



OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501

Phone (605) 773-3215

Fax (605) 773-4106

<http://atg.sd.gov>

RECEIVED

APR 19 2024

OFFICE OF
WATER

MARTY J. JACKLEY
ATTORNEY GENERAL

BRENT K. KEMPEMA
CHIEF DEPUTY

April 18, 2024

Chief Engineer Eric Gronlund
Water Rights DANR
523 E. Capitol
Pierre, SD 57501-3182

David M. McVey
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-2243
Email: David.McVey@state.sd.us
Counsel for Water Management Board

Pre-hearing Chair for Water
Management Board
c/o Ron Duvall
DANR Water Rights Program
Joe Foss Building
523 E. Capitol
Pierre, SD 5501-3182

Todd Wilkinson
Wilkinson & Schumacher Law
Prof. L.L.C.
P.O. Box 29
De Smet, South Dakota 57231-
0029
Counsel for Lenny Peterson

Lenny Peterson
19111 Maple Ave.
Hitchcock, SD 57348

Ryan Vogel
Richardson, Wyly, Wise, Sauck
& Hieb
P.O. Box 1030
Aberdeen, SD 57402

Robert Roeber
309 E. 6th Ave.
Redfield, SD 57469

Re: *In the Matter of Water Permit Application No. 8825-3, Lenny Peterson*

To Whom It May Concern:

Enclosed please find a true and correct copy of the *Chief Engineer's Motion to Dismiss and Certificate of Service* in the above-referenced matter.

Sincerely,

/s/ Jennifer L. Verleger

Jennifer L. Verleger
Assistant Attorney General

JLV/lde
Enclosure

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

IN THE MATTER OF WATER PERMIT)
APPLICATION NO. 8825-3,)
LENNY PETERSON)

CHIEF ENGINEER'S
MOTION TO DISMISS

INTRODUCTION

1. Lenny Peterson applied for a water permit, Application No. 8825-3. The Chief Engineer and Water Rights Program received two petitions in opposition to the Application. Mr. Roeber's petition is procedurally defective and does not meet the criteria for granting party status under SDCL § 46-2A-4. The Chief Engineer asks that the Roeber petition be dismissed.

FACTS

2. Lenny Peterson applied for a water permit, Application No. 8825-3, to irrigate 230 acres in the E ½ of Section 11, Township 115 North, Range 65 West, approximately 6.5 miles southwest of Redfield, SD. The proposed appropriation is for 1.33 cubic feet per second (cfs) from Turtle Creek.

3. Ms. Brittan Hullinger and Mr. Mark Rath, Natural Resources Engineers for the Department of Agriculture and Natural Resources (DANR) Water Rights Program, co-authored a technical report addressing the Application. Based on the technical report and his engineering judgment, Chief Engineer Eric Gronlund issued a recommendation for approval of Application No. 8825-3 subject to several conditions.

4. The Application and recommendation were properly noticed under SDCL § 46-2A-4. Comments and petitions in opposition were due April 15, 2024.

5. The Water Rights Program received a petition in opposition from Robert Roeber postmarked April 16, 2024. *See* Exhibit A. Mr. Roeber listed six alleged injuries the Application’s approval would cause him:

- Loss of future domestic use for human consumption and livestock watering
- Loss of riparian vested senior water right for future irrigation rights
- Loss of future water replenishment of Western Hitchcock/Tulare aquifer with the removal of WPA Dam by Game, Fish, and Parks
- Loss of storage capacity for aquifer going to Twin Lakes
- Loss of habitat for fishing and hunting
- Loss of property value with depletion of aquifer

Id. The reason listed for opposing the petition is that senior water rights holders should maintain their senior water rights. *Id.*

LAW AND ARGUMENT

A. Mr. Roeber did not properly serve his petition.

6. “Petitions filed pursuant to SDCL [§] 46-2A-4(4) ... to oppose or support an application must be served by first class mail or personally delivered to the chief engineer’s office and the applicant. Mail must be postmarked ... within 10 days after the published notice pursuant to SDCL 46-2A-23.” ARSD § 74:02:01:12.04. The petition form itself also includes a note that the petition must be served either by mail or personally delivered to the Water Rights

Program by the deadline date specified in the public notice.¹ See Exhibit A. The Water Rights Program received Mr. Roeber's petition via first class mail postmarked April 16, 2024, one day after the procedural deadline.² As this petition was not properly served, Mr. Roeber should not be considered a proper party to a contested case hearing on the Application.

B. Mr. Roeber's petition does not allege a unique injury, nor any injury to himself.

7. In 2021, the legislature amended SDCL § 46-2A-4 to clarify and streamline the water right permitting process. In so doing, the legislature provided for the submission of comments from any member of the public regarding a potential appropriation, but restricted those individuals who may require and participate in a hearing to those who have alleged a unique personal injury and that injury must fall within the Board's regulatory authority. Specifically, SDCL § 46-2A-4(4) provides:

- ... that a person may only participate in the hearing if:
 - (a) The person alleges that the application, upon approval, will cause injury to the person that is unique from any injury suffered by the public in general[.]

¹ In addition, Mr. Roeber was personally instructed via phone by Ron Duvall, water rights staff member, who provided the form to Mr. Roeber, to mail the completed petition no later than April 15.

² For full disclosure, the Water Rights Program did receive a courtesy copy of Mr. Roeber's petition via email at 4:45 pm on April 15. Applicant Lenny Peterson is not included on the email, and it is unknown if or when he has been properly served.

The legislature imposed this restriction believing that the multi-layered reviews by the Water Rights Program staff, the Chief Engineer, and the Board adequately protects the general public's interests.

8. Here, not only does Petitioner Roeber fail to allege any potential injuries that are personally unique, he fails to allege any personal injury at all. His petition names "Rollie Binger, Jerry Binger, Tim Binder, John K. Roeber, and Don Schade," but makes no reference to himself. See Exhibit A. He further couches his complaint on behalf of "farmers and family farms [that] have existed for decades" and "the descendants." *Id.* These are members of the general public whose rights the legislature has specifically delegated the Water Rights Program staff, the Chief Engineer, and the Board for protection. To summarize, Petitioner Roeber believes that the Application should not be granted because senior water rights holders should maintain their senior water rights. *Id.* While the Chief Engineer agrees senior water rights must be protected, to the extent these rights are being asserted on behalf of the public rather than a specific individual or entity, the Chief Engineer is responsible for that protection without the need for a contested case hearing.

C. The objections regarding future perceived harms raised by Mr. Roeber's petition are contrary to fundamental water law administration principles.

9. Mr. Roeber lists six objections in his petition, all of which relate to future perceived harms:

- Loss of *future* domestic use for human consumption and livestock watering
- Loss of riparian vested senior water right for *future* irrigation rights

- Loss of *future* water replenishment of Western Hitchcock/Tulare aquifer with the removal of WPA Dam by Game, Fish, and Parks
- Loss of [*future*] storage capacity for aquifer going to Twin Lakes
- Loss of [*future*] habitat for fishing and hunting
- Loss of [*future*] property value with depletion of aquifer

See Exhibit A (emphasis added). But rejecting an application based on objections about perceived harms that might potentially occur at some undisclosed future time runs counter to fundamental water law administration principles.

10. The prior appropriation doctrine is generally regarded as originating from the California Supreme Court based on the legal maxim “*qui prior est in tempore potior est injure*” (whoever is earlier in time is strong in right) in 1855. *Irwin v. Phillips*, 5 Cal. 140, 147 (1855). Since nearly that time (and as succinctly stated in the statutes of the other Dakota) another judicial maxim has pervaded water law – “One must so use one’s own rights as not to infringe upon the rights of another.” N.D. Cent. Code § 31-11-05.

11. This concept was recognized in the water law context by the U.S. Supreme Court as early as 1874. In *Basey v. Gallagher*, 87 U.S. 670, Gallagher was a downstream water user who sued when Basey constructed an upstream dam and fully diverted the stream, depriving Gallagher of his water use. The Court noted that since 1855, “the right to water by prior appropriation for any beneficial purpose is entitled to protection” in the Pacific States and Territories. *Id.* at 683. Noting specific examples, the court continued: “Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their

mining claims; and in all such cases the right of the first appropriator, *exercised within reasonable limits*, is respected and enforced.” *Id.* (emphasis added). Concluding, the Court stated: “We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. *It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.*” *Id.* (emphasis added).

12. This maxim that “one must so use one’s own rights as not to infringe upon the rights of another” is also reflected in water law in the antispeculation doctrine. “The antispeculation doctrine prohibits the acquisition of a conditional water right without a vested interest or a specific plan to possess and control the water for a specific beneficial use.” 94 C.J.S. Waters § 347. In other words, water rights cannot be acquired simply because an individual wishes to deprive future users the ability to obtain water rights. “Merely storing water for a later use [can be] akin to speculative hoarding” and without a plan for an “immediate beneficial use ... has been found to violate an antispeculation policy.” 94 C.J.S. Waters § 347.

13. The “adequate well” doctrine also reflects the principle that future users cannot be held hostage by senior prior appropriators. In South Dakota, all wells except monitoring wells must be constructed as “adequate wells.” ARSD 74:02:04:23.01. An “adequate well” is defined as “a well constructed or rehabilitated to allow various withdrawal methods to be used, to allow the inlet

to the pump to be placed not less than 20 feet into the saturated aquifer or formation material when the well is constructed, or to allow the pump to be placed as near to the bottom of the aquifer as is practical if the aquifer thickness is less than 20 feet.” ARSD 74:02:04:20(6). Only domestic wells that “adequate wells” can be registered with the Chief Engineer. ARSD 74:02:01:05.02. And only “adequate wells” can be considered “adversely impacted domestic wells” if there is a decline in water levels such that the well is no longer sufficiently able to provide water. ARSD 74:02:04:20(7). In other words, the only domestic wells entitled to protection from junior appropriators are “adequate wells.” The policy reason for this “adequate well” doctrine is that “a whole neighborhood or community” (*Basey*, 87 U.S. at 683) of future water users should not be prevented from appropriating water simply because the senior appropriator’s well is too shallow in the aquifer. This would “vest an absolute monopoly in a single individual.” *Basey*, 87 U.S. at 683.

14. The Chief Engineer is charged with administering water law for “the protection of the public interest in the development of water ... for the greatest public benefit.” SDCL § 46-1-2. The use of that water is “a paramount interest” to the people of the state. SDCL § 46-1-1. “[T]he general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable ... [and] the conservation of such water is to be exercised with a view to the reasonable and beneficial use ... in the interest of the people and for the public welfare.” SDCL § 46-1-4.

15. All of these doctrines illustrate that generic objections about future

perceived harms, such as those raised by Mr. Roeber's petition, are contrary to fundamental water law administration principles. Mr. Roeber's speculation about future impacts without any specificity – and not even on behalf of himself, but generic “farmers” and “descendants” – are not the sort of harms the prior appropriation doctrine and administration of water rights are meant to protect.

CONCLUSION

16. Mr. Roeber's petition does not allege any unique injury to himself, nor are the perceived future injuries he alleges unique to this water permit. Under Mr. Roeber's view of the prior appropriation doctrine, no additional water permits would be able to be granted anywhere because there could always be the threat of speculative harm. Mr. Roeber's petition does not qualify him as a person able to participate in a contested case hearing under SDCL § 46-2A-4(4)(a), and he cannot use his own right to the reasonable use of water to unreasonably infringe upon the rights of others to pursue their own reasonable water use. In addition, his petition was untimely. The Chief Engineer asks that Mr. Roeber's petition be dismissed.

Respectfully submitted April 18, 2024.

MARTY J. JACKLEY
ATTORNEY GENERAL

/s/ Jennifer L. Verleger

Jennifer L. Verleger
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501
Telephone: (605) 773-2243
Email: Jennifer.Verleger@state.sd.us

*Attorneys for South Dakota Chief Engineer
and Water Rights Program*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of **Chief Engineer's Motion to Dismiss** were served upon the following by enclosing the same in envelopes with first class postage prepaid, and depositing said envelopes in the United States mail on April 18, 2024:

Chief Engineer Eric Gronlund
Water Rights DANR
523 E. Capitol
Pierre, SD 57501-3182

Ryan Vogel
Richardson, Wyly, Wise, Sauck
& Hieb
P.O. Box 1030
Aberdeen, SD 57402

Todd Wilkinson
Wilkinson & Schumacher Law Prof. L.L.C.
P.O. Box 29
De Smet, South Dakota 57231-0029
Counsel for Lenny Peterson

Robert Roeber
309 E. 6th Ave.
Redfield, SD 57469

Lenny Peterson
19111 Maple Ave.
Hitchcock, SD 57348

And on the same date, a copy was hand delivered to:

David M. McVey
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-2243
Email: David.Mcvey@state.sd.us
Attorney for Water Management Board

And on the same date, the original was sent inter-office for filing:

Pre-hearing Chair for Water Management Board
c/o Ron Duvall
DANR Water Rights Program
Joe Foss Building
523 East Capitol Building
Pierre, SD 57501

Dated April 18, 2024.

MARTY J. JACKLEY
ATTORNEY GENERAL

/s/ Jennifer L. Verleger
Jennifer L. Verleger
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501
Telephone: (605) 773-2243
Email: Jennifer.Verleger@state.sd.us

*Attorneys for South Dakota Chief Engineer
and Water Rights Program*



RECEIVED

APR 17 2024

OFFICE OF
WATER

DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES

JOE FOSS BUILDING
523 E. CAPITOL AVE
PIERRE SD 57501-3182
danr.sd.gov

Petition

Opposing Application for a Water Right Permit

Application No. 8825-3 Name of Applicant Lenny Peterson

The Application No. and applicant's name can be found in the public notice at <https://danr.sd.gov/public>.

Note. According to South Dakota Codified Law section 46-2A-4(5), all the following information is required.

Describe the unique injury approval of this application will have upon you.

-loss of future domestic use for human consumption and livestock watering
-loss of riparian vested senior water rights for future irrigation rights
-loss of future water replenishment of Western Hitchcock/Tulare aquifer with the removal of WPA Dam by GFP
-loss of storage capacity for aquifer going to Twin Lakes
-loss of habitat for fishing and hunting
-loss of property value with depletion of aquifer

List the reasons for your opposition to this application.

Rollie Binger, Jerry Binger, Tim Binger, John K Roeber, Don Schade all signed up for the Oahe Project with Hans Jessen. They all bought land along Turtle Creek and Cottonwood Lake. This land is west of the 100th Meridian and falls under the Doctrine of Prior Appropriations, "First in time, First in Right." Most senior water right holders have first call on any water that is available. 1978 provision added present withdrawals of ground water in excess of the average estimated recharge to the ground water source. Since the farmers and family farms have existed for decades, the decendants should maintain senior water rights. Lenny Peterson has owned this property for about five years.

Provide name and mailing address of the person filing this petition or the petitioner's legal counsel.

First Name: Robert Last Name: Roeber

Mailing Address: 309 E 6th Ave

City: Redfield State: SD Zip: 57469

Optional contact information. Phone: 605-460-0398 Email: _____

Note. This petition needs to be submitted via mail or personally served upon Water Rights no later than the deadline date provided in the public notice. The mailing address is provided above and should be sent to "Attention - Water Rights Program." A copy of this petition also needs to be mailed to, or personally served upon, the applicant whose mailing address is provided in the public notice.

Exhibit A

R Roeber
309 E. 5th Ave
Redfield S. Dak
57469

Retail



57501

RDC 99

U.S. POSTAGE PAID
FCM LG ENV
REDFIELD, SD 57469
APR 16, 2024

\$1.39

R2304Y122914-07

Attention - Water Rights Program
Dept. of Agriculture, Natural Resources
Joe Foss Building
523 E. Capitol Ave
Pierre, SD 57501-3182

RECEIVED

APR 17 2024

OFFICE OF
WATER



**DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 E. CAPITOL AVE
PIERRE SD 57501-3182
danr.sd.gov


April 22, 2024

NOTICE OF RESPONSE DEADLINE REGARDING MOTION TO DISMISS

TO: Robert Roeber Lenny Peterson Todd Wilkinson
309 E. 6th Ave. 19111 Maple Ave. Wilkinson & Schumacher Law Prof. L.L.C.
Redfield, SD 57469 Hitchcock, SD 57348 103 Joliet Ave. SE
De Smet, South Dakota 57231-0029
Counsel for Lenny Peterson

Ryan Vogel Richardson, Wyly, Wise, Jennifer L. Verleger, Assistant Attorney General
Sauck & Hieb 1302 East Highway 14, Suite 1
1 Court Street Pierre SD 57501-8501
Aberdeen, SD 57402 *Counsel for Chief Engineer*

David M. McVey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501
Counsel for Water Management Board

FROM: Ron Duvall, Natural Resources Engineer 
SD DANR, Water Rights Program

SUBJECT: Response Deadline concerning Chief Engineer's Motion to Dismiss Robert Roeber
Petition Regarding Water Permit Application No. 8825-3, Lenny Peterson

On April 18, 2024, the Chief Engineer, by and through their legal counsel, filed a motion to dismiss the petition in opposition to Water Permit Application No. 8825-3 filed by Robert Roeber. The Pre-hearing Chair for the Water Management Board has directed that any written responses to the motion to dismiss be received no later than 5:00 p.m. central daylight time on Monday, April 29, 2024. After reviewing the motion to dismiss and any written responses received by the April 29, 2024 deadline, the Pre-hearing Chair will issue a decision regarding the motion to dismiss.

Responses are to be provided to everyone listed in the enclosed Certificate of Service and:

Pre-hearing Chair for Water Management Board
c/o Ron Duvall
SD DANR, Water Rights Program
Joe Foss Building
523 E. Capitol
Pierre, SD 5501-3182

The Pre-hearing Chair has jurisdiction to consider this matter pursuant to South Dakota Codified Law (SDCL) 1-41-15.3 and 46-2-24. Decisions of the Pre-hearing Chair may be appealed to the Water Management Board pursuant to provisions of SDCL 46-2-24.

CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury that a true and correct copy of a "Notice of Response Deadline regarding Motion to Dismiss" dated April 22, 2024, concerning Water Permit Application No. 8825-3, was served upon the following by enclosing the same in envelopes and sent FedEx Standard Overnight mail on April 22, 2024.


Robert Roeber	Lenny Peterson	Todd Wilkinson
309 E. 6th Ave.	19111 Maple Ave.	Wilkinson & Schumacher Law Prof. L.L.C.
Redfield, SD 57469	Hitchcock, SD 57348	103 Joliet Ave. SE
		De Smet, South Dakota 57231-0029

Ryan Vogel Richardson, Wyly, Wise, Sauck & Hieb
1 Court Street
Aberdeen, SD 57402

Above also Sent Inter-office to:

Jennifer L. Verleger, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

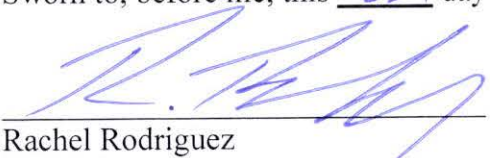
David McVey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501



Vickie Maberry
Water Rights Program, DANR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 22nd day of April, 2024.



Rachel Rodriguez
Notary Public
My Commission expires May 16, 2029



Wilkinson & Schumacher Law Prof. LLC

Attorneys At Law

RECEIVED

APR 26 2024

HARRY J. EGGEN (1922-1969)
ELLSWORTH F. WILKINSON (1952-2005)

103 JOLIET AVE., S.E. - P.O. BOX 29
DE SMET, SOUTH DAKOTA 57231

TELEPHONE: (605) 854-3378
FACSIMILE: (605) 854-9006

OFFICE OF
WATER
todd@wslawfirm.net
gary@wslawfirm.net
michelle@wslawfirm.net
*ALSO LICENSED IN
MINNESOTA

TODD D. WILKINSON
GARY W. SCHUMACHER*
MICHELLE ORTON, paralegal

April 25, 2024

Mr. Eric Gronlund
Chief Engineer
Joe Foss Building
523 East Capitol Avenue
Pierre, SD 57501

Attorney Ryan S. Vogel
Richardson, Wyly, Wise, Sauck & Hieb
PO Box 1030
Aberdeen, SD 57402
Attorney for City of Redfield

Robert Roeber
309 E 6th Ave
Redfield SD 57469

David M. McVey
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501
Attorney for Water Management Board

Ron Duvall
Water Rights Program
Joe Foss Building
523 East Capitol Building
Pierre SD 57501
Chair for Water Management Board

Jennifer L. Verleger
Assistant Attorney General
1302 East Highway 14, suite 1
Pierre, SD 57501
*Attorney for SD Chief Engineer
and Water Rights Program*

Re: *In the Matter of Water Permit Application No. 8825-3, Lenny Peterson*

All:

Enclosed please find a true and correct copy of the Notice of Appearance, Applicant Lenny Peterson's Motion to Dismiss, and Certificate of Service in the above entitled matter. This is intended as service by mail upon you.

Thank you.

Sincerely yours,

WILKINSON & SCHUMACHER
LAW PROF LLC



Todd D. Wilkinson

TDW:mo
Encl.

RECEIVED

APR 26 2024

OFFICE OF
WATER

IN THE MATTER OF WATER PERMIT) NOTICE OF APPEARANCE
APPLICATION NO. 8825-3,)
LENNY PETERSON.)

PLEASE TAKE NOTICE that Todd D. Wilkinson of Wilkinson & Schumacher Law Prof, LLC, PO Box 29, De Smet, South Dakota, hereby gives notice that he will be appearing as the retained attorney of record for Lenny Peterson, in the above referenced matter.

Dated this 25th day of April, 2024.

WILKINSON & SCHUMACHER
LAW PROF LLC



Todd D. Wilkinson
103 Joliet Avenue S.E.
P.O. Box 29
De Smet, South Dakota 57231
(605) 854-3378 telephone
(605) 854-9006 facsimile
todd@wslawfirm.net
Attorney for Lenny Peterson

IN THE MATTER OF WATER PERMIT)	APPLICANT LENNY PETERSON'S
APPLICATION NO. 8825-3,)	MOTION TO DISMISS
LENNY PETERSON.)	

FACTS

Application NO. 8825-3 was applied for by Lenny Peterson and properly filed and noticed. Lenny Peterson's application is for a water permit, to irrigate 230 acres in the E 1/2 of Section 11, Township 115 North, Range 65 West, Spink County, South Dakota. The appropriation requested is for 1.33 cubic feet per second (cfs) from Turtle Creek. Chief Engineer Eric Gronlund issued a recommendation for approval of Application NO. 8825-3 subject to several conditions that Lenny Peterson does not oppose.

A. Robert Roeber failed to properly serve his petition.

1. Lenny Peterson never received a petition in opposition from Robert Roeber postmarked April 16, 2024. See Exhibit A.
2. Mr. Roeber's listed alleged injuries if the application is approved. Robert Roeber did not personally serve his petition. SDCL 46-2A-4(4) requires the opposition petition to be served by first-class mail or personally delivered to the chief engineer's office and the applicant within 10 days after the published notice.

3. The applicant never received Robert Roeber's petition via first-class mail. The Water Rights Program received Mr. Roeber's petition via first-class mail postmarked April 16, 2024, one day after the procedural deadline.
4. As this petition was not properly served, Mr. Roeber should not be considered a proper party to a contested case hearing on the Application.

B. Robert Roeber's petition does not allege a unique injury nor any injury to himself.

5. SDCL 46-2A-4(4) requires that a person can only participate in a hearing if (a) the person alleges that the application, upon approval, will cause injury to the person that is unique from any injury suffered by the public in general.
6. The petition filed by Robert Roeber fails to allege any potential injuries and fails to allege any personal injuries to him at all. The petition names "Rollie Binger, Jerry Binger, Tim Binder, John K. Roeber, and Don Schade as being impacted but does not allege any unique personal injuries to himself.

C. By failing to identify any unique personal injuries the petition is fatally flawed and should be denied.

7. Robert Roeber lists six objections in his petition, all of which allege future losses:

- i. Loss of future domestic use for human consumption and livestock watering;
- ii. Loss of riparian vested senior water rights for future irrigation rights;
- iii. Loss of future water replenishment of Western Hitchcock/Tulare aquifer with the removal of WPA Dam by Game, Fish, and Parks;
- iv. Loss of storage capacity for aquifer going to Twin Lakes;
- v. Loss of habitat for fishing and hunting; and
- vi. Loss of property value with depletion of aquifer.

All of these are interests of the general public and the state law delegates that responsibility to the Chief Engineer and staff and board.

Conclusion

8. Robert Roeber's petition fails to allege any unique injury to himself and the alleged future injuries are generic in general and not unique. The petition does not qualify Robert Roeber as a person able to participate in a contested hearing under SDCL 46-2A-4(4)(a). the applicant requests that Rober Roeber's petition be dismissed.

Dated this 25th day of April, 2024.

WILKINSON & SCHUMACHER
LAW PROF LLC



Todd D. Wilkinson
103 Joliet Avenue S.E.
P.O. Box 29
De Smet, South Dakota 57231
(605) 854-3378 telephone
(605) 854-9006 facsimile
todd@wslawfirm.net
Attorney for Lenny Peterson

IN THE MATTER OF WATER PERMIT)
 APPLICATION NO. 8825-3,)
 LENNY PETERSON.) CERTIFICATE OF SERVICE

The undersigned, Todd D Wilkinson, hereby certifies that a true and correct copy of the **Applicant Lenny Peterson’s Motion to Dismiss and Notice of Appearance**, were served upon the following by first class mail, postage prepaid, on this the 25th day of April, 2024.

Mr. Eric Gronlund
 Chief Engineer
 Joe Foss Building
 523 East Capitol Avenue
 Pierre, SD 57501

Attorney Ryan S. Vogel
 Richardson, Wyly, Wise, Sauck & Hieb
 PO Box 1030
 Aberdeen, SD 57402
Attorney for City of Redfield

Robert Roeber
 309 E 6th Ave
 Redfield SD 57469

David M. McVey
 Assistant Attorney General
 1302 East Highway 14, Suite 1
 Pierre, SD 57501
Attorney for Water Management Board

Ron Duvall
 Water Rights Program
 Joe Foss Building
 523 East Capitol Building
 Pierre SD 57501
Chair for Water Management Board

Jennifer L. Verleger
 Assistant Attorney General
 1302 East Highway 14, suite 1
 Pierre, SD 57501
*Attorney for SD Chief Engineer
 and Water Rights Program*

Dated this 25th day of April, 2024.

WILKINSON & SCHUMACHER
LAW PROF LLC

A handwritten signature in black ink, appearing to read "WILKINSON", written over a horizontal line.

Todd D. Wilkinson
103 Joliet Avenue S.E.
P.O. Box 29
De Smet, South Dakota 57231
(605) 854-3378 telephone
(605) 854-9006 facsimile
Attorney for Lenny Peterson



RECEIVED DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES
JOE FOSS BUILDING
523 E. CAPITOL AVE
PIERRE SD 57501-3182
danr.sd.gov

APR 29 2024
OFFICE OF
WATER

Petition

Opposing Application for a Water Right Permit

Application No. 8825-3 Name of Applicant Lenny Peterson

The Application No. and applicant's name can be found in the public notice at <https://danr.sd.gov/public>.

Note. According to South Dakota Codified Law section 46-2A-4(5), all the following information is required.

Describe the unique injury approval of this application will have upon you.

- loss of future domestic use for human consumption and livestock watering
- loss of riparian vested senior water rights for future irrigation rights
- loss of future water replenishment of Western Hitchcock/Tulare aquifer with the removal of WPA Dam by GFP
- loss of storage capacity for aquifer going to Twin Lakes
- loss of habitat for fishing and hunting
- loss of property value with depletion of aquifer

List the reasons for your opposition to this application.

Rollie Binger, Jerry Binger, Tim Binger, John K Roever, Don Schade all signed up for the Oahe Project with Hans Jessen. They all bought land along Turtle Creek and Cottonwood Lake. This land is west of the 100th Meridian and falls under the Doctrine of Prior Appropriations, "First in time, First in right." Most senior water right holders have first call on any water that is available. 1978 provision added present withdrawals of ground water in excess of the average estimated recharge to the ground water source. Since the farmers and family farms have existed for decades, the decendants should maintain senior water rights. Lenny Peterson has owned this property for about five years.

In closing, give these young farmers an opportunity for future use permits. Their fathers and grandfathers were also great stewards of the land and natural resources. When President Roosevelt initiated the "New Deal," the Pick/Sloan project, Congress approved several dams to bring water and jobs to the surviving farmers. Returning Veteran Serviceman from WWII were given the opportunity to work on these great dams and reclamation projects. The opportunity to receive future water rights and low cost hydroelectric to the Tribes and rural farm areas.

Thank you for your time and consideration.

Provide name and mailing address of the person filing this petition or the petitioner's legal counsel.

First Name: Robert Last Name: Roeber

Mailing Address: 309 E 6th Ave

City: Redfield State: SD Zip: 57469

Optional contact information. Phone: 605-460-0395 Email: _____

Note. This petition needs to be submitted via mail or personally served upon Water Rights no later than the deadline date provided in the public notice. The mailing address is provided above and should be sent to "Attention - Water Rights Program." A copy of this petition also needs to be mailed to, or personally served upon, the applicant whose mailing address is provided in the public notice.

Amended Supplement. Missouri River Basin Water Law Timeline

- 1824 U.S. Supreme Court declares in *Gibbons v. Ogden* “That the power of Congress comprehends navigation, within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with commerce with foreign nations, or among the several states, or with the Indian Tribes.” Federal commerce power over navigation includes authority to control not only all navigable water of the U.S., but also the non-navigable tributaries if the navigable waterway is affected or if interstate commerce is otherwise affected.
- 1936 Flood Control Act 1936. The Act prescribes that federal investigations and improvements of rivers and waterways should be under the jurisdiction of the Corp of Engineers
- 1939 Board of Engineers for Rivers and Harbors recommends a 9ft by 300ft navigation channel on the Missouri River for Sioux City to the mouth
- 1942 Missouri River States committee organized a meeting in Billings, Montana. Aim of Governors Committee is to foster and expediate the planning and development and the use of the water and land resources of the Missouri basin for the greatest common good of the basin and the nation.
- 1944 Flood control act. Senate document 247. Pick and Sloan. Flood protection structures. Water rising west of the 97th meridian.
- 1946 Fish and wildlife Coordination Act for consultation to prevent loss or damage to fish and wildlife at a federal or non-federal agency, project operation under federal permit when the project is authorized to impound, divert, or control waters. Amended in 1958 equal consideration to other project purposes
- 1963 US Supreme Court reaffirms the Winter’s Doctrine in *Arizona vs. California* and clarifies the question of quantification of Indian reserve water rights.
- 1971 Framework study to provide guidance for future multi-purpose development of basin water and related land resources for the optimum or best use.
- 1968 Congress reauthorizes downscaled Oahe Irrigation Project
- 1968 Wild and Scenic Rivers Act consider setting aside certain streams as wild, scenic, or recreation rivers as an alternative to other uses
- 1969 Act Requires an Environmental Impact Statement
- 1972 Missouri River Basin Commission is created by Presidential Executive Order 11658. The Federal Water Pollution Control Act is amended into Nations waters permits to be administered by the Corps of Engineers for the disposal of dredge fill. EPA 402 and 403. 404 separate permit.
- 1977 MRBC adopts its first comprehensive water management plan
- 1980 MRBC adopts its second comprehensive water management plan
- 1980 Fish and Wildlife conservation act provides funds to state

Amended Supplement. Missouri River Basin Water Law Timeline

- 1981 COE officially completes navigation channel to Sioux City.
- 1981 Janklow ETSI (Energy Transport Systems, Inc.) intent to contract with South Dakota to 50,000 acre feet of water a year for 50-year lease.
- 1982 Congress authorizes Development of Web Water in lieu of Oahe and Pollack-Herried Projects.
- 1982 Reclamation Reform Act
- 1986 Congress passes a Water Resource Development Act. 1st in 16 years. New cost sharing requirement and preconditions for local protection projects. Senate Report No. 470 and House Report 282, 89th congress 1st session. Authority to undertake fish and wild life mitigation measures.
- 1990 Upper Basin States Montana, South Dakota, North Dakota concerned about the impact of Spawning fish filed suit in U.S. District Court. US Court of Appeals for the 8th circuit ruled in favor of the Corps of Engineers
- 1992 Missouri files suit, reducing below the amount recommended in the water control plan contained in the master manual
- 1993 US District Court dismissed suit filed by South Dakota, North Dakota, and Montana against the Corps of Engineers. Bureau used 1.5 acre ft per irrigated acre as the consumption use formula.
- 1945 Statement of Merrill Q Sharpe (South Dakota Governor) before the Senate sub-committee on irrigation and reclamation with reference to S.555 September 25, 1945.
- 1824 Supreme Court Gibbons v. Ogden power of Congress comprehends navigation within the limits of every state of the union connected with commerce
- 1824 Authorizes the Corps of Engineers
- 1862 First 160-acre land grant under the Homestead Act. Nebraska
- 1866 Rights have vested and accrued owners of such vested rights shall be maintained and protected the acquisition of water by prior appropriation was entitled for a beneficial use was entitled to protection
- 1877 Desert Lands Act sale of public land to those who would irrigate them within 3 years
- 1897 Captain Hiram Chittenden COE submits report upon the practicality and desirability of constructing reservoirs in upper Missouri basin an indispensable condition to the highest development of the region
- 1889 John Wesley Powell
- 1902 Reclamation Act. Secretary of Interior
- 1906 Secretary of Interior authorizes to develop Hydro Electric generator at reclamation projects where modular irrigation

Amended Supplement. Missouri River Basin Water Law Timeline

- 1908 Winters vs. US Indian reserved water rights
- 1917 Conservation of water sheds legislation states enter into compacts or agreements
- 1920 Federal Water Tower Act
- 1925 The Rivers and Harbors Act heeds for irrigation in planning for navigation, water power, and flood control
- 1926 First Interstate Compact allocating surface water in the Missouri River approved by Colorado and Nebraska. South Platte.
- 1927 308 reports authorized. Purposes of navigation, flood control, hydroelectric power, and irrigation
- 1933 Roosevelt provisions of National Industrial Recovery Act to initiate first main steam dam of the Missouri
- 1936 Roosevelt creates the Great Plains Committee Flood Control Act
- 1938 Hydroelectric facility at Fort Peck
- 1939 BOR Sloan Plan
- 1944 Missouri River States Committee. Beneficial consumptive use of basin water arising in states wholly or partially west to have precedence over water for navigation. 98th meridian to have precedence. Contains a statement assigning navigation functions a priority, subordinate to beneficial consumptive use functions in cases involving water west of the 97th meridian.
- 1950 Congress establishes guidelines for settlement negotiations with Cheyenne River and Standing Rock Sioux Tribes for the Oahe Project.
- 1951/1952 Extensive floods
- 1952 Congress authorizes \$450 settlement with Arapahoe and Shoshone Tribes of the Wind River Reservation for Boyson project damages.
- 1953 COE files suit to condemn lands on Crow Creek and Lower Brule Sioux Reservations for Fort Randall Dams
- 1954 Congress authorizes 10.6 million settlement with Cheyenne Reiver Sioux Tribe for Oahe Project damages and 238,000 settlement with Yankton Sioux Tribe for Fort Randall Project Damages
- 1957 Congress authorizes 12.3 million dollar settlement with Standing Rock Sioux Tribe for Oahe Damages
- 1958 Water Supply Act
- 1963 US Supreme Court reaffirms the Winters Doctrine in Arizona v. California and clarifies the question of quantification of Indian reserved water rights.
- March 15, 1993 Letter from Daschle to President Clinton

PRESS FIRMLY TO SEAL



PRESS FIRMLY TO SEAL



PRIORITY MAIL

FROM:

- Expected delivery date specified for domestic use.
- Domestic shipments include \$100 of insurance (restrictions apply).*
- USPS Tracking® service included for domestic and many international destinations.
- Limited international insurance.**
- When used internationally, a customs declaration form is required.

*Insurance does not cover certain items. For details regarding claims exclusions see the Domestic Mail Manual at <http://pe.usps.com>.

** See International Mail Manual at <http://pe.usps.com> for availability and limitations of coverage.

PRIORITY MAIL



VISIT US AT USPS.COM
ORDER FREE SUPPLIES ONLINE

FROM:

Robert Roeber
309 E 6th Ave
Redfield SD 57469

RECEIVED

APR 29 2024

OFFICE OF WATER

TO:

Pre-hearing Chair for Water
Management Board
c/o Ron Duvall
DANR Water Rights Program
Joe Foss Building
523 E Capitol
Pierre SD 57501-3182

FLAT RATE ENVELOPE

ONE RATE ■ ANY WEIGHT

TRACKED ■ INSURED



USPS TRACKING #



9114 9022 0078 9859 2056 36

LAB400R Aug 2013
7690-17-000-0669



PS00001000014

EP14F J
OD: 12 1/2 x 9 1/2

USPS.COM/PRIORITY

Label 228, March 2016

FOR DOMESTIC AND INTERNATIONAL USE

This package is made from post-consumer waste. Please recycle - again.

This packaging is the property of the U.S. Postal Service® and is provided solely for use in sending Priority Mail® and Priority Mail International® shipments. Misuses may be a violation of federal law. This package is not for resale. EP14F © U.S. Postal Service; July 2022; All rights reserved.

CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury that a true and correct copy of a "Notice of Entry of Order Granting the Chief Engineer's Motion to Dismiss Robert Roeber Petition and Denying Applicant's Motion" dated May 1, 2024, concerning Water Permit Application No. 8825-3 and the Order signed by Pre-Hearing Chairman Rodney Freeman on April 30, 2024, was served upon the following by enclosing the same in envelopes and sent FedEx Standard Overnight mail on May 1, 2024.

Robert Roeber
309 E. 6th Ave.
Redfield, SD 57469

Lenny Peterson
19111 Maple Ave.
Hitchcock, SD 57348

Todd Wilkinson
Wilkinson & Schumacher Law Prof. L.L.C.
103 Joliet Ave. SE
De Smet, South Dakota 57231-0029

Ryan Vogel
Richardson, Wyly, Wise, Sauck & Hieb
1 Court Street
Aberdeen, SD 57402

Above also Sent Inter-office to:

Jennifer L. Verleger, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

David McVey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

Vickie Maberry

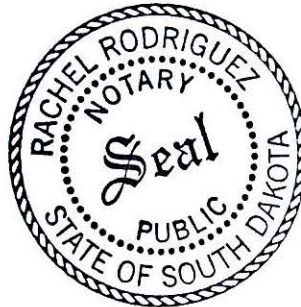
Vickie Maberry
Water Rights Program, DANR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 1st day of May, 2024.

R. Rodriguez

Rachel Rodriguez
Notary Public
My Commission expires May 16, 2029



STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF WATER)	ORDER GRANTING CHIEF
PERMIT APPLICATION NO. 8825-3,)	ENGINEER'S
LENNY PETERSON)	MOTION TO DISMISS

PROCEDURAL HISTORY

1. Lenny Peterson applied for a water permit, Application No. 8825-3, to irrigate 230 acres in the E ½ of Section 11, Township 115 North, Range 65 West, approximately 6.5 miles southwest of Redfield, SD(the "Application".) The proposed appropriation is for 1.33 cubic feet per second (cfs) from Turtle Creek.
2. Robert Roeber filed a Petition in Opposition which was postmarked on April 16, 2024 listing six injuries which would allegedly occur if the Application were granted.
3. On April 18, 2024, the Chief Engineer, by and through their legal counsel, filed a Motion To Dismiss the Petition In Opposition to Water Permit Application No. 8825-3 filed by Robert Roeber.
4. On April 22, 2024, at the direction of the Pre-Hearing Chair, a Notice Of Response Deadline Regarding Motion To Dismiss was served on the interested individuals which directed "that any written responses to the motion to dismiss be received no later than 5:00 p.m. central daylight time on Monday, April 29, 2024."
5. The Notice required any responses to be served on Pre-hearing Chair for Water Management Board c/o Ron Duvall, Robert Roeber, Lenny Peterson, Todd Wilkinson, Ryan Vogel, and inter-office to Jennifer Verleger and David McVey.
6. On April 25, 2024 the Applicant Lenny Peterson, by and through his attorneys, filed a motion to dismiss the petition in opposition to Water Permit Application No. 8825-3 filed by Robert Roeber.

7. On April 29, 2024, a response was timely and properly served on the Pre-hearing Chair for Water Management Board c/o Ron Duvall and on the Chief Engineer. There was no Certificate of Service attached and it is unknown whether any of the other required parties were served.

DECISION

The Pre-hearing Chair has jurisdiction to consider this matter pursuant to South Dakota Codified Law (SDCL) 1-4 1-15.3 and 46-2-24. Decisions of the Pre-hearing Chair may be appealed to the Water Management Board pursuant to provisions of SDCL 46-2-24.

Both the Chief Engineer and the Applicant argue in their respective Motions that the Petition in Opposition is defective in that:

1. The Petition was not properly served as required by SDCL §46-2A-4(4) and ARSD § 74:02:01:12.04.
2. The Petition did not allege a unique injury as required by SDCL §46-2A-4(4).

SDCL § 46-2A-4(4) provides in relevant part:

A statement that a person may only participate in the hearing if:

- (a) The person alleges that the application, upon approval, will cause injury to the person that is unique from any injury suffered by the public in general;
- (b) The person's injury concerns a matter either within the regulatory authority found in § 46-2A-9 for approval or denial of the application, or other matter concerning the application within the regulatory authority of the board to act upon as defined by §§ 46-2-9 and 46-2-11, or both;
- (c) The person files a petition to oppose the application with the chief engineer and applicant within ten days of the published notice.

ARSD § 74:02:01:12.04 provides:

Petitions filed pursuant to SDCL 46-2A-4(4) or 46-2A-23 to oppose or support an application must be served by first class mail or personally delivered to the chief engineer's office and the applicant. Mail must be postmarked or personal delivery must occur at least 10 days before the published date of hearing pursuant to SDCL 46-2A-4 or within 10 days after the published notice pursuant to SDCL 46-2A-23. If the tenth day is a Saturday, Sunday, or legal holiday, petitions must be postmarked or personally delivered to the chief engineer's office and the applicant by the next working day.

The Water Rights Program received Mr. Roeber's petition via first class mail postmarked April 16, 2024, one day after the procedural deadline. Additionally, the Applicant alleges in his Motion to Dismiss that he never received the Petition in Opposition via First Class Mail in advance of the procedural deadline as required by both statute and rule. No Certificate of Service was attached to the Petition in Opposition demonstrating such service was made, nor does Mr. Roeber contest the asserted lack of service in his April 29, 2024 response to the Motion to Dismiss. Mr. Roeber had the opportunity to submit proof or assert that service was completed properly and failed to do so.

Mr. Roeber lists six objections in his petition:

1. Loss of future domestic use for human consumption and livestock watering.
2. Loss of riparian vested senior water right for future irrigation rights.
3. Loss of future water replenishment of Western Hitchcock/Tulare aquifer with the removal of WPA Dam by Game, Fish, and Parks.
4. Loss of storage capacity for aquifer going to Twin Lakes.
5. Loss of habitat for fishing and hunting.
6. Loss of property value with depletion of aquifer.

In the Petition in Opposition, Mr. Roeber alleges six individuals and their rights will be negatively affected in the event the application is granted. The listed individuals are Rollie Binger, Jerry Binger, Tim Binder, John K. Roeber, Don Schade and Hans Jessen; notably absent is Mr. Roeber himself. Mr. Roeber couches his complaint on behalf of "farmers and family farms [that] have existed for decades" and "the descendants." In the response to the Motion to dismiss filed by Mr. Roeber, he does not address the issue of a unique injury but rather provides further historical references to the Missouri River Basin Water Law Timeline.

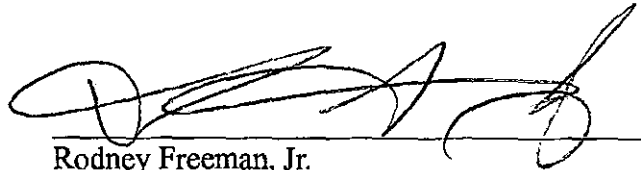
Nothing in Roeber's Petition in Opposition nor in his response to the Motion to Dismiss alleges an injury to him that is unique from any injury suffered by the public in general.

ORDER

FOR THE REASONS SET FORTH HEREIN, the Chief Engineer's Motion to dismiss is **GRANTED** as Mr. Roeber's Petition was not properly served and failed to set forth an injury to Mr. Roeber that is unique from any injury suffered by the public in general.

The Motion to Dismiss filed by the Applicant herein is **DENIED** as moot.

Dated this 30th day of April 2024.

A handwritten signature in black ink, appearing to read 'Rodney Freeman, Jr.', is written over a horizontal line. The signature is stylized and cursive.

Rodney Freeman, Jr.
Pre-Hearing Chairman
South Dakota Water Management Board