

MINUTES OF THE 245th MEETING
OF THE WATER MANAGEMENT BOARD
FLOYD MATTHEW TRAINING CENTER
523 EAST CAPITOL AVENUE
PIERRE, SOUTH DAKOTA
AUGUST 2, 2023

CALL TO ORDER: Chairman Bill Larson called the meeting to order at 10:00 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, Rodney Freeman, and Tim Bjork participated in person. Leo Holzbauer and Peggy Dixon participated remotely. Jim Hutmacher and Chad Comes were absent.

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

Attorney General's Office: David McVey, Assistant Attorney General, board counsel; Ann Mines Bailey, Assistant Attorney General, Water Rights Program counsel; Mark Barnett, Chief Deputy Attorney General; and Charles McGuigan, Deputy Attorney General.

Legislative Oversight Committee: Representative Mike Weisgram attended in person, Senator Randy Deibert, and Senator Shawn Bordeaux attended remotely.

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

Others: John Hines, attorney for McCook Lake Recreation Area Association; Dean Fankhauser and Stacy Hegge, attorneys for Dakota Bay LLC; Jon Kotilnek, staff attorney for Game, Fish and Parks; Mike Chicoine, James Chicoine, Tyler Chicoine, Brenda Gabel, Robert Finineze, Dave Mitchell, Joan Christiansen, Tammy Scollard, Julie Burhoop, Greg Meyer, Chris Bogenrief, Jaron Condley, Tim Cowman, Dirk Lohry, and Kip Rounds.

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

CONFLICT DISCLOSURES AND REQUESTS FOR STATE BOARD WAIVERS: None.

ADOPT JUNE 30, 2023, BOARD MEETING MINUTES: Motion by Freeman, seconded by Bjork, to approve the minutes of the June 30, 2023, Water Management Board meeting. The motion carried unanimously.

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

public comments.

CONSIDER MOTION AND ANY RESPONSES TO MOTION TO DISQUALIFY WATER MANAGEMENT BOARD LEGAL COUNSEL AND SEEK OUTSIDE COUNSEL – FILED BY JOHN M HINES, LEGAL COUNSEL FOR MCCOOK LAKE RECREATION AREA ASSOCIATION:

John Hines, attorney for McCook Lake Recreation Area Association, stated that since the Attorney General's Office has filed an opposition in this matter, several legal, technical, and procedural challenges have been raised challenging the association's petition, and the association finds itself in the difficult position of defending attacks from the Attorney General on the sufficiency of its legal action and then having the Attorney General's Office advise the board about whose legal position is correct. Mr. Hines said this is a conflict of interest that should have been addressed. He asked the Water Management Board to seek outside counsel.

Ann Mines Bailey, Assistant Attorney General and counsel to the DANR Water Rights Program and the Chief Engineer, said the rules Mr. Hines cites in his motion are the rules of professional conduct, which are designed to be guidance; they are not designed to be used as a weapon and they are not to be used to disqualify counsel in a matter.

Ms. Mines Bailey said there is no conflict. Mr. McVey represents the Water Management Board, and she represents the Water Rights Program, and it's done by design of the Legislature. This is not the only instance where the Attorney General's Office represents both the board and the program. Ms. Mines Bailey stated that to any extent that there might be a conflict, she would argue that it is waived by the Legislature in the enactment of SDCL 46-2-4 and 46-2-4.1. Also, Rule 1.7 allows a lawyer to represent, if there is a concurrent conflict, if the lawyer believes he is able to do so. Under Rule 1.7 Mr. Hines and the association are not the client, so Ms. Mines Bailey questioned whether he has standing. She noted that if Mr. McVey believes he can represent the board fairly and appropriately, and as long as she believes she can represent the Water Rights Program, they have satisfied the requirement of Rule 1.7.

Ms. Mines Bailey stated that the South Dakota Supreme Court looked at this matter in *Romey v. Landers*, 392 N.W.2d 415, and found that if there is sufficient separation between the Water Management Board and the program, it is acceptable for this kind of proceeding to take place.

Motion by Freeman, seconded by Bjork, to deny the motion to disqualify Water Management Board legal counsel and seek outside counsel that was filed by John Hines, legal counsel for McCook Lake Recreation Area Association. A roll call vote was taken, and the motion carried unanimously.

CONSIDER MOTION AND ANY RESPONSE TO MOTION TO STRIKE DAKOTA BAY, LLC'S RESISTANCE, JOINDER, EXHIBITS, AND APPEARANCES REGARDING THE MCCOOK LAKE RECREATION AREA ASSOCIATION'S PETITION FOR DECLARATORY RULING REGARDING APPROPRIATIVE PERMITS AND SHORELINE ALTERATION – FILED BY JOHN M. HINES, LEGAL COUNSEL FOR MCCOOK LAKE RECREATION AREA ASSOCIATION: Mr. Hines stated that on August 1, 2023, Ms. Hegge submitted a response on behalf of Dakota Bay LLC regarding this matter.

South Dakota law does not state that a party who receives the declaratory ruling petition, as it is required to be served on a person who has a pecuniary interest, is entitled to receive that petition. The law does not say that party is automatically a party to the declaratory ruling. Declaratory rulings do not start as contested cases until someone files an opposition. For a person entitled to receive a copy of the petition by service, they have to have a pecuniary interest that would be immediately and directly affected. The standard for a party to become an opponent to a declaratory ruling is that they have to suffer a unique injury. This is why the board requires a party who wants to file an opposition to state for the record what unique injury they will be suffering. Mr. Hines stated that while the association is seeking a ruling that would likely affect Dakota Bay LLC's pecuniary interest, he does not believe that it rises to the level of an injury. Mr. Hines questioned why the Chief Engineer is a party to this matter. The declaratory ruling requests an interpretation of existing law, so if the board rules in favor of the motion, the Chief Engineer and the Water Rights Program will simply follow the law and do their job.

Mr. Hines stated that he does not believe Dakota Bay LLC is a party to this action. Dakota Bay LLC filed the resistance too late, and it is not on the correct form. Mr. Hines asked that Dakota Bay LLC not be permitted to participate in the declaratory ruling hearing.

Dean Fankhauser, attorney for Dakota Bay LLC and Michael Chicoine, stated that his clients resist the motion to strike. It is very clear that Mr. Chicoine and Dakota Bay LLC are parties to this action. South Dakota Codified Law requires only a petition for intervention under the code provisions cited by Mr. Hines in his motion to strike in the event that someone is not an original party to the case. Mr. Fankhauser stated that Michael Chicoine was named in the attachment to the petition, which effectively narrows the petition to make it more specific. Because he is specifically named, Mr. Chicoine was personally served with the petition, and Dakota Bay LLC was personally served with the petition separately. Mr. Fankhauser stated that the Chief Engineer was not personally served, and no other party was personally served with this petition. Effectively, the association's request would make it so that the plaintiff in any lawsuit would be able to argue in front of the Water Management Board that they have the ability to say, "I am suing you, but you're not a party to the case yet." Mr. Fankhauser said that does not logically make sense.

Mr. Fankhauser stated that for the reasons he outlined, his clients resist the motion to strike. He noted that it is accurate that on August 1, 2023, Ms. Hegge filed Dakota Bay LLC's response to the association's motion to strike Dakota Bay LLC's resistance, joinder, exhibits, and appearances.

Ms. Mines Bailey stated that she disagrees with Mr. Hines' position that this matter does not commence as a contested case. ARSD 74:02:01.48 requires the petitioner to serve a copy of the petition upon all known persons whose pecuniary interests would be directly and immediately affected by a declaratory ruling on the petition. It also requires the petitioner to publish a notice of the hearing describing the contents of the petition pursuant to SDCL 46-2A-4 and SDCL 1-26-17. Ms. Mines Bailey said SDCL 1-26-17 is entitled "contents of notice in contested cases." The individual upon whom service is received is referred to in the rule as a party, and the Chief Engineer is required to give notice to the parties of the hearing that is going to commence.

Ms. Mines Bailey said she would join in what Mr. Fankhauser said, even though she has some uncertainty as to what the relief being requested actually is in the petition for declaratory ruling. It seems to have been narrowed down to a specific question of whether Mr. Chicoine and Dakota Bay LLC need to have an appropriation permit from the waters of McCook Lake. Ms. Mines Bailey said that involves Mr. Chicoine and Dakota Bay LLC, and it would be erroneous to have a hearing regarding their rights and obligations without them being allowed to be parties.

Motion by Freeman, seconded by Dixon, to deny the motion to strike Dakota Bay, LLC's resistance, joinder, exhibits, and appearances regarding the McCook Lake Recreation Area Association's petition for declaratory ruling regarding appropriative permits and shoreline alteration filed by John Hines, legal counsel for McCook Lake Recreation Area Association. A roll call vote was taken, and the motion carried unanimously.

CONSIDER MCCOOK LAKE RECREATION AREA ASSOCIATION'S PETITION FOR DECLARATORY RULING FILED BY JOHN M. HINES, LEGAL COUNSEL FOR MCCOOK LAKE RECREATION AREA ASSOCIATION: Chairman Larson opened the hearing at 10:30 a.m. Central Time.

John Hines, attorney from Sioux City, IA, represented the McCook Lake Recreation Area Association.

Dean Fankhauser, attorney from Sioux City, IA, and Stacy Hegge, attorney from Pierre, represented Michael Chicoine and Dakota Bay LLC.

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

Mr. Hines stated that the parties in this matter entered a stipulation regarding some of the facts of the case. He read the stipulation.

Chairman Larson stated that the stipulation would be entered into the record.

Mr. Hines provided an opening statement. Mr. Fankhauser and Ms. Mines Bailey waived opening statements.

Mr. Hines called Julie Burhoop, who was administered the oath by the court reporter.

Ms. Burhoop testified regarding her education, background experience, and her role as the vice president of communications for McCook Lake Recreation Area Association. Ms. Burhoop has been using McCook Lake for recreation since 2002, and she has lived on McCook Lake since 2004.

Exhibit 1 is a photograph of the sunrise at McCook Lake, which appears on McCook Lake's website and Facebook page. Mr. Hines offered Exhibit 1.

Ms. Mines Bailey objected as to foundation and relevance. Mr. Hines stated that Ms. Burhoop testified that she manages the McCook Lake website and Facebook page as vice president of communications.

Chairman Larson sustained the objection.

Exhibit 2 contains two photographs of McCook Lake showing that the lake is six feet lower without pumping and when the lake is at its full level. These photographs also appear on McCook Lake's website and Facebook page. Ms. Burhoop testified that the lake association is only allowed to pump water from March 1 to sometime in the fall, and there are a number of reasons for that. The biggest reason is that the river level is too low for McCook Lake to pump water year-round; McCook Lake can only pump water when there is enough river elevation. The photograph is what the lake looks like when McCook Lake stops pumping, and the photograph on the right is what the lake looks like when pumping resumes.

Mr. Hines offered Exhibit 2.

Ms. Mines objected as to foundation and relevance.

Chairman Larson requested Mr. Hines lay more foundation for the exhibit.

In response to questions from Mr. Hines, Ms. Burhoop stated that she does not know when the photographs were taken, but every year in the spring the lake level looks very much like the photograph on the left in Exhibit 2 because the lake drops approximately two inches per day, depending on varying weather conditions, dewpoints, evaporation rates, etc. Ms. Burhoop stated that she lives right next to McCook Lake and, unless there is extremely high water table such as years with a flood like 2011, she has personally observed when the lake looks like the photographs in Exhibits 1 and 2. It looks like the photograph on the left three-fourths of the years she has lived on McCook Lake.

Mr. Hines reoffered Exhibit 2. Chairman Larson overruled the objection and admitted Exhibit 2 into the record.

Mr. Hines re-offered Exhibit 1 as an exhibit showing what the lake looks like when water is being pumped to it. Chairman Larson overruled the objection and admitted Exhibit 1 into the record.

Ms. Burhoop testified that, in a really good year where there are high water tables, high amounts of rainfall, McCook Lake Recreation Area Association spends approximately \$50,000 per year to make sure the lake looks like Exhibit 1, and not the photograph on the left in Exhibit 2. In dry years where the water tables are low and there is less than average rainfall, the association spends more than \$150,000 on pump utilities and maintenance costs. The city of North Sioux City provides \$25,000 per year and the rest of the money comes from fund-raising. McCook Lake is a public lake. The association does not control who from the public is allowed to use the lake, and the association does not have the authority to tax anyone. The association is a non-profit, volunteer organization. In an average year, the association starts pumping in March or

April, as soon as the river levels get high enough to do so. The association then pumps continuously to maintain the lake over the summer, even when an elevation of 1,088 feet mean sea level is reached, until the pumps are shut off at the end of September.

Exhibit 3 consists of 11 pages copied from the 2002 McCook Lake Recreation Area Association water permit application.

Mr. Hines offered Exhibit 3. There were no objections, and Chairman Larson admitted Exhibit 3 into the record.

Ms. Burhoop said that on page 2 of Exhibit 3, it states that the association is authorized to pump 12,000 gallons per minute.

Ms. Burhoop stated that the reason the association filed for a declaratory ruling is that if anyone wanted to expand McCook Lake, they would have to use lake water to help fill the canal. There is no separation between a new body of water and McCook Lake; it would all be one body of water. The association does not have the pumping capacity to maintain a larger body of water. The association's pipeline cannot handle pumping any more than 12,000 gallons per minute and the association does not have the budget to pump any more water. Ms. Burhoop said she is not aware of anyone other than Dakota Bay and Mr. Chicoine who has plans to expand McCook Lake.

Exhibit 6 is a copy of Mr. Chicoine's application for shoreline alteration of a South Dakota public water body. Ms. Burhoop stated that she has reviewed this document.

Mr. Hines offered Exhibit 6. There were no objections, and Chairman Larson admitted Exhibit 6 into the record.

Ms. Burhoop stated that if the association doesn't pump water, there will be no water in the canal. She is concerned that if a canal is constructed, that will negatively affect the association's ability to pump water pursuant to its water right. In dry years, the association has a hard time pumping to a level of 1,088. The lake only reached that level during the last couple of weeks due to extra rainfall. Last year that level wasn't reached until the beginning of August, also due to rainfall, because even at pumping 12,000 gallons per minute the lake couldn't keep up with the evaporation and seepage. Ms. Burhoop said that if Dakota Bay were to apply for another water right she would express her concerns during that hearing.

Responding to questions from Ms. Mines Bailey, Mr. Burhoop stated that not all the residents that own land surrounding McCook Lake are members of the association. Only some of the landowners that donate funds toward pumping water to the lake are actual members. Regarding Exhibit 3, the source of water in McCook Lake is the Missouri River. The association or other organizations have dredged McCook Lake three times.

Ms. Mines Bailey asked if the lake was dredged despite the fact that the Department of Agriculture and Natural Resources has warned that removal of sedimentation from the bed of McCook Lake will increase the speed at which the waters of McCook Lake equilibrate with the

groundwater table.

Ms. Burhoop answered that the lake association did not hire the dredging to be done; that was done by a different entity. The entities that were in place because of all the seepage on the far south end of the lake, built a dam so they could maintain McCook Lake because there was so much seepage past this point.

Ms. Mines Bailey asked Ms. Burhoop if she is aware that the department issued a report.

Mr. Hines objected to Ms. Mines Bailey's question as being beyond the scope of direct.

Chairman Larson overruled the objection.

Ms. Mines Bailey said Ms. Burhoop has stated that the association's purpose is to maintain a certain water level in McCook Lake. She asked if the association approved or encouraged efforts to dredge the lake. Ms. Burhoop answered that she has no knowledge of that.

Ms. Mines Bailey asked if Ms. Burhoop has knowledge of the department's report indicating that removal of sedimentation would increase the connection between the groundwater table and the waters of McCook Lake. She answered that she does not.

Mr. Fankhauser asked if someone who does not own property around McCook Lake has the ability to put a boat on the lake without paying a fee.

Mr. Hines objected as to foundation.

Chairman Larson overruled the objection.

Ms. Burhoop stated that there may be a fee, but it is extremely minimal.

In response to a question from Mr. Fankhauser, Ms. Burhoop stated that the lake was dredged by the Isaac Walton League, which is a non-profit entity that owns property on the west shore of the lake. There are no contractual relationships between the Isaac Walton League and the McCook Lake Recreation Area Association. Ms. Burhoop does not believe there are any current board members that are on the boards of both entities. Several members of the McCook Lake association own property around the lake, but there are other people that contribute to the lake association that are members but live elsewhere and enjoy recreating on the lake. Ms. Burhoop is a member of the McCook Lake association.

On redirect by Mr. Hines, Ms. Burhoop stated that the McCook Lake association does not charge a fee to use the lake. The Isaac Walton League charges a fee, and the city of North Sioux City has a \$5.00 fee to put a motorized boat in the lake and a \$5.00 fee to take a boat out, or a \$30.00 pass for the entire year. The McCook Lake association has never hired someone to dredge the lake.

Mr. Hines called Dirk Lohry who was administered the oath by the court reporter. He testified

regarding his education and experience. He is the president of the McCook Lake Recreation Area Association, has been a member of the association since 2010, and he has been using McCook Lake for recreation since 2008.

Exhibit 5 is a weekly plot of the McCook Lake levels over the previous 10 years.. It shows changes in the lake level over one year in weekly intervals. Mr. Lohry created the graph by measuring the lake on a weekly basis. He has a certified surveyor's mark on his property which is on a wall, and he used a tape measure to measure from the wall down to the lake level. The top of the surveyor's mark is at an elevation of 1,092.67, and he measured in inches down from that to the level of the lake, divided the inches by 12 to get it in feet then subtracted from that number to get the elevation. He has taken the lake measurement weekly since the flood of 2011.

Mr. Hines offered Exhibit 5. Mr. Fankhauser objected stating that it seems this is a graph from a larger report that is not complete.

Chairman Larson overruled the objection and admitted Exhibit 5 into the record.

Mr. Lohry stated that the sharp upward lines on the graph represent when the association begins pumping, the flat area is the sustained pumping, and the sharp downward lines are when the pumps shut off. If the lines are averaged together over the past ten years, the average annual fall is 3.7 feet. It has a range of zero feet to six feet; last year it was six feet. The range of zero feet was from 2019, which was a very wet year. The lake and the canal are hydraulically connected so if the water level in the lake goes down the water level in the canal goes down. If the canal level would somehow go up, the lake level would go up because water finds its own level. Mr. Lohry said at one point the lake level fell below the elevation of 1,082. The graph Mr. Lohry has seen from the application to the Corps of Engineers shows that the bottom of Mr. Chicoine's proposed canal is at 1,082. If the lake is below 1,082, there would be no water in the canal.

Exhibit 10 is a photo taken by Mr. Lohry showing the installation of a pipe going into McCook Lake. The pipe was damaged in early 2022 so it had to be replaced. When the pipe was being replaced, no water was being pumped into the lake. If the pumps of the pipeline failed, there would be no water coming from the lake into the canal and, on most years, that canal would be dry if there was no pumping into the lake. McCook Lake has a level that is basically artificial because it is being maintained by a pumping system. Many of the oxbow lakes along the Missouri River are drying up, and McCook Lake would also dry up without the ability for the association to pump water into the lake. Mr. Lohry stated that today McCook Lake is pumping at its maximum capacity. When the association reaches the target elevation, the pumps are slowed down to match the amount of water that is leaching or lost to evaporation. The association pumps approximately 11,000 gallons per minute when filling the lake, depending on the level of the river.

Exhibit 9 is the application for a permit to appropriate water in South Dakota. The parties have stipulated that Mr. Chicoine has submitted this application. Mr. Lohry stated that the exhibit appears to be a correct copy of the application.

Mr. Hines offered Exhibit 9. Ms. Mines Bailey objected as to relevance.

In response to a question from Mr. Hines regarding the rate of pumping that Mr. Chicoine has applied for compared to the amount of pumping done by the association, Mr. Lohry stated that Mr. Chicoine is claiming a rate of 1.55 cfs and in gallons per minute that is a very small fraction of the amount of water being pumped by the McCook Lake association pumping system.

Mr. Larson overruled the objection and admitted Exhibit 9 into the record.

Mr. Fankhauser objected to admitting Exhibit 9 stating that the red markings on the exhibit are not in Mr. Chicoine's handwriting and the red markings were not on his original application, so it appears not to be the original document.

Mr. Hines stated that it is the file copy from the Water Rights Program. He offered to call Mr. Duvall to testify and lay foundation about the document.

Mr. Fankhauser withdrew his objection.

On Exhibit 3, which was previously admitted into the record, page 2 shows that the amount of water claimed is 13.85 cubic feet per second. Exhibit 9 shows 1.55 cubic feet per second, which is a small amount less than 10 percent of 13.85. The 1.55 cubic feet per second would not be enough water per second to hold the level of McCook Lake in a dry year.

In response to questions from Mr. Fankhauser regarding Exhibit 5, Mr. Lohry stated that 2011 and 2019 were very wet years, and those years were not included on the graph in Exhibit 5 because the water levels did not drop.

On redirect by Mr. Hines, Mr. Lohry stated that if the years 2019 and 2020 were included in Exhibit 5, the lake levels would still fall every year. All data for the last 10 years was used to determine average lake levels fall of 3.7 feet.

Chairman Larson asked if the lake association conducted any studies to determine how much water Dakota Bay should be pumping into the canal to keep the lake level.

Mr. Lohry answered that the losses to the lake are primarily from leaching and evaporation. Leaching from the bottom of the lake varies and it is difficult to predict both in the present and in the future. The silt buildup prevents leaching in the lake. There are areas that are sandy, and there is quite a bit of leaching in those areas. Measurements have been done on the lake that show there are some areas of the lake that leach almost a foot per day and in other areas it doesn't leach at all. The problem with a manufactured clay-lined canal is that initially, it probably won't leak, but since it's clay-lined, it dries up every year and it shrinks and cracks. Underneath that layer are gravel layers. In 1987, a dike was installed there because that area on the south end of the lake had a high leaching capacity. Mr. Lohry stated that to be able to predict, presently and in the future, the leaching rate would be somewhat difficult but predictable considering the history of other types of canals and lakes.

Chairman Larson asked if the lake association conducted a study regarding how much water

should be pumped into the canal.

Mr. Lohry answered that the lake association has a lot of data in terms of the leaching rate on McCook Lake, such as that shown on Exhibit 5, but a formal study has not been done.

Mr. Kotilnek, staff attorney for Game, Fish and Parks, requested to appear on behalf of Kip Rounds to assert any potential privileged communications or objections, but not participate in direct or cross-examination.

Chairman Larson granted Mr. Kotilnek's request.

Mr. Hines called Kip Rounds, who was administered the oath by the court reporter.

In response to questions from Mr. Hines, Mr. Rounds testified that he has been the wildlife supervisor for Game, Fish and Parks for approximately three months. Prior to that he was the aquatic habitat and access biologist for Game, Fish and Parks for five years. As the aquatic habitat and access biologist he reviewed shoreline alteration applications. Mr. Rounds described the general process for the approval of a shoreline alteration application. The permitting process does not involve a public hearing. The most common type of projects Game, Fish and Parks receives permit applications for are shoreline stabilization projects involving riprap. The application submitted by Mr. Chicoine is the only shoreline alteration permit application Mr. Rounds has received for that type of project.

Mr. Rounds stated that he is not aware of any lakes, other than McCook Lake, in South Dakota that receive the majority of the water from pumping pursuant to a water rights permit. Other than the application from Michael Chicoine, Game, Fish and Parks has not received any other shoreline alteration applications to expand McCook Lake.

Exhibit 7 is a letter from Game, Fish and Parks Secretary Kevin Robling to Mike Chicoine. Mr. Rounds reviewed the letter before it was sent to Mr. Chicoine. Game, Fish and Parks has concerns regarding the integrity of the canal liner. Department engineers determined that the soil types at the location of the proposed canal are susceptible to potential seepage, so to help mitigate that, they recommended a clay liner be involved in the canal construction process.

Mr. Hines offered Exhibit 7. There were no objections, and Chairman Larson admitted Exhibit 7 into the record.

Mr. Rounds stated that according to Game, Fish and Parks engineers, there is a chance for the canal liner to dry out, crack, and become compromised to the point where it's no longer preventing seepage.

Exhibit 202 is the 2023 South Dakota Fishing Handbook issued by Game, Fish and Parks. The fishing handbook contains information regarding shoreline alteration permits for the public to be aware of.

Ms. Mines Bailey offered Exhibit 202. There were no objections, and Chairman Larson

admitted Exhibit 202 into the record.

In response to questions from Ms. Mines Bailey, Mr. Rounds stated that the information regarding shoreline alterations is located on page 65 of the South Dakota Fishing Handbook. A shoreline alteration permit from Game, Fish and Parks is required any time alteration work is being done below the ordinary high water mark for a lake. If the removal process of vegetation alters the lake bottom, it would require a permit. If seawall installation or repairs involves work below the ordinary high water mark, it would require a permit.

Mr. Rounds stated that Game, Fish and Parks has not issued a decision regarding Mr. Chicoine's shoreline alteration permit application. The department has issued shoreline alterations for lake expansions in the past. Mr. Rounds is not aware of any water permits Game, Fish and Parks holds for elevating lake levels.

On redirect by Mr. Hines, Mr. Rounds agreed that the Department of Game, Fish and Parks is a government agency, and the McCook Lake Recreation Area Association is a private entity. The information regarding shoreline alterations in the South Dakota Fishing Handbook is an explanation of statutes and rules that are in place.

Mr. Hines called Eric Gronlund who was administered the oath by the court reporter.

Mr. Gronlund discussed his education and work experience. He is the Water Rights Program Chief Engineer.

Mr. Hines read the following statute: 46-1-3. Water as property of people--Appropriation of right to use. It is hereby declared that all water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation as provided by law.

In response to questions from Mr. Hines, Mr. Gronlund stated that, in his opinion, a canal built on McCook Lake would not use the water of McCook Lake. Mr. Gronlund said he does not know that there is a specific definition for the word "use." Mr. Hines asked if it is true that if there is not a specific definition we are supposed to use the common understanding of that word. Mr. Gronlund said, in his opinion, the word use means to take possession and control.

Mr. Hines asked if Mr. Chicoine dug a pond that does not breach the dike on the south end of the McCook Lake, would they be two separate bodies? Mr. Gronlund answered that they would be two separate bodies from the same water source since they both represent the groundwater table.

Mr. Hines read SDCL 46-2013(3): 46-2-13. Fees of department--Payment to state treasury to environment and natural resources fee fund.

- (3) For each inspection of constructed water use works, including diversion works, dams, pumping plants, canals, or other conduits and for confirming the application of water to beneficial use under provisions of a permit to appropriate water, including issuance of a water license, two hundred dollars. The fee shall be submitted with the application to appropriate water and be refunded if the application is denied;

Mr. Hines asked if the statute describes a canal as a water use works, how is it that the canal would not use the water on McCook Lake? Mr. Gronlund stated that they're not taking possession and control of the water. Mr. Hines said the statute does not say possession and control, it says use. Mr. Gronlund said Mr. Hines is asking for his interpretation. Mr. Hines stated that he is asking what word the statute uses.

Mr. Fankhauser objected, stating that this is a legal question. Mr. Fankhauser said the Chief Engineer is represented by legal counsel and, to the best of his knowledge, Mr. Gronlund is not an attorney.

Chairman Larson sustained the objection.

Mr. Hines asked if a canal is connected to McCook Lake, does the water from the canal stay in the canal or does it move into the lake and the lake water moves into the canal? Mr. Gronlund answered that it depends on the water elevation. Mr. Hines asked if for this canal, as designed with a bottom elevation of 1,082, would the water from the canal move into the lake and vice versa? Mr. Gronlund said there is potential for that.

Mr. Hines asked Mr. Gronlund if he is aware that the McCook Lake association pumps water into the lake. Mr. Gronlund answered that the association has a water right for 26.74 cfs total, which equates to 12,000 gallons per minute. Mr. Hines asked if Mr. Gronlund has any data to refute the graph that Mr. Lohry presented during his testimony regarding annual lake levels in McCook Lake. Mr. Gronlund stated that he does not have anything to refute it. Mr. Hines asked if Mr. Gronlund would agree with Mr. Lohry's average that year to year the lake falls approximately 3.7 feet. Mr. Gronlund answered that he did not analyze that, and he has no data to refute it.

Mr. Hines asked if the lake were to fall five feet, would the level of water in the canal also fall five feet?

Mr. Fankhauser objected as to speculation and relevance. Chairman Larson sustained the objection.

Mr. Hines stated that the Chief Engineer is qualified as an expert. Mr. Larson asked Mr. Hines to rephrase the question to Mr. Gronlund.

Mr. Hines asked if it is Mr. Gronlund's opinion as a professional engineer, that on an average year the water levels in the lake and the canal would correspond to one another.

Mr. Fankhauser objected as to speculation and foundation.

Chairman Larson overruled the objection.

Mr. Gronlund answered that the water levels in the lake and canal would not necessarily correspond to one another. He stated that from his discussions with Mr. Chicoine is that he intends to have a two-foot berm at the entrance between McCook Lake and his canal. If that was

the case and there was a clay liner, potentially, that would hold water in the canal.

Mr. Hines asked if it is true, that that is not part of the specifications Mr. Chicoine provided to the Water Rights Program.

Ms. Mines Bailey objected stating there have been a lot of leading questions and asking questions that are not referred to in evidence.

Mr. Hines stated that Mr. Gronlund is an opposing party in this action, so he is permitted to ask Mr. Gronlund leading questions.

Chairman Larson sustained the objection.

Mr. Hines asked Mr. Gronlund if it is correct that, in his professional opinion, the water levels in the canal and the lake will not correspond to one another. Mr. Gronlund answered that at times they will and at times they may not. Mr. Hines asked if during the times the water levels in the lake and the canal correspond to one another and the lake levels go down, the water level in the water canal will go down. Mr. Gronlund answered that there is a balance point where if McCook Lake lowers to such a point, that water, because of the clay liner, will be retained in the canal.

Mr. Hines asked if Mr. Chicoine is proposing to construct a 110-foot wide, 11-foot tall barrier between the canal and the lake. Mr. Gronlund said that is not his understanding. Mr. Hines asked if the water level goes down in the canal, will the canal liner be exposed. Mr. Gronlund answered that he does not believe so.

Mr. Hines asked if the canal liner is exposed, would it be subject to drying out, cracking, or otherwise failing. Mr. Gronlund stated that he did not analyze that. Mr. Hines asked if it is true that if the association does not pump any water in a dry year the level of the water in McCook Lake will be very low. Mr. Gronlund answered in the affirmative. Mr. Hines asked if the canal could use the lake if the McCook Lake Association did not pump water. Mr. Gronlund answered that he does not know what Mr. Hines' definition of use is. Mr. Hines asked if any boats would be able to access the lake from the water. Mr. Gronlund said it is unlikely if there is only two feet of water. Mr. Hines asked if it's fair to say that the canal's existence will depend on the association's efforts pumping water. Mr. Gronlund stated that would be to access from the canal to McCook Lake, but Mr. Chicoine may have other uses intended. Mr. Hines asked if access is a type of use. Mr. Gronlund answered in the affirmative.

Mr. Hines asked if Mr. Gronlund is aware of any other proposals to expand McCook Lake.

Mr. Fankhauser objected as to relevance.

Mr. Hines said there is an assertion by the Chief Engineer that the McCook Lake Association failed to serve all proper parties. All of the parties' knowledge of any proposals to expand the lake is relevant to that question.

Chairman Larson sustained the objection.

Exhibit 11 is a copy of the Department of Agriculture and Natural Resources' speaking points on a bill that was introduced during the 2023 legislature. Mr. Hines asked if Mr. Gronlund assisted in the preparation of the speaking points. Mr. Gronlund said he did.

Ms. Mines Bailey objected as to relevance.

Mr. Hines asked to strike the question. He then asked if Mr. Gronlund's position is that no water right is required for the construction of an expansion on McCook Lake. Mr. Gronlund answered that the expansion proposed by Mr. Chicoine does not require a water right. Mr. Hines asked if any expansion would require a water rights permit. Mr. Gronlund answered that if action were taken to alter the outlet elevation of the lake, a water permit would be required. Mr. Hines asked if a water right permit is not required, then is there no public hearing and no public input required. Mr. Gronlund said he does not know the process for the shoreline alteration permit.

Mr. Hines asked if Mr. Gronlund was familiar with HB 1134A from the last legislative session that was proposed and supported by the McCook Lake Association.

Ms. Mines Bailey and Mr. Fankhauser both objected as to relevance. Chairman Larson sustained both objections.

Mr. Hines said he is seeking to enter into evidence a prior inconsistent statement by Mr. Gronlund but if he is not permitted to ask questions about the exhibit, he doesn't know if he can get there.

Mr. Hines asked Mr. Gronlund if he testified to the agricultural committee that HB 1134A would have disrupted a well-established water rights procedure. Mr. Gronlund answered that he did.

Mr. Hines asked if HB 1134A was proposed in response to the Dakota Bay canal project.

Ms. Mines Bailey objected as to foundation and relevance. Chairman Larson sustained the objection.

Mr. Hines asked Mr. Gronlund if he was at the committee hearing on HB 1134A.

Ms. Mines Bailey objected as to relevance. Chairman Larson sustained the objection.

Mr. Hines asked Mr. Gronlund if there is any public hearing or input for the McCook Lake expansion proposed by Dakota Bay. Mr. Gronlund answered not that he is aware of. Mr. Hines asked that if the Water Management Board ruled that Mr. Chicoine would be required to obtain an additional water rights permit for the waters of McCook Lake, would there be the opportunity for public hearing and public input. Mr. Gronlund stated that the water right permitting process has public notice and the ability to petition.

In response to questions from Ms. Mines Bailey, Mr. Gronlund stated that he has been the Chief

Engineer since February 26, 2020, and he has been employed with the Water Rights Program since February 1990. He is familiar with the different ways water is administered throughout the United States. He is familiar with South Dakota's water permitting system and its evolution.

Ms. Mines Bailey asked Mr. Gronlund to explain the type of approach South Dakota takes to the administration of water rights. Mr. Gronlund answered that by and large, South Dakota is like the other western states that are a prior appropriation state. South Dakota has what he considers a riparian component to that. That riparian component is generally what the Water Management Board would know as domestic uses of water that don't require a permit. A prior appropriations system is first in time, first in right seniority. The person with a senior water right gets their water needs satisfied before junior appropriators.

Ms. Mines Bailey stated that Mr. Hines was using the word "use." She asked if the appropriate word is "appropriation." Mr. Gronlund said appropriation is the word the Water Rights Program commonly uses. An appropriation, in terms of water permitting, is basically taking control and possession of that public water. Mr. Gronlund discussed the types of appropriation permits in the state of South Dakota. There is the standard water permit for irrigation, municipal use, or commercial use, which is an ongoing permit or right to use that water. There is a future use permit, which allows certain entities, such as municipalities and rural water systems, in South Dakota to reserve water for future use for future development. There is a temporary use permit which is the ability of someone to come into a water source that would otherwise be fully appropriated and use water in the interim if there were future use permits that haven't been developed and allow those people to use that water in the interim until that future use permit is fully developed. There is also a temporary permit for the use of public waters for construction, testing, and drilling purposes. A temporary permit is basically a short-term permit commonly issued for road construction, filling a lagoon, or other testing purposes.

Ms. Mines Bailey asked if a temporary permit for use in construction would be the type of permit necessary in this case, to fill the canal. Mr. Gronlund answered that it may be.

Ms. Mines Bailey asked Mr. Gronlund what has to be satisfied for a more traditional appropriation permit. Mr. Gronlund stated that the Water Management Board is accustomed to the four criteria; that there needs to be a reasonable probability that unappropriated water is available, whether it can be developed without unlawful impairment of existing domestic use and water rights, whether it's a beneficial use, and whether it's in the public interest within the function and regulatory authority of the Water Management Board.

Ms. Mines Bailey asked how Water Rights and state law define or utilize the phrase "unlawful impairment." Mr. Gronlund answered that it is the proven inability of a senior right to obtain their water due to the actions of the junior right.

In response to questions from Ms. Mines Bailey, Mr. Gronlund stated that he recalls the initial conversations with Mr. Chicoine regarding the proposed canal project. Mr. Gronlund's understanding of the parameters of that project was that he intended to construct a canal. During the initial discussions, Mr. Chicoine did not indicate that he intended to supplement the canal with water.

Ms. Mines Bailey asked if Mr. Gronlund felt, based on what his understanding was, that the construction of the canal alone required a traditional permit. Mr. Gronlund answered that he did not believe it required a permit because it is a shoreline alternation. It is not taking possession and control of the water. Shoreline alternations are not under the Water Rights Program's purview.

In response to questions from Ms. Mines Bailey, Mr. Gronlund stated that the McCook Lake Association's water right and permit authorize the diversion of water from the Missouri River for recreation. There are no appropriative permits for the waters of McCook Lake. The association does not retain a use to the water once it is released into McCook Lake. There are other manmade canals in the state which are constructed off of natural waterbodies, such as at Lake Madison, Lake Kampeska, and Fort Pierre. None of those projects required water permits.

Ms. Mines Bailey asked Mr. Gronlund if Mr. Chicoine would need a permit if he was going to fill the canal from an outside source. Mr. Gronlund stated that he would need a permit. Mr. Gronlund is aware that Mr. Chicoine's plans have changed, and he now intends to supplement the water in the canal, so he is now required to obtain a water permit.

Ms. Mines Bailey said Mr. Hines asked Mr. Gronlund if access is a type of use. She asked Mr. Gronlund if access, in his opinion, would require an appropriation permit. Mr. Gronlund answered that a permit would not be required; it is not to his understanding a beneficial use of the water.

In response to questions from Mr. Fankhauser, Mr. Gronlund stated that it is true that during the course of obtaining a water permit an applicant may have ongoing conversations with the Water Rights Program staff. The Water Rights Program provides guidance based on questions the applicant asks. The Water Rights Program has had multiple conversations with Mr. Chicoine regarding his proposal. It is possible, that if Mr. Chicoine's canal were to retain water and water was pumped into that canal from a separate source and the lake level dropped, Mr. Chicoine's water from the canal would be providing water into McCook Lake rather than taking it.

On redirect, Mr. Hines asked if it is correct that after the association pumps water from the Missouri River into McCook Lake, that water becomes the property of the people of the state of South Dakota. Mr. Gronlund said he believes it's the property of the people of South Dakota regardless; it's still public water. Regarding access, Mr. Gronlund said he has a hard time saying that access is a beneficial use. This project has the potential to create a new access to McCook Lake.

Mr. Hines said Mr. Gronlund testified that Mr. Chicoine did not initially intend to fill his canal. He asked where the water would have come from. Mr. Gronlund stated that the water would have come from precipitation, from the groundwater table, and potentially, a component of McCook Lake.

Mr. Hines asked if 700 gallons per minute is enough to fill the lake. Mr. Gronlund stated that, in his engineering judgement, it is not. Mr. Hines said Mr. Gronlund testified that the Water Rights

Program had ongoing conversions with the applicant about the proposal. He asked when the public gets public notice of those ongoing changes. Mr. Gronlund stated that the public becomes aware of the application when it is public noticed in the newspaper, unless they have inquired of the Water Rights Program. If, after the public notice, the application is changed to amend the concept or legal description, or the amount of water, or anything on that order, then the application would have to be re-advertised.

In response to a question from Mr. Fankhauser, Mr. Gronlund stated that 700 gallons of water per minute is not enough to fill McCook Lake. Seven hundred gallons per minute equates to 1.55 cfs. One cfs is equal to 724 acre-feet per year if pumped continuously over a year, which is approximately 1,200 to 1,300 acre-feet of water. The capacity of McCook Lake is not that many acre-feet, but there is an evaporation component and a seepage component that are not factored into that. Mr. Gronlund said it is stipulated between the parties that Mr. Chicoine has a pending water rights permit for an irrigation well to supplement the canal and, based on that, the amount of water requested in that permit is enough to supplement the canal.

In response to a question from Mr. Bjork, Mr. Gronlund stated that DANR's position is that Mr. Chicoine does not need a water permit to construct the canal and fill the channel. It does need approval of the shoreline alteration from the Game, Fish and Parks. There is an appropriation under the water permit application for a quantity of water for the first year, then thereafter each year for a lesser amount. Mr. Gronlund said he does not know the intended construction technique, but if this water permit was approved, Mr. Chicoine would fill the canal, likely, before he made the cut to McCook Lake, so it may not be McCook Lake water flowing into the canal. Mr. Gronlund said there is potential for the water, depending on the conditions, to flow either way. In Mr. Gronlund's conversations with Mr. Chicoine over the telephone, he understood that as part of the shoreline alteration permit, he was intending to have a two-foot berm across the entrance between the canal and McCook Lake in order to hold water in the canal and maintain the wetted bottom in the canal to protect the integrity of the clay liner. In the application there is the initial fill request, then each subsequent year Mr. Chicoine could use up to 7.99 acre-feet, which was the engineering estimate of what evaporation and seepage would be.

Mr. Hines called Mike Chicoine who was administered the oath by the court reporter.

In response to a question from Mr. Hines, Mr. Chicoine stated that Exhibit 8 is a Nationwide Permit Pre-Construction Notification from the Corps of Engineers. He did not write the two paragraphs on page 4 of the exhibit, and he is not sure who wrote them.

In response to a question from Mr. Fankhauser regarding Exhibit 8, Number 20, Description of Proposed Mitigation Measures, Mr. Chicoine stated that berms are included as a mitigation measure. Mr. Fankhauser asked if the two paragraphs on page 4 of the exhibit were included in the initial application, added later as part of the ongoing conversions with the Chief Engineer or Mr. Chicoine's own engineer, or not part of the application at all. Mr. Chicoine answered that he does not know.

Mr. Bjork asked if Number 20 on Exhibit 8 talks about the berm between the lake and the canal. Mr. Chicoine stated that he does not believe it specifies that in Number 20 on Exhibit 8, but he

has had conversations with Game, Fish and Parks about the berm.

Mr. Hines had no other witnesses.

Chairman Larson recessed the meeting at 12:25 p.m. He called the meeting back to order at 1:30 p.m.

Ms. Mines Bailey stated that there have been multiple versions of the requested relief in this action. The initial version in the petition requests 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 Ag and Natural Resources Committee and consistent with state law. The petition asks for a very broad ruling that would entail, arguably, all water in the state of South Dakota and not just McCook Lake. If you read the petition in conjunction with the letter attached to it, you might be able to narrow it down to a ruling on just McCook Lake water. If you narrow it down even further with the public notice, then the request for relief before the board is specifically requiring that Dakota Bay obtain a permit to appropriate water and, presumably that appropriation of water would have to be from McCook Lake, before beginning any construction or placement of works to expand McCook Lake.

Ms. Mines Bailey said she does not know whether to proceed statewide, any shoreline alteration in McCook Lake in general, or Mr. Chicoine's project specifically. She said if she could get some clarification, she would have a better idea of what to present.

Mr. McVey asked if the letter by the McCook Lake Association was incorporated by reference in the original petition.

Mr. Hines stated that paragraph 4 of the petition states that the letter sent to the board from the association is attached as Exhibit A and incorporated by reference.

Ms. Mines Bailey said page 2 of the petition references the letter for the specific facts as to the reason for the requested action.

Motion by Larson, seconded by Bjork, that pursuant to SDCL 1-25-2(3) the board enter into executive session for the purpose of consulting with legal counsel regarding the scope of the petition filed by the McCook Lake Association. A roll call vote was taken, and the motion carried unanimously.

The board exited executive session at 2:25 p.m.

Chairman Larson stated that after meeting with legal counsel in executive session, the board decided to give Mr. Hines the opportunity to argue the issues before the board makes its ruling.

Mr. Hines stated that at the beginning of the hearing he thought this was one of the issues that would be addressed later, and if he had known that it would affect Ms. Mines Bailey's case, he would have addressed it at the beginning of the hearing. Mr. Hines said it's his understanding that the question is about the scope of the requested relief that the association is seeking in

dealing with the petition, the attached letter, and the public notice that was published. The requested relief will ultimately be decided by the draft Findings of Fact and Conclusions of Law that the board will create. The McCook Lake Recreation Area Association submitted a petition that asks for action concerning submitted facts pertaining to McCook Lake and the Dakota Bay project. The ruling that is requested is not for every shoreline alteration, nor is it for every lake. This is a question about a proposal for a shoreline alteration to expand McCook Lake, so the witnesses the association called today testified about McCook Lake and they testified about the Dakota Bay project. The petition was laid out to mirror the statutory requirements for the petition, so the requested action in paragraph 3 is for the board to issue a Declaratory Ruling finding that the expansion of a public body of water for private use or gain such as by altering the shoreline or a lake and connecting a canal requires a permit to appropriate water. Mr. Hines said it would have been more precise, given the attached incorporated letter, to say this public body of water rather than a public body of water. The statutory requirement for publishing that notice describing the contents of the petition was accurate and consistent. The question that was intended to be brought before the board today is whether a shoreline alteration for the expansion of McCook Lake under existing South Dakota law requires a water rights permit.

Chairman Larson stated that in Ms. Mines Bailey's prehearing brief on page 9 states that the association should be limited to the relief requested in the public notice.

Ms. Mines Bailey responded that her understanding of what Mr. Hines said is that it would still be any shoreline alteration for the expansion of McCook Lake. Ms. Mines Bailey said that presents some potential procedural issues. She believes they could proceed with regard to what was specifically public noticed regarding Dakota Bay's project as to McCook Lake.

Ms. Mines Bailey moved to narrow the scope of this ruling to Dakota Bay's project on McCook Lake as it is described within the public notice and as modified by Mr. Hines in the June 30, 2023, hearing which provided for striking the phrase in the public notice which says, "and would also unlawfully impair the McCook Lake Recreation Area Association's water rights."

Mr. Hines said he would not resist the motion.

Mr. Freeman asked how limiting alteration of the shoreline to just this project affects other project throughout the state.

Ms. Mines Bailey said that has been the main concern for the Chief Engineer and one of the reasons the department was hoping for specificity as to the actual request because of the potential impacts if this were applicable to any shoreline alteration or to any public water.

Mr. Freeman questioned whether this is a good, sound way to make policy for the board to say that it is only specific to this project and exclude every other lake.

Mr. Bjork questioned whether the board wants to set that precedent.

Ms. Mines Bailey stated that it would be the Chief Engineer's preference that the board would not set that precedent.

Mr. McVey stated that those questions are within the purview of the board to decide within the scope of this pending application. The petition in and of itself it appears to implicate all the waters of the state, and the pending motion is that the request and application will be narrowed specifically to McCook Lake and taking out the phrase “regarding unlawful impairment to McCook Lake Recreation Area Association’s water rights”. That would necessarily exclude the other areas of the state but doesn’t address the issue of whether that is a sound method of proceeding policy in general.

Mr. Hines stated that the sentence regarding unlawful impairment of the water rights is not part of the ruling McCook Lake Association is seeking in this declaratory action. It is not for every shoreline alteration; it is for expansion, which is a specific type of shoreline alteration, limited to McCook Lake and limited to this proposal.

Ms. Mines Bailey said the whole purpose was to figure out how broad of scope she needed to address. It doesn’t change the position of the Chief Engineer, even if it were narrowed to the public notice.

Mr. Fankhauser said it seems that to limit the scope of this application for declaratory action would create precedent in the state no matter what project came before the board the next time. If the board determined that it was necessary to obtain a water permit for McCook Lake under these circumstances, then in the event another project comes before the board that precedent has already been set if that lake is manmade or it has water pumped into it from another source. All of those things are similar to McCook Lake, so to differentiate McCook Lake out, he does not see how that changes the fact that it will set a precedent across the state.

Chairman Larson stated that Ms. Mines Bailey, through her motion, is asking the board to narrow the scope for this petition for declaratory ruling by issuing a declaratory ruling finding whether or not the expansion of McCook Lake by altering the shoreline requires a permit to appropriate water versus the petition, which says for the board to issue a declaratory ruling finding that expansion of a public water body requires obtaining a water permit.

Mr. Fankhauser stated that based on what the board does today, even if it limits the scope to just McCook Lake, it’s still setting a precedent for other similarly situated lakes. Changing the name of the lake or saying that this project is somehow unique doesn’t change the overall circumstances and facts that bring us here today.

Ms. Mines Bailey withdrew her motion.

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

In response to questions from Ms. Mines Bailey, Mr. Gronlund discussed his duties as Chief Engineer. Statutorily, one of his primary responsibilities is to be an advisor to the Water Management Board. Mr. Gronlund believes, if constructed, the canal proposed by Mr. Chicoine will be part of McCook Lake. From a Water Rights aspect, once the canal is constructed and initially filled, an ongoing appropriation of water will not be required; however, there is the

shoreline alteration permit that is out of the Chief Engineer's purview. Mr. Gronlund does not believe construction of the canal, as proposed is going to increase the amount of seepage of McCook Lake. Construction of the canal does not change the volume of water in McCook Lake. Currently, these types of projects have Corps of Engineers federal requirements as well as the shoreline alteration permit administered through the Department of Game, Fish and Parks.

Mr. Gronlund stated that if the ruling focuses on any alteration of a shoreline statewide it would have huge consequences with any number of activities that take place in or around waterbodies in the state of South Dakota. For example, to the southwest of McCook Lake there is an area along the Missouri River, south of the Wynstone Development, where there are four to six areas that have been excavated out and armored with riprap to accommodate boat slips up to three to five boats, so all of those would require permits. Someone going out and filling a five-gallon bucket with sediment, within the ordinary high water mark, could be required to obtain a water permit, under the interpretation that could be made. Also, a water permit could be required for a dredging project.

Ms. Mines Bailey asked if pumping water from the Missouri River into McCook Lake is the most efficient way to maintain the lake level. Mr. Gronlund answered that short of sealing McCook Lake, pumping water into the lake is probably the only option because McCook Lake basically represents the groundwater table in the area, and natural seepage from the lake occurs. There was some effort to quantify that about 40 years ago.

Ms. Mines Bailey asked if there is anything else going on in the watershed that is affecting the groundwater table. Mr. Gronlund stated that for water permits from the Missouri:Elk Point Aquifer in close proximity, the Water Management Board has seen the observation wells showing a decline in elevations. The Missouri River gaging station by Yankton is included in the reports on the applications. There are studies on it, or references to it, showing that since construction of the dams, there has basically been somewhat of an entrenchment or a scouring where the bed of the Missouri River is lowering, causing a lower water level, so the observation wells and the Missouri River gage are showing lower water levels.

Ms. Mines Bailey asked what a declaratory ruling from the board, that an appropriation permit for any shoreline alteration is needed, might mean to the implementation of the water permitting system in the state of South Dakota. Mr. Gronlund said the Water Rights Program looks toward past board decisions in how the program moves forward with the administration of water rights and water permitting in the state. The Water Management Board is the entity responsible for making those decisions, and Mr. Gronlund said he feels obligated to try to follow their decisions to the best of his ability. Such a ruling would be an issue for the Water Rights Program on how to handle those issues. If that decision came down, the Water Rights Program would start requiring a lot more water permits to be issued. Mr. Gronlund said it is not his belief that expansion of a lake constitutes an appropriation.

In response to questions from Mr. Hines, Mr. Gronlund said if the canal was constructed and connected to McCook Lake, it would be a shoreline alteration that would in essence become part of the lake.

Mr. Hines said earlier Mr. Gronlund testified that McCook Lake faces certain challenges for maintaining water and a seepage situation that is not getting better. He asked if those concerns are present for every lake in the state of South Dakota or just some lakes in the state. Mr. Gronlund answered that, to some extent, seepage probably occurs in any water body in the state, but certainly not to the severity that McCook Lake faces.

In response to questions from Mr. Fankhauser, Mr. Gronlund stated that, based on reports he has read, the losses in the bottom of McCook Lake are significant. The Missouri River is probably the only viable option. Another option would be to seal the bottom of the entire lake, so it didn't have that seepage loss. Mr. Gronlund stated that there are different types of sealants, but it would be a major undertaking, for a lake of this size, to be able to seal the bottom of the lake. If the board were to grant the petition for declaratory ruling, Mr. Gronlund foresees that impacting other lakes where the public is engaging in activities within the ordinary high water mark.

Ms. Mines Bailey had no further witnesses.

Mr. Fankhauser had no further witnesses.

Mr. Hines, Ms. Mines Bailey, and Mr. Fankhauser provided closing arguments.

Motion by Larson, seconded by Freeman, that pursuant to SDCL 1-25-2(3) the board enter into executive session for the purpose of consulting with legal counsel regarding pending litigation. A roll call vote was taken, and the motion carried unanimously.

The board exited executive session at 3:35 p.m.

Motion by Freeman, seconded by Bjork to deny the requested relief requested and declare that Mr. Chicoine's/Dakota Bay's canal is not an appropriation of McCook Lake water and does not require a standard or traditional permit from the Water Management Board. A roll call vote was taken, and the motion carried unanimously.

Ms. Mines Bailey will prepare proposed Findings of Fact, Conclusions of Law and the Final Decision, which are due by August 23, 2023. Objections and alternative Findings of Fact, Conclusions of Law and Final Decision are due by September 11, 2023.

CONSIDER WATER PERMIT APPLICATION NO. 8744-3, DAKOTA BAY: Chairman Larson opened the hearing at 3:45 p.m.

Ms. Mines Bailey appeared on behalf of the Chief Engineer and the Water Rights Program.

John Hines appeared on behalf of McCook Lake Recreation Area Association.

Dean Fankhauser and Stacy Hegge appeared on behalf of Michael Chicoine and Dakota Bay.

John Kotilnek, staff attorney for the Department of Game, Fish and Parks, requested to appear on behalf of Kip Rounds to assert any privileged communications or objections, but not participate

in direct or cross-examination.

The parties waived opening statements.

Ms. Mines Bailey offered Exhibit 600, the administrative file which contains the application, the report and recommendations, the notices of public hearing, the petition, and other documents that were received regarding this matter.

There were no objections, and Chairman Larson admitted the exhibit into the record.

Ms. Mines Bailey called Nakaila Steen who was administered the oath by the court reporter.

Ms. Steen testified that she is employed with the Department of Agriculture and Natural Resources.

Exhibit 601 is Ms. Steen's resume. Ms. Mines Bailey offered Exhibit 601.

There were no objections, and Chairman Larson admitted the exhibit into the record.

In response to questions from Ms. Mines Bailey, Ms. Steen stated that she is an engineer with the Water Rights Program. She has been employed with the Water Rights Program for approximately three years. Ms. Steen testified regarding her educational background. Ms. Steen reviews water permit applications, does field work measuring lake levels and observation wells, and she trains the Black Hills seasonal observation well readers for the Water Rights Program. Ms. Steen is also the department's representative on the Western States Water Council.

Ms. Steen wrote the report analyzing water availability and the potential for unlawful impairment to existing water right and permit holders and domestic users within the water source and based on the volume requested by Water Permit Application No. 8744-3, Dakota Bay.

Water Permit Application No. 8744-3 was filed under the name Dakota Bay by Mike Chicoine for recreational purposes to fill and maintain the water level in a proposed canal and to maintain the integrity of that canal line. The applicant would like to use an existing irrigation well completed into the Missouri:Elk Point Aquifer as the water source. The existing well is authorized by Water Permit No. 6557-3, which authorizes a diversion rate of 1.55 cfs for irrigation. The volume requested by this application is 28.6 acre-feet the first year followed thereafter by 7.99 acre-feet annually. This new application is to use additional water for a different use than what Water Permit No. 6557-3 is currently authorized for. Ms. Steen did not have any part in calculating the amount of water the applicant's project would require and it was not part of her review.

Ms. Steen testified that the scope of her review was to analyze water availability in the Missouri:Elk Point Aquifer and the potential for unlawful impairment to existing users; water right and permit holders and domestic users with adequate wells within the aquifer.

Ms. Steen pointed out the following corrections in her report. In the last sentence on page 3, on

page 4, the second paragraph under the Discharge section, and on page 21, the last paragraph on the page, Water Permit Application No. 8754-3 should be Future Use Permit Application No. 8754-3. In the second paragraph on page 9 eight water rights should be nine water rights. In the first sentence of the second paragraph on page 19. The saturated thickness of approximately 10 to 60 feet should be saturated thickness of approximately 30 to 95 feet. On page 22 the following addition should be made to the report: Water Rights, 2023f. It is noted in several places throughout the report, and it accounts for the non-irrigation reports that are submitted to the Water Rights Program each year.

Ms. Steen stated that there is nothing about any of these corrections that alters her analysis or conclusion.

Ms. Steen stated that Mr. Chicoine is seeking an appropriation from the Missouri:Elk Point Aquifer, which is a glacial outwash deposit consisting of fine sand to very coarse gravel. It is hydrologically connected to the Big Sioux, Lower Vermillion-Missouri and Lower James-Missouri aquifers, and the Big Sioux, James, Missouri, and Vermillion Rivers. The Missouri:Elk Point Aquifer underlies approximately 219,100 acres in Clay, Union, and Yankton Counties in South Dakota.

At the existing well site, at the time of well completion, the well was completed into approximately 95 feet of saturated aquifer thickness, and within a mile of the proposed diversion point the saturated aquifer thickness ranges from 30 to 95 feet thick. The aquifer varies between confined and unconfined conditions depending on location, but primarily behaves in an unconfined manner. At the existing well site, based on the well completion report on file, the aquifer is expected to be confined. At the time of well completion, there was approximately 40 feet of artesian head pressure in the well.

To determine the availability of unappropriated water, Ms. Steen compiled a hydrologic budget, comparing average annual recharge and withdrawals to and from the aquifer and she looked at observation well data to see how the aquifer reacts to climatic conditions and local pumping.

Recharge is water entering the aquifer through any means and withdrawal is the intentional removal of water from an aquifer. The Missouri:Elk Point Aquifer receives recharge primarily through the infiltration of precipitation when the aquifer is at or near the ground surface. There is some seepage from the hydrologically connected rivers and inflow from the hydrologically connected aquifers, and there may be some underlying upward leakage occurring from the Dakota Aquifer.

Several studies have been completed to estimate the average annual recharge to the Missouri:Elk Point Aquifer. The best information Ms. Steen has regarding recharge is a Hedges study completed in 1982 and a more recent study completed by the South Dakota Geological Survey in 2022. Using observation well analysis, Hedges and others estimated a recharge rate of 3.8 inches per year to the aquifer. That, taken over the entire aerial extent yields a recharge rate of approximately 69,000 acre-feet per year to the aquifer. The South Dakota Geological Survey completed a study quantifying the amount of induced recharge that is happening to the aquifer resulting from the pumping occurring at Lewis and Clark Regional Water System's wellfield. It

was determined that 84.6 percent of the water pumped at the wellfield is Missouri River water during their model run. At the time of this application Lewis and Clark Regional Water System was permitted to pump approximately 53,000 acre-feet and multiplying that by the 84.6 percent yields a recharge rate of approximately 45,212 acre-feet per year. When the two recharge estimates are combined, collectively, the estimated average annual recharge rate is approximately 114,593 acre-feet per year. If approval and development of any additional Lewis and Clark permits withdrawing from the Missouri:Elk Point Aquifer were to be approved, more induced recharge to the aquifer is expected to occur.

The Water Rights Program monitors 36 observation wells completed into the Missouri: Elk Point Aquifer at this time. For her review, Ms. Steen analyzed approximately 20 of the observation wells, and hydrographs for the nearest five observation wells are included in her report. The nearest observation well is approximately one-half mile away from the application, but all five observation wells are located within four miles of the application.

Exhibit 603 are the hydrographs for the five nearest observation wells, which are included in Ms. Steen's report. These hydrographs contain updated water level measurements taken by the Water Rights Program seasonal employees in the summer of 2023.

Ms. Mines Bailey offered Exhibit 603. There were no objections, and Chairman Larson admitted the exhibit into the record.

Ms. Steen stated that the hydrographs show that the aquifer responds well to climatic conditions rising during wet periods and declining to more stable water level during dry periods. However, there are observations wells completed into the Missouri: Elk Point Aquifer near the Missouri River that are showing a long-term gradual downward trend. Ms. Steen believes the entrenchment occurring in the river channel downstream of Gavin's Point Dam on the Missouri River is causing the downward trend.

Exhibit 604 is a hydrograph constructed from the mean gage height measured on the stream gage on the Missouri River located at Yankton, South Dakota. Ms. Steen created this exhibit using information from the USGS site.

Ms. Mines Bailey offered Exhibit 604. There were no objections, and Chairman Larson admitted the exhibit into the record.

Exhibit 604 shows the same trend seen on the hydrographs for the observation wells completed into the aquifer near the river. This indicates that there is likely a connection. The lowering in the observation wells or in the Missouri River gage is not an indication that there is less water. It has been shown that roughly the same volume of water is flowing through the river; it is just flowing at a lower surface elevation.

Ms. Steen stated that at the time of this application there were 647 water rights/permits authorized to withdraw water from the Missouri:Elk Point Aquifer, plus two pending applications. Additionally, there were five future use permits authorized to reserve water from the Missouri:Elk Point Aquifer. Including the estimated use for this application, if it were

approved, the average annual withdrawal rate from the aquifer is approximately 100,591 acre-feet per year. Ms. Steen determined this estimate by using methods to estimate average annual use from an aquifer that have been accepted by the board and the Water Rights Program in the past. Future use permit holders are assumed to use their full authorized volume. For irrigation appropriations, a crop and turf application rate was calculated for each, then applied over the authorized acres to be irrigated. For the non-irrigators, those that are required to report, generally, the average of their reported value was used in Ms. Steen's estimate; however, exceptions to this may be if a permit is still in a construction phase or is continually undergoing development. For the non-irrigation water rights that are not required to report, those that are only limited by diversion rate are assumed to pump 60 percent of the time, and those limited by a volume are assumed to use their full volume. Sixty percent of the time is a general Water Rights Program method, but this is proven to be a slight over-estimation based off the reported values that are submitted by users. The volume of this application is 28.6 acre-feet the first year and then up to 7.99 acre-feet every year thereafter. Based on the review of the hydrologic budget and the observation well data, Ms. Steen concluded that there is a reasonable probability that unappropriated water is available for the proposed appropriation.

Ms. Steen also performed a review of the potential for unlawful impairment of existing water rights. An unlawful impairment is the inability to obtain the water to which someone has a right. To receive protection from unlawful impairment, an existing right or domestic use must be using an adequate well. An adequate well is a well that is capable of allowing the inlet of a pump to be placed 20 feet into the saturated aquifer material and, if there is not 20 feet present, as near to the bottom as possible.

Exhibit 605 is a map of the existing well site with the nearby water rights and permits authorized from the Missouri:Elk Point Aquifer and the nearby Missouri:Elk Point observation wells. The map was created by Ms. Steen using ArcMap, information from the water rights database, and the aquifer boundary comes from Hedges 1982.

Ms. Mines Bailey offered Exhibit 605. There were no objections, and Chairman Larson admitted the exhibit into the record.

The proposed point of diversion is marked on Exhibit 605 with a black star encompassed in a pink circle. The green area represents the city limit boundaries for North Sioux City. The blue cross hatch represents the aquifer boundary in this view. The purple circles are Missouri:Elk Point Aquifer water rights/permits. The blue squares represent the Missouri:Elk Point Aquifer observation wells. The small blue circles represent domestic wells completed into the Missouri:Elk Point Aquifer. The yellow circle is also a domestic well completed into the aquifer, but it's the nearest one not held by the applicant.

Ms. Steen determined the existence of domestic wells by using the Water Rights Program well completion report database. The location of domestic wells is generally based off of the location provided by the driller on the report submitted at the time of well completion. Not all domestic wells are on file. Some pre-date the turn-in requirements for the well completion reports. The domestic wells shown on Exhibit 605 are only in the Missouri:Elk Point Aquifer. Based on the records Ms. Steen was able to search, the closest domestic well to the proposed point of

diversion is held by the applicant, and it is located 0.25 miles south of the existing well site. The nearest well not held by the applicant is located 0.3 miles northwest of the existing well site. There are three permits approximately one mile away from the proposed point of diversion, and those permits are Water Right No. 6680-3 and Water Permit Nos. 8381-3 and 8435-3. The nearest observation well to the existing well site is UN-78C, which is located about one-half mile away. The other observation wells shown in Exhibit 605 are all within four miles of the existing well site.

Ms. Steen's opinion is that there is a reasonable probability that any interference from the proposed appropriation will not cause an unlawful impairment on existing water right and permit holders and domestic uses with adequate wells. This opinion is based on the tremendous resource that the Missouri:Elk Point Aquifer is, the saturated aquifer thickness at the existing well site, the volume requested by this application is small, and this well has been diverting at this rate since 2005 without any well interference complaints or any substantiated complaints within the entire aquifer.

Observation Well UN-78D has a water right nearby that is held by a municipality, and it authorizes a diversion rate comparable to the one authorized by this existing well. The hydrographs for Observation Well UN-78D are not showing any signs of impacts from the pumping occurring under this permit. If there are effects from pumping, it appears that the aquifer is returning to pre-pumping conditions following each irrigation season. Ms. Steen said this tells her that even with heavy pumping, drawdown is not showing up in observation wells.

Ms. Steen said she reviewed the petition in opposition to this application, and her understanding of the association's concern is that approval of this permit would unlawfully impair the association's water right and permit, and that approval of this permit will undermine their efforts in sustaining the water levels in McCook Lake.

Ms. Steen stated that when she conducted her review of unlawful impairment she did not include the association's water right because they are authorized for a diversion from the Missouri River. When she conducts an unlawful impairment review Ms. Steen generally only looks at water rights completed into the same water source. If an unlawful impairment is not being seen within that water source, she would not expect to see an unlawful impairment from permit users in outside water sources.

Ms. Steen stated that, while not in the scope of her review, she would not anticipate a Missouri:Elk Point Aquifer water right or water permit to unlawfully impair a Missouri River water right, given what she knows about water availability of water in the river and how the observation wells react in the aquifer. Ms. Steen stated that in her opinion, approval of this permit would not have a measurable effect on the waters of McCook Lake, despite the hydraulic connection.

Ms. Mines Bailey had no further questions of Ms. Steen.

Mr. Fankhauser had no questions of Ms. Steen.

Mr. Hines asked Ms. Steen to direct him to which South Dakota Codified Law or Administrative Rule limits her review of unlawful impairment to the same water source.

Mr. Fankhauser objected as to the question calling for a legal conclusion, and Ms. Steen is not an attorney.

Mr. Hines said he is asking Ms. Steen if she is aware of whether there is any law or rule governing her review that limits that review to only water rights in the same water source.

Chairman Larson overruled the objection.

Ms. Steen answered that she is not sure if it is defined in law, but if there is no unlawful impairment within the proposed water source, she would not expect to see an unlawful impairment from permit users in outside water sources.

Mr. Hines asked Ms. Steen if she is aware of whether unlawful impairment is defined by statute. Ms. Steen answered that she does not believe it is defined in statute.

Mr. Hines asked if it is possible that a water right from one source could impair a water right in another source. Ms. Steen stated that it is possible.

Mr. Hines asked if someone were to construct a dam in an area and a property owner had a well in that area that would then be filled with water, the well right would be impaired by the existence of now having, in the case of Lake Oahe for example, 200 feet of water on top.

Ms. Mines Bailey objected as to the question calling for speculation. Chairman sustained the objection.

Mr. Hines asked Ms. Steen to direct him to the part of her report that discusses the specifications of the proposed canal. Ms. Steen stated that her report does not contain any of the design elements for the proposed canal. She said review of the plans was not in the scope of her review. She analyzed the water permit application based on the volume of water requested and the proposed water source. Ms. Steen said she would have to re-review the application to know if it included specifications for the canal.

Mr. Hines asked if there is any part of Ms. Steen's report that discusses the integrity of the canal liner. Ms. Steen stated that the introduction addresses why the water would be needed to maintain the integrity of the liner to prevent any evaporation and seepage for the purpose of preventing the canal liner from drying out, cracking, floating or otherwise failing. Ms. Steen stated that she did not calculate the amount of water needed for those purposes.

Ms. Hines asked if there is any part of Ms. Steen's report that discusses the soil composition in the area where the canal would be constructed. Ms. Steen answered that she does not believe so.

Mr. Hines asked if there is any part of Ms. Steen's report that discusses the McCook Lake Association's water right. Ms. Steen answered that the report does not discuss that water right

because it is authorized for diversion from the Missouri River.

Mr. Hines asked if there is any part of Ms. Steen's report that concludes that 1.55 cfs will be sufficient to prevent the liner of the canal from drying out, cracking, floating, or otherwise failing. Ms. Steen answered that she does not believe that was in the scope of her review.

In response to a question from Chairman Larson, Ms. Steen stated that the information in Conclusion number 2 on page 20 was included in the application. She said she does not believe she has enough information at this time to perform any calculations to determine what the evaporation and seepage losses might be per year from the canal. Chairman Larson asked if it is possible to determine the annual evaporation and seepage for this canal. Ms. Steen answered that it could probably be done.

There were no further questions of Ms. Steen. Ms. Mines Bailey had no other witnesses.

Mr. Fankhauser called Michael Chicoine who had previously been administered the oath.

In response to questions from Ms. Fankhauser, Mr. Chicoine stated that he worked with Scott Gernhart, an engineer, in preparing the water right permit application. Mr. Chicoine worked with Game, Fish and Parks and other agencies when preparing the application for Shoreline Alteration of a South Dakota Water Body.

Exhibit A is the Application for Shoreline Alteration of a South Dakota Public Water Body.

Mr. Fankhauser asked if while preparing the Shoreline Alteration application Mr. Chicoine discussed with his engineer the material for the liner for the canal.

Mr. Hines objected as to hearsay. Chairman Larson sustained the objection.

Mr. Fankhauser asked if Exhibit A talks about the material used to construct the canal. Mr. Chicoine answered that the application describes the size, depth and length of the canal.

In response to questions from Mr. Fankhauser, Mr. Chicoine stated that originally the canal idea came about when Eric Christenson from North Sioux City called and asked if Mr. Chicoine would be willing to construct a canal.

Mr. Hines objected as to hearsay. Chairman Larson sustained the objection.

In response to questions from Mr. Fankhauser, Mr. Chicoine stated that he lives in Jefferson, South Dakota and Dakota Bay owns property adjacent to McCook Lake. If the canal were to be built, Mr. Chicoine would have better access to his property. The canal would also give the 15 homeowners on the east side of the lake access to McCook Lake. At this time, access to McCook Lake is very steep and the parking is poor. There is only room for four or five trucks and boats, so a lot of people park on the street. The cost to put a boat on or off McCook Lake at its current boat ramp is \$5.00 on and \$5.00 off and it's \$30.00 for all year use. Mr. Chicoine said his intention is to install a public boat ramp on the canal. A permit has already been approved

for a boat ramp.

Mr. Hines objected to Mr. Chicoine's last statement under the best evidence rule. No such permit has been provided into evidence. Chairman Larson sustained the objection.

Mr. Fankhauser asked if it is Mr. Chicoine's intention to build a public boat ramp on the canal. Mr. Chicoine answered that is his intention.

Mr. Fankhauser asked Mr. Chicoine why the water right is necessary for the protection of the liner. Mr. Chicoine answered that if the lake would ever happen to be down or precipitation was down, he would be able to maintain the water liners so it would be moist at all times. The barrier that is intended to be installed on the end of the canal would also help hold the water in the canal.

In response to questions from Mr. Fankhauser, Mr. Chicoine stated that he has used McCook Lake for recreational activities since 2002. Mr. Chicoine has no intention of jeopardizing or harming the integrity of McCook Lake or its water levels. The canal will allow people on the lake to have more area to boat, jet ski, or fish. Mr. Chicoine opted to request a water right for filling the canal from his irrigation well versus filling it from McCook Lake because he did not want to take any water from McCook Lake. Mr. Chicoine already has his water source and a submersible well for backup in case there are ever any issues with his well. There have not been any issues with the well in 18 years. Mr. Chicoine has not ever had any issues with the water levels in either well when he is pumping both wells at the same time. Mr. Chicoine said the Game, Fish and Parks would like to have the canal and public boat ramp because there would be no fees.

Mr. Fankhauser asked why McCook Lake does not have a fee free boat ramp for public access.

Mr. Hines objected to the question as to foundation. Chairman Larson sustained the objection.

Mr. Fankhauser asked if Mr. Chicoine is aware of why McCook Lake doesn't have a free boat ramp. Mr. Chicoine said McCook Lake Association thinks the lake is a private lake, and they would like to keep people off the lake.

Mr. Hines objected stating that does not answer the question. Chairman Larson asked Mr. Fankhauser to move on.

In response to questions from Mr. Fankhauser, Mr. Chicoine said he has 15 lots that border McCook Lake, and he has 15 lots that would border the proposed canal. Mr. Chicoine said he owns 72 acres around McCook Lake. The use of the water in the canal would allow all of those lots access to McCook Lake and it would also allow the public access to McCook Lake through Dakota Bay's intended public boat ramp.

Mr. Fankhauser asked Mr. Chicoine if, based on his intended use of the canal, he believes that the public will benefit from additional recreational use. Mr. Chicoine answered he does.

Mr. Fankhauser asked if Mr. Chicoine believes the public will benefit from any other use. Mr.

Chicoine stated that it will be good for the habitat. Besides boating, jet skiing, etc., there will be more area for fish. Mr. Fankhauser asked if Mr. Chicoine believes he will gain beneficial use of McCook Lake or, that the water will provide him beneficial use and access to McCook Lake, if the water right is granted. Mr. Chicoine answered that he does. If the water right is granted it will allow Mr. Chicoine to protect the integrity of the canal without any appropriation of water from McCook Lake.

Mr. Fankhauser asked Mr. Chicoine if his intentions and expectations for the purpose of this project are fairly laid out in Exhibit A. Mr. Chicoine answered in the affirmative.

Mr. Fankhauser said he and Mr. Chicoine have talked about the public responses to this permit application. He asked Mr. Chicoine why he has chosen not to respond publicly or to do any news conferences related to this canal project. Mr. Chicoine said his neighbors are misinformed. There has been a propaganda campaign for over a year on television and in the newspaper.

Mr. Hines objected. He said Mr. Chicoine is slandering the association and he is speculating. Chairman Larson overruled the objection.

Mr. Fankhauser asked what the benefit is to Mr. Chicoine as the applicant, if the permit application is granted and the proposed canal is built. Mr. Chicoine answered that those 15 people would be able to have access to McCook Lake and there would be public access with a boat ramp. Mr. Chicoine said this is a reasonable and useful use of the water. Mr. Chicoine does not believe that there will be a unique injury to anyone else's water right if his permit is granted.

Mr. Fankhauser offered Exhibit A. There were no objections, and Chairman Larson admitted the exhibit into the record.

Mr. Hines asked Mr. Chicoine if he has ever built a canal before. Mr. Chicoine stated that he has not.

Mr. Hines asked Mr. Chicoine if it is true that he has not dedicated any of his 72 acres for a public purpose that would allow for a public access dock. Mr. Chicoine answered that he plans on it with the installation of this boat ramp.

Mr. Hines asked if Mr. Chicoine has provided the Water Management Board with any of the plans or specifications for the proposed public boat ramp. Mr. Chicoine answered that he is not sure.

Mr. Hines ask Mr. Chicoine how many feet of shoreline there are on the 72 acres he owns in proximity to McCook Lake. Mr. Chicoine answered there is approximately 900 to 1,000 feet of shoreline. After construction of the canal there would be 800 or 900 feet of shoreline.

Mr. Hines asked if it is Mr. Chicoine's intention to sell the lots that would be developed along the canal. Mr. Chicoine said the 15 lots on the east side, next to Sodrac Park have shown interest in it, but he has never met with them or signed any documents.

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Mr. Hines asked Mr. Chicoine if he obtains the water right that he has requested, does anything in the requested water permit require him to pump water annually. Mr. Chicoine said he hasn't gotten the permit from Game, Fish and Parks so he does not know.

Mr. Hines asked if Mr. Chicoine has asked Game, Fish and Parks for permission to pump water every year. Mr. Chicoine said he has discussed it with Game, Fish and Parks but he does not have the permit at this time.

Mr. Hines asked if one of the terms of the permit is that Mr. Chicoine would be required to pump the water every year. Mr. Chicoine said he is sure it is.

Mr. Hines asked if it would require any of Mr. Chicoine's successors to pump water every year. Mr. Chicoine said he is not sure.

Mr. Hines asked if it would require pumping water for the life of the canal.

Mr. Fankhauser objected as to speculation. The shoreline permit has not been granted yet. It is contingent on it obtaining, according to Game, Fish and Parks, a water right. Any conversations about what is required under that shoreline alteration permit being granted is pure speculation because Mr. Chicoine does not yet have an answer back from Game, Fish and Parks.

Mr. Hines said his question is not about the shoreline alteration.

Chairman Larson said Mr. Chicoine is requesting a water permit and Game, Fish and Parks has nothing to do with it; the Water Management Board does.

Mr. Hines said he is asking if the water right Mr. Chicoine has applied for would require him to pump water every year.

Chairman Larson overruled the objection.

Mr. Chicoine answered that he is not sure.

Mr. Hines asked who will be responsible for the annual maintenance of the canal. Mr. Chicoine answered that he will.

Mr. Hines asked who will be responsible for the annual maintenance of the canal after Mr. Chicoine sells the lots, after he passes away, or after the LLC dissolves. Mr. Chicoine answered that he is not sure.

Mr. Hines asked that if for some reason Mr. Chicoine can't or is unable to pump water into the canal, isn't it true that water the McCook Lake Association's pumps into the lake will fill the canal? Mr. Chicoine said he does not foresee having any problems with it.

Mr. Fankhauser objected as to speculation. Mr. Hines said he will save the question for direct.

Chairman Larson asked Mr. Hines to re-phrase the question.

Mr. Hines asked Mr. Chicoine if he constructs the canal and pumps no water, will there be water in the canal? Mr. Chicoine answered that there are test wells there. The water table is very close, but Dakota Bay would not construct the canal unless it was going to pump water.

Mr. Hines asked if it is Mr. Chicoine's intention to line the canal with a fat clay layer. Mr. Chicoine answered that existing topsoil is what used to be the bottom of the lake. His property used to be part of McCook Lake.

Mr. Hines asked if Mr. Chicoine was going to line the sides and the bottom of the canal. Mr. Chicoine said it will be lined with 18 inches of fat clay.

Mr. Hines asked if installing docks for access will damage the canal liner. Mr. Chicoine answered that Dakota Bay plans on putting in...

Mr. Fankhauser objected as to speculation. Chairman Larson sustained the objection.

Mr. Hines asked if it is a beneficial use to pump water into the canal if the canal liner is damaged or fails.

Mr. Fankhauser objected as to speculation. Chairman Larson overruled the objection.

Mr. Chicoine said he does not foresee damage to the canal.

Mr. Hines said he is not asking if Mr. Chicoine foresees it. He asked if there would still be a beneficial use to pumping water into the canal if the canal was damaged by a boating accident. Mr. Chicoine said he is sure it could be fixed.

Mr. Hines asked if it is correct that until the canal was fixed there would be no reason to pump water into it. Mr. Chicoine said the water would need to be pumped to maintain the bottom of the liner.

This concluded questioning by Mr. Hines.

Ms. Mines Bailey had no questions of Mr. Chicoine.

In response to questions from Mr. Fankhauser, Mr. Chicoine stated that his intention is to build a canal and to fill the canal with water to provide several properties with access to McCook Lake. In order to protect the canal and to protect the integrity of the liner, Dakota Bay wishes to pump water into the canal without appropriating water from McCook Lake. Mr. Chicoine said Dakota Bay's use of the water pumped into the canal is for recreational purposes for himself, the people that own property around, and to the general public. Obtaining a water permit is one of the steps for obtaining a permit from Game, Fish and Parks for shoreline alteration. The water being pumped out of Mr. Chicoine's irrigation well provides a backup plan that the canal's integrity will be maintained. If Dakota Bay is unable to ensure the integrity of the canal, the canal will

not be built. Mr. Chicoine said he has no intentions of harming McCook Lake.

In response to questions from Chairman Larson, Mr. Chicoine stated that the water permit application requests 7.99 acre-feet annually after the canal is filled. His engineer, Scott Gernhart, did the calculations for that. A hydrology study was done, and it was determined that with 18 inches of the clay liner material, which is existing on his property, it would have leakage of only an inch or less per year.

Mr. Hines objected as to hearsay. He said Mr. Chicoine is now testifying about what his engineer said and the engineer is not available to testify.

Chairman Larson asked Mr. Chicoine if his engineer evaluated and determined the annual evaporation and seepage losses from this proposed canal. Mr. Chicoine answered in the affirmative. Mr. Chicoine said he plans on pumping water into the canal every year. He does not want to affect McCook Lake in any way. The pump is currently used for irrigation. It pumps 700 gallons per minute. Mr. Chicoine said he only has to fill the canal once, then all he has to do is maintain evaporation or seepage in the canal.

Chairman Larson asked Mr. Chicoine how he plans to monitor the evaporation and seepage losses in the canal. Mr. Chicoine said he has farmed there for 21 years, and he is on the property every three or four days.

Chairman Larson asked if Mr. Chicoine has a third party, an engineer or a professional that is going to monitor the evaporation and seepage losses. Mr. Chicoine answered that he is not sure what the Game, Fish and Parks will require because he hasn't obtained the permit yet.

Chairman Larson said Game, Fish and Parks does not issue the water permit; the Water Management Board does, and the board wants to know what the plan is to monitor the evaporation and seepage losses on the canal going forward. Mr. Chicoine said he can establish a plan or whatever the board wishes to see how it fluctuates.

Chairman Larson said it is his understanding, based on the DANR engineer's testimony, that there is a method for calculating what that loss would be. He asked if Mr. Chicoine would comply if the board requires monitoring of the evaporation and seepage and that a certain amount of water is pumped back into the canal every year. Mr. Chicoine said he would comply with those requirements.

Chairman Larson asked if the liner is just clay. Mr. Chicoine said the liner is a type of clay. When it gets wet it seals quite well. It will be 18 inches thick with leakage limited to one inch per year. Mr. Chicoine said it is the same material that was present under McCook Lake before the lake was dredged.

In response to questions from Chairman Larson, Mr. Chicoine stated that concrete does not need to be poured in the bottom of the canal; it will be constructed with a clay liner. There are 15 privately-owned lots on the east side of the canal. The canal will be 30 to 40 feet away from those existing property lines, and Mr. Chicoine would potentially be able to sell 15 of his lots.

On May 5, 2022, Mr. Chicoine explained Dakota Bay's plans regarding the canal to Mr. Lohry, but he has not had discussions with the McCook Lake Association about working together to contribute or pump additional water as it becomes necessary. Mr. Chicoine's engineer, Scott Gernhart, assisted him with preparing the U.S. Army Corps of Engineers permit preconstruction application. Mr. Chicoine has not contributed funds to the McCook Lake Association in the past. If the board granted a water permit that required Mr. Chicoine to contribute water every year, he would comply.

Mr. Fankhauser had no further witnesses.

Mr. Hines made a motion for judgement as a matter of law. It is the association's position that Dakota Bay has not carried its burden to prove that its proposed water right application has a beneficial use, is in the public interest, and does not unlawfully impair the association's water right. Dakota Bay did not provide any documents related to the design or proposal for its canal. Dakota Bay did not bring its engineer to testify about the methods used to calculate the amount of water required, so there has been no opportunity for the Water Management Board or the association to evaluate those numbers, which the state's engineer stated she had nothing to do with calculating. Mr. Hines said for those reasons the association believes Dakota Bay has not carried its burden for approval of the water right.

Chairman Larson reserved ruling on the motion until all of the evidence is heard.

Mr. Hines called Kip Rounds who had previously been administered the oath.

Mr. Hines stated he had discussed with Mr. Fankhauser the fact that several of the exhibits that were included in the exhibit binders given to the board members are duplicates of the exhibits that were offered during the Declaratory Ruling hearing, but they were renumbered for this hearing. Mr. Hines said Dakota Bay agreed that Exhibits 802, 803, 805, 806, 807, 809, and 810 can be admitted without laying foundation but Mr. Fankhauser has the right to cross-examine or object on the record if he wishes to.

Ms. Mines Bailey objected as to relevance on the admission of Exhibits 802, 805, and 810. Chairman Larson stated that he would reserve ruling on those objections until he hears the testimony.

Mr. Rounds testified regarding this employment background and experience.

In response to questions from Mr. Hines, Mr. Rounds stated that he is familiar with Mr. Chicoine's application for a shoreline alteration, and he is familiar with Dakota Bay's proposed canal.

Mr. Hines asked Mr. Rounds to discuss Game, Fish and Parks' concerns regarding the canal liner. Mr. Rounds stated that Game, Fish and Parks' engineers have concerns about what would happen if the canal liner were to dry out, the integrity of that liner and its ability to reduce seepage. Game, Fish and Parks has shared those concerns with Mr. Chicoine.

Mr. Hines asked what it means for a canal liner to float. Mr. Rounds said that would be a question for an engineer.

Mr. Hines asked if the water level in the canal falls, is there a possibility that the canal liner would dry out, crack, or otherwise fail.

Mr. Fankhauser objected. The question is asking for an improper lay opinion. Chairman Larson overruled the objection.

Mr. Rounds said the possibility that the canal liner drying out, cracking, or otherwise failing was a concern of Game, Fish and Parks' engineers.

In response to questions from Mr. Hines, Mr. Rounds said if the canal is constructed, and a water permit is granted to Dakota Bay, Game, Fish and Parks will not monitor the canal every year to check for canal liner failures. Mr. Rounds does not know who would be responsible for monitoring the canal or who would be responsible in the event of the canal liner failing.

In response to questions from Mr. Fankhauser regarding the shoreline alteration permit application, Mr. Rounds stated that if the Department of Game, Fish and Parks has concerns about a proposed project, the department shares those concerns with the applicant. Game, Fish and Parks has communicated its concerns regarding this project with Mr. Chicoine. Mr. Chicoine has been active in addressing those concerns.

Mr. Rounds stated that Game, Fish and Parks did not request that Mr. Chicoine obtain a water permit. Game, Fish and Parks requested that Mr. Chicoine provide means to prevent the canal liner from drying out. Mr. Rounds said it is his understanding that the beneficial purpose of a water permit like this one would be to help ensure that the canal's liner would not dry out. It will benefit everybody if the canal liner does not dry out. Mr. Rounds stated that, outside of Mr. Chicoine's proposal to monitor the canal and add water as needed, there has been no additional conversation. Mr. Rounds said he understands Mr. Chicoine is currently working with an engineer.

Mr. Fankhauser asked Mr. Rounds if the properties adjacent to the proposed canal could be subject to an agreement to protect the canal liner or to ensure that water is maintained in the canal.

Mr. Hines objected as to foundation. Chairman Larson sustained the objection.

There were no further questions for Mr. Rounds.

Mr. Hines called Nakaila Steen who had previously been administered the oath.

Mr. Hines asked Ms. Steen what it means for a canal liner to float. Ms. Steen answered that even though she is an engineer, she does not know if she has the proper engineering language for a definition like that, but in her opinion, it means that the liner is floating on top of the water surface. A potential cause of the liner floating would be water getting under the liner.

Mr. Hines asked what water would be likely to get underneath the liner. Mr. Steen said it could be the water coming from Mr. Chicoine's well or if McCook Lake water were to overtop the berm and under the liner.

Mr. Hines asked if pumping water into the canal from a well mitigates the risk of float.

Mr. Fankhauser objected to this line of questioning. Ms. Steen did say that while she is an engineer, she doesn't have the background to testify about this line of questioning. Chairman Larson sustained the objection.

Mr. Hines asked Ms. Steen if it is within her education and experience to tell him if the water levels in the lake and the canal will correspond to each other, regardless of whether pumping is occurring from the well. Ms. Steen stated that the water levels will not necessarily correspond if the berm at the end of the canal is going to be constructed as she was informed today. It is possible that if a berm was constructed, the water levels would may not correspond, but if no berm were constructed, they may correspond.

Mr. Fankhauser asked if Ms. Steen's report was based on the current application for a water allocation permit. Ms. Steen answered in the affirmative.

Mr. Fankhauser asked Ms. Steen if the figures and numbers used in the application for the permit were used for her calculations and based on her engineering training.

Mr. Hines objected as to the questions being beyond the scope of direct. Chairman Larson overruled the objection.

In response to questions from Mr. Fankhauser, Ms. Steen stated that based on the volume requested by the application she determined there was a reasonable probability that unappropriated water was available from the aquifer for the proposed appropriation and any interference from the proposed appropriation is not likely to cause unlawful impairment to existing users within the aquifers; users being licensed and permitted water permits and domestic users with adequate wells.

Ms. Fankhauser asked if Game, Fish and Parks regulates the construction of shoreline alteration permits. Ms. Steen answered that she is unaware of what Game, Fish and Parks regulates.

There were no further questions of Ms. Steen.

Mr. Hines called Dirk Lohry who had previously been administered the oath.

Mr. Hines asked Mr. Lohry to testify regarding his education and employment background. Mr. Lohry stated that he has been instrumental in writing laws for secondary containment of fertilizer tanks. He has also designed and built several secondary containment systems for fertilizer tanks. Mr. Lohry said the problem with a clay liner in a secondary containment for a fertilizer tank is that the clay tends to fail over a period of time due to vegetation growth, which ends up

penetrating the clay layer and also because of drying and cracking. For that reason, the vast majority of containment ponds for fertilizer tanks are plastic lined primarily with a 30 mil polyethylene coating and in many cases a cement liner.

Mr. Fankhauser objected. He moved that his objection precede the answer and that the answer be stricken based on relevance. The testimony was about fertilizer containment facilities, and McCook Lake and the canal are neither.

Mr. Hines offered to ask the question again and ask Mr. Lohry to answer just the question that he asks.

Chairman Larson sustained the objection and sustained the motion to strike.

Ms. Hines asked Mr. Lohry if he has experience with clay liners for containment. Mr. Lohry answered in the affirmative. Mr. Hines asked if Mr. Lohry has concerns about the long-term durability of those types of containments.

Ms. Mines Bailey objected as to relevance. This is a water appropriation permit, and the four factors are: availability of unappropriated water, potential for unlawful impairment, beneficial use, and public interest. Chairman Larson sustained the objection.

Mr. Hines stated that Mr. Chicoine is asking for a water permit for the purpose of filling a canal and ensuring the canal liner will not fail. This is why he believes the question is relevant.

Chairman Larson said he sustained the objection because the question before the board is not whether or not the liner will fail or is of a certain quality. The purpose of the hearing is for the board to decide whether the four factors for approval of a water permit are met.

Mr. Hines asked if the pump fails for Mr. Chicoine's well or if he or Dakota Bay doesn't pump water, who will ultimately bear the burden of making sure that the canal has water in it. Mr. Lohry said it will be the McCook Lake Association.

Mr. Fankhauser object as to speculation. Chairman Larson overruled the objection.

Mr. Hines asked if it would cost more money for the association to pump water into the additional square footage of the canal.

Mr. Fankhauser objected as to speculation. Chairman Larson sustained the objection.

Mr. Hines asked Mr. Lohry what the cost of pumping water by the McCook Lake Association is based on.

Ms. Mines Bailey objected as to relevance. Chairman Larson sustained the objection.

There were no further questions for Mr. Lohry.

Mr. Hines had no further witnesses.

Chairman Larson denied Mr. Hine's motion for judgement as a matter of law.

The parties presented closing arguments.

Motion by Larson, seconded by Freeman, that pursuant to SDCL 1-25-2(3) the board enter into executive session for the purpose of consulting with legal counsel regarding pending litigation. A roll call vote was taken, and the motion carried unanimously.

The board exited executive session at 6:10 p.m.

Motion by Bjork, seconded by Freeman, to approve Water Permit Application No. 8744-3, Dakota Bay, subject to the qualifications set forth by the Chief Engineer. A roll call vote was taken, and the motion carried with Bjork, Dixon, Freeman, and Holzbauer voting aye. Chairman Larson abstained.

Ms. Mines Bailey will prepare proposed Findings of Fact, Conclusions of Law and the Final Decision, which are due by August 23, 2023. Objections and alternative Findings of Fact, Conclusions of Law and Final Decision are due by September 11, 2023.

ADJOURN: Motion by Bjork, seconded by Freeman, 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, or email pcbachand@pie.midco.net.

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