

The audio recording for this meeting is available on the South Dakota Boards and Commissions Portal at <https://boardsandcommissions.sd.gov/Meetings.aspx?BoardID=106>

MINUTES OF THE 230TH MEETING OF THE
WATER MANAGEMENT BOARD
FLOYD MATTHEW TRAINING CENTER
523 EAST CAPITOL AVENUE
PIERRE, SOUTH DAKOTA

MAY 5, 2021

CALL TO ORDER: Chairman Jim Hutmacher called the meeting to order at 9:30 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 for the meeting:

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

Department of Agriculture and Natural Resources (DANR): Eric Gronlund, Chief Engineer, Ron Duvall, Genny McMath, and Adam Mathiowetz, Water Rights Program; Jeanne Goodman, DANR Deputy Secretary/Director, Office of Water; Brian Walsh, Public Affairs Director; Kelli Buscher, Shannon Minerich, and Patrick Snyder, Surface Water Quality 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.

Consider rescission of suspension of Water Right No. 6168-3, Todd Hattum: Bill Van Camp, counsel for Todd Hattum.

Findings of Fact, Conclusions of Law, and Final Decision in the matter of Water Permit Application No. 2813-2, Mineral Mountain Resources (SD) Inc.: Matthew Naasz, counsel for Mineral Mountain Resources (SD), Inc., and Liliias Jarding, Rapid City.

Powertech (USA) Inc. Status Conference concerning Water Permit Application No. 2685-2 and 2686-2 and GWD 1-13: Matt Naasz and Rich Williams, counsel for Powertech; DeAnn McComb and Joe Allen, Hot Springs; Bruce Ellison, Carla Marshall, Liliias Jarding, and Gena Parkhurst, Rapid City.

Water Permit Application No. 2814-2, Jude Wildeman/Big Mountain Cabins: Jude Wildeman, and Lon Buehner, Rapid City.

Recommendation to Department Secretary to approve applications for renewal of the ground water discharge plans for Wharf Resources' Reliance Spent Ore Depository (GWD 1-94) and Juno Foley Spent Ore Depository (CWD 1-98): Dwight Gubbrud, counsel for Wharf Resources.

Court Reporter: Carla Bachand, Capital Reporting Services.

Other: Bob Mercer, Keloland News

ADOPT FINAL AGENDA: Motion by Freeman, seconded by Holzbauer, to adopt the final agenda. Motion carried unanimously.

CONFLICT DISCLOSURES AND REQUESTS FOR STATE BOARD WAIVERS: None.

ADOPT MARCH 3, 2021, BOARD MINUTES: Motion by Bjork, seconded by Freeman, to approve the minutes of the March 3, 2021, Water Management Board meeting. A roll call vote was taken, and the motion carried unanimously.

STATUS AND REVIEW OF WATER RIGHTS LITIGATION: None.

UPDATE ON DANR ACTIVITIES: Eric Gronlund reported that Bill O'Connor, a natural resources technician with the Water Rights Program, has passed away.

Brian Walsh, DANR public affairs director, provided an overview on the status of the merger of the Department of Agriculture and the Department of Environment and Natural Resources.

Mr. Walsh reported that the process began in August 2020 when Governor Noem announced her plan to merge the two agencies. In September 2020, DENR Secretary Hunter Roberts was appointed as the interim secretary for the Department of Agriculture, and he has been leading both agencies since.

On January 9, 2021, the Governor issued an Executive Order that officially reorganized the two agencies into the Department of Agriculture and Natural Resources. The Executive Order took effect 90 days after it was issued. It did not require legislative approval; however, the legislature had the opportunity through a Resolution of Disapproval, if they chose to do so, to reject the reorganization. Mr. Walsh noted that such an attempt was made, but it failed on the Senate floor, which cleared the way for the merger to proceed.

On April 19, 2021, the Department of Agriculture and Natural Resources officially began serving South Dakota. The department's mission is to protect and preserve South Dakota's agriculture, environment, and natural resources through effective regulatory services, natural resource conservation, and financial and technical assistance.

Mr. Walsh said it is important to note that no laws or regulations for either agency were changed as part of the merger, and DANR does not anticipate significant changes to the work that the Water Management Board does.

Mr. Walsh noted that Jeanne Goodman, DANR deputy secretary, is also the director of the DANR Office of Water, which includes the Drinking Water Program, the Surface Water Quality Program, and Water Rights Program. Other divisions in DANR are Agriculture and Environmental Services which includes Air Quality, Inspection, Compliance and Remediation, Livestock Services, Minerals and Mining and Waste Management; Finance and Technical Assistance, which includes

Environmental Funding and Geological Survey; and Resource Conservation and Forestry which includes Conservation, Forestry, Plant Industry, Watershed Protection, and Apiary, and the State Fair.

Mr. Walsh stated that the department is excited about the merger and is looking forward to working with the board. DANR believes that the merger puts the state in a strong position to protect the environment and natural resources.

Chairman Hutmacher asked if there are any changes with employee status or numbers. Mr. Walsh answered that there were five vacant positions between the two departments that were released after the merger, and all other positions were combined into DANR.

PUBLIC COMMENT PERIOD IN ACCORDANCE WITH SDCL 1-25-1: Gena Parkhurst, Rapid City, commented on the Powertech project.

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

REQUEST TO AMEND ARSD 74:51:01:11, PROTECTION OF WETLANDS AS WATERS OF THE STATE: Kelli Buscher reported that the Surface Water Quality Program is included in the DANR Office of Water. She stated that due to the merger, groundwater permitting activities are now within the Surface Water Quality Program. Ms. Buscher also noted the Patrick Snyder will be retiring on June 8, 2021. She introduced Shannon Minerich and Sean Kruger, who will be helping with some of the work that Mr. Snyder does.

Ms. Buscher noted that the rules the board approved at the December 2020 meeting received final approval from the Interim Rules Committee and were filed with the Secretary of State.

Ms. Buscher reported that EPA has been working on changes to the Waters of the U.S. definition. This is a provision in the federal Clean Water Act that basically determines which waters are regulated under that Act. The state has its own definition of Waters of the State, so those changes have not impacted the department's regulatory programs. Changes have been made through court cases, the Obama administration, and the Trump administration, and now President Biden is pulling back all those rule changes for further review. The Corps of Engineers is not requiring permits for some of the activities for which permits have been required in the past. Specifically, there are wetlands that people have been filling that no longer require a permit from the Corps of Engineers.

Ms. Buscher stated that the department's concern is that there is now a gap in protection. These wetlands are protected as Waters of the State, but there is no mitigation or other regulatory activities by the Corps of Engineers.

DANR is proposing to amend ARSD 74:51:01:11 to allow the state some authority to review a project that does not have a permit from the Corps of Engineers, and to require some mitigation and control measures to make sure there are not further water quality impacts.

Ms. Buscher requested permission to proceed with rulemaking activities and permission to advertise for a public hearing to consider amendments to ARSD 74:51:01:11.

Motion by Freeman, seconded by Dixon, to authorize DANR to proceed with rulemaking activities and to advertise for a public hearing to consider amendments to ARSD 74:51:01:11. A roll call vote was taken, and the motion carried unanimously.

CANCELLATION CONSIDERATIONS: Included in the board packet that the board received prior to the meeting was a table listing the proposed cancellations, the notices of cancellation, and the chief engineer's recommendations.

Mr. Duvall explained that the three reasons for cancellation, which are abandonment, forfeiture, and non-construction.

Seventeen water rights/permits were scheduled for cancellation. The owners were notified of the hearing, the reason for cancellation, and the chief engineer's recommendation. The department received no comments or letters in response to the notices of cancellation.

None of the right/permit holders were present at the meeting.

The following water rights/permits were recommended for cancellation for the reasons listed in the table.

NUMBER	ORIGINAL OWNER	PRESENT OWNER(S) & OTHER PERSONS NOTIFIED	REASON
DIVISION I WATER RIGHTS			
RT 1010-1	Donald & Ann Brady	Donald Brady	Abandonment/Forfeiture
PE 1933-1	Roy & Karin Schley & Roger Simon	Janet Burback, dba Tilton Ranch Inc	Non-Construction
DIVISION II WATER RIGHT			
RT 1262-2	Thomas Lebeda	Charles Lebeda	Abandonment
DIVISION III WATER PERMITS AND WATER RIGHTS			
RT 985-3	City of Yankton	Same (% Kyle Goodmanson)	Abandonment
RT 1673-3	Constance Templeton	Same	Abandonment/Forfeiture
RT 1696-3	Donald G Ahlers	Sharon Nelson, Adam Wiese	Abandonment/Forfeiture
RT 1978-3	City of Yankton	Same (% Kyle Goodmanson)	Abandonment
RT 3291B-3	Rocky Quam	Paul & Jonathan Edwards	Abandonment/Forfeiture
FU 3371-3	City of Yankton	Same (% Kyle Goodmanson)	Abandonment

RT 3504-3	Jon Parsons	Jon or Jay Parsons	Abandonment/Forfeiture
PE 6880A-3	Pheasant Crest Lodge Inc. % Brian Havlik	Same	Non-Construction
PE 6929-3	Marvin Post	Marvin & Joyce Post	Non-Construction
PE 7287-3	Bret Flihs	Same	Non-Construction
PE 7689-3	Nicholas Olson	Gary & Amy Freeburg dba Freeburg Limited Partnership	Non-Construction
PE 7777-3	Arlen Zomermaand	Same	Non-Construction
PE 7811-3	Charles Storm	Same	Non-Construction
PE 8219-3	Jack R Tolk	Same	Abandonment

Motion by Dixon, seconded by Bjork, to accept the chief engineer’s recommendation for cancellation of the seventeen water rights/permits for the reasons listed. A roll call vote was taken, and the motion carried unanimously.

FUTURE USE PERMIT SEVEN YEAR REVIEWS: Included in the packet the board members received prior to the meeting was a table listing one future use permit up for a seven-year review. State law requires future use permits to be reviewed by the Water Management Board every seven years, and it requires the permit holder to demonstrate a reasonable need for the future use permit.

Also included in the board packet was a letter submitted by the city of Mobridge requesting to retain the future use permit, the chief engineer’s recommendation, and the Affidavit of Publication showing that the hearing was public noticed.

No letters in opposition were received in response to the public notice.

The chief engineer recommended that Future Use Permit No. 4290-3 for the city of Mobridge be allowed to remain in effect for an additional seven years with 1,656 acre-feet of water in reserve.

Motion by Holzbauer, seconded by Bjork, to allow Future Use Permit No. 4290-3 for the city of Mobridge to remain in effect for an additional seven years with 1,656 acre-feet of water in reserve. A roll call vote was taken, and the motion carried unanimously.

CONSIDER RESCISSION OF SUSPENSION OF WATER RIGHT NO. 6168-3, TODD HATTUM: Bill Van Camp, attorney for Todd Hattum and the estate of Robert Hattum. Mr. Van Camp stated that Robert Hattum passed away in November 2020, and Todd Hattum was named personal representative by the court in Hughes County in December 2020. Todd Hattum became aware that the Water Right No. 6168-3 was suspended by the Water Management Board in early 2020 because Robert Hattum had not completed the necessary paperwork to maintain the permit. Todd Hattum intends to transfer the interest in the rights in the property that utilized the water permit as part of the estate process. Mr. Van Camp requested that the suspension on the water right be lifted so Todd Hattum can proceed with irrigating the property as was done in the past by his father. Mr. Van Camp stated that Todd Hattum is aware that he must comply with the requirements of statutes and rules regarding the permit, and he has pledged to do so. Mr. Van Camp requested that the Water Management Board lift the suspension of the water right.

In response to a question from Mr. Holzbauer, Mr. Van Camp stated that over the years Robert Hattum had a history of not returning the annual irrigation questionnaires.

Motion by Bjork, seconded by Holzbauer, to rescind suspension of Water Right No. 6168-3, Todd Hattum.

Mr. Freeman stated that he believes in second chances, but Mr. Van Camp should remind his client that he needs to submit the paperwork to the department. Mr. Van Camp stated that Todd Hattum has discovered that, since his father passed, there are several things that need to be taken care of, with this being one of them.

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. 2813-2, MINERAL MOUNTAIN RESOURCES (SD) INC.: Mr. McVey stated that the board held a hearing and approved Water Permit Application No. 2813-2 on March 3, 2021.

Proposed Findings of Fact, Conclusions of Law, and Final Decision were submitted by Ann Mines Bailey on behalf of the Water Rights Program. The applicant filed objections to the proposed Findings of Fact and Conclusions of Law and requested board adopt the Findings of Fact and Conclusions of law with the following additional Findings of Fact:

The board finds that there is a reasonable probability that there is unappropriated water available to fulfill the amount requested by the application.

Mr. McVey stated that applicant's additional Finding of Fact was incorporated into the final Findings of Fact, Conclusions of Law, and Final Decision, and based on the Findings of Fact and Conclusions of Law, the board will enter its determination that Water Permit Application No. 2813-2 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. 2813-2 authorizes a total annual diversion of 3.68 acre-feet of water for exploratory drilling.

Motion by Freeman, seconded by Bjork, to adopt the Findings of Fact, Conclusions of Law, and Final Decision with the addition of Finding No 26 regarding the reasonable probability that there is unappropriated water available in the matter of Water Permit Application No. 2813-2, Mineral Mountain Resources (SD) Inc. A roll call vote was taken, and the motion carried unanimously.

POWERTECH (USA) INC. STATUS CONFERENCE CONCERNING WATER PERMIT APPLICATION NOS. 2685-2 AND 2686-2 AND GWD 1-13: Matt Naasz, attorney for Powertech (USA) Inc. stated that Powertech intends to proceed with the water permit applications and the Groundwater Discharge Plan for Powertech (USA), Inc.

Mr. Naasz stated that in 2013, the Water Management Board granted Powertech's motion to continue these matters pending review by the Nuclear Regulatory Committee (NRC) and the Environmental Protection Agency (EPA). Since that time and recently, the NRC and EPA have issued permits and made determinations of financial assurance regarding Powertech's application before those federal agencies. Those permits are currently working their way through appeals process. The issuance of those permits effectuates the goal of Powertech's motion to continue, which was to narrow the issues before the board. Because those permits have been issued, Powertech intends to move forward with the state permitting process. Mr. Naasz said he and Mr. Williams intend to file a motion for a scheduling order, which would provide dates for reestablishing the proceedings before the Water Management Board. The motion for a scheduling order will be filed with the prehearing chair Freeman. Mr. Naasz said he also intends to file a motion for a scheduling order with the Class A intervenors, which are the intervenors that elected to fully participate in the contested case and received notice of the board's order granting the continuance in 2013.

Mr. Naasz asked if the board has any guidance regarding filing the motion for a scheduling order.

Mr. McVey suggested that all the intervenors should be served, rather than only the Class A intervenors.

Mr. Bjork asked Mr. Naasz if he plans to file a motion with the Board of Minerals and Environment. Mr. Naasz stated that his understanding is that in 2013 the Board of Minerals and Environment continued the Powertech contested case hearing until such time as the Water Management Board makes its decision.

Mr. Bjork asked why the decision was made to file with the Water Management Board before the Board of Minerals and Environment. Mr. Naasz said the reason for filing with the Water Management Board first that is something that can be included in the initial motion.

Bruce Ellison asked if the board would receive input from the intervenors today.

Mr. McVey stated that this is a status conference, and Powertech is entitled to file whatever motions they want to file. He stated that Mr. Ellison will have the opportunity to be heard as part of the notice and the hearing process on the motion for scheduling order.

Mr. Ellison stated that the federal matters are far from complete. Powertech may file a written motion, but the record is particularly clear from Mr. Freeman's order in 2013 that all Powertech was doing was filing what all intervenors had already discussed with the board to continue the hearing pending resolution of the federal applications. The EPA has not even had a hearing on Powertech's license. The BLM is just beginning. This whole issue is arising because a federal appeals court and the EPA are wondering what Powertech's status is in front of the state boards. The state boards clearly said until the federal permitting is complete, they will not resume the hearing.

Chairman Hutmacher stated that Powertech has the right to file a motion with the Water Management Board and so does Mr. Ellison. That does not necessarily mean that any of the motions are going to be granted. Chairman Hutmacher said the Water Management Board will not debate the issue of whether or not Powertech has the right to file a motion.

Mr. Ellison requested that there be a hearing on the motions. Chairman Hutmacher stated that Mr. Ellison will receive notice of the motions as they are presented to the board and the board's attorney.

Mr. Ellison stated that it has been very difficult to get written orders and he requested that they be done electronically.

Mr. McVey stated that transmittal of orders will be done in the normal manner with regular mail.

No board action was taken.

UNOPPOSED NEW WATER PERMITS ISSUED BY THE CHIEF ENGINEER WITHOUT A HEARING BEFORE THE BOARD: Prior to the meeting the board received a copy of the table listing the unopposed new water permits issued by the chief engineer. (See attachment.)

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 his 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.

WATER PERMIT APPLICATION NO. 2814-2, JUDE WILDEMAN/BIG MOUNTAIN CABINS:
Chairman Hutmacher opened the hearing.

Ann Mines Bailey represented the Water Rights Program.

Jude Wildeman, applicant, appeared pro se.

Lon Buehner, intervenor, appeared pro se.

Ms. Mines Bailey reported that the application was initially submitted by Big Mountain Cabins, and it was subsequently transferred to Jude Wildeman.

Ms. Mines Bailey offered Exhibit 1, the administrative file. Chairman Hutmacher admitted the exhibit into the record.

Ms. Mines Bailey called Adam Mathiowetz who was previously administered the oath.

Mr. Mathiowetz testified that he is a senior groundwater engineer with the Water Rights Program. He is responsible for preparing reports on groundwater permit applications and is the lead reviewer of other engineer's groundwater permit application reports. He reviews well completion reports and well construction standards, licenses driller and pump installers, he is the day-to-day manager for two permanent technicians and the primary manager for four seasonal technicians. Mr. Mathiowetz also provides technical assistance to the chief engineer, Water Management Board, department staff, and the public, when needed. Mr. Mathiowetz has worked in the Water Rights Program for 9 years.

Mr. Mathiowetz stated that Exhibit 2 is his curriculum vitae.

Ms. Mines Bailey offered Exhibit 2. Chairman Hutmacher admitted the exhibit into the record.

Mr. Mathiowetz presented his report on the application. He pointed out that in first paragraph on page 1, fourth line, "and to serve a single domestic household" was added to the end of the sentence.

Water Permit Application No. 2814-2 proposes to appropriate less than two acre-feet of water annually at a maximum instantaneous diversion rate of 0.067 cubic feet of water per second (30 gallons per minute) from one existing well approximately 160 feet deep completed into the Crystalline Rock aquifer for commercial use. The well is located in Pennington County approximately two miles southwest of Rockerville, SD.

Mr. Mathiowetz stated that this well does not have a permit.

The scope of Mr. Mathiowetz's review was determination that there is a reasonable probability the unappropriated water is available for the proposed appropriation and that there is reasonable probability this proposed diversion can be made without unlawfully impairing existing users. He used the best information available to determine whether there is a greater or equal amount of recharge entering the aquifer as there is withdrawals. Recharge is water entering the aquifer and withdrawal is a deliberate removal of water from the aquifer.

At the area of the application the Crystalline Rock aquifer consists of metaconglomerate, quartzite, and metapelite that is gray, dark-gray, and tan in color. Metagraywacke and metagabbro are also common within two miles of the well site. Water is stored in the secondary porosity, which are the faults, fractures, and cracks within the rock. The secondary porosity is uneven and unpredictable due to the nature of crystalline rock. The Crystalline Rock aquifer makes up the central core of the Black Hills underlying approximately 574,000 acres.

Due to the unpredictable nature of the fractures and cracks where the water is stored, it needs to be determined whether site specific data is available when determining unappropriated water availability.

The Crystalline Rock aquifers are recharged through the infiltration of precipitation and streamflow losses. In 2001 Driscoll and Carter wrote a report regarding a study on recharge to the Crystalline Rock aquifers that was conducted as part of the Black Hills Hydrology Study. They estimated the recharge to the entirety of the Crystalline Rock aquifers within the core of the Black Hills must be at least equal to average withdrawals, which is 3,600 acre-feet per year. Driscoll and Carter also noted the actual recharge to the Crystalline Rock aquifers must be much larger than estimated to account for discharge to streams.

There is no average annual recharge estimate available for the localized Crystalline Rock aquifer the applicant proposes to use.

The DANR-Water Rights Program maintains two observation wells that have historically been considered completed into the Crystalline Rock aquifer, CU-86A and PE-95D. Mr. Mathiowetz stated that he relied on the data from CU-86A because it was determined that PE-95D is open to both the Deadwood Formation and the Crystalline Rock, and water levels appear to be more similar to the Deadwood aquifer than the Crystalline Rock aquifer. CU-86A, which is in the city of Custer, is approximately 15.2 miles southwest of the applicant's well.

Ms. Mines Bailey asked how looking at data from an observation well that is 15 miles away helpful in reviewing this application. Mr. Mathiowetz stated that Observation Well CU-86A shows that the Crystalline Rock aquifer receives recharge.

Mr. Mathiowetz stated that Exhibit 3 is an enlarged version of Figure 1 on page 2 of his report. This is a map of the area near Application No. 2814-2 with Crystalline Rock aquifer water rights and fault locations. Mr. Mathiowetz used ARC GIS and information from databases maintained by the Water Rights Program, the US Geological Survey, and SD Geological Survey to create the map.

Ms. Mines Bailey offered Exhibit 3. Chairman Hutmacher admitted the exhibit into the record.

Mr. Mathiowetz stated that Exhibit 4 is a modified version of Figure 3 on page 8 of his report. It is zoomed in to an approximate radius of one mile around the applicant's well completion reports on file at the Water Rights Program, water rights in the area, the applicant's well, and faults. Mr. Mathiowetz used ARC GIS, databases maintained by the Water Rights Program, the well completion reports, downloads from the US Geological Survey, and SD Geological Survey to create the map.

Ms. Mines Bailey offered Exhibit 4. Chairman Hutmacher admitted the exhibit into the record.

Mr. Mathiowetz stated that on Exhibit 3, the red dots are the locations of diversion points for the water rights on file with the Water Rights Program. The red line is Highway 16, the blue lines are section lines, and the various types of black lines are fault locations as provided by his data source.

Exhibit 4 includes one extra designation that Exhibit 3 does not, and that is the addition of the blue triangles, which represent the map locations as they are mapped in well completion reports on file with the Water Rights Program.

In general, fault lines act as maximum limits of aquifer extent for the localized Crystalline Rock aquifers because due to misalignments of the smaller fractures that form there will be limitations to what extent water can move up. It will move along the fault instead of across it, therefore, acting as a boundary.

Ms. Mines Bailey asked Mr. Mathiowetz to describe on Exhibit 4 the area that he looked to for his technical analysis of the application. Mr. Mathiowetz stated that he looked primarily between the two faults where the applicant's well is located which is marked by the blue W within the yellow circle. The faults predominately act as boundary conditions and are limiting factors on the probable maximum extent of any localized aquifer the applicant could withdraw water from.

Ms. Mines Bailey asked how Mr. Mathiowetz determined what water rights are in existence and where they are located. Mr. Mathiowetz said he used the Water Rights database, which includes denoting where the wells are located. From the localized area between the two faults there is the applicant's proposed withdrawal of up to two acre-feet per year, Water Right No. 2224-2 is estimated to withdraw 1.7 acre-feet per year, and any domestic users, making the assumption that use is 70 gallons per day per person, which came from a USGS study specific to Pennington County, as well as assuming 2.5 people per rural dwelling would use 0.2 acre-feet per year per rural dwelling. Based on the Water Rights well completion report database, there are three domestic wells that staff knows are between the fault space on the map and an additional five that may be located between the faults.

Mr. Mathiowetz stated that when he identified the water rights, he did not include the rights located in the upper right corner and the lower portion of Exhibit 3 because they are outside the faults and at that distance, due to the unpredictable nature of the fractures, it is unlikely that they would have any connection.

Mr. Mathiowetz said it is his opinion that there is a reasonable probability of unappropriated water available for the applicant. He said his opinion is based on the fact that the observation well shows that the aquifer can receive recharge, there is relatively limited use between the faults where the well is located, and that the applicant's well has been in use for some time without issue. In his opinion, there is a reasonable probability that there would be no unlawful impairment of adequate wells for existing water rights and domestic wells. This opinion is based, in part, on the relatively low diversion rate that the applicant plans to use for the majority of the year, which would only be their domestic use and would not need a permit, and based on the distance between wells and the unique protections that are in place to ensure the applicant does not unlawfully impair existing rights.

Mr. Mathiowetz said he is not aware of any complaints regarding water availability or impairment in the localized area between the faults.

Mr. Mathiowetz stated that he has reviewed Mr. Buehner's petition. In the first paragraph of his letter, Mr. Buehner states that he is a domestic water user located approximately two miles from the subject application. Mr. Mathiowetz stated that, given Mr. Buehner's location, he does not have any concerns regarding the applicant's proposed water use. Referencing Exhibit 3, Mr. Mathiowetz said Mr. Buehner's water supply wells are located in the upper northeast corner of the map in the vicinity of the wells for Water Right Nos. 2211-2 and 483-2. It is unlikely that Mr. Buehner's water source would be impaired because of the faults acting as limiting factors on the potential to influence wells outside of them. Also, over this distance, especially at the applicant's low diversion rate, the potential for creating any drawdown from the applicant's well to go that far is essentially zero.

In his petition, Mr. Buehner states that that he does not believe the report to the chief engineer properly describes and assesses the potential impact to the large number of domestic wells in the area. Mr. Mathiowetz said he can only assess the wells for which completion reports are filed with the Water Rights Program or that he has become aware of through various processes when he may be in the field and becomes aware of things. Not all domestic wells are on file in the department because well completion reports were not required until sometime in the 1980's and there are many wells that predate that time.

In the petition, Mr. Buehner states that Table 1 in the report names water rights entities that apparently are no longer in existence. Mr. Mathiowetz stated that he is charged with reviewing the water rights that are on file at the department with the information that is available, and he can only review the wells he knows exist.

Mr. Buehner's petition also states that the report appears to potentially exclude other existing commercial entities in the area. Mr. Mathiowetz said once the Water Rights Program becomes aware of these commercial entities, it pursues bringing them into compliance with South Dakota water law.

The petition also states that the application seems to show that the applicant's commercial entity has been operating without the water permit required by state law. Mr. Mathiowetz said this hearing is meant to potentially issue the entity a water permit, which would bring them into compliance. Mr. Mathiowetz agrees that the entity has been operating without a water permit.

Mr. Buehner said in his report, Mr. Mathiowetz states that the Crystalline Rock aquifer consists of numerous localized aquifers and because of the faults he believes that the applicant's area would not affect the Rockerville area, which is about two miles away, so what Mr. Mathiowetz is saying is that he is looking at multiple aquifers that potentially are very small in size, but yet he is comfortable using a well 15 miles away to say that that well can appropriately determine whether or not there is recharge in the applicant's area as well as the Rockerville area. Mr. Buehner asked how that can be consistent because Mr. Mathiowetz refers to that as an aquifer, but it's not an aquifer; it's a very large number of localized aquifers. Mr. Mathiowetz said he believes he stated that it shows the aquifers can be recharged in an area where there are other users.

Mr. Buehner said 3,600 acre-feet sounds like a big number when Mr. Mathiowetz talks about recharge has to be at least equal to withdrawals, but the report also says that the exposed area of the Crystalline Rock is 574,000 acres, so that 3,600 acre-feet only represents 0.07 of an inch of water. Mr. Buehner said he does not disagree with the statement that recharge is greater than 3,600 acre-feet,

but he believes we need to recognize that recharge is critical for all the wells whether they are domestic or commercial to continue to get water. He asked Mr. Mathiowetz if that is true. Mr. Mathiowetz answered that recharge is critical.

Mr. Buehner said there is literature that says it is difficult to predict the recharge in a particular area, yet there is a map that does predict, in general, how much recharge will be available based on projected rainfall and snowfall. Mr. Mathiowetz said he is not aware of a recharge map; he is aware of a yield map, and they are not the same. Mr. Buehner asked Mr. Mathiowetz to explain the difference between a yield map and recharge map. Mr. Mathiowetz said to his understanding, the yield map is a broad prediction of essentially the difference between precipitation and the evaporation. Mr. Buehner said he would encourage Mr. Mathiowetz to go back and re-look at that literature and assess what the yield is because his understanding, having read that and having been through the hearing, is they do take into account evaporation.

Ms. Mines Bailey objected to Mr. Buehner testifying rather than asking questions. Chairman Hutmacher sustained the objection.

Mr. Buehner said Mr. Mathiowetz has a table in the report where he estimates the water usage of the various water rights in the area and Mr. Mathiowetz assumes that there using 60 percent of the maximum permitted diversion rate. He asked if that is correct. Mr. Mathiowetz said that is correct. Mr. Buehner asked why Mr. Mathiowetz uses that approach to estimate water use. Mr. Mathiowetz said that is the standardized approach that is used in the Water Rights Program that was developed during discussions with municipalities. At that time the program went from issuing permits exclusively on diversion rate to assigning volumes. Mr. Buehner asked if Mr. Mathiowetz is aware there is a state law for wastewater flow capacity requirements that project usage for various types of properties. Mr. Mathiowetz said he is aware of wastewater flow numbers.

Mr. Buehner said for the wastewater flow numbers in his particular area the water that is produced generally goes into the wastewater. An example would be if rural dwellings use 70 gallons of water per person per day yet a domestic well can produce up to 18 gallons per minute and still be within their rights under law, so if 60 percent were applied in domestic wells it would appear that over 10 gallons per minute is being produced but in reality 70 gallons per person per day is being used. Depending on what method is used in this domestic use case, there is a wide range regarding how much water is being used. Mr. Buehner said part of his concern is the water usage that is in Mr. Mathiowetz's report. He is concerned about the completeness of the report. Mr. Buehner said the hearing is being held because he informed the department that Big Mountain Cabins does not have a water permit.

Ms. Mines Bailey objected stating that Mr. Buehner is testifying rather than asking a question. Chairman Hutmacher sustained the objection.

Mr. Buehner asked Mr. Mathiowetz what information, other than a map that shows faults, does he have to confirm that there is no affect to other wells in the area. Mr. Mathiowetz answered that he has statements from well drillers and well owners that to pump the wells hard enough to create significant drawdown far from their wells also caused the wells to run dry because they over-pumped the well. Mr. Mathiowetz said he can apply various equations to that data to estimate drawdown over

a certain distance. He discussed a method he used to estimate drawdown in the Madison aquifer. Mr. Buehner said we're not dealing with the Madison aquifer in this instance.

Mr. Buehner said Mr. Mathiowetz testified that he is not aware of any complaints. He asked if Mr. Mathiowetz is aware that water complaints, not only on water quantity but also water quality, have been filed with DANR in this vicinity. Mr. Mathiowetz answered that he testified that between the two faults there were no complaints that his was aware of; however, he is aware the one that he mentioned in his report. Mr. Buehner asked if Mr. Mathiowetz is aware that those complaints have also been filed in Pennington County. Mr. Mathiowetz stated that he is not aware of complaints filed in Pennington County. Mr. Buehner said Mr. Mathiowetz's report did state that there were no complaints in the Pennington County file, so he is trying to understand what information Mr. Mathiowetz has regarding complaints. Mr. Mathiowetz said he was referring to the DANR Pennington County file which is list of complaints that have occurred in Pennington county filed with the Water Rights Program.

Mr. Buehner said regarding Table 1 in the report, Mr. Mathiowetz states that he only reviews what is available. He asked if Mr. Mathiowetz reviews any DANR information that is outside of the Water Rights Program. Mr. Mathiowetz answered that he generally does not. Mr. Buehner asked if there is additional DANR information available regarding the water usage of commercial entities. Mr. Mathiowetz said he is not aware of additional DANR information for water usage of commercial entities. There may be information on public water systems, but he does not know if those are commercial entities. Mr. Buehner asked if Mr. Mathiowetz has looked at the public water system database when preparing his report on Water Permit Application No. 2814-2. Mr. Mathiowetz answered that he has looked at that database in the past, but he does not remember if he looked at it for this report. Mr. Buehner asked Mr. Mathiowetz if it would surprise him if the public water database would show that there is significant additional commercial production in this area that apparently is not under a water right. Mr. Mathiowetz said it would not surprise him if there were additional commercial diversion rates in the Rockerville area that are not covered in his report. Mr. Buehner said that would mean that the report, which is used by the chief engineer to assess whether this water right should be approved, is incomplete or perhaps inaccurate. Mr. Mathiowetz said he would not agree to that. Mr. Buehner said if there are additional commercial entities other than what has already been reported to DANR that are producing water but apparently do not have a water right, would that indicate that perhaps revisions and modifications should be made to the report prior to the decision being made by the Water Management Board. Mr. Mathiowetz said that is not a decision for him to make. Mr. Buehner asked Mr. Mathiowetz if, for the water rights that are listed in the report, he looked at purpose of the water use. Mr. Mathiowetz said he checked to make sure the listed use makes sense. Mr. Buehner asked Mr. Mathiowetz to describe what the water for Pine Haven Heritage Home, Rockerville Gold Town, and Rockerville Park is being used for. Mr. Mathiowetz said the water is being used in some form by a commercial entity. Mr. Buehner asked Mr. Mathiowetz if it would surprise him that none of those three commercial entities are listed in the Drinking Water Program database. Mr. Mathiowetz said it would not surprise him. Mr. Buehner asked if it is correct that state law requires most if not all commercial entities to have a water right as well as, if they are serving the public, a drinking water permit. Mr. Mathiowetz answered that he does not know the full extent of drinking water permit, but most commercial entities are required to have a water permit. Mr. Buehner asked if any of these commercial entities been visually inspected with regard to their water right. Mr. Mathiowetz answered that they were licensed at one point, which means the department staff was there at the time of licensing. Part of the permitting process

requires a site visit to ensure that it is being licensed as built. Mr. Buehner indicated the Water Right database shows some of the entities do have an inspection report from when it was issued, many do not. He asked if that means the data is missing or does it mean that perhaps there was not an inspection. Mr. Mathiowetz answered that he cannot speak for inspection done prior to his employment with the department. Mr. Buehner said Mr. Mathiowetz does not really know whether these entities have been inspected or not.

Ms. Mines Bailey objected; asked and answered and argumentative. Chairman Hutmacher sustained the objection.

Mr. Buehner had no further questions for Mr. Mathiowetz.

Responding to questions from Mr. Wildeman, Mr. Mathiowetz stated that it is likely that Mr. Wildeman's well is not in the same portion of the aquifer as Mr. Buehner, in part, due to the elevation of fractures, but the faulting in general is going to prevent any significant transfer of drawdown created by Mr. Wildeman pumping to that distance of several miles away.

Responding to questions from the board, Mr. Mathiowetz said it is his understanding that the entities that are operating without a water permit have been contacted by the Water Rights Program and asked to apply for a water permit.

Mr. Mathiowetz stated that the well log for this application is included in the administrative file. The well was completed by Alexander Drilling on May 22, 2014, with a listed use as domestic/stock use.

Ms. Mines Bailey called Eric Gronlund who had previously been administered the oath.

Mr. Gronlund testified that he is the chief engineer and the administrator of the Water Rights Program. He has been the chief engineer for 14 months. Prior to being appointed chief engineer he handled the day-to-day processing of water permit applications. Mr. Gronlund is familiar with Water Permit Application 2814-2. The application originated based on a letter he sent to Big Mountain Cabins.

Ms. Mines Bailey asked why Mr. Gronlund sent a letter to Big Mountain Cabins. Mr. Gronlund stated that there was a contested case last July that resulted in Findings being considered by the Water Management Board in October 2020. In the response to those Findings, Mr. Buehner listed three entities that did not have water permits and two other entities that he thought were permitted as a rate less than what is actually being used. Based on that, the Water Management Board directed staff to contact those entities.

Mr. Gronlund recommended approval of Water Permit Application No. 2814-2, Jude Wildeman/Big Mountain Cabins because 1) there is reasonable probability that there is unappropriated water available for the applicant's proposed use, 2) the proposed diversion can be developed without unlawful impairment of existing rights, 3) the proposed use is a beneficial use and 4) it is in the public interest.

Mr. Gronlund stated that he has reviewed Mr. Buehner's petition. Mr. Buehner's petition states that Table 1 of the report to the chief engineer names water rights entities that apparently are no longer in

existence and that those entities were considered in the report. Mr. Gronlund said if those entities are in the Water Rights database as water rights that are licensed, the Water Rights Program is under an obligation to consider those being in place until those individuals have due process and those matters are brought before the board potentially for cancellation. He stated that the permit holder and the user do not always match by name. There is a process in state law that a transfer of ownership needs to be filed with the Water Rights Program, but it is not uncommon that when a property changes hands that transfer of ownership does not get filed with the Water Rights Program.

Mr. Buehner's petition also states that there are entities in this area that operating without a water permit. Mr. Gronlund stated that last October, Mr. Buehner pointed out that there were three entities that he felt were operating without a water right and two that were under permitted so staff was aware that some entities are operating without a permit. The Water Rights Program has contacted all five of the entities. Mr. Wildeman was one of the first to file an application. Mr. Gronlund had contact from another entity that Mr. Buehner felt was under-permitted. In that case, the water right holder informed Mr. Gronlund that the well is capable of 13 gallons per minute, which is the amount the well is permitted at. Another application is currently out for staff review for a third entity. Mr. Gronlund has had personal contact with the other two, but neither has submitted an application yet.

Ms. Mines Bailey asked if there are methods by which a commercial entity can receive water without requiring a water permit. Mr. Gronlund stated that if the commercial entity is receiving water from someone who is permitted, such as a water distribution system, the entity does not need a water permit.

Mr. Buehner's petition states that Big Mountain Cabins has been operating without a permit and that he does not feel the qualifications recommended by Mr. Gronlund are sufficient. Mr. Gronlund stated that he is recommending approval of the application 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.

If the board approves the water permit application, in order to remain compliant with the law, the permit holder will be required to comply with the conditions and limitations of the permit being a maximum pump rate of 30 gallons per minute, the annual diversion is not to exceed two acre-feet per year, and to annually report to the chief engineer the amount of water withdrawn.

Mr. Gronlund stated that, if there is a problem, the well interference qualification will address whether this well is causing some sort of impairment.

Ms. Mines Bailey asked Mr. Gronlund if there are any additional actions the Water Rights Program is taking to provide further information for the board or to protect existing users. Mr. Gronlund stated that there have been several contested cases from the Precambrian rock recently that caused staff to have discussions and Mr. Gronlund has authorization to place two new Crystalline Rock observation wells in the area. Initially, Mr. Gronlund was given direction to have the observation wells completed this year. Due to the workload of well drillers, it won't be possible to drill the observation wells this year. One of the wells will be located at Rockerville in the median of Highway 16.

Mr. Mines Bailey asked Mr. Gronlund when the Water Rights Program conducts an inspection. Mr. Gronlund stated that when an applicant is granted a water permit by Water Management Board, the water permit is basically authorization to construct and start using the water. The permit holder has a five-year period in which to construct the works. When the new water permit is issued, a notice of completion report is included. The owner is supposed to file that notice of completion report with the Water Rights Program, but even if they don't file the report, after that five-year period they go on the list to have an inspection where one of the staff engineers with the Water Rights Program physically views the water works to verify that the works are constructed and the extent that the works are constructed.

Mr. Gronlund noted that inspections are also done when a complaint is filed with the Water Rights Program.

Mr. Buehner asked Mr. Gronlund if he knows the time period that state law requires for someone to file a transfer of ownership of a water right. Mr. Gronlund answered that he believes it is 90 days. Mr. Buehner asked if it is correct that in the area shown on Figure 1 in the report there are several of those entities where the 90-day time period was not met for transfer of ownership. Mr. Gronlund said that is very possible. Mr. Buehner asked if that is a violation of a water right. Mr. Gronlund said that is a legal question. Mr. Buehner asked if commercial entities producing water without a water right in violation of water right law. Mr. Gronlund answered yes. Mr. Buehner asked if state law says that each day is a separate violation and that, potentially, they can have a civil fine of no more than \$500 for each violation. Mr. Gronlund said that is the statute on violations. Mr. Buehner asked who would be responsible for determining whether a violation occurred and whether they should be fined. Mr. Gronlund answered that he believes he has the ability to issue an order, but it would ultimately be a Water Management Board determination. He stated that the Water Rights Program usually works to bring people into compliance.

Mr. Buehner stated that he appreciates the effort the Water Rights staff has made to try to correct some of the issues in this area. These issues have developed over decades. Regarding the individual that said they were in compliance, Mr. Buehner said he is concerned that even though there is a note in the file saying they are in compliance based on a phone call, but there is nothing in writing from that particular entity stating that they are in compliance. He asked if Mr. Gronlund is comfortable with that. Mr. Gronlund said it is common for the Water Rights Program to just do file documentation when available, but he is certainly willing to revisit that matter and require something with a signature if that is what the Water Management Board feels is necessary. Mr. Buehner stated that in that case the issue at hand is how much water they are producing. The previous owner indicated that the well was for 25 gallons per minute. The new owner has indicated that he is staying within the allocated permitted volume of 13 gallons per minute. He asked if Mr. Gronlund asked the individual what size of the pump is in the well. Mr. Gronlund answered that he does not recall. Mr.

Buehner asked if it would be a violation of the water right if that individual had a pump in the well capable of pumping greater than 13 gallons per minute. Mr. Gronlund stated said if he is pumping at a rate greater than 13 gallons per minute, that could be a violation. Mr. Gronlund stated that Mr. Buehner is using the 25 gallons per minute from the R & J matter as being what they told Pennington County. There are several systems that pump to storage or some sort of pressure tank, so he is not certain if the reference Mr. Buehner is making at 25 gallons per minute from storage or if that was from the source. Mr. Buehner said he lives in that area and he saw the cistern setting on the property before it was installed.

Mr. Buehner said his concern is water volumes are elevated substantially above the allocated volume. He said in this case, the allocated volume that is requested is 21 times the septic volume so he would like the board to consider a qualification requiring metered volumes. He asked Mr. Gronlund if he thinks it is prudent to approve a water right where the maximum permitted rate is 20 times what the approved septic volume is. Mr. Gronlund stated that the Water Rights Program processes the application and reviews it under the criteria for a water right permit based on the application requested quantity of water. Mr. Buehner asked if, as chief engineer, Mr. Gronlund has the right to place that qualification on the water permit. Mr. Gronlund said the Water Management Board has the ability to place qualifications and limitations on a water right if it deems necessary.

Mr. Buehner said state law says if a permit holder does not use the water that has been allocated for the use that it is intended during a three-year period any portion that is not used becomes unappropriated water and reverts back to the public. Mr. Buehner said Mr. Gronlund has reviewed the report for many of these entities when that 60 percent of the diversion rate is applied, which provides for a huge volume of water. He asked Mr. Gronlund without doing a physical inspection how would he know whether, during that 3-year period, they were using their allocated water. Mr. Gronlund answered that the permit holder is required to annually report water use. Mr. Buehner asked if Mr. Gronlund knows the annual volume for Pine Haven Heritage Home and Rockerville Park. Mr. Gronlund said he did not look at that, but his sense is that those water rights are extremely old, some dating back to the 1950's, which was prior to the Water Rights Program requiring reporting on those types of uses. Mr. Buehner asked Mr. Gronlund if these are entities that are not producing water and are not showing up on the DANR public water system database, how would he know that they have produced their allocated water in the last three years if an inspection has not been done. Mr. Gronlund said he does not know for certain whether they are or are not using water.

Mr. Buehner said he has not brought up Hillside Country Cabins because they have a water right and they are listed on the public water system database with a priority date of 1898. The water right is for two gallons per minute and Table 1 in the report shows an estimated usage of 1.2 gallons per minute. The website says they have 18 cabins, log homes, and an executive lodge with a maximum occupancy of 80 people. This entity was initially established in 1933 by bringing in cabins from a work camp so it has been operating since 1931. They say it's probably the oldest rental cabins in the Hills. He asked Mr. Gronlund if he believes it is likely under permitted. Mr. Gronlund said he does not know, but that is one of the entities the Water Rights Program sent a letter to. Mr. Gronlund said he had a telephone call from the new owner who was going to research the pump size and complete a transfer of ownership. The application has not yet been submitted.

Mr. Buehner asked if water right priority dates are important. Mr. Gronlund answered that they can be.

Mr. Buehner had no further questions of Mr. Gronlund.

There were no questions from the board.

Ms. Mines Bailey had no other witnesses.

Mr. Wildeman had no witnesses.

The court reporter administered the oath to Mr. Buehner.

Mr. Buehner testified that he lives in the Rockerville area. He said after the R & J hearing he invited Mr. Gronlund to visit the Rockerville area so he could explain to Mr. Gronlund what he believes to be some of the water rights issues in the area. Mr. Buehner said he and Mr. Gronlund were unable to meet due to Covid 19.

Mr. Buehner offered Exhibit 200, a screenshot of a map of in the DANR Water Rights Program database. Chairman Hutmacher admitted the exhibit into the record.

Mr. Buehner stated that Exhibit 200 shows the same water rights in the area along Highway 16 where it splits as the water rights that are listed in Mr. Mathiowetz's report in Table 1.

Mr. Buehner offered Exhibit 201, a screen shot of a map from the DANR public water systems database. Chairman Hutmacher admitted the exhibit into the record.

Mr. Buehner stated that Exhibit 201 shows some entities that do not show up on Exhibit 200, such as Rockerville Gold Nugget Lodge, Rocker Motel and Cabins. The Gas Light Restaurant is also located in this area, but it does not show up on the map. Hillside Country Cabins is shown on Exhibit 201. Mr. Buehner said when comparing what entities are present on Exhibit 200 with those present on Exhibit 201, there are some differences. Shown in the water systems database is the Rockerville Gold Nugget Lodge, which used to be the Pine Haven Heritage Home. Pine Haven Heritage Home hasn't been in operation for at least five years. This is one of those entities that transfer of ownership has not been properly made within the 90-day period. The Rockerville Motel and Cabins shown on the water systems database map is actually the Rockerville Trading Post, as shown on the water rights database map. Mr. Buehner stated that again, transfer of ownership has not occurred. He said he personally visited the Rockerville Trading Post in 1970 when he was in college; it was a gift shop, and the Rockerville Motel and Cabins are now present on that same property. Mr. Buehner stated that the Gas Light does not show up on the water rights database map, but it does show up on the drinking water database map.

Mr. Buehner said he is concerned that these entities that are producing water do not have a water right. Neither one of these exhibits show Silver Mountain Cabins, which are located between the applicant and Storm Mountain Center. He said when you look at the number of occupancies on their website, it should trigger the need to be in that water right database. Mr. Buehner said depending on the number of diversion points and what their water systems are like, there is a chance that they do not have to be regulated even though they serve the public. They have been operating for years without a water right. Mr. Buehner said this is a new entity that he did not previously know about.

In the lower left corner of the drinking water database map is Cosmos Mystery Area, which as been present since 1952. It is not listed as having a water right.

Mr. Buehner said he recognizes that there are a lot of different reasons for water rights, but the Hills are in a unique situation because when you look at all these entities, they serve the public. State law says that they need a drinking water permit and state law says they need a water right.

Mr. Buehner said there are many omissions and errors that he would like to see cleaned up. Some commercial entities are shown to have a water right, but there is no public water system.

Ms. Mines Bailey objected to Mr. Buehner's testimony due to relevance. She said she understands that Mr. Buehner has a lot of concerns, but she is not sure of the relevance of many of his statements.

Mr. Buehner said this gets back to the accuracy and completeness of the report, and the report is the basis for the chief engineer's recommendation.

Chairman Hutmacher sustained the objection.

Mr. Buehner offered Exhibit 202, copies of pages from the DANR database. Ms. Mines Bailey objected as to relevance.

Mr. Buehner said the exhibit is relevant because it gets back the department or the federal government saying that it is appropriate to inspect these at least periodically.

Chairman Hutmacher sustained the objection, and the exhibit was not admitted into the record.

Mr. Buehner said in 1988 the Bureau of Reclamation within the Department of Interior had apparently stated they were going to oppose vested water rights in three counties in western South Dakota because of the lack of inspection. The state performed some inspections and got back to the Bureau of Reclamation. The point of that effort was that there was an expectation that these rights should be inspected periodically, and state law indicates that they should be inspected periodically. For example, if allocated a right holder does not use the water in three years, it loses the right.

Mr. Buehner said when he looks at the detailed file of information on the DANR water rights database, he can't say it is complete, but he has no reason to not believe it is complete. The Rockerville Gold Town water right was last inspected in 1971, Rockerville Park was last inspected in 1971, Rockerville Trading Post was last inspected in 1990, Pine Haven Heritage Home was last inspected in 1991.

Mr. McVey asked Mr. Buehner to take what he is talking about and tie it back to this specific application.

Mr. Buehner said the lack of inspections has resulted in information that is used in the preparation of the report, which is incomplete and inaccurate. He said he made a request to the chief engineer prior to the R & J LLC report being prepared that the Water Rights Program consider rewriting the report because of these issues, but that was not done. The lack of inspection has been the cause of having water rights listed that are probably not actually using water. These water rights, keeping in the mind

the 60 percent rule, are used to estimate use. When a water problem develops it will be critical for DANR to understand what the water use is in the area. It is important that the data be complete and correct before granting an application.

Mr. Buehner said he does not believe that the information can be corrected without on-site inspections. He requested adding a qualification that there be periodic inspections, and he encouraged the Water Rights Program to develop a process for inspections that is like that of the Drinking Water Program.

Mr. Buehner offered Exhibit 203, a letter from Eric Gronlund written in 2000 to Mr. Parker who was inquiring about a water right at the Gas Light Restaurant. Ms. Mines Bailey objected as to relevance. Chairman Hutmacher sustained the object, and the exhibit was not admitted into the record.

Mr. Buehner stated that with regard to the allocated water for Water Right No. 479-2, there was a letter written by the owner of the Gas Light Restaurant in 2000, and there were questions regarding whether or not the transfer of ownership should occur for the owner who had purchased part of the property, and that issue apparently was not resolved. Mr. Buehner said that same water right is under the Rockerville Planned Unit Development. The Water Rights Program was asked how much water they were entitled to, and they were told that they were entitled to the full allocation. In addition to that, the report for estimated water use says this water is already being used.

Mr. Buehner said the approval of this application, in his opinion, clearly has the potential to be very detrimental to other commercial entities that are operating now but do not have a water right, and the Gas Light Restaurant is an example.

This concluded Mr. Buehner's testimony.

Ms. Mines Bailey asked if Mr. Buehner believes there is available water to be appropriated. Mr. Buehner said he believes there are enough errors in the assumptions that have been made in the report such that he is not comfortable that there is unallocated water available.

Ms. Mines Bailey asked Mr. Buehner what his opinion is regarding the potential for Mr. Wildeman's application to unlawfully impair another water right. Mr. Buehner answered that across the road from Mr. Wildeman is Hillside Country Cabins, and he has no idea how much water they are using or how much water Mr. Wildeman is using; he's been using water for years.

Ms. Mines Bailey asked if Mr. Buehner knows if Hillside Country Cabins has filed any complaints. Mr. Buehner said he suspects they have not, but he knows that they had their water right re-validated in the early 1990's. He suspects that they probably would not raise an issue knowing that they are servicing their needs with a two gallon per minute water right.

Ms. Mines Bailey asked Mr. Buehner if he believes granting a water right for purposes of a cabin would be a beneficial use of water. Mr. Buehner said if a water right for the purposes of a cabin is granted with a maximum permissible rate, that is 21 times the approved septic volume, and as a result of that water is contaminated, he would argue that is not a beneficial use of water. Water quality should be considered at the same time as water appropriation. Mr. Buehner said the application for a

water right permit asks what the septic volume is, and just the fact that is on the application tells him it should be considered and be a factor.

Responding to questions from Mr. Wildeman, Mr. Buehner said his concern is that Pennington County approves Mr. Wildeman's building permit and construction permit without determining if he has a water right in place. Mr. Buehner stated that he is trying to recognize the process of reports being prepared and the understanding of the approval process of the water right itself. The reason for this hearing is that there was an ordinance developed in the county that required a water right to be obtained prior to county permits being received. Mr. Buehner said he believes it was appropriate given issues that have existed with water quality and quantity down the road from Mr. Wildeman. He stated that this is not the first time he has brought his concerns forward, but he hopes it's the last. Mr. Buehner said he recognizes he is asking the Water Management Board and the Water Rights staff to take whatever steps are necessary to correct the situation.

Mr. Wildeman asked Mr. Buehner if his complaint is about his application or a complaint about the procedural workings of the Department of Agriculture and Natural Resources. Mr. Buehner answered that he has a complaint with not only the department, but also with Mr. Wildeman because state laws were violated.

There were no questions from the board.

Mr. Wildeman, Ms. Mines Bailey, and Mr. Buehner offered closing statements.

Mr. Wildeman stated that he built his family's home, which is a cabin, first and drilled a well that was on commercial property. The commercial cabin business was built in 2018, and he was not aware that he had to have a water rights permit. He believed he was in compliance in the sense that he had to submit quarterly water samples to the state, and the state did not tell Mr. Wildeman that he needed a water rights permit. He said the business is small, but he plans to expand the business eventually. Mr. Wildeman requested board approval of the water permit application.

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

Ms. Mines Bailey said the board is to use the best information reasonably available. The board heard evidence and testimony based on the best information reasonably available, which is the Driscoll and Carter report. The report says there is a minimum of 3,600 acre-feet of recharge available, and the report says there is more than 3,600 acre-feet because it is going to streams. Mr. Mathiowetz testified that there is unappropriated water available. He also testified that, based on his experience and expertise, there is a reasonable probability that unlawful impairment will not occur, and that the faults function as a boundary. Ms. Mines Bailey said Exhibit 3 shows how close Water Permit 2224-2, Hillside Country Cabins, is to this proposed diversion. Hillside Country Cabins has not filed a complaint, nor have they intervened in this proceeding. Ms. Mines Bailey said one could reasonably assume that there is no problem with unlawful impairment. The chief engineer testified that this is consistent with previous findings of beneficial use and public interest.

Ms. Mines Bailey said she understands Mr. Buehner's concerns. She believes some of it is miscommunication and some of it is a desire to see things done the way Mr. Buehner believes they should be done, and not necessarily the way it is required by law or by rule. Ms. Mines Bailey said Mr. Gronlund has heard what Mr. Buehner said and has taken great strides to advance the information available and to try to resolve some of those concerns.

Ms. Mines Bailey requested that the board approve the application with the qualifications set forth in the chief engineer's recommendation. Ms. Mines Bailey stated that Mr. Buehner has asked that the board add a qualification requiring metering. That is not something that has been done typically for this type of water right, however, the chief engineer will abide whatever decision the board makes in that regard.

Mr. Buehner stated that regarding his proposed metering qualification, this is a water right in which large volumes of water will be allocated that greatly exceed septic issues. Mr. Buehner said he is not saying that Mr. Wildeman shouldn't have a water right, he is just asking the board not to grant the water right now. He would like to see the issues he raised addressed together. He would like to see a report prepared that will clean these issues up, and he would like to see the board give water rights to the people that need water rights. Mr. Buehner said he would like to see the priority dates go back to the dates that these entities started operating. Mr. Buehner stated that he was one of the petitioners that came in and said certain wells had created issues with interference with existing wells.

Mr. Buehner said he does not believe granting this water right now is appropriate because of the lack of proper information and the potential problems regarding the priority dates. He said this matter is important enough to himself and his community that he will be hand delivering a complaint submittal to the chairman of the Water Management Board and to Chief Engineer Gronlund.

Chairman Hutmacher requested board action.

Motion by Freeman, seconded by Larson, to approve Water Permit Application No. 2814-2 subject to the qualifications set forth by the chief engineer.

Ms. Dixon said she understands the broad issues that Mr. Buehner presented, and she agrees that they need to be addressed but she does not believe the board should punish Mr. Wildeman for all those oversights and shortcomings.

Mr. Holzbauer stated that the issues need to be addressed, but he does not believe the board should deny Mr. Wildeman's permit because of the issues.

Mr. Freeman said he understands the concerns, but he would like to remind everyone that, unfortunately, we don't live in a perfect world and there is not a money tree in the backyard that the state can shake. There are limitations to manpower and other things that can be done because of the financial limitations.

Mr. Hutmacher stated that he agrees with Mr. Freeman. He believes the Water Rights Program is taking steps to take care of the problem. He noted that if there were several more people on staff, they could probably do a lot of inspections.

A roll call vote was taken, and the motion carried unanimously.

Ms. Mines Bailey will prepare proposed Findings of Fact and Conclusions of Law by June 17, 2021, and objections or alternative proposals are due June 25, 2021.

RECOMMENDATION TO DEPARTMENT SECRETARY TO APPROVE APPLICATIONS FOR RENEWAL OF THE GROUND WATER DISCHARGE PLANS FOR WHARF RESOURCES' RELIANCE SPENT ORE DEPOSITORY (GWD 1-94) AND JUNO FOLEY SPENT ORE DEPOSITORY (CWD 1-98): Mr. McVey stated that on January 27, 2021, and January 29, 2021, the Secretary of the Department of Agriculture and Natural Resources formally requested that the Water Management Board act as the Secretary's hearing examiner for the purpose of hearing applications for renewal of the Ground Water Discharge Plans for Wharf Resources' Reliance Spent Ore Depository (GWD 1-94) and Juno Foley Spent Ore Depository (CWD 1-98). At the March 3, 2021, the Water Management Board accepted the Secretary's request and appointed board member Larson as hearing chair. At that time, there was already a motion to dismiss, which had been filed by the applicant, and on March 31, 2021, a preconference hearing was held to decide on the applicant's motion to dismiss. The intervener did not appear at the prehearing conference. Testimony was taken from the applicant, and the intervener's papers were reviewed in relation to the motion to dismiss. At the conclusion of the prehearing conference, hearing officer Larson granted the motion to dismiss, and the Order commanded that any appeal of the Order to be appealed to the Water Management Board in its entirety and that an appeal would have to be filed by April 26, 2021, before 5:00 p.m. No appeal was filed.

The Order also stated that in the event the intervener fails to appeal by April 26, 2021, a recommendation to approve the application will be delivered to the Secretary of DANR.

Mr. McVey stated that since the time has run for appeal, it is appropriate that the board makes their recommendation to the Secretary.

Ms. Mines Bailey noted her appearance for the record. Dwight Gubbrud, attorney for Wharf Resources, noted his appearance for the record.

Motion by Freeman, seconded by Dixon, to adopt the hearing officer's Order and forward the recommendation for approval to the Secretary of DANR. A roll call vote was taken, and the motion carried unanimously.

Mr. Duvall noted that the next meeting is scheduled for July 7 and 8, 2021. Mr. Larson stated that at this time he had a trial in Iowa scheduled for July 7 and 8, so he may not be able to attend the next meeting.

ADJOURN: Motion by Freeman, seconded by Holzbauer, to adjourn the meeting. Motion carried unanimously.

A court reporter was present for the hearing and a transcript of the proceedings may be obtained by contacting Carla Bachand, Capital Reporting Services, PO Box 903, Pierre SD 57501, telephone number (605) 222-4235.

The meeting was also recorded, and the recording is available on the Boards and Commissions Portal at <https://boardsandcommissions.sd.gov/Meetings.aspx?BoardID=106>.

Approved this 7th day of July 2021.

Water Management Board

DRAFT

WATER MANAGEMENT BOARD MEETING May 5, 2021

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

2002-1	City of Spearfish	Spearfish	LA	1.33 cfs	40 acres	2 wells-Madison Aquifer	wi, wcr, iq 2 special
2004-1	Stephen or Connie Sulzbach	Newell	BU	1.06 cfs	70 acres	Return flows-Belle Fourche Irrigation Project	lf, iq
2377A-2	Southern Black Hills WS	Hot Springs	CU	no add'l	RWS	2 wells-Madison Aquifer	wi, 1 special
2752A-2	Southern Black Hills WS	Hot Springs	CU	no add'l	RWS	3 wells-Inyan Kara Aquifer	wi, 2 special
8463-3	Brook Bye	Vermillion	CL	1.78 cfs	120 acres	1 well-Missouri:Elk Point	wi, wcr, iq, 1 special
8464-3	Lakeview Httm Brethren	Lake Andes	CM	0.30 cfs	commercial	3 wells-Dakota, Codell & Choteau: West Aquifers	wi, 4 special
8465-3	Robert Maeschen	Ethan	DN	1.22 cfs	91 acres	1 well-Niobrara Aquifer	wi, wcr, iq
8466-3	Leber Bros LLC	Parker	TU	1.78 cfs	120 acres	1 well-Parker Centerville Aqu	wi, wcr, iq, 1 special
8467-3	Leber Bros LLC	Parker	TU	1.78 cfs	140 acres	1 well-Parker Centerville Aqu	wi, wcr, iq
8469-3	Double A Farms LLC	Centerville	LN	2.22 cfs	114 acres	1 well-Upper Vermillion Missouri: South Aquifer	wi, wcr, iq, 1 special
8470-3	Nicholas Blake	Centerville	TU	1.78 cfs	160 acres	1 well-Upper Vermillion Missouri: South Aquifer	wi, wcr, iq
8471-3	Roger Blake	Centerville	TU	1.78 cfs	160 acres	1 well-Parker Centerville Aqu	wi, wcr, iq
8472-3	Roger Blake	Centerville	TU	0.22 cfs	60 acres	1 well-Parker Centerville Aqu	wi, iq
8473-3	Terry Wieting	Huron	BD	1.78 cfs	160 acres	James River	iq, 2 special
8474-3	Mike Chicoine	Jefferson	UN	2.22 cfs	160 acres	1 well-Missouri:Elk Point	wi, wcr, iq
8475-3	Mike Chicoine	Jefferson	UN	2.22 cfs	80 acres	1 well-Missouri:Elk Point	wi, wcr, iq, 1 special
8476-3	Mike Chicoine	Jefferson	UN	2.22 cfs	48.2 acres	1 well-Missouri:Elk Point	wi, wcr, iq, 1 special
8477-3	Larry Braun Farms LP	Warner	MP	1.78 cfs	132 acres	1 well-Spr Creek: McPherson	wi, wcr, iq
8478-3	Xcel Energy	Marvin	GT	0.022 cfs	commercial	1 well-Prairie Choteau Aquifer	wi
8479-3	Concrete Materials	Sioux Falls	UN	0.133 cfs	industrial	1 well-Lower James Missouri	wi, 2 special
8480-3	David Zubke	Waubay	DA	0.67 cfs	40 acres	2 wells-Big Sioux: North	wi, wcr, iq, 1 special
8481-3	MGJR LLC	Ft. Pierre	HU	2.22 cfs	80 acres	1 well-Gray Goose Aquifer	wi, wcr, iq, 1 special
8483-3	Frank Kralicek & Frank Kralicek Jr.	Yankton	YA	2.22 cfs	400 acres	2 wells-Lower James Missouri	wi, wcr, iq
8484-3	Dean & John Lindstrom	Beresford	CL	1.78 cfs	120 acres	1 well-Lower James Missouri	wi, wcr, iq, 1 special
8485-3	Hilltop Irrigation District	Chamberlain	BL	no add'l	160 acres	Missouri River	iq
8487-3	Spink Hutterian Brethren	Frankfort	SP	0.144 cfs	comm & dom	2 wells-Dakota Aquifer	wi, wcr, 5 special
8489-3	Blake Allard	Jefferson	UN	1.78 cfs	120 acres	1 well-Missouri:Elk Point	wi, wcr, iq, 1 special

8490-3	Nathan Meland	Wallace	CD	0.87	30 acres	slough	iq
8491-3	Mike Barber	Sioux Falls	LN	2.56 cfs	232 acres	4 wells-Big Sioux:South	
8492-3	Tim or Kari Ostrem	Centerville	CL	no add'l	180 acres	1 well-Upper Vermillion Missouri:South	wi, iq, 1 special
8493-3	Melvin Donnelly	Elk Point	UN	1.78 cfs	130 acres	1 well-Missouri:Elk Point	wi, wcr, 1 special
8502-3	Bret Flihs	Groton	BN	1.33 cfs	130 acres	drainage tile outflow	iq

Future Use Review

No.	Name	Address	County	Amount Remaining in Reserve	Use	Source	Qualifications
4290-3	City of Mobridge	Mobridge	WL	1,656 AF	municipal	Missouri River	none

DRAFT