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June 24, 2021

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RE: Water Right Application No. 2814-2, Big Mtn. Cabins / Jude Wildeman

Proposed Findings of Fact, Conclusions of Law, and Final Decision Suggested Revisions

Regarding Item 19 I recommend adding the following:

Mr. Buehner testified that a comparison of the DANR public water system and DANR water rights databases indicates Big Mountain Cabins, Cosmos Mystery Area, Gaslight Restaurant, Rockerville Gold Nugget Lodge, Rockerville Motel and Cabins, and Rustic Ridge Guest Cabins are commercial entities with a public water system but no water right. Rockerville Park, Rockerville Gold Town, Pine Haven Heritage Home, and Rockerville Trading Post are commercial entities that have a water right but have no public water system. Silver Mountain Cabins is a commercial entity with no public water system and no water right. Mr. Buehner also testified Hillside Country Cabins is a commercial entity that is likely to be exceeding their 2 GPM allocated water volume since it is serving 18 cabins and log homes.

I also question the reasoning behind item 5 and recommend it's removal. I do not believe it is appropriate to utilize the water permit transfer form to transfer an application for a water right. In doing so, you essentially transferred a nonexistent water right from one entity to another. Is not the intent of the water permit transfer form to transfer existing water rights due to ownership changes, etc.? I would think if Big Mountain Cabins LLC owns the commercial entity, the water right needs to be assigned to Big Mountain Cabins LLC versus Jude Wildeman. In any case, I believe it is prudent for the SD Water Management Board to reassess if it is appropriate to use the water right transfer form to transfer a nonexistent water right in order to change an application from an LLC to an individual.

Thank you for your consideration regarding the above recommendations.

Sincerely,



Lon Buehner

STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF WATER)	FINDINGS OF FACT,
APPLICATION NO. 2814-2, BIG)	CONCLUSIONS OF LAW, AND
MOUNTAIN CABINS/JUDE)	FINAL DECISION
WILDEMAN)	

This matter came before the South Dakota Water Management Board for hearing on May 5, 2021. Board members James Hutmacher, Tim Bjork, Rodney Freeman, Peggy Dixon, Leo Holzbauer, and Bill Larson were present at the hearing and heard the evidence presented. Applicant Jude Wildeman and Intervenor Lon Buehner appeared *pro se*. Ann F. Mines Bailey represented the DANR Water Rights Program and the Chief Engineer.

The Board, having considered the testimony and exhibits presented and all records and documents on file and having entered its oral decision and rulings on the parties' submissions, now enters the following:

FINDINGS OF FACT

1. On November 16, 2020, Water Rights received Water Permit Application No. 2814-2 on behalf of Big Mountain Cabins seeking an appropriation of water for commercial use for cabin rentals near Rockerville, SD. The application proposes the diversion of less than 2 acre-feet of water annually with an instantaneous diversion rate of 0.067 cubic feet of water per second (cfs) from an existing well completed into the Crystalline Rock aquifer in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 22-T1S-R6E in Pennington County.

2. The Chief Engineer, Eric Gronlund, recommended approval of the application subject to the permit including three qualifications. Those qualifications are as follows:

- A. The well approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this Permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.
- B. The permit holder shall report to the Chief Engineer annually the amount of water withdrawn from the Crystalline Rock aquifer.
- C. Water Permit No. 2814-2 authorizes a total annual diversion of less than 2.0 acre-feet of water.

3. Notice of the application was timely advertised on January 29, 2021, in the Rapid City Journal (Pennington County).

4. DENR received a timely petition to intervene from Lon Buehner.

5. On February 18, 2021, the application was transferred from Big Mountain Cabins to Jude Wildeman.

6. The matter was initially scheduled to be heard by the Water Management Board during its March 4, 2021 meeting; however, an automatic delay was requested and the hearing was rescheduled for the next regular Board meeting in May.

7. Water Permit Application No. 2814-2 is a new water permit application which requires a determination pursuant to SDCL § 43-2A-9 that there is a reasonable probability unappropriated water is available for the proposed use, whether the use would impair existing rights, whether the use

would be a beneficial use, and whether the proposed use is in the public interest.

8. In considering water availability this Board must examine whether the average quantity of the water withdrawn annually from the groundwater source would exceed the quantity of the average estimated annual recharge of water to the groundwater source if this permit was granted.

9. DENR witness, Adam Mathiowetz, a natural resources engineer, reviewed the permit application, analyzed the hydrology of the Crystalline Rock aquifer, and reviewed the information obtained from an observation well completed into the Crystalline Rock aquifer, as well as current water right/permit files and well completion reports for the aquifer.

10. In this area, the Crystalline Rock aquifer consists of metaconglomerate, quartzite, metapelite, and metagraywacke. The aquifer has very low primary porosity. Water movement in the aquifer occurs through its secondary porosity which consists of fractures, joints, and faults within the aquifer material. This secondary porosity is very uneven and unpredictable. The aquifer is estimated to contain approximately 2,900,000 acre-feet of recoverable water in storage in western South Dakota.

11. When determining the availability of unappropriated water and the potential for unlawful impairment, the Crystalline Rock aquifer must be examined within a more localized area rather than as a whole due to these aquifer characteristics.

12. Mr. Mathiowetz testified recharge to the Crystalline Rock aquifer occurs mainly through infiltration of precipitation and streamflow losses.

13. There are no average annual recharge estimates available for the localized portion of the Crystalline Rock aquifer in which the proposed diversion is sought. However, the best information available is a report analyzing the different water sources within the Black Hills. The authors of that study concluded that recharge to the Crystalline Rock aquifer must be *much greater* than 3600 acre-feet.

14. There are two observation wells completed into the Crystalline Rock aquifer. One of the wells is believed to be open to both the Deadwood Formation and the Crystalline Rock aquifer and, therefore, was not relied upon when reviewing this application. The other observation well, CU-86A, is located approximately 15.2 miles southwest of the proposed diversion point. The data from this observation well demonstrates that the aquifer responds to climatic trends, recharging during wet periods and declining during dry periods. The observation well data demonstrates that the aquifer can receive recharge and that the effects from pumping are temporal and are masked by climatic conditions.

15. Mr. Mathiowetz testified that in reviewing the pertinent information, he concluded that the localized portion of the Crystalline Rock aquifer in which this diversion is sought is limited by larger faults and significant geologic features which have been mapped to some extent.

16. Within this localized area, there is one existing water right in the Crystalline Rock aquifer located approximately 750 feet to the south of the proposed diversion point. Additionally, there are up to 8 domestic wells within the vicinity.

17. Mr. Mathiowetz concluded that based upon the observation well data that demonstrates the aquifer receives recharge, the relatively limited use in the localized area, and that the proposed diversion point has been in use for some time without issue, there is a reasonable probability that unappropriated water is available.

18. Mr. Mathiowetz further concluded that based upon the limited diversion rate and volume requested and minimal history of well interference in that area, there is a reasonable probability that the proposed diversion would not result in an unlawful impairment of existing rights.

19. The Board finds Mr. Mathiowetz to be a credible expert witness and that these Findings of Fact are supported by the evidence presented including Mr. Mathiowetz's testimony and the reports and exhibits upon which he prepared and/or relied.

20. The Board also received the testimony of Chief Engineer Eric Gronlund. Mr. Gronlund testified that he had contacted Big Mountain Cabins, owned and operated by Mr. Wildeman, upon direction of the Board after Mr. Buehner had suggested in a prior proceeding that Big Mountain Cabins did not have a permit. Based upon that contact, Big Mountain Cabins submitted this application. Mr. Gronlund testified that based upon his review of the report

and the best information available, he recommended approval of the application. He further testified that he believed the proposed diversion to be a beneficial use and in the public interest consistent with the Board's previous decisions.

21. Mr. Gronlund further testified that the Water Rights Program is aware that there are entities operating without a permit and that the goal is to bring them into compliance. To that end, contact is being made with those entities believed to be operating without a permit.

22. The Board finds Chief Engineer Gronlund to be a credible expert witness and that these Findings of Fact are supported by the evidence presented including Chief Engineer Gronlund's testimony.

23. Lon Buehner also testified before the Board. Mr. Buehner testified that he lives in the Rockerville area. Mr. Buehner expressed concerns regarding a number of issues regarding water rights in that area. Mr. Buehner further expressed concerns that the report by Water Rights is incomplete because it does not account for those entities which are operating without a permit. In particular, Mr. Buehner expressed concerns regarding inspections and urged that periodic inspections be required. Additionally, Mr. Buehner urged the theory that the septic volumes that are permitted should act as a limitation for the water volumes permitted and suggested that a qualification should be added to that effect. Mr. Buehner additionally expressed concerns that the approval of this application would be a detriment to those commercial entities currently operating without a permit.

24. The Board finds that there is unappropriated water available to satisfy this application.

25. The Board finds that granting this application would not unlawfully impair existing water rights.

26. The Board further finds that the proposed use of the water for commercial use for cabin rentals constitutes a beneficial use.

27. The Board further finds that placing the water to this beneficial use is in the public interest.

28. Any finding of fact more properly designated as a conclusion of law shall be treated as such.

Based on the foregoing Findings of Fact, the Board makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter. The present application falls within the Board's responsibility over water appropriation and regulation in Title 46.

2. Publication was properly made, and the Notice of Hearing was properly issued pursuant to SDCL § 46-2A-4.

3. The Chief Engineer recommended granting this application. This recommendation is not, however, binding on the Board. SDCL § 46-2A-4(8).

4. The applicant is required to satisfy each of the factors set forth in SDCL § 46-2A-9.

5. The Board concludes that the applicant has satisfied each of the factors set forth in SDCL § 46-2A-9.

6. South Dakota Codified Law, section 46-2A-9 provides that a permit to appropriate water may be issued “only if there is reasonable probability that there is unappropriated water available for the applicant's proposed use, that the proposed diversion can be developed without unlawful impairment of existing rights and that the proposed use is a beneficial use and in the public interest.” Each of these factors must be met and the permit must be denied if the applicant does not meet its burden of proof on any one of them.

7. The first factor for consideration under SDCL § 46-2A-9 is whether there is water available for the appropriation. Determination of water availability includes consideration of the criteria in SDCL § 46-6-3.1 pertaining to recharge/withdrawal: whether “according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from a groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source.”

8. The Board concludes there is a reasonable probability that there is unappropriated water available to fulfill the amount requested by the application.

9. The Board further concludes that it is not probable that withdrawals from the aquifer would exceed recharge to the aquifer in violation of SDCL § 46-6-3.1 if this application is granted.

10. The second requirement of SDCL § 46-2A-9 is that the proposed water use may not unlawfully impair existing water rights. The proposed diversion can be developed without unlawful impairment of existing water rights.

11. The third element in SDCL § 46-2A-9 is whether the use of water would be a beneficial use: one that is reasonable and useful and beneficial to the appropriator and also consistent with the interest of the public in the best utilization of water supplies under SDCL § 46-1-6(3). The proposed use (commercial) is a beneficial use.

12. The fourth requirement of SDCL § 46-2A-9 concerns the public interest. The proposed use of the water must be “consistent with the interests of the public of this state in the best utilization of water supplies.” SDCL § 6-1-6(3). The Board concludes that appropriating water for this commercial use is in the public interest.

13. Any conclusion of law more properly designated as a finding of fact shall be treated as such.

FINAL DECISION

Water Rights filed complete Proposed Findings of Fact and Conclusions of Law and Decision and the Intervenor, Lon Buehner, filed an objection and requested an amendment to Findings of Fact Paragraph 19 (now Paragraph 23) and further requested that Findings of Fact Paragraph 5 be deleted in its entirety. In compliance with SDCL § 1-26-25, the Proposed Findings of Fact and Conclusions of Law are accepted, modified, or rejected as follows:

- A. Intervenor's request to amend Findings of Fact Paragraph 19 (now Paragraph 23) is denied.
- B. Intervenor's request to delete Finding of Facts Paragraph 5 in its entirety is denied.

Based on the foregoing Findings of Fact and Conclusions of Law, the Board enters its determination that Water Permit Application No. 2814-2 is **GRANTED** with the following qualifications:

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

2. The permit holder shall report to the Chief Engineer annually the amount of water withdrawn from the Crystalline Rock aquifer.

3. Water Permit No. 2814-2 authorizes a total annual diversion of less than 2.0 acre-feet of water.

Dated this 7th day of July, 2021.

BY THE BOARD:

South Dakota Water Management Board
Jim Hutmacher, Chairman