

.MINUTES OF THE 244<sup>th</sup> MEETING  
OF THE WATER MANAGEMENT BOARD  
REMOTE CONFERENCE MEETING  
FLOYD MATTHEW TRAINING CENTER  
523 EAST CAPITOL AVENUE  
PIERRE, SOUTH DAKOTA  
JULY 12, 2023

CALL TO ORDER: Chairman Bill Larson called the meeting to order at 9:30 a.m. Central Time. The roll was called, and a quorum was present.

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

The following attended the meeting:

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

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

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

Legislative Oversight Committee: Representative Mike Weisgram.

Court Reporter: Carla Bachand, Capital Reporting Services, Pierre, SD.

Others: Jon Kotilnek, staff attorney, Game, Fish and Parks; Leslie Murphy, Banner Associates; John Hines, attorney for McCook Lake Recreation Area Association; John Taylor, attorney for Lewis & Clark Regional Water System, Dean Fankhauser and Deborah J. Morris, attorneys for Dakota Bay.

ANNUAL ELECTION OF OFFICERS: Motion by Comes, seconded by Bjork, to appoint Bill Larson as chairman. A roll call vote was taken, and the motion carried unanimously.

Motion by Bjork, seconded by Dixon, to appoint Rodney Freeman as prehearing chairman. A roll call vote was taken, and the motion carried unanimously.

Motion by Comes, seconded by Dixon, to appoint Jim Hutmacher as vice chairman. A roll call vote was taken, and the motion carried unanimously.

Motion by Dixon, seconded by Bjork, to appoint Leo Holzbauer as secretary. A roll call was taken, and the motion carried with Bjork, Comes, Dixon, and Larson voting aye. Holzbauer abstained.

ADOPT FINAL AGENDA: Ann Mines Bailey stated that on July 11, 2023, the department received a subpoena, which requires compliance on July 14. She requested that the board amend the agenda to add, under the Dakota Bay Water Permit Application No. 8744-3, an opportunity for her to make an oral motion regarding the subpoena.

The Department of Game, Fish and Parks also received a subpoena. Jon Kotilnek, attorney for Game, Fish and Parks, also requested that this matter be added to the agenda.

John Hines, attorney for the McCook Lake Recreation Area Association, stated that the motion to amend the agenda violates the South Dakota open meetings law. Mr. Hines said the Water Management Board is a political subdivision of the state of South Dakota and is subject to the open meetings law. SDCL 1-25-1.1 requires that the proposed agenda be posted for 24 hours immediately preceding the meeting. He said he understands that a proposed agenda is a proposed agenda until finalized, but he can find no South Dakota law, rule, court ruling, or attorney general opinion that allows the addition of items. The public would have no notice of the item that is going to be considered. Mr. Hines said Ms. Mines Bailey emailed the parties at 5:48 p.m. on July 11 informing them that a motion would be made to amend the agenda, but the parties had no knowledge of what that motion would be, so there was no opportunity to have prepared for it.

Mr. Hines stated that under the South Dakota Codified Laws, he does not believe the addition of this agenda item is appropriate and, even if there is a provision for allowing the addition of this item, no adequate notice has been given to the parties or to the public.

In response to a question from Chairman Larson, Mr. Hines stated that he served the subpoena upon Ms. Mines Bailey and the Department of Game, Fish and Parks.

Chairman Larson asked if Mr. Hines served the subpoena upon the Water Management Board. Mr. Hines answered that the subpoena was transmitted to the board.

Chairman Larson asked Mr. Hines if he is prepared to argue if Ms. Mines Bailey and Mr. Kotilnek are allowed to argue against the subpoena. Mr. Hines said the question is not about arguing the merits of the subpoena; it's whether the board should consider some action item that was not noticed on the agenda.

Chairman Larson called for a short recess so he could consult with Assistant Attorney General McVey.

Chairman Larson called the meeting back to order. He stated that he could not find a record that the board was actually served a subpoena. Additionally, Mr. Hines served the subpoena the day before this Water Management Board meeting, with a two-day compliance. Mr. Hines was given notice of the challenge to his subpoena yesterday by Ms. Mines Bailey; therefore, he had notice that it was going to be challenged.

Chairman Larson stated that he does not know of any case law that says the board cannot add an agenda item with the proper motion. Additionally, SDCL 1-26-19.1 gives subpoena power to the

board, not to counsel. He requested a motion to amend the final agenda for today's meeting to allow Ms. Mines Bailey and Mr. Kotilnek to orally argue to quash the subpoena that was issued by Mr. Hines.

Motion by Bjork, seconded by Comes, to amend the agenda to allow Ms. Mines Bailey and Mr. Kotilnek to orally argue to quash the subpoena issued by Mr. Hines. A roll call vote was taken, and the motion carried unanimously.

Motion by Bjork, seconded by Dixon, to adopt the final agenda, as amended. A roll call vote was taken, and the motion carried unanimously.

The oral arguments to quash the subpoena was added to the 10:00 a.m. agenda item; "Schedule a Special Meeting of the Water Management Board to consider Water Permit Application No. 8744-3, Dakota Bay."

CONFLICT DISCLOSURES AND REQUESTS FOR STATE BOARD WAIVERS: None.

ADOPT MAY 3, 2023, BOARD MEETING MINUTES: Motion by Bjork, seconded by Comes, to approve the minutes of the May 3, 2023, Water Management Board meeting. A roll call vote was taken, and the motion carried unanimously.

SET OCTOBER 4-5, 2023, MEETING AND LOCATION: Staff suggested that the October 4-5 meeting be held at the Matthew Training Center in Pierre.

Motion by Comes, seconded by Bjork, to hold the October 4-5, 2023, Water Management Board meeting at the Matthew Training Center in Pierre. A roll call vote was taken, and the motion carried unanimously.

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

UPDATE ON DANR ACTIVITIES: Eric Gronlund, Chief Engineer, Water Rights Program, stated that he had no report.

Mr. Gronlund acknowledged that Representative Mike Weisgram, Legislative Oversight Committee, was present for the meeting.

STATUS AND REVIEW OF WATER RIGHTS LITIGATION: Mr. McVey reported that there was nothing to report regarding litigation. Powertech still remains waiting for the court to act on a motion for a consolidated record.

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

CANCELLATION CONSIDERATIONS: Prior to the meeting, the board members received a table listing the proposed cancellations, the notices of cancellation, and the chief engineer's

recommendations.

Ron Duvall stated that once a water right permit is issued it can be cancelled for non-construction, abandonment, or forfeiture due to non-use of water.

Mr. Duvall presented the water rights/permits scheduled for cancellation. The owners were notified of the hearing and the reasons for cancellation. The Water Rights Program received no comments or letters in response to the notices of cancellation.

Division I is all of the area north of the Cheyenne River and Pennington County, Division II is all of the area south of the Cheyenne River including Pennington County, and Division III includes all of the east river area.

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

Number	Original Owner	Present Owner(s) and Other Persons Notified	Reason
--------	----------------	---	--------

#### **DIVISION I WATER PERMIT**

<b>RT 1850-1</b>	Ted Heidrich	Guy Casteel	Abandonment/Forfeiture
------------------	--------------	-------------	------------------------

#### **DIVISION II WATER RIGHTS**

<b>RT 968-2</b>	Harry F Newman	Bart & Marcy Ramsey	Abandonment/Forfeiture
<b>PE 2799-2</b>	Daniel G Warren	Same	Abandonment

#### **DIVISION III WATER PERMITS AND WATER RIGHTS**

<b>RT 2966-3</b>	Charles M Fuller	Lonnie & Linda Fischer Corey & Julie Lewison	Abandonment/Forfeiture
<b>RT 3723-3</b>	Rocky Meadows Inc.	Same	Abandonment/Forfeiture
<b>PE 7455-3</b>	Dan Mettler	Same	Non-Construction
<b>PE 7512-3</b> <b>PE 7513-3</b> <b>PE 7514-3</b>	Greg Wirth	Same	Non-Construction
<b>PE 7813-3</b>	Dwight Rossow	Same	Non-Construction
<b>PE 7873-3</b>	Lee Pawlowski	Same	Non-Construction

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

FUTURE USE REVIEWS: Mr. Duvall stated that a table listing the future use permits up for a

seven-year review was included in the packet the board members received prior to the meeting. Certain entities such as water distribution systems, municipalities and rural water systems can reserve water for future needs.

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.

Mr. Duvall stated that the Water Rights Program contacted each of the entities inquiring whether the entity wanted to retain the future use permit. The letters from the entities requesting that they be allowed to retain their future use permits, the Chief Engineer's recommendations, and the Affidavits of Publication showing that the hearing was public noticed were included in the board packet. No letters in opposition were received in response to the public notices.

The chief engineer recommended that the board allow the following Future Use Permits to remain in effect for an additional seven years, as listed below.

No.	Name	Amount Remaining in Reserve	Source
1442-2	West River WDD	5,515 AF	Missouri River
5155-3	Lincoln County RWS	440 AF	Dakota
449-3	City of Sioux Falls	5,430 AF	Big Sioux Southern Skunk Creek
3981-3, 3981A-3	City of Sioux Falls	30,000 AF	Big Sioux River

Motion by Bjork, seconded by Dixon, that the future use permits shown in the table remain in effect for the amounts listed. A roll call vote was taken, and the motion carried with Bjork, Dixon, Holzbauer, and Larson voting aye. Comes abstained.

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)

Mr. Duvall explained that when the public notice regarding these applications is published, the public has the opportunity to file a petition to intervene or comment on the application. Comments do not result in a contested case hearing before the board. The law provides that those comments be provided to the Water Management Board. At the May 3, 2023, Water Management Board meeting, the comments were provided to the board in their packet, but there was no specific agenda item concerning those comments; for this board meeting there is.

Comment received concerning Water Permit Application 8745-3, University of South Dakota (USD): Mr. Duvall stated that the Department of Agriculture and Natural Resources received a letter from the city of Vermillion. A copy of the letter was included in the board packet.

Mr. Duvall explained that about a year ago the Water Rights Program became aware that USD had developed a geothermal heating and cooling system for a campus building because they intended to pump water out of the Lower Missouri aquifer and then re-inject the water. There were problems with USD's injection well, so they were discharging to the city of Vermillion's storm sewer system. The city contacted the Water Rights Program. The Water Rights Program then contacted USD and informed them that in order to continuing to use water, a water right permit was required. The Water Rights Program learned that USD intended to investigate whether more injection wells should be drilled in order to get the system working. The Water Rights Program told USD to apply for a permit.

The Chief Engineer recommended a one-time use of a volume of water to allow USD to continue discharging while trying to get the system operating with injection wells. The application was for a specific volume of water for one-time use, then after that it would be non-consumptive. If USD cannot get the system operating, then USD will have to submit another application for a new permit if they plan to continue discharging water.

Mr. Duvall stated that in response to the public notice, the Water Rights Program made the city of Vermillion aware of this water permit application, and the city submitted comments concerning the discharge of the water to the storm sewer system.

Mr. Duvall stated that no board action was required.

Mr. Comes asked if the discussion regarding this comment being recorded in the minutes would suffice rather than a motion to acknowledge the comment.

Mr. McVey stated that he does not believe a motion to acknowledge is necessary or appropriate. No petition in opposition to the application was filed, so the Chief Engineer issued the permit. The purpose of this agenda item is to give the board an opportunity to be aware of the comments that were submitted. The fact that the comment letter was discussed and is on the record is adequate.

Chairman Larson asked if there was a representative of the city of Vermillion in attendance at this meeting so board could ask questions about the comments.

Mr. Duvall stated that the Water Rights Program did not provide notice of this meeting to the city of Vermillion because the permit has been issued.

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.

CONSIDER VALIDATION OF RECOGNIZED VESTED WATER RIGHT CLAIM NO. 815-3, SD DEPARTMENT OF GAME, FISH AND PARKS FOR MINA LAKE:

Eric Gronlund reported that the Department of Game, Fish and Parks filed a vested water right claim for Mina Lake in 1961. Mina Lake is a dam impoundment on Snake Creek in Edmunds County. In 1961, the claim stated the amount of water to be the amount required to fill the lake to the outlet elevation, approximately 2,568 acre-feet per year. It was standard practice at the time for the amount of water specified to be reflective of three times the surface area to account for yearly evaporation.

When this was originally filed in 1961, there was not a mechanism in state law for public notice for validation of impoundments or natural lakes to which Game, Fish and Parks had placed filings on. The claims were simply filed with the Water Rights Program as recognized vested water rights claims and protected accordingly.

In 1986, the South Dakota Legislature enacted statutes that provided a process for validation, which includes public notice. The statutes provide that no hearing be held unless a petition to oppose is filed, and further directs the board to proceed with validating the uncontested vested water right claims. In cases where a petition is filed, the board is to hear that matter and determine it.

In 1988 when these public notices occurred John Hatch, the Chief Engineer at that time, filed notice of intent to oppose validation of all of Game, Fish, and Parks vested water right claims for lakes to be able to further quantify them on an actual elevation or volume storage. In the case of Mina Lake, the opposition was to allow for the claim to be amended to include the spillway elevation, correct the amount of water claimed, and add any amendments and qualifications necessary to clarify the vested right claim.

Recently, as part of the reconstruction of the spillway at Mina Lake, Game, Fish and Parks provided the Water Rights Program with as-built plans, which include the primary spillway surveyed elevation; therefore, validation of the vested right claim can proceed.

Chief Engineer Gronlund recommended the Water Management Board validate recognized Vested Water Right Claim No. 815-3 for sufficient water annually to maintain the water level to the spillway elevation of 1413.64 feet mean sea level.

Motion by Bjork, seconded by Comes, to validate Recognized Vested Water Right Claim No. 815-3 for sufficient water to maintain the water level to Mina Lake dam's spillway elevation of 1413.64 feet mean sea level. 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. 2850-2, ELK MOUNTAIN

WATER USERS ASSOCIATION, INC.: David McVey stated that this matter came before the board on May 3, 2023. The applicant, Elk Mountain Water Users Association, was represented by J. Scott James. Petitioners Daniel and Dalton Stearns were represented by Robert Galbraith. Petitioners Tomas and Eraclio Martinez were represented by Matthew Naasz. The Department of Agriculture and Natural Resources, Water Rights Program and the Chief Engineer were represented by Ann Mines Bailey. Petitioner Travis Paulton appeared pro se.

Mr. McVey stated that the Water Rights Program filed proposed Findings of Fact and Conclusions of Law, and intervenors, Tomas and Eraclio Martinez filed several objections to those Findings of Fact and Conclusions of Law. Specifically, they objected to paragraphs 19, 27, 31, and 41 as incomplete, they proposed no alternative Findings of Fact, and their assertion of incompleteness does not affect the facts set forth in paragraphs 19, 27, 31, and 41. The Martinez's objected to Conclusions of Law paragraph 11, stating that without an aquifer performance test, given the proximity of the proposed diversion to the Martinez well, the evidence does not establish that the proposed diversion can be developed without impairment of the Martinez well, and suggesting that the application should be denied until such time as an aquifer performance test is completed and evaluated by the Water Rights Program.

Mr. McVey stated that the board voted to approve Water Permit Application No. 2850-2 and granted a priority date of July 7, 2022, with the following qualifications:

1. In accordance with SDCL 46-1-14 and 46-2A-20, Permit No. 2850-2 is issued for a twenty-year term. Pursuant to SDCL 46-2A-21, the twenty-year term may be deleted at any time during the twenty-year period or following its expiration. If the twenty-year term is not deleted at the end of the term, the permit may either be cancelled or amended with a new term limitation of up to twenty years. Permit No. 2850-2 may also be cancelled for non-construction, forfeiture, abandonment or three permit violations pursuant to SDCL 46-1-12, 46-5-37.1 and ARSD 74:02:01:37.
2. The well will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner, under the permit shall control withdrawals so there is



not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.

3. The well authorized by Permit No. 2850-2 shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.
4. The permit holder shall report to the Chief Engineer annually the amount of water withdrawn from the Madison aquifer.
5. Water Permit No. 2850-2 appropriates up to 145 acre-feet of water annually.

Motion by Bjork, seconded by Comes, to adopt the Findings of Fact, Conclusions of Law, and Final Decision in the matter of Water Permit Application 2850-2, Elk Mountain Water Users Association, Inc., as prepared by the Water Rights Program. A roll call vote was taken, and the motion carried unanimously.

CONSIDER FUTURE USE WATER PERMIT APPLICATION NO. 8754-3, LEWIS AND CLARK REGIONAL WATER SYSTEM: Ann Mines Bailey stated that John Taylor, attorney for Lewis & Clark Regional Water System, was participating remotely.

Ms. Mines Bailey stated that this particular application falls under SDCL 46-5-20.1, which states that any appropriation in excess of 10,000 acre-feet annually shall be presented by the Water Management Board to the legislature for approval prior to the board's acting upon the application. However, this requirement does not apply if the applicant is a South Dakota Conservancy District or for applications to use water for energy industry use. Ms. Mines Bailey noted that the since applicant is a regional water system, not a conservancy district or energy industry user, the application must be presented to the legislature for approval prior to the Water Management Board acting upon it.

Prior to the meeting, the board was provided with a copy of the pertinent statutes and rules for large-scale appropriations. Ms. Mines Bailey discussed the following procedure: Upon receipt of Lewis & Clark Regional Water System's application, the Chief Engineer has 60 days to formulate a report and a recommendation. It also goes through the regular public notice procedure as set forth in 46-2A-4 with the variation that the notice does provide the date of the evidentiary hearing; that is held at a later time along with the opportunity to exercise the auto-delay provision set forth in statute. Following public notice, the board may take official action to present matter to the South Dakota Legislature. SDCL 46-5-20.1 states that any application for appropriation of water pursuant to this chapter in excess of 10,000 acre-feet annually shall be presented by the Water Management Board to the legislature for approval prior to the board acting upon the application, so the Chief Engineer's intent is that once the board decides by majority vote to present this application to the legislature, the application, the report prepared by Water Rights staff, the recommendation of the Chief Engineer, the public notice, any comments that were received or petitions in opposition, and the minutes of this meeting will be transmitted to the legislature for approval. If the legislature approves the application, it will then be

scheduled for a hearing before the Water Management Board. Ms. Mines Bailey stated that legislative approval does not mandate approval by the board.

Ms. Mines Bailey noted that Future Use Water Permit Application No. 8754-3 has been public noticed, and no comments or petitions in opposition were submitted.

Chief Engineer Eric Gronlund presented the application and recommendation.

Future Use Water Permit Application No. 8754-3 for Lewis & Clark Regional Water System (RWS) proposes to appropriate and reserve for future use 19,121 acre-feet of water annually from the Missouri: Elk Point aquifer. The water is reserved for future water supplies for a rural water system. This application, if approved, does not authorize construction of works or application of water to beneficial use.

The future use area is located approximately three miles southwest of Vermillion. The Missouri: Elk Point aquifer underlies approximately 219,100 acres of Clay, Union, and Yankton Counties in southeastern South Dakota and contains. At this location the aquifer is generally unconfined and water movement in the aquifer is generally towards the southeast.

Mr. Gronlund stated that pursuant to SDCL 46-2A-10, a reservation for a future use may be approved only if there is a reasonable probability that unappropriated water is available for appropriation, that the quantity of water reserved will be needed by the entity, that the proposed use will be a beneficial use and is in the public interest.

Since this application requests in excess of 10,000 acre-feet of water annually, the Water Management Board must present the application to the Legislature for approval prior to the board acting on the application.

Mr. Gronlund stated that the last time an application for greater than 10,000 acre-feet came before the board was between 1994 and 1995, and it was filed by the Lewis & Clark Regional Water System.

SDCL 46-6-3.1 requires the amount of water withdrawn annually to not exceed the average estimated recharge. ARSD 74:02:05:07 requires that the Water Management Board rely upon the record of observation well measurements in addition to other data to determine that the quantity of water withdrawn annually from the aquifer does not exceed the estimated average annual recharge of the aquifer.

The Water Rights Program maintains 36 observation wells completed into the Missouri: Elk Point aquifer. Overall, these observation wells show water levels respond well to climatic conditions, rising during wetter periods (early spring snowmelt and precipitation) and declining to stable levels during drier periods. Several of the Missouri: Elk Point aquifer observation well hydrographs show a gradual long-term downward trend especially those close to the Missouri River. This downward trend is caused by entrenchment of the Missouri Riverbed and, in some places, a widening of the channel leading to lower water levels despite the river having the same rate of flow. The lowering of the water level in the Missouri River downstream of the Gavins

Point Dam and the subsequent lowering of the water level of Missouri: Elk Point aquifer observation wells in close proximity to the river show the strong hydrologic connection between the Missouri River and the Missouri: Elk Point aquifer. The lowering of the water levels in the aquifer, especially in close proximity to the Missouri River, is not a sign of over appropriation of the Missouri: Elk Point aquifer. The observation well water levels simply show the connection between the river and the aquifer.

The estimated recharge from a study of the Missouri: Elk Point aquifer based on the aerial extent is 3.8 inches per year. Applying that recharge rate over the approximate aquifer extent of 219,100 acres yields an annual average recharge estimate of 69,382 acre-feet. The South Dakota Geological Survey conducted an extensive study to more accurately quantify the percentage of induced recharge from the Missouri River from pumping in Lewis & Clark RWS's well field. It was determined that 84.6 percent of the water pumped from the well field is water that is induced from the Missouri River.

Lewis & Clark RWS is currently permitted to pump 53,442 acre-feet, and this application proposes to reserve an additional 19,121 acre-feet for a total of 72,563 acre-feet of water per year. Assuming 84.6 percent capture and full development of existing Lewis & Clark RWS water rights/permits and this application, that equates to 61,388.2 acre-feet of induced recharge from the Missouri River. When the original recharge that is taking place over the aerial extent and the induced recharge are combined, there would be 130,770.2 acre-feet of recharge if Lewis & Clark RWS is fully developed.

Currently, the discharge from all the uses, including Lewis & Clark RWS, the other municipalities and the irrigation is 118,276 acre-feet per year. Based on the hydrologic budget and the observation well data there is a reasonable probability there is unappropriated water available for this proposed appropriation.

Lewis & Clark RWS currently holds 53,442 acre-feet of water annually in water permits, which equates to a firm capacity of 47.71 million gallons per day. Lewis & Clark RWS has a desired system firm capacity of 60 million gallons per day, which requires a total annual volume of 72,563 acre-feet. This increase in annual volume is needed to supply current and future demand as the system completes its targeted expansion by 2030-2031.

Mr. Gronlund stated that Lewis and Clark RWS has demonstrated a need for water for the regional water system.

Mr. Gronlund recommended approval of Future Use Water Permit Application No. 8754-3, Lewis & Clark Regional Water System, and that the Water Management present the application to the South Dakota Legislature. This recommendation is based on the reasonable probability that unappropriated water is available as well as the application showing and demonstrating a need for the water.

Motion by Bjork, seconded by Holzbauer, to present Future Use Water Permit Application No. 8754-3, Lewis & Clark Regional Water System, to the South Dakota Legislature for approval. A roll call vote was taken, and the motion carried unanimously.

WATER RIGHTS PROGRAM LEGAL COUNSEL'S ORAL MOTION TO QUASH A

SUBPOENA ISSUED BY ATTORNEY JOHN HINES: Ann Mines Bailey stated that on the afternoon of July 11, 2023, at approximately 2:22 p.m. she was informed that the Department of Agriculture and Natural Resources received a subpoena duces tecum in the matter of Water Permit Application No. 8744-3, Dakota Bay, LLC. The subpoena is addressed to Ann Mines Bailey, Assistant Attorney General, attorney for the South Dakota Department of Agriculture and Natural Resources. Within an hour of receiving the subpoena, Ms. Mines Bailey spoke with Mr. Hines. Ms. Mines Bailey said she wanted to make it clear that she does not believe Mr. Hines' intent was for her to be served so close to the time required for compliance. The subpoena requests certain documents or Ms. Mines Bailey's presence at Mr. Hines' office on July 14, 2023, at 3:00 p.m. Ms. Mines Bailey said when they spoke, Mr. Hines agreed to increasing the amount of time to respond to the subpoena; however, Ms. Mines Bailey does not believe increasing the amount of time to respond to the subpoena is sufficient. Ms. Mines Bailey does not believe she has any choice under the law but to ask the board to quash the subpoena. The subpoena is issued in the name of Bill Larson, chair of the board.

SDCL 15-6-45(a) is part of the chapter known as the rules of procedure in circuit court. Those rules are applicable only in circuit court. That limitation is found in SDCL 15-6-1.

SDCL 1-26-18 and 1-26-19.1 are part of what is known as the administrative procedures act. Those two statutes provide, in general terms, the authority to conduct discovery in administrative hearings that are proceeding under SDCL 1-26. SDCL 1-26-19.1 provides the authority to administer oaths and issue subpoenas to the agency and officers thereof. SDCL 1-26-1(1) defines agency for the purposes of the board, so reading SDCL 1-16-19.1 with the understanding of agency, as the board and the board's officers that have the authority to issue a subpoena.

Ms. Mines Bailey stated that this subpoena was not issued under the board's authority or with the board's permission; discovery is not automatic in administrative cases. Even though SDCL 1-26-19.2 is titled "Depositions of witnesses" the South Dakota Supreme Court has held that those titles don't control. The statute says the board shall have power to cause the deposition or other discovery procedure to be conducted upon notice of the interested person, if any. So, the board does have discretion to determine whether or not discovery should occur. Ms. Mines Bailey stated that administrative hearings function on a truncated period of time, and they deal with very narrow issues. In this case, the board has not authorized discovery, there is no procedural order, there has been no motion to the board for discovery measures; therefore, the subpoena should be quashed because it does not properly exercise the authority of the board.

Ms. Mines Bailey said if the board finds that the rules of procedure in circuit courts apply she would ask the board to quash the subpoena even under those rules. This subpoena is directed to Ms. Mines Bailey as counsel for the Chief Engineer. Ms. Mines Bailey is counsel for the Chief Engineer and the Water Rights Program, not the entire Department of Agriculture and Natural Resources. The subpoena states that she is the attorney for the South Dakota Department of Agriculture and Natural Resources. Ms. Mines Bailey stated that she does not have access to everything held by the department in this matter, and even if she did, it would be protected under attorney/client privileges or a work product privilege. The documents Ms. Mines Bailey has that

would not be protected by privilege are documents that were given to her by Mr. Hines or that she accesses from the internet in general; and those documents are equally accessible to Mr. Hines. Ms. Mines Bailey stated that the subpoena was received by the Department of Agriculture and Natural Resources; it was not received by her. It was not served upon Ms. Mines Bailey though it was directed to her. It was not served upon the Office of the Attorney General, of whom Ms. Mines Bailey is an employee. Ms. Mines Bailey stated that service is improper, it doesn't properly denote her position, and it asks for documents that are privileged. Under the rules of procedure in Circuit Court, discovery is only allowed for relevant material. Here the subpoena seeks any and all documents, records, notes, reports, or recordings that relate to or concern Michael Chicoine's proposed canal and application to alter lake shore or bottom lands relating to McCook Lake, Michael Chicoine's and Dakota Bay LLC's water right permits and application in Union County, South Dakota, the McCook Lake Recreation Area Association's petition for declaratory ruling, and House Bill 1134A from the 2023 session.

Ms. Mines Bailey stated that alteration of shoreline permitting is handled by the Department of Game, Fish and Parks, not the Department of Agriculture and Natural Resources. She said she does not understand how House Bill 1134A is relevant to a water permit application. This matter is only pertaining to the water permit application, and what is at issue is Mr. Chicoine's desire to have an appropriation from the Missouri: Elk Point aquifer for the purposes of a one-time fill of a canal, which will be constructed off of McCook Lake, and additional water to maintain the level of the canal to counteract seepage or evaporation.

Ms. Mines Bailey said she does not believe McCook Lake Recreation Area Association's petition for declaratory ruling and House Bill 1134A are relevant to the four factors upon which the Water Management Board must decide whether or not to issue that permit.

Ms. Mines Bailey asked the Water Management Board to quash the subpoena.

Jon Kotilnek, staff attorney for Game, Fish and Parks, requested that the Water Management Board quash the subpoena Game, Fish and Parks received. This subpoena does not have the authority necessary to request the documents because it is not coming from the board. Even if the board were to find that this subpoena was valid, the Department of Game, Fish and Parks objects to the scope of it. The subpoena is overly broad, and it is requesting any and all documentation. Game, Fish and Parks is unsure of the specific documentation Mr. Hines is requesting in the subpoena.

Mr. Kotilnek noted that Game, Fish and Parks has received open records requests from Mr. Hines, which the department has complied with. The records Mr. Hines requested were the application and supplemental documents that Mr. Chicoine submitted to the department. The department has not made a decision on the application, so it is still a pending application. Mr. Kotilnek stated Game, Fish and Parks could not comply with that Items 2, 3, and 4 of the request in the subpoena because it is material that the department does not have, namely, the water rights permits and applications in Union County, the McCook Lake Recreation Area Association's petition for declaratory ruling, and House Bill 1134A, which is public knowledge and is easily accessible by Mr. Hines.

Mr. Kotilnek joined in Ms. Mines Bailey's motion to quash the subpoena submitted to Game, Fish and Parks by Mr. Hines.

John Hines, attorney for McCook Lake Recreation Area Association, which is a party in opposition of record to the Water Permit Application No. 8744-3.

Mr. Hines said if there were any modifications or corrections to the subpoena that would satisfy Game, Fish and Parks and Ms. Mines Bailey on behalf of the Chief Engineer, he would be happy to make those revisions and, if necessary, have a new subpoena issued today. The McCook Lake Recreation Area Association is willing to allow for additional time for the subpoenas, keeping in mind that the deadline for submitting exhibits on the petition for declaratory ruling is July 21, 2023, and if the board sets the water permit application hearing for the same August 2, 2023, date, the evidence deadline for that would also be July 21, 2023. If the board was willing to extend that, there would be additional time for the production of the documents.

Mr. Hines stated that regarding the statutory authority for the subpoena, SDCL 1-26-19.1 clearly gives the board the authority to have subpoenas issued. In SDCL 1-26-18 it is also clear that in contested cases the parties have the right to present evidence on issues of fact and may have subpoenas issued to compel attendance of witnesses and production of evidence. Mr. Hines said he does not see any administrative rules in the board's procedures that explains a process for having a subpoena issued, but SDCL 15-6-45(a) specifically refers back to SDCL 1-26-19.1 and goes on to say that any attorney of record in any action of proceeding or collateral hearing, civil or criminal, may issue subpoenas. It also says that the subpoena has to be transmitted to the clerk of court, secretary, or other filing officer of the board or tribunal. Mr. Hines said if this is not the proper procedure for having a subpoena issued, much of that language would be meaningless. The courts don't have boards or tribunals. This rule clearly states that the attorney of record may issue a subpoena in the name of the board, which was done. Mr. Hines said that subpoena has been issued and transmitted to the board under that rule. It was emailed to Mr. McVey, and it was mailed to the board. Mr. Hines stated that he could submit an affidavit of mailing to the board if the board desires.

Mr. Hines stated that, with regard to the content of the scope of subpoena, thirteen days ago, Ms. Mines Bailey argued to the Water Management Board that the declaratory ruling petition and the water rights issue were so intertwined that they must be heard together. He said he does not understand how now the position could be that these documents, which might be relevant to one couldn't be relevant to another. They are absolutely relevant. Mr. Hines said he assumes this board will set the hearing on the water permit application for August 2, 2023; the same day as the petition for the declaratory ruling. He does not believe it is appropriate for the Attorney General's Office to decide what may or may not be relevant. Mr. Hines said this is a request for documents so he and his clients can decide what would be relevant to submit to the board as evidence for these proceedings.

Mr. Hines stated to the extent that the attorneys general have indicated these subpoenas seek protected, privileged records that they don't have, the association is not expecting any governmental agency to turn over privileged records or to produce records they do not have.

Mr. Bjork commented that the attorneys seem to be interpreting the statutes differently. He said the board needs to decide on the matter based on conflicting information from the two attorneys on the same statutes.

Chairman Larson stated that he did not receive a copy of the subpoena. He asked Mr. Hines if he served the subpoena on Prehearing Chairman Rodney Freeman.

Mr. Hines stated that the rule requires that the subpoena be transmitted to the board. He is not sure if the filing officer of the board is Chairman Larson or Prehearing Chairman Freeman. Mr. Hines said the subpoena was directed to Chairman Larson, but he does not know if that was received in the office. He noted that since the board does not list any email addresses or other ways to communicate with the board, it was mailed to the office.

Chairman Larson stated that if SDCL 15-6-45(a) applies, the attorney issuing the subpoena must transmit a copy to the secretary or other filing officer of the board. Chairman Larson stated that as it stands now, he does not have the subpoena.

Mr. Hines stated that the subpoena has been transmitted, and as is the case under South Dakota law, that transmission occurs when it is mailed. It was mailed on June 30, 2023, the same time the issues were sent for service. He said it was not his intent to create this log jam of time. He said he is operating with an externally shortened timeframe due to Ms. Mines Bailey's impending departure from the Attorney General's Office. Mr. Hines said he is willing to provide all the time necessary, but the subpoenas were transmitted and served on the agencies. He does not yet have returns of service, since they were only served yesterday. If any additional documents require service, he will ensure that they will be served today.

Chairman Larson stated that as of today it is not a valid subpoena because it doesn't matter whether it was sent to the agency; he is supposed to have a copy.

Mr. Hines said he would draft new subpoenas and have them served today.

Chairman Larson questioned the relevance of communications with Ms. Mines Bailey and her client.

Mr. Hines said the subpoena was not intended to obtain communications that are attorney/client privileged; it was intended to obtain communications regarding the shoreline alteration, the water rights permit application, the declaratory ruling and House Bill 1134A.

Chairman Larson asked if it states in the subpoena that Mr. Hines is not asking for attorney/client communications.

Mr. Hines said the subpoena does not specifically say that.

Mr. McVey stated that it would be appropriate for the board go into executive session to consult with legal counsel in accordance with 1-26 and 1-25-2(3).

Motion by Bjork, seconded by Comes, to go into executive session to consult with legal counsel regarding pending legal matters. A roll call vote was taken, and the motion carried unanimously.

The board came out of executive session.

Motion by Bjork, seconded by Dixon to quash the subpoenas issued by John Hines and received by the Department of Agriculture and Natural Resources and the Department of Game, Fish and Parks based upon arguments of counsel and after considering SDCL 1-26-18, 1-26-19, 1-26-19.1 and 15-6-45. A roll call vote was taken, and the motion carried unanimously.

SCHEDULE A SPECIAL MEETING OF THE WATER MANAGEMENT BOARD TO CONSIDER WATER PERMIT APPLICATION NO. 8744-3, DAKOTA BAY: Motion by Dixon, seconded by Bjork, to schedule a hearing in Pierre on August 2, 2023, to consider Water Permit Application No. 8744-3, Dakota Bay. A roll call vote was taken, and the motion carried unanimously.

ADJOURN: Motion by Bjork, seconded by Dixon, to adjourn. The motion carried unanimously.

A court reporter was present, 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.

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 October 4, 2023.

---

Water Management Board



# WATER MANAGEMENT BOARD MEETING

## July 12, 2023

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

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

No.	Name	Address	County	Amount	Use	Source	Qualifications
1762B-	Roch or Rita Bestgen	Whitewood	MD	Transfer	10 acres	4 wells – Inyan Kara	wi, iq, 1 special 1
2028-1	Bear Butte Valley Water, Inc.	Sturgis	MD	440 AF	RWS/WDS	Madison	3 special
2029-1	City of Spearfish	Spearfish	LA	1.33 cfs	426 AF	1 well – Madison	wi, 3 special
2030-1	City of Spearfish	Spearfish	LA	1.78 cfs	679 AF	1 well – Madison	wi, wc, 3 special
2866-2	Daniel D O’Neill	Tuthill	BT	1.78 cfs	63.88 acres	1 well – Ogallala	wi, wc, iq, 1 special
2867-2	Robert/Carol Jorgensen	Custer	CU	0.067 cfs	Commercial	1 well – Crystalline Rock	wi, 2 special
2868-2	Davin Hubbs	Yankton	BT	4.0 cfs	295.1 acres	2 wells – Ogallala	wi, wc, iq
2869-2	Stanley Cty School Dist 57-1	Fort Pierre	ST	0.10 cfs	2.5 acres	Bad River/Missouri River	iq, 1 special
8684-3	Matthew H Wirth	Viborg	TU	2.11 cfs	300 acres	2 wells – Niobrara	wi, wc, iq, 1 special
8689-3	Richard P. Hybertson	Beresford	TU	1.78 cfs	97 acres	1 well – Upper Vermillion Miss	wi, wc, iq, 1 special
8690-3	Richard P. Hybertson	Beresford	TU	1.78 cfs	72 acres	1 well – Upper Vermillion Miss	wi, wc, iq, 1 special
8727-3	TR Golf LLC	Dakota Dune	UN	No add’l	Add’l 10 acres	Missiour Elk Point & Dakota	wi, 1 special
8730-3	Jay W Parsons	Viborg	TU	1.33 cfs	115 acres	1 well – Parker Centerville	wi, iq
8731-3	Gary Stapelman	Sioux Falls	CL	1.67 cfs	162 acres	1 well – Lower Vermillion Miss	wi, wc, iq
8734-3	Marvin Amdahl	Ortley	GT	0.13 cfs	332 acres	5 wells – Big Sioux North/Prairie Coteau	wi, iq
8735-3	City of Platte	Platte	CM	700 AF		Dam – Platte Creek	lf, 1 special
8736-3	David G Sternhagen	Yankton	YA	1.78 cfs	134.98 acres	1 well – Lower James Missouri	wi, wc, iq
8737-3	Joe Davis	Elkton	BG	2.22 cfs	150 acres	1 well – Rutland	wi, wc, iq, 1 special
8738-3	Todd Jongeling	Estelline	HM	1.78 cfs	120 acres	2 wells – Big Sioux Brookings	wi, wc, iq, 1 special
8739-3	Brook Bye	Vermillion	CL	1.67 cfs	80 acres	1 well – Missouri Elk Point	wi, wc, iq, 1 special
8740-3	Arthur Anderson	Skiatook OK	YA	1.56 cfs	120 acres	1 well – Lower James Missouri	wi, iq
8741-3	James Thyen	Waverly	GT	1.89 cfs	130 acres	Crooked Lake	iq, 3 special
8743-3	B. Huth or B. & H. Hegge	Wakonda	CL	1.9 cfs	180 acres	1 well – Missouri Elk Point	wi, iq
8745-3	University of South Dakota	Vermillion	CL	0.78 cfs	564 AF /1time	2 wells -Lower Vermillion Missouri	wi, wc, 1 special