MINUTES OF THE 214th MEETING OF THE
WATER MANAGEMENT BOARD
LEGISLATIVE RESEARCH COUNCIL ROOM 414
IN THE STATE CAPITOL
500 EAST CAPITOL AVENUE
PIERRE, SOUTH DAKOTA
MAY 8, 2019

CALL TO ORDER: Chairman Hutmacher called the meeting to order at 8:30 a.m. Central time.

Julie Smith conducted a roll call of members present. A quorum was present.

Chairman Hutmacher welcomed Legislative Oversight Committee Member, Representative Mary Duvall.

Chairman Hutmacher announced that the meeting was streaming live on SD.net, a service of South Dakota Public Broadcasting.

The following were in attendance at the meeting:

BOARD MEMBERS: Peggy Dixon, Jim Hutmacher, Everett Hoyt, Tim Bjork, and Rodney Freeman. Chad Comes and Leo Holzbauer did not attend the meeting.

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES (DENR): Jeanne Goodman, Eric Gronlund, Karen Schlaak, Ron Duvall, Vickie Maberry, Whitney Kilts, and Kim Drennon with the Water Rights Program; Julie Smith, Tammie Hill, and Mark Mayer, with the Drinking Water Program.

ATTORNEY GENERAL'S OFFICE: Ann Mines Bailey, representing the Water Rights Program and David McVey, Board Counsel

LEGISLATIVE OVERSIGHT COMMITTEE: Representative Mary Duvall

OTHERS:

Elizabeth Lone Eagle, petitioner (on phone)
Zora Lone Eagle, petitioner (on phone)
Merle John Lone Eagle, petitioner (on phone)
Tatanka Lone Eagle, petitioner (on phone)
Thomasina Real Bird, counsel for Yankton Sioux Tribe (on phone)
Cindy Myers, petitioner (on phone)
Mahmud Fitil, petitioner (on phone)
Jason Shald, petitioner (on phone)

Tracey Zephier, Attorney General, Cheyenne River Sioux Tribe (on phone)
Bruce Ellison - Counsel for Dakota Rural Action
John Taylor - Counsel for TransCanada Keystone Pipeline
James Moore - Counsel for TransCanada Keystone Pipeline
William Taylor – Counsel for TransCanada Keystone Pipeline
Matt Naasz - Counsel for Tom & Lori Wilson and Wink Cattle Company
Scott Heine
Bob Mercer, reporter
Alex Timpererly
Chuck Banner
Julie Santella, petitioner
Tonia Stands, petitioner
Sarah Maarhoft, reporter
Martin Bates
Mark Rowland
Carol (not legible on sign in sheet)
Wakanyan Kiya Ka
Janie Stein
Tiffanie Pieper
Oscar High Elk
Ramona Three Legs
J C Veileup
Ricky Gray Grass
Madonna Thunder Hawk
Lisa M Skye
Waniya Locke
Baylee LaCompte
Jeremy M (not legible on sign in sheet)
George Jaeger
Peter Capossela, counsel for Great Plains Tribal Water Alliance (joined by conference call later)

ADOPT FINAL AGENDA:

Chairman Hutmacher stated that on the three matters scheduled for 9:00 AM, the issue of considering discovery should be moved to top of the list for Board consideration.

Motion by Hoyt, second by Bjork, to adopt the final agenda with the change suggested by Chairman Hutmacher. Motion carried unanimously by a roll call vote.

CONFLICTS DISCLOSURES AND REQUEST FOR STATE BOARD WAIVERS: None

APPROVAL OF BOARD MINUTES FOR MARCH 6, 2019:

Motion by Bjork, second by Hoyt to adopt the March 6, 2019 minutes. Motion carried unanimously by a roll call vote.

SET JULY 10 – 11, 2019 BOARD MEETING:

Chairman Hutmacher suggested setting of the July meeting date be deferred and discussed when the 9:00 AM matters are heard.

STATUS AND REVIEW OF WATER RIGHTS LITIGATION:

Ms. Mines Bailey stated there is no litigation pending on matters regarding the Board.

ADMINISTER OATH TO DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES STAFF: Carla Bachand, the court reporter, administered the oath to the DENR employees who intended to testify.

PUBLIC HEARING ON AMENDMENT TO ADMINISTRTIVE RULES OF SOUTH DAKOTA CHAPTER 74:04:12, DRINKING WATER STANDARDS:

Chairman Hutmacher opened the public hearing at 8:38 a.m.

Mark Mayer introduced himself as the Administrator of the Drinking Water Program and Tammie Hill, Enforcement Coordinator with the Drinking Water Program.

The packet sent to the Board members prior to the public hearing included the proposed rule revisions.

Mr. Mayer stated the effect of these proposed rules will be to incorporate by reference the most recent published version of the Code of Federal Regulation for drinking water. An additional section for the federal rules associated with the Revised Total Coliform Rule will be added to the existing administrative rules for drinking water standards.

The reason for adopting these rules is to ensure that public health is being protected based on the latest information available regarding contaminants in drinking water. Also these rules meet the EPA conditions necessary to remain a delegated state for an approved drinking water program. By being a delegated state for the federal Drinking Water Program, DENR can provide better customer services to regulated drinking water systems and the public in South Dakota.

The notice of pubic hearing was sent to 11 newspapers. The following newspapers published the notice scheduling the public hearing for May 8, 2019: Aberdeen American News, Brookings Register, Huron Plainsman, Madison Daily Leader, Mitchell Daily Republic, Pierre Capital Journal, Rapid City Journal, Sioux Falls Argus Leader, Spearfish Black Hills Pioneer, Watertown Public Opinion, Yankton Daily Press & Dakotan.

Mr. Mayer stated on March 6, 2019, he was before the board asking for authorization to advertise for the public hearing at this meeting. They served Secretary Pirner the proposed rule amendments on March 22, 2019. On April 3, 2019, the Drinking Water Program sent notice of

public hearing to all eleven daily newspapers across the state. The Drinking Water Program asked for the hearing notice to be published on or before April 8, 2019.

The Drinking Water Program posted the notice of pubic hearing with a link to the draft rules on the DENR public notice web page.

The Drinking Water Program mailed hard copies of the notice to 120 entities that expressed interest in Drinking Water Rules Revisions. Additionally, every water system in the state was emailed a copy of the notice, which had a link to proposed revised rules.

Mr. Mayer stated that the Drinking Water Program received the Legislative Research Council review for style and form on April 24, 2019. They also received the Bureau of Finance and Management fiscal note and small impact statement signed off on May 1, 2019.

The proposed rules are an integral part of the Safety Drinking Water Act. Revisions are intended to not have an impact on cost and work load, but are to improve public health protection.

The Environmental Protection Agency (EPA), worked with the states in the revision. Rob Kittay who is the Drinking Water Program Rule Manager participated on an EPA work group to make sure that the states voice was heard.

Mr. Mayer stated one rule impacts every water system in the state. The rule provides for monitoring for the presence of bacteria. Depending on what type of bacteria that is detected, the required response is different. If *E. coli,* is present there is an acute risk to health and a Tier 1 notice is required. What this means is the system has to notify everybody within the 24 hours of detection because of immediate risk to health.

Mr. Mayer stated the more important changes are to the Revised Total Coliform Rule. In the past, if there was detection for bacteria, the system was required to conduct additional monitoring at various sites. If enough other sites had bacteria also detected, the system was a violation and public notice is required as well as additional sampling during the next monthly sampling.

The revised rule proposes to change the strategy. It still requires monthly monitoring of bacteria and if detected, addition monitoring but also adds a feature that requires the system to find and fix the issue if there is a problem.

The other change impacts the non-community systems or seasonal systems. Under the existing Total Coliform Rule the seasonal systems that are open only part of the year are only allowed to monitor quarterly. The proposed Revised Total Coliform Rule allows states flexibility to decide whether the systems can continue to quarterly monitoring or require monthly monitoring for when a system is in operation.

The other requirement of the proposed revised rule for the seasonal systems is a start-up procedure when they reopen. This start up procedure includes flushing, disinfection and having a safe bacterially absent sample prior to opening.

This rule actually went into effect at a federal level in 2016. The Drinking Water Program implemented the federal rule requirements and has trained all the operators of systems on the requirements. The delay in bringing these rule amendment before the Board is that back in 2016 the Drinking Water Program was anticipating revisions to rules for Lead, Copper and Chlorite. However, those proposed changes at the federal level have not been set forth. Therefore, the Drinking Water Program made the decision to proceed with today's proposed rule amendments.

Drinking Water Program has been working with EPA on these rules. EPA has reviewed and is in agreement with the proposed rule amendments.

Drinking Water Program received no comments for the proposed rules. No one was present in the audience to present comments.

Mr. Meyer presented a form for the board members to sign, allowing the Drinking Water Program to submit the package to LRC with the intent to present to the Interim Rules Committee at their June meeting. Upon approval, the Drinking Water Program will file the rules with the Secretary of State, then finalize and submit the primacy package to EPA.

Motion by Hoyt, second by Bjork, that the proposed rules Chapter 74:04:12 Drinking Water Standards, be adopted by the board with the amendments as stated. Motion carried unanimously by a roll call vote.

CANCELLATION CONSIDERATIONS: A table listing the water rights/permits proposed for cancellation, the notices of cancellation, and the chief engineer's recommendations was included in the packet the board members received prior to the meeting.

Mr. Gronlund explained that Water Permit No. 2692-2 for Elshere Land Company appropriated 7.87 cubic feet of water per second from springs and tributaries to Straight Head Creek for irrigation of 552 acres and hydropower generation in Haakon County. Works were to be completed by December 17, 2017. However, the system has not been constructed. Mr. Elshere filed an application for reinstatement of the water permit as provided for in SDCL 46-2A-8.1. DENR seeks cancellation so that we may proceed with the application for reinstatement.

Water Right No. 1358-3 appropriates 1.78 cubic feet of water per second from the Tulare: East James aquifer to irrigate 160 acres in Spink County. DENR recently processed an application to transfer the water right to a new location. In doing so, only 135 acres had been historically irrigated so that is all that was transferred. The recommendation is for cancellation of the remaining 25 acres that have not been historically irrigated.

Number	Original Owner	Present Owner(s) & Other Persons Notified	Reason

DIVISION II WATER PERMIT

PE 2692-2	Steve Elshere Land Company	same	Non-construction

DIVISION III WATER RIGHT

RT 1358-3	Wipf Acres LP % Gary D Wipf	same	Abandonment/Forfeiture

Cancellation consideration is for 25 acres only. The remaining acreage and diversion authority were severed and transferred to Water Permit No. 1358B-3

Motion by Freeman, second by Dixon, to cancel Water Permit No. 2692-2 and cancel the remaining 25 acres from Water Right No. 1358-3. Motion carried unanimously by a roll call vote.

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

CONSIDER RESCISSION OF SUSPENSION FOR FAILURE TO REPORT 2018 IRRIGATION QUESTIONNAIRE:

Board packet included notice for reconsideration of suspension of Water Right No. 5601-3, Jeb Peterson. This water right appropriates 35 gallons per minute from the Tulare Western Spink Hitchcock aquifer to irrigate 5 acres. DENR brought this action after becoming aware that the land was sold to Matt Van Buskirk in November 2018. While Mr. Peterson received the initial irrigation questionnaire in October 2018, the new owner did not receive the notice scheduling the matter for the March 6th meeting or the follow-up notice after the meeting providing another 30 days prior to the suspension going into effect. The Chief Engineer recommends rescission of the suspension of Water Right No. 5601-3.

Mr. Gronlund stated the holder of Water Right Nos. 6179-3, 6180-3, 6181-3 and Water Permit No. 8211-3, Timber8 LLC has requested rescission of the suspension of this water rights/permit. The Board packet included reporting summary for 2018, the notice scheduling the matter before the Board and an email from Andrea Koch requesting this be brought before the Board.

The water rights/permits are located in Union County and appropriate a total of 12.51 cubic feet of water per second from the Missouri Elk Point aquifer to irrigate 864 acres.

Mr. Gronlund briefly summarized Genny McMath's report.

Scott Heine was administered the oath. Mr. Heine indicated that he is a partner in the Timber8 LLC. He explained that Andrea Koch had a number of personal matters that distracted her from filing the irrigation questionnaires. In fact, she thought she had filed the questionnaires but later found them in the file drawer. Mr. Heine stated that steps have been taken to insure the irrigation questionnaires will be filed in a timely manner in the future.

Mr. Hoyt asked Mr. Gronlund if DENR had a recommendation. Mr. Gronlund stated DENR has not taken a formal stance and instead brought the matter to the Board. He indicated that DENR has worked on other matters with Mr. Heine in the past and has no reason not to take his word that future irrigation questionnaires will be timely filed.

Motion by Hoyt, second by Bjork, to rescind the suspension for the 2018 irrigation season for Water Right No. 5601-3 and Water Right Nos. 6179-3, 6180-3, 6181-3 and Water Permit No. 8211-3. Motion carried unanimously by a roll call vote.

WATER PERMIT APPLICATION NOS. 1986-1, 2792-2 AND 2793-2, TRANSCANADA KEYSTONE PIPELINE LP

WATER PERMIT APPLICATION NOS. 1963A-1, TOM & LORI WILSON

WATER PERMITS APPLICATION NOS 1975A-1, WINK CATTLE COMPANY

Chairman Hutmacher asked for appearances:

Ann Mines Bailey – Counsel for Water Rights Program
Bill Taylor, John Taylor and James Moore – Counsel for TransCanada
Bruce Ellison – Counsel for Dakota Rural Action (DRA)
Matt Naasz – Counsel for Wink Cattle Company and Tom and Lori Wilson
Cindy Meyer
Julie Santella
Tonia Sand
Thomasina Real Bird – Counsel for Yankton Sioux Tribe (YST)
Jason Shad
Zora Lone Eagle
Elizabeth Lone Eagle
David McVey – Water Management Board Counsel
Tracey Zephier – Attorney General of Cheyenne River Sioux Tribe
Chuck Banner – Oglalla Sioux Tribe (not a petitioner)

David McVey, Water Management Board Counsel stated the following motions were submitted regarding discovery.

- Elizabeth Lone Eagle's motion for discovery and interrogatories
- TransCanada's response to Ms. Lone Eagle's motion

- Mniwakan Nakicijinpi's motion for discovery
- Dakota Rural Action's motion and memorandum to compel discovery from DENR and TransCanada and/or issuance of subpoenas
- DENR response to DRA's motion

Elizabeth Lone Eagle's motion for discovery and interrogatories:

Elizabeth Lone Eagle stated her motion is for discovery on TransCanada Pipeline LP. The motion is based on the fact that only vague information is available on DENR website. TransCanada indicates no impact to cultural sites. But no information is provided. Only a tribal cultural person can conduct a cultural survey. The Chief Engineer says the four criteria for issuing a permit were met. However, the technical report only addresses the first criteria. Ms. Lone Eagle contends that TransCanada's response is the same that was provided in Public Utilities Commission (PUC) hearings. But she was not allowed to participate in PUC hearing due to missing a deadline.

James Moore, Counsel for TransCanada, stated TransCanada's response will be for motions involving Application Nos. 1986-1, 2792-2 and 2793-2.
Mr. Moore stated he would bring forth seven points regarding the motions.

1. Statutes do not support allowing discovery. The previous scheduling order did not provide for discovery.
2. No regulations of this Board requires prehearing discovery.
3. Due process does not require discovery. Scope of Board review is under 46-2A-9.
4. No showing in Lone Eagle's motion that prehearing discovery is needed.
5. Request is not consistent with statutory authority based on statutory timeframes for processing of a water permit application.
6. Any ruling in this case will set precedence for other applications before Board.
7. Issue of timing for TransCanada to get permits in place.

Mr. Moore stated that TransCanada requests that the motions be denied.

Ms. Mines Bailey stated the Chief Engineer is of the position that discovery is not automatic. There is no obligation to engage in discovery. The Board can authorize discovery but needs to narrowly tailor that position. The Chief Engineer does not take a position on the motions. The Chief Engineer's review is based on the technical reports and statutes of the State of South Dakota including the four factors in statute and relies on past Board actions.

Ms. Lone Eagle stated that regarding the Environmental Impact Statement (EIS) issue, the federal judge has indicated a new EIS needs to be performed. The EIS TransCanada refers to is invalid because it does not address cultural resources.

Tonia Stands was administered the oath. Ms. Stands stated she is a sovereign treaty right believer. The treaties are the supreme law of the land. It was a mystery why cultural surveys were done by non-tribal individuals. Cultural surveys need to be done by proper people and that

is why she is here. TransCanada Company has changed its name so they need to start over. All tribal entities need to be added to the witness list. All water downstream is tribal water that they use in their ceremonies and their waters are being contaminated.

Mniwakan Nakicijinpi's motion for discovery:

John Taylor, Counsel for TransCanada stated the children that form MniWakan Nakicijinpi are not represented by counsel. TransCanada reserves the right to an objection.

Zora Lone Eagle stated no one said they have to have an attorney. Mniwakan Nakicijinpi wants discovery because they were not given very much information. They live on the river and conduct their ceremonies there. They eat from the river. Zora Lone Eagle stated TransCanada is trying to take their water away.

Mahmud Fitil from Nebraska stated he supports the motions. Many from the public are just engaging in the process knowing the amount of water they will be using.

Tonia Stands stated South Dakota guidelines for historic preservation provides that participants in the process have a right and this includes tribes. Ms. Stands asserted that under theWinters Doctrine the tribes have rights to the water.

Tiffany Pieper from California was administered the oath.

Bill Taylor, Counsel for TransCanada asked if Ms. Pieper is a party to this proceeding. Mr. Taylor stated since Ms. Pieper is not a party she is not allowed to formally participate in the hearing. Chairman Hutmacher stated she would be allowed to speak during the public comment period at the end of the agenda.

Julie Santella was administered the oath. Ms. Santella is only an intervenor in the Tom and Lori Wilson application.

Tracey Zephier, Attorney General with Cheyenne River Sioux Tribe introduced herself and began to speak supporting the motions for discovery. Chairman Hutmacher stated the Cheyenne River Sioux Tribe only intervened in the Tom and Lori Wilson application.

Tonia Stands stated that a number of documents including a 1993 court case favor the tribe in this matter.

DRA motion and memorandum to compel discovery from Chief Engineer and/or issuance of subpoenas in the matter of Application Nos. 1986-1, 2792-2 and 2793-2:

Separate motions were filed for each application. However, Mr. Ellison testified on all three motions at the same time.

Bruce Ellison spoke on behalf of Dakota Rural Action (DRA). Mr. Ellison stated a number of ranchers/farmers that are DRA members could not be here today. TransCanada has stated there will be no construction in 2019, so there should be no rush to hold a hearing. Mr. Ellison stated DENR has indicated a willingness to help him find the information that is on-line. Motions on

all three TransCanada applications are basically the same except for one issue. Water is very important to DRA. Therefore, this project's potential impact to resources is important to them. Mr. Ellison stated the Board should re-examine whether the public notice was proper.

Mr. Ellison stated the Chief Engineer needs to better address the amount of water needed to build the pipeline. The pipeline will be constructed on areas with unstable soils that may cause failure in the pipeline. The construction of the pipeline can result in anthrax spores being released. Mr. Ellison wants to know what discharge permits are needed. He indicated these are issues that have not been addressed by the Chief Engineer in making a recommendation including what benefit this pipeline brings to South Dakota.

Mr. Ellison went on to cite the 1981 Union Carbide case and the administratves procedure act. Due process is very important to the case. The 1981 case said that due process applies on contested cases. The purpose of due process is to convey that government has dealt with them fairly. If the parties are to have due process and the Board is to have benefit of that, parties need access to information and therefore need to be able to approach the Chief Engineer to obtain information. The Supreme Court has ruled in contested cases that discovery should be allowed. How can parties be best prepared? DRA requests help from the Board to get what they need. Mr. Ellison also expressed concern regarding pressures exerted upon the Chief Engineer by the Governor's office.

Mr. Ellison went through a list of information they have requested which includes the following:

1. Who provided the information?
2. What did DENR look at in reviewing the applications?
3. The definition of beneficial use and how it was used. There are four factors that must be looked at. DRA wants more from the Chief Engineer on what was taken into consideration.
4. DRA wants to know what was behind making a decision on public interest. All water of South Dakota is held in trust for the people of the state.
5. DRA has sought communications from the Governor's office and other state officials with regard to TransCanada. DRA wants the things that are not in the public file. DRA has a right to understand what pressures are being exerted upon the Board or staff.
6. DRA is interested in the permits needed for directional drilling.
7. DRA asks for permits obtained for man camps.
8. DRA has requested water discharge permits and details regarding them.

This information will help DRA make a determination on the public interest and beneficial use which are matters the Board should consider.

Mr. Ellison stated that TransCanada got ahead of themselves as sites for man camps are changing. Site locations should be known prior to coming to this Board to make a decision on public interest and beneficial use.

Mr. Ellison stated he has asked for the number of workers to be housed. Numbers always are changing. How will anyone decide whether they surpassed the authorized amount of water?

How will DENR monitor TransCanada's water use? He indicated a key question is if TransCanada doesn't know if they need 100 acre feet of water why did they apply for only 50 acre feet of water.

Mr. Ellison stated there is still an injunction in place preventing TransCanada from beginning construction. The Judge's injunction is due to inadequacies of cultural surveys. The Judge also found inadequacies in the environmental studies conducted.

Regarding DRA's request on discharge permits, Mr. Ellison stated that DENR said it was not within their purview and permits are not needed to be in place to issue a permit. DRA thinks this goes to downstream impacts. DRA wants copies of discharge permits if they are in place.

DRA requests of the Chief Engineer documents on erosion studies and this goes to the impact on the environment and people downstream.

DRA requests hydrostatic testing permits. DRA feels they are entitled to receive them.

Specifically regarding Application No. 2792-2, DRA requests to know how the Board will monitor water use.

DRA requests the Board order Water Rights staff to provide requested discovery.

Chairman Hutmacher requested proponent testimony to the motions.

- Cindy Meyers supports the motion.
- Peter Caposella, Counsel for Great Plains Tribal Water Alliance, concurs with the motions for discovery so there is transparency.
- Jason Shald supports all arguments made for discovery of DENR.
- Tonia Stands cited more South Dakota guidelines. Ms. Stands is in support of all the discovery requested by DRA. Need to gather this information.
- Mahmud Fitil joins in support of motion for discovery. Discovery is valid and warranted in this case.

Chairman Hutmacher asked for opponent testimony to DRA motions for discovery of the Chief Engineer.

Ms. Mines Bailey, counsel for the Chief Engineer stated the party to this proceeding is the Chief Engineer and the Water Rights Program and not the entire DENR.

Ms. Mines Bailey stated DRA motions contain two parts – discovery and issuance of subpoenas. Rules of Civil Procedure are found in SDCL 15-6. There are two ways discovery can be provided. They are by operation of law or order of a court. Neither are applicable in this case. SDCL 1 -26 contemplates this Board's ability to afford discovery. The timelines by statute for permit application is short with 60 days to review an application and a one-time ability for a petitioner to request delay of the published hearing date. DENR does not have an obligation to provide discovery. However, in the effort for transparency DENR has tried to provide information to Mr. Ellison.

Mr. Ellison's interrogatories have requested information that is protected under attorney client privilege. DRA's motion requested all communication between applicant, DENR, Governor's office, AG's office. Most of those documents are protected and not subject to discovery.

Ms. Mines Bailey stated the applications are posted on-line. If there are attachments they are on-line. Many of the other permits requested by DRA are not in the possession of the Chief Engineer. DENR feels they have provided what they have.

Ms. Mines Bailey stated if discovery is provided, this Board will be altering the way and the timing that permit applications are processed, not only on these pending applications but future applications.

Bruce Ellison provided rebuttal on behalf of DRA. When a motion to compel is made it is because discovery has not been properly provided. He wants to know what the Wink Cattle Company or the Wilson's are monetarily getting to supply water to the workforce camps. DRA's principal concern is in knowing what the Governor's office involvement has been in the process. DRA is not interested in work product.

As to the issuance of subpoenas, Mr. Ellison believes that is a last resort.

Mr. Ellison moved on to present DRA motion and memorandum to compel discovery from TransCanada and/or issuance of subpoenas.

Mr. Ellison will handle each application separately.

<u>DRA's motion and memorandum to compel discovery from TransCanada on Application No. 1986-1 and/or issuance of subpoenas:</u>

Mr. Ellison stated Application No. 1986-1 requests 3,000 gpm and an annual volume depending on the year.

Water use is for dust suppression, six or seven under river pipeline crossings and pump station construction. The use of South Dakota surface waters and the impact is not only at the point of diversion but downstream. DRA's request was to get answers to questions they have in order to prepare for the hearing. Mr. Ellison spoke to each interrogatory individually and request for documents as set forth in his motion.

Mr. Ellison pointed out that just because there is a beneficial use does not necessarily mean it is in the public interest. The public trust is for future generations.

<u>DRA's motion and memorandum to compel discovery from TransCanada on Application No. 2792-2 and/or issuance of subpoenas:</u>

Mr. Ellison spoke to each interrogatory individually and request for documents as set forth in his motion.

DRA's motion and memorandum to compel discovery from TransCanada on Application No. 2793-2 and/or issuance of subpoenas:

Mr. Ellison spoke to each interrogatory individually and request for documents as set forth in his motion.

Chairman Hutmacher asked for intervenor proponents to DRA's motions to compel discovery from TransCanada on Application Nos. 1986-1, 2792-2 and 2793-2.

- Cindy Meyers supports the motions as it involves her concern with chemical composition of dilbit that are used in hydrostatic drilling.
- Mahmud Fitil supports Mr. Ellison's motions.
- Jason Shald – supports Mr. Ellison's motions.

Chairman Hutmacher asked for opponents to DRA's motions to compel discovery from TransCanada on Application Nos. 1986-1, 2792-2 and 2793-2.

James Moore on behalf of TransCanada stated that these motions were filed last Friday. TransCanada did not know whether they would be considered today so have not filed a response. TransCanada does not think the motions are timely. Mr. Freeman previously did not provide an opportunity for additional motions. As far as subpoenas, they are not generally issued to a party but instead to a non-party in a contested case. TransCanada has not attempted to stifle the truth. Instead TransCanada is trying to follow the rules and regulations. TransCanada believes Mr. Ellison wants to broaden the statutes that are in place. TransCanada gave Mr. Ellison information regarding the public interest and beneficial use. Mr. Moore emphasized the role of the Board in this matter. Mr. Ellison has confused the role of the Chief Engineer and the Board.

Mr. Ellison provided rebuttal. Mr. Ellison has not had time to review the hydrostatic directional drilling frac out plan that TransCanada provided him.

Mr. Ellison stated there was an original motion deadline. However, until he got TransCanada's response to interrogatories he didn't know to what extent they complied with his request. Now since no construction will take place in 2019 there is a lot of time to address his issues. Mr. Ellison stated that subpoenas are another tool in the box for parties to get the information they deserve. As to the scope of the hearing, there are a lot of interesting questions. TransCanada needs to include not only how much water is needed but also what the use will be. DRA needs information to assess impacts to resources downstream. DRA does believe their request is broad, but TransCanada wants to use South Dakota's public water so DRA deserves those answers.

Mr. Ellison stated that ultimately the decision will have to be based on facts, and it is TransCanada's burden to show the four factors are met for each application. Mr. Ellison states TransCanada is trying to limit what the Board considers.

DRA's motion and memorandum to compel discovery from the Chief Engineer and/or issuance of subpoenas for Application No. 1963A-1, Tom and Lori Wilson:

Bruce Ellison, counsel for DRA, stated the backup water supply is for two man camps in Montana and those in South Dakota. Tom and Lori Wilson obtained Water Permit No. 1963-1 and DRA was not aware of the publication notice. These camps will house out-of-state workers to construct the pipeline. Application No. 1963A-1 seeks to amend the existing permit to allow water as a backup supply to other man camps. Use of water is essential for TransCanada to construct the pipeline. Mr. Ellison went over the interrogatories requested of the Chief Engineer.

Chairman Hutmacher asked for intervenor proponents to DRA's motion to compel discovery of the Chief Engineer regarding Application No. 1963A-1, Tom and Lori Wilson.

- Julie Santella supports DRA motion for discovery. Regarding the cultural surveys, Ms. Santella supports getting that information.
- Mahmud Fitil supports DRA motion. He is not a party of record to Application No. 1963A-1.
- Tracey Zephier, Attorney General for Cheyenne River Sioux Tribe, supports DRA motion.

Chairman Hutmacher asked for opponents to the DRA motion to compel discovery of the Chief Engineer regarding Application No. 1963A-1, Tom and Lori Wilson.

Ann Mines Bailey, counsel for the Chief Engineer, stated a motion to compel should only be granted if there is obligation by operation of law or court order. SDCL 1-26 does not require discovery so there is not an obligation to answer unless required by the Board. This requirement does not exist. The Chief Engineer did attempt to provide information by providing where the information exists on-line at DENR's website. Ms. Mines Bailey indicated that many of the requested documents are not in possession of the Chief Engineer or the Water Rights Program. Ms. Mines Bailey stated Water Permit No. 1963-1 is in place. This application is to amend to add locations for back up purposes at other man camps.

Mr. Ellison provided a rebuttal. He relies on the authority provided in his brief.

Mr. Ellison stated he should not have to come to Pierre when information can be provided to him electronically since travel is difficult. Mr. Ellison indicated they are not challenging Permit No. 1963-1. However, Water Permit No. 1963-1 is being asked to be amended to include serving man camps in two states.

<u>DRA motion and memorandum to compel discovery from Tom and Lori Wilson and/or issuance of subpoenas:</u>

Mr. Ellison reaffirmed DRA's position regarding discovery as previously provided in prior motions and then went through interrogatories requested of Tom and Lori Wilson. He indicated the Board needs to look at the purpose of man camps not just that the water is for the workers to drink but that the workers are building an oil pipeline.

Chairman Hutmacher asked for intervenor proponents to DRA's motion to compel discovery from Tom and Lori Wilson.

- Julie Santella echoes Mr. Ellison's motion for discovery
- Tonia Stands supports Mr. Ellison's motion especially regarding cultural resources
- Tracey Zephier, Attorney General for the Cheyenne River Sioux Tribe, concurs with DRA location

Chairman Hutmacher asked for opponents to DRA's motion to compel discovery from Tom and Lori Wilson.

Matt Naasz, counsel for Tom and Lori Wilson, first addressed a procedural issue. The motion was received Monday and Tom and Lori Wilson did not have an opportunity to file a response. The Wilsons object to the motion to compel on the grounds that discovery is not warranted and was not part of the procedural order. The motion to compel is not timely. The deadline to file the motion has past and therefore is untimely. Mr. Naasz stated regarding subpoenas they are normally used for getting information from non-parties.

Mr. Naasz stated there is nothing in water right statutes regarding following the rules of civil procedure. The timeframes set forth in statutes for processing water permit applications do not envision time for discovery. If discovery was intended, it would be impossible to follow the statutory structure of timing for processing a water permit application. Mr. Naasz went on to state that if the Board determined that discovery is necessary it must do so with its eyes wide open as this will become like a court proceeding and cannot comply with the current statutory structure for timely consideration of water permit applications.

Mr. Naasz stated the scope of this Board inquiry to Application No. 1963A-1 does not affect Water Permit No. 1963-1. The application seeks to amend the existing permit to allow water to be used as a backup supply for additional man camps. The application does not seek an additional appropriation. There will not be impairment of existing rights since no more water is to be used. In fact, the recommendation limits the volume to 57.2 acre feet per year. It is clear DRA's objection is to collaterally attack the man camps and construction of TransCanada pipeline.

Bruce Ellison on rebuttal stated this application is unique and complex. This is not what was envisioned within the timeframes in the statutes. Mr. Ellison stated we have a foreign company that wants to compensate a landowner to use water. Mr. Ellison stated this Board has discretion to require discovery. It is important for the Board to know whether this will be for 400 workers or 10,000 workers. Yearly reporting is not a proper way to monitor water use.

<u>DRA motion and memorandum to compel discovery from the Chief Engineer and/or issuance of subpoenas regarding Application No. 1975A-1 for Wink Cattle Company:</u>

Mr. Ellison stated in order to assess this application they need the background information on prior Water Permit Nos. 1855-1 and 1975-1. Application No. 1975A-1 is to be back up water supply for other man camps. DRA has asked for information they have not been able to get informally. Mr. Ellison went through the interrogatories and requested documents.

Chairman Hutmacher asked for intervenor proponents to DRA's motion to compel discovery of the Chief Engineer regarding the Wink Cattle Company's application.

Peter Capossela, Great Plains Tribal Water Alliance, supports DRA's Motion.

Chairman Hutmacher asked for opponents to DRA's motion to compel discovery of the Chief Engineers regarding the Wink Cattle Company's application.

Ms. Mines Bailey stated this is an amendment to an existing permit from the Inyan Kara aquifer. The original Water Permit No. 1855-1 was obtained in 2006. Then Water Permit No. 1975-1 was obtained to increase the water appropriation and includes use in a temporary man camp. All permits and this application were properly public noticed. There is not an obligation to respond to the discovery. The discovery process is not compelled in law. The rules of procedure in court do not apply to anadministrative proceeding. Under SDCL 1-26, discovery is contemplated but not automatically required. The Chief Engineer responded to Mr. Ellison's interrogatories and complied with a number of the requests. The response to the request regarding the existing permits was to provide Mr. Ellison where they can be found on DENR's website. Also the Chief Engineer provided Mr. Ellison the on-line access location for well completion reports. DENR has not ignored the law or the Board's wishes.

Mr. Ellison provided rebuttal.

<u>DRA's motion and memorandum to compel discovery from Wink Cattle Company and/or issuance of subpoenas in the matter of Application No. 1975A-1:</u>

Mr. Ellison went through the interrogatories and request for production of documents. Arguments are similar to the arguments in the Wilson matter and asked that they be taken into consideration for the Wink Cattle Company matter.

Chairman Hutmacher asked for intervenor proponents to DRA's motions to compel discovery of Wink Cattle Company. There were none.

Chairman Hutmacher asked for opponents to DRA's motions to compel discovery of Wink Cattle Company.

Matt Naasz, Counsel for Wink Cattle Company stated he would like to incorporate his arguments that were made in the Wilson application matter since they are basically identical.

Mr. Freeman acting in his capacity as prehearing officer issued the following verbal order that will be followed up with a formal written order.

1. Elizabeth Lone Eagle's motion for discovery and interrogatories is granted to the extent that will be set forth in the order.
2. Mniwakan Nakicijinpi's motion for discovery is granted to the extent that will be set forth in the order.
3. DRA motion to compel DENR on all cases is denied.

4. DRA motion to compel from TransCanada is denied as are the motions to compel in the matter of Tom and Lori Wilson application and Wink Cattle Company application.
5. The prehearing officer is granted authority to issue subpoenas.
6. Any party wishing a subpoena shall file a written request.
7. All interrogatories shall be filed within 30 days of the issuance of the written order.
8. The order will allow for some degree of discovery and submittal of interrogatories.
9. At the July meeting, the Board will set dates for hearing on all three matters.
10. At the July meeting, the Board will also set dates for disclosure of witnesses and exhibits.

Mr. Freeman suggested setting the next meeting date for July 17 – 18. Also, Mr. Freeman stated he will likely hold prehearings to consider motions.

Motion by Hoyt, second by Freeman to set the next Board meeting for July 17 – 18, 2019. Motion carried unanimously by a roll call vote.

Mr. Hutmacher indicated parties will need to be present and participation by conference call will not be allowed at future meetings involving the TransCanada, Wink Cattle Company and Tom and Lori Wilson water permit applications. This is due to the fact it is very difficult for the court reporter to identify witnesses and accurately transcribe the testimony. Technical issues with a phone connection make is almost impossible for the court reporter and Board members to understand the testimony presented.

Ms. Mines Bailey requested clarification on previously filed interrogatories. Mr. Freeman stated previously filed interrogatories are no longer in effect. Mr. Freeman stated that new interrogatories need to be filed. The interrogatories are also to be filed with the entity being requested to answer, Mr. Freeman, and Board Counsel David McVey.

PUBLIC COMMENT PERIOD IN ACCORDANCE WITH SDCL 1-25-1

Public comment was given by:
Janie Stein
Martin Bates
Gathers People Woman
Jeremy (did not provide last name)
Clarence (unknown last name)
Ricky Gray Grass
Tiffany Pieper
Gentleman that did not provide his name
Oscar High Elk
Elizabeth Lone Eagle

Motion by Freeman, second by Bjork, to adjourn. Motion carried unanimously by a roll call vote.

Chairman Hutmacher declared the meeting adjourned at approximately 5:30 PM.

A Court reporter was present and transcript of the hearings may be obtained by contacting Carla Bachand, PO Box 903, Pierre, SD 57501, and (605) 224-7611

Approved the 30 day of July, 2019

Water Management Board

WATER MANAGEMENT BOARD MEETING
May 8, 2019

No.	Name	Address	County	Amount	Use	Source	Qualifications
Unopposed New Water Permit Applications Issued Based on the Chief Engineer Recommendations							
1987-1	Centennial Vista Estates Homeowners Assoc.	Spearfish	LA	0.1 cfs	WDS	1 well-Madison Aquifer	wi, 3 special
2796-2	Nelson's Oil & Gas Inc	Hot Springs	PE	0.018 cfs	COM	1 well-Crystalline Rock Aquifer	wi, 2 special
3984B-3	Big Sioux Community WS	Egan	MY	expand future use area		Big Sioux:Moody Aquifer	3 special
6834A-3	Big Sioux Community WS	Egan	LK	expand future use area		Big Sioux:Northern Skunk Crk	3 special
8385-3	Glendale Hutterian Brethren	Frankfort	SP	1.45 cfs	110 acres	James River (reinstatement)	iq, 1 special
8387-3	Big Sioux Community WS	Egan	LK	1.67 cfs	RWS	Big Sioux:Northern Skunk Crk	3 special
8389-3	Harvey/Andrea Sheehan	Pierre	HU	28.9 cfs	962 acres	Missouri River	iq
8988-3	Percy Tjeerdsma	Springfield	BH	no add'l	46 acres	1 well-Choteau:Tyndall Aquifer	wi, iq, 1 specia
8390-3	Mike Rogers	Redfield	HD	4.44 cfs	478.3 acres	4 wells-Tulare:Hand Aquifer	wi, wcr, iq, 1 sp
8391-3	Big Sioux Community WS	Egan	MY	0.67 cfs	RWS	Big Sioux:Moody Aquifer	3 special
8392-3	Sunset Hutterian Brethren	Britton	ML	0.22 cfs	DOM	1 well-Middle James:Columbia	wi, 2 special
8393-3	Pearl Creek Hutterian Brth	Iroquois	BD	0.13 cfs	COM	1 well-Dakota Aquifer	wi, 4 special

ATTENDANCE SHEET
WATER MANAGEMENT BOARD
Date May 8, 2019

NAME *(PLEASE PRINT)*	MAILING ADDRESS	CITY, STATE & ZIP	ITEM OF INTEREST
James Moore	P.O. Box 5027	Sioux Falls, SD 57104	Keystone
Wm Taylor	4820 E 57th	Sioux Falls, SD 57108	Key Stone
JOHN TAYLOR	4820 E 57th ST	Sioux Falls, SD 57108	Keystone
Bruce Ellison	PO Box 2508	Rapid City SD 57709	KXL
Rebecca Terk	PO Box 5204	Brookings SD 57006	KXL
Matt Naasz	Po Box 1040	Rapid City, SD 57702	Winkelwilson
Scott Heine	56368 886 RD	Hartington NE	Water Permit
Shane Mattheis			LRC
Bob Mercer		Pierre SD	
MARK MAYER		PIERRE	RULES
TAMMIE HILL		PIERRE SD	RULES
Mary Duvall		Pierre	Leg. Oversight
Alex Timperley		Pierre	LRC
Chuck Banner	24493 San Mateo Ave ~~Carmel CA~~	Carmel CA	KXL
Julie Santella	~~422 Colu~~ Rapid City, SD		KXL

ATTENDANCE SHEET
WATER MANAGEMENT BOARD
Date May 8, 2019

NAME *(PLEASE PRINT)*	MAILING ADDRESS	CITY, STATE & ZIP	ITEM OF INTEREST
Tonia Stands	202 Bald Eagle Ln	RCSD 57701	Tribal Gov.
Sarah [illegible]		Pierre, SD	reporter
Martin Bafer		Sioux Falls SD	Keystone (DRA)
Mark Rowland			
Carol [illegible]		Wounded Knee, SD	Keystone
WAKANYAN Kiya Kin	Cankpe-opi	Cankpe-opi	Keystone
Janie Stein		Sioux Falls, SD	water, " , DRA
Tiffanie Pieper			
Oscar High Elk		Eagle Butte SD	
Ramona Three Legs		Eagle Butte, SD	
J C Veilleux		Lake Andes, SD	Water
Richard [illegible]	Batedland SD 57716	Pine Ridge SD	water
[illegible]	Wounded Knee 57794	Pine Ridge	water
MADONNA Thunder Hawk	P.O. Box 1384 57675		
Lisa M. Skye	" "	Eagle Butte SD	Protect Water

ATTENDANCE SHEET
WATER MANAGEMENT BOARD
Date May 8, 2019

NAME *(PLEASE PRINT)*	MAILING ADDRESS	CITY, STATE & ZIP	ITEM OF INTEREST
waniya Locke	wainxa 69@gmail	S.D.	
Baylee LaCompte	baylee lacompte 1@gmail	SD	
Noah clown		SD	
Jerm M.		CO	
~~[illegible]~~ George Jaeger		Tyndall	