

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 243RD MEETING
OF THE WATER MANAGEMENT BOARD
REMOTE CONNECTION
FLOYD MATTHEW TRAINING CENTER
523 EAST CAPITOL AVENUE
PIERRE, SOUTH DAKOTA

JUNE 30, 2023

CALL TO ORDER AND ROLL CALL: Chairman William Larson called the meeting to order at 11:00 a.m. Central Time. The roll was called. A quorum was present.

The meeting was streaming live on SD.net.

The following participated in the meeting:

Board Members: William Larson, Rodney Freeman, Chad Comes, Peggy Dixon, Tim Bjork, Jim Hutmacher and Leo Holzbauer.

Department of Agriculture and Natural Resources (DANR): Eric Gronlund, Chief Engineer, Ron Duvall, Water Rights Program.

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

McCook Lake Recreation Area Association: John Hines, Sioux City, IA, Attorney for McCook Lake Recreation Area Association.

Court Reporter: Elizabeth Lundquist, Sioux Falls, SD.

Others: Senator Randy Deibert, Deborah Morris, Jay Gilbertson.

ADOPT FINAL AGENDA: Motion by Freeman, seconded by Hutmacher, to amend the agenda to add a possible motion to schedule the petition for Declaratory Ruling and the hearing on Water Permit Application No. 8744-3. A roll call vote was taken, and the motion carried unanimously.

CONFLICTS DISCLOSURES AND REQUESTS FOR STATE WAIVERS: None.

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

CONSIDER APPEAL OF PREHEARING CHAIR'S ORDER GRANTING THE CHIEF ENGINEER'S MOTION FOR CONTINUANCE IN THE MATTER OF MCCOOK LAKE

RECREATION AREA ASSOCIATION'S PETITION FOR DECLARATORY RULING: David McVey stated that pending before the board is a petition that was filed by the McCook Lake Recreation Area Association for a declaratory ruling regarding a proposed shoreline alteration, a petition in opposition filed regarding a water permit application filed by Dakota Bay, a motion for a continuance filed by the Water Rights Program and the scheduling of a special meeting, and resistance to that motion filed by McCook Lake Recreation Area Association.

An order was entered by the prehearing chairman on June 22, 2023, granting the continuance and placing the request for a special meeting on the July meeting agenda. In addition, the Water Rights Program filed a motion for a special meeting regarding Water Permit Application No. 8744-3, and McCook Lake Recreation Area Association filed resistance to that motion for a special meeting.

The purpose of this meeting is to consider the appeal on granting the Chief Engineer's motion for a continuance.

Appearances:

Ann Mines Bailey, Assistant Attorney General, on behalf of the Chief Engineer and the DANR Water Rights Program.

Deborah Morris and Dean Fankhauser, attorneys with Tigges Bottaro Firm, on behalf of Dakota Bay.

John Hines, attorney with Crary Huff, on behalf of McCook Lake Recreation Area Association.

Ms. Mines Bailey stated that the McCook Lake Recreation Area Association (the Association) filed a petition for declaratory ruling with the Water Rights Program on March 13, 2023. The petition specifically requests that the board issue a declaratory ruling that the alteration of a public water body by a private party requires a permit for appropriation of water consistent with Mr. Gronlund's testimony to the Agriculture and Natural Resources Committee and consistent with state law. The petition describes some facts and general terms and has attached to it a letter from the Association president speaking more specifically about the project with which the Association is concerned. That project, as proposed by Mr. Chicoine, is to develop an area next to McCook Lake. Part of that plan is the construction of a canal. The specifics of the exact plan are not in the petition or in the letter.

The public notice for the petition was drafted by the Association's counsel, and it provides a few more facts, and it also provides that the requested action from the board is that the board issue a declaratory ruling that Michael Chicoine/Dakota Bay LLC are required to make an application to the Water Management Board for a permit to appropriate water before starting any construction or placement of works to expand McCook Lake for Michael Chicoine/Dakota Bay LLC's private

Water Management Board
June 30, 2023, Meeting Minutes

use because the proposed construction appropriates the water of McCook Lake and would also unlawfully impair the McCook Lake Recreation Area Association's water rights.

Approximately two weeks later, after the filing of the petition, Dakota Bay filed an application for a water right seeking an appropriation of water from the Missouri Elk Point Aquifer. The purpose of that appropriation is to initially fill the canal, which is to be constructed off of McCook Lake, then after that initial fill the first year, a subsequent appropriation to cover evaporation, and seepage losses in order to maintain the integrity of the canal liner.

That water permit application was public noticed and the only petition received is from the lake association. The matter was originally scheduled for hearing at the July 12 board meeting. The Association exercised its statutory rights and requested an auto delay. Therefore, the board cannot hear the water right application for at least 20 days from July 12, 2023.

Ms. Mines Bailey stated that the draft public notice for the petition for declaratory ruling very much focuses on Mr. Chicoine and the Association's concerns regarding its own water rights.

Assuming that the Association proceeds on the matter as set forth in the public notice, and not the request as set forth in the petition, it is the Chief Engineer's position that it would be inefficient for the board to hear the petition for declaratory ruling and the water right application at separate times, during separate hearings.

Ms. Mines Bailey said part of the Association's claim in the request for relief set forth in the public notice is a declaration from the board that Mr. Chicoine's project will unlawfully impair the Association's water permits. Deciding on the water right application would necessarily eliminate or render moot part of the Association's request. The Association is resisting this motion, but even in their resistance to the motion, they know that if they were granted the requested relief, it would materially affect Mr. Chicoine's water permit application.

In addition to all of this, the Chief Engineer is requesting a special meeting preferably to be held at the beginning of August. The purpose of that meeting would be to hear both of these matters together, to have everybody in the same room, and allow efficiency of the board's time. Ms. Mines Bailey stated that the reason she set forth in the motion for that special meeting is due to staffing changes. She has accepted a position outside of the Attorney General's Office and her last day with the Attorney General's Office is August 23, 2023. After that, new counsel will be assigned to the Chief Engineer and Water Rights Program. It is the Chief Engineer and Water Rights Program's desire to hear this matter before Ms. Mines Bailey's departure. Because the auto delay was invoked, a hearing on the water permit application cannot be held until after August 1, 2023. Ms. Mines Bailey requested that the board hold a special meeting sometime during the first two weeks in August to hear this matter and the water permit application at the same time.

Water Management Board
June 30, 2023, Meeting Minutes

In their response and opposition, the Association argues that they filed first and should be heard first. The board has discretion as to which matter would be heard first, even at a special meeting. The Association indicates that the requested relief would require Dakota Bay or Mr. Chicoine to apply for an entirely separate water right permit from Application No. 8744-3 and would potentially render Application No. 8744-3 moot.

Ms. Mines Bailey stated that Dakota Bay is seeking an appropriation for an initial fill and to cover evaporation and seepage thereafter. She said it seems that the two matters are related. The Association asserts that there are specific undisputed facts, and that this is just merely legal argument. Ms. Mines Bailey said a large portion of this is legal argument; however, there will need to be an establishment of facts, such as what exactly the parameters of the Association's rights are, what the parameters of Dakota Bay's proposed project are, and to determine an unlawful impairment. It seems to be necessary for the board hear the other factor; the availability of unappropriated water. It would be redundant to do that at the declaratory ruling and then to turn around and do it again at the water right hearing, because even if the board were to grant the requested relief, there would still need to be a hearing on Dakota Bay's water right. Additionally, the Association argues that the hearing on the petition must be held at the regularly scheduled July meeting because of the rule, and they essentially argue that they are entitled to a continuance of the water permit application until the next regularly scheduled meeting.

Ms. Mines Bailey stated that the rule provides specifically that the board shall schedule the petition for hearing no later than its second regularly scheduled meeting unless all parties agree to a postponement. In this instance, the board has scheduled the meeting. The published hearing date in the notice is July 12, 2023. SDCL 46-2A-5 provides an auto-delay in a contested case. The hearing date in the public notice is equivalent to scheduling because 46-2A-5 says when someone invokes the auto-delay provision, that matter shall be rescheduled for hearing. Because it has been scheduled, there is no agreement necessary by all parties. None of the parties would be prejudiced because these were both initially scheduled to be heard in July. The board has the authority to control its docket. Ms. Mines Bailey stated that for those reasons the Chief Engineer and Water Rights program believes this is an appropriate action.

Mr. Hines stated that he is the attorney for the Association. The Association is not seeking a ruling on July 12th regarding unlawful impairment of the Association's water rights. The relief requested in the petition and in the notice is for the declaration that a permit to appropriate water is required prior to starting any construction. The form of the notice was provided by the Water Rights Program and the facts and requested relief were supplied by Mr. Hines. The portion of the notice that says, the proposed construction appropriates water and would also unlawfully impair the Association's water rights, is meant to be more explanatory. He said the Association will not be seeking that determination. The Association is seeking a declaration that would allow the Association to make the argument that the project would impair the Association's rights. That will not be before the board when the parties argue the declaratory ruling petition. Mr. Hines stated that in the resistance to the motion to continue and the motion for a special meeting,

Water Management Board
June 30, 2023, Meeting Minutes

he does not recall stating the Association believes the declaratory ruling will materially affect pending Application No. 8744-3. He believes that if Dakota Bay or Mr. Chicoine are required to obtain a different permit, it may no longer be necessary for him to pursue this permit, and that is why the existing permit application was described as potentially being moot.

Mr. Hines said the reason for the appeal is because of Board Rule 74:02:01:47 titled "Timely consideration by board," and he cannot take any issue with Ms. Mines Bailey's reading of that rule, but the interpretation that the Attorney General's office is putting forward would effectively render this rule meaningless. If the board is free to continue matters without the consent of the parties, then there would be nothing to prevent the board from continuing it indefinitely. Also, continuing the hearing without the consent of the parties raises questions whether the notice has to be republished because the Association was required to publish notices in the newspapers of the date and time of the hearing, which sets the deadlines for comments in opposition. If the board is going to continue the hearing, will the notice need to be published again? Will the state reimburse the fee for publishing since it was the state's decision to continue the hearing? Does it reopen the comments and opposition period? Mr. Hines said these are all questions that would become open if the interpretation of the rule is that the board does not have to timely consider the matter. Mr. Hines said the statutory right for the automatic postponement of the water rights application applies to the water rights permit. It doesn't apply to the declaratory ruling action; it's a different part of the rules. Mr. Hines said he knows that because the form of the notice that was provided to him by the Water Rights Program to publish on this matter doesn't include that language. The notice that was published by Dakota Bay and Mr. Chicoine on the application includes a specific line about the continuation of the matter, so he believes the rules don't apply to the petition for declaratory ruling. The portion of the published notice that was drafted by the state says that after the board has heard the declaratory ruling it can take the following actions: 1) Issue declaratory rulings on the requested actions; 2) take other action as the board deems warranted after hearing the evidence presented; 3) defer action; or 4) take no action. Mr. Hines stated that the Association believes when the board hears their evidence and arguments on the petition for declaratory ruling, the board will take action number one and issue a ruling. He said the Association understands that the board might not agree. The Water Rights Program will certainly argue that the board needs to also consider the water rights application, and the board could defer the action until hearing that matter.

Mr. Hines said it is the Association's position that hearing these matters together confuses the issues. The facts and argument that will be presented are going to have nothing to do with the water rights application. That application didn't exist when the petition for a declaratory ruling was prepared. He said the Association understands that these actions might affect one another, but they don't believe it is necessary or even advisable to consider them together.

Mr. Hines stated that regarding scheduling the special hearing, he understands the State is concerned that Ms. Mines Bailey has accepted new position, but the Association's concern is that this matter will be rushed to conclusion without everyone having an opportunity to make the best

Water Management Board
June 30, 2023, Meeting Minutes

record possible. The Association is ready to proceed on the argument for the declaratory ruling. It is primarily going to be presentation of undisputed facts and legal argument, whereas the water rights permit application is a bit more technical. This is why the Association has appealed the prehearing officer's ruling. Mr. Hines said he believes that it is required by rule to have the board timely consider this matter at the July 12 meeting, and he opposes continuation of the petition.

Ms. Morris stated that on behalf of Dakota Bay, she believes the two matters are inextricably combined and need to be heard together.

Mr. Bjork said he was confused by what Ms. Mines Bailey said. He asked when the Department of Agriculture and Natural Resources told the Association that the expansion of a public lake by private property does not need require a water permit. He asked if the application for a water permit makes the declaratory ruling a moot point.

Ms. Mines Bailey responded that the evidence that the board will hear is that the initial project that was presented to the Chief Engineer was merely the construction of the canal and alteration of the shoreline. There was no need for water to fill the canal or to maintain a liner. Shoreline alteration permits are issued through the Department of Game, Fish and Parks, and because there was no use of water, Mr. Chicoine was told that there was no need for a continuous appropriation, but that perhaps a temporary permit for the one-time fill might be appropriate. Those were the facts that were initially provided.

The initial project was a canal that was going to be constructed off the lake. It was for modification of the shoreline, but no use of water.

Mr. Hines said he agrees with Ms. Mines Bailey's description of the initial project and what triggered this proceeding. He said he would agree that if Mr. Chicoine/Dakota Bay had submitted an application to appropriate water from McCook Lake, then that would make the declaratory ruling petition moot. Mr. Chicoine's application to appropriate water from his well doesn't speak to the Association's initial question and what the Association wants to argue to the board, which is that under the law the canal project appropriates water from McCook Lake.

Chairman Larson asked if Mr. Hines would agree that as the Water Rights Program has set forth the issues between his client's position and Dakota Bay's position are so intertwined it would make more sense in judicial economy to hear all of those issues at the same hearing.

Mr. Hines said he believes the issue is that the water rights application that was submitted deals with confined aquifers and has twenty-two pages of reports and engineering and hydrogeology and hydrology, that's all very technical and interesting, and the Association is working on getting their own expert to look at that report. However, the Association's declaratory ruling petition is primarily undisputed facts and legal argument, and he would be concerned that if the board rules

Water Management Board
June 30, 2023, Meeting Minutes

in the Association's favor and finds that Mr. Chicoine/ Dakota Bay are required to apply for an additional permit that then we would hear the first permit at the same time as the ruling and then Mr. Chicoine would have to come back and get a second permit, that's going to have another twenty-two page report, potentially. Mr. Hines said he believes the economy can be argued both ways, and he believes it will be simpler and clearer for everyone involved to argue the petition first.

Chairman Larson asked Mr. Hines if he would be able to have his evidence ready if the order for continuance is affirmed and the hearing is set for sometime in August.

Mr. Hines answered that his concern is that the Association is a nonprofit governed by a board and the board has been working to find someone qualified and willing to assist in this matter. The Association has not yet secured that individual, so they would have concerns about that time frame and just not having adequate time to get that put together for the board's consideration.

Chairman Larson requested board action.

Motion by Hutmacher, seconded by Comes, to affirm prehearing chairman Freeman's order continuing this matter. A roll call vote was taken, and the motion carried with Comes, Dixon, Freeman, Holzbauer, Hutmacher, and Larson voting aye and Bjork voting no.

Mr. McVey stated that the next order of business was for the board to schedule the declaratory ruling matter and to consider the motion by the Water Rights Program to schedule a special meeting for Water Permit Application No. 8744-3 and the consideration of whether to schedule both matters together sometime in early August.

Mr. Hines objected to consideration of setting a special meeting to consider these two items since it was not noticed in advance. Mr. Hines said he realizes that the board has amended the agenda, but he believes this item was originally scheduled for the July 12 meeting and he would prefer to have that additional time to prepare a response.

Motion by Chairman Larson, seconded by Freeman, that at its July 12 meeting the board set the hearing date for Water Permit Application No. 8744-3. A roll call vote was taken, and the motion carried unanimously.

Chairman Larson requested a motion to set a hearing date on the petition for a declaratory judgment within the first two weeks of August.

Mr. Bjork asked why the board can continue that beyond the second meeting as required by the rules.

Ms. Mines Bailey stated that the rule requires that the matter be scheduled. Scheduled means

Water Management Board
June 30, 2023, Meeting Minutes

placed on the agenda, put in the public notice for hearing. That has been accomplished. It was scheduled for the July meeting. The concept of scheduling being accomplished by being issued in a public notice is supported by the language used in 46-2A-5, which requires a rescheduling of a hearing based on the invocation of an auto delay, and that rescheduling is 20 days later than the initial date placed in the published notice. So, the notion of scheduling being accomplished by the public notice is already in statute. The matter was set for hearing in July. The board has authority of its docket and can continue a hearing.

Motion by Chairman Larson, seconded by Freeman, to set a hearing on the petition for declaratory judgement sometime during the first two weeks in August. A roll call vote was taken, and the motion carried unanimously.

Motion by Freeman, seconded by Bjork, to schedule August 2, 2023, at 10:00 a.m. for the hearing for the petition for declaratory judgement. A roll call vote was taken, and the motion carried unanimously.

Ms. Morris stated that attorney Dean Fankhauser is in the process of obtaining pro hoc vice, and he will be proceeding on this case with her.

ADJOURN: Motion by Freeman, seconded by Hutmacher, to adjourn. Motion carried.

Chairman Larson declared the meeting adjourned.

A court reporter was present for the hearing and a transcript of the proceedings may be obtained by contacting Elizabeth Lundquist at 4821 E. 41st Street #207, Sioux Falls, SD 57110; telephone number 215-360-1008 or lizlundquist@gmail.com.

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

Approved 8/2, 2023.


Water Management Board