Rapid City, have enacted ordinances that regulate the operation of cesspools and pit privies, including cesspools and pit privies constructed prior to February 28, 1975. This matter is of the utmost interest to the SDML as the authority of its member-municipalities to regulate the operation of cesspools and pit privies, including systems existing prior to February 28, 1975, is necessary for the health, safety, and welfare of the general public.

3. **PETITIONER'S REASON FOR OPPOSING GEORGE FEREBEE'S PETITION FOR A DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53:01:18:**

The SDML opposes George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 for multiple reasons, including, but not limited to:

State law provides municipalities with broad authority to regulate activities such as cesspools and pit privies. In addition to other authority provided in state law, SDCL §§ 9-32-6 and 9-32-8 provide municipalities with the authority to regulate activities such as the operation of cesspools and pit privies and do not limit such authority to only those cesspools and pit privies constructed after February 28, 1975. In particular, SDCL § 9-32-6 provides, "Every municipality shall have power to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof." Additionally, SDCL § 9-32-8 provides, "Every municipality shall have power to prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of the limits of the municipality."

The foregoing authority of municipalities to regulate such activities is not precluded by ARSD 74:53:01:18. For the aforementioned reasons, and additional authority as may later be supplemented, the SDML gives this written petition in opposition of George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18.

4. **MAILING ADDRESS OF LEGAL COUNSEL FOR THE SDML:**

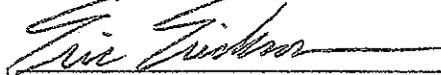
Cutler Law Firm, LLP  
Attn: Eric E. Erickson  
P.O. Box 1400  
Sioux Falls, SD 57101-1400  
Phone: (605) 271-4938  
Email: erice@cutlerlawfirm.com

5. REQUEST FOR A DELAY OF HEARING:

Petitioner respectfully requests that the hearing to consider George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18, currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Dated this 23<sup>rd</sup> of June, 2016.

CUTLER LAW FIRM, LLP  
Attorneys at Law



---

Eric E. Erickson  
100 N. Phillips Ave., 9th Floor  
P.O. Box 1400  
Sioux Falls, South Dakota 57101-1400  
Telephone (605) 335-4950  
Facsimile (605) 335-4961  
*Attorney for Petitioner*

**PETITION IN OPPOSITION OF GEORGE FEREBEE'S PETITION FOR A  
DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE  
RULE OF SOUTH DAKOTA 74:53:01:04**

1. **PETITIONER:** South Dakota Municipal League ("SDML").
2. **PETITIONERS INTEREST IN THE PETITION FOR A DECLARATORY RULING:**

The SDML was organized in 1934 as a non-partisan, non-profit association of incorporated municipalities in South Dakota. Many of the SDML's member-municipalities, including without limitation Rapid City, have enacted ordinances that regulate the operation of on-site wastewater systems, including on-site wastewater systems constructed prior to February 28, 1975. This matter is of the utmost interest to the SDML as the authority of its member-municipalities to regulate the operation of on-site wastewater systems, including systems existing prior to February 28, 1975, is necessary for the health, safety, and welfare of the general public.

3. **PETITIONER'S REASON FOR OPPOSING GEORGE FEREBEE'S PETITION FOR A DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53:01:04:**

The SDML opposes George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 for multiple reasons, including, but not limited to:

State law provides municipalities with broad authority to regulate activities such as on-site wastewater systems. In addition to other authority provided in state law, SDCL §§ 9-32-6 and 9-32-8 provide municipalities with the authority to regulate activities such as the operation of on-site wastewater systems and do not limit such authority to only those on-site wastewater systems constructed after February 28, 1975. In particular, SDCL § 9-32-8 provides, "Every municipality shall have power to prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of the limits of the municipality." Additionally, SDCL § 9-32-6 provides, "Every municipality shall have power to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof."

The foregoing authority of municipalities to regulate such activities is not precluded by ARSD 74:53:01:04. For the aforementioned reasons, and additional authority as may later be supplemented, the SDML gives this written petition in opposition of George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04.

4. **MAILING ADDRESS OF LEGAL COUNSEL FOR THE SDML:**

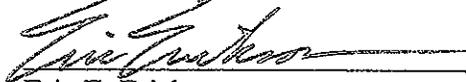
Cutler Law Firm, LLP  
Attn: Eric E. Erickson  
P.O. Box 1400  
Sioux Falls, SD 57101-1400  
Phone: (605) 271-4938  
Email: erice@cutlerlawfirm.com

5. **REQUEST FOR A DELAY OF HEARING:**

Petitioner respectfully requests that the hearing to consider George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04, currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Dated this 23<sup>rd</sup> of June, 2016.

CUTLER LAW FIRM, LLP  
Attorneys at Law



Eric E. Erickson  
100 N. Phillips Ave., 9th Floor  
P.O. Box 1400  
Sioux Falls, South Dakota 57101-1400  
Telephone (605) 335-4950  
Facsimile (605) 335-4961  
*Attorney for Petitioner*

**PETITION IN OPPOSITION OF GEORGE FEREBEE'S PETITION FOR A  
DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE  
RULE OF SOUTH DAKOTA 74:53:01:04**

1. **PETITIONER:** South Dakota Association of County Commissioners ("SDACC").
2. **PETITIONERS INTEREST IN THE PETITION FOR A DECLARATORY RULING:**

The SDACC is an association authorized by state law that represents all of South Dakota's sixty-six (66) counties. The SDACC has a stated purpose of "securing concerted action among the counties in behalf of such matters, measures and county affairs as the associations deem to be beneficial to and in the common interest of the counties." SDCL § 7-7-28. Many of the SDACC's member-counties, including without limitation Pennington County, have enacted ordinances that regulate the operation of on-site wastewater systems, including systems existing prior to February 28, 1975. This matter is of the utmost interest to the SDACC as the authority of its member-counties to regulate the operation of on-site wastewater systems, including systems existing prior to February 28, 1975, is necessary for the health, safety, and welfare of the general public.

3. **PETITIONER'S REASON FOR OPPOSING GEORGE FEREBEE'S PETITION FOR A DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53:01:04:**

The SDACC opposes George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04 for multiple reasons, including, but not limited to:

State law provides counties with broad authority to regulate activities such as on-site wastewater systems. In addition to other authority provided in state law, SDCL §§ 7-8-20 and 7-8-33 provide counties with the authority to regulate activities such as the operation of on-site wastewater systems and do not limit such authority to only those systems constructed after February 28, 1975. In particular, SDCL § 7-8-33 provides, in part, "The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality...." In addition, SDCL § 7-8-20 provides, in relevant part, the county commissioners with the power to:

- (14) To enact ordinances to regulate and prevent the placing of ashes, dirt, garbage or any offensive matter in any highway or public ground or in any body or stream of water within the county, but outside of an incorporated municipality or outside of the one mile limits of any incorporated municipality;

(15) To enact ordinances to regulate and compel the cleansing, abatement or removal of any sewer, cesspool or any unwholesome or nauseous thing or place;

The authority of counties to regulate such activities is not precluded by state law nor ARSD 74:53:01:04. For the foregoing reasons, and additional authority as may later be supplemented, the SDACC gives this written petition in opposition of George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04.

**4. MAILING ADDRESS OF LEGAL COUNSEL FOR THE SDACC:**

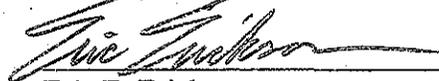
Cutler Law Firm, LLP  
Attn: Eric E. Erickson  
P.O. Box 1400  
Sioux Falls, SD 57101-1400  
Phone: (605) 271-4938  
Email: erice@cutlerlawfirm.com

**5. REQUEST FOR A DELAY OF HEARING:**

Petitioner respectfully requests that the hearing to consider George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04, currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Dated this 23<sup>rd</sup> of June, 2016.

CUTLER LAW FIRM, LLP  
Attorneys at Law



---

Eric E. Erickson  
100 N. Phillips Ave., 9th Floor  
P.O. Box 1400  
Sioux Falls, South Dakota 57101-1400  
Telephone (605) 335-4950  
Facsimile (605) 335-4961  
*Attorney for Petitioner*



**CITY OF RAPID CITY**  
**RAPID CITY, SOUTH DAKOTA 57701-2724**

RECEIVED

JUN 27 2016

WATER RIGHTS  
PROGRAM

**Office of the City Attorney**

300 Sixth Street

Rapid City, South Dakota 57701-2724

Telephone: 605-394-4140

FAX: 605-394-6633

E-mail: [attorney@rcgov.org](mailto:attorney@rcgov.org)

[www.rcgov.org/attorney/attorneyhomepage.htm](http://www.rcgov.org/attorney/attorneyhomepage.htm)

June 24, 2016

Ms. Jeanne Goodman, Chief Engineer  
Water Rights Program  
523 E. Capitol  
Pierre, SD 57501

RE: City of Rapid City Petitions in Opposition  
George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:04  
George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:18

Dear Ms. Goodman

Enclosed for filing in the above matters is the City of Rapid City's Petition in Opposition to George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:04 and the City's Petition in Opposition to George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:18. As is noted in the Petitions, the City is requesting the Water Management Board delay the matter at least 20 days in order for the City to more fully respond.

Thank you for your assistance.

Sincerely,

Wade Nyberg, Assistant City Attorney

cc: Mr. George Ferebee  
Mr. Jay Alderman

SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

---

**CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION  
FOR DECLARATORY RULING ON ARSD 74:53:01:18**

---

Comes now, the City of Rapid City, by and through its attorneys of record, and submits the following as its Petition in Opposition to George Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:18 as follows:

1. Petitioner City of Rapid City is a South Dakota municipality and is represented by counsel identified below.
2. Petitioner is interested in Mr. Ferebee's petition for declaratory ruling as Petitioner is a municipality sought to be bound by the declaratory ruling requested.
  - a. The Water Management Board has no legal authority to issue the declaratory ruling requested by petitioner. ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order pertaining to a submitted factual situation within the board's jurisdiction." First, Mr. Ferebee has not presented a factual situation. His request is about the general applicability of this rule, as applied to every locality in the state. Second, the Board has no jurisdiction to declare localities "bound" by a rule that applies to specific factual situations. It is unclear what a declaration that localities are "bound" by a rule that describes which types of wastewater systems are subject to agency administrative rules would even mean. It seems that Mr. Ferebee is seeking a declaratory ruling regarding local governments' ability to legislate in this area; this subject matter is clearly beyond the scope of the Board's

authority. Mr. Ferebee is attempting to suggest that ARSD 74:53:01:18 preempts local legislative enactments regarding cesspools or pit privies. Preemption is a legal doctrine, suitable for interpretation by court of law through a declaratory action, a remedy available to Mr. Ferebee under SDCL 1-26-14. The request presented by Mr. Ferebee is both lacking a required factual basis and beyond the jurisdiction of the Board, and thus should be denied.

- b. The South Dakota State Legislature has granted municipalities the authority “to protect public groundwater supplies from pollution” (SDCL 9-12-17); “to do what may be necessary or expedient for the promotion of health or the suppression of disease” (SDCL 9-32-1); “to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof” (SDCL 9-32-6); “to prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of the limits of the municipality” (SDCL 9-32-8); and “to declare what shall constitute a nuisance and prevent, abate, and remove the same” (SDCL 9-29-13). Nowhere in these statutes does it state that such authority is subject to an agency’s administrative rules. These direct grants of authority contradict Mr. Ferebee’s assertion that municipalities are prohibited from legislating in this area.

It is not hard to imagine how a cesspool or pit privy, of any age, may become a threat to either groundwater or the water supply of a municipality, a contributor to the spread of disease, or simply a nuisance. To date, no South Dakota court has declared a municipality’s regulation of such invalid due to state preemption.

Furthermore, if a municipality should overstep its granted authority, the separation of powers doctrine dictates that a court of law must be the authority to declare such regulation invalid.

3. Petitioner's mailing address is City of Rapid City, 300 Sixth Street, Rapid City, SD 57701
4. Petitioner's legal counsel is Wade Nyberg, Assistant City Attorney.
5. The City of Rapid City respectfully requests that Mr. Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:18 be denied; in the alternative, the City requests that the hearing on the Petition be continued for at least 20 days to give the City time to fully prepare its response.

Dated at Rapid City, South Dakota, this 24th day of June, 2016.

**CITY OF RAPID CITY**

  
\_\_\_\_\_  
Wade Nyberg, Assistant City Attorney

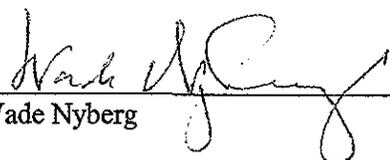
**CERTIFICATE OF SERVICE**

I hereby certify that I sent a true and correct copy of the above CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION FOR DECLARATORY RULING ON ARSD 74:53:10:18 by US Mail, postage prepaid, to the following :

Chief Engineer  
Water Rights Program  
Foss Building  
523 E Capitol  
Pierre, SD 57501

Mr. George Ferebee  
11495 Gillette Prairie Rd  
Hill City, SD 57545

Mr. Jay Alderman  
Pennington County States Attorney  
130 Kansas City Street, Ste. 300  
Rapid City, SD 57701-2818

  
\_\_\_\_\_  
Wade Nyberg

SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

---

**CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION  
FOR DECLARATORY RULING ON ARSD 74:53:01:04**

---

Comes now, the City of Rapid City, by and through its attorneys of record, and submits the following as its *Petition in Opposition to George Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:04* as follows:

1. Petitioner City of Rapid City is a South Dakota municipality and is represented by counsel identified below.
2. Petitioner is interested in Mr. Ferebee's petition for declaratory ruling as Petitioner is a municipality sought to be bound by the declaratory ruling requested.
3. Petitioner opposes Mr. Ferebee's petition for declaratory ruling for the following reasons:
  - a. The Water Management Board has no legal authority to issue the declaratory ruling requested by petitioner. ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order pertaining to a submitted factual situation within the board's jurisdiction." First, Mr. Ferebee has not presented a factual situation. His request is about the general applicability of this rule, as applied to every locality in the state. Second, the Board has no jurisdiction to declare localities "bound" by a rule that applies to specific factual situations. It is unclear what a declaration that localities are "bound" by a rule that describes which types of wastewater systems are subject to agency administrative rules would even mean. It seems that Mr. Ferebee is seeking a declaratory ruling regarding local governments' ability to

legislate in this area; this subject matter is clearly beyond the scope of the Board's authority. Mr. Ferebee is attempting to suggest that ARSD 74:53:01:04 preempts local legislative enactments regarding certain on-site wastewater systems. Preemption is a legal doctrine, suitable for interpretation by court of law through a declaratory action, a remedy available to Mr. Ferebee under SDCL 1-26-14. The request presented by Mr. Ferebee is both lacking a required factual basis and beyond the jurisdiction of the Board, and thus should be denied.

- b. The South Dakota State Legislature has granted municipalities the authority "to protect public groundwater supplies from pollution" (SDCL 9-12-17); "to do what may be necessary or expedient for the promotion of health or the suppression of disease" (SDCL 9-32-1); "to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof" (SDCL 9-32-6); "to prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of the limits of the municipality" (SDCL 9-32-8); and "to declare what shall constitute a nuisance and prevent, abate, and remove the same" (SDCL 9-29-13). Nowhere in these statutes does it state that such authority is subject to an agency's administrative rules. These direct grants of authority contradict Mr. Ferebee's assertion that municipalities are prohibited from legislating in this area.

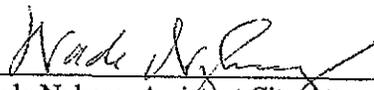
Furthermore, it is not hard to imagine how a cesspool or pit privy, of any age, may become a threat to either groundwater or the water supply of a municipality, a contributor to the spread of disease, or simply a nuisance. To date, no South Dakota

court has declared a municipality's regulation of such invalid due to state preemption. Furthermore, if a municipality should overstep its granted authority, the separation of powers doctrine dictates that a court of law must be the authority to declare such regulation invalid.

4. Petitioner's mailing address is City of Rapid City, 300 Sixth Street, Rapid City, SD 57701
5. Petitioner's legal counsel is Wade Nyberg, Assistant City Attorney.
6. The City of Rapid City respectfully requests that Mr. Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:04 be denied; in the alternative, the City requests that the hearing on the Petition be continued for at least 20 days to give the City time to fully prepare its response.

Dated at Rapid City, South Dakota, this 24th day of June, 2016.

**CITY OF RAPID CITY**

  
\_\_\_\_\_  
Wade Nyberg, Assistant City Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that I sent a true and correct copy of the above CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION FOR DECLARATORY RULING ON ARSD 74:53:10:04 by US Mail, postage prepaid, to the following :

Chief Engineer  
Water Rights Program  
Foss Building  
523 E Capitol  
Pierre, SD 57501

Mr. George Ferebee  
11495 Gillette Prairie Rd  
Hill City, SD 57545

Mr. Jay Alderman  
Pennington County States Attorney  
130 Kansas City Street, Ste. 300  
Rapid City, SD 57701-2818

  
\_\_\_\_\_  
Wade Nyberg

RECEIVED

JUN 30 2016

WATER RIGHTS  
PROGRAM

11495 Gillette Prairie Rd  
Hill City, SD 57745  
June 28, 2016

SD DENR  
523 East Capitol  
Pierre, SD 57501

RE: Water Management Board Hearing

Dear Mr. Secretary:

I understand that your department (agency) intends to delay the Water Management Board hearing set for July 6, 2016, regarding my two (2) petitions. If so, I object on the grounds that there is no basis in law or in fact for such a delay.

The law, SDCL 1-26-17, which provides for the contents of notice, begins with "contested case." Clearly, the entering argument (threshold question so to speak) is whether my petitions fit the definition of "contested case." If not, then obviously SDCL 1-26-17 does not apply. Hence, the scheduled date of July 6, 2016, should not be altered.

SDCL 1-26-1(2) defines "contested case." Critical to meeting the definition; and, going forth with the delay, is specification of the "legal rights," "duties," or "privileges," of a **party** which by law are required to be **determined** by an agency. Please recall, I merely asked for a declaration by the Water Management Board. The South Dakota Supreme Court opinions are littered with expressions regarding "declarations." For example, quite recently, "When regulatory language is clear, certain, and unambiguous, our function is confined to declaring its meaning as clearly expressed." *Krsnak v. South Dakota Department of Environment and Natural Resources*, 2012 S.D. 89, ¶ 16.

Mr. Secretary, I merely ask that the Water Management Board "declare" that your Administrative Rules, 74:53:01:04 & :18, say what they say. Application of the conventions of the English language suggest that the words in those two rules are "clear," "certain," and "unambiguous." All that remains is for the "authoritative" body in this matter (Water Management Board) to "declare" such. Thereby, any misinterpretation by those who are wont to do so would be summarily disabused.

Sincerely,

  
George W. Ferebee

cc: South Dakota Attorney General

STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

---

IN THE MATTER OF GEORGE	)	ORDER ON PETITIONER'S
FEREBEE'S PETITION FOR A	)	OBJECTIONS TO AUTOMATIC
DECLARATORY RULING ON THE	)	DELAY
APPLICABILITY OF	)	
ADMINISTRATIVE RULE OF SOUTH	)	
DAKOTA 74:53:01:04; AND IN THE	)	
MATTER OF GEORGE FEREBEE'S	)	
PETITION FOR A DECLARATORY	)	
RULING ON THE APPLICABILITY OF	)	
ADMINISTRATIVE RULE OF SOUTH	)	
DAKOTA 74:53:01:18.	)	
	)	

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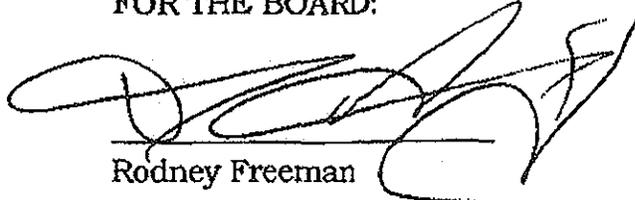
On June 30, 2016, Petitioner George W. Ferebee submitted a letter addressed to the Chairman of the South Dakota Water Management Board, objecting to the automatic delay of his two petitions for declaratory ruling, originally scheduled to come on for hearing before the South Dakota Water Management Board on July 6, 2016. Mr. Ferebee did not serve the other parties with his objections.

After reviewing the submission of Mr. Ferebee, and upon review of the applicable statutes and rules, Mr. Ferebee's objections to the automatic delay are hereby OVERRULED. The hearing before the Water Management Board on the above-captioned matter will not occur during the Water Management Board's July meeting. The hearing to consider Mr. Ferebee's declaratory ruling requests will now be scheduled for the October 5 and 6, 2016, Water

Management Board meeting, tentatively to be held in Pierre. Future notice of the date, time and place of the hearing will be provided to all parties of record.

Dated this 1st day of July 2016.

FOR THE BOARD:

A handwritten signature in black ink, appearing to read 'Rodney Freeman', written over a horizontal line.

Rodney Freeman  
Prehearing Chairman  
South Dakota Water Management Board

STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

---

IN THE MATTER OF GEORGE )  
FEREBEE'S PETITION FOR A )  
DECLARATORY RULING ON THE )  
AUTHORITY REGARDING )  
ADMINISTRATIVE RULE OF SOUTH )  
DAKOTA 74:53:01:04; AND IN THE )  
MATTER OF GEORGE FEREBEE'S )  
PETITION FOR A DECLARATORY )  
RULING ON THE AUTHORITY )  
REGARDING ADMINISTRATIVE )  
RULE OF SOUTH DAKOTA )  
74:53:01:18. )

CERTIFICATE OF SERVICE

---

The undersigned hereby certifies that on the 1st day of July 2016, a true and correct copy of the Order on Petitioner's Objections to Automatic Delay was mailed by U.S. mail first-class and also by e-mail to:

George Ferebee  
11495 Gillette Prairie Road  
Hill City, South Dakota 57745  
[silverfoxdriver@MSN.com](mailto:silverfoxdriver@MSN.com)

Lyndell Petersen, Chairman  
Pennington County Commission  
130 Kansas City Street  
Rapid City, South Dakota 57701  
[jillpete271@gmail.com](mailto:jillpete271@gmail.com)

Kinsley P. Groote  
Deputy State's Attorney  
Pennington Co State's Attorney's Office  
130 Kansas City Street, Suite 300  
Rapid City, South Dakota 57701  
[kinsleyg@pennco.org](mailto:kinsleyg@pennco.org)

Eric E. Erickson  
Cutler Law Firm LLP  
P.O. Box 1400  
Sioux Falls, South Dakota 57101  
[erice@cutlerlawfirm.com](mailto:erice@cutlerlawfirm.com)

Wade Nyberg  
City of Rapid City  
300 Sixth Street  
Rapid City, South Dakota 57701-2724  
[wade.nyberg@rcgov.org](mailto:wade.nyberg@rcgov.org)

by hand delivery to:

Ann Mines Bailey  
Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre, South Dakota 57501-8501

Jeanne Goodman  
Chief Engineer, Water Rights Program  
DENR  
523 East Capitol Avenue  
Pierre, South Dakota 57501

Ellie Bailey  
Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre, South Dakota 57501-8501



Matt Naasz  
Assistant Attorney General

# City of Sioux Falls



## City Attorney

Providing a Better Quality of Life for You

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dpfeifle@siouxfalls.org

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605-367-7330 Fax

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kallenstein@siouxfalls.org

(Law Enforcement Center)  
320 West Fourth Street  
Sioux Falls, SD  
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100 South Dakota Avenue  
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57117-7402  
605-367-8745  
605-367-7330 Fax

DIANE P. BEST  
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dbest@siouxfalls.org

(Public Works Administration)  
224 West Ninth Street  
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57117-7402  
605-367-8880  
605-367-7330 Fax

605-367-7039 TTY  
www.siouxfalls.org

July 1, 2016

Jeanne Goodman  
Chief Engineer  
Foss Building  
523 E. Capitol Ave  
Pierre, SD 57501

Re: Ferrebee Declaratory Ruling Petitions

Dear Chief Engineer Goodman:

Enclosed for filing are City of Sioux Falls Motions as follows:

1. Motion to Intervene in George Ferebee's Petition for Declaratory Ruling ARSD 74:53:01:04 (and Certificate of Service)
2. Motion to Intervene in George Ferebee's Petition for Declaratory Ruling ARSD 74:53:01:18 (and Certificate of Service)

Each of the parties is being served with a copy of this letter and the Motions. I am asking that the City's Motion be heard at the earliest convenient date for the Board or its hearing chairman.

Sincerely,

Diane Best  
Assistant City Attorney

RECEIVED

JUL - 6 2016

WATER RIGHTS  
PROGRAM

STATE OF SOUTH DAKOTA

SOUTH DAKOTA WATER MANAGEMENT BOARD

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	*	
	*	
IN THE MATTER OF GEORGE	*	CITY OF SIOUX FALLS
FEREBEE'S PETITION FOR	*	MOTION TO INTERVENE
DECLARATORY RULING ON ARSD	*	
74:53:01:04	*	
	*	

\*\*\*\*\*

City of Sioux Falls ("City"), through Assistant City Attorney Diane Best, submits its Motion to Intervene as follows:

1. The City is a municipality chartered under the constitution of the State of South Dakota.

2. The City recognizes the published date for intervention in the above referenced matter was June 27, 2016. Unfortunately, due to a recent illness, the undersigned attorney was out of the office for a period of time and was not aware of the intervention date until late in the day on June 30.

3. The City's intervention at this time would not be prejudicial to any party. To date, the only procedure that has been undertaken is the publication and filing of petitions to intervene. Because one or more of the other intervenors requested an automatic delay under SDCL 46-2A-4 (9), the hearing in this matter will likely not be held until the Board's next regular meeting after July 6, 2016, which would be October 5-6, 2016. This City's intervention at this time could not possibly interfere with that process.

4. The City is interested in this matter since Mr. Ferebee's petition seeks a

declaratory ruling that would apply to all cities and counties in the state who restrict or regulate on-site sanitary sewer systems in any way. The City of Sioux Falls is, of course, a municipality and regulates and restricts on-site sanitary sewer systems within its boundaries.

5. The City opposes the petition for the following reasons (and such additional authority as may later be supplemented):

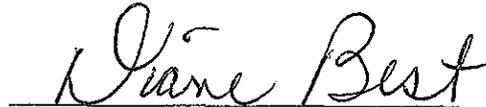
- a. The Ferebee request does not satisfy the threshold procedural requirements for a declaratory ruling by the Board. ARSD 74:02:01:46 expressly requires that a "submitted factual situation" be provided as part of a declaratory ruling request. Mr. Ferebee has not submitted such a factual situation and his petition does not meet this threshold requirement for Board consideration. The petition should be dismissed.
- b. Mr. Ferebee is essentially asking the Board to issue a ruling that if various unknown city and county ordinances and rules are different or more stringent than ARSD 74:53:01:04, they are invalid. This exceeds the Board's subject matter jurisdiction. While the Board can certainly issue declaratory rulings interpreting the statutes and rules that it directly administers, it lacks authority to invalidate separate city and county ordinances stemming from separate state statutes not administered by the Board. Moreover, even if the Board were to hold such subject matter jurisdiction, it appears to lack authority to issue coercive relief to enforce such a holding. *Romey v. Landers*, 392 N.W.2d 415 (1986).
- c. Municipalities hold significant authority to regulate and restrict waste water systems independent of the Department of Environment and Natural Resources (DENR). This includes SDCL 9-12-17 (to prevent groundwater pollution); SDCL 9-32-1 (to promote health and suppress disease); SDCL 9-29-13 and SDCL 9-32-6 (to abate nuisance). Further, municipalities are owners of City water systems and, as such, have the ability and duty to protect such systems from pollution or injury to city water system. SDCL 9-32-8.
- d. The City of Sioux Falls, as a municipality chartered pursuant to the South Dakota Constitution, Article IX, holds authority to restrict or regulate on-site wastewater systems within the City, unless that specific regulation or restriction is denied by its own charter, the state

constitution or state law. ARSD 74:53:01:04 does not create a wholesale restriction on all City power to restrict or regulate on-site wastewater facilities.

6. The City asks that the Board enter an order authorizing it to intervene and participate as a party in the above referenced matter.

Dated this 1<sup>st</sup> day of July, 2016.

CITY OF SIOUX FALLS



Diane Best  
Assistant City Attorney  
224 West Ninth Street  
Sioux Falls, SD 57104-6407  
(605) 367-8880  
dbest@siouxfalls.org

#### CERTIFICATE OF SERVICE

I, Diane Best, hereby certify that on this 1<sup>st</sup> day of July 2016 I sent true and correct copies of the *City of Sioux Falls Motion to Intervene* in the above entitled matter by First Class Mail from Sioux Falls South Dakota to the following:

Matthew Naasz  
WMB Board Counsel  
Assistant Attorney General  
1302 E. HWY 14, Suite 1  
Pierre, SD 57501

Chief Engineer  
Water Rights Program  
Foss Building  
523 E. Capitol Ave  
Pierre, SD 57501

George Ferebee  
11495 Gillette Prairie Rd.  
Hill City, SD 57545

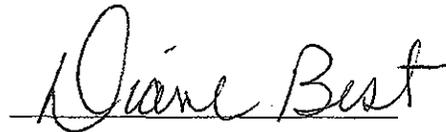
Kinsley Groote  
Pennington Deputy States Attorney  
130 Kansas City Street, Suite. 300  
Rapid City, SD 57701-2818

Wade Nyberg  
City Attorney  
City of Rapid City  
300 Sixth Street  
Rapid City, SD 57701

Ellie Bailey  
Counsel for DENR  
Assistant Attorney General  
1302 E. HWY 14, Suite 1  
Pierre, SD 57501

Eric E. Erickson  
Cutler Law Firm  
100 N. Phillips Av., 9<sup>th</sup> Floor  
P.O. Box 1400  
Sioux Falls, SD 57101

Ann Mines-Bailey  
Counsel for Water Rights Program  
Assistant Attorney General  
1302 E. HWY 14, Suite 1  
Pierre, SD 57501

A handwritten signature in cursive script that reads "Diane Best". The signature is written in black ink and is positioned above a horizontal line.

Diane Best  
Assistant City Attorney  
224 West Ninth Street  
Sioux Falls, SD 57104  
(605) 367-8880

STATE OF SOUTH DAKOTA

SOUTH DAKOTA WATER MANAGEMENT BOARD

\*\*\*\*\*

	*	
	*	
IN THE MATTER OF GEORGE	*	CITY OF SIOUX FALLS
FEREBEE'S PETITION FOR	*	MOTION TO INTERVENE
DECLARATORY RULING ON ARSD	*	
74:53:01:18	*	

\*\*\*\*\*

City of Sioux Falls ("City"), through Assistant City Attorney Diane Best, submits its Motion to Intervene as follows:

1. The City is a municipality chartered under the constitution of the State of South Dakota.

2. The City recognizes the published date for intervention in the above referenced matter was June 27, 2016. Unfortunately, due to a recent illness, the undersigned attorney was out of the office for a period of time and was not aware of the intervention date until late in the day on June 30.

3. The City's intervention at this time would not be prejudicial to any party. To date, the only procedure that has been undertaken is the publication and filing of petitions to intervene. Because one or more of the other intervenors requested an automatic delay under SDCL 46-2A-4 (9), the hearing in this matter will likely not be held until the Board's next regular meeting after July 6, which meeting is now scheduled for October 5-6, 2016. This City's intervention at this time could not possibly interfere with that process.

4. The City is interested in this matter since Mr. Ferebee's petition seeks a

declaratory ruling that would apply to all cities and counties in the state who prohibit cesspools or pit privies. The City of Sioux Falls is, of course, a municipality and prohibits cesspools and pit privies.

5. The City opposes the petition for the following reasons (and such additional authority as may later be supplemented):

- a. The Ferebee request does not satisfy the threshold procedural requirements for a declaratory ruling by the Board. ARSD 74:02:01:46 expressly requires that a "submitted factual situation" be provided as part of a declaratory ruling request. Mr. Ferebee has not submitted such a factual situation and his petition does not meet this threshold requirement for Board consideration. The petition should be dismissed.
- b. Mr. Ferebee is essentially asking the Board to issue a ruling that if various unknown city and county ordinances and rules are different or more stringent than ARSD 74:53:01:18, they are invalid. This exceeds the Board's subject matter jurisdiction. While the Board can certainly issue declaratory rulings interpreting the statutes and rules that it directly administers, it lacks authority to invalidate separate city and county ordinances stemming from separate state statutes not administered by the Board. Moreover, even if the Board were to hold such subject matter jurisdiction, it appears to lack authority to issue coercive relief to enforce such a holding. *Romey v. Landers*, 392 N.W.2d 415 (1986).
- c. Municipalities hold significant authority to prohibit cesspools and pit privies independent of the Department of Environment and Natural Resources (DENR). This includes SDCL 9-12-17 (to prevent groundwater pollution); SDCL 9-32-1 (to promote health and suppress disease); SDCL 9-29-13 and SDCL 9-32-6 (to abate nuisance). Further, municipalities are owners of City water systems and, as such, have the ability and duty to protect such systems from pollution or injury to city water system. SDCL 9-32-8.
- d. The City of Sioux Falls, as a municipality chartered pursuant to the South Dakota Constitution, Article IX, holds authority to prohibit cesspools and pit privies. The City's ordinances in that respect are not denied by city charter, the state constitution or state law. ARSD 74:53:01:18 does not create a wholesale restriction on the City power to prohibit cesspools and pit privies.

6. The City asks that the Board enter an order authorizing it to intervene and participate as a party in the above referenced matter.

Dated this 1<sup>st</sup> day of July, 2016.

CITY OF SIOUX FALLS



Diane Best  
Assistant City Attorney  
224 West Ninth Street  
Sioux Falls, SD 57104-6407  
(605) 367-8880  
dbest@siouxfalls.org

#### CERTIFICATE OF SERVICE

I, Diane Best, hereby certify that on this 1<sup>st</sup> day of July 2016 I sent true and correct copies of the *City of Sioux Falls Motion to Intervene* in the above entitled matter by First Class Mail from Sioux Falls South Dakota to the following:

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11495 Gillette Prairie Rd.  
Hill City, SD 57545

Kinsley Groote  
Pennington Deputy States Attorney  
130 Kansas City Street, Suite. 300  
Rapid City, SD 57701-2818

Wade Nyberg  
City Attorney  
City of Rapid City  
300 Sixth Street  
Rapid City, SD 57701

Ellie Bailey  
Counsel for DENR  
Assistant Attorney General  
1302 E. HWY 14, Suite 1  
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Eric E. Erickson  
Cutler Law Firm  
100 N. Phillips Av., 9<sup>th</sup> Floor  
P.O. Box 1400  
Sioux Falls, SD 57101

Ann Mines-Bailey  
Counsel for Water Rights Program  
Assistant Attorney General  
1302 E. HWY 14, Suite 1  
Pierre, SD 57501

A handwritten signature in cursive script that reads "Diane Best". The signature is written in black ink and is positioned above a horizontal line.

Diane Best  
Assistant City Attorney  
224 West Ninth Street  
Sioux Falls, SD 57104  
(605) 367-8880

RECEIVED

SEP - 9 2016

WATER RIGHTS  
PROGRAM

STATE OF SOUTH DAKOTA  
SOUTH DAKOTA WATER MANAGEMENT BOARD

IN THE MATTER OF GEORGE  
FEREBEE'S PETITION FOR  
DECLARATORY RULING  
ARSD 74:53:01:04

ORDER GRANTING THE  
CITY OF SIOUX FALLS'  
MOTION TO INTERVENE

On August 22, 2016 a telephonic Motion hearing was held before the South Dakota Water Management Board Hearing Chairman Rodney Freeman, Jr. regarding the City of Sioux Falls' Motion to Intervene. The following individuals participated: George Ferebee; Board Counsel Matthew Naasz; Chief Engineer Jeanne Goodman; DENR Engineer Eric Gronlund; Fedclot Permit Program Administrator Kent Woodmansey and its attorney, Assistant Attorney General Ellie Bailey; Pennington County Deputy State's Attorney Michael Hoffman; Attorney Eric Erickson appearing for the South Dakota Association of County Commissioners and the South Dakota Municipal League; and Diane Best, Assistant City Attorney for Sioux Falls.

Under SDCL 46-2A-4(4), any interested party who intends to participate in a case before the Board may do so by filing a timely signed petition and briefly explaining its interest. In this case, the date to do so expired on June 27, 2016. Assistant City Attorney Best filed a petition on July 1, 2016. She explained she had been ill and was not aware of this proceeding or the opportunity to intervene until June 30, 2016. She filed a Motion to Intervene the next day. Because other parties had already invoked the automatic delay provision of SDCL 46-2A-4, the hearing had already been delayed until the Board's regularly scheduled meeting in October 2016. No party is prejudiced because of the late petition and the City of Sioux Falls should be entitled to participate the same as any other interested party.

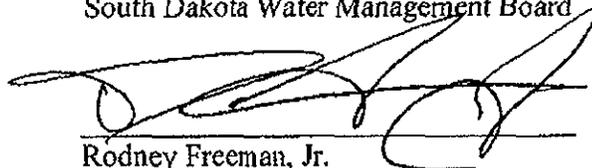
Ferebee objects because he did not intend his petition to be a contested case where intervenors would be allowed and, further, because chartered municipalities have their own separate rules. The remaining parties do not object to the City of Sioux Falls participating as a party.

Having considered the matter, the pleadings, and the arguments of the parties, I hereby find the City of Sioux Falls meets the requirements to intervene. It is therefore:

ORDERED, that the City of Sioux Falls Motion to Intervene is granted and the City of Sioux Falls may participate as a party in the above referenced matter for the reasons and bases set forth in its telephonic arguments and its Motion to Intervene.

Dated this 7<sup>th</sup> day of September, 2016.

South Dakota Water Management Board

A handwritten signature in black ink, appearing to read 'Rodney Freeman, Jr.', written over a horizontal line.

Rodney Freeman, Jr.  
Hearing Chairman



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

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

denr.sd.gov

September 1, 2016

NOTICE

TO: George Ferebee  
11495 Gillette Prairie Rd  
Hill City SD 57745

Eric E Erickson  
Cutler Law Firm LLP  
PO Box 1400  
Sioux Falls SD 57101-1400

Diane P. Best, Assistant City Attorney  
City of Sioux Falls  
P.O. Box 7402  
Sioux Falls, SD 57117-7402

Michaelae Hofmann, Kinsley Groote & Jay  
Alderman  
Pennington County State's Attorney Office  
130 Kansas City St., Suite 300  
Rapid City, SD 57701

Wade Nyberg  
City of Rapid City  
300 Sixth Street  
Rapid City SD 57701-2724

FROM: Jeanne Goodman, Chief Engineer  
Water Rights Program

SUBJECT: Scheduling of Hearing on George Ferebee's Petition for Declaratory Ruling regarding  
ARSD 74:53:01:04

This notice schedules a hearing date and time for the Water Management Board to consider Mr. Ferebee's petition for declaratory ruling that local governments are bound by Administrative Rule of South Dakota 74:53:01:04.

The Water Management Board will conduct the hearing at 10:30 AM (Central Time) on Thursday, October 13, 2016, at the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre SD. The agenda time is an estimate and may be delayed due to prior agenda items. Future notice will be provided to all parties if there are changes to the hearing time.

Applicable provisions of the notice of hearing published in the Rapid City Journal, American News and Argus Leader on June 16, 2016, will still apply at the hearing.

c: Ann Mines-Bailey, Assistant Attorney General  
Ellie Bailey, Assistant Attorney General

CERTIFICATION

I hereby certify that on September 1, 2016, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated September 1, 2016, regarding scheduling a hearing on the Petition for Declaratory Ruling Regarding Administrative Rule of South Dakota 74:53:01:04, as addressed below.

George Ferebee  
11495 Gillette Prairie Rd  
Hill City SD 57745

Eric E Erickson  
Cutler Law Firm LLP  
PO Box 1400  
Sioux Falls SD 57101-1400

Michaele Hofmann, Kinsley Groote & Jay  
Alderman  
Pennington County State's Attorney's Office  
130 Kansas City St., Suite 300  
Rapid City, SD 57701

Diane P. Best, Assistant City Attorney  
City of Sioux Falls  
P.O. Box 7402  
Sioux Falls, SD 57117-7402

Wade Nyberg  
City of Rapid City  
300 Sixth Street  
Rapid City SD 57701-2724

Sent Inter-office to:

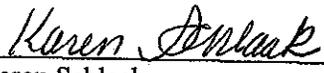
Ann Mines-Bailey, Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre SD 57501-8501

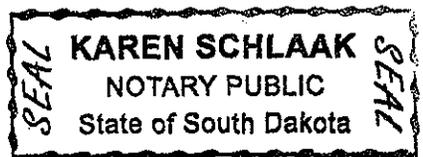
Ellie Bailey, Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre SD 57501-8501

  
\_\_\_\_\_  
Gail Jacobson  
Water Rights Program, DENR

STATE OF SOUTH DAKOTA            )  
  ) SS  
COUNTY OF HUGHES                )

Sworn to, before me, this 1<sup>st</sup> day of September, 2016

  
\_\_\_\_\_  
Karen Schlaak  
Notary Public  
My Commission expires April 1, 2019



STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

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IN THE MATTER OF GEORGE	)	BRIEF IN SUPPORT OF
FEREBEE'S PETITION FOR A	)	PENNINGTON COUNTY'S
DECLARATORY RULING	)	PETITION IN OPPOSITION
REGARDING ARSD 74:53:01:04	)	TO FEREBEE'S PETITION

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The State of South Dakota, by and through Deputy State's Attorney Kinsley P. Groote, submits this Brief in Support of Pennington County's Petition in Opposition to Ferebee's Petition. ARSD 74:53:01:04 provides: "On-site wastewater systems existing prior to February 28, 1975, are not subject to this chapter unless the systems are changed, the systems cause the groundwater to become polluted, or the systems are allowing wastewater to surface. Abandoned wastewater systems are not exempt from this chapter and shall be abandoned in accordance with § 74:53:01:11." George Ferebee argues that the administrative rules concerning on-site wastewater systems occupy the field to the exclusion of local regulation and requests a ruling from this Board declaring that "local units of government (cities and counties) are bound by ARSD 74:53:01:04." His position is without merit.

Pennington County opposes Ferebee's petition for declaratory ruling on jurisdictional, procedural, and substantive grounds. First, the petition submitted by Ferebee is not proper for a declaratory ruling for multiple reasons: Ferebee failed to submit a factual situation; Ferebee raises the issue of preemption, which is a matter of legislative intent for a court of law to decide; and Ferebee failed to give proper notice. Second, the South Dakota Legislature gave counties the authority to regulate and prevent waste in water; regulate and compel the cleansing, abatement, and removal of any sewer, cesspool, and any unwholesome or nauseous thing or

place; and declare and abate public nuisances. The Legislature delegated authority to the South Dakota Water Management Board to establish minimum requirements for the treatment of wastes. It did not prohibit or limit a locality's power to regulate the treatment of waste in water. Additionally, the State has not wholly occupied the field of on-site wastewater systems and water pollution regulation to the exclusion of any local regulation. Third, Pennington County has validly exercised its authority to protect water resources and public health by regulating on-site wastewater systems of any age. Finally, Ferebee's petition is an improper collateral attack against Ferebee's Pennington County Zoning Ordinance violation. Therefore, the County urges the Board to either take no action on Ferebee's petition or declare that local governments can regulate on-site wastewater systems existing prior to February 28, 1975.

#### JURISDICTION OF WATER MANAGEMENT BOARD

Ferebee has not submitted a factual situation as required by ARSD 74:02:01:46. Rather, he requests a blanket ruling declaring that "local units of government (cities and counties) are bound by ARSD 74:53:01:04." ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order *pertaining to a submitted factual situation within the board's jurisdiction.*" (Emphasis added.) Therefore, without a submitted factual situation, no declaratory ruling should be made.

Furthermore, this Board does not have authority to strike down local ordinances. SDCL 1-26-15 allows administrative agencies to issue declaratory rulings "as to the applicability of any statutory provision or of any rule or order of the agency." Determining whether state laws occupy the field and preempt localities from regulating on-site wastewater systems is a question of legislative intent for a court of law rather than this Board. *See State ex rel. Jackley v. City of Colman*, 2010 S.D. 81, ¶¶ 9-11, 790 N.W.2d 491, 494.

Additionally, Ferebee's petition was not properly noticed. Pursuant to ARSD 74:02:01:48,<sup>1</sup> Ferebee should have served a copy of the petition on Pennington County because the County's pecuniary interests<sup>2</sup> would be directly and immediately affected by the requested declaratory ruling.

COUNTY AUTHORITY TO REGULATE ON-SITE WASTEWATER SYSTEMS OF ANY

AGE

The South Dakota Legislature gave counties the ability to regulate waste in water, public nuisances, sewers, cesspools, and unwholesome things and did not limit its delegation of authority to systems of a certain date. Ferebee erroneously argues that ARSD chapter 74:53:01 governing on-site wastewater systems limits or prohibits regulation by counties or municipalities. The enabling statute responsible for most of the administrative rules in chapter 74:53:01 regarding individual and small on-site wastewater systems, SDCL 34A-2-20, provides that, “[t]he board shall establish *minimum requirements* for the treatment of wastes.” (Emphasis added.) The language in this statute is clear, certain, and unambiguous. “When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and [a] [c]ourt’s only function is to declare the meaning of the statute as clearly expressed.” *Paul Nelson Farm v.*

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<sup>1</sup> ARSD 74:02:01:48 provides:

The petitioner shall serve a copy of the petition upon all known persons whose pecuniary interests would be directly and immediately affected by a declaratory ruling on the petition. Proof of such service shall be filed with the board with the petition. All such parties shall be notified by the chief engineer at least 15 days before the petition is scheduled to be heard. In addition, the petitioner shall publish a notice of hearing describing the contents of the petition pursuant to SDCL 46-2A-4(1) to 46-2A-4(10), as applicable, and SDCL 1-26-17.

<sup>2</sup> Pennington County's pecuniary interests are directly and immediately affected by the costs of the necessary abatement of public nuisances caused by malfunctioning on-site wastewater systems and clean-up of contaminated soils and water supplies. Pennington County requires both an on-site wastewater system construction permit and an operating permit. These permits are necessary so the County can conduct inspections and verify that systems are properly installed and functioning. In order to recover its administrative costs, the County charges a fee for the permits. If the County could not require inspections and permits to verify the functionality of on-site wastewater systems, the County would be faced with taking more costly actions of abating and cleaning up nuisances caused by malfunctioning systems or pursuing public nuisance lawsuits.

*S.D. Dep't of Revenue*, 2014 S.D. 31, ¶ 10, 847 N.W.2d 550, 554. The Legislature delegated authority to the South Dakota Water Management Board to establish minimum requirements. It did not prohibit local governments from passing ordinances to regulate the treatment of wastes. And it did not delegate authority to the Board to prohibit local governments from passing ordinances to regulate the treatment of wastes. Furthermore, the language in ARSD 74:53:01:04 is also clear, certain, and unambiguous. It states that “[o]n-site wastewater systems existing prior to February 28, 1975, are not subject to *this chapter*” – meaning pre-1975 systems are not subject to the State administrative rules in chapter 74:53:01. ARSD 74:53:01:04 (emphasis added). The language does not prohibit a local government from passing an ordinance that regulates an on-site wastewater system built in, say, 1955. Thus, the administrative rules are minimums and do not preclude Pennington County from regulating pre-1975 on-site wastewater systems.

Ferebee argues that the State intended to occupy the field of on-site wastewater systems and water pollution regulation. “Field preemption by state law can be either express or implied.” *Law v. City of Sioux Falls*, 2011 S.D. 63, ¶ 10, 804 N.W.2d 428, 432. There is no express preemption here because there is no “specific legislative enactment reflecting the Legislature’s intent to preempt any local regulation.” *Id.* There is no implied preemption because the legislative scheme is not sufficiently comprehensive to infer that the Legislature “left no room for supplementary local regulation.” *Id.* The statutes and administrative rules explicitly state that they are merely minimum requirements. Localities could easily add more requirements to protect their water supplies given the unique geography and soils of each city and county. The administrative rules generally concern the design, capacity, gravity, and elevation of on-site wastewater systems built after 1974. The rules do not cover topics such as septage pumping and

inspection of operational systems because the rules are not comprehensive; they are minimum regulations.<sup>3</sup>

Looking to the entire statutory scheme regarding the regulation of waste in water, prevention of water pollution, and regulation of nuisances, it is clear that the South Dakota Legislature sought to allow both the State and local governments to regulate. The South Dakota Legislature granted county commissioners the authority to regulate and prevent waste in water; regulate and compel the cleansing, abatement, and removal of any sewer, cesspool, or unwholesome or nauseous thing or place; and declare and abate public nuisances.<sup>4</sup> SDCL 7-8-20; SDCL 7-8-33. The Legislature also gave counties the extremely broad authority to regulate the use of land and structures in order to promote health, safety, and welfare. SDCL 11-2-13.<sup>5</sup>

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<sup>3</sup> In a March 31, 2016 letter to Steven Pirner, the Secretary of the Department of Environment and Natural Resources (DENR), Ferebee inquired whether it was DENR's "intent to exclusively occupy the field circumscribed by Administrative Rules chapter 74:53:01." See attached Exhibit 1. Secretary Pirner replied to Ferebee's inquiry in a May 3 letter, writing that DENR did not intend to exclusively occupy the field:

My informal position as Secretary of the Department, however, is that we do not intend to exclusively occupy this field. We are not aware of any law that would prohibit local governments from adopting [their] own requirements for the design, construction, or operation of septic systems within [their] jurisdiction as several have done for many years. While any ordinance adopted by a county may not be less stringent than a state requirement, the legislature has given broad authority to local governments in making land use decisions through their respective planning and zoning ordinances.

See attached Exhibit 2. Additional correspondence between Ferebee and Secretary Pirner is attached as Exhibit 3.

<sup>4</sup> The South Dakota Legislature also gave municipalities and townships unfettered authority to regulate wastewater systems and water pollution. See SDCL 8-2-9 (township power to regulate any privy, prevent pollution to any water supply, and prevent and abate nuisance); SDCL 9-12-17 (municipal power to prevent groundwater pollution); SDCL 9-29-13 (municipal power to prevent, abate, and remove nuisance); SDCL 9-32-1 (municipal power to promote health and suppress disease); SDCL 9-32-6 (municipal power to compel privy owner to cleanse, abate, or remove privy); SDCL 9-32-8 (municipal power to prevent pollution of water supply belonging to municipality or public water supply within one mile of municipality).

<sup>5</sup> SDCL 11-2-13 provides:

For the purpose of promoting health, safety, or the general welfare of the county the board may adopt a zoning ordinance to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, flood plain, or other purposes.

This authority is not limited to systems, structures, or pollution of a certain date. ARSD 74:53:01:04 in no way prohibits localities from passing ordinances regulating on-site wastewater systems above and beyond their regulation by the State as set forth in this administrative rule.

SDCL 7-8-20 addresses the general powers of county commissioners. Subsections 14 and 15 specifically grant county commissioners the power to regulate and prevent waste in water and compel the cleansing, abatement, or removal of any unwholesome or nauseous thing. SDCL 7-8-20 states in pertinent part:

In addition to others specified by law, the board of county commissioners shall have power: . . .

(14) To enact ordinances to regulate and prevent the placing of ashes, dirt, garbage or any offensive matter in any highway or public ground or in any body or stream of water within the county, but outside of an incorporated municipality or outside of the one mile limits of any incorporated municipality;

(15) To enact ordinances to regulate and compel the cleansing, abatement or removal of any sewer, cesspool or any unwholesome or nauseous thing or place[.]

Moreover, SDCL 7-8-33 allows county commissioners to declare and abate public nuisances:

*The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality. For purposes of this section only, the feeding, breeding, or raising of livestock or the operations of a livestock sales barn, is not presumed, by that fact alone, to be a nuisance.*

(Emphasis added.) Simply put, a nuisance is an act or omission which “endangers the comfort, repose, health, or safety of others.” SDCL 21-10-1. It is clear that an on-site wastewater system of any age may contaminate water and endanger the health of others. Water has no bounds, so contamination of water is felt widespread throughout a community and by many, many people. Furthermore, SDCL 34A-2-1 and 34A-2-21 specify that the pollution of the waters of the state

constitutes a public nuisance and may be abated as such.<sup>6</sup> A county also has an extremely broad power to regulate the use of land and structures in order to promote health, safety, and welfare – which in turn means on-site wastewater systems – pursuant to SDCL 11-2-13.

The South Dakota Supreme Court has reviewed statutes similar to the aforementioned statutes and has stated that they vest a local government “with the police power to preserve the public health and welfare and the proper disposition of sewage is essential to this public health and welfare.” *Ericksen v. City of Sioux Falls*, 70 S.D. 40, 50-53, 14 N.W.2d 89, 94-95 (1944). Furthermore, the local government “is necessarily invested with power to exercise its discretion, and the courts will not interfere with such action unless it appears to be unreasonable or arbitrary.” *Id.* at 53, 14 N.W.2d at 95.

#### PENNINGTON COUNTY’S REGULATION OF ON-SITE WASTEWATER SYSTEMS

Pennington County has chosen to exercise the powers given to it by the State by passing a resolution and an ordinance to protect drinking water resources, to promote clean water, and to protect public health and the environment. On April 15, 2008, the Board of Commissioners approved a Resolution for the Protection of Water Resources in Pennington County. The Board recognized that implementation of water protection programs to preserve and protect drinking water resources in Pennington County would avoid unnecessary costs in the future and protect the health, safety, and general welfare of the public. Due to the unique geology, the interconnection of ground and surface water, and increasing population in un-sewered areas of the Black Hills and surrounding areas, Pennington County has enacted sections of the

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<sup>6</sup> ARSD 74:53:01:06 provides in part that “[n]o on-site wastewater system, regardless of when constructed may cause a violation of any existing water quality standard [or] cause a health hazard.” (Emphasis added.) Even these minimum state regulations prohibit systems – of any age – that may cause water quality violations or health hazards. Pursuant to the aforementioned statutes, local governments clearly have the authority to determine what constitutes a health hazard.

Pennington County Zoning Ordinance to address siting and function of on-site wastewater treatment systems.

Section 204(J) of the Pennington County Zoning Ordinance currently requires on-site wastewater systems of any age to undergo septage pumping and an inspection. Because on-site wastewater systems are underground, it may not be easy to determine whether they are malfunctioning. Pennington County is taking a proactive approach and attempting to prevent water quality violations and health hazards by requiring inspections of on-site wastewater treatment systems of any age, so that malfunctioning systems can be detected earlier.

#### IMPROPER COLLATERAL ATTACK

Ferebee's petition appears to be an improper collateral attack against Ferebee's Pennington County Zoning Ordinance violation that is currently being litigated in Seventh Judicial Circuit Magistrate Court Case No. 15-5543. Ferebee is currently charged with a violation of Pennington County Zoning Ordinance §§ 204(J)(2) and 514 pertaining to on-site wastewater treatment systems. In that case, it is alleged that Ferebee is operating an on-site wastewater treatment system without a permit. Ferebee has challenged the County's authority to enact an ordinance requiring owners of on-site wastewater treatment systems to obtain an operating permit.<sup>7</sup> Thus far his legal arguments have been found to be without merit.<sup>8</sup> However, the matter is still in litigation.

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<sup>7</sup> In his brief filed on December 15, 2015, Ferebee's first issue was: "Does a South Dakota county have the authority to pass an ordinance mandating 'operating permits' for on-site wastewater treatment systems?" See attached Exhibit 4 at 3. It appears that Ferebee is asking the South Dakota Water Management Board to rule that the State is exclusively occupying the field circumscribed by ARSD chapter 74:53:01 in order to prohibit Pennington County from regulating any on-site wastewater treatment systems, including Ferebee's own system, and to attempt to use such a ruling in the pending case against him.

<sup>8</sup> Judge Strawn determined that Pennington County had the statutory authority to enact Pennington County Zoning Ordinance section 204(J) in a memorandum decision filed on April 12, 2016. See attached Exhibit 5 at 5-6. Judge Strawn did not side with Ferebee's arguments.

**CONCLUSION**

For all the reasons set forth above, the County urges the Board to either take no action on Ferebee's petition or declare that local governments can regulate on-site wastewater systems existing prior to February 28, 1975 and that the State does not intend to exclusively occupy the field circumscribed by ARSD chapter 74:53:01.

Respectfully submitted this 3rd day of October, 2016.



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Kinsley P. Groote  
Pennington County Deputy State's Attorney  
130 Kansas City Street, Suite 300  
Rapid City, SD 57701  
(605) 394-2191

STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

---

IN THE MATTER OF GEORGE )  
FEREBEE'S PETITION FOR A )  
DECLARATORY RULING )                    CERTIFICATE OF SERVICE  
REGARDING ARSD 74:53:01:04 )

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The undersigned hereby certifies that she served a true and correct copy of Pennington County's **Brief in Support of Pennington County's Petition in Opposition to Ferebee's Petition** on the individuals hereinafter next designated, all on the date shown below, by U.S. mail first-class, postage prepaid at their last known address, to-wit:

George Ferebee  
11495 Gillette Prairie Road  
Hill City, SD 57745

Eric E. Erickson  
Cutler Law Firm LLP  
P.O. Box 1400  
Sioux Falls, SD 57101

Jeanne Goodman  
Chief Engineer, Water Rights Program  
DENR, Foss Building  
523 E. Capitol Avenue  
Pierre, SD 57501

Wade Nyberg  
City of Rapid City  
300 Sixth Street  
Rapid City, SD 57701-2724

Ellie Bailey  
Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre, SD 57501-8501

Diane Best  
City of Sioux Falls  
P.O. Box 7402  
Sioux Falls, SD 57117-7402

Ann F. Mines Bailey  
Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre, SD 57501-8501

Kent Woodmansey  
DENR Feedlot Program  
Foss Building  
523 E. Capitol Avenue  
Pierre, SD 57501

Jim Hutmacher  
SD Water Mgmt Bd Chairman  
DENR, Foss Building  
523 E. Capitol Avenue  
Pierre, SD 57501

Matt Naasz  
Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre, SD 57501-8501

Dated this 3rd day of October, 2016.



---

Kinsley P. Groot  
Pennington County Deputy State's Attorney

RECEIVED

APR 4 - 2016

Dept. of Environment and  
Natural Resources  
Secretary's Office

11495 Gillette Prairie Rd  
Hill City, SD 57745  
March 31, 2016

SD DENR  
Joe Foss Building  
523 E. Capitol  
Pierre, SD 57501

Dear Secretary Pirner:

I write to suggest a dialogue regarding "declaratory rulings" as applied by your "agency" (Department). Even though the law (SDCL 1-26-15) requiring that each agency have a rule for the filing and prompt disposition of petitions for declaratory rulings has been around for a number of years, I only recently became aware of such a redress mechanism.

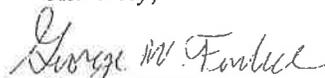
On March 9, 2016, the South Dakota Supreme Court ruled on a petition to the Department of Labor for a declaratory ruling regarding the application of a statute. In its opinion, the Court wrote rather extensively, addressing the applicable statutes and relevant case law. As I read and studied the Court's *opinion*, I came to the realization that the *declaratory ruling* process enacted by our Legislature might just be the appropriate methodology to resolve the nagging controversy regarding the issue(s) of *water quality* as envisioned by Pennington County. *In Re: Petition for Declaratory Ruling*, 2016 S.D. 21

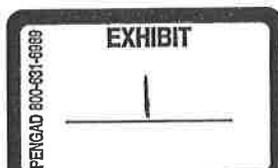
After reading and studying the Court's *opinion*, I made several calls to Pierre, searching for guidance on how to proceed. For example, I was trying to find the *rule* for the filing of a petition with your agency (Department). I talked with Kim Smith and Ron Duvall of your Department. Ron Duvall suggested that before filing a petition, I might want to write a letter to you or Mr. Woodmansee to broach the issue.

Mr. Secretary, there are numerous issues and sub issues and sub sub issues involving *water quality* and Pennington County, however, I believe that resolution of one critical issue will serve to moot many other issues. The critical issue is, as set forth by the South Dakota Supreme Court: "And, third, state law [rule] may occupy a particular field to the exclusion of all local regulation." *Rantapaa v. Black Hills Chair Lift Co., v. Curtis Allen*, 2001 S.D. 111, ¶ 23. My specific inquiry to the South Dakota Department of Environment and Natural Resources involves chapter 74:53:01 of your Administrative Rules.

For full disclosure, my efforts in this matter are for both me and the many constituents of my county commission district. Recognizing that your agency has a multitude of *rules* which may have differing implementation arrangements, our initial inquiry is limited to: Is it your intent to exclusively *occupy* the field circumscribed by Administrative Rules chapter 74:53:01?

Sincerely,

  
George W. Ferebee





DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

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

denr.sd.gov

May 3, 2016

George Ferebee  
11495 Gillette Prairie Road  
Hill City, SD 57745

Dear Mr. Ferebee:

Thank you for your letter regarding the Department of Environment and Natural Resources' implementation of Administrative Rules Chapter 74:53:01. You ask in your letter whether it is the department's intent to exclusively occupy the field circumscribed by this chapter.

South Dakota Codified Law (SDCL) § 34A-2-93 gives the Water Management Board the authority to promulgate rules to establish the design and installation requirements for on-site wastewater systems. The Water Management Board has used this authority to adopt Chapter 74:53:01, Individual and Small On-site Wastewater Systems. This chapter sets out the minimum design and installation requirements for on-site systems built throughout the state. You can request an official declaratory ruling from the Water Management Board pursuant to South Dakota Administrative Rule 74:02:01:46.

My informal position as Secretary of the Department, however, is that we do not intend to exclusively occupy this field. We are not aware of any law that would prohibit local governments from adopting its own requirements for the design, construction, or operation of septic systems within its jurisdiction as several have done for many years. While any ordinance adopted by a county may not be less stringent than a state requirement, the legislature has given broad authority to local governments in making land use decisions through their respective planning and zoning ordinances.

Thank you again for your letter.

Sincerely,

Steven M. Pirner, P.E.  
Secretary

cc: Ellie Bailey, Assistant Attorney General, Office of Attorney General  
Matt Konenkamp, Policy Advisor, Governor's Office

EXHIBIT

2

RECEIVED

MAY 4 - 2016

Dept. of Environment and  
Natural Resources  
Secretary's Office

11495 Gillette Prairie Rd  
Hill City, SD 57745  
May 2, 2016

SD DENR  
Joe Foss Building  
523 E. Capitol  
Pierre, SD 57501

RE: Declaratory rulings

Dear Secretary Pirner:

This letter is a follow-up to my March 31, 2016, letter to you. It is my understanding that my March 31<sup>st</sup> letter arrived in Pierre and has been discussed.

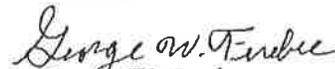
Seems to me that since I narrowed the focus of the initial inquiry to one rather straightforward question, your response should have arrived in Hill City by now. Please recall the initial inquiry was and still is: Is it your intent to exclusively *occupy* the field circumscribed by Administrative Rules chapter 74:53:01?

Mr. Secretary, if your response to my March 31<sup>st</sup> letter is in want of more specificity and/or particularity, I will provide a petition for "declaratory ruling," relying on ARSD 74:02:01:46 for guidance. Such petition is attached.

Maybe, just maybe, a petition for a "declaratory ruling," on what seems to be a rather simple, straightforward matter will be a catalyst to cause breakup of whatever logjam might exist in responding to my March 31<sup>st</sup>. The *petition*: Seasoned outhouses (pit privies) or not is the question.

Once again, Mr. Secretary, my efforts in this matter are for both me and the many constituents of my county commission district. Please be reminded of the South Dakota Supreme Court's words from *Rantapaa v. Black Hills Chair Lift Co., v. Curtis Allen*, 2001 S.D. 111, ¶ 23. "And, third, state law [rule] may occupy a particular field to the exclusion of all local regulation."

Sincerely,

  
George W. Ferebee

cc: South Dakota Attorney General Jackley

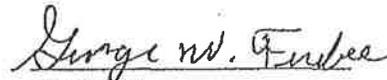
Atch: Petition for Declaratory Ruling

**PETITION**  
**FOR**  
**DECLARATORY RULING**

(1) The authority by which the petition is presented: SDCL 1-26-15 & ARSD 74:02:01:46

(2) The name of person submitting the petition: George W. Ferebee

(3) The requested action and reasons for the action: Declare ARSD 74:53:01:18 the exclusive province of the State of South Dakota. Put another way, declare that local governments do not have authority to prohibit the operation of pit privies (outhouses) constructed prior to February 28, 1975. Reason for *Petition*: To eliminate the existing controversy.

  
GEORGE W. FEREBEE

RECEIVED

MAY 11 2016

Dept. of Environment and  
Natural Resources  
Secretary's Office

11495 Gillette Prairie Rd  
Hill City, SD 57745

May 9, 2016

SD DENR  
Joe Foss Building  
523 E. Capitol  
Pierre, SD 57501

Dear Secretary Pirner:

Thank you so very much for your May 3<sup>rd</sup> letter. Quite impressive. Thank you for identifying the applicable South Dakota Administrative Rule for requesting a *declaratory ruling*. Also, thanks for providing "your" *position* on *occupying* the field circumscribed by ARSD 74:53:01.

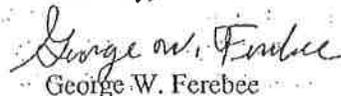
In your letter you point out that the South Dakota Water Management Board promulgated rules regulating "Individual and Small On-Site Wastewater Systems" (ARSD chapter 74:53:01) under authority granted by the South Dakota Legislature in SDCL 34A-2-93. In your next paragraph you state: "We [presumably you and your staff] are not aware of any law that would prohibit local governments from adopting its [sic] own requirements for the design, construction, or operation of septic systems within its [sic] jurisdiction ... ." You continue with a pronouncement (declaration of sorts) regarding ordinance stringency.

First question (request): Are you *aware* of any *law* that *allows* local governments to *adopt* requirements for the design, construction, or *operation* of septic systems within that government's jurisdiction? If so, please provide, with particularity. Second question (request): Will you please share with me, which legislative enactments, if any, and/or promulgated provisions, if any, that give local units of government the authority to regulate "Individual and Small On-Site Wastewater Systems?" My research thus far on both questions, which are essentially the same, has yielded an empty hand. Looking forward to your specificity.

I am looking forward to your information for at least two reasons: (1) I can discontinue my search, and (2) We (the involved government and South Dakota citizens) can move on to other relevant matters. Identifying the appropriate authority(ies), with specificity, just might bring an end to some of the uncertainty and, of course, some of the misperceptions.

Back to "ordinance" *stringency*. For now, I intend to hold on that matter. Seems to me that we should first reconcile our apparent differences regarding regulatory authority as suggested above. In other words, let's nail down the authority for "Individual and Small On-Site Wastewater Systems."

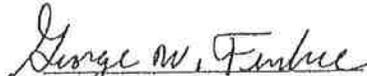
Sincerely,

  
George W. Ferebee

cc: South Dakota Attorney General Jackley

**PETITION**  
**FOR**  
**DECLARATORY RULING**

- (1) The authority by which the petition is presented: SDCL 1-26-15 & ARSD 74:02:01:46
- (2) The name of person submitting the petition: George W. Ferebee
- (3) The requested action and reasons for the action: Declare that local units of government (cities and counties) are bound by ARSD 74:53:01:04. Reason for *Petition*: To eliminate the existing controversy.

  
GEORGE W. FEREBEE  
11495 Gillette Prairie Rd  
Hill City, SD 57745  
(605) 574-2637



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

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

denr.sd.gov

May 26, 2016

George Ferebee  
11495 Gillette Prairie Road  
Hill City, SD 57745

Dear Mr. Ferebee:

Thank you for your May 2, 2016, letter providing DENR with a petition for a declaratory ruling. We also received your May 9, 2016, letter regarding local government's authority to regulate septic systems and a second petition for another declaratory ruling.

In your letters, you asked several questions regarding the authority of local governments. Generally, South Dakota Codified Laws, Title 11, addresses planning and zoning. Other areas of the code may also contain additional statutes regarding zoning.

We are processing your two petitions for a declaratory ruling by the Water Management Board on your two questions. Your first petition is whether local governments have authority to prohibit the operation of pit privies constructed prior to February 28, 1975. Your second petition is to declare local units of government are bound by ARSD 74:53:01:04. We have tentatively scheduled two hearings to allow the Board to consider your two separate declaratory ruling petitions for the July 6 – 7 meeting in Pierre.

My staff is drafting the required public notices for your two separate petitions as required by administrative rule 74:02:01:48. To ensure your petitions may be heard at the July board meeting, the notices must appear in the required newspapers by mid-June to meet the necessary timelines established in law. Since your declaratory ruling petitions have ramifications beyond Pennington County, the public notice will need to be published in at least three daily newspapers located in Aberdeen, Rapid City, and Sioux Falls to give others throughout South Dakota the opportunity to be part of the hearing. Also, since your petitions are separate issues, we have determined a notice is required for each petition.

Administrative rule 74:02:01:48 requires the petitioner to publish a notice of hearing describing the contents of the petition. Therefore, while DENR staff will draft the public notices for your two petitions to meet all state requirements for the notices, you will be responsible for the cost of all publications. In early June, my staff will provide you with the notices with instructions on which newspapers to contact to authorize publication and arrange for payment. If the notices are not adequately published, the hearings cannot be held.

If you have any questions about the board hearing in July, please contact Eric Gronlund at (605)773-3352.

Thank you again for your letters.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Pirner", with a horizontal line extending to the right.

Steven M. Pirner, P.E.  
Secretary

cc: Ellie Bailey, Office of Attorney General  
Matt Konenkamp, Governor's Office

STATE OF SOUTH DAKOTA	)	IN MAGISTRATE COURT
	)SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
	)	
PENNINGTON COUNTY,	)	COURT NO. MAG 15-5543
	)	
Plaintiff,	)	<b>BRIEF IN SUPPORT</b>
	)	<b>OF CONTENTION THAT</b>
vs.	)	<b>PENNINGTON COUNTY ORDINANCE</b>
	)	<b>#34 SUBSUBSECTION 204J.2</b>
GEORGE W. FEREBEE,	)	<b>IS INVALID/UNCONSTITUTIONAL</b>
	)	
Defendant.	)	

Comes now the Defendant, George W. Ferebee, and offers the following brief in support of his contention that Pennington County ordinance #34 subsection 204J.2 is invalid/unconstitutional.

**Preliminary Matters**

1. To begin with, my appreciation to the court for so quickly grasping the real issue in this matter—individual liberty and private property rights versus twenty bucks. My sincere appreciation.
2. Rest assured, this matter is not about me, George Ferebee. Rather, this matter is about the heavy hand of government. Pennington County’s (a.k.a. Penalty County) heavy handedness stands in sharp contrast to John Locke’s view of government’s role in the lives of its citizenry. His writings suggest a heartfelt abhorrence to *arbitrary* and *capricious* restrictions on the lives of individual citizens. Anecdotally, a friend told me that during one encounter with a previous Pennington County Planning and Zoning Director he was told that he could not do such and such because the *Ordinance* did not say he could. Really!
3. For me personally, as the Rapid City Journal seems to take a measure of delight in pointing out, I have been around seventy-five (75) years. Why then this? Simple. Obligation to leave future generations with at least some semblance of the freedom and liberty those of us



clear, ostensibly fear of drinking water contamination. The only certainty was, and *still is*, the lack of any showing that “septic systems” have caused or are causing any problem with Rapid City’s drinking water. [Minutes of the drinking water committee’s meeting are available at city hall in Rapid City, the court is hereby asked to take judicial notice thereof.]

Several of us rural Pennington County residents became aware of the committee’s meetings, and Pennington County’s involvement, and began a counteroffensive to reverse the committee’s direction, which was government imposed restrictions. We began in May of 2002 and were successful by that December.

Six (6) years later the group (affectionately called the potty patrol) had regrouped, reloaded, and launched another attack on *septic systems*. Since they controlled the levers of power, we were limited to guerrilla type tactics. Took them almost two years, but they prevailed.

### **ISSUES PRESENTED**

#### **1. DOES A SOUTH DAKOTA COUNTY HAVE THE AUTHORITY TO PASS AN ORDINANCE MANDATING “OPERATING PERMITS” FOR ON-SITE WASTEWATER TREATMENT SYSTEMS?**

The South Dakota Supreme Court has noted more than once that “a county in this state is a creature of statute and has no inherent authority. It has only such powers as are expressly conferred upon it by statute and such as may be reasonably implied from those expressly granted.” Even scolded Pennington County twenty (20) years ago. *Pennington County v. Moore*, 525 N.W. 2d 257, 258 (S.D. 1994) Nevertheless, the Pennington County Board of Commissioners ignored citizens’ admonitions and enacted an “operating permit” ordinance five (5) years ago, July 10, 2010.

Similarly, cities of South Dakota have also been instructed by the South Dakota Supreme Court. Even though cities are beneficiaries of considerably more expansive statutory grants of power than counties, limits remain. “Municipalities ‘possess only those powers conferred upon



STATE OF SOUTH DAKOTA

IN MAGISTRATE COURT

COUNTY OF PENNINGTON

SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,  Plaintiff,  vs.  GEORGE FEREBEE,  Defendant.	File No. MAG 15-5543  <b>MEMORANDUM OF DECISION</b>
--	---

**PROCEDURAL POSTURE**

This matter came on for hearing with an initial appearance on November 16, 2015 at 2:30 p.m., and a status hearing on January 25, 2016 at 2:30 p.m., the State and Defendant appeared at both hearings. Defendant was advised of his constitutional and statutory rights as well as the nature of the charge and the maximum fines and penalties. At the Initial Appearance, and among other petitions, the Defendant requested the Court consider the constitutionality of Pennington County Zoning Ordinance Section 204(J)(2) and 514. This Court granted a briefing of the issues by the parties, setting filing dates for both sides. On November 24<sup>th</sup>, 2015 Defendant filed his answer and counterclaim which was followed by the State's Reply to Counterclaim and Objections to Answer and Counterclaim on December 4, 2015. On December 15, 2015 the Defendant filed his Brief in Support of Contention that Pennington County Ordinance #34 Subsection 204J.2 is Invalid/Unconstitutional. The State filed its Reply Brief on January 6, 2016.

A series of mail and email correspondences occurred wherein Defendant requested an opportunity to respond to the State's Reply Brief. Both parties were reminded of the necessity to have formal pleadings filed in the future regarding motions and requests. During this time, Defendant requested an opportunity to respond to the State's Reply. The State did not object; however, this Court was concerned regarding timing of this case and the likelihood of a protracted briefing schedule. To alleviate this concern, the Defendant agreed to file a Waiver for Speedy Trial. At the Status hearing, held on January 25, 2016, the State filed its proposed Scheduling Order and Defendant submitted his Speedy Trial Waiver. On February 4, 2016, the State filed its Motion for Determination that Defendant's Counterclaim and Answer are Improper and Motion to Amend Reply. On February 8, 2016, Defendant filed his Response to Pennington County's Reply Brief to Defendant's Brief in Support of Contention that Pennington County Ordinance #34 Subsection 204J.2 is Invalid/Unconstitutional. On February 16, 2016, Defendant

Class 1 misdemeanor. In addition to a jail sentence authorized by § 22-6-2, a Class 1 misdemeanor imposed by this chapter is subject to a criminal fine not to exceed ten thousand dollars per day of violation. The violator is also subject to a civil penalty not to exceed ten thousand dollars per day of violation, or for damages to the environment of this state, or both.

The plain meaning of these statutes is unambiguous. A person (“individual”), who violates 34A-2-21 or 28 is subject to criminal prosecution. 34A-2-21 and 28 are general laws of this State and a violation of either of these statutes is a criminal matter. Thus, under the principles of *sui generis*, Pennington County, through its ordinances, may enforce its ordinance criminally. Therefore, this Court issues its declaratory judgment holding that the enforcement of Pennington County Ordinance 204(J) may be enforced criminally.

#### *Statutory Authority to Enact 204(J)*

Defendant alluded to the Constitutionality regarding the enactment of 204(J). This Court reviewed the ordinance to ascertain its legislative authority. In this case Pennington County procured its authority from two separate sources. First, 204(J)(C) obtains its authority from “Title 7 of the South Dakota Codified Laws.” Defendant argues that since this section only cites “Title 7” and does not use the specific word “statute” therefore the ordinance lacks its statutory authority as required under case law.(see Defendant’s Brief in Support of Contention..... pp.7-8; (citing Pennington County v. Moore, 525 N.W.2d 257, 258 (SD 1994). Defendant misconstrues the position of the Supreme Court in *Moore*; *Moore* stands for the proposition that a county may not enact an ordinance unless it draws its authority from statute. The Supreme Court did not specifically state the ordinance must specifically use the word, “statute,” or have an exact citation back to a specific statute. This Court finds that the citation back to Title 7 is sufficient to meet the requirements that the ordinance attains its authority from statute. Title 7, after all, is the title of the South Dakota Codified Law that contains statutes specifically granting counties with legislative authority to enact ordinances at the county level.

#### *What powers are granted to Counties in Title 7*

Title 7, specifically SDCL 7-18A-2, not only grants counties the power to “enact, amend or repeal ordinances, but also creates a categorization of the penalties of violations of ordinances.

#### **7-18A-2 Authority to enact, amend, and repeal ordinances and resolutions- Penalties for violations.**

Each county may enact, amend, and repeal such ordinances and resolutions as may be proper and necessary to carry into effect the powers

granted to it by law and provide for the enforcement of each violation of any ordinance by means of any or all of the following:

- (1) A fine not to exceed the fine established by subdivision 22-6-2(2) for each violation, or by imprisonment for a period not to exceed thirty days for each violation, or by both the fine and imprisonment, or
- (2) An action for civil injunctive relief, pursuant to chapter 21-8.

This statute authorizes counties to “enact, amend, and repeal . . . ordinances and resolutions.” The statute also allows the counties to enforce using “any or all” of the enforcement powers granted under subsections (1) and (2).

In reading the plain meaning of this statute, an ordinance may use any or all of the enforcement powers granted in subsections (1) and (2) of SDCL 7-18A-2. Section 514 of the Pennington County Ordinances, deriving its authority from 204(C), (which in turn attains its authority from SDCL 7-18A-2), grants the County enforcement power to charge for a violation of 204(J) including a fine not exceeding \$500.00 for each violation or by imprisonment for a period not exceeding 30 days for each violation, or both fine and imprisonment.

SDCL 7-18A-2 is reconcilable with the principles of *sui generis*. If the violation of an ordinance would typically be considered a crime under the general laws of this State, then the nature of the charge and its proceedings would comport with the enforcement powers of subsection (1) of SDCL 7-18A-2. If on the other hand, the charge would not typically be considered a crime under the general laws of this State, then the enforcement of the ordinance would be subject to the civil injunctive relief provided in SDCL 7-18A-2(2). The next step is to analyze the enforcement power exercised in Pennington County’s Ordinances Section §514. That enforcement ordinance reads as follows:

#### **SECTION 514 – VIOLATIONS AND PENALTIES**

A. In addition to all other remedies available to the County to prevent, correct, or abate Ordinance violations, a violation of these Zoning Ordinances is also punishable by a fine and/or imprisonment, pursuant to SDCL 7-18A-2, as provided below:

1. A fine not to exceed \$500.00 for each violation or by imprisonment for a period not to exceed 30 days for each violation, or by both the fine and imprisonment. Each day the violation continues shall constitute a separate violation. The date of the first violation shall be the date upon which the property owner first received notice of the violation.

Department no later than 30 days after actual receipt of the Notice of Non-Compliance by the owner or after the date of the Notice of Non-Compliance is mailed by the Planning Department, whichever is sooner. The Notice of Decision from the Planning Director, on that appeal, shall be mailed within 30 days after the receipt by the Planning Department of a timely appeal.

In his Brief, Defendant did not argue he had appealed the decision in writing 30 days after actual receipt of the Notice of Non-Compliance. As a result, this Court will not consider the argument at this time.

**ISSUE 6. WHETHER DEFENDANT'S MOTION FOR RULE 11 SANCTIONS SHOULD BE GRANTED.**

This Court received several supplementary pleadings from Defendant while this Opinion was drafted and as a result, the State has an opportunity to respond to the latest Motion which the Court received this past Monday, March 21, 2016.

**CONCLUSIONS**

After considering all of the Briefs and Reply briefs of the parties, this Court concludes this matter shall proceed as a criminal matter with the Defendant being afforded all the protections in criminal proceedings. Pursuant to this Memorandum Opinion, Defendant's written answer will be deemed a plea of not guilty and Defendant is precluded from prosecuting his Counterclaims. Finally, this Court will schedule a Jury Trial as requested by Defendant.

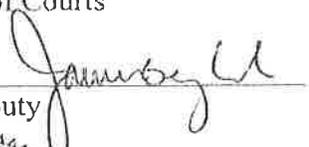
Dated this 22<sup>nd</sup> day of March, 2016.

BY THE COURT:

  
Eric J. Sifawn  
Magistrate Judge

ATTEST:

  
Clerk of Courts

By:   
Deputy

Pennington County, SD  
FILED  
IN CIRCUIT COURT

APR 12 2016

Ranee Truman, Clerk of Courts  
By:  Deputy



**DECLARATORY RULING ON**

**ARSD 74:53:01:18**

RECEIVED

MAY 4 - 2016

Dept. of Environment and  
Natural Resources  
Secretary's Office

11495 Gillette Prairie Rd  
Hill City, SD 57745  
May 2, 2016

SD DENR  
Joe Foss Building  
523 E. Capitol  
Pierre, SD 57501

RE: Declaratory rulings

Dear Secretary Pirner:

This letter is a follow-up to my March 31, 2016, letter to you. It is my understanding that my March 31<sup>st</sup> letter arrived in Pierre and has been discussed.

Seems to me that since I narrowed the focus of the initial inquiry to one rather straightforward question, your response should have arrived in Hill City by now. Please recall the initial inquiry was and still is: Is it your intent to exclusively *occupy* the field circumscribed by Administrative Rules chapter 74:53:01?

Mr. Secretary, if your response to my March 31<sup>st</sup> letter is in want of more specificity and/or particularity, I will provide a petition for "declaratory ruling," relying on ARSD 74:02:01:46 for guidance. Such petition is attached.

Maybe, just maybe, a petition for a "declaratory ruling," on what seems to be a rather simple, straightforward matter will be a catalyst to cause breakup of whatever logjam might exist in responding to my March 31<sup>st</sup>. The *petition*: Seasoned outhouses (pit privies) or not is the question.

Once again, Mr. Secretary, my efforts in this matter are for both me and the many constituents of my county commission district. Please be reminded of the South Dakota Supreme Court's words from *Rantapaa v. Black Hills Chair Lift Co., v. Curtis Allen*, 2001 S.D. 111, ¶ 23. "And, third, state law [rule] may occupy a particular field to the exclusion of all local regulation."

Sincerely,

  
George W. Ferebee

cc: South Dakota Attorney General Jackley

Atch: Petition for Declaratory Ruling

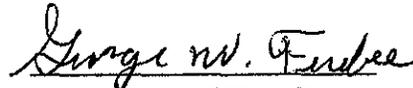
**PETITION**  
**FOR**  
**DECLARATORY RULING**

(1) The authority by which the petition is presented: SDCL 1-26-15 & ARSD 74:02:01:46

(2) The name of person submitting the petition: George W. Ferebee

(3) The requested action and reasons for the action: Declare ARSD 74:53:01:18 the

exclusive province of the State of South Dakota. Put another way, declare that local governments do not have authority to prohibit the operation of pit privies (outhouses) constructed prior to February 28, 1975. Reason for *Petition*: To eliminate the existing controversy.

  
GEORGE W. FEREBEE

*Administrative Rule of South Dakota*

**74:53:01:18. Cesspools and pit privies prohibited.** The construction of a cesspool or a pit privy is prohibited. The operation of a cesspool or a pit privy constructed after February 28, 1975, is prohibited.

**NOTICE OF HEARING ON  
PETITION FOR A  
DECLARATORY  
RULING ON THE AUTHORITY  
REGARDING**

**ADMINISTRATIVE RULE OF  
SOUTH DAKOTA 74:53:01:18**

Notice is given that a petition for declaratory ruling has been filed with the Water Management Board pursuant to South Dakota Codified Law (SDCL) 1-26-15 and Administrative Rule of South Dakota (ARSD) 74:02:01:46 by George W. Ferebee, 11495 Gillette Prairie Road, Hill City, SD 57745. Mr. Ferebee requests the Board declare Administrative Rule of South Dakota 74:53:01:18 is the exclusive province of the State of South Dakota and declare that local governments do not have authority to prohibit the operation of pit privies (outhouses) constructed prior to February 28, 1975. The reason cited in the petition for submitting the declaratory ruling request is to eliminate the existing controversy.

ARSD 74:53:01:18 reads "The construction of a cesspool or a pit privy is prohibited. The operation of a cesspool or a pit privy constructed after February 28, 1975, is prohibited."

The applicable statutes and administrative rules are SDCL 34A-2-93, 34A-2-20 and 34A-2-21 and ARSD 74:53:01:18.

The petition for a declaratory ruling to determine authority under ARSD 74:53:01:18, will be considered by the Water Management Board at 10:30 AM on Wednesday, July 6, 2016 at the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre, SD. The agenda time is an estimate and may be delayed due to prior agenda items. The board may issue one of the following decisions regarding the petition for a declaratory ruling after all the evidence is taken at the hearing: 1) that ARSD 74:53:01:18 is the exclusive province of the state of South Dakota and local governments do not have authority to prohibit the operation of pit privies constructed prior to February 28, 1975; 2) take other action as the Board deems warranted after hearing the evidence presented; 3) defer action; or 4) take no action.

Any interested person who intends to participate in the hearing by presenting evidence or cross-examining witnesses according to SDCL 1-26, shall file by June 27, 2016, a written petition to oppose or support the declaratory ruling request to declare that local governments do not have authority to prohibit the operation of a pit privy constructed prior to February 28, 1975. The petition shall be filed with the Chief Engineer and Mr. Ferebee. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre, SD 57501 (605) 773-3352," and Mr. Ferebee's address is given above. The petition may be informal but must include a statement describing the petitioner's interest in the petition for a declaratory ruling, the petitioner's reasons for opposing or supporting the petition for declaratory ruling, and the signature and mailing address of the petitioner or the petitioner's legal counsel. If legal counsel is obtained, Mr. Ferebee is a party to the hearing and need not file a petition to intervene. The July 6, 2016, hearing date will be automatically delayed for at least 20 days upon written request of Mr. Ferebee or any person who has filed a timely petition to oppose or support the request for declaratory ruling. The request for an automatic delay must be filed by June 27, 2016.

This hearing is an adversary proceeding. Any person filing a petition, including Mr. Ferebee has the right to be represented by a lawyer. These and other due process rights will be forfeited if

# Affidavit of Publication

STATE OF SOUTH DAKOTA

County of Pennington SS:

RECEIVED

JUL - 5 2016

WATER RIGHTS PROGRAM

Carina Tyler being first duly sworn, upon his/her oath says: That he/she is now and was at all time hereinafter mentioned, an employee of the RAPID CITY JOURNAL, a corporation of Rapid City, South Dakota, the owner and publisher of the RAPID CITY JOURNAL, a legal and daily newspaper printed and published in Rapid City, in said County of Pennington, and has full and personal knowledge of all the facts herein stated as follows: that said newspaper is and at all of the times herein mentioned has been a legal and daily newspaper with a bonafide paid circulation of at least Two Hundred copies daily, and has been printed and published in the English language, at and within an office maintained by the owner and publisher thereof, at Rapid City, in said Pennington County, and has been admitted to the United States mail under the second class mailing privilege for at least one year prior to the publication herein mentioned; that the advertisement, a printed copy of which, taken from said Rapid City Journal, the paper, in which the same was published, is attached to this sheet and made a part of this affidavit, was published in said paper once each

day for 1 successive day, the first publication there of being on the 16 day of June 2016, that the fees charged for the publication there of are 115 dollars and 38 cents.

*Carina Tyler*

Subscribed and sworn to before me this 23 day of June, 2016.

*Dustin Rice*

Notary public

7/1/20

DUSTIN RICE

My commission expires

SEAL NOTARY PUBLIC SEAL  
SOUTH DAKOTA

Court as provided by law. Contact Eric Gronlund by June 27, 2016, at the above Water Rights Program address to request copies of information pertaining to this petition for declaratory ruling. The declaratory ruling, public notice and any subsequent filings may also be found on DENR's website at <http://denr.sd.gov/des/wr/cbnotice.aspx>. Please notify the Department of Environment and Natural Resources at least 48 hours before the hearing if you have a disability for which special arrangements must be made at the hearing.

According to SDCL 1-26-18.3, in any contested case, if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request no later than ten days after service of a notice of hearing issued pursuant to § 1-24-17. If you choose to use the Office of Hearing Examiners rather than the hearing procedure before the Water Management Board set forth above, you need to notify the Chief Engineer (Water Rights Program, 523 E Capitol Avenue, Pierre SD) by June 27, 2016.

This petition for a declaratory ruling is made pursuant to Board General Rules Sections 74:02:01:46 through 74:02:01:49. The Board has legal authority and jurisdiction to consider this matter pursuant to SDCL 46-2-5, 46-2-9 and 34A-2-93. Steven M. Pirner, Secretary, Department of Environment and Natural Resources.

(Published once at the total approximate cost of \$115.38)

**Publisher's and Attorney's Affidavit**

Filed in the office of \_\_\_\_\_  
\_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_  
the \_\_\_\_\_  
on \_\_\_\_\_  
Attorney for \_\_\_\_\_

IN THE \_\_\_\_\_ COURT  
COUNTY OF PENNINGTON

RECORDED  
INDEXED  
JUN 28 2016  
COURT CLERK

RECEIVED

JUN 27 2016

Form 8

WATER RIGHTS PROGRAM

PROOF OF PUBLICATION

STATE OF SOUTH DAKOTA )

County of Brown ) SS

I, Mary Bostin

certify that the attached printed Notice was taken

from the Aberdeen News

printed and published in Aberdeen

County of Brown and

state of South Dakota. The notice was published

in the newspaper on the following date:

June 16 2016

Cost of Printing \$ 89.98

Mary Bostin  
(Signature)

Adv. Billing Specialist  
(Title)

June 16, 2016  
(Date Signed)

(No. 2133530)  
June 16, 2016 - 1P

**NOTICE OF HEARING ON PETITION FOR A DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA 74-53-01-18**

Notice is given that a petition for declaratory ruling has been filed with the Water Management Board pursuant to South Dakota Codified Law (SDCL) 1-26-15 and Administrative Rule of South Dakota (ARSD) 74-02-01-46, by George W. Ferabee, 11495 Gillette Frame Road, Hill City SD 57745. Mr. Ferabee requests the Board declare Administrative Rule of South Dakota 74-53-01-18 is the exclusive province of the State of South Dakota and declare that local governments do not have authority to prohibit the operation of pit privies (outhouses) constructed prior to February 28, 1975. The reason cited in the petition for submitting the declaratory ruling request is to eliminate the existing controversy.

ARSD 74-53-01-18 reads "The construction of a cesspool or a pit privy is prohibited. The operation of a cesspool or a pit privy constructed after February 28, 1975, is prohibited."

The applicable statutes and administrative rules are SDCL 34A-2-93, 34A-2-20 and 34A-2-21 and ARSD 74-53-01-18.

The petition for a declaratory ruling to determine authority under ARSD 74-53-01-18 will be considered by the Water Management Board at 10:30 AM on Wednesday, July 6, 2016 at the Floyd Mathew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre SD. The agenda time is an estimate and may be delayed due to prior agenda items. The board may issue one of the following decisions regarding the petition for a declaratory ruling after all the evidence is taken at the hearing: 1) that ARSD 74-53-01-18 is the exclusive province of the state of South Dakota and local governments do not have authority to prohibit the operation of pit privies constructed prior to February 28, 1975; 2) take other action as the Board deems warranted after hearing the evidence presented; 3) defer action; or 4) take no action.

Any interested person who intends to participate in the hearing by presenting evidence or cross-examining witnesses according to SDCL 1-26 shall file by June 27, 2016 a written petition to oppose or support the declaratory ruling request to declare that local governments do not have authority to prohibit the operation of a pit privy constructed prior to February 28, 1975. The petition shall be filed with the Chief Engineer and Mr. Ferabee. The Chief Engineer's address is Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501-6005, 773-3352. And Mr. Ferabee's address is given above. The petition may be informal but must include a statement describing the petitioner's interest in the petition for a declaratory ruling, the petitioner's reasons for opposing or supporting the petition for declaratory ruling, and the signature and mailing address of the petitioner for the hearing and need not file a petition to intervene. The July 6, 2016 hearing date will be automatically delayed for at least 20 days upon written request of Mr. Ferabee or any person who has filed a timely petition to oppose or support the request for declaratory ruling. The request for an automatic delay must be filed by June 27, 2016.

This hearing is an adversary proceeding. Any person filing a petition including Mr. Ferabee has the right to be represented by a lawyer. These and other due process rights will be forfeited if not exercised. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law. Contact Eric Gronlund by June 27, 2016, at the above Water Rights Program address to request copies of information pertaining to this petition for declaratory ruling. The declaratory ruling, public notice and any subsequent filings may also be found on

D E N R was by e-mail at <http://dehr.sd.gov/des/wr/pubnotice.asp>. Please notify the Department of Environment and Natural Resources at least 48 hours before the hearing if you have a disability for which special arrangements must be made at the hearing.

According to SDCL 1-26-15 in any contested case, if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request no later than ten days after service of a notice of hearing issued pursuant to 1-26-17. If you choose to use the Office of Hearing Examiners rather than the hearing procedure before the Water Management Board set forth above, you need to notify the Chief Engineer (Water Rights Program, 523 E Capitol Avenue, Pierre SD) by June 27, 2016.

This petition for a declaratory ruling is made pursuant to Board General Rules, Sections 74-02-01-46 through 74-02-01-49. The Board has legal authority and jurisdiction to consider this matter pursuant to SDCL 46-2-5, 46-2-9 and 34A-2-93. Steven M. Birner, Secretary, Department of Environment and Natural Resources. Published once at an approximate total cost of \$89.98.



CUSTOMER NUMBER:	078400	<b>Argus Leader</b>	
AD ORDER NUMBER:	1345963		
	6/16, 2016	P.O. Box 677349, Dallas, TX 75267-7349	
			\$124.79 Pd

**RECEIVED**  
**JUN 20 2016**  
**WATER RIGHTS PROGRAM**

George Ferebee  
11495 Gillette Prairie Rd  
Hill City, SD 57745

DETACH THIS STUB AND RETURN WITH PAYMENT

PAYMENT DUE UPON RECEIPT

**AFFIDAVIT OF PUBLICATION**

Customer Number: 078400  
Invoice Number: 1345963

## Argus Leader AFFIDAVIT OF PUBLICATION

**STATE OF SOUTH DAKOTA**  
**COUNTY OF MINNEHAHA } ss**

Linda Schulte being duly sworn, says: That The Argus Leader is, and during all the times hereinafter mentioned was, a daily legal newspaper as defined by SDCL 17-2-21, as amended published at Sioux Falls, Minnehaha County, South Dakota; that affiant is and during all of said times, was an employee of the publisher of such newspaper and has personal knowledge of the facts stated in this affidavit; that the notice, order or advertisement, a printed copy of which is hereto attached, was published in said newspaper upon

Thursday	the	16	day of	June	2016
_____	the	_____	day of	_____	2016
_____	the	_____	day of	_____	2016
_____	the	_____	day of	_____	2016
_____	the	_____	day of	_____	2016
_____	the	_____	day of	_____	2016
_____	the	_____	day of	_____	2016
_____	the	_____	day of	_____	2016

and that \$124.79 Pd was charged for publishing the same including a \$10.00 affidavit fee.

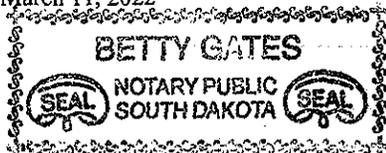
*Linda Schulte*

Subscribed and sworn to before me 6/16/2016

*Betty Gates*

Notary Public, South Dakota

My Commission expires March 11, 2022



**NOTICE OF HEARING ON PETITION FOR A DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53-01:18**

Notice is given that a petition for declaratory ruling has been filed with the Water Management Board pursuant to South Dakota Codified Law (SDCL) 1-26-15 and Administrative Rule of South Dakota (ARSD) 74:53-01:18 by George W. Ferebee, 11495 Gillette Prairie Road, Hill City, SD 57745. Mr. Ferebee requests the Board declare Administrative Rule of South Dakota 74:53-01:18 is the exclusive province of the State of South Dakota and declare that local governments do not have authority to prohibit the operation of privies (outhouses) constructed prior to February 28, 1975. The reason cited in the petition for submitting the declaratory ruling request is to eliminate the existing controversy.

ARSD 74:53-01:18 reads: "The construction of a cesspool or a pit privy is prohibited. The operation of a cesspool or a pit privy constructed after February 28, 1975 is prohibited."

The applicable statutes and administrative rules are SDCL 34A-2-23, 34A-2-20 and 34A-2-1 and ARSD 74:53-01:18.

The petition for a declaratory ruling to determine authority under ARSD 74:53-01:18 will be considered by the Water Management Board at 10 AM on Wednesday, July 6, 2016 at the Floyd Marnow Training Center, Joe Foss Building, 323 E. Capitol Avenue, Pierre, SD. The agenda time is an estimate and may be delayed due to prior agenda items. The Board may issue one of the following decisions regarding the petition for a declaratory ruling after all the evidence is taken at the hearing: 1) that ARSD 74:53-01:18 is the exclusive province of the State of South Dakota and local governments do not have authority to prohibit the operation of privies constructed prior to February 28, 1975; 2) take other action as the Board deems warranted after hearing the evidence presented; 3) defer action; or 4) take no action.

Any interested person who intends to participate in the hearing by presenting evidence or cross-examine witnesses according to SDCL 1-26 shall file by June 27, 2016, a written petition to oppose or support the declaratory ruling, public notice and any subsequent filings may also be found on DENB's website at <http://web.dnr.sd.gov/denb/> or by notice of special meeting of the Department of Environment and Natural Resources at least 28 hours before the hearing if you have a disability for which special arrangements must be made of the hearing. According to SDCL 1-26-18.3, in any contested case, if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request no later than ten days after service of a notice of hearing issued pursuant to 5-1-26-17. If you choose to use the Office of Hearing Examiners rather than the hearing procedure, before the Water Management Board set forth above, you need to notify the Chief Engineer (Water Rights Program) 323 E. Capitol Avenue, Pierre, SD) by June 27, 2016.

This petition for a declaratory ruling is made pursuant to Board General Rules, Sections 74:02-01:46 through 74:02-01:49. The Board has legal authority and jurisdiction to consider this matter pursuant to SDCL 46-2-5, 46-2-9 and 46-2-23. Steven M. Pirnie, Secretary, Department of Environment and Natural Resources, 1345963 June 16, 2016.

This petition for a declaratory ruling is made pursuant to Board General Rules, Sections 74:02-01:46 through 74:02-01:49. The Board has legal authority and jurisdiction to consider this matter pursuant to SDCL 46-2-5, 46-2-9 and 46-2-23. Steven M. Pirnie, Secretary, Department of Environment and Natural Resources, 1345963 June 16, 2016.

## Petition in Opposition to George Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:18

1. Petitioner: Pennington County Board of Commissioners
2. Petitioner's interest in Ferebee's petition for declaratory ruling: Petitioner is the governing body of a county that would be affected by the declaratory ruling that Ferebee is requesting.
3. Petitioner's reasons for opposing Ferebee's petition for declaratory ruling: Petitioner opposes Ferebee's petition for multiple reasons.

a. First, ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order *pertaining to a submitted factual situation within the board's jurisdiction.*" Ferebee has not submitted a factual situation. Rather, he is requesting a blanket ruling declaring that "Administrative Rule of South Dakota 74:53:01:18 is the exclusive province of the State of South Dakota" and that "local governments do not have authority to prohibit the operation of pit privies (outhouses) constructed prior to February 28, 1975." Therefore, without a submitted factual situation, no declaratory ruling can be made.

b. Second, in Title 7 that contains many of the powers of counties, the South Dakota Legislature specifically gave counties the statutory authority to regulate and prevent waste in water; regulate and compel the cleansing, abatement, and removal of any sewer, cesspool, or unwholesome or nauseous thing or place; and declare and abate public nuisances. These powers are not limited to systems, structures, or pollution of a certain date. ARSD 74:53:01:18 in no way prohibits localities from passing ordinances regulating cesspools and pit privies above and beyond their regulation by the State in the administrative rule. Subsections 14 and 15 of SDCL 7-8-20 provide county commissioners with the power to regulate waste in water and the cleansing or abatement of such.

SDCL 7-8-20 provides in relevant part: In addition to others specified by law, the board of county commissioners shall have power: . . .

(14) To enact ordinances to regulate and prevent the placing of ashes, dirt, garbage or any offensive matter in any highway or public ground or in any body or stream of water within the county, but outside of an incorporated municipality or outside of the one mile limits of any incorporated municipality;

(15) To enact ordinances to regulate and compel the cleansing, abatement or removal of any sewer, cesspool or any unwholesome or nauseous thing or place[.]

Furthermore, SDCL 7-8-33 allows county commissioners to declare and abate public nuisances:

The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality. For purposes of this section only, the feeding,

breeding, or raising of livestock or the operations of a livestock sales barn, is not presumed, by that fact alone, to be a nuisance.

Simply put, a nuisance is an act or omission which "endangers the comfort, repose, health, or safety of others." SDCL 21-10-1. It is clear that an on-site wastewater system of any age may be in danger of contaminating water and endangering the health of others. Water has no bounds, so contamination of water is felt widespread throughout a community and by many, many people. Furthermore, SDCL 34A-2-1 and 34A-2-21 specify that the pollution of the waters of the state constitutes a public nuisance and may be abated as such. A county also has an extremely broad power to regulate the use of land and structures in order to promote health, safety, and welfare – which in turn means on-site wastewater systems – pursuant to SDCL 11-2-13.

- c. Third, on April 15, 2008, the Board of Commissioners approved a Resolution for the Protection of Water Resources in Pennington County. The Board recognized that implementation of water protection programs to preserve and protect drinking water resources in Pennington County would avoid unnecessary costs in the future and protect the health, safety, and general welfare of the public. Due to the unique geology, the interconnection of ground and surface water, and increasing population in un-sewered areas of the Black Hills and surrounding areas, Pennington County has enacted sections of the Pennington County Zoning Ordinance to address siting and function of on-site wastewater treatment systems to protect drinking water resources and to promote clean water resources and protect public health and the environment.
  - d. Finally, this appears to be a collateral attack by Ferebee against local regulation of matters closely related to on-site wastewater systems. Ferebee is currently charged with a violation of Pennington County Zoning Ordinance sections pertaining to on-site wastewater treatment systems.
4. Mailing address: Pennington County Board of Commissioners, 130 Kansas City Street, Rapid City, SD 57701
  5. Petitioner's legal counsel: Jay Alderman, Chief Civil Deputy State's Attorney; Kinsley Groote, Civil Deputy State's Attorney; Michaele Hofmann, Civil Deputy State's Attorney
  6. The Pennington County Board of Commissioners requests a continuance of the hearing (from the July 6, 2016 meeting presumably to the October 5, 2016 meeting).
  7. ---Copy of Motion made by Pennington County Board of Commissioners on 6/21/16---  
**PETITIONS FOR DECLARATORY RULINGS – SD DENR WATER MANAGEMENT BOARD:** MOVED by Buskerud and seconded by Trautman to direct the States Attorney's Office to file a petition in opposition to the two Declaratory Ruling Petitions regarding Administrative Rule. It was further moved to authorize the Chairman's signature and request an automatic continuance. The motion carried 4-0 on a roll call vote: Buskerud – yes, Ferebee – abstained, Hadcock – yes, Trautman – yes, Petersen – yes.

Signature: Lyndell Petersen  
Lyndell Petersen, Pennington County Board of Commissioners Chairman

Date: 6/21/2016

RICHARD A. CUTLER  
KENT R. CUTLER  
STEVEN J. SARBACKER  
MICHAEL D. BORNITZ \*  
TRENT A. SWANSON \*  
RYAN J. TAYLOR °  
KIMBERLY R. WASSINK  
MEREDITH A. MOORE  
NATHAN S. SCHOEN \*\*  
NICHOLE J. MOHNING \*  
DANIEL J. DOYLE  
ALEX S. HALBACH \*  
ROBERT D. TRZYNKA  
ERIC E. ERICKSON  
JOSEPH P. HOGUE °  
JONATHAN A. HEBER  
BRENDAN F. PONS

**CUTLER LAW FIRM, LLP**  
**ATTORNEYS AT LAW**

100 NORTH PHILLIPS AVENUE, 9TH FLOOR  
POST OFFICE BOX 1400  
SIOUX FALLS, SOUTH DAKOTA 57101-1400  
TELEPHONE (605) 335-4950  
www.cutlerlawfirm.com

June 23, 2016

**RECEIVED**  
**JUN 27 2016**

**WATER RIGHTS  
PROGRAM**

JEAN BROCKMUELLER, CPA (Inactive)  
BUSINESS MANAGER

\*Also licensed to practice  
in Minnesota  
\*Also licensed to practice  
in Iowa  
\*Also licensed to practice  
in Nebraska  
\*Also licensed to practice  
in Kansas  
°Also licensed as a Certified  
Public Accountant (Inactive)

Water Rights Program  
Attn: Chief Engineer  
Foss Building  
523 E. Capitol  
Pierre, SD 57501

Mr. George W. Ferebee  
11495 Gillette Prairie Road  
Hill City, SD 57745

Re: *Petitions in Opposition of (i) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04; and, (ii) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18*

Dear Chief Engineer Goodman and Mr. Ferebee:

Please be advised that our firm represents the South Dakota Association of County Commissioners ("SDACC") and the South Dakota Municipal League ("SDML"). Enclosed please find petitions from the SDACC and SDML in opposition to: i) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04; and, (ii) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 (collectively the "Ferebee Petitions"). Please accept this letter, and the enclosed petitions, as notice by the SDACC and SDML of their opposition to the Ferebee Petitions and as a request that such hearing currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Should you have any questions regarding this petition or the request for delay, please do not hesitate to contact me at (605) 271-4938; at the address above, or via email at [erice@cutlerlawfirm.com](mailto:erice@cutlerlawfirm.com).

Sincerely,

CUTLER LAW FIRM, LLP



Eric E. Erickson  
For the Firm

EEE/nmw  
Enclosures  
cc: SDACC, SDML

**PETITION IN OPPOSITION OF GEORGE FEREBEE'S PETITION FOR A  
DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE  
RULE OF SOUTH DAKOTA 74:53:01:18**

1. **PETITIONER:** South Dakota Association of County Commissioners ("SDACC").

2. **PETITIONERS INTEREST IN THE PETITION FOR A DECLARATORY RULING:**

The SDACC is an association authorized by state law that represents all of South Dakota's sixty-six (66) counties. The SDACC has a stated purpose of "securing concerted action among the counties in behalf of such matters, measures and county affairs as the associations deem to be beneficial to and in the common interest of the counties." SDCL § 7-7-28. Many of the SDACC's member-counties, including without limitation Pennington County, have enacted ordinances that regulate the operation of cesspools and pit privies, including cesspools and pit privies constructed prior to February 28, 1975. This matter is of the utmost interest to the SDACC as the authority of its member-counties to regulate the operation of cesspools and pit privies, including systems existing prior to February 28, 1975, is necessary for the health, safety, and welfare of the general public.

3. **PETITIONER'S REASON FOR OPPOSING GEORGE FEREBEE'S PETITION FOR A DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53:01:18:**

The SDACC opposes George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 for multiple reasons, including, but not limited to:

State law provides counties with broad authority to regulate activities such as cesspools and pit privies. In addition to other authority provided in state law, SDCL §§ 7-8-20 and 7-8-33 provide counties with the authority to regulate activities such as the operation of cesspools and pit privies and do not limit such authority to only those cesspools and pit privies constructed after February 28, 1975. In particular, SDCL § 7-8-33 provides, in part, "The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality...." Additionally, SDCL § 7-8-20 provides, in relevant part, the county commissioners with the power to:

(14) To enact ordinances to regulate and prevent the placing of ashes, dirt, garbage or any offensive matter in any highway or public ground or in any body or stream of water within the county, but outside of an incorporated municipality or outside of the one mile limits of any incorporated municipality;

(15) To enact ordinances to regulate and compel the cleansing, abatement or removal of any sewer, cesspool or any unwholesome or nauseous thing or place;

The authority of counties to regulate such activities is not precluded by state law or ARSD 74:53:01:18. For the foregoing reasons, and additional authority as may later be supplemented, the SDACC gives this written petition in opposition of George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18.

**4. MAILING ADDRESS OF LEGAL COUNSEL FOR THE SDACC:**

Cutler Law Firm, LLP  
Attn: Eric E. Erickson  
P.O. Box 1400  
Sioux Falls, SD 57101-1400  
Phone: (605) 271-4938  
Email: erice@cutlerlawfirm.com

**5. REQUEST FOR A DELAY OF HEARING:**

Petitioner respectfully requests that the hearing to consider George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18, currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Dated this 23<sup>rd</sup> of June, 2016.

CUTLER LAW FIRM, LLP  
Attorneys at Law



Eric E. Erickson  
100 N. Phillips Ave., 9th Floor  
P.O. Box 1400  
Sioux Falls, South Dakota 57101-1400  
Telephone (605) 335-4950  
Facsimile (605) 335-4961  
*Attorney for Petitioner*

**PETITION IN OPPOSITION OF GEORGE FEREBEE'S PETITION FOR A  
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RULE OF SOUTH DAKOTA 74:53:01:18**

1. **PETITIONER:** South Dakota Municipal League ("SDML").
2. **PETITIONERS INTEREST IN THE PETITION FOR A DECLARATORY RULING:**

The SDML was organized in 1934 as a non-partisan, non-profit association of incorporated municipalities in South Dakota. Many of the SDML's member-municipalities, including without limitation Rapid City, have enacted ordinances that regulate the operation of cesspools and pit privies, including cesspools and pit privies constructed prior to February 28, 1975. This matter is of the utmost interest to the SDML as the authority of its member-municipalities to regulate the operation of cesspools and pit privies, including systems existing prior to February 28, 1975, is necessary for the health, safety, and welfare of the general public.

3. **PETITIONER'S REASON FOR OPPOSING GEORGE FEREBEE'S PETITION FOR A DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53:01:18:**

The SDML opposes George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 for multiple reasons, including, but not limited to:

State law provides municipalities with broad authority to regulate activities such as cesspools and pit privies. In addition to other authority provided in state law, SDCL §§ 9-32-6 and 9-32-8 provide municipalities with the authority to regulate activities such as the operation of cesspools and pit privies and do not limit such authority to only those cesspools and pit privies constructed after February 28, 1975. In particular, SDCL § 9-32-6 provides, "Every municipality shall have power to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof." Additionally, SDCL § 9-32-8 provides, "Every municipality shall have power to prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of the limits of the municipality."

The foregoing authority of municipalities to regulate such activities is not precluded by ARSD 74:53:01:18. For the aforementioned reasons, and additional authority as may later be supplemented, the SDML gives this written petition in opposition of George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18.

4. **MAILING ADDRESS OF LEGAL COUNSEL FOR THE SDML:**

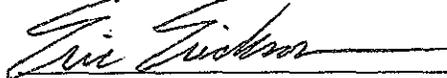
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CUTLER LAW FIRM, LLP  
Attorneys at Law



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Eric E. Erickson  
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P.O. Box 1400  
Sioux Falls, South Dakota 57101-1400  
Telephone (605) 335-4950  
Facsimile (605) 335-4961  
*Attorney for Petitioner*

**PETITION IN OPPOSITION OF GEORGE FEREBEE'S PETITION FOR A  
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4. **MAILING ADDRESS OF LEGAL COUNSEL FOR THE SDML:**

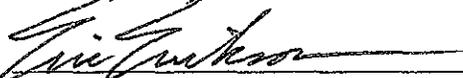
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CUTLER LAW FIRM, LLP  
Attorneys at Law



Eric E. Erickson  
100 N. Phillips Ave., 9th Floor  
P.O. Box 1400  
Sioux Falls, South Dakota 57101-1400  
Telephone (605) 335-4950  
Facsimile (605) 335-4961  
*Attorney for Petitioner*

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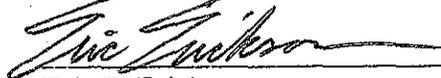
Cutler Law Firm, LLP  
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Dated this 23<sup>rd</sup> of June, 2016.

CUTLER LAW FIRM, LLP  
Attorneys at Law



Eric E. Erickson  
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P.O. Box 1400  
Sioux Falls, South Dakota 57101-1400  
Telephone (605) 335-4950  
Facsimile (605) 335-4961  
*Attorney for Petitioner*



# CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

RECEIVED  
JUN 27 2016  
WATER RIGHTS  
PROGRAM

## Office of the City Attorney

300 Sixth Street

Rapid City, South Dakota 57701-2724

Telephone: 605-394-4140

FAX: 605-394-6633

E-mail: [attorney@rcgov.org](mailto:attorney@rcgov.org)

[www.rcgov.org/attorney/attorneyhomepage.htm](http://www.rcgov.org/attorney/attorneyhomepage.htm)

June 24, 2016

Ms. Jeanne Goodman, Chief Engineer  
Water Rights Program  
523 E. Capitol  
Pierre, SD 57501

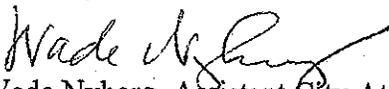
RE: City of Rapid City Petitions in Opposition  
George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:04  
George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:18

Dear Ms. Goodman

Enclosed for filing in the above matters is the City of Rapid City's Petition in Opposition to George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:04 and the City's Petition in Opposition to George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:18. As is noted in the Petitions, the City is requesting the Water Management Board delay the matter at least 20 days in order for the City to more fully respond.

Thank you for your assistance.

Sincerely,

  
Wade Nyberg, Assistant City Attorney

cc: Mr. George Ferebee  
Mr. Jay Alderman

SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

---

**CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION  
FOR DECLARATORY RULING ON ARSD 74:53:01:18**

---

Comes now, the City of Rapid City, by and through its attorneys of record, and submits the following as its Petition in Opposition to George Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:18 as follows:

1. Petitioner City of Rapid City is a South Dakota municipality and is represented by counsel identified below.
2. Petitioner is interested in Mr. Ferebee's petition for declaratory ruling as Petitioner is a municipality sought to be bound by the declaratory ruling requested.
  - a. The Water Management Board has no legal authority to issue the declaratory ruling requested by petitioner. ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order pertaining to a submitted factual situation within the board's jurisdiction." First, Mr. Ferebee has not presented a factual situation. His request is about the general applicability of this rule, as applied to every locality in the state. Second, the Board has no jurisdiction to declare localities "bound" by a rule that applies to specific factual situations. It is unclear what a declaration that localities are "bound" by a rule that describes which types of wastewater systems are subject to agency administrative rules would even mean. It seems that Mr. Ferebee is seeking a declaratory ruling regarding local governments' ability to legislate in this area; this subject matter is clearly beyond the scope of the Board's

authority. Mr. Ferebee is attempting to suggest that ARSD 74:53:01:18 preempts local legislative enactments regarding cesspools or pit privies. Preemption is a legal doctrine, suitable for interpretation by court of law through a declaratory action, a remedy available to Mr. Ferebee under SDCL 1-26-14. The request presented by Mr. Ferebee is both lacking a required factual basis and beyond the jurisdiction of the Board, and thus should be denied.

- b. The South Dakota State Legislature has granted municipalities the authority “to protect public groundwater supplies from pollution” (SDCL 9-12-17); “to do what may be necessary or expedient for the promotion of health or the suppression of disease” (SDCL 9-32-1); “to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof” (SDCL 9-32-6); “to prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of the limits of the municipality” (SDCL 9-32-8); and “to declare what shall constitute a nuisance and prevent, abate, and remove the same” (SDCL 9-29-13). Nowhere in these statutes does it state that such authority is subject to an agency’s administrative rules. These direct grants of authority contradict Mr. Ferebee’s assertion that municipalities are prohibited from legislating in this area.

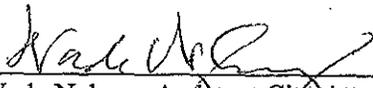
It is not hard to imagine how a cesspool or pit privy, of any age, may become a threat to either groundwater or the water supply of a municipality, a contributor to the spread of disease, or simply a nuisance. To date, no South Dakota court has declared a municipality’s regulation of such invalid due to state preemption.

Furthermore, if a municipality should overstep its granted authority, the separation of powers doctrine dictates that a court of law must be the authority to declare such regulation invalid.

3. Petitioner's mailing address is City of Rapid City, 300 Sixth Street, Rapid City, SD 57701
4. Petitioner's legal counsel is Wade Nyberg, Assistant City Attorney.
5. The City of Rapid City respectfully requests that Mr. Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:18 be denied; in the alternative, the City requests that the hearing on the Petition be continued for at least 20 days to give the City time to fully prepare its response.

Dated at Rapid City, South Dakota, this 24th day of June, 2016.

**CITY OF RAPID CITY**

  
\_\_\_\_\_  
Wade Nyberg, Assistant City Attorney

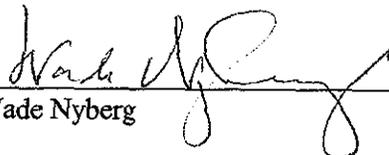
**CERTIFICATE OF SERVICE**

I hereby certify that I sent a true and correct copy of the above CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION FOR DECLARATORY RULING ON ARSD 74:53:10:18 by US Mail, postage prepaid, to the following :

Chief Engineer  
Water Rights Program  
Foss Building  
523 E Capitol  
Pierre, SD 57501

Mr. George Ferebee  
11495 Gillette Prairie Rd  
Hill City, SD 57545

Mr. Jay Alderman  
Pennington County States Attorney  
130 Kansas City Street, Ste. 300  
Rapid City, SD 57701-2818

  
\_\_\_\_\_  
Wade Nyberg

SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

---

**CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION  
FOR DECLARATORY RULING ON ARSD 74:53:01:04**

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1. Petitioner City of Rapid City is a South Dakota municipality and is represented by counsel identified below.
2. Petitioner is interested in Mr. Ferebee's petition for declaratory ruling as Petitioner is a municipality sought to be bound by the declaratory ruling requested.
3. Petitioner opposes Mr. Ferebee's petition for declaratory ruling for the following reasons:
  - a. The Water Management Board has no legal authority to issue the declaratory ruling requested by petitioner. ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order pertaining to a submitted factual situation within the board's jurisdiction." First, Mr. Ferebee has not presented a factual situation. His request is about the general applicability of this rule, as applied to every locality in the state. Second, the Board has no jurisdiction to declare localities "bound" by a rule that applies to specific factual situations. It is unclear what a declaration that localities are "bound" by a rule that describes which types of wastewater systems are subject to agency administrative rules would even mean. It seems that Mr. Ferebee is seeking a declaratory ruling regarding local governments' ability to

legislate in this area; this subject matter is clearly beyond the scope of the Board's authority. Mr. Ferebee is attempting to suggest that ARSD 74:53:01:04 preempts local legislative enactments regarding certain on-site wastewater systems. Preemption is a legal doctrine, suitable for interpretation by court of law through a declaratory action, a remedy available to Mr. Ferebee under SDCL 1-26-14. The request presented by Mr. Ferebee is both lacking a required factual basis and beyond the jurisdiction of the Board, and thus should be denied.

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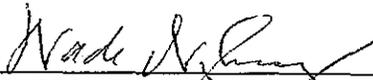
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Dated at Rapid City, South Dakota, this 24th day of June, 2016.

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Chief Engineer  
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Mr. Jay Alderman  
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\_\_\_\_\_  
Wade Nyberg



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

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

denr.sd.gov

June 29, 2016

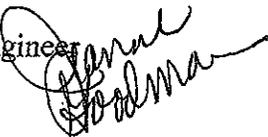
NOTICE

TO: George Ferebee  
11495 Gillette Prairie Rd  
Hill City SD 57745

Eric E Erickson  
Cutler Law Firm LLP  
PO Box 1400  
Sioux Falls SD 57101-1400

Lyndell Petersen, Chairman  
Pennington County Commission  
130 Kansas City Street  
Rapid City SD 57701

Wade Nyberg  
City of Rapid City  
300 Sixth Street  
Rapid City SD 57701-2724

FROM: Jeanne Goodman, Chief Engineer  
Water Rights Program 

SUBJECT: Automatic Delay of Hearing on Petition for Declaratory on the Authority Regarding  
Administrative Rule of South Dakota 74:53:01:18

Petitions were filed in response to the public notice scheduling a hearing before the Water Management Board on Mr. Ferebee's Petition for Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18. Mr. Ferebee requests the Board declare Administrative Rule of South Dakota 74:53:01:18 is the exclusive province of the State of South Dakota and declare that local governments do not have authority to prohibit the operation of pit privies (outhouses) constructed prior to February 28, 1975.

The notice published in the Aberdeen American News, Argus Leader and Rapid City Journal scheduled a July 6, 2016, hearing before the Water Management Board. The submitted petitions included a formal request for postponement of the July 6, 2016, hearing date. The petitions are enclosed. Therefore, the hearing on declaratory ruling request is automatically delayed pursuant to SDCL 46-2A-4 and ARSD 74:02:01:48 and will not be held on July 6, 2016.

The hearing to consider this declaratory ruling request will now be scheduled for the October 5 and 6, 2016, Water Management Board meeting tentatively to be held in Pierre. Future notice of the date, time and place of the hearing will be provided to all parties of record.

Please contact Eric Gronlund at (605) 773-3352, if you have any questions.

enclosure

c: Ann Mines-Bailey, Assistant Attorney General  
Ellie Bailey, Assistant Attorney General  
Kinsley P. Groote, Deputy State's Attorney, 130 Kansas City St., Suite 300  
Rapid City, SD 57701



**Petition in Opposition to George Ferebee's Petition for Declaratory  
Ruling on ARSD 74:53:01:18**

1. Petitioner: Pennington County Board of Commissioners
2. Petitioner's interest in Ferebee's petition for declaratory ruling: Petitioner is the governing body of a county that would be affected by the declaratory ruling that Ferebee is requesting.
3. Petitioner's reasons for opposing Ferebee's petition for declaratory ruling: Petitioner opposes Ferebee's petition for multiple reasons.

- a. First, ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order *pertaining to a submitted factual situation within the board's jurisdiction.*" Ferebee has not submitted a factual situation. Rather, he is requesting a blanket ruling declaring that "Administrative Rule of South Dakota 74:53:01:18 is the exclusive province of the State of South Dakota" and that "local governments do not have authority to prohibit the operation of pit privies (outhouses) constructed prior to February 28, 1975." Therefore, without a submitted factual situation, no declaratory ruling can be made.
- b. Second, in Title 7 that contains many of the powers of counties, the South Dakota Legislature specifically gave counties the statutory authority to regulate and prevent waste in water; regulate and compel the cleansing, abatement, and removal of any sewer, cesspool, or unwholesome or nauseous thing or place; and declare and abate public nuisances. These powers are not limited to systems, structures, or pollution of a certain date. ARSD 74:53:01:18 in no way prohibits localities from passing ordinances regulating cesspools and pit privies above and beyond their regulation by the State in the administrative rule. Subsections 14 and 15 of SDCL 7-8-20 provide county commissioners with the power to regulate waste in water and the cleansing or abatement of such.

SDCL 7-8-20 provides in relevant part: In addition to others specified by law, the board of county commissioners shall have power: . . .

(14) To enact ordinances to regulate and prevent the placing of ashes, dirt, garbage or any offensive matter in any highway or public ground or in any body or stream of water within the county, but outside of an incorporated municipality or outside of the one mile limits of any incorporated municipality;

(15) To enact ordinances to regulate and compel the cleansing, abatement or removal of any sewer, cesspool or any unwholesome or nauseous thing or place[.]

Furthermore, SDCL 7-8-33 allows county commissioners to declare and abate public nuisances:

The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality. For purposes of this section only, the feeding,

breeding, or raising of livestock or the operations of a livestock sales barn, is not presumed, by that fact alone, to be a nuisance.

Simply put, a nuisance is an act or omission which "endangers the comfort, repose, health, or safety of others." SDCL 21-10-1. It is clear that an on-site wastewater system of any age may be in danger of contaminating water and endangering the health of others. Water has no bounds, so contamination of water is felt widespread throughout a community and by many, many people. Furthermore, SDCL 34A-2-1 and 34A-2-21 specify that the pollution of the waters of the state constitutes a public nuisance and may be abated as such. A county also has an extremely broad power to regulate the use of land and structures in order to promote health, safety, and welfare – which in turn means on-site wastewater systems – pursuant to SDCL 11-2-13.

- c. Third, on April 15, 2008, the Board of Commissioners approved a Resolution for the Protection of Water Resources in Pennington County. The Board recognized that implementation of water protection programs to preserve and protect drinking water resources in Pennington County would avoid unnecessary costs in the future and protect the health, safety, and general welfare of the public. Due to the unique geology, the interconnection of ground and surface water, and increasing population in un-sewered areas of the Black Hills and surrounding areas, Pennington County has enacted sections of the Pennington County Zoning Ordinance to address siting and function of on-site wastewater treatment systems to protect drinking water resources and to promote clean water resources and protect public health and the environment.
  - d. Finally, this appears to be a collateral attack by Ferebee against local regulation of matters closely related to on-site wastewater systems. Ferebee is currently charged with a violation of Pennington County Zoning Ordinance sections pertaining to on-site wastewater treatment systems.
4. Mailing address: Pennington County Board of Commissioners, 130 Kansas City Street, Rapid City, SD 57701
  5. Petitioner's legal counsel: Jay Alderman, Chief Civil Deputy State's Attorney; Kinsley Groote, Civil Deputy State's Attorney; Michael Hofmann, Civil Deputy State's Attorney
  6. The Pennington County Board of Commissioners requests a continuance of the hearing (from the July 6, 2016 meeting presumably to the October 5, 2016 meeting).
  7. ---Copy of Motion made by Pennington County Board of Commissioners on 6/21/16---
- PETITIONS FOR DECLARATORY RULINGS – SD DENR WATER MANAGEMENT BOARD:** MOVED by Buskerud and seconded by Trautman to direct the States Attorney's Office to file a petition in opposition to the two Declaratory Ruling Petitions regarding Administrative Rule. It was further moved to authorize the Chairman's signature and request an automatic continuance. The motion carried 4-0 on a roll call vote: Buskerud – yes, Ferebee – abstained, Hadcock – yes, Trautman – yes, Petersen – yes.

Signature: \_\_\_\_\_

Lyndell Petersen, Pennington County Board of Commissioners Chairman

Date: \_\_\_\_\_

6/21/2016

RICHARD A. CUTLER  
KENT R. CUTLER  
STEVEN J. SARBACKER  
MICHAEL D. BORNITZ \*  
TRENT A. SWANSON \*  
RYAN J. TAYLOR °  
KIMBERLY R. WASSINK  
MEREDITH A. MOORE  
NATHAN S. SCHOEN \*\*  
NICHOLE J. MOHNING \*  
DANIEL J. DOYLE  
ALEX S. HALBACH \*  
ROBERT D. TRZYNKA  
ERIC E. ERICKSON  
JOSEPH P. HOGUE °  
JONATHAN A. HEBER  
BRENDAN F. PONS

**CUTLER LAW FIRM, LLP**  
**ATTORNEYS AT LAW**

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JEAN BROCKMUELLER, CPA (inactive)  
BUSINESS MANAGER

\*Also licensed to practice  
in Minnesota  
\*Also licensed to practice  
in Iowa  
\*Also licensed to practice  
in Nebraska  
\*Also licensed to practice  
in Kansas  
°Also licensed as a Certified  
Public Accountant (inactive)

RECEIVED

JUN 27 2016

June 23, 2016

WATER RIGHTS  
PROGRAM

Water Rights Program  
Attn: Chief Engineer  
Foss Building  
523 E. Capitol  
Pierre, SD 57501

Mr. George W. Ferebee  
11495 Gillette Prairie Road  
Hill City, SD 57745

Re: *Petitions in Opposition of (i) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04; and, (ii) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18*

Dear Chief Engineer Goodman and Mr. Ferebee:

Please be advised that our firm represents the South Dakota Association of County Commissioners ("SDACC") and the South Dakota Municipal League ("SDML"). Enclosed please find petitions from the SDACC and SDML in opposition to: i) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04; and, (ii) George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 (collectively the "Ferebee Petitions"). Please accept this letter, and the enclosed petitions, as notice by the SDACC and SDML of their opposition to the Ferebee Petitions and as a request that such hearing currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Should you have any questions regarding this petition or the request for delay, please do not hesitate to contact me at (605) 271-4938; at the address above, or via email at [erice@cutlerlawfirm.com](mailto:erice@cutlerlawfirm.com).

Sincerely,

CUTLER LAW FIRM, LLP



Eric E. Erickson  
For the Firm

EEE/nmw  
Enclosures  
cc: SDACC, SDML

**PETITION IN OPPOSITION OF GEORGE FEREBEE'S PETITION FOR A  
DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE  
RULE OF SOUTH DAKOTA 74:53:01:18**

1. **PETITIONER:** South Dakota Association of County Commissioners ("SDACC").
2. **PETITIONERS INTEREST IN THE PETITION FOR A DECLARATORY RULING:**

The SDACC is an association authorized by state law that represents all of South Dakota's sixty-six (66) counties. The SDACC has a stated purpose of "securing concerted action among the counties in behalf of such matters, measures and county affairs as the associations deem to be beneficial to and in the common interest of the counties." SDCL § 7-7-28. Many of the SDACC's member-counties, including without limitation Pennington County, have enacted ordinances that regulate the operation of cesspools and pit privies, including cesspools and pit privies constructed prior to February 28, 1975. This matter is of the utmost interest to the SDACC as the authority of its member-counties to regulate the operation of cesspools and pit privies, including systems existing prior to February 28, 1975, is necessary for the health, safety, and welfare of the general public.

3. **PETITIONER'S REASON FOR OPPOSING GEORGE FEREBEE'S PETITION FOR A DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53:01:18:**

The SDACC opposes George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 for multiple reasons, including, but not limited to:

State law provides counties with broad authority to regulate activities such as cesspools and pit privies. In addition to other authority provided in state law, SDCL §§ 7-8-20 and 7-8-33 provide counties with the authority to regulate activities such as the operation of cesspools and pit privies and do not limit such authority to only those cesspools and pit privies constructed after February 28, 1975. In particular, SDCL § 7-8-33 provides, in part, "The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality...." Additionally, SDCL § 7-8-20 provides, in relevant part, the county commissioners with the power to:

- (14) To enact ordinances to regulate and prevent the placing of ashes, dirt, garbage or any offensive matter in any highway or public ground or in any body or stream of water within the county, but outside of an incorporated municipality or outside of the one mile limits of any incorporated municipality;

(15) To enact ordinances to regulate and compel the cleansing, abatement or removal of any sewer, cesspool or any unwholesome or nauseous thing or place;

The authority of counties to regulate such activities is not precluded by state law or ARSD 74:53:01:18. For the foregoing reasons, and additional authority as may later be supplemented, the SDACC gives this written petition in opposition of George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18.

**4. MAILING ADDRESS OF LEGAL COUNSEL FOR THE SDACC:**

Cutler Law Firm, LLP  
Attn: Eric E. Erickson  
P.O. Box 1400  
Sioux Falls, SD 57101-1400  
Phone: (605) 271-4938  
Email: erice@cutlerlawfirm.com

**5. REQUEST FOR A DELAY OF HEARING:**

Petitioner respectfully requests that the hearing to consider George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18, currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Dated this 23<sup>rd</sup> of June, 2016.

CUTLER LAW FIRM, LLP  
Attorneys at Law



Eric E. Erickson  
100 N. Phillips Ave., 9th Floor  
P.O. Box 1400  
Sioux Falls, South Dakota 57101-1400  
Telephone (605) 335-4950  
Facsimile (605) 335-4961  
*Attorney for Petitioner*

**PETITION IN OPPOSITION OF GEORGE FEREBEE'S PETITION FOR A  
DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE  
RULE OF SOUTH DAKOTA 74:53:01:18**

1. **PETITIONER:** South Dakota Municipal League ("SDML").
2. **PETITIONERS INTEREST IN THE PETITION FOR A DECLARATORY RULING:**

The SDML was organized in 1934 as a non-partisan, non-profit association of incorporated municipalities in South Dakota. Many of the SDML's member-municipalities, including without limitation Rapid City, have enacted ordinances that regulate the operation of cesspools and pit privies, including cesspools and pit privies constructed prior to February 28, 1975. This matter is of the utmost interest to the SDML as the authority of its member-municipalities to regulate the operation of cesspools and pit privies, including systems existing prior to February 28, 1975, is necessary for the health, safety, and welfare of the general public.

3. **PETITIONER'S REASON FOR OPPOSING GEORGE FEREBEE'S PETITION FOR A DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53:01:18:**

The SDML opposes George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 for multiple reasons, including, but not limited to:

State law provides municipalities with broad authority to regulate activities such as cesspools and pit privies. In addition to other authority provided in state law, SDCL §§ 9-32-6 and 9-32-8 provide municipalities with the authority to regulate activities such as the operation of cesspools and pit privies and do not limit such authority to only those cesspools and pit privies constructed after February 28, 1975. In particular, SDCL § 9-32-6 provides, "Every municipality shall have power to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof." Additionally, SDCL § 9-32-8 provides, "Every municipality shall have power to prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of the limits of the municipality."

The foregoing authority of municipalities to regulate such activities is not precluded by ARSD 74:53:01:18. For the aforementioned reasons, and additional authority as may later be supplemented, the SDML gives this written petition in opposition of George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18.

4. **MAILING ADDRESS OF LEGAL COUNSEL FOR THE SDML:**

Cutler Law Firm, LLP  
Attn: Eric E. Erickson  
P.O. Box 1400  
Sioux Falls, SD 57101-1400  
Phone: (605) 271-4938  
Email: erice@cutlerlawfirm.com

5. **REQUEST FOR A DELAY OF HEARING:**

Petitioner respectfully requests that the hearing to consider George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18, currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Dated this 23<sup>rd</sup> of June, 2016.

CUTLER LAW FIRM, LLP  
Attorneys at Law



---

Eric E. Erickson  
100 N. Phillips Ave., 9th Floor  
P.O. Box 1400  
Sioux Falls, South Dakota 57101-1400  
Telephone (605) 335-4950  
Facsimile (605) 335-4961  
*Attorney for Petitioner*

**PETITION IN OPPOSITION OF GEORGE FEREBEE'S PETITION FOR A  
DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE  
RULE OF SOUTH DAKOTA 74:53:01:04**

1. **PETITIONER:** South Dakota Municipal League ("SDML").

2. **PETITIONERS INTEREST IN THE PETITION FOR A DECLARATORY RULING:**

The SDML was organized in 1934 as a non-partisan, non-profit association of incorporated municipalities in South Dakota. Many of the SDML's member-municipalities, including without limitation Rapid City, have enacted ordinances that regulate the operation of on-site wastewater systems, including on-site wastewater systems constructed prior to February 28, 1975. This matter is of the utmost interest to the SDML as the authority of its member-municipalities to regulate the operation of on-site wastewater systems, including systems existing prior to February 28, 1975, is necessary for the health, safety, and welfare of the general public.

3. **PETITIONER'S REASON FOR OPPOSING GEORGE FEREBEE'S PETITION FOR A DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53:01:04:**

The SDML opposes George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:18 for multiple reasons, including, but not limited to:

State law provides municipalities with broad authority to regulate activities such as on-site wastewater systems. In addition to other authority provided in state law, SDCL §§ 9-32-6 and 9-32-8 provide municipalities with the authority to regulate activities such as the operation of on-site wastewater systems and do not limit such authority to only those on-site wastewater systems constructed after February 28, 1975. In particular, SDCL § 9-32-8 provides, "Every municipality shall have power to prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of the limits of the municipality." Additionally, SDCL § 9-32-6 provides, "Every municipality shall have power to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof."

The foregoing authority of municipalities to regulate such activities is not precluded by ARSD 74:53:01:04. For the aforementioned reasons, and additional authority as may later be supplemented, the SDML gives this written petition in opposition of George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04.

4. **MAILING ADDRESS OF LEGAL COUNSEL FOR THE SDML:**

Cutler Law Firm, LLP  
Attn: Eric E. Erickson  
P.O. Box 1400  
Sioux Falls, SD 57101-1400  
Phone: (605) 271-4938  
Email: erice@cutlerlawfirm.com

5. REQUEST FOR A DELAY OF HEARING:

Petitioner respectfully requests that the hearing to consider George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04, currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Dated this 23<sup>rd</sup> of June, 2016.

CUTLER LAW FIRM, LLP  
Attorneys at Law



Eric E. Erickson  
100 N. Phillips Ave., 9th Floor  
P.O. Box 1400  
Sioux Falls, South Dakota 57101-1400  
Telephone (605) 335-4950  
Facsimile (605) 335-4961  
*Attorney for Petitioner*

**PETITION IN OPPOSITION OF GEORGE FEREBEE'S PETITION FOR A  
DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE  
RULE OF SOUTH DAKOTA 74:53:01:04**

1. **PETITIONER:** South Dakota Association of County Commissioners ("SDACC").
2. **PETITIONERS INTEREST IN THE PETITION FOR A DECLARATORY RULING:**

The SDACC is an association authorized by state law that represents all of South Dakota's sixty-six (66) counties. The SDACC has a stated purpose of "securing concerted action among the counties in behalf of such matters, measures and county affairs as the associations deem to be beneficial to and in the common interest of the counties." SDCL § 7-7-28. Many of the SDACC's member-counties, including without limitation Pennington County, have enacted ordinances that regulate the operation of on-site wastewater systems, including systems existing prior to February 28, 1975. This matter is of the utmost interest to the SDACC as the authority of its member-counties to regulate the operation of on-site wastewater systems, including systems existing prior to February 28, 1975, is necessary for the health, safety, and welfare of the general public.

3. **PETITIONER'S REASON FOR OPPOSING GEORGE FEREBEE'S PETITION FOR A DECLARATORY RULING ON THE AUTHORITY REGARDING ADMINISTRATIVE RULE OF SOUTH DAKOTA 74:53:01:04:**

The SDACC opposes George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04 for multiple reasons, including, but not limited to:

State law provides counties with broad authority to regulate activities such as on-site wastewater systems. In addition to other authority provided in state law, SDCL §§ 7-8-20 and 7-8-33 provide counties with the authority to regulate activities such as the operation of on-site wastewater systems and do not limit such authority to only those systems constructed after February 28, 1975. In particular, SDCL § 7-8-33 provides, in part, "The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality..." In addition, SDCL § 7-8-20 provides, in relevant part, the county commissioners with the power to:

- (14) To enact ordinances to regulate and prevent the placing of ashes, dirt, garbage or any offensive matter in any highway or public ground or in any body or stream of water within the county, but outside of an incorporated municipality or outside of the one mile limits of any incorporated municipality;

(15) To enact ordinances to regulate and compel the cleansing, abatement or removal of any sewer, cesspool or any unwholesome or nauseous thing or place;

The authority of counties to regulate such activities is not precluded by state law nor ARSD 74:53:01:04. For the foregoing reasons, and additional authority as may later be supplemented, the SDACC gives this written petition in opposition of George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04.

**4. MAILING ADDRESS OF LEGAL COUNSEL FOR THE SDACC:**

Cutler Law Firm, LLP  
Attn: Eric E. Erickson  
P.O. Box 1400  
Sioux Falls, SD 57101-1400  
Phone: (605) 271-4938  
Email: erice@cutlerlawfirm.com

**5. REQUEST FOR A DELAY OF HEARING:**

Petitioner respectfully requests that the hearing to consider George Ferebee's Petition for a Declaratory Ruling on the Authority Regarding Administrative Rule of South Dakota 74:53:01:04, currently scheduled for July 6, 2016, be delayed for at least 20 days as set forth in the notice of hearing.

Dated this 23<sup>rd</sup> of June, 2016.

CUTLER LAW FIRM, LLP  
Attorneys at Law



---

Eric E. Erickson  
100 N. Phillips Ave., 9th Floor  
P.O. Box 1400  
Sioux Falls, South Dakota 57101-1400  
Telephone (605) 335-4950  
Facsimile (605) 335-4961  
*Attorney for Petitioner*



**CITY OF RAPID CITY**  
**RAPID CITY, SOUTH DAKOTA 57701-2724**

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JUN 27 2016

WATER RIGHTS  
PROGRAM

**Office of the City Attorney**

300 Sixth Street

Rapid City, South Dakota 57701-2724

Telephone: 605-394-4140

FAX: 605-394-6633

E-mail: [attorney@rcgov.org](mailto:attorney@rcgov.org)

[www.rcgov.org/attorney/attorneyhomepage.htm](http://www.rcgov.org/attorney/attorneyhomepage.htm)

June 24, 2016

Ms. Jeanne Goodman, Chief Engineer  
Water Rights Program  
523 E. Capitol  
Pierre, SD 57501

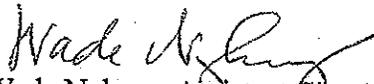
RE: City of Rapid City Petitions in Opposition  
George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:04  
George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:18

Dear Ms. Goodman

Enclosed for filing in the above matters is the City of Rapid City's Petition in Opposition to George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:04 and the City's Petition in Opposition to George Ferebee Petition for Declaratory Ruling ARSD 74:53:01:18. As is noted in the Petitions, the City is requesting the Water Management Board delay the matter at least 20 days in order for the City to more fully respond.

Thank you for your assistance.

Sincerely,

  
Wade Nyberg, Assistant City Attorney

cc: Mr. George Ferebee  
Mr. Jay Alderman

SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

---

**CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION  
FOR DECLARATORY RULING ON ARSD 74:53:01:18**

---

Comes now, the City of Rapid City, by and through its attorneys of record, and submits the following as its Petition in Opposition to George Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:18 as follows:

1. Petitioner City of Rapid City is a South Dakota municipality and is represented by counsel identified below.
2. Petitioner is interested in Mr. Ferebee's petition for declaratory ruling as Petitioner is a municipality sought to be bound by the declaratory ruling requested.
  - a. The Water Management Board has no legal authority to issue the declaratory ruling requested by petitioner. ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order pertaining to a submitted factual situation within the board's jurisdiction." First, Mr. Ferebee has not presented a factual situation. His request is about the general applicability of this rule, as applied to every locality in the state. Second, the Board has no jurisdiction to declare localities "bound" by a rule that applies to specific factual situations. It is unclear what a declaration that localities are "bound" by a rule that describes which types of wastewater systems are subject to agency administrative rules would even mean. It seems that Mr. Ferebee is seeking a declaratory ruling regarding local governments' ability to legislate in this area; this subject matter is clearly beyond the scope of the Board's

authority. Mr. Ferebee is attempting to suggest that ARSD 74:53:01:18 preempts local legislative enactments regarding cesspools or pit privies. Preemption is a legal doctrine, suitable for interpretation by court of law through a declaratory action, a remedy available to Mr. Ferebee under SDCL 1-26-14. The request presented by Mr. Ferebee is both lacking a required factual basis and beyond the jurisdiction of the Board, and thus should be denied.

- b. The South Dakota State Legislature has granted municipalities the authority “to protect public groundwater supplies from pollution” (SDCL 9-12-17); “to do what may be necessary or expedient for the promotion of health or the suppression of disease” (SDCL 9-32-1); “to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof” (SDCL 9-32-6); “to prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of the limits of the municipality” (SDCL 9-32-8); and “to declare what shall constitute a nuisance and prevent, abate, and remove the same” (SDCL 9-29-13). Nowhere in these statutes does it state that such authority is subject to an agency’s administrative rules. These direct grants of authority contradict Mr. Ferebee’s assertion that municipalities are prohibited from legislating in this area.

It is not hard to imagine how a cesspool or pit privy, of any age, may become a threat to either groundwater or the water supply of a municipality, a contributor to the spread of disease, or simply a nuisance. To date, no South Dakota court has declared a municipality’s regulation of such invalid due to state preemption.

Furthermore, if a municipality should overstep its granted authority, the separation of powers doctrine dictates that a court of law must be the authority to declare such regulation invalid.

3. Petitioner's mailing address is City of Rapid City, 300 Sixth Street, Rapid City, SD 57701
4. Petitioner's legal counsel is Wade Nyberg, Assistant City Attorney.
5. The City of Rapid City respectfully requests that Mr. Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:18 be denied; in the alternative, the City requests that the hearing on the Petition be continued for at least 20 days to give the City time to fully prepare its response.

Dated at Rapid City, South Dakota, this 24th day of June, 2016.

**CITY OF RAPID CITY**

  
\_\_\_\_\_  
Wade Nyberg, Assistant City Attorney

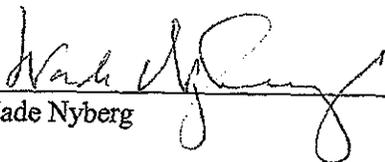
**CERTIFICATE OF SERVICE**

I hereby certify that I sent a true and correct copy of the above CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION FOR DECLARATORY RULING ON ARSD 74:53:10:18 by US Mail, postage prepaid, to the following :

Chief Engineer  
Water Rights Program  
Foss Building  
523 E Capitol  
Pierre, SD 57501

Mr. George Ferebee  
11495 Gillette Prairie Rd  
Hill City, SD 57545

Mr. Jay Alderman  
Pennington County States Attorney  
130 Kansas City Street, Ste. 300  
Rapid City, SD 57701-2818

  
\_\_\_\_\_  
Wade Nyberg

SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

---

**CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION  
FOR DECLARATORY RULING ON ARSD 74:53:01:04**

---

Comes now, the City of Rapid City, by and through its attorneys of record, and submits the following as its Petition in Opposition to George Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:04 as follows:

1. Petitioner City of Rapid City is a South Dakota municipality and is represented by counsel identified below.
2. Petitioner is interested in Mr. Ferebee's petition for declaratory ruling as Petitioner is a municipality sought to be bound by the declaratory ruling requested.
3. Petitioner opposes Mr. Ferebee's petition for declaratory ruling for the following reasons:
  - a. The Water Management Board has no legal authority to issue the declaratory ruling requested by petitioner. ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order pertaining to a submitted factual situation within the board's jurisdiction." First, Mr. Ferebee has not presented a factual situation. His request is about the general applicability of this rule, as applied to every locality in the state. Second, the Board has no jurisdiction to declare localities "bound" by a rule that applies to specific factual situations. It is unclear what a declaration that localities are "bound" by a rule that describes which types of wastewater systems are subject to agency administrative rules would even mean. It seems that Mr. Ferebee is seeking a declaratory ruling regarding local governments' ability to

legislate in this area; this subject matter is clearly beyond the scope of the Board's authority. Mr. Ferebee is attempting to suggest that ARSD 74:53:01:04 preempts local legislative enactments regarding certain on-site wastewater systems. Preemption is a legal doctrine, suitable for interpretation by court of law through a declaratory action, a remedy available to Mr. Ferebee under SDCL 1-26-14. The request presented by Mr. Ferebee is both lacking a required factual basis and beyond the jurisdiction of the Board, and thus should be denied.

- b. The South Dakota State Legislature has granted municipalities the authority "to protect public groundwater supplies from pollution" (SDCL 9-12-17); "to do what may be necessary or expedient for the promotion of health or the suppression of disease" (SDCL 9-32-1); "to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof" (SDCL 9-32-6); "to prevent the pollution of or injury to any water supply belonging to the municipality or any public water supply within or within one mile of the limits of the municipality" (SDCL 9-32-8); and "to declare what shall constitute a nuisance and prevent, abate, and remove the same" (SDCL 9-29-13). Nowhere in these statutes does it state that such authority is subject to an agency's administrative rules. These direct grants of authority contradict Mr. Ferebee's assertion that municipalities are prohibited from legislating in this area.

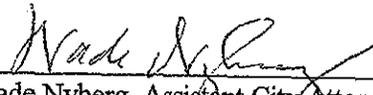
Furthermore, it is not hard to imagine how a cesspool or pit privy, of any age, may become a threat to either groundwater or the water supply of a municipality, a contributor to the spread of disease, or simply a nuisance. To date, no South Dakota

court has declared a municipality's regulation of such invalid due to state preemption. Furthermore, if a municipality should overstep its granted authority, the separation of powers doctrine dictates that a court of law must be the authority to declare such regulation invalid.

4. Petitioner's mailing address is City of Rapid City, 300 Sixth Street, Rapid City, SD 57701
5. Petitioner's legal counsel is Wade Nyberg, Assistant City Attorney.
6. The City of Rapid City respectfully requests that Mr. Ferebee's Petition for Declaratory Ruling on ARSD 74:53:01:04 be denied; in the alternative, the City requests that the hearing on the Petition be continued for at least 20 days to give the City time to fully prepare its response.

Dated at Rapid City, South Dakota, this 24th day of June, 2016.

**CITY OF RAPID CITY**

  
\_\_\_\_\_  
Wade Nyberg, Assistant City Attorney

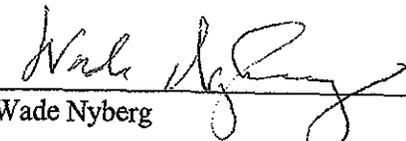
**CERTIFICATE OF SERVICE**

I hereby certify that I sent a true and correct copy of the above CITY OF RAPID CITY'S PETITION TO OPPOSE GEORGE FEREBEE'S PETITION FOR DECLARATORY RULING ON ARSD 74:53:10:04 by US Mail, postage prepaid, to the following :

Chief Engineer  
Water Rights Program  
Foss Building  
523 E Capitol  
Pierre, SD 57501

Mr. George Ferebee  
11495 Gillette Prairie Rd  
Hill City, SD 57545

Mr. Jay Alderman  
Pennington County States Attorney  
130 Kansas City Street, Ste. 300  
Rapid City, SD 57701-2818

  
\_\_\_\_\_  
Wade Nyberg

RECEIVED

JUN 30 2016

WATER RIGHTS  
PROGRAM

11495 Gillette Prairie Rd  
Hill City, SD 57745  
June 28, 2016

SD DENR  
523 East Capitol  
Pierre, SD 57501

RE: Water Management Board Hearing

Dear Mr. Secretary:

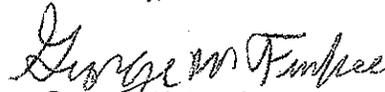
I understand that your department (agency) intends to delay the Water Management Board hearing set for July 6, 2016, regarding my two (2) petitions. If so, I object on the grounds that there is no basis in law or in fact for such a delay.

The law, SDCL 1-26-17, which provides for the contents of notice, begins with "contested case." Clearly, the entering argument (threshold question so to speak) is whether my petitions fit the definition of "contested case." If not, then obviously SDCL 1-26-17 does not apply. Hence, the scheduled date of July 6, 2016, should not be altered.

SDCL 1-26-1(2) defines "contested case." Critical to meeting the definition; and, going forth with the delay, is specification of the "legal rights," "duties," or "privileges," of a party which by law are required to be **determined** by an agency. Please recall, I merely asked for a declaration by the Water Management Board. The South Dakota Supreme Court opinions are littered with expressions regarding "declarations." For example, quite recently, "When regulatory language is clear, certain, and unambiguous, our function is confined to declaring its meaning as clearly expressed." *Krsnak v. South Dakota Department of Environment and Natural Resources*, 2012 S.D. 89, ¶ 16.

Mr. Secretary, I merely ask that the Water Management Board "declare" that your Administrative Rules, 74:53:01:04 & :18, say what they say. Application of the conventions of the English language suggest that the words in those two rules are "clear," "certain," and "unambiguous." All that remains is for the "authoritative" body in this matter (Water Management Board) to "declare" such. Thereby, any misinterpretation by those who are wont to do so would be summarily disabused.

Sincerely,

  
George W. Ferebee

cc: South Dakota Attorney General

STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

---

IN THE MATTER OF GEORGE )	ORDER ON PETITIONER'S
FEREBEE'S PETITION FOR A )	OBJECTIONS TO AUTOMATIC
DECLARATORY RULING ON THE )	DELAY
APPLICABILITY OF )	
ADMINISTRATIVE RULE OF SOUTH )	
DAKOTA 74:53:01:04; AND IN THE )	
MATTER OF GEORGE FEREBEE'S )	
PETITION FOR A DECLARATORY )	
RULING ON THE APPLICABILITY OF )	
ADMINISTRATIVE RULE OF SOUTH )	
DAKOTA 74:53:01:18. )	
)	

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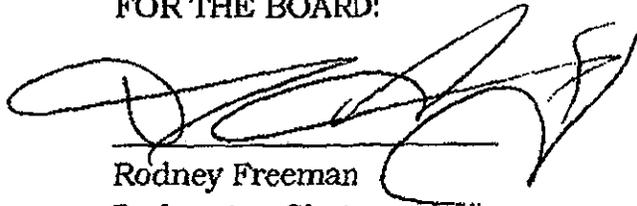
On June 30, 2016, Petitioner George W. Ferebee submitted a letter addressed to the Chairman of the South Dakota Water Management Board, objecting to the automatic delay of his two petitions for declaratory ruling, originally scheduled to come on for hearing before the South Dakota Water Management Board on July 6, 2016. Mr. Ferebee did not serve the other parties with his objections.

After reviewing the submission of Mr. Ferebee, and upon review of the applicable statutes and rules, Mr. Ferebee's objections to the automatic delay are hereby OVERRULED. The hearing before the Water Management Board on the above-captioned matter will not occur during the Water Management Board's July meeting. The hearing to consider Mr. Ferebee's declaratory ruling requests will now be scheduled for the October 5 and 6, 2016, Water

Management Board meeting, tentatively to be held in Pierre. Future notice of the date, time and place of the hearing will be provided to all parties of record.

Dated this 1st day of July 2016.

FOR THE BOARD:

A handwritten signature in black ink, appearing to read 'Rodney Freeman', written over a horizontal line.

Rodney Freeman  
Prehearing Chairman  
South Dakota Water Management Board

STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

---

IN THE MATTER OF GEORGE )  
FEREBEE'S PETITION FOR A )  
DECLARATORY RULING ON THE ) CERTIFICATE OF SERVICE  
AUTHORITY REGARDING )  
ADMINISTRATIVE RULE OF SOUTH )  
DAKOTA 74:53:01:04; AND IN THE )  
MATTER OF GEORGE FEREBEE'S )  
PETITION FOR A DECLARATORY )  
RULING ON THE AUTHORITY )  
REGARDING ADMINISTRATIVE )  
RULE OF SOUTH DAKOTA )  
74:53:01:18. )

---

The undersigned hereby certifies that on the 1st day of July 2016, a true and correct copy of the Order on Petitioner's Objections to Automatic Delay was mailed by U.S. mail first-class and also by e-mail to:

George Ferebee  
11495 Gillette Prairie Road  
Hill City, South Dakota 57745  
[silverfoxdriver@MSN.com](mailto:silverfoxdriver@MSN.com)

Lyndell Petersen, Chairman  
Pennington County Commission  
130 Kansas City Street  
Rapid City, South Dakota 57701  
[jillpete271@gmail.com](mailto:jillpete271@gmail.com)

Kinsley P. Groote  
Deputy State's Attorney  
Pennington Co State's Attorney's Office  
130 Kansas City Street, Suite 300  
Rapid City, South Dakota 57701  
[kinsleyg@pennco.org](mailto:kinsleyg@pennco.org)

Eric E. Erickson  
Cutler Law Firm LLP  
P.O. Box 1400  
Sioux Falls, South Dakota 57101  
[erice@cutlerlawfirm.com](mailto:erice@cutlerlawfirm.com)

Wade Nyberg  
City of Rapid City  
300 Sixth Street  
Rapid City, South Dakota 57701-2724  
[wade.nyberg@rcgov.org](mailto:wade.nyberg@rcgov.org)

by hand delivery to:

Ann Mines Bailey  
Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre, South Dakota 57501-8501

Jeanne Goodman  
Chief Engineer, Water Rights Program  
DENR  
523 East Capitol Avenue  
Pierre, South Dakota 57501

Ellie Bailey  
Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre, South Dakota 57501-8501



Matt Naasz  
Assistant Attorney General



DAVID A. PFEIFLE  
City Attorney  
dpfeifle@siouxfalls.org

KAREN A. LEONARD  
Deputy City Attorney  
kleonard@siouxfalls.org

PAUL M. BENGFORD  
Assistant City Attorney  
pbengford@siouxfalls.org

DANIEL J. BROWN  
Assistant City Attorney  
dbrown4@siouxfalls.org

100 South Dakota Avenue  
Suite 200  
P.O. Box 7402  
Sioux Falls, SD  
57117-7402  
605-367-8880  
605-367-7330 Fax

KEITH E. ALLENSTEIN, JR.  
Assistant City Attorney  
Police and Fire Legal Advisor  
kallenstein@siouxfalls.org

(Law Enforcement Center)  
320 West Fourth Street  
Sioux Falls, SD  
57104-2413  
605-367-8880  
605-978-6676 Fax

COLLEEN M. MORAN  
Assistant City Attorney  
Human Relations Legal Advisor  
cmoran@siouxfalls.org

100 South Dakota Avenue  
Suite 101  
P.O. Box 7402  
Sioux Falls, SD  
57117-7402  
605-367-8745  
605-367-7330 Fax

DIANE P. BEST  
Assistant City Attorney  
Public Works Legal Advisor  
dbest@siouxfalls.org

(Public Works Administration)  
224 West Ninth Street  
P.O. Box 7402  
Sioux Falls, SD  
57117-7402  
605-367-8880  
605-367-7330 Fax

605-367-7039 TTY  
www.siouxfalls.org

July 1, 2016

Jeanne Goodman  
Chief Engineer  
Foss Building  
523 E. Capitol Ave  
Pierre, SD 57501

Re: Ferrebee Declaratory Ruling Petitions

Dear Chief Engineer Goodman:

Enclosed for filing are City of Sioux Falls Motions as follows:

1. Motion to Intervene in George Ferebee's Petition for Declaratory Ruling ARSD 74:53:01:04 (and Certificate of Service)
2. Motion to Intervene in George Ferebee's Petition for Declaratory Ruling ARSD 74:53:01:18 (and Certificate of Service)

Each of the parties is being served with a copy of this letter and the Motions. I am asking that the City's Motion be heard at the earliest convenient date for the Board or its hearing chairman.

Sincerely,

  
Diane Best  
Assistant City Attorney

RECEIVED  
JUL - 6 2016  
WATER RIGHTS  
PROGRAM

STATE OF SOUTH DAKOTA

SOUTH DAKOTA WATER MANAGEMENT BOARD

\*\*\*\*\*

IN THE MATTER OF GEORGE  
FEREBEE'S PETITION FOR  
DECLARATORY RULING ON ARSD  
74:53:01:04

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CITY OF SIOUX FALLS  
MOTION TO INTERVENE

\*\*\*\*\*

City of Sioux Falls ("City"), through Assistant City Attorney Diane Best,  
submits its Motion to Intervene as follows:

1. The City is a municipality chartered under the constitution of the State  
of South Dakota.

2. The City recognizes the published date for intervention in the above  
referenced matter was June 27, 2016. Unfortunately, due to a recent illness,  
the undersigned attorney was out of the office for a period of time and was not  
aware of the intervention date until late in the day on June 30.

3. The City's intervention at this time would not be prejudicial to any party.  
To date, the only procedure that has been undertaken is the publication and  
filing of petitions to intervene. Because one or more of the other intervenors  
requested an automatic delay under SDCL 46-2A-4 (9), the hearing in this  
matter will likely not be held until the Board's next regular meeting after July  
6, 2016, which would be October 5-6, 2016. This City's intervention at this  
time could not possibly interfere with that process.

4. The City is interested in this matter since Mr. Ferebee's petition seeks a

declaratory ruling that would apply to all cities and counties in the state who restrict or regulate on-site sanitary sewer systems in any way. The City of Sioux Falls is, of course, a municipality and regulates and restricts on-site sanitary sewer systems within its boundaries.

5. The City opposes the petition for the following reasons (and such additional authority as may later be supplemented):

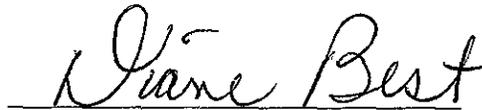
- a. The Ferebee request does not satisfy the threshold procedural requirements for a declaratory ruling by the Board. ARSD 74:02:01:46 expressly requires that a "submitted factual situation" be provided as part of a declaratory ruling request. Mr. Ferebee has not submitted such a factual situation and his petition does not meet this threshold requirement for Board consideration. The petition should be dismissed.
- b. Mr. Ferebee is essentially asking the Board to issue a ruling that if various unknown city and county ordinances and rules are different or more stringent than ARSD 74:53:01:04, they are invalid. This exceeds the Board's subject matter jurisdiction. While the Board can certainly issue declaratory rulings interpreting the statutes and rules that it directly administers, it lacks authority to invalidate separate city and county ordinances stemming from separate state statutes not administered by the Board. Moreover, even if the Board were to hold such subject matter jurisdiction, it appears to lack authority to issue coercive relief to enforce such a holding. *Romey v. Landers*, 392 N.W.2d 415 (1986).
- c. Municipalities hold significant authority to regulate and restrict waste water systems independent of the Department of Environment and Natural Resources (DENR). This includes SDCL 9-12-17 (to prevent groundwater pollution); SDCL 9-32-1 (to promote health and suppress disease); SDCL 9-29-13 and SDCL 9-32-6 (to abate nuisance). Further, municipalities are owners of City water systems and, as such, have the ability and duty to protect such systems from pollution or injury to city water system. SDCL 9-32-8.
- d. The City of Sioux Falls, as a municipality chartered pursuant to the South Dakota Constitution, Article IX, holds authority to restrict or regulate on-site wastewater systems within the City, unless that specific regulation or restriction is denied by its own charter, the state

constitution or state law. ARSD 74:53:01:04 does not create a wholesale restriction on all City power to restrict or regulate on-site wastewater facilities.

6. The City asks that the Board enter an order authorizing it to intervene and participate as a party in the above referenced matter.

Dated this 1<sup>st</sup> day of July, 2016.

CITY OF SIOUX FALLS



Diane Best  
Assistant City Attorney  
224 West Ninth Street  
Sioux Falls, SD 57104-6407  
(605) 367-8880  
dbest@siouxfalls.org

#### CERTIFICATE OF SERVICE

I, Diane Best, hereby certify that on this 1<sup>st</sup> day of July 2016 I sent true and correct copies of the *City of Sioux Falls Motion to Intervene* in the above entitled matter by First Class Mail from Sioux Falls South Dakota to the following:

Matthew Naasz  
WMB Board Counsel  
Assistant Attorney General  
1302 E. HWY 14, Suite 1  
Pierre, SD 57501

Chief Engineer  
Water Rights Program  
Foss Building  
523 E. Capitol Ave  
Pierre, SD 57501

George Ferebee  
11495 Gillette Prairie Rd.  
Hill City, SD 57545

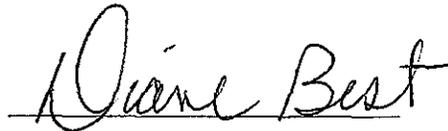
Kinsley Groote  
Pennington Deputy States Attorney  
130 Kansas City Street, Suite. 300  
Rapid City, SD 57701-2818

Wade Nyberg  
City Attorney  
City of Rapid City  
300 Sixth Street  
Rapid City, SD 57701

Ellie Bailey  
Counsel for DENR  
Assistant Attorney General  
1302 E. HWY 14, Suite 1  
Pierre, SD 57501

Eric E. Erickson  
Cutler Law Firm  
100 N. Phillips Av., 9<sup>th</sup> Floor  
P.O. Box 1400  
Sioux Falls, SD 57101

Ann Mines-Bailey  
Counsel for Water Rights Program  
Assistant Attorney General  
1302 E. HWY 14, Suite 1  
Pierre, SD 57501

A handwritten signature in cursive script that reads "Diane Best". The signature is written in black ink and is positioned above a horizontal line.

Diane Best  
Assistant City Attorney  
224 West Ninth Street  
Sioux Falls, SD 57104  
(605) 367-8880

STATE OF SOUTH DAKOTA

SOUTH DAKOTA WATER MANAGEMENT BOARD

\*\*\*\*\*

IN THE MATTER OF GEORGE  
FEREBEE'S PETITION FOR  
DECLARATORY RULING ON ARSD  
74:53:01:18

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CITY OF SIOUX FALLS  
MOTION TO INTERVENE

\*\*\*\*\*

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1. The City is a municipality chartered under the constitution of the State of South Dakota.

2. The City recognizes the published date for intervention in the above referenced matter was June 27, 2016. Unfortunately, due to a recent illness, the undersigned attorney was out of the office for a period of time and was not aware of the intervention date until late in the day on June 30.

3. The City's intervention at this time would not be prejudicial to any party. To date, the only procedure that has been undertaken is the publication and filing of petitions to intervene. Because one or more of the other intervenors requested an automatic delay under SDCL 46-2A-4 (9), the hearing in this matter will likely not be held until the Board's next regular meeting after July 6, which meeting is now scheduled for October 5-6, 2016. This City's intervention at this time could not possibly interfere with that process.

4. The City is interested in this matter since Mr. Ferebee's petition seeks a

declaratory ruling that would apply to all cities and counties in the state who prohibit cesspools or pit privies. The City of Sioux Falls is, of course, a municipality and prohibits cesspools and pit privies.

5. The City opposes the petition for the following reasons (and such additional authority as may later be supplemented):

- a. The Ferebee request does not satisfy the threshold procedural requirements for a declaratory ruling by the Board. ARSD 74:02:01:46 expressly requires that a "submitted factual situation" be provided as part of a declaratory ruling request. Mr. Ferebee has not submitted such a factual situation and his petition does not meet this threshold requirement for Board consideration. The petition should be dismissed.
- b. Mr. Ferebee is essentially asking the Board to issue a ruling that if various unknown city and county ordinances and rules are different or more stringent than ARSD 74:53:01:18, they are invalid. This exceeds the Board's subject matter jurisdiction. While the Board can certainly issue declaratory rulings interpreting the statutes and rules that it directly administers, it lacks authority to invalidate separate city and county ordinances stemming from separate state statutes not administered by the Board. Moreover, even if the Board were to hold such subject matter jurisdiction, it appears to lack authority to issue coercive relief to enforce such a holding. *Romey v. Landers*, 392 N.W.2d 415 (1986).
- c. Municipalities hold significant authority to prohibit cesspools and pit privies independent of the Department of Environment and Natural Resources (DENR). This includes SDCL 9-12-17 (to prevent groundwater pollution); SDCL 9-32-1 (to promote health and suppress disease); SDCL 9-29-13 and SDCL 9-32-6 (to abate nuisance). Further, municipalities are owners of City water systems and, as such, have the ability and duty to protect such systems from pollution or injury to city water system. SDCL 9-32-8.
- d. The City of Sioux Falls, as a municipality chartered pursuant to the South Dakota Constitution, Article IX, holds authority to prohibit cesspools and pit privies. The City's ordinances in that respect are not denied by city charter, the state constitution or state law. ARSD 74:53:01:18 does not create a wholesale restriction on the City power to prohibit cesspools and pit privies.

6. The City asks that the Board enter an order authorizing it to intervene and participate as a party in the above referenced matter.

Dated this 1<sup>st</sup> day of July, 2016.

CITY OF SIOUX FALLS



Diane Best  
Assistant City Attorney  
224 West Ninth Street  
Sioux Falls, SD 57104-6407  
(605) 367-8880  
dbest@siouxfalls.org

#### CERTIFICATE OF SERVICE

I, Diane Best, hereby certify that on this 1<sup>ST</sup> day of July 2016 I sent true and correct copies of the *City of Sioux Falls Motion to Intervene* in the above entitled matter by First Class Mail from Sioux Falls South Dakota to the following:

Matthew Naasz  
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1302 E. HWY 14, Suite 1  
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Kinsley Groote  
Pennington Deputy States Attorney  
130 Kansas City Street, Suite. 300  
Rapid City, SD 57701-2818

Wade Nyberg  
City Attorney  
City of Rapid City  
300 Sixth Street  
Rapid City, SD 57701

Ellie Bailey  
Counsel for DENR  
Assistant Attorney General  
1302 E. HWY 14, Suite 1  
Pierre, SD 57501

Eric E. Erickson  
Cutler Law Firm  
100 N. Phillips Av., 9<sup>th</sup> Floor  
P.O. Box 1400  
Sioux Falls, SD 57101

Ann Mines-Bailey  
Counsel for Water Rights Program  
Assistant Attorney General  
1302 E. HWY 14, Suite 1  
Pierre, SD 57501

A handwritten signature in cursive script that reads "Diane Best". The signature is written in dark ink and is positioned above a horizontal line.

Diane Best  
Assistant City Attorney  
224 West Ninth Street  
Sioux Falls, SD 57104  
(605) 367-8880

SEP - 9 2016

WATER RIGHTS  
PROGRAMSTATE OF SOUTH DAKOTA  
SOUTH DAKOTA WATER MANAGEMENT BOARD

IN THE MATTER OF GEORGE  
FEREBEE'S PETITION FOR  
DECLARATORY RULING  
ARSD 74:53:01:18

ORDER GRANTING THE  
CITY OF SIOUX FALLS'  
MOTION TO INTERVENE

On August 22, 2016 a telephonic Motion hearing was held before the South Dakota Water Management Board Hearing Chairman Rodney Freeman, Jr. regarding the City of Sioux Falls' Motion to Intervene. The following individuals participated: George Ferebee; Board Counsel Matthew Naasz; Chief Engineer Jeanne Goodman; DENR Engineer Eric Gronlund; Feedlot Permit Program Administrator Kent Woodmansey and its attorney, Assistant Attorney General Ellie Bailey; Pennington County Deputy State's Attorney Michael Hoffman; Attorney Eric Erickson appearing for the South Dakota Association of County Commissioners and the South Dakota Municipal League; and Diane Best, Assistant City Attorney for Sioux Falls.

Under SDCL 46-2A-4(4), any interested party who intends to participate in a case before the Board may do so by filing a timely signed petition and briefly explaining its interest. In this case, the date to do so expired on June 27, 2016. Assistant City Attorney Best filed a petition on July 1, 2016. She explained she had been ill and was not aware of this proceeding or the opportunity to intervene until June 30, 2016. She filed a Motion to Intervene the next day. Because other parties had already invoked the automatic delay provision of SDCL 46-2A-4, the hearing had already been delayed until the Board's regularly scheduled meeting in October 2016. No party is prejudiced because of the late petition and the City of Sioux Falls should be entitled to participate the same as any other interested party.

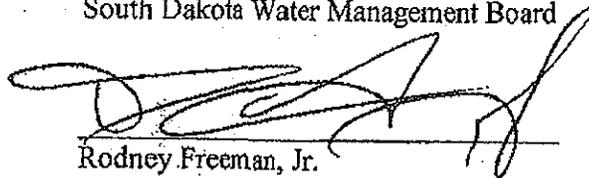
Ferebee objects because he did not intend his petition to be a contested case where intervenors would be allowed and, further, because chartered municipalities have their own separate rules. The remaining parties do not object to the City of Sioux Falls participating as a party.

Having considered the matter, the pleadings, and the arguments of the parties, I hereby find the City of Sioux Falls meets the requirements to intervene. It is therefore:

ORDERED, that the City of Sioux Falls Motion to Intervene is granted and the City of Sioux Falls may participate as a party in the above referenced matter for the reasons and bases set forth in its telephonic arguments and its Motion to Intervene.

Dated this 7<sup>th</sup> day of September, 2016.

South Dakota Water Management Board



Rodney Freeman, Jr.  
Hearing Chairman



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

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

denr.sd.gov

September 1, 2016

NOTICE

TO: George Ferebee  
11495 Gillette Prairie Rd  
Hill City SD 57745

Michaele Hofmann, Kinsley Groote & Jay  
Alderman  
Pennington County State's Attorney Office  
130 Kansas City St., Suite 300  
Rapid City, SD 57701

Eric E Erickson  
Cutler Law Firm LLP  
PO Box 1400  
Sioux Falls SD 57101-1400

Wade Nyberg  
City of Rapid City  
300 Sixth Street  
Rapid City SD 57701-2724

Diane P. Best, Assistant City Attorney  
City of Sioux Falls  
P.O. Box 7402  
Sioux Falls, SD 57117-7402

FROM: Jeanne Goodman, Chief Engineer  
Water Rights Program

SUBJECT: Scheduling of Hearing on George Ferebee's Petition for Declaratory Ruling regarding  
ARSD 74:53:01:18

This notice schedules a hearing date and time for the Water Management Board to consider Mr. Ferebee's petition for declaratory ruling on the authority regarding Administrative Rule of South Dakota 74:53:01:18.

The Water Management Board will conduct the hearing at 10:30 AM (Central Time) on Thursday, October 13, 2016, at the Floyd Matthew Training Center, Joe Foss Building, 523 E. Capitol Avenue, Pierre SD. The agenda time is an estimate and may be delayed due to prior agenda items. Future notice will be provided to all parties if there are changes to the hearing time.

Applicable provisions of the notice of hearing published in the Rapid City Journal, American News and Argus Leader on June 16, 2016, will still apply at the hearing.

c: Ann Mines-Bailey, Assistant Attorney General  
Ellie Bailey, Assistant Attorney General



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

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IN THE MATTER OF GEORGE	)	BRIEF IN SUPPORT OF
FEREBEE'S PETITION FOR A	)	PENNINGTON COUNTY'S
DECLARATORY RULING	)	PETITION IN OPPOSITION
REGARDING ARSD 74:53:01:18	)	TO FEREBEE'S PETITION

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The State of South Dakota, by and through Deputy State's Attorney Kinsley P. Groote, submits this Brief in Support of Pennington County's Petition in Opposition to Ferebee's Petition. ARSD 74:53:01:18 provides: "The construction of a cesspool or a pit privy is prohibited. The operation of a cesspool or a pit privy constructed after February 28, 1975, is prohibited."<sup>1</sup> George Ferebee argues that the administrative rules concerning on-site wastewater systems occupy the field to the exclusion of local regulation and requests a ruling from this Board declaring that "local governments do not have authority to prohibit the operation of pit privies (outhouses) constructed prior to February 28, 1975." His position is without merit.

Pennington County opposes Ferebee's petition for declaratory ruling on jurisdictional, procedural, and substantive grounds. First, the petition submitted by Ferebee is not proper for a declaratory ruling for multiple reasons: Ferebee failed to submit a factual situation; Ferebee raises the issue of preemption, which is a matter of legislative intent for a court of law to decide; and Ferebee failed to give proper notice. Second, the South Dakota Legislature gave counties the authority to regulate and prevent waste in water; regulate and compel the cleansing, abatement, and removal of any sewer, cesspool, and any unwholesome or nauseous thing or place; and declare and abate public nuisances. The Legislature delegated authority to the South

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<sup>1</sup> ARSD 74:53:01:18 was enacted in 1985.

Dakota Water Management Board to establish minimum requirements for the treatment of wastes. It did not prohibit or limit a locality's power to regulate the treatment of waste in water. Additionally, the State has not wholly occupied the field of on-site wastewater systems and water pollution regulation to the exclusion of any local regulation. Third, Pennington County has validly exercised its authority to protect water resources and public health by prohibiting outhouses of any age. Finally, Ferebee's petition is an improper collateral attack against Ferebee's Pennington County Zoning Ordinance violation. Therefore, the County urges the Board to either take no action on Ferebee's petition or declare that local governments can regulate outhouses (pit privies) built prior to February 28, 1975.

#### JURISDICTION OF WATER MANAGEMENT BOARD

Ferebee has not submitted a factual situation as required by ARSD 74:02:01:46. Rather, he requests a blanket ruling declaring that "ARSD 74:53:01:18 [is] the exclusive province of the State of South Dakota" and that "local governments do not have authority to prohibit the operation of pit privies (outhouses) constructed prior to February 28, 1975." ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order *pertaining to a submitted factual situation within the board's jurisdiction.*" (Emphasis added.) Therefore, without a submitted factual situation, no declaratory ruling should be made.

Furthermore, this Board does not have authority to strike down local ordinances. SDCL 1-26-15 allows administrative agencies to issue declaratory rulings "as to the applicability of any statutory provision or of any rule or order of the agency." Determining whether state laws occupy the field and preempt localities from regulating cesspools and outhouses is a question of

legislative intent for a court of law rather than this Board. *See State ex rel. Jackley v. City of Colman*, 2010 S.D. 81, ¶¶ 9-11, 790 N.W.2d 491, 494.

Additionally, Ferebee's petition was not properly noticed. Pursuant to ARSD 74:02:01:48,<sup>2</sup> Ferebee should have served a copy of the petition on Pennington County because the County's pecuniary interests<sup>3</sup> would be directly and immediately affected by the requested declaratory ruling.

#### COUNTY AUTHORITY TO REGULATE OUTHOUSES OF ANY AGE

The South Dakota Legislature gave counties the ability to regulate waste in water, public nuisances, sewers, cesspools, and unwholesome things and did not limit its delegation of authority to systems of a certain date. Ferebee erroneously argues that ARSD chapter 74:53:01 governing on-site wastewater systems limits or prohibits regulation by counties or municipalities. The enabling statute responsible for most of the administrative rules in chapter 74:53:01 regarding individual and small on-site wastewater systems, SDCL 34A-2-20, provides that, "[t]he board shall establish *minimum requirements* for the treatment of wastes." (Emphasis added.) The language in this statute is clear, certain, and unambiguous. "When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and [a] [c]ourt's only function is to declare the meaning of the statute as clearly expressed." *Paul Nelson Farm v. S.D. Dep't of Revenue*, 2014 S.D. 31, ¶ 10, 847 N.W.2d 550, 554. The Legislature delegated

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<sup>2</sup> ARSD 74:02:01:48 provides:

The petitioner shall serve a copy of the petition upon all known persons whose pecuniary interests would be directly and immediately affected by a declaratory ruling on the petition. Proof of such service shall be filed with the board with the petition. All such parties shall be notified by the chief engineer at least 15 days before the petition is scheduled to be heard. In addition, the petitioner shall publish a notice of hearing describing the contents of the petition pursuant to SDCL 46-2A-4(1) to 46-2A-4(10), as applicable, and SDCL 1-26-17.

<sup>3</sup> Pennington County's pecuniary interests are directly and immediately affected by the costs of the necessary abatement of public nuisances and clean-up of contaminated soils. See discussion regarding outhouses and public nuisances below.

authority to the South Dakota Water Management Board to establish minimum requirements. It did not prohibit local governments from passing ordinances to regulate the treatment of wastes. And it did not delegate authority to the Board to prohibit local governments from passing ordinances to regulate the treatment of wastes. Furthermore, the language in ARSD 74:53:01:18 is also clear, certain, and unambiguous. It prohibits the “operation of a cesspool or a pit privy constructed after February 28, 1975.” It does not prohibit a local government from passing an ordinance that bans an outhouse built in 1960. Thus, the administrative rules are minimums and do not preclude Pennington County from regulating the operation of outhouses.

Ferebee argues that the State intended to occupy the field of on-site wastewater systems and water pollution regulation. “Field preemption by state law can be either express or implied.” *Law v. City of Sioux Falls*, 2011 S.D. 63, ¶ 10, 804 N.W.2d 428, 432. There is no express preemption here because there is no “specific legislative enactment reflecting the Legislature’s intent to preempt any local regulation.” *Id.* There is no implied preemption because the legislative scheme is not sufficiently comprehensive to infer that the Legislature “left no room for supplementary local regulation.” *Id.* The statutes and administrative rules explicitly state that they are merely minimum requirements. Localities could easily add more requirements to protect their water supplies given the unique geography and soils of each city and county. The administrative rules generally concern the design, capacity, gravity, and elevation of on-site wastewater systems built after 1974. The rules do not cover topics such as septage pumping and inspection of operational systems because the rules are not comprehensive; they are minimum regulations.<sup>4</sup>

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<sup>4</sup> In a March 31, 2016 letter to Steven Pirner, the Secretary of the Department of Environment and Natural Resources (DENR), Ferebee inquired whether it was DENR’s “intent to exclusively occupy the field circumscribed by Administrative Rules chapter 74:53:01.” See attached Exhibit 1. Secretary Pirner replied to Ferebee’s inquiry in a May 3 letter, writing that DENR did not intend to exclusively occupy the field:

Looking to the entire statutory scheme regarding the regulation of waste in water, prevention of water pollution, and regulation of nuisances, it is clear that the South Dakota Legislature sought to allow both the State and local governments to regulate. The South Dakota Legislature granted county commissioners the authority to regulate and prevent waste in water; regulate and compel the cleansing, abatement, and removal of any sewer, cesspool, or unwholesome or nauseous thing or place; and declare and abate public nuisances.<sup>5</sup> SDCL 7-8-20; SDCL 7-8-33. The Legislature also gave counties the extremely broad authority to regulate the use of land and structures in order to promote health, safety, and welfare. SDCL 11-2-13.<sup>6</sup> This authority is not limited to systems, structures, or pollution of a certain date. ARSD 74:53:01:18 in no way prohibits localities from passing ordinances regulating cesspools and pit privies above and beyond their regulation by the State as set forth in this administrative rule.

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My informal position as Secretary of the Department, however, is that we do not intend to exclusively occupy this field. We are not aware of any law that would prohibit local governments from adopting [their] own requirements for the design, construction, or operation of septic systems within [their] jurisdiction as several have done for many years. While any ordinance adopted by a county may not be less stringent than a state requirement, the legislature has given broad authority to local governments in making land use decisions through their respective planning and zoning ordinances.

See attached Exhibit 2. Additional correspondence between Ferebee and Secretary Pirner is attached as Exhibit 3.

<sup>5</sup> The South Dakota Legislature also gave municipalities and townships unfettered authority to regulate wastewater systems and water pollution. See SDCL 8-2-9 (township power to regulate any privy, prevent pollution to any water supply, and prevent and abate nuisance); SDCL 9-12-17 (municipal power to prevent groundwater pollution); SDCL 9-29-13 (municipal power to prevent, abate, and remove nuisance); SDCL 9-32-1 (municipal power to promote health and suppress disease); SDCL 9-32-6 (municipal power to compel privy owner to cleanse, abate, or remove privy); SDCL 9-32-8 (municipal power to prevent pollution of water supply belonging to municipality or public water supply within one mile of municipality).

<sup>6</sup> SDCL 11-2-13 provides:

For the purpose of promoting health, safety, or the general welfare of the county the board may adopt a zoning ordinance to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, flood plain, or other purposes.

SDCL 7-8-20 addresses the general powers of county commissioners. Subsections 14 and 15 specifically grant county commissioners the power to regulate and prevent waste in water and compel the cleansing, abatement, or removal of any unwholesome or nauseous thing such as outhouses. SDCL 7-8-20 states in pertinent part:

In addition to others specified by law, the board of county commissioners shall have power: . . .

(14) To enact ordinances to regulate and prevent the placing of ashes, dirt, garbage or any offensive matter in any highway or public ground or in any body or stream of water within the county, but outside of an incorporated municipality or outside of the one mile limits of any incorporated municipality;

(15) To enact ordinances to regulate and compel the cleansing, abatement or removal of any sewer, cesspool or any unwholesome or nauseous thing or place[.]

Moreover, SDCL 7-8-33 allows county commissioners to declare and abate public nuisances:

*The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality. For purposes of this section only, the feeding, breeding, or raising of livestock or the operations of a livestock sales barn, is not presumed, by that fact alone, to be a nuisance.*

(Emphasis added.) Simply put, a nuisance is an act or omission which “endangers the comfort, repose, health, or safety of others.” SDCL 21-10-1. It is clear that an on-site wastewater system of any age may contaminate water and endanger the health of others. Water has no bounds, so contamination of water is felt widespread throughout a community and by many, many people. Furthermore, SDCL 34A-2-1 and 34A-2-21 specify that the pollution of the waters of the state

constitutes a public nuisance and may be abated as such.<sup>7</sup> A county also has an extremely broad power to regulate the use of land and structures in order to promote health, safety, and welfare – which in turn means on-site wastewater systems – pursuant to SDCL 11-2-13.

The South Dakota Supreme Court has reviewed statutes similar to the aforementioned statutes and has stated that they vest a local government “with the police power to preserve the public health and welfare and the proper disposition of sewage is essential to this public health and welfare.” *Ericksen v. City of Sioux Falls*, 70 S.D. 40, 50-53, 14 N.W.2d 89, 94-95 (1944). Furthermore, the local government “is necessarily invested with power to exercise its discretion, and the courts will not interfere with such action unless it appears to be unreasonable or arbitrary.” *Id.* at 53, 14 N.W.2d at 95.

#### PENNINGTON COUNTY’S REGULATION OF OUTHOUSES

Pennington County has chosen to exercise the powers given to it by the State by passing a resolution and an ordinance to protect drinking water resources, to promote clean water, and to protect public health and the environment. On April 15, 2008, the Board of Commissioners approved a Resolution for the Protection of Water Resources in Pennington County. The Board recognized that implementation of water protection programs to preserve and protect drinking water resources in Pennington County would avoid unnecessary costs in the future and protect the health, safety, and general welfare of the public. Due to the unique geology, the interconnection of ground and surface water, and increasing population in un-sewered areas of the Black Hills and surrounding areas, Pennington County has enacted sections of the

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<sup>7</sup> ARSD 74:53:01:06 provides in part that “[n]o on-site wastewater system, regardless of when constructed may cause a violation of any existing water quality standard [or] cause a health hazard.” (Emphasis added.) Even these minimum state regulations prohibit systems – of any age – that may cause water quality violations or health hazards. Pursuant to the aforementioned statutes, local governments clearly have the authority to determine what constitutes a health hazard. Pennington County has done so with regard to outhouses. Under Pennington County Zoning Ordinance section 204(J), outhouses are presumed to create an imminent danger to public health, safety, and welfare and are declared a nuisance, regardless of when the outhouse was built.

Pennington County Zoning Ordinance to address siting and function of on-site wastewater treatment systems.

Section 204(J) of the Pennington County Zoning Ordinance currently prohibits the operation of outhouses of any age. Under the Pennington County Zoning Ordinance: outhouses are considered malfunctioning or failing systems; are presumed to create an imminent danger to public health, safety, and welfare; and are declared a nuisance. The basic scientific rationale for this is that an outhouse permits raw sewage to go directly into the ground without being treated.<sup>8</sup> Once in the ground, the sewage may be very close to groundwater and contaminate it. Thus, Pennington County requires that outhouses be removed and a compliant on-site wastewater system be constructed to serve the structure that the outhouse had been serving.

#### IMPROPER COLLATERAL ATTACK

Ferebee's petition appears to be an improper collateral attack against Ferebee's Pennington County Zoning Ordinance violation that is currently being litigated in Seventh Judicial Circuit Magistrate Court Case No. 15-5543. Ferebee is currently charged with a violation of Pennington County Zoning Ordinance §§ 204(J)(2) and 514 pertaining to on-site wastewater treatment systems. In that case, it is alleged that Ferebee is operating an on-site wastewater treatment system without a permit. Ferebee has challenged the County's authority to enact an ordinance requiring owners of on-site wastewater treatment systems to obtain an

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<sup>8</sup> A typical on-site wastewater system has a septic tank and a drain field. The septic tank is made of a non-porous material and is completely contained except for the inlet and outlet pipes where the waste comes in and where the waste goes out into the drain field. The liquid effluent is partially treated when it leaves the septic tank and then receives the remainder of its needed treatment in the drain field. The scum and sludge, which contains the bad bacteria, viruses, soap, and grease, stays in the septic tank and does not make contact with the ground.

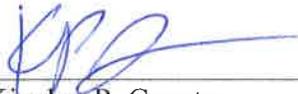
operating permit.<sup>9</sup> Thus far his legal arguments have been found to be without merit.<sup>10</sup>

However, the matter is still in litigation.

### CONCLUSION

For all the reasons set forth above, the County urges the Board to either take no action on Ferebee's petition or declare that local governments can regulate outhouses built prior to February 28, 1975 and that the State does not intend to exclusively occupy the field circumscribed by ARSD chapter 74:53:01.

Respectfully submitted this 3rd day of October, 2016.



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Kinsley P. Groote  
Pennington County Deputy State's Attorney  
130 Kansas City Street, Suite 300  
Rapid City, SD 57701  
(605) 394-2191

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<sup>9</sup> In his brief filed on December 15, 2015, Ferebee's first issue was: "Does a South Dakota county have the authority to pass an ordinance mandating 'operating permits' for on-site wastewater treatment systems?" See attached Exhibit 4 at 3. It appears that Ferebee is asking the South Dakota Water Management Board to rule that the State is exclusively occupying the field circumscribed by ARSD chapter 74:53:01 in order to prohibit Pennington County from regulating any on-site wastewater treatment systems, including Ferebee's own system, and to attempt to use such a ruling in the pending case against him for an ordinance violation.

<sup>10</sup> Judge Strawn determined that Pennington County had the statutory authority to enact Pennington County Zoning Ordinance section 204(J) in a memorandum decision filed on April 12, 2016. See attached Exhibit 5 at 5-6. Judge Strawn did not side with Ferebee's arguments.

STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

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IN THE MATTER OF GEORGE )  
FEREBEE'S PETITION FOR A )  
DECLARATORY RULING ) CERTIFICATE OF SERVICE  
REGARDING ARSD 74:53:01:18 )

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The undersigned hereby certifies that she served a true and correct copy of Pennington County's **Brief in Support of Pennington County's Petition in Opposition to Ferebee's Petition** on the individuals hereinafter next designated, all on the date shown below, by U.S. mail first-class, postage prepaid at their last known address, to-wit:

George Ferebee  
11495 Gillette Prairie Road  
Hill City, SD 57745

Eric E. Erickson  
Cutler Law Firm LLP  
P.O. Box 1400  
Sioux Falls, SD 57101

Jeanne Goodman  
Chief Engineer, Water Rights Program  
DENR, Foss Building  
523 E. Capitol Avenue  
Pierre, SD 57501

Wade Nyberg  
City of Rapid City  
300 Sixth Street  
Rapid City, SD 57701-2724

Ellie Bailey  
Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre, SD 57501-8501

Diane Best  
City of Sioux Falls  
P.O. Box 7402  
Sioux Falls, SD 57117-7402

Ann F. Mines Bailey  
Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre, SD 57501-8501

Kent Woodmansey  
DENR Feedlot Program  
Foss Building  
523 E. Capitol Avenue  
Pierre, SD 57501

Jim Hutmacher  
SD Water Mgmt Bd Chairman  
DENR, Foss Building  
523 E. Capitol Avenue  
Pierre, SD 57501

Matt Naasz  
Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre, SD 57501-8501

Dated this 3rd day of October, 2016.

A handwritten signature in blue ink, appearing to read 'KPG', is written above a horizontal line.

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Kinsley P. Groot  
Pennington County Deputy State's Attorney

RECEIVED

APR 4 - 2016

Dept. of Environment and  
Natural Resources  
Secretary's Office

11495 Gillette Prairie Rd  
Hill City, SD 57745  
March 31, 2016

SD DENR  
Joe Foss Building  
523 E. Capitol  
Pierre, SD 57501

Dear Secretary Pirner:

I write to suggest a dialogue regarding “declaratory rulings” as applied by your “agency” (Department). Even though the law (SDCL 1-26-15) requiring that each agency have a rule for the filing and prompt disposition of petitions for declaratory rulings has been around for a number of years, I only recently became aware of such a redress mechanism.

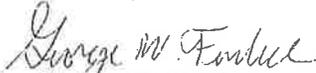
On March 9, 2016, the South Dakota Supreme Court ruled on a petition to the Department of Labor for a declaratory ruling regarding the application of a statute. In its opinion, the Court wrote rather extensively, addressing the applicable statutes and relevant case law. As I read and studied the Court’s *opinion*, I came to the realization that the *declaratory ruling* process enacted by our Legislature might just be the appropriate methodology to resolve the nagging controversy regarding the issue(s) of *water quality* as envisioned by Pennington County. *In Re: Petition for Declaratory Ruling*, 2016 S.D. 21

After reading and studying the Court’s *opinion*, I made several calls to Pierre, searching for guidance on how to proceed. For example, I was trying to find the *rule* for the filing of a petition with your agency (Department). I talked with Kim Smith and Ron Duvall of your Department. Ron Duvall suggested that before filing a petition, I might want to write a letter to you or Mr. Woodmansee to broach the issue.

Mr. Secretary, there are numerous issues and sub issues and sub sub issues involving *water quality* and Pennington County, however, I believe that resolution of one critical issue will serve to moot many other issues. The critical issue is, as set forth by the South Dakota Supreme Court: “And, third, state law [rule] may occupy a particular field to the exclusion of all local regulation.” *Rantapaa v. Black Hills Chair Lift Co., v. Curtis Allen*, 2001 S.D. 111, ¶ 23. My specific inquiry to the South Dakota Department of Environment and Natural Resources involves chapter 74:53:01 of your Administrative Rules.

For full disclosure; my efforts in this matter are for both me and the many constituents of my county commission district. Recognizing that your agency has a multitude of *rules* which may have differing implementation arrangements. our initial inquiry is limited to: Is it your intent to exclusively *occupy* the field circumscribed by Administrative Rules chapter 74:53:01?

Sincerely,

  
George W. Ferebee

EXHIBIT

PENGAD 800-631-6363



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

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

denr.sd.gov

May 3, 2016

George Ferebee  
11495 Gillette Prairie Road  
Hill City, SD 57745

Dear Mr. Ferebee:

Thank you for your letter regarding the Department of Environment and Natural Resources' implementation of Administrative Rules Chapter 74:53:01. You ask in your letter whether it is the department's intent to exclusively occupy the field circumscribed by this chapter.

South Dakota Codified Law (SDCL) § 34A-2-93 gives the Water Management Board the authority to promulgate rules to establish the design and installation requirements for on-site wastewater systems. The Water Management Board has used this authority to adopt Chapter 74:53:01, Individual and Small On-site Wastewater Systems. This chapter sets out the minimum design and installation requirements for on-site systems built throughout the state. You can request an official declaratory ruling from the Water Management Board pursuant to South Dakota Administrative Rule 74:02:01:46.

My informal position as Secretary of the Department, however, is that we do not intend to exclusively occupy this field. We are not aware of any law that would prohibit local governments from adopting its own requirements for the design, construction, or operation of septic systems within its jurisdiction as several have done for many years. While any ordinance adopted by a county may not be less stringent than a state requirement, the legislature has given broad authority to local governments in making land use decisions through their respective planning and zoning ordinances.

Thank you again for your letter.

Sincerely,

Steven M. Pirner, P.E.  
Secretary

cc: Ellie Bailey, Assistant Attorney General, Office of Attorney General  
Matt Konenkamp, Policy Advisor, Governor's Office

PENGAD 800-681-6888

EXHIBIT

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RECEIVED

MAY 4 - 2016

Dept. of Environment and  
Natural Resources  
Secretary's Office

11495 Gillette Prairie Rd  
Hill City, SD 57745  
May 2, 2016

SD DENR  
Joe Foss Building  
523 E. Capitol  
Pierre, SD 57501

RE: Declaratory rulings

Dear Secretary Pirner:

This letter is a follow-up to my March 31, 2016, letter to you. It is my understanding that my March 31<sup>st</sup> letter arrived in Pierre and has been discussed.

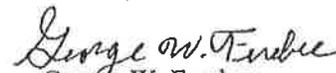
Seems to me that since I narrowed the focus of the initial inquiry to one rather straightforward question, your response should have arrived in Hill City by now. Please recall the initial inquiry was and still is: Is it your intent to exclusively *occupy* the field circumscribed by Administrative Rules chapter 74:53:01?

Mr. Secretary, if your response to my March 31<sup>st</sup> letter is in want of more specificity and/or particularity, I will provide a petition for "declaratory ruling," relying on ARSD 74:02:01:46 for guidance. Such petition is attached.

Maybe, just maybe, a petition for a "declaratory ruling," on what seems to be a rather simple, straightforward matter will be a catalyst to cause breakup of whatever logjam might exist in responding to my March 31<sup>st</sup>. The *petition*: Seasoned outhouses (pit privies) or not is the question.

Once again, Mr. Secretary, my efforts in this matter are for both me and the many constituents of my county commission district. Please be reminded of the South Dakota Supreme Court's words from *Rantapaa v. Black Hills Chair Lift Co., v. Curtis Allen*, 2001 S.D. 111, ¶ 23. "And, third, state law [rule] may occupy a particular field to the exclusion of all local regulation."

Sincerely,

  
George W. Ferebee

cc: South Dakota Attorney General Jackley

Atch: Petition for Declaratory Ruling

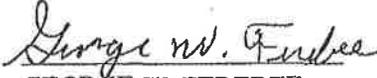
PENGAD 800-631-6988

EXHIBIT

3

**PETITION**  
**FOR**  
**DECLARATORY RULING**

- (1) The authority by which the petition is presented: SDCL 1-26-15 & ARSD 74:02:01:46
- (2) The name of person submitting the petition: George W. Ferebee
- (3) The requested action and reasons for the action: Declare ARSD 74:53:01:18 the exclusive province of the State of South Dakota. Put another way, declare that local governments do not have authority to prohibit the operation of pit privies (outhouses) constructed prior to February 28, 1975. Reason for *Petition*: To eliminate the existing controversy.

  
GEORGE W. FEREBEE

RECEIVED

MAY 11 2016

Dept. of Environment and  
Natural Resources  
Secretary's Office

11495 Gillette Prairie Rd  
Hill City, SD 57745  
May 9, 2016

SD DENR  
Joe Foss Building  
523 E. Capitol  
Pierre, SD 57501

Dear Secretary Pimer:

Thank you so very much for your May 3<sup>rd</sup> letter. Quite impressive. Thank you for identifying the applicable South Dakota Administrative Rule for requesting a *declaratory ruling*. Also, thanks for providing "your" *position* on *occupying* the field circumscribed by ARSD 74:53:01.

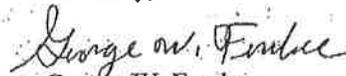
In your letter you point out that the South Dakota Water Management Board promulgated rules regulating "Individual and Small On-Site Wastewater Systems" (ARSD chapter 74:53:01) under authority granted by the South Dakota Legislature in SDCL 34A-2-93. In your next paragraph you state: "We [presumably you and your staff] are not aware of any law that would prohibit local governments from adopting its [sic] own requirements for the design, construction, or operation of septic systems within its [sic] jurisdiction ... ." You continue with a pronouncement (declaration of sorts) regarding ordinance stringency.

First question (request): Are you *aware* of any *law* that *allows* local governments to *adopt* requirements for the design, construction, or *operation* of septic systems within that government's jurisdiction? If so, please provide, with particularity. Second question (request): Will you please share with me, which legislative enactments, if any, and/or promulgated provisions, if any, that give local units of government the authority to regulate "Individual and Small On-Site Wastewater Systems?" My research thus far on both questions, which are essentially the same, has yielded an empty hand. Looking forward to your specificity.

I am looking forward to your information for at least two reasons: (1) I can discontinue my search, and (2) We (the involved government and South Dakota citizens) can move on to other relevant matters. Identifying the appropriate authority(ies), with specificity, just might bring an end to some of the uncertainty and, of course, some of the misperceptions.

Back to "ordinance" *stringency*. For now, I intend to hold on that matter. Seems to me that we should first reconcile our apparent differences regarding regulatory authority as suggested above. In other words, let's nail down the authority for "Individual and Small On-Site Wastewater Systems."

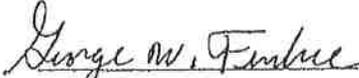
Sincerely,

  
George W. Ferebee

cc: South Dakota Attorney General Jackley

**PETITION**  
**FOR**  
**DECLARATORY RULING**

- (1) The authority by which the petition is presented: SDCL 1-26-15 & ARSD 74:02:01:46
- (2) The name of person submitting the petition: George W. Ferebee
- (3) The requested action and reasons for the action: Declare that local units of government (cities and counties) are bound by ARSD 74:53:01:04. Reason for *Petition*: To eliminate the existing controversy.

  
GEORGE W. FEREBEE  
11495 Gillette Prairie Rd  
Hill City, SD 57745  
(605) 574-2637



**DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES**

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

[denr.sd.gov](http://denr.sd.gov)

May 26, 2016

George Ferebee  
11495 Gillette Prairie Road  
Hill City, SD 57745

Dear Mr. Ferebee:

Thank you for your May 2, 2016, letter providing DENR with a petition for a declaratory ruling. We also received your May 9, 2016, letter regarding local government's authority to regulate septic systems and a second petition for another declaratory ruling.

In your letters, you asked several questions regarding the authority of local governments. Generally, South Dakota Codified Laws, Title 11, addresses planning and zoning. Other areas of the code may also contain additional statutes regarding zoning.

We are processing your two petitions for a declaratory ruling by the Water Management Board on your two questions. Your first petition is whether local governments have authority to prohibit the operation of pit privies constructed prior to February 28, 1975. Your second petition is to declare local units of government are bound by ARSD 74:53:01:04. We have tentatively scheduled two hearings to allow the Board to consider your two separate declaratory ruling petitions for the July 6 – 7 meeting in Pierre.

My staff is drafting the required public notices for your two separate petitions as required by administrative rule 74:02:01:48. To ensure your petitions may be heard at the July board meeting, the notices must appear in the required newspapers by mid-June to meet the necessary timelines established in law. Since your declaratory ruling petitions have ramifications beyond Pennington County, the public notice will need to be published in at least three daily newspapers located in Aberdeen, Rapid City, and Sioux Falls to give others throughout South Dakota the opportunity to be part of the hearing. Also, since your petitions are separate issues, we have determined a notice is required for each petition.

Administrative rule 74:02:01:48 requires the petitioner to publish a notice of hearing describing the contents of the petition. Therefore, while DENR staff will draft the public notices for your two petitions to meet all state requirements for the notices, you will be responsible for the cost of all publications. In early June, my staff will provide you with the notices with instructions on which newspapers to contact to authorize publication and arrange for payment. If the notices are not adequately published, the hearings cannot be held.

If you have any questions about the board hearing in July, please contact Eric Gronlund at (605)773-3352.

Thank you again for your letters.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Pirner", with a horizontal line extending to the right.

Steven M. Pirner, P.E.  
Secretary

cc: Ellie Bailey, Office of Attorney General  
Matt Konenkamp, Governor's Office

STATE OF SOUTH DAKOTA	)	IN MAGISTRATE COURT
	)SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
	)	
PENNINGTON COUNTY,	)	COURT NO. MAG 15-5543
	)	
Plaintiff,	)	<b>BRIEF IN SUPPORT</b>
	)	<b>OF CONTENTION THAT</b>
vs.	)	<b>PENNINGTON COUNTY ORDINANCE</b>
	)	<b>#34 SUBSUBSECTION 204J.2</b>
GEORGE W. FEREBEE,	)	<b>IS INVALID/UNCONSTITUTIONAL</b>
	)	
Defendant.	)	

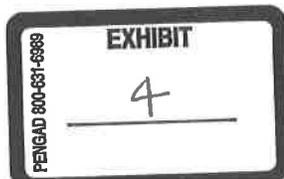
Comes now the Defendant, George W. Ferebee, and offers the following brief in support of his contention that Pennington County ordinance #34 subsection 204J.2 is invalid/unconstitutional.

**Preliminary Matters**

1. To begin with, my appreciation to the court for so quickly grasping the real issue in this matter—individual liberty and private property rights versus twenty bucks. My sincere appreciation.

2. Rest assured, this matter is not about me, George Ferebee. Rather, this matter is about the heavy hand of government. Pennington County’s (a.k.a. Penalty County) heavy handedness stands in sharp contrast to John Locke’s view of government’s role in the lives of its citizenry. His writings suggest a heartfelt abhorrence to *arbitrary* and *capricious* restrictions on the lives of individual citizens. Anecdotally, a friend told me that during one encounter with a previous Pennington County Planning and Zoning Director he was told that he could not do such and such because the *Ordinance* did not say he could. Really!

3. For me personally, as the Rapid City Journal seems to take a measure of delight in pointing out, I have been around seventy-five (75) years. Why then this? Simple. Obligation to leave future generations with at least some semblance of the freedom and liberty those of us



clear, ostensibly fear of drinking water contamination. The only certainty was, and *still is*, the lack of any showing that “septic systems” have caused or are causing any problem with Rapid City’s drinking water. [Minutes of the drinking water committee’s meeting are available at city hall in Rapid City, the court is hereby asked to take judicial notice thereof.]

Several of us rural Pennington County residents became aware of the committee’s meetings, and Pennington County’s involvement, and began a counteroffensive to reverse the committee’s direction, which was government imposed restrictions. We began in May of 2002 and were successful by that December.

Six (6) years later the group (affectionately called the potty patrol) had regrouped, reloaded, and launched another attack on *septic systems*. Since they controlled the levers of power, we were limited to guerrilla type tactics. Took them almost two years, but they prevailed.

### **ISSUES PRESENTED**

#### **1. DOES A SOUTH DAKOTA COUNTY HAVE THE AUTHORITY TO PASS AN ORDINANCE MANDATING “OPERATING PERMITS” FOR ON-SITE WASTEWATER TREATMENT SYSTEMS?**

The South Dakota Supreme Court has noted more than once that “a county in this state is a creature of statute and has no inherent authority. It has only such powers as are expressly conferred upon it by statute and such as may be reasonably implied from those expressly granted.” Even scolded Pennington County twenty (20) years ago. *Pennington County v. Moore*, 525 N.W. 2d 257, 258 (S.D. 1994) Nevertheless, the Pennington County Board of Commissioners ignored citizens’ admonitions and enacted an “operating permit” ordinance five (5) years ago, July 10, 2010.

Similarly, cities of South Dakota have also been instructed by the South Dakota Supreme Court. Even though cities are beneficiaries of considerably more expansive statutory grants of power than counties, limits remain. “Municipalities ‘possess only those powers conferred upon



STATE OF SOUTH DAKOTA

IN MAGISTRATE COURT

COUNTY OF PENNINGTON

SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,  Plaintiff,  vs.  GEORGE FEREBEE,  Defendant.	File No. MAG 15-5543  <b>MEMORANDUM OF DECISION</b>
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### PROCEDURAL POSTURE

This matter came on for hearing with an initial appearance on November 16, 2015 at 2:30 p.m., and a status hearing on January 25, 2016 at 2:30 p.m., the State and Defendant appeared at both hearings. Defendant was advised of his constitutional and statutory rights as well as the nature of the charge and the maximum fines and penalties. At the Initial Appearance, and among other petitions, the Defendant requested the Court consider the constitutionality of Pennington County Zoning Ordinance Section 204(J)(2) and 514. This Court granted a briefing of the issues by the parties, setting filing dates for both sides. On November 24<sup>th</sup>, 2015 Defendant filed his answer and counterclaim which was followed by the State's Reply to Counterclaim and Objections to Answer and Counterclaim on December 4, 2015. On December 15, 2015 the Defendant filed his Brief in Support of Contention that Pennington County Ordinance #34 Subsection 204J.2 is Invalid/Unconstitutional. The State filed its Reply Brief on January 6, 2016.

A series of mail and email correspondences occurred wherein Defendant requested an opportunity to respond to the State's Reply Brief. Both parties were reminded of the necessity to have formal pleadings filed in the future regarding motions and requests. During this time, Defendant requested an opportunity to respond to the State's Reply. The State did not object; however, this Court was concerned regarding timing of this case and the likelihood of a protracted briefing schedule. To alleviate this concern, the Defendant agreed to file a Waiver for Speedy Trial. At the Status hearing, held on January 25, 2016, the State filed its proposed Scheduling Order and Defendant submitted his Speedy Trial Waiver. On February 4, 2016, the State filed its Motion for Determination that Defendant's Counterclaim and Answer are Improper and Motion to Amend Reply. On February 8, 2016, Defendant filed his Response to Pennington County's Reply Brief to Defendant's Brief in Support of Contention that Pennington County Ordinance #34 Subsection 204J.2 is Invalid/Unconstitutional. On February 16, 2016, Defendant



Class 1 misdemeanor. In addition to a jail sentence authorized by § 22-6-2, a Class 1 misdemeanor imposed by this chapter is subject to a criminal fine not to exceed ten thousand dollars per day of violation. The violator is also subject to a civil penalty not to exceed ten thousand dollars per day of violation, or for damages to the environment of this state, or both.

The plain meaning of these statutes is unambiguous. A person (“individual”), who violates 34A-2-21 or 28 is subject to criminal prosecution. 34A-2-21 and 28 are general laws of this State and a violation of either of these statutes is a criminal matter. Thus, under the principles of *sui generis*, Pennington County, through its ordinances, may enforce its ordinance criminally. Therefore, this Court issues its declaratory judgment holding that the enforcement of Pennington County Ordinance 204(J) may be enforced criminally.

#### *Statutory Authority to Enact 204(J)*

Defendant alluded to the Constitutionality regarding the enactment of 204(J). This Court reviewed the ordinance to ascertain its legislative authority. In this case Pennington County procured its authority from two separate sources. First, 204(J)(C) obtains its authority from “Title 7 of the South Dakota Codified Laws.” Defendant argues that since this section only cites “Title 7” and does not use the specific word “statute” therefore the ordinance lacks its statutory authority as required under case law.(see Defendant’s Brief in Support of Contention..... pp.7-8; (citing Pennington County v. Moore, 525 N.W.2d 257, 258 (SD 1994). Defendant misconstrues the position of the Supreme Court in *Moore*; *Moore* stands for the proposition that a county may not enact an ordinance unless it is draws its authority from statute. The Supreme Court did not specifically state the ordinance must specifically use the word, “statute,” or have an exact citation back to a specific statute. This Court finds that the citation back to Title 7 is sufficient to meet the requirements that the ordinance attains its authority from statute. Title 7, after all, is the title of the South Dakota Codified Law that contains statutes specifically granting counties with legislative authority to enact ordinances at the county level.

#### *What powers are granted to Counties in Title 7*

Title 7, specifically SDCL 7-18A-2, not only grants counties the power to “enact, amend or repeal ordinances, but also creates a categorization of the penalties of violations of ordinances.

#### **7-18A-2 Authority to enact, amend, and repeal ordinances and resolutions- Penalties for violations.**

Each county may enact, amend, and repeal such ordinances and resolutions as may be proper and necessary to carry into effect the powers

granted to it by law and provide for the enforcement of each violation of any ordinance by means of any or all of the following:

- (1) A fine not to exceed the fine established by subdivision 22-6-2(2) for each violation, or by imprisonment for a period not to exceed thirty days for each violation, or by both the fine and imprisonment, or
- (2) An action for civil injunctive relief, pursuant to chapter 21-8.

This statute authorizes counties to “enact, amend, and repeal . . . ordinances and resolutions.” The statute also allows the counties to enforce using “any or all” of the enforcement powers granted under subsections (1) and (2).

In reading the plain meaning of this statute, an ordinance may use any or all of the enforcement powers granted in subsections (1) and (2) of SDCL 7-18A-2. Section 514 of the Pennington County Ordinances, deriving its authority from 204(C), (which in turn attains its authority from SDCL 7-18A-2), grants the County enforcement power to charge for a violation of 204(J) including a fine not exceeding \$500.00 for each violation or by imprisonment for a period not exceeding 30 days for each violation, or both fine and imprisonment.

SDCL 7-18A-2 is reconcilable with the principles of *sui generis*. If the violation of an ordinance would typically be considered a crime under the general laws of this State, then the nature of the charge and its proceedings would comport with the enforcement powers of subsection (1) of SDCL 7-18A-2. If on the other hand, the charge would not typically be considered a crime under the general laws of this State, then the enforcement of the ordinance would be subject to the civil injunctive relief provided in SDCL 7-18A-2(2). The next step is to analyze the enforcement power exercised in Pennington County’s Ordinances Section §514. That enforcement ordinance reads as follows:

#### **SECTION 514 – VIOLATIONS AND PENALTIES**

A. In addition to all other remedies available to the County to prevent, correct, or abate Ordinance violations, a violation of these Zoning Ordinances is also punishable by a fine and/or imprisonment, pursuant to SDCL 7-18A-2, as provided below:

1. A fine not to exceed \$500.00 for each violation or by imprisonment for a period not to exceed 30 days for each violation, or by both the fine and imprisonment. Each day the violation continues shall constitute a separate violation. The date of the first violation shall be the date upon which the property owner first received notice of the violation.

Department no later than 30 days after actual receipt of the Notice of Non-Compliance by the owner or after the date of the Notice of Non-Compliance is mailed by the Planning Department, whichever is sooner. The Notice of Decision from the Planning Director, on that appeal, shall be mailed within 30 days after the receipt by the Planning Department of a timely appeal.

In his Brief, Defendant did not argue he had appealed the decision in writing 30 days after actual receipt of the Notice of Non-Compliance. As a result, this Court will not consider the argument at this time.

**ISSUE 6. WHETHER DEFENDANT'S MOTION FOR RULE 11 SANCTIONS SHOULD BE GRANTED.**

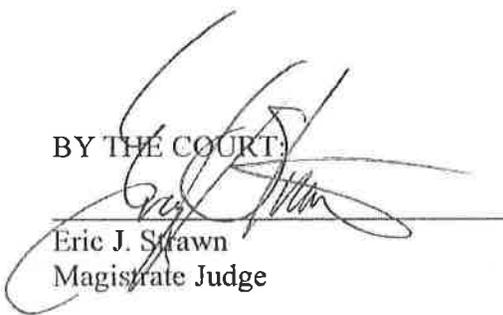
This Court received several supplementary pleadings from Defendant while this Opinion was drafted and as a result, the State has an opportunity to respond to the latest Motion which the Court received this past Monday, March 21, 2016.

**CONCLUSIONS**

After considering all of the Briefs and Reply briefs of the parties, this Court concludes this matter shall proceed as a criminal matter with the Defendant being afforded all the protections in criminal proceedings. Pursuant to this Memorandum Opinion, Defendant's written answer will be deemed a plea of not guilty and Defendant is precluded from prosecuting his Counterclaims. Finally, this Court will schedule a Jury Trial as requested by Defendant.

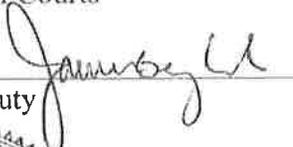
Dated this 22<sup>nd</sup> day of March, 2016.

BY THE COURT:

  
Eric J. Strawn  
Magistrate Judge

ATTEST:

  
Clerk of Courts

By:   
Deputy



**REPORT TO THE CHIEF ENGINEER  
ON  
WATER PERMIT APPLICATION NO. 8232-3  
BARRY & ROBIN VCULEK  
AUGUST 8, 2016**

Water Permit Application No 8232-2 proposes to increase the diversion rate authority, add a diversion point, change the location of the acreage authorized for irrigation and clarify the location of the diversion points for an existing irrigation project. Water Right No. 3656-3 authorizes the irrigation of 380 acres, using three wells completed into the McPherson management unit of the Spring Creek aquifer, at a maximum diversion rate of 3.00 cubic feet of water per second (cfs). An inspection of Water Right No. 3656-3, conducted pursuant to SDCL 46-5-3, identified four discrepancies between what the water right authorized and what was developed. The inspection identified: (a) the system was capable of diverting water at a rate of 5.79 cfs, (2.79 cfs greater than the authorized rate); (b) the system was capable of diverting water from four wells (one additional well than was authorized); (c) the wells are in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$  NE $\frac{1}{4}$  and the center of the SW $\frac{1}{4}$  Section 22, T127N-R71W; (d) the irrigated acreage is located in the W $\frac{1}{2}$ , NE $\frac{1}{4}$ , NW $\frac{1}{4}$ SE $\frac{1}{4}$  Section 22, T127N-R71W. This application, if approved and Water Right No. 3656-3 will authorize a total diversion rate of 5.79 cfs for irrigation of 380 acres. The applicant is requesting a diversion rate greater than the statutory limit of 1 cfs per 70 acres.

**AQUIFER: SPRING CREEK: MCPHERSON (SC:M)**

**GEOLOGY AND AQUIFER CHARACTERISTICS:**

The McPherson management unit of the Spring Creek aquifer consists of sand and gravel deposited as glacial outwash probably "during the last episodes of melting of the continental ice sheet" (Hamilton, 1974). The deposition of the outwash was limited to channels between large blocks of ice and till (Hamilton, 1974). The McPherson management unit of the Spring Creek aquifer underlies approximately 101,200 acres of McPherson County and contains an estimated 307,000 acre-feet of recoverable water in storage in the County (Hedges and others, 1982). The maximum thickness of the Spring Creek aquifer is estimated to be 85 feet. However, the average thickness is about 30 feet (Hamilton, 1982). Completion reports on file for three of the irrigation wells associated with this project identify the top of the aquifer ranging from 28 to 42 feet below grade and 66 feet, 54 feet and 29 feet of saturated thickness, respectively (Water Rights, 2016b and Water Rights 2016c). The aquifer is under confined conditions in the project area with a potentiometric surface less than 20 feet below grade. The transmissivity of the Spring Creek: McPherson was estimated to range from 49,110 to 119,835 gal/day/ft based on the specific capacities of seven irrigation wells completed into the aquifer (Buhler, 2012).

This application does not propose an increase to the acreage authorized for irrigation by Water Right No. 3656-3, therefore the appropriation from the Spring Creek: McPherson aquifer will not increase with approval of this application. Water Permit No. 8232-2, if approved, will authorize the current, as built, irrigation project. A May 7, 2016, inspection of Water Right No. 3656-3 identified an irrigation project consisting of four wells, capable of diverting 5.79 cfs, delivering water through four center pivot irrigations systems (M. Rath, personal communication, August

10, 2016). A July 1, 1980, inspection of Water Right No. 3656-3 identified a project consisting of three wells, capable of diverting 3.00 cfs, delivering water through two towable center pivot irrigation systems (Water Rights, 1980). Although the number of irrigated acres has remained the same (380 acres), the project, as constructed is capable of using more water than could be used in 1980 since all of the acreage can now be irrigated simultaneously.

Water use reported under Water Right No. 3656-3 is shown in Table 1. Based on the reported diversion rate (gpm), annual rate (Ac-ft/yr), and application rate (in/yr), it appears that the diversion rates and application rate increased for the irrigation project between 2001 and 2002. The average annual water use reported under this appropriation was 107.6 ac-ft/yr for 1980-2001, while the average annual water use was 390.5 ac-ft/yr for 2002-2015 (Water Rights, 1980-2016a).

Table 1. Water use reported under Water Right No. 3656-3 (Water Rights, 1980-2016b)

Year	Acres	gpm	days	hours	Ac-ft/yr	in/yr
2015	380	2800	36	24	445.46	14.067
2014	380	2500	21	24	232.01	7.326565
2013	380	2500	41	24	452.97	14.30425
2012 Crop <sub>1</sub>	280	1600	47	24	332.32	14.24244
2012 Crop <sub>2</sub>	100	1200	28	24	148.49	17.81821
2011	380	2600	33	24	379.17	11.9737
2010	380	2400	36	24	381.82	12.05743
2009 Crop <sub>1</sub>	100	600	25	24	66.29	7.954556
2009 Crop <sub>2</sub>	260	1600	15	24	106.06	4.895111
2008 Crop <sub>1</sub>	200	1200	56	24	296.97	17.81821
2008 Crop <sub>2</sub>	115	700	34	24	105.18	10.97498
2008 Crop <sub>3</sub>	65	400	27	24	47.73	8.8112
2007 Crop <sub>1</sub>	264	1600	49	24	346.47	15.74841
2007 Crop <sub>2</sub>	116	600	44	24	116.67	12.06898
2006	NA	NA	NA	NA	NA	NA
2005	330	2250	33	24	328.13	11.93183
2004	342	2200	35	24	340.28	11.93959
2003	342	2200	43	24	418.06	14.66864
2002	337	2000	47	24	415.40	14.79185
2001	326	1350	35	24	208.81	7.686151
2000 Crop <sub>1</sub>	50	450	25	10	20.71	4.971597
2000 Crop <sub>2</sub>	260	800	30	15	66.29	3.059445
1999 Crop <sub>1</sub>	130	600	10	10	11.05	1.019815
1999 Crop <sub>2</sub>	130	600	15	12	19.89	1.835667
1999 Crop <sub>3</sub>	130	600	10	20	22.10	2.03963
1999 Crop <sub>4</sub>	40	450	10	20	16.57	4.971597
1998 Crop <sub>1</sub>	135	750	22	24	72.92	6.48149
1998 Crop <sub>2</sub>	30	450	12	24	23.86	9.545467
1997 Crop <sub>1</sub>	135	700	20	10	25.78	2.291436
1997 Crop <sub>2</sub>	135	700	15	15	29.00	2.577865
1997 Crop <sub>3</sub>	60	450	20	15	24.86	4.971597

#### SDCL 46-2A-9

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

proposed use is a beneficial use and in the public interest. This report will address water availability and existing rights issues only.

**WATER AVAILABILITY:**

Approval of Water Permit Application No. 8232-3 will authorize an additional withdrawal from the Spring Creek: McPherson aquifer. The average amount of water reportedly pumped annually by this irrigation project increased by approximately 283 ac-ft/yr since 2001, when it appears the system changes that are to be authorized by this permit were put in place. The probability of 283 acre-feet of unappropriated water available for appropriation can be evaluated by considering SDCL 46-6-3.1 which 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.”

If the source of the water is older or lower than the Greenhorn formation and a water distribution system has applied for a permit, the Board need not consider the recharge/withdrawal issue. In the case of Application No. 8232-3, the Spring Creek: McPherson aquifer is not older or lower than the Greenhorn formation, and a water distribution system is not involved, therefore recharge versus withdrawals must be considered.

**Recharge versus Withdrawals:**

*Recharge:*

Recharge to the Spring Creek: McPherson aquifer which occurs through infiltration of precipitation falling on the aquifer surface has not been quantified. However, the Spring Creek: McPherson aquifer is considered a “non-buried aquifer” in the “surface system” by Hedges and others (1985). Other non-buried aquifers in the surface system in this area include the Bowdle aquifer and the Selby aquifer. Recharge rates determined for these aquifers using observation well analysis is estimated to be 2 inches/year for the Selby aquifer and between 2 and 2.7 in/yr in the Bowdle aquifer (Hedges and others, 1985). Based on recharge rates for these similar aquifers, a recharge rate of 2 inches/year is assumed for the McPherson management unit of the Spring Creek aquifer. The average annual recharge for the Spring Creek: McPherson would be approximately 16,850 acre-feet/yr.

*Withdrawals:*

There are eight existing water rights/permits appropriating water from the Spring Creek: McPherson, they are shown on Figure 1 and in Table 1 (Water Rights, 2016b).

Table 1. Water Rights/Permits appropriating water from the McPherson management unit of the Spring Creek aquifer (Water Rights, 2016b).

PERMIT NO	NAME	PRIORITY DATE	STATUS	USE	CFS	ACRES
3012-3	MARVIN & MARK MORLOCK	09/13/1976	LC	IRR	2	211
3656-3	BARRY & ROBIN VCULEK	03/08/1976	LC	IRR	3	380
3925A-3	JEFF NEUHARTH	04/27/1977	LC	IRR	2.28	160
5706-3	BORDER CLUB	08/31/1992	LC	COM	0.01	0
6258-3	BARRY & ROBIN VCULEK	04/12/2001	PE	IRR	12	940
7304-3	MICHAEL C NEUHARTH	01/03/2012	LC	IRR	1.78	136
7323-3	BARRY & ROBIN VCULEK	02/15/2012	PE	IRR	3.56	264
7455-3	DAN METTLER	09/26/2012	PE	IRR	1.78	160
8052-3	DENNIS WOLFF	09/24/2014	PE	IRR	2.2	157

Water use from the Spring Creek: McPherson is principally for irrigation. A summary of the reported pumping from the aquifer for irrigation is shown in Table 2.

Table 2. Water use reported for irrigation from the Spring Creek: McPherson aquifer (Water Rights, 1980-2016)

YEAR	NO. PMTS	APPROPRIATION (Acre-feet)	PUMPED (Acre-feet)
2015	8	5567	1357.74
2014	7	5253	811.36
2013	7	5253	1768.36
2012	6	4981	1388.51
2011	4	4133	890.36
2010	4	4133	1004.81
2009	4	4133	606.04
2008	4	4133	1351.83
2007	4	4133	1545.84
2006	5	4739	2770.28
2005	5	4739	1415.5
2004	5	4739	1224.48
2003	5	4739	1904.35
2002	5	4739	2095.91
2001	4	2859	611.4
2000	4	2859	560.3
1999	4	2859	340.49
1998	4	2859	442.37
1997	4	2859	285
1996	4	2859	317
1995	4	2619	120.64
1994	4	2619	317.19
1993	4	2859	21
1992	4	2859	374.8
1991	4	2859	456.1
1990	4	2859	715
1989	4	2859	838
1988	4	2859	1075.2
1987	3	2379	350
1986	3	2379	198
1985	4	2699	410
1984	5	2819	388
1983	3	2379	256.15
1982	3	2379	211.58
1981	6	3779	308
1980	5	3456	566
<i>Minimum</i>	3	2379	21
<i>Maximum</i>	8	5567	2770.28
<i>Average</i>	4.47	3534.14	813.82

Withdrawals from the Spring Creek: McPherson aquifer are expected to be considerably less than the average annual recharge to the aquifer, and there is a reasonable probability that unappropriated water is available from the aquifer for this proposed appropriation.

**Observation Well Data:**

Administrative Rule of South Dakota Section 74:02:05:07 requires that the Water Management Board shall rely upon the record of observation well measurements in addition to other data to determine that the quantity of water withdrawn annually from the aquifer does not exceed the estimated average annual recharge of the aquifer.”

The DENR-Water Rights Program monitors five observation wells completed into the Spring Creek McPherson aquifer. Hydrographs for the observation wells are shown in Figures 1-6.

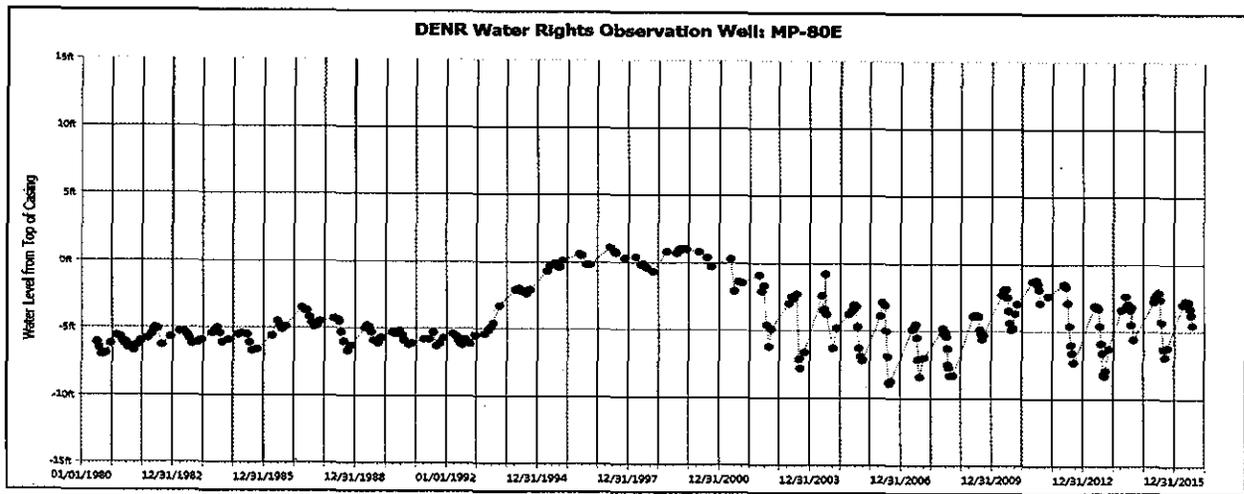


Figure 1. Hydrograph for DENR-Water Rights' observation well completed into the Spring Creek McPherson aquifer within one-half mile (east) of the wells that are to supply this water permit.

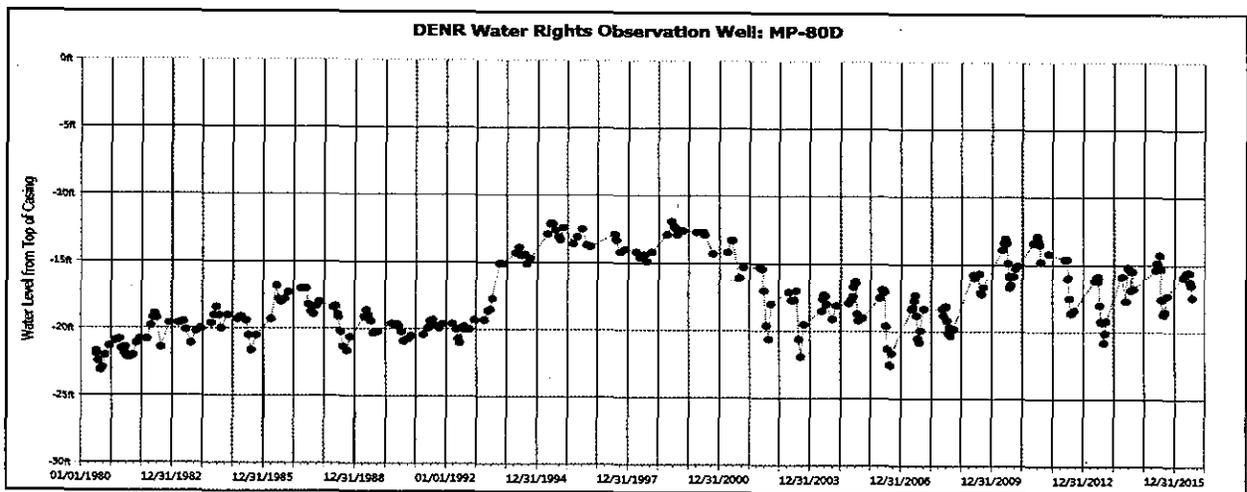


Figure 2. Hydrograph for DENR-Water Rights' observation well completed into the Spring Creek McPherson aquifer approximately one mile west of the wells that are to supply this water permit.

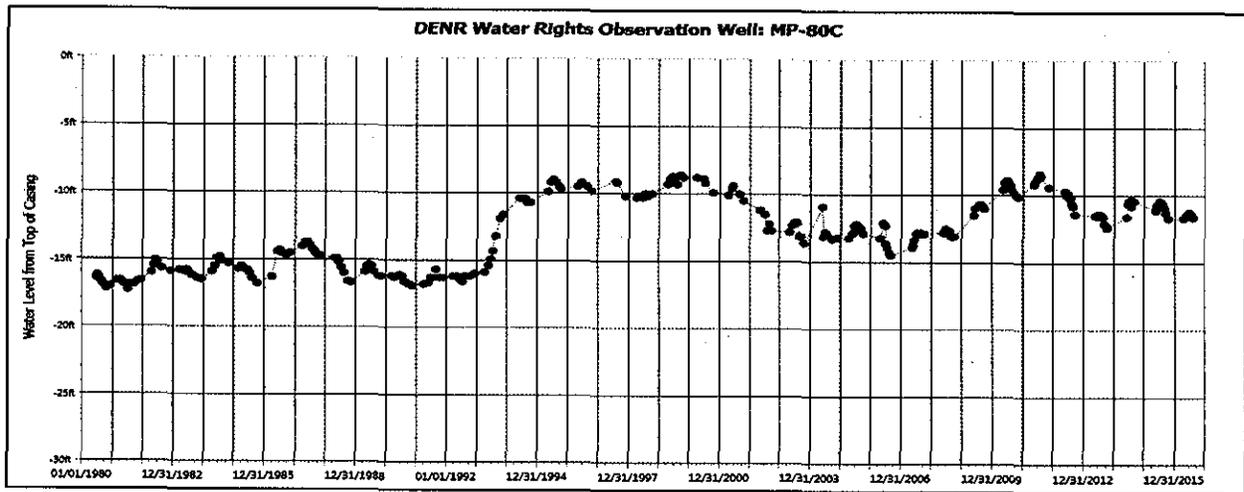


Figure 3. Hydrograph for DENR-Water Rights' observation well completed into the Spring Creek McPherson aquifer approximately three and one-half miles west of the wells that are to supply this water permit.

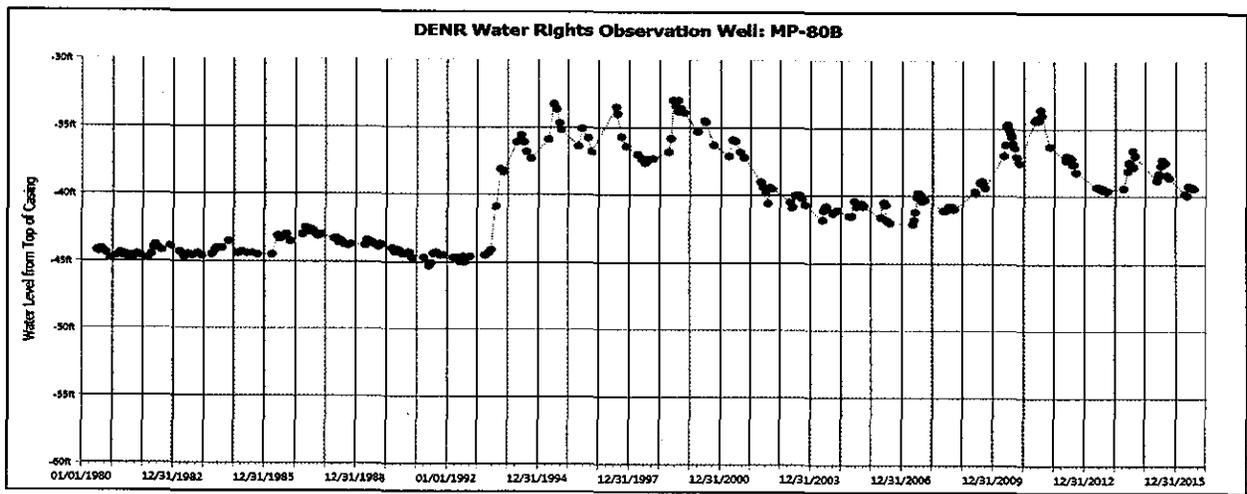


Figure 4. Hydrograph for DENR-Water Rights' observation well completed into the Spring Creek McPherson aquifer approximately six and one-half miles west-northwest of the wells that are to supply this water permit.

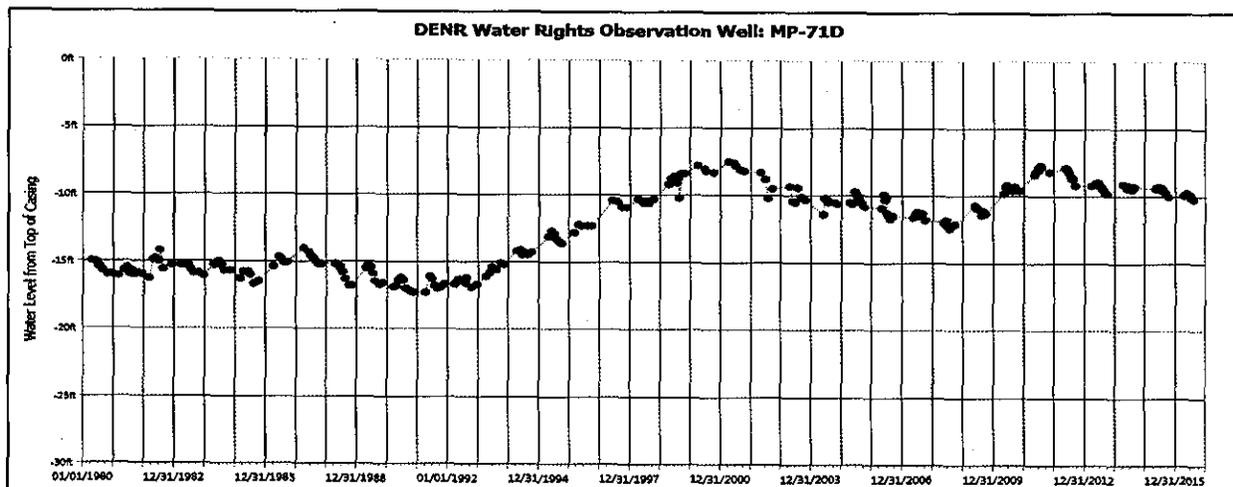


Figure 5. Hydrograph for DENR-Water Rights' observation well completed into the Spring Creek McPherson aquifer approximately 10 and one-half miles northeast of the wells that are to supply this water permit.

In general, the hydrographs show upward trending water levels over the period of record. The hydrographs document that the aquifer responds well to climatic conditions with rising water levels during wet years and declining water levels during dry years. The data documents that at the current level of development temporal well withdrawal is masked by climatic conditions. Therefore, recharge to and natural discharge from the aquifer greatly exceeds well withdrawal, so water is available for capture before natural discharge. Therefore, unappropriated water is available from the Spring Creek: McPherson aquifer to support the proposed appropriation.

#### **EXISTING WATER RIGHTS:**

As stated earlier, this application proposes a permit to authorize an existing irrigation project. Evidence suggests that the project has actually been operating under what would be the constraints of Water Permit No. 8232-3, if it is approved. Observation well data in the immediate vicinity of this irrigation project (see Figure 1.) has recorded seasonal fluctuations of 4-6 feet since 2001 as compared to seasonal fluctuations of one foot or less before 2001 (Water Rights, 2016a). It appears that the artesian pressure in the area has experienced an additional 3-5 feet of drawdown in this area as a result of the alterations to this irrigation project that this application proposes to authorize. Considering the greater than 70 feet of artesian head pressure in this area, 3-5 feet of additional fluctuation should not be considered significant.

Considering that SDCL 46-6-6.1 does not protect artesian head pressure as a means of delivery and the Water Management Board has consistently recognized that to place water to maximum beneficial use a certain amount of drawdown may occur, a nearby adequate well defined by ARSD 74:02:20(7), which states that the pump intake must be set 20 feet below the top of the aquifer or, if the aquifer is less than 20 feet thick, as near to the bottom of the aquifer as is practical, is not expected to be adversely or unlawfully impaired. Therefore, there is a reasonable probability that any well interference from the proposed appropriation will not cause a significant impact and will also not adversely or unlawfully impair existing users.

### **SDCL 46-5-6**

Pursuant to SDCL 46-5-6, the diversion rate for an irrigation appropriation cannot be in excess of one cfs for every 70 acres, or "the equivalent thereof." The statute does provide that the Water Management Board may allow a greater diversion rate if the method of irrigation so requires. Water Permit Application No. 8232-3 indicates "This application also requests authorization of the total diversion rate of more than 1 cfs per 70 acres due to the need to efficiently operate the four center pivot irrigation systems."

### **CONCLUSIONS:**

1. Water Permit Application No. 8232-3 proposes a water permit that will allow an existing irrigation project to maintain status quo.
2. Water Permit Application No 8232-2 proposes to increase the diversion rate authority, add a diversion point, change the location of the acreage authorized for irrigation and clarify the location of the diversion points for an existing irrigation project.
3. Approval of Water Permit No. 8232-3 will not increase the annual appropriation from the Spring Creek: McPherson aquifer.
4. The diversion proposed by this application will not adversely impair existing wells.



Ken Buhler

SD DENR-Water Rights Program

### **REFERENCES:**

- Buhler, K.A., 2012, Report to the Chief Engineer on Water Permit Application No. 7323-3 Barry & Robin Vculek, March 2, 2012: SD DENR-Water Rights Program Water Right File No. 7323-3
- Hamilton, L.J., 1974, Major Aquifers in McPherson, Edmunds and Faulk counties, South Dakota: S.D. Geological Survey Information Pamphlet No. 8, 12 p.
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- Hedges, L.S., Burch, S.L., Iles, D.L., Barari, R.A., Schoon, R.A., 1982, Evaluation of Ground-Water Resources Eastern South Dakota and Upper Big Sioux River, South Dakota and Iowa, Task 1: Bedrock Topography and Distribution, Task 2: Extent of Aquifers, Task 3: Ground-Water Storage, Task 4: Computerized Data Base, Final Report; U.S. Army Corps of Engineers Contract DACW 45-80-C-0185
- Hedges, L.S., Allen, J., and Holly, D.E., 1985, Evaluation of Ground-Water Resources Eastern South Dakota and Upper Big Sioux River, South Dakota and Iowa, Task 7: Ground Water Recharge, South Dakota DENR-Geological Survey, Vermillion, SD

Rath, M., Personal Communication, August 10, 2016, Engineer III, DENR-Water Rights Program

Water Rights, 1980, Report of Examination of Works and/or Application of Water To Beneficial Use for Water Permit No. 3656-3, Water Right File No. 3656-3SD DENR-Water Rights Program, Joe Foss Building, Pierre, SD

Water Rights, 1980-2016, Irrigation Questionnaire Summary by Aquifer 1979-2015: SD DENR-Water Rights Program, Joe Foss Building, Pierre, SD

Water Rights, 1980-2016b, Irrigation Questionnaire for Water Right No. 3656-3 for the years 1979-2015: SD DENR-Water Rights Program, Joe Foss Building, Pierre, SD

Water Rights, 2016a, Observation Well Files, SD DENR-Water Rights Program, Joe Foss Bldg, Pierre, SD.

Water Rights, 2016b, Water Right/Permit Files, SD DENR-Water Rights Program, Joe Foss Bldg, Pierre, SD.

Water Rights, 2016c, Well Completion Report Files, SD DENR-Water Rights Program, Joe Foss Bldg, Pierre, SD.



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

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

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**RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT  
APPLICATION NO. 8232-3, Barry & Robin Vculek**

Pursuant to SDCL 46-2A-2, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Water Permit Application No. 8232-3, Barry & Robin Vculek, 1109 S 7<sup>th</sup> Street, Oakes ND 58474..

The Chief Engineer is recommending APPROVAL of Application No. 8232-3 because 1) there is reasonable probability that there is unappropriated water available for the applicant's proposed use, 2) the proposed diversion can be developed without unlawful impairment of existing rights, 3) the proposed use is a beneficial use and 4) it is in the public interest with the following qualifications:

1. The wells approved under this Water Right No. 3656-3 and Water Permit No. 8232-3 will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under these water rights 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. Pursuant to SDCL 46-5-6 which allows a greater diversion rate if the method of irrigation, time constraints, or type of soils so requires, Water Right No. 3656-3 and Water Permit No. 8232-3, combined, authorize a maximum diversion rate of 5.79 cfs for the irrigation of 380 acres with an annual volume not to exceed 2 acre feet of water per acre per year.
3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

See report on application for additional information.

Jeanne Goodman, Chief Engineer  
August 16, 2016

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WATER RIGHTS  
PROGRAM

Sirs,

I have a domestic well for cattle located in the SW quarter of Section 16, of 127N & 71W, McPherson County. The well has been productive in spring and summer, unfortunately not productive in the fall and winter months. I have been in contact with Jim Goodman and now Ken Buhler with the SD DENR regarding this perplexing problem. The well is more than adequate at spring time pumping 5 gal/min for five hours in 2012, yet is dry in the fall and winter. The well is not rejuvenating after the irrigation has stopped and not reflecting the same status as the monitor well MP 80 D. This past season it became necessary to haul water beginning August 19th to the 32 head of yearling heifers. This is a well that in the recent past supplied a larger herd for the entire season. We do not have an exact understanding of ground waters. That is why I am concerned the increased pumping rate will deplete the wells water source even earlier in the season. I am requesting the SD DENR send staff to pump the well the spring of 2017 temporarily placing the request for increased cubic feet of water on hold until completion of the spring pumping. I believe this can be the most expeditious method of solving this problem thus avoiding a long wasteful process.

Thank you for your consideration.

*Dan Mettler 8/31/16*

Dan Mettler

11220 338<sup>th</sup> Ave

Eureka, SD 57437

605-577-6240

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WATER RIGHTS PROGRAM

Form 8

PROOF OF PUBLICATION

STATE OF SOUTH DAKOTA )  
County of Brown ) SS

I, Mary Best

certify that the attached printed Notice was taken

from the Aberdeen News

printed and published in Aberdeen

County of Brown and

state of South Dakota. The notice was published

in the newspaper on the following date:

August 25, 2016

Cost of Printing \$ 53.59

Mary Best  
(Signature)

Adv. Betty Speno  
(Title)

August 26  
(Date Signed)

(No. 106016)  
(August 25, 2016 - 17)

NOTICE OF APPLICATION  
NO. 8232-3 to Appropriate Water

Notice is given that Barry & Robin Voulek, 1109 S 7th St, Oakes ND 58474 has filed an application for a water permit to increase the diversion authority, add a diversion point, change the location of irrigated acres and clarify the location of the diversion points, Water Right No. 3658-3 appropriates 3.00 cubic feet of water per second (cfs) from three wells to irrigate 380 acres. An investigation of the Water Right found the system capable of diverting an additional 2.79 cfs from four wells completed into the Spring Creek/McPherson Aquifer (59-94 feet deep) located in the SE 1/4 NW 1/4, N 1/2 NW 1/4, SW 1/4 NE 1/4 and the center of the SW 1/4 Section 22 for irrigation of 380 acres located in the W 1/2, NE 1/4, NW 1/4 SE 1/4 Section 22; all in T127N-R71W. This application, if approved, and Water Right No. 3658-3 will authorize a total diversion rate of 5.79 cfs for irrigation of 380 acres. The applicant is requesting a diversion rate greater than the statutory limit of 1 cfs per 70 acres.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 8232-3 with qualifications because 1) unappropriated water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest. The Chief Engineer's recommendation with qualifications, the application, and staff report are available at <http://denr.sd.gov/public> or contact Eric Gronlund for this information, or other information, at the Water Rights Program address provided below.

Any person interested in opposing or supporting this application or recommendation must file a written petition with BOTH the applicant and Chief Engineer. The applicant must file a petition if contesting the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605-773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by September 6, 2016.

The petition may be informal, but must include a statement describing the petitioner's interest in the application, the

petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

If the applicant does not contest the recommendation of the Chief Engineer and no petition to oppose the application is received, the Chief Engineer shall act on the application pursuant to the recommendation with no hearing held before the Water Management Board. If a petition opposing the application or contesting the recommendation is filed, then a hearing will be scheduled and the Water Management Board will consider this application. Notice of the hearing will be given to the applicant and any person filing a petition.

Steven M. Plmer, Secretary, Department of Environment and Natural Resources. Published once at the total approximate cost of \$53.59.

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Dept. of Environment & Natural Resources  
GROUND WATER QUALITY



**AFFIDAVIT OF PUBLICATION**

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WATER RIGHTS PROGRAM

**The Northwest Blade**  
P.O. Box 797; Eureka, SD 57437  
605-284-2631

STATE OF South Dakota: COUNTY OF McPherson

I, Linda Bergman, am authorized by the publisher as agent to make this affidavit of publication. Under oath, I state that the following is true and correct.

The Northwest Blade is a newspaper which is published weekly and is of general circulation and is in compliance with South Dakota Newspaper Association legalized Statutes.

The notice has been published in the newspaper listed above.

DATE(S) OF PUBLICATION

8-25-16 Notice of Application No. 8232-3 to Appropriate Water for Barry + Robin Vculek

NAME OF THE CORPORATION/GOVERNMENT OFFICE: Dept. of Environment + Natural Resources

TYPE OF DOCUMENT: Legal

AUTHORIZED SIGNATURE: Linda Bergman

SUBSCRIBED AND SWORN TO BEFORE ME ON THE

30 DAY OF August, 2016.

NOTARY SIGNATURE: [Signature]  
Exp: 5-29-21



**NOTICE OF  
APPLICATION NO. 8232-  
3 to Appropriate Water**

Notice is given that Barry & Robin Vculek, 1109 S 7th St, Oakes ND 58474 has filed an application for a water permit to increase the diversion authority, add a diversion point, change the location of irrigated acres and clarify the location of the diversion points. Water Right No. 3656-3 appropriates 3.00 cubic feet of water per second (cfs) from three wells to irrigate 380 acres. An investigation of the Water Right found the system capable of diverting an additional 2.79 cfs from four wells completed into the Spring Creek McPherson Aquifer (59-94 feet deep) located in the SE 1/4 NW 1/4, N 1/2 NW 1/4, SW 1/4 NE 1/4 and the center of the SW 1/4 Section 22 for irrigation of 380 acres located in the W 1/2, NE 1/4, NW 1/4 SE 1/4 Section 22; all in T127N-R71W. This application, if approved, and Water Right No. 3656-3 will authorize a total diversion rate of 5.79 cfs for irrigation of 380 acres. The applicant is requesting a diversion rate greater than the statutory limit of 1 cfs per 70 acres.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 8232-3 with qualifications because 1) unappropriated water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest. The Chief Engineer's recommendation with qualifications, the application, and staff report are available at <http://denr.sd.gov/public> or contact Eric Gronlund for this information, or other information, at the Water Rights Program address provided

below.

Any person interested in opposing or supporting this application or recommendation must file a written petition with BOTH the applicant and Chief Engineer. The applicant must file a petition if contesting the Chief Engineer's recommendation. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501 (605-773-3352)" and the applicant's mailing address is given above. A petition filed by either an interested person or the applicant must be filed by September 6, 2016.

The petition may be informal, but must include a statement describing the petitioner's interest in the application, the petitioner's reasons for opposing or supporting the application, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained.

If the applicant does not contest the recommendation of the Chief Engineer and no petition to oppose the application is received, the Chief Engineer shall act on the application pursuant to the recommendation with no hearing held before the Water Management Board. If a petition opposing the application or contesting the recommendation is filed, then a hearing will be scheduled and the Water Management Board will consider this application. Notice of the hearing will be given to the applicant and any person filing a petition.

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

*Published once at a total  
approximate cost of \$27.82 at .01  
cents per reader.*



DEPARTMENT of ENVIRONMENT  
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JOE FOSS BUILDING  
523 EAST CAPITOL  
PIERRE, SOUTH DAKOTA 57501-3182

September 7, 2016

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**NOTICE OF HEARING**

TO: Barry and Robin Vculek  
1109 S 7<sup>th</sup> Street  
Oakes ND 58474

Dan Mettler  
11220 338<sup>th</sup> Avenue  
Eureka SD 57437

FROM: Jeanne Goodman, Chief Engineer  
Water Rights Program

SUBJECT: Notice of Hearing on Water Permit Application No. 8232-3, Barry and Robin Vculek

A petition to Water Permit Application No. 8232-3 was filed by Dan Mettler in response to the Notice of Application published in the Northwest Blade and Aberdeen American News. This notice schedules a hearing on Application No. 8232-3 before the South Dakota Water Management Board.

Water Permit Application No. 8232-3 proposes to increase the diversion authority, add a diversion point, change the location of irrigated acres and clarify the location of the diversion points. Water Right No. 3656-3 appropriates 3.00 cubic feet of water per second (cfs) from three wells to irrigate 380 acres. An investigation of the Water Right found the system capable of diverting an additional 2.79 cfs from four wells completed into the Spring Creek:McPherson Aquifer (59-94 feet deep) located in the SE 1/4 NW 1/4, N 1/2 NW 1/4, SW 1/4 NE 1/4 and the center of the SW 1/4 Section 22 for irrigation of 380 acres located in the W 1/2, NE 1/4, NW 1/4 SE 1/4 Section 22; all in T127N-R71W. This application, if approved, and Water Right No. 3656-3 will authorize a total diversion rate of 5.79 cfs for irrigation of 380 acres. The applicant is requesting a diversion rate greater than the statutory limit of 1 cfs per 70 acres.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 8232-3 with qualifications because 1) unappropriated water is available, 2) existing rights will not be unlawfully impaired, 3) it is a beneficial use of water, and 4) it is in the public interest.

The Water Management Board will consider Application No. 8232-3 at 9:30 AM (Central Time) on Thursday, October 13, 2016, in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre SD. The agenda time is an estimate. Parties will be provided written notice if there is a change to the hearing time or date.

The Chief Engineer's recommendation is not final or binding upon the Board. The Board is authorized to 1) approve, 2) approve with qualifications, 3) defer, or 4) deny the application after it reaches a conclusion based on the facts presented at the public hearing.

The October 13, 2016, hearing date will be automatically delayed for at least 20 days upon written request to the Chief Engineer from the applicant or any person who has filed a petition to oppose or support the application. The request for an automatic delay must be filed by September 30, 2016. If an

automatic delay is requested, the hearing will be rescheduled for a future Board meeting and personal notice will be provided to parties regarding the time, date and location.

The hearing is an adversary proceeding and any party has the right to be present at the hearing and to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised at the hearing. Decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

Contact Eric Gronlund at the above Chief Engineer's address to request the staff report, recommendation, application or any other information. Notice is given to individuals with disabilities that this hearing is being held in a physically accessible place. Please notify the Department of Environment and Natural Resources at least 48 hours before the hearing if you have a disability for which special arrangements must be made at the hearing. The telephone number for making arrangements is (605) 773-3352.

Enclosed is the report, recommendation, affidavits of publication and the petition filed in the matter of Water Permit Application No. 8232-3. State law directs the Chief Engineer to provide Water Management Board members with a copy of all pleadings including petitions for each proceeding. The information being provided to you is also being sent to the Board members in advance of the hearing. In addition, enclosed are two documents intended to acquaint parties with the hearing process entitled "Procedure for Hearings before the Water Management Board" and "Summary of South Dakota Water Laws and Rules." You are encouraged to review these documents prior to the hearing.

Under SDCL 1-26-17(7) notices must state that "if the amount in controversy exceeds \$2,500.00 or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request to the agency no later than ten days after service of a notice of hearing issued pursuant to SDCL 1-26-17." This is a Notice of Hearing, service is being provided by direct mail to you, and the applicable date to give notice to the Chief Engineer is September 17, 2016. However, since this particular matter is a water permit application and not a monetary controversy in excess of \$2,500.00 or termination of a property right, the Chief Engineer disputes the applicability of this provision and maintains that the hearing must be conducted by the Board.

As applicable, the following provides the legal authority and jurisdiction under which the hearing will be held and the particular statutes and rules pertaining to this application: SDCL 1-26-16 thru 1-26-28; SDCL 46-1-1 thru 46-1-9, 46-1-13 thru 46-1-16; 46-2-3.1, 46-2-9, 46-2-11, 46-2-17; 46-2A-1 thru 46-2A-12, 46-2A-14, 46-2A-15, 46-2A-20, 46-2A-21, 46-2A-23; 46-5-1.1, 46-5-2 thru 46-5-26, 46-5-30.2 thru 46-5-30.4, 46-5-31 46-5-32 thru 46-5-34.1, 46-5-38 thru 46-5-39, 46-5-46, 46-5-47, 46-5-49; 46-6-1 thru 46-6-3.1, 46-6-6.1, 46-6-10, 46-6-13, 46-6-14, 46-6-21, 46-6-26; Board Rules ARSD 74:02:01:01 thru 74:02:01:24.02 and ARSD Chapter 74:02:04.

Questions regarding the hearing process may be directed to Eric Gronlund, Water Rights Program at (605) 773-3352 or [eric.gronlund@state.sd.us](mailto:eric.gronlund@state.sd.us).

enclosures

c: Ann Mines-Bailey, Assistant Attorney General



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

JOE FOSS BUILDING  
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PIERRE, SOUTH DAKOTA 57501-3182

denr.sd.gov

September 29, 2016

NOTICE

TO: Barry and Robin Vculek  
1109 S 7<sup>th</sup> Street  
Oakes ND 58474

Dan Mettler  
11220 338<sup>th</sup> Avenue  
Eureka SD 57437

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

SUBJECT: Notice Time Change for Hearing in the matter of Water Permit Application No. 8232-3,  
Barry and Robin Vculek

In response to a petition filed to Water Permit Application No. 8232-3, a notice of hearing dated September 7, 2016 was sent to parties scheduling a hearing before the Water Management Board at 9:30 AM on October 13, 2016 in Pierre. Due to changes in the agenda for this meeting, the hearing time is changed to 1:00 PM.

The Water Management Board will consider Application No. 8232-3 at 1:00 PM (Central Time) on Thursday, October 13, 2016, in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Avenue, Pierre SD. The agenda time is an estimate and may be delayed due to prior agenda items.

Applicable provisions of the notice of application published in the Northwest Blade and Aberdeen American News and the notice of hearing sent to parties on September 7, 2016 will still apply at the hearing.

Questions regarding the hearing process may be directed to Eric Gronlund, Water Rights Program at (605) 773-3352 or [eric.gronlund@state.sd.us](mailto:eric.gronlund@state.sd.us).

c: Ann Mines-Bailey, Assistant Attorney General