

South Dakota
 Department of Environment
 & Natural Resources
Protecting SD's Tomorrow... Today

WATER MANAGEMENT BOARD
December 9, 2015
Floyd Matthew Training Center
Joe Foss Building
523 E Capitol Avenue
Pierre SD

Scheduled hearing times are Central Standard Time

AGENDA

Scheduled times are estimates only. Agenda items may be delayed due to prior scheduled items.
 Breaks will be at the discretion of the chair.

December 9, 2015

- 8:30 AM** Call to Order
 October 14, 2015, Board Minutes
 March 2 -3, 2016 Meeting Location (Pierre suggested)
 Status and Review of Water Rights Litigation – Matt Naasz
 Administer Oath to Department of Environment and Natural Resources Staff

 Presentation on Invasive Species in South Dakota by Department of Game, Fish and Parks – Tony Leif & Mike Smith
- 9:00 AM** Public Hearing on Amendment to Administrative Rules of South Dakota Chapter 74:5, Surface Water Quality
- 9:30 AM** Findings of Fact, Conclusions of Law and Final Decision on Declaratory Ruling Request on Navigability of Firesteel Creek in Davison County
- 10:00 AM** Public Hearing on Amendment to Administrative Rules of South Dakota Chapter 74:02:10, Fences Crossing Navigable Streams
- 11:00 AM** Request Permission to Advertise Amendment to Administrative Rules of South Dakota Chapter 74:04:12, Drinking Water Standards – Mark Mayer

 Consider Withdrawal of Water Permit Application No. 7386-3, Brian Gatzke – Eric Gronlund
- 11:30 AM** Findings of Fact, Conclusions of Law and Final Decision on Water Permit Application No. 2730-2, United Order of South Dakota
- LUNCH**
- 1:00 PM** Water Permit Application No. 8152-3, Lake Andes – Ken Buhler
- 2:00 PM** Water Permit Application No. 8165-3, Todd Swenson – Ken Buhler

ADJOURN

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

December 9, 2015

Qualifications: wi - well interference wcr - well construction rules iq - irrigation questionnaire lf - low flow

No.	Name	Address	County	Amount	Use	Source	Qualifications
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Water Permit Applications to be Considered as Scheduled

7386-3	Brian Gatzke	Aurora	BG	3.06 cfs	214 acres	2 wells-undetermined	withdrawal
8152-3	City of Lake Andes	Lake Andes	CM	0.17 cfs	recreational	1 well-Dakota Aquifer	wi, wcr, 1 special
8165-3	Todd Swenson	Wessington Sprs	JE	5.33 cfs	460 acres	3 wells-Bad-Cheyenne Aquifer	wi, wcr, iq

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

3982B-3	Joint Wellfield Inc.	Toronto	DU	no add'l	RWS	expands the future use area	2 special
7572B-3	Herb Hofer	Huron	BD	no add'l	no add'l	1 well-Tulare Western Sp/Hitchcock	wi, wcr, iq
8180-3	Zochert Farms Inc.	Webster	DA	1.56 cfs	120 acres	1 well-Coteau Lakes Aquifer	wi, wcr, iq
8181-3	Marc T Bernard	Mitchell	UN	0.89 cfs	40 acres	1 well-Missouri:Elk Point	wi, wcr, iq, 1 special
8184-3	Darrell Nelson	Yankton	YA	47.4 AF	FWP,livestock	runoff	lf, 1 special
8185-3	Joint Wellfield Inc.	Toronto	DU	207 AF	RWS	1 well-Big Sioux:Brookings Aquifer	iq, 3 special

Readvertisement

1838-2	Canyon Shadows Water Company Inc.	Rapid City	PE	0.03 cfs	SHD	1 well-Madison Aquifer	wi
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MINUTES OF THE 195TH MEETING OF THE
WATER MANAGEMENT BOARD
PIERRE CHAMBER OF COMMERCE
800 WEST DAKOTA AVENUE
PIERRE, SD

October 14, 2015

CALL TO ORDER: Chairman Comes called the meeting to order at 8:38 a.m.

APPLICATIONS: Consider Removal of a Qualifications to Water Right No. 1666A-1, Golden Mining Company LP; Water Permit Application Nos. 8091-3 and 8092-3, Roy Grismer; Water Permit Application No. 8096-3, Jeffrey Aman; and Water Permit Application No. 2730-2, United Order of South Dakota.

DECLARATORY RULING REQUEST: Navigability of Firesteel Creek in Davison County.

The following were present at the meeting:

Board Members: Tim Bjork, Ev Hoyt, Chad Comes, Leo Holzbauer, and Peggy Dixon. Rodney Freeman was absent for the morning but present in the afternoon. Jim Hutmacher was absent.

Department of Environment and Natural Resources (DENR): Jami Burrer – Water Management Board Secretary; Mark Rath, Ron Duvall, Jeanne Goodman, Eric Gronlund, Ken Buhler, Karen Schlaak, Bracken Capen, Whitney Kilts, Mike DeFea, Genny McMath, Adam Mathiowetz, and Lynn Beck – Water Rights Program; Patrick Snyder and Shannon Minerich – Surface Water Quality Program.

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

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

Annual Election of Officers: Jim Hutmacher, Chair; Tim Bjork, Vice Chair; Leo Holzbauer, Secretary.

Motion to approve officers by Bjork, seconded by Holzbauer. Motion carried.

APPROVE July 8-9, 2015, MINUTES: Motion to approve minutes with changes by Hoyt, seconded by Bjork. Dixon, Hoyt, Bjork, Holzbauer, and Comes all voted in favor of the motion. Motion carried.

NEXT MEETING: December 9, 2015, in Pierre.

STATUS AND REVIEW OF WATER RIGHTS LITIGATION: Mr. Naasz stated an appeal was filed by Lenny Peterson, Oscar Inc., Van Buskirk Farms, and Brad Peterson regarding the denial of the permit applications in the Tulare:East James and the Tulare:Western Spink Hitchcock Aquifers. DENR moved to dismiss due to lack of subject matter jurisdiction

because of the failure to serve all parties. The argument on the motion was held October 15, 2015. During the hearing the judge determined to allow further briefing by the parties. Mr. Rylance was instructed to submit his brief by October 27, 2015. DENR will then have 10 days from that date to reply.

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

UPDATE ON WATER RIGHTS PROGRAM ACTIVITIES:

Annual Irrigation Questionnaires:

Ms. Goodman stated a packet was passed out relating to the irrigation questionnaires. These irrigation questionnaires are mailed out to all South Dakota irrigators for each of their water rights. The qualification for annual reporting of water use by irrigators in the state was first added to water right permits by this board in 1980. In 1983, it was adopted as an administrative rule for South Dakota, which required all irrigation permits annually report water use to the Water Rights Program. The only exception to the rule is owners of water spreading systems because there are no pumps.

Annual water use is reported using the irrigation questionnaires. The forms provide irrigators a way to report their water use from the previous season. Included is information on what crop was irrigated, where, when, how, and how much water was applied to the crops. Genny McMath and Karen Schlaak, who make sure the questionnaires are sent out and received, are present today. Each questionnaire form will have a permit number, the name and address of the irrigator, legal location, and how many acres are being irrigated under the permit.

Ms. Goodman stated the first page of the packet explains what the irrigator needs to do, why, and by what date. On the back of the form there are several examples of how the form can be filled out. The forms are to be returned to Water Rights by December 1. The form states three ways to complete and return. The form can be mailed, faxed, or submitted online. On occasion irrigators will come to the office to fill out the questionnaire or they will call with questions and Ms. McMath will help fill it out. If the forms are not returned by December 1, a list of delinquent water right holders is made. In mid-January they are mailed a second form, as a reminder, with a notice they will be scheduled for a hearing in front of the board in March if it is not submitted.

Ms. Goodman stated there are a lot of considerations when looking at whether or not the information given is reliable. It is important to know that all irrigators in the state of South Dakota, except those that do not use a pump, are required to report their water use every year. Each irrigator that holds a permit or a water right is notified of the questionnaire, even if they did not irrigate. Most of the irrigators keep track of the details of irrigation. They have to pay for the fuel or the electricity to run the systems, they know long the system is run, and they also know what the bottom line crop production needs to be. Due to all of that, most irrigators keep very good records and do report it to DENR. DENR's ability to determine annual water use depends greatly on the responder's method of filling out the irrigation

questionnaires. Reporting examples are included in the packet. Water Rights staff has been doing this for over 35 years; they are very familiar with the forms and how the information is submitted.

Ms. Goodman stated once the questionnaires are received, Ms. McMath inputs all the information into the database, and a report is then developed. The information is listed by county, by water source, and the amount of water pumped annually. Staff engineers use that information to generate reports when new applications are reviewed. The information is then presented to the board.

Ms. Goodman stated in the packet there is an example from Mr. Schultz. This is a copy of an electronic form, and Mr. Schultz was not sure how to fill it out. Ms. McMath helped fill it out over the phone.

Mr. Comes asked if DENR has ever thought about requiring or encouraging online submissions and having the form go into the database automatically.

Ms. Goodman stated it has been discussed, and some forms are submitted online. DENR is in the process of transitioning all the department databases into internet based reporting. Permit holders are encouraged to submit the information online.

Mr. Duvall stated there is a pdf version of the form available online that can be filled out, which then comes to DENR as an email. This gives Ms. McMath a chance to review the information. That form is then put into the database.

Mr. Hoyt asked with all of Ms. McMath's experience, if she gets a form that does not look right, will the irrigator be contacted by phone and work out the details?

Ms. Goodman stated Ms. McMath does do that and has done this for several years. She knows which irrigators have issues with reporting in the past and will need guidance again.

Mr. Bjork asked if there is a way to cross-reference all of the information.

Ms. McMath stated she can tell if there is an error but still calls and asks if it is correct or if anything has changed.

Mr. Hoyt asked Mr. Buhler if he has confidence in the reporting system.

Mr. Buhler stated generally, yes. There are problems sometimes with misunderstanding or misreporting.

Irrigation End Gun Overspray

Ms. Goodman stated every year during the irrigation season DENR receives calls and complaints about irrigation systems that are spraying water beyond where they are supposed to be spraying. These complaints come from neighbors with property near an irrigated field, county officials concerned about their roads and road maintenance, and from drivers that are

driving by an irrigated field and being sprayed by the system. The number of complaints has increased in the last few years.

Ms. Goodman stated with the increase of complaints, DENR issued a press release in 2014 and again this year. This was done to remind irrigators that state water rights law only allows irrigation of the acres that are approved in the water right, making the overspray a violation of the permit. Irrigators were also informed that spraying on non-cropped areas is a waste of water. The pivot systems can be equipped with a stop for the end gun, which will turn off the end gun for a period of time to avoid any overspray.

Mr. Duvall showed the board pictures of overspray examples.

Mr. Holzbauer stated if water is being sprayed where it is not allowed, there needs to be accountability. However, if there are high winds and it blows the water out of the permitted area causing an overspray, DENR should not hold the permit holder responsible in those situations.

REQUEST PERMISSION TO ADVERTISE AMENDMENT TO ADMINISTRATIVE RULES OF SOUTH DAKOTA CHAPTER 74:51, SURFACE WATER QUALITY:

Patrick Snyder stated the Surface Water Quality Program is asking permission to advertise two changes to the rules. One change goes back to 2009 when DENR adopted an E.coli bacterial standard for recreational water. It is now being asked that fecal coliform criteria be removed. E. Coli bacterial standard will remain in effect as it is the best indication. The other change comes as a recommendation from the US Fish and Wildlife Service. It is being recommended that the toxic pollutant nonylphenol aquatic life criteria be added. This was also recommend by EPA.

Motion to approve Surface Water Quality Program to advertise rule changes by Bjork, seconded by Dixon. Motion carried.

CANCELLATION CONSIDERATIONS:

Mr. Gronlund stated the board packet included a table of water permits/rights that are being considered for cancellation. The board packet included a notice for each of the 12 water permit/rights. DENR is recommending that all 12 permits be cancelled. No responses have been received from any of the permit holders, and no one is present today.

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

Water Permit No. 1548-1	Martha Graf and LeRoy Brown dba Black Hills Water Co	Non-Construction
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Water Permit No. 1549-1	Martha Graf and LeRoy Brown dba Black Hills Water Co	Non-Construction
Water Permit No. 1548A-1	Martha Graf and LeRoy Brown dba Black Hills Water Co	Non-Construction
Water Permit No. 1549A-1	Martha Graf and LeRoy Brown dba Black Hills Water Co	Non-Construction
Water Permit No. 1828-1	Herbert A Jensen	Non-Construction
Water Permit No. 1758-2	Rodney Sharp	Abandonment or Forfeiture
Water Right No. 2653-3	Horace Walter	Abandonment or Forfeiture
Water Right No. 2710-3	Horace Walter	Abandonment or Forfeiture
Water Right No. 4508-3	Rick Eggerecht and Donald Endres with Novita Aurora LLC	Abandonment
Water Right No. 6904-3	Wolf Creek Hutterian Brethren	Abandonment or Forfeiture
Water Right No. 7165-3	Paul Buckneberg	Non-Construction
Water Right No. 7369-3	Huron Hutterian Brethren	Abandonment or Forfeiture

SEVEN YEAR REVIEW OF FUTURE USE PERMITS:

Mr. Gronlund stated Future Use Permit Nos. 3984-3 and 3984A-3 held by Big Sioux Community Water System are scheduled for review. The permits currently have 889 acre-feet of water remaining in reserve. In the board packet, there is a letter from Big Sioux Community Water System requesting to retain the future use permit, including justification for the need of the permits. The chief engineer's recommendation is to allow the permits to remain in effect. This was public noticed and no petitions to intervene have been received.

Motion to allow to remain in effect Future Use Permit Nos. 3984-3 and 3984A-3 by Holzbauer, seconded by Dixon. Dixon, Hoyt, Bjork, Holzbauer, and Comes all voted in favor of this motion. Motion carried.

CONSIDER REMOVAL OF A QUALIFICATION TO WATER RIGHT NO. 1666A-1, GOLDEN REWARD MINING COMPANY LP:

Appearances:

Ms. Mines-Bailey, representing the Chief Engineer and the Water Rights Program.

Max Main, representing Golden Reward and Wharf Resources.

Ron Waterland, Environmental Manager for Golden Reward and Wharf Resources.

Mr. Gronlund stated for this matter, the board packet included a letter dated June 18, 2015, requesting removal of a qualification from Water Right No. 1666A-1, regarding a continuous recording of the gaging station on Stewart Gulch. Also, included was the staff report, chief engineer's recommendation and the notice of hearing.

Mr. Gronlund stated a representative from Golden Reward is present.

Mr. Gronlund stated the Chief Engineer received a letter on June 22, 2015, from Ron Waterland, Environmental Manager, for Wharf Resources. Golden Reward Mining Company is controlled by Wharf Resources. The request is for removal of a qualification regarding continuing to operate a continuous recording flow gaging station on Stewart Gulch that is placed on Water Right No. 1666A-1. Specifically, the qualification requires Golden Reward to operate a continuous gaging station at the existing site below Berta Mine working outflow and above the confluence of Whitetail Creek. The basis for Golden Reward's request is that the mining operation is much reduced, and the qualification is no longer valid.

Water Right No. 1666A-1, was licensed July 11, 2015, based on an investigation by staff engineer Mike DeFea regarding the level of development. The water right appropriates 0.83 cubic feet of water per second (cfs) from one well known as the Bonanza well and a holding pond located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ SW $\frac{1}{4}$ respectively in Section 6 T4N-R3E in Lawrence County. The use is commercial, industrial and domestic purposes.

The Stewart Gulch gaging station had not been in operation since 2008 and likely not since reclamation of the area occurred in the late 1990's. A metal weir remains in place in the channel but has not been maintained and is filled with boulders.

Golden Reward Mining Company filed four applications for appropriations in April 1988 to appropriate water from sources for use in their mining operation.

The applications were:

Application No. 1438-1, sought to appropriate 0.67 cfs from one well, 365 feet deep, completed into the Deadwood Formation located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 7, T4N-R3E. This well is known as the Astoria well.

Application No. 1439-1, sought to appropriate 0.33 cfs from one well, 300 feet deep, completed into the Deadwood Formation located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 7, T4N-R3E. This well is known as the Hannibal well.

Application No. 1440-1, sought to appropriate 0.28 cfs of impounded ground water from dewatering of mine pits and impounded runoff water from precipitation falling on the proposed mine site. Runoff water from areas disturbed by mining operations was also impounded by sediment control traps and by the primary pit water storage area. Groundwater seeping into mine pits located within the proposed site was to be diverted to the primary pit storage area. The impounded surface and groundwater would be used for industrial purposes. DENR was contacted in 1994 that the pit was to be back filled with a pipe installed that would in effect be

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a well so that diversion could still be made. DENR allowed this since the original application was processed in part as being groundwater. Ken Buhler's 1998 licensing investigation of these permits and Permit No. 1666-1, documented the well to be a directional drill hole 560 feet long and 97 feet deep located in the NE ¼ SW ¼ Section 6, T4N-R3E. This well is known as the Bonanza well.

Application No. 1441-1, sought to appropriate 0.22 cfs from one well approximately 100 feet deep. This well was to be completed into the Bertha Mine workings which contribute to the water flow in Stewart Gulch. The application proposed that no water will be diverted from the well when the flow in Stewart Gulch is equal to or less than 150% of the previously recorded minimum flow. The well was to supplement the wells specified on Application Nos. 1438-1 and 1439-1 to meet short term water demands that exceed average requirements and will be a backup well in the event of pump failure in the other two wells.

A hearing was held before the Water Management Board on July 27, 1988, and Water Permit Nos. 1438-1, 1439-1 and 1440-1 were approved with the above qualification for continuous recording on Stewart Gulch. Application No. 1441-1 was denied. The Board's findings stated that at critical times of the year, the water of Stewart Gulch contributes over 40 percent of the flow to Whitetail Creek. In summary, the denial of the Application No. 1441-1 was based on detrimental impacts of this cold water flow to Stewart Gulch, and, thereafter to Whitetail and Whitewood Creeks necessary for the propagation of fish. The Board's decision also involved consideration of Black Hills Power and Light and Homestake Mining Company's discharge permits which were based on existing flows in Whitetail and Whitewood Creeks.

Application No. 1666-1, was filed in March of 1998, proposing to appropriate 0.55 cfs by increasing the diversion rate authorized by Water Permit No. 1440-1 (Bonanza well). The application was filed based on a 1996 licensing investigation by staff engineer Ken Buhler which found the diversion from the Bonanza well was greater than the permitted amount. Permit No. 1666-1 was approved by the Water Management Board including the same qualification for continuous recording flow gaging station on Stewart Gulch at the existing site below the Bertha Mine Workings outflow and above the confluence with Whitetail Creek. Water License No. 1666-1 was then issued based on the 1996 staff investigation. Water License No. 1666-1 incorporated Water Permit Nos. 1438-1, 1439-1 and 1440-1 for a total appropriation of 1.83 cfs from the Astoria, Hannibal and Bonanza wells.

Application No. 1666A-1, filed in May of 2002, proposed to amend Water License No. 1666-1 to include commercial use to allow water to be pumped from the three wells to existing holding ponds and then used for snow-making purposes at Terry Peak Ski area. Permit No. 1666A-1 was approved but did not include any qualifications, most notably the condition requiring the gaging station. Staff engineer Mike DeFea conducted an on-site investigation of No. 1666A-1 for the purpose of licensing. This investigation found that only the Bonanza well and one holding pond were still in use. The Astoria and Hannibal wells were no longer in use as part of the mining operation or snowmaking process. Water License No. 1666A-1 incorporated Water License No. 1666-1 and was issued for 0.83 cfs from the Bonanza well and the one holding pond.

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Since Water License No. 1666A-1 incorporated No. 1666-1, the qualification requiring the gaging station in Stewart Gulch was placed on Water License No. 1666A-1. This led Golden Reward to the request to remove the qualification from the water right. The request states the basis for having this qualification was relative to active mining in and around Stewart Gulch. The scope of the mining operation is much reduced, and the qualification is no longer valid.

Mr. Gronlund stated the Minerals and Mining Program was consulted regarding the present status of mining in the area. Historically, mining activities at the Golden Reward mine have had a much greater and more direct impact to the Stewart Gulch drainage than is currently being performed or planned at the site. There has not been mining at this site from 1998 through 2013. The mine was in full reclamation as of 2001, and reclamation was considered complete and placed into post closure in 2009. The Harmony Pit along the western edge was reopened for mining in 2014. Harmony Pit is at the base of Terry Peak and located at the headwaters of Fantail Creek. While it is possible that new mining could intercept underground mine workings which could serve as a groundwater conduit to old mine workings in Stewart Gulch, based on information available on the historic mine workings, the impact is likely minimal as there is only one known connecting tunnel to the mines along Stewart Gulch. Current mining activities are anticipated to have little impact to Stewart Gulch and past flow records are adequate to determine baseline flows at the site.

The Bonanza well is located approximately ½ mile north of Stewart Gulch. The well is not within a direct groundwater gradient to Stewart Gulch. Therefore withdrawals from this well are not expected to have impacts to stream flow in Stewart Gulch.

There was a USGS gaging station on Whitetail Creek at Lead that was in place from October 1988 through September 1998. This relates closely to when the Golden Reward permits were approved and when mining ceased in this area of Stewart Gulch. Stewart Gulch's contributing flow to Whitetail Creek and Whitewood were factors in the Board's consideration of the applications in 1988.

If a diversion from the Bonanza, Hannibal, or Astoria wells were diminishing flow in Stewart Gulch during Golden Reward's operations from 1988 - 1998, Whitetail Creek flows do not reflect a decrease in flow. Since Stewart Gulch is a large contributor to Whitetail Creek's flow, it can be concluded that there was not a significant loss of flow due to Golden Reward's diversion.

Golden Reward has requested removal of the qualification on Water License No. 1666A-1 requiring them to maintain a continuous recording gaging station on Stewart Gulch. The gage has not been in operation for a number of years. There is no evidence that Golden Reward's diversions from the Bonanza well authorized by Water Right No. 1666A-1 have impacted flow in Stewart Gulch.

Mr. Gronlund stated the Chief Engineer is recommending deletion of the qualification on Water License No. 1666A-1 regarding the requirement for a continuous recording flow gauging station on Stewart Gulch at the existing site below the Bertha Mining workings outflow and above the confluence of Whitetail Creek. The basis for the recommendation to

remove the qualification is diversion of water from the Bonanza well authorized by Water License No. 1666A-1 is not anticipated to affect the flow of water in Stewart Gulch.

Mr. Bjork asked if there is any record from this station that was required regarding the water flow.

Mr. Gronlund stated not from the Water Right permit file. There is currently no mining in Stewart Gulch. However, there is mining at the base of Terry Peak in the Fantail Gulch.

Mr. Hoyt disclosed that Ron Waterland and he are members of the Black Hills Fly Fishers and Wharf Resources donates \$250 to the Fly Fishers annual auction. He does not benefit from this donation and does not feel that it will affect his decision in this matter

Mr. Hoyt asked if the chief engineer is in agreement with conclusion 10, in the report.

Mr. Gronlund stated yes.

Mr. Main stated Mr. Gronlund summarized his investigation well. Wharf Recourses will stand behind the recommendation made by DENR.

Motion to approve removal of the qualification on Water Right 1666A-1, for continuous recording flow gaging station on Stewart Gulch by Hoyt, seconded by Dixon. Dixon, Hoyt, Bjork, Holzbauer, and Comes all voted in favor of this motion. Motion carried.

Motion to approve an order to be signed by the chairman by Holzbauer, seconded by Bjork. Dixon, Hoyt, Bjork, Holzbauer, and Comes all voted in favor of this motion. Motion carried.

**WATER PERMIT APPLICATIONS NOS. 8091-3 AND 8092-3, ROY GRISMER AND
WATER PERMIT APPLICATION NO. 8096-3, JEFFREY AMAN:**

Appearances:

Ms. Mines-Bailey, representing the Chief Engineer and the Water Rights Program.

Rudy Aman, intervener.

Roy Grismer, applicant.

Jane Aman, wife of Jeffrey Aman and Aaron Rolf, farm manager on behalf of applicant Jeffrey Aman.

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

WATER PERMIT APPLICATION NOS. 8091-3 AND 8092-3 FOR ROY GRISMER:

Ms. Mines-Bailey, Mr. Grismer, and Ms. Aman did not give an opening statement.

Mr. Aman stated the main concern is the domestic wells being impacted.

Ms. Mines-Bailey offered DENR Exhibit 1, the administrative files for Water Permit Application Nos. 8091-3 and 8092-3, which were admitted into the record.

Whitney Kilts was called to testify.

Ms. Kilts stated her educational and professional background.

Ms. Mines-Bailey offered DENR Exhibit 2, curriculum vita of Ms. Kilts, which was admitted into the record.

Ms. Kilts stated Water Permit Application Number 8091-3 proposes to appropriate water from the Grand aquifer at a maximum diversion rate of 2.67 cfs. The water is to be used for the irrigation of 240 acres located in the SE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$ Section 8 in T125N-R72W. The proposed well location is the NE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 8 in T125N-R72W and estimated depth is to be about 280 feet deep.

Water Permit Application Number 8092-3 proposes to appropriate water from the Grand aquifer at a maximum diversion rate of 2.67 cfs. The water is to be used for the irrigation of 240 acres located in the S $\frac{1}{2}$, S $\frac{1}{2}$ NE $\frac{1}{4}$ Section 13 in T125N-R73W. The proposed well location is the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 13 in T125N-R73W and estimated depth is to be about 330 feet deep.

The Grand aquifer underlies approximately 405,100 acres of Campbell, Edmunds, Faulk, Hand, McPherson, and Walworth counties and contains about 3,637,000 acre-feet of recoverable water. Approximately 44,200 acres of that area underlies McPherson County. The Grand aquifer lies in a bedrock valley formed by erosion caused by the preglacial ancient Grand River. The aquifer is composed of stratified sand, gravel, and silts from the outwash and alluvium of the preglacial Grand River and can contain thin beds of silty clay.

Water movement varies locally within the aquifer. Major discharge areas for the aquifer are southeastern and northeastern Faulk county, southeastern Edmunds county, and areas where the aquifer underlies the Missouri River. This aquifer is primarily under artesian conditions. Water in some areas of the Grand aquifer has medium sodium hazard and a high salinity, which would indicate the potential need for special management when utilizing the Grand aquifer for irrigation purposes.

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

Recharge to the aquifer is from infiltration of water through overlying sediments. Based on observation well analysis, a 1985 report by Hedges and others, estimated recharge to the unconfined portions of the Grand aquifer at approximately 4.0 inches per year; however there

is not enough data to estimate the area for which this aquifer is unconfined. For confined aquifers, Hedges and others recommends utilizing a range of recharge rates from 0.15 to 0.60 inches per year for management and development programs to estimate recharge. By applying this rate to the area of the aquifer, recharge to the aquifer can be estimated to be between 5,064 to 20,255 acre feet per year of which about 552 to 2,210 acre feet per year is in McPherson County.

Withdrawals from the aquifer are the result of natural discharge and pumping from wells. Withdrawals due to wells can be split into irrigation and non-irrigation uses. Withdrawals from domestic wells are not considered a significant portion of the hydraulic budget for the aquifer. Currently there are 49 water rights/permits authorizing wells to withdraw water from the Grand aquifer. None of these are located in McPherson County. Of those, 16 water rights/permits are for non-irrigation use, and 33 are for irrigation.

Combining irrigation and non-irrigation uses results in an estimated average annual withdrawal of 3,881 acre-feet. This estimate falls below the range of estimated recharge for the aquifer. Therefore there is a reasonable probability that there is water available to support these applications.

The Water Rights Program monitors 36 observation wells in the Grand aquifer. These observation wells generally show steady increasing water levels in the aquifer. Some observation wells near irrigation water rights/permits can show the effects of pumping; however water levels recover after irrigation has ceased.

There are currently no water rights/permits for the Grand aquifer in McPherson County. The nearest water right/permit completed into the Grand aquifer is Water Right No. 1705-3. Water Right No. 1705-3 is held by the City of Hosmer located 6.6 miles southeast from the proposed well location of Application No. 8091-3 and 7.7 miles southeast from the proposed well location of Application No. 8092-3. Due to the distances involved these applications are not expected to impact existing water rights/permits. Also of note in the area of Application No. 8091-3 there is a pending application for the Grand aquifer, Water Permit Application No. 8096-3, with a proposed well location of the SE ¼ NW ¼ Section 8 of T125N-R72W.

Based on the available data these applications, if approved, would not be expected to adversely impact nearby adequate wells. An adequate well as defined by South Dakota Administrative Rules is:

“a well-constructed or rehabilitated to allow various withdrawal methods to be used, to allow the inlet to the pump to be placed not less than 20 feet into the saturated aquifer or formation material when the well is constructed, or to allow the pump to be placed as near as possible to the bottom of the aquifer as is practical if the aquifer thickness is less than 20 feet.”

In conclusion, Ms. Kilts stated that there is a reasonable probability that water is available to meet the request of these applications. There is a reasonable probability that these applications will not adversely impact nearby adequate wells.

Under further questioning by Ms. Mines-Bailey, Ms. Kilts indicated that she and fellow Water Rights staff engineer Ken Buhler had conducted an onsite visit with the petitioners- Mr. Rudy Aman and Mr. Cletus Imberi- to listen to their concerns and answer questions. From this visit the approximate locations and some limited information for Mr. Imberi's wells were determined, since well completion reports were not available for Mr. Imberi's wells. A well completion report was on file with the Water Rights program for Mr. Rudy Aman's well. Using the approximate distances from the proposed well sites for the three applications, best available aquifer characteristic data, and the use of the full permit appropriation of two feet per acre per year applied during the irrigation season to estimate a worst case drawdown at the well locations. Ms. Kilts also noted that application rates are typically less than one foot per acre per year. The calculations further supported that adequate wells completed in the Grand aquifer at the same approximate distance from these applications as the petitioners' wells would not be adversely impacted.

Answering questions from Mr. Grismer, Ms. Kilts explained the difference between an inadequate well and an adequate well.

Answering questions from Mr. Aman, Ms. Kilts stated his well is estimated to have a maximum of seven feet of drawdown under the scenario outlined in earlier questioning by Ms. Mines-Bailey.

Answering questions from Mr. Hoyt, Ms. Kilts stated it is concluded there will be no adverse impact on an adequate well. To determine an exact magnitude of drawdown an aquifer pump test would need to be required. Ms. Kilts stated on pages 11 and 12 of her report, it indicates that in the past the board has recognized that in order to place water to a maximum beneficial use, artesian head pressure is not protected as a means of groundwater delivery. In cases of irrigation, the board has given consideration to artesian head pressure since reasonable domestic use would be protected first.

Answering questions from Mr. Holzbauer, Ms. Kilts stated the top of the aquifer is 225 feet below grade in the area of Mr. Rudy Aman's well. There would be an maximum estimated 10 feet of draw down from the three applications at the closest of the petitioners' wells.

WATER PERMIT APPLICATION NO. 8096-3 FOR JEFFREY AMAN:

Bracken Capen was called to testify.

Mr. Capen stated his educational and professional background.

Ms. Mines-Bailey offered DENR Exhibit 3, curriculum vita of Bracken Capen, which was admitted into the record.

Mr. Capen stated that Water Permit Application No. 8096-3 proposes to appropriate water from the Grand aquifer in McPherson County at a maximum diversion rate of 2.28 cubic feet per second (cfs). Water Permit Application No. 8096-3 proposes to construct a single well located in the SE ¼ NW ¼ of Section 8, T125N-R72W to supply the proposed diversion rate. The well is expected to be completed at a depth of approximately 270 feet below ground

surface and will be used to irrigate 160 acres in the NW ¼ of Section 8, T125N-R72W of McPherson County.

Including non-irrigation water rights/permits, the average annual rate of withdrawal from the Grand aquifer over the period of record has been estimated to be 2,874 ac-ft/yr. If the number of water permits/rights in 2013 is seen as more representative of the future of the region, the average rate of withdrawal is expected to increase to approximately 3,320 ac-ft/yr. Both these withdrawal rates are below the range of possible recharge rates presented by the 1985 Hedges and others report. Therefore, there is a reasonable probability that unappropriated water is available from the Grand aquifer for the use proposed in Water Permit Application No. 8096-3.

There are no existing water rights or permits appropriating water from the Grand aquifer within four miles of the proposed well sites. Interference with water rights/permits more than four miles from the proposed well sites is not expected to occur given the distance involved.

The Water Rights Program is aware of domestic wells located approximately 1.6 miles to the southeast of the proposed well sites in Water Permit Application Nos. 8096-3. Using the characteristics described above, the calculated drawdown at a distance greater than 1.5 miles from the production wells as a result of applying one ac-ft/yr to each irrigated acre over half a year is less than one foot in the case of Application No. 8096-3. Assuming all domestic wells within the radius of influence are adequately constructed, this level of drawdown is not expected to adversely impair any existing nearby domestic wells on file with the Water Rights Program.

Wells supplying existing water rights/permits and domestic uses are protected from adverse impacts per Water Management Board rules 74:02:04 and 74:02:05, which were promulgated pursuant to SDCL 46-6-6.1. These rules provide for the regulation of large capacity wells to the degree necessary to maintain an adequate depth of water for a prior appropriator in wells that have the ability to produce water independent of artesian pressure. Simply put, the pump placement in a prior appropriator's well is not necessarily protected.

If the water levels in the Grand aquifer were to decline, owners of existing wells bear the responsibility of lowering the pump inlet in the well to the top of the aquifer, if necessary. Increased lift would decrease the pump discharge or require a larger pump or a different type of a pump to maintain the same output.

In conclusion, there is a reasonable probability that unappropriated water is available from the Grand aquifer to supply the proposed appropriations. The proposed wells are not expected to adversely impair nearby adequate wells.

Answering questions from Mr. Aman, Mr. Capen stated to prove an adequate well is being affected, the well owner would want to contact DENR and advise them the domestic well has run dry and is no longer able to pump water. DENR would then come to the location to check the well and its adequacy.

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Answering questions from Mr. Hoyt, Mr. Capen stated if the pump needed to be lowered the well owner is responsible for those costs.

Answering questions from Mr. Holzbauer, Mr. Capen stated the closest observation well to Water Permit Application No. 8096-3 is MP-80I. This well is located approximately 4.25 miles to the southwest of the proposed well site.

Answering questions from Mr. Hoyt, Mr. Capen stated it is a requirement for well drillers to file a well completion report upon drilling a well.

Roy Grismer was sworn into oath.

Mr. Grismer stated he grew up in the area and has been farming all his life. If the permit is approved, it will be used to improve production and add revenue to the area by selling the crop to local elevators. The concerns of a domestic well being adversely impacted are understood, however, with the report from DENR there is not a concern with this well affecting the surrounding domestic wells. If an adequate well is affected, for some reason, it is protected.

Ms. Mines-Bailey asked if he understood that if there was any interference or any adverse impact to any of the wells, he would be required to limit the withdrawal.

Mr. Grismer stated he did understand, with the understanding that the well being affected is an adequate well.

Mr. Hoyt stated in the chief engineer's recommendation there was a suggestion that the effects of water salinity be taken into consideration.

Mr. Grismer stated if there is an issue with water quality, and adverse effects to the crop production, his irrigation would more than likely stop.

Aaron Roth was sworn into oath.

Mr. Roth stated the farming operation has three full time and a few part time employees. The entire crop production is sold locally, and everything to construct the well is being done local. The landowners around the area have seen that there is water available, and more may pursue permits.

Answering questions from Ms. Mines-Bailey, Mr. Roth stated he does understand that if any of the adequate domestic wells in the area are showing an adverse effect, Jeffery Aman will be required to limit his withdrawal.

Answering questions from Mr. Holzbauer, Mr. Roth stated he has farmed for his entire life. He has a degree in civil engineering.

Rudy Aman was sworn into oath.

Mr. Aman stated moving his domestic well pump down could be expensive.

Ms. Mines-Bailey gave her closing argument.

Ms. Mines-Bailey stated under SDCL 46-2A-9, the Water Management Board is required to look at four factors when determining whether or not to issue a permit, one factor requiring there be a reasonable probability that there is unappropriated water available. The evidence heard today from two different engineers, did show that there is water available. The testimony stated there are conservatively 5,000 acre feet available for recharge, and approximately 3,500 acre feet for withdrawals. The second factor for the board to consider is that the proposed diversions can be developed without unlawful impairment of existing rights which is the professional opinion of both engineers. DENR understands the concerns for the domestic wells. The law does provide adequate protection for those wells. If the wells are adequate the wells should not suffer any adverse impact based on the calculations done by both engineers. The third factor is of beneficial use. The water is being requested to increase crop production and improve the land being farmed. The final factor is that it is in the public interest. Traditionally, the board has found that irrigation is in the public interest with increasing crop production. For those reasons Water Rights and the chief engineer are recommending approval of the applications subject to the qualifications as set forth in the chief engineer's recommendation.

Motion to approve Water Permit Application Nos. 8091-3 and 8092-3, Roy Grismer and Water Permit Application No. 8096-3, Jeffrey Aman subject to the qualifications by the chief engineer by Hoyt, seconded by Bjork. Motion carried by roll call vote. Board members Bjork, Comes, Holzbauer, Hoyt, and Dixon all in favor of the motion.

QUALIFICATIONS FOR WATER PERMIT APPLICATION NO. 8091-3:

1. The well approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this Permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.
2. The well authorized by Permit No. 8091-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.
3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

QUALIFICATIONS FOR WATER PERMIT APPLICATION NO. 8092-3:

1. The well approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this Permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.

2. The well authorized by Permit No. 8092-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.
3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

QUALIFICATIONS FOR WATER PERMIT APPLICATION NO. 8096-3:

1. The well approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this Permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.
2. The well authorized by Permit No. 8096-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.
3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

Mr. Aman and all parties waived Findings of Fact and Conclusions of Law.

WATER PERMIT APPLICATION NO. 2730-2, UNITED ORDER OF SOUTH DAKOTA:

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

Appearances:

Ms. Mines-Bailey, representing the chief engineer and the Water Rights Program.

Jeffrey Connelly, representing the applicant.

Mike Hickey, representing Linda Kilcoin.

Karl Von Rump, intervener.

Motion to enter into an executive session by Hoyt, seconded by Holzbauer. Motion carried.

Chairman Comes reconvened the meeting.

Motion to approve Water Permit Application No. 2730-2, subject to the qualifications of the chief engineer by Dixon, seconded by Freeman. Motion carried by roll call vote. Board members Bjork, Comes, Hoyt, Dixon, and Freeman all in favor of the motion. Board member Holzbauer against the motion.

QUALIFICATIONS:

1. In accordance with SDCL 46-1-14 and 46-2A-20, Permit No. 2730-2 is issued for a twenty year term. Pursuant to SDCL 46-2A-21, the twenty year term may be deleted at any time during the twenty year period or following its expiration. If the twenty year term is not deleted at the end of the term, the permit may either be cancelled or amended with a new term limitation of up to twenty years. Permit No. 2730-2 may also be cancelled for non-construction, forfeiture, abandonment or three permit violations pursuant to SDCL 46-1-12, 46-5-37.1 and ARSD 74:02:01:37.
2. The wells approved under Permit Nos. 2610-2 and 2730-2 will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under these Permits shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.
3. The new well authorized by Permit No. 2730-2 shall be constructed by a licensed well driller and construction shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.
4. Water Permit Nos. 2610-2 and 2730-2, combined, are limited to an annual volume of 60 acre feet of water at a maximum diversion rate of 0.446 cubic feet of water per second.
5. A water meter shall be installed and maintained at the well sites authorized by Water Permit Nos. 2610-2 and 2730-2. The Water Permit Holder shall report to the Chief Engineer annually the amount of water withdrawn from the Madison aquifer. The report shall be a total volume submitted each January and provide a month by month breakdown of water withdrawn for the previous calendar year for each well. Site visits by Department of Environment and Natural Resources staff will be permitted at any time to verify any of the permit qualifications.
6. Failure to comply with any of these qualifications may result in cancellation proceedings before this Board.

APPOINTMENT OF THE PREHEARING OFFICER:

Motion to appoint Mr. Freeman as the prehearing officer by Hoyt, seconded by Holzbauer.
Motion carried.

**DECLARATORY RULING REQUEST PURSUANT TO SDCL 43-17-34 ON THE
NAVIGABILITY OF FIRESTEEL CREEK IN DAVISON COUNTY:**

Appearances:

Ms. Mines-Bailey, representing the chief engineer and the Water Rights Program.

Dick Neil, representing South Dakota Department of Game, Fish, and Parks (GF&P).

Gary Bussmus, landowner.

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

Mr. Bussmus gave an opening statement.

Mr. Bussmus stated two years ago there were gates put in. However, there was an issue with kayakers not closing the gates, so the cattle kept getting out of the pasture. His other worry is if someone were to get hurt, who is responsible and could he get sued?

Ms. Mines-Bailey stated DENR received a late filed email, asking for it to be considered as a public comment.

Mr. Naasz stated the email will be considered, but it is not an intervener and only a member of the public. Therefore, it is to be considered public comment and not as evidence.

Ms. Mines-Bailey gave her opening statement.

Ms. Mines-Bailey stated SDCL 43-17-34, defines navigability as "A stream, or portion of a stream, is navigable if it can support a vessel capable of carrying one or more persons throughout the period between the first of May to the thirtieth of September, inclusive, in two out of every ten years..." The statute goes on to provide a method, where an individual may petition the board for a determination as to navigability. The issue before the board today is the navigability. DENR is not taking a position on the navigability, however, DENR does intend to offer testimony from one of the engineers regarding background information for Firesteel Creek.

Mr. Neil gave his opening statement.

Mr. Neil stated Firesteel Creek serves a real purpose for the people in Davison County in South Dakota, for purposes of recreation. GF&P will provide evidence that shows Firesteel Creek is navigable and their petition to intervene supports that. The intervener's concern is the failure of others to close the gates, by recreational users. It is not directly an issue of navigability. In addition to the statute that Ms. Mines-Bailey quoted for the board, there is

additional language in SDCL 43-17-38. The statute states, "The extent of the public's use shall be the determining factor in designating a stream or portion of a stream pursuant to this section".

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

Ms. Mines-Bailey called Mark Rath to testify.

Mr. Rath stated his educational and work background.

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

Mr. Rath gave his report.

Mr. Rath stated based upon this request on September 1, 2015, DENR Water Rights Program staff engineers Mark Rath and Bracken Capen made a reconnaissance investigation of Firesteel Creek located in Davison County. Figure 1 is an area map of Firesteel Creek in Davison County and shows the locations of the United States Geological Survey (USGS) Stream Gaging Station No. 06477500 - Firesteel Creek near Mt. Vernon SD and the photo locations (Figures 2 -15). On September 1, 2015, the flow of Firesteel Creek measured at the gaging station was 0.01 cubic feet of water per second (4.5 gallons per minute).

Since it was a reconnaissance investigation it was only meant to become familiarized with the character of the stream and view it under the flow conditions on that particular day. The investigation was limited to the conditions viewed from numerous points adjacent to public roads crossing Firesteel Creek in the reach west of Lake Mitchell. At the time of the investigation there was minimal flow in the creek. Observed throughout the reach, there were numerous large pools of water separated by sections of shallow water and narrow strips of land generally containing sand, silt, cobbles, and larger rocks which is typical of a prairie stream bed.

Firesteel Creek is a prairie stream draining a watershed area of approximately 590 square miles upstream from Davison County. The stream channel overlies alluvium throughout the Davison County reach. Water observed in the channel may be from runoff from the contributing watershed and from water stored in the alluvium where the channel bottom is lower than the top of the water table. The USGS maintains a stream gaging station on Firesteel Creek near Mt Vernon SD, in the reach between the western Davison County line and Lake Mitchell. Table 1 of the report is a flow probability table based on 60 years of flow data from this gaging station. As previously referenced SDCL 46-17-34 states a stream, or portion of a stream, is navigable if it can support a vessel capable of carrying one or more persons throughout the period, between the first of May to the thirtieth of September, inclusive, in two out of every ten years.

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Answering questions from Mr. Bussmus, Mr. Rath stated there have been two complaints in 2015 regarding fences across Firesteel Creek, one kayaker and one snowmobiler.

Answering questions from Mr. Neil, Mr. Rath stated DENR cannot testify whether or not the stream can support a vessel containing one or more people for the prior of May 1 to September 30. In the last 5 years, there have been three complaints involving recreational use of the creek.

Answering questions from Mr. Hoyt, Mr. Rath pointed out where Mr. Bussmus' s land is located in Davison County.

Mr. Hoyt stated the pictures in the report were taken on September 1, 2015. In the Firesteel Creek area is this considered an above average year for precipitation.

Mr. Rath stated in a general sense it was a very dry spring, with a wet May and June period. This area is probably a little dryer overall because this area was one of the last to come out of a drought situation. There are portions of the creek where you will hit rocks. There are portions of the creek that would float a boat in two of the ten years, although DENR does not know if the entire creek would since only a portion of the creek was looked at.

Mr. Freeman stated this creek is currently listed as a navigable stream. At the time it was determined to be a navigable stream it met the definition of navigability. DENR is stating there is nothing to prove it is no longer a navigable creek.

Answering questions from Mr. Comes, Mr. Rath stated the minimum flow required for the creek to be considered navigable would be based on the local conditions. Considering the 20 other navigable streams listed as navigable, Firesteel Creek is not the smallest. Of those other 20 streams, the board throughout the years has removed several segments. In the early 1990's, there were other stream segments that would have been smaller than Firesteel Creek.

Mr. Freeman stated before you can declassify a stream that the board has already classified as navigable, would there have to be 10 years of record?

Mr. Rath stated there are long term gaging stations.

Mr. Bjork stated if you put your kayak in where picture number one of the report is taken and you float all the way down are there not going to be a couple sections where they have to portage? And would that make it non-navigable?

Mr. Rath stated that is unknown. However, as of right now the stream is considered navigable.

Answering questions from Mr. Bussmus, Mr. Rath stated Firesteel Creek was put on the list of navigable streams in either 1991 or 1992, and it was only Firesteel Creek in Davison County.

Gary Bussmus was sworn into oath.

Mr. Bussmus stated he went out and had a petition signed by residents of Davison County. Over the years it has become more stressful. In the area of his land, there are no fishermen. Fishing only tends to occur off the bridges.

Mr. Bussmus offered DENR Exhibit 1, a map indicating where his land is located by section, which was admitted into the record.

Mr. Neil stated according to the petition letter submitted, Mr. Bussmus stated. "I am at my wits end with this. I have complied with the law of having gates on fences across Firesteel Creek, yet people who choose to participate in activities, like kayaking, do not feel the need to close these gates." Mr. Neill stated that unfortunately, some of the users are either intentionally or unintentionally leaving gates open, after they go through. On occasion this has the effect of enabling cattle to escape from Mr. Bussmus' pasture. Mr. Neil asked how often in the last five years have there been problems with this kind of activity.

Mr. Bussmus stated about two years ago, roughly 2013 was the worst year.

Mr. Neil stated in August 2010, there was an unfortunate situation. An individual hit and killed a cow and calf because someone had left the gate open. Other than that incident, what other additional problems have there been with this kind of activity since 2010.

Mr. Bussmus stated in 2013 it happened often. It got to the point where someone had to always be home to be sure the gates were kept closed. It has become a lot of work to sort through the cattle with the neighbors.

Mr. Hoyt stated with the 65 people that have joined you in the petition, how many of those have land surrounding Firesteel Creek? Are these landowners shown on Exhibit 1? How many gated crossings do you maintain?

Mr. Bussmus stated around 90 percent have land along Firesteel Creek. All of the land owners are shown on the map, all the way up to the Mt. Vernon oil road. Mr. Bussmus indicated he maintains about 12 gated crossings.

Mr. Bjork asked if there is an estimate of how many gates are on this stretch of the creek.

Mr. Bussmus stated there are a lot of gates in fences across the creek.

Mr. Neil stated these gates have to be physically opened and physically closed. So, would it be a solution if gates could be installed that did not have to be manually opened and closed?

Mr. Bussmus stated a lot of the neighbors probably would not do that because of the cost.

Mr. Bussmus called Larry Hasz to testify.

Mr. Hasz was sworn into oath.

Mr. Hasz stated he has several pictures of the creek running through his property. There are seven different locations that are dry right now; some locations have pools of water but there is not flow every year. Firesteel Creek is probably navigable in May and June. Pictures off the road crossings do show water, however, if you go around the bend there are several dry spots or it is all rocks. Around 20 percent of the creek bed on his property is dry.

Mr. Bussmus offered Bussmus Exhibit A, pictures of Firesteel Creek.

Mr. Neil objected to Bussmus Exhibit A, stating it was not entered timely. The pictures are from October 13, 2015, which is outside of the time frame for determining navigability of the stream.

Bussmus Exhibit 2 was admitted into the record.

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

Mr. Freeman stated the creek has already been declared a navigable stream. The motion needs to be either to grant or deny the petition to remove it from the listing of navigable streams.

Motion to deny the request for the declaratory ruling by Freeman, seconded by Dixon. Motion carried by roll call vote. Board members Bjork, Comes, Holzbauer, Hoyt, Dixon, and Freeman all voting in favor of the motion.

Mr. Bjork stated there has been a lot of evidence presented, most of which has been opinion or speculation. The board has also seen pictures taken at various times of the year. Any changes cannot be supported with scientific evidence to show that there is a need for that kind of change. Before listening to another argument on another portion of the stream, there needs to be a long term study.

Mr. Comes stated he did not see where the applicant needed to provide further study. It does appear there is some evidence in the western area, it is not navigable.

Mr. Freeman stated while that may be true, the board does not know what the creek looks like over a 10 year period. It may be possible, as Mr. Rath said, to work with the gage and determine how much flow is necessary. There needs to more than pictures from just this year showing dry spots. Until the codified law is changed, the board cannot rely on pictures only taken this year. The legislature deemed this a navigable creek, at some point someone took evidence to meet the definition.

Mr. Naasz went over dates for submittal of Findings of Facts and Conclusions of Law.

**REQUEST PERMISSION TO ADVERTISE AMENDMENT TO ADMINISTRATIVE RULES
OF SOUTH DAKOTA CHAPTER 74:02:10, FENCE CROSSING NAVIGABLE STREAMS:**

Appearances:

Ms. Mines-Bailey, representing the chief engineer and the Water Rights Program.

Dick Neil, representing South Dakota Department of Game, Fish, and Parks (GF&P).

Gary Bussmus, landowner.

Mr. Naasz stated this statute allows the board to removed sections of streams from SDCL 43:17:38, which requires gates. The standard is different from the determination as to navigability. Conditionally, that statute requires the deletion from the statute be accomplished by rule making.

Ms. Mines-Bailey stated a petition for the deletion of the stream from SDCL 43-17-39, has not been heard by the board since 1994. In reviewing the statute and the petition that was presented it was properly published for the purposes of the declaratory ruling. However, after reviewing the statute which provides for the petition of the deletion of the stream, SDCL 43-17-39, it does need to be noticed under the rule making notice provisions. In reviewing the notice that was published, the notice did not meet the expansive requirements, for the purposes of rulemaking. As a result, DENR requests this matter be continued until the December 2015 meeting, to be able to properly notice the matter.

Mr. Neil stated he agreed with Ms. Mines-Bailey's recommendation.

Mr. Bussmus also agreed to Ms. Mines-Bailey's recommendation.

Motion to continue the issue of deletion of Firesteel Creek from SDCL 43:17:36 until the December meeting and proceeding with the promulgation of rules as required under SDCL 1-26 by Freeman, seconded by Bjork. Motion carried.

ADJOURN: Chairman Comes declared the meeting adjourned.

A court reporter was present for the meeting and a transcript of the proceedings from October 14, 2015, may be obtained by contacting Carla Bachand, PO Box 903, Pierre, SD 57501-0903, telephone number (605) 224-7611.

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

Approved this 9th day of December, 2015.

Chairman, Water Management Board

Secretary, Water Management Board

Draft



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

denr.sd.gov

Memorandum

To: Members of the Water Management Board

From: Patrick Snyder, Senior Environmental Scientist, S.D. Department of Environment and Natural Resources

Subject: December 9, 2015 – Proposed changes to the Surface Water Quality Standards

Date: November 30, 2015

Enclosed are several documents related to proposed changes to the Surface Water Quality Standards that will be presented at the December 9, 2015, Water Management Board meeting.

- 1) Public notice of the hearing;
- 2) Statement of Basis;
- 3) Proposed changes;
- 4) Comment letter from the Bureau of Finance and Management; and
- 5) Comment letter from the Legislative Research Council.

If you should have questions or would like more information, please contact me at Patrick.Snyder@state.sd.us or at (605) 773-4729.

WATER MANAGEMENT BOARD
NOTICE OF PUBLIC HEARING TO AMEND RULES

A public hearing to review proposed changes to the Surface Water Quality Standards will be held by the Water Management Board on December 9, 2015, at 9:00 a.m. CDT at the Matthew Environmental Education and Training Center, 523 East Capitol Avenue, Pierre, South Dakota, to receive and consider testimony, suggestions, and recommendations to the proposed amendments to the Administrative Rules of South Dakota (ARSD):

ARSD 74:51:01:50 Criteria for immersion recreation waters

ARSD 74:51:01:51 Criteria for limited contact recreation waters

ARSD 74:51:01 Appendix B Toxic Pollutant Criteria

The following is a summary of the proposed changes:

- ARSD 74:51:50 and :51 – delete the fecal coliform criteria from immersion recreation and limited contact recreation waters as this water quality parameter is no longer recommended. This change will leave intact the United States Environmental Protection Agency's (USEPA) recommended *Escherichia coli* criteria
- ARSD 74:51:01 Appendix B – adding the USEPA's nonylphenol aquatic life criteria.

The reason for the proposed changes is to update the water quality standards for these two parameters.

Persons interested in presenting data, opinions, and arguments for or against the proposed rules may do so by appearing in person at the hearing or by sending written comments to the South Dakota Department of Environment and Natural Resources (DENR), Surface Water Quality Program, Joe Foss Building, 523 East Capitol, Pierre, South Dakota, 57501-3182. Material sent by mail must reach the Surface Water Quality Program by 5:00 PM, December 8, 2015, to be taken into consideration at the hearing.

After the hearing, the board will consider all written and oral comments it receives on the proposed rules. The board may modify or amend a proposed rule to include or exclude matters that are described in this notice. The final water quality standards adopted by the board must be submitted to EPA pursuant to the federal Clean Water Act for review and approval. If EPA disapproves any portion of the water quality standards, EPA has the authority to promulgate federal standards for South Dakota.

Notice is further given to individuals with disabilities that this hearing is being held in a physically accessible place. Please notify the DENR at least 48 hours before the public hearing if you have a disability for which special arrangements must be made at the hearing. To request special arrangements or copies of the proposed rules and supporting documentation, call or write to: Patrick Snyder, Surface Water Quality Program, Joe Foss Building, 523 East Capitol, Pierre, South Dakota, 57501-3182; phone (605) 773-3351. Copies of the proposed rules and supporting documents can also be obtained by visiting the DENR's One-Stop Public Notice website at <http://denr.sd.gov/public>.

Sincerely,

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

Steven M. Pirner
Secretary

Published once at the total approximate cost of _____.

STATEMENT OF BASIS

REVISIONS TO ARSD 74:51:01:50, 74:51:01:51 and 74:51:01 Appendix B

SURFACE WATER QUALITY PROGRAM

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1.0 Background

Proposed changes included deleting the Fecal coliform criteria from § :50 and § :51. When the Water Management Board adopted the *Escherichia coli* recreation criteria on March 11, 2009, it was with the understanding that the Fecal coliform criteria would be removed after sufficient time to allow changes to Surface Water Discharge Permits issued by the Department.

The nonylphenol criteria were recommended by the United States and Wildlife Service and by the United States Environmental Protection Agency (USEPA) during the triennial review held in December of 2014. The Department recommended not adopting the criteria until further discussion with the USEPA had occurred. Based on those discussions, the Department is now recommending these criteria be adopted.

2.0 Chapter 74:51:01 – Surface Water Quality Standards

2.1 § :50. Criteria for immersion recreation waters.

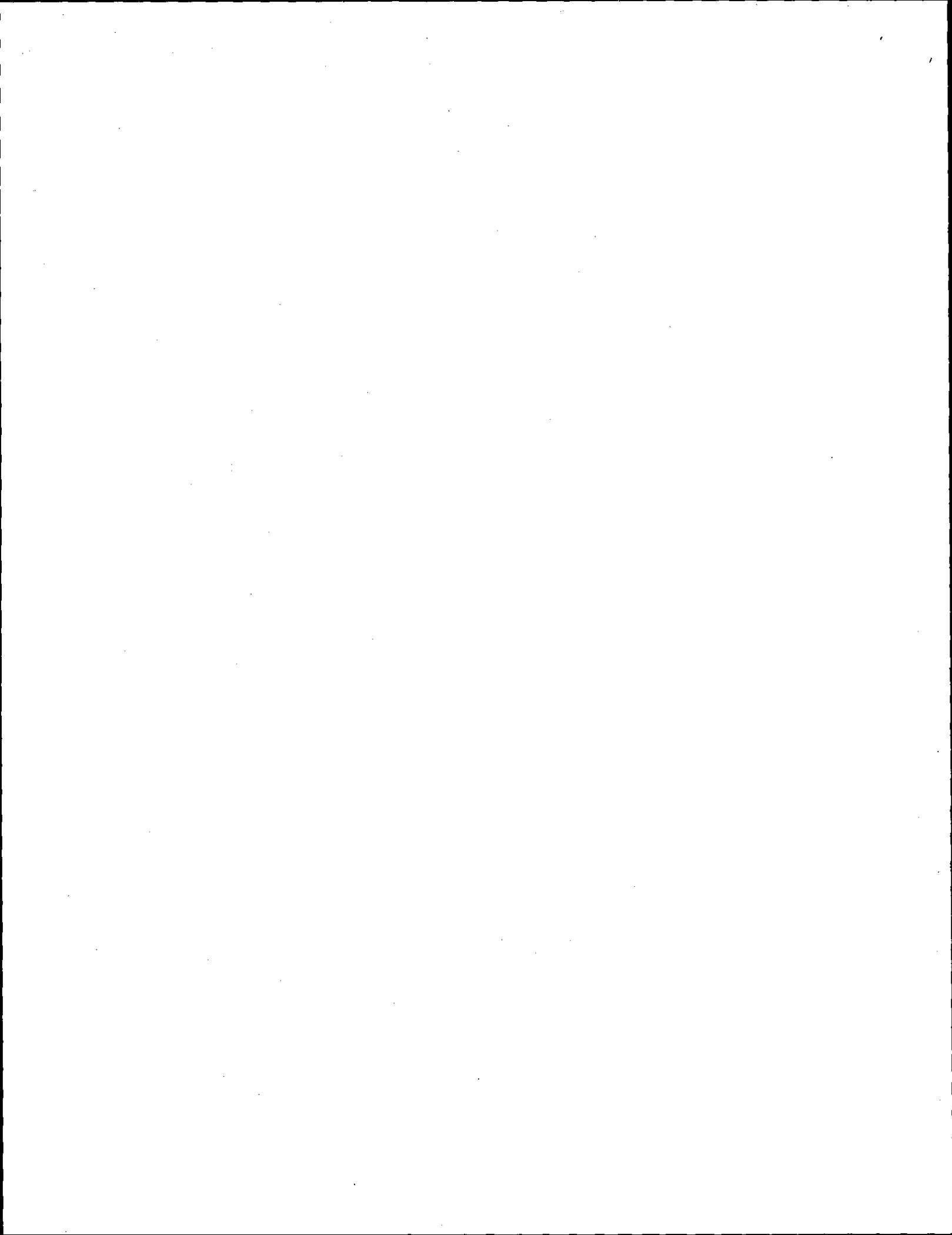
The Department is recommending the deletion of Fecal coliform as this bacterial parameter is no longer needed.

2.2 § :51. Criteria for limited contact recreation waters.

The Department is recommending the deletion of Fecal coliform as this bacterial parameter is no longer needed.

2.3 Appendix B Toxic Pollutant Criteria

Nonylphenol – This change reflects the latest U.S. EPA criteria for aquatic life.



Proposed changes to Surface Water Quality Standards;

74:51:01:50. Criteria for immersion recreation waters. The criteria of parameters for immersion recreation waters and their allowable variations that are not included under § 74:51:01:55 and Appendix B, unless set under § 74:51:01:24, are as found in the following table and only apply May 1 - September 30:

Parameter	Criteria	Unit of Measure	Special Conditions
Dissolved oxygen as measured anywhere in the water column of a non-stratified water body, or in the epilimnion and metalimnion of a stratified water body	≥ 5.0	mg/L	daily minimum
Fecal coliform	≤ 200	/100 mL	geometric mean based on a minimum of 5 samples obtained during separate 24-hour periods for any 30-day period, and they may not exceed this value in more than 20 percent of the samples examined in this same 30-day period
	≤ 400		in any one sample
<i>Escherichia coli</i>	≤ 126	/100 mL	geometric mean based on a minimum of 5 samples obtained during separate 24-hour periods for any 30-day period
	≤ 235		in any one sample

74:51:01:51. Criteria for limited contact recreation waters. The criteria of parameters for limited contact recreation waters and their allowable variations that are not included under § 74:51:01:55 and Appendix B, unless set under § 74:51:01:24, are as found in the following table and only apply May 1 - September 30:

Parameter	Criteria	Unit of Measure	Special Conditions
Dissolved oxygen as measured anywhere in the water column of a non-stratified water body, or in the epilimnion and metalimnion of a stratified water body	≥ 5.0	mg/L	daily minimum
Fecal coliform	$\leq 1,000$	/100 mL	geometric mean based on a minimum of 5 samples obtained during separate 24-hour periods for any 30-day period, and they may not exceed this value in more than 20 percent of the samples examined in this same 30-day period
	$\leq 2,000$		in any one sample
<i>Escherichia coli</i>	≤ 630	/100mL	geometric mean based on a minimum of 5 samples obtained during separate 24-hour periods for any 30-day period
	≤ 1178		in any one sample

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

Pollutant	CAS Number	Human Health Value Concentrations in µg/L		Freshwater Aquatic Life Value Concentrations in µg/L	
		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
Acenaphthene	83329	670	990		
Acenaphthylene (PAH) ⁽⁶⁾	208968				
Acrolein	107028	6	9	3	3
Acrylonitrile ⁽⁴⁾	107131	0.051	0.25		
Aldrin ⁽⁴⁾	309002	0.000049	0.000050	3.0	
Anthracene (PAH) ⁽⁵⁾	120127	8,300	40,000		
Antimony	7440360	5.6	640		
Arsenic ⁽⁴⁾	7440382	0.018 ⁽⁴⁾⁽¹¹⁾	0.14 ⁽⁴⁾⁽¹¹⁾	340	150
Asbestos ⁽⁴⁾	1332214	7,000,000 fibers/L			
alpha-BHC ⁽⁴⁾	319846	0.0026	0.0049		
beta-BHC ⁽⁴⁾	319857	0.0091	0.017		
gamma-BHC (Lindane) ⁽⁴⁾	58899	0.98	1.8	0.95	
Benzene ⁽⁴⁾	71432	2.2	51		
Benzidine ⁽⁴⁾	92875	0.000086	0.00020		
Benzo(a)Anthracene ⁽⁴⁾	56553	0.0038	0.018		
Benzo(a)Pyrene ⁽⁴⁾	50328	0.0038	0.018		

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

Pollutant	CAS Number	Human Health Value Concentrations in µg/L		Freshwater Aquatic Life Value Concentrations in µg/L	
		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
Benzo(b)Fluoroanthene ⁽⁴⁾	205992	0.0038	0.018		
Benzo(k)Flouroanthene ⁽⁴⁾	207089	0.0038	0.018		
Beryllium ⁽⁴⁾	7440417	4			
Bis(2-Chloroethyl)Ether ⁽⁴⁾	111444	0.030	0.53		
Bis(2-Chloroisopropyl)Ether ⁽⁴⁾	108601	1,400	65,000		
Bis(2-Ethylhexyl)Phthalate ⁽⁴⁾	117817	1.2	2.2		
Bromoform ⁽⁵⁾	75252	4.3	140		
Butylbenzyl Phthalate	85687	1,500	1,900		
Cadmium	7440439			2.0 ⁽⁷⁾	0.25 ⁽⁷⁾
Carbon Tetrachloride ⁽⁴⁾	56235	0.23	1.6		
Chlordane ⁽⁴⁾	57749	0.00080	0.00081	2.4	0.0043
Chlorine	7782505			19	11
Chlorobenzene	108907	130	1,600		
Chlorodibromomethane ⁽⁴⁾	124481	0.40	13		
Chloroform ⁽⁴⁾	67663	5.7	470		
2-Chloronaphthalene	91587	1,000	1,600		
2-Chlorophenol	95578	81	150		

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

Pollutant	CAS Number	Human Health Value Concentrations in µg/L		Freshwater Aquatic Life Value Concentrations in µg/L	
		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
Chromium(III)	16065831			570 ⁽⁷⁾	74 ⁽⁷⁾
Chromium(VI)	18540299			16	11
Chrysene ⁽⁴⁾	218019	0.0038	0.018		
Copper	7440508	1,300		13 ⁽⁷⁾	9.0 ⁽⁷⁾
Cyanide (weak acid dissociable)	57125	140	140	22	5.2
4,4'-DDD ⁽⁴⁾	72548	0.00031	0.00031		
4,4'-DDE ⁽⁴⁾	72559	0.00022	0.00022		
4,4'-DDT ⁽⁴⁾	50293	0.00022	0.00022	1.1	0.001
Dibenzo(a,h)Anthracene ⁽⁴⁾	53703	0.0038	0.018		
1,2-Dichlorobenzene	95501	420	1,300		
1,3-Dichlorobenzene	541731	320	960		
1,4-Dichlorobenzene	106467	63	190		
3,3'-Dichlorobenzidine ⁽⁴⁾	91941	0.021	0.028		
Dichlorobromomethane ⁽⁵⁾	75274	0.55	17		
1,2-Dichloroethane ⁽⁴⁾	107062	0.38	37		
1,1-Dichloroethylene ⁽⁴⁾	75354	330	7,100		
2,4-Dichlorophenol	120832	77	290		

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

Pollutant	CAS Number	Human Health Value Concentrations in µg/L		Freshwater Aquatic Life Value Concentrations in µg/L	
		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
1,2-Dichloropropane ⁽⁴⁾	78875	0.50	15		
1,3-Dichloropropene	542756	0.34	21		
Dieldrin ⁽⁴⁾	60571	0.000052	0.000054	0.24	0.056
Diethyl Phthalate	84662	17,000	44,000		
2,4-Dimethylphenol	105679	380	850		
Dimethyl Phthalate	131113	270,000	1,100,000		
Di-n-Butyl-Phthalate	84742	2,000	4,500		
2-Methyl-4,6-Dinitrophenol	534521	13	280		
2,4-Dinitrophenol	51285	69	5,300		
Dioxin (2,3,7,8-TCDD) ⁽⁴⁾	1746016	5.0E-9	5.1E-9		
2,4-Dinitrotoluene ⁽⁴⁾	121142	0.11	3.4		
1,2-Diphenylhydrazine ⁽⁴⁾	122667	0.036	0.20		
alpha-Endosulfan	959988	62	89	0.22	0.056
beta-Endosulfan	33213659	62	89	0.22	0.056
Endosulfan Sulfate	1031078	62	89		
Endrin	72208	0.059	0.060	0.086	0.036
Endrin Aldehyde	7421934	0.29	0.30		

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

Pollutant	CAS Number	Human Health Value Concentrations in µg/L		Freshwater Aquatic Life Value Concentrations in µg/L	
		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
Ethylbenzene	100414	530	2,100		
Fluoranthene	206440	130	140		
Fluorene ⁽⁵⁾	86737	1,100	5,300		
Heptachlor ⁽⁴⁾	76448	0.000079	0.000079	0.52	0.0038
Heptachlor epoxide ⁽⁴⁾	1024573	0.000039	0.000039	0.52	0.0038
Hexachlorobenzene ⁽⁴⁾	118741	0.00028	0.00029		
Hexachlorobutadiene ⁽⁴⁾	87683	0.44	18		
Hexachlorocyclopentadiene	77474	40	1,100		
Hexachloroethane ⁽⁴⁾	67721	1.4	3.3		
Ideno(1,2,3-cd)Pyrene	193395	0.0038	0.018		
Isophorone ⁽⁴⁾	78591	35	960		
Lead	7439921			65 ⁽⁷⁾	2.5 ⁽⁷⁾
Mercury	7439976	0.050	0.051	1.4	0.77 ⁽⁸⁾
Methyl Bromide	74839	47	1,500		
Methyl Chloride ⁽⁵⁾	74873				
Methylene Chloride ⁽⁴⁾	75092	4.6	590		
Methylmercury	22967926		0.3 mg/kg		

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

Pollutant	CAS Number	Human Health Value Concentrations in µg/L		Freshwater Aquatic Life Value Concentrations in µg/L	
		Use ¹⁽²⁾	Uses ²⁻³⁻⁴⁻⁵⁻⁶⁻⁹⁽³⁾	Acute (CMC)	Chronic (CCC)
N-Nitrosodimethylamine ⁽⁴⁾	62759	0.00069	3.0		
N-Nitrosodi-n-Propylamine ⁽⁴⁾	621647	0.0050	0.51		
N-Nitrosodiphenylamine ⁽⁴⁾	86306	3.3	6.0		
Nickel	7440020	610	4,600	470 ⁽⁷⁾	52 ⁽⁷⁾
Nitrobenzene	98953	17	690		
<u>Nonylphenol</u>	<u>84852153</u>			<u>28</u>	<u>6.6</u>
Polychlorinated Biphenyls, PCBs ⁽⁴⁾⁽⁹⁾		0.000064	0.000064		0.014
Pentachlorophenol	87865	0.27	3.0	19 ⁽⁶⁾	15 ⁽⁶⁾
Phenanthrene ⁽⁵⁾	85018				
Phenol	108952	10,000	860,000		
Pyrene ⁽⁵⁾	12900	830	4,000		
Selenium	7782492	170	4,200	⁽¹⁰⁾	5.0 ⁽⁸⁾
Silver	7440224			3.2 ⁽⁷⁾	
1,2,4-Trichlorobenzene	120821	35	70		
1,1,2,2-Tetrachloroethane ⁽⁴⁾	79345	0.17	4.0		
Tetrachloroethylene ⁽⁵⁾	127184	0.69	3.3		

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

Pollutant	CAS Number	Human Health Value Concentrations in µg/L		Freshwater Aquatic Life Value Concentrations in µg/L	
		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
Thallium	7440280	0.24	0.47		
Toluene	108883	1,300	15,000		
Toxaphene ⁽⁴⁾	8001352	0.00028	0.00028	0.73	0.0002
1,2-Trans-Dichloroethylene	156605	140	10,000		
1,1,1-Trichloroethane	71556				
1,1,2-Trichloroethane ⁽⁴⁾	79005	0.59	16		
Trichloroethylene ⁽⁴⁾	79016	2.5	30		
2,4,6-Trichlorophenol ⁽⁴⁾	88062	1.4	2.4		
Vinyl Chloride ⁽⁴⁾	75014	0.025	2.4		
Zinc	7440666	7,400	26,000	120 ⁽⁷⁾	120 ⁽⁷⁾



DEPARTMENT OF EXECUTIVE MANAGEMENT
BUREAU OF FINANCE AND MANAGEMENT

RECEIVED

NOV 3 - 2015

Dept. of Environment and
Natural Resources
Secretary's Office

MEMORANDUM

TO: Department of Environment and Natural Resources
FROM: Bureau of Finance and Management
RE: Fiscal Note
DATE: October 30, 2015

The Bureau of Finance and Management has reviewed the proposed rules from the Department of Environment and Natural Resources and concurs with the department's assumptions and fiscal impact calculations.

DJ:bn

Attachment: BFM Fiscal Note

cc: Jason Hancock, Director
South Dakota Legislative Research Council

South Dakota Municipal League (with Fiscal Note package)

South Dakota Association of County Commissioners (with Fiscal Note package)

Associated School Boards of South Dakota (with Fiscal Note package)

STATE CAPITOL
500 EAST CAPITOL AVE.
PIERRE, SOUTH DAKOTA
57501-5070

Voice: (605) 773-3411
Fax: (605) 773-4711

**ADMINISTRATIVE PROCEDURES ACT
FISCAL NOTE
Prepared by Submitting Agency**

	CODE	NAME
DEPARTMENT	20	Environment and Natural Resources
DIVISION	2	Environmental Services
PROGRAM	03	Surface Water Quality

PROPOSED RULES: 74:51:01:50, 74:51:01:51, 74:51:01 Appendix B

Hearing Date: December 9, 2015

FISCAL IMPACT STATEMENT:

Brief description of fiscal impact: (Example: Pursuant to 1-26-4.2, these rules have minimal impact to all entities. No additional staffing or resources are needed.)

FISCAL NOTE SUMMARY:

List state agencies of local governmental subdivisions affected.

COST INCREASES (DECREASES)

State Agencies:	First-Year Impact	Continuous-Yearly Impact
South Dakota DENR		(\$6,000)
TOTAL		(\$6,000)
Local Subdivisions:		
TOTAL	\$0	\$0
Small Business Increases (Decreases)		
TOTAL	\$0	\$0

REVENUE INCREASES (DECREASES)

Revenue Increases (Decreases) State, Local & Small Business:		
TOTAL	\$0	\$0

APPROVED _____

Signature Department Secretary or Board or Commission Chairman

DATE

12/30/15

ATTACH: Copy of proposed rules; separate sections for: 1) explanation of rules effect, i.e. what procedures, schedules, activities, etc. will change with its adoption; 2) statistics used, and their source; 3) assumptions that were made to arrive at fiscal impact; 4) computations that were made; and 5) small business impact statement



Legislative Research Council

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NOV 04 2015

SURFACE WATER PROGRAM

Representative Dean Wink, Chair
Senator Corey Brown, Vice Chair

Jason Hancock, Director
Sue Cichos, Deputy Director
Doug Decker, Code Counsel

November 3, 2015

Mr. Joe Nadenicek
South Dakota Department of Environment and Natural Resources
523 East Capitol Avenue
Pierre, South Dakota 57501

Dear Mr. Nadenicek:

The Water Management Board has proposed the amendment or adoption of ARSD 74:51:01:50, 74:51:01:51, 74:51:01 Appendix B - Surface Water Quality, which are scheduled for hearing on December 9, 2015. We have reviewed the proposed rules and approve them for legality with the following exceptions:

-Do not include entire chapters in the rules packet if no item within the chapter itself is being changed. Only those rules that are being amended, transferred, repealed, or adopted should be included in the proposed rules packet.

This letter is based on a preliminary review of your rules. Attached are your rules edited for form and style pursuant to SDCL 1-26-6.5 and directions for submitting the final draft of the rules. If you have any questions, please don't hesitate to call me or the staff member who has reviewed your rule.

Sincerely yours,

A handwritten signature in black ink that reads "Doug".

Doug Decker
Code Counsel

DD:AJ

Cc: Patrick Snyder, DENR

§ 74:51:01:55 and Appendix B, unless set under § 74:51:01:24, are as found in the following table and only apply May 1 - September 30:

Parameter	Criteria	Unit of Measure	Special Conditions
Dissolved oxygen as measured anywhere in the water column of a non-stratified water body, or in the epilimnion and metalimnion of a stratified water body	≥ 5.0	mg/L	daily minimum
Fecal coliform	≤ 200	/100 mL	geometric mean based on a minimum of 5 samples obtained during separate 24-hour periods for any 30-day period, and they may not exceed this value in more than 20 percent of the samples examined in this same 30-day period
	≤ 400		in any one sample
<i>Escherichia coli</i>	≤ 126	/100 mL	geometric mean based on a minimum

Parameter	Criteria	Unit of Measure	Special Conditions
			of 5 samples obtained during separate 24-hour periods for any 30-day period
	≤ 235		in any one sample

Source: SL 1975, ch 16, § 1; 4 SDR 32, effective December 4, 1977; transferred from § 34:04:02:40, effective July 1, 1979; 10 SDR 145, effective July 4, 1984; 13 SDR 129, 13 SDR 141, effective July 1, 1987; 19 SDR 111, effective January 31, 1993; transferred from § 74:03:02:40, July 1, 1996; 24 SDR 10, effective July 20, 1997; 35 SDR 253, effective May 12, 2009.

General Authority: SDCL 34A-2-11, 34A-2-93.

Law Implemented: SDCL 34A-2-10, 34A-2-11.

74:51:01:51. Criteria for limited contact recreation waters. The criteria of parameters for limited contact recreation waters and their allowable variations that are not included under § 74:51:01:55 and Appendix B, unless set under § 74:51:01:24, are as found in the following table and only apply May 1 - September 30:

Parameter	Criteria	Unit of Measure	Special Conditions
Dissolved oxygen as measured anywhere in the water column of a non-stratified water body, or in the	≥ 5.0	mg/L	daily minimum

Parameter	Criteria	Unit of Measure	Special Conditions
epilimnion and metalimnion of a stratified water body			
Fecal coliform	$\leq 1,000$	/100 mL	geometric mean based on a minimum of 5 samples obtained during separate 24-hour periods for any 30-day period, and they may not exceed this value in more than 20 percent of the samples examined in this same 30-day period
	$\leq 2,000$		in any one sample
<i>Escherichia coli</i>	≤ 630	/100mL	geometric mean based on a minimum of 5 samples obtained during separate 24-hour periods for any 30-day period
	≤ 1178		in any one sample

Source: SL 1975, ch 16, § 1; 4 SDR 32, effective December 4, 1977; transferred from § 34:04:02:41, effective July 1, 1979; 10 SDR 145, effective July 4, 1984; 13 SDR 129, 13 SDR 141, effective July 1, 1987; 19 SDR 111, effective January 31, 1993; transferred from § 74:03:02:41, July 1, 1996; 24 SDR 10, effective July 20, 1997; 35 SDR 253, effective May 12, 2009.

General Authority: SDCL 34A-2-11, 34A-2-93.

Law Implemented: SDCL 34A-2-10, 34A-2-11.

74:51:01:52. Criteria for fish and wildlife propagation, recreation, and stock watering waters. The criteria of parameters for fish and wildlife propagation, recreation, and stock watering waters and their allowable variations that are not included under § 74:51:01:55 and Appendix B, unless set under § 74:51:01:24, are as found in the following table:

Parameter	Criteria	Unit of Measure	Special Conditions
Total alkalinity as calcium carbonate	≤ 750	mg/L	30-day average
	≤ 1313	mg/L	daily maximum
Total dissolved solids	≤ 2,500	mg/L	30-day average
	≤ 4,375	mg/L	daily maximum
Conductivity at 25°C	≤ 4,000	micromhos/cm	30-day average
	≤ 7,000	micromhos/cm	daily maximum
Nitrates as N	≤ 50	mg/L	30-day average
	≤ 88	mg/L	daily maximum
pH	≥ 6.0 - ≤ 9.5	units	see § 74:51:01:07
Total petroleum hydrocarbon	≤ 10	mg/L	see § 74:51:01:10

APPENDIX B

SEE: § 74:51:01:55

Source: 19 SDR 111, effective January 31, 1993; transferred from Chapter 74:03:02, Appendix C, July 1, 1996; transferred from Chapter 74:51:01, Appendix A, 24 SDR 10, effective July 20, 1997; 25 SDR 98, effective January 27, 1999; 31 SDR 29, effective September 13, 2004; 35 SDR 253, effective May 12, 2009; 41 SDR 109, effective January 12, 2015.

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

Pollutant	CAS Number	Human Health Value Concentrations in µg/L		Freshwater Aquatic Life Value Concentrations in µg/L Uses 2-3-4-5-6-9	
		Use 1 ⁽²⁾	Uses 2-3-4-5-6- 9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
Acenaphthene	83329	670	990		
Acenaphthylene (PAH) ⁽⁶⁾	208968				
Acrolein	107028	6	9	3	3
Acrylonitrile ⁽⁴⁾	107131	0.051	0.25		
Aldrin ⁽⁴⁾	309002	0.000049	0.000050	3.0	
Anthracene (PAH) ⁽⁵⁾	120127	8,300	40,000		
Antimony	7440360	5.6	640		
Arsenic ⁽⁴⁾	7440382	0.018 ⁽⁴⁾⁽¹¹⁾	0.14 ⁽⁴⁾⁽¹¹⁾	340	150
Asbestos ⁽⁴⁾	1332214	7,000,000 fibers/L			
alpha-BHC ⁽⁴⁾	319846	0.0026	0.0049		
beta-BHC ⁽⁴⁾	319857	0.0091	0.017		
gamma-BHC (Lindane) ⁽⁴⁾	58899	0.98	1.8	0.95	

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

Pollutant	CAS Number	Human Health Value Concentrations in µg/L		Freshwater Aquatic Life Value Concentrations in µg/L Uses 2-3-4-5-6-9	
		Use 1 ⁽²⁾	Uses 2-3-4-5-6- 9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
Benzene ⁽⁴⁾	71432	2.2	51		
Benzidine ⁽⁴⁾	92875	0.000086	0.00020		
Benzo(a)Anthracene ⁽⁴⁾	56553	0.0038	0.018		
Benzo(a)Pyrene ⁽⁴⁾	50328	0.0038	0.018		
Benzo(b)Fluoroanthene ⁽⁴⁾	205992	0.0038	0.018		
Benzo(k)Flouoroanthene ⁽⁴⁾	207089	0.0038	0.018		
Beryllium ⁽⁴⁾	7440417	4			
Bis(2-Chloroethyl)Ether ⁽⁴⁾	111444	0.030	0.53		
Bis(2-Chloroisopropyl)Ether ⁽⁴⁾	108601	1,400	65,000		
Bis(2-Ethylhexyl)Phthalate ⁽⁴⁾	117817	1.2	2.2		
Bromoform ⁽⁵⁾	75252	4.3	140		
Butylbenzyl Phthalate	85687	1,500	1,900		
Cadmium	7440439			2.0 ⁽⁷⁾	0.25 ⁽⁷⁾
Carbon Tetrachloride ⁽⁴⁾	56235	0.23	1.6		

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

Pollutant	CAS Number	Human Health Value Concentrations in µg/L		Freshwater Aquatic Life Value Concentrations in µg/L	
		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
Chlordane ⁽⁴⁾	57749	0.00080	0.00081	2.4	0.0043
Chlorine	7782505			19	11
Chlorobenzene	108907	130	1,600		
Chlorodibromomethane ⁽⁴⁾	124481	0.40	13		
Chloroform ⁽⁴⁾	67663	5.7	470		
2-Chloronaphthalene	91587	1,000	1,600		
2-Chlorophenol	95578	81	150		
Chromium(III)	16065831			570 ⁽⁷⁾	74 ⁽⁷⁾
Chromium(VI)	18540299			16	11
Chrysene ⁽⁴⁾	218019	0.0038	0.018		
Copper	7440508	1,300		13 ⁽⁷⁾	9.0 ⁽⁷⁾
Cyanide (weak acid dissociable)	57125	140	140	22	5.2
4,4'-DDD ⁽⁴⁾	72548	0.00031	0.00031		
4,4'-DDE ⁽⁴⁾	72559	0.00022	0.00022		

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

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		Use 1 ⁽²⁾	Uses 2-3-4-5-6- 9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
4,4'-DDT ⁽⁴⁾	50293	0.00022	0.00022	1.1	0.001
Dibenzo(a,h)Anthracene ⁽⁴⁾	53703	0.0038	0.018		
1,2-Dichlorobenzene	95501	420	1,300		
1,3-Dichlorobenzene	541731	320	960		
1,4-Dichlorobenzene	106467	63	190		
3,3'-Dichlorobenzidine ⁽⁴⁾	91941	0.021	0.028		
Dichlorobromomethane ⁽⁵⁾	75274	0.55	17		
1,2-Dichloroethane ⁽⁴⁾	107062	0.38	37		
1,1-Dichloroethylene ⁽⁴⁾	75354	330	7,100		
2,4-Dichlorophenol	120832	77	290		
1,2-Dichloropropane ⁽⁴⁾	78875	0.50	15		
1,3-Dichloropropene	542756	0.34	21		
Dieldrin ⁽⁴⁾	60571	0.000052	0.000054	0.24	0.056
Diethyl Phthalate	84662	17,000	44,000		

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

Pollutant	CAS Number	Human Health Value Concentrations in µg/L		Freshwater Aquatic Life Value Concentrations in µg/L	
		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
2,4-Dimethylphenol	105679	380	850		
Dimethyl Phthalate	131113	270,000	1,100,000		
Di-n-Butyl-Phthalate	84742	2,000	4,500		
2-Methyl-4,6-Dinitrophenol	534521	13	280		
2,4-Dinitrophenol	51285	69	5,300		
Dioxin (2,3,7,8-TCDD) ⁽⁴⁾	1746016	5.0E-9	5.1E-9		
2,4-Dinitrotoluene ⁽⁴⁾	121142	0.11	3.4		
1,2-Diphenylhydrazine ⁽⁴⁾	122667	0.036	0.20		
alpha-Endosulfan	959988	62	89	0.22	0.056
beta-Endosulfan	33213659	62	89	0.22	0.056
Endosulfan Sulfate	1031078	62	89		
Endrin	72208	0.059	0.060	0.086	0.036
Endrin Aldehyde	7421934	0.29	0.30		
Ethylbenzene	100414	530	2,100		

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

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		Use 1 ⁽²⁾	Uses 2-3-4-5-6- 9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
Fluoranthene	206440	130	140		
Fluorene ⁽⁵⁾	86737	1,100	5,300		
Heptachlor ⁽⁴⁾	76448	0.000079	0.000079	0.52	0.0038
Heptachlor epoxide ⁽⁴⁾	1024573	0.000039	0.000039	0.52	0.0038
Hexachlorobenzene ⁽⁴⁾	118741	0.00028	0.00029		
Hexachlorobutadiene ⁽⁴⁾	87683	0.44	18		
Hexachlorocyclopentadiene	77474	40	1,100		
Hexachloroethane ⁽⁴⁾	67721	1.4	3.3		
Ideno(1,2,3-cd)Pyrene	193395	0.0038	0.018		
Isophorone ⁽⁴⁾	78591	35	960		
Lead	7439921			65 ⁽⁷⁾	2.5 ⁽⁷⁾
Mercury	7439976	0.050	0.051	1.4	0.77 ⁽⁸⁾
Methyl Bromide	74839	47	1,500		
Methyl Chloride ⁽⁵⁾	74873				

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

Pollutant	CAS Number	Human Health Value Concentrations in µg/L		Freshwater Aquatic Life Value Concentrations in µg/L Uses 2-3-4-5-6-9	
		Use 1 ⁽²⁾	Uses 2-3-4-5-6- 9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
Methylene Chloride ⁽⁴⁾	75092	4.6	590		
Methylmercury	22967926		0.3 mg/kg		
N-Nitrosodimethylamine ⁽⁴⁾	62759	0.00069	3.0		
N-Nitrosodi-n-Propylamine ⁽⁴⁾	621647	0.0050	0.51		
N-Nitrosodiphenylamine ⁽⁴⁾	86306	3.3	6.0		
Nickel	7440020	610	4,600	470 ⁽⁷⁾	52 ⁽⁷⁾
Nitrobenzene	98953	17	690		
<u>Nonylphenol</u>	<u>84852153</u>			<u>28</u>	<u>6.6</u>
Polychlorinated Biphenyls, PCBs ⁽⁴⁾⁽⁹⁾		0.000064	0.000064		0.014
Pentachlorophenol	87865	0.27	3.0	19 ⁽⁶⁾	15 ⁽⁶⁾
Phenanthrene ⁽⁵⁾	85018				
Phenol	108952	10,000	860,000		
Pyrene ⁽⁵⁾	12900	830	4,000		

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

Pollutant	CAS Number	Human Health Value Concentrations in µg/L		Freshwater Aquatic Life Value Concentrations in µg/L	
		Use 1 ⁽²⁾	Uses 2-3-4-5-6-9 ⁽³⁾	Acute (CMC) ⁽¹⁰⁾	Chronic (CCC) ⁽⁸⁾
Selenium	7782492	170	4,200		
Silver	7440224			3.2 ⁽⁷⁾	
1,2,4-Trichlorobenzene	120821	35	70		
1,1,2,2-Tetrachloroethane ⁽⁴⁾	79345	0.17	4.0		
Tetrachloroethylene ⁽⁵⁾	127184	0.69	3.3		
Thallium	7440280	0.24	0.47		
Toluene	108883	1,300	15,000		
Toxaphene ⁽⁴⁾	8001352	0.00028	0.00028	0.73	0.0002
1,2-Trans-Dichloroethylene	156605	140	10,000		
1,1,1-Trichloroethane	71556				
1,1,2-Trichloroethane ⁽⁴⁾	79005	0.59	16		
Trichloroethylene ⁽⁴⁾	79016	2.5	30		
2,4,6-Trichlorophenol ⁽⁴⁾	88062	1.4	2.4		
Vinyl Chloride ⁽⁴⁾	75014	0.025	2.4		

SOUTH DAKOTA SURFACE WATER QUALITY STANDARDS⁽¹⁾

FOR TOXIC POLLUTANTS - ARSD 74:51:01

Pollutant	CAS Number	Human Health Value Concentrations in µg/L		Freshwater Aquatic Life Value Concentrations in µg/L Uses 2-3-4-5-6-9	
		Use 1 ⁽²⁾	Uses 2-3-4-5-6- 9 ⁽³⁾	Acute (CMC)	Chronic (CCC)
Zinc	7440666	7,400	26,000	120 ⁽⁷⁾	120 ⁽⁷⁾

SOUTH DAKOTA

Surface Water Quality Standards⁽¹⁾

for Toxic Pollutants

(1) The aquatic life values for arsenic, cadmium, chromium (III), chromium (VI), copper, lead, mercury (acute), nickel, selenium, silver and zinc given in this document refer to the dissolved amount of each substance unless otherwise noted. All surface water discharge permit effluent limits for metals shall be expressed and measured in accordance with § 74:52:03:16.

(2) Based on two routes of exposure - ingestion of contaminated aquatic organisms and drinking water.

(3) Based on one route of exposure - ingestion of contaminated aquatic organisms only.

(4) Substance classified as a carcinogen with the value based on an incremental risk of one additional instance of cancer in one million persons (10^{-6}).

(5) Chemicals which are not individually classified as carcinogens but which are contained within a class of chemicals with carcinogenicity as the basis for the criteria derivation for that class of chemicals; an individual carcinogenicity assessment for these chemicals is pending.

(6) pH-dependent criteria. Value given is an example only and is based on a pH of 7.8. Criteria for each case must be calculated using the following equation taken from National Recommended Water Quality Criteria: 2002 (EPA-822-R-02-047, November 2002):

Pentachlorophenol (PCP), ug/L

$$\text{Chronic} = e^{[1.005(\text{pH}) - 5.134]}$$

$$\text{Acute} = e^{[1.005(\text{pH}) - 4.869]}$$

(7) Hardness-dependent criteria in ug/L. Value given is an example only and is based on a CaCO_3 hardness of 100 mg/L. Criteria for each case must be calculated using the following equations taken from National Recommended Water Quality Criteria:
<http://water.epa.gov/scitech/swguidance/standards/criteria/current/index.cfm#hhtable>, June 2013:

Cadmium, ug/L

$$\text{Chronic} = (*0.909)e^{(0.7409[\ln(\text{hardness})]-4.719)} \quad \text{Acute} = (*0.944)e^{(1.0166[\ln(\text{hardness})]-3.924)}$$

*Conversion factors are hardness-dependent. The values shown are with a hardness of 100 mg/L as calcium carbonate (CaCO₃). Conversion factors (CF) for any hardness can be calculated using the following equations:

$$\text{Chronic: CF} = 1.101672 - [(\ln \text{ hardness})(0.041838)]$$

$$\text{Acute: CF} = 1.136672 - [(\ln \text{ hardness})(0.041838)]$$

Chromium (III), ug/L

$$\text{Chronic} = (0.860)e^{(0.8190[\ln(\text{hardness})]+0.6848)} \quad \text{Acute} = (0.316)e^{(0.8190[\ln(\text{hardness})]+3.7256)}$$

Copper, ug/L

$$\text{Chronic} = (0.960)e^{(0.8545[\ln(\text{hardness})]-1.702)} \quad \text{Acute} = (0.960)e^{(0.9422[\ln(\text{hardness})]-$$

1.700)

Lead, ug/L

$$\text{Chronic} = (*0.791)e^{(1.273[\ln(\text{hardness})]-4.705)} \quad \text{Acute} = (*0.791)e^{(1.273[\ln(\text{hardness})]-1.460)}$$

*Conversion factors are hardness-dependent. The values shown are with a hardness of 100 mg/L as calcium carbonate (CaCO₃). Conversion factors (CF) for any hardness can be calculated using the following equations:

$$\text{Acute and Chronic: CF} = 1.46203 - [(\ln \text{ hardness})(0.145712)]$$

Nickel, ug/L

$$\text{Chronic} = (0.997)e^{(0.8460[\ln(\text{hardness})]+0.0584)} \quad \text{Acute} = (0.998)e^{(0.8460[\ln(\text{hardness})]+2.255)}$$

Silver, ug/L

$$\text{Acute} = (0.85)e^{(1.72[\ln(\text{hardness})]-6.59)}$$

Zinc, ug/L

$$\text{Chronic} = (0.986)e^{(0.8473[\ln(\text{hardness})]+0.884)} \quad \text{Acute} = (0.978)e^{(0.8473[\ln(\text{hardness})]+0.884)}$$

(8) These criteria are based on the total-recoverable fraction of the metal.

(9) This criterion applies to total pcbs, (e.g. the sum of congener or all isomer or homolog or Aroclor analyses).

(10) The $(0.996)\text{CMC} = 1/[f_1/\text{CMC}_1 + (f_2/\text{CMC}_2)]$ where f_1 and f_2 are the fractions of total selenium that are treated as selenite and selenate, respectively, and CMC_1 and CMC_2 are 185.9 $\Phi\text{g/L}$ and 12.82 $\Phi\text{g/L}$, respectively.

(11) This criterion for arsenic refers to the inorganic form only.



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

dennr.sd.gov

Water Management Board

November 30, 2015

Re: Rulemaking Regarding Deletion of Firesteel Creek from SDCL 43-17-38

Dear Members of the Board,

As the Board is aware, a petition was received pursuant to SDCL 43-17-39 requesting that the Board delete Firesteel Creek in Davison County from the list of streams set forth in SDCL 43-17-38 upon which gating requirements in fences across Firesteel Creek have been enacted. South Dakota Codified Law, section 43-17-39 authorizes the Board to delete a stream from SDCL 43-17-38 if (1) the public's use of the stream is not significant or (2) the public's rights to use the stream "would not be adversely impaired without a gate or opening in any fence across the stream."

Enclosed are the documents which the South Dakota Department of Environment and Natural Resources, Water Rights Program is providing for your consideration in making a determination as to whether Firesteel Creek should be deleted from this list:

- 1) Public notice for rule making including affidavits of publication
- 2) Notice of rulemaking to interested parties
- 3) Following documents from administrative file for the declaratory ruling:
 - a) the originating petition;
 - b) a report by DENR Engineer Mark Rath dated September 23, 2015;
 - c) a series of photographs taken by Mr. Larry Hasz which were submitted during the October 14, 2015, hearing regarding the navigability of Firesteel Creek.
- 4) Report by DENR Engineer Mike DeFea regarding the fencing complaints which he has investigated on Firesteel Creek.

- 5) Comments in response to the public notice of rulemaking from:
 - a) SD Game, Fish, and Parks Department including partial transcript of the October 14th hearing and Conservation Officer Petersen and Senator Vehle submitted photographs from the October 14th hearing
 - b) Mark Puetz
 - c) Donald Stehly
 - d) Todd Hanson
 - e) Kenneth Bussmus
 - f) Larry Hasz
 - g) Legislative Research Council
 - h) Bureau of Finance and Management
- 6) Codified laws and administrative rules

Any written comments received by DENR Water Rights Program after this mailing and before the hearing will be provided at the time of the hearing for your consideration in addition to any oral and written testimony provided at the hearing.

Respectfully


Jeanne Goodman

Chief Engineer, Water Rights Program

Water Management Board
Notice of Public Hearing to Amend and Adopt Stream Fencing Rule

A public hearing will be held in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Ave, Pierre, South Dakota, on December 9, 2015, at 10:00 a.m. Central Time, to consider amending and adopting Administrative Rule of South Dakota number 74:02:10:07 (see rule at <http://legis.sd.gov/Rules/DisplayRule.aspx?Rule=74:02:10:07>) which is a section of Chapter 74:02:10 entitled "Fences Crossing Navigable Streams." South Dakota Codified Law (SDCL) Chapter 43-17 allows fencing of navigable streams provided fences have a gate or opening permitting safe use of the stream and passage of boats, canoes, or other vessels, pedestrians, and snowmobiles. In addition, the law provides the opportunity for any person to file a petition to either add or delete a stream from the list of streams in which a gate or opening must be provided.

The effect of the rule will be to allow fences to be constructed without a gate across Firesteel Creek in Davison County. This proposed rule is brought to the Water Management Board by a petition filed pursuant to SDCL 43-17-39 by Gary Bussmus, 24973 404th Avenue, Mitchell SD. A copy of the petition is available at <http://denr.sd.gov/740210petition.pdf> or without charge from the address listed below. According to SDCL 43-17-39, the Department of Environment and Natural Resources (DENR) must submit this petition in the form of a proposed rule to the Water Management Board.

The reason for adopting the rule is to remove Firesteel Creek in Davison County from the list of streams where gates are required in fences across the streams pursuant to SDCL 43-17-38. The Water Management Board may adopt the rule to remove Firesteel Creek from the list of streams where gates are required, remove a portion of Firesteel Creek, or not adopt the rule.

Persons interested in presenting data, opinions, and arguments for or against the proposed rule may do so by appearing in person at the hearing or by sending them to South Dakota DENR, Water Rights Program, Joe Foss Building, 523 E Capitol Ave, Pierre, South Dakota 57501-3182. Material sent by mail must reach the Department of Environment and Natural Resources by December 8, 2015, to be considered. Comments can also be provided online at <http://denr.sd.gov/public>.

After the hearing, the board will consider all written and oral comments it receives on the proposed rules. The board may modify or amend a proposed rule at that time to include or exclude matters that are described in this notice.

Notice is further 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 public hearing if you have special needs for which special arrangements must be made. The telephone number for making special arrangements is (605) 773-5559.

A copy of the proposed rule may be obtained from the DENR web site at <http://denr.sd.gov/public>; the state Open Government administrative rules page at <https://rules.sd.gov/default.aspx>; or without charge from:

South Dakota DENR
Water Rights Program
Joe Foss Building

523 E Capitol
Pierre, South Dakota 57501-3182

Published at the approximate cost of \$_____.

Water Management Board

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South Dakota DENR
Water Rights Program
Joe Foss Building
523 E Capitol
Pierre, South Dakota 57501-3182

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Affidavit of Publication

RECEIVED

NOV 23 2015

STATE OF SOUTH DAKOTA: ss
County of Beadle

WATER RIGHTS
PROGRAM

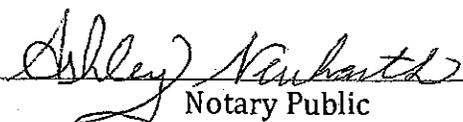
I, ELDON JACOBS, do solemnly swear that I am the Legal Advertising Coordinator of the Huron Plainsman, printed and published at Huron, in the state of South Dakota, and that from my own personal knowledge and reference to the files of said publication, the display advertising for SD DEPT OF ENVIROMENTAL was published in the Huron Plainsman in the size of: 2X7.5 NOTICE OF PUBLIC HEARING

NOV 10, 2015

Total Cost \$155.25



Subscribed & sworn to me before this 19TH day of NOV 2015


Notary Public

My Commission Expires 10/25/17

Water Management Board

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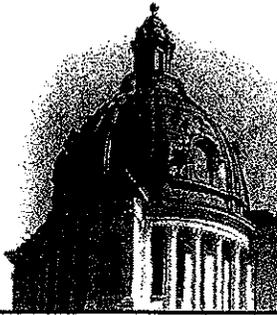
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SD EN



Capital Journal

AFFIDAVIT OF PUBLICATION

State of South Dakota, County of Hughes

Jackie Odom of said county, being, first duly sworn, on oath, says: That ~~he~~^{she} is the publisher or an employee of the publisher of the Capital Journal, a daily newspaper published in the City of Pierre in said County of Hughes and State of South Dakota; that ~~he~~^{she} has full and personal knowledge of the facts herein stated, that said newspaper is a legal newspaper as defined in SDCL 17-2-2.1 through 17-2-2.4 inclusive, that said newspaper has been published within the said County of Hughes and State of South Dakota, for at least one year next prior to the first publication of the attached public notice, and that the ~~legal~~^{display} advertisement headed Water Management Board Notice of Public Hearing to Amend and Adopt Stream Fencing Rule a printed copy of which, taken from the paper in which the same was published, and which is hereto attached and made a part of this affidavit, was published in said newspaper for one successive week(s) to wit:

<u>November 9</u>	<u>2015</u>	<u>20</u>
<u> </u>	<u>20</u>	<u>20</u>

That the full amount of the fee charged for the publication of the attached public notice inures to the sole benefit of the publisher or publishers; that no agreement or understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever; that the fees charged for the publication thereof are: \$ 216.30.

Signed: Jackie Odom

subscribed and sworn to before me this 12 day of November 2015

Mary Baker

Notary Public in and for the County of Hughes, South Dakota.
My Commission expires 2-19, 2021.

Water Management Board
Notice of Public Hearing to Amend and Adopt Stream
Fencing Rule

A public hearing will be held in the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol Ave, Pierre, South Dakota, on December 9, 2015, at 10:00 a.m. Central Time, to consider amending and adopting Administrative Rule of South Dakota number 74-02:10-07 (see rule at <http://legis.sd.gov/RulesDisplayRule.aspx?Rule=74-02:10-07>) which is a section of Chapter 74-02:10 entitled "Fences Crossing Navigable Streams" South Dakota Codified Law (SDCL) Chapter 43-17 allows fencing of navigable streams provided fences have a gate or opening permitting safe use of the stream and passage of boats, canoes, or other vessels, pedestrians, and snowmobiles. In addition, the law provides the opportunity for any person to file a petition to either add or delete a stream from the list of streams in which a gate or opening must be provided.

The effect of the rule will be to allow fences to be constructed without a gate across Firesteel Creek in Davison County. This proposed rule is brought to the Water Management Board by a petition filed pursuant to SDCL 43-17-39 by Gary Busman, 24973 404th Avenue, Mitchell SD. A copy of the petition is available at <http://denr.sd.gov/740210petition.pdf> or without charge from the address listed below. According to SDCL 43-17-39, the Department of Environment and Natural Resources (DENR) must submit this petition in the form of a proposed rule to the Water Management Board.

The reason for adopting the rule is to remove Firesteel Creek in Davison County from the list of streams where gates are required in fences across the streams pursuant to SDCL 43-17-38. The Water Management Board may adopt the rule to remove Firesteel Creek from the list of streams where gates are required, remove a portion of Firesteel Creek, or not adopt the rule.

Persons interested in presenting data, opinions, and arguments for or against the proposed rule may do so by appearing in person at the hearing or by sending them to South Dakota DENR, Water Rights Program, Joe Foss Building, 523 E Capitol Ave, Pierre, South Dakota 57501-3182. Material sent by mail must reach the Department of Environment and Natural Resources by December 8, 2015, to be considered. Comments can also be provided online at <http://denr.sd.gov/public>.

After the hearing, the board will consider all written and oral comments it receives on the proposed rules. The board may modify or amend a proposed rule at that time to include or exclude matters that are described in this notice.

Notice is further 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 public hearing if you have special needs for which special arrangements must be made. The telephone number for making special arrangements is (605) 773-5559.

A copy of the proposed rule may be obtained from the DENR web site at <http://denr.sd.gov/public>, the state Open Government administrative rules page at <https://rules.sd.gov/default.aspx>, or without charge from:

South Dakota DENR
Water Rights Program
Joe Foss Building
523 E Capitol
Pierre, South Dakota 57501-3182

Published at the approximate cost of \$214.00.

Affidavit of Publication

STATE OF SOUTH DAKOTA

County of Pennington SS:

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NOV 17 2015

WATER RIGHTS PROGRAM

Brandyn Crawford 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 Week for one successive Weeks, the first publication there of being on the 7th day of November that the fees charged for the publication there of are 155 dollars and 50 cents.

Rapid City

Brandyn R Crawford

Subscribed and sworn to before me this 9th day of November, 2015.

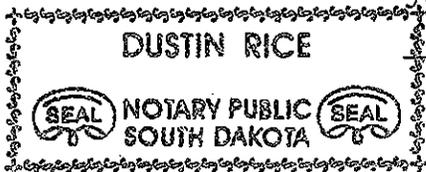
Dustin Rice

Notary public

DUSTIN RICE

July 1, 2020

My commission expires



Nov. 7, 2015

L20964847

**WATER MANAGEMENT BOARD
NOTICE OF PUBLIC HEARING TO AMEND
AND ADOPT STREAM FENCING RULE**

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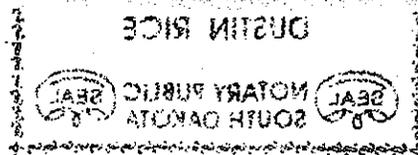
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A copy of the proposed rule may be obtained from the DENR web site at <http://denr.sd.gov/public>; the state Open Government administrative rules page at <https://rules.sd.gov/default.aspx>; or without charge from:

South Dakota DENR
Water Rights Program
Joe Foss Building
523 E Capitol
Pierre, South Dakota 57501-3182

(Published once at the total approximate cost of \$155.80)



AFFIDAVIT OF PUBLICATION

RECEIVED
NOV 12 2015
WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA }
 } ss.
County of Lake }

Judy Dahl of the City of Madison, County of Lake, State of South Dakota, being first duly sworn on oath, deposes and says:

The Madison Daily Leader is a daily legal newspaper of general circulation, printed and published in the City of Madison, in said County of Lake, by Hunter Publishing, Inc., Jon M. Hunter, publisher, and has been such legal newspaper during the times hereinafter mentioned; that the said Madison Daily Leader has been in existence as such legal newspaper for more than one year prior to the publication of the notice hereunto attached, and has during all of said time had, and how has, more than 200 bona fide subscribers; that the undersigned, the affiant, is the Secretary of the said newspaper, in charge of the advertising department thereof and has personal knowledge of all the facts stated in this affidavit and the advertisement headed

Water Management Board

Amend & Adopt Stream Fencing Rules / Display Advertisement

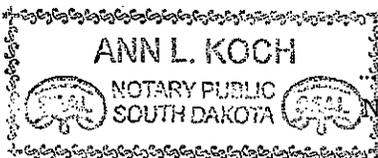
printed copy of which hereunto attached, was printed and published in the said newspaper for One successive weeks, once each week and on the same day of the week, on the following dates, to-wit:

- On Mon, the 9th day of November, 2015;
- On _____, the _____ day of _____, 20_____;
- On _____, the _____ day of _____, 20_____;
- On _____, the _____ day of _____, 20_____;
- On _____, the _____ day of _____, 20_____;
- On _____, the _____ day of _____, 20_____;
- On _____, the _____ day of _____, 20_____;
- On _____, the _____ day of _____, 20_____;

That \$ 140.40 being the full amount of the fees for publication of the attached notice inures solely for the benefit of the publisher of the said newspaper; that no arrangement or understanding for a division thereof has been made with any other person and that no part thereof has been agreed to be paid to any other person whomsoever.

Judy Dahl

Subscribed and sworn to before me this 10th day of November, 2015



Ann L. Koch
Notary Public, Lake County, South Dakota

Publication Fees _____ \$ _____
Notary Fees _____ \$ _____
Total _____ \$ _____

Received Payment,

WATER MANAGEMENT BOARD

Notice of Public Hearing to Amend and Adopt Stream Fencing Rule

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South Dakota DENR
Water Rights Program
Joe Foss Building
523 E Capitol
Pierre, South Dakota 57501-3182

Published once at the total approximate cost of \$140.40

Attorneys for

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NOV 12 2015

WATER RIGHTS PROGRAM

AFFIDAVIT OF PUBLICATION

YANKTON DAILY PRESS AND DAKOTAN

Department of Environment and Natural Resources
c/o Water Rights Program
523 E Capitol Ave
Pierre, SD 57501

STATE OF SOUTH DAKOTA
COUNTY OF YANKTON

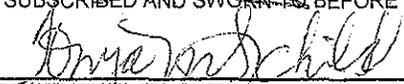
KELLY HERTZ BEING FIRST DULY SWORN ON OATH DEPOSES AND SAYS THAT HE IS THE MANAGING EDITOR OF, YANKTON MEDIA INC, A CORPORATION, THE PRINTER AND THE PUBLISHER OF THE YANKTON DAILY PRESS AND DAKOTAN, A LEGAL DAILY NEWSPAPER PUBLISHED AND CIRCULATED IN THE CITY OF YANKTON, SAID COUNTY AND STATE, AND ONE OF THE OFFICIAL NEWSPAPERS OF THE SAID COUNTY OF FACTS STATED IN THIS AFFIDAVIT; THAT THE ANNEXED Public Hearing to Adopt Rules

TAKEN FROM THE PAPER, IN WHICH IT WAS LAST PUBLISHED IN THE NEWSPAPER ON THE 9th DAY OF November 2015 THAT THE FULL AMOUNT OF THE FEE CHARGED FOR THE PUBLICATION OF SAID NOTICE TO WIT \$39.31 ENSURES TO THE BENEFITS OF THE PUBLISHER OF SAID NEWSPAPER AND THAT NO AGREEMENT AND UNDERSTANDING FOR THE DIVISION THEREOF HAS BEEN MADE WITH ANY OTHER PERSON, AND THAT NO PART THEREOF HAS BEEN AGREED TO BE PAID TO ANY PERSON WHOMSOEVER.

PUBLISHED ON: 11/9/2015

FILED ON: 11/9/2015


SUBSCRIBED AND SWORN TO BEFORE ME THIS 9th DAY OF November 2015


NOTARY PUBLIC, SOUTH DAKOTA
MY COMMISSION EXPIRES 8/19/2021

Water Management Board

Notice of Public Hearing to Amend and Adopt Stream Fencing Rule

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South Dakota DENR
Water Rights Program
Joe Foss Building
523 E Capitol
Pierre, South Dakota 57501-3182

Published at the approximate cost of \$39.31.



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

IN THE MATTER OF THE
PROMULGATION OF
ADMINISTRATIVE RULES

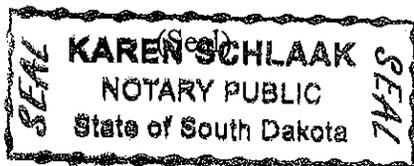
AFFIDAVIT OF MAILING NOTICE
TO INTERESTED PARTIES

I, Ron Duvall, under oath, do swear, that on November 9, 2015, I mailed a copy of the notice attached to this affidavit to the list of persons attached to this affidavit. I further swear that the attached list is a true and correct list of all persons who have requested advance notice of rule-making proceedings by the Department of Environment and Natural Resources.


Ron Duvall

Subscribed and sworn to
before me this 9th day
of November, 2015.


Notary Public - South Dakota



My Commission expires
April 1, 2019.

Water Management Board
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523 E Capitol
Pierre, South Dakota 57501-3182

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UNION NJ 07083

REP JACQUELINE SLY
22560 POTTER RD
RAPID CITY SD 57702

SEN BILLIE H SUTTON
919 FRANKLIN ST
BURKE SD 57523

BRINK ENGINEERING
616 4TH ST N
ABERDEEN SD 57401

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BLDG

SECRETARY KELLY HEPLER - G F & P Foss Bldg
INTEROFFICE

INTEROFFICE

SCHOOL & PUBLIC LANDS -- Capitol Bldg
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TONY LEIF -G F & P Foss Bldg INTEROFFICE

SECRETARY LUCAS LENTSCH - DEPT OF AG Foss
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WATER MANAGEMENT BOARD
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RAPID CITY SD 57702

CHAD COMES
WATER MANAGEMENT BOARD
116 W CENTER
MADISON SD 57042

TIM BJORK
WATER MANAGEMENT BOARD
112 W OAK ST
PIERRE SD 57501

REP MARY DUVALL
PO BOX 453
PIERRE SD 57501

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WILMOT SD 57279

SEN JIM WHITE
1145 BEACH CIRCLE NE
HURON SD 57350

DARREL PAHL
21248 475TH AVE
AURORA SD 57002

STOCKGROWERS ASSOCIATION
426 ST JOSEPH
RAPID CITY SD 57701

STATE CONSERVATIONIST
NATURAL RESOURCE CONSERVATION SERVICE
200 4TH ST SW
HURON SD SD 57350-2475

HOMESTAKE MINING CO
11457 BOBTAIL GULCH ST
LEAD SD 57754

JAY GILBERTSON
EAST DAKOTA WDD
B2B AIRPORT DR
BROOKINGS SD 57006

WEST DAKOTA WATER DEV DIST
PO BOX 6365
RAPID CITY SD 57709

SOUTH CENTRAL WDD
PO BOX 43
ARMOUR SD 57313

SD FARM BUREAU
PO BOX 1426
HURON SD 57350

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26 MESA CT # 4
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DENNIS DAVIS
SD RURAL WATER ASSOCIATION
PO BOX 287
MADISON SD 57042

YVONNE TAYLOR
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FORT PIERRE SD 57532

KATHY ZANDER
SD AGRI-BUSINESS ASSN
320 E CAPITOL AVE
PIERRE SD 57501

DALE COCKRELL
PO BOX 7370
KALISPELL MT 59904-0370

STEVE SCHELSKE
US BUREAU OF RECLAMATION
515 9TH ST # 101
RAPID CITY SD 57701

GOLDSTAKE EXPLORATION
PO BOX 38
SPEARFISH SD 57783

BLACK HAWK WATER USER DISTRICT
PO BOX 476
BLACK HAWK SD 57718

SD RESOURCES COALITION
928 8TH ST
BROOKINGS SD 57006

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GENERAL SERVICES ADMINIS
PO BOX 25546 BLDG 41 RM 240
DENVER CO 80225

MICHAEL JENSEN
US DEPT OF INTERIOR
PO BOX 25287
DENVER CO 80225-0287

MAYOR - STEVE ALLENDER
CITY OF RAPID CITY
300 6TH ST
RAPID CITY SD 57701

BOB ROTHERMEL
ALLAINCE OF ARCHITECTS & ENG
706 W BLVD
RAPID CITY SD 57701

JAMES RIVER WATER DD
PO BOX 849
HURON SD 57350

KURT PFEIFLE - MANAGER
MID DAKOTA WDD
PO BOX 318
MILLER SD 57362

HOWARD KENNEDY
405 S 5TH ST
BERESFORD SD 57004-2115

VAN KELLEY, DIRECTOR
WATER RESOURCES INSTITUTE
PO BOX 2120
BROOKINGS SD 57007

QUINTIN NEMMERS
24480 476TH AVE
DELL RAPIDS SD 57022

DIANE BEST, MUNICIPAL UTILITIES
CITY OF SIOUX FALLS
224 W 9TH ST
SIOUX FALLS SD 57102-0596

LINDA HILDE
104 WOODLAND DR
MADISON SD 57042

JIM EDWARDS
EAST RIVER ELECTRIC
PO BOX 227
MADISON SD 57042-2924

SD CATTLEMEN'S ASSOCIATION
215 E PROSPECT
PIERRE SD 57501

GREG HENDERSON
THIRD PLANNING & DEV DIST
PO BOX 687
YANKTON SD 57078-0687

SOUTH EASTERN DEVELOPMENT FOUNDATION
500 N WESTERN AVE # 100
SIOUX FALLS SD 57104

JAY LARSON
SCHMUCKER, PAUL & NOHR
PO BOX 398
MITCHELL SD 57301

GERARD BREEN
U S WEST
301 WEST 65 ST RM 100
RICHFIELD MN 55423

SEN MIKE VEHLE
132 N HARMON DR
MITCHELL SD 57301

REP JOSHUA KLUMB
29296 401ST AVE
MOUNT VERNON SD 57363

REP TONA ROZUM
87 S HARMON DR
MITCHELL SD 57301

JERALD TOOMEY, MAYOR
CITY OF MITCHELL
612 N MAIN ST
MITCHELL SD 57301

FARMERS UNION
BOX 1388
HURON SD 57350

FIRST PLANNING & DEV DIST
PO BOX 1207
WATERTOWN SD 57201-1207

CLARK RWS
PO BOX 162
CLARK SD 57225-0162

SD SHEEP GROWER'S ASSN
13627 RABBIT CREEK PL
REVA SD 57651

SD ASSN OF CONSERVATION DISTRICTS
1007 KINGSBURY
BELLE FOURCHE SD 57717

BRENDA FORMAN
SD ASSN OF COOPERATIVES
PO BOX 102
HURON SD 57350-2414

CHRIS HESLA
SOUTH DAKOTA WILDLIFE FEDERATION
PO BOX 7075
PIERRE SD 57501

MEADE COUNTY COMMISSIONERS
1300 SHERMAN STREET, SUITE 212
STURGIS, SD 57785

JOHN R FREDERICKSON
PO BOX 583
DEADWOOD SD 57732

ALAN AKER, CHAIR
MEADE CO COMMISSION
14347 MAHAFFEY DRIVE
PIEDMONT, SD 57769

JANET RYAN
BLACK HILLS ALLIANCE
PO BOX 2508
RAPID CITY SD 57709-2508

DERRIC ILES
SD GEOLOGICAL SURVEY
AKELEY SC CTR - 414 E CLARK
VERMILLION SD 57069-2390

SD PORK PRODUCER'S
500 N WESTERN AVE #500
SIOUX FALLS SD 57104

CAPTAIN DAVID BEALE
USAF ENVMT LAW DIV CENTRAL REGION
525 GRIFFIN ST # 505
DALLAS TX 75202-5203

MARLENE KNUTSON
CENTRAL SD ENHANCMENT DIST
PO BOX 220
PIERRE SD 57501

ENVIRONMENTAL DIRECTOR
WHARF RESOURCES MINING CO
10928 WHARF RD
LEAD SD 57754

JAKE FITZGERALD
WEST RIVER -LYMAN/JONES RWS
PO BOX 407
MURDO SD 57759

CHARLOTTE KRAFT
CITATION PUBLISHING
7729 E GREENWAY RD # 300
SCOTTSDALE AZ 85260

DELL MAJURE
GRAPHIC PACKAGING INTERNATIONAL
100 GRAPHIC PKG INT WAY
MACON GA 31206

MIKE SHAW
PO BOX 160
PIERRE SD 57501

JUDY A MCCARTHY
AT&T
605 LIBERT AVE
UNION NJ 07083

REP JACQUELINE SLY
22560 POTTER RD
RAPID CITY SD 57702

SEN BILLIE H SUTTON
919 FRANKLIN ST
BURKE SD 57523

BRINK ENGINEERING
616 4TH ST N
ABERDEEN SD 57401

ANN MINES - BAILEY --AG'S OFFICE MICKELSON
BLDG

SECRETARY KELLY HEPLER - G F & P Foss Bldg
INTEROFFICE

INTEROFFICE

SCHOOL & PUBLIC LANDS -- Capitol Bldg
INTEROFFICE

TONY LEIF -G F & P Foss Bldg INTEROFFICE

SECRETARY LUCAS LENTSCH - DEPT OF AG Foss
Bldg INTEROFFICE

REP STEVE MCCLEEREY
45708 116TH ST
SISSETON SD 57262

LEO HOLZBAUER
WATER MANAGEMENT BOARD
PO BOX 877
WAGNER SD 57380

RODNEY FREEMAN JR
WATER MANAGEMENT BOARD
PO BOX 176
HURON SD 57350

EVERETT HOYT
WATER MANAGEMENT BOARD
4422 CARRIAGE HILLS DR
RAPID CITY SD 57702-6874

JIM HUTMACHER
WATER MANAGEMENT BOARD
802 EAST 7TH ST
OACOMA SD 57365

PEGGY DIXON
WATER MANAGEMENT BOARD
3311 HOGAN COURT
RAPID CITY SD 57702

CHAD COMES
WATER MANAGEMENT BOARD
116 W CENTER
MADISON SD 57042

TIM BJORK
WATER MANAGEMENT BOARD
112 W OAK ST
PIERRE SD 57501

REP MARY DUVALL
PO BOX 453
PIERRE SD 57501

SEN JASON FRERICHS
13507 465TH AVE
WILMOT SD 57279

SEN JIM WHITE
1145 BEACH CIRCLE NE
HURON SD 57350

SD Water Management Board
PMB 2020
Water Rights
Joe Foss Building
523 E Capital
Pierre, SD 57501

RECEIVED
JUL 16 2015
WATER RIGHTS
PROGRAM

Tuesday, July 14, 2015

To Whom It May Concern:

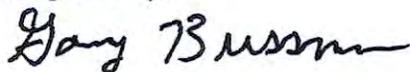
It was brought to my attention in order to get the 43-17-39 petition to delete from, list of streams requiring gates I needed to have a request form in no later then August 1, 2015. This is my formal request to delete this law requiring gates to be up on creek crossings in Davison County.

I have collected several signatures of residence that agree with this petition to delete this law. I am at my wits end with this. I have complied with the law of having gates on the streams, Firesteel Creek, yet people who chose to participate in activities, like kayaking, do not feel the need to close these gates. This leaves us landowners liable for any injuries that may occur as a result. A good example I am referring to would be from 2 years ago, on several incidences, when we had this same issue with a kayaker opening our creek crossing gates and not closing them. This resulted in our cattle get out on the road and getting hit by cars, leaving us liable. We are still dealing with this today. Our neighbors are in these same situations.

I went around to my neighbors and was not turned down once for signing this petition to change this law. I have enclosed photos to show Firesteel Creek is not a navigable creek. There are several areas that are not passable leaving the kayaker trespassing on landowners land. If the kayaker would get injured in picking up their kayak and walking on my land then I am left liable. We landowners have much more to loose.

Davison County is the only county on Firesteel Creek that has this law. We would sure like to change this. Please highly consider our request.

Respectfully,

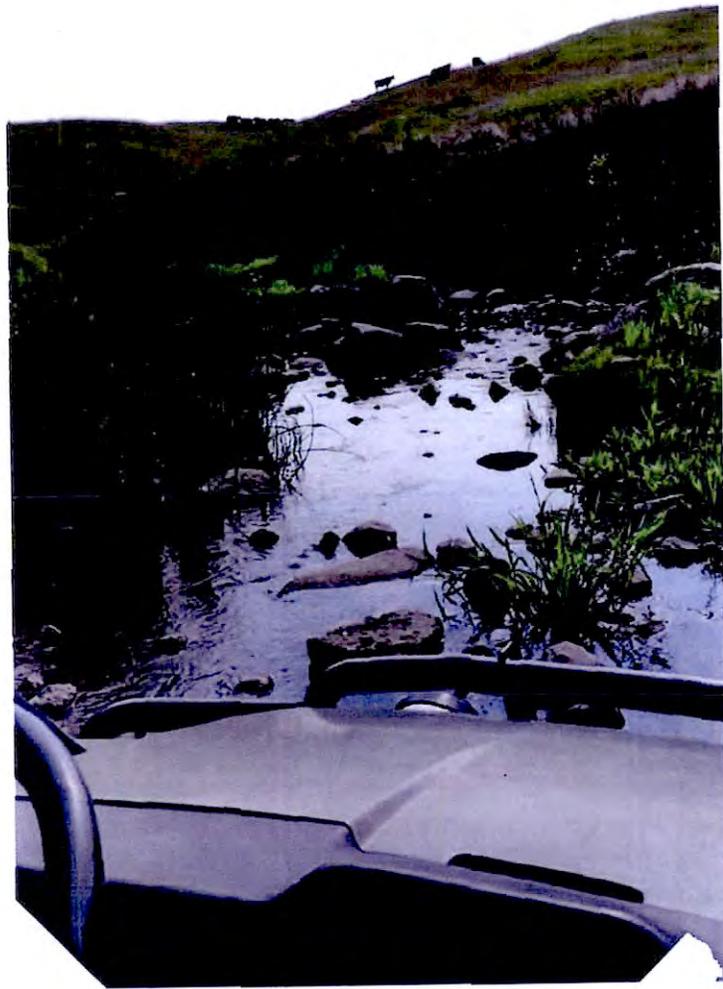


Gary Bussmus

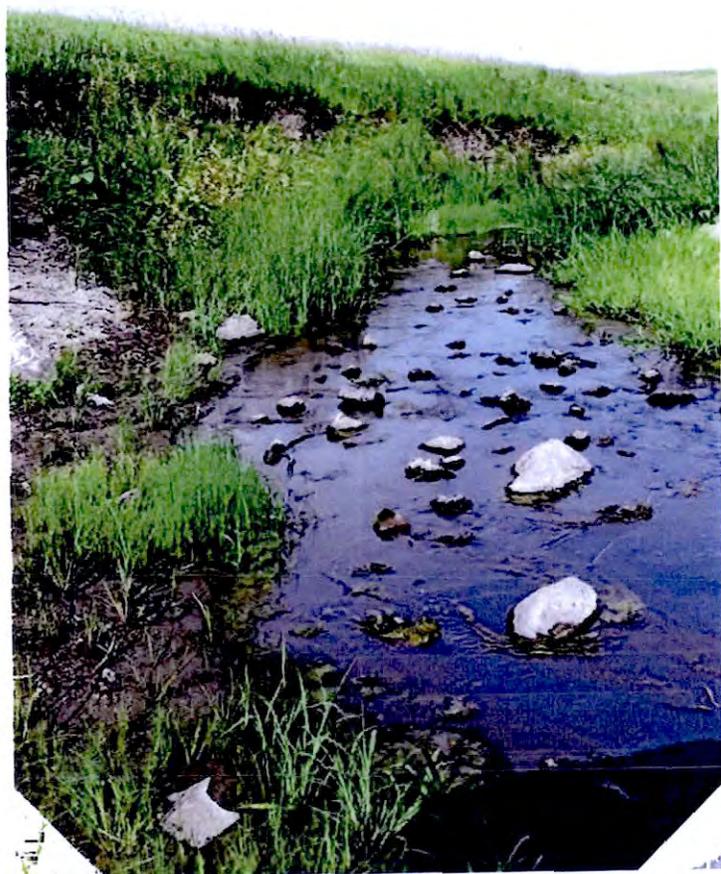
We the people, who have signed below, are petitioning to delete the law of requiring gates or openings across the navigable stream or portions of the stream on Firesteel Creek in Davison County.

- | | |
|------------------------|------------------------------|
| 1.) Gary Bussman | 22.) Gary Dyer |
| 2.) Blessing | 23.) [Signature] |
| 3.) [Signature] | 24.) Larry Hartz |
| 4.) [Signature] | 25.) [Signature] |
| 5.) [Signature] | 26.) Peter Thayer |
| 6.) Duane Stebbins | 27.) Harvey J. Jorgensen |
| 7.) Thomas Smith | 28.) [Signature] |
| 8.) Thomas Greenway | 29.) [Signature] |
| 9.) [Signature] | 30.) [Signature] |
| 10.) Kevin Hoop | 31.) [Signature] |
| 11.) Joan Nemecek | 32.) Council Stevens |
| 12.) Kim Nemecek | 33.) Dal Math |
| 13.) [Signature] | 34.) Barry [Signature] |
| 14.) [Signature] | 35.) Jim [Signature] |
| 15.) [Signature] | 36.) Ken [Signature] |
| 16.) Rita Bussman | 37.) [Signature] |
| 17.) Kenneth Benjamin | 38.) [Signature] John BLASIK |
| 18.) Betty [Signature] | 39.) Tammy Steffen |
| 19.) Greg [Signature] | 40.) Lynn [Signature] |
| 20.) [Signature] | 41.) [Signature] |
| 21.) Ken Schockman | 42.) [Signature] |

- 43.) Durkin
- 44.) Blairde Hanson
- 45.) Todd M. Hanson
- 46.) Roy O. Hanson
- 47.) A. Hanson
- 48.) Bi. Bod
- 49.) Peggy Greenway
- 50.) Bruce Cunniff
- 51.) Timothy Bell
- 52.) Charles M. Johnson
- 53.) Sam. P. Kelly
- 54.) Clayton
- 55.) John W. Jones
- 56.) Lester Jones
- 57.) James Johnson
- 58.) Rodney Muhs
- 59.) Becky Muhs
- 60.) Wanda Busa
61. Ann VanDerschulde
62. Julie VanDerschulde
63. John S. V. J. J. J.
64. Harvey L. Kelley
65. Daggy L. Kelley











Firesteel Creek Navigability Reconnaissance Investigation

A request was filed with the Water Management Board regarding the navigability of Firesteel Creek in Davison County. The petition requests the Board to issue a declaratory ruling that the portion of Firesteel Creek located in Davison County is not a navigable stream. SDCL 46-17-34 states a stream, or portion of a stream, is navigable if it can support a vessel capable of carrying one or more persons throughout the period, between the first of May to the thirtieth of September, inclusive, in two out of every ten years.

Based upon this request on September 1, 2015, DENR Water Rights Program staff engineers Mark Rath and Bracken Capen made a reconnaissance investigation of Firesteel Creek located in Davison County. Figure 1 is an area map of Firesteel Creek in Davison County and shows the locations of the United States Geological Survey (USGS) Stream Gaging Station No. 06477500 - Firesteel Creek near Mt. Vernon SD and the photo locations (Figures 2 -15). On September 1, 2015, the flow of Firesteel Creek measured at the gaging station was 0.01 cubic feet of water per second (4.5 gallons per minute).

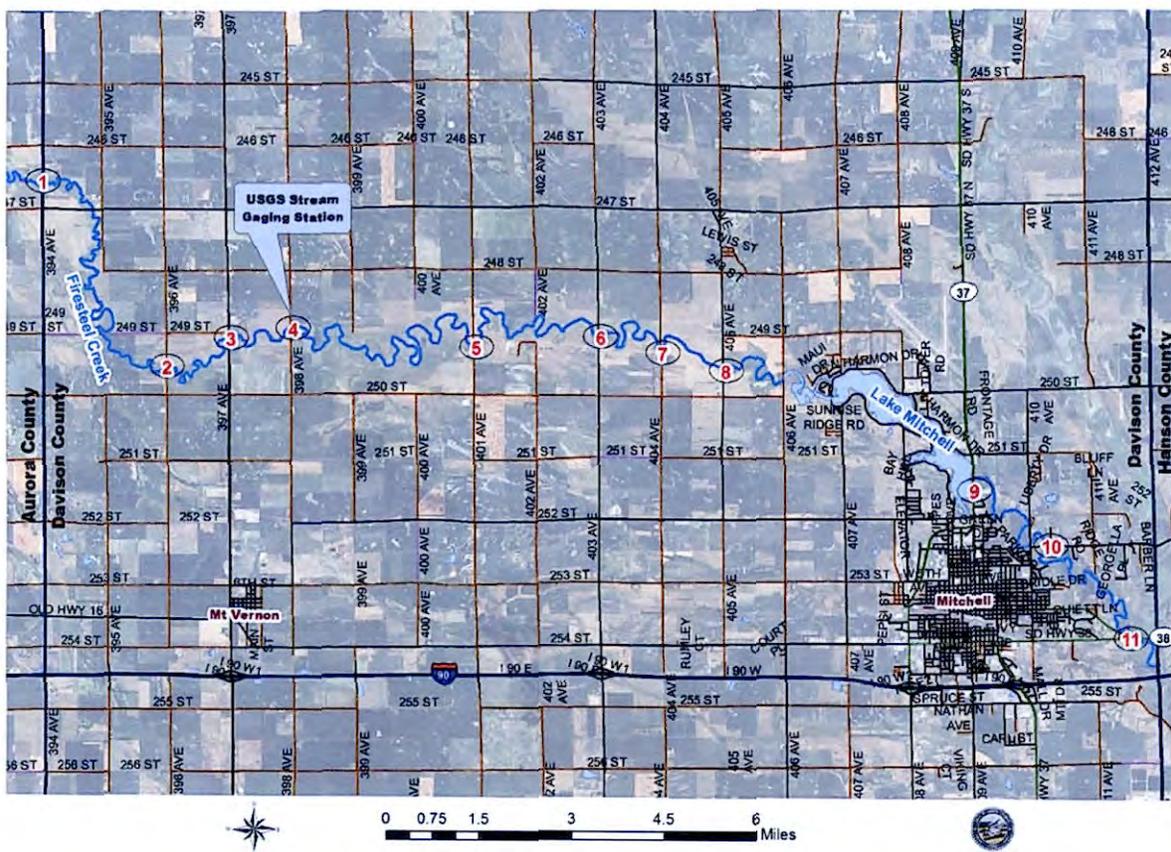


Figure 1 - Firesteel Creek reconnaissance investigation area map showing photo locations from September 1, 2015.



Figure 2 - Location 3; at the 397 Avenue bridge facing west.



Figure 3 - Location 3; at the 397 Avenue bridge facing east.



Figure 4 - Location 4; at the 398 Avenue bridge facing west.



Figure 5 - Location 4; at the 398 Avenue bridge facing east.



Figure 6 - Location 4; below the 398 Avenue bridge



Figure 7 - Location 5; at the 401 Avenue bridge facing west



Figure 8 - Location 5; at 401 the Avenue bridge facing east



Figure 9 - Location 6; at the 403 Avenue bridge facing west.



Figure 10 - Location 6; at the 403 Avenue bridge facing east.



Figure 11 - Location 6; below the 403 Avenue bridge.



Figure 12 - Location 7; at the 404 Avenue bridge facing west.



Figure 13 - Location 7; at the 404 Avenue bridge facing east.



Figure 14 - Location 8; at the 405 Avenue bridge facing west.



Figure 15 - Location 8; at the 405 Avenue bridge facing east.

Since it was a reconnaissance investigation it was only meant to become familiarized with the character of the stream and view it under the flow conditions on that particular day. The investigation was limited to the conditions viewed from numerous points adjacent to public roads crossing Firesteel Creek in the reach west of Lake Mitchell. At the time of the investigation there was minimal flow in the creek. Observed throughout the reach, there were numerous large pools of water separated by sections of shallow water and narrow strips of land generally containing sand, silt, cobbles, and larger rocks which is typical of a prairie stream bed.

Firesteel Creek is a prairie stream draining a watershed area of approximately 590 square miles upstream from Davison County. The stream channel overlies alluvium throughout the Davison County reach. Water observed in the channel may be from runoff from the contributing watershed and from water stored in the alluvium where the channel bottom is lower than the top of the water table. The USGS maintains a stream gaging station on Firesteel Creek near Mt Vernon SD, in the reach between the western Davison County line and Lake Mitchell. Table 1 is a flow probability table based on 60 years of flow data from this gaging station. As previously referenced SDCL 46-17-34 states a stream, or portion of a stream, is navigable if it can support a vessel capable of carrying one or more persons throughout the period, between the first of May to the thirtieth of September, inclusive, in two out of every ten years.

Probability	May (cfs)	Jun (cfs)	Jul (cfs)	Aug (cfs)	Sep (cfs)	Recurrence
75%	0.59	0.11	0.01	0.00	0.00	Avg 3 out of 4 yrs
50%	4.39	2.69	0.65	0.12	0.06	Avg 2 out of 4 yrs
25%	26.84	40.20	9.15	1.58	0.56	Avg 1 out of 4 yrs
20%	144.68	121.77	27.58	5.01	1.76	Avg 2 out of 10 yrs
10%	205.48	230.97	63.52	16.60	2.66	Avg 1 out of 10 yrs

Table 1. The flow probability table for the USGS Gaging Station No. 06477500; Firesteel Creek near Mt.Vernon SD; 60 years of data, 1955-2015.



Mark Rath
 Natural Resources Engineer
 SD DENR – Water Rights Program
 September 23, 2015

Addendum 1

On September 21, 2015, Water Rights Permitting Administrator Ron Duvall made a second photo reconnaissance trip along Firesteel Creek, Figures 16-27. On that date the flow of Firesteel Creek measured at the gaging station was 0.00 cubic feet of water per second.

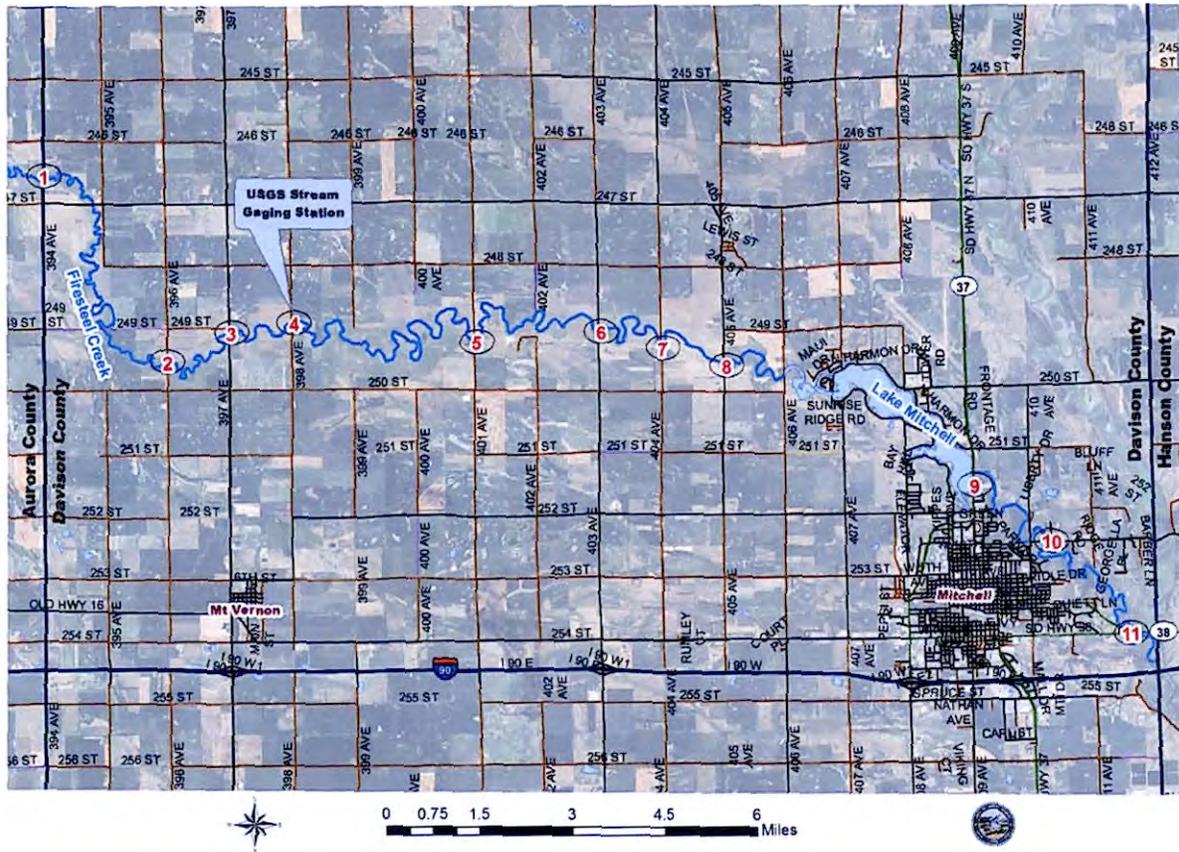


Figure 16 - Firesteel Creek reconnaissance investigation area map showing photo locations from September 21, 2015.



Figure 17 - Location 1; at 394 Avenue facing east.



Figure 18- Location 2; at 396 Avenue facing west.

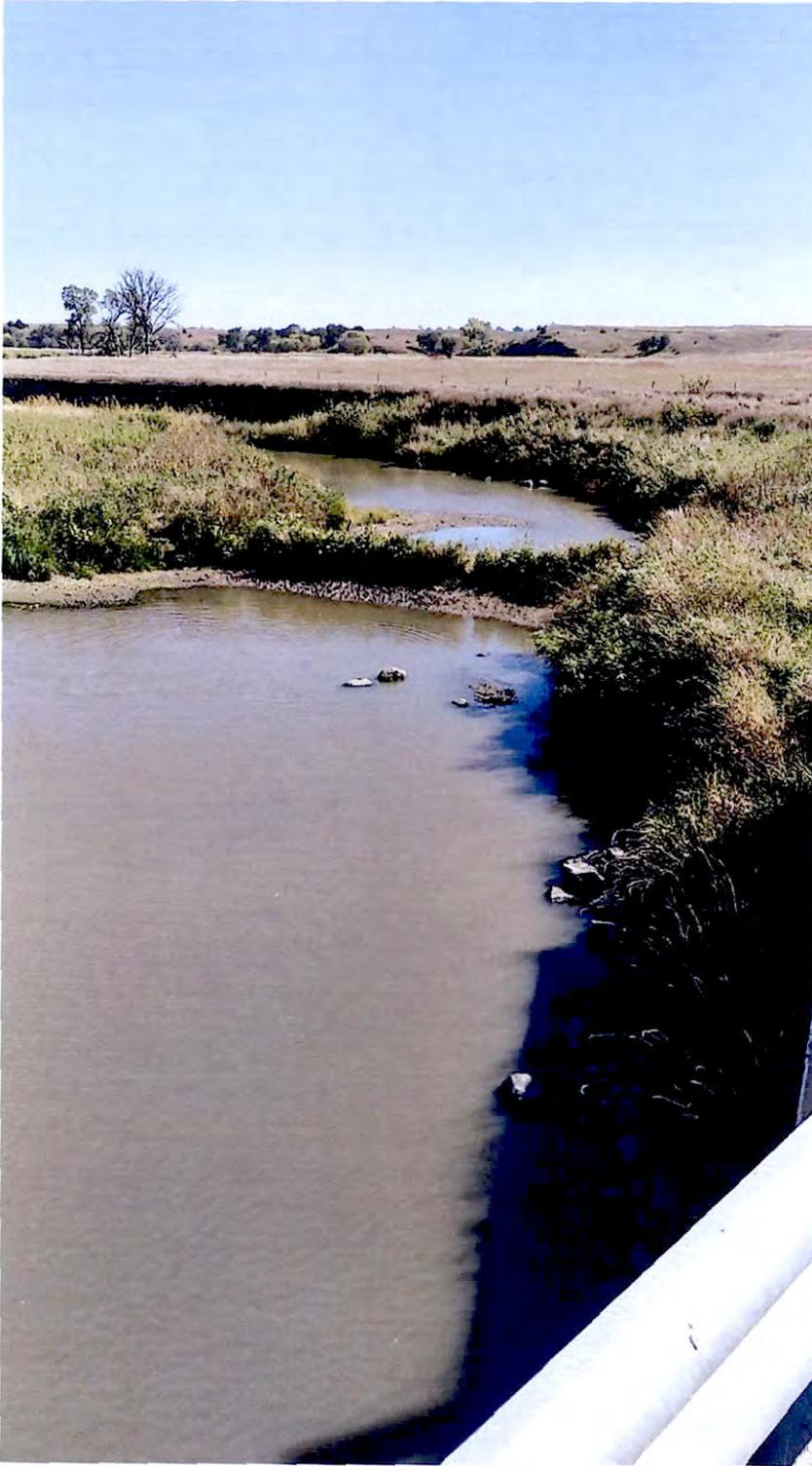


Figure 19 – Location 2; at 396 Avenue facing east.



Figure 20 - Location 3; at 397 Avenue facing west.



Figure 21 - Location 3; at 397 Avenue facing east.



Figure 22 - Location 4; at 398 Avenue facing west.



Figure 23 - Location 4; at 398 Avenue facing east.



Figure 24 - Location 5; at 401 Avenue facing west.



Figure 25 - Location 5; at 401 Avenue facing east.



Figure 26- Location 6; at 403 Avenue facing west.



Figure 27 - Location 6; at 403 Avenue facing east.

F



Figure 28 - Location 6; at 403 Avenue below bridge.

Addendum 2

On September 28, 2015, Environmental Scientist Anine Rosse with the DENR Watershed Protection Program made a third photo reconnaissance trip along Firesteel Creek, Figures 29 - 47. On that date the flow of Firesteel Creek measured at the gaging station was 0.02 cubic feet of water per second (9 gallons per minute).

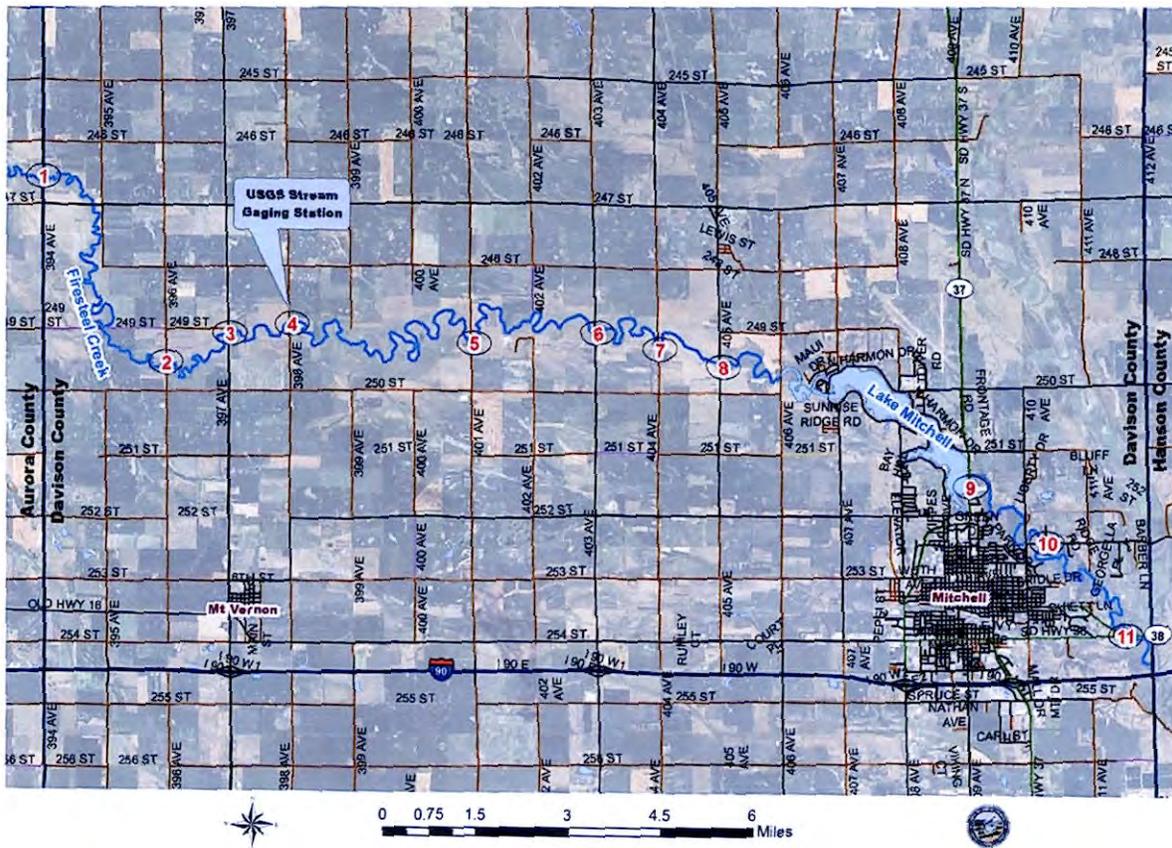


Figure 29 - Firesteel Creek reconnaissance investigation area map showing photo locations from September 28, 2015.



Figure 30 - Location 2; at 396 Avenue facing west.



Figure 31 - Location 2; at 396 Avenue facing east.



Figure 32 - Location 4; at 398 Avenue facing west.



Figure 33 - Location 4; at 398 Avenue facing east.



Figure 34 - Location 5; at 401 Avenue facing west.



Figure 35 - Location 5; at 401 Avenue facing east.



Figure 36 - Location 6; at 403 Avenue facing west.



Figure 37 – Location 6; at 403 Avenue facing east.



Figure 38 - Location 7; at 404 Avenue facing west.



Figure 39 - Location 7; at 404 Avenue facing east.



Figure 40 - Location 8; at 405 Avenue facing west.



Figure 41 - Location 8; at 405 Avenue facing east.



Figure 42 - Location 9; at Hwy 37 west-side.



Figure 43 - Location 9; at Hwy 37 facing east.



Figure 44 - Location 10; at Shannard Rd facing north.



Figure 45 - Location 10; at Shannard Rd facing south.



Figure 46 - Location 11; at Hwy 38 facing north.



Figure 47 - Location 11; at Hwy 38 facing south.

Mr. Larry Hasz
Photographs

All pictures between 402 Ave and 403 Ave.



1A



1B



1c



2



4A



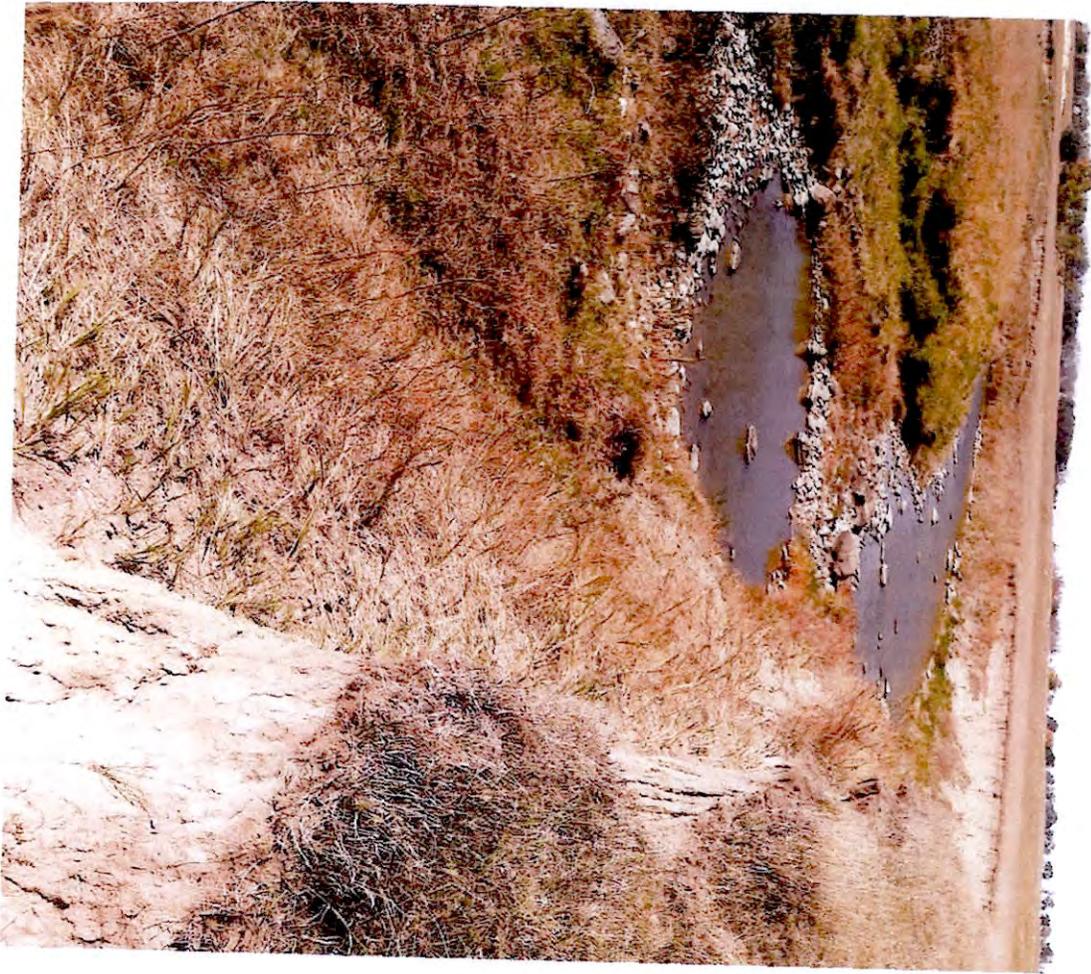
4B



5A



5B



51
C



50



6



7A



7B

EXHIBIT
BUSINESS
A

PENCO 800-631-6089

REPORT ON FENCING COMPLAINT INVESTIGATIONS ON FIRESTEEL CREEK

**By
Mike DeFea
November 17, 2015**

The first complaint investigation the DENR, Water Rights Program received regarding fences crossing Firesteel Creek occurred in 2010. The complaint involved a single-strand electric fence crossing the creek between the SW ¼ NE ¼, SE ¼ NE 1/4 Section 35 and SE ¼ Section 35; all in T104N-R61W. The complaint was investigated on September 27, 2010 and September 29, 2010. The fence was along property owned by two landowners, but rented for use to keep cattle. The renter, Gary Bussmus did mark, register and install a gate; however, improvements were needed to meet the requirements of the rules. Global Positioning System (GPS) coordinates and pictures were taken at this site. (Figure 1, Picture's 1 and 2)

On January 13, 2015, the Water Rights Program received a second complaint of fences crossing Firesteel Creek from Dave Helleloid. The complainant was contacted and stated he had been snowmobiling on Firesteel Creek and came across two, single-strand electric fences. One of the fences appeared to have been hit or cut to get through, and the other fence was still strung across the creek. The Water Rights Program was informed the fences were located between 403rd and 404th Avenue and between 249th and 250th Streets in Section 34-T104N-R61W in Davison County.

On January 15, 2015, Jon Bussmus was contacted as the Davison-Hanson county directory listed the landownership as O.L. Bussmus Farms. Jon Bussmus was also the contact person from the first Firesteel Creek complaint in 2010. Mr. Bussmus informed the Water Rights Program there were possibly three fences, two of which he was sure had been removed, but one fence might still be in place to keep their cattle out of the neighbor's property in the Conservation Reserve Program. Mr. Bussmus stated he would check if there was a fence crossing the creek and remove it if the fence was still in place.

Later that day, Mr. Bussmus informed the Water Rights Program a single-strand fence had been in place, but he removed it. He stated he could not just remove the fence because part of the

fence had frozen into the ice in the creek. He had to cut the wire to keep it from crossing the creek.

On January 22, 2015, Water Rights staff met with Jon Bussmus to investigate the fencing complaint made by Mr. Helleloid. The investigation found that the fence identified in the complaint by Mr. Helleloid had been removed as Jon Bussmus had indicated on January 15, 2015. GPS coordinates and pictures were taken at this site (Figure 1 and Picture 3).

During the meeting, Jon Bussmus also mentioned the two other locations where fences might be constructed in the future. These locations were observed, and GPS coordinates were taken at the locations. No fences were installed at that time. Mr. Bussmus registered the three locations with the Water Rights Program.

On June 9, 2015, the Water Rights Program received a third complaint of fences crossing Firesteel Creek in Davison County. The complaint was sent by email from Mike Henrickson stating he had passed through or under approximately seven fences crossing Firesteel Creek while canoeing the creek between 406th and 401st Avenue. The map provided by the complainant indicated the fences he encountered crossing the creek were between 401st and 404th Avenue and between 248th and 250th Street.

On June 12, 2015, Mr. Hendrickson was contacted, and he indicated none of the fences he encountered while canoeing had gates installed.

On June 24, 2015, a field investigation was conducted by the Water Rights Program regarding the fences crossing the creek based upon the information provided to the Water Rights Program by Mike Henrickson. The investigation confirmed three fences without a required gate or opening located under road bridges crossing Firesteel Creek. One landowner, Larry Hasz, also acknowledged there was a fence crossing the creek located along the section line between the SW ¼ Section 28 and SE ¼ Section 29; both in T104N-R61W which did not have a gate or opening installed. Pictures and GPS coordinates were taken at the sites below the bridges. (Figure 1, Picture's 4 through 6)

On July 16, 2015, a petition requesting Firesteel Creek in Davison County be deleted from the list of navigable streams in statute was received from Gary Bussmus with additional signatures also attached.

Letters dated July 24, 2015, were sent to the Davison County Highway Department, Gary and Jon Bussmus, and Larry Hasz informing them that Firesteel Creek in Davison County is considered navigable requiring a gate or opening to be installed in any fence crossing the creek to allow public access through the fence, and the fences must also be registered with DENR and appropriately marked. A copy of DENR's stream fencing brochure and a map identifying the fence locations were included.

To date, two fences have not been registered.

Figure 1: Firesteel Creek Fencing Investigations



Prepared By:
 Mike DeFea
 Natural Resources Engineer
 DENR, Water Rights Program
 October 13, 2015

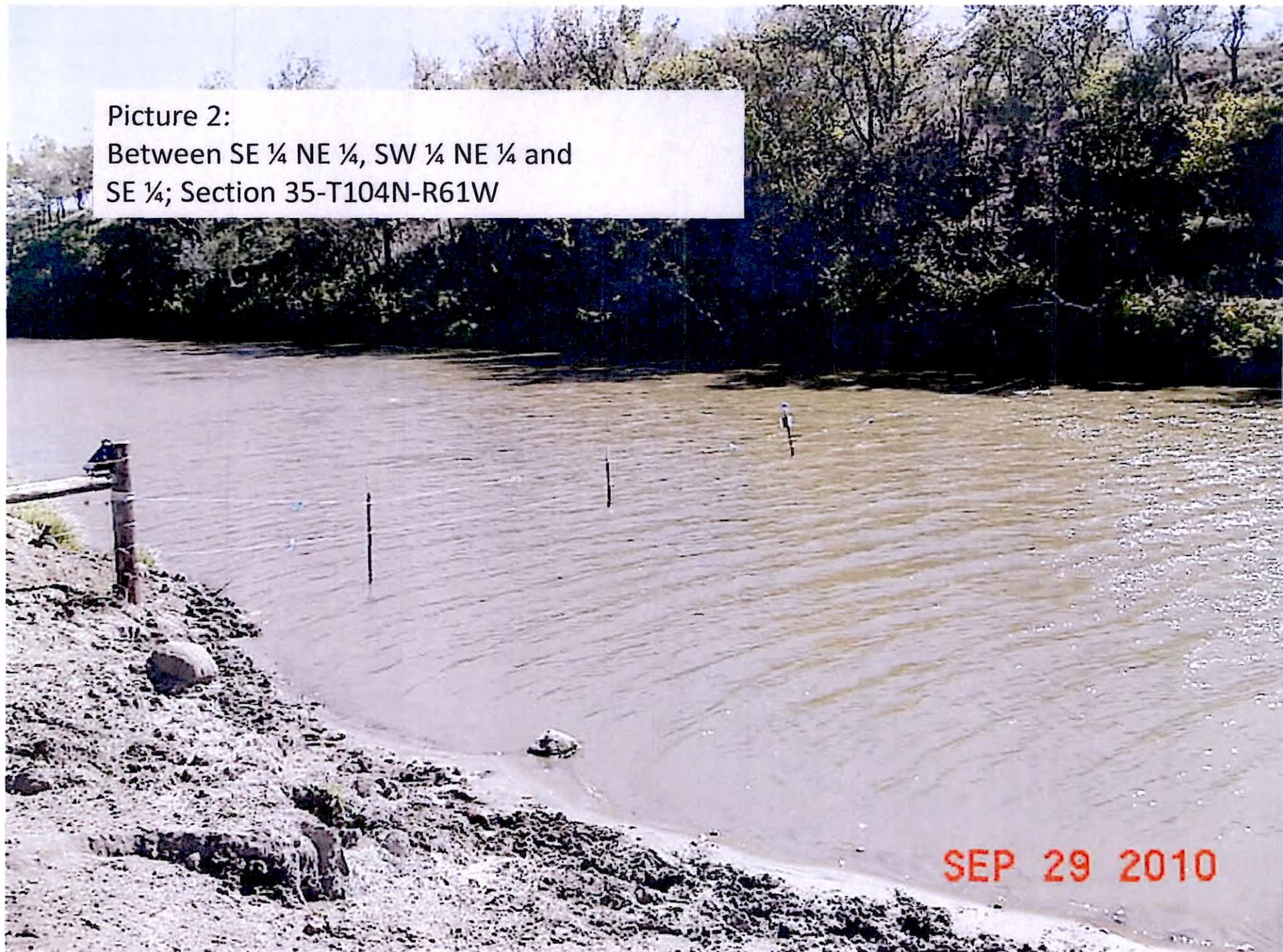


Picture 1:
Between SE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ and
SE $\frac{1}{4}$; Section 35-T104N-R61W



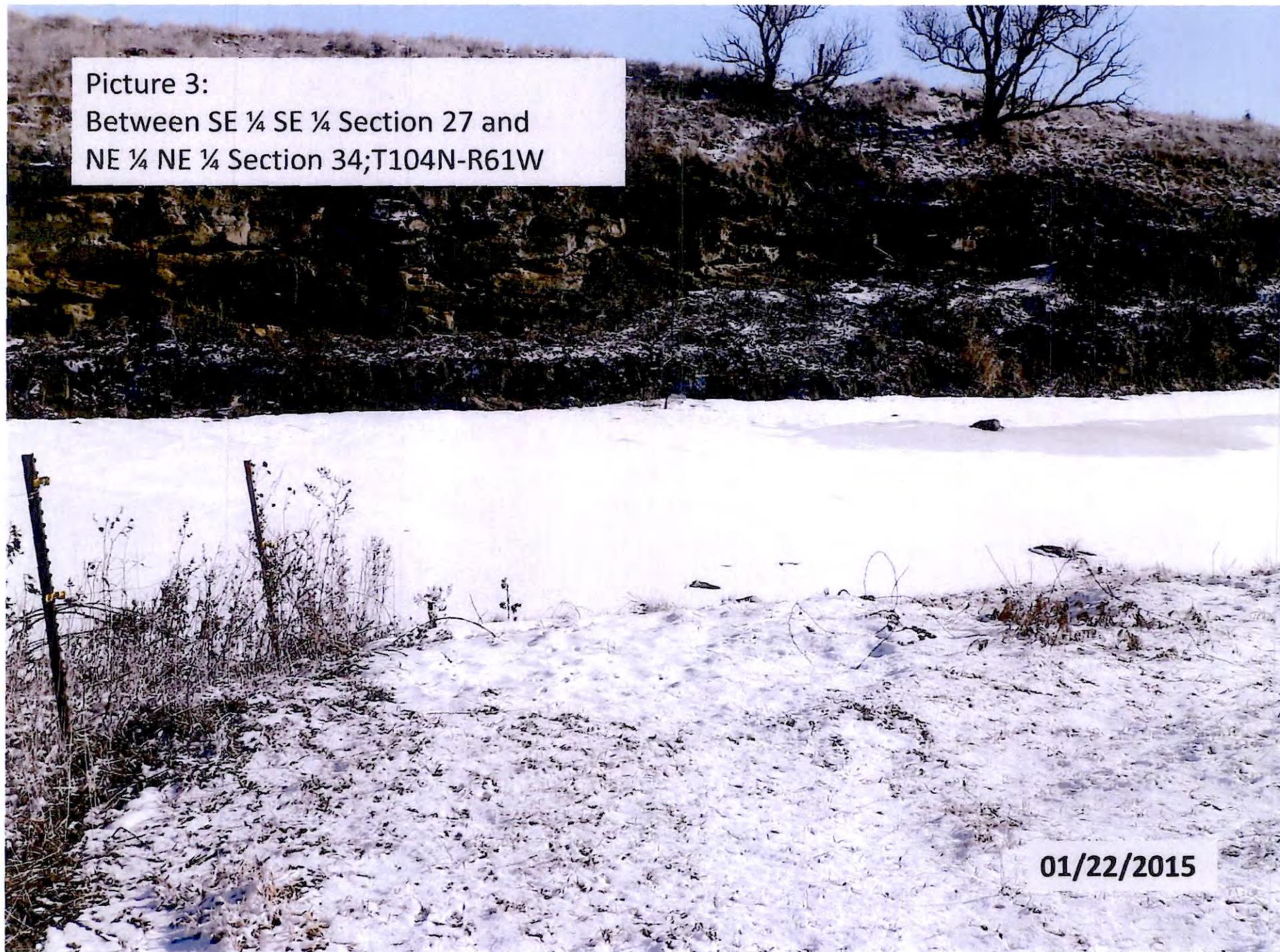
SEP 27 2010

Picture 2:
Between SE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ and
SE $\frac{1}{4}$; Section 35-T104N-R61W



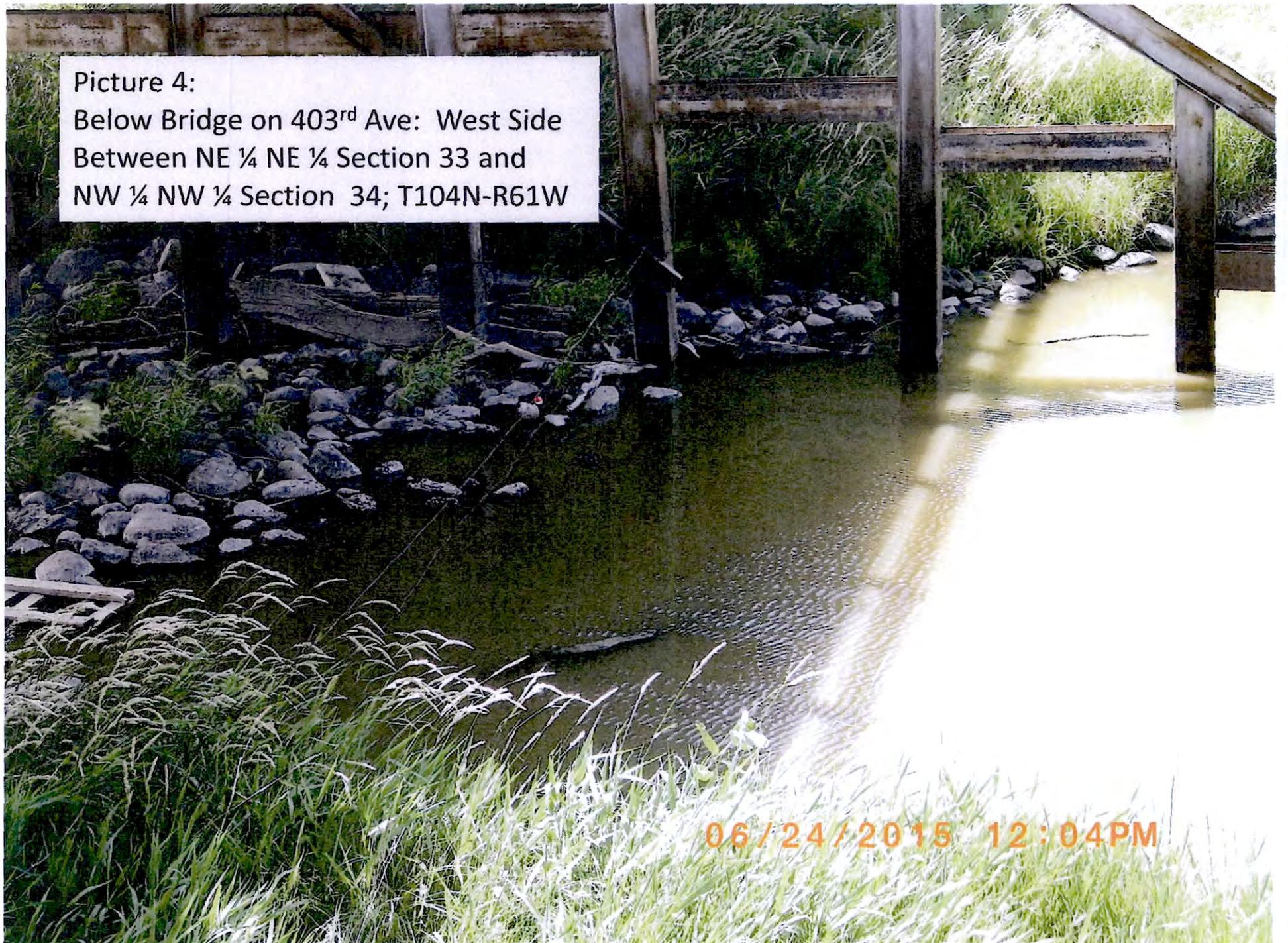
SEP 29 2010

Picture 3:
Between SE ¼ SE ¼ Section 27 and
NE ¼ NE ¼ Section 34;T104N-R61W



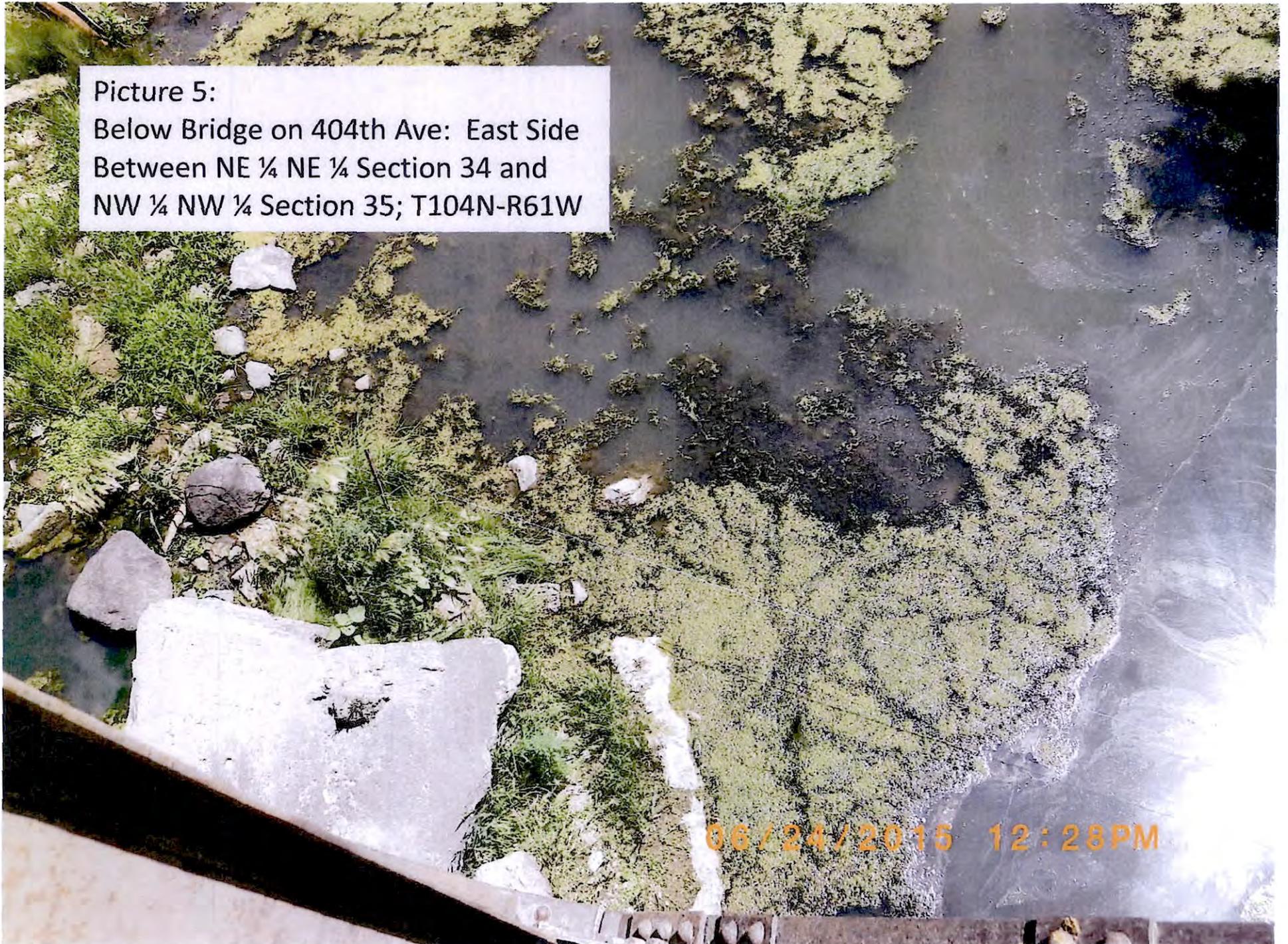
01/22/2015

Picture 4:
Below Bridge on 403rd Ave: West Side
Between NE ¼ NE ¼ Section 33 and
NW ¼ NW ¼ Section 34; T104N-R61W



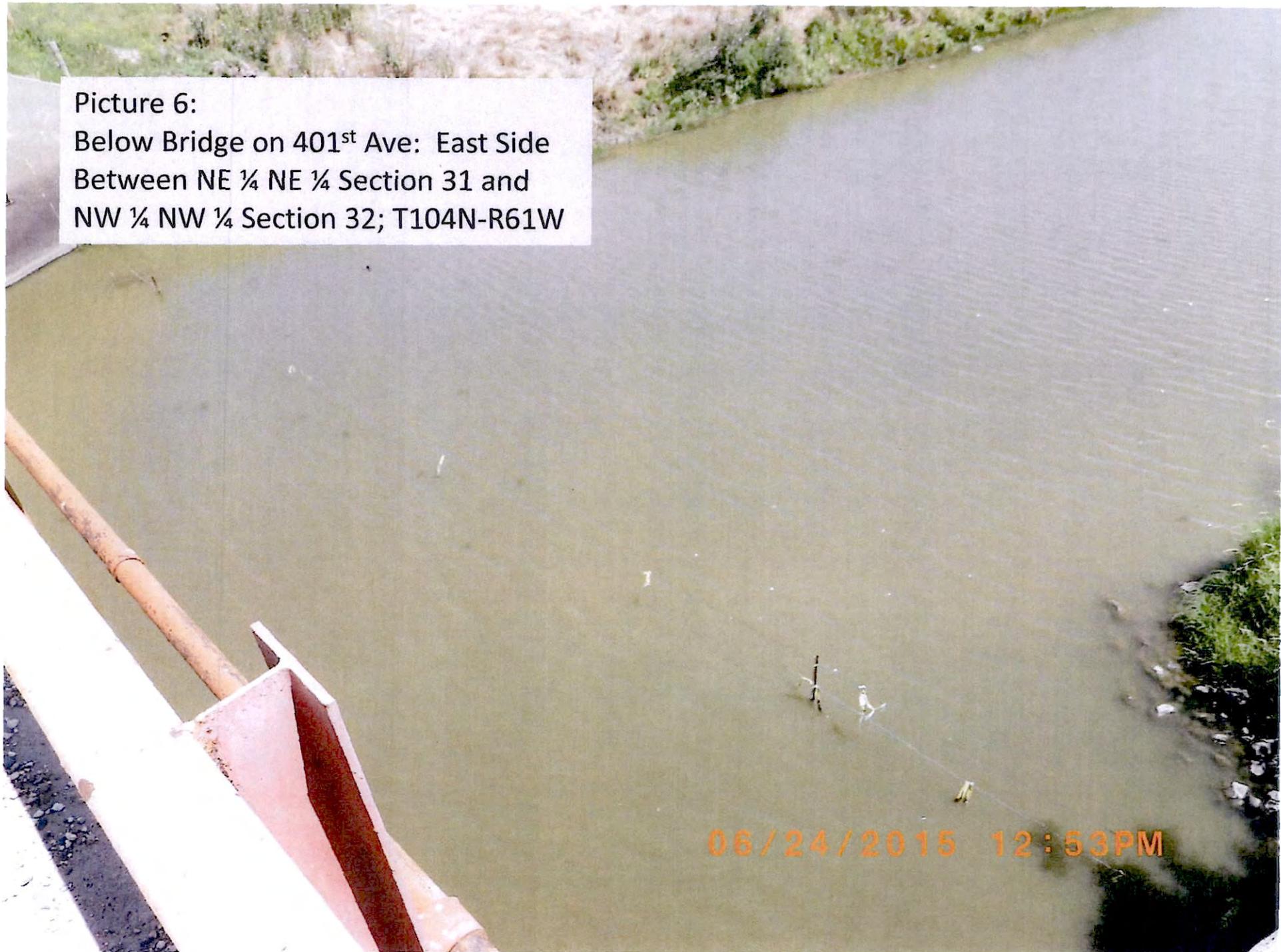
06/24/2015 12:04PM

Picture 5:
Below Bridge on 404th Ave: East Side
Between NE ¼ NE ¼ Section 34 and
NW ¼ NW ¼ Section 35; T104N-R61W



06/24/2015 12:28PM

Picture 6:
Below Bridge on 401st Ave: East Side
Between NE ¼ NE ¼ Section 31 and
NW ¼ NW ¼ Section 32; T104N-R61W



06/24/2015 12:53PM

RECEIVED

605-996-8535

NOV 23 2015

WATER RIGHTS PROGRAM

Section 27 Badger Township Davison County
Section 34 Badger Township Davison County

S. Dakota Water Board

Sirs:

In my seventy years of pasturing cattle and repairing fences, I have never seen a bayak on that mile of creek. On numerous occasions I have rounded ~~the~~ cattle that escaped through gates left open. One summer you could have ~~off~~ walked the creek bed the whole mile without getting your shoes muddy. Maintaining a creek crossing is a chore. Putting a usable gate in it is impossible, using barbwire and steel posts.

Portaging around a creek crossing should not be a problem. If the general public is to be granted access to the creek, the state should build and maintain creek crossings with gates on them like the bridges on the road.

The artifacts will be gone, titles will remain and gates will be left open. The land owner must maintain the fences, control erosion, improve habitat, prevent water contamination, have liability insurance, replace creek crossings ^{yearly} or often, pay taxes. Now you want to add gates to creek crossings! When is enough enough?

Donald Kelly Mitchell & Co
24847 403 rd
57301

RECEIVED

NOV 23 2015

WATER RIGHTS
PROGRAM

November 14, 2015

South Dakota Water Management Board
PMB 2020 Water Rights
Joe Foss Building
523 East Capitol
Pierre, SD 57501

Dear Water Management Board:

I am writing this letter to support Gary Bussmus's petition request to:

Remove the request pursuant to SDCL 43-17-34 on the Navigability of Firesteel Creek in Davison County.

Delete Firesteel Creek, that portion located in Davison County west of Mitchell from a list of streams requiring gates pursuant to SDCL 14-17-39 .

I am a farmer/rancher who has land abutting Firesteel Creek and my cattle run in pastures along the creek. Firesteel Creek is not a viable navigable stream. It is a wet weather – dry weather creek – that usually by June 1st has areas of less than 3" of water going over them. The navigability is determined only by the weather – and more often than not it is not a stream someone could kayak in.

You are placing the responsibility on the farmer/rancher to make sure you have gates to be open and shut by someone who is using it for recreational use. Why doesn't the "party" using it have to be responsible when they don't shut the gate, the cattle get out, someone hits them on the road, it isn't their insurance that will pay for not only the loss of livestock (upwards of \$2,000 a head – depending on your herd if they hit a cow and if it is a bull – the range is much much higher sometimes up to \$20,000) , not including the price of the vehicle which the farmer/rancher pays that was damaged or what it does to the farmer/rancher's insurance. Do kayakers carry insurance in case of their negligence to the farmer/rancher and his animals?

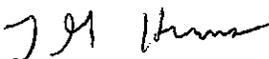
Put yourself in our position ---how would you feel if this happened to you ---this happened to Mr. Bussmus - what kind of a hit would it do to your insurance, or your livestock herd.

I am requesting you approve Mr. Bussmus's petition to remove from the SDCL 43-17-34 and SDCL -14-17-39 Firesteel Creek. If you do feel it is a viable stream – why don't you have all the tributaries of Firesteel Creek on your stream list –anywhere west of Davison County is not on the list.

Thank you for the consideration of my request and I fully support Mr. Gary Bussmus's request.

Sincerely,

Todd Hanson
25124 397th Avenue
Mt. Vernon, SD 57363



November 16, 2015

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WATER RIGHTS
PROGRAM

SD Water Management Board
PMB 2020
Water Rights
Joe Foss Building
523 East Capitol
Pierre, SD 57501

Re: 43-17-39 Petition to Delete
From Streams Requiring Gates

Dear Board,

This letter is in support of petition mentioned above to delete from the list of streams requiring gates on the Firesteel Creek located in Davison County, South Dakota.

The liability exposure for all landowners along the creek is my concern.

Sincerely,



Kenneth Busmus
25042 403 Avenue
Mitchell, SD 57301

Duvall, Ron

From: ron.duvall@state.sd.us
Sent: Tuesday, November 10, 2015 7:58 AM
To: DENR INTERNET INFORMATION
Subject: Public Notice Comments

Public Notice Category:

rules

Public Notice:

ARSD Chapter 74:02:10 Fences Crossing Navigable Streams

A petition has been filed to remove Firesteel Creek in Davison county from the list of navigable streams requiring a gate in fences crossing the creek. If the proposed rule is adopted, a gate will no longer be needed in any fence crossing the creek.

Comment Deadline:

12/08/2015

Date Comment Filed:

11/10/2015 07:58:18 AM

Commenter Info:

Mark Puetz

174 N Harmon Dr.

Mitchell SOUTH DAKOTA, 57301

Email: puetzmark@puetzcorp.com **Phone:** 6057704947

Comments :

I am against the petition that has been filed to remove Firesteel Creek in Davison County from the list of navigable streams requiring a gate in fences. Also removing the clause requiring land owners to have gates in their fences that crosses the navigable waterway is not acceptable either as this in effect creates a non navigable waterway. If this petition was allowed, I think it would be very hard to enforce, and it would create conflict with land owners as kayak, canoe, and snowmobile users would still look to use the water way and be forced to trespass on ranchers property. As chair of the Mitchell Lake committee and an avid conoer and kyaker, I am apossed to this potential change as is the majority of the committee and the Mayor of Mitchell, Jerry Toomey.

November 23, 2015

SD Department of Environment & Natural Resources
Joe Foss Building
523 E. Capitol
Pierre, SD 57501-3182

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NOV 24 2015
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Re: Navigability of Firesteel Creek In Davison County

This is a request to have the part of Firesteel Creek deleted as a navigable stream between 405th Ave. and Davison-Aurora county line-394th Ave. because:

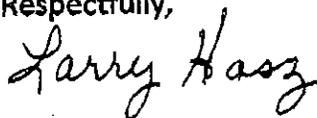
1. Stream will not support a vessel between May 1 and September 30 inclusive
2. (a) livestock are pastured along said creek
(b) fences across creek are needed to prevent livestock from straying
(c) gates that were constructed were left open by water users

Also, I do not believe the use of Firesteel between 405th Ave. and 394th Ave. is significant as there have been only 3 complaints over the last 5 years.

I'm not saying boaters can't use Firesteel—just expect and respect the fences.

Lastly, I wonder why Firesteel is designated navigable while the James River, which the Firesteel empties into, is not a listed navigable waterway.

Respectfully,



Larry Hasz

40245 248th St.

Mitchell, SD 57301



DEPARTMENT OF GAME, FISH, AND PARKS

Foss Building
523 East Capitol
Pierre, South Dakota 57501-3182

RECEIVED
NOV 16 2015
WATER RIGHTS
PROGRAM

November 16, 2015

S. D. Department of Environment and Natural Resources
Water Rights Program
Joe Foss Building
523 East Capitol Avenue
Pierre, SD 57501-3182
ATTN: Eric Gronlund

RE: Bussmus petition for rule to remove Firesteel Creek from list of streams where gates are required per 43-17-38

Dear Mr. Gronlund:

The South Dakota Department of Game, Fish and Parks respectfully submits the following information for consideration by the Water Management Board at its hearing scheduled for Wednesday, December 9, 2015, at 10:00 A.M., pertaining to the Board's consideration the above referenced petition:

1. Partial Transcript of Proceedings held on Wednesday, October 14, 2015, in conjunction with the Matter of the Declaratory Ruling Request Pursuant to SDCL 43-17-34 on the Navigability of Firesteel Creek in Davison County, setting out the testimony of State Senator Mike Vehle, GFP Senior Biologist Leslie Murphy, and GFP Conservation Officer Andy Petersen, all pertaining to the public's use of Firesteel Creek for recreational purposes;
2. Pictures of Firesteel Creek submitted by Senator Mike Vehle in conjunction with and in support of his testimony on October 14, 2015;
3. Pictures taken by GFP Conservation Officer Andy Petersen and submitted with the GFP response to the request for navigability ruling and to which CO Petersen made reference during his testimony to the Board on October 14, 2015; and
4. Schematic drawings of stream crossing gates and supporting pictures of such gates submitted by GFP during Leslie Murphy's testimony on October 14, 2015.

Gary Bussmus of Mitchell, South Dakota, has petitioned the Board for a rule which, if adopted, would remove Firesteel Creek in Davison County from the list of navigable streams for which gates are required in fences across streams as listed in SDCL 43-17-38. Firesteel Creek is an integral part of the watershed of Davison County and supports diverse activities for resource users. The removal of Firesteel Creek from the fence gating

requirements of SDCL 43-17-38 would have negative impacts to the recreating public of South Dakota.

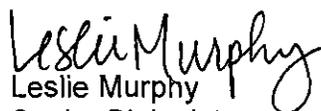
As supported by the testimony of Senator Vehle, Leslie Murphy and Andy Petersen and supporting documents presented at the Board's navigability hearing on October 14, 2015, Firesteel Creek and Lake Mitchell are inhabited by game fish, such as walleye, largemouth bass, smallmouth bass, channel catfish, flathead catfish, crappies and bluegills. Fishermen, boaters and other recreational users come from around the state to utilize both Lake Mitchell and Firesteel Creek. In addition, Firesteel Creek provides a baitfish population that supplies and enhances other fishing opportunities in and around the area. While fishing remains popular, additional outdoor activities such as kayaking, canoeing, snowmobiling, bow-fishing and trapping are a popular past time for recreationists on Firesteel Creek as well. Public use of Firesteel Creek is significant, and removing Firesteel Creek in Davison County from the list of navigable streams for which gates are required in fences across streams as listed in SDCL 43-17-38 would negatively impact the usage of a valuable public resource as well as the local economy. Furthermore, the rights of the public to the use of Firesteel Creek would be adversely impaired without requiring gates in fences which cross the stream.

Mr. Bussmus claims in his petition that kayakers are leaving gates open over the creek, leaving his livestock to run at-large. Although GFP does not condone the misuse of the gates by the users, this actually supports the fact that these waters are being used by the public for recreational purposes. In addition, as more fully illustrated by the schematic drawings and supporting pictures of stream crossing gates presented by the undersigned during her testimony to the Board on October 14, 2015, it is relatively easy and inexpensive to install stream crossing gates which would adequately address the concerns expressed by Mr. Bussmus.

The Department of Game, Fish and Parks respectfully requests that the Water Management Board deny Mr. Bussmus' petition for a rule to remove Firesteel Creek in Davison County from the list of navigable streams for which gates are required in fences across streams as listed in SDCL 43-17-38.

If you have any questions or require additional information, please contact me at 605.773.6208.

Sincerely,


Leslie Murphy
Senior Biologist

Encls.

cc: Kelly Hepler, Secretary, SDGFP
Tony Leif, Director, Wildlife Division, SDGFP
Richard J. Neill, Special AAG/General Counsel, SDGFP

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT & NATURAL RESOURCES
WATER MANAGEMENT BOARD

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IN THE MATTER OF THE DECLARATORY RULING
REQUEST PURSUANT TO SDCL 43-17-34 ON THE
NAVIGABILITY OF FIRESTEEL CREEK IN
DAVISON COUNTY

=====

Partial Transcript of Proceedings
Wednesday, October 14, 2015

=====

BOARD MEMBERS PRESENT

- Chad Comes, Chairman
- Everett Hoyt
- Leo Holzbauer
- Rodney Freeman
- Tim Bjork
- Peggy Dixon
- Matthew Naasz, Counsel for the Board

ORIGINAL

APPEARANCES

ANN MINES-BAILEY, Assistant Attorney General, 1302 East
Highway 34, Pierre, SD 57501,
appearing on behalf of DENR;

RICHARD J. NEALL, Attorney at Law, SD Department of Game,
Fish and Parks, 523 East Capitol Avenue, Pierre, SD 57501,
appearing on behalf of GF&P;

GARY BUSSMUS, 24973 404th Avenue, Mitchell, SD 57301,
appearing pro se.

Reported by Carla A. Bachand, RMR, CRR, Capital Reporting
Services, PO Box 903, Pierre, SD 57501 (605) 224-7611.

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WEDNESDAY, OCTOBER 14, 2015

(The following is a partial transcript including only testimony of Mike Vehle, Leslie Murphy and Andy Petersen.)

CHAIRMAN COMES: We will proceed. GF&P, Mr. Neall, do you have any witnesses?

MR. NEALL: Yes, I do. I call Mike Vehle.

Thereupon,

MIKE VEHLE,

called as a witness, being first duly sworn as hereinafter certified, testified as follows:

DIRECT EXAMINATION

BY MR. NEALL:

Q. Would you state your name for the record, sir?

A. Mike Vehle.

Q. And where do you live?

A. I live in Mitchell.

Q. Are you employed?

A. Technically, yes.

Q. And how are you employed?

A. I happen to be a state senator, otherwise I'm retired.

Q. Mike, how long have you lived in Mitchell?

A. Since '76, 1976.

Q. And are you familiar with Firesteel Creek?

A. I am.

Q. Are you a canoer or a kayaker?

1 A. I'm not a kayaker. It didn't look like it had a quick
2 enough exit, but I do have -- well, someone stole my canoe last
3 year, but I did have a canoe up until last year.

4 Q. Mike, you are familiar with what's going on here
5 today, that we have a petition that is seeking to essentially
6 remove Firesteel Creek from the list of navigable streams in
7 South Dakota? You have indicated to me that you would like to
8 share some thoughts and observations and personal experiences
9 with the board; is that correct?

10 A. Correct.

11 MR. NEALL: With the board's indulgence, I would like
12 to allow Senator Vehle to go ahead and speak to the board.
13 Would that be acceptable?

14 CHAIRMAN COMES: Yes, sir.

15 MR. NEALL: Go ahead.

16 A. Thank you. Thank you, members of the board, for
17 allowing me to do this. This is not easy. And I come to you
18 as a resident of Mitchell and I have lived on that lake since
19 1977; so I lived in town a year and decided the lake was a much
20 better place to live.

21 I also understand the feelings and the problems that
22 are associated that Mr. Bussmus and Mr. Hasz have. I also own
23 some land, a half section, has two miles of creek through it,
24 it's Red Stone Creek, and it's navigable. You can put a canoe
25 down her most of the time. But there are times when you can't.

1 So I understand those feelings.

2 Before I get started, there are a couple of things I
3 wanted to say. 405 is Loomis oil, it's got some bad raps here;
4 so if you are just looking at the map, that is the number that
5 goes with the Loomis oil, it's 405, if you are looking at the
6 map.

7 The tough part about this is when you have land on
8 both sides of the creek, which I also have, and people want to
9 go down it, it can be irritating, and I understand that. And
10 so I look at that petition and I've got a lot of friends on
11 that petition; so this is not easy for me to come and be here.
12 But I do feel that at this point this is not the thing to do,
13 and listening to the testimony, my feeling is that it probably
14 fits in that two out of 10 years, and I'll just give you an
15 idea.

16 Years ago when we used to do more canoeing, in the
17 fall we would pick a spot and a group of us would get in our
18 canoes and we would go and we would take an area, whether it's
19 James River or the Firesteel, and I remember one year when the
20 Firesteel in the fall was full and I'll pass out some pictures
21 here, but at this point here this is what's called the west end
22 bridge and I think that's where most people feel that the creek
23 and the Lake Mitchell, that's the dividing line, and the creek
24 was so full, as we were coming up to it, we are debating are we
25 going to do this or not; so we laid down the canoe and actually

1 went like this under the bridge.

2 Well, this year I looked at it with my pontoon and was
3 trying to decide if I could make it under. So that's the
4 difference that you have in the level of that creek, and it
5 does vacillate. I've lived on that lake, there's been times
6 when it's come way over my gate ends upon my land, and there is
7 like this year where when I went to take out the pontoon, it
8 was a huge step to get down to the boat. The water vacillates
9 a lot and that will make a difference if you have a wet year
10 preceding, and we have had kind of a dry, I think someone was
11 talking about a dry cycle, and it kind of seems the way it is.
12 We have had a dry cycle here and we have got great crops this
13 year, but we had timely rains and that makes a huge difference.
14 I used to be in the seed and fertilizer business; so timely
15 rains are what's really important and that's what's bailed us
16 out this year.

17 What I would like to do, everybody has got pictures to
18 show their side of the story. And so I'm going to pass out
19 some pictures. What I did last night, and I realize this is
20 end of October, but since the others were, I'm going to offer
21 these also. But I went at every bridge and I started at the
22 first one is 407 and it's called Lake Firesteel and that's
23 where I would say is the division and I took a picture. I
24 didn't take a picture back towards the lake because there is no
25 sense. I did take it towards the lake.

1 Then a picture of this is the guy that's selling land
2 on that creek and it shows where the division is between
3 Firesteel Creek and Lake Mitchell. And then just someone
4 that's on that piece of ground, you know, there are boat lifts
5 that are on there; so that part of it would obviously be
6 navigable. And can I set these down or pass them around? I
7 don't know how this works. I know how this works in a
8 legislative committee. I'm not familiar with this.

9 MR. NEALL: How many pictures?

10 A. I have got one at each bridge up to Mount Vernon. It
11 got dark on me at Mount Vernon.

12 MR. NEALL: How many are we talking about here? I can
13 have them all marked. Mr. Chairman, would it be acceptable for
14 me to have these collectively introduced as an exhibit instead
15 of as separate, seven or eight separate?

16 CHAIRMAN COMES: Yes. Ms. Mines-Bailey, is there any
17 objection?

18 MS. MINES-BAILEY: No objection.

19 CHAIRMAN COMES: Mr. Bussmus, do you have any
20 objection to that?

21 MR. BUSSMUS: No.

22 (Exhibit No. 3 marked for identification.)

23 Q. (BY MR. NEALL) Mr. Vehle, I'm going to show you
24 what's been marked as GFP No. 3 and just ask you very briefly,
25 I know you are familiar with it. Just page through it and once

1 again tell the board what Exhibit 3 -- what is represented in
2 Exhibit 3.

3 A. Exhibit 3 is last night I started at what the west end
4 bridge is between Lake Mitchell and Firesteel Creek and at
5 every bridge, except that one, I took a picture both east and
6 west so you could see what was there. I just stopped at every
7 bridge and took a picture, and I could go through them, but
8 this one, I explained that one.

9 This one here is a mile away, which would be at 406.
10 There is a house there and a pontoon boat pulled up to the edge
11 there. 405, I put in there Loomis oil so that you -- I want
12 you all to get familiar where this is at. This is Loomis oil
13 here. The next one is 404 and that one is the place that -- I
14 got a picture of the bridge in there, I'm really into roads and
15 bridges; so especially the other one, you can see that's a spot
16 where you would have to be very light to get over. I don't
17 even think someone had the idea of an inner tube, that's not
18 going to cut it on that one.

19 This is 403, this is Betts Road just before you get to
20 Mitchell; so this would be the Betts Road, nice oil road. This
21 one here is 401, it's a few miles to the west. This is 398,
22 it's the next bridge, and then 397 is Mount Vernon oil. So
23 that gives you a perspective from Mitchell to -- that's 397,
24 and the one between Lake Mitchell and Firesteel Creek, that is
25 just about maybe not even quite a quarter mile in from 407. So

1 that's about seven miles there that this distance is. And
2 that's a picture of that and that's called the Mount Vernon
3 oil. That gives you a look at it.

4 If you look at the pools that another person
5 testified, you look here, it's got good water, but if you look
6 here in the distance, it looks like there is a place you would
7 have to portage. But you gotta understand where the water is
8 this year. It's low. My lake in front of my house is very
9 low. Here is that same crossing looking the other way, look
10 into the sunset, it didn't take real well. So that gives you
11 an idea of what is out there. It has both, as the person
12 talked about, pools of water that will be quite long, and then
13 you have got the pieces that you would have to go over this
14 year.

15 The reason that I wanted to testify or speak my piece
16 is that I talked to the mayor and I talked to the chair of the
17 Lake Mitchell Advisory Committee yesterday, and that was -- I
18 talked to them before and then after they had the meeting that
19 Gary is on that committee. And they both expressed their --
20 that they really hated to see this take place, and I think one
21 of the reasons that I feel this way, it takes a little bit away
22 from the navigability discussion, but what we don't want to do
23 is have this be a country/city ordeal where we are trying to
24 obviously entice people to come to the city and we don't want
25 them to hear that oh, no, the country doesn't want you kayaking

1 by their land. We just don't -- I think that was what the
2 mayor's feeling was, we just don't want to go there.

3 I know that was the feeling of the person that's the
4 chair of that committee. We want to -- but they didn't want to
5 take action because they really hadn't studied it enough and
6 they didn't know the information that the person this morning
7 who testified, you know, about the flow of the water and so
8 forth. They didn't want to take a position last night. They
9 really didn't have the information, but they hated to see this
10 take place.

11 So that's kind of my story. I have lived on that
12 lake, like I said, since '77, and you will see water in that
13 creek and in that lake and then you will see where it will have
14 its years where it's not there. You wouldn't want to take an
15 inner tube up there, okay, but there are years when there is
16 water in it. That's it.

17 Q. Mike, based upon your years of living in Mitchell and
18 at Lake Mitchell and being familiar with Firesteel Creek and
19 also after having sat in this hearing up to this point, being
20 advised that navigability in South Dakota is defined as being
21 able to use a stream, support a vessel containing one or more
22 people from May 1 through September 30 of any given year two
23 out of 10 years, do you have a layman's opinion as to whether
24 or not Firesteel Creek meets that definition?

25 A. I can't answer that always because we never canoed as

1 far as the Mount Vernon oil, okay; so probably because we were
2 too hungry and wanted to get some beer, I shouldn't say that,
3 but that was probably it. So I don't know how far we would go,
4 but we would go quite a ways up that creek, and at that time I
5 wasn't looking at what the road numbers were or what it was.
6 We would say, look at that old bridge, holy buckets, that would
7 be your thought process. So I can't tell you, but I do know
8 that we have gone a fair amount at one time up the creek.

9 Q. Could I have you step over here a minute and take a
10 look at this map. If you look at this aerial map, Mike, would
11 this give you some kind of idea if you walk through the streets
12 as to maybe how far you were able to canoe up Firesteel Creek?

13 A. No. You said, what, 402, 403, I remember going by
14 here, 404, that's the one that Gary is on.

15 MR. BUSSMUS: I'm 404.

16 A. Yeah, and I think -- 404, I think that's the old
17 bridge we shook our head at. But other than that, I can't
18 honestly say.

19 Q. (BY MR. NEALL) Fair enough.

20 A. But I know people go up there. I have heard, as Gary
21 has said, people -- he's had them screw up.

22 Q. So you are familiar with the fact that people have
23 used portions beyond --

24 A. I don't know how far they go. I have never asked
25 them. Until this came up, I didn't ask people.

1 Q. But would it be generally true that Firesteel Creek is
2 a stream that's used for recreational purposes in Davison
3 County?

4 A. Yeah, I would say there are people that go up it,
5 yeah, I know there are.

6 Q. Would you say that use is regular or sporadic? Do you
7 have any way of knowing that?

8 A. No, I don't know. I'll see in the -- in the summer
9 I'll see kayaks going by my place and it's a good ways before
10 you get there, but I don't know how far they are going. I
11 don't. I would like to know so I could say, but I don't.

12 MR. NEALL: Mr. Chairman, I would introduce GFP 3.

13 CHAIRMAN COMES: Ms. Mines-Bailey and Mr. Bussmus
14 already said they do not object; so we will accept this into
15 evidence.

16 EXHIBITS:

17 (GFP Exhibit No. 3 received into evidence.)

18 MR. NEALL: I have no further questions of Mr. Vehle.

19 CHAIRMAN COMES: Ms. Mines-Bailey do you have any
20 questions?

21 MS. MINES-BAILEY: No questions.

22 CHAIRMAN COMES: Mr. Bussmus, do you have any
23 questions?

24 CROSS-EXAMINATION

25 BY MR. BUSSMUS:

1 Q. I guess I do have one question. Last night at the
2 meeting I didn't realize Lake Mitchell owns all the way up to
3 where you have that picture of Harrises' house?

4 A. Yeah.

5 Q. I didn't realize Mitchell owned that.

6 A. I didn't either. When you say owned, I don't know how
7 that --

8 Q. It came into the city limits, I believe that's how I
9 understood it.

10 A. Really? I didn't know --

11 Q. (Inaudible comments)

12 COURT REPORTER: I'm sorry, I can't hear you.

13 Q. (BY MR. BUSSMUS) I was wondering if he knew Darrin
14 Nemec, Harvey Kelly. He's county and Jeff Harris is Mitchell.

15 A. They are on the opposite sides of the creek, though.

16 Q. Yes.

17 A. Maybe they took one side.

18 MR. BUSSMUS: That's the only question I have.

19 CHAIRMAN COMES: Any questions for Mr. Vehle from the
20 board? Thank you, Senator.

21 A. I would just like to make one last statement, that is
22 Lake Mitchell's source of water. According to Siri, I called
23 them, it's 877 acres of lake; so it's a large lake that's
24 primarily its source is Firesteel Creek. So there must be some
25 water coming there at some point to keep it filled. At one

1 time it was our water source for 16,000 people and it had a
2 rural water component to it. Any more that's not true, we do
3 get our water from somewhere else. And it's a secondary supply
4 in the summer if we need more water, it's a secondary source,
5 primary now is Missouri River. Thank you.

6 CHAIRMAN COMES: Thank you, sir. Mr. Neall, do you
7 have any other witnesses?

8 MR. NEALL: Yes, thank you, Mr. Chairman. Call Leslie
9 Murphy.

10 Thereupon,

11 LESLIE MURPHY,

12 called as a witness, being first duly sworn as hereinafter
13 certified, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. NEALL:

16 Q. Would you state your name for the record, please?

17 A. Leslie Murphy.

18 Q. Where do you live, Leslie?

19 A. Pierre, South Dakota.

20 Q. And are you employed?

21 A. I am employed. I work for the Department of Game,
22 Fish and Parks.

23 Q. How long?

24 A. 15 years.

25 Q. At my request prior to appearing today to testify, did

1 you prepare a curriculum vita detailing your educational
2 background and experience?

3 A. I did.

4 Q. And I'm going to show you what's been marked as GFP 1.
5 Is that your curriculum vita?

6 A. That is it.

7 MR. NEALL: How do you pronounce that? In any event,
8 I would introduce Exhibit 1.

9 MR. FREEMAN: Resume. (Laughter)

10 CHAIRMAN COMES: Ms. Mines-Bailey, do you have any
11 objection?

12 MS. MINES-BAILEY: No objection.

13 CHAIRMAN COMES: Mr. Bussmus, do you have any
14 objection?

15 MR. BUSSMUS: No.

16 CHAIRMAN COMES: We will admit that into evidence.

17 EXHIBITS:

18 (GFP Exhibit No. 1 received into evidence.)

19 Q. (BY MR. NEALL) Now, Leslie, are you familiar with a
20 petition filed with the Department of Environment and Natural
21 Resources by Mr. Bussmus which has as its purpose to delete
22 that portion of Firesteel Creek located in Davison County?

23 A. I am.

24 Q. Okay, from the list of navigable waters in South
25 Dakota.

1 A. Yes, I am.

2 Q. Did you submit a response to this petition on behalf
3 of the South Dakota Department of Game, Fish and Parks?

4 A. Yes, I did.

5 MR. NEALL: And Mr. Chairman, I did not prepare an
6 exhibit because I understand that the board has that letter.
7 It's the September 29, 2015, letter.

8 CHAIRMAN COMES: We do have it.

9 MR. NEALL: That's what Leslie will be talking about
10 and referring to.

11 Q. (BY MR. NEALL) Leslie, would you provide the board
12 just a very brief summary of the department's position with
13 reference to Mr. Bussmus's petition?

14 A. Our department recommended denial of Mr. Bussmus's
15 petition to designate Firesteel Creek as a nonnavigable water
16 way. The public utilizes Firesteel Creek for various
17 recreational uses including fishing, trapping, kayaking, and
18 canoeing, and a change in that navigability status would result
19 in negative impacts for the usage of this water for the public.

20 Q. Now, Leslie, much of the concern that is expressed by
21 Mr. Bussmus in his petition and in his testimony to the board
22 today appears to involve primarily kayakers leaving gates on
23 the creek open after passing through, which can and in fact has
24 resulted in cattle escaping from adjoining pastures. Can Game,
25 Fish and Parks be of assistance to Mr. Bussmus and other

1 adjoining landowners in addressing this problem?

2 A. Yes, we can, and first of all, again, we don't condone
3 users of the resource leaving gates open. That's not what they
4 are supposed to be doing. But there are some options available
5 to landowners, and we have actually implemented some of those,
6 and these would just provide an instream passage or a gate
7 system that would allow for passage of canoes or kayaks and
8 they don't have to get out of the canoes or kayaks to use
9 these, and they would also keep the cattle in the pasture that
10 they are supposed to be in.

11 Q. Leslie, I'm going to show you what has been marked as
12 GFP 2 and ask if you can identify that for me please.

13 A. This is a plan, the first sheet is a plan sheet of
14 those examples of the gates that would be used for instream
15 flow gates, and then there are five photos of those gates being
16 used.

17 Q. And what do the photographs show?

18 A. The photographs would show essentially, if we are
19 looking at, for example, the first one is just the overall view
20 of that stream gate, and they are constructed of PVC, a PVC
21 around the stream gate and there's either buoys, I think all of
22 these photos show buoys floating on top of the water surface
23 and the canoers or kayakers can go over the top of those, they
24 don't have to get out of the canoe or kayak to go through the
25 fence. You either have buoys or you can also run a PVC pipe

1 with a cable and that usually is a little bit heavier so it
2 will stay under the water surface a little more than the buoys
3 will. The example of that is in the last photo, there. Again,
4 those canoes and kayaks can go right over the top, but the
5 cattle stay in.

6 Q. Would the department be willing to give assistance to
7 landowners in terms of constructing these?

8 A. And we have in the past as well as continue to do in
9 the future, we do partner with landowners and cost share some
10 of these expenses for putting in these gates.

11 Q. And given what you know about these gates, have they
12 proven to be effective where they have been installed?

13 A. From what I know about the gates, they are effective
14 when they are installed correctly.

15 MR. NEALL: Mr. Chairman, may I introduce -- I would
16 introduce Exhibit 2.

17 CHAIRMAN COMES: Any objections?

18 MS. MINES-BAILEY: No objection.

19 CHAIRMAN COMES: Any objections, Mr. Bussmus?

20 MR. BUSSMUS: No.

21 CHAIRMAN COMES: We will accept that into evidence.

22 EXHIBITS:

23 (GFP Exhibit No. 2 received into evidence.)

24 MR. NEALL: I have no further questions of Leslie.

25 CHAIRMAN COMES: Ms. Mines-Bailey, do you have any

1 questions of Ms. Murphy?

2 MS. MINES-BAILEY: No questions.

3 CHAIRMAN COMES: Mr. Bussmus, do you have any
4 questions of Ms. Murphy?

5 CROSS-EXAMINATION

6 BY MR. BUSSMUS:

7 Q. We are talking about cost shares, like what
8 percentage?

9 A. And it differs in every county, but I think that's
10 where you have to talk to the county, probably start with our
11 conservation officer in Davison County and go from there.

12 Q. Not the Game, Fish and Parks?

13 A. Yeah, that would be us, yep.

14 Q. Right now you don't know the percentage?

15 A. I can't for sure tell you that information, but they
16 are relatively inexpensive structures, you know, basically it's
17 fence posts and PVC pipe and cables and buoys, if you go the
18 buoy route.

19 CHAIRMAN COMES: Any other questions?

20 MR. BUSSMUS: No.

21 CHAIRMAN COMES: Are there any questions from the
22 board for Ms. Murphy?

23 MR. HOLZBAUER: Mr. Chairman.

24 EXAMINATION

25 BY MR. HOLZBAUER:

1 Q. Weeds and tree branches and stuff don't get hooked up
2 on that?

3 A. No more than it would a fence.

4 Q. That was what I was wondering.

5 A. There is still a fence across there.

6 Q. Things like that could get tangled up.

7 A. Uh-huh.

8 CHAIRMAN COMES: Any other questions from the board?
9 I have a few questions.

10 EXAMINATION

11 BY CHAIRMAN COMES:

12 Q. I have some questions. Would GF&P object if just a
13 portion of Firesteel Creek in Davison County was removed from
14 the navigable -- from that first request we have here?

15 MR. NEALL: Leslie, are you prepared to answer that on
16 behalf of the department?

17 A. On behalf of our department, I am not going to be able
18 to answer that.

19 Q. (BY CHAIRMAN COMES) The other streams that Mr. Rath
20 talked about being modified, I believe the list was in -- the
21 list that is listed in 43-17-34, I believe, that's modified in
22 the administrative rule list, did DENR object to those being
23 modified at the time that they were modified, do you know that?

24 A. I do not know.

25 Q. Do you know, do you have any estimation of what flow

1 is needed to carry a one- or two-person vessel in terms of CFS?

2 A. I do not.

3 Q. Do you have any information on the flow from those
4 other streams that were removed? The portions that were
5 removed, were they similar to what's being requested to be
6 removed here?

7 A. I can't speak to those. This is the first
8 nonnavigable/navigable thing that I have been involved with
9 since I've been here; so I can't speak to when those were
10 removed or what the flows were.

11 Q. Does Game, Fish and Parks have any counts or anything?
12 I know we have had testimony about how many people we see and
13 it doesn't seem to be a uniform comment. Do you have any idea
14 on the usage?

15 A. I personally don't, but our conservation officer from
16 the county will be testifying as to public use of the area, but
17 while I say that, we don't keep any official counts of user
18 activity. There is no station that they have to check in or
19 keep a log book of.

20 Q. Do you have any user feedback where you survey people
21 and say what's your use?

22 A. We don't do any paddler surveys.

23 CHAIRMAN COMES: I don't have any more questions.

24 MR. HOYT: Just one.

25

EXAMINATION

1 BY MR. HOYT:

2 Q. Leslie, do you know whether any agency of state
3 government has any regulations concerning the construction of
4 stream crossing gates?

5 A. DENR has authority over fences over streams; so I
6 would assume that these gate structures would fit into that
7 fencing category. But I don't know -- are you asking if
8 there's any specific construction guidelines to make them?
9 That I don't know. I don't believe they are written in rule
10 anywhere. This is just kind of an easier method for people to
11 utilize a resource without upsetting landowners. You don't
12 have to get out of your kayak to open a gate, you don't have to
13 close the gate.

14 Q. For your future reference, counsel has just pointed
15 out to me that it is in fact Administrative Rule 74:02:10:03.

16 A. Okay. Gate crossings?

17 Q. Yes.

18 A. Okay.

19 MR. BUSSMUS: I have a couple questions, if I could
20 speak.

21 CHAIRMAN COMES: In a moment. Any other questions
22 from the board?

23 EXAMINATION

24 BY MR. HOLZBAUER:

25 Q. I was kind of wondering as far as cost sharing and

1 stuff like that, should it maybe be cost shared with South
2 Dakota Game, Fish and Parks and the kayakers or the canoers?

3 A. The South Dakota Paddling and Kayaking Association are
4 involved in getting some of these, the gated structures, up.

5 Q. For their own use, that way they can float over
6 them --

7 A. Uh-huh.

8 Q. -- up and down the stream? See what I'm trying to
9 say, rather than with the landowner, with the people that need
10 to use the gate.

11 A. Right. I understand what you are saying.

12 CHAIRMAN COMES: I have one more question, Ms. Murphy.
13 You mentioned -- who in GF&P might have authority or say on
14 whether the Game, Fish and Parks would oppose a partial
15 removal? Would that be the commission?

16 A. You know, those navigability statutes are in DENR; so
17 I think that's kind of what we are trying to flesh out today,
18 and from Game and Fish's standpoint, we are the agency that's
19 out there to protect public resource. So we don't really want
20 to see anything given up from the public's standpoint. It's
21 our responsibility to insure that the public can utilize all
22 those resources that are available to them. So I don't feel
23 comfortable telling you today, yeah, we would be fine with
24 giving up this portion or this portion. From our perspective,
25 we would like to see, since it is in statute, that we would

1 like to see it remain the same.

2 CHAIRMAN COMES: Any other questions from the board?

3 Ms. Mines-Bailey, do you have any questions?

4 MS. MINES-BAILEY: No, thank you.

5 CHAIRMAN COMES: Mr. Bussmus?

6 RECROSS-EXAMINATION

7 BY MR. BUSSMUS:

8 Q. I was curious where these pictures are taken.

9 A. Those are Split Rock Creek over by Sioux Falls.

10 Q. Some places on the Firesteel Creek today these will
11 not work because they are dried up.

12 A. Yep. And you know, I kayak and I canoe, and to me
13 portaging isn't that fun so if you can't -- if you can't kayak
14 or canoe for a reasonable distance, you are not going to want
15 to drag your canoe hundreds of feet.

16 Q. The cows will walk over these.

17 A. Yeah, and the cows would walk over those if there is
18 no water. Obviously they don't work in every situation.

19 Q. Would you have to take them out in the winter time so
20 they don't freeze?

21 A. That's a good question.

22 Q. In the spring time, there is trees that come.

23 A. Yep. You know, those are made to slip right over --
24 those PVC pipe slip over a fence post; so they are not that
25 hard to take in and take out.

1 Q. I guess that would be my only concern, there is some
2 dry spots.

3 A. Yeah.

4 CHAIRMAN COMES: Mr. Neall, do you have any follow-up
5 questions?

6 MR. NEALL: No, sir.

7 CHAIRMAN COMES: Do you have any other witnesses?

8 MR. NEALL: I have one more witness, Mr. Chairman.
9 Call Andy Petersen. For purposes of Andy's testimony, I would
10 like to hand out -- they don't need to be introduced because it
11 already has been. These are just small copies of this.

12 CHAIRMAN COMES: That's fine.

13 Thereupon,

14 ANDY PETERSEN,

15 called as a witness, being first duly sworn as hereinafter
16 certified, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. NEALL:

19 Q. Would you state your name for the record, please?

20 A. Andy Petersen.

21 Q. Are you employed?

22 A. Yes.

23 Q. How so?

24 A. I'm with the South Dakota Game, Fish and Parks.

25 Q. And how long have you been so employed?

1 A. 13 years.

2 Q. Has all that time been as a conservation officer in
3 the Mitchell/Davison County area?

4 A. Yes.

5 Q. In that capacity, Andy, are you familiar with
6 Firesteel Creek in Davison County?

7 A. Yes, I am.

8 Q. Would you explain to the board how it is that you
9 arrived at your familiarity with that creek?

10 A. Being the conservation officer in the area, I patrol
11 Lake Mitchell and up into Firesteel Creek. We do boating and
12 safety inspections, we check fishermen and anglers and other
13 users on the creek and into the lake there. So I travel up and
14 down it routinely checking fishermen and boaters.

15 Q. So would it be fair for me to say you are familiar
16 with the nature and extent of its use by the public out there?

17 A. Yes.

18 Q. Would you describe for the board the public uses that
19 you are aware of that are made of Firesteel Creek.

20 A. I'd say in portions of it it's used pretty heavily by
21 boaters and anglers, and we were talking a lot about kayakers
22 and canoers, and I would say probably in the last five years,
23 those type of paddle sports have been increasingly more
24 popular; so I have seen more and more usage of that above Lake
25 Mitchell and below it.

1 Q. Are you familiar with the petition that Mr. Bussmus
2 has filed in this matter?

3 A. Yes, I am.

4 Q. And are you familiar with the pictures of Firesteel
5 Creek that he enclosed with his petition?

6 A. Yes.

7 Q. Based upon your familiarity with Firesteel Creek and
8 your knowledge of it, are those pictures representative of
9 normal water conditions on Firesteel Creek?

10 A. Well, this year I think is below average for normal
11 conditions. We didn't have a lot of snowfall in the winter
12 time, we didn't have a lot of rain in the spring. I think
13 other folks have testified to that too. So I think it's a
14 little lower than a normal year certainly.

15 Q. Did you take pictures of Firesteel Creek?

16 A. Yes, I did.

17 Q. And when would you have done that?

18 A. I did it I believe it was about the middle of
19 September, I don't know exact date.

20 Q. And Andy, isn't it true that those pictures have been
21 provided to the board with the petition or with the
22 department's response to the petition?

23 A. Yes, they were.

24 MR. NEALL: Folks, I draw your attention to the packet
25 of pictures that were provided to you as part of the record

1 today, part of the file that were submitted with the
2 department's response to the petition. That's what Andy is
3 going to be talking about.

4 Q. (BY MR. NEALL) Andy, I am going to show you what's
5 already been made part of the record and ask if you can
6 identify that for us.

7 A. I went up and down the Firesteel Creek starting from
8 the very east portion of Davison County, which would be 412th,
9 and I went all the way to the west, taking a picture off the
10 east and west side of every access point there is what I did.

11 Q. So I think I'm going to have you step over here.
12 Bring the pictures with you for a moment. So starting with the
13 first pictures, could you kind of just point out on this large
14 aerial photo where we are starting and where we are.

15 A. We are starting right here at 412th at the Firesteel
16 Creek and Highway 38 there and that's roughly about a quarter
17 to half mile away from the Jim River, the mouth of the Jim
18 River or the mouth of the Firesteel to the Jim River.

19 Q. The next picture, next set of pictures would have been
20 taken where?

21 A. The next one is that same bridge just off the west
22 side. You have east and the west side there.

23 Q. Okay. Maybe to save time, rather than going through
24 each and every one of these, you took pictures of access points
25 all the way across Davison County?

1 A. Yeah, the easiest -- where the public would have
2 access to the creek there.

3 Q. That goes from west to east, correct? Excuse me, east
4 to west.

5 A. East to west, yes.

6 Q. And to the best of your knowledge, do those pictures
7 accurately reflect the conditions of Firesteel Creek at the
8 locations where you took those pictures?

9 A. During this time period, yes.

10 Q. And just for the record, you took them on September
11 22nd, 2015, correct?

12 A. September 22nd, yes.

13 Q. Have you had an opportunity to look at the pictures
14 that Mr. Rath submitted with his reconnaissance investigation
15 report in this matter?

16 A. Yes, I did.

17 Q. In your opinion, do they fairly represent the
18 conditions of Firesteel Creek at the locations where he and Mr.
19 Duvall took their pictures?

20 A. I think in those portions they do.

21 Q. And Firesteel Creek is used for kayaking obviously;
22 isn't that true?

23 A. Yes.

24 Q. And of course I think you have already testified that
25 people fish there, hunt, trap.

1 that area of Firesteel Creek, what percentage of fishermen are
2 fishing off the bridges and the roadways?

3 A. Generally when I see people up in that portion past,
4 I'd say past 405 there, the Loomis oil, past that area most of
5 the folks are just fishing around the bridges, but I'd say from
6 405 east they are mainly fishing out of vessels and boats.

7 Q. East of that?

8 A. East of that.

9 Q. Very few fishing to the west of that.

10 A. Except for the off the bridges and that, I haven't
11 noticed a lot of activity.

12 MR. BUSSMUS: I agree with that. No further
13 questions.

14 CHAIRMAN COMES: Are there any questions of the board
15 of Mr. Petersen?

16 EXAMINATION

17 BY MR. HOYT:

18 Q. As it relates to the fishing, Mr. Petersen, if they
19 were between the bridges on creek that is adjacent to private
20 ground, they pretty much have to be fishing from a boat,
21 wouldn't they?

22 A. That or wading --

23 Q. Or a kayak or something, some vessel.

24 A. Since it's navigable, they could wade down and walk
25 down it as far as they wanted to, you know, to fish.

1 Q. Between the ordinary high water mark?

2 A. Yes, you are correct. That's what a lot of the
3 trappers do too, they walk down and trap.

4 CHAIRMAN COMES: Any other questions?

5 EXAMINATION

6 BY CHAIRMAN COMES:

7 Q. I have a question, sir. Would you have any estimate,
8 in any terms, whether it's per month, per week, the number of
9 kayakers you see kayaking I'll say west of the Loomis oil?

10 A. How many I see west of the Loomis oil?

11 Q. Yes.

12 A. Very few. I have only been -- I've been west of the
13 Loomis oil a couple times only half a mile, and I've only seen
14 one other boat fishing up in there too. So not very common.
15 East is mainly where you see kayakers routinely.

16 Q. How about on point six on the map, is that a paved
17 road, do you know?

18 A. Is that 403?

19 Q. Looks like it is 403.

20 A. Yeah.

21 Q. How many do you see west of point six?

22 A. Boaters, I have not seen any myself, kayakers, no.

23 Q. Obviously the same would go for point five.

24 A. Yes. There are other resource users but not boaters.

25 CHAIRMAN COMES: One moment please. I don't have any

1 other questions. Is there any other questions from the board?

2 EXAMINATION

3 BY MR. HOLZBAUER:

4 Q. A navigable stream allows the public to go up and down
5 that stream, right?

6 A. That's correct.

7 Q. I heard something about the high water mark, right?
8 And that's between the two sides, the high water mark.

9 A. Yep.

10 Q. How wide is that on Firesteel?

11 A. It --

12 Q. It varies?

13 A. It varies quite a little bit, depending on the width
14 of it and the water level.

15 Q. Anything within that average you are talking about,
16 what, 50 feet, 100 feet?

17 A. I think 50 is most commonly used if it's not easily
18 noticed.

19 Q. Anywhere in there, that's because it's a navigable,
20 quote, navigable stream, it's navigable because of foot traffic
21 or boat traffic, right? No, I'm sorry, I corrected myself.
22 It's navigable if it can carry a person in a boat, at least one
23 person in a boat two years out of 10.

24 A. Portions of it, yes.

25 Q. Portions or the whole thing?

1 A. I believe it says portions in the definition, I have
2 to reread it. Is that correct?

3 Q. Otherwise it's a dry draw it says here.

4 A. I guess I'm not sure.

5 Q. Okay, thank you.

6 CHAIRMAN COMES: Any other questions for Mr. Petersen?
7 Ms. Mines-Bailey, do you have any follow-up to that?

8 MS. MINES-BAILEY: No questions, thank you.

9 CHAIRMAN COMES: Mr. Bussmus, do you have any
10 follow-up questions?

11 MR. BUSSMUS: No.

12 CHAIRMAN COMES: Mr. Neall?

13 MR. NEALL: No, sir.

14 CHAIRMAN COMES: Thank you, sir.

15 MR. NEALL: The Department of Game, Fish and Parks has
16 no further witnesses.

17 (Partial transcript concluded.)

18

19

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25

C E R T I F I C A T E

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STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

I, Carla A. Bachand, RMR, CRR, Freelance Court Reporter for the State of South Dakota, residing in Pierre, South Dakota, do hereby certify:

That I was duly authorized to and did report the testimony and evidence in the above-entitled cause;

I further certify that the foregoing pages of this transcript represents a true and accurate transcription of my stenotype notes.

Dated this 13th day of November 2015.



Carla A. Bachand, RMR, CRR
Freelance Court Reporter

From: Mike Senator Vehle Sen.Vehle@state.sd.us
Subject: 398
Date: Today at 11:15 PM
To: scahoy@mit.midco.net



Sent from my iPhone

From: **Mike Senator Vehle** Sen.Vehle@state.sd.us
Subject: 397 *the Vernon Oil*
Date: Today at 11:22 PM
To: scahoy@mil.midco.net



Sent from my iPhone

From: **Mike Senator Vehle** Sen.Vehle@state.sd.us
Subject: 397. Mr Vernon Ojl
Date: Today at 10:25 PM
To: scahoy@mit.midco.net, Mike Vehle mvehle@mit.midco.net

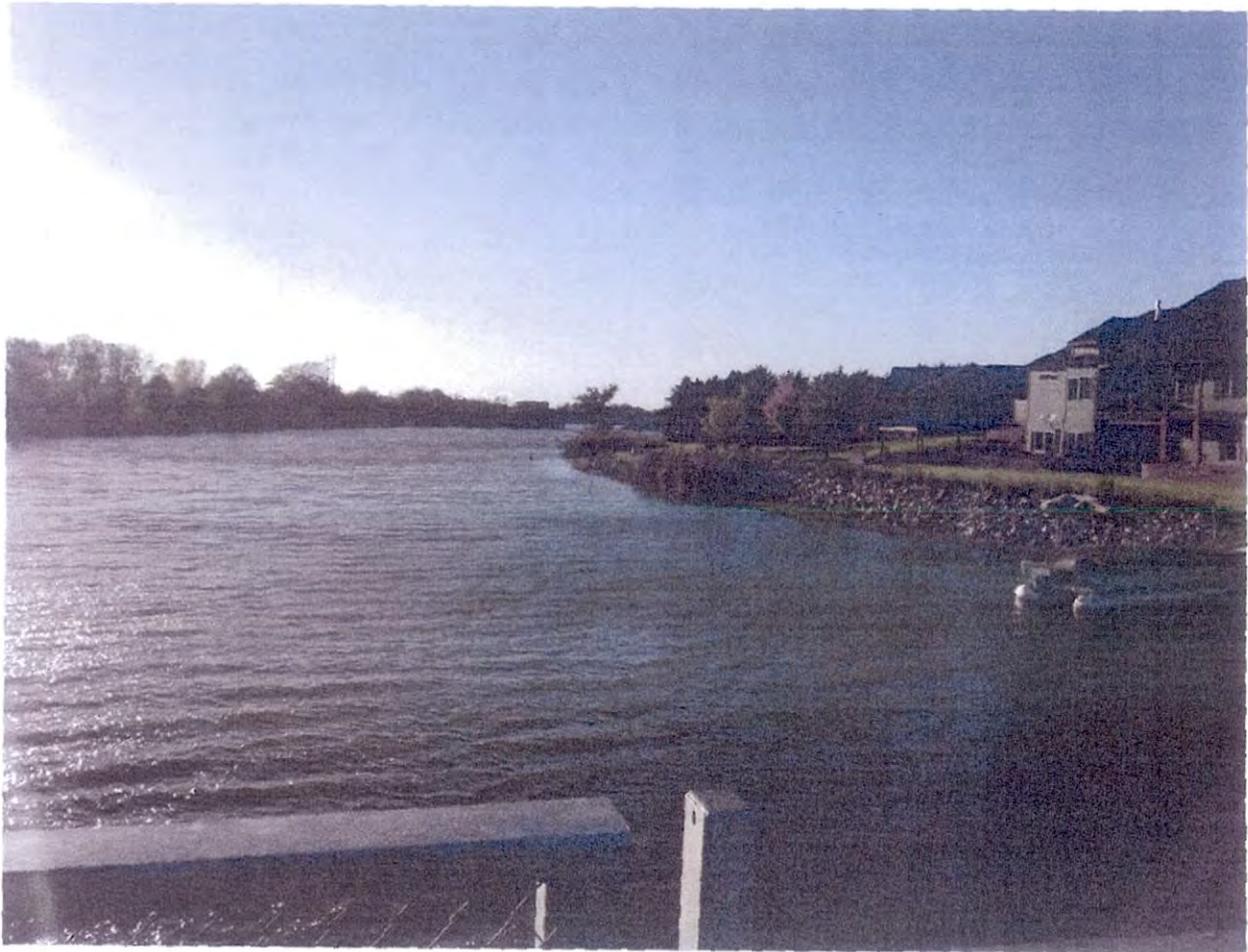


From: **Mike Vehle** mvehle@mit.midco.net
Subject: 397. Mt Vernon Oil
Date: Today at 9:51 PM
To: scahoy@mit.midco.net, **Michael Vehle** mvehle@mit.midco.net

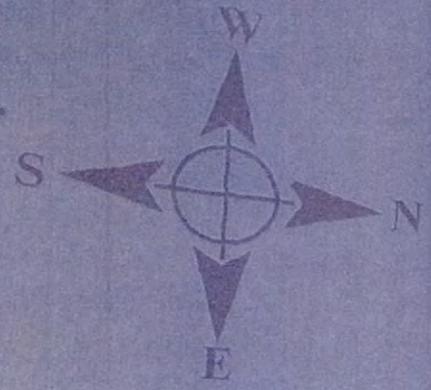


From: Mike Vehle mvehle@mit.midco.net
Subject: Lake/Firesteel
Date: Today at 9:32 PM
To: scahoy@mit.midco.net, Mike Vehle mvehle@mit.midco.net

EXHIBIT
GFP 3
PENGAD 800-831-0989



ISLAND



FIRESTEEL CREEK



LAKE MITCHELL

LAKE MITCHELL

999-7070

CHUCK MAUSZYCKI

BROKER ASSOCIATE / OWNER

605-995-0999



From: **Mike Vehle** mvehle@mit.midco.net
Subject: 406. Backlund ၄၃
Date: Today at 9:34 PM
To: scahoy@mit.midco.net, **Mike Vehle** mvehle@mit.midco.net



From: Mike Senator Vehle Sen.Vehle@state.sd.us
Subject: 405
Date: Today at 10:57 PM
To: scahoy@mit.midco.net



Sent from my iPhone

From: **Mike Senator Vehle** Sen.Vehle@state.sd.us
Subject: 406
Date: Today at 10:56 PM
To: scahoy@mit.midco.net



Sent from my iPhone

From: **Mike Vehle** mvente@mit.midco.net
Subject: 405 *Kanash Oil*
Date: Today at 9:41 PM
To: scahoj@mit.midco.net, Michael Vehle mvehle@mit.midco.net

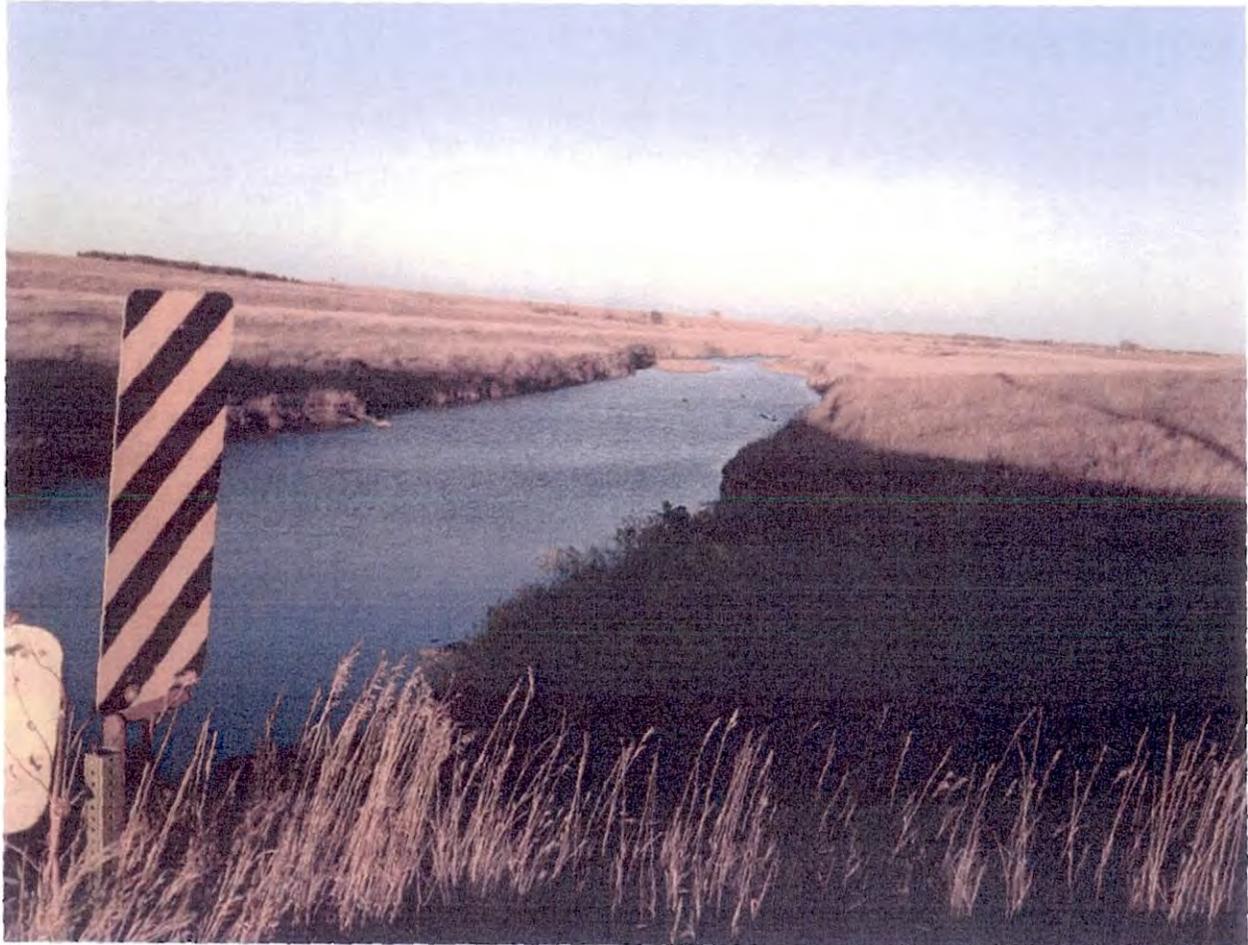


From: Mike Vehle mvehle@mit.midco.net
Subject: 404 *Business Homeplace*
Date: Today at 9:42 PM
To: scahoy@mit.midco.net, Michael Vehle mvehle@mit.midco.net





From: **Mike Vehle** mvehle@mit.midco.net
Subject: **Betts, 403** *Betts Rd*
Date: Today at 9:46 PM
To: scahoy@mit.midco.net, **Michael Vehle** mvehle@mit.midco.net



From: Mike Vehle mvehle@mit.midco.net
Subject: 404 also
Date: Today at 9:45 PM
To: scahoy@mit.midco.net, Mike Vehle mvehle@mit.midco.net



Sent from my iPhone





From: **Mike Vehle** mvehle@mit.midco.net
Subject: 401
Date: Today at 9:47 PM
To: scahoy@mit.midco.net, **Michael Vehle** mvehle@mit.midco.net



From: **Mike Senator Vehle** Sen.Vehle@state.sd.us
Subject: 401
Date: Today at 11:13 PM
To: scahoy@mit.midco.net



Sent from my iPhone

From: Mike Vehle mvehle@mit.midco.net
Subject: 398
Date: Today at 9:48 PM
To: scahoy@mit.midco.net, Mike Vehle mvehle@mit.midco.net

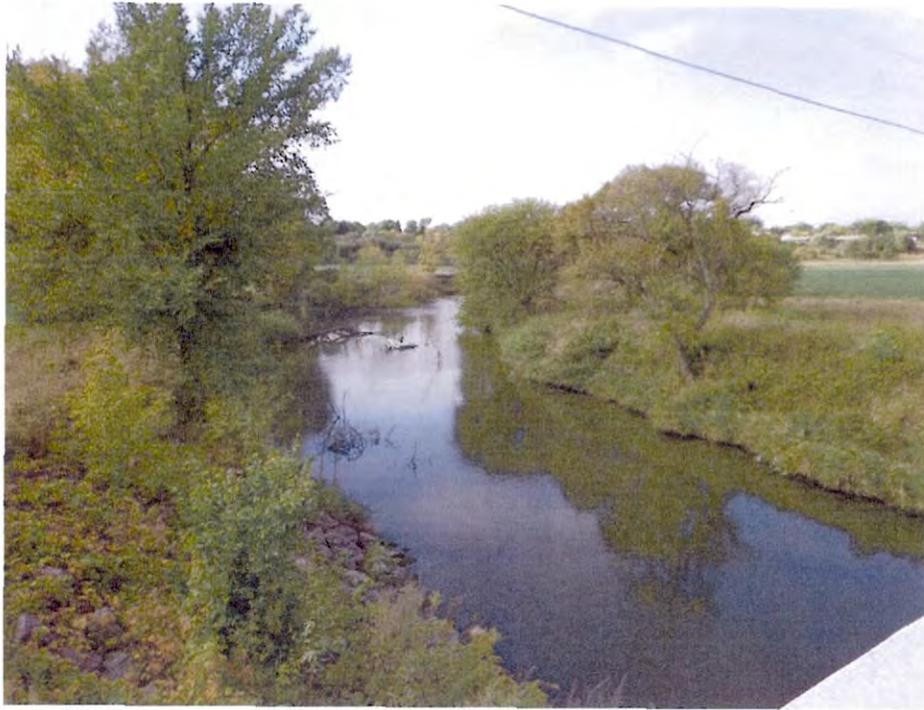




HWY 38 E



HWY 38 W



Old Mill Road E



Old Mill Road W



Foster E



Foster W



North Harmon Dr (407th Ave.) W



North Harmon Dr (407th Ave.) W



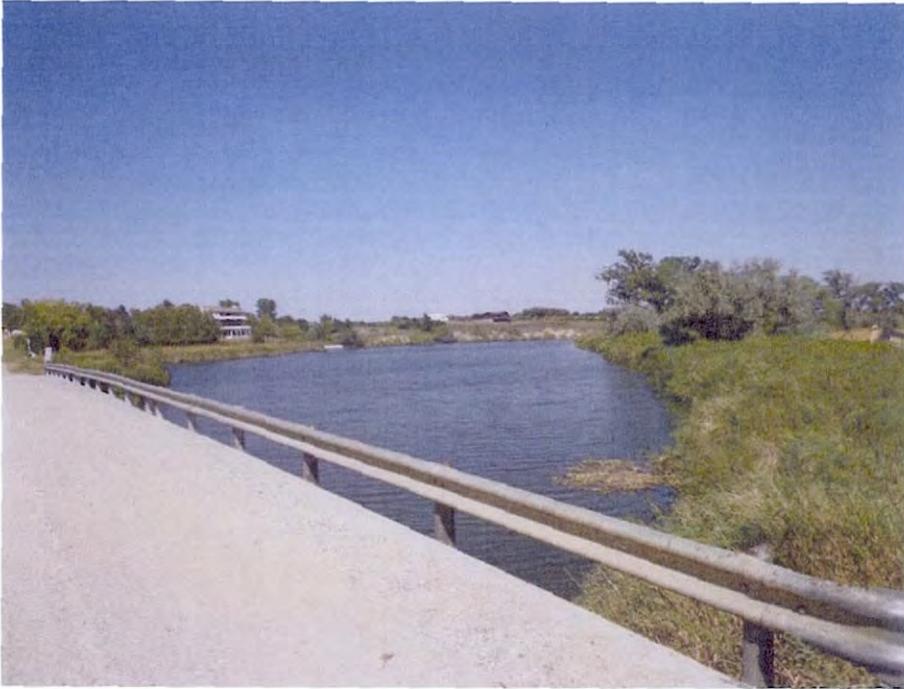
RailRoad Bridge E



Railroad Bridge W



RailRoad Bridge and Canal E



406th Ave E



406th Ave W



405th Ave W



405th Ave E



404th Ave W



404th Ave E



403rd Ave E



403rd Ave W



401st Ave W



401st Ave E



Tjomsland GPA



Tjomsland GPA



398th Ave E



398th Ave W



397th Ave E



397th Ave W



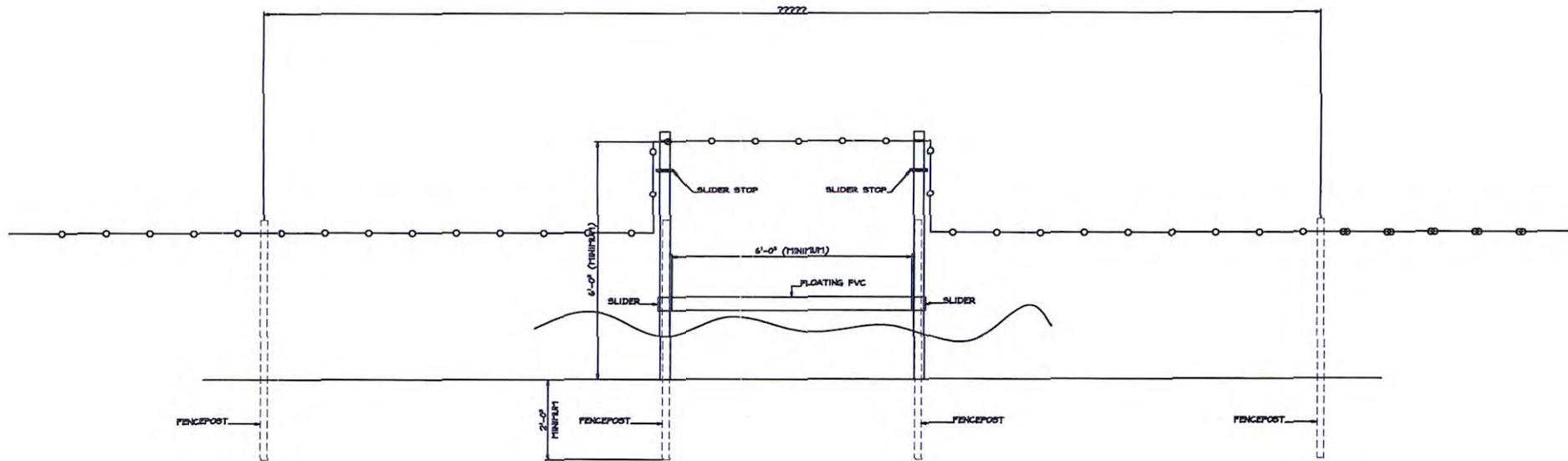
396th Ave W



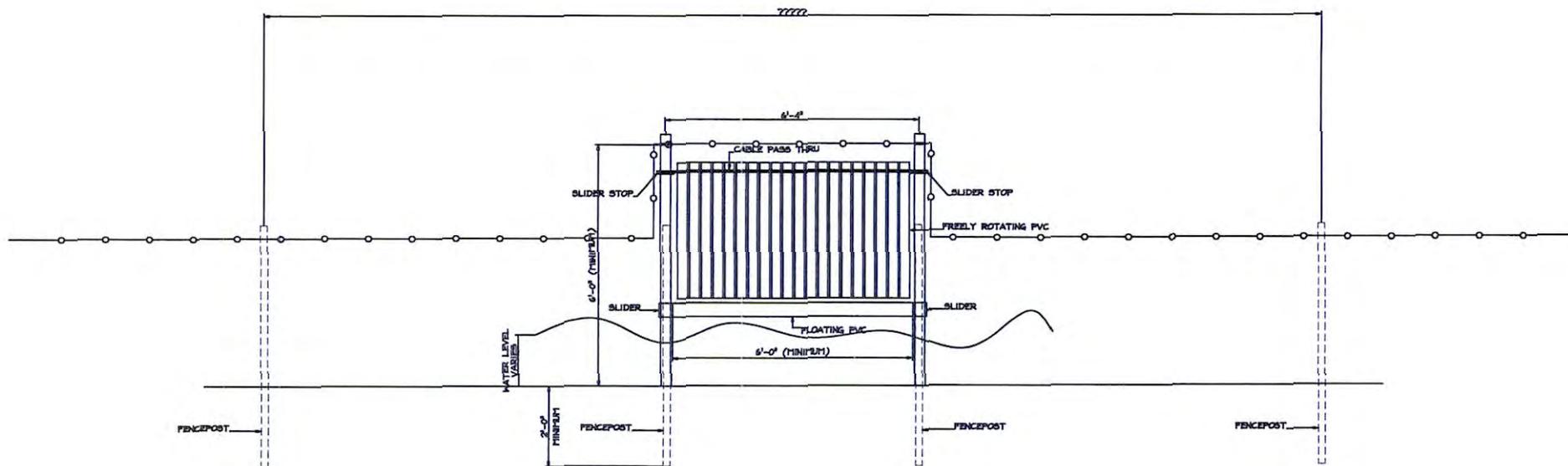
396th Ave E



394th Ave E



OPTION #1



OPTION #2











DEPARTMENT OF EXECUTIVE MANAGEMENT
BUREAU OF FINANCE AND MANAGEMENT

RECEIVED

NOV 23 2015

Dept. of Environment and
Natural Resources
Secretary's Office

MEMORANDUM

TO: Department of Environment and Natural Resources
FROM: Bureau of Finance and Management
RE: Fiscal Note
DATE: November 20, 2015

The Bureau of Finance and Management has reviewed the proposed rules from the Department of Environment and Natural Resources and concurs with the department's assumptions and fiscal impact calculations.

DJ:bn

Attachment: BFM Fiscal Note

cc: Jason Hancock, Director
South Dakota Legislative Research Council

South Dakota Municipal League (with Fiscal Note package)

South Dakota Association of County Commissioners (with Fiscal Note package)

Associated School Boards of South Dakota (with Fiscal Note package)

STATE CAPITOL
500 EAST CAPITOL AVE.
PIERRE, SOUTH DAKOTA
57501-5070

Voice: (605) 773-3411
Fax: (605) 773-4711

**ADMINISTRATIVE PROCEDURES ACT
FISCAL NOTE
Prepared by Submitting Agency**

	CODE	NAME
DEPARTMENT		Environment and Natural Resources
DIVISION	2020	Environmental Services
PROGRAM	20208	Water Rights Program

PROPOSED RULES: Amendment of rules number § 74:02:10:07.

Hearing Date: December 9, 2015

FISCAL IMPACT STATEMENT:

Brief description of fiscal impact; (Example: Pursuant to 1-26-4.2, these rules have minimal impact to all entities. No additional staffing or resources are needed.) The fiscal impact is negligible to all participants including state agencies (Game Fish and Parks and School and Public Lands), local governments, small businesses and individuals. If the rule is adopted, property owners may experience reduced expenses by not needing to install gates in stream fence crossings on Firesteel Creek in Davison County.

FISCAL NOTE SUMMARY:

List state agencies of local governmental subdivisions affected. (SEE ABOVE)

COST INCREASES (DECREASES)

State Agencies:	First-Year Impact	Continuous-Yearly Impact
TOTAL (negligible change)		
Local Subdivisions:		
TOTAL (negligible change)		
Small Business Increases (Decreases)		
TOTAL (negligible change)		

REVENUE INCREASES (DECREASES)

Revenue Increases (Decreases) State, Local & Small Business:		
TOTAL (negligible change)		

APPROVED 
Signature Department Secretary or Board or Commission Chairman

DATE 12/14/15

ATTACH: Copy of proposed rules; separate sections for: 1) explanation of rules effect, i.e. what procedures, schedules, activities, etc. will change with its adoption; 2) statistics used, and their source; 3) assumptions that were made to arrive at fiscal impact; 4) computations that were made; and 5) small business impact statement



Legislative Research Council

RECEIVED
NOV 18 2015
WATER RIGHTS
PROGRAM

Representative Dean Wink, Chair
Senator Corey Brown, Vice Chair

Jason Hancock, Director
Sue Cichos, Deputy Director
Doug Decker, Code Counsel

November 17, 2015

Mr. Joe Nadenicek
South Dakota Department of Environment and Natural Resources
523 East Capitol Avenue
Pierre, South Dakota 57501

Dear Mr. Nadenicek:

The Water Management Board has proposed the amendment of ARSD 74:02:10:07–Fences Covering Navigable Streams, which is scheduled for hearing on December 9, 2015. We have reviewed the proposed rules and approve them for legality with the following exception:

Only those rules that are being amended, transferred, repealed or adopted should be included. In the future do not send rules that are not proposed for change. See page 2 of the Guide to Form and Style.

This letter is based on a preliminary review of your rules. Attached are your rules edited for form and style pursuant to SDCL 1-26-6.5 and directions for submitting the final draft of the rules. If you have any questions, please don't hesitate to call me or the staff member who has reviewed your rule.

Sincerely yours,

A handwritten signature in black ink that reads "Doug".

Doug Decker
Code Counsel

DD:AJ

Cc: Ron Duvall, DENR

DIRECTIONS FOR SUBMITTING THE FINAL DRAFT

Rules Review Meeting Schedule: The Interim Rules Review Committee has set the following tentative meeting schedule for the 2015 interim: December 14, 2015.

- A. Final Draft to the Legislative Research Council:** Bring the final draft of the adopted rules to this office at least five days before the committee meeting date for signature for legality and for form and style, please include the following items:
1. The edited copy of the first draft;
 2. One legible copy of the final draft, to be left here. The final draft should be double spaced, contain only rules being amended, repealed, or adopted, and show changes from current printed rules by means of overstrikes and underscores;
 3. The original Form #11 which contains the signature of the officer empowered to adopt the rules or the signatures of a majority of the members of a board or commission which has the rule-making authority; and
 4. Copies of the following:
 - a. The minutes of all public hearings, (a summary of the minutes if needed); and
 - b. The affidavit of mailing to Rules Committee members – Form #12.
- B. Service on Committee:** The following information is to be served on the Interim Rules Review Committee at least five days before the committee meeting date:
1. The final draft of the adopted rules (three-hole punched and numbered by page);
 2. The minutes of the public hearing;
 - a. Include a summary of the hearing if a verbatim transcript is used;
 - b. Include a summary of any subsequent hearing if the public hearing is continued or final action is taken at a later date;
 3. A summary of the written comments or copies of the written comments;
 4. The Impact Statement on Small Business;
 5. The Fiscal Note; and
 6. Agency financial resource information if the agency proposes a rule to increase a fee.
- First class mail, e-mail, or both should be used (See Form #12).
- C. Filing with the Secretary of State's Office:** (After appearing before the Interim Rules Review Committee)
1. Each agency must complete and sign all documents before filing the certificate of compliance with Chapter 1-26 and the final draft of the rules with the Secretary of State's Office. Although it is not required by statute, the Secretary of State's Office would like to have a copy of the approval signature sheet with the filing of the final draft and the certificate.

Department/Board/Commission Name _____

Interim Rules Review Committee Rules Presentation Format

When you submit the final draft to the Legislative Research Council (LRC) and the Rules Review Committee, please answer these questions to show that the SDCL § 1-26 rule-making process is complete. Use this format to organize your presentation to the Committee.

- Approval to proceed? Yes _____ No _____ Date _____

- The date of your public hearing. Date _____

- The date you submitted the proposed rules and the supporting documents to LRC and the Bureau of Finance and Management: Date _____ *(Note - This must be completed at least 20 days before your public hearing.)*
 - any publication incorporated by reference;
 - the fiscal note;
 - the impact statement on small business; and
 - the notice of hearing.

- The date and the name of the newspapers where you published the notice of the public hearing.
 - Date _____ Newspaper _____
 - Date _____ Newspaper _____
 - Date _____ Newspaper _____

- Summarize how and when interested persons, if any, were contacted and how many were contacted. _____

- Provide the page numbers in the minutes where it mentions how the agency considered amendments, data, opinions, or arguments regarding the proposed rules, along with any changes and final action. _____

- If the rules are implementing a bill from last session, identify the bill number. _____

- The date you submitted the final rules and supporting documents to the LRC and the Rules Review Committee: Date _____ *(Note - This must be received no later than 5 days before the Rules Review Committee meeting.)*
 - the "Approval of Rules" - Form 11 (LRC only);
 - the style and form copy (LRC only);
 - the "Affidavit" of mailing - Form 12 (LRC only);
 - the final copy of the rules (Both);
 - the minutes of the hearing (Both);
 - the record of written comments (Both);
 - the impact statement on small business – Form 14 (Committee only);
 - the fiscal note – Form 5 (Committee only);
 - the budgetary information required to increase a fee (Committee only); and
 - the rules process outline (Both).

Form + style

CHAPTER 74:02:10

FENCES CROSSING NAVIGABLE STREAMS

Section

- 74:02:10:01 Definitions.
- 74:02:10:02 Landowner requirements.
- 74:02:10:03 Gate specifications.
- 74:02:10:04 Declaratory ruling on navigability.
- 74:02:10:05 Timely consideration by board.
- 74:02:10:06 Petitioner to publish notice.
- 74:02:10:07 Deletion of stream portions from streams listed in SDCL 43-17-38.

74:02:10:01. Definitions. Terms defined in SDCL chapter 43-17 have the same meaning when used in this chapter. In addition, the term "gate" means a section of the fence, including switchbacks and other devices, that crosses a stream, as allowed by SDCL 43-17-35, and that can be opened to allow safe passage.

Source: 18 SDR 59, effective September 29, 1991.

General Authority: SDCL 43-17-36.

Law Implemented: SDCL 43-17-36.

74:02:10:02. Landowner requirements. Persons constructing or maintaining a fence across a navigable stream shall:

(1) Provide the following information to the chief engineer:

(a) The name, address, and telephone number of the landowner proposing to construct or maintain the fence;

(b) The name, address, and telephone number of the person responsible for maintaining the fence if different than the landowner; and

(c) The location of the fence where it crosses the stream, described by its direction and distance from the nearest legal section corner, including section number, township, and range;

(2) Install and maintain a functional gate in the fence over the stream or, if allowed by a variance, immediately adjacent to the public right of way to allow passage of boats, canoes, other vessels, snowmobiles, and pedestrians; and

(3) Remove the gate or keep it open when livestock are not present, unless a variance has been granted.

Source: 18 SDR 59, effective September 29, 1991.

General Authority: SDCL 43-17-36.

Law Implemented: SDCL 43-17-35.

74:02:10:03. Gate specifications. The gate must have a minimum overhead clearance of 6 feet and a minimum opening that is 6 feet wide. The opening must be outlined with reflective or highly visible material. Fencing materials may be used to close the gap on each side of the

gate between the gate and the stream banks. Reflectors, spaced at a maximum of 25 feet, or reflective or highly visible material must be attached to the fencing that connects the gate to the stream banks. The reflectors or other material must be visible both upstream and downstream simultaneously.

Source: 18 SDR 59, effective September 29, 1991.

General Authority: SDCL 43-17-36.

Law Implemented: SDCL 43-17-35.

74:02:10:04. Declaratory ruling on navigability. A request for a declaratory ruling on the navigability of a stream must be in the form of a petition submitted to the chief engineer containing the following:

- (1) The name, address, and telephone number of the person or persons submitting the petition;
- (2) The name and location of the stream;
- (3) The requested action and reasons for the request; and
- (4) A fee of \$50 for each petition.

Source: 18 SDR 59, effective September 29, 1991.

General Authority: SDCL 1-26-15.

Law Implemented: SDCL 43-17-34.

74:02:10:05. Timely consideration by board. The board shall consider the petition submitted pursuant to § 74:02:10:04 no later than its second regularly scheduled meeting after receipt of the petition.

Source: 18 SDR 59, effective September 29, 1991.

General Authority: SDCL 1-26-15.

Law Implemented: SDCL 43-17-34.

74:02:10:06. Petitioner to publish notice. 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.

Source: 18 SDR 59, effective September 29, 1991.

General Authority: SDCL 1-26-15.

Law Implemented: SDCL 43-17-34.

74:02:10:07. Deletion of stream portions from streams listed in SDCL 43-17-38. The following portions of streams are deleted from the list of streams where gates or openings are required in fences across streams pursuant to SDCL 43-17-38:

(1) The portion of the Belle Fourche River from the Wyoming state line to the Belle Fourche Irrigation District Diversion Dam in Butte County [SDCL 43-17-38(18)];

(2) The portion of the Belle Fourche River from its intersection with Highway 79 in Butte County to its intersection with Meade County Highway 12 on the west side of section 19, township 5 north, range 10 east of the Black Hills meridian [SDCL 43-17-38(18)];

(3) The portion of the Cheyenne River from the Wyoming state line to the mouth of Hat Creek in Fall River County in the southeast quarter of section 13, township 9 south, range 4 east of the Black Hills meridian [SDCL 43-17-38(14)];

(4) The Little Minnesota River from Highway 10 to Lake Traverse in Roberts County [SDCL 43-17-38(19)];

(5) The North Fork of Whetstone River in Roberts and Grant Counties from Highway 15 near Wilmot to the Minnesota state boundary [SDCL 43-17-38(5)];

(6) The portion of the Cheyenne River from the Angostura Dam to the Fall River-Custer County line [SDCL 43-17-38(14)];

(7) The portion of the Cheyenne River from Highway 44 to the mouth of the Belle Fourche River [SDCL 43-17-38(14)];

(8) The Little Missouri River in Harding County from the Montana state boundary to the North Dakota state boundary [SDCL 43-17-38(17)]; and

(9) The portion of the Belle Fourche River from its intersection with Meade County Highway 12 on the west side of section 19, township 5 north, range 10 east to its confluence with

the Cheyenne River, section 33/34, township 6 north, range 15 east of the Black Hills Meridian [SDCL 43-17-38(18)]; and

(10) Firesteel Creek located in Davison County [SDCL 43-17-38(10)].

Source: 19 SDR 73, effective November 19, 1992; 20 SDR 53, effective October 20, 1993; 21 SDR 68, effective October 13, 1994.

General Authority: SDCL 43-17-39.

Law Implemented: SDCL 43-17-38, 43-17-39.

Declaratory Ruling:

A list of petitioners requested the Water Management Board to declare the portion of the Little Missouri River from the Montana-South Dakota state line to the North Dakota-South Dakota state line as not meeting the definition of navigable in SDCL 43-17-34. The board found that the river segment was not navigable and adopted ARSD 74:02:10:07(8) to delete the river segment because public use was not significant. South Dakota Water Management Board Declaratory Ruling dated August 31, 1994.

Codified Laws

43-17-34. "Navigability" defined--Application of term. A stream, or portion of a stream, is navigable if it can support a vessel capable of carrying one or more persons throughout the period between the first of May to the thirtieth of September, inclusive, in two out of every ten years. A dry draw, as defined in § 46-1-6, is not navigable. This section does not apply to any stream or portion of a stream which is navigable pursuant to federal law. Any person may petition the Water Management Board for a declaratory ruling as to the navigability of any stream, or portion of a stream, in this state. The Water Management Board may charge the petitioner a fee not to exceed two hundred fifty dollars to defray the costs of preparing the declaratory ruling. Neither this section nor any declaratory ruling made pursuant to this section grants, creates, recognizes, conveys, removes, or diminishes any right or title to property. The provisions of this section apply only to the implementation of §§ 43-17-35 to 43-17-37, inclusive.

43-17-35. Fencing certain land on both sides of navigable stream permitted--Violation as misdemeanor. Any person who owns any tract of agricultural land on both sides of a navigable stream may, individually, fence such tract, or any persons who collectively own any tract of agricultural land on both sides of a navigable stream may, collectively, fence such tract:

- (1) If livestock are annually pastured on such tract;
- (2) If the fence is reasonably necessary to prevent the livestock from straying from such tract;
- (3) If the fence is so constructed and so marked that it does not, under daytime and nighttime conditions, constitute a danger to the public; and
- (4) If the fence is so constructed that the right of the public to utilize the navigable stream is not prohibited or unduly restricted.

This section does not apply to any river or stream or portion of any river or stream that has been determined to be navigable pursuant to federal law. Construction of a fence in violation of this section is a Class 2 misdemeanor.

43-17-36. Promulgation of rules for safe use of stream. The Water Management Board shall promulgate rules pursuant to chapter 1-26 to establish criteria, standards, and requirements for appropriate gates, switchbacks, or other devices that permit safe use of the stream and passage of boats, canoes, or other vessels, pedestrians, and snowmobiles in accordance with § 43-17-35.

43-17-37. Variance request from adjacent landowners. The owners of land adjacent to the stream may request a variance from the requirements of §§ 43-17-35 and 43-17-36 by application to the Water Management Board if local conditions do not permit compliance with rules promulgated pursuant to § 43-17-36. Upon receiving a request for a variance, the chief engineer, as defined in subdivision 46-1-6(5), shall schedule the matter for hearing by the Water Management Board in accordance with the procedures specified in chapter 46-2A.

43-17-38. Gate or opening required in fence constructed across certain streams--Federally-navigable portions--Public access. A gate or opening constructed pursuant to § 43-17-36 is required in any fence that crosses any stream or portion of any stream that is navigable pursuant to § 43-17-34 and that has been designated by the Water Management Board as requiring a gate or opening pursuant to § 43-17-39. A gate or opening constructed pursuant to § 43-17-36 is required in any fence that may be constructed across any of the following streams or portions of such streams:

- (1) Big Sioux River from the Grant-Codington County boundary to a point five miles north of the Missouri River in Union County;
- (2) Turtle creek, from Highway 26 to the James River, located in Spink County;
- (3) Elm River, from Elm Lake to the James River, located in Brown County;
- (4) Moccasin Creek, from 18th Avenue southwest to 8th Avenue northwest in the City of Aberdeen, located in Brown County;
- (5) North fork of Whetstone River, from Highway 15 near Wilmot to the Minnesota state boundary, located in Roberts and Grant Counties;
- (6) Flandreau Creek, from the Minnesota state boundary to the Big Sioux River, located in Moody County;
- (7) Vermillion River, from Lake Vermillion to the Missouri River;
- (8) East fork of the Vermillion River, from Interstate 90 to Lake Vermillion, located in McCook County;
- (9) Splitrock Creek, from the Minnesota state boundary to the Big Sioux River, located in Minnehaha County;

- (10) Firesteel Creek, that portion located in Davison County;
- (11) Little White River, from the Bennett-Todd County boundary to the White River, located in Todd and Mellette Counties;
- (12) White River, from the Nebraska state boundary to the Missouri River;
- (13) Bad River, from the Stanley-Jones County boundary to the Missouri River, located in Stanley County;
- (14) Cheyenne River, from the Wyoming state boundary to the Missouri River;
- (15) Moreau River, from Highway 63 to the Missouri River;
- (16) Grand River, from Shadehill Reservoir to the Missouri River;
- (17) Little Missouri River, from the Montana state boundary to the North Dakota state boundary, located in Harding County;
- (18) Belle Fourche River, from the Wyoming state boundary to the Belle Fourche irrigation project diversion dam and from Highway 79 to the Cheyenne River;
- (19) Little Minnesota River, from Highway 10 to Lake Traverse, located in Roberts County; and
- (20) Redwater River, from Highway 85 to the Belle Fourche River, located in Butte County.

Because the Missouri River, James River, Boise des Sioux River, and the lower five miles of the Big Sioux River have been designated as navigable pursuant to federal law, this chapter does not permit fencing, with or without gates, across the federally-navigable portions of these rivers.

The extent of the public's use shall be the determining factor in designating a stream or portion of a stream pursuant to this section or § 43-17-39. The public's right to the use of such designated streams as public highways pursuant to § 43-17-2 may be impaired if a gate or opening is not provided in each fence across the streams. Construction of a fence in violation of this section is a Class 2 misdemeanor.

The public's interest in or right to use other streams navigable pursuant to § 43-17-34 but not designated pursuant to this section or § 43-17-39 is not impaired or unduly restricted if fences crossing such other navigable streams are not provided with a gate or opening. This section and § 43-17-39 do not diminish the public's interest in or right to use streams that are navigable pursuant to § 43-17-34 but that are not designated pursuant to this section or § 43-17-39.

43-17-39. Petition to add to, or delete from, list of streams requiring gates. Any person may file a petition by August first in any year with the Water Management Board requesting the board to add any stream or portion of a stream to, or to delete any stream or portion of a stream from, the streams listed pursuant to § 43-17-38. At its next regularly scheduled meeting after August first, the board shall consider any petitions that have been received during the twelve months immediately prior to August first and may act on such petitions by promulgating rules pursuant to chapter 1-26 to:

(1) Designate a stream or portion of a stream to be included among the streams listed pursuant to § 43-17-38 and this section:

(a) If the stream portion is navigable pursuant to § 43-17-34; and

(b) If available information shows that use by the public justifies the construction and maintenance of a gate or opening in any fence across the navigable stream; or if the public's right to the use of a stream as a public highway pursuant to § 43-17-2 would be adversely impaired without a gate or opening in each fence across the stream;

(2) Delete a stream or portion of a stream from the streams listed pursuant to § 43-17-38 and this section:

(a) If available information shows that the public's use is not significant; or

(b) If the rights of the public to the use of the stream would not be adversely impaired without a gate or opening in any fence across the stream.

Any designation made pursuant to this section shall specify the months of the year during which a gate or opening across the navigable stream or portion of the stream is required. Any person who submitted written or oral testimony at the hearing pursuant to this section and who does not agree with a board decision, may file a petition within ten days of the hearing with the chief engineer, as defined in subdivision 46-1-6(5), to request the Legislature to take final action on the matter governed by the petition. Upon receipt of a petition to submit the decision of the board to the Legislature, the board's decision is nullified and the

portion of the rules addressed by the petition may not take effect. The chief engineer shall draft legislation in accordance with the petition and submit the proposed legislation to the next Legislature. All persons submitting written or oral testimony at the hearing shall be given notice by first class mail that the decision of the board has been nullified and that legislation to address the petition will be submitted to the Legislature. The Legislature may add or delete a stream or portion of a stream to the streams designated pursuant to this section and § 43-17-38.

43-17-40. Responsibility for construction and maintenance of gate or opening. The responsibility for construction and maintenance of any gate or opening required pursuant to §§ 43-17-35 and 43-17-36 in a fence across a stream that is navigable pursuant to § 43-17-34 shall be shared equally among those persons who caused the fence to be constructed. Any liability arising from the construction of a fence across a stream that is navigable pursuant to § 43-17-34 shall be borne by those persons who caused the fence to be constructed.

43-17-41. Liability for damage from fencing on both sides of navigable streams. No cause of action may arise against the owners, tenants, or lessees of any real estate for any injury to any person or death resulting therefrom or damage to property of the person in connection with the fencing of agricultural land on both sides of navigable streams if such fencing is in accordance with the provisions of § 43-17-35.

This section does not affect the doctrine of attractive nuisance or other legal doctrines relating to the liability arising from artificial conditions highly dangerous to children.

Administrative Rules on Fences Crossing Navigable Streams

74:02:10:01. Definitions. Terms defined in SDCL chapter 43-17 have the same meaning when used in this chapter. In addition, the term "gate" means a section of the fence, including switchbacks and other devices, that crosses a stream, as allowed by SDCL 43-17-35, and that can be opened to allow safe passage.

74:02:10:02. Landowner requirements. Persons constructing or maintaining a fence across a navigable stream shall:

(1) Provide the following information to the chief engineer:

(a) The name, address, and telephone number of the landowner proposing to construct or maintain the fence;

(b) The name, address, and telephone number of the person responsible for maintaining the fence if different than the landowner; and

(c) The location of the fence where it crosses the stream, described by its direction and distance from the nearest legal section corner, including section number, township, and range;

(2) Install and maintain a functional gate in the fence over the stream or, if allowed by a variance, immediately adjacent to the public right of way to allow passage of boats, canoes, other vessels, snowmobiles, and pedestrians; and

(3) Remove the gate or keep it open when livestock are not present, unless a variance has been granted.

74:02:10:03. Gate specifications. The gate must have a minimum overhead clearance of 6 feet and a minimum opening that is 6 feet wide. The opening must be outlined with reflective or highly visible material. Fencing materials may be used to close the gap on each side of the gate between the gate and the stream banks. Reflectors, spaced at a maximum of 25 feet, or reflective or highly visible material must be attached to the fencing that connects the gate to the stream banks. The reflectors or other material must be visible both upstream and downstream simultaneously.

74:02:10:04. Declaratory ruling on navigability. A request for a declaratory ruling on the navigability of a stream must be in the form of a petition submitted to the chief engineer containing the following:

(1) The name, address, and telephone number of the person or persons submitting the petition;

(2) The name and location of the stream;

(3) The requested action and reasons for the request; and

(4) A fee of \$50 for each petition.

74:02:10:05. Timely consideration by board. The board shall consider the petition submitted pursuant to § 74:02:10:04 no later than its second regularly scheduled meeting after receipt of the petition.

74:02:10:06. Petitioner to publish notice. 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.

74:02:10:07. Deletion of stream portions from streams listed in SDCL 43-17-38. The following portions of streams are deleted from the list of streams where gates or openings are required in fences across streams pursuant to SDCL 43-17-38:

(1) The portion of the Belle Fourche River from the Wyoming state line to the Belle Fourche Irrigation District Diversion Dam in Butte County [SDCL 43-17-38(18)];

(2) The portion of the Belle Fourche River from its intersection with Highway 79 in Butte County to its intersection with Meade County Highway 12 on the west side of section 19, township 5 north, range 10 east of the Black Hills meridian [SDCL 43-17-38(18)];

(3) The portion of the Cheyenne River from the Wyoming state line to the mouth of Hat Creek in Fall River County in the southeast quarter of section 13, township 9 south, range 4 east of the Black Hills meridian [SDCL 43-17-38(14)];

(4) The Little Minnesota River from Highway 10 to Lake Traverse in Roberts County [SDCL 43-17-38(19)];

(5) The North Fork of Whetstone River in Roberts and Grant Counties from Highway 15 near Wilmot to the Minnesota state boundary [SDCL 43-17-38(5)];

(6) The portion of the Cheyenne River from the Angostura Dam to the Fall River-Custer County line [SDCL 43-17-38(14)];

(7) The portion of the Cheyenne River from Highway 44 to the mouth of the Belle Fourche River [SDCL 43-17-38(14)];

(8) The Little Missouri River in Harding County from the Montana state boundary to the North Dakota state boundary [SDCL 43-17-38(17)]; and

(9) The portion of the Belle Fourche River from its intersection with Meade County Highway 12 on the west side of section 19, township 5 north, range 10 east to its confluence with the Cheyenne River, section 33/34, township 6 north, range 15 east of the Black Hills Meridian [SDCL 43-17-38(18)].

Source: 19 SDR 73, effective November 19, 1992; 20 SDR 53, effective October 20, 1993; 21 SDR 68, effective October 13, 1994.

General Authority: SDCL 43-17-39.

Law Implemented: SDCL 43-17-38, 43-17-39.

Declaratory Ruling:

A list of petitioners requested the Water Management Board to declare the portion of the Little Missouri River from the Montana-South Dakota state line to the North Dakota-South Dakota state line as not meeting the definition of navigable in SDCL 43-17-34. The board found that the river segment was not navigable and adopted ARSD 74:02:10:07(8) to delete the river segment because public use was not significant. South Dakota Water Management Board Declaratory Ruling dated August 31, 1994.

RECEIVED

NOV 16 2015

WATER RIGHTS
PROGRAM

RECEIVED

NOV 16 2015

WATER RIGHTS
PROGRAM

November 10, 2015

DENR -WATER RIGHTS PROGRAM

Joe Foss Building

523 East Capitol Ave

Pierre, South Dakota 57501

RE: Application No. 2730-2, United Order of South Dakota

To Whom It May Concern:

It was my understanding that the use of the water was to be for domestic use, gardens, orchards, people, animals. Giving them the benefit of the doubt, they dug a hole that measures 30'x40'x15' deep that was said to be used for water. If so, they have water storage that equals 79,500 gallons of liquid. Seth Jeffs said they have only 30,000 gallons of storage. The cistern was constructed by the Fundamentalists out of concrete made at their Concrete Plant right there on their property. That uses a lot of water. They also built a milking parlor that is 2 stories high that is all concrete. According to them they have a well that produces 94 gallons per minute already, which is large enough to supply a small city of about 4,000. Why do they need more water? They do not have any animals. They have gardens that they water using a sprinkler system, however, wouldn't it be better to use a drip system that would use less water?

Thank you for listening to my concerns.

Sincerely,



Karl R Von Rump
11560 Farmer Rd
Custer, SD 57730



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

denr.sd.gov

October 27, 2015

NOTICE

TO: Brian Gatzke
20836 475th Avenue
Aurora SD 57002

FROM: Jeanne Goodman, Chief Engineer
Water Rights Program

A handwritten signature in cursive script, appearing to read "Jeanne Goodman", is written over the printed name and title.

SUBJECT: Withdrawal of Water Permit Application No. 7386-3, Brian Gatzke

Water Permit Application No. 7386-3 sought to appropriate 3.06 cubic feet of water per second from two wells for irrigation of 214 acres located in the NW ¼ Section 3 and NE ¼ Section 4; all in T110N, R49W in Brookings County. The application was deferred by the Water Management Board in 2013 until completion of an aquifer pump test to allow evaluation of the aquifer.

In email correspondence you requested withdrawal of the application due to inability to find sufficient groundwater at this site.

The Water Management Board will consider withdrawal of Water Permit Application No. 7386-3 at 11:00 AM, on Wednesday, December 9, 2015, in the Floyd Matthew Training Center, Joe Foss Building, 523 East Capitol Avenue, Pierre SD.

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

c: Ann Mines-Bailey, Assistant Attorney General

RECEIVED

SEP 30 2015

WATER RIGHTS
PROGRAM

September 26, 2015

Brian Gatzke
20836 475 avenue
Aurora, SD, 57006

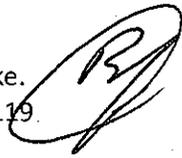
Ref. Permit application 7386-3

Dear Karen

Regarding the water permit application No. 7386-3 and your last correspondence dated 7/22/15. I did not find any more suitable water source. I decided not to drill any more wells and testing, due to the cost on our land.

Thank you.

Brian Gatzke.
605-691-2119

A handwritten signature in black ink, appearing to be 'BG', enclosed within a circular scribble.

Schlaak, Karen

From: Brian J. Gatzke <brian.gatzke@northernplainsappraisal.com>
Sent: Wednesday, September 30, 2015 4:55 PM
To: Schlaak, Karen
Subject: Re: Deferred Water Permit Application No. 7386-3

I believe withdraw application is better. I do not need a refund.

Sent from my Verizon 4G LTE Smartphone

----- Original message-----

From: Schlaak, Karen
Date: Wed, Sep 30, 2015 2:05 PM
To: Brian J. Gatzke;
Cc:
Subject: Deferred Water Permit Application No. 7386-3

We received your letter today regarding deferred Water Permit Application No. 7386-3 and the lack of a suitable water source. Since this application was deferred by the Water Management Board on March 7, 2013, it will be necessary to bring the application before the Board again for final consideration. At this point, there are two ways to proceed.

- 1) You can withdraw the application from consideration. A notice scheduling a hearing before the Board will be sent to you. At which time we will state you would like the application withdrawn (no refund of filing fee); or
- 2) You can request the application be denied. A notice scheduling a hearing before the Board will sent to you. If the application is denied by the Board, we will refund 75% of the application fee (\$712.50) and the license fee (\$200) for a total of \$912.50 (\$1150.00 originally submitted).

Please let us know how you wish to proceed. We will then schedule a hearing for the December, 2015 Water Management Board meeting. Let me know if you have any questions.

Karen Schlaak
Water Rights Program
523 E Capitol Ave
Pierre SD 57501
Phone: 605 773-3352

Schlaak, Karen

From: Brian J. Gatzke <brian.gatzke@northernplainsappraisal.com>
Sent: Thursday, October 01, 2015 9:08 AM
To: Schlaak, Karen
Subject: Re: Deferred Water Permit Application No. 7386-3

Thank you.

Just not able to find water down to 200'

Sent from my Verizon 4G LTE Smartphone

----- Original message-----

From: Schlaak, Karen
Date: Thu, Oct 1, 2015 8:44 AM
To: Brian J. Gatzke;
Cc:
Subject: RE: Deferred Water Permit Application No. 7386-3

We will schedule the withdrawal of Application No. 7386-3 for the December Water Management meeting. You will receive a notice for the hearing. It will not be necessary for you to attend or to do anything further.

From: Brian J. Gatzke [<mailto:brian.gatzke@northernplainsappraisal.com>]
Sent: Wednesday, September 30, 2015 4:55 PM
To: Schlaak, Karen
Subject: Re: Deferred Water Permit Application No. 7386-3

I believe withdraw application is better. I do not need a refund.

Sent from my Verizon 4G LTE Smartphone

----- Original message-----

From: Schlaak, Karen
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To: Brian J. Gatzke;
Cc:
Subject: Deferred Water Permit Application No. 7386-3

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- 1) You can withdraw the application from consideration. A notice scheduling a hearing before the Board will be sent to you. At which time we will state you would like the application withdrawn (no refund of filing fee); or

- 2) You can request the application be denied. A notice scheduling a hearing before the Board will sent to you. If the application is denied by the Board, we will refund 75% of the application fee (\$712.50) and the license fee (\$200) for a total of \$912.50 (\$1150.00 originally submitted).

Please let us know how you wish to proceed. We will then schedule a hearing for the December, 2015 Water Management Board meeting. Let me know if you have any questions.

Karen Schlaak

Water Rights Program

523 E Capitol Ave

Pierre SD 57501

Phone: 605 773-3352

**REPORT TO THE CHIEF ENGINEER
ON
WATER PERMIT APPLICATION NO. 8152-3
CITY OF LAKE ANDES
JUNE 24, 2015**

Water Permit No. 8152-3 proposes to appropriate water from a well completed into the Dakota aquifer, approximately 800 feet deep, at a maximum diversion rate of 0.17 cubic feet of water per second (cfs). The well is to be located in the NE¼ NE¼ Sec. 9, T96N-R65W. Water from the well will be used for recreational use to maintain the water level in the Park Avenue Lake Restoration Project.

The Park Avenue Lake Restoration Project involves constructing a dike around Lake Andes in the southwest portion of the lake, and creating an artificial impound. The surface area of the proposed artificial impoundment is expected to be 16.8 acres. Spuhler and others, (1971) estimated an average annual lake evaporation rate for this area of approximately 38 inches per year. Therefore, evaporation from the pond will be approximately 53.52 acre-feet annually. The proposed well discharge into the impoundment of 0.17 cfs would equate to an annual rate of 123.07 acre-feet per year. A well discharge of 0.17 cfs for the eight months a year when the pond is not frozen would result in 82.05 acre-feet of water.

AQUIFER: Dakota aquifer (DKOT)

AQUIFER CHARACTERISTICS:

The Dakota aquifer consists of the permeable beds of sand and sandstone contained in the Cretaceous aged Dakota Formation. The lithology of the Dakota Formation is quite variable both laterally and vertically, consisting of interbedded sand, sandstone, and shale. It has been postulated the explanation for this is that the Dakota was deposited in a fluvial environment. The porosity of the Dakota varies with the lithology but is assumed to average 15 %, and the specific yield of the aquifer is assumed to be 0.075 (Hedges and others, 1982). Over large areas of the eastern part of State, the Dakota Formation can be subdivided into three units: an upper unit consisting of light-brown to reddish-brown, fine-to medium-grained, friable, sandstone that is interbedded with gray to dark-gray shale and thin, discontinuous beds of lignite; a middle unit consisting of a gray silty clay; and a lower unit consisting of medium-to coarse-grained quartz sandstone (Schoon, 1971).

“The Dakota sandstone is the most widely extended and serviceable water-bearing formation in South Dakota and it is the principal source of artesian flow in the many wells.” (Darton, 1909) The Dakota Formation underlies approximately 66,500 square miles of the 77,047 total square miles that constitute the State (Schoon, 1971). The total recoverable water in storage in the Dakota Formation in eastern South Dakota is estimated to be 381,104,000 acre-feet of water (Hedges and others, 1982). The Dakota-Newcastle Formation contains another 308,442,000 acre-feet of recoverable water in storage in western South Dakota (Allen and others, 1985).

In the area of this proposed project, the Dakota Formation is overlain by the Graneros Shale, and it overlies the Skull Creek Shale. The Dakota Formation is expected to be approximately 300

feet thick in this area (Schoon, 1971). The potentiometric surface of the aquifer is expected to be approximately 1,535 feet above mean sea level elevation (Kume, 1977), (i.e. approximately 43 psi shut in pressure).

SDCL 46-2A-9:

South Dakota Codified Law (SDCL) 46-2A-9 requires "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."

Water Availability:

The probability of unappropriated water available from an aquifer can be evaluated by considering SDCL 46-6-3.1 which requires "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. Although there is an exception to the recharge/withdrawal consideration in SDCL 46-6-3.1, it applies only to applications filed by water distribution systems and is not applicable here.

Water Permit Application No. 8152-3 proposes to divert water from a well completed into the Dakota aquifer, at a maximum diversion rate of 0.17 cfs. If approved, the amount of water that can be diverted annually through this water permit would be limited only by the diversion rate, and in theory, the permit would appropriate approximately 123 acre-feet of water annually.

Data is not available to compare the average annual recharge to the Dakota aquifer with the average annual withdrawal from the aquifer. Since the early 1900's there has been concern in regard to the declining artesian head of the Dakota Formation. This artesian pressure decline has been well documented, and in some parts of the state, water levels have declined several hundred feet since the aquifer was first developed. Some have interpreted this declining pressure as an indicator that the Dakota is being "mined". As Schoon (1971) states: "The fact that withdrawal from the artesian system exceeds recharge is clearly demonstrated by declining pressures." Water level records in parts of the state indicate this decline is continuing and is in the range of one foot per year or less.

In general, the artesian pressure of the Dakota aquifer has been declining in this area (Kume, 1977). The decline of head pressure in the area can be seen in the hydrograph for DENR-Water Rights' Observation Well AU-89A, which is located approximately 32 miles north of the well site proposed by this application, is shown in Figure 1.

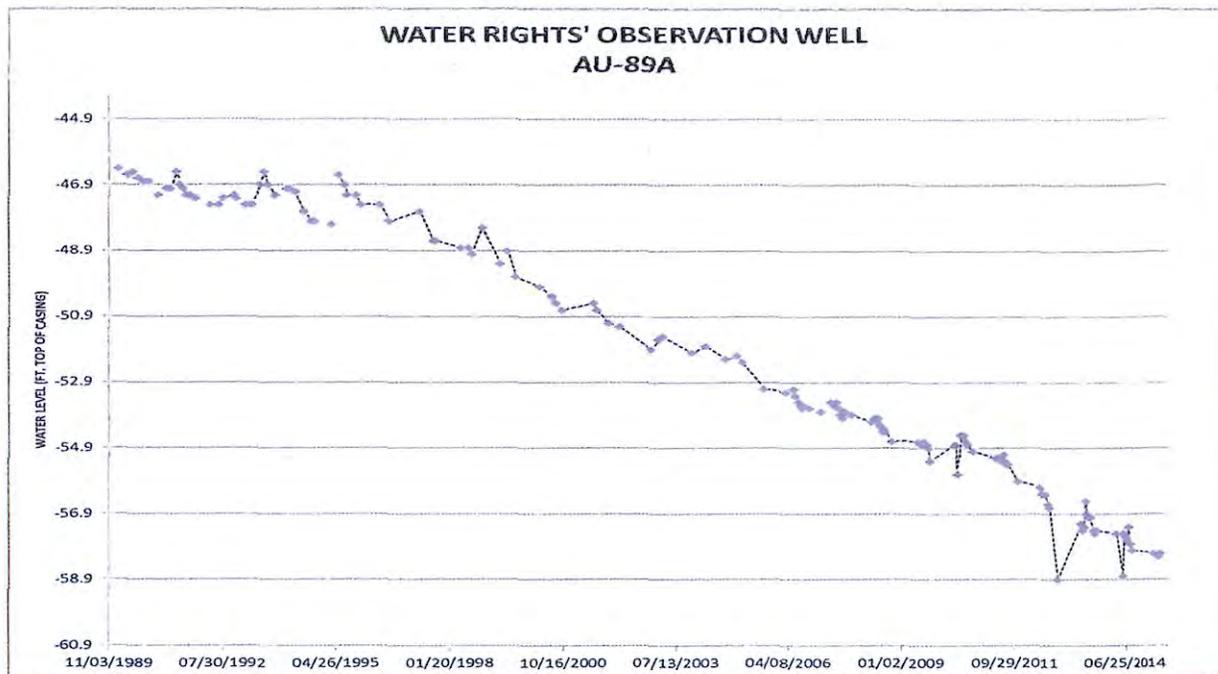


Figure 1. Hydrograph for observation well completed into the Dakota aquifer approximately 32 miles north of the well site proposed by this application.

Historically, the Water Management Board has carefully considered the issue of declining pressures in the Dakota aquifer and the lack of average annual recharge estimates for the aquifer. The Board concluded that whether withdrawals exceed the average annual recharge cannot be determined based solely upon a decline in head pressure, and in theory the Dakota aquifer head pressure is stabilizing relative to withdrawals and discharges. The Board found that the decline of head pressure is due to water being discharged without beneficial use through uncontrolled flowing wells and that water discharged from uncontrolled flowing wells does not constitute withdrawal (appropriation) pursuant to SDCL 46-6-3.1. The Board also found that withdrawals pursuant to SDCL 46-6-3.1 are appropriations for beneficial uses of water, including withdrawals through private domestic wells for domestic use (Water Rights, 1987).

Existing Water Rights:

Water Rights/Permits appropriating water from the Dakota aquifer within approximately 20 miles of the well site proposed by this application are shown in Figure 2 and Table 1. In addition to the appropriative rights, there are a number of domestic wells on file with the DENR-Water Rights Program in this area that appear to be completed into the Dakota aquifer (Water Rights, 2015c). The nearest well completed into the Dakota aquifer that is authorized by a water right/permit (Water Right No. 220-3, US Fish/Wildlife Service), is located approximately four and one-half miles east of this proposed well site. The Dakota aquifer is confined and under artesian conditions in this area and drawdown resulting from the withdrawal proposed by this application may extend some distance from a production well. The distance between the well proposed by this application and the well authorized by Water Right No. 220-3 is sufficient that well interference is not expected to be adverse at the diversion rate proposed by this application (i.e. 0.17 cfs). It is possible, however, that drawdown from this appropriation, if it is approved, may be measurable in existing wells.

Wells supplying existing water rights/permits and domestic uses are protected from adverse impacts per Water Management Board rules 74:02:04 and 74:02:05, which were promulgated pursuant to SDCL 46-6-6.1. These rules provide for the regulation of large capacity wells to the degree necessary to maintain an adequate depth of water for a prior appropriator in wells that have the ability to produce water **independent of artesian pressure**. Simply put, the pump placement in a prior appropriator's well is not necessarily protected.

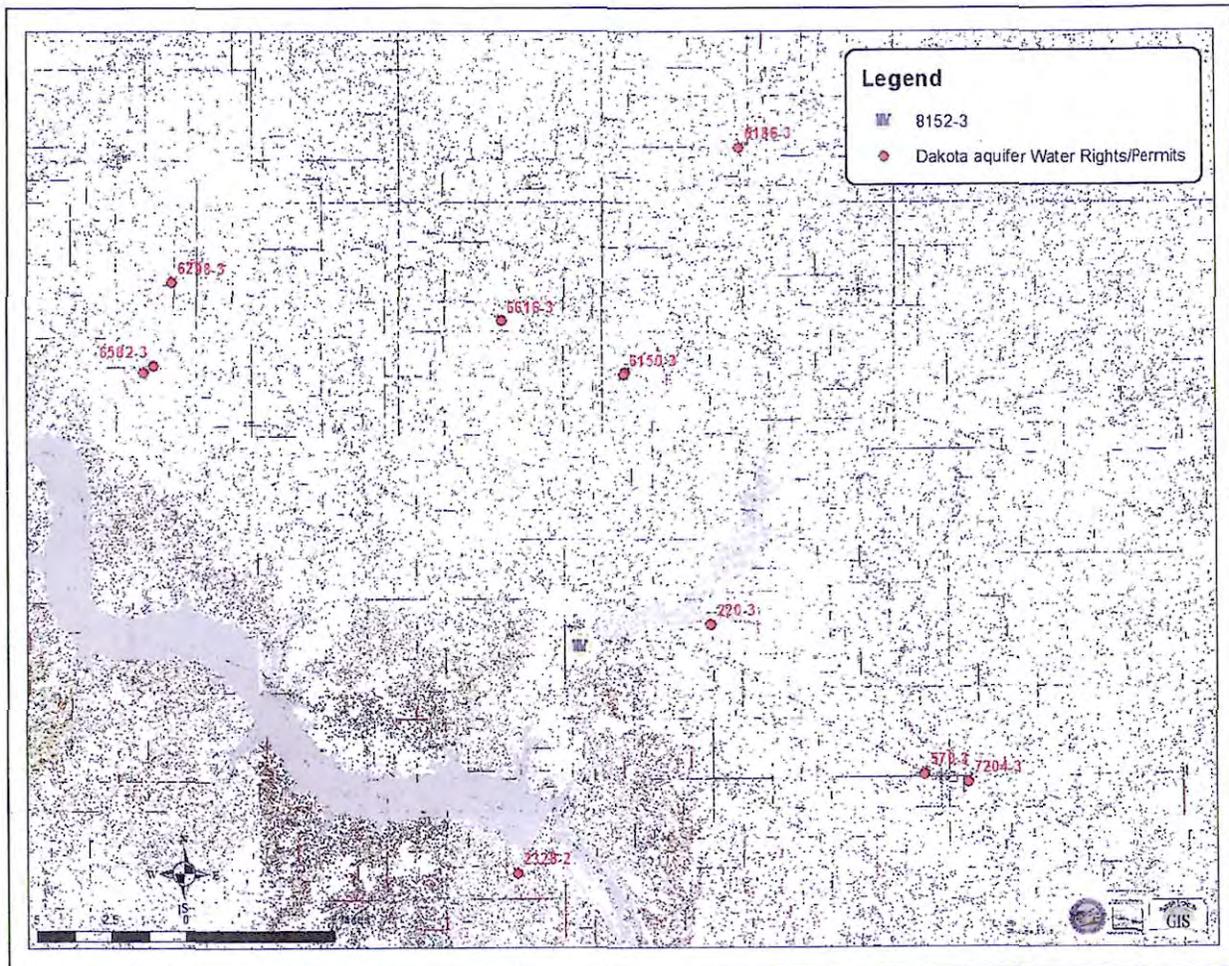


Figure 2. Approximate location of diversion points for wells supplying water rights/permits appropriating water from the Dakota aquifer in the vicinity of the well site proposed by Application No. 8152-3.

If the water levels in the Dakota aquifer were to decline, owners of existing wells bear the responsibility of lowering the pump inlet in the well to the top of the aquifer, if necessary. Increased lift would decrease the pump discharge; or require a larger pump or a different type of a pump to maintain the same output.

An increase in operating expenses that may result from interference between wells is not necessarily an adverse impact. The Water Management Board considered this situation in the

matter of Water Permit Application 2313-2, Coca-Cola Bottling Company of the Black Hills (Water Rights, 1995). The Board adopted findings of fact and conclusions of law that basically state that if the increased cost or decreased production is considered an adverse impact, it could be in conflict with SDCL 46-1-4, which requires South Dakota's water resources to be put to beneficial use to the fullest extent of which they are capable.

Table 1. Water rights/permits appropriating water from the Dakota aquifer in the vicinity of the well site proposed by Application No. 8152-3.

PERMIT NO	NAME	PRIORITY DATE	STATUS	USE	CFS
220-3	US FISH/WILDLIFE SERVICE	07/06/1956	LC	FWP	2.22
570-3	CITY OF WAGNER	01/01/1933	LC	MUN/REC	0.55
2328-2	MICHAEL KIRWAN	02/21/1995	LC	IRR (31 acres)	0.22
6150-3	RED ROCK COOP ASSOC	08/25/1999	LC	COM/LCO	0.333
6186-3	B & B WASHOUT	03/07/2000	LC	COM	0.111
6298-3	COYOTE RIDGE COOPERATIVE	02/07/2002	PE	COM/LCO	0.1
6582-3	DEHAAN LIVESTOCK & GRAIN	02/01/2005	PE	COM/LCO	0.156
6616-3	ARMOUR HUNTERS HAVEN LLP	03/28/2005	PE	FWP/REC	0.22
7204-3	STEVEN FOUSEK	06/02/2010	PE	COM/GEO	0.133

LC= Water Right, PE= Water Permit, FWP= Fish and Wildlife Propagation, MUN= Municipal, REC= Recreational, IRR= Irrigation, COM= Commercial, LCO= Large Confinement Operation, GEO= Geothermal

CONCLUSIONS:

1. Water Permit Application No. 8152-3 proposes to appropriate water from the Dakota aquifer at a diversion rate of 0.17 cfs to maintain the water level in Park Avenue Lake Restoration Project.
2. The artificial impound proposed by the applicant will result in an evaporation loss of approximately 60 acre-feet of water annually.
3. The diversion rate proposed by this application exceeds the evaporation losses of the pond that is to be maintained.
4. To ensure this permit, if approved, does not result in a waste of water, the City of Lake Andes is responsible to shut in the well to ensure no discharge occurs if the stage of Park Avenue lake is above 1441.25 feet msl.
5. Water levels in the Dakota aquifer have declined in many parts of the State since the first wells were completed into the aquifer.
6. The Water Management Board has concluded that whether withdrawals exceed average annual recharge cannot be determined based solely upon a decline in head pressure.
7. The potentiometric surface of the Dakota aquifer has declined primarily as a result of the waste of water from uncontrolled flowing wells.
8. The Water Management Board has concluded that in reference to SDCL 46-6-3.1, "withdrawals" applies only to water placed to beneficial use via appropriations or domestic use.

9. The Water Management Board's position has been to optimize development for beneficial use from the Dakota aquifer.
10. There is a reasonable probability that existing water rights/permits will not be adversely impacted if this application is approved.



Ken Buhler
SD DENR-Water Rights Program

REFERENCES:

- Allen, J.C., Iles, D.L., and Petres, A.K., 1985, Analysis of Groundwater and Streamflow Data Western Dakotas Region of South Dakota, Tasks #A.B.C. and 4A.B.: Groundwater Resource Inventory Final Report. Prepared for U.S. Army Corps of Engineers, contract DACW45-82-C-0151
- Darton, N.H., 1909, Geology and Underground Waters of South Dakota: U.S. Geological Survey Water-Supply Paper 227, 156 p.
- Hedges, L.S., Burch, S.L., Iles, D.L., Barari, R.A., and Schoon, R.A., 1982, Evaluation of Ground-Water Resources Eastern South Dakota and Upper Big Sioux River, South Dakota and Iowa, Task 1: Bedrock Topgraphy [Sic.] and Distribution, Task 2: Extent of Aquifers, Task 3: Ground-Water Storage, Task 4: Computerized Data Base. Prepared for U.S. Army Corps of Engineers, contract DACW 45-80-C-0185
- Kume, J., 1977, Geology and Water Resources of Charles Mix and Douglas Counties, South Dakota, Part II: Water Resources: South Dakota Department of Natural Resources Development-Geological Survey Bulletin 22, 31 p., 23 figs., 8 tables.
- Schoon, R.A., 1971, Geology and Hydrology of the Dakota Formation in South Dakota: S.D. Geological Survey Report of Investigations 104, 61 p.
- Spuhler, W., Lytle, W.F., and Moe, D., 1971, Climate of South Dakota: Agicultural Experiment Station, South Dakota State University, Brookings, SD, pg. 29
- Water Rights, 1987, Water Right No. 5136-3, Farmland Industries: SD DENR-Water Rights Program 5136-3 file
- Water Rights, 1995, Water Right No. 2313-2, Coca-Cola Bottling Company of the Black Hills: SD DENR-Water Rights Program 2313-2 file
- Water Rights, 2015a, Observation well Records, SD DENR-Water Rights Program, Joe Foss Bldg., Pierre, South Dakota

Water Rights, 2015b, Water Right/Permit Records, SD DENR-Water Rights Program, Joe Foss Bldg., Pierre, South Dakota

Water Rights, 2015c, Well Completion Report Records, SD DENR-Water Rights Program, Joe Foss Bldg., Pierre, South Dakota



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

denr.sd.gov

**REVISED RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT
APPLICATION NO. 8152-3, City of Lake Andes**

Pursuant to SDCL 46-2A-2, the following is the revised recommendation of the Chief Engineer, Water Rights Program, Department of Environment and Natural Resources concerning Water Permit Application No. 8152-3, City of Lake Andes, c/o Debbra Houseman, Finance Officer, PO Box 783, Lake Andes SD 57356.

The Chief Engineer is recommending APPROVAL of Application No. 8152-3 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 well approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this Permit shall *control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.*
2. The well authorized by Permit No. 8152-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.
3. The City of Lake Andes is responsible to monitor the Park Avenue water level and control the well. The well shall be capable of being shut in and no discharge from the well is authorized when the Park Avenue lake level is at or above 1441.25 feet mean sea level which is the elevation of the vertical drop inlet overflow structure.

See report on application for additional information.

Jeanne Goodman, Chief Engineer

July 21, 2015

NOTE: The well must be constructed so that the city can completely shut in the well to prohibit it from flowing. This will require constructing the well with a flowing well pitless unit so the well can be completely shut in during winter months. DENR encourages the city to discuss installation of the flowing well pitless unit with the well driller prior to construction of the well.

RECEIVED

AUG 17 2015

WATER RIGHTS
PROGRAM

STATE OF SOUTH DAKOTA
BEFORE THE WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT
APPLICATION NO. 8152-3

PETITION OPPOSING WATER
PERMIT APPLICATION NO. 8152-3

The Yankton Sioux Tribe, by and through Fredericks Peebles & Morgan, LLP (Thomasina Real Bird), hereby files this petition opposing water permit application no. 8152-3.

Interest

The Yankton Sioux Tribe holds aboriginal title to the lakebed of Lake Andes. *See Yankton Sioux Tribe v. United States*, 224 Ct. Cl. 62, 623 F.2d 159, 183 (1980). Despite being the title holder to this lakebed, the Tribe was neither notified nor consulted regarding the actions described in the Application which appear to have direct consequences on the lakebed. Furthermore, the Tribe holds water rights in the State of South Dakota that it is entitled to protect and the State is bound to respect. Neither the State nor the Applicant consulted with the Tribe regarding this proposed use of water. In addition, the area at issue is ancestral territory of the Tribe and has spiritual and cultural significance.

Reasons

The Yankton Sioux Tribe submits this Petition for the reasons asserted above. As owner of the Lake Andes lakebed and as a holder of tribal water rights, the Tribe's interests will likely be affected by the issuance of the requested permit. Furthermore, the intended use by the City of Lake Andes as represented in the Application is neither a permissible domestic use nor an acceptable municipal use under SDCL 46-1-6(7) or 46-1-6(14).

Dated this 10th day of August, 2015.

/s/ Thomasina Real Bird

Thomasina Real Bird, SD Bar No. 4415
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600

Facsimile: (303) 673-9155
Email: trealbird@ndnlaw.com

Attorney for Yankton Sioux Tribe

CERTIFICATE OF SERVICE

I certify that on this 10th day of August, 2015, a true and correct copy of PETITION OPPOSING WATER PERMIT APPLICATION NO. 8152-3 was filed with the Chief Engineer and served upon the City of Lake Andes via U.S. Certified Mail as addressed below:

City of Lake Andes
Debra Houseman
Finance Officer
PO Box 783
Lake Andes SD 57356

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

/s/Ashley KlingleSmith

Ashley KlingleSmith
Legal Assistant

RECEIVED

AUG - 3 2015

WATER RIGHTS PROGRAM

AFFIDAVIT OF PUBLICATION

NOTICE OF APPLICATION NO. 8152-3 to Appropriate Water

Notice is given that the City of Lake Andes, Debra Houseman, Finance Officer, PO Box 783, Lake Andes SD 57356 has filed an application for a water permit to appropriate 0.17 cubic feet of water per second from one well to be completed into the Dakota Aquifer (800 feet deep) located in the NE 1/4 NE 1/4 Section 9-T96N-R65W. The water will be for recreational use to maintain the water level in the Park Avenue Lake Restoration Project to an elevation of 1441.25 feet mean sea level.

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. Contact Eric Gronlund at the above Water Rights Program address to request copies of information pertaining to this application. Steven M. Pirner, Secretary, Department of Environment and Natural Resources. Published once at the total approximate cost of \$61.01

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 8152-3 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. In accordance with SDCL 46-2A-23, the Chief Engineer will act on this application, as recommended, unless a petition is filed opposing the application or the applicant files a petition contesting the Chief Engineer's recommendation. 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.

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 August 10, 2015.

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF DAVISON)

Penny Hohbach of said county, being, first duly sworn, on oath, says; that he/she is the publisher or an employee of the publisher of The Daily Republic, a daily newspaper, published in the City of Mitchell, in said County of Davison, and State of South Dakota; that he/she has full and personal knowledge of the facts herein stated; that said newspaper is a legal newspaper as defined in SDCL 17-2-2.1 through 17-2-2.4 inclusive; that said newspaper has been published within the said County of Davison and State of South Dakota, for at least one year next prior to the first publication of the attached public notice, and that the notice, order or advertisement, a printed copy of which, taken from the paper in which the same was published, and which is hereto attached and made a part of this affidavit, was published in said newspaper for 1 issues(s), to wit:

Wednesday, July 29, 2015

That the full amount of the fee charged for the publication of the attached public notice insures to the sole benefit of the publisher or publishers; that no agreement or understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever, that the fees charged for the publication thereof are: \$61.01

Signed: Penny Hohbach

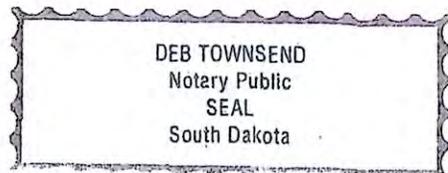
Subscribed and sworn to before me this 31st day of July, 2015.

Deb Townsend

Notary Public
County of Davison

My Commission Expires: 09-21-18

Prepared by: The Daily Republic, P.O. Box 1288, Mitchell S.D. 57301 605-996-5515



Affidavit of Publication

RECEIVED

STATE OF SOUTH DAKOTA)
COUNTY OF CHARLES MIX)

L
JSS
AUG 19 2015
WATER RIGHTS PROGRAM

Kristina Hajek, of said County and State being first duly sworn on her oath says: That *The Lake Andes Wave* is a legal newspaper of general circulation, printed and published in Wagner, in said County and State, by Kristina Hajek, and has been such newspaper during the time herein mentioned; and that I, Kristina Hajek, the undersigned, of said newspaper in charge of the advertising department thereof, and have personal knowledge of all the facts stated in this affidavit; a printed copy of which is hereunto attached, was printed and published in the regular and entire issue of said newspaper and not in supplement, once each week for 1 successive weeks.

- 1st publication made on 29th day of July, 2015
- 2nd publication made on _____ day of _____, 2015
- 3rd publication made on _____ day of _____, 2015
- 4th publication made on _____ day of _____, 2015
- 5th publication made on _____ day of _____, 2015

That said newspaper is a legal newspaper, and has a bonafide circulation of more than two hundred copies weekly, and has been published within the County of Charles Mix for more than fifty-two successive weeks prior to the first publication of said notice, and is printed in an office maintained in Wagner, South Dakota, the place of publication of said newspaper. That the full amount of the fee for the publication of the annexed notice is

\$ 23.61
Kristina Hajek

Subscribed and sworn before me this 18th day of August, 2015

Bruce Larson

Notary Public

My commission expires 10/22/16

NOTICE OF APPLICATION NO. 8152-3 TO APPROPRIATE WATER

Notice is given that the City of Lake Andes, Debra Houseman, Finance Officer, PO Box 783, Lake Andes SD 57356 has filed an application for a water permit to appropriate 0.17 cubic feet of water per second from one well to be completed into the Dakota Aquifer (800 feet deep) located in the NE 1/4 NE 1/4 Section 9-T96N-R65W. The water will be for recreational use to maintain the water level in the Park Avenue Lake Restoration Project to an elevation of 1441.25 feet mean sea level.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application No. 8152-3 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. In accordance with SDCL 46-2A-23, the Chief Engineer will act on this application, as recommended, unless a petition is filed opposing the application or the applicant files a petition contesting the Chief Engineer's recommendation. 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.

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 August 10, 2015.

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. Contact Eric Gronlund at the above Water Rights Program address to request copies of information pertaining to this application. Steven M. Pirner, Secretary, Department of Environment and Natural Resources.

Published once at the total approximate cost of \$23.61.



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

denr.sd.gov

October 27, 2015

NOTICE

TO: Debra Houseman, Finance Officer
City of Lake Andes
PO Box 783
Lake Andes SD 57356

Thomasina Real Bird
Fredericks Peebles & Morgan LLP
1900 Plaza Drive
Louisville CO 80027

FROM: Jeanne Goodman, Chief Engineer
Water Rights Program 

SUBJECT: Scheduling of Hearing on Water Permit Application No. 8152-3, City of Lake Andes

Water Permit Application No. 8152-3 proposes to appropriate 0.17 cubic feet of water per second from one well to be completed into the Dakota Aquifer (800 feet deep) located in the NE 1/4 NE 1/4 Section 9-T96N-R65W. The water will be for recreational use to maintain the water level in the Park Avenue Lake Restoration Project to an elevation of 1441.25 feet mean sea level.

In response to the public notice, the Yankton Sioux Tribe filed a petition in opposition to Water Permit Application No. 8152-3. A notice of hearing was sent to parties of record on August 31, 2015, scheduling a hearing before the Water Management Board on October 14, 2015. The October 14, 2015 hearing before the Water Management Board was then postponed pursuant to SDCL 46-2A-5 based on the request by Thomasina Real Bird, counsel for the Yankton Sioux Tribe. This notice schedules the hearing before the Water Management Board to consider Application No. 8152-3.

The Water Management Board will conduct a hearing to consider Application No. 8152-3 at 1:00 PM (Central Standard Time) on Wednesday, December 9, 2015, 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 items. Future notice will be provided to all parties if there is a significant change to the hearing time. Pursuant to SDCL 46-2-9, 46-2-11, and 46-2A-23, the Board has legal authority and jurisdiction to conduct this hearing.

Applicable provisions of the notice of application published in the in the Lake Andes Wave and the Daily Republic on July 29, 2015, and the notice of hearing sent to parties of record on August 31, 2015, 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 Ann Mines-Bailey, Assistant Attorney General at (605) 773-3215.

c: Ann Mines-Bailey, Assistant Attorney General
Timothy Whalen, PO Box 127, Lake Andes SD 57356

**REPORT TO THE CHIEF ENGINEER
ON
WATER PERMIT APPLICATION NOS. 8164-3 AND 8165-3
TODD SWENSON
JUNE 28, 2015**

Water Permit Application No. 8164-3 proposes to appropriate water from the Bad-Cheyenne aquifer for the purpose of irrigating 650 acres. The application proposes to divert water at a maximum rate of 5.33 cubic feet of water per second (cfs) from three wells (103, 170 and 147 feet deep respectively). The approximate location of the proposed well sites and acres to be irrigated are shown in Figure 1. The project is located approximately 8 miles northeast of Wessington Springs in Jerauld County.

Water Permit Application No. 8165-3 proposes to appropriate water from the Bad-Cheyenne aquifer for the purpose of irrigating 460 acres. The application proposes to divert water at a maximum rate of 5.33 cubic feet of water per second (cfs) from three wells (45, 46, and 45 feet deep respectively). The approximate location of the proposed well sites and acres to be irrigated are shown in Figure 1. The project is located approximately 8 miles northeast of Wessington Springs in Jerauld County.

AQUIFER: Bad-Cheyenne aquifer (BC)

GEOLOGY AND AQUIFER CHARACTERISTICS:

The three test well completion reports submitted with Application No. 8164-3 identify sand and gravel (glacial outwash) at depths ranging from 35 feet to 170 feet below grade (approximately 1,250-1,385 feet above mean sea level elevation (fmsl)). The test wells completed for Application No. 8165-3 identify glacial outwash at depths ranging from 14 feet to 46 feet below grade (approximately 1,289-1,338 fmsl). Hedges and others, (1982) correlated the outwash deposit in this area with that of the Bad-Cheyenne aquifer, an aquifer that extends northwest from this area (see Figure 2). Hamilton (1984) associated the outwash in this area with the West James management unit of the Warren aquifer which extends to the east from this area (see Figure 3). The South Dakota Geological Survey has produced a series of maps intended for use as a tool to aid in identifying areas underlain by aquifer material. A composite of the First Occurrence of Aquifer Materials in Jerauld County, South Dakota (Jensen, 2005), and the First Occurrence of Aquifer Materials in Beadle County, South Dakota (Schulz, 2003) for the vicinity of the well sites proposed by Water Permit Application Nos. 8164-3 and 8165-3, is shown in Figure 4. Incorporating additional data available through DENR-Water Rights Program Water Well Completion Report database with the work done by Jensen (2005) and Schulz (2003) produces an areal extent of the aquifer in this area as shown in Figure 5.

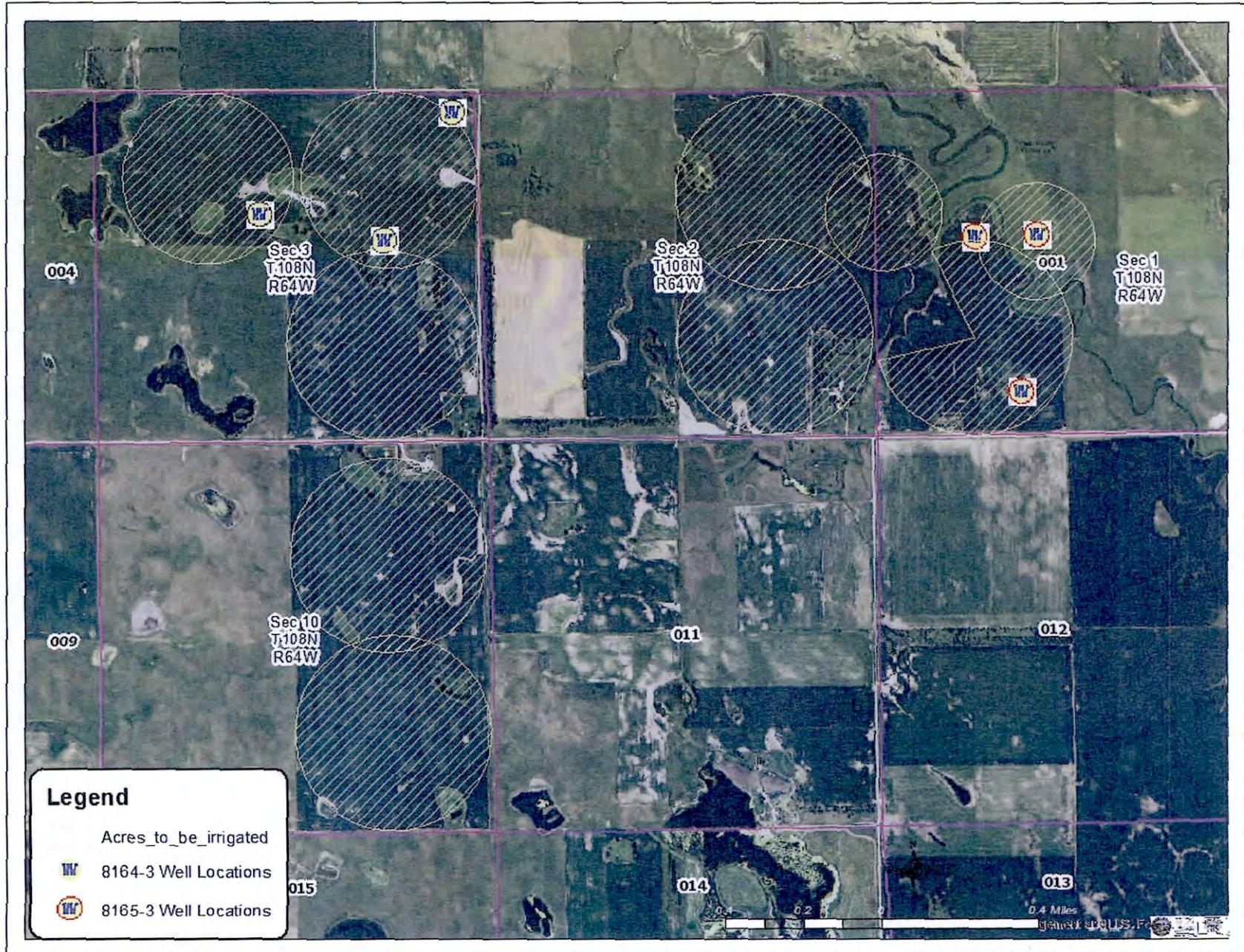


Figure 1. Approximate location of the well sites and irrigated acres proposed by Water Permit Application No. 8164-3 and 8165-3.

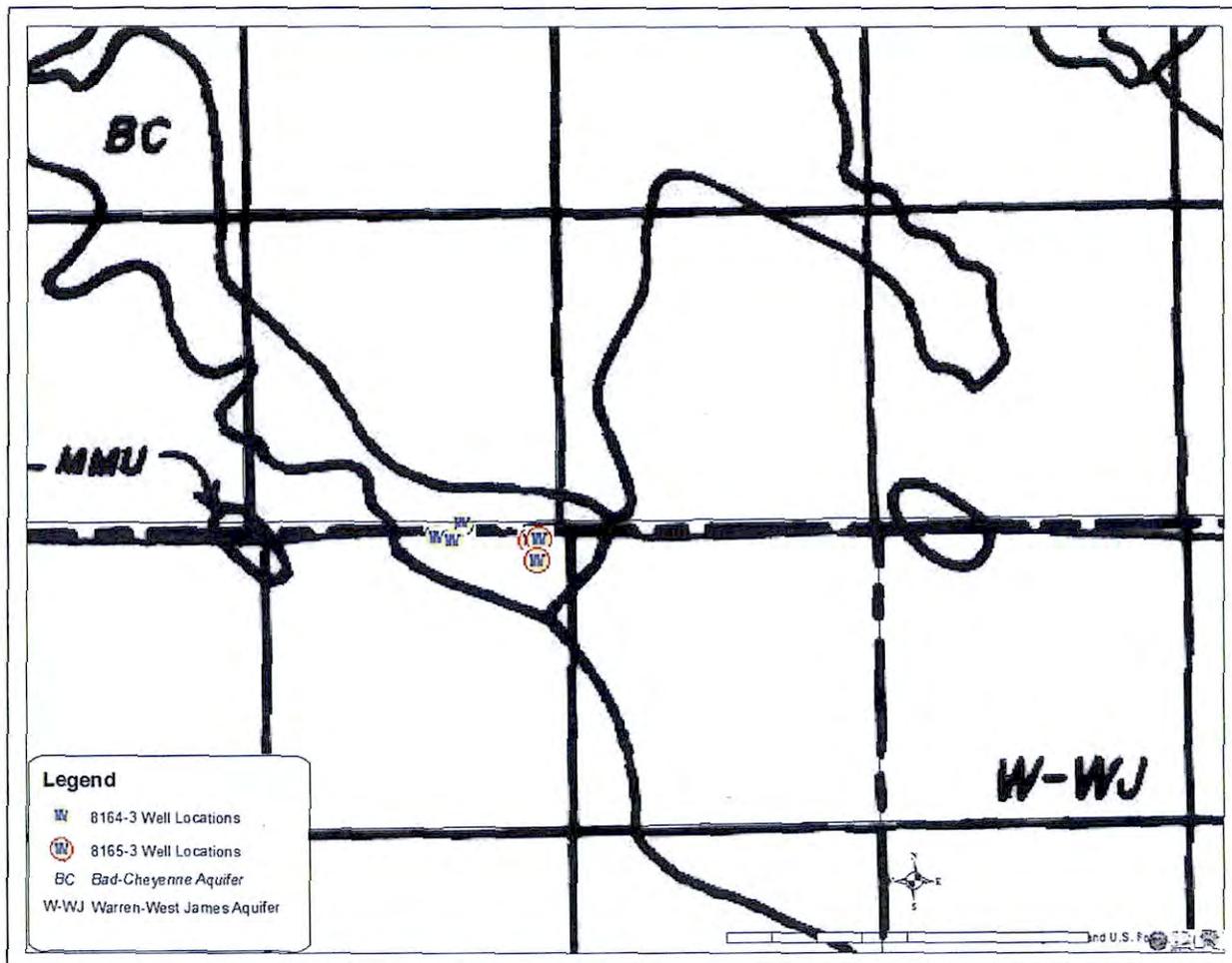


Figure 2. Glacial aquifers in the vicinity of the diversion points proposed by Water Permit Application Nos. 8164-3 and 8165-3 (modified from Hedges and others, 1982).

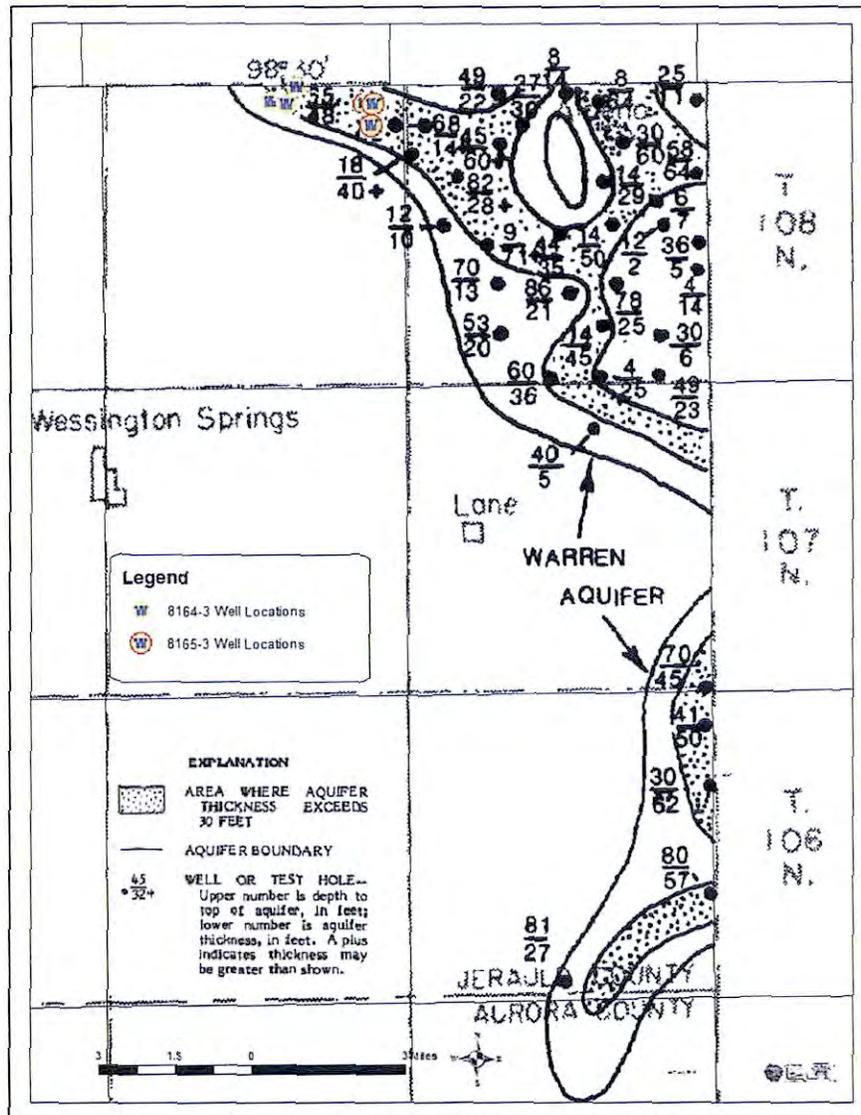


Figure 3. Glacial aquifers in the vicinity of the diversion points proposed by Water Permit Application Nos. 8164-3 and 8165-3 (modified from Hamilton, 1984).

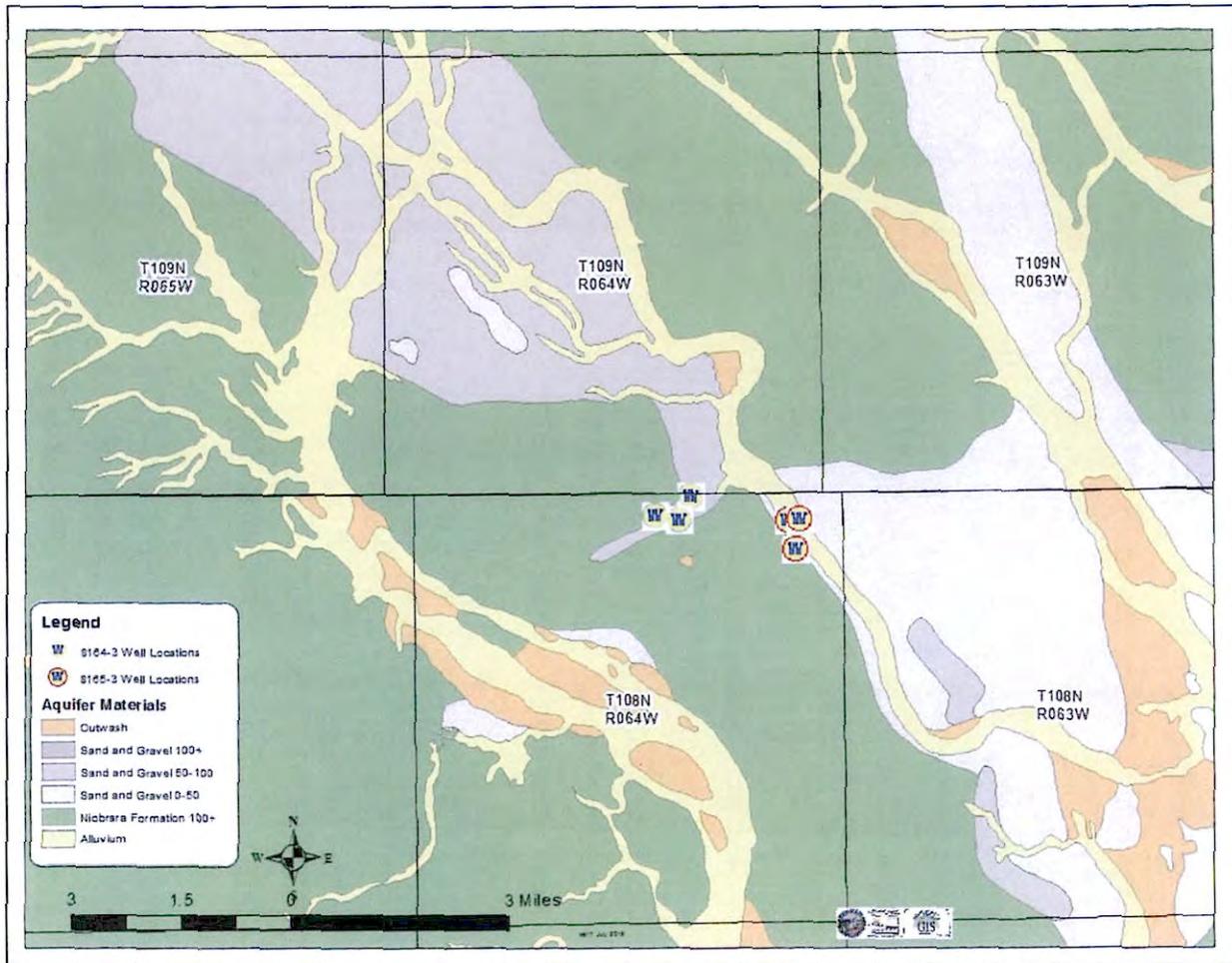


Figure 4. First Occurrence of Aquifer Materials in the vicinity of the well sites proposed by Water Permit Application Nos. 8164-3 and 8165-3. (Modified from (Schulz, 2003 and Jensen, 2005)).

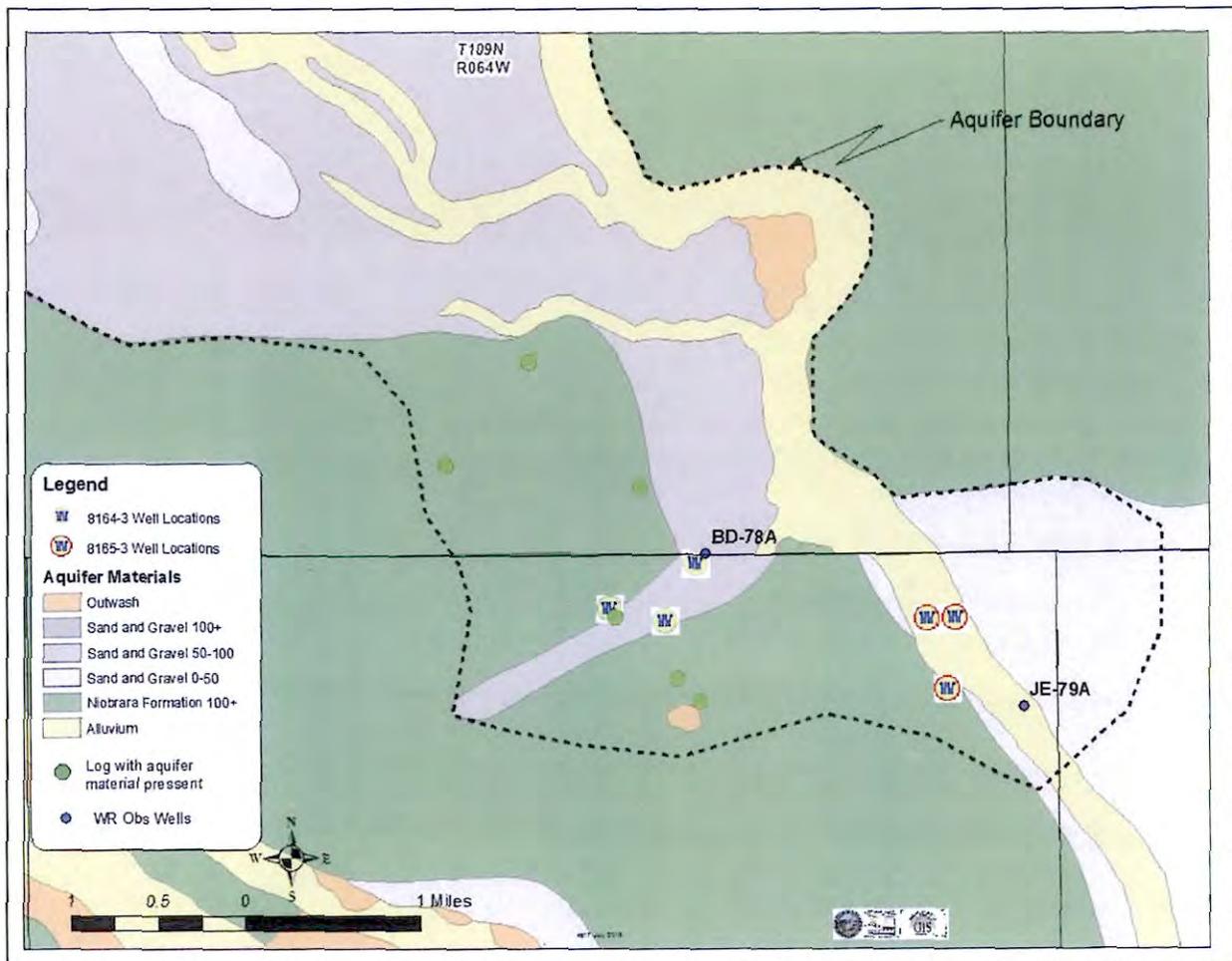


Figure 5. Approximate location of aquifer materials and DENR-Water Rights' observation wells in the vicinity of the well sites proposed by Water Permit Application Nos. 8164-3 and 8165-3. (Modified from (Schulz, 2003 and Jensen, 2005)).

The DENR-Water Rights Program has two observation wells in the immediate area of the diversion points proposed by these applications (see Figure 5) and for appropriative purposes considers this area a portion of the Bad-Cheyenne aquifer.

The Bad-Cheyenne aquifer consists of glacial outwash and alluvium sand and gravel buried in an interconnected system of pre-glacial and ice-marginal river channels (Koch, 1980). The top of the aquifer is between 14 and 71 feet below ground surface at the well sites proposed by these permit applications. Test well data submitted with Application No. 8164-3 reports November 2013 static water levels ranging from 71.6 to 78 feet below grade. The test well logs submitted with Application No. 8165-3 report February 2015 static water levels ranging from 3.5 to 5.4 feet below grade. The saturated thickness of the Bad-Cheyenne aquifer in this area is between 30 and 75 feet based on the test hole data submitted with this application. The aquifer is under confined conditions at the well sites proposed by Application No. 8164-3 and under unconfined conditions at the well sites proposed by Application No. 8165-3. Groundwater flow in this area is from northwest to southeast at a gradient of approximately 6.4 feet per mile (Water Rights, 2015a).

SDCL 46-2A-9

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

WATER AVAILABILITY:

Water Permit Application No. 8164-3 proposes to appropriate water for the irrigation of 650 acres. Application No. 8165-3 proposes to appropriate water for the irrigation of 460 acres. If both of these permits are approved, the average annual water use that can be expected under the appropriations is estimated to be less than 1010 ac-ft/yr. The probability of unappropriated water available from an aquifer can be evaluated by considering SDCL 46-6-3.1, which requires "No application to appropriate groundwater may be approved if, according to the best information reasonably available, it is probable 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. Here, a water distribution system is not involved and the aquifer is not older or lower than the Greenhorn Formation therefore withdrawal/recharge issue must be considered.

Recharge versus Discharge:

Reliable recharge estimates are not available for the Bad-Cheyenne aquifer; therefore a hydrologic budget cannot be developed to directly compare average annual recharge with average annual withdrawal from the aquifer. "Interpretation of flow-net systems can provide insight into the recharge potential of a ground-water system." (Hedges and others, 1985). The amount of water flowing through an aquifer at any time can be calculated according to the equation:

$$Q=TI L$$

where:

Q= quantity in gallons per day

T= transmissivity in gallons per day per foot (gpd/ft)

I= hydraulic gradient in feet per mile

L= cross sectional length in miles

Hamilton (1984) estimated the transmissivity (T) of the aquifer in this area to be between 10,000 and 20,000 square feet per day (i.e. 74,800 to 149,600 gpd/ft). The hydraulic gradient (I) of the aquifer in this area, based on DENR- Water Rights Program observation wells has averaged 6.4 feet per mile since 1979 (Water Rights, 2015a). The cross sectional length of the aquifer perpendicular to the flow (L) (see Figure 5) is approximately 1.5 miles. Inputting the values above into the equation, groundwater outflow from this area is estimated to be 804-1,609 acre-

feet per year. Therefore, recharge to the aquifer in this area must exceed withdrawals from the aquifer by 804-1,609 acre-feet.

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 SD DENR-Water Rights Program monitors eight observation wells completed into the Bad-Cheyenne aquifer. Two of these observation wells, BD-78A and JE-79A are located in the vicinity of the well sites proposed by these applications, (see Figure 5). Hydrographs for BD-78A and JE-79A are shown in Figures 5 and 6 respectively. The hydrographs show that the water level of the aquifer responds to climatic conditions with rising water levels during periods when recharge exceeds withdrawals, and declining water levels during periods when withdrawals exceed recharge. The hydrographs document that water levels in this area are in general, stable or rising. Temporal well withdrawal of the aquifer is masked by climatic conditions, indicating that recharge to and natural discharge from the aquifer greatly exceeds well withdrawal, therefore water is available to capture for additional well withdrawals from the aquifer. The observation well data documents that unappropriated water is available from the Bad-Cheyenne aquifer to support these proposed appropriations.

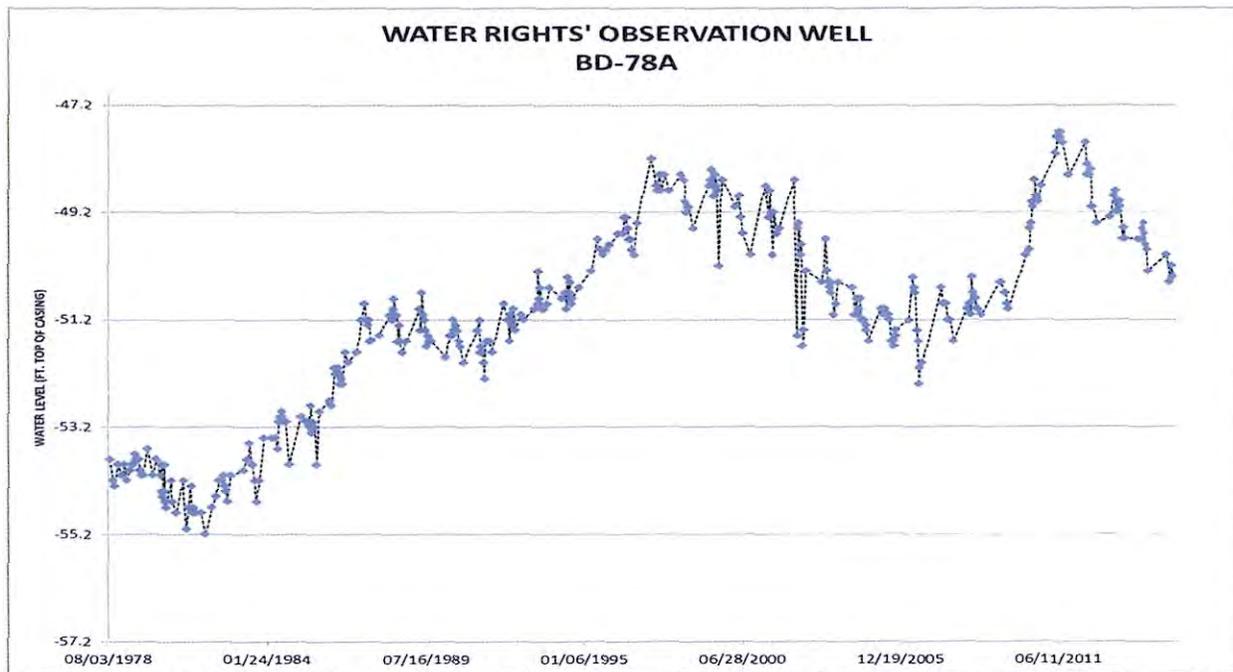


Figure 5. Hydrograph of DENR-Water Rights' Observation Well BD-78A

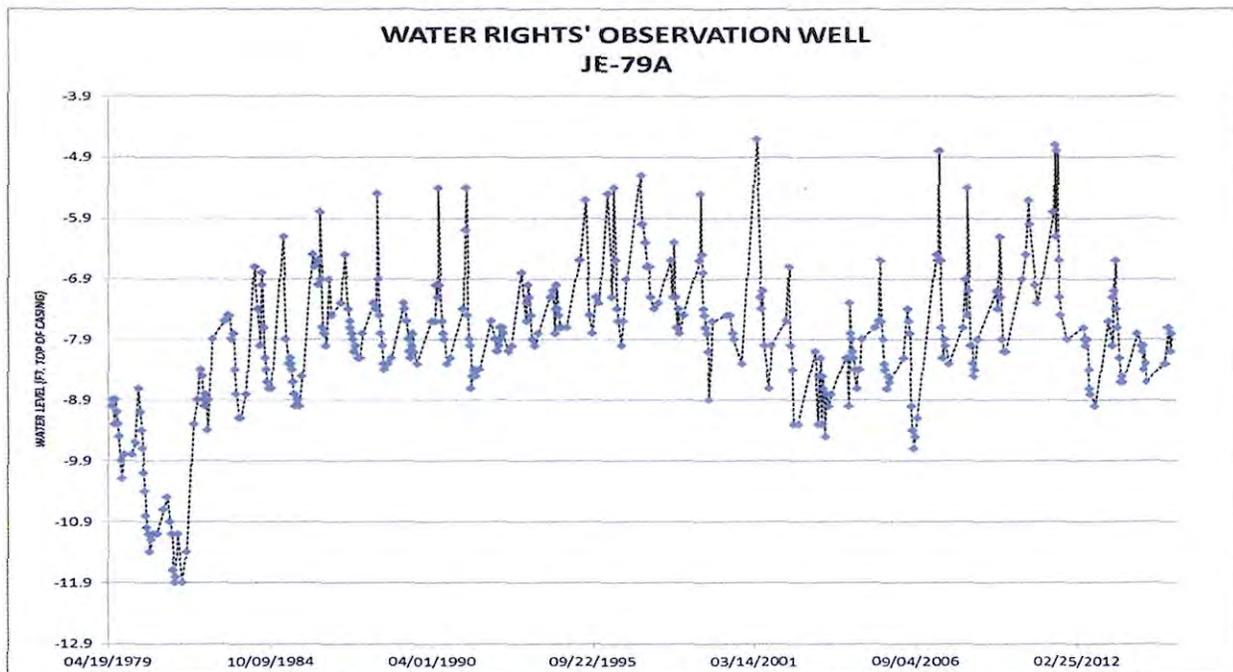


Figure 6. Hydrograph of DENR-Water Rights' Observation Well JE-79A

EXISTING WATER RIGHTS:

The nearest well supplying a Bad-Cheyenne aquifer water right to the well sites proposed by Application Nos. 8164-3 and 8165-3 is Water Right No. 4387-3, Kevin or Nicole VonEye, located approximately 5.75 miles and 7.25 miles respectively, to the northwest (Water Rights, 2015b). Considering the distances involved, well interference is not expected to be significant, and the existing water right will not be adversely impacted.

There are a number of completion reports on file with the DENR-Water Rights Program for domestic use wells that appear to be completed into the Bad-Cheyenne aquifer in this area (Water Rights, 2015c). There will be drawdown associated with the pumping proposed by these applications. However, the precise extent of the drawdown cannot be quantified without aquifer testing. The Water Management Board has consistently recognized that to place water to maximum beneficial use, drawdown will occur. South Dakota Codified Law 46-6-6.1 does not require protection of artesian head pressure as a means of delivery. However, the Supreme Court has ruled that consideration must be given to the maintenance of artesian head pressure in domestic wells before irrigation is allowed. To balance maintaining artesian head pressure as a method of delivery for domestic wells and placing water to maximum beneficial use, the Water Management Board has adopted minimum construction standards based upon the ability of a well to produce water independent of artesian pressure. South Dakota Well Construction Standard (ARSD) 74:02:04:20(7) defines an adversely impacted domestic well as:

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

Depending on the characteristics of the Bad-Cheyenne aquifer at the proposed well sites, and the distances involved, some existing well owners may need to lower their pumps to accommodate possible reduction of head pressure. There is a reasonable probability that any well interference experienced in adequate domestic wells will not be adverse or unlawful.

CONCLUSIONS:

1. Water Permit Application No. 8164-3-3 proposes to withdraw groundwater at a maximum diversion rate of 5.33 cfs from three wells to be completed into the Bad-Cheyenne aquifer for the irrigation of 650 acres.
2. Water Permit Application No. 8164-3-3 proposes to withdraw groundwater at a maximum diversion rate of 5.33 cfs from three wells to be completed into the Bad-Cheyenne aquifer for the irrigation of 650 acres.
3. There is a reasonable probability that unappropriated water is available from the Bad-Cheyenne aquifer to supply the proposed appropriation.
4. There is a reasonable probability that any possible well inference due to the proposed appropriation will not adversely or unlawfully impair existing users.



Ken Buhler
SD DENR-Water Rights Program

REFERENCES:

Hamilton, L.J. 1985. Water Resources of Aurora and Jerauld Counties, South Dakota, U.S. Geological Survey Water-Resources Investigations Report 84-4030. Vermillion, South Dakota.

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

Jensen, A.R., 2005, First Occurrence of Aquifer Materials in Jerauld County, South Dakota, South Dakota DENR-Geological Survey Aquifer Materials Map 21, Scale: 1:100,000

Koch, N.C. 1980. Geology and Water Resources of Hand and Hyde Counties, South Dakota; Part II: Water Resources: South Dakota Geological Survey Bulletin 28, SD DENR-Geological Survey, Vermillion, South Dakota.

Schulz, L.D., 2003, First Occurrence of Aquifer Materials in Beadle County, South Dakota: South Dakota Geological Survey Aquifer Materials Map 15, Scale: 1:100,000

Water Rights. 2015a. Observation Well Files, SD DENR-Water Rights Program, Joe Foss Bldg., Pierre, South Dakota.

Water Rights. 2015b. Water Right/Permit Files, SD DENR-Water Rights Program, Joe Foss Bldg., Pierre, South Dakota.

Water Rights. 2015c. Water Well Completion Reports, SD DENR-Water Rights Program, Joe Foss Bldg., Pierre, South Dakota.



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 WATER PERMIT
APPLICATION NO. 8165-3, Todd Swenson**

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. 8165-3, Todd Swenson, 38770 235th Street, Wessington Springs SD 57382.

The Chief Engineer is recommending APPROVAL of Application No. 8165-3 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 Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this Permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.
2. The wells authorized by Permit No. 8165-3 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.
3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.

See report on application for additional information.

Jeanne Goodman, Chief Engineer
July 24, 2015

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AUG 17 2015

WATER RIGHTS
PROGRAM

August 14, 2015

Water Rights Program
Foss Building
523 E Capitol
Pierre SD 57501

To: Chief Engineer and Todd Swenson

We as land owners and renters along Sand Creek are concerned about the effects of Application No. 8165-3. Sand Creek is our primary source of water for our livestock during the grazing season. We would appreciate more time to be informed of the long term effects of the level of water when the pumps are in use and how much water is available in this aquifer before affecting creek levels. Sand Creek is a vital part of our operations. Our concern is with the location and depth of the wells near Sand Creek. A contact person to help answer some of our concerning questions would be much appreciated.

Sincerely,

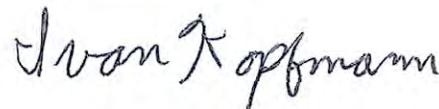
Jon Jones
22174 US Highway 281
Alpena SD 57312



Orth Brothers
38892 221st St
Alpena SD 57312



Ivan Kopfmann
38741 Country Ln
Alpena SD 57312



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AUG 10 2015

Form 8

WATER RIGHTS PROGRAM

PROOF OF PUBLICATION

STATE OF SOUTH DAKOTA)
County of Jerome) SS

Kristi Hine

certify that the attached printed Notice was taken

from the True Dakotan

printed and published in Wessington Springs

County of Jerome and

state of South Dakota. The notice was published

in the newspaper on the following date:

August 4, 2015

Cost of Printing \$39.15

Kristi Hine
(Signature)

NOTICE OF APPLICATION NOS. 8164-3, 8165-3 and 8166-3 to Appropriate Water
Notice is given that Todd Swenson, 38770 235th St, Wessington Springs SD 57382 has filed the following three applications for a water permits:
Application No. 8164-3 proposes to appropriate 5.33 cubic feet of water per second (cfs) from three wells to be completed into the Bad-Cheyenne Aquifer (103, 170, and 147 feet deep) located in the SE 1/4 NW 1/4, Lot 1, (NE 1/4 NE 1/4) and near the center of E 1/2 Section 3 for irrigation of 650 acres located in Lots 1, 2, 3, 4 and S 1/2 NW 1/4, S 1/2 NE 1/4, SE 1/4 Section 3 and E 1/2 Section 10, all in T108N-R64W.
Application No. 8165-3 proposes to appropriate 5.33 cfs from three wells to be completed into the Bad-Cheyenne Aquifer (45, 46 and 45 feet deep) located in the S1/2 NW 1/4 and the SE 1/4 SW 1/4 Section 1 to irrigate 460 acres located in Lots 1, 2 and E 1/2 Section 2 and S 1/2 NW 1/4, SW 1/4, SW 1/4 NE 1/4, Section 1, all in T108N-R64W.
Application No. 8166-3 proposes to appropriate 2.13 cfs from a gravel pit located in the E 1/2 SW 1/4 Section 16 to irrigate 150 acres located in the SW 1/4 Section 16, all in T108N-R64W. The gravel pit penetrates a sand and gravel deposit designated as Pliocene-Unknown Aquifer.
Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application Nos. 8164-3, 8165-3 and 8166-3 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. In accordance with SDCL 46-2A-23, the Chief Engineer will act on these applications as recommended, unless a petition is filed opposing the applications or the applicant

files a petition contesting the Chief Engineer's recommendations. If a petition opposing the applications or contesting the recommendations is filed, then a hearing will be scheduled and the Water Management Board will consider these applications. Notice of the hearing will be given to the applicant and any person filing a petition. Any person interested in opposing or supporting these applications or recommendations must file a written petition with BOTH the applicant and Chief Engineer. The applicant must file a petition if contesting the Chief Engineer's recommendations. 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 August 17, 2015. The petition may be informal, but must include a statement describing the petitioner's interest in the applications, the petitioner's reasons for opposing or supporting the applications, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained. Contact Eric Gronlund at the above Water Rights Program address to request copies of information pertaining to these applications. Steven M. Pirner, Secretary, Department of Environment and Natural Resources. Published once at the total approximate cost of \$39.15. c-45

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AUG 31 2015

WATER RIGHTS PROGRAM

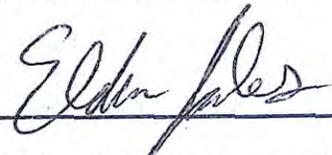
PRINTER'S AFFIDAVIT

STATE OF SOUTH DAKOTA,
COUNTY OF BEADLE: ss

I, ELDON JACOBS, being duly sworn on oath say that the PLAINSMAN is a daily paper published at Huron, Beadle County, South Dakota, and that said newspaper has a bona fide circulation of at least 250 copies daily; that said newspaper has been published within said county for fifty-two consecutive weeks immediately prior to this date, that said newspaper is printed in whole or in part, in an office maintained at said place of publication; that I am Legal Advertising Coordinator of said newspaper and know the facts herein state. The annexed notice headed:

**SD DEPT OF ENVIRONMENTAL -
WATER RIGHTS - TODD SWENSON**

was published for one day, in said newspaper, and not in any supplement of the said newspaper, the publication was of the 4TH day AUG 2015. That the full amount of the fee charged for publishing is: FORTY-THREE & 87/100 dollars insures to the benefit of the publisher of said newspaper; that no agreement or understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whom so ever.



Subscribed and sworn to me before this 31ST Day of AUG 2015.



Notary Public, South Dakota

My term expires 01/27/2018
Legal #1951

F.P. 07-28-15

**NOTICE OF
APPLICATION NOS.
8164-3, 8165-3 and
8166-3 to**

Appropriate Water

Notice is given that Todd Swenson, 38770 235th St, Wessington Springs SD 57382 has filed the following three applications for a water permits.

Application No. 8164-3 proposes to appropriate 5.33 cubic feet of water per second (cfs) from three wells to be completed into the Bad-Cheyenne Aquifer (103, 170 and 147 feet deep) located in the SE 1/4 NW 1/4, Lot 1 (NE 1/4 NE 1/4) and near the center of E 1/2 Section 3 for irrigation of 650 acres located in Lots 1, 2, 3, 4 and S 1/2 NW 1/4, S 1/2 NE 1/4, SE 1/4 Section 3 and E 1/2 Section 10; all in T108N-R64W.

Application No. 8165-3 proposes to appropriate 5.33 cfs from three wells to be completed into the Bad-Cheyenne Aquifer (45, 46 and 45 feet deep) located in the S 1/2 NW 1/4 and the SE 1/4 SW 1/4 Section 1 to irrigate 460 acres located in Lots 1, 2 and E 1/2 Section 2 and S 1/2 NW 1/4, SW 1/4, SW 1/4 NE 1/4 Section 1; all in T108N-R64W.

Application No. 8166-3 proposes to appropriate 2.13 cfs from a gravel pit located in the E 1/2 SW 1/4 Section 16 to irrigate 150 acres located in the SW 1/4 Section 16; all in T108N-R64W. The gravel pit penetrates a sand and gravel deposit designated as Pleistocene: Unknown Aquifer.

Pursuant to SDCL 46-2A-2, the Chief Engineer recommends APPROVAL of Application Nos. 8164-3, 8165-3 and 8166-3 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. In accor-

dance with SDCL 46-2A-23, the Chief Engineer will act on these applications, as recommended, unless a petition is filed opposing the applications or the applicant files a petition contesting the Chief Engineer's recommendations. If a petition opposing the applications or contesting the recommendations is filed, then a hearing will be scheduled and the Water Management Board will consider these applications. Notice of the hearing will be given to the applicant and any person filing a petition.

Any person interested in opposing or supporting these applications or recommendations must file a written petition with BOTH the applicant and Chief Engineer. The applicant must file a petition if contesting the Chief Engineer's recommendations. 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 August 17, 2015.

The petition may be informal, but must include a statement describing the petitioner's interest in the applications, the petitioner's reasons for opposing or supporting the applications, and the signature and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained. Contact Eric Gronlund at the above Water Rights Program address to request copies of information pertaining to these applications.

Steven M. Pirner, Secretary, Department of Environment and Natural Resources. No. 1951 (adv.) Published once at the total approximate cost of \$43.86.

WILES & RYLANCE
ATTORNEYS AT LAW
3 East Kemp - Suite 200
P. O. Box 227
Watertown, South Dakota 57201-0227
(605) 886-5881

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OCT 05 2015
WATER RIGHTS
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FACSIMILE
(605) 886-3934

E-MAIL:
rdr@wilesandrylance.com

John C. Wiles, P.C.
Raymond D. Rylance, P.C.
Rebecca L. Morlock Reeves

October 1, 2015

Jeanie Goodman
Chief Engineer of Water Rights Program
Department of Environmental & Natural Resources
523 E Capitol
Pierre, SD 57501-3182

Re: Water Permit Application #8165-3, Todd Swenson

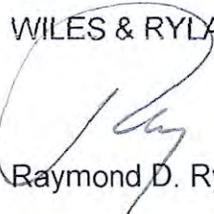
Dear Jeanie Goodman:

This letter will serve to advise that I will be representing Jon Jones in opposition to permit number 8165-3.

Pursuant to SDCL 46-2A-5 we are also requesting at this time an automatic delay of the October 14th hearing.

Yours very truly,

WILES & RYLANCE



Raymond D. Rylance

RDR/jls

cc: Todd Swenson
Orth Brothers
Jon Jones
Ivan Kopfmann
Tim Bottum



DEPARTMENT of ENVIRONMENT
and NATURAL RESOURCES

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

denr.sd.gov

October 27, 2015

NOTICE

TO: Tim Bottum, Attorney
PO Box 1025
Mitchell SD 57301-7025

Raymond Rylance, Attorney
PO Box 227
Watertown SD 57201

Orth Brothers
38892 221st Street
Alpena SD 57312

Ivan Kopfmann
38741 Country Ln
Alpena SD 57312

FROM: Jeanne Goodman, Chief Engineer
Water Rights Program

SUBJECT: Scheduling of Hearing on Water Permit Application No. 8165-3, Todd Swenson

Application No. 8165-3 filed by Todd Swenson proposes to appropriate 5.33 cubic feet of water per second from three wells to be completed into the Bad-Cheyenne Aquifer (45, 46 and 45 feet deep) located in the S1/2 NW 1/4 and the SE 1/4 SW 1/4 Section 1 to irrigate 460 acres located in Lots 1, 2 and E 1/2 Section 2 and S 1/2 NW 1/4, SW 1/4, SW 1/4 NE 1/4 Section 1; all in T108N-R64W.

In response to the public notice, a petition was filed in opposition to Water Permit Application No. 8165-3. A notice of hearing was sent to parties of record on August 31, 2015, scheduling a hearing before the Water Management Board on October 14, 2015. The October 14, 2015 hearing before the Water Management Board was then postponed pursuant to SDCL 46-2A-5 based on the request by Raymond Rylance, counsel for Jon Jones. This notice schedules the hearing before the Water Management Board to consider Application No. 8165-3.

The Water Management Board will conduct a hearing to consider Application No. 8165-3 at 2:00 PM (Central Standard Time) on Wednesday, December 9, 2015, 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 items. Future notice will be provided to all parties if there is a significant change to the hearing time. Pursuant to SDCL 46-2-9, 46-2-11, and 46-2A-23, the Board has legal authority and jurisdiction to conduct this hearing.

Applicable provisions of the notice of application published in the True Dakotan and Plainsman on August 4, 2015, and the notice of hearing sent to parties of record on August 31, 2015, 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 Ann Mines-Bailey, Assistant Attorney General at (605) 773-3215.

c: Ann Mines-Bailey, Assistant Attorney General

CERTIFICATION

I hereby certify that on October 27, 2015, I have personally deposited with the United States mail at Pierre, South Dakota, first class postage, prepaid envelopes containing a Notice dated October 27, 2015, regarding scheduling the hearing for Water Right Permit Application No. 8165-3, as addressed below:

Tim Bottum, Attorney
PO Box 1025
Mitchell SD 57301-7025

Raymond Rylance, Attorney
PO Box 227
Watertown SD 57201

Orth Brothers
38892 221st Street
Alpena SD 57312

Ivan Kopfmann
38741 Country Ln
Alpena SD 57312

Sent Inter-office to:

Ann Mines-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 27th day of October, 2015



Karen Schlaak
Notary Public
My Commission expires April 1, 2019

