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MINUTES OF THE 225th MEETING OF THE
WATER MANAGEMENT BOARD
REMOTE MEETING VIA AUDIO/VISUAL CONFERENCE

JUNE 11, 2020

CALL TO ORDER: Chairman Hutmacher called the meeting to order at 9:00 a.m. Central Time. The roll was called, and a quorum was present.

Chairman Hutmacher announced that the meeting was streaming live on SD.net, a service of South Dakota Public Broadcasting.

The following were present:

Water Management Board Members: Jim Hutmacher, Leo Holzbauer, Peggy Dixon, Rodney Freeman, Chad Comes, and Bill Larson. Tim Bjork was absent.

Department of Environment and Natural Resources (DENR): Eric Gronlund and Ron Duvall, Water Rights Program.

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

Others: Bruce Ellison, attorney for petitioners, Dakota Rural Action; Dusty Ginsbach, attorney for the town of Buffalo; Lon Buehner, petitioner in R & J, LLC matter, Robert Wendt, R & J LLC, Michael Hickey, attorney for R & J, LLC; Kari Bartling, attorney for petitioners in Schley Farms and Schley Realty matter; John Taylor, attorney for Schley Farms and Schley Realty.

ADOPT FINAL AGENDA: Motion by Freeman, seconded by Dixon, to adopt the agenda. A roll call vote was taken, and the motion carried with Comes, Freeman, Holzbauer, Dixon, and Hutmacher voting aye.

CONFLICT DISCLOSURES AND REQUEST FOR STATE BOARD WAIVERS: None.

STATUS AND REVIEW OF WATER RIGHTS LITIGATION: David McVey stated that there are no current or pending lawsuits involving the Water Management Board.

PUBLIC COMMENT PERIOD IN ACCORDANCE WITH SDCL 1-25-1: None.

DISCUSS CONDUCTING JULY 8-10, 2020, MEETING AND LOCATION: Ron Duvall stated that the meeting is scheduled for July 8-10, 2020, in the Matthew Training Center in Pierre. The Matthew Training Center in the Foss Building been remodeled and is ready to use.

Mr. Duvall requested discussion on whether the meeting will be conducted remotely or if a quorum of the board members would be present in the Training Center.

Ann Mines Bailey, Water Rights Program counsel, stated DENR staff had given her a demonstration on the video conferencing equipment in the Training Center. There seemed to be a very clear connection. The equipment had the ability that those board members who are remote would be visible to the people in the meeting room. However, the technology is not available to have a witness and exhibits visible at all times. Ms. Mines Bailey stated she felt it would be a workable solution if the attorneys and witnesses are in the same location. The hearing would be set up so that when a witness is testifying, they would always be visible to the board members. The board members would always be visible to the individuals attending in the Training Center.

David McVey, counsel for the board stated he is fairly comfortable with that format, although his biggest concern is having witnesses, counsel, and a member of the board present to review and admit evidence.

Discussion took place regarding possible methods to access exhibits for board members participating remotely.

Hearing Chairman Freeman said the board members should be prohibited from looking at the exhibits until they are offered and accepted into evidence.

Chairman Hutmacher asked how many board members plan to be present at the meeting in Pierre. Freeman, Dixon, Holzbauer, and Hutmacher indicated that they plan to attend in person. Mr. Comes said he is unsure at this time whether he will be able to attend in person or remotely.

Bill Larson joined the meeting at this time. He stated that he plans to attend the meeting in person.

Chairman Hutmacher stated that since Tim Bjork will not attend in person, and a quorum of the board will be present in person, there should not be a problem with board members viewing the exhibits.

Bruce Ellison objected to all board members not being present in person. He said if exhibits are being made available to a witness, the people participating remotely can only see the exhibits, and they can't see the demeanor of the witness, which creates a serious due process question.

Mr. Ellison objected to holding the hearing July 8-10 because it's too close to the predicted peak time period of Covid-19. He requested, on behalf of Dakota Rural Action, that if the board does hold the hearing, that it be held in a facility with good air circulation and ventilation, that all participants be given the 15-minute rapid test for Covid-19 before the hearing begins, and that there be constant cleaning of all surfaces in the room throughout the hearing.

Mr. Ellison stated he has never heard the town of Buffalo say they need to get this permit approved immediately. He said the board should not be taking the risk of holding the hearing in July.

Lon Buehner, petitioner in opposition of the R & J, LLC application, agreed with Mr. Ellison. He stated that both he and his wife are in the high risk category if contracting Covid-19, but he would be willing to appear remotely.

Mr. McVey stated that, as previously suggested, any attorney or intervenor that will be entering evidence into the record should be present at the hearing in person.

John Taylor, attorney for Schley Farms and Schley Realty stated that he is also considered high risk, but he and his clients are happy to appear anytime and anywhere.

Chairman Hutmacher requested discussion on how the hearings will be set up.

Mr. Duvall stated that the notice to the parties for all three hearings stated that Schley would be scheduled to begin at 8:30 a.m. on Wednesday, July 8, R & J, LLC at 1:00 p.m. on Wednesday, July 8, and the town of Buffalo at 8:30 a.m. on Thursday, July 9 and continuing into Friday July 10, if necessary.

Mr. Duvall stated the intention is to limit the number people who are in the room at one time, so only the parties involved in each specific case will be allowed in the Training Center during the time of their hearing. Staff will attempt to arrange for a different location in the Foss Building for people who are waiting for their specific hearing to begin.

Chairman Hutmacher commented that this is probably the only way to limit the occupancy rate in the room.

Mr. Ellison stated he does not understand what the rush to hold the hearings is. He said he has not heard from any of the parties that it is dire to hold the hearings next month as opposed to a later date when it might be safer.

Ms. Mines Baily stated that while the Water Rights Program is ready to go with all three cases, they do not object if the board decided to hear the Schley matter in July and the other two matters later.

Mr. Hickey said he would have no objections to proceeding in that manner.

Ms. Bartling stated that the petitioners in the Schley matter would prefer to begin the hearing in the afternoon rather than the morning because of the three-hour drive to Pierre.

Mr. Wendt representing R & J LLC stated he would prefer that the hearing to take place sooner rather than later so they can take advantage of the construction season.

Mr. Freeman stated that the board should proceed with holding the three hearings on July 8-10.

Chairman Hutmacher agreed that the board should hold the hearings as noticed.

Mr. Ellison stated he objected because of the health risks.

Mr. Ginsbach stated that if the hearing continues to be pushed further down the road in the way that the intervenors want, the hearing will never be held.

Mr. Buehner requested the board wait a month to hold the R & J LLC hearing.

Mr. Wendt again stated he would like the hearing for R & J LLC to be held as soon as possible.

Motion by Freeman, seconded by Holzbauer, to hold the hearings as originally noticed to the parties with Schley Farms and Schley Realtors at 8:30 a.m. on July 8, 2020; R & J, LLC at 1:00 p.m. on July 8, 2020; and the town of Buffalo at 8:30 a.m. on July 9, 2020 and possibly July 10, 2020, if needed. A roll call vote was taken, and the motion carried unanimously.

Mr. Ellison stated that a large factor on whether or not he will be able to attend will be the state providing the 15-minute rapid Covid-19 testing for everyone before the hearings begin.

Chairman Hutmacher said staff will check into whether the test will be available.

Mr. Freeman and Mr. McVey will prepare a prehearing order regarding when exhibits need to be submitted and requesting that all of the parties provide the department with the number of people that will attend each hearing.

ADJOURN: Motion by Freeman, seconded by Larson, to adjourn. A roll call vote was taken, and the motion carried unanimously.

Approved the 8th day of July 2020.

Water Management Board