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MINUTES OF THE 238<sup>TH</sup> MEETING  
OF THE WATER MANAGEMENT BOARD  
FLOYD MATTHEW TRAINING CENTER  
523 EAST CAPITOL AVENUE  
PIERRE, SOUTH DAKOTA  
OCTOBER 5, 2022

CALL TO ORDER: Chairman Bill Larson was not present when the meeting began. Vice Chairman Jim Hutmacher called the meeting to order at 9:30 a.m. Central Time. The roll was called, and a quorum was present.

Motion by Holzbauer, seconded by Bjork, to appoint Jim Hutmacher as acting chairman for this meeting. Motion carried.

The meeting was streaming live on SD.net, a service of South Dakota Public Broadcasting.

Vice Chairman Hutmacher welcomed Senator Duvall and Representative Weisgram to the meeting.

The following attended the meeting:

Board Members: Peggy Dixon, Leo Holzbauer, and Jim Hutmacher attended in person. Tim Bjork, Chad Comes and Bill Larson attended remotely. Rodney Freeman was absent.

Department of Agriculture and Natural Resources (DANR): Eric Gronlund, Chief Engineer, Ron Duvall, Mark Rath, and Kim Drennon, Water Rights Program; Joane Lineburg and Andrew Fox, Inspection, Compliance and Remediation Program.

Attorney General's Office: David McVey, board counsel; Ann Mines Bailey, Water Rights Program counsel.

Legislative Oversight Committee: Senator Mary Duvall and Representative Mike Weisgram.

Court Reporter: Carla Bachand, Capital Reporting Services.

Consider Findings of Fact, Conclusions of Law and Final Decision in the matter of Water Permit Application No. 2833-2 and Water Permit Application 2834-2: Brian and Blake Burnham.

Consider Water Permit Application No. 2016-1, South Dakota Ellsworth Development Authority: Matt Naasz, Glen Kane, Greg Erlandson, John Wetstein, Ken LeBon, Tom Norman, Brian Peterson.

ADOPT FINAL AGENDA: Vice Chairman Hutmacher announced that there was a change to the agenda. Hermosa has requested that the matter of the town's noncompliance with its Surface Water Discharge Permit scheduled at 1:00 p.m. be continued.

Jeff Hagg, attorney for the town of Hermosa, requested that the board continue the matter. He noted that settlement negotiations are currently taking place.

Vice Chairman Hutmacher noted that the board would act on the continuance request later in the meeting.

Mr. Larson joined the meeting remotely.

Motion by Holzbauer, seconded by Dixon, to adopt the agenda with the removal of the Hermosa matter. Motion carried unanimously.

CONFLICT DISCLOSURES AND REQUESTS FOR STATE BOARD WAIVERS: Vice Chairman Hutmacher stated that he knows the well driller in the matter of the application for renewal of South Dakota Well Driller License No. 285, but he does not believe there is a conflict.

Ms. Mines Bailey stated that the Water Rights Program had no objection to Vice Chairman Hutmacher participating during that hearing. No one in the audience objected.

ADOPT JULY 6, 2022, BOARD MEETING MINUTES: Motion by Larson, seconded by Dixon, to approve the minutes of the July 6, 2022, Water Management Board meeting. Motion carried unanimously.

DECEMBER 7-8, 2022, MEETING LOCATION: Vice Chairman Hutmacher noted that he will be unable to attend the December 7-8, 2022, meeting. Mr. Larson stated that he is scheduled to be in court that week, so will be unable to attend the December 7-8 meeting. Mr. Freeman was absent so his schedule for December 7-8 is unknown.

Mr. Duvall suggested that the board wait until later in the meeting to set a date for the December meeting to allow time for him to check for meeting room availability.

Vice Chairman Hutmacher stated that the board is scheduled to meet on the following dates in 2023: March 7-8, May 3-4, July 12-13, October 4-5, and December 6-7.

PUBLIC COMMENT PERIOD IN ACCORDANCE WITH SDCL 1-25-1: There were no public comments.

UPDATE ON DANR ACTIVITIES: No update.

STATUS AND REVIEW OF WATER RIGHTS LITIGATION: Mr. McVey reported that the only pending litigation is the Powertech appeal regarding the board's order denying the motion to amend the procedural order to resume the evidentiary hearing.

ADMINISTER OATH TO DANR STAFF: The court reporter administered the oath to DANR staff who were present and intended to testify during the meeting.

TOWN OF HERMOSA REQUEST FOR CONTINUANCE: Ann Mines Bailey, counsel for the DANR Surface Water Quality Program, stated that the Surface Water Quality Program agreed to the

continuance of this matter until the December board meeting.

Vice Chairman Hutmacher requested board action.

Motion by Bjork, seconded by Comes, to continue the hearing in the matter of the town of Hermosa’s noncompliance with its Surface Water Discharge Permit until the December Water Management Board meeting. A roll call vote was taken, and the motion carried unanimously.

**CANCELLATION CONSIDERATIONS:** The board members received a board packet prior to the meeting, which included a table listing the proposed cancellations, the notices of cancellation, and the chief engineer’s recommendations.

Eleven water rights and water permits were scheduled for cancellation. Mr. Duvall stated that the owners were notified of the hearing and the reasons for cancellation. The department received no comments or letters in response to the notices of cancellation.

The chief engineer recommended cancellation of the following water rights and water permits for the reasons listed.

Number	Original Owner	Present Owner(s) and Other Persons Notified	Reason
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**DIVISION I WATER RIGHT**

<b>RT 813-1</b>	Alimadad Jatoi	Jatoi Family	Abandonment/Forfeiture
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**DIVISION II WATER PERMIT & WATER RIGHT**

<b>RT 1105-2</b>	Donald Moody	Same	Abandonment
<b>PE 2794-2</b>	Brent or Pamela Veurink	Same	Abandonment

**DIVISION III WATER PERMITS & WATER RIGHTS**

<b>RT 1912-3</b>	Bon Homme Hutterian Brethren Inc.	Same (% Samuel Waldner)	Abandonment/Forfeiture
<b>RT 2510A-3</b>	Donna Johnson Revocable Living Trust	Same (% Lori Johnson)	Abandonment/Forfeiture
<b>RT 2510B-3</b>	Donna Johnson Revocable Living Trust	Same (% Lori Johnson)	Abandonment/Forfeiture
<b>PE 4888B-3</b>	Jacob & Bradley Den Herder	Same	Abandonment
<b>RT 6940-3</b>	Ken Less	James Jay Ryon, owner Doug Halvig, Farm Mgr Ken Less	Abandonment
<b>RT 6941-3</b>	Ken Less	James Jay Ryon, owner Doug Halvig, Farm Mgr Ken Less	Abandonment
<b>PE 7970-3</b>	David H Hoops	Same	Non-Construction
<b>PE 8160-3</b>	Scott Carlson	Same	Non-Construction

Motion by Larson, seconded by Bjork, to accept the chief engineer's recommendations for cancellation of the water rights and water permits for the reasons listed in the table. A roll call vote was taken, and the motion carried unanimously.

CONSIDER FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION IN THE MATTER OF WATER PERMIT APPLICATION NO 2833-2, BRIAN BURNHAM AND NO. 2834-2, BLAKE BURNHAM: David McVey stated that counsel for the Water Rights Program filed proposed Findings of Fact and Conclusions of Law, and Kevin Herrmann, the petitioner in opposition of the water permit applications, filed alternative proposed Findings in relation to Finding of Fact No. 39 and requested an additional qualification to the permit.

Mr. McVey stated that Mr. Herrmann's proposed finding is rejected in that it was not consistent with the motion and vote of the board at the hearing.

Mr. McVey stated that, based on the Findings of Fact and Conclusions of Law as prepared by the Water Rights Program counsel, the board enters its determination that Water Permit Application No. 2833-2 is granted with the following qualifications:

1. The wells approved under Water Permit No. 2833-2 are located near domestic wells and other wells which may obtain water from the same aquifer. Water withdrawals shall be controlled 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. 2833-2 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.
3. This Permit is approved subject to the irrigation water use questionnaire being submitted each year.
4. Water Permit 2833-2 and Water Right No. 1260-2 may not be exercised simultaneously, and the maximum combined diversion rate authorized by Permit No. 2833-2 and Water Right No. 1260-2 may not exceed 1.85 cubic feet of water per second.

Mr. McVey stated that additionally, the board enters its determination that Water Permit Application No. 2834-2 is granted with the following qualifications:

1. The wells approved under Water Permit No. 2834-2 are located near domestic wells and other wells which may obtain water from the same aquifer. Water withdrawals shall be controlled 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. 2834-2 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.

Motion by Holzbauer, seconded by Dixon, to adopt the Findings of Fact, Conclusions of Law and Final Decision in the matter of Water Permit Application No. 2833-2, Brian Burnham and No. 2834-2, Blake Burnham. A roll call vote was taken, and the motion carried unanimously.

CONSIDER APPLICATION FOR RENEWAL OF SOUTH DAKOTA WELL DRILLER LICENSE NO. 285, MANIKOWSKI WELL DRILLING: Ann Mines Bailey, counsel for the Water Rights Program, stated that a notice of hearing was issued to Mr. Manikowski and Manikowski Well Drilling on September 2, 2022. Neither Mr. Manikowski nor his counsel were not present at the hearing.

Ms. Mines Bailey called Eric Gronlund, who was administered the oath earlier in the meeting.

Mr. Gronlund provided the following testimony in response to Ms. Mines Bailey's questions.

Mr. Gronlund is the chief engineer of the DANR Water Rights Program. As part of his responsibilities and obligations as chief engineer, Mr. Gronlund oversees the Well Driller Licensing Program. To obtain a well driller's license, there are statutory and administrative rule requirements regarding the application process. A well driller needs to apply, show five years of experience, and the applicant must pay fee and take a test. The well driller's license is effective for one year because, by statute, there is a renewal process in which renewals must be submitted by January 31 of each year. Renewal of a well driller's license requires an application, a fee, and continuing education. If a renewal application has been submitted, but not yet approved, the well driller is allowed to keep operating under the existing well driller's license.

Manikowski holds Well Driller License No. 285. Manikowski Well Drilling has been licensed by the state since 1966. The license representative is Byron Manikowski, and he has been the license representative since 1981. A license representative is responsible for the construction of a well and compliance with the well construction standards. Mr. Manikowski filed a renewal application for 2022.

Exhibit 1 is the application for renewal of South Dakota Well Driller License No. 285, which was received January 27, 2022. The application is included in the administrative file.

Ms. Mines Bailey moved admission of Exhibit 1. The exhibit was admitted into the record.

The Water Rights Program received a complaint regarding well construction performed by Manikowski Well Drilling, so Mr. Gronlund delayed the issuance of the license in an effort to get that issue resolved. Manikowski Well Drilling was allowed to continue to conduct well drilling during this time. The formal complaint was filed with the Water Rights Program on December 2, 2021; however, preceding that was correspondence with Water Rights staff through phone calls with the well owner. The Water Rights Program had no well log on file for the well referenced in the complaint. A well log was subsequently submitted by the well owner, Garrett Penfield.

Exhibit 2 is the letter of complaint submitted by Garrett Penfield.

Ms. Mines Bailey moved admission of Exhibit 2. The exhibit was admitted into the record.

Exhibit 3 is the water well completion report for the well that was drilled by Manikowski Well Drilling for Garrett Penfield with a completion date of October 8, 2019.

Ms. Mines Bailey moved admission of Exhibit 3. The exhibit was admitted into the record.

Well drillers are required to file well completion reports. In reviewing Mr. Penfield's well completion report, Mr. Gronlund determined that the report is not complete; it is missing information.

Mr. Penfield's well is completed into the Dakota Aquifer. The depth of the well is 1,440 feet. The type of construction used was the alternative construction method. There are board rules for alternative construction in situations where the water use is for non-commercial, domestic type purposes, the alternative well construction doesn't necessarily require the grouting of the well in the Dakota Aquifer if water is not flowing up on the outside of the casing after a reasonable time. It also affords the ability for a pump chamber, which basically is a larger diameter casing at a depth where artesian head pressure provides water to the pump, but a smaller diameter hole that penetrates the aquifer. The alternative form of well construction is not allowed in all aquifers; there is a rule that allows for it in the Dakota Aquifer and a rule that allows for it in the Inyan Kara Aquifer.

Mr. Penfield called the Water Rights Program in September 2021 and talked with staff engineers Whitney Kilts and Adam Mathiowetz. The well was pumping a lot of sand or mud. He could no longer get in contact with Mr. Manikowski. One of his pressing issues was that he was looking for NRCS funding, and he needed to have a properly constructed well to qualify for that funding. There was also an issue with who was responsible for submitting a water sample for analysis.

Exhibit 4 is the Water Rights Program file documentation. When there is an issue that staff believes needs to be memorialized, the staff person prepares a file documentation for future reference regarding the discussions that took place. This exhibit is included in the administrative file for License No. 285.

Ms. Mines Bailey moved admission of Exhibit 4. The exhibit was admitted into the record.

Staff listened to Mr. Penfield's concerns, then based on that, Adam Mathiowetz and Whitney Kilts contacted Mr. Byron Manikowski. Mr. Gronlund's take-away from that conversation with Mr. Manikowski is he admitted that the well never properly cleared up, that he had been busy drilling in North Dakota, but it was his intent to get back to that well this fall. Water Rights staff also asked Mr. Manikowski to contact Mr. Penfield because one of Mr. Penfield's concerns was that he had lost communication with Mr. Manikowski.

Exhibit 5 is a letter dated January 18, 2022, to Byron Manikowski, Manikowski Well Drilling from Mr. Gronlund.

Ms. Mines Bailey moved admission of Exhibit 5. The exhibit was admitted into the record.

The purpose of the letter was to inform Mr. Manikowski that the Water Rights Program received a complaint, what the issues in the complaint were, and setting forth the Well Construction Standards to get this matter resolved. Approximately 10 days after the letter was sent, Mr. Gronlund received a telephone call from Mr. Manikowski.

Exhibit 6 is a letter outlining the discussion Mr. Gronlund had with Mr. Manikowski on the previous day.

Vice Chairman Hutmacher admitted the exhibit into the record.

Mr. Gronlund's take-away from the conversation was the Mr. Manikowski intended to make the Penfield well matter right. The Water Rights Program required him to provide proof that he ordered the well casing for completion of a replacement of the well. Mr. Manikowski also committed to going out to the Penfield well and seeing if he could reduce the amount sediment in that well by possibly bring the gallonage down. It was also Mr. Gronlund's understanding that Mr. Manikowski would maintain communication with Mr. Gronlund or the Water Rights staff regarding this situation.

Mr. Gronlund stated that the Water Rights Program received an email from the casing supply company stating that Mr. Manikowski had placed an order, and the company put a mid-to-late June delivery date on receiving the well casing.

Exhibit 7 is a letter dated August 5, 2022, to Mr. Manikowski from Mr. Gronlund trying to get him to contact Mr. Gronlund immediately to discuss the status of his efforts to replace the Penfield well because Mr. Gronlund's efforts to contact him by phone were unsuccessful.

Ms. Mines Bailey moved admission of Exhibit 7. The exhibit was admitted into the record.

Mr. Gronlund stated that he tried to contact Mr. Manikowski by telephone at least three times. The Water Rights Program was expecting a June 2022 delivery date for pipe, so in mid-June Mr. Gronlund emailed the supply company, and after the second email the pipe supplier indicated that they would let Mr. Gronlund know when the pipe arrived. A couple weeks later Mr. Gronlund sent another email to the supply company, but never received a response. To this date, Mr. Gronlund has not been contacted by either the supply company or Mr. Manikowski.

The next step Mr. Gronlund took was to have discussions with Ms. Mines Bailey regarding the best way to bring this matter before the Water Management Board for action.

Exhibit 8 is an August 19, 2022, letter to Mr. Manikowski from the Office of the Attorney General and signed by Ms. Mines Bailey. This letter is part of the administrative file for Well Driller License No. 285.

Ms. Mines Bailey moved for admission of Exhibit 8. The exhibit was admitted into the record.

Exhibit 8 stated that if Mr. Manikowski does not contact Ms. Mines Bailey within 10 days of the letter, the Chief Engineer will commence an enforcement action and that the hearing would be scheduled before the Water Management Board at its October 5-6, 2022, meeting. Mr. Gronlund

stated that to his knowledge Mr. Manikowski did not contact Ms. Mines Bailey.

Mr. Gronlund stated that the DANR Drinking Water Program had contacted him in regard to a well that was supposedly drilled by Manikowski Well Drilling for the city of South Shore in 2019. The Drinking Water Program was trying to find out if the Water Rights Program had a well completion report on file. The Water Rights Program was unable to locate a well completion report for this well.

Exhibit 9 is a letter dated August 29, 2022, to Byron Manikowski from Adam Mathiowetz, Water Rights Program, in regard to obtaining a well completion report for the city of South Shore's well that was drilled in 2019.

Ms. Mines Bailey moved admission of Exhibit 9. The exhibit was admitted into the record.

Mr. Gronlund read the following sentence that was shown in bold in Exhibit 9: We require either the well completion report or contact from you stating that you were not the driller of South Shore's well by Wednesday, September 14<sup>th</sup>.

The Water Rights Program did not hear from Mr. Manikowski by September 14<sup>th</sup>.

The Water Rights Program subsequently moved forward with scheduling this matter for hearing before the Water Management Board.

Exhibit 11 is the Notice of Hearing dated September 2, 2022, scheduling the matter before the Water Management Board on October 5, 2022.

Ms. Mines Bailey moved admission of Exhibit 11. The exhibit was admitted into the record.

Exhibit 12 is the Recommendation of the Chief Engineer for Deferring Renewal of South Dakota Well Driller License No. 285, Manikowski Well Drilling, License Representative Byron Manikowski.

Ms. Mines Bailey moved admission of Exhibit 12. The exhibit was admitted into the record.

Mr. Gronlund's recommendation was for a deferral of the application to renew Mr. Manikowski's 2022 well driller license. Mr. Gronlund stated that initially he was trying to jump-start the matter to get Mr. Manikowski's attention so he would contact the Water Rights Program and the Water Rights Program could find out the status and move forward with rectifying the issues with the Penfield well.

Exhibit 10 is an Order dated September 2, 2022, to Manikowski Well Drilling Licensed Representative Byron Manikowski.

Ms. Mines Bailey moved admission of Exhibit 10. The exhibit was admitted into the record.

A Certification accompanied the Order, which certifies that the Notice of Hearing with recommendation and Order were sent via US mail with first class postage affixed on September 2, 2022. The certification also indicates who the Notice of Hearing with a recommendation and Order were sent to.

The substance of the Mr. Gronlund's Order was for Mr. Manikowski to immediately cease all South Dakota activities that require licensure until such time as the Water Management Board authorizes him to engage in that activity. The Water Rights Program did not hear from Mr. Manikowski in response to the order.

Mr. Gronlund stated that Adam Mathiowetz, staff engineer, made a site visit to the Penfield well site.

Exhibit 13 is a Water Rights Program File Documentation regarding Mr. Mathiowetz's site visit on September 20, 2022. The file documentation was written by Mr. Mathiowetz on October 3, 2022, following receipt of the analysis from the State Health Laboratory in regard to the well. This exhibit is part of the administrative file for Well Driller License No. 285.

Ms. Mines Bailey moved admission of Exhibit 13. The exhibit was admitted into the record.

Based on the site visit, the conclusions substantiated what the Water Rights Program had seen in photos of the well and had heard from Mr. Penfield. Attached to the file documentation are the lab results from the composite water sample taken by Adam Mathiowetz. The water sample was analyzed by the State Public Health Laboratory. ARSD 74:02:04:37 refers to the limit for mud or silt turbidity of 25 milligrams per liter or less, and the lab result came in at 438 milligrams per liter. The file documentation also included several photos of the dirty water and sediment.

Mr. Gronlund stated that in the past there were letters sent to Mr. Manikowski by the Water Rights Program about various issues regarding well completion reporting or grouting requirements.

Exhibit 14 is an October 16, 1986, letter to Byron Manikowski from then Chief Engineer, John Hatch. This letter is in the administrative file.

Ms. Mines Bailey moved for admission of Exhibit 14. The exhibit was admitted into the record.

This letter is in regard to two well completion reports filed by Manikowski Well Drilling that did not meet the grouting requirements in the Well Construction Standards.

Exhibit 15 is a December 5, 1989, letter to Byron Manikowski from then Chief Engineer, John Hatch.

Ms. Mines Bailey moved for admission of Exhibit 15. The exhibit was admitted into the record.

This letter states that Mr. Manikowski's application in 1989 for renewal of the South Dakota Well Driller's License was being delayed until acceptable well completion reports are received for five wells he constructed in 1988.

Exhibit 16 is an April 15, 1994, Water Rights Program file documentation of a telephone conversation that Ken Buhler, then staff engineer, had with Byron Manikowski. This document is included in the administrative file.

Ms. Mines Bailey moved for admission of Exhibit 16. The exhibit was admitted into the record.

This exhibit shows that the substance of the conversation between Mr. Buhler and Mr. Manikowski was regarding a well completion report for a well that was not grouted properly.

Mr. Gronlund stated that prior to the complaint filed by Mr. Penfield, his opinion of Manikowski Well Drilling was that he was a respected well driller. Mr. Gronlund said this matter was brought to the Water Management Board because there is an issue where Mr. Manikowski did not follow well completion construction standards in regard to the proper development of this well and he ultimately stopped communicating with the Water Rights Program.

Mr. Gronlund stated that at this time, his recommendation is for denial of the renewal of Well Driller License No. 285 for Manikowski Well Drilling. Since Mr. Manikowski will not communicate with the Water Rights Program and his actions regarding the Penfield well, Mr. Gronlund said he had no other choice.

Vice Chairman Hutmacher asked, if the Water Management Board denies Mr. Manikowski's Well Driller License, can he apply again in 2023 without any consequences.

Mr. Gronlund said he does not believe denial of his renewal license prohibits Mr. Manikowski from applying in 2023, but under SDCL 46-2A-13 the chief engineer has the ability to recommend denial or deferral, so the application would have to come back before the Water Management Board. Mr. Gronlund said his intent would be to bring it back to the board.

Vice Chairman Hutmacher asked if the Water Rights Program can make Mr. Manikowski fix the Penfield well. Mr. Gronlund said he believes that would have to be through the court. The Water Rights Program worked closely with Mr. Penfield throughout this process, and he agreed with the process the Water Rights Program took, but it was made clear to Mr. Penfield that the Water Rights Program couldn't force Mr. Manikowski to make this right and that Mr. Penfield would need to consult with legal counsel.

Mr. Larson asked why Mr. Gronlund recommended deferral. Mr. Gronlund stated that his recommendation has now changed to denial.

Ms. Dixon asked if Mr. Manikowski's Well Driller License expired in December 2021.

Mr. Gronlund responded that, technically, in the statutes there isn't a specific expiration date, but the well driller is required to file for renewal by January 31 and they are also required to pay the fee each calendar year, so in effect, the license is only good for a year. The Water Rights Program's past practice is to let the well driller keep operating. In this instance, Mr. Gronlund said he believed they were working toward resolution, which turned out not to be the case.

Motion by Bjork, seconded by Larson to deny the renewal of Well Driller License No. 285 for Manikowski Well Drilling. A roll call vote was taken, and the motion carried unanimously.

Ms. Mines Bailey will prepare an Order for this matter.

NEW WATER PERMIT APPLICATIONS: The pertinent qualifications attached to approved water permit applications throughout the hearings are listed below:

Well Interference Qualification

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

Well Construction Rule Qualification No. 1

The well(s) authorized by Permit No. \_\_\_ shall be constructed by a licensed well driller and construction shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) from the producing formation to the surface pursuant to Section 74:02:04:28.

Well Construction Rule Qualification No. 2

The well(s) authorized by Permit No. \_\_\_ 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.

Irrigation Water Use Questionnaire Qualification

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

Low Flow Qualification

Low flows as needed for downstream domestic use, including livestock water and prior water rights must be by-passed.

CONSIDER WATER PERMIT APPLICATION NO. 2016-1, SOUTH DAKOTA ELLSWORTH DEVELOPMENT AUTHORITY: Vice Chairman Hutmacher opened the hearing. He requested appearances.

Ann Mines Bailey, Assistant Attorney General, appeared on behalf of the Water Rights Program.

Greg Erlandson, attorney from Rapid City, appeared on behalf of the South Dakota Ellsworth Development Authority.

Matt Naasz, attorney from Rapid City, appeared on behalf of the intervenor, Black Hawk Water User District.

The parties waived opening statements.

Ms. Mines Bailey offered Exhibit 50, the administrative file for Water Permit Application No. 2016-1, South Dakota Ellsworth Development Authority. The administrative file contains the application, the request for amendment to the application, the report and revised report, the recommendation and revised recommendation, and the Affidavits of Publication along with all other correspondence that has been received regarding this matter.

There were no objections.

The exhibit was admitted into the record.

Ms. Mines Bailey called Kim Drennon, Water Rights Program staff engineer, who had previously been administered the oath.

In response to questioning by Ms. Mines Bailey, Ms. Drennon provided the following testimony.

Exhibit 51 is the curriculum vitae of Kim Drennon.

Ms. Mines Bailey offered Exhibit 51. There were no objections.

The exhibit was admitted into the record.

Ms. Drennon received a bachelor's degree from Dordt University in May 2015, passed the Fundamentals of Engineering exam that same month. That qualifies her as an engineer intern or engineer in training, which is a step in the process of receiving a P.E. license. She received a master's degree in Civil and Environmental Engineering from South Dakota School of Mines and Technology in December 2018.

Ms. Drennon has been employed at the Department of Agriculture and Natural Resources in the Water Rights Program since January 2019. She prepares technical reviews of applications, inspects dams that are owned by the state, answers constituent complaints and questions along with other activities, as described in her curriculum vitae. In her practice the focus has been primarily groundwater.

Ms. Drennon performed the technical review for Water Permit Application No. 2016-1.

Water Permit Application No. 2016-1 seeks to appropriate up to 1,600 acre-feet of water annually at a maximum diversion rate of 2.67 cubic feet of water per second, approximately 1,200 gallons per minute, from one well to be completed in the Madison aquifer for a water distribution system serving users in Meade and Pennington Counties.

During her technical analysis, Ms. Drennon reviewed the availability of unappropriated water for this application and the possibility of developing this application without unlawful impairment of existing water rights.

Ms. Drennon prepared a report for the application. She also prepared a revised report because the applicant amended the application by moving the proposed diversion location. The revised report was issued on July 11, 2022. On page 1 of the report, the citation that is numbered 5 on the report should be number 14. There was also a clerical issue with the citation system Ms. Drennon used, so there is a corrected references list included with the report, which was included in the board packet. There are changes to some of the owners and permits listed in Table 2 on page 5. There were no changes in the amounts appropriated or that would affect the estimate of total withdrawal.

The application is seeking an appropriation from the Madison Aquifer. The Madison Aquifer is composed of the Pahasapa Limestone and the Englewood Limestone, which are dolomite and limestone formations that were deposited during Lower Mississippian and Upper Devonian geologic

periods. The Madison Aquifer underlies approximately 210,000 square miles in various states in the United States. In South Dakota the Madison Aquifer stores approximately 692,000,000 acre-feet of available water. There is 380 feet of saturated thickness of aquifer material in this area. The aquifer is confined in this location, and in this area there is approximately 750 feet of head pressure above the top of the aquifer.

The Madison Aquifer is older and stratigraphically lower than the Greenhorn Formation. The Greenhorn Formation is a limestone formation that was deposited during the middle Cretaceous period, which well drillers use as a marker bed to identify where they are in the stratigraphic column.

SDCL 46-6-3.1 provides that applications proposing to withdraw from groundwater may be approved if there is a reasonable probability that recharge to the aquifer exceeds withdrawals. There is an exception in that statute that allows for water distribution systems which are proposing to withdraw from a formation lower than the Greenhorn Formation that the Water Management Board may approve an application for withdrawals of groundwater in excess of the average estimated annual recharge. In this case, the applicant will be a water distribution system, and the Madison aquifer is stratigraphically lower than the Greenhorn Formation.

Recharge is any means by which water flows into the aquifer. Withdrawal is an intentional removal of water from the aquifer. Ms. Drennon looked at recharge and withdrawal even though the statute makes an exception for this kind of project. She did a hydrologic budget and looked at the record of observation wells. A hydrologic budget is accounting for recharge and comparing recharge with withdrawals.

The Madison Aquifer receives recharge from infiltration of precipitation along the outcrop and infiltration of streamflow. The best study available to the Water Rights Program is a group of studies called Black Hills Hydrology Study. One study within this group estimated that recharge to the Madison Aquifer is 137,000 acre-feet per year in South Dakota.

In South Dakota most of the withdrawals are for various kinds of water distribution systems. There are some withdrawals for irrigation, commercial use, industrial use, domestic use, geothermal use, institutional use, and recreation. The estimated total withdrawal from the Madison Aquifer is 65,954 acre-feet per year in South Dakota. This amount includes future use permits. For irrigation permits, Ms. Drennon looked at the record of irrigation questionnaires that are submitted to the Water Rights Program each year. For permits that have more than 10 years of data she used the average reported irrigation withdrawal. There are some irrigation permits that have additional uses permitted. Ms. Drennon added an additional withdrawal to the those permits based on 60 percent times the pump rate of the permit. For non-irrigation permits, it was assumed the permit holders would withdraw the entire volume limit listed on the permit. For permits that do not have a volume limit but do have a diversion rate limit, Ms. Drennon assumed that the permit holders would pump at the maximum diversion rate 60 percent of the time. Sixty percent is a value that the Water Rights Program has established based on studying various water distribution systems and other users, and it is a value that the Water Management Board has accepted. For future use permits, Ms. Drennon assumed the permit holders would withdraw the entire volume as listed on the permit.

This analysis was conducted on a statewide basis. Ms. Drennon also looked at the aquifer in a more localized perspective for the information of the chief engineer and the Water Management Board. In

the end, Ms. Drennon relied on the statewide budget.

There are two local hydrologic budgets that cover the area of this application. The first is Carter et al. which is a part of the Black Hills Hydrology Study. The Carter et al. study estimated that recharge to the Madison Aquifer in Subarea 4, which is the location of this application, was 15,600 acre-feet a year. The Black Hills were divided into nine subareas based on what Carter et al. believed at the time was how the groundwater would flow. It was divided so that groundwater would not cross subarea boundaries at the time they did the report. The Water Rights Program has not adopted the use of those subareas for management.

For Subarea 4, using the same estimation methods as she did in the statewide budget, Ms. Drennon estimated a withdrawal of 26,738 acre-feet a year, including future use permits and pending, deferred or held permits, other than Application No. 2016-1.

For the Long and Putnam report, which the second local budget area that is available, they estimated a recharge of 24,400 acre-feet a year. Using the same methods as the statewide budget, Ms. Drennon estimated a withdrawal of 29,203 acre-feet a year within their subarea boundary.

The withdrawals are higher than the recharge estimates, but the observation well record indicates that there is still unappropriated water available.

The Water Rights Program maintains 25 observation wells completed into the Madison Aquifer. Observation well data shows that, in general, water levels rise during periods of higher than average precipitation and decline during periods lower than average precipitation. This means that water is flowing naturally out of the aquifer and, therefore, natural discharge is available to capture as withdrawals. Based on observation well analysis, there is reasonable probability unappropriated water is available for this application.

Ms. Drennon also looked at the potential for unlawful impairment.

Exhibit 53 is a map showing the location of Water Permit Application No. 2016-1, the surrounding area, water rights, permits, observation wells, and future use permits.

Ms. Mines Bailey moved admission of Exhibit 53. The exhibit was admitted into the record.

Ms. Drennon stated that the proposed point of diversion is shown by a yellow triangle surrounded by a pink outline on Exhibit 53. The orange triangles are water rights and permits completed into the Madison Aquifer. The black circles with blue crosses are Water Rights Program observation wells completed into the Madison Aquifer. The cross-hatch area in purple in the lower right quadrant of the map indicates the area for Future Use Permit No. 2086-2 held by the city of Rapid City with a priority date of May 18, 1989. The pink area in the upper right side of the map indicated Future Use Permit No. 1833-2 held by Weston Heights Homeowners Association with a priority date of February 18, 1983. The blue cross-hatch area indicates Future Use Permit No. 1995-1 held by Black Hawk Water User District with a priority date of April 15, 2020.

The nearest existing water right to this application Water Right No. 1674-1, which is held by Black Hawk Water Use District and is located approximately 0.7 miles southwest of the application. The

nearest observation well to the point of diversion is PE-95C located 3.7 miles southwest of the application.

There are domestic wells in this area. Ms. Drennon determined the presence of domestic wells by using the Water Rights Program well completion report database. Not all domestic wells are included in the database because the Water Rights Program did not start requiring well drillers to submit well completion reports until in the late 1980s or early 1990s, so older wells may not be included in the database.

The nearest domestic well on file with the Water Rights Program is located approximately 2.5 miles southeast of this application. It is unlikely that there are other domestic wells in the Madison Aquifer in this area. The Madison Aquifer is very deep in this area, and there are higher aquifers and other water distribution systems that may be more accessible for a domestic water user.

To receive protection under the law a domestic well or water right must be an adequate well. ARSD 74:02:04:20(6) defines an adequate well as a well that completed so that the pump can be placed 20 feet below the top of the aquifer formation or, if the aquifer is thinner than that, as low as possible.

Ms. Drennon stated that there is a reasonable probability that South Dakota Ellsworth Development Authority can develop their application without unlawful impairments of existing water rights. This opinion is based on the fact that there are no complaints in Meade County regarding unlawful impairment of existing wells, the Madison Aquifer is highly transmissible in this area, there are 750 feet of hydraulic head lifting water above the top of the aquifer.

Transmissivity is the capability of the aquifer to convey water horizontally. An aquifer with high transmissivity will show low drawdown in nearby wells because the aquifer can recharge the area faster than an aquifer with low transmissivity.

The 750 feet of artesian head pressure fits into Ms. Drennon's analysis because to unlawfully impair an adequate well the applicant would have to drawdown the water approximately 770 feet before that rule would apply.

Ms. Drennon did calculations regarding the potential drawdown at the proposed point of diversion. She used the Theis equation, which is a standard equation groundwater engineers use, to estimate drawdown. She used an estimated transmissivity of 5,000 square feet per day, storage coefficient of  $1.4 \times 10^{-5}$  and a flow rate equating to the average annual discharge of 1,600 acre-feet a year. Over 27 years of pumping, the Theis equation indicates that without recharge in the area drawdown would be approximately 40 feet to the nearest water right.

Ms. Drennon reviewed the petition in opposition, and her understanding of the petition is that the petitioners are largely concerned about economic competition, including possible additional expenses due to drawdown in their wells. Exhibit 53 shows that there is overlap in the future use areas with the existing rights and there is overlap amongst the future use areas. She said this does not present any concern to her because they can still complete wells into their future use area without either well impacting the other.

Ms. Mines Bailey had no other questions of Ms. Drennon.

Responding to a question from Mr. Erlandson, Ms. Drennon stated that the opinions she presented today are based upon a reasonable degree of engineering certainty.

Responding to questions from Mr. Naasz, Ms. Drennon stated analyzing the applicant's need for the volume of water requested was not within the scope of her review. Ms. Drennon said she was aware that one of the purposes of the application is to provide water for PFOS and PFOA impacted homes in the Ellsworth Air Force Base area. She does not know how many PFOS and PFOA impacted homes have been identified. On page 2 of her report, Ms. Drennon indicates that the applicant is a water distribution system as defined in SDCL 46-1-6(17). That determination was made by Ms. Drennon and other staff engineers with the Water Rights Program. That determination was based on the understanding provided by Mr. Duvall and Mr. Gronlund. Ms. Drennon did not do an investigation into the system of wells, pipes, etc. currently existing in the area of the application. She does not know how far it is between the proposed well site and the PFOS and PFOA impacted homes.

Ms. Drennon stated the scope of her review was not to review SDCL 1-16J-7 to determine whether if the applicant has the legal authority to construct and operate a water distribution system.

Mr. Erlandson objected, citing foundation and it is a legal question.

Vice Chairman Hutmacher asked Mr. Naasz to restate the question.

Mr. Naasz asked the question again. Mr. Erlandson objected. Vice Chairman Hutmacher overruled the objection.

Ms. Drennon answered that she did not look at SDCL 1-16J-7 when determining that the application was a water distribution system.

Ms. Drennon said it is correct that the Carter localized hydrologic budget and the Long and Putnam localized hydrologic budget indicate that there is more withdrawal than recharge in the local area. If this application were to be granted, analyses of the localized hydrologic budgets in these areas would include an additional 1,600 acre-feet per year of withdrawal.

Mr. Naasz had no other questions of Ms. Drennon.

#### Redirect

Responding to questions from Ms. Mines Bailey, Ms. Drennon stated that when she receives an application to perform a technical analysis on, she reviews the application and assumes that the information on the application is correct. On this application, the applicant marked municipal and water distribution for the use of the water.

In response to questions from Mr. Erlandson, Ms. Drennon stated that SDCL 46-1-6(17) states "Water distribution system," a system of piping, valves, storage tanks, pumps, and appurtenances by which water is conveyed for domestic or municipal use by a common distribution system, including a municipality as defined in chapter 9-1-1, a nonprofit rural water supply company as defined in chapter 10-36A-1, a water user district as defined in chapter 46A-9-2, a sanitary district as defined in chapter 34A-5, or homes, including mobile homes as defined in chapter 32-3-1, and manufactured

homes as defined in chapter 34-34A-1.1 supplied by a common distribution system.

Ms. Drennon relied on her conclusion that the South Dakota Ellsworth Development Authority was a water distribution system.

Mr. Naasz had no questions on redirect.

Vice Chairman Hutmacher asked if there is recharge area to the Madison Aquifer besides the Black Hills. Ms. Drennon answered that there is recharge in Wyoming.

Ms. Mines Bailey had no further questions or witnesses.

Mr. Erlandson stated that parties have stipulated that the exhibits offered by Black Hawk Water User District and the South Dakota Ellsworth Development Authority are admissible, and the parties understand that the basis for Black Hawk Water User District's opposition is the fourth prong in SDCL 46-2A-9, which is public interest.

The exhibits were admitted into the record.

Mr. Erlandson called John Wetstein. The court reporter administered the oath to Mr. Wetstein.

Mr. Wetstein testified that he is a practicing hydrogeologist and civil engineer for Engineering Associates in Laramie, Wyoming. Exhibit 3A is Mr. Wetstein's resume, which was prepared by Mr. Wetstein, and it is accurate. Mr. Wetstein has a B.S. in geophysical engineering from Montana Tech, a B.S. and a M.S. in civil engineering from the University of Wyoming. Mr. Wetstein has over 30 years primarily in the groundwater field in well siting, well design, hydrogeologic studies, and small water and wastewater system designs.

Engineering Associates is a sub-consultant to KTM Engineers in Rapid City. Engineering Associates' task was to review the proposed well site for the potential of developing the requested groundwater flow and water quality for the proposed South Dakota Ellsworth Development Authority system. Engineering Associates proposed a hydrogeologic study to determine if the proposed design flow could adequately be produced by a Madison well in the area and the potential water quality.

Mr. Wetstein said the initial review is a study for previous published hydrogeologic studies in the area, a look at the DANR observation well information in the area, and mapping and developing a cross-section through the area to get a better visual understanding of the proposed well in relation to the geologic conditions. With the Madison Aquifer, since it is typically a nonproductive formation, the limestone is usually very tight intrinsically so you are looking for secondary enhancement features, primarily structural deformation due to folding and faults, and these are areas that would essentially break up that limestone. He also used infrared imagery to look for lineaments, which may show where a subsurface event, typically a fault, is located that doesn't manifest itself at the surface. Putting all that together and looking at the potential for secondary enhancement development, Mr. Wetstein concluded that the proposed well site would probably encounter a fracture system and be capable of producing the desired flow.

The location of the proposed well is shown in Figure 1 in Exhibit 1A. Mr. Wetstein was given the

location of that well by Terry Cash, an engineer with KTM Engineers, after discussions with Ellsworth Development Authority. The proposed well location was provided based upon the availability of property to put a well that would support the system, and this area happens to be one of the best areas to drill a well. There are two anticlines that are offset, and the well location is in the middle of them. The formation is shallower in this area and the distance from the recharge, which is typically precipitation onto the outcropping Madison plus where streams cross the Madison, is very close so the water quality should be very good. The depth to the Madison is relatively shallowed compared to going further east, so the construction costs are less.

Mr. Wetstein stated that previous localized recharge studies show the aquifer is over-appropriated, but that would show up in the observation well records. At the point where it became over-appropriated, that aquifer should have started to become mined; in essence, the static water level should have been declining for a number of years. It has remained steady and fluctuating with the recent precipitation moisture activity. Mr. Wetstein stated that to him that says the recharge is capable of keeping up with the current demand and future demand. It is Mr. Wetstein's opinion that there is a reasonable probability that unappropriated water is available for the proposed use, and he believes there would be minimal impact to the surrounding wells if this proposed well is developed.

Responding to questions from Mr. Naasz, Mr. Wetstein stated that the location of the proposed well was selected prior to the initiation of his report. He believes KTM Engineering chose the location of the proposed well, but he was not privy to discussions that took place between KTM Engineering and Ellsworth Development Authority. The location of the proposed well was based on the availability of property upon which to construct the well. Through the process the location of the proposed well site changed. Mr. Wetstein stated that his understanding is that the landowner, who is in the process of developing that particular parcel, asked that the well be moved to a different area.

Exhibit 2A is Mr. Wetstein's supplemental report. In the supplemental report, Mr. Wetstein says, "Stated another way, this decision indicates that an increase in operating expenses may result from interference between wells is not considered an adverse impact." Mr. Wetstein said it has not been determined at this point whether drawdown at the Black Hawk Water User District's Madison well could increase operating costs. In general, the lack of or decreased head pressure could result in increased pumping costs. Mr. Wetstein said he agrees that, based on the amount requested by the applicant, there could be drawdown at the Black Hawk Water User District's No. 5 well, and a consequence of that drawdown is that the pump may need to be lowered further into that well, which could cause additional operating costs.

Mr. Wetstein said he would expect a typical residential home to use approximately 100 gallons per resident per day.

Mr. Erlandson objected a question by Mr. Naasz asking if Mr. Wetstein knows how many PFOS/PFOA impacted homes the proposed diversion seeks to serve. The objection was sustained.

In response to questions from Mr. Naasz, Mr. Wetstein stated that he does not know how far the proposed well site is from the PFOS/PFOA impacted homes.

This concluded questioning by Mr. Naasz.

Ms. Mines Bailey had no questions of Mr. Wetstein.

Redirect

Responding to questions from Mr. Erlandson, Mr. Wetstein stated that South Dakota's statutes regarding adverse impact do not view lowering of the hydraulic head as an impact. He said in his opinion, just because there is a lowered pumping level in the well, that is not a negative impact to the point that the pump can still be lowered and still withdraw the water. They want to fully develop the aquifer, so if you were going to limit someone's production potential based on the hydraulic head, you would be leaving an unknown magnitude of undeveloped groundwater that would now be unusable based on the fact that the pumping level has been lowered in an existing well. If one of the criteria happened to be whether or not a water user's operation and maintenance costs would be increased by the granting of a water permit possibly affecting their system, then in certain areas that would limit many water permit being granted.

There were no other questions of Mr. Wetstein.

Mr. Erlandson called Glen Kane who was administered the oath by the court reporter. Mr. Kane testified that he is the managing director of the South Dakota Ellsworth Development Authority. He is a native South Dakotan. He has spent 35 years in the building development business in the Black Hills and he is very active in the community and economic development, home building industry. He served as the local president and state president and spent 12 years on the National Homebuilders board. In 2009 he was appointed to the first board of the South Dakota Ellsworth Development Authority by Governor Rounds, and he served two years on that board. He was then asked to come on board as a contractor to be the managing director, and he has been in that capacity since.

The South Dakota Ellsworth Development Authority is a government corporate body created by the South Dakota Legislature in 2009. South Dakota Ellsworth Development Authority's main mission is to make sure that the state of South Dakota is a good host to Ellsworth Air Force Base and the Department of Defense. Within that mission, Ellsworth Development Authority does several different things.

Ellsworth Development Authority built, owns and operates a wastewater treatment plant that has two customers; Ellsworth Air Force Base and the city of Box Elder. The plant was built for a joint use. Ellsworth Air Force Base's plant had run its useful life and Box Elder was operating on lagoons. Having one treatment plant will save millions of dollars over the life of a treatment plant instead to two treatment plants. Ellsworth Development Authority has purchased 4,000 acres of property around the Air Force Base, either easements or fee simple, in the flight path to address encroachment issues. Ellsworth Development Authority is getting ready to complete the Liberty Center, a very large fitness center. This was built because with the B-21 expansion coming to the base. Currently, Air Force men and women were exercising inside a hanger. The hanger will go back to its original use. The Liberty Center is located outside the Base so the community can also use it. The Ellsworth Development Authority was instrumental in the Powder River expansion. A closed air support site was built by the Ellsworth Development Authority on the Powder River so when planes take off from Ellsworth they don't have to fly to Arizona to do training. The Ellsworth Development Authority is also very active in the community and community relations. The Ellsworth Development Authority tries to leverage the assets it gets from Ellsworth into the community by looking at the big picture, and it has done that very successfully in the past.

Mr. Kane stated that there are zones on the end of the runway at Ellsworth Air Force Base. The zones are in place so that in case there would be a catastrophic event of a plane going down it would not take out a daycare or a residential neighborhood or whatever it might be. One of the tasks the Ellsworth Development Authority was asked to do by the Ellsworth Air Force was to look at incompatible uses around the Base, and that is the reason those 4,000 acres worth of easements or fee simple property were purchased around the Base. This was done for the health and safety of the people around the Base and for the pilots.

In 2005 Ellsworth Air Force Base was placed on the Base Realignment and Closure list. That basically said Ellsworth Air Force Base was going to be shut down. At that time, the Ellsworth Development Authority did not exist. Many people in the community fought to get the Base off the Base Realignment and Closure list, and they were successful in doing that. After that, a checklist of things that need to be done to keep the Air Force Base off the list was created, and that checklist is currently being used.

One of the things on the checklist is the health and safety of people on and around the Air Force Base. Water Permit Application No. 2016-1 is directly related to the health and safety of people on and around the Base. Approval of this water permit will help these people and also avoid issues in a potential future Base Realignment and Closure.

Mr. Kane said the Ellsworth Development Authority was asked by the Air Force to come up with a viable solution to get good quality source water to the PFOS/PFOA affected people. PFOS/PFOA is a forever chemical. It was used as a lubricant and in firefighting foam. At the time it was deemed to be safe. It turned out to be a health hazard. It was determined that PFOS/PFOA was in the shallow groundwaters around the Air Force Base. A lot of people around the Base have shallow wells, so they were basically drinking water contaminated with PFOS/PFOA. Ellsworth Development Authority entered into an Environmental Service one-year agreement with the Air Force a year ago in September. The agreement was to design and estimate the cost of a project to provide good source water to those affected by PFOS. Ellsworth Development Authority looked at a number of alternatives in order to find the best water source. Once that was determined, it was realized that there is a big gap between Black Hawk and Box Elder that is not served. There are large segments of people in that area that are still hauling water, and Ellsworth Development Authority realized there is an opportunity to help a lot of people. People in Ashland Heights haul water. The proposed water line will go right by that area, so this would be a great opportunity for these people to get clean drinking water. Box Elder is contemplating supplementing their supply with this water. Ellsworth Development Authority is also working with Box Elder to wheel through their system to the other side of Box Elder because there are PFOS people affected there. Mr. Kane said he sees this going even further east into New Underwood at some point in time.

Mr. Kane said the initial purpose of this water permit is to serve PFOS affected people. There are dozens of properties that are affected. If this permit is granted, the residents of Box Elder will also benefit.

Mr. Kane said there was a lot of discussion on a regional water plan in the Black Hills region. This has spawned a lot of discussion in connecting Rapid Valley, Rapid City, the area to then north. There has been discussion of bring Missouri River water to the Black Hills region, so some day, if that

happens, at least there will be a system to tie into. There is a regional study taking place at this time.

When the first phase of the Environmental Service contract was completed, Ellsworth Development Authority moved into Phase 2, and signed an Environment Service contract with the Air Force to do this project. This allows Ellsworth Development Authority to receive Air Force funding to construct the project.

Exhibit 5A is a map, prepared by KTM Engineering, showing the proposed water line for the distribution system. That well site was chosen because the Air Force asked Ellsworth Development Authority to find the best water source available within reason. The route was secondary based on the fact that a willing property owner was needed to work with Ellsworth Development Authority on a well site in that area. The distribution system follows the section lines and will end up connecting to Box Elder's system, then wheel through their system to some other PFOS affected properties to the east side of Box Elder. The Air Force gave the Development Authority two years to spend the money.

Mr. Kane met with every property owner that is affected by PFOS. They have an interest in getting clean, safe water. In order for the Air Force to move forward with the Environmental Service contract, they needed to have at least 50 percent of the people that were affected by the PFOS to sign on to the project. Mr. Kane said 100 percent of the people he met with agreed to sign on to the project.

Responding to questions from Mr. Naasz, Mr. Kane stated that the proposed well site is 14 miles from the PFOS/PFOA impacted homes, and there are 140 individuals in this area.

Mr. Kane said he agrees that SDCL 1-16J-7 identifies the powers of the South Dakota Ellsworth Development Authority. It specifically allows South Dakota Ellsworth Development Authority to construct, own and operate a wastewater treatment facility. The statute does not authorize the Development Authority to construct, own and operate a water distribution system, and it also does not authorize the Development Authority to buy land or do a lot of things the Development Authority does.

Most of the directors of the South Dakota Ellsworth Development Authority live in the Black Hills region. One director lives in the White River area. The directors are appointed by the Governor and approved by the Legislature. Mr. Kane stated that, to his knowledge, none of the current directors live in an area that would be served by this proposed project.

The new Environmental Service Agreement with the Air Force provides \$17,000,000 in funding for this project. The total estimated cost of the project is \$30,000,000. Ellsworth Development Authority has submitted a funding application to the Board of Water and Natural Resources grant funds for the project. The board has deferred action the funding application until after the Water Management Board acts on water permit application.

Mr. Kane stated that 60 gallons of water per minute would be needed for the PFOS/PFOA affected residents. The water permit application seeks to appropriate 1,200 gallons per minute.

Mr. Naasz asked if Ellsworth Development Authority needs approval from Meade County to utilize

the section lines for the distribution lines. Mr. Erlandson objected citing relevance. Vice Chairman Hutmacher overruled the objection.

Mr. Kane answered that Ellsworth Development Authority has applied for the permit to utilize the section lines, and that hearing is scheduled for October 11, 2022. He said that was another reason the Board of Water and Natural Resources deferred action on the funding application. Part of the section line was vacated in the past. Ellsworth Development Authority is in discussions with the landowners regarding easements for the distribution system to be placed on land where the section lines have been vacated; the easements are not in place at this time.

#### Redirect

In response to questions from Mr. Erlandson, Mr. Kane stated that said there a lot of moving parts to solve the PFOS issue. If the project is not constructed within the required time, Ellsworth Development Authority would not only lose funding, but it would also lose its water permit. Ellsworth Development Authority signed the Environmental Service Agreement with the Air Force, understanding that if the bids come back and it turns out to be a \$40,000,000 project, there won't be enough money to construct the project.

Mr. Kane stated that he had a conversation with Mark Mayer, DANR Drinking Water Program, who gave him the idea of regionalization concept. Because of that conversion, Ellsworth Development Authority is now sponsoring a study for the region for water and wastewater.

Responding to questions from Mr. Naasz, Mr. Kane said a water permit is needed in order to solve the PFOS/PFOA issue. The PFOS/PFOA issue can be solved with a water permit for 60 gallons per minute. Mr. Kane did not have discussions with the DANR Water Rights Program or staff about the possibility of future use permit from the Water Management Board rather than a permit to appropriate water.

In response to a question from Mr. Erlandson, Mr. Kane said the decision to request a permit for 1,200 gallons of water per minute was made because a well is needed that will produce enough water to address the PFOS/PFOA issue as well as serve the needs of others in that region.

Responding to questions from the board, Mr. Kane said there is a study currently being done regarding bringing Missouri River water to the Black Hills area.

Ellsworth Air Force Base currently gets water from Pactola, wheeled through Rapid City.

Mr. Kane said part of the agreement with the Air Force is that Ellsworth Development Authority will own and operate the proposed water distribution system. The people that were affected by PFOS demanded not to be part of a municipality, they were afraid of annexation, and there were several other issues.

The Air Force visited with Rapid City and Rapid Valley, worked with the Corps of Engineers, and looked at several different options. The reason the municipalities did not work was because with the restrictions the Air Force has on this money, they can't pay for operations or maintenance.

Mr. Kane said he has not had discussions with West Dakota Water Development District regarding

this project.

There were no other questions of Mr. Kane.

Mr. Erlandson called Rita Krebs who was administered the oath by the court reporter. Ms. Krebs testified remotely.

Responding to questions from Mr. Erlandson, Ms. Krebs stated that she is an environmental restoration program manager at Ellsworth Air Force Base. She manages cleanup of soil and groundwater contamination. Her main duty is to manage impacts from PFAS, which are manmade chemicals in everyday items such as Teflon and scotch guard. PFAS were also a component in firefighting foam, which was formerly used by the Air Force to extinguish fires in real incidents as well as during training exercises. Two of the best known PFAS substances are PFOS and PFOA.

Ms. Krebs has B.S. degree in geology and a M.S. degree in geology and geological engineering from South Dakota School of Mines and Technology. She is a licensed professional geoscientist in the state of Texas. She has over 20 years of experience in environmental cleanups, and she has worked for the Air Force Civil Engineer Center at Ellsworth Air Force Base since 2010.

Ellsworth Air Force Base has a very successful partnership with South Dakota Ellsworth Development Authority dating back when they were first formed in 2009. South Dakota Ellsworth Development Authority built the regional wastewater treatment plant, which solved a huge problem for Ellsworth Air Force Base and the city of Box Elder. Ellsworth Development Authority also handled a lot of encroachment problems at the Base. The B1 Bomber is so loud there is a big noise problem, and Ellsworth Development Authority solved those problems. They purchased restricted easements for land in the crash zone for safety purposes.

Ms. Krebs said the work that South Dakota Ellsworth Development Authority has done for the Base and the surrounding community really means that the Air Force trusts them to do what's in the best interest for both the Base and the surrounding community. Ms. Krebs said her professional partnership with the Ellsworth Development Authority started in 2019.

Ms. Krebs stated that in 2018, the Air Force was collecting samples trying to determine the presence or absence of contamination in the soil and groundwater. Based on the sample results, it looked like the contamination could be migrating off-Base to shallow drinking water wells in the community. In September 2018, an off-Base water survey began looking for private drinking water wells. Most of that work was done in 2018 and 2019. It was discovered that there were 23 drinking water wells with PFOS and PFOA above EPA's 2016 lifetime health advisory. Those 23 wells serve 28 properties and 94 residences. One of those properties is a mobile home park that has approximately 70 mobile homes, but the capacity is there for over 100 mobile homes on that property. It is estimated that over 280 people have been impacted. Once the Air Force learned that those drinking water wells were impacted, it started an emergency action to provide bottled water to those people immediately. Once the emergency action was started, the Air Force started working right away to get them off bottled water because it is so inconvenient for those people. Twenty household treatment systems were provided, and a large treatment system was built at the mobile home park to treat their water. Once those interim actions were in place, the Air Force started looking at a long-term solution to get them a good, clean, reliable source of water. In 2020 an Engineering Evaluation and Cost Analysis was

started to identify alternatives, the costs, the estimated timeframe, and in July 2020 the document was issued for public comment for 30 days. In January 2021 the Air Force signed an Action Memorandum to document the decision that was made following that process. That decision was to basically to expand the city of Box Elder's municipal system by adding a new wells and distribution lines. At that point South Dakota Ellsworth Development Authority was the Air Force's backup, or Plan B.

After that, another impacted area was identified. There were also difficulties coming to an agreement with the city of Box Elder, so a second Engineering Evaluation and Cost Analysis was completed to analyze an alternative that was not considered in the first analysis. Once that document was complete, it was issued for public comment in June 2021. The Air Force made its decision and documented that in an Action Memorandum in January 2022. The decision was to have South Dakota Ellsworth Development Authority design, construct, own and operate a new community water system. Following that decision, the Air Force entered into an Environmental Services Agreement with South Dakota Ellsworth Development Authority on September 1, 2021, for them to design the system. On September 21, 2022, the Air Force entered into a second Environmental Services Agreement with South Dakota Ellsworth Development Authority, where the Air Force provides partial funding for them to build the system.

One of the reasons the Air Force's talks with the city of Box Elder fell through is because of engineering requirements like fire flow. A certain amount of water needs to be stored to respond to a house fire. A certain number of hydrants are required along the system. It was determined that the Air Force's environmental restoration funds could not pay for those requirements. Another reason was the Air Force had been meeting with the impacted residents, and most of the impacted people are located between the city of Box Elder and the city of Rapid City, but they are not annexed into either city. These people were very concerned about being annexed because that would increase their property taxes and even if the city of Box Elder were to relax the annexation requirements, their water bill would be twice the amount the in-town customers pay. The majority of the impacted residents expressed concern that they were being penalized even though it is not their fault that their wells are contaminated.

The Air Force looked at several other options. A no action alternative was evaluated, which would mean keeping the pump and treat systems, which was estimated to cost \$11,000,000 to keep them operating for 30 years. The Air Force met with the city of Rapid City in 2019. The city chose not to participate at that time because it would not be cost-effective for the city to expand their distribution system that far to the east and it would take resources away from their primary customers. The Air Force also looked at purchasing the impacted properties; however, the Department of Defense has very strict guidelines for how the Air Force can purchase property, and a lot of the properties would not fall into that category of being able to be purchased. The Air Force also looked at drilling a new deep well for every impacted property.

Ms. Krebs said the Air Force did not look at trying to partner up with other existing water user districts, such as Black Hawk Water User District. At the time, it was believed that Black Hawk Water User District was too far away from the impacted residents. Rapid Valley reached out to the Air Force, but they wanted either the Ellsworth Air Force Base's water rights or manage the water rights for the Air Force Base and, for National Security purposes, that could not happen.

One-on-one meetings were held twice with each of the impacted property owners, and the property owners seemed to feel like Mr. Kane heard their concerns and was going to deal with their concerns, and they seemed to trust Mr. Kane.

Ms. Krebs stated that she believes, should the board grant this water permit, it is in the best interest of South Dakota Ellsworth Development Authority and those impacted users. She said Ellsworth Development Authority is implementing an Air Force restoration decision, and she really hopes Ellsworth Development Authority can get a good, safe drinking water source to those impacted residents that the Air Force has affected.

Responding to questions from Mr. Naasz, Mr. Krebs stated that several alternatives are included in the 2020 Engineering Evaluation and Cost Analysis as possible restoration solutions for the impacted area, but none of the restoration alternatives mention activity west of Elk Vale Road. Ms. Krebs does not know how far Elk Vale Road is from the proposed well site location. The June 2021 Engineering Evaluation and Cost Analysis was prepared after identifying an area near New Underwood that needed to be restored. This area is east of Elk Vale Road and Ellsworth Air Force Base.

The 2020 Engineering Evaluation and Cost Analysis mentions an alternative for South Dakota Ellsworth Development Authority constructing a well and it indicates that the well would preferably be located in Area A, which is east of Elk Vale Road. Ms. Krebs stated that at the time the 2020 and 2021 Engineering Evaluation and Cost Analysis were prepared, it was not anticipated that the proposed alternative to the PFOS issue would be located eight to ten miles west of Elk Vale Road. The Air Force's decision was to go with South Dakota Ellsworth Development Authority, and it did not stipulate where the well would be located. The Air Force became aware that the proposed well would be located 10 miles west of Ellsworth Air Force Base and that Black Hawk Water User District has a high-capacity well less than a mile away from the proposed well. Ms. Krebs said the Air Force did not engage Black Hawk Water User District in conversations about this project; however, South Dakota Ellsworth Development Authority did. Ms. Krebs said she does not know if Black Hawk Water User District requires annexation into a municipality before providing water. The Air Force did not facilitate any conversations between the impacted residents and Black Hawk Water User District.

Exhibit 4A is an August 10, 2022, letter from Ms. Judy Lopez, Director of the Air Force Civil Engineering Center, to the Water Management Board. Ms. Krebs said she is aware the letter states that Black Hawk Water User District is not a government entity; she is now aware that Black Hawk Water User District is a government entity. On September 22, 2022, Black Hawk Water User District submitted a response to the Air Force regarding the August 20, 2022, letter to Mr. Larson, and on October 3, 2022, the Air Force submitted a reply to Black Hawk Water User District's response. In the September 22, 2022, letter, Black Hawk Water User District requested an opportunity to discuss this project with the Air Force. Ms. Krebs said she talked to Black Hawk Water User District about this project a couple of times. She said Mr. LeBon reached out to her, but she does not recall the date.

In the October 3, 2022, letter to Black Hawk Water User District, Ms. Lopez states that the Air Force declines Black Hawk Water User District's offer to have a meeting regarding this project.

John McCuen stated that he is an attorney with the Air Force Environmental Law Field Support

Center, which provides a full spectrum of environmental legal support to Air Force commands and installations throughout the United States and overseas. He specifically provides environmental restoration support to Ms. Krebs and the organization she works for. Ms. McCuen said Ms. Krebs has not been authorized to talk about the recent letter. The request for her appearance did not address that letter, and because it is an Air Force person appearing in litigation, there is a process that has to be followed to get permission for her to provide testimony and exhibits. Mr. McCuen said he had requested that permission and was told “no,” so Ms. Krebs cannot go into details about issues in the most recent letter.

Mr. Erlandson said Mr. McCuen represents Ms. Krebs. He had to go through a procedure to get authorization for Ms. Krebs to testify before the Water Management Board, and one of the conditions the Air Force attaches is that she must be represented by counsel to make sure she does not exceed the scope of her involvement in the project and authority.

Mr. Naasz apologized and said he was not aware of the parameters that were set. He said the letter is part of the administrative record, and it will speak for itself. Mr. Naasz had no further questions of Ms. Krebs.

In response to questions from Mr. Erlandson, Ms. Krebs stated that she visited with Mr. LeBon, Black Hawk Water User District, about the district’s possible involvement in this project. The Air Force ultimately declined the invitation to meet with Black Hawk and instead decided to continue working with South Dakota Ellsworth Development Authority on the project. The U.S. Air Force has approved of the budgeting and the initial financing for a great deal of this project based upon where the project is presently to be located.

There were no other questions of Ms. Krebs.

Mr. Bjork asked why Ellsworth Development Authority chose a project with a well that is ten miles away.

Mr. Erlandson recalled Mr. Kane who stated that the Air Force asked the Ellsworth Development Authority to find good source. The engineering team determined the constructing a well that is 14 miles away is the best source water available within the area. This is the reason Ellsworth Development Authority decided to make this a regional project. It wouldn’t make sense to install 14 miles of water line and drill a well for 60 gallons per minute, but if Ellsworth Development Authority can install this well, provide an alternative water source to Box Elder and all the people along the way, and leverage \$17,000,000 in Air Force money in South Dakota, it starts to make sense.

Mr. Bjork said if this is going to be a regional system, more of the regional players need to be involved, specifically, the West Dakota Water Development District. The water development district is a government player in all of these activities, and they are elected officials so Ellsworth Development Authority should take a look at the region if there is to be a regional water system.

Mr. Erlandson had no other witnesses.

Mr. Naasz called Ken LeBon who was administered the oath by the court reporter. Mr. LeBon testified that he the manager of Black Hawk Water User District. He has been involved in the Black

Hawk Water User District for the last 22 years. Black Hawk Water Company was created in 1949 and in 1996 became a water user district. Mr. LeBon said Black Hawk Water User District is a regional water system that provides water to Black Hawk, the city of Summerset, the city of Piedmont, Stagebarn Subdivision, and Pine Hills. The water user district has approximately 4,000 customers.

The Black Hawk Water User District board of directors is made up of individuals that live in the district and are customers of the water user district.

Exhibit 200 is the Black Hawk Water User District's Future Use Water Permit No. 1995-1. Mr. LeBon stated that Black Hawk Water User District applied for the future user permit because the interest in receiving water east of Black Hawk. The water source for the future use permit is the Madison Aquifer. The last page of Exhibit 200 is a map showing the location of the Future Use Permit area.

Mr. LeBon said he is familiar with the proposed pipeline route of the applicant. The pipeline route is proposed to run on the section line from east to west through the center of the Black Hawk Water User District future use permit area. The eastern boundary of the future use permit area is Haines Avenue, which is approximately four miles west of Elk Vale Road.

Exhibit 201 is a Black Hawk Water User District water system planning map. Before the map was created, Black Hawk Water User District had identified some reservoir and well sites, so the water user district asked its engineers, AE2S, to design this map, which includes elevations, so the water user district could start planning for development in that area. Mr. LeBon pointed out the location of Well No. 5 on the map. Well No. 5 is less than a mile from the proposed well site of the applicant. Exhibit 201 was created by AE2S in 2017. Black Hawk Water User District wanted to establish where wells and reservoirs could be placed in the area. Prior to the creation of the map, Mr. LeBon met with Salvador Ranches to establish a location for a reservoir and some well sites. The infrastructure identified on the map, both existing and proposed, east of Interstate 90 are within the Black Hawk Water User District future use permit area. Mr. LeBon pointed out on the map the location of Black Hawk Water User District's current Marble Mountain Reservoir, which is approximately a mile south of the section line that the pipeline would be on and approximately 2.5 miles east of where the proposed South Dakota Ellsworth Development Authority well. Exhibit 201 includes potential infrastructure, and the Marble Mountain Reservoir, which was constructed in 2007, is existing infrastructure.

Mr. LeBon said he is familiar with the report of Mr. Wetstein for this matter.

Mr. Naasz asked Mr. LeBon what his concerns are regarding the possibility of drawdown at the Anderson Well if the proposed well is completed and put into production.

Mr. Erlandson objected stating that Mr. Naasz may be going into the area of expert testimony, which would be prohibited under Rule 702 of the rules of evidence and in violation of the Board's Order of that any experts be disclosed with their opinions being given prior to this hearing. On September 23, 2022, no such disclosures were made by Black Hawk Water User District and no reports were given, so anything that goes beyond Rule 701 for opinion testimony by lay witnesses should not be allowed. Rule 701 says that lay witness testimony is limited to items rationally based on the witness'

perception, helpful to clearly understand the witness's testimony, and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Mr. Erlandson said he believes Mr. Naasz's question is going directly into that prohibition, and he objects.

Mr. Naasz said he can define his questions well enough that they are in fact based on Mr. LeBon's rational perception and not any expertise opinions.

Mr. McVey said if Mr. Naasz can construct his questions in a manner that doesn't conflict with Rule 702 he can proceed.

In response to a question from Mr. Naasz, Mr. LeBon stated that he has been a certified water operator for approximately 12 years.

Mr. Naasz asked Mr. LeBon what the result is, as relates to cost, in decreased head pressure in a well.

Mr. Erlandson objected stating that the question is a clear violation of Rule 701. It doesn't matter if it's based on his perception so long as he is talking about scientific, technical, or other specialized knowledge, which is exactly what this is, and it has to be excluded.

Vice Chairman Hutmacher sustained the objection.

Responding to questions from Mr. Naasz, Mr. LeBon stated that Black Hawk Water User District obtains its revenue from the water customers, so ultimately, the customers would be required to pay for any increased operating costs associated with drawdown in the Anderson Well as a result of this application.

Exhibit 202 is the Black Hawk Water User District 2021 Drinking Water Report, which states that the water user district serves more than 3,750 customers an average of 490,000 gallons of water per day. Mr. LeBon stated that at this time approximately 4,000 customers are served. Mr. LeBon helped prepare Exhibit 202 in his capacity as the manager of the Black Hawk Water User District.

Mr. LeBon stated that he first became aware of the proposed well to be located just over one-half miles from the current Anderson Well in January 2022. Some landowners had called asking if Black Hawk Water User District was requesting permission to survey on their property. The landowners had received letters KTM Engineering requesting permission to survey.

Mr. LeBon said he is familiar with the Water Permit No. 1991-1 for Black Hawk Water User District's existing well located approximately four miles northwest of Black Hawk. The water user district initially applied for 1,120 acre-feet of water per year, 800 gallons per minute. The Water Management Board approved Water Permit No. 1991-1 for 760 acre-feet of water per year.

Mr. Naasz asked Mr. LeBon why the diversion amount was decreased. Mr. Erlandson objected citing relevance.

Vice Chairman Hutmacher sustained the motion.

Mr. Naasz asked Mr. LeBon if the Water Rights Program has required Black Hawk Water User

District to establish the need for water prior to recommending approval of a permit. Mr. Erlandson objected citing relevance.

Vice Chairman Hutmacher sustained the objection.

Mr. Naasz asked if Mr. LeBon recalls a June 2019 email between Mitch Kannenberg and Mr. Gronlund with the Water Rights Program requesting Black Hawk Water User District to reduce the amount of water requested in Water Permit Application No. 1991-1.

Mr. Erlandson objected citing relevance.

Vice Chairman Hutmacher asked Mr. Naasz to explain where this line of questioning is going. Mr. Naasz said he could make an offer of proof.

Mr. Naasz asked Mr. LeBon if he recalls that email. Mr. LeBon answered that he recalls the email. The Water Rights Program was questioning the need for the volume of water requested in Water Permit Application No. 1991-1.

In response a question from Ms. Mines Bailey, Mr. LeBon said the application was for a current well.

Responding to a question from Mr. Naasz, Mr. LeBon stated that Black Hawk Water User District is a public entity.

In response to questions from Mr. Erlandson, Mr. LeBon said it is correct that he was invited by Glen Kane and members of the South Dakota Ellsworth Development Authority to discuss working together on a potential solution to the issues being discussed today. Mr. Erlandson stated that Mr. LeBon was invited more than once to meet with Mr. Kane, in fact at one point Mr. LeBon met with Mr. Kane and himself.

Mr. Naasz objected citing confidential settlement negotiations.

Vice Chairman Hutmacher sustained the objection.

Mr. Erlandson asked Mr. LeBon if it is correct that solutions were offered to Mr. LeBon to work together that ultimately the Black Hawk Water User District rejected. Mr. LeBon answered that Black Hawk Water User District was asked to come back with a proposal, which they did, and the proposal was turned down.

Mr. Erlandson said the proposal was 180 degrees different than what Ms. LeBon tentatively agreed to and agreed to present to the Black Hawk Water User District board. Mr. LeBon said he presented what was discussed during the meeting to the Black Hawk Water District board, and the board came back with their own proposal to Ellsworth Development Authority.

Responding to questions from Mr. Erlandson, Mr. LeBon said the Black Hawk Water User District has a reservoir east of Interstate 90 and water lines going toward the section line where Ellsworth Development proposes to put its water line. Black Hawk Water User District is not serving any customers in the future use permit area.

Mr. Erlandson asked if it is correct that Mr. LeBon has been given many opportunities to work with Ellsworth Development Authority and for one reason or another no agreement has been reached between the two entities. Mr. LeBon stated that every time Black Hawk Water User District met with Ellsworth Development Authority nothing changed; it was always that Ellsworth Development Authority needs to own and operate the well and they need to own everything.

Mr. Naasz asked Mr. LeBon how the proposed alternatives that were discussed would ultimately impact the operating costs for Black Hills Water User District.

Mr. Erlandson objected citing that the question calls for expert testimony.

Vice Chairman Hutmacher sustained the objection.

Mr. Naasz asked if the alternatives that were suggested would require Black Hawk Water User District to spend money. Mr. LeBon answered that it would require Black Hawk Water User District to spend money, and Black Hawk Water User District and its customers would have been responsible for the increased cost.

There were no further questions from the parties or the board members.

Mr. Naasz called Tom Norman who was administered the oath by the court reporter.

Mr. Norman stated that he owns property on the east side of Interstate 90 at Exit 52, and he was the previous owner of the Southwest quarter of Section 32 in Township 3 North of Range 7 East. Mr. Norman stated that Exhibit 203 is the Declaration of Covenants and Restrictions on the property he previously owned. The first sentence of Section 1.01 states, "All lots in the restricted property shall be used exclusively for private residential purposes." The first line of Section 1.03 states, "None of the restricted property shall be used for commercial activity..." Mr. Norman said he is one of the declarants of these covenants and restrictions.

Mr. Naasz asked if it is Mr. Norman's understanding of these covenants that there are no exceptions for constructing a well or reservoir on this property.

Mr. Erlandson objected.

Vice Chairman Hutmacher overruled the objection.

Mr. Norman answered that there are no exceptions.

In response to questions from Mr. Naasz, Mr. Norman stated that his signature is on page 4 of the covenants and restrictions. Mr. Norman also filed comments regarding this matter. In the comments, Mr. Norman indicates that Black Hawk Water User District should control the water in this area because the district is already controlling the water in three communities. Mr. Norman said there is water from Black Hawk Water User District at the end of his driveway. He commented that the bulk of this water will go to developers east of the Air Force Base.

There were no further questions of Mr. Norman from the parties or board members.

Mr. Naasz had no other witnesses.

### Rebuttal

Ms. Mines Bailey called Eric Gronlund who had been administered the oath by the court reporter earlier in the meeting.

In response to questions from Ms. Mines Bailey, Mr. Gronlund testified that he is the Chief Engineer in the DANR Water Rights Program. Mr. Gronlund stated that he is familiar with SDCL 46-6-6.1 as it pertains to artesian head pressure. Based on that statute, the Water Management Board is not required to protect head pressure. Mr. Gronlund said his understanding of the statute is that the board is supposed to take into consideration but doesn't necessarily have to maintain artesian head pressure as a means of delivery.

Mr. Gronlund said he is aware of the board's past decisions, and he is familiar with the board's Findings of Fact and Conclusions of Law for Water Permit Application No. 2313-2, Coca Cola Bottling Company of the Black Hills, which was a case that came before the Water Management Board in the mid-1990s. The water permit application considered by the Water Management Board for No. 2313-2 dealt with Coca Cola Bottling Company of the Black Hills applying for additional diversion rate authority and potentially an additional well to what they currently had. The city of Rapid City contested the application, and the Water Management Board held a contested case hearing regarding that matter. Based on the proximity of their well, the city of Rapid City was concerned about the decrease in artesian head pressure and potentially the additional costs associated with pumping and/or having to replace or lower the pump. Mr. Gronlund read the following portion of Conclusion of Law No. 4, "The city of Rapid City has intentionally set its pump at approximately 320 feet below the level. Approximately 1,000 additional feet of head pressure is available below the place at which Rapid City has set its well. To accept the Rapid City argument that no pumping should be allowed which lowers the head pressure below the level at which its pump is set would mean Rapid City could reserve 1,000 feet of head pressure for itself." He also read Conclusion of Law No. 5, "The board also concludes that Rapid City attempted reservation of 1,000 feet of head pressure is not consistent with SDCL 46-1-4, which states that the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable. Furthermore, it would constitute waste of water under the same statute."

Mr. Gronlund stated that in his opinion, if the board denies this application for the purpose of protecting the 750 feet of artesian head pressure, it will constitute a waste.

Responding to questions from Mr. Naasz, Mr. Gronlund stated that it is his understanding that the Water Management Board has the ability to take head pressure under consideration.

Mr. Naasz ask if a lack of artesian head pressure should result in increased operating costs to customers of a water distribution system and residents of the state, would it be fair game under the public interest component. Mr. Gronlund said it is up to the Water Management Board to make that decision. He said the board can take artesian head pressure into consideration, but it does not necessarily have to consider it as a means of delivery. Mr. Gronlund said that is backed up by the

board's past decision, but he does not believe the board is bound by its past decision.

Mr. Naasz asked what investigation the Water Rights Program did regarding the amount of water needed by the applicant. Mr. Gronlund said he is not aware of any investigation on the amount of water needed by the applicant.

### Redirect

In response to a question from Ms. Mines Bailey, Mr. Gronlund stated that the applications that the Water Rights Program receives are signed under a penalty of perjury, so when an applicant makes a representation or makes a request for a certain amount of water, unless there is a red flag, it is not investigated.

In response to a question from Mr. Naasz, Mr. Gronlund said he recalls the testimony of Mr. LeBon regarding Water Permit Application No. 1991-1. In 2019 Mr. Gronlund sent an email to Mitch Kannenberg inquiring in about the amount of water requested in the application. Mr. Gronlund said it is his understanding that as a result of his inquiry the permitted amount of water was reduced.

In response to a question from Ms. Mines Bailey, Mr. Gronlund said the amount of water requested was 1.78 cubic feet of water per second, 800 gallons per minute, and the volume of water equated to about 87 percent of continual pumping. The Water Rights Program commonly implements a 60 percent general rule. Mr. Gronlund said the email reflects that he was questioning whether that was really the amount needed. Based on that, the Black Hawk Water User District changed the amount requested. The email also discussed the past water use of Black Hawk Water User District as being between 600 and 650 gallons per minute.

Ms. Mines Bailey asked Mr. Gronlund if there was anything about the volume requested in South Dakota Ellsworth Development Authority's application that raised a red flag. Mr. Gronlund said when he was dealing with the consultant for Black Hawk Water User District, they had existing permits and reporting requirements that he was able to base that off of. Since this was a new application, he did not have that information for the Ellsworth Development Authority application.

Mr. Gronlund stated that there is a licensing process. The applicant obtains a water permit that authorizes the permit holder to construct and start using the water. There are construction timeframes associated with that. When the project is completed or the time to complete construction of works is up, there is a state investigation or inspection, which is verification that system is constructed and the extent that it constructed. Based on that, the water license is issued for that amount.

Ms. Mines Bailey asked Mr. Gronlund what the Water Rights Program advises applicants when they are completing an application with regard to the volume of water they are requesting for a new use. Mr. Gronlund said it is standard practice regardless of the type of use staff tells the applicant if they apply for a greater amount, it is handled at licensing where the volume is reduced to the amount that is developed.

In response to a question from Mr. Erlandson, Mr. Gronlund stated that his recommendation is to grant Water Permit No. 2016-1 for the amount of water that was requested. Nothing he heard during the hearing has changed his recommendation.

Mr. Comes said the Water Rights Program issues a license for the amount that the developed water works or infrastructure can handle, but is the water right also reduced to the licensed amount or is the water right still granted for the original application amount. Mr. Gronlund said a water permit is initially issued. The water permit authorizes the permit holder to construct and start using the water. At the time of licensing, after the state has verified the system is constructed and the extent it is constructed, the permit holder is issued a water license, which now becomes the permit holder's water right and quantifies the amount of water the permit holder is entitled to.

Mr. Naasz recalled Mr. LeBon and asked what his concerns are regarding this project globally as the manager of Black Hawk Water User District. Mr. LeBon stated that one of his main concerns is that where the wells and water lines are proposed to be located is within Black Hawk Water User District. Those would be Black Hawk Water User District's customers and that is revenue that will be taken away. Black Hawk Water User District has spent a lot of money in that area developing the future use map and planning for that area. The last well Black Hawk Water User District installed was to ensure there would be enough water for the future, and now it will be taken away. Black Hawk Water User District has a future use permit, a new well and a \$3.8 million loan and now the growth of the water user district will be stunted from this new well in the future use area. The only way Black Hawk Water User District can grow is to the east.

Mr. Erlandson asked if it is correct that when Mr. LeBon was in negotiations with his client he was given options that would specifically address future growth and Black Hawk Water User District customers. Mr. LeBon answered that is correct, but he was also given the option that if Black Hawk Water User District didn't agree to what Mr. Erlandson's client was saying to them, the well would be moved to Haines Avenue. Mr. Erlandson said he disagreed with Mr. LeBon's characterization of that but said Black Hawk Water User District has had many opportunities to try to come to an agreement and ultimately they were not able to agree.

Mr. Naasz had no other witnesses.

The parties offered closing statements.

Vice Chairman Hutmacher requested board action.

Mr. Bjork said this application makes him a little uneasy. One of the things the board has not discussed is regionalization. Water is becoming a very precious commodity so we should be looking at how to share the water rather than compete. Mr. Bjork said we have to start being a little bit more frugal, which leads to the fact that the board is being asked for 1,600 acre-feet of water to solve a much smaller problem that does not require that amount of water. The applicant is proposing a huge infrastructure system to move that water 10 to 15 miles to solve that problem. He said it seems that the applicant is applying for a lot more water than what is needed to solve the problem, and he is concerned with waste and the competition amongst several small, fractured water systems.

Mr. Holzbauer said he agrees with Mr. Bjork. He said he has a problem with the principal of it because other people in the state might need to use the other 600 gallons per minute, so he is a little leery about approving this water permit at the requested volume.

Motion by Larson, seconded by Comes, to approve Water Permit Application No. 2016-1, South Dakota Ellsworth Development Authority subject to the qualifications of the Chief Engineer.

Mr. Comes said he empathizes with Mr. Bjork, and he believes regionalization is the future. He believes the Chief Engineer has made a recommendation consistent with the statutes.

Mr. Holzbauer said he disagrees with the way Ellsworth Development Authority went after that amount of water, but he is not in disagreement with the need for the use of that water.

Ms. Dixon said she is trying to reconcile in her mind the importance of Ellsworth Air Force Base and the amount of water requested by Ellsworth Development Authority.

Vice Chairman Hutmacher said he sees this as a turf battle and he is hopeful that the parties could settle this, but that is not for the Water Management Board to address. The board is obligated by statute to approve the permit if the water is available, and it may be too much water, but the amount will be adjusted during licensing. He said he does not believe the board has a choice because the availability has been proven.

A roll call vote was taken, and the motion carried with Comes, Dixon, Holzbauer, Larson, and Hutmacher voting aye. Bjork voted no.

Ms. Mines Bailey will prepare proposed Findings of Fact, Conclusions of Law and Final Decision by November 10. Objections and alternative Findings of Fact and Conclusions of Law are due by November 21.

NEXT MEETING DATE: Motion by Comes, seconded by Holzbauer, to hold the next board meeting November 30, 2022, and December 1, 2022, in Pierre. Motion carried.

ADJOURN: Vice Chairman Hutmacher declared the meeting adjourned at 2:45 p.m.

A court reporter was present for the hearings and a transcript of the proceedings may be obtained by contacting Carla Bachand, PO Box 903, Pierre, SD 57501, phone number (605) 224-7611, or email [pcbachand@pie.midco.net](mailto:pcbachand@pie.midco.net).

Approved December 7, 2022.

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Water Management Board

ATTENDANCE SHEET  
WATER MANAGEMENT BOARD

Date: Oct. 5, 2002

NAME (PLEASE PRINT)	MAILING ADDRESS	CITY, STATE & ZIP	ITEM OF INTEREST
Ken LeBon	PO Box 476	Black Hawk SD 57718	
Matt Naanz	PO Box 3045	Rapid City SD 57702	SOEDA
Glen Kane	PO Box 477	Rapid City SD 57702	SOEDA
Gregy Eclandson	333 W Blvd	" "	" "
JOHN WEISTEIN	P.O. Box 2022	CARMIER WY 82073	" "
Brian Bamber	29605 314th Ave	Winnier SD	
Brian Peterson	7512 Redridge Drive	Black Hawk	BHWD
Tom Namer	P.O. Box 767	Black Hawk	BAWD
Mitewisgram	114 Post Charlotte F	Fort Pierre	oversight
Mary Duvall	Box 453	Pierre	"
Samuel Lindburg	205 Hyde Road	Pierre	SO DANR
Andrew Fox	DANR	Pierre	SO DANR

# WATER MANAGEMENT BOARD MEETING

## October 5, 2022

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

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

No.	Name	Address	County	Amount	Use	Source	Qualifications
2019-1	Poss Ranch Inc	Sturgis	MD	2.0 cfs	65 acres	Belle Fourche River	lf, iq, 1 special
2020-1	Bear Butte Valley Water Inc	Sturgis	MD	1.40 cfs	rws	1 well-Madison Aquifer	wi, wcr, 3 special
2021-1	Riverview LLP	Morris MN	CN	0.50 cfs	commercial	5 wells-Fox Hills Aquifer	wi, wcr, 4 special
2848-2	Rapid Valley Sanitary Dist.	Rapid City	PE	1.56 cfs	rws	1 well-Madison Aquifer	wi, wcr, 3 special
2849-2	Tripp Co Water User Dist.	Winner	TR	4,000 AF	rws-future use	Ogallala Aquifer	3 special
3178B-3	Mark LaBrie	Frankfort	SP	no add'l	no add'l	2 wells-Tulare East James	wi, iq, 1 special
8521A-3	Terry Brandenburg	Clear Lake	DU	no add'l	no add'l	Lake Alice	iq, 4 special
	Legacy Trust						
8626-3	Tri-Cross Renewable Energy LLC	Viborg	TU	0.10 cfs	commercial	1 well-Niobrara Aquifer	wi, wcr, 2 special
8630-3	Margaret A Dailey	Jefferson	UN	1.33 cfs	54 acres	1 well-Missouri:Elk Point	wi, wcr, iq, 1 special
8635-3	Big Watt Digital SD LLC	Humacao PR	SU	0.67 cfs	commercial	1 well-Inyan Kara Aquifer	wi, wcr, 2 special
8636-3	Arnie Beisch	Waubay	RB	no add'l	15 acres	2 wells-Coteau Lakes	wi, iq, 1 special
8637-3	Wilde Air Service LLC	Volga	KG	0.056 cfs	commercial	1 well-Vermillion East Fork	wi, wcr, 2 special
8638-3	Darrel or Karen Jongeling	Brookings	HM	1.11 cfs	120 acres	1 well-Big Sioux Brookings	wi, wcr, iq
8639-3	James Bondesen	Hurley	TU	2.0 cfs	no add'l	2 wells-Upper Vermillion Miss	wi, wcr, iq, 1 special
8640-3	City of Volga	Volga	BG	1.11 cfs	municipal	2 wells-Big Sioux:Brookings	wi, wcr, 2 special
8641-3	Derrick Skogsberg	Benbrook TX	UN	1.78 cfs	160 acres	1 well-Lower Vermillion Miss	wi, wcr, iq
8642-3	John & Melissa Schutte	Canton	LN	no add'l	16.5 acres	Big Sioux River	lf, iq, 1 special
8643-3	Blumengard Httm Brth	Faulton	FA/ED	4.21 cfs	295 acres	runoff – Hamak Dam	lf, iq, 1 special
8644-3	Riverview LLP	Morris MN	HM	120 AF	commercial	3 wells-Altamont	wi, 4 special
8645-3	Poinsett Httm Brth	Estelline	HM	1.78 cfs	136 acres	1 well-Big Sioux:Brookings	wi, iq
8646-3	Residence Parcel Trust	Sioux Falls	MA	18.56 AF	rec, fwp	runoff-unnamed tributary	lf, 1 special
8653-3	Pleasant Dutch Dairy LLP	Willow Lake	CK	5.57 cfs	commercial	wetland	none
8655-3	By Lane Well	Yankton	YA	1.60 cfs	67 acres	1 well-Lower James Missouri	wi, wcr, iq, 1 special