

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

MCCOOK LAKE RECREATION AREA	)	
ASSOCIATION	)	Appeal No. 30795
	)	
Appellant,	)	
	)	
v.	)	
	)	
DAKOTA BAY, LLC, MICHAEL	)	
CHICOINE, AND THE SOUTH	)	
DAKOTA DEPARTMENT OF	)	
AGRICULTURE AND NATURAL	)	
RESOURCES, CHIEF ENGINEER	)	
AND WATER RIGHTS PROGRAM	)	
	)	
Appellees.		

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Appeal from the Circuit Court First Judicial Circuit, Union County, South Dakota.

The Hon. Tami Bern presiding.

**Appellant's Brief**

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The notice of appeal was filed on the 16th day of August, 2024.

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## **JURISDICTIONAL STATEMENT**

The circuit court issued a memorandum decision affirming the decision of the South Dakota Department of Agriculture and Natural Resources Water Management Board ("Board") on July 2, 2024. (Memorandum Decision, App. 1). The circuit court entered its corresponding order and final decision on July 17, 2024, which was served on July 19, 2024 (Notice of Entry of Order; App. 10). McCook Lake Recreation Area Association (the "Association") timely filed its notice of appeal on August 16, 2024. This Court has appellate jurisdiction pursuant to SDCL § 1-26-37 and SDCL § 15-26A-3(1).

## **LEGAL ISSUES**

Whether the circuit court erred in affirming the Board ruling that no water right permit is required for Michael Chicoine/Dakota Bay, LLC, (collectively referred to herein as "Dakota Bay") to modify the shoreline of McCook Lake to construct a canal to expand McCook Lake for private use or gain. The Board ruled that the canal is not an ongoing appropriation of water, and thus no water rights permit is required. The circuit court affirmed the Board's ruling.

### **Most relevant authority:**

SDCL § 46-1-3

SDCL § 46-1-4

SDCL § 46-1-15

SDCL § 46-3-9

SDCL § 46-5-10

*In re Pooled Advoc. Tr.*, 2012 S.D. 24, ¶ 49, 813 N.W.2d 130, 146

*Parks v. Cooper*, 2004 S.D. 27, ¶ 32, 676 N.W.2d 823, 834

### STATEMENT OF THE CASE AND FACTS

This is an appeal from a decision of the Honorable Tami Bern of the Union County Circuit Court affirming the Board ruling regarding the Petition for Declaratory Ruling (“Petition”) filed by the Association. The Petition seeks a ruling that Dakota Bay is required to obtain a water rights permit from the Water Rights Program prior to altering the shoreline of McCook Lake for the purpose of constructing a canal connected to McCook Lake. (Petition, App. 12–15).

The facts in this matter are undisputed. McCook Lake is a public, meandered lake of the State of South Dakota located in Union County and is an oxbow of the Missouri River. (Water Management Board Findings of Fact, Conclusions of Law, and Decision; App. 20–21; T.T.<sup>1</sup> p. 13, App. 33). The Association holds two water rights permits to divert water from the Missouri River to McCook Lake when the elevation of the lake is less than 1090.3 feet. (Water Management Board Findings of Fact, Conclusions of Law, and Decision; App. 21; T.T. p. 13–14, App. p. 33–34). Most years, the Association pumps up to 11,000 gallons of water per minute 24 hours a day, 7 days a week, from roughly March until September, to maintain the lake elevation near the high-water mark. (T.T. p. 24–26, App. 36–37). The Association has no additional pumping capacity beyond what it already pumps. (T.T. p. 26, App. p. 38).

Dakota Bay applied to the South Dakota Department of Game Fish and Parks for a “Permit to Alter Lakeshore or Bottom Lands” for the purpose of breaching an existing

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<sup>1</sup> “T.T.” used herein refers to the transcript of proceedings before the South Dakota Department of Agriculture and Natural Resources Water Management Board.

dike and constructing a canal connected to the southeast corner of McCook Lake, which would be built to further private development or sale of lots to adjoining property owners. (Application for Shoreline Alteration; App. p. 46–47). After the Association learned of Dakota Bay’s proposed canal, the Association filed its Petition. (Chronological Index; App. 48).

## ARGUMENT

### I. Standard of Review

Under SDCL § 1-26-36, the Supreme Court “examine[s] agency findings in the same manner as the circuit court to decide whether they were clearly erroneous in light of all evidence.” *Reidburn v. South Dakota Dep’t of Labor and Regulation, Reemployment Assistance Division*, 2024 S.D. 19, ¶ 21, 5 N.W.3d 834, 839 (citation omitted). However, “[w]hen the issue is a question of law, the decisions of the administrative agency and the circuit court are fully reviewable’ under the de novo standard of review.” *Id.* Statutory interpretation is a question of law reviewed under the de novo standard. *Snelling v. S. Dakota Dep’t of Soc. Servs.*, 2010 S.D. 24, ¶ 13, 780 N.W.2d 472, 478. Under the clearly erroneous standard, the Court “[does] not look for reasons to reverse, even if we would not have made a similar decision ... but confine our review to a determination whether the record contains substantial evidence to support the agency’s decision.” *Gilchrist v. Trail King Indus., Inc.*, 2000 S.D. 68, ¶ 40, 612 N.W.2d 1, 10. The Court will reverse an agency’s decision only if it is “clearly erroneous in light of the entire evidence in the record.” *In re Pooled Advoc. Tr.*, 2012 S.D. 24, ¶ 49, 813 N.W.2d 130, 146. Because the question in this appeal is a question of law, the court should apply the de novo standard of review.

**II. The Circuit Court erred in affirming the Board ruling that no water right permit is required to modify the shoreline of McCook Lake for the purpose of constructing a canal to expand McCook Lake for private use or gain.**

**A. Analysis**

1. *South Dakota Codified Law requires a water rights permit for the use of water and for the placement of works*

“[T]he people of the state have a paramount interest in the use of all the water of the state and . . . the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection.” SDCL § 46-1-1. A person may acquire the right to use, control, divert, or otherwise make beneficial use of the public waters of the state, and the mechanism for acquiring that right is a permit for appropriation. SDCL § 46-1-15 (“[A]ll water within the state is the property of the people of the state, *but the right to the use of water may be acquired by appropriation as provided by law.*”) (emphasis added). The Circuit Court and Board’s decision concluding no permit is required for the canal because there is no “ongoing appropriation” is not a standard established by law, is clearly erroneous, and is contrary to law.

“[T]he starting point when interpreting a statute must always be the language itself.” *State v. Livingood*, 2018 S.D. 83, ¶ 31, 921 N.W.2d 492, 499 (quoting *State v. Rus*, 2021 S.D. 14, ¶ 13, 956 N.W.2d 455, 458). South Dakota law is replete with references to uses of water which require a permit. *See, e.g.*, SDCL § 46-1-3 (“It is hereby declared that all water within the state is the property of the people of the state, *but the right to the use of the water may be acquired by appropriation as provided by law.*”) (emphasis added); SDCL § 46-1-15 (“Except as otherwise provided throughout this title, no person may appropriate waters of this state *for any purpose* without first

obtaining a permit to do so.”) (emphasis added); SDCL § 46-5-9 (“No person may begin or carry on any *construction of works for storing or carrying water* until a permit to appropriate the water has been issued.”) (emphasis added); SDCL § 46-5-10 (“Any person intending to *acquire a right to beneficial use* of water shall, before starting construction or placement of works for that purpose or before taking the water from any constructed works, make an application to the Water Management Board for a permit to appropriate water . . . .”) (emphasis added).

The general state policy on the use of water, and the acquisition of the right to use water, is clearly established under statute, and has been recognized by the South Dakota Supreme Court:

[T]he general welfare requires that the water resources of the state be put to beneficial use to the extent which they are capable, and that the waste or unreasonable use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use of the water in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of diversion of water . . . . Gone from our code was the pre-1955 statutory dictum inherited from territorial times that ‘the owner of the land owns water standing thereon [.]’ Instead, there remained sweeping provisions that all waters, ‘surface and underground, can be converted to public use or controlled for public protection,’ and ‘all water within the state is the property of the people of the state[.]’

*Parks v. Cooper*, 2004 S.D. 27, ¶ 32, 676 N.W.2d 823, 834 (citing former SDC 61.0101, now codified SDCL § 46-1-4).

The Chief Engineer’s legal counsel conceded that South Dakota law requires the issuance of a permit for the construction of water works during. (T.T. p. 108, App. 44). Nonetheless, the Board did not conclude the construction of the canal was a water works requiring a permit, instead it concluded that no “ongoing appropriation” (a term

undefined by the Board, statute, or regulation) existed and thus no permit was required. (Water Management Board Findings of Fact, Conclusions of Law, and Decision; App. 25; T.T. p. 45; App. 45). The plain language of South Dakota law requires a permit for any use, construction of any water works, or acquisition of the right for beneficial use of water. Dakota Bay's proposed canal is indisputably a water works, uses water from McCook Lake, stores water, and has the potential to be a beneficial use of water.

If no water rights permit is required for the construction of the canal, then there is no public hearing required as part of the State approval process. (T.T. p. 63, App. 42). If a water rights permit is required, Dakota Bay would be required to show unappropriated water is available for the proposed use, that the canal does not unlawfully impair the Association's prior existing water rights, and that the canal is a beneficial use and in the public interest. *See* SDCL § 46-2A-9. The requirement that Dakota Bay should apply for a permit and meet the requirements of SDCL § 46-2A-9 is a miniscule burden considering water has been declared by the Legislature to be "of paramount interest" to the people of the State. *See* SDCL § 46-1-1. The Circuit Court and Board's decision that no water right permit is required was clearly erroneous and contrary to law, and a water rights permit is required prior to the construction of the canal.

2. *The Board erred in concluding the canal is not an ongoing appropriation of water*

Even under the unwritten "ongoing appropriation" standard, the Circuit Court and Board erred in concluding no ongoing appropriation exists. As stated during the Board hearing by counsel for the Chief Engineer, the statute does not define "appropriation". (T.T. p. 107, App. 43). Longstanding precedent holds that when a statute does not define a term, then the term's common usage and understanding is to be used. *See, e.g.,*

SDCL § 2-14-1 (“Words used are to be understood in their ordinary sense . . . .”); *In re Sales Tax Liab. of USA Tire Mgmt. Sys., Inc.*, 2016 S.D. 7, ¶ 7, 874 N.W.2d 510, 512 (“When terms are not statutorily defined, we give the terms a reasonable, natural, and practical meaning.”); *Unruh v. Davison Cnty.*, 2008 S.D. 9, ¶ 5, 744 N.W.2d 839, 842 (“We interpret statutes in accord with legislative intent. Such intent is derived from the plain, ordinary and popular meaning of statutory language.”) (citation omitted).

The plain, ordinary, and common meaning of “appropriation” (or appropriate) means to take possession of, to set aside, or assign for a particular use. *See, Appropriate, Merriam-Webster.com Dictionary*, <https://www.merriam-webster.com/dictionary/appropriate> (last accessed November 2, 2024). The undisputed evidence establishes that, except for in especially wet years, the Association must pump water into McCook Lake to maintain its water level. (T.T. p. 35-36, 61, App. p. 039-041). Every year the Association pumps water into McCook Lake, that same water will flow from McCook Lake into the canal, because the proposed canal’s bottom is lower than the high water mark the Association aims to fill McCook Lake. (Letter from Association to William Larson; App. 16). The water will be taken possession of, set aside, or used to maintain water levels in the canal to benefit the private development, properties, and parties adjacent to the canal. (Application for Shoreline Alteration; App. 46). Indeed, it is the canal’s ongoing reliance on the Association’s pumping, pursuant to its own water rights permits, which gives rise to the Association’s concerns – if construction of the canal could impair the Association’s existing water rights, how can no water rights permit be required to construct the canal?

While the Chief Engineer argues that the canal could be initially filled by a temporary use permit or other means (T.T. 107; App. p. 43) the fact remains that, unless Dakota Bay is required to separately fill the canal annually, the canal will be filled from McCook Lake's water—water supplied by the Association pumping from the Missouri River. Even if the canal is annually filled through some other water source, if the Association does not pump water in a dry year, the canal will drain. Under a reasonable, natural, and practical meaning of “ongoing appropriation”, the annual filling of the canal via McCook Lake's water must be considered an ongoing appropriation. *See In re Sales Tax Litab. of USA Tire Mgmt. Sys., Inc.*, 2016 S.D. at ¶ 7, 874 N.W.2d at 512. Thus, a water rights permit is required even under the arbitrary “ongoing appropriation” standard.

### CONCLUSION

The Circuit Court and Board's decisions ignore the plain letter of South Dakota law, which requires a water right permit for the use of public water, for the acquisition for the right to use the waters of the state for private gain, and for the placement of waterworks. The singular focus on the word “appropriation” misconstrues and misapplies South Dakota law. But even so, the canal is clearly an “ongoing appropriation” of the water of McCook Lake, as the term “appropriation” is reasonably, naturally, and practically defined.

Under the “sweeping provisions” of SDCL § 46-1, where it is proclaimed that water is of “paramount interest” to the people, Dakota Bay's proposed expansion of McCook Lake requires a water rights permit. If Dakota Bay modifies the shoreline of McCook Lake and constructs a canal without first obtaining a water rights permit, then there is no public input, and no ability for the Association to contest whether the canal's

use of McCook Lake's water would unlawfully inhibit the Association's prior existing water right. Such an outcome would ignore the public's paramount interest in the use of water and violate the Association's substantial rights, its prior existing water rights permits, and its due process rights.

The Circuit Court and Board's decision was made in violation of statutory provisions, upon unlawful procedure, was affected by other errors of law, and was clearly erroneous in light of the entire evidence in the record. The Association requests this Court to reverse or modify the Circuit Court and Board's decision and rule that the alteration of the shoreline of McCook Lake for the construction of the canal is a use or appropriation of water, the acquisition of the right to beneficial use, or a construction of works, requiring a water rights permit, and require Dakota Bay to submit an application for a water rights permit prior to any construction related to the canal.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that the foregoing brief complies with the page limitation set by this Court. This brief was prepared and printed in a proportionally spaced typeface in Times New Roman font, size 12. This brief contains 2,460 words including headings, footnotes, and quotations, but excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, addendum materials, and certificates of counsel.

Dated this 15th day of November, 2024

/s/ John M. Hines

John M. Hines

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of November, 2024, I electronically filed the foregoing with the Clerk of the Court using the Odyssey File & Serve system. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system as follows:

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## APPENDIX

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RE: Memorandum Decision

In the Matter of McCook Lake Recreation Area Association's Petition for  
Declaratory Ruling Regarding Appropriative Permits and Shoreline  
Alterations 63CIV23-171

In the Matter of Water Permit Application No. 8744-3, Dakota Bay, LLC  
63CIV23-172

Dear Counsel:

63CIV23-171 and 63CIV23-172 are administrative appeals to the circuit court by McCook Lake Recreation Area Association ("Association") from decisions of the South Dakota Department of Agriculture and Natural Resources Water and Management Board ("Board").

Because the Board correctly determined no water right permit is required for the Dakota Bay canal construction, allowed the intervention of Dakota Bay and the Chief Engineer and did not require disqualification of legal counsel, the determination by the Board in 63CIV23-171 is affirmed. Because the Board correctly determined Dakota Bay's water use will be beneficial and in the public interest and quashed subpoenas not served, the determination by the Board in 63CIV23-172 is affirmed.

### Procedural History

63CIV23-171 is an administrative appeal by the Association of the Board's declaratory ruling that Michael Chicoline and Dakota Bay, LLC (jointly "Dakota Bay") were not required to make application to the Board for a permit to appropriate water before starting construction to expand McCook Lake for Dakota Bay's use as well as its Orders allowing the intervention of the Chief Engineer of the South Dakota Department of Agriculture and Natural Resources, Water

Filed on: 7/2/2024      Union County, South Dakota 63CIV23-000171

Rights Program ("Chief Engineer") and denying the Association's motion to disqualify the Board's legal counsel. 63CIV23-172 is an administrative appeal by Association of the Board's approval of Dakota Bay's Water Permit No. 8744-3 and its Order quashing the Association's subpoena duces tecum to the South Dakota Department of Game, Fish and Parks ("GFP") and the Chief Engineer or Board.

Dakota Bay applied to GFP for a permit to alter lakeshore or bottom lands to construct a canal on McCook Lake for private development or sale of lots to adjoining property owners. Dakota Bay had not applied for a water rights permit from the Board for the project although it had applied for a water permit to use water from an existing irrigation well for the purpose of pumping water into the proposed canal. The Association commenced an action for declaratory ruling from the Board as to whether a permit is required, a petition opposing a permit for use of the existing irrigation water and issued subpoenas to GFP and the South Dakota Department of Agriculture and Natural Resources Water Rights Program ("DANR") which were subsequently quashed by the Board. The Chief Engineer filed a petition opposing the Association's declaratory ruling petition and was granted a continuance of the hearing. The Association filed a motion to disqualify the attorney general's office from serving as the Board's legal counsel which was denied at the hearing on the petition's merits. After hearing, the Board declared a water permit was not necessary concluding the construction of the canal is not an appropriation of water and granted a water rights permit for use of the irrigation well water in the separate application. The Board also overruled the Association's objection to participation by Dakota Bay and the Chief Engineer in the declaratory judgment proceeding and its motion to disqualify legal counsel for conflict of interest. The Board had quashed the subpoenas which are also a subject of appeal at a prior proceeding.

The Association filed its appeal of the Board's declaratory ruling on November 13<sup>th</sup>, 2023.

The Association filed its appeal of the water rights permit issued on November 13<sup>th</sup>, 2023.

Hearing was held before this court on April 9<sup>th</sup>, 2024 .

#### **Standard of Review**

The circuit court's standard of review in these matters is set forth by the South Dakota Supreme Court referencing its own as follows:

"We review the Department's decision in the same manner as the circuit court." *Hughes v. Dakota Mill and Grain, Inc.*, 2021 S.D. 31, ¶ 12, 959 N.W.2d 903, 907; see SDCL 1-26-37; SDCL 1-26-36. We review the Department's findings of fact for clear error and overturn them only if "after reviewing the evidence we are left with a definite and firm conviction that a mistake has been made." *Hughes*, 2021 S.D. 31, ¶ 12, 959 N.W.2d at 907 (quoting *Schneider v. S.D. Dep't of Transp.*, 2001 S.D. 70, ¶ 10, 628 N.W.2d 725, 728). But "[w]e review the Department's factual determinations based on documentary evidence, such as depositions and

medical records, de novo.” *Id.*; see *Peterson v. Evangelical Lutheran Good Samaritan Soc’y*, 2012 S.D. 52, ¶¶ 18–19, 816 N.W.2d 843, 849 (explaining that proposed amendments to SDCL 1-26-36 failed, leaving this standard of review intact with respect to agency findings of fact derived from documentary evidence). “The Department’s conclusions of law are fully reviewable.” *Hughes*, 2021 S.D. 31, ¶ 12, 959 N.W.2d at 907.

*News Am. Mktg. v. Schoon*, 2022 S.D. 79, ¶18, 984 N.W.2d 127, 133.

...reviewing courts are required to “give great weight to the findings made and inferences drawn by the agency on questions of fact.” “However, questions of law are reviewed de novo.” *Manuel*, 2012 S.D. 47, ¶ 8, 815 N.W.2d at 670 (citing *Vollmer v. Wal-Mart Store, Inc.*, 2007 S.D. 25, ¶ 12, 729 N.W.2d 377, 382). “Mixed questions of law and fact require further analysis.” *Id.* (quoting *Darling v. W. River Masonry, Inc.*, 2010 S.D. 4, ¶ 10, 777 N.W.2d 363, 366). “If ... the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then ... the question should be classified as one of law and reviewed de novo.” *Id.*

*Easton v. Hanson Sch. Dist. 30-1*, 2013 S.D. 30, ¶7, 829 N.W.2d 468, 471.

**In the Matter of McCook Lake Recreation Area Association’s Petition for Declaratory Ruling Regarding Appropriative Permits and Shoreline Alterations 63CIV23-171**

**1. Permit Necessity**

The Board determined the canal as proposed is not an ongoing appropriation of water and, accordingly, no water permit is necessary.

Although the Association asserts the Board’s determination that there was no appropriation of water is an answer to a question not asked, such is a necessary resolution for deciding whether a permit from the Board was required for Dakota Bay’s project. The Association’s attempt to distinguish “acquiring the right to use water or to construct waterworks” (emphasis added) from an analysis of whether an appropriation of water will occur is nonpersuasive and not supported by precedent. Similarly unconvincing is the Association’s citation of *Parks v. Cooper*, 2004 SD 27, ¶ 32, 676 NW2d 823, 834 (SD 2004) for the premise that the history of South Dakota water law is not relevant to the Court’s analysis in this matter. To the contrary, the very premise of the Court’s holding in *Parks v. Cooper* is that **history and precedent have established** the public trust doctrine that exists apart from statute controlling as to its decision in that matter. *Id.* at ¶42, 837.

The Chief Engineer’s analysis is persuasive as to whether an appropriation such as to require a permit is implicated in this case. An ongoing appropriation permit is unnecessary because Dakota Bay would not have exclusive control of the water on the canal once it is joined to McCook Lake. The facts are undisputed and correctly found by the Board. The Board correctly concluded the canal is not an ongoing appropriation of water.

2. Proper Parties to the Action.

A. Chief Engineer

While the objection was not raised until submission of its Objections and Alternative Findings of Fact and Conclusions of Law, the Association argues the Board improperly allowed the participation of Dakota Bay and the Chief Engineer. Although SDCL 1-26-17.1 provides for intervention in a contested case by a person with a pecuniary interest, intervention is not confined to those with a pecuniary interest for purposes of a declaratory judgment action<sup>1</sup>.

Declaratory judgment proceedings are generally considered equitable in their nature as to bring them within the rule of equity which permits a joinder of defendants where there is a community of interest in questions of law and fact and which makes inapplicable the common-law rule that there can be a joinder of defendants only where they are under a joint obligation or liability. In addition, a state provision which was based on the federal rule dealing with permissive joinder of parties in civil proceedings has been construed as giving broad authority for permissive joinder of defendants and as having been intended to extend to all civil actions the principles of permissive joinder which had been followed in equity, which authority is to be liberally construed in a declaratory judgment suit.

22A Am. Jur. 2d *Declaratory Judgments* § 211 (West 2024) (internal citations omitted).

Although Association cites SDCL 46-2A-4 in support of its position that parties who file a petition in opposition to a declaratory ruling action may only participate if it suffers a unique injury which concerns a matter within the regulatory authority of the agency, that statute only applies to an application pursuant to SDCL 46-2A-1, not a declaratory judgment action. In the event a declaratory judgment action is construed to be an application pursuant to SDCL 46-2A-1, 46-2A-2 provides that the chief engineer shall make a recommendation on the application. The chief engineer's input is allowed and even required under these statutes and its participation cannot be considered prejudicial under any construction.

B. Dakota Bay

The Association objects to the Board's receipt and consideration of Dakota Bay's untimely Petition in Opposition to the Association's Petition for Declaratory Ruling. The Association made a motion to strike Dakota Bay's opposition and preclude their participation at hearing. The Board denied the Association's motions finding that because Dakota Bay is a necessary, original proper to the action, it was not required to additionally file a petition to participate in the proceedings.

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<sup>1</sup> SDCL 46-2-5 provides the Board may promulgate rules to establish practice procedures for issuing declaratory rulings.

The Association concedes the facts are not in dispute. Brief of Appellant, pg. 3. The participation of Dakota Bay and the Chief Engineer did not significantly delay the proceedings. There is no evidence that the Association was prejudiced by either Dakota Bay's or the Chief Engineer's participation.

The Board correctly concluded that Dakota Bay was a necessary, original party that was not required to file a petition to participate. The Board further correctly concluded that the Chief Engineer was a party to the action and also filed a timely petition to participate.

### 3. Representation by the Attorney General's Office

The Association asserts that the representation by separate attorneys under the employ of the Attorney General's Office of both the Board and the Chief Engineer is a conflict of interest resulting in violation of the Association's right to due process.

While the Association concedes that an administrative agency can both prosecute and adjudicate a dispute by virtue of the South Dakota Supreme Court's holding in *Romey v. Landers*, 392 NW2d 415, 420 (SD 1986), it objects to the Attorney General's *representation* of both the prosecutor and adjudicator. SDCL 46-2-4 and 46-2-4.1 provide the Attorney General has an obligation to represent both the Board and the Chief Engineer.

To the extent that the attorney general is not a party to an action or personally interested in a private capacity, the attorney general may represent opposing state agencies in a dispute. Thus, unlike conflict of interest rules governing the conduct of lawyers representing private clients, the attorney general is not necessarily prohibited from representing governmental clients whose interests may be adverse to each other.

7 Am. Jur. 2d *Attorney General* § 19 (West 2024)(internal citations omitted).

As argued by the Chief Engineer, "...it has also been stated that, due to the attorney general's statutorily mandated role in the state legal system, the rules of professional conduct cannot be mechanically applied to the attorney general's office." 7 Am. Jur. 2d *Attorney General* § 17 (West 2024) citing *Chun v. Board of Trustees of Employees' Retirement System of State of Hawaii*, 87 Haw. 152, 952 P.2d 1215, 124 Ed. Law Rep. 1074 (1998); *State ex rel. Com'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734 (Tenn. Ct. App. 2001) and *Attorney General v. Michigan Public Service Com'n*, 243 Mich. App. 487, 625 N.W.2d 16 (2000).

The Board correctly concluded the Attorney General's Office may properly represent both the Chief Engineer and the Board in this proceeding.

### **In the Matter of Water Permit Application No. 8744-3, Dakota Bay, LLC 63CIV23-172**

The Association appeals from a decision of the Board granting a water permit submitted by Dakota Bay arguing there is not substantial evidence to support the Board's determination

pursuant to SDCL 46-2A-9 as the Board failed to review soil reports, construction plans, and/or detailed specifications with respect to the proposed construction.

1. SDCL 46-2A-9 criteria

Dakota Bay submitted Water Permit 8744-3 for a proposed canal project. The proposed project requested one time use of well ground water of 20.61 acre-feet to fill the canal with a continuing yearly appropriation of 7.99 acre-feet of ground water. The Chief Engineer recommended approval of the permit. A contested hearing was held. The Board approved the permit subject to the Chief Engineer's recommended qualifications and entered Findings of Fact, Conclusions of Law and Decision.

SDCL 46-2A-9 provides as follows:

A permit to appropriate water may only be issued if there is reasonable probability that unappropriated water is available for the applicant's proposed use, the proposed diversion can be developed without unlawful impairment of existing domestic water uses and water rights, the proposed use is a beneficial use, and the permit is in the public interest as it pertains to matters of public interest within the regulatory authority of the Water Management Board as defined by §§ 46-2-9 and 46-2-11.

The Association appeals the Board's findings of fact which are reviewed under the clearly erroneous standard. *News Am. Mktg. supra*. Its decision will be upheld unless this court is left with a definite and firm conviction that a mistake has been committed. *Id.*

A. Reasonable probability unappropriated water is available for use.

The Board received the testimony of Nakaila Steen, a natural resources engineer with Water Rights, who performed a technical review of the application and was qualified as an expert by the Board. Ms. Steen opined that based upon information regarding recharge to the aquifer, existing water rights, and the observation well data, there is sufficient unappropriated water available to satisfy the use sought by Dakota Bay.

The Association has failed to show that the finding was erroneous.

B. Proposed use would not impair existing domestic water uses and rights.

Mr. Michael Chicoine, who sought the application on behalf of Dakota Bay, testified as to his plans to construct a canal stemming off McCook Lake to provide lake access for current and future residents as well as the public. Mr. Chicoine testified as to the construction of the canal including an 18-inch fat, clay liner.

Ms. Steen further testified that the nearest existing domestic well is owned by Mr. Chicoine of Dakota Bay, LLC; the next nearest domestic well is .3 miles northwest of the proposed point of diversion; the nearest existing water rights are three separate water

rights/permits each located approximately one mile from the proposed point of diversion; and the nearest observation well is .6 miles from the proposed point of diversion. Ms. Steen testified that because of the qualities of the Missouri Elk Point aquifer, the area of the proposed point of diversion and small volume requested, there is a reasonable probability that the application could be developed without unlawful impairment to existing domestic uses and water rights. The record established that, in fact, the point of diversion proposed has been operated with the same rate of diversion under an irrigation permit for nearly 20 years without complaint.

While the GFP provided testimony that it had concern that if the canal liner were to dry out, its integrity and ability to reduce seepage would be compromised and the Association provided testimony that it would bear the burden of filling the canal should Mr. Chicoine's well fail or water is not pumped under the proposed appropriation, the continuing appropriation addresses those concerns.

The Board determined there is a reasonable probability that unappropriated water is available for the proposed use and there will be no unlawful impairment of existing domestic water uses and water rights.

The Association has failed to show that the finding was erroneous.

C. Proposed use would be a beneficial use in the public interest.

SDCL 46-1-6(3) defines beneficial use:

"Beneficial use," any use of water within or outside the state, that is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interests of the public of this state in the best utilization of water supplies.

While "public interest" is not defined in SDCL 46-1-6, the Association does not seem to dispute that greater access to the public for recreation activities is in the public interest.<sup>2</sup> Instead, the Association argues the viability of the project precludes a determination that such is in the public's best interests.

The South Dakota Supreme Court has ruled that public interest review should include whether a proposed project will flood and damage neighboring property. *Dekay v. U.S. Fish & Wildlife Serv.*, 524 N.W.2d 855, 859 (S.D. 1994). Thus, the viability of the canal is a relevant consideration under public interest review. Here, the Board found the expert testimony established that the given the nature of proposed point of diversion and relative small volume requested by the application, there is a reasonable probability that the application could be developed without unlawful impairment to existing domestic uses and water rights. FOF #19. This finding satisfies the requirement of determining whether the proposed project will damage neighboring property or interests and is correctly found.

The Board found that the proposed use for recreation, to fill the proposed canal and replace losses due to evaporation or seepage constitutes a beneficial use in the public interest.

<sup>2</sup> See ARSD 74:51:03:01 which defines beneficial use of South Dakota streams to include recreation.

The Association has failed to show that these findings were erroneous.

The court is not left with a definite and firm conviction that a mistake has been committed in regard to any of the Board's findings as to approval of the permit.

## 2. Quashing of Subpoena

The Association claims as additional error that the Board's incorrectly quashed the Association's subpoenas to GFP and DANR.

The clear language of both SDCL 15-6-45(a) and SDCL 1-26-19.1 supports the Association's position that the subpoenas were validly issued by its attorney without leave of the Board. The Association failed, however, to effect service pursuant to SDCL 15-6-45(c) making the Board's decision to quash valid on that basis alone.<sup>3</sup> In addition, even if the Board's determination quashing the subpoenas was error, the Association did not establish prejudice as a result. The Association could have, and did, move the Board for issuance of subpoenas pursuant to the Board's construction of the procedural requirements. Further, the Association called a witness at hearing pursuant to subpoena.

The Board correctly quashed the subpoenas pursuant to motion. Even if that determination was in error, the Association was not prejudiced thereon.

In conclusion, the Board correctly determined no water right permit is required for the Dakota Bay canal construction, allowed the intervention of Dakota Bay and the Chief Engineer and did not require disqualification of legal counsel. Accordingly, the Board's determinations in 63CIV23-171 are affirmed. Further, as the Board correctly determined Dakota Bay's water use will be beneficial and in the public interest and quashed subpoenas not served, the determinations by the Board in 63CIV23-172 are affirmed.

Counsel for Dakota Bay may submit Orders in accordance with this memorandum opinion incorporating it by reference.

Sincerely,



Tami Bern  
Circuit Court Judge

<sup>3</sup> SDCL 15-6-45(c) provides the subpoena shall be served in the same manner as a summons except no service by publication is authorized. SDCL 15-6-5(b), the statute allowing service on a party's attorney, provides 15-6-5 does not apply to service of a summons or process for contempt. Accordingly, the subpoena must be personally served to be effective. Service on the administrative assistant is ineffective as is mailing to counsel. SDCL 15-6-4(d)(5); 15-6-4(d)(6); 15-6-4(e).

STATE OF SOUTH DAKOTA     )  
  ) ss  
COUNTY OF UNION            )

IN CIRCUIT COURT  
  
FIRST JUDICIAL DISTRICT

IN THE MATTER OF MCCOOK     )  
LAKE RECREATION AREA        )  
ASSOCIATION'S PETITION FOR   )  
DECLARATORY RULING           )  
REGARDING APPROPRIATIVE      )  
PERMITS AND SHORELINE        )  
ALTERATIONS                  )

Case No. 63CIV23-171  
Case No. 63CIV23-172

IN THE MATTER OF WATER       )  
PERMIT                          )  
APPLICATION NO. 8744-3,        )  
DAKOTA BAY, LLC                )

**FINAL DECISION AND ORDER**

Pursuant to SDCL 1-26-36, it is hereby ORDERED that the Memorandum Decision filed on July 2, 2024 is incorporated by reference; it is further

ORDERED that the South Dakota Department of Agriculture and Natural Resources Water Management Board's (Board's) Findings of Fact, Conclusions of Law, and Decision in 63CIV23-171 is affirmed; it is further

ORDERED that the Board's Findings of Fact, Conclusions of Law, and Decision in 63CIV23-172 is affirmed; it is further

ORDERED that the stay of proceedings is lifted in light of this Court's final decision, and Judgment is hereby entered accordingly.

7/17/2024 2:00:11 PM

BY THE COURT:

Attest:  
Meyer, Laura  
Clerk/Deputy



  
Honorable Tami Bern  
Circuit Court Judge

STATE OF SOUTH DAKOTA )  
 ) SS  
COUNTY OF UNION )

IN CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT

IN THE MATTER OF MCCOOK )  
LAKE RECREATION AREA )  
ASSOCIATION'S PETITION FOR )  
DECLARATORY RULING )  
REGARDING APPROPRIATIVE )  
PERMITS AND SHORELINE )  
ALTERATIONS )

Case No. 63CIV23-171  
Case No. 63CIV23-172

IN THE MATTER OF WATER )  
PERMIT )  
APPLICATION NO. 8744-3, )  
DAKOTA BAY, LLC )

**NOTICE OF ENTRY OF ORDER**

NOTICE HEREBY GIVEN that attached hereto and incorporate herein is a copy of the Final Decision and Order in the above-title action, the original of which was entered by the Honorable Tami Bern on July 17, 2024, and filed in the office of the Clerk of the First Judicial Circuit, Union County, at Elk Point, South Dakota.

Dated this 19th day of July 2024.

GUNDERSON, PALMER, NELSON  
& ASHMORE, LLP

By: /s/ Stacy R. Hegge

Stacy R. Hegge  
111 W. Capitol Ave, Suite 230  
Pierre, SD 57501  
Phone: (605) 494-0105  
Email: shegge@gpna.com

*Attorneys for Dakota Bay, LLC and  
Michael Chicoine*

### CERTIFICATE OF SERVICE

I certify that on July 19, 2024, a true and correct copy of the **NOTICE OF ENTRY OF ORDER** was electronically filed and served upon the following individuals through South Dakota's Odyssey File and Serve Portal:

Jennifer L. Verleger  
South Dakota Attorney  
General's Office  
1302 East Highway 14, Suite 1  
Pierre, SD 57501  
jennifer.verleger@state.sd.us  
atgservice@state.sd.us

Attorneys for Chief Engineer and  
Water Rights Program, DANR

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John M. Hines  
Crary Huff, P.C.  
329 Pierce Street, Suite 200  
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jhines@craryhuff.com  
dbriesse@craryhuff.com

Attorneys for McCook Lake  
Recreation Area Association

/s/ Stacy R. Hegge

Stacy R. Hegge

RECEIVED

MAR 13 2023

OFFICE OF  
WATER

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

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IN THE MATTER OF	)	
THE MCCOOK LAKE RECREATION	)	PETITION FOR
AREA ASSOCIATION'S PETITION	)	DECLARATORY RULING
FOR A DECLARATORY RULING	)	
ON SDCL CHAPTER § 46-1	)	

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The McCook Lake Recreation Area Association (the "Association") hereby petitions the South Dakota Water Management Board (the "Board") to issue a Declaratory Ruling on the applicability of SDCL Chapter 46-1 pertaining to the factual situation presented herein:

1. The authority by which the petition is presented: SDCL § 1-26-15; SDCL § 46-2-5; SDCL § 46-5-10; ARSD 74:02:01:03; and ARSD 74:02:01:46.
2. The name of the group submitting the petition: The McCook Lake Recreation Area Association, a South Dakota nonprofit corporation.
3. The requested action: For the Board to issue a Declaratory Ruling finding that the expansion of a public body of water for private use or gain (such as by altering the shoreline of a lake and connecting a "canal") requires a permit to appropriate water.
  - a. SDCL § 46-1-1 states: "It is hereby declared that the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection."
  - b. SDCL § 46-1-3 states: "It is hereby declared that all water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation as provided by law."

- c. SDCL § 46-1-10 states: "Any person intending to acquire a right to beneficial use of water shall, before starting construction or placement of works for that purpose or before taking the water from any constructed works, make an application to the Water Management Board for a permit to appropriate water, in the form required by rules promulgated pursuant to chapter 1-26 by the board."
  - d. SDCL § 46-1-15 states: "Except as otherwise provided throughout this title, no person may appropriate the waters of this state for any purpose without first obtaining a permit to do so."
4. The reason for the requested action is described in additional detail in the letter sent from the Association to the Board dated December 5, 2022, attached hereto as Exhibit "A" and incorporated by reference herein.
- a. In short, the reason the Association seeks the Declaratory Ruling is because representatives of the South Dakota Department of Agriculture and Natural Resources ("DANR") have told the Association that the expansion of a public lake by a private party does not require a permit to appropriate water.
  - b. After DANR's statements to the Association that no permit to appropriate water is required to expand a public lake, DANR Chief Engineer Eric Gronlund testified in opposition to 2023 HB 1134 before the South Dakota House Agriculture and Natural Resources Committee.
  - c. 2023 HB 1134 requires the consent of a majority of lakefront property before a permit may be issued to alter the shoreline.
  - d. It was Mr. Gronlund's testimony that HB 1134 "potentially circumvents any opportunity for a full hearing on the merits of an application" and that "a well-

established water rights procedure affording the opportunity for meaningful public participation and public hearing is potentially being upended.”

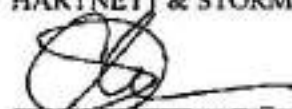
- e. Mr. Gronlund’s testimony to the Agriculture and Natural Resources Committee and DANR’s statements to the Association are inconsistent with one another.
- f. 2023 HB 1134, which was supported by the Association, was developed in response to DANR’s previous statements that no water rights permit was required for a private party to expand a public lake.
- g. The Association agrees with Mr. Gronlund’s testimony that before a private individual can permanently alter a public body of water for private gain, meaningful public participation and public hearing is required by the plain language of South Dakota law.
- h. SDCL § 46-1-3 states explicitly that “the right to the use of water may be acquired by appropriation as provided by law.” (Emphasis added).
- i. Expanding a public body of water, via canal or otherwise, uses the water of the public water body, and the right to do so may only be acquired by a permit for appropriation.
- j. The procedure for obtaining a permit to appropriate water includes the opportunity for public input.
- k. Because the people of South Dakota have a “paramount interest” in the use of all water of the state, no private party should be allowed to permanently alter a public lake for private gain without first receiving State and public approval through the appropriation permit procedures.

1. The Association respectfully asks that the Water Management Board issue a Declaratory Ruling that the alteration of a public water body by a private party requires a permit for appropriation of water, consistent with Mr. Gronlund's testimony to the Agriculture and Natural Resources Committee and consistent with State law.

Dated this 17th day of February, 2023.

CRARY, HUFF, RINGGENBERG,  
HARTNETT & STORM, P.C.

BY



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ATTORNEYS FOR PETITIONER,  
MCCOOK LAKE RECREATION  
AREA ASSOCIATION



William Larson, Chairman  
Water Management Board  
South Dakota Department of  
Agriculture and Natural Resources  
523 East Capitol Ave.  
Pierre, S.D. 57501-3182  
December 5, 2022

Re: Chicoine Canal

Chairman Larson:

I am writing on behalf of the McCook Lake Recreation Association (MLA) to request a "Declaratory Ruling" requiring Mike Chicoine to obtain a water right permit for the taking of water from McCook Lake (Lake) for the purpose of developing a canal off of the Lake. Furthermore, we request the Mike Chicoine Water Right Permit be subservient to the Water Right Permits of MLA. Presently MLA has two permits for pumping water out of the Missouri River (Permits 5878-3 and 6479-3 for a combined capacity of 26.74 cfs). The proposed Chicoine Canal (Canal) will impact the MLA permits by taking water from McCook Lake.

Mike Chicoine (Chicoine) has applied for several permits to construct a canal off of the southeast end of McCook Lake with features as follows:

- Length: 2,050 l.f. (Secretary Robling assures us the length of the canal is 1,500.)
- Width: 90 ft. at a water surface elevation of 1090. (McCook Lake has not been able to reach the water surface elevation of 1090 in recent years).
- Bottom width: 42 ft.
- Bottom Elevation: 1082 ft. (Below the recent spring water level in McCook Lake prior to the start of MLA pumping.)
- Side slope: 3:1

I have attached a copy of the "Application for Shoreline Alteration of a South Dakota Public Water Body" as prepared by Chicoine for details illustrating the above information.

McCook Lake is an Ox-Bow of the Missouri River. The McCook Lake Association and the Izaak Walton League of McCook Lake have spent over \$10 million in dredging and constructing a pumping system. The McCook Lake Association spends over \$60,000 per year for pumping water from the Missouri River. As stated above, MLA has two water right permits allowing the pumping of 26.74 cfs through a MLA constructed 7000 foot, 24 inch pipeline to McCook Lake.

During the summer of 2022 the 26.74 cfs was pumped continuously without raising the water level to elevation 1088 until rainfall events assisted the pumps.

Pumping resulting in a water level in McCook Lake that is approximately 10-11 ft. above the Missouri River water surface elevation (as measured at the pumping station). Attached is a graph of the water level monitoring over the last nine years. This graph shows how MLA pumping annually raises the Lake from a recent spring Lake level that is slightly below the bottom of the Canal. If the Canal existed in 2022, water would not have entered the Canal until the MLA pumps were placed in operation. Any ground water around the Canal would be the result of MLA pumping. The seepage rate is about 2 inches per day from predominantly the southern shoreline and south end of the Lake. Previous borings by the State of South Dakota indicated the northern and eastern shoreline and bottom are clay soils with lower seepage rates. During the summer the evaporation rates are about 0.25 inches per day.

MLA functions on donations and volunteerism. The Association does not have funds for expanding the pumping or pipe capacity to accommodate the Canal.

In 1978, the State of South Dakota published a study titled: "Ground Water Study for Southern Union County" by Derric L. Isles. Attached is a "Map Showing Water Table Contours" prepared by Derric Isles (Map). Derric provided arrows indicating the direction of ground water flow as previously discussed in this letter. The southeast end of the Lake has the steepest hydraulic gradient due to the shorter distance to the Rivers. The extension of the Lake by a Canal is believed to increase the hydraulic gradient out of the southeast end of the Lake resulting in greater seepage losses from the Lake.

The Canal will increase the surface area of the Lake and result in an increase in evaporation. The water will be taken from McCook Lake.

Additionally, the Canal will bring the Lake closer to an irrigation well owned and operated by Mike Chicoine. We believe the Canal will feed the cone of depression created by the operation of the Chicoine irrigation well increasing the impact on McCook Lake.

We believe the Laws of South Dakota protect the water rights of its citizens and should be applied in this situation. SDCL 46-1-1 states: "It is hereby declared that the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection."



The Canal will result in the appropriation of water from McCook Lake to meet the evaporation and seepage losses from the Canal. The Canal should be required to comply with SDCL 46-1-1. In wet years MLA may have the ability to supply water to the Canal. In dry years, MLA cannot meet the needs of the Lake if a canal is built. The MLA records indicate that in dry years as presently being experienced, the Canal would not have water without MLA pumping. The MLA pumps are not able to provide the Canal design water at any elevation but especially a surface elevation of 1090.

Taking of the Lake water is a taking from the MLA water right which must be appropriated as required by law. SDCL 46-1-3 states: "It is hereby declared that all water within the state is the property of the people of the state, but the right to the use of the water may be acquired by appropriation as provided by law".

Especially applicable for the Canal is SDCL 46-1-15 which states "Except as otherwise provided throughout this title, no person may appropriate the waters of this state for any purpose without first obtaining a permit to do so."

We ask that Mike Chicoine be required to obtain a water rights permit and the Chicoine permit is subservient to the water rights of MLA.

Sincerely,

A handwritten signature in dark ink, appearing to read "Dirk Lohry".

Dirk Lohry, President  
McCook Lake Association  
417 Lakeshore Drive  
McCook Lake, SD 57049  
712-251-6819  
[DirkLohry@aol.com](mailto:DirkLohry@aol.com)

Cc: Ron Duvall

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

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IN THE MATTER OF MCCOOK LAKE	)	
RECREATION AREA ASSOCIATION'S	)	
PETITION FOR DECLARATORY	)	FINDINGS OF FACT,
RULING REGARDING	)	CONCLUSIONS OF LAW,
APPROPRIATIVE PERMITS AND	)	AND DECISION
SHORELINE ALTERATIONS	)	

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This matter came before the South Dakota Water Management Board for hearing on August 2, 2023. Board members Peggy Dixon, Rodney Freeman, Tim Bjork, Leo Holzbauer, and Bill Larson attended the hearing and heard the evidence presented. Petitioner, McCook Lake Recreation Area Association (Association), was represented by John M. Hines. Dakota Bay was represented by Dean A. Fankhauser and Stacy R. Hegge. Ann F. Mines Bailey represented the Department of Agriculture and Natural Resources, Water Rights Program, and the Chief Engineer.

The Board, having considered the testimony and exhibits presented and having entered its oral decision and rulings on the parties' submissions, now enters the following:

A. FINDINGS OF FACT

1. On March 13, 2023, the Association submitted a petition for declaratory ruling. The petition requested that the Board issue a ruling that "the alteration of a public water body by a private party requires a permit for appropriation of water[.]"

2. The Association served the petition on Michael Chicoine and Dakota Bay, LLC on March 14, 2023.

3. The public notice was placed on the Department of Agriculture and Natural Resources website on June 12, 2023, and printed in The Leader-Courier (Union County) and the Yankton Daily Press and Dakotan (Yankton County) on June 22, 2023. The public notice provided that the Association was requesting that the Board “[i]ssue a declaratory ruling that Michael Chicoine/Dakota Bay, LLC are required to make an application to the Water Management Board for a permit to appropriate water before starting any construction or placement of works to expand McCook Lake for Michael Chicoine’s/Dakota Bay, LLC’s private use, because the proposed construction appropriates the water of McCook Lake and would also unlawfully impair the McCook Lake Recreation Area Association’s water rights.” The notice further provided that the hearing was scheduled for July 12, 2023.

4. On June 21, 2023, the Chief Engineer/Water Rights program filed a petition to participate in the contested case hearing. The Chief Engineer also requested a continuance from the July 12, 2023 hearing date and the setting of a special meeting to hear this matter.

5. The Chief Engineer’s motion to continue was granted and hearing was rescheduled for August 2, 2023.

6. McCook Lake was originally an oxbow of the Missouri River which became landlocked. It receives its water from runoff in the watershed, precipitation, and is believed to be hydrologically connected to groundwater

sources and the Missouri River. In 1981, the Water Management Board set the ordinary high-water mark for McCook Lake at 1090.7 feet mean sea level (msl).

7. The Association holds two water permits/rights for the purpose of stabilizing the McCook Lake water elevation (Water Right No. 5878A-3 and Water Permit No. 6479-3). Each of these authorizes the diversion of water from the Missouri River to McCook Lake. Pumping, however, is not authorized unless the elevation of McCook Lake is less than 1090.3 feet msl and the lake elevation may not be raised over 1090.3 feet msl.

8. Mr. Michael Chicoine has proposed the construction of a canal extending off the southeast corner McCook Lake to provide a waterway to/from a proposed residential development. The finished canal will be approximately 110-feet wide, 11-feet deep with a flat bottom, and approximately 1,800-feet in length.

9. The alteration of a shoreline requires a permit from the State. The South Dakota Department of Game, Fish and Parks (SDGFP) is the entity responsible for issuing shoreline alteration permits. The State's official position is that shoreline alteration permits may be required for any activity that may have an impact on the lake, lakebed or lake shore, including, but not limited to: The construction of ditches or channels; dredging or excavating to remove sediment, or rock; seawall installation or repairs; retaining wall or breakwater construction; rip-rap installation or repairs; filling or creating artificial beach; stockpiling brush, trees, vegetation, construction materials or debris in the lake or on the shore; and/or removal or clearing of aquatic vegetation.

10. Mr. Chicoine has applied for a shoreline alteration permit. During the review of the application for a shoreline alteration permit by the SDGFP,

Mr. Chicoine amended his plans and indicated that he would use his existing irrigation well to provide an initial fill of the canal and then maintain a water elevation in the canal to protect the integrity of the canal liner. SDGFP responded by indicating SDGFP would be holding his application for a shoreline alteration permit in abeyance until a proper water right permit was obtained.

11. Mr. Chicoine has applied for the additional use of his irrigation well, which is completed into the Missouri: Elk Point aquifer, for the purpose of maintaining the integrity of the canal liner (Water Permit Application No. 8744-3.) That permit application is currently pending before the Water Management Board.

12. South Dakota Codified Law, section 46-1-15 provides "Except as otherwise provided throughout this title, no person may appropriate the waters of the state for any purpose without first obtaining a permit to do so,"

13. Additionally, SDCL § 46-5-10 provides "Any person intending to acquire a right to beneficial use of water shall, before starting construction or placement of works for that purpose or before taking the water from any constructed works, make an application to the Water Management Board for a permit to appropriate water, in the form required by rules promulgated pursuant to chapter 1-26 by the board."

14. "Appropriation" is not defined in statute. The plain meaning of "appropriation", however, is the exercise of control over property; to take exclusive possession of; or to set apart for or assign to a particular use.

15. The Board heard testimony from Julie Burhoop. Ms. Burhoop serves as the vice president of communications for the Association. The Association

spends from \$50,000 to over \$150,000 per year pumping water from the Missouri River into McCook Lake. Ms. Burhoop additionally testified that the proposed canal would necessarily use McCook Lake water. She further testified that the Association does not have the pumping capacity and the pipeline cannot handle more than the current appropriation allowed for pumping of water into McCook Lake.

16. Dirk Lohry also provided testimony to the Board. Mr. Lohry is the current president of the Association. Mr. Lohry testified that he has measured McCook Lake weekly since 2011. The average fall of the elevation is 3.7 feet and has a range of 0 to 6 feet. Mr. Lohry testified that there would be no water for the proposed canal if the Association did not pump. He further testified that McCook Lake would dry up without the Association's pumping. Mr. Lohry additionally testified that water is leaving the lake through evaporation and leaching. While he feels they know what amount of what is lost through evaporation, the amount lost through leaching varies. He further testified that clay liners may work initially but will dry up and crack and allow leaching.

17. Kip Rounds, a regional supervisor for SDGFP also presented testimony to the Board. One of Mr. Rounds' duties is the review of applications for shoreline alterations. Mr. Rounds described the shoreline alteration permitting process and indicated that the permitting process does not involve public hearing. The most common type of shoreline alteration applications he has seen has been for shoreline stabilization. He further testified that the only shoreline alteration application for expansion of a lake that Mr. Rounds has seen is Mr. Chicoine's application.

18. Mr. Rounds further testified that the engineers for SDGFP determined that the soils present at the location for the construction of the proposed canal are susceptible to seepage. To mitigate seepage, those engineers recommended a clay liner. Should the clay liner dry out, it could become compromised to a point where it would not prevent seepage.

19. Chief Engineer Eric Gronlund testified before the Board as well. Mr. Gronlund testified that water permits are required when the water will be under the possession or control of the user. The construction of a canal as proposed by Mr. Chicoine does not result in the possession or control of the water and, therefore, it is not an appropriation of water. Mr. Gronlund further testified that the elevation levels of the lake and the elevation levels of the canal may not correspond at all times due to the berm which is to be constructed at the end of the canal.

20. Mr. Gronlund testified regarding the appropriation process in South Dakota and the different types of permits available including a standard or traditional type of permit which is required for an appropriation that occurs annually and a temporary permit for the use of public waters for construction, testing, and drilling purposes which has a limited duration. He stated that the initial fill for the proposed canal could be accomplished without an ongoing standard appropriative permit, but through a temporary permit for the use of public water for construction, testing, and drilling purposes.

21. Additionally, Mr. Gronlund testified that there are currently federal and state regulatory processes in place for a project like Mr. Chicoine's through

the United States Army Corps of Engineer 404 permitting program and SDGFP's shoreline alteration permitting process.

22. Mr. Gronlund is charged with protecting the waters of the state from waste and implementation of South Dakota's water permitting system.

Mr. Gronlund stated that the canal, if constructed as proposed, would become part of McCook Lake and would not be appropriating water from McCook Lake.

Mr. Gronlund also testified under natural conditions that McCook Lake is essentially a representation of the ground water table. Making matters more complicated is the entrenchment (or scouring causing a lowering of the bed) of the Missouri River which is lowering the ground water table in the area.

Mr. Gronlund also testified of other similar projects (the expansion of a shoreline or construction of a canal) that have not been required to obtain a standard or traditional water permit.

23. Michael Chicoine additionally provided testimony regarding his application for a water right permit and associated documents.

24. Once constructed, the canal extends the shoreline of the lake and becomes part of the lake.

25. The construction of the proposed canal does not constitute an ongoing appropriation of McCook Lake water and, therefore, does not require a standard or traditional water right.

26. The initial fill of the proposed canal can be accomplished through the issuance of a temporary permit for the use of public waters for construction, testing, or drilling purposes pursuant to SDCL § 46-5-40.1.

27. Any finding of fact more properly designated as a conclusion of law shall be treated as such.

#### B. OBJECTIONS TO FINDINGS OF FACT

Water Rights filed Proposed Findings of Fact and the Petitioner filed objections and proposed alternate findings. In compliance with SDCL § 1-26-25, Petitioner's Objections to the Proposed Findings of Fact are accepted, modified, or rejected as follows:

1. Petitioner objected to Proposed Findings Paragraph 1 and alleged that it misstates the relief requested in the Petition and states: "The Association's Petition requests "For the Board to issue a Declaratory Ruling finding that the expansion of a public body of water for private use or gain (such as by altering the shoreline of a lake and connecting a "canal") requires a permit to appropriate water." This is not an accurate recitation of the relief requested in the Petition. Rather, Water Rights proposed fact #1 is taken verbatim from the Petition. Alternative Finding to Paragraph 1 is DENIED.
2. Petitioner objects to Proposed Findings Paragraph 19, specifically the sentence "The construction of a canal as proposed by Mr. Chicoine does not result in the possession or control of the water and, therefore, it is not an appropriation of water." The Proposed Finding is consistent with the evidence and testimony presented to the Board. No alternative Finding is proposed. Petitioner's objection is noted.
3. Petitioner objects to Proposed Finding 25 and asserts "The Association objects to Paragraph 25 of the Proposed Findings of Fact

because (a) the conclusion itself is wrong; and (b) the correct question is not whether an ongoing appropriation exists, but whether the canal "uses" water from McCook Lake. See SDCL § 46-1-3." This is merely a portion of Petitioner's argument at Hearing. No alternative Finding is proposed. Petitioner's objection is noted.

#### C. CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Board makes the following Conclusions of Law:

1. The Board has jurisdiction to entertain this request for a declaratory ruling pursuant to SDCL § 46-2-5 and ARSD 74:02:01:46.
2. The Chief Engineer is a proper party to this action. Additionally, the Chief Engineer filed a timely petition to participate in the matter.
3. Michael Chicoine, and Dakota Bay, LLC are also proper parties to this matter. Because the Association personally served Mr. Chicoine and Dakota Bay, LLC, neither were required to additionally file a petition to participate in the contested case proceedings.

#### D. OBJECTIONS TO CONCLUSIONS OF LAW

Water Rights filed Proposed Conclusions of Law and Petitioner filed objections to the proposed conclusions of law. In compliance with SDCL § 1-26-25, Petitioner's Objections to the Proposed Conclusions of Law are accepted, modified, or rejected as follows:

1. Petitioner objects to Paragraph 2 of the Proposed Conclusions of Law and alleges that the Chief Engineer is not a proper party to the action

and cites to SDCL § 46-2A-4 for this proposition. This assertion misunderstands the role of the Chief Engineer in the water appropriation methodology in South Dakota. Additionally, the Chief Engineer filed a timely petition to participate in the matter. No alternative Conclusion is proposed. Petitioner's objection is noted.

2. The Petitioner objects to Paragraph 3 of the Proposed Conclusions of Law and asserts that Dakota Bay, LLC/Michael Chicione were not proper parties pursuant to § SDCL 46-2A-4. At the hearing, the Board determined that they were a necessary, original party, additionally, the Association personally served Mr. Chicoine and Dakota Bay, LLC. No alternative Conclusion is proposed. Petitioner's objection is noted.

#### E. DECISION

The Board hereby **DENIES** the requested relief and declares that Mr. Chicoine's/Dakota Bay's canal is not an appropriation of McCook Lake water and does not require a standard or traditional permit from this Board.

Dated this 12 day of October, 2023.

BY THE BOARD:

Bill Larson

Bill Larson (Oct 12, 2023 16:42 CDT)

William Larson, Chairman  
South Dakota Water Management Board

1 STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

2 COUNTY OF UNION

FIRST JUDICIAL CIRCUIT

3  
4  
5  
6 IN THE MATTER OF WATER  
7 PERMIT APPLICATION NO. 8744-3,  
8 DAKOTA BAY, LLC

Case No. 63CIV23-000172

9  
10 Transcript of Proceedings  
11 August 2, 2023

12  
13  
14 BOARD MEMBERS PRESENT

15 William Larson, Chairman  
16 Leo Holzbauer  
17 Rodney Freeman  
18 Tim Bjork  
19 Peggy Dixon

20 David M. McVey, Counsel for the Board  
21  
22  
23  
24  
25

1 simply say that the statutes 46 -- my apologies, I have the  
2 wrong notebook. First, the rules that he cites in his motion  
3 are the Rules of Professional Conduct, and he refers to the  
4 scope of the Rules of Professional Conduct. It specifically  
5 provides that they are designed to be guidance, they are not  
6 designed to be used as a weapon, and they are not to be used  
7 necessarily to disqualify counsel in a matter.

8           Second, I would say there is no conflict. Mr. McVey  
9 represents the board, I represent the Water Rights Program, and  
10 it's done by design of the legislature. So our office, this is  
11 not the only instance where the office represents both the  
12 board and the program. And to any extent that there might be a  
13 conflict, I would argue that it is waived by the legislature in  
14 the enactment of 46-2-4 and 46-2-4.1.

15           Additionally, I'll point out that Rule 1.7 allows a  
16 lawyer to represent, if there is a concurrent conflict, if the  
17 lawyer believes he is able to do so, it is not prohibited by  
18 law, no assertions by one client in conflict or against another  
19 client, and there is informed consent. And here I would argue,  
20 even under 1.7, Mr. Hines and the association are not the  
21 client. So I question whether or not he has standing. And  
22 two, as long as Mr. McVey believes he can represent the board  
23 fairly and appropriately and as long as I believe I can  
24 represent the board, we have satisfied the requirements of Rule  
25 1.7.

1 MS. BINEGAR: Holzbauer.

2 MR. HOLZBAUER: Aye.

3 MS. BINEGAR: Larson.

4 CHAIRMAN LARSON: Aye. The motion to disqualify Water  
5 Management Board's legal counsel is hereby denied. We will  
6 move on to the next item on the agenda, which is to consider  
7 the motion and any responses to the motion to strike Dakota  
8 Bay's resistance, joinder, exhibits, and appearances regarding  
9 the McCook Lake Recreation Area Association's petition for  
10 declaratory ruling regarding appropriative permits and  
11 shoreline alteration that was filed by Mr. Hines on behalf of  
12 the McCook Lake Recreation Area Association. Mr. Hines, your  
13 motion.

14 MR. HINES: Thank you, Mr. Chairman. This is John  
15 Hines again. So I believe the board yesterday received the  
16 response from Ms. Hegge on behalf of Dakota Bay, and so I would  
17 just, in addition to what was submitted, offer a short response  
18 to that, which is that the rules and the South Dakota law do  
19 not state that a party who receives the declaratory ruling  
20 petition, as it's required to be served on a person who has a  
21 pecuniary interest, is entitled to receive that petition, the  
22 rule and the law do not say that that party is automatically a  
23 party to the declaratory ruling.

24 These declaratory rulings do not start as contested  
25 cases until someone files in opposition. The standard is

1 obligations without them to be allowed to be a party. Thank  
2 you.

3 CHAIRMAN LARSON: Thank you. Any questions by the  
4 board members? Hearing none, do I have a motion to either  
5 grant or deny the motion to strike Dakota Bay's resistance?

6 MR. FREEMAN: Mr. Chairman, Freeman. I would move to  
7 deny the motion to strike.

8 CHAIRMAN LARSON: Do I have a second to Mr. Freeman's  
9 motion to deny the motion to strike?

10 MS. DIXON: Dixon. Second.

11 CHAIRMAN LARSON: Can we have a roll call please?

12 MS. BINEGAR: Bjork.

13 MR. BJORK: Aye.

14 MS. BINEGAR: Dixon.

15 MS. DIXON: Aye.

16 MS. BINEGAR: Freeman.

17 MR. FREEMAN: Aye.

18 MS. BINEGAR: Holzbauer.

19 MR. HOLZBAUER: Aye.

20 MS. BINEGAR: Larson.

21 CHAIRMAN LARSON: Aye. The motion to strike Dakota  
22 Bay's resistance is hereby denied. We will move on to the next  
23 item on the agenda, which is to consider the McCook Lake  
24 Recreation Area Association's petition for declaratory ruling  
25 filed by Mr. John Hines on behalf of the McCook Lake Recreation

1 still want me to read it?

2 CHAIRMAN LARSON: What I would prefer to do is just  
3 make the stipulation part of the record in the case without  
4 having you read every word. Any objection to that?

5 MS. MINES-BAILEY: Mr. Holzbauer and Ms. Dixon do not  
6 have copies of the stipulation. That would be the only  
7 advantage of reading it.

8 MR. HINES: It's a short stipulation. I can read it.  
9 So for those who can't read the stipulation, this is an  
10 agreement between the parties in the declaratory ruling action.  
11 The parties in the above-entitled action, McCook Lake  
12 Recreation Area Association, the Chief Engineer, and Dakota Bay  
13 hereby stipulate to the following facts. One, McCook Lake was  
14 originally an oxbow of the Missouri River which became  
15 landlocked. It receives its water from runoff in the  
16 watershed, precipitation, and is believed to be hydrologically  
17 connected to ground water sources in the Missouri River. In  
18 1981, the Water Management Board set the ordinary high water  
19 mark for McCook Lake at 1090.7 msl.

20 Two, the association holds two water permits/rights  
21 for the purpose of stabilizing the McCook Lake water elevation,  
22 water right number 5878A-3 and water permit number 6479-3.  
23 Each of these authorizes the diversion of water from the  
24 Missouri River to McCook Lake. Pumping, however, is not  
25 authorized unless the elevation of McCook Lake is less than

1 1090.3 feet msl and the lake elevation may not be raised over  
2 1090.3 feet msl.

3         Number three, Mr. Michael Chicoine has proposed the  
4 construction of a canal extending off of the southeast corner  
5 of McCook Lake to provide a waterway to and from a proposed  
6 residential development. The finished canal will be  
7 approximately 110 feet wide, 11 feet deep with a flat bottom  
8 and approximately 1800 feet in length.

9         Number four, the alteration of a shoreline requires a  
10 permit from the State. The South Dakota Department of Game,  
11 Fish and Parks is the entity responsible for issuing shoreline  
12 alteration permits. The State's official position is that  
13 shoreline alteration permits may be required for any activity  
14 that may have an impact on the lake, lake bed or lake shore,  
15 including, but not limited to the construction of ditches or  
16 channels; dredging or excavating to remove sediment or rock;  
17 seawall installation or repairs; retaining wall or break water  
18 construction; rip-rap installation or repairs; filling or  
19 creating artificial beach; stockpiling brush, trees,  
20 vegetation, construction materials or debris in the lake or on  
21 the shore; and/or removal or clearing of aquatic vegetation.

22         Number five, Mr. Chicoine has applied for a shoreline  
23 alteration permit. During the review of the application for a  
24 shoreline alteration permit by the South Dakota Department of  
25 Game, Fish and Parks, Mr. Chicoine amended his plans and

1 indicated that he would use his existing irrigation well to  
2 maintain the water elevation in the canal to protect the  
3 integrity of the canal liner. Game, Fish and Parks responded  
4 by indicating Game, Fish and Parks would be holding his  
5 application for a shoreline alteration permit in abeyance until  
6 a proper water right permit was obtained.

7 Number six, Mr. Chicoine has applied for the  
8 additional use of his irrigation well for the purpose of  
9 maintaining the integrity of the canal liner, water permit  
10 application number 8744-3. That permit is currently pending  
11 before the Water Management Board. Dated this 30th day of July  
12 2023, and signed by attorneys for the parties.

13 CHAIRMAN LARSON: Thank you, Mr. Hines. Further  
14 evidence.

15 MR. HINES: Back to the original question, Mr.  
16 Chairman. The additional procedural matters that were raised,  
17 would you like me to address those at closing?

18 CHAIRMAN LARSON: Yes.

19 MR. HINES: I will go ahead and call my first witness,  
20 Julie Burhoop. Julie. Are we going to do opening statements?

21 CHAIRMAN LARSON: That's fine.

22 MR. HINES: Julie, I'm sorry, I called you too soon.  
23 Again, I'm John Hines, attorney for the McCook Lake  
24 Association. McCook Lake, South Dakota, is a unique lake in  
25 the state of South Dakota in that it is sustained by pumping

1 and tear so we have a lot more maintenance, and so last year we  
2 spent over \$150,000.

3 Q. And where does the money for the association generally  
4 come from?

5 A. Mostly fund raising efforts. The city gives \$25,000  
6 per year, and everything else is fund raised.

7 Q. When you say city, is that the City of North Sioux  
8 City, South Dakota?

9 A. It is.

10 Q. And McCook Lake is a public lake, correct?

11 A. Correct.

12 Q. The McCook Lake Association doesn't control who in the  
13 public is allowed to use the lake.

14 A. Not at all.

15 Q. And the association doesn't have the authority to tax  
16 anyone; is that correct?

17 A. No, we are a nonprofit volunteer organization.

18 Q. Can you tell me in an average year when the  
19 association starts pumping and when you stop?

20 A. We start pumping every year in the spring usually in  
21 March or April as soon as the river levels get high enough for  
22 us to do so. We continue pumping until the water level  
23 reaches -- well, we pump continuously just to maintain the lake  
24 over the summer, even once we do reach an elevation of 1088,  
25 and then we shut the pumps off roughly in the end of September.

1 Q. Can you turn to what's been marked as Exhibit 3. The  
2 parties have stipulated that the association holds two water  
3 rights permits. As you flip through Exhibit 3, which is 11  
4 pages long, does this appear to be a copy of those documents?

5 A. Correct.

6 Q. Have you seen these before as VP of communications for  
7 the association?

8 A. I have.

9 MR. HINES: I would offer Exhibit 3.

10 CHAIRMAN LARSON: Stipulated. I presume there is no  
11 objection.

12 MS. MINES-BAILEY: No objection.

13 CHAIRMAN LARSON: Exhibit 3 is admitted.

14 EXHIBITS:

15 (Exhibit Number 3 received into evidence.)

16 Q. (BY MR. HINES) On page two of that exhibit, can you  
17 read to me how many gallons per minute the association is  
18 authorized to pump?

19 A. 12,000 gallons per minute.

20 Q. Does the association's pumps ever reach that level?

21 A. They do.

22 Q. They reach 12,000 if you turn them all the way up?

23 A. Yes.

24 Q. But you are not authorized to pump any more than that?

25 A. Correct.

1 Q. What's the reason that the association filed the  
2 petition for declaratory ruling?

3 A. We have Dakota Bay or whoever would want to expand  
4 McCook Lake would have to use lake water to help fill the  
5 canal. If there's not a separation between another body of  
6 water and McCook Lake, it's all one body of water, it uses some  
7 of the water. We don't have the pumping capacity, we don't  
8 have -- the pipeline that we have cannot handle pumping any  
9 more than 12,000 gallons a minute, and we don't have the budget  
10 to pump any more water than what we already have.

11 Q. Are you aware of anyone other than Dakota Bay and Mr.  
12 Chicoine who has plans to expand McCook Lake?

13 A. I do not have any knowledge of that.

14 Q. Turn to Exhibit 6, it should be Mr. Chicoine's  
15 application for a shoreline alteration. The parties have  
16 stipulated that he has done this, but does this appear to be a  
17 copy of that document?

18 A. Yes.

19 Q. You have reviewed it before?

20 A. I have.

21 MR. HINES: I would offer Exhibit 6.

22 CHAIRMAN LARSON: I am assuming no objections.

23 MR. FANKHAUSER: No objection.

24 CHAIRMAN LARSON: Exhibit 6 is admitted.

25 EXHIBITS:

1 MS. MINES-BAILEY: No objections.

2 MR. FANKHAUSER: I would object only that it seems  
3 that it's a graph from a larger report that is not complete.

4 CHAIRMAN LARSON: I'll overrule that objection.  
5 Exhibit 5 is admitted.

6 EXHIBITS:

7 (Exhibit Number 5 received into evidence.)

8 Q. (BY MR. HINES) Dirk, is it a fair summary to say that  
9 the sharp upward line on these graphs represents when the  
10 association begins pumping, the flat area is the sustained  
11 pumping, and then the sharp downward line is when the pumps  
12 shut off?

13 A. That is a correct characterization of that trend on  
14 that line, yes.

15 Q. What's the average annual fall if you average these  
16 lines together?

17 A. If you averaged it over the past 10 years, the average  
18 is 3.7 feet. It has a range of 0 feet to six feet. Last year  
19 it was six feet.

20 Q. When you say a range of zero, what does that mean?

21 A. That means it didn't go down that year.

22 Q. What happened that year?

23 A. That was 2019 and it was a very wet year. 2011 it  
24 didn't go down, it kind of went down, but not enough below the  
25 level we haven't measured.

1 Q. When the water level goes down in the lake every year,  
2 what will happen to the water level in the canal?

3 A. They are hydrologically connected and the canal is  
4 connected to the lake. If the lake goes down, the canal level  
5 goes down. If the canal level would somehow go up, then the  
6 lake level would go up because water finds its own level.

7 Q. On your chart, it appears there was at one time the  
8 lake level fell below the elevation of 1082; is that correct?

9 A. That is correct.

10 Q. Do you know what the specification for the bottom of  
11 the elevation is for Mr. Chilcoine's canal?

12 A. The graph that I have seen from an application, I  
13 think it was for the Corps of Engineers, that the bottom of  
14 that canal was at 1082.

15 Q. If the lake is below 1082, would there be any water in  
16 the canal?

17 A. No.

18 Q. Dirk, can you turn to Exhibit 10.

19 A. 10, yes.

20 Q. Did you take this photo, Dirk?

21 A. Yes.

22 Q. What does this show?

23 A. That shows the installation of a pipe going into  
24 McCook Lake. It was damaged I think early last year, and it  
25 had to be replaced.

1 drying out and cracking or otherwise failing?

2 A. I did not analyze that.

3 Q. Isn't it true if the association doesn't pump any  
4 water, that in dry years there won't be any water in the lake  
5 or very little?

6 A. Repeat your question please.

7 Q. Is it true that if the association does not pump any  
8 water in a dry year, that the level of the lake will be very  
9 low?

10 A. Yes.

11 Q. Could the canal use the lake if the McCook Lake  
12 Association did not pump water?

13 A. Repeat again please.

14 Q. Can the canal use the lake if the McCook Lake  
15 Association does not pump any water?

16 A. I don't know what your definition of use is.

17 Q. Will any boats be able to access the lake from the  
18 water?

19 A. Unlikely if there's only two foot of water there.

20 Q. So isn't it fair to say that the canal's existence  
21 will depend on the association's efforts pumping water?

22 A. Their ability to access from the canal to McCook Lake,  
23 but he may have other uses attendant.

24 Q. Is access a type of use?

25 A. Is access a type of use?

1 CHAIRMAN LARSON: I'm going to sustain that objection.

2 Q. (BY MR. HINES) Mr. Gronlund, were you at the  
3 committee hearing on HB 1134A?

4 MS. MINES-BAILEY: Objection. Foundation and  
5 relevance. I'm sorry, not foundation, just relevance.

6 CHAIRMAN LARSON: Sustain that.

7 Q. (BY MR. HINES) Mr. Gronlund, is there any public  
8 hearing or input for the McCook Lake expansion proposed by  
9 Dakota Bay?

10 A. Specifically for the canal, not that I'm aware of.

11 Q. If this board ruled that Mr. Chicoine would be  
12 required to obtain an additional water rights permit for the  
13 waters of McCook Lake, would there be the opportunity for  
14 public hearing and public input?

15 A. The water right permitting process has a public notice  
16 and the ability to petition.

17 Q. Is that a yes?

18 A. Yes. Sorry.

19 MR. HINES: Thank you. No further questions.

20 CHAIRMAN LARSON: Ms. Mines-Bailey?

21 MS. MINES-BAILEY: Thank you.

22 CROSS-EXAMINATION

23 BY MS. MINES-BAILEY:

24 Q. Eric, how long have you been Chief Engineer?

25 A. Since February 26th or 27th of 2020, two weeks before

1 noticed set of facts and requested relief as modified by Mr.  
2 Hines in the June 30 hearing.

3           Regardless, I want to be very clear about what the  
4 board's jurisdiction is here right now. What you are being  
5 asked to determine is not whether it's okay or an appropriation  
6 should issue, but it's whether or not one is necessary. And  
7 you have heard testimony that this does not constitute an  
8 appropriation. The statutes require that before anybody  
9 appropriates water, they have to obtain a permit. An  
10 appropriation is not defined by statute, but you use the common  
11 language, and an appropriation means a setting aside, a setting  
12 apart, a designation for a particular purpose.

13           This particular project, enlarging the lake, adding a  
14 canal, does not set aside any water. There's no diversion  
15 after that initial fill. There is no withholding of the water  
16 from anybody else. There is nothing about it that indicates  
17 that it requires a traditional appropriation permit.

18           And I don't deny that the initial fill of the canal  
19 would require a permit, but that could be satisfied, as Mr.  
20 Gronlund testified, with a temporary permit for use of public  
21 waters for the purposes of construction, drilling, and testing.  
22 As Mr. Gronlund noted, to logic out this particular request  
23 means that even a child playing and removing a bucket full of  
24 sediment would require a water appropriation. It's absurd.  
25 But any homeowner around the lake would also be required to get

1 an appropriation if they were placing a permanent dock.

2           You heard testimony that there are other canals, other  
3 modifications throughout, of shorelines throughout the state  
4 which have expanded lakes, and the state has never required a  
5 permit to appropriate. Of course the Chief Engineer acts as  
6 advisor to the board and is charged with implementing and  
7 overseeing the water appropriations and protecting the waters  
8 from waste.

9           The Chief Engineer is going to look at this ruling.  
10 So even if it is McCook Lake specific, Mr. Gronlund or his  
11 predecessors will look at what the board has ruled and try to  
12 determine what the board would have him or her do with any  
13 future situation. And to the extent that the public notice  
14 requests a ruling from the board that Mr. Chicoine must obtain  
15 a permit prior to starting any construction or placement of  
16 works, I would point the board to South Dakota Codified Law  
17 46-5-10. That statute provides *Any person intending to acquire*  
18 *a right to beneficial use of water shall, before starting*  
19 *construction or placement of works for that purpose or before*  
20 *taking the water from any constructed works, make an*  
21 *application to the Water Management Board. If it is an*  
22 *appropriation, the law already requires the obtaining of a*  
23 *permit prior to the placement of those waters to beneficial*  
24 *use.*

25           For those reasons, the Chief Engineer would request

1 McCook Lake Recreation Area Association.

2 MR. DUVALL: I don't have Leo yet. Peggy is on.

3 (Brief pause)

4 CHAIRMAN LARSON: Back on the record. All right -- --

5 MR. HOLZBAUER: Can you hear me?

6 CHAIRMAN LARSON: We can hear you, Leo. The issue  
7 before the board right now is to either grant or deny the  
8 petition for declaratory ruling that was filed by the McCook  
9 Lake Recreation Area Association. Do I have a motion to either  
10 grant or deny the petition?

11 MR. FREEMAN: Mr. Chairman, this is Freeman. I would  
12 move that we deny the relief requested in this matter in that  
13 the building of the canal, in our opinion, is not an  
14 appropriation of water and doesn't require a permit from this  
15 department or the water board.

16 CHAIRMAN LARSON: Do I have a second to that motion?

17 MR. BJORK: Second.

18 MS. DIXON: Dixon. Second.

19 CHAIRMAN LARSON: Petition for declaratory ruling  
20 filed by the McCook Lake Recreation Area Association, there's  
21 been a motion to deny it. Let's have a roll call.

22 MS. BINEGAR: Bjork.

23 MR. BJORK: Aye.

24 MS. BINEGAR: Dixon.

25 MS. DIXON: Aye.

ApplicationID:  
8864

Application for Shoreline Alteration of a  
South Dakota Public Water Body

RECEIVED

JUL 24 2023

OFFICE OF  
Project WATERRESS: SE1/4 of 16-89-48 Union County, SD  
North Sioux City, SD, SD 57049



Applicant Name: Mike Chicoine

Business Name: N/A

Mailing Address: 32926 482nd Avenue Jefferson, SD  
57038

Phone Number: (712) 898-9173

Email: mjchicoine24@gmail.com or brenda.gabel@gmail.com

Proposed Date Range: 03/01/2022 - 09/01/2022

**Water Body:**

Name/Description: The canal will run from where we have the marker placed, north, to the Southeast corner of McCook Lake.

Location of water body: **County:** Union | **Latitude:** 42.52103 | **Longitude:** -96.50865 | **TRS:** 089N048W16



**Purpose of Project:**

To construct a waterway southerly from McCook Lake in order to provide lake access to existing residential lots, future lots to be developed and the potential relocation of the McCook Lake Boat Ramp for the city of North Sioux City, SD.

**Description of Project:**

To excavate a waterway (canal) having a 90-foot wide water surface to allow for 2-way no-wake boat travel to and from residential lots and the proposed relocated boat ramp. Proposed water depth of 8.0 feet with a flat bottom and 2:1 side slopes. Possible private boat docks on both sides leaving a boat travel width of about 46 feet. No wetland areas are to be affected. The area is currently mainly farmland with bordering grass areas. The excavated area will consist of an 11-foot deep, 110-foot wide canal that is approximately 1,800 feet in length.

Has a portion of the project already been completed? No

**Description of Portion**

Footprint of Project Area (sq. ft.): 522720

Linear Feet of Shoreline: 1800

Type and estimated amount of materials to be excavated: Sand 56000CY

Type and estimated amount of materials to be placed: N/A

**Adjacent Landowners:**

Note: Both sides of the canal are owned by Mike Chicoine.

**Comments:**

No additional comments at this time

MCLDR\_AR\_094

Signature of Applicant: Mike Chicoine

Date: 12/31/2021

MCLDR\_AR\_095

STATE OF SOUTH DAKOTA )  
: SS  
COUNTY OF UNION )  
IN THE MATTER OF MCCOOK )  
LAKE RECREATION AREA )  
ASSOCIATION'S PETITION FOR )  
DECLARATORY RULING REGARDING )  
APPROPRIATIVE PERMITS AND )  
SHORELINE ALTERATIONS )

IN CIRCUIT COURT  
FIRST JUDICIAL COURT  
(CIV NO. 63CIV23-000171)

CHRONOLOGICAL  
INDEX

Entry No.	Date of Entry	Document	Bates Numbering (Prefix MCLDR_AR #)
1.	March 13, 2023	Letter from Cray Huff containing: Petition for Declaratory Ruling, Personal letter from Dirk Lohry, and receipts for service	1-10
2.	June 15, 2023	Instruction to Newspaper for publication on June 15, 2023 for Notice of Hearing	11-12
3.	June 22, 2023	Affidavit of Publication for Notice of Hearing from the Lead-Courier and Yankton Daily Press and Dakotan	13-17
4.	June 22, 2023	Letter from Office of Attorney General containing: Notice of Appearance, Motion for Continuance and Scheduling a Special Meeting, Petition, proposed Order Granting the Chief Engineer's Motion for Continuance, and Placing the Request from a Special Meeting on the July Agenda and Certificate of Service	18-27
5.	June 23, 2023	Notice of Entry of Order and Notice of Hearing and Certification	28-30
6.	June 26, 2023	From Cray Huff containing: Resistance to Motion for Continuance and Scheduling a Special Meeting and proposed Order denying Chief Engineer's motion for continuance and placing request for special meeting on July agenda and Certificate of Service	31-37
7.	June 27, 2023	Notice of Hearing and Certification	38-40
8.	June 28, 2023	From Cray Huff containing: Appeal of Prehearing Ruling for Continuance and Certificate of Service	41-44
9.	June 30, 2023	Water Management Board Meeting - board packet cover letter, meeting agenda, and meeting minutes	45-55
10.	July 5, 2023	From Cray Huff containing: Motion to Disqualify Water Management Board's Legal Counsel and Certificate of Service	56-58
11.	July 6, 2023	Notice of Affirmation of Order and Notice of Hearings and Certification	59-61
12.	July 13, 2023	Email correspondence between John Hines and Ron Duvall confirming how exhibits should be numbered.	62-63

13.	July 17, 2023	From Dirk Lohry containing: Affidavit regarding naming of McCook Lake Recreation Area Association	64-65
14.	July 19, 2023	From Cray Huff containing: Motion for Subpoenas	66-67
15.	July 24, 2023	From Dakota Bay attorneys containing: Notices of Appearance, Certificate of Service, Copy of Chief Engineer's Recommendation and Report for Permit No. 8744-3 (labeled Exhibit 400), SD GF&P Application ID 8864 for Shoreline Alteration (labeled Exhibit 401)	68-95
16.	July 24, 2023	Letter from Office of Attorney General containing: Chief Engineer's prehearing brief and Certificate of Service	96-112
17.	July 24, 2023	From Dakota Bay attorneys containing: Resistance to Petition to Declaratory Ruling filed by the McCook Lake Rec. Area Assoc. & Joinder to the Chief Engineer's Prehearing Brief, Certificate of Service, and SD GF&P Application ID 8864 for Shoreline Alteration (labeled Exhibit 800)	113-117
18.	July 24, 2023	Letter from Office of Attorney General containing: Chief Engineer's response to Motion for Subpoena of Secretary Rohling and Certificate of Service	118-120
19.	July 24, 2024	Notice of Entry of Order and Certification for the Prehearing Chair signed Order granting in part McCook Lake Rec Area Assoc.'s motion for subpoenas and two subpoenas	121-126
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35.	August 2, 2023	Exhibit 11-Department of Agriculture and Natural Resource's speaking points on a bill introduced during the 2023 Legislature--Not Offered	Not in record
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## CHAPTER 46-1

### DEFINITIONS AND GENERAL PROVISIONS

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  - 46-1-2 Development of water resources for public benefit.
  - 46-1-3 Water as property of people--Appropriation of right to use.
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  - 46-1-5 Domestic use of water takes precedence over appropriative rights--Governmental use.
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  - 46-1-9 Vested rights defined.
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  - 46-1-11 Violations of water use laws as misdemeanors--Civil fine in addition--Each day as separate violation--Exemption of board and commission actions.
  - 46-1-12 Suspension or cancellation of permit or license.
  - 46-1-13 Grant of water right for use outside state.
  - 46-1-14 Terms and conditions of permits and licenses--Amendment.
  - 46-1-15 Permit required for appropriation of waters.
  - 46-1-16 Authority of chief engineer to issue permits--Scheduling application.
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#### **46-1-1. Use of water of state--Paramount interest of people--Conversion to public use.**

It is hereby declared that the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection.

**Source:** SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0101 (3).

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#### **46-1-2. Development of water resources for public benefit.**

It is hereby declared that the protection of the public interest in the development of the water resources of the state is of vital concern to the people of the state and that the state shall determine in what way the water of the state, both surface and underground, should be developed for the greatest public benefit.

**Source:** SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0101 (4); SL 1972, ch 237, § 1; SL 1978, ch 323, § 1.

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#### **46-1-3. Water as property of people--Appropriation of right to use.**

It is hereby declared that all water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation as provided by law.

**Source:** SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0101 (2); SL 1983, ch 314, § 1.

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**46-1-4. Beneficial use of water resources--Prevention of waste--Right to water from natural stream or watercourse.**

It is hereby declared that, because of conditions prevailing in this state, the 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 that the waste or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use of the water in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is limited to an amount of water reasonably required for the beneficial use to be served, and such right does not extend to the waste or unreasonable use or unreasonable method of diversion of water.

**Source:** SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0101 (1); SL 2011, ch 165, § 254.

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**46-1-5. Domestic use of water takes precedence over appropriative rights--Governmental use.**

It is the established policy of this state:

- (1) That the use of water for domestic purposes is the highest use of water and takes precedence over all appropriative rights, if it is exercised in a manner consistent with public interest as provided in § 46-1-2;
- (2) That the state may, through its institutions, facilities, and properties, and a water distribution system may acquire and hold rights to use water, which rights shall be protected to the fullest extent necessary for existing and future uses, but neither the state nor any water distribution system may acquire or hold any right to waste any water, to use water for other than its own purposes or to prevent the appropriation and application of water in excess of its reasonable and existing needs for useful purposes by other persons, subject to the rights of the state or a water distribution system to apply the water to use whenever necessity therefor exists.

**Source:** SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0101 (5); SL 1966, ch 259, § 1; SL 1972, ch 237, § 2; SL 1983, ch 314, § 2.

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**46-1-6. Definition of terms.**

Terms used in this title mean:

- (1) "Artesian water," any confined groundwater that is under sufficient pressure to rise above its confining bed;
- (2) "Artesian well," any well drilled into artesian waters which flows naturally or is pumped by mechanical means;
- (3) "Beneficial use," any use of water within or outside the state, that is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interests of the public of this state in the best utilization of water supplies;
- (4) "Board," the Water Management Board created by § 1-41-15;
- (5) "Chief engineer," the officer employed pursuant to § 46-2-3, or an authorized representative;
- (6) "Department," the Department of Agriculture and Natural Resources;
- (7) "Domestic use," use of water not exceeding eighteen gallons per minute on an average daily basis, except for larger domestic wells in operation before July 1, 1983, by an individual, or by a family unit or household, for drinking, washing, sanitary, and culinary purposes and other ordinary household purposes; irrigation of a noncommercial family garden, trees, shrubbery, or orchard not greater in area than one acre; eighteen gallons per minute or less for uses in schools, parks, and other public recreation areas; geothermal heat for a single household; or noncommercial on-farm alcohol production. The use of water supplied by a water distribution system for the preceding purposes, for the occupants of schools, hospitals, and other custodial care facilities and for fire protection is a domestic use as against appropriative rights having a priority after June 30, 1978. Stock watering is a domestic use. Use of water not exceeding eighteen gallons per minute on an average daily basis for livestock in a confinement operation, including water for drinking, sanitary and general welfare purposes and for like purposes by those caring for the livestock, is a domestic use. Use of groundwater

by water distribution systems, except for irrigation purposes is a domestic use except where groundwater and water in flowing streams constitute the same water supply source, but only to the extent the water was actually used before July 1, 1978;

- (8) "Dry draw," any ravine or watercourse not having an average daily flow of at least four-tenths cubic feet per second (twenty miner's inches) of water during the period May first to September thirtieth, inclusive, except for a body of water such as a natural or publicly owned lake;
- (9) "Energy industry use," the use of water in an amount in excess of one thousand acre-feet per year as a medium for carrying coal or other energy minerals, or in the extraction or refining of energy minerals;
- (10) "Energy industry user," a natural person, firm, partnership, limited liability company, association, syndicate, corporation, joint venture, public entity, or state or federal agency using or supplying water for energy industry use;
- (11) "Energy minerals," energy minerals as that term is defined in § 10-39A-1.1;
- (12) "Groundwater," water under the surface, whatever may be the geologic reservoir in which it is standing or moving;
- (13) "Large capacity well," a well capable of delivering water in excess of four one-hundredths cubic feet per second or eighteen gallons per minute;
- (14) "Municipal use," the use of water by the state through its institutions, facilities, and properties or by a municipality, and, with regard to municipal rights having a priority before July 1, 1978, by the inhabitants of the municipality, for household, custodial care, and fire protection purposes, whether supplied by the government or by a privately owned public utility or other agency, primarily to promote the life, safety, health, comfort, and business pursuits of the state, municipality and the inhabitants of the municipality. The term does not include the irrigation of crops on a commercial scale, even within the limits of the state institution, facility, property, or municipality, nor does it include large recreational uses such as lakes;
- (15) "Person," a natural person, a partnership, an association, a corporation, a municipality, the State of South Dakota, any political subdivision of the state, and any agency of the federal government;
- (16) "Secretary," the secretary of the Department of Agriculture and Natural Resources;
- (17) "Water distribution system," a system of piping, valves, storage tanks, pumps, and appurtenances by which water is conveyed for domestic or municipal use by a common distribution system, including a municipality as defined in § 9-1-1, a nonprofit rural water supply company as defined in § 10-36A-1, a water user district as defined in § 46A-9-2, a sanitary district as defined in chapter 34A-5, or homes, including mobile homes as defined in § 32-3-1, and manufactured homes as defined in § 34-34A-1.1 supplied by a common distribution system;
- (18) "Well," an artificial excavation or opening in the ground, made by means of digging, boring, drilling, jetting, or by any other artificial method, for the purpose of obtaining groundwater. Any series of openings, borings, or drillings developed and pumped collectively by a single pump unit shall be considered as one well;
- (19) "Well driller," any person or persons engaged in the commercial drilling or construction, redrilling, and rebuilding of wells in this state.

**Source:** SL 1955, ch 430, § 1; SL 1955, ch 431, § 1; SDC Supp 1960, §§ 61.0102, 61.0401 (1) to (9); SL 1966, ch 259, § 2; SL 1972, ch 237, §§ 3, 4; SL 1973, ch 279, § 1; SL 1978, ch 314, §§ 1, 2; SL 1981 (2d SS), ch 1, §§ 2, 8; SL 1982, ch 309, § 2; SL 1983, ch 314, §§ 3 to 8; SL 1987, ch 324; SL 1989, ch 382; SL 1991, ch 17 (Ex. Ord. 91-4), § 17; SL 1994, ch 351, § 111; SL 2012, ch 213, § 1; SL 2021, ch 1 (Ex. Ord. 21-3), §§ 14, 53, eff. Apr. 19, 2021.

#### **46-1-7. Standards of measurement--Flow of water--Volume of water--Miner's inch.**

The standard of the measurement of the flow of water shall be the cubic foot per second of time; and the standard of measurement of the volume of water shall be the acre-foot, being the amount of water upon an acre covered one foot deep, equivalent to forty-three thousand five hundred sixty cubic feet. The miner's inch shall be regarded as one-fiftieth of a cubic foot per second in all cases, except when some other equivalent of the cubic foot per second has been specially stated by the contract or has been established by actual measurement or use, or by court decree.

Source: SDC 1939, § 61.0138; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0124.

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**46-1-8. Beneficial use--Measure and limit of right to use of waters.**

Beneficial use is the basis, the measure and the limit of the right to the use of waters described in this title.

Source: SL 1955, ch 430, § 1; SL 1955, ch 431, § 1; SDC Supp 1960, §§ 61.0102 (6), 61.0401 (10).

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**46-1-9. Vested rights defined.**

The term, vested rights, used in this title means:

- (1) The right of a riparian owner to continue to use water actually applied to any beneficial use on March 2, 1955, or within three years immediately before that date to the extent of the existing beneficial use made of the water;
- (2) Use for domestic purposes as that term is defined in subdivision 46-1-6(7);
- (3) The right of a riparian owner to take and use water for beneficial purposes if the riparian owner was engaged in the construction of works for the actual application of the water to a beneficial use on March 2, 1955, and if the works were completed and water was applied to use within a reasonable time thereafter;
- (4) Rights granted before July 1, 1955, by court decree;
- (5) Uses of water under diversions and applications of water before the passage of the 1907 water law and not subsequently abandoned or forfeited.

Source: SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0102 (7); SL 1983, ch 314, § 9; SL 2011, ch 165, § 255.

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**46-1-10. Vested rights acquired before July 1, 1955, validated.**

All vested rights as defined in § 46-1-9 acquired before July 1, 1955, are hereby in all respects validated.

Source: SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0106.

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**46-1-11. Violations of water use laws as misdemeanors--Civil fine in addition--Each day as separate violation--Exemption of board and commission actions.**

Unless otherwise provided in this title, any person, firm, or corporation violating any of the provisions of chapters 46-4 to 46-10, inclusive, is guilty of a Class 2 misdemeanor. In addition, a civil fine of not more than five hundred dollars may be imposed for the violation. Each day of noncompliance with the provisions of this title shall be deemed a separate violation. Administrative actions of the department or Board of Water and Natural Resources, the Water Management Board, or the conservation commission are exempt from this section.

Source: SL 1955, ch 430, § 2; SL 1955, ch 431, § 2; SDC Supp 1960, §§ 61.9920, 61.9921; SL 1977, ch 347, § 1; SL 1981, ch 316, § 11.

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**46-1-12. Suspension or cancellation of permit or license.**

Any permit or license issued pursuant to this title may be suspended or canceled by order of the Water Management Board after a hearing pursuant to chapter 1-26 whenever the board finds that an individual permittee or licensee, or the agent or employee of either of them as the case may be, has violated any term of the permit or license. The board may suspend the permit or license for a period of up to one year for the first

violation; for up to three years for the second violation; and may cancel the permit or license for a third violation.

**Source:** SL 1977, ch 350; SL 1983, ch 314, § 10.

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**46-1-13. Grant of water right for use outside state.**

A water right may be granted for uses outside this state on the same basis and subject to the same terms and conditions as water rights are granted to persons for use of water within this state, subject to the principle of beneficial use as defined in subdivision § 46-1-6(3).

**Source:** SL 1978, ch 311; SL 1981 (2d SS), ch 1, § 11; SL 1983, ch 314, § 11.

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**46-1-14. Terms and conditions of permits and licenses--Amendment.**

The Water Management Board may issue any permit or license subject to terms, conditions, restrictions, qualifications, quantifications, or limitations on perpetuity consistent with this chapter which it considers necessary to protect the public interest and which are related to matters within the jurisdiction of the board. Water rights issued pursuant to this section may be amended by the board and priority is retained upon amendment. Upon amendment the board may alter terms, conditions, restrictions, qualifications, or quantifications consistent with this chapter.

**Source:** SL 1978, ch 312; SL 1983, ch 314, § 12.

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**46-1-15. Permit required for appropriation of waters.**

Except as otherwise provided throughout this title, no person may appropriate the waters of this state for any purpose without first obtaining a permit to do so.

**Source:** SL 1983, ch 314, § 13.

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**46-1-16. Authority of chief engineer to issue permits--Scheduling application.**

The provisions of § 46-1-14 notwithstanding, the board may promulgate rules pursuant to chapter 1-26 to delegate the authority to issue permits to the chief engineer if the applicant does not contest the recommendation of the chief engineer and no person has filed a petition to oppose the application as provided in chapter 46-2A. Upon such delegation, the recommendation of the chief engineer shall become the decision of the board and the chief engineer shall issue the permit as recommended. However, the chief engineer may schedule an application, even if uncontested, for hearing by the board pursuant to chapter 46-2A upon finding that an application presents important issues of public policy or public interest that should be heard by the board.

**Source:** SL 1990, ch 355, § 1; SL 1992, ch 254, § 85.

## CHAPTER 46-5

### APPROPRIATION OF WATER

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- 
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**46-5-1. Natural flow of stream or spring--Restrictions on riparian use.**

No landowner may prevent the natural flow of a stream, or of a natural spring from where it starts its definite course, or of a natural spring arising on his or her land which flows into and constitutes a part of the water supply of a natural stream, nor pursue nor pollute any of these, except as provided by § 46-5-2.

**Source:** SDC 1939, § 61.0101; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0137; SL 1983, ch 314, § 39; SL 2011, ch 165, § 265.

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**46-5-1.1. Obstruction of navigable watercourse or interference with stage, level, or flow of public waters prohibited--Contests resolved by Water Management Board.**

No person may obstruct the free navigation of any navigable watercourse within this state. No person, except under lawful authority to do so, may intentionally obstruct, tamper with, or interfere with the stage, level, or flow of the public waters of this state by any means, including a ditch, drain, or dike, so that the stage, level, or flow of water in any lake, stream, river, or other public watercourse is raised or lowered or its natural flow interfered with in any way. At the request of any person, unit of local government, or political subdivision of the state, any contest pertaining to the restrictions set forth in this section may be brought to the Water Management Board for resolution. The board may require the parties to any contested case under this section to submit the matter for mediation prior to a hearing before the board. Mediation may be informal or through a trained professional mediator as may be directed by the board. All costs of mediation shall be equally shared by the parties unless the parties agree to some other apportionment of costs. The parties shall report to the board at its

next regularly scheduled meeting the status of the mediation. If the parties are unable to resolve the matter through mediation, the matter shall be submitted to the board for resolution by contested case hearing. The board's ruling may be appealed to the circuit court under the provisions of chapter 1-26.

**Source:** SDC 1939, § 13.1615; SL 1955, ch 435; SDC Supp 1960, § 13.4522; SDCL, §§ 46-26-1, 46-26-2; SL 1983, ch 314, § 38; SL 1996, ch 264.

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**46-5-1.2. Removal of obstructions built by beavers if lands flooded or water rights impaired.**

No person owning land through which a watercourse passes may prohibit the removal of obstructions built by beavers in the watercourse, if the beavers have obstructed or interfered with the flow of water through the watercourse in a manner that floods land belonging to others or impairs existing water rights. Upon written request, the Department of Game, Fish and Parks may authorize removal of the beavers.

**Source:** SL 1987, ch 332, § 6.

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**46-5-2. Nonnavigable stream--Right to construct and maintain dam.**

Any person owning land through which any nonnavigable stream passes, may construct and maintain a dam across such nonnavigable stream if the course of the water is not changed, vested rights are not interfered with, and no land flooded other than that belonging to the owner of such dam or upon which an easement for such purpose has been secured.

**Source:** SDC 1939, § 61.0101; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0137.

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**46-5-3. Natural spring forming part of stream--Right to appropriate flow from spring.**

Nothing in § 46-5-1 or 46-5-2 may be construed to prevent the owner of land on which a natural spring arises and which constitutes the source or part of the water supply of a definite stream from acquiring a right to appropriate the flow from the spring as provided by law for appropriation of waters.

**Source:** SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0137; SL 1983, ch 314, § 40.

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**46-5-4. Priority of appropriative rights granted since March 7, 1907.**

Appropriative rights to water granted since March 7, 1907, are in full force and effect and their respective priority dates retained according to valid legal records.

**Source:** SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0108; SL 1983, ch 314, § 41.

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**46-5-4.1. Validation of prior licenses.**

Any license issued prior to January 1, 1983, by the chief engineer or the Water Management Board is hereby cured, legalized, and validated as fully as if the license had been issued in full compliance with all existing provisions of this title.

**Source:** SL 1983, ch 314, § 60.

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**46-5-5. Waters flowing in definite stream subject to appropriation--Beneficial use--Excessive appropriation not allowed.**

Subject to vested rights and prior appropriations, all waters flowing in definite streams of the state may be appropriated only as provided in chapters 46-1 to 46-10, inclusive. A water right does not constitute absolute ownership of the water, but shall remain subject to the principle of beneficial use. No appropriation in excess of the reasonable needs of the appropriators may be allowed.

**Source:** SDC 1939, § 61.0102; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0109; SL 1983, ch 314, § 42.

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**46-5-6. Appropriation of water for irrigation--Limitation of amount.**

In the issuance of permits to appropriate water for irrigation or in the adjudication of rights to the use of water for such purpose, the amount allowed may not be in excess of the rate of one cubic foot of water per second for each seventy acres, or the equivalent thereof, and the volume of water diverted for use may not exceed two acre-feet per acre, delivered on the land for a specified time each year. The Water Management Board may allow a greater diversion, in volume or rate or both, if the method of irrigation, any time constraints on diversion of water, or the type of soil so requires. However, no annual volume may be greater than three acre-feet per acre delivered to the land. The above rate of one cubic foot per second for each seventy acres does not apply in cases of flood water at such times when the flow of the stream is much in excess of the total recorded and approved rights on the stream.

**Source:** SDC 1939, § 61.0140; SL 1955, ch 430, § 1; SL 1957, ch 490, § 2; SDC Supp 1960, § 61.0126; SL 1976, ch 274; SL 1978, ch 308; SL 1996, ch 263, § 2.

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**46-5-6.1. Restrictions on appropriation of Missouri River water for irrigation.**

The seventy acre restriction set forth in § 46-5-6 does not apply to permits to appropriate water for irrigation from the Missouri River. The Water Management Board shall establish by rules promulgated pursuant to chapter 1-26, acreage restrictions to apply to permits to appropriate water for irrigation from the Missouri River.

**Source:** SDCL § 46-5-6 as added by SL 1976, ch 274; SL 2011, ch 165, § 266.

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46-5-6.2 to 46-5-6.10. Repealed by SL 1994, ch 313, § 6

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**46-5-6.11. Authority of chief engineer to issue appropriation permits.**

As provided in § 46-1-16, the board may delegate to the chief engineer the authority to issue a permit for the appropriation of water if the applicant does not contest the recommendation of the chief engineer and no person has filed a petition to oppose the application.

**Source:** SL 1990, ch 355, § 4.

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**46-5-7. Priority of appropriation--Date of filing application.**

As between appropriators, the first in time is the first in right. The priority of the appropriation shall date from the time of filing of the application therefor in the office of the Water Management Board.

Source: SDC 1939, § 61.0102; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0109.

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**46-5-8. Permit not required for domestic use--Permit required for dams on streams or dry-draws--Registration of domestic wells.**

Any person desiring to make reasonable domestic use of water from any source may do so without obtaining a permit from the Water Management Board, except that no person may construct a dam across any dry-draw for any purpose, including domestic use, if the dam will impound more than twenty-five acre-feet of water, without first obtaining a permit from the board. Permits for dams on streams or dry-draws for domestic or other uses are subject to the doctrine of prior appropriation. Domestic users other than water distribution systems may register a domestic well with the board to document the location and output of their water supply and the quality of its water. The registration of a domestic well is not subject to the procedures for appropriation of water under chapters 46-5, 46-6, and the procedure contained in chapter 46-2A. The fee for registration is twenty-five dollars.

Source: SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0107; SL 1978, ch 319, § 1; SL 1983, ch 314, § 45.

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**46-5-8.1. Permit issued by board to effectuate contract between district and energy industry user--Cancellation of permit or license.**

The Water Management Board may issue a permit to appropriate up to fifty thousand acre-feet of water for use per year to the South Dakota Conservancy District to effectuate the provisions of a contract executed between the district and an energy industry user under § 46A-2-19. An appropriation authorized under this section shall be licensed as provided in this chapter. Upon the receipt by the Division of Water Rights of a notice of cancellation from the district, the division shall cancel the permit or license specified in the notice.

Source: SL 1981 (2d SS), ch 1, § 5.

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**46-5-8.2. Permit required for water distribution system.**

If water is to be conveyed to users by a water distribution system diverting more than eighteen gallons per minute, the system shall comply with the provisions of § 46-5-10.

Source: SL 1983, ch 314, § 47.

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**46-5-9. Construction of works prior to obtaining permit to appropriate water prohibited.**

No person may begin or carry on any construction of works for storing or carrying water until a permit to appropriate the water has been issued.

Source: SDC 1939, §§ 61.9907, 61.9910; SL 1965, ch 304, § 2; SL 1981, ch 316, § 1; SL 1983, ch 314, § 46.

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**46-5-10. Appropriation of water--Application for permit required.**

Any person intending to acquire a right to beneficial use of water shall, before starting construction or placement of works for that purpose or before taking the water from any constructed works, make an application to the Water Management Board for a permit to appropriate water, in the form required by rules promulgated pursuant to chapter 1-26 by the board.

Source: SDC 1939, § 61.0122; SL 1955, ch 430, § 1; SL 1957, ch 490, § 1; SDC Supp 1960, § 61.0110; SL 1983, ch 314, § 48; SL 1993, ch 256, § 56.

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**46-5-11. Application--Information required.**

Water Management Board rules shall, in addition to providing the form and manner of preparing and presenting an application, require the applicant to state the amount of water, periods of annual use, and all other data necessary for proper description and limitation of the right applied for, together with such information, maps, field notes, plans, and specifications as may be necessary to show the method and practicability of construction.

**Source:** SDC 1939, § 61.0122; SL 1955, ch 430, § 1; SL 1957, ch 490, § 1; SDC Supp 1960, § 61.0110; SL 1983, ch 314, § 49; SL 2011, ch 165, § 267.

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46-5-12. Repealed by SL 1985, ch 345, § 4

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**46-5-13. Diversion rate and amount allowed by permit.**

A permit may allow diversion from a designated source of water from one or more points within an area described in the permit. However total diversion rate and amount may not exceed the rate and amount allowed by the permit.

**Source:** SL 1955, ch 430, § 1; SL 1957, ch 490, § 1; SDC Supp 1960, § 61.0110; SL 1983, ch 314, § 50.

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**46-5-13.1. Change of location of diversion point.**

The location of a point of diversion may be changed or additional points of diversion may be approved if the new or additional point of diversion is from the same source of water, no additional water is appropriated, and, if the water use is for irrigation, no new land is to be irrigated. The change in location of diversion points may be allowed without application or publication pursuant to § ~~46-2A-4~~, if the chief engineer is contacted and makes a finding that the change does not increase the potential for interference with existing diversions.

**Source:** SL 1987, ch 327; SL 1994, ch 344.

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**46-5-14. Water which may be reclaimed.**

Water turned into any natural or artificial watercourse for means of transport by any person entitled to the use of the water may be reclaimed below and diverted by that person, subject to existing rights, accurate allowance for losses to be made, as approved by the Water Management Board.

**Source:** SDC 1939, § 61.0118; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0153; SL 1983, ch 314, § 51.

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**46-5-15. Water diverted for municipal use--Issuance of permit--Contest and appeal.**

Natural flow water of any stream appropriated or diverted for municipal use is subject to downstream senior priority water rights. Any contest between water right owners shall be brought to the Water Management Board first for resolution. The board's ruling may be appealed to circuit court under the provisions of chapter 1-26.

No water permit to appropriate natural flow of a stream by a municipality may be issued unless the board determines, based upon the evidence presented at a hearing that questions on impairment of downstream senior priority water rights have been resolved.

**Source:** SDC 1939, § 45.1903; SL 1993, ch 334, § 3.

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46-5-16. Repealed by SL 1985, ch 345, § 6

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46-5-17 to 46-5-19. Repealed by SL 1983, ch 316, §§ 7 to 9

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46-5-20. Repealed by SL 1983, ch 316, § 15

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**46-5-20.1. Legislative approval required for large-scale appropriation--Eminent domain powers denied for unauthorized appropriation.**

Any application for appropriation of water, pursuant to this chapter, in excess of ten thousand acre feet annually shall be presented by the Water Management Board to the Legislature for approval prior to the board's acting upon the application and all powers of eminent domain shall be denied any common carrier appropriating over ten thousand acre feet of water per annum which has not obtained such prior legislative approval. Legislative approval does not mandate approval by the Water Management Board and does not constitute an issuance of a water permit. This section does not apply to applications by the South Dakota Conservancy District or applications for the approval of water permits for energy industry use.

**Source:** SL 1975, ch 275; SL 1981 (2d SS), ch 1, § 12.

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46-5-21. Repealed by SL 1983, ch 316, § 17

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**46-5-21.1. Permits for energy industry use--Period for application of water to beneficial use.**

Section ~~46-2A-8~~ does not apply to permits issued to the South Dakota Conservancy District for energy industry use or to any permit or right held by an energy industry user acquired pursuant to an assignment by the district. Periods for completion of construction or application of water to beneficial use for rights transferred by the district to energy industry users shall be fixed in the instrument of transfer but may not exceed ten years from the date the contract is executed for application of water to beneficial use.

**Source:** SL 1981 (2d SS), ch 1, § 13; SL 1987, ch 29, § 23; SL 1987, ch 332, § 5.

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46-5-22. Repealed by SL 1983, ch 316, § 14

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46-5-23. Repealed by SL 1981 (2d SS), ch 1, § 14

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**46-5-24. Amendment or change of plans of construction or place of diversion.**

The plans of construction or place of diversion may be amended, but no amendment may authorize any extension of time for construction beyond five years from the date of the permit, except as provided by this chapter. A change in the proposed point of diversion of water or change of construction plans shall be subject to the procedures contained in chapter 46-2A and may not be allowed to the detriment of the rights of others having valid water permits or rights to the use of the water.

**Source:** SDC 1939, § 61.0123; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0111; SL 1983, ch 314, § 52.

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**46-5-25. Diligent prosecution of construction work--Forfeiture of rights--Extension.**

The work of construction shall be diligently prosecuted to completion. If one-fifth of the work is not completed within one-half the time allowed, as determined by the Water Management Board, the board may accept and approve an application for the use of any of the waters included in the permit issued to the prior applicant, and the right to use the waters under the former permit are forfeited. However, the Water Management Board shall allow an extension of time at the request of the prior applicant, equal to the time during which work was prevented by the operation of law beyond the power of the applicant to avoid. This section does not apply to permits or licenses issued under § 46-5-8.1.

**Source:** SDC 1939, § 61.0127; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0115; SL 1981 (2d SS), ch 1, § 15; SL 2011, ch 165, § 268.

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**46-5-26. Extension of time for completion of construction or application to beneficial use.**

A permit may be amended by extending the time for the completion of construction, or for application to beneficial use, for a reasonable time, but only on account of delays due to physical or engineering difficulties which could not have been reasonably anticipated, due to operation of law beyond the power of the applicant to avoid, or due to other exigent circumstances identified by the Water Management Board.

**Source:** SDC 1939, § 61.0132; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0120; SL 1983, ch 314, § 53.

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46-5-27 to 46-5-29. Repealed by SL 1983, ch 314, §§ 54 to 56

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**46-5-30. Inspection of works by chief engineer before use--Authority to require changes.**

Within a reasonable time before the date set for the application of the water to a beneficial use, the chief engineer shall inspect the works, if any, after due notice to the holder of the permit. If the works are not properly and safely constructed, the chief engineer may require the necessary changes to be made within a reasonable time.

Source: SDC 1939, § 61.0131; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0119; SL 1983, ch 314, § 57.

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**46-5-30.1. License issued by chief engineer.**

Upon completion of an inspection, upon completion of any required changes and upon payment of any applicable fees, the chief engineer shall issue a license to appropriate water to the extent and under the conditions of the actual application of water to beneficial use, but he may not extend the rights described in the permit. No permit holder may divert water until the assessed license fee has been paid.

Source: SL 1983, ch 314, § 58.

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**46-5-30.2. Limitations on rights given by permit or license.**

Neither a permit to appropriate water nor a license to appropriate water may become a right to use the water for any purpose or in any manner other than that specified on the permit or license, unless amended pursuant to the provisions of this title.

Source: SL 1983, ch 314, § 59.

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**46-5-30.3. Sale or transfer of application, permit, or license--Notice to chief engineer.**

Notice of any sale, grant, lease, conveyance, or other transfer of an application, permit, or license to appropriate water under the provisions of this title shall be filed with the chief engineer within ninety days.

Source: SL 1983, ch 314, § 66; SL 2008, ch 230, § 1.

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**46-5-30.4. Amendment of permits or rights.**

Subject to the limitations in §§ 46-5-33 and 46-5-34 governing changes in irrigation rights from one parcel of land to another, any water permit or right holder may apply for a change of use of the water, a change of location of the use or other amendment to the permit or right. Permits or rights may be amended pursuant to the procedure contained in chapter 46-2A. Priority shall be retained upon amendment. An amendment of a water permit or right may not increase the rate of diversion or increase the volume of water to be appropriated under the original water permit or right. The amendment may not impair existing rights.

Source: SL 1983, ch 314, § 67.

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**46-5-30.5. Unpermitted acreage developed for irrigation--Requirement.**

Acreage developed for irrigation outside of the acreage described on the permit may be licensed pursuant to § 46-5-30.1, if no increase occurs in either permitted acreage or water appropriated. The unpermitted acreage shall be contiguous to the permitted acreage, owned by the same property owner, and developed as part of the original irrigation project within the time period designated for completion of works. The unpermitted acreage added to a license under this section retains the priority date assigned to the original permit. Licensing of the unpermitted acreage may occur without application or publication pursuant to § 46-2A-4, if the chief engineer makes a finding that existing water rights will not be impaired and the overall project, as developed, is consistent with the original application. This section does not apply to the transfer of licensed acreage from one parcel of land to another as provided for by § 46-5-34.

Source: SL 1996, ch 263, § 5.

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**46-5-31. Change of use or place of diversion.**

Any appropriator of water may use the water for purposes other than for which it was appropriated, or may change the place of diversion, storage, or use, in a manner and under conditions approved by the Water Management Board, except that changes in irrigation permits shall be as prescribed by §§ 46-5-34 to 46-5-36, inclusive.

**Source:** SDC 1939, § 61.0142; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0129; SL 1983, ch 314, § 61.

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**46-5-31.1. Abandoned permitted irrigation use--Stock watering permitted.**

If permitted irrigation use from a storage dam is abandoned or forfeited but the storage dam is used for stock watering, stock watering may be added to the license or permit upon the request of the permit or license holder. A license or permit modified under this section retains the priority date of the original license or permit. This addition of stock watering to the license or permit may occur without application or publication pursuant to § 46-2A-4, if no diversion is made from the stock dam and the chief engineer makes a finding that existing water rights will not be impaired.

**Source:** SL 1996, ch 263, § 6.

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**46-5-32. Assignment of application, permit, or license.**

Subject to the limitations provided in §§ 46-5-33 and 46-5-34, any application, permit, or license to appropriate water, including a permit issued under § 46-5-8.1, may be assigned, but no assignment is binding, except upon the parties thereto, unless filed for record with the chief engineer. No assignment may carry with it the right to use the water for any purpose or in any manner other than that specified in the application, permit, or license without the approval of the Water Management Board. Transfer of an application to appropriate water does not confer any right to use of water. The evidence of the right to use water from any works constructed by the United States, or its duly authorized agencies, shall in like manner be filed with the chief engineer, upon assignment. A sale, grant, conveyance, assignment, lease, or other transfer of a permit or license issued under § 46-5-8.1 may be assigned only in accordance with the terms of the contract or instrument of conveyance between the district and the energy industry user.

**Source:** SDC 1939, § 61.0134; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0127; SL 1981 (2d SS), ch 1, § 9; SL 1983, ch 314, § 62; SL 2008, ch 230, § 2.

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**46-5-33. Irrigation application, permit, or right not assignable apart from land.**

No application, permit, or right to appropriate water for irrigation purposes may be assigned, nor may the ownership of an application, permit, or right in any manner be transferred, apart from the land to which it is appurtenant, except in the manner provided by law. A transfer of title to land shall carry with it all rights to the use of water appurtenant to the land for irrigation purposes.

**Source:** SDC 1939, § 61.0134; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0127; SL 1983, ch 314, § 63; SL 2008, ch 230, § 3.

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**46-5-34. Irrigation rights appurtenant to land--Amendment of permit required for severance and transfer.**

All water used in this state for irrigation purposes shall remain appurtenant to the land upon which it is used. However, if for any reason it should become impracticable to use all or any part of the water beneficially or economically for irrigation of any land to which the right of its use is appurtenant, all or any part of the right

may be severed from the land and simultaneously transferred and become appurtenant to other land without losing priority of right previously established, subject to existing rights, upon approval of an application for an amended permit. No increase in total acres irrigated may be allowed under this section.

**Source:** SDC 1939, § 61.0141; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0128; SL 1983, ch 314, § 64.

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**46-5-34.1. Transfer of irrigation rights apart from land--Restricted purposes--Protection of other users.**

The provisions of §§ 46-5-33 and 46-5-34 notwithstanding, irrigation rights may be transferred apart from the land to which they are appurtenant if they are transferred for domestic use or use within a water distribution system. Such irrigation rights may be transferred or leased in whole or in part and may be acquired only through the exercise of powers possessed independently of this section. No transfer, however, may be approved by the Water Management Board unless the transfer can be made without detriment to existing rights having a priority date before July 1, 1978, or to individual domestic users. No land which has had an irrigation right transferred from it pursuant to this section, may qualify for another irrigation right from any water source.

**Source:** SL 1978, ch 320; SL 1983, ch 314, § 65; SL 1989, ch 383; SL 1992, ch 314; SL 1994, ch 345.

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46-5-35. Repealed by SL 1996, ch 263, § 3

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**46-5-36. Abandonment of use of water appurtenant to land--Public water subject to general appropriation.**

If the owner of the land to which water has become appurtenant abandons the use of such water upon such land, such water shall become public water, subject to general appropriation.

**Source:** SDC 1939, § 61.0141; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0128.

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**46-5-37. Failure to use beneficially appropriated water--Forfeiture for nonuse--Reversion to public.**

If any person entitled to the use of appropriated water fails to use beneficially any part of the water for the purpose for which it was appropriated, for a period of three years, the unused water shall revert to the public and shall be regarded as unappropriated public water.

**Source:** SDC 1939, § 61.0139; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0125; SL 2011, ch 165, § 269.

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**46-5-37.1. Abandonment or forfeiture of permits or rights--Recommendation of chief engineer for cancellation.**

Upon the initiative of the chief engineer or upon petition by any interested person and after reasonable notice to the holder of the right or permit, if the holder can be located, the chief engineer may investigate whether or not a water permit or right has been abandoned or forfeited. After the investigation, the chief engineer may recommend cancellation of the permit or right for reason of abandonment or forfeiture. The recommendation, notice, and hearing shall be conducted pursuant to the procedure contained in chapter 46-2A.

**Source:** SL 1983, ch 314, § 69; SL 2011, ch 165, § 270.

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#### **46-5-37.2. Exceptions to forfeiture for nonuse.**

The provisions of § 46-5-37 notwithstanding, no water right or permit may be forfeited for nonuse if land authorized for irrigation by a permit or right is placed under an acreage reserve or production quota program or otherwise withdrawn from use as required for participation in any federal program, if the water source is not fully appropriated, if the withdrawal from use does not prevent approval of new permits from the same source, and if the appropriated water has been applied to beneficial irrigation use prior to participation in a federal program.

**Source:** SL 1989, ch 384.

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#### **46-5-38. Future use of water--Entities entitled to reservation.**

The following entities may reserve water for contemplated future needs upon a showing of availability of unappropriated water and future need pursuant to procedures set forth in chapter 46-2A:

- (1) A state institution, facility, or agency;
- (2) A municipality as defined in § 9-1-1;
- (3) The South Dakota Conservancy District or a water development district as defined in § 46A-2-4;
- (4) A water user district as defined in § 46A-9-2;
- (5) A nonprofit rural water supply company as defined in § 10-36A-1 engaged in the treatment, distribution, and sale of water primarily for domestic purposes to a rural area. The term "rural area" may include a municipality;
- (6) A sanitary district as defined in chapter 34A-5;
- (7) An irrigation district as defined in chapter 46A-4; and
- (8) A water project district as defined in chapter 46A-18.

**Source:** SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0122; SL 1961, ch 456; SL 1966, ch 259, § 3; SL 1978, ch 322; SL 1983, ch 314, § 70; SL 1984 (SS), ch 1, § 60.

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#### **46-5-38.1. Future use of water--Permit required for actual use--Review of future use permits.**

Water Management Board approval of an application to appropriate water for future use is a reservation of a definite amount of water with a specified priority date and is not a grant of authority to construct the works or to put the water to beneficial use. Before the time that the holder of a future use permit initiates construction of the works and puts water to beneficial use, the holder shall file an application for a water permit pursuant to the procedure contained in chapter 46-2A. If the holder of the future use permit is granted a water permit to develop only a portion of the water reserved by the future use permit, the holder shall apply for and receive an additional water permit, or permits, before developing and using the remaining water reserved in the future use permit. Permits for future uses shall be reviewed by the board every seven years and are subject to cancellation if the board determines that the permit holder cannot demonstrate a reasonable need for a future use permit.

**Source:** SL 1983, ch 314, § 71; SL 2011, ch 165, § 271.

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#### **46-5-39. Temporary use permits--Authorization for.**

Before an entity described in § 46-5-38 is ready to use part or all of the water subject to a future use permit or permits, temporary appropriations may be made of the water. Any person desiring to appropriate the water shall make an application to the chief engineer for a temporary permit pursuant to the procedure contained in chapter 46-2A.

**Source:** SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0122; SL 1961, ch 456; SL 1966, ch 259, § 3; SL 1983, ch 314, § 72.

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**46-5-40. Temporary use permits--Cancellation.**

The chief engineer may not cancel a temporary use permit with less than six months notice to the permit holder. In no case may a temporary use permit be cancelled prior to the time at which facilities are constructed and water may be put to beneficial use by an entity described in § 46-5-38 holding a permit under the provisions of § 46-5-38.1. No person may acquire any right under a temporary permit to the use of water beyond the time of cancellation of the temporary use permit.

**Source:** SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0122; SL 1961, ch 456; SL 1966, ch 259, § 3; SL 1983, ch 314, § 73.

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**46-5-40.1. Temporary permits for use of public water for construction, testing, or drilling purposes--Term of permit--Qualifications and limitations.**

The Water Management Board may promulgate rules to authorize the chief engineer to issue temporary permits for the use of public water for construction, testing, or drilling purposes. No temporary permit is valid after December thirty-one of the year in which the permit is issued. No temporary permit may be issued if the permit interferes with or adversely affects prior appropriations or vested rights. A temporary permit shall contain qualifications and limitations necessary to protect the public interest. The issuance of a temporary permit is permission to use public water on a temporary basis and does not grant any water rights.

**Source:** SL 1987, ch 328, § 5.

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46-5-41 to 46-5-43. Repealed by SL 1983, ch 314, §§ 74 to 76

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**46-5-44. United States withdrawal of unappropriated waters--Cancellation.**

As soon as the Water Management Board is satisfied that the construction of works by the United States subject to a United States withdrawal approved prior to July 1, 1983, is no longer contemplated, it shall cancel its withdrawal of those waters from appropriation and the waters again shall be subject to general appropriation.

**Source:** SDC 1939, § 61.0137; SL 1955, ch 430, § 1; SDC Supp 1960, § 61.0123; SL 1983, ch 314, § 77.

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46-5-45. Repealed by SL 1983, ch 314, § 78

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**46-5-46. Unauthorized use or waste of water or violation of permit or license prohibited.**

No person may engage in unauthorized use of water, may waste water, or may violate the terms or conditions of a permit or license to appropriate water.

**Source:** SDC 1939, §§ 61.9907, 61.9910; SL 1965, ch 304, § 2; SL 1981, ch 316, § 2; SL 1983, ch 314, § 79.

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**46-5-47. Flood control--Permit required.**

No person may construct facilities on any watercourse to control floods for the purpose of preventing or alleviating damage without a permit issued pursuant to the procedure contained in chapter 46-2A. The permit may be approved subject to conditions deemed necessary, including conditions to safeguard water supplies for existing water permits and licenses, to assure the safety of works, and to prevent damage to property. No person may construct works in a manner not approved in the permit for those works. This section applies only to watercourses whose flow exceeds that of a dry-draw as defined in subdivision 46-1-6(8).

**Source:** SL 1983, ch 314, § 80; SL 2011, ch 165, § 272.

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**46-5-48. Flood control--Emergency facilities authorized.**

Section 46-5-47 does not apply to temporary emergency facilities constructed for the immediate protection of life or property. The chief engineer shall be promptly notified of the construction of such emergency facilities.

**Source:** SL 1983, ch 314, § 81.

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**46-5-49. Filing of vested right claim--Hearing--Mandatory filing--Waiver of right.**

Any person claiming to be owner of a vested right to appropriate water from any surface water source for beneficial use other than domestic use as defined in subdivision § 46-1-6(7), may file with the chief engineer a vested right claim in a form and manner prescribed by the Board of Water Management. The claim shall set forth the amount of water used, when the water was used, purpose of use, the location of the diversion works and, if the water has been used for irrigation purposes, the legal description of the land upon which the water has been used, and the name of the owner of the land. The claim shall be signed under oath and shall be either from the claimant's own personal knowledge or on information and belief. The hearing on the vested right claim shall be conducted pursuant to the procedures contained in chapter 46-2A. If, in the course of an investigation conducted by the chief engineer pursuant to subdivision 46-2-17(1), a person asserts the existence of a vested water right, the chief engineer may require that person to file a vested right claim within ninety days pursuant to this section. Failure to file in the absence of such a requirement by the chief engineer does not constitute a waiver of a vested water right.

**Source:** SL 1986, ch 363, § 5.

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**46-5-50. Drip irrigation defined.**

For purposes of § 46-5-51, the term, drip irrigation, means a planned irrigation system in which water is applied directly to the root zone of plants by means of applicators, such as orifices, emitters, porous tubing, or perforated pipe, that are operated under low pressure and are placed on or below the surface of the ground.

**Source:** SL 1990, ch 358, § 1; SL 2011, ch 165, § 273.

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**46-5-51. Permit not required for drip irrigation.**

A permit to appropriate water, pursuant to §§ 46-1-15 and 46-5-10, is not required for drip irrigation, as defined in § 46-5-50, if the drip irrigation meets the following conditions:

- (1) The irrigation is for noncommercial purposes; and
- (2) Use of water does not exceed eighteen gallons per minute.

**Source:** SL 1990, ch 358, § 2; SL 1996, ch 263, § 4.

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**46-5-52. Noncommercial purposes defined.**

For purposes of § 46-5-51, the term, noncommercial purposes, means tree plantings specifically for conservation purposes, excluding trees planted for ornamental or commercial purposes.

**Source:** SL 1990, ch 358, § 3.

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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No. 30795

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MCCOOK LAKE RECREATION AREA ASSOCIATION,

*Plaintiff and Appellant,*

v.

DAKOTA BAY, LLC, MICHAEL CHICOINE, AND THE SOUTH DAKOTA  
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES, CHIEF  
ENGINEER AND WATER RIGHTS PROGRAM,

*Defendants and Appellees.*

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APPEAL FROM THE CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT  
UNION COUNTY, SOUTH DAKOTA

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THE HONORABLE TAMI A. BERN  
CIRCUIT COURT JUDGE

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**APPELLEE SOUTH DAKOTA DEPARTMENT OF  
AGRICULTURE AND NATURAL RESOURCES, CHIEF  
ENGINEER AND WATER RIGHTS PROGRAM'S BRIEF**

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Notice of Appeal filed August 16, 2024

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IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

No. 30795

McCOOK LAKE RECREATION AREA ASSOCIATION,

*Plaintiff and Appellant,*

v.

DAKOTA BAY, LLC, MICHAEL CHICOINE, AND THE SOUTH DAKOTA  
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES, CHIEF  
ENGINEER AND WATER RIGHTS PROGRAM,

*Defendants and Appellees.*

**PRELIMINARY STATEMENT**

The parties to this case are the McCook Lake Recreation Area Association (Association); Dakota Bay, LLC and Michael Chicoine (collectively Dakota Bay); and the South Dakota Department of Agriculture and Natural Resources (DANR), Chief Engineer and Water Rights Program (collectively Chief Engineer). The Water Management Board (Board) adjudicated the underlying case. References to documents are designated as follows:

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## **JURISDICTIONAL STATEMENT**

The Association submitted a petition for a declaratory ruling under SDCL § 1-26-15 and ARSD § 74:02:01:46, requesting that the Board find that the alteration of a shoreline that expands a public waterbody requires a water appropriation permit under SDCL ch. 46-1. App. 12-18. The Board held a hearing and denied the Association's requested relief. App. 28. The Association appealed to the circuit court. App. 1. The Association now appeals the Memorandum Decision (App. 1) entered by the Honorable Tami A. Bern, Circuit Court Judge, First Judicial Circuit, on July 2, 2024. The circuit court entered the Final Decision and Order (App. 9) on July 17, 2024. The Notice of Entry of Order (App. 10) was filed July 19, 2024. The Association timely filed a Notice of Appeal with this Court on August 16, 2024. This Court has jurisdiction under SDCL § 1-26-37 and SDCL § 15-26A-3(1).

## **STATEMENT OF LEGAL ISSUE AND AUTHORITIES**

WHETHER THE CIRCUIT COURT CORRECTLY AFFIRMED THE BOARD'S DECISION THAT DAKOTA BAY'S PROPOSED CANAL CONSTRUCTION DOES NOT REQUIRE AN APPROPRIATION PERMIT FROM THE BOARD?

The Board found that the construction of the proposed canal does not constitute an ongoing appropriation and does not require a standard or traditional water right. App. 25 (Findings of Fact #25). The Board denied the Association's requested relief. App. 28. The circuit court affirmed the Board's findings and decision. App. 1.

SDCL § 46-1-15

*Parks v. Cooper*, 2004 S.D. 27, 676 N.W.2d 823

*Montana v. Wyoming*, 563 U.S. 368 (2011)

### **STATEMENT OF THE CASE**

This case is an administrative appeal of the Board's decision in a declaratory ruling case brought under SDCL § 1-26-15 and ARSD § 74:02:01:46. AR 002.

Dakota Bay wants to construct a canal extending off the southeast corner of McCook Lake to provide waterway access to/from a proposed residential development. AR 133 (Stipulation), ¶ 3. This proposed canal requires a Shoreline Alteration Permit from the South Dakota Department of Game, Fish and Parks (SDGFP), which Dakota Bay applied for in December 2021. AR 133, ¶ 4; App. 46-7.

In February 2023, the Association petitioned the Board to issue a declaratory ruling finding "that the alteration of a public water body by a private party requires a permit for appropriation of water." App. 15 (¶ 4(l)).

A hearing was held on August 2, 2023. App. 19. At the hearing's conclusion, the Board entered executive session. AR 158. Upon returning to open session, the Board voted to deny the Association's requested relief and declared that Dakota Bay's proposed canal does not require a water permit from the Board. *Id.* The Chief Engineer's counsel

was instructed to prepare proposed Findings of Fact, Conclusions of Law, and the Final Decision for the Board's review. *Id.*

The Chief Engineer's proposed Findings of Fact, Conclusions of Law, and the Final Decision were submitted (AR 189-199), and the Association submitted Objections and Alternative Findings of Fact and Conclusions of Law (AR 200-203) for the Board's consideration. At the Board's October 4, 2023 meeting, the Board discussed the proposed decision and objections, addressing the Association's objections with specificity. AR 218-219. The Board voted to adopt the final Findings of Fact, Conclusions of Law, and the Decision prepared by the Board's counsel. *Id.*; App. 19-28.

The Board mailed notice of entry of Order and the final adopted Findings of Fact, Conclusions of Law, and the Decision on October 13, 2023. AR 220. Due to an incorrect zip code, the notice of entry of Order and the final adopted Findings of Fact, Conclusions of Law, and the Decision were re-mailed on November 1, 2023. AR 232-243. The Association timely appealed to circuit court on November 13, 2023. App. 2.

The circuit court received briefs and held a hearing on April 9, 2024. *Id.* When the Association presented its oral argument, it co-mingled its arguments in this case and a related case (No. 30796) without any formal consolidation motion or order. The circuit court

judge then issued a combined decision. App. 1-8. The Association timely filed a Notice of Appeal to this Court on August 16, 2024.

The Association sought to consolidate this case and Case No. 30796, which this Court denied on November 1, 2024.

### **STATEMENT OF FACTS**

Few facts are required to address the water permit necessity issue because it is a question of law. As noted above, Dakota Bay wants to construct a canal off the corner of McCook Lake to provide waterway access to/from a proposed residential development. AR 133 (Stipulation), ¶ 3. This proposal requires a Shoreline Alteration Permit from SDGFP. AR 133, ¶ 4; AR 175-176. The Association petitioned the Board for a declaratory ruling because it believes “that the alteration of a public water body by a private party requires a permit for appropriation of water.” App. 15 (¶ 4(l)). The Chief Engineer disagrees that a shoreline alteration – in and of itself – is an “appropriation” of water that requires a permit. The Board agreed with the Chief Engineer and found that the proposed canal does not constitute an ongoing appropriation of McCook Lake water and does not require a water right permit. App. 25 (Findings of Fact #25); App. 28 (Decision).

The Chief Engineer does not disagree with any of the undisputed facts offered in the Association’s Brief (pp. 6-7), but also asserts that they are irrelevant to the issue.

## ARGUMENT

THE CIRCUIT COURT CORRECTLY AFFIRMED THE BOARD'S DECISION THAT DAKOTA BAY'S PROPOSED CANAL CONSTRUCTION DOES NOT REQUIRE AN APPROPRIATION PERMIT FROM THE BOARD.

### **I. Standard of Review.**

In an administrative appeal, this Court “shall give the same deference to the findings of fact, conclusions of law, and final judgment of the circuit court as it does to other appeals from the circuit court.” SDCL § 1-26-37. The Board’s findings of fact are to be reviewed under the clearly erroneous standard, while conclusions of law and statutory interpretation questions are reviewed de novo. *Midwest Railcar Repair, Inc. v. South Dakota Department of Revenue*, 2015 S.D. 92, ¶ 22, 872 N.W.2d 79, 85. The Board’s findings of fact should only be reversed if this Court is “definitely and firmly convinced a mistake has been made.” *In re Tinklenberg*, 2006 S.D. 52, ¶ 11, 716 N.W.2d 798, 801-02 (citations omitted). This Court should “not look for reasons to reverse, even if [it] would not have made a similar decision.” *Howie v. Pennington Cnty.*, 1997 S.D. 45, ¶ 10, 563 N.W.2d 116, 119.

### **II. The Board Did Not Err in Concluding Dakota Bay’s Proposed Canal Does Not Require an Ongoing Water Appropriation Permit.**

This case distills down to a declaration on the question – what does it mean to appropriate water? And although the Association complains that “[t]he singular focus on the word ‘appropriation’

misconstrues and misapplies South Dakota law,” (Association Brief, p. 13), “appropriate” is the triggering word in the statute that requires a water permit, SDCL § 46-1-15.

Under SDCL § 46-1-15, “[e]xcept as otherwise provided throughout [title 46], no person may appropriate the waters of this state for any purpose without first obtaining a permit to do so.”

“Appropriate” is not defined in statute. The plain meaning of “appropriation” is “[t]he exercise of control over . . .,” *Black’s Law Dictionary* (11th ed. 2019). Likewise, Merriam Webster defines “appropriate” as “to take exclusive possession of” and “to set apart for or assign to a particular purpose or use.” <https://www.merriam-webster.com/dictionary/appropriate#h2> (last visited Dec. 28, 2024).

The Association seeks a declaratory judgment that Dakota Bay’s proposed shoreline alteration requires a water appropriation permit in accordance with SDCL § 46-1-15. The Chief Engineer, who has been delegated the authority under SDCL § 46-2-3.1 to interpret, apply, and enforce SDCL § 46-1-15, disagrees that a shoreline alteration – in and of itself – constitutes an activity requiring a water appropriation.

While the Association’s recitation of various statutes in its brief (pp. 8-10) is correct, the Association misunderstands the basic aspects of water appropriation law as a whole. This misunderstanding leads to a fundamentally flawed analysis and application of the law.

To correct this misunderstanding warrants a bit of historical context to understand how South Dakota water law developed and how it is applied.

**A. The Three Historical Water Law Administration Systems.**

There are generally three systems of water law administration in the United States: riparian, prior appropriation, and hybrid states. David H. Getches, *Water Law in a Nutshell* 3 (3d ed. 1997). Under the riparian system, a landowner bordering a waterbody has the right to make a reasonable use of that water as long as that use doesn't interfere with the other riparian landowners also making reasonable use of the waterbody. *Id.* at 15. This is the type of water system used in the eastern states, traditionally those east of the 100th meridian.<sup>1</sup> *Id.* at 5.

In contrast to the more developed and humid states in the east, the arid lands west of the 100<sup>th</sup> meridian often didn't have water where water was needed and much of the land was owned by the federal government. Early miners, particularly in 1840s California during the gold rush, could not assert riparian water rights because they didn't own the land, and so they competed for water in the same way they competed for gold – “first in time, first in right.” *Id.* at 6, 77-78. This “first in time, first in right” concept is known as the prior appropriation system. *Id.* at 6. It generally states that a user who puts the water to “beneficial use” can

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<sup>1</sup> <https://www.nps.gov/places/100th-meridian-marker.htm> (“[T]he meridian symbolizes the physical demarcation where the east ended and the west began.”) (last visited Dec. 28, 2024).

continue using the water to the exclusion of others who later come along. *Id.* In a dispute, the earlier user is often referred to as the “senior” or “senior appropriator,” with all later users referred to as “junior” or “junior appropriators.” *Id.* at 101.

The third system of water appropriation is the hybrid system. *Id.* at 7. Hybrid states<sup>2</sup> – including South Dakota – are those states that originally recognized riparian water rights, later converted to a prior appropriation system, and still recognize the original riparian rights (to the extent they still exist). *Id.* at 7-8.

**B. Historical Development of South Dakota’s Water Law Administration System.**

It is generally accepted that water law administration in South Dakota began in 1877 when Congress passed the Desert Land Act. “In sum, the Desert Land Act limited the water rights of settlers to what they had actually appropriated and used, and freed all surplus water for public appropriation.” *Parks v. Cooper*, 2004 S.D. 27, ¶ 26, 676 N.W.2d 823, 831.

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<sup>2</sup> Ironically, although the prior appropriation doctrine originally got its start in California, California is considered a hybrid state. *Id.* at 8. Hybrid states often adopted laws originating in California or under the “California doctrine” body of case law, whereas purely prior appropriation states often adopted laws originating in Colorado under the “Colorado doctrine,” and sometimes this distinction becomes important. See generally, *Cartwright v. Pub. Serv. Co. of N.M.*, 66 N.M. 64, 343 P.2d 654, overruled by *State ex rel. Martinez v. City of Las Vegas*, 135 N.M. 375, 89 P.3d 47 (both cases generally discussing the precedential value of California case law versus Colorado case law in determining Pueblo water rights).

In 1881, the Territorial Legislature passed the first statutes regulating water appropriation. 1881 Sess. Laws of Dakota Territory ch. 142.<sup>3</sup> As noted, these initial laws established a hybrid system of appropriation. First, the riparian water rights were recognized for those “who may have or hold a title or possessory right or title to any mineral or agricultural lands within the limits of this Territory.” *Id.* at § 1.<sup>4</sup> But immediately thereafter at § 2, the legislature established the beginning of the prior appropriation system by allowing those “too far removed from any stream or creek to use the waters thereof” the right-of-way “for conducting and conveying said water” via ditches, canals, and other such works.<sup>5</sup> Further, controversies were to “be determined by the date of appropriation as respectively made by the parties” (§ 4)<sup>6</sup>, all waters were made “available to the full extent of the capacity” as long the user did “not materially affect or impair the rights of the prior appropriator” (§ 5)<sup>7</sup>, and the water right “shall be deemed abandoned” for failure to use the works for a one year period (§ 7)<sup>8</sup> or for abandoning construction of the works for sixty days (§ 10). *Id.* Probably most importantly, the legislature prescribed specific procedures that prior appropriators had to

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<sup>3</sup> <https://www.ndlegis.gov/assembly/sessionlaws/1881t/pdf/gl-water-rights.pdf> (last accessed Dec. 28, 2024).

<sup>4</sup> Compare with SDCL § 46-1-9 (validation of vested riparian rights).

<sup>5</sup> Compare with SDCL § 46-8-1 (allowing right of eminent domain for water conveyance).

<sup>6</sup> Compare with, e.g., SDCL §§ 46-2A-7.4; 46-2A-7.6; 46-2A-8.1; 46-5-7 (priority statutes).

<sup>7</sup> Compare with SDCL §§ 46-1-4; 46-2A-9 (full extent without materially impairing prior appropriators).

<sup>8</sup> Compare with SDCL §§ 46-5-36; 46-5-37 (abandonment/forfeiture).

follow to establish their water rights, including a requirement to “file a location certificate thereof with the register of deeds, in the proper county” and post the certificate at the head of the works. *Id.* at § 9.<sup>9</sup> These notice provisions required the appropriator’s name, the date, the water quantity claimed, and the purpose of the appropriation (i.e., the “beneficial use”). *Id.* While the specific wording of the statutes have evolved, the elements of the 1881 statutes remain the foundation of South Dakota water law in SDCL today.

### **C. The Exclusivity Doctrine and the Doctrine of Recapture.**

Stemming from the historical context of water law development and the reasons for the appropriation permitting system, an important element of water appropriation is the exclusivity doctrine and the doctrine of recapture.<sup>10</sup> The exclusivity doctrine is both a positive doctrine and a negative doctrine. It is a positive doctrine in that once water is appropriated, the appropriator has the exclusive right to put that water to beneficial use. It is a negative doctrine in that water is only appropriated for as long as it is being exclusively used and controlled by the appropriator.

When a person has a permit to “appropriate” water, the “appropriator is entitled to the ‘exclusive control [of his appropriated water] so long as he is able and willing to apply it to beneficial uses . . . .’”

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<sup>9</sup> Compare with SDCL §§ 46-2A-4, 46-2A-23 (required notice).

<sup>10</sup> The doctrine of recapture is not particularly relevant in the context of this case because no party is trying to “recapture” any of its water. But the doctrine is a coexistent concept that the courts discuss together.

*Montana v. Wyoming*, 563 U.S. 368, 380 (2011) (brackets in original).

Under the doctrine of recapture, “an appropriator who has diverted water . . . has the right to recapture and reuse his own runoff . . . before it escapes his control or his property.” *Id.* In other words, as long as the appropriator retains exclusive control of the water, the water remains his to use within the limits of his permit. However, once the appropriator has relinquished exclusive control of the water, the water reverts to its unappropriated public water status and becomes available for reappropriation to other users. A broad-scale example of this concept is that South Dakota can use water from the Missouri River and can reuse and reappropriate the water as it flows downstream. The water is within the exclusive control of South Dakota (within other reasonable limits). However, once the water flows into Nebraska, the water has escaped South Dakota’s control and property, and is no longer “appropriated” to South Dakota. The same concept applies on a smaller individual-appropriator scale, such as to the Association and Dakota Bay.

**1. Application of exclusivity to the Association’s water permit from the Missouri River.**

The Association has two water permits to draw water from the Missouri River to artificially raise the level of McCook Lake. AR 133, ¶ 2 (Stipulation). The Association pumps water through a pipeline that discharges the water into McCook Lake. *See* TT 37:1-8 (describing consequences of pipeline failure). Once that water is discharged from the pipeline into the lake, it has escaped the Association’s control and

property, and the Association has “used” the extent of its water permit right. The Association would not be able to recapture and reuse that water without getting a new appropriation permit. Once the water is in McCook Lake, which the Association admits is a public lake (App. 36 - TT 24:10-11), it loses its status as “appropriated water” and returns to its status as unappropriated public water. Thus, the Association does not hold a water right for the water in McCook Lake. As such, “the canal does not unlawfully impair the Association’s prior existing water rights.” Association Brief, p. 10. The Association has the right to pump water from the Missouri River regardless of the canal project.

**2. Application of exclusivity to the Dakota Bay proposed canal.**

The exclusivity doctrine could apply in two opposing ways in the case of Dakota Bay’s proposed canal. In the first instance, if Dakota Bay were simply to dig a trench from McCook Lake and let the McCook Lake water fill the trench, the exclusivity doctrine would dictate that this is not an appropriation of water. While other permits may be required for such activity, an ongoing appropriation permit is unnecessary because Dakota Bay would not have exclusive control of the water as the water available to the canal would not all be on its own property. The water would be in the entire footprint of McCook Lake, whatever shape (with or without a connected canal) the lake is in. As an additional illustration of this point, when the Association dredges the bottom of McCook Lake (TT 28:18-20), it fundamentally changes the shape and volume of the

lake, but no appropriation permit is needed for this activity because the Association does not have exclusive control of the water in McCook Lake.

The second and opposing way the exclusivity doctrine could apply to the canal would be if there were some type of physical separation between the canal and McCook Lake. In this case, Dakota Bay indicated that there would be a two-foot berm between the lake and the entrance to the canal. TT 59:4-8. In this case, the canal is essentially acting like a large self-contained swimming pool, and any water in the canal would be under Dakota Bay's exclusive control on Dakota Bay's property. Water to fill the canal in this case would require an appropriation permit from whatever water source Dakota Bay used. See, for example, Case No. 30796, where Dakota Bay has applied for a water permit to initially fill the canal and then to maintain the canal's structural integrity.

If water overtops the berm, it will have escaped Dakota Bay's control and property, and Dakota Bay will have "used" the extent of the water permit right. This is the reason why no ongoing appropriation is necessary for the canal, because once the canal water has joined McCook Lake water, it loses its status as appropriated water and returns to its status as unappropriated public water.

**D. Conclusion - The alteration of A Shoreline Does Not Inherently Require A Water Appropriation Permit.**

Returning to the ultimate question of the Association's Petition – whether the alteration of a public water body by a private party, in and of itself, requires a water appropriation permit – the answer is no. This is

not to say that a water appropriation permit will always be unnecessary when altering a public waterbody, but it's not the alteration that causes the permit necessity. It is the appropriation – the taking of the water for beneficial use to the exclusion of others – that requires an appropriation permit. Thus, the Board did not err in its determination that the canal's construction is not an appropriation of McCook Lake water and does not require an appropriation permit.

### **CONCLUSION**

The Chief Engineer asks the Court to affirm the Board's decision that Dakota Bay's proposed canal does not require a water appropriation permit. Further, if this Court finds that the Board did err regarding Dakota Bay's necessity for a water appropriation permit, the Chief Engineer asks that the Court specify that the ruling narrowly applies to this specific case and that a shoreline alteration permit – in and of itself – does not automatically require a corresponding water appropriation permit.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 3,213 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 30th day of December 2024.

/s/ Jennifer L. Verleger  
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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 30th day of December 2024, a true and correct copy of Appellee's Brief in the matter of *McCook Lake Recreation Area Association v. Dakota Bay, LLC, Michael Chicoine, and the South Dakota Department of Agriculture and Natural Resources, Chief Engineer and Water Rights Program* was served electronically through Odyssey File and Serve upon:

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/s/ Jennifer L. Verleger  
Jennifer L. Verleger  
Assistant Attorney General

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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**Appeal No. 30795**

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**IN THE MATTER OF MCCOOK LAKE RECREATION AREA  
ASSOCIATION'S PETITION FOR DECLARATORY RULING  
REGARDING APPROPRIATIVE PERMITS AND SHORELINE  
ALTERATIONS**

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APPEAL FROM THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT  
UNION COUNTY, SOUTH DAKOTA  
(63CIV23-000171)

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THE HONORABLE TAMI BERN PRESIDING

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**APPELLEES BRIEF  
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Notice of Appeal was filed on the 16<sup>th</sup> day of August, 2024.

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## **PRELIMINARY STATEMENT**

For the convenience of the Court, Appellant McCook Lake Recreation Area Association will be referred to as “Association”; Appellees Michael Chicoine and Dakota Bay LLC will be referred to collectively as “Dakota Bay”; Appellee South Dakota Chief Engineer and Water Rights Program will be referred to collectively as the “Chief Engineer”; and the South Dakota Department of Agriculture and Natural Resources Water Management Board will be referred to as the “Board”. The Board’s Findings of Fact, Conclusions of Law, and Decision dated October 12, 2023, will be referred to as the “Board’s Decision”. The circuit court certified record, which encompasses the administrative record and hearing transcript among other things, is cited as “R. \_\_\_\_”. Finally, Dakota Bay’s appendix is cited as “(App. P. \_\_\_\_)”. All citations are followed by appropriate page, line, and paragraph designations.

## **JURISDICTIONAL STATEMENT**

The Board denied the Association’s Petition for Declaratory Ruling. R. 430, App. P. 021. Notice of Entry of Order concerning the Decision was provided on October 13, 2023, and again on November 1, 2023.<sup>1</sup> R. 420, App. P. 011-22. The Association filed a Notice of Appeal to the Circuit Court for the First Judicial Circuit on November 13, 2023. R. 25; App. P. 023-25.

The circuit court issued its Memorandum Decision on July 2, 2024, which affirmed the Board’s Decision. R. 697-705, App. P. 104-111. The circuit court issued a

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<sup>1</sup> An incorrect zip code for the Association’s counsel was included on the initial mailing by the Board. *See* R. 420, App. P. 011. Accordingly, the Notice of Entry of Order was re-sent to all parties on November 1, 2023. *Id.*

Final Decision and Order on July 17, 2024, and Notice of Entry of that Order was given on July 19, 2024. R. 706-08; App. P. 112-114. For purposes of this Supreme Court appeal, the Association filed a Notice of Appeal on August 16, 2024. R. 709-10.

### **STATEMENT OF THE LEGAL ISSUES AND AUTHORITIES**

Whether the circuit court correctly affirmed the Board’s denial of the Association’s Petition for Declaratory Ruling because Appellees Chicoine/Dakota Bay’s canal “is not an appropriation of McCook Lake water and does not require a standard or traditional permit from [the] Board.”

**The circuit court correctly affirmed the Board’s Decision in denying the Association’s Petition for Declaratory Ruling because the proposed canal is not an appropriation of McCook Lake water.**

- *Parks v. Cooper*, 2004 SD 27, 676 N.W.2d 823

### **STATEMENT OF THE CASE**

This case involves a Petition for Declaratory Ruling (the “Petition”) filed by the Association on February 17, 2023. R. 190-93; App. P. 001-008. The Petition itself sought a ruling declaring that “the alteration of a public water body by a private party requires a permit for appropriation of water[.]” *See* R. 190-93; App. P. 005. Through a separate correspondence, however, the Association set forth two different requested declarations:

- (1) that Michael Chicoine (Chicoine) be required “to obtain a water right permit for the taking of water from McCook Lake (Lake) for the purpose of developing a canal off of the Lake;” and
- (2) “that the Mike Chicoine Water Right Permit be subservient to the Water Right Permits” of the Association.

*See* R. 194; App. P. 006. The Association’s subsequent Notice of Hearing requested yet

another different declaration: that the Board “[i]ssue a declaratory ruling that Michael Chicoine/Dakota Bay, LLC are required to make an application to the Water Management Board for a permit to appropriate water before starting any construction or placement of works to expand McCook Lake for Michael Chicoine’s/Dakota Bay, LLC’s private use, because the proposed construction appropriates the water of McCook Lake and would also unlawfully impair the McCook Lake Recreation Area Association’s water rights.” *See* R. 199; *see also* R. 132, App. P. 083-93 (84:10-94:5) (discussing the variations in the requested relief).

After a hearing on August 2, 2023, the Board denied the Association’s Petition and entered Findings of Fact, Conclusions of Law, and Decision on October 12, 2023. R. 409-418; App. P. 026-36. The Association appealed the Board’s decision to the circuit court which issued a Memorandum Decision on July 2, 2024, and an Order and Final Decision on July 17, 2024, affirming the Board’s Decisions. R. 697-705. Association then appealed the circuit court’s decision to this Court. R. 709-10. Appellees Chicoine and Dakota Bay, LLC, now submit this Brief requesting this Court to affirm the circuit court decision upholding the Board’s denial of the Association’s Petition for Declaratory Ruling.

### **STATEMENT OF THE FACTS**

McCook Lake is a public body of water that was initially an oxbow of the Missouri River before it became landlocked. R. 321; R. 61, App. P. 068. Michael Chicoine (Chicoine), owner of Dakota Bay, LLC, has proposed the construction of a canal on the southeast corner of McCook Lake to allow approximately fifteen currently-existing homes to gain access to McCook Lake, to allow for better access to McCook

Lake from property owned by Dakota Bay, and to allow the public better access to McCook Lake through a new public boat ramp. R. 321; R. 423, App. P. 014. Chicoine, on behalf of Dakota Bay, LLC applied to the South Dakota Game, Fish, and Parks (SDGFP) for a shoreline alteration permit for the proposed canal. R. 322; R. 62, App. P. 069.

During SDGFP's review of Chicoine's application for a shoreline application permit, Chicoine amended his plans to provide that the canal would be initially filled with Chicoine's existing irrigation well and that well would be used to maintain "a water elevation in the canal to protect the integrity of the canal liner." R. 412; R. 62-63, App. P. 069-70. As that amendment expanded the use of Chicoine's irrigation well, he applied for a water permit which was pending before the Board at the same time as this matter. *Id.* SDGFP informed Chicoine that it would hold the shoreline alteration permit in abeyance until Chicoine had obtained the appropriate water right permit. *Id.*

After the Association learned of Dakota Bay's canal project, the Association launched various efforts to stop the construction of the canal, including through the Association's filing of the Petition for Declaratory Ruling in March 2023. R. 189-94, App. P. 001-006. The Association holds two water permits to divert water from the Missouri River to McCook Lake if necessary to obtain a lake elevation of 1090.3 feet msl, and the Association was seemingly concerned of the proposed canal's effects on its diversion of water from the Missouri River. R. 194, App. P. 006. As discussed *supra*, the Petition sought a ruling declaring that "the expansion of a public body of water for private use or gain (such as by altering the shoreline of a lake and connecting a 'canal')

requires a permit to appropriate water[.]” *See* R. 190; App. P. 002.<sup>2</sup> Yet the Association’s separate correspondence attached as Exhibit A to the Petition set forth two different requested declarations specifically implicating Chicoine’s rights and obligations:

- (1) that Michael Chicoine (Chicoine) be required “to obtain a water right permit for the taking of water from McCook Lake (Lake) for the purpose of developing a canal off of the Lake;” and
- (2) “that the Mike Chicoine Water Right Permit be subservient to the Water Right Permits” of the Association.

*See* R. 194; App. P. 006.

After hearing evidence on the Petition, the Board denied the Association’s Petition and concluded that Chicoine’s/Dakota Bay’s proposed canal “is not an appropriation of McCook Lake water and does not require a standard or traditional permit from this Board.” R. 418; App. P. 011-22. The Association then filed an appeal to the Union County Circuit Court. R. 25. The Circuit Court affirmed the Board’s ruling, and now the Association brings this appeal. R. 697-70, App. P. 107-111; R 708, App. P. 114.

## **ARGUMENT**

### **I. Standard of Review**

“In reviewing an agency ruling, [this Court] appl[ies] the same standard as the

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<sup>2</sup> This requested declaratory ruling appears inconsistent with the declaratory ruling requested by the Association later on in the same Petition. *See* R. 193, App. P. 005. (requesting a declaration “that the alteration of a public water body by a private party requires a permit for appropriation of water[.]”).

circuit court, with no assumption that the court’s ultimate decision was correct.” *In re GCC License Corp.*, 2001 S.D. 32, ¶ 8, 623 N.W.2d 474, 479 . Therefore, administrative appeals are reviewed in accord with SDCL 1–26–36. “A review of an administrative agency's decision requires this Court to give great weight to the findings made and inferences drawn by an agency on questions of fact.” *In re Pooled Advoc. Tr.*, 2012 S.D. 24, ¶ 49, 813 N.W.2d 130, 146 (quoting *Snelling v. S.D. Dep't of Soc. Servs.*, 2010 S.D. 24, ¶ 13, 780 N.W.2d 472, 477). “We will reverse an agency's decision only if it is ‘clearly erroneous in light of the entire evidence in the record.’” *Id.* “However, statutory interpretation and other questions of law within an administrative appeal are reviewed under the de novo standard of review.” *Id.* The Association contends that only the de novo standard of review should apply in this matter, claiming that “no facts are in dispute.” *See* Appellant’s Brief at 7. That contention, however, ignores that the Association objected to certain Findings of Fact made by the Board and now contends that the Board’s Decisions “is clearly erroneous”. *See* Appellant’s Brief at 8; R. 416-17.

**II. The circuit court correctly affirmed the Board’s Decision that “Mr. Chicoine’s/Dakota Bay’s canal is not an appropriation of McCook Lake water and does not require a standard or traditional permit from [the] Board.”**

The South Dakota Legislature has made clear that “all water within the state is the property of the people of the state[.]” *See Parks v. Cooper*, 2004 SD 27, ¶ 31, 676 N.W.2d 823, 834 (citing SDC 61.0101). South Dakota employs the doctrine of prior appropriation to determine who has rights to appropriate water for private use. *See id.* ¶ 29.

The South Dakota Department of Agriculture and Natural Resources Water

Rights Program is charged with issuing water rights permits under South Dakota Codified Laws chapter 46-1 *et. seq.* “Except as otherwise provided throughout this title, no person may appropriate the water of the state for any purpose without first obtaining a permit to do so.” [SDCL 46-1-15](#). While “appropriation” is not defined in South Dakota law, the Board determined that “[t]he plain meaning of “appropriation” is “the exercise of control over property” or “to take exclusive possession of. . . ; to set apart for or assign to a particular purpose or use.” *See* R. 412, App. P. 015. *See also* “Appropriation” Black’s Law Dictionary (11<sup>th</sup> ed. 2019); “Appropriate”, 1 & 2, Merriam Webster Online Dictionary, available at <https://www.merriam-webster.com/dictionary/appropriate> (last visited Dec. 30, 2024).<sup>3</sup> Thus, and as the Chief Engineer articulated, water rights permits are required when the water will be under the possession or control of the user. R. 101-03; App. P. 74-76; *see also* R. 114-117, App. P. 079-082 (66:21-69:9).

The Board correctly determined, and the circuit court properly affirmed, that the construction of a canal as proposed by Mr. Chicoine is not an appropriation of water. R. 111; R. 430, App. P. 021. As supported by the testimony of the Chief Engineer, the proposed canal “does not result in the possession or control of the water.” *See* R. 414, App. P. 017. The filling of the canal can be accomplished through the issuance of a temporary permit applied for by Chicoine, rather than a standard or traditional water permit. *See* R. 415, App. P. 018; *see also* R. 114-117, App. P. 079-82 (describing the different types of permits). Indeed, other similar projects (including the expansion of a

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<sup>3</sup> In its Appellant Brief, the Association fails to acknowledge that pursuant to Merriam-Webster, “appropriate” means “... *exclusive* possession....” *See* Appellant’s Brief at 11.

shoreline or construction of a canal) have not been required to obtain a standard or traditional water permit. *Id.*

Additionally, the circuit court properly determined that no ongoing appropriation would occur because after the canal is constructed and connected to McCook Lake, Dakota Bay will not have exclusive control of the water on the canal. R. 699. Because the "appropriation" of water contemplates "exclusive control" or "exclusive possession" of the water, the circuit court was correct in concluding, like the Board, that there would not be an appropriation of water necessitating that Dakota Bay obtain a permit. *See supra.*

The Association contends that the Board's Decision that no water rights permit is required was clearly erroneous and contrary to law, because a water rights permit is required prior to the construction of the canal. Appellant's Brief at 9-10. However, the Association's argument misstates the Board's Decision and fails to account for the separate water rights permit application submitted in reference to the proposed canal. In fact, the Board's Decision recognized that Chicoine had a pending water rights permit application related to the canal. R. 412, App. P. 015. While the Association claims that Dakota Bay should be required to obtain a permit in this instance because otherwise the Association would not have an opportunity to participate in a public hearing, such claim ignores the fact that a public hearing was actually held on Chicoine/Dakota Bay's water rights permit application, therefore, there is no prejudice.

The Association has not articulated any legal basis supporting that the Board's, Circuit Court's Chief Engineer's, and Appellees' application and interpretation of the appropriation process is incorrect. Accordingly, Chicoine and Dakota Bay respectfully

request this Court affirm the circuit court's Final Decision and Order and uphold Board's denial of the Association's Petition.

### CONCLUSION

The Board correctly denied the Association's Petition as the proposed canal "is not an appropriation of McCook Lake water and does not require a standard or traditional permit from [the Board]". R. 418, App. P. 021. For the foregoing reasons, Appellees Michael Chicoine and Dakota Bay respectfully request this Court to affirm the circuit court's Final Decision and Order and to uphold the Board's Findings of Fact, Conclusions of law, and Decision.

Respectfully submitted this 30<sup>th</sup> day of December, 2024,

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I hereby certify that this brief complies with [SDCL 15-26A-66\(b\)](#). The font is Times New Roman size 12, which includes serifs. The brief is 12 pages long and the word count is 2,414, exclusive of the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated: December 30, 2024.

/s/ Stacy R. Hegge

Stacy R. Hegge

/s/ Dean A. Fankhauser

Dean A. Fankhauser

## CERTIFICATE OF SERVICE

The Undersigned hereby certifies that on December 30, 2024, I electronically served the foregoing using the Odyssey File and Serve system upon the following individuals:

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Michael Chicoine, Appellees**

*/s/ Stacy R. Hegge*

---

Stacy R. Hegge

## APPENDIX

<b><u>Document</u></b>	<b><u>Page Number</u></b>
Application for Permit to Appropriate Water in South Dakota with information attached .....	App. P. 001
Sheriff's Return of Service for Michael Chicoine .....	009
Sheriff's Return of Service for Dakota Bay, LLC .....	010
Notice of Entry of Order for Board Decision with attached Findings of Fact, Conclusions of Law and Decision .....	011
Notice of Appeal (to Circuit Court) with Exhibit A attached.....	023
Instruction to Newspaper for Publication of Notice of Hearing on Petition.....	037
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MAR 13 2023

OFFICE OF  
WATER

March 10, 2023

Via Electronic Mail  
and U.S. Mail

Water Management Board  
South Dakota Department of  
Agriculture and Natural Resources  
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[DANRmail@state.sd.us](mailto:DANRmail@state.sd.us)

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Re: Declaratory Ruling - Chicoine

Dear Mr. Larson:

Please see the enclosed Petition for Declaratory Ruling on behalf of the McCook Lake Recreation Area Association. Please let us know when the matter will be set before the Board so we can move forward with publishing the required notices. Thank you.

Sincerely,



John M. Hines  
For the Firm

RECEIVED

MAR 13 2023

OFFICE OF  
WATER

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

---

IN THE MATTER OF	)	
THE MCCOOK LAKE RECREATION	)	PETITION FOR
AREA ASSOCIATION'S PETITION	)	DECLARATORY RULING
FOR A DECLARATORY RULING	)	
ON SDCL CHAPTER § 46-1	)	

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The McCook Lake Recreation Area Association (the "Association") hereby petitions the South Dakota Water Management Board (the "Board") to issue a Declaratory Ruling on the applicability of SDCL Chapter 46-1 pertaining to the factual situation presented herein:

1. The authority by which the petition is presented: SDCL § 1-26-15; SDCL § 46-2-5; SDCL § 46-5-10; ARSD 74:02:01:03; and ARSD 74:02:01:46.
2. The name of the group submitting the petition: The McCook Lake Recreation Area Association, a South Dakota nonprofit corporation.
3. The requested action: For the Board to issue a Declaratory Ruling finding that the expansion of a public body of water for private use or gain (such as by altering the shoreline of a lake and connecting a "canal") requires a permit to appropriate water.
  - a. SDCL § 46-1-1 states: "It is hereby declared that the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection."
  - b. SDCL § 46-1-3 states: "It is hereby declared that all water within the state is the property of the people of the state, but the right to the use of water may be acquired by appropriation as provided by law."

- c. SDCL § 46-1-10 states: "Any person intending to acquire a right to beneficial use of water shall, before starting construction or placement of works for that purpose or before taking the water from any constructed works, make an application to the Water Management Board for a permit to appropriate water, in the form required by rules promulgated pursuant to chapter 1-26 by the board."
  - d. SDCL § 46-1-15 states: "Except as otherwise provided throughout this title, no person may appropriate the waters of this state for any purpose without first obtaining a permit to do so."
4. The reason for the requested action is described in additional detail in the letter sent from the Association to the Board dated December 5, 2022, attached hereto as Exhibit "A" and incorporated by reference herein.
- a. In short, the reason the Association seeks the Declaratory Ruling is because representatives of the South Dakota Department of Agriculture and Natural Resources ("DANR") have told the Association that the expansion of a public lake by a private party does not require a permit to appropriate water.
  - b. After DANR's statements to the Association that no permit to appropriate water is required to expand a public lake, DANR Chief Engineer Eric Gronlund testified in opposition to 2023 HB 1134 before the South Dakota House Agriculture and Natural Resources Committee.
  - c. 2023 HB 1134 requires the consent of a majority of lakefront property before a permit may be issued to alter the shoreline.
  - d. It was Mr. Gronlund's testimony that HB 1134 "potentially circumvents any opportunity for a full hearing on the merits of an application" and that "a well-

established water rights procedure affording the opportunity for meaningful public participation and public hearing is potentially being upended.”


- e. Mr. Gronlund’s testimony to the Agriculture and Natural Resources Committee and DANR’s statements to the Association are inconsistent with one another.
- f. 2023 HB 1134, which was supported by the Association, was developed in response to DANR’s previous statements that no water rights permit was required for a private party to expand a public lake.
- g. The Association agrees with Mr. Gronlund’s testimony that before a private individual can permanently alter a public body of water for private gain, meaningful public participation and public hearing is required by the plain language of South Dakota law.
- h. SDCL § 46-1-3 states explicitly that “the right to the use of water may be acquired by appropriation as provided by law.” (Emphasis added).
- i. Expanding a public body of water, via canal or otherwise, uses the water of the public water body, and the right to do so may only be acquired by a permit for appropriation.
- j. The procedure for obtaining a permit to appropriate water includes the opportunity for public input.
- k. Because the people of South Dakota have a “paramount interest” in the use of all water of the state, no private party should be allowed to permanently alter a public lake for private gain without first receiving State and public approval through the appropriation permit procedures.

1. The Association respectfully asks that the Water Management Board issue a Declaratory Ruling that the alteration of a public water body by a private party requires a permit for appropriation of water, consistent with Mr. Gronlund's testimony to the Agriculture and Natural Resources Committee and consistent with State law.

Dated this 17th day of February, 2023.

CRARY, HUFF, RINGGENBERG,  
HARTNETT & STORM, P.C.

BY



Cody M. McCullough  
John M. Hines  
329 Pierce Street, Suite 200  
PO Box 27  
Sioux City, Iowa 51102  
Telephone: (712) 274-7559  
Fax: (712) 277-4605  
Email: [cmccullough@craryhuff.com](mailto:cmccullough@craryhuff.com)  
[jhines@craryhuff.com](mailto:jhines@craryhuff.com)  
ATTORNEYS FOR PETITIONER,  
MCCOOK LAKE RECREATION  
AREA ASSOCIATION



---

William Larson, Chairman  
Water Management Board  
South Dakota Department of  
Agriculture and Natural Resources  
523 East Capitol Ave.  
Pierre, S.D. 57501-3182  
December 5, 2022

Re: Chicoine Canal

Chairman Larson:

I am writing on behalf of the McCook Lake Recreation Association (MLA) to request a "Declaratory Ruling" requiring Mike Chicoine to obtain a water right permit for the taking of water from McCook Lake (Lake) for the purpose of developing a canal off of the Lake. Furthermore, we request the Mike Chicoine Water Right Permit be subservient to the Water Right Permits of MLA. Presently MLA has two permits for pumping water out of the Missouri River (Permits 5878-3 and 6479-3 for a combined capacity of 26.74 cfs). The proposed Chicoine Canal (Canal) will impact the MLA permits by taking water from McCook Lake.

Mike Chicoine (Chicoine) has applied for several permits to construct a canal off of the southeast end of McCook Lake with features as follows:

- Length: 2,050 l.f. (Secretary Robling assures us the length of the canal is 1,500.)
- Width: 90 ft. at a water surface elevation of 1090. (McCook Lake has not been able to reach the water surface elevation of 1090 in recent years).
- Bottom width: 42 ft.
- Bottom Elevation: 1082 ft. (Below the recent spring water level in McCook Lake prior to the start of MLA pumping.)
- Side slope: 3:1

I have attached a copy of the "Application for Shoreline Alteration of a South Dakota Public Water Body" as prepared by Chicoine for details illustrating the above information.

McCook Lake is an Ox-Bow of the Missouri River. The McCook Lake Association and the Izaak Walton League of McCook Lake have spent over \$10 million in dredging and constructing a pumping system. The McCook Lake Association spends over \$60,000 per year for pumping water from the Missouri River. As stated above, MLA has two water right permits allowing the pumping of 26.74 cfs through a MLA constructed 7000 foot, 24 inch pipeline to McCook Lake.



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During the summer of 2022 the 26.74 cfs was pumped continuously without raising the water level to elevation 1088 until rainfall events assisted the pumps.

Pumping resulting in a water level in McCook Lake that is approximately 10-11 ft. above the Missouri River water surface elevation (as measured at the pumping station). Attached is a graph of the water level monitoring over the last nine years. This graph shows how MLA pumping annually raises the Lake from a recent spring Lake level that is slightly below the bottom of the Canal. If the Canal existed in 2022, water would not have entered the Canal until the MLA pumps were placed in operation. Any ground water around the Canal would be the result of MLA pumping. The seepage rate is about 2 inches per day from predominantly the southern shoreline and south end of the Lake. Previous borings by the State of South Dakota indicated the northern and eastern shoreline and bottom are clay soils with lower seepage rates. During the summer the evaporation rates are about 0.25 inches per day.

MLA functions on donations and volunteerism. The Association does not have funds for expanding the pumping or pipe capacity to accommodate the Canal.

In 1978, the State of South Dakota published a study titled: "Ground Water Study for Southern Union County" by Derric L. Isles. Attached is a "Map Showing Water Table Contours" prepared by Derric Isles (Map). Derric provided arrows indicating the direction of ground water flow as previously discussed in this letter. The southeast end of the Lake has the steepest hydraulic gradient due to the shorter distance to the Rivers. The extension of the Lake by a Canal is believed to increase the hydraulic gradient out of the southeast end of the Lake resulting in greater seepage losses from the Lake.

The Canal will increase the surface area of the Lake and result in an increase in evaporation. The water will be taken from McCook Lake.

Additionally, the Canal will bring the Lake closer to an irrigation well owned and operated by Mike Chicoine. We believe the Canal will feed the cone of depression created by the operation of the Chicoine irrigation well increasing the impact on McCook Lake.

We believe the Laws of South Dakota protect the water rights of its citizens and should be applied in this situation. SDCL 46-1-1 states: "It is hereby declared that the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection."



The Canal will result in the appropriation of water from McCook Lake to meet the evaporation and seepage losses from the Canal. The Canal should be required to comply with SDCL 46-1-1. In wet years MLA may have the ability to supply water to the Canal. In dry years, MLA cannot meet the needs of the Lake if a canal is built. The MLA records indicate that in dry years as presently being experienced, the Canal would not have water without MLA pumping. The MLA pumps are not able to provide the Canal design water at any elevation but especially a surface elevation of 1090.

Taking of the Lake water is a taking from the MLA water right which must be appropriated as required by law. SDCL 46-1-3 states: "It is hereby declared that all water within the state is the property of the people of the state, but the right to the use of the water may be acquired by appropriation as provided by law".

Especially applicable for the Canal is SDCL 46-1-15 which states "Except as otherwise provided throughout this title, no person may appropriate the waters of this state for any purpose without first obtaining a permit to do so."

We ask that Mike Chicoine be required to obtain a water rights permit and the Chicoine permit is subservient to the water rights of MLA.

Sincerely,

A handwritten signature in dark ink, appearing to read "Dirk Lohry", written in a cursive style.

Dirk Lohry, President  
McCook Lake Association  
417 Lakeshore Drive  
McCook Lake, SD 57049  
712-251-6819  
[DirkLohry@aol.com](mailto:DirkLohry@aol.com)

Cc: Ron Duvall

FIRST JUDICIAL COURT

Return # 23918  
Process # C23-00147  
Docket #  
Reference #

STATE OF SOUTH DAKOTA  
COUNTY OF UNION

State Of SD Department Of Agriculture & Natural  
Resources Water Management Board

Plaintiff.

- vs -

MICHAEL JAMES CHICOINE (Chicoine, Mike)  
Defendant

SHERIFF'S RETURN OF PERSONAL SERVICE

I hereby certify that on the **21st day of February, 2023**, a **Petition for Declaratory Ruling**, in the above entitled action, came into my hand for service. That on the **28th day of February, 2023** at **9:03 PM**, in said county, I did **serve the documents on MICHAEL JAMES CHICOINE**.  
By then and there delivering to and leaving with: **CHICOINE, MICHAEL JAMES** at **32926 482nd Ave, Jefferson, SD 57038**

Item	Amount Owed	Amount Paid
Mileage Fee	\$20.40	\$0.00
Sheriff's Fee	\$50.00	\$0.00
	<b>Total Owed</b>	<b>\$70.40</b>
	<b>Total Paid</b>	<b>\$0.00</b>
	<b>Uncollectible</b>	<b>\$0.00</b>
	<b>Remaining</b>	<b>\$70.40</b>

Invoice # 23-00324  
Crary, Huff, Ringgenberg, Harthett & Storm, P.C.  
P.O. Box 27, 329 Pierce St., Ste. 200, Sioux City, IA 51102

Comments

Date Returned 3/1/23

Signed

  
Deputy Cody Braun  
Union County Sheriff's Office  
209 East Main, Suite 250  
Elk Point, SD 57025  
Phone: (605) 356-2579  
Fax: (605) 356-3356

Date

3/1/2023

FIRST JUDICIAL COURT

Return # 23953

Process # C23-00146

Docket #

Reference #

STATE OF SOUTH DAKOTA  
COUNTY OF UNION

State Of SD Department Of Agriculture & Natural  
Resources Water Management Board

Plaintiff,

- vs -

Dakota Bay, LLC

Defendant

SHERIFF'S RETURN OF PERSONAL SERVICE

I hereby certify that on the 21st day of February, 2023, a Petition for Declaratory Ruling, in the above entitled action, came into my hand for service. That on the 10th day of March, 2023 at 6:51 PM, in said county, I did serve the documents on Dakota Bay, LLC.

By then and there delivering to and leaving with: CHICOINE, MICHAEL JAMES (Dakota Bay, LLC) at 32925 482nd Avenue, Jefferson, SD 57038


Item	Amount Owed	Amount Paid
Mileage Fee	\$22.90	\$0.00
Sheriff's Fee	\$50.00	\$0.00
	Total Owed	\$72.90
	Total Paid	\$0.00
	Uncollectible	\$0.00
	Remaining	\$72.90

Invoice # 23-00323  
Crary, Huff, Ringgenberg, Hartnett & Storm, P.C.  
P.O. Box 27, 329 Pierce St., Ste. 200, Sioux City, IA 51102

Comments

Date Returned 3/13/23

Signed

  
Deputy Cody Braun  
Union County Sheriff's Office  
209 East Main, Suite 250  
Elk Point, SD 57025  
Phone: (605) 356-2679  
Fax: (605) 356-3356

Date

3/14/2023



**DEPARTMENT of AGRICULTURE  
and NATURAL RESOURCES**

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

November 1, 2023


**NOTICE OF ENTRY OF ORDER**

TO: John M. Hines, Attorney for McCook Lake  
Recreation Area Association  
PO Box 27  
Sioux City IA 51102

Dean A. Fankhauser, Attorney for Dakota Bay  
PO Box 1557  
Sioux City IA 51102

Stacy R. Hegge, Attorney for Dakota Bay  
111 W. Capitol Ave., Suite #230  
Pierre SD 57501

Charles McGuigan, Deputy Attorney General  
1302 East Highway 14, Suite 1  
Pierre SD 57501-8501

FROM: Ron Duvall, Engineer III  
SD DANR, Water Rights Program 

SUBJECT: Notice of Entry of Order concerning Adoption Findings of Fact, Conclusions of Law and Final Decision in the matter of McCook Lake Recreation Area Association's Petition for Declaratory Ruling

Notice is hereby given that on the 4th day of October 2023, the South Dakota Water Management Board entered its Findings of Fact, Conclusions of Law, and Final Decision in the above-entitled matter. Enclosed is the signed Findings of Fact, Conclusions of Law and Final Decision adopted by the Board. Due to placement of an errant zip code on the mailing to John M. Hines resulting in his October 13, 2023 mailing being returned to the Water Rights Program, the Order is being mailed again.

South Dakota statutes provide that decisions of the Board may be appealed to the Courts. Notice of appeal of the Board's decision must be filed within thirty days of this notice and be in accordance with procedures established in SDCL 1-26-31.

Enclosure

c: David McVey, Water Management Board Counsel

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

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IN THE MATTER OF MCCOOK LAKE	}	
RECREATION AREA ASSOCIATION'S	}	
PETITION FOR DECLARATORY	}	FINDINGS OF FACT,
RULING REGARDING	}	CONCLUSIONS OF LAW,
APPROPRIATIVE PERMITS AND	}	AND DECISION
SHORELINE ALTERATIONS	}	

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This matter came before the South Dakota Water Management Board for hearing on August 2, 2023. Board members Peggy Dixon, Rodney Freeman, Tim Bjork, Leo Holzbauer, and Bill Larson attended the hearing and heard the evidence presented. Petitioner, McCook Lake Recreation Area Association (Association), was represented by John M. Hines. Dakota Bay was represented by Dean A. Fankhauser and Stacy R. Hegge. Ann F. Mines Bailey represented the Department of Agriculture and Natural Resources, Water Rights Program, and the Chief Engineer.

The Board, having considered the testimony and exhibits presented and having entered its oral decision and rulings on the parties' submissions, now enters the following:

A. FINDINGS OF FACT

1. On March 13, 2023, the Association submitted a petition for declaratory ruling. The petition requested that the Board issue a ruling that "the alteration of a public water body by a private party requires a permit for appropriation of water[.]"

2. The Association served the petition on Michael Chicoine and Dakota Bay, LLC on March 14, 2023.

3. The public notice was placed on the Department of Agriculture and Natural Resources website on June 12, 2023, and printed in The Leader-Courier (Union County) and the Yankton Daily Press and Dakotan (Yankton County) on June 22, 2023. The public notice provided that the Association was requesting that the Board "[i]ssue a declaratory ruling that Michael Chicoine/Dakota Bay, LLC are required to make an application to the Water Management Board for a permit to appropriate water before starting any construction or placement of works to expand McCook Lake for Michael Chicoine's/Dakota Bay, LLC's private use, because the proposed construction appropriates the water of McCook Lake and would also unlawfully impair the McCook Lake Recreation Area Association's water rights." The notice further provided that the hearing was scheduled for July 12, 2023.

4. On June 21, 2023, the Chief Engineer/Water Rights program filed a petition to participate in the contested case hearing. The Chief Engineer also requested a continuance from the July 12, 2023 hearing date and the setting of a special meeting to hear this matter.

5. The Chief Engineer's motion to continue was granted and hearing was rescheduled for August 2, 2023.

6. McCook Lake was originally an oxbow of the Missouri River which became landlocked. It receives its water from runoff in the watershed, precipitation, and is believed to be hydrologically connected to groundwater

sources and the Missouri River. In 1981, the Water Management Board set the ordinary high-water mark for McCook Lake at 1090.7 feet mean sea level (msl).

7. The Association holds two water permits/rights for the purpose of stabilizing the McCook Lake water elevation (Water Right No. 5878A-3 and Water Permit No. 6479-3). Each of these authorizes the diversion of water from the Missouri River to McCook Lake. Pumping, however, is not authorized unless the elevation of McCook Lake is less than 1090.3 feet msl and the lake elevation may not be raised over 1090.3 feet msl.

8. Mr. Michael Chicoine has proposed the construction of a canal extending off the southeast corner McCook Lake to provide a waterway to/from a proposed residential development. The finished canal will be approximately 110-feet wide, 11-feet deep with a flat bottom, and approximately 1,800-feet in length.

9. The alteration of a shoreline requires a permit from the State. The South Dakota Department of Game, Fish and Parks (SDGFP) is the entity responsible for issuing shoreline alteration permits. The State's official position is that shoreline alteration permits may be required for any activity that may have an impact on the lake, lakebed or lake shore, including, but not limited to: The construction of ditches or channels; dredging or excavating to remove sediment, or rock; seawall installation or repairs; retaining wall or breakwater construction; rip-rap installation or repairs; filling or creating artificial beach; stockpiling brush, trees, vegetation, construction materials or debris in the lake or on the shore; and/or removal or clearing of aquatic vegetation.

10. Mr. Chicoine has applied for a shoreline alteration permit. During the review of the application for a shoreline alteration permit by the SDGFP,

Mr. Chicoine amended his plans and indicated that he would use his existing irrigation well to provide an initial fill of the canal and then maintain a water elevation in the canal to protect the integrity of the canal liner. SDGFP responded by indicating SDGFP would be holding his application for a shoreline alteration permit in abeyance until a proper water right permit was obtained.

11. Mr. Chicoine has applied for the additional use of his irrigation well, which is completed into the Missouri: Elk Point aquifer, for the purpose of maintaining the integrity of the canal liner (Water Permit Application No. 8744-3.) That permit application is currently pending before the Water Management Board.

12. South Dakota Codified Law, section 46-1-15 provides "Except as otherwise provided throughout this title, no person may appropriate the waters of the state for any purpose without first obtaining a permit to do so."

13. Additionally, SDCL § 46-5-10 provides "Any person intending to acquire a right to beneficial use of water shall, before starting construction or placement of works for that purpose or before taking the water from any constructed works, make an application to the Water Management Board for a permit to appropriate water, in the form required by rules promulgated pursuant to chapter 1-26 by the board."

14. "Appropriation" is not defined in statute. The plain meaning of "appropriation", however, is the exercise of control over property; to take exclusive possession of; or to set apart for or assign to a particular use.

15. The Board heard testimony from Julie Burhoop. Ms. Burhoop serves as the vice president of communications for the Association. The Association

spends from \$50,000 to over \$150,000 per year pumping water from the Missouri River into McCook Lake. Ms. Burhoop additionally testified that the proposed canal would necessarily use McCook Lake water. She further testified that the Association does not have the pumping capacity and the pipeline cannot handle more than the current appropriation allowed for pumping of water into McCook Lake.

16. Dirk Lohry also provided testimony to the Board. Mr. Lohry is the current president of the Association. Mr. Lohry testified that he has measured McCook Lake weekly since 2011. The average fall of the elevation is 3.7 feet and has a range of 0 to 6 feet. Mr. Lohry testified that there would be no water for the proposed canal if the Association did not pump. He further testified that McCook Lake would dry up without the Association's pumping. Mr. Lohry additionally testified that water is leaving the lake through evaporation and leaching. While he feels they know what amount of what is lost through evaporation, the amount lost through leaching varies. He further testified that clay liners may work initially but will dry up and crack and allow leaching.

17. Kip Rounds, a regional supervisor for SDGFP also presented testimony to the Board. One of Mr. Rounds' duties is the review of applications for shoreline alterations. Mr. Rounds described the shoreline alteration permitting process and indicated that the permitting process does not involve public hearing. The most common type of shoreline alteration applications he has seen has been for shoreline stabilization. He further testified that the only shoreline alteration application for expansion of a lake that Mr. Rounds has seen is Mr. Chicoine's application.

18. Mr. Rounds further testified that the engineers for SDGFP determined that the soils present at the location for the construction of the proposed canal are susceptible to seepage. To mitigate seepage, those engineers recommended a clay liner. Should the clay liner dry out, it could become compromised to a point where it would not prevent seepage.

19. Chief Engineer Eric Gronlund testified before the Board as well. Mr. Gronlund testified that water permits are required when the water will be under the possession or control of the user. The construction of a canal as proposed by Mr. Chicoine does not result in the possession or control of the water and, therefore, it is not an appropriation of water. Mr. Gronlund further testified that the elevation levels of the lake and the elevation levels of the canal may not correspond at all times due to the berm which is to be constructed at the end of the canal.

20. Mr. Gronlund testified regarding the appropriation process in South Dakota and the different types of permits available including a standard or traditional type of permit which is required for an appropriation that occurs annually and a temporary permit for the use of public waters for construction, testing, and drilling purposes which has a limited duration. He stated that the initial fill for the proposed canal could be accomplished without an ongoing standard appropriative permit, but through a temporary permit for the use of public water for construction, testing, and drilling purposes.

21. Additionally, Mr. Gronlund testified that there are currently federal and state regulatory processes in place for a project like Mr. Chicoine's through

the United States Army Corps of Engineer 404 permitting program and SDGFP's shoreline alteration permitting process.

22. Mr. Gronlund is charged with protecting the waters of the state from waste and implementation of South Dakota's water permitting system.

Mr. Gronlund stated that the canal, if constructed as proposed, would become part of McCook Lake and would not be appropriating water from McCook Lake.

Mr. Gronlund also testified under natural conditions that McCook Lake is essentially a representation of the ground water table. Making matters more complicated is the entrenchment (or scouring causing a lowering of the bed) of the Missouri River which is lowering the ground water table in the area.

Mr. Gronlund also testified of other similar projects (the expansion of a shoreline or construction of a canal) that have not been required to obtain a standard or traditional water permit.

23. Michael Chicoine additionally provided testimony regarding his application for a water right permit and associated documents.

24. Once constructed, the canal extends the shoreline of the lake and becomes part of the lake.

25. The construction of the proposed canal does not constitute an ongoing appropriation of McCook Lake water and, therefore, does not require a standard or traditional water right.

26. The initial fill of the proposed canal can be accomplished through the issuance of a temporary permit for the use of public waters for construction, testing, or drilling purposes pursuant to SDCL § 46-5-40.1.

27. Any finding of fact more properly designated as a conclusion of law shall be treated as such.

#### B. OBJECTIONS TO FINDINGS OF FACT

Water Rights filed Proposed Findings of Fact and the Petitioner filed objections and proposed alternate findings. In compliance with SDCL § 1-26-25, Petitioner's Objections to the Proposed Findings of Fact are accepted, modified, or rejected as follows:

1. Petitioner objected to Proposed Findings Paragraph 1 and alleged that it misstates the relief requested in the Petition and states: "The Association's Petition requests "For the Board to issue a Declaratory Ruling finding that the expansion of a public body of water for private use or gain (such as by altering the shoreline of a lake and connecting a "canal") requires a permit to appropriate water." This is not an accurate recitation of the relief requested in the Petition. Rather, Water Rights proposed fact #1 is taken verbatim from the Petition. Alternative Finding to Paragraph 1 is DENIED.
2. Petitioner objects to Proposed Findings Paragraph 19, specifically the sentence "The construction of a canal as proposed by Mr. Chicoine does not result in the possession or control of the water and, therefore, it is not an appropriation of water." The Proposed Finding is consistent with the evidence and testimony presented to the Board. No alternative Finding is proposed. Petitioner's objection is noted.
3. Petitioner objects to Proposed Finding 25 and asserts "The Association objects to Paragraph 25 of the Proposed Findings of Fact

because (a) the conclusion itself is wrong; and (b) the correct question is not whether an ongoing appropriation exists, but whether the canal "uses" water from McCook Lake. See SDCL § 46-1-3." This is merely a portion of Petitioner's argument at Hearing. No alternative Finding is proposed. Petitioner's objection is noted.

#### C. CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Board makes the following Conclusions of Law:

1. The Board has jurisdiction to entertain this request for a declaratory ruling pursuant to SDCL § 46-2-5 and ARSD 74:02:01:46.
2. The Chief Engineer is a proper party to this action. Additionally, the Chief Engineer filed a timely petition to participate in the matter.
3. Michael Chicoine, and Dakota Bay, LLC are also proper parties to this matter. Because the Association personally served Mr. Chicoine and Dakota Bay, LLC, neither were required to additionally file a petition to participate in the contested case proceedings.

#### D. OBJECTIONS TO CONCLUSIONS OF LAW

Water Rights filed Proposed Conclusions of Law and Petitioner filed objections to the proposed conclusions of law. In compliance with SDCL § 1-26-25, Petitioner's Objections to the Proposed Conclusions of Law are accepted, modified, or rejected as follows:

1. Petitioner objects to Paragraph 2 of the Proposed Conclusions of Law and alleges that the Chief Engineer is not a proper party to the action

and cites to SDCL § 46-2A-4 for this proposition. This assertion misunderstands the role of the Chief Engineer in the water appropriation methodology in South Dakota. Additionally, the Chief Engineer filed a timely petition to participate in the matter. No alternative Conclusion is proposed. Petitioner's objection is noted.

2. The Petitioner objects to Paragraph 3 of the Proposed Conclusions of Law and asserts that Dakota Bay, LLC/Michael Chicione were not proper parties pursuant to § SDCL 46-2A-4. At the hearing, the Board determined that they were a necessary, original party, additionally, the Association personally served Mr. Chicoine and Dakota Bay, LLC. No alternative Conclusion is proposed. Petitioner's objection is noted.

#### E. DECISION

The Board hereby **DENIES** the requested relief and declares that Mr. Chicoine's/Dakota Bay's canal is not an appropriation of McCook Lake water and does not require a standard or traditional permit from this Board.

Dated this 12 day of October, 2023.

BY THE BOARD:

Bill Larson

Bill Larson (Oct 12, 2023 16:42 CDT)

William Larson, Chairman

South Dakota Water Management Board

### CERTIFICATION

The undersigned hereby certifies under the penalty of perjury that a true and correct copy of a Notice of Entry of Order dated November 1, 2023, and a signed copy of the findings of fact, conclusions of law and a final decision in the matter of McCook Lake Recreation Area Association's Petition for Declaratory Ruling was served upon the following by U.S. mail, first class postage prepaid, on November 1, 2023.

John M. Hines, Attorney  
Crary Huff Law Firm  
PO Box 27  
Sioux City IA 51102

Dean A. Fankhauser, Attorney  
Tigges, Bottaro & Lessmann, LLP  
PO Box 1557  
Sioux City IA 51102

Stacy R. Hegge, Attorney  
Gunderson, Palmer, Nelson & Ashmore LLP  
111 W. Capitol Ave., Suite #230  
Pierre SD 57501

#### Above sent inter-office to:

Charles McGuigan, Deputy 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 1<sup>st</sup> day of November, 2023.

  
Rachel Rodriguez  
Notary Public  
My Commission expires May 16, 2029



STATE OF SOUTH DAKOTA     )  
  :SS  
COUNTY OF UNION            )

IN CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT

IN THE MATTER OF MCCOOK LAKE     )  
RECREATION AREA ASSOCIATION'S    )  
PETITION FOR DECLARATORY         )  
RULING REGARDING                    )  
APPROPRIATIVE PERMITS AND         )  
SHORELINE ALTERATIONS            )

Case No. 63CIV23-000171

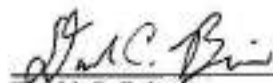
**NOTICE OF APPEAL**

COMES NOW the Appellant/Petitioner, McCook Lake Recreation Area Association, and hereby appeals to the Circuit Court for the First Judicial Circuit, Union County, South Dakota the Findings of Fact, Conclusions of Law, and Decision of the South Dakota Department of Agriculture and Natural Resources Water Management Board dated October 12, 2023, with a Notice of Entry of Order dated November 1, 2023, attached hereto as Exhibit A. The other interested parties are Dakota Bay, LLC, Michael Chicoine, the Water Management Board, the Water Rights Program, and the South Dakota Attorney General's Office.

Dated this 13th day of November, 2023.

CRARY, HUFF, RINGGENBERG,  
HARTNETT & STORM, P.C.

BY



David C. Bries

John M. Hines

329 Pierce Street, Suite 200

Sioux City, IA 51011

(712) 224-7550 phone

(712) 277-4605 fax

[dbries@craryhuff.com](mailto:dbries@craryhuff.com)

[jhines@craryhuff.com](mailto:jhines@craryhuff.com)

ATTORNEYS FOR APPELLANT/  
PETITIONER

### **CERTIFICATE OF SERVICE**

David C. Briese, attorney for the Petitioner, hereby certifies that a true and correct copy of the foregoing *Application for Stay* was served by U.S. Mail upon the following on the 13th day of November, 2023:

Dakota Bay, LLC  
c/o Dean Fankhauser, Attorney for Dakota Bay, LLC  
613 Pierce Street  
Sioux City, IA 51101

Dakota Bay, LLC  
32926 482nd Ave.  
Jefferson, SD 57038

Michael Chicoine  
32926 482nd Ave.  
Jefferson, SD 57038

Michael Chicoine  
c/o Dean Fankhauser, Attorney for Michael Chicoine  
613 Pierce Street  
Sioux City, IA 51101

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

Water Management Board  
Attn: Eric Gronlund  
Joe Foss Building  
523 E. Capitol Ave  
Pierre, SD 57501

Water Rights Program  
c/o South Dakota Department of Agriculture and Natural Resources—Office of Water  
523 E. Capitol Ave.  
Pierre, SD 57501

South Dakota Attorney General's Office  
Attn: Charles McGuigan  
Attorney for Chief Engineer/Water Rights Program  
1302 East Highway 14, Suite 1  
Pierre, SD 57501

  
\_\_\_\_\_  
David C. Biese



**DEPARTMENT of AGRICULTURE  
and NATURAL RESOURCES**

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

November 1, 2023


**NOTICE OF ENTRY OF ORDER**

TO: John M. Hines, Attorney for McCook Lake Recreation Area Association  
PO Box 27  
Sioux City IA 51102

Dean A. Fankhauser, Attorney for Dakota Bay  
PO Box 1557  
Sioux City IA 51102

Stacy R. Hegge, Attorney for Dakota Bay  
111 W. Capitol Ave., Suite #230  
Pierre SD 57501

Charles McGuigan, Deputy Attorney General  
1302 East Highway 14, Suite 1  
Pierre SD 57501-8501

FROM: Ron Duvall, Engineer III  
SD DANR, Water Rights Program 

SUBJECT: Notice of Entry of Order concerning Adoption Findings of Fact, Conclusions of Law and Final Decision in the matter of McCook Lake Recreation Area Association's Petition for Declaratory Ruling

Notice is hereby given that on the 4th day of October 2023, the South Dakota Water Management Board entered its Findings of Fact, Conclusions of Law, and Final Decision in the above-entitled matter. Enclosed is the signed Findings of Fact, Conclusions of Law and Final Decision adopted by the Board. Due to placement of an errant zip code on the mailing to John M. Hines resulting in his October 13, 2023 mailing being returned to the Water Rights Program, the Order is being mailed again.

South Dakota statutes provide that decisions of the Board may be appealed to the Courts. Notice of appeal of the Board's decision must be filed within thirty days of this notice and be in accordance with procedures established in SDCL 1-26-31.

Enclosure

c: David McVey, Water Management Board Counsel

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

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IN THE MATTER OF MCCOOK LAKE	)	
RECREATION AREA ASSOCIATION'S	)	FINDINGS OF FACT,
PETITION FOR DECLARATORY	)	CONCLUSIONS OF LAW,
RULING REGARDING	)	AND DECISION
APPROPRIATIVE PERMITS AND	)	
SHORELINE ALTERATIONS	)	

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This matter came before the South Dakota Water Management Board for hearing on August 2, 2023. Board members Peggy Dixon, Rodney Freeman, Tim Bjork, Leo Holzbauer, and Bill Larson attended the hearing and heard the evidence presented. Petitioner, McCook Lake Recreation Area Association (Association), was represented by John M. Hines. Dakota Bay was represented by Dean A. Fankhauser and Stacy R. Hegge. Ann F. Mines Bailey represented the Department of Agriculture and Natural Resources, Water Rights Program, and the Chief Engineer.

The Board, having considered the testimony and exhibits presented and having entered its oral decision and rulings on the parties' submissions, now enters the following:

A. FINDINGS OF FACT

1. On March 13, 2023, the Association submitted a petition for declaratory ruling. The petition requested that the Board issue a ruling that "the alteration of a public water body by a private party requires a permit for appropriation of water[.]"

2. The Association served the petition on Michael Chicoine and Dakota Bay, LLC on March 14, 2023.

3. The public notice was placed on the Department of Agriculture and Natural Resources website on June 12, 2023, and printed in The Leader-Courier (Union County) and the Yankton Daily Press and Dakotan (Yankton County) on June 22, 2023. The public notice provided that the Association was requesting that the Board "[i]ssue a declaratory ruling that Michael Chicoine/Dakota Bay, LLC are required to make an application to the Water Management Board for a permit to appropriate water before starting any construction or placement of works to expand McCook Lake for Michael Chicoine's/Dakota Bay, LLC's private use, because the proposed construction appropriates the water of McCook Lake and would also unlawfully impair the McCook Lake Recreation Area Association's water rights." The notice further provided that the hearing was scheduled for July 12, 2023.

4. On June 21, 2023, the Chief Engineer/Water Rights program filed a petition to participate in the contested case hearing. The Chief Engineer also requested a continuance from the July 12, 2023 hearing date and the setting of a special meeting to hear this matter.

5. The Chief Engineer's motion to continue was granted and hearing was rescheduled for August 2, 2023.

6. McCook Lake was originally an oxbow of the Missouri River which became landlocked. It receives its water from runoff in the watershed, precipitation, and is believed to be hydrologically connected to groundwater

sources and the Missouri River. In 1981, the Water Management Board set the ordinary high-water mark for McCook Lake at 1090.7 feet mean sea level (msl).

7. The Association holds two water permits/rights for the purpose of stabilizing the McCook Lake water elevation (Water Right No. 5878A-3 and Water Permit No. 6479-3). Each of these authorizes the diversion of water from the Missouri River to McCook Lake. Pumping, however, is not authorized unless the elevation of McCook Lake is less than 1090.3 feet msl and the lake elevation may not be raised over 1090.3 feet msl.

8. Mr. Michael Chicoine has proposed the construction of a canal extending off the southeast corner McCook Lake to provide a waterway to/from a proposed residential development. The finished canal will be approximately 110-feet wide, 11-feet deep with a flat bottom, and approximately 1,800-feet in length.

9. The alteration of a shoreline requires a permit from the State. The South Dakota Department of Game, Fish and Parks (SDGFP) is the entity responsible for issuing shoreline alteration permits. The State's official position is that shoreline alteration permits may be required for any activity that may have an impact on the lake, lakebed or lake shore, including, but not limited to: The construction of ditches or channels; dredging or excavating to remove sediment, or rock; seawall installation or repairs; retaining wall or breakwater construction; rip-rap installation or repairs; filling or creating artificial beach; stockpiling brush, trees, vegetation, construction materials or debris in the lake or on the shore; and/or removal or clearing of aquatic vegetation.

10. Mr. Chicoine has applied for a shoreline alteration permit. During the review of the application for a shoreline alteration permit by the SDGFP,

Mr. Chicoine amended his plans and indicated that he would use his existing irrigation well to provide an initial fill of the canal and then maintain a water elevation in the canal to protect the integrity of the canal liner. SDGFP responded by indicating SDGFP would be holding his application for a shoreline alteration permit in abeyance until a proper water right permit was obtained.

11. Mr. Chicoine has applied for the additional use of his irrigation well, which is completed into the Missouri: Elk Point aquifer, for the purpose of maintaining the integrity of the canal liner (Water Permit Application No. 8744-3.) That permit application is currently pending before the Water Management Board.

12. South Dakota Codified Law, section 46-1-15 provides "Except as otherwise provided throughout this title, no person may appropriate the waters of the state for any purpose without first obtaining a permit to do so."

13. Additionally, SDCL § 46-5-10 provides "Any person intending to acquire a right to beneficial use of water shall, before starting construction or placement of works for that purpose or before taking the water from any constructed works, make an application to the Water Management Board for a permit to appropriate water, in the form required by rules promulgated pursuant to chapter 1-26 by the board."

14. "Appropriation" is not defined in statute. The plain meaning of "appropriation", however, is the exercise of control over property; to take exclusive possession of; or to set apart for or assign to a particular use.

15. The Board heard testimony from Julie Burhoop. Ms. Burhoop serves as the vice president of communications for the Association. The Association

spends from \$50,000 to over \$150,000 per year pumping water from the Missouri River into McCook Lake. Ms. Burhoop additionally testified that the proposed canal would necessarily use McCook Lake water. She further testified that the Association does not have the pumping capacity and the pipeline cannot handle more than the current appropriation allowed for pumping of water into McCook Lake.

16. Dirk Lohry also provided testimony to the Board. Mr. Lohry is the current president of the Association. Mr. Lohry testified that he has measured McCook Lake weekly since 2011. The average fall of the elevation is 3.7 feet and has a range of 0 to 6 feet. Mr. Lohry testified that there would be no water for the proposed canal if the Association did not pump. He further testified that McCook Lake would dry up without the Association's pumping. Mr. Lohry additionally testified that water is leaving the lake through evaporation and leaching. While he feels they know what amount of what is lost through evaporation, the amount lost through leaching varies. He further testified that clay liners may work initially but will dry up and crack and allow leaching.

17. Kip Rounds, a regional supervisor for SDGFP also presented testimony to the Board. One of Mr. Rounds' duties is the review of applications for shoreline alterations. Mr. Rounds described the shoreline alteration permitting process and indicated that the permitting process does not involve public hearing. The most common type of shoreline alteration applications he has seen has been for shoreline stabilization. He further testified that the only shoreline alteration application for expansion of a lake that Mr. Rounds has seen is Mr. Chicoine's application.

18. Mr. Rounds further testified that the engineers for SDGFP determined that the soils present at the location for the construction of the proposed canal are susceptible to seepage. To mitigate seepage, those engineers recommended a clay liner. Should the clay liner dry out, it could become compromised to a point where it would not prevent seepage.

19. Chief Engineer Eric Gronlund testified before the Board as well. Mr. Gronlund testified that water permits are required when the water will be under the possession or control of the user. The construction of a canal as proposed by Mr. Chicoine does not result in the possession or control of the water and, therefore, it is not an appropriation of water. Mr. Gronlund further testified that the elevation levels of the lake and the elevation levels of the canal may not correspond at all times due to the berm which is to be constructed at the end of the canal.

20. Mr. Gronlund testified regarding the appropriation process in South Dakota and the different types of permits available including a standard or traditional type of permit which is required for an appropriation that occurs annually and a temporary permit for the use of public waters for construction, testing, and drilling purposes which has a limited duration. He stated that the initial fill for the proposed canal could be accomplished without an ongoing standard appropriative permit, but through a temporary permit for the use of public water for construction, testing, and drilling purposes.

21. Additionally, Mr. Gronlund testified that there are currently federal and state regulatory processes in place for a project like Mr. Chicoine's through

the United States Army Corps of Engineer 404 permitting program and SDGFP's shoreline alteration permitting process.

22. Mr. Gronlund is charged with protecting the waters of the state from waste and implementation of South Dakota's water permitting system. Mr. Gronlund stated that the canal, if constructed as proposed, would become part of McCook Lake and would not be appropriating water from McCook Lake. Mr. Gronlund also testified under natural conditions that McCook Lake is essentially a representation of the ground water table. Making matters more complicated is the entrenchment (or scouring causing a lowering of the bed) of the Missouri River which is lowering the ground water table in the area. Mr. Gronlund also testified of other similar projects (the expansion of a shoreline or construction of a canal) that have not been required to obtain a standard or traditional water permit.

23. Michael Chicoine additionally provided testimony regarding his application for a water right permit and associated documents.

24. Once constructed, the canal extends the shoreline of the lake and becomes part of the lake.

25. The construction of the proposed canal does not constitute an ongoing appropriation of McCook Lake water and, therefore, does not require a standard or traditional water right.

26. The initial fill of the proposed canal can be accomplished through the issuance of a temporary permit for the use of public waters for construction, testing, or drilling purposes pursuant to SDCL § 46-5-40.1.

27. Any finding of fact more properly designated as a conclusion of law shall be treated as such.

#### B. OBJECTIONS TO FINDINGS OF FACT

Water Rights filed Proposed Findings of Fact and the Petitioner filed objections and proposed alternate findings. In compliance with SDCL § 1-26-25, Petitioner's Objections to the Proposed Findings of Fact are accepted, modified, or rejected as follows:

1. Petitioner objected to Proposed Findings Paragraph 1 and alleged that it misstates the relief requested in the Petition and states: "The Association's Petition requests 'For the Board to issue a Declaratory Ruling finding that the expansion of a public body of water for private use or gain (such as by altering the shoreline of a lake and connecting a "canal") requires a permit to appropriate water.' This is not an accurate recitation of the relief requested in the Petition. Rather, Water Rights proposed fact #1 is taken verbatim from the Petition. Alternative Finding to Paragraph 1 is DENIED.
2. Petitioner objects to Proposed Findings Paragraph 19, specifically the sentence "The construction of a canal as proposed by Mr. Chicoine does not result in the possession or control of the water and, therefore, it is not an appropriation of water." The Proposed Finding is consistent with the evidence and testimony presented to the Board. No alternative Finding is proposed. Petitioner's objection is noted.
3. Petitioner objects to Proposed Finding 25 and asserts "The Association objects to Paragraph 25 of the Proposed Findings of Fact

because (a) the conclusion itself is wrong; and (b) the correct question is not whether an ongoing appropriation exists, but whether the canal "uses" water from McCook Lake. See SDCL § 46-1-3.\* This is merely a portion of Petitioner's argument at Hearing. No alternative Finding is proposed. Petitioner's objection is noted.

#### C. CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Board makes the following Conclusions of Law:

1. The Board has jurisdiction to entertain this request for a declaratory ruling pursuant to SDCL § 46-2-5 and ARSD 74:02:01:46.
2. The Chief Engineer is a proper party to this action. Additionally, the Chief Engineer filed a timely petition to participate in the matter.
3. Michael Chicoine, and Dakota Bay, LLC are also proper parties to this matter. Because the Association personally served Mr. Chicoine and Dakota Bay, LLC, neither were required to additionally file a petition to participate in the contested case proceedings.

#### D. OBJECTIONS TO CONCLUSIONS OF LAW

Water Rights filed Proposed Conclusions of Law and Petitioner filed objections to the proposed conclusions of law. In compliance with SDCL § 1-26-25, Petitioner's Objections to the Proposed Conclusions of Law are accepted, modified, or rejected as follows:

1. Petitioner objects to Paragraph 2 of the Proposed Conclusions of Law and alleges that the Chief Engineer is not a proper party to the action

and cites to SDCL § 46-2A-4 for this proposition. This assertion misunderstands the role of the Chief Engineer in the water appropriation methodology in South Dakota. Additionally, the Chief Engineer filed a timely petition to participate in the matter. No alternative Conclusion is proposed. Petitioner's objection is noted.

2. The Petitioner objects to Paragraph 3 of the Proposed Conclusions of Law and asserts that Dakota Bay, LLC/Michael Chicione were not proper parties pursuant to § SDCL 46-2A-4. At the hearing, the Board determined that they were a necessary, original party, additionally, the Association personally served Mr. Chicoine and Dakota Bay, LLC. No alternative Conclusion is proposed. Petitioner's objection is noted.

#### E. DECISION

The Board hereby **DENIES** the requested relief and declares that Mr. Chicoine's/Dakota Bay's canal is not an appropriation of McCook Lake water and does not require a standard or traditional permit from this Board.

Dated this 12 day of October, 2023.

BY THE BOARD:

*Bill Larson*

Bill Larson (Oct 12, 2023 12:42 CDT)

William Larson, Chairman  
South Dakota Water Management Board

Instruction to Newspaper - Publish on June 15, 2023. McCook Lake Recreation Area Association is responsible for payment.

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NOTICE OF HEARING ON PETITION FOR A DECLARATORY RULING REGARDING  
APPLICATION OF SDCL CHAPTER 46-1 TO PROPOSED SHORELINE ALTERATION OF  
MCCOOK LAKE, UNION COUNTY, SOUTH DAKOTA

Notice is given that a petition for declaratory ruling has been filed with the Water Management Board pursuant to SDCL §§ 1-26-15 and 46-2-5(4) and ARSD § 74:02:01:46. The name of the entity submitting and signing the petition: McCook Lake Recreation Area Association, PO Box 1185, McCook Lake, SD 57049.

The factual situation within the Water Management Board's jurisdiction is as follows:

Michael Chicoine has submitted an "Application for Shoreline Alteration of a South Dakota Public Water Body" for property owned by Dakota Bay, LLC. As detailed in the alteration application, Chicoine intends to expand McCook Lake, an oxbow lake located in Union County, South Dakota, by constructing a "canal" on property adjacent to the lake and connecting the canal to the lake for the private economic development of Dakota Bay, LLC's property. The South Dakota Department of Agriculture and Natural Resources has stated that Chicoine's expansion of McCook Lake does not require an application to the Water Management Board for a permit to appropriate water.

The applicable statutes and rules are: SDCL §§ 46-1-1, 46-1-3, 46-1-10, 46-1-15

Based on the petition, the requested action and reasons for the requested action are as follows:

Issue a declaratory ruling that Michael Chicoine/Dakota Bay, LLC are required to make an application to the Water Management Board for a permit to appropriate water before starting any construction or placement of works to expand McCook Lake for Michael Chicoine's/Dakota Bay, LLC's private use, because the proposed construction appropriates the water of McCook Lake and would also unlawfully impair the McCook Lake Recreation Area Association's water rights.

The petition for a declaratory ruling will be considered by the Water Management Board at 10:00 A.M. (**Central Time**), July 12, 2023, at the Floyd Matthew Training Center, Joe Foss Building, 523 E Capitol, Pierre, SD. The agenda time is an estimate and may be delayed due to prior agenda items. The Board may issue one of the following decisions regarding the petition for a declaratory ruling after all the evidence is taken at the hearing: 1) issue declaratory rulings on the requested actions set forth above; 2) take other action as the Board deems warranted after hearing the evidence presented; 3) defer action; or 4) take no action.

Any person who intends to participate in the hearing by opposing the petition for declaratory ruling shall allege that adoption of the petition by the Board will cause injury to the person that is unique from any injury suffered by the public in general. The injury must involve a matter either within the regulatory authority found in SDCL § 46-2A-9, or other matter concerning the

application within the regulatory authority of the board to act upon as defined by SDCL §§ 46-2-9 and 46-2-11, or both. Any person meeting requirements to be a party of record in a contested case hearing shall file a written petition to oppose the petition for declaratory ruling with BOTH the petitioner and Chief Engineer. A petition opposing the declaratory ruling shall be filed on a form provided by the Chief Engineer. The petition form is available online at <https://danr.sd.gov/public> or by contacting the Chief Engineer. The Chief Engineer's address is "Water Rights Program, Foss Building, 523 E Capitol, Pierre SD 57501" or call (605) 773-3352. The petitioner's mailing address is given above. A petition filed by an interested person must be filed by June 30, 2023. The person filing the petition for declaratory ruling is a party to the hearing and need not file a petition to intervene.

The petition opposing the petition for declaratory ruling shall be in writing and shall include a statement describing the unique injury upon adoption of the petition for declaratory ruling by the Board, the petitioner's reasons for opposing the declaratory ruling, and the name and mailing address of the petitioner or the petitioner's legal counsel, if legal counsel is obtained. The hearing is an adversary proceeding and any party has the right to be present at the hearing and to be represented by a lawyer. These and other due process rights will be forfeited if they are not exercised at the hearing and decisions of the Board may be appealed to the Circuit Court and State Supreme Court as provided by law.

Any interested person may file a comment on the petition for declaratory ruling with the Chief Engineer. The comment shall be filed on a form provided by the Chief Engineer and is available online at <https://danr.sd.gov/public> or by calling (605) 773-3352 or writing the Chief Engineer at the address provided above. Filing a comment does not make the commenter a party of record or a participant in any hearing that may be held. Any filed comment shall be provided by the Chief Engineer to the Board and become part of the public record. Any comment must be filed by June 30, 2023.

Notice is given to individuals with disabilities that the meeting is being held in a physically accessible location. Individuals requiring assistive technology or other services in order to participate in the meeting or materials in an alternate format should contact Brian Walsh, Nondiscrimination Coordinator, by calling (605) 773-5559 or by email at [Brian.Walsh@state.sd.us](mailto:Brian.Walsh@state.sd.us) as soon as possible but no later than two business days prior to the meeting in order to ensure accommodations are available.

Under SDCL § 1-26-17(7) notices must state that "if the amount in controversy exceeds \$2,500.00 or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request to the agency no later than ten days after service of a notice of hearing issued pursuant to SDCL § 1-26-17." This is a Notice of Hearing, service is being provided by publication, and the applicable date to give notice to the Chief Engineer is June 30, 2023.

This petition for a declaratory ruling is made pursuant to ARSD §§ 74:02:01:46 thru 74:02:01:49. The Board's legal authority and jurisdiction is found in SDCL §§ 46-2-5, 46-2-9, and 46-2-11.



DEPARTMENT of AGRICULTURE  
and NATURAL RESOURCES

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

## Petition

### Opposing Declaratory Ruling by McCook Lake Area Recreation Assn.

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

**Describe the unique injury approval of the proposed amendment(s) will have upon you.**

**List the reasons for your opposition.**

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

First Name: \_\_\_\_\_ Last Name: \_\_\_\_\_

Mailing Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

**Optional contact information.** Phone: \_\_\_\_\_ 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."

Petitioner's Name \_\_\_\_\_

**Any additional description of the unique injury or reasons for your opposition:**



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and NATURAL RESOURCES  
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## Comment

### Concerning Declaratory Ruling by McCook Lake Area Recreation Assn.

**Note.** Filing a comment does NOT make the commenter a party of record to, or a participant in, any hearing that may be held concerning this matter. Your comment will be provided to the Water Management Board and become part of the public record.

Comments:

Commenter's name and address:

First Name: \_\_\_\_\_ Last Name: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

**Note.** This comment needs to be submitted no later than the deadline date provided in the public notice. The mailing address is provided above, send to "Attention - Water Rights Program" or send via email to [DANRmail@state.sd.us](mailto:DANRmail@state.sd.us).

Commenter's Name \_\_\_\_\_

**Any additional comments:**

**Application ID:****8864****Application for Shoreline Alteration of a  
South Dakota Public Water Body****RECEIVED****JUL 24 2023****OFFICE OF****Project Address: SE 1/4 of 16-89-48 Union County, SD,  
North Sioux City, SD, SD 57049**Applicant Name: Mike ChicoineBusiness Name: N/AMailing Address: 32926 482nd Avenue Jefferson, SD,  
57038Phone Number: (712) 898-9173Email: mjchicoine24@gmail.com or brenda.gabel@gmail.comProposed Date Range: 03/01/2022 - 09/01/2022**Water Body:**Name/Description: The canal will run from where we have the marker placed, north, to the Southeast corner of  
McCook Lake.Location of water body: County: Union | Latitude: 42.52103 Longitude: -96.50865 | TRS: 089N048W16**Purpose of Project:**

To construct a waterway southerly from McCook Lake in order to provide lake access to existing residential lots, future lots to be developed and the potential relocation of the McCook Lake Boat Ramp for the city of North Sioux City, SD.

**Description of Project:**

To excavate a waterway (canal) having a 90-foot wide water surface to allow for 2-way no-wake boat travel to and from residential lots and the proposed relocated boat ramp. Proposed water depth of 8.0 feet with a flat bottom and 2:1 side slopes. Possible private boat docks on both sides leaving a boat travel width of about 40 feet. No wetland areas are to be affected. The area is currently mostly farmland with bordering grass areas. The excavated area will consist of an 11-foot deep, 110-foot wide canal that is approximately 1,800 feet in length.

Has a portion of the project already been completed? No**Description of Portion**
Footprint of Project Area (sq. ft.): 522720Linear Feet of Shoreline: 1800Type and estimated amount of materials to be excavated: Sand 56000CYType and estimated amount of materials to be placed: N/A**Adjacent Landowners:**

None. Both sides of the canal are owned by Mike Chicoine.

**Comments:**

No additional comments at this time.

MCLDR\_AR\_094

**APP 34****Filed: 1/16/2024 2:40 PM CST Union County, South Dakota 63CIV23-000171**

Signature of Applicant: Mike Chicoine

Date: 12/31/2021

MCLDR\_AR\_095

APP 35

Filed: 1/16/2024 2:40 PM CST Union County, South Dakota 63CIV23-000171

App P. 044



DEPARTMENT of AGRICULTURE  
and NATURAL RESOURCES  
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danr.sd.gov



**RECOMMENDATION OF CHIEF ENGINEER FOR WATER PERMIT  
APPLICATION NO. 8744-3, Dakota Bay**

Pursuant to SDCL 46-2A-2, the following is the recommendation of the Chief Engineer, Water Rights Program, Department of Agriculture and Natural Resources concerning Water Permit Application No. 8744-3, Dakota Bay, 32926 482nd Avenue, Jefferson SD 57038.

The Chief Engineer is recommending APPROVAL of Application No. 8744-3 because 1) there is reasonable probability that there is unappropriated water available for the applicant's proposed use, 2) the proposed diversion can be developed without unlawful impairment of existing domestic water uses and water rights, 3) the proposed use is a beneficial use and 4) it is in the public interest as it pertains to matters of public interest within the regulatory authority of the Water Management Board with the following qualifications:

1. The well approved under Water Permit No. 8744-3 is located near domestic wells and other wells which may obtain water from the same aquifer. Water withdrawals shall be controlled so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.
2. The Permit holder shall report to the Chief Engineer annually the amount of water withdrawn from the Missouri Elk Point aquifer.
3. Water Permit No. 8744-3 authorizes a total diversion of up to 28.6 acre-feet of water the first year when use begins and then up to 7.99 acre-feet annually from the Missouri Elk Point aquifer.

See report on application for additional information.

*Eric Gronlund*  
Eric Gronlund, Chief Engineer  
May 18, 2023

Report to the Chief Engineer  
On Water Permit Application No. 8744-3

Dakota Bay  
c/o Mike Chicoline  
May 19, 2023

Water Permit Application No. 8744-3 proposes to appropriate an amount of water not to exceed 28.6 acre-feet the first year of use followed by up to 7.99 acre-feet annually at a maximum instantaneous diversion rate of 1.55 cubic feet per second (cfs) from one existing well (150 feet deep) completed into the Missouri: Elk Point aquifer located in the E ½ SE ¼ (Lot 1 – original survey) of Section 16-T89N-R48W. The existing well is also authorized for irrigation use by Water Permit No. 6557-3 (Water Rights, 2023c). Water from the well will be used for recreational purposes to initially fill a proposed canal (20.61 acre-feet) which connects to McCook Lake and provide up to 7.99 acre-feet annually to cover any evaporation and seepage losses for purposes of preventing the canal liner from drying out, cracking, floating, or otherwise failing. Incidental runoff from adjoining property as well as direct precipitation may also provide water to the canal. The canal project is located in the NW ¼ SW ¼ (Lot 3 – original survey), SW ¼ SW ¼ of Section 15; E ½ SE ¼ (Lot 1 – original survey) of Section 16; all in T89N-R48W on the southeast side of McCook Lake in Union County.

**AQUIFER:** Missouri: Elk Point (M: EP)

**HYDROGEOLOGY:**

The Missouri: Elk Point aquifer is a glacial outwash deposit consisting of fine sand to very coarse gravel (Niehus, 1997). The Missouri: Elk Point aquifer underlies approximately 219,100 acres in Clay, Union, and Yankton Counties in South Dakota, and the aquifer contains approximately 3,287,100 acre-feet of recoverable water in storage (Hedges et al., 1982). The Missouri: Elk Point aquifer is hydrologically connected to the Big Sioux, Lower Vermillion-Missouri and Lower James-Missouri aquifers, and the Big Sioux, James, Missouri, and Vermillion Rivers (Niehus, 1994; Stephens, 1967).

In Union County, the average saturated thickness of the Missouri: Elk Point aquifer is approximately 84 feet, with a documented maximum aquifer thickness of approximately 146 feet (Niehus, 1997). The Missouri: Elk Point aquifer is generally under confined conditions in the northwestern part of the aquifer and unconfined conditions in the southern part of the aquifer, and the direction of groundwater movement in the aquifer is generally from the northwest to the southeast (Niehus, 1994 and 1997).

A well completion report is on file for the existing well (authorized by Water Permit No. 6557-3) proposed to be used by Water Permit Application No. 8744-3 (Water Rights, 2023c and 2023d). The report lists, "hard clay" from 0 to 8 feet below the ground surface, "sand" from 8 to 34 feet, "clay" from 34 to 55 feet, "gravel" from 55 to 62 feet, "sand" from 62 to 72 feet, "gravel" from 70 to 75 feet, "sand" from 75 to 110 feet, and "med gravel" from 110 to 150 feet (Water Rights,

2023c and 2023d). The well was screened in "med gravel" from 110 to 150 feet below the ground surface and had an approximate static water level of 13 feet below the ground surface at the time of well completion (May 24, 2005) (Water Rights, 2023d). Based on the well completion report on file, the Missouri: Elk Point aquifer is locally confined at the existing well site but unconfined in nearby areas (Water Rights, 2023d).

Figure 1 displays a map of the approximate Missouri: Elk Point aquifer boundary (modified from Hedges et al., 1982) and the location of the existing well proposed to be used by Water Permit Application No. 8744-3 (Water Rights, 2023c and 2023d).

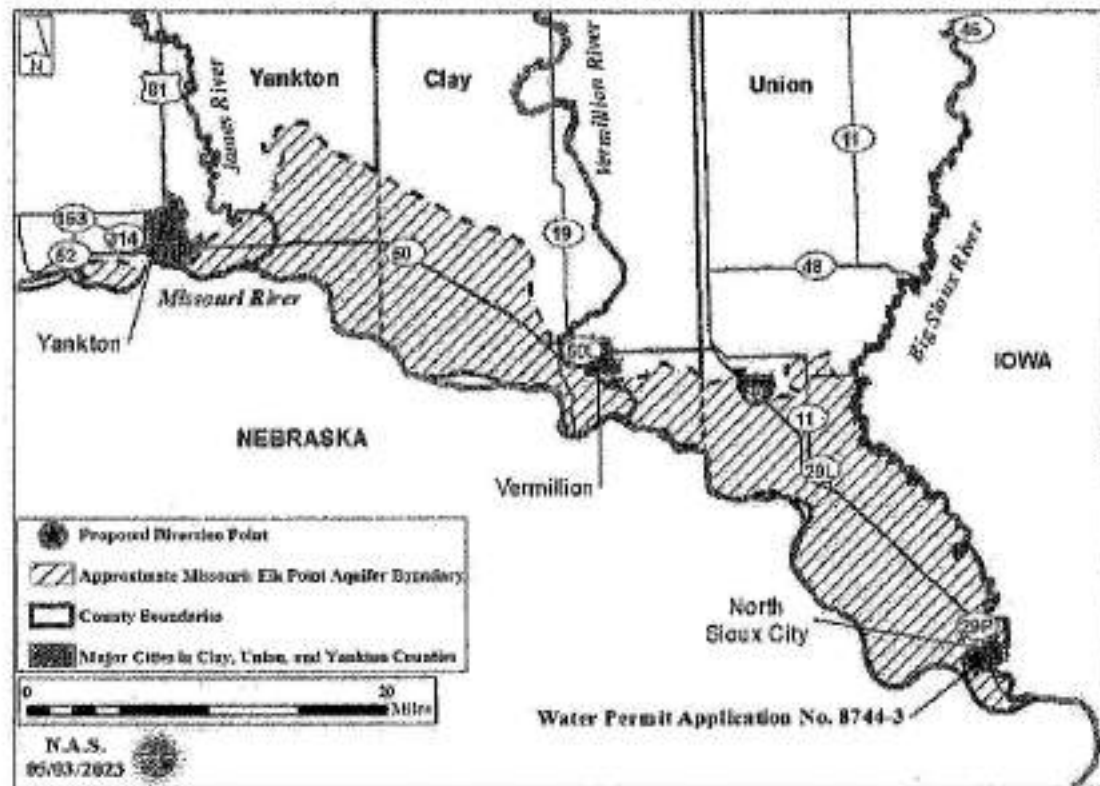


Figure 1. Map of the approximate Missouri: Elk Point aquifer boundary modified from Hedges and others (1982) with the location of the existing well proposed to be used by Water Permit Application No. 8744-3 (Water Rights, 2023c and 2023d)

#### **South Dakota Codified Law (SDCL) 46-2A-9**

Pursuant to SDCL 46-2A-9, "A permit to appropriate water may be issued only if there is a reasonable probability that there is unappropriated water available for the applicant's proposed use, that the diversion point can be developed without unlawful impairment of existing domestic water uses and water rights, and that the proposed use is a beneficial use and in the public interest as it pertains to matters of public interest within the regulatory authority of the Water Management Board as defined by SDCL 46-2-9 and 46-2-11." This report will address the availability of unappropriated water and the potential for unlawful impairment of existing domestic water uses and water rights within the Missouri: Elk Point aquifer.

#### **WATER AVAILABILITY:**

Water Permit Application No. 8744-3 proposes to appropriate water from the Missouri: Elk Point aquifer. The probability of unappropriated water being available from the aquifer can be evaluated by considering SDCL 46-6-3.1, which requires "No application to appropriate groundwater may be approved if, according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from a groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source. An application may be approved, however, for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the greenhorn formation in excess of the average estimated annual recharge for use by water distribution systems." The Missouri: Elk Point aquifer is not older than or stratigraphically lower than the Greenhorn Formation (Fahrenbach et al., 2010), and the applicant's proposed use is not for use in a water distribution system as defined by SDCL 46-1-6(17). Therefore, the average annual recharge and average annual withdrawal rates to and from the Missouri: Elk Point aquifer must be considered.

#### **HYDROLOGIC BUDGET:**

##### **Recharge**

Recharge to the Missouri: Elk Point aquifer is primarily through the infiltration of precipitation where the aquifer is at or near the ground surface, seepage from the Big Sioux, James, Missouri, and Vermillion Rivers, inflow from the Lower Vermillion-Missouri and Lower James-Missouri aquifers at the northern boundary of the Missouri aquifer and inflow from the Big Sioux aquifer at the extreme northeastern boundary of the Missouri aquifer, and from the underlying Dakota aquifer in Union County (Condley and Lamkey, 2022; Niehus, 1994 and 1997).

Several studies have been completed to estimate average annual recharge to the Missouri: Elk Point aquifer (Condley and Lamkey, 2022; Hedges et al., 1985; Mathiowetz, 2022; Stephens, 1967; Stonesifer, 2013). A discussion of these studies is available in the hydrologic budget section within the report for Water Permit No. 8614-3 - Lewis & Clark Regional Water System completed by Mathiowetz (2022). Collectively, the estimated average annual recharge rate to the Missouri: Elk Point aquifer is approximately 114,593.9 acre-feet per year assuming full development of the existing water rights/permits currently held by Lewis & Clark Regional Water System (Mathiowetz, 2022). If Water Permit Application No. 8754-3 (with a priority date

junior to this application), applied for by Lewis & Clark Regional Water System, requesting to appropriate up to 19,121 acre-feet per year, is approved and fully developed, the estimated average annual recharge rate to the Missouri: Elk Point aquifer is approximately 130,770.3 acre-feet per year (Mathiowetz, 2023).

### **Discharge**

Discharge from the Missouri: Elk Point aquifer is primarily through well withdrawals, evapotranspiration where the aquifer is at or near the ground surface, outflow to the Big Sioux and Missouri Rivers during periods of low flow and stage, and leakage to the underlying Dakota aquifer (Niehus, 1994 and 1997; Water Rights, 2023c).

Currently, there are 647 water rights/permits authorized to appropriate water from the Missouri: Elk Point aquifer, plus two pending applications (with priority dates senior to this application) – Water Permit Application No. 8727-3 proposing to irrigate 10 acres of turf at a golf course in Union County, and Water Permit Application No. 8739-3 proposing to crop irrigate 80 acres in Clay County (Water Rights, 2023c). There is one additional pending application (with a priority date junior to this application) – Water Permit Application No. 8754-3, applied for by Lewis & Clark Regional Water System, requesting to appropriate up to 19,121 acre-feet per year (Water Rights, 2023c).

Additionally, there are five future use permits (Nos. 5832-3, 6237-3, 6869-3, 6869A-3, and 7208-3) reserving 1,900 acre-feet of water annually from the Missouri: Elk Point aquifer (Water Rights, 2023c). For the purpose of estimating average annual withdrawals, the future use permits are assumed to be fully developable for a total of 1,900 acre-feet per year.

Table 1 summarizes the 43 non-irrigation water rights/permits (including two irrigation water permits, see paragraph below) authorized to appropriate water from the Missouri: Elk Point aquifer with the estimated annual use for each water right/permit as determined by their limiting diversion rate or annual volume. Historically, average water use by non-irrigation appropriations limited by an instantaneous diversion rate have been assumed to be pumping 60% of full time at the respective permitted diversion rate. Water rights/permits limited by an annual volume are assumed to withdraw their entire respective annual volume limitation. This is a standard method used by the DANR-Water Rights Program for estimating annual withdrawals by non-irrigation appropriations from an aquifer (Water Rights, 2023c). This method is likely an overestimation of withdrawals. Three municipal water rights were identified as being connected to a rural water system and likely maintain their wells for standby purposes (Drinking Water Program, 2023; Water Rights, 2023c); as such, the average annual water use for these water rights has been estimated to be zero acre-feet per year on Table 1.

Water Permit No. 5998-3 is permitted for the irrigation of turf and Water Permit No. 5998A-3 extends the amount of time allowed for water to be put to beneficial use as authorized by Water Permit No. 5998-3 (Water Rights, 2023c). The estimated use for these two irrigation permits is included with the non-irrigation water rights/permits listed on Table 1, as the permit holder is not required to submit an annual irrigation questionnaire. However, Water Permit No. 5998-3 is authorized for use in a rural water system and the permit holder reports the annual use by Water

Permit No. 5998-3 with their other rural water system Missouri: Elk Point aquifer permits, listed on Table 2 (Water Rights, 2023c).

Water Permit No. 7059-3 is permitted for recreational use for maintaining the water level of a small lake with a surface area of 17.6 acres (Water Rights, 2023c). It is assumed that the only consumptive use of this water is due to evaporation; however, it is likely there is some seepage through the bottom of the pond (Water Rights, 2023c). Annual evaporation of water from shallow lakes is estimated to be approximately 42 inches per year at the location of the authorized diversion point for Water Permit No. 7059-3 (NOAA, 1982; Water Rights, 2023c), and average annual total precipitation at the Sioux City, Iowa airport was determined to be approximately 29.27 inches over a 30-year period of record (1991 to 2020) (Arguez et al., 2020), which results in the lake to fluctuate approximately 12.73 inches per year. To maintain the water level of the small lake, the estimated use of Water Permit No. 7059-3 is approximately 18.7 acre-feet per year.

Overall, the average annual withdrawal rate for the 43 non-irrigation water rights/permits (including the two irrigation permits not required to submit an annual irrigation questionnaire) authorized to appropriate water from the Missouri: Elk Point aquifer is approximately 70,648 acre-feet per year (Table 1) (Water Rights, 2023c and 2023f).

Report on Water Permit Application No. 8744-3

**Table 1.** Estimated annual use for the non-irrigation water rights/permits (plus two irrigation water permits for Clay RWS) authorized to divert water from the Missouri Elk Point aquifer (Drinking Water Program, 2023; Water Rights, 2023c and 2023f)

Permit No.	Name	Status	Priority Date	Use	Authorized Diversion Rate (cfs)	Authorized Annual Volume (acre-feet/year)	Total Estimated Use (acre-feet/year)
4501-3	Eddie Wahl	LC	02/22/1980	COM	0.95		21.2
5616-3	Cimph Inc	LC	01/31/1992	COM	0.44		191.2
5837-3	Dan Lantis	LC	06/08/1994	COM	0.022		9.6
5953-3	H & K Oil Co	LC	08/19/1996	COM	0.037		16.1
6151-3	Vernon & Norma Yakov	LC	10/04/1999	COM	0.67		291
6580-3	West Shores Acres LLC	LC	01/28/2005	COM	0.10		43.5
8231-3	Dakota Protein Conversion Inc	PE	06/18/2014	COM	0.22		93.6
8147-3	Doug Lafflor	PE	04/06/2015	COM, LCO	1.0	160	162
8381-3	R² Constructors	PE	11/19/2018	COM	0.04	1	1
8403-3	Sackman's Livestock Inc	PE	06/23/2019	COM	2.0	40	40
8415-3	J Sun Properties	PE	11/14/2019	COM	0.10	25	25
8435-3	Sloan City Irrigation	PE	07/30/2012	COM	0.33	1	1
8794-3	Jerold J. Gant	PE	07/24/2006	DOM, COM	0.78		339.0
7388-3	Clay RWS Inc	PE	07/30/2012	DOM, IRR	2.0		346
5908-3	Clay RWS Inc	PE	06/21/1997	IRR, DOM	2.2		
5908A-3	Clay RWS Inc	PE	06/21/1997	IRR, DOM	0.9		
5490-3	USGS CERC Field Research Station	LC	11/15/1990	FWP	0.09		10.1
3907-3	US Fish and Wildlife Service	LC	01/28/1996	FWP	3.78		1,642
6733-3	US Fish and Wildlife Service	LC	06/03/2006	FWP	1.11		482.5
2094-3	US Fish and Wildlife Service	LC	12/06/2008	FWP	2.67		1,139.8
5021-3	Valley-Dale Electronics Inc	LC	05/04/1981	IND	0.10		43.5
5188-3	LC Electric Inc	LC	01/29/1991	IND	0.45		195.6
5453-3	ArLudin Industries Inc	LC	05/24/1999	IND	0.05		21.2
5503-3	Valley-Dale Electronics Inc	LC	10/30/1999	IND	0.096		39.3
6120-3	Krifle River	LC	01/03/2000	IND	0.222		96.5
1255-3	City of Elk Point	LC	01/01/1914	MUN	1.13		491.1
143-3	City of Vermilion	LC	08/21/1956	MUN	1.78		773.7
147-3	City of Vermilion	LC	01/01/1935	MUN	2.65		1,237
6236-3	City of Vermilion	LC	11/06/2000	MUN	2.6	1,161	
6254-3	City of Vermilion	LC	09/12/2002	MUN	0.022		10
1565-3	Town of Gayville	LC	03/01/1914	MUN	0.37		0*
4702-3	Town of Jefferson	LC	03/01/1916	MUN	0.90		191
5118-3	Town of Gayville	LC	01/28/1987	MUN	0.33		0*
5437-3	Dakota Dunes Community Improvement District	LC	04/12/1990	MUN	3.33		2,412
5782-3	City of North Sioux City	LC	08/12/1993	MUN	1.14		495.5
8212-3	City of Yankton	LC	03/25/2016	MUN	20.12	6,090	6,050
2059-3	WJ Investments LLC	PE	06/28/2008	REC	3.11		18.7
6736-3	Lewis and Clark RWS	PE	07/08/1998	RWS	27.85	20,165	53,442
7207-3	Lewis and Clark RWS	PE	07/08/1998	RWS	20	12,000	
8613-3	Lewis and Clark RWS	PE	07/16/2007	RWS	29.8	13,000	
8614-3	Lewis and Clark RWS	PE	03/04/2022	RWS	17.61	8,277	
5281-3	Lansons Landings	LC	07/30/1991	SHD	0.089		38.7
5992-3	East Winds Court Inc	LC	10/09/1991	SHD	0.11		0*
						<b>TOTAL:</b>	<b>70,648</b>

\* Identified as being converted to a RWS, therefore, water use from aquifer is presumed to be zero acre-feet/year

COM: Commercial; DOM: Domestic; FWP: Fish and Wildlife Propagation; IND: Industrial; IRR: Irrigation; LCO: Livestock Confinement Operation; MUN: Municipal; REC: Recreation; RWS: Rural Water Systems; SHD: Suburban Housing Development

Of the 43 non-irrigation water rights/permits (including the two irrigation permits not required to submit an annual irrigation questionnaire), there are 16 non-irrigation water rights/permits that are required to report their annual usage from the Missouri: Elk Point aquifer (Water Rights, 2023c and 2023f).

Four of the non-irrigation water rights/permits that are required to report (Nos. 8031-3, 8415-3, 8435-3, and 8614-3) are currently under development (or were approved in 2023) and have not reported any withdrawals from the Missouri: Elk Point aquifer to the DNR-Water Rights Program (Water Rights, 2023c). The remaining twelve non-irrigation water rights/permits that are required to report their annual usage from the Missouri: Elk Point aquifer are shown on Table 2 (Water Rights, 2023c and 2023f). The reported usage (as shown on Table 2) for Permit Nos. 8381-3 and 8403-3 (approved in 2018 and 2019) is not necessarily reflective of the future usage of these permits based on information within their respective water permit files (Water Rights, 2023c), and only three years of reported withdrawals (Water Rights, 2023f). Therefore, the estimated use for Permit Nos. 8031-3, 8415-3, 8435-3, 8381-3, and 8403-3 will be based on the method used above: water rights/permits limited by an instantaneous diversion rate have been assumed to be pumping 60% of full time at the respective permitted diversion rate; water rights/permits limited by an annual volume are assumed to withdraw their entire respective annual volume limitation. The estimated average annual withdrawal rate for these permits is listed on Table 1.

Next, the reported use for the City of Yankton (8212-3) and Lewis and Clark Regional Water System (6736-3, 7207-3, and 8613-3) (as shown on Table 2) is steadily increasing (Water Rights, 2023f), as these water users are continually undergoing development (8614-3 was approved in 2023) (Water Rights, 2023c). It is likely these water users will use up to their entire respective annual volume limitation in the future; therefore, the average annual withdrawal rate for these water rights/permits is assumed to be their entire respective annual volume listed on Table 1 (Water Rights, 2023c).

The annual withdrawal rate for Clay Rural Water System Inc (Permit Nos. 5998-3, 5998A-3, and 7388-3) averaged over the last ten years (approximately 346 acre-feet per year) is more reflective of current usage than the entire period of record of reported withdrawals because the first few years the permit holder reported values were during a construction period (Water Rights, 2023c and 2023f). The average annual withdrawal rate based off the reported annual withdrawal rates averaged from 2012 to 2021 on Table 2 for these water permits will be used in this analysis.

Lastly, the annual withdrawal rates for Doug Lafleur (8147-3) and City of Vermillion (147-3, 6236-3) on Table 2 are relatively steady over their respective periods of record (Water Rights, 2023c and 2023f); therefore, the average annual withdrawal rate based on the reported values from each of these water users (as shown on Table 2) is reasonably reflective of the future withdrawals likely to be made by these appropriative users. The average annual withdrawal rate based off the reported annual withdrawal rates averaged over the period of record on Table 2 for these water rights/permits will be used in this analysis.

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Table 2. Non-irrigation water rights/permits required to report their respective annual use from the Missouri: Elk Point aquifer (Water Rights, 2023c and 2023f)

	RP Constructors	Stockmen's Livestock Inc	Clay RWS Inc	Doug LaFleur	City of Vermillion	City of Yankton	Lewis and Clark RWS
	8381-3	8403-3	5998-3, 5998A-3, 7388-3	8147-3	147-3, 6236-3	8212-3	6736-3, 7207-3, 8013-3
2003			238		1,363		
2004			483		1,226		
2005			21		1,247		
2006			170		1,352		
2007			217		1,344		0
2008			215		1,199		0
2009			215		1,140		0
2010			183		1,071		0
2011			137		1,127		92
2012			525		1,217		3,536
2013			301		1,183		9,368
2014			307		1,121		11,532
2015			278	302	1,161		15,591
2016			231	302	1,175	66	17,091
2017			276	202	1,215	531	18,051
2018			305	98	1,368	594	18,143
2019	0.0171	1	292	155	1,440	1,370	20,397
2020	0.0024	4.2	461	121	1,373	2,923	21,039
2021	0.2332	5.5	486	170	1,378	3,065	23,537
Max	0.2	5.5	525	302	1,440	3,065	23,537
Min	0.0171	1	21	98	1,071	66	0
Avg	0.091	3.57	281	162	1,237	1,410	14,428*

RWS: Rural Water System \*Excluded reported zero values

Currently, there are 606 irrigation water rights/permits authorized to appropriate water from the Missouri: Elk Point aquifer, plus two pending irrigation permit applications collectively proposing to irrigate 90 acres (Water Rights, 2023c). Irrigation water rights/permits have been typically required to report their annual usage on an irrigation questionnaire since 1979. The estimated average annual withdrawal rate for the Missouri: Elk Point aquifer irrigation water rights/permits that have reported over the period of record is approximately 18,703 acre-feet per year (Table 3) (Water Rights, 2023a). To reflect the current development of irrigation water rights/permits more accurately, the average annual withdrawal rate for irrigation appropriations that have reported from 2012 to 2021 is approximately 27,247 acre-feet per year (Table 3) (Water Rights, 2023a).

The usage for two irrigation water permits (Nos. 5998-3 and 5998A-3) was accounted for on Table 1 with the non-irrigation water rights/permits, as the permit holder is not required to submit an annual irrigation questionnaire (Water Rights, 2023c), resulting in only 604 of the Missouri: Elk Point aquifer irrigation water rights/permits being currently required to submit an annual irrigation questionnaire (Water Rights, 2023c).

Additionally, Water Right No. 6110-3 is authorized to divert water from a well completed into the Dakota aquifer and pump the water into two ponds that receive incidental surface runoff and possible groundwater inflow from the Missouri: Elk Point aquifer (Water Rights, 2023c). Water Right No. 6110-3 is included in the 606 irrigation water rights/permits authorized to appropriate water from the Missouri: Elk Point aquifer; however, the estimated use for this permit is assumed to be negligible to the overall hydrologic budget due to the minimal amount of water from the Missouri: Elk Point aquifer the permit holder is expected to withdraw. When omitting Water Right No. 6110-3 and Water Permit Nos. 5998-3 and 5998A-3 from this analysis of Missouri: Elk Point aquifer irrigation water rights/permits, 603 water rights/permits remain.

Table 3 lists only 572 water rights/permits as reporting in 2021 (Water Rights, 2023a and 2023c). These 572 water rights/permits listed as reporting in 2021 includes eight water rights/permits (Nos. 3722-3, 5658A-3, 6940-3, 6941-3, 7066-3, 7447-3, 7663-3, 7800-3, and 7941-3) that were incorporated into another water right or cancelled in 2022 (Water Rights, 2023c), resulting in only 563 of the water rights/permits listed as reporting in 2021 being currently active.

Forty water permits/rights did not submit an irrigation questionnaire form in 2021 that are currently active, accounting for the difference between the 563 currently active water rights/permits listed as reporting in 2021 and the 603 irrigation water rights/permits currently required to submit an annual irrigation questionnaire and annual use being estimated in this analysis (Water Rights, 2023a and 2023c). Of these 40 permits, 37 were issued in 2021, 2022, or 2023 and have not submitted an irrigation questionnaire at this time. Of the remaining three water rights (Nos. 3154-3, 4745-3, and 5935-3), Water Right No. 5935-3 is not required to submit an irrigation questionnaire and Water Right Nos. 3154-3 and 4745-3 did not submit an irrigation questionnaire in 2021 for an unknown reason. Overall, these 37 water permits/rights are authorized to irrigate approximately 3,110 acres (Water Rights, 2023c).

Table 3. Reported historic irrigation use from Missouri Elk Point aquifer (Water Rights, 2023a)

Year	No. of Permits Reporting	Reported Pumpage (acre-feet)
1979	259	10,258
1980	263	14,937
1981	297	13,931
1982	269	19,143.1
1983	273	11,081
1984	281	9,605.5
1985	282	14,020.7
1986	286	6,324.8
1987	281	13,369
1988	282	28,558.1
1989	292	25,904.3
1990	297	19,508
1991	300	18,877.7
1992	295	1,895
1993	298	1,475.2
1994	295	10,314.9
1995	292	18,761.3
1996	296	9,473.6
1997	305	17,236
1998	313	11,079.5
1999	308	14,877
2000	309	26,551
2001	313	19,115.2
2002	315	23,326.9
2003	314	27,007
2004	322	24,309
2005	335	24,206.1
2006	353	27,943.3
2007	366	30,652
2008	396	16,439
2009	410	6,346
2010	419	2,906.9
2011	431	12,330
2012	445	56,994.7
2013	543	35,090.5
2014	557	12,423.5
2015	563	17,834.1
2016	564	27,869.3
2017	567	37,209.9
2018	570	9,160.7
2019	575	8,736.3
2020	570	26,601
2021	572	40,501.4
Min	259	1,475.2
Max	575	56,994.7
Avg (1979 to 2021)	369	18,703
Avg (2012 to 2021)	553	27,247

Farmer (2018a, 2018b, and 2021) analyzed the amount of water pumped per permitted acre for the period from 1979 to 2005. This period was chosen due to the relatively stable number of permitted acres across the entire period. There was a continual annual increase in the number of permitted acres from 2006 to 2013/2014. Since 2013/2014 the total number of permitted acres has been relatively stable (Mathiowetz, 2022; Water Rights, 2023c). Farmer (2021) determined that it would be best to separate the review of pumpage per permitted acres between crops, such as corn and soybeans, and turf, such as golf courses and lawn irrigation, to describe the pumpage more accurately per permitted acres. Turf irrigation typically requires more water per acre annual than crop irrigation. Mathiowetz (2022) determined over the entire period of record (1979 through 2021), the crop application rate per permitted acre is 0.331 feet per year (3.97 inches per year), and 0.908 feet per year for turf (10.9 inches per year) (Water Rights, 2023a and 2023c).

Currently, there are approximately 83,116.1 acres authorized to be irrigated from the Missouri: Elk Point aquifer (plus two pending irrigation applications – Water Permit App No. 8727-3 proposing to irrigate 10 acres of turf and Water Permit App No. 8739-3 proposing to irrigate 80 acres of crop(s)), with 809.6 of those acres authorized for turf irrigation (Water Rights, 2023c). Table 4 contains the turf irrigation permits with their respective authorized permitted acres and an estimated average annual use based on Mathiowetz's (2022) application rate per permitted acre (Water Rights, 2023c). By multiplying the application rate of 0.908 feet per acre per year (Mathiowetz, 2022), by the 809.6 acres being turf irrigated (plus 10 acres for pending Water Permit App No. 8727-3) (Water Rights, 2023c), the annual use for turf irrigation yields approximately 744.2 acre-feet per year (Table 4). By multiplying the application rate of 0.331 feet per acre per year (Mathiowetz, 2022), by the 82,386.5 acres (total acres minus turf irrigated acres, including pending Water Permit App No. 8727-3) acres being crop irrigated (Water Rights, 2023c), including 80 acres for pending Water Permit App No. 8739-3, the annual use for crop irrigation yields approximately 27,270 acre-feet per year. Collectively, the average annual use from the Missouri: Elk Point aquifer for both crop and turf irrigation water rights/permits utilizing Mathiowetz's (2022) application rates is approximately 28,014.1 acre-feet per year.

Table 4. Water rights/permits authorized for irrigation of turf (Water Rights, 2023c)

Permit No.	Name	Status	County	Acres	Total Estimated Use (acre-feet/year)
1294-3	Recreation Development Assn. Inc.	LC	Union	102	92.6
2011-3	TR Golf LLC	LC	Union	95	86.3
5786-3	Dakota Dunes Golf Course	LC	Union	173	157.1
5998-3	Clay Rural Water System Inc	PE	Union	300	272.4
5998A-3	Clay Rural Water System Inc	PE	Union	0	0
5935-3	Ted Wolt	LC	Union	1	0.908
5936-3	Applied Engineering	LC	Yankton	1.8	1.6
8010-3	Ryan Rusher	LC	Yankton	2.5	2.3
8029-3	Dakota Dunes Comm Improvement District	PE	Union	17.8	16.2
8040-3	Heine Electric & Irrigation Inc	LC	Clay	1	0.908
8354-3	TR Golf LLC	PE	Union	30	27.24
8407-3	Cresville-Volia School District 63-1	LC	Yankton	4.5	4.1
8530-3	National Field Archery Association Foundation	LC	Yankton	16	14.5
8560-3	TR Golf LLC	PE	Union	65	59
<b>TOTAL:</b>				<b>809.6</b>	<b>735.1</b>

There are domestic wells completed into the Missouri: Elk Point aquifer that do not require a water right/permit, so the withdrawal amount from those wells is unknown (Water Rights, 2023d). Due to their relatively low diversion rates, withdrawals from domestic wells are not considered to be a significant portion of the hydrologic budget. Additionally, with the development of rural water systems in areas where the Missouri: Elk Point aquifer is the uppermost aquifer available; it is likely some domestic users may have transitioned to rural water. Therefore, the quantity of water withdrawn by domestic wells is estimated to be negligible to the hydrologic budget for the Missouri: Elk Point aquifer.

#### Hydrologic Budget Summary

The average annual recharge rate to the Missouri: Elk Point aquifer is approximately 114,593.9 acre-feet per year. The average annual withdrawal rate for the water rights/permits authorized to appropriate water from the Missouri: Elk Point aquifer totals approximately 100,591 acre-feet per year (including the estimated use for Water Permit Application No. 8744-3, if approved) (listed on Table 5). Based on the hydrologic budget, there is a reasonable probability unappropriated water is available from the Missouri: Elk Point aquifer for the proposed appropriation.

Table 5. Estimated use from Missouri: Elk Point aquifer (Water Rights, 2023a, 2023c, and 2023f)

Type of Water Right/Permit	Estimated Use (acre-feet/year)
Future Use Reservations	1,500
Non-Irrigation	70,648
Irrigation (Mathiowetz's (2022) turf and crop application rates) including pending applications: Nos. 8727-3 and 8739-3	28,014
Application No. 8744-3 (if approved, assuming full volume - 20.61 one-time use, 7.99 annually)	28.6
<b>TOTAL:</b>	<b>100,591</b>

# **OBSERVATION WELL DATA:**

Administrative Rule of South Dakota (ARSD) 74:02:05:07 requires that the Water Management Board shall rely upon the record of observation well measurements in addition to other data to determine that the quantity of water withdrawn annually from the aquifer does not exceed the estimated average annual recharge of the aquifer.

Observation wells provide data on how the aquifer reacts to regional climatic conditions and local pumping. The DANK-Water Rights Program monitors 36 observation wells completed into the Missouri: Elk Point aquifer (Water Rights, 2023b). The five closest observation wells to the well the applicant proposes to use are UN-78C (approximately 0.6 miles southeast), UN-78D (approximately 1.6 miles northeast), UN-77U (approximately 1.8 miles northeast), UN-77V (approximately 1.8 miles northeast), and UN-77Q (approximately 3.8 miles northwest) (as shown in Figure 8) (Water Rights, 2023b). The hydrographs for these observation wells are displayed in Figures 2 to 6 (Water Rights, 2023b). The data points utilized to construct the hydrographs are measurements of the static water level in the observation wells from the top of the well casing. It is worth noting the hydrograph titles display DENR Water Rights Observation Well on the hydrographs when the titles should display DANK Water Rights Observation Well on the hydrographs.

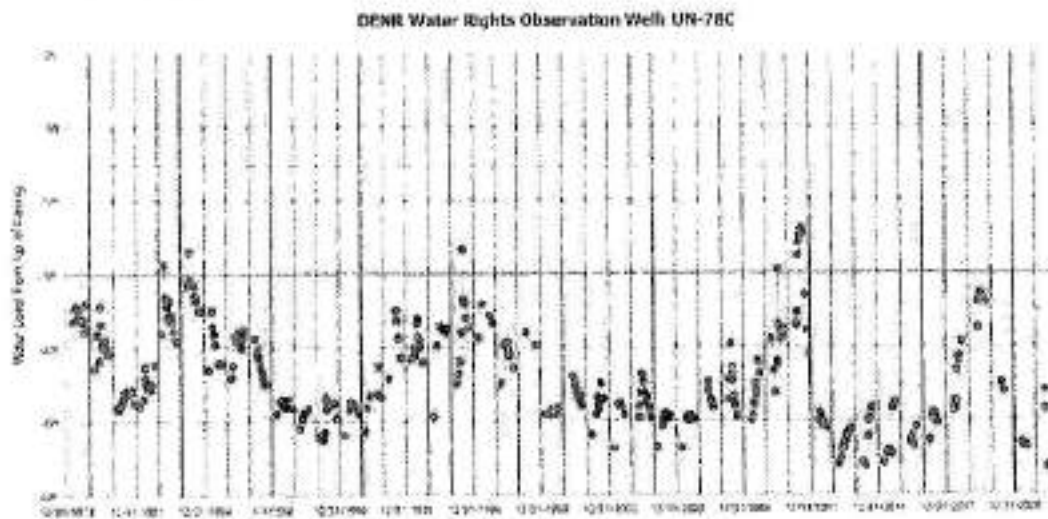


Figure 2. Hydrograph for observation well UN-78C (Water Rights, 2023b)

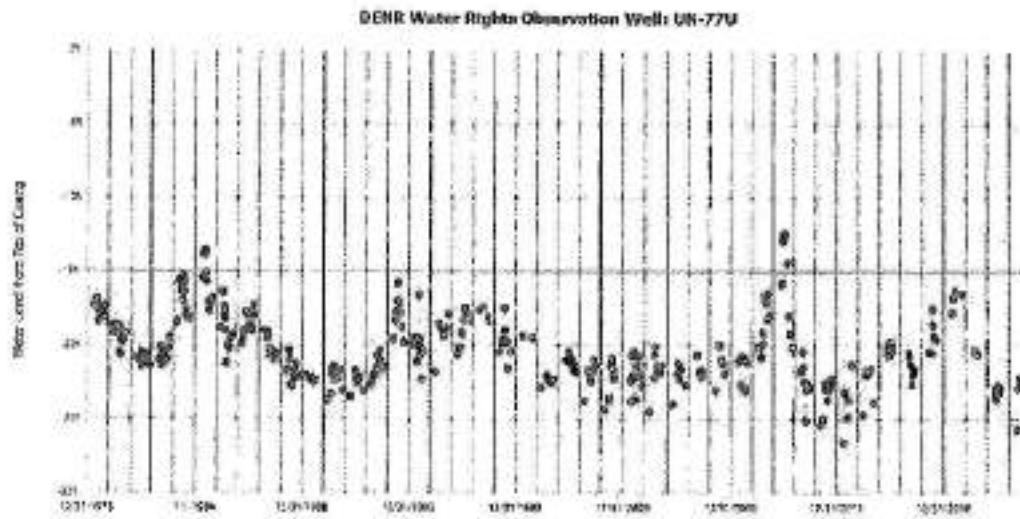


Figure 3. Hydrograph for observation well UN-77U (Water Rights, 2023b)

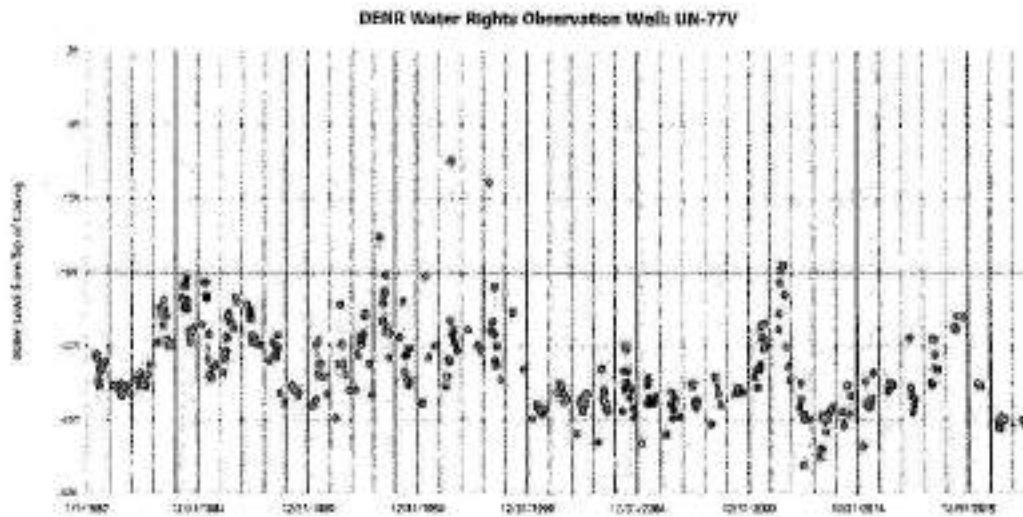
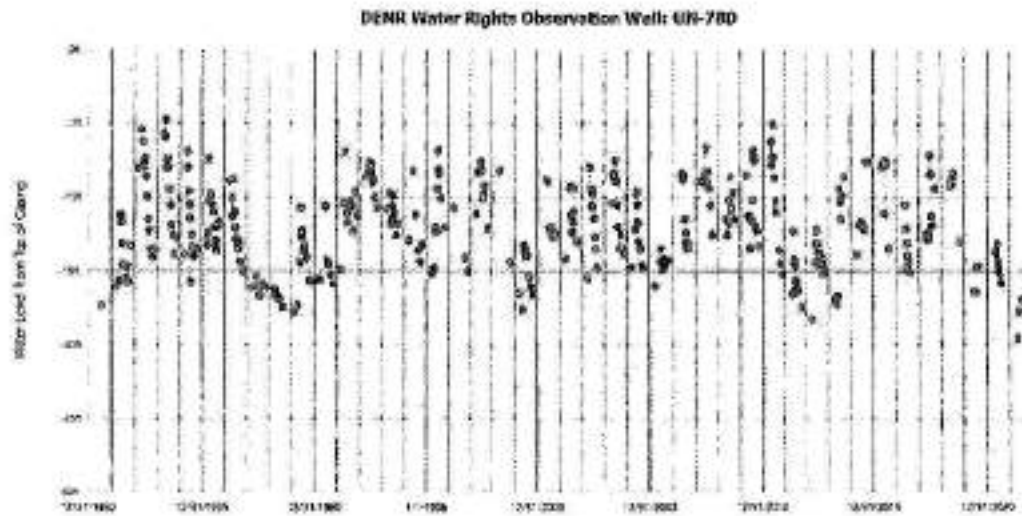
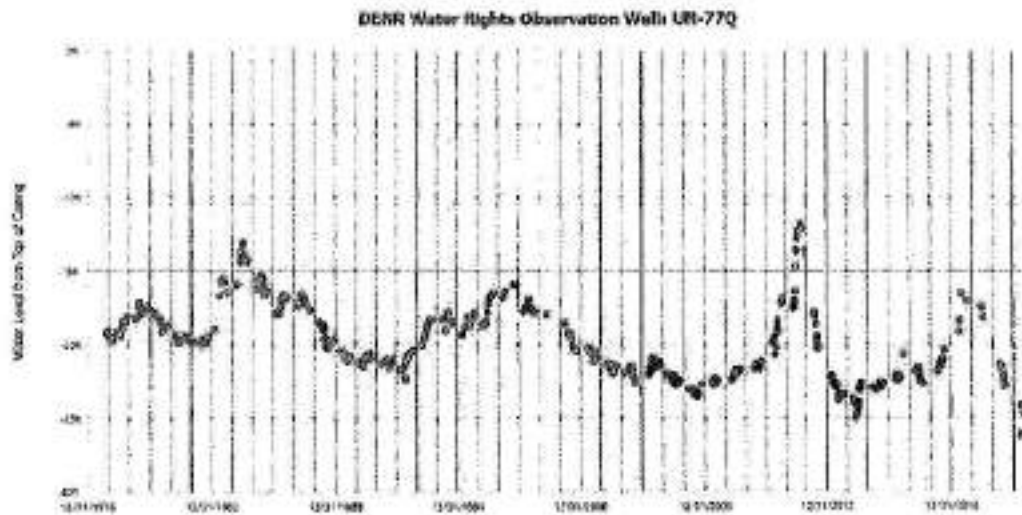


Figure 4. Hydrograph for observation well UN-77V (Water Rights, 2023b)



**Figure 5.** Hydrograph for observation well UN-78D (Water Rights, 2023b)



**Figure 6.** Hydrograph for observation well UN-77Q (Water Rights, 2023b)

The hydrographs for these observation wells were compared to hydrographs for other observations wells completed into the Missouri: Elk Point aquifer and each displayed a generally similar trend as shown on the hydrographs displayed in Figures 2 to 6 (Water Rights, 2023b). Several of the Missouri: Elk Point aquifer observation well hydrographs show a gradual long-term downward trend especially those close to the Missouri River (Water Rights, 2023b). This downward trend is caused by entrenchment of the Missouri River riverbed and in some places a widening of the channel leading to lower water levels despite the river having the same rate of flow (Elliott and Jacobson, 2022). The lowering of the water level in the Missouri River downstream of the Gavin's Point Dam and the subsequent lowering of the water level of

Missouri: Elk Point aquifer observation wells in close proximity to the river show the strong hydrologic connection between the Missouri River and the Missouri: Elk Point aquifer. This is demonstrated by the very similar water levels between the aquifer and river as shown in the hydrographs in Figures 2 to 7. The lowering of the water levels in the aquifer, especially in close proximity to the Missouri River, is not a sign of over appropriation of the Missouri: Elk Point aquifer.

To demonstrate the connection between the aquifer and the Missouri River, consider the United States Geological Survey (USGS) Stream Gage #06467500, located on the Missouri River at Yankton, SD, and the hydrograph for this gage is shown in Figure 7 (USGS, 2023). By comparing the hydrograph for Stream Gage #06467500 to the observation well hydrographs of the Missouri: Elk Point aquifer (Figures 2 to 6), both show the river and aquifer react to climatic conditions by rising and falling over similar trends (USGS, 2023; Water Rights, 2023b). Additionally, during flood events (such as, the years 2011 and 2019), the water level in the Missouri: Elk Point aquifer, especially where in closer proximity to the Missouri River, rises very quickly beyond what is typically seen for glacial outwash aquifers (Water Rights, 2023b). This indicates there is a hydrologic connection between the Missouri: Elk Point aquifer and the Missouri River. Therefore, when the elevation of the water in the Missouri River is higher than the elevation of water in the aquifer, the river will recharge the aquifer. In contrast, when the elevation of water is higher in the Missouri: Elk Point aquifer, the aquifer naturally discharges to the Missouri River. The observation well water levels simply show the connection between the river and the aquifer and how the aquifer reacts to climatic conditions without showing any long-term effects from pumping. Therefore, there is a reasonable probability unappropriated water is available for this proposed appropriation.

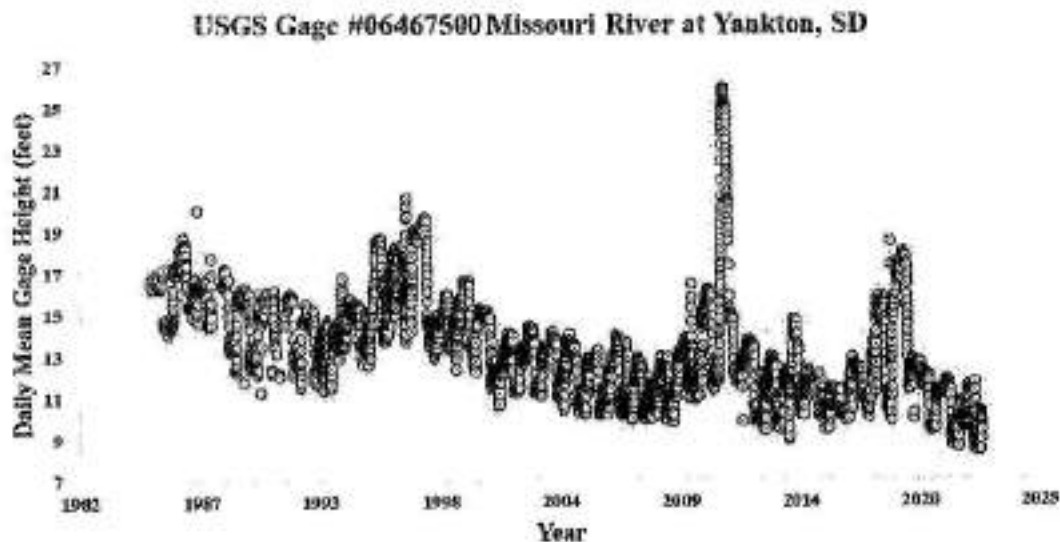


Figure 7. Hydrograph for USGS Stream Gage #06467500 Missouri River at Yankton, SD from 1985 to 2023 (USGS, 2023)

# POTENTIAL FOR UNLAWFUL IMPAIRMENT OF EXISTING WATER RIGHTS:

Currently, there are 647 water rights/permits authorized to appropriate water from the Missouri: Elk Point aquifer, plus three pending permit applications (two senior, one junior in priority) (Water Rights, 2023c). The nearest diversion points are authorized by Water Right No. 6680-3 and Water Permit Nos. 8381-3 and 8435-3 and are located approximately one mile southeast and west of the existing well location for this application (Table 6) (Figure 8) (Water Rights, 2023c). These water rights/permits are held by Parks & Wildlife Foundation, RP Constructors, and Sioux City Insulation (Water Rights, 2023c).

There are domestic wells on file with the DANR-Water Rights Program that are completed into the Missouri: Elk Point aquifer, with the closest domestic well on file (not held by the applicant) approximately 0.3 miles northwest of the existing well location (Water Rights, 2023d). There could potentially be other domestic wells completed into the Missouri: Elk Point aquifer near the existing well that are not on file with the DANR-Water Rights Program. The location of the domestic wells is based on the location provided at the time of completion by the well driller.

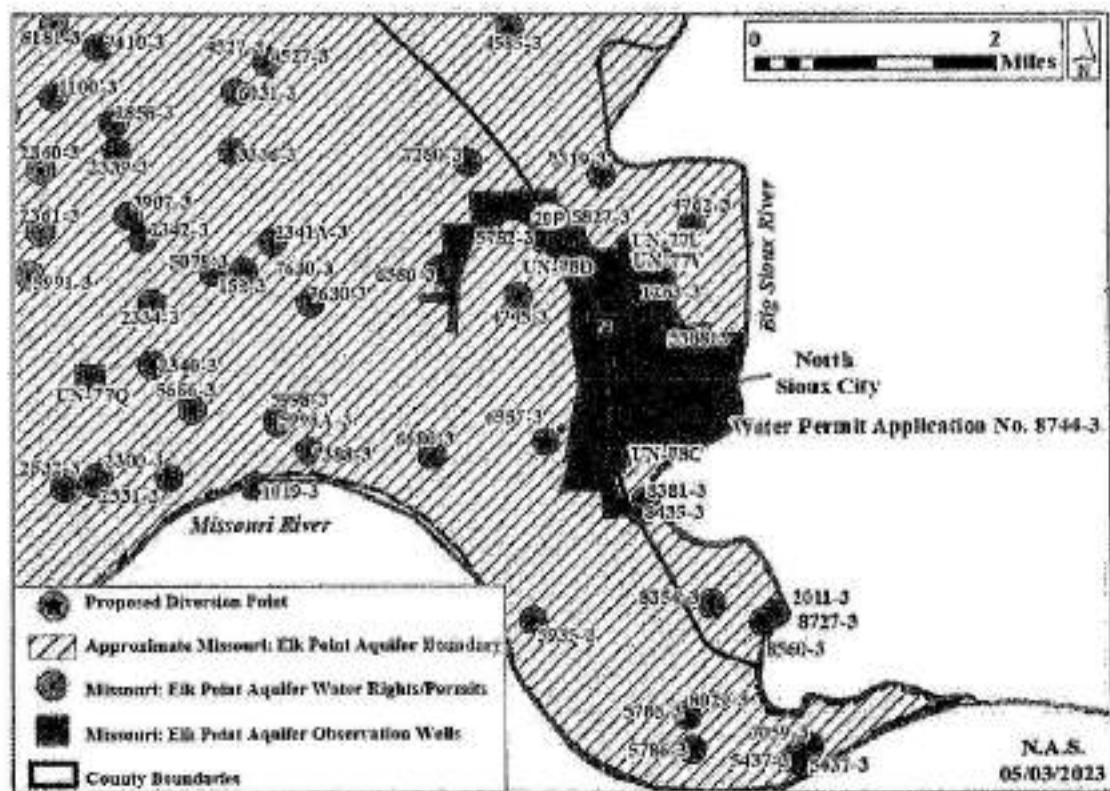


Figure 8. Location of the existing well completed into the Missouri: Elk Point aquifer proposed to be used by Water Permit Application No. 8744-3, with the Missouri: Elk Point aquifer water rights/permits and observation wells within approximately four miles (Water Rights, 2023b and 2023c)

Report on Water Permit Application No. E744-3

Table 6. Water rights/permits authorized to withdraw water from the Missouri Elk Point aquifer within approximately four miles of the existing well, as shown in Figure 3 (Water Rights, 2023c)

Permit No.	Name	Status	Use	Authorized Acres IRR	Authorized Diversion Rate (cfs)	Authorized Annual Volume (acre-feet)
152-3	Stephen F Jones	LC	IRR	39	0.55	
1019-3	Leonard Jones & Richard Dailey	LC	IRR	238	3.21	
1105-3	Vincent Trudeau	LC	IRR	64.3	0.92	
1263-3	Eugene Pham	LC	IRR	152	2.16	
2016-3	TR Golf LLC	LC	IRR	95	1.33	
2304-3	Michael A Dailey	LC	IRR	125	1.78	
2334-3	Bradley J & Constance J Beavers	LC	IRR	191	2.68	
2139-3	Danochie Farms LLC	LC	IRR	126	1.71	
2140-3	Steve Holman	LC	IRR	214	2.7	
2341A-3	Alan J Howe	LC	IRR	216	1.94	
2342-3	Russell Laflour	LC	IRR	198	1.41	
2369-3	Mervin Kappen	LC	IRR	112	1.9	
2364-3	Mervin Kappen	LC	IRR	131	1.9	
2531-3	Paul E Dailey	LC	IRR	251	2.7	
2532-3	Paul E Dailey	LC	IRR	260	2.7	
2854-3	Alan J Howe	LC	IRR	136	1.94	
3336-3	LaFlour Farms	LC	IRR	897	2.22	
3907-3	Russell Laflour	LC	IRR	71	1.04	
4523-3	Booge Properties Limited Partnership	LC	IRR	238	3.4	
4585-3	JPR-INV-LTD, LLC	LC	IRR	667	2.38	
4745-3	McCook Lake Junior Water League	LC	IRR	231	3	
4762-3	Mike & Matt Schmitz	LC	IRR	136	1.89	
5074-3	Bradley & Constance Beavers	LC	IRR	40	0.57	
5344-3	E. G. Fworst Inc	LC	IND		0.45	
5633-3	Dakota Dunes Community Improvement District	LC	MUN		3.33	
5665-3	Joe & John Trudeau	LC	IRR	205	1.56	
5742-3	City of North Sioux City	LC	MUN		1.14	
5786-3	Dakota Dunes Golf Course	LC	IRR	175	4.5	
5823-3	Don Lantis	LC	COM		0.022	
5935-3	Ted Wain	LC	IRR	1	0.044	
5993-3	Donald C Jorgensen	LC	IRR	95	1.36	
5994-3	Clay Rural Water System Inc	PE	IRR	303	2.22	
5998A-3	Clay Rural Water System Inc	PE	IRR		0	
6014-3	LaFlour Farms	LC	IRR	95	1.17	
6533-3	Mike Chisole	PE	IRR	60	1.55	
6580-3	West Shore Acres LLC	LC	COM		0.1	
6680-3	Parke & White Foundation	LC	IRR	310	2.44	
7059-3	WE Investments	PE	RUC		1.11	
7210-3	Toni Norton-Schwenep	PE	IRR	136	1.78	
7319-3	Mont Schmitz	PE	IRR	120	1.45	
7318-3	Clay Rural Water System Inc	PE	DOM, IRR		2	
7410-3	Eugene Moller	PE	IRR	67	1.33	
7630-3	Mark A Nylen	PE	IRR	150	3.34	
8029-3	Dakota Dunes Community Improvement District	PE	IRR	178	0.78	
8181-3	Marc T. Bernard	PE	IRR	40	0.82	
8356-3	TR Golf LLC	PE	IRR	30	1.11	
8381-3	R P Constructors	PE	COM		0.04	1
8415-3	Sioux City Irrigation	PE	COM		0.33	1
8560-3	TR Golf LLC	PE	IRR	85	0.12	
8727-3	TR Golf LLC	PE	IRR	10	0	

LC, Leased Water Right; PE, Water Permit; COM, Commercial; DOM, Domestic; IND, Industrial; IRR, Irrigation; MUN, Municipal; RUC, Recreation

The Missouri: Elk Point aquifer ranges from confined to unconfined aquifer conditions, but is primarily under unconfined conditions (Nichus, 1994 and 1997). Based on the well completion report on file for the existing well proposed to be used, the water well completion reports on file for nearby wells completed into the aquifer, and the lithologic logs on file for nearby observation wells, the Missouri: Elk Point aquifer is locally confined at the existing well site but unconfined in nearby areas (SDGS, 2023; Water Rights, 2023b and 2023d). Drawdown created by pumping a well generally does not extend far from the pumped well in an unconfined aquifer; however, in a confined aquifer, drawdown from pumping could extend a distance from the diversion point. The exact drawdown behavior of a well cannot be known without an aquifer performance test. Examination of the hydrographs for observation wells completed into the Missouri: Elk Point aquifer show no signs of being significantly impacted by drawdown caused by pumping, despite usually being located within a mile of several high-yield wells (assumed to be a well with an authorized diversion rate greater than 0.2 cfs) (Water Rights, 2023b and 2023c).

Within one mile of the existing well site, the Missouri: Elk Point aquifer has a saturated thickness of approximately 10 to 60 feet (Water Rights, 2023d). This would generally allow for enough thickness for a pump to be placed 20 feet below the top of the aquifer, which is required for the well to be considered adequate under ARSD 74:02:04:20(6). Any drawdown as a result of the proposed diversion for this application is not expected to unlawfully impair nearby adequate wells. In Clay, Union, and Yankton Counties, there are no substantiated complaints on file with the DANR-Water Rights Program regarding well interference for adequate wells completed into the Missouri: Elk Point aquifer (Water Rights, 2023c).

The Water Management Board recognizes that putting water to beneficial use requires a certain amount of drawdown to occur. The Board has developed rules to allow water to be placed to maximum beneficial use without the necessity of maintaining artesian head pressure for domestic use. The Water Management Board defined an "adversely impacted domestic well" in ARSD 74:02:04:20(7) as:

"A well in which the pump intake was set at least 20 feet below the top of the aquifer at the time of construction or, if the aquifer is less than 20 feet thick, is as near to the bottom of the aquifer as is practical and the water level of the aquifer has declined to a level that the pump will no longer deliver sufficient water for the well owner's needs."

The Water Management Board considered the delivery of water by artesian head pressure versus maximum beneficial use during the issuance of Water Right No. 2313-2 for Coca-Cola Bottling Company of the Black Hills. The Board adopted the Findings of Facts and Conclusions of Law that noted the reservation of artesian head pressure for delivery of water would be inconsistent with SDCL 46-1-4 which states, "general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable..." (Water Rights, 1995). Furthermore, the Water Management Board found if increased cost or decreased production as a result of impacts on artesian head pressure by legitimate users is to be considered as an unlawful impairment, it would also conflict with SDCL 46-1-4 (Water Rights, 1995). With that in mind, some existing well owners may need to install or lower pumps depending on the specific

characteristics of the Missouri: Elk Point aquifer at their location. However, when considering the statutes (SDCL 46-1-4 and 46-6-6.1), rules (ARSD 74:02:04:20(6) and (7)), the saturated thickness of the Missouri: Elk Point aquifer near the existing well location, the generally unconfined nature of the aquifer, and the lack of well interference complaints from the Missouri: Elk Point aquifer in the area, any drawdown created from the proposed diversion is not expected to cause an unlawful impairment on existing water right/permit holders or domestic users with adequate wells. Therefore, there is a reasonable probability that any interference from the proposed appropriation will not impose unlawful impairments on existing users with adequate wells. Additionally, the existing well proposed to be used has been in place and is presumed to have been in use since roughly 2005 without any reported well interference complaints on file with the DANR-Water Rights Program (Water Rights, 2023d and 2023e).

#### CONCLUSIONS:

1. Water Permit Application No. 8744-3 proposes to appropriate an amount of water not to exceed 28.6 acre-feet the first year of use followed by up to 7.99 acre-feet annually at a maximum instantaneous diversion rate of 1.55 cfs from one existing well (150 feet deep) completed into the Missouri: Elk Point aquifer. The existing well is also authorized for irrigation use by Water Permit No. 6557-3.
2. Water from the well will be used for recreational purposes to initially fill a proposed canal (20.61 acre-feet) which connects to McCook Lake and provide up to 7.99 acre-feet annually to cover any evaporation and seepage losses for purposes of preventing the canal liner from drying out, cracking, floating, or otherwise failing. Incidental runoff from adjoining property as well as direct precipitation may also provide water to the canal. The canal project is located on the southeast side of McCook Lake in Union County.
3. Based on observation well data and the hydrologic budget, there is a reasonable probability that unappropriated water is available from the Missouri: Elk Point aquifer to supply the proposed appropriation.
4. There is a reasonable probability that the proposed diversion by Water Permit Application No. 8744-3 will not unlawfully impair adequate wells for existing water rights/permits and domestic users.

*Nakaila Steen*

Nakaila Steen  
Natural Resources Engineer II  
SD DANR - Water Rights Program  
Reviewed by:

*Adam Mathiowetz*

Adam Mathiowetz, PE

Natural Resources Engineer IV  
SD DANR -Water Rights Program

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1 still want me to read it?

2 CHAIRMAN LARSON: What I would prefer to do is just  
3 make the stipulation part of the record in the case without  
4 having you read every word. Any objection to that?

5 MS. MINES-BAILEY: Mr. Holzbauer and Ms. Dixon do not  
6 have copies of the stipulation. That would be the only  
7 advantage of reading it.

8 MR. HINES: It's a short stipulation. I can read it.  
9 So for those who can't read the stipulation, this is an  
10 agreement between the parties in the declaratory ruling action.  
11 The parties in the above-entitled action, McCook Lake  
12 Recreation Area Association, the Chief Engineer, and Dakota Bay  
13 hereby stipulate to the following facts. One, McCook Lake was  
14 originally an oxbow of the Missouri River which became  
15 landlocked. It receives its water from runoff in the  
16 watershed, precipitation, and is believed to be hydrologically  
17 connected to ground water sources in the Missouri River. In  
18 1981, the Water Management Board set the ordinary high water  
19 mark for McCook Lake at 1090.7 msl.

20 Two, the association holds two water permits/rights  
21 for the purpose of stabilizing the McCook Lake water elevation,  
22 water right number 5878A-3 and water permit number 6479-3.  
23 Each of these authorizes the diversion of water from the  
24 Missouri River to McCook Lake. Pumping, however, is not  
25 authorized unless the elevation of McCook Lake is less than

1 1090.3 feet msl and the lake elevation may not be raised over  
2 1090.3 feet msl.

3         Number three, Mr. Michael Chicoine has proposed the  
4 construction of a canal extending off of the southeast corner  
5 of McCook Lake to provide a waterway to and from a proposed  
6 residential development. The finished canal will be  
7 approximately 110 feet wide, 11 feet deep with a flat bottom  
8 and approximately 1800 feet in length.

9         Number four, the alteration of a shoreline requires a  
10 permit from the State. The South Dakota Department of Game,  
11 Fish and Parks is the entity responsible for issuing shoreline  
12 alteration permits. The State's official position is that  
13 shoreline alteration permits may be required for any activity  
14 that may have an impact on the lake, lake bed or lake shore,  
15 including, but not limited to the construction of ditches or  
16 channels; dredging or excavating to remove sediment or rock;  
17 seawall installation or repairs; retaining wall or break water  
18 construction; rip-rap installation or repairs; filling or  
19 creating artificial beach; stockpiling brush, trees,  
20 vegetation, construction materials or debris in the lake or on  
21 the shore; and/or removal or clearing of aquatic vegetation.

22         Number five, Mr. Chicoine has applied for a shoreline  
23 alteration permit. During the review of the application for a  
24 shoreline alteration permit by the South Dakota Department of  
25 Game, Fish and Parks, Mr. Chicoine amended his plans and

1 indicated that he would use his existing irrigation well to  
2 maintain the water elevation in the canal to protect the  
3 integrity of the canal liner. Game, Fish and Parks responded  
4 by indicating Game, Fish and Parks would be holding his  
5 application for a shoreline alteration permit in abeyance until  
6 a proper water right permit was obtained.

7 Number six, Mr. Chicoine has applied for the  
8 additional use of his irrigation well for the purpose of  
9 maintaining the integrity of the canal liner, water permit  
10 application number 8744-3. That permit is currently pending  
11 before the Water Management Board. Dated this 30th day of July  
12 2023, and signed by attorneys for the parties.

13 CHAIRMAN LARSON: Thank you, Mr. Hines. Further  
14 evidence.

15 MR. HINES: Back to the original question, Mr.  
16 Chairman. The additional procedural matters that were raised,  
17 would you like me to address those at closing?

18 CHAIRMAN LARSON: Yes.

19 MR. HINES: I will go ahead and call my first witness,  
20 Julie Burhoop. Julie. Are we going to do opening statements?

21 CHAIRMAN LARSON: That's fine.

22 MR. HINES: Julie, I'm sorry, I called you too soon.  
23 Again, I'm John Hines, attorney for the McCook Lake  
24 Association. McCook Lake, South Dakota, is a unique lake in  
25 the state of South Dakota in that it is sustained by pumping

1 and tear so we have a lot more maintenance, and so last year we  
2 spent over \$150,000.

3 Q. And where does the money for the association generally  
4 come from?

5 A. Mostly fund raising efforts. The city gives \$25,000  
6 per year, and everything else is fund raised.

7 Q. When you say city, is that the City of North Sioux  
8 City, South Dakota?

9 A. It is.

10 Q. And McCook Lake is a public lake, correct?

11 A. Correct.

12 Q. The McCook Lake Association doesn't control who in the  
13 public is allowed to use the lake.

14 A. Not at all.

15 Q. And the association doesn't have the authority to tax  
16 anyone; is that correct?

17 A. No, we are a nonprofit volunteer organization.

18 Q. Can you tell me in an average year when the  
19 association starts pumping and when you stop?

20 A. We start pumping every year in the spring usually in  
21 March or April as soon as the river levels get high enough for  
22 us to do so. We continue pumping until the water level  
23 reaches -- well, we pump continuously just to maintain the lake  
24 over the summer, even once we do reach an elevation of 1088,  
25 and then we shut the pumps off roughly in the end of September.

1 Q. Can you turn to what's been marked as Exhibit 3. The  
2 parties have stipulated that the association holds two water  
3 rights permits. As you flip through Exhibit 3, which is 11  
4 pages long, does this appear to be a copy of those documents?

5 A. Correct.

6 Q. Have you seen these before as VP of communications for  
7 the association?

8 A. I have.

9 MR. HINES: I would offer Exhibit 3.

10 CHAIRMAN LARSON: Stipulated. I presume there is no  
11 objection.

12 MS. MINES-BAILEY: No objection.

13 CHAIRMAN LARSON: Exhibit 3 is admitted.

14 EXHIBITS:

15 (Exhibit Number 3 received into evidence.)

16 Q. (BY MR. HINES) On page two of that exhibit, can you  
17 read to me how many gallons per minute the association is  
18 authorized to pump?

19 A. 12,000 gallons per minute.

20 Q. Does the association's pumps ever reach that level?

21 A. They do.

22 Q. They reach 12,000 if you turn them all the way up?

23 A. Yes.

24 Q. But you are not authorized to pump any more than that?

25 A. Correct.

1 Q. What's the reason that the association filed the  
2 petition for declaratory ruling?

3 A. We have Dakota Bay or whoever would want to expand  
4 McCook Lake would have to use lake water to help fill the  
5 canal. If there's not a separation between another body of  
6 water and McCook Lake, it's all one body of water, it uses some  
7 of the water. We don't have the pumping capacity, we don't  
8 have -- the pipeline that we have cannot handle pumping any  
9 more than 12,000 gallons a minute, and we don't have the budget  
10 to pump any more water than what we already have.

11 Q. Are you aware of anyone other than Dakota Bay and Mr.  
12 Chicoine who has plans to expand McCook Lake?

13 A. I do not have any knowledge of that.

14 Q. Turn to Exhibit 6, it should be Mr. Chicoine's  
15 application for a shoreline alteration. The parties have  
16 stipulated that he has done this, but does this appear to be a  
17 copy of that document?

18 A. Yes.

19 Q. You have reviewed it before?

20 A. I have.

21 MR. HINES: I would offer Exhibit 6.

22 CHAIRMAN LARSON: I am assuming no objections.

23 MR. FANKHAUSER: No objection.

24 CHAIRMAN LARSON: Exhibit 6 is admitted.

25 EXHIBITS:

1 MR. HINES: I ask the board release him from the  
2 subpoena for this hearing, but he will be returning for the  
3 next hearing.

4 CHAIRMAN LARSON: He's released. Any additional  
5 witnesses, Mr. Hines?

6 MR. HINES: One final witness. Maybe two. I would  
7 call Chief Engineer Eric Gronlund.  
8 Thereupon,

9 ERIC GRONLUND,  
10 called as a witness, being first duly sworn as hereinafter  
11 certified, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. HINES:

14 Q. Thank you, Mr. Gronlund. Can you briefly explain your  
15 education and training and experience?

16 A. I have a bachelor's in agricultural engineering from  
17 South Dakota State University. Out of school, I came to work  
18 for the department, was then the Department of Water and  
19 Natural Resources, in their funding and grants management. In  
20 1990 I moved to water rights, and I've basically worked my way  
21 up through water rights to the Chief Engineer position.

22 Q. And so with your long experience in the department and  
23 as Chief Engineer, you are pretty familiar with the state  
24 statutes that govern the water rights program?

25 A. Yes.

1 Q. Isn't it true that state code requires that a permit  
2 be obtained before any private right to the use of water is  
3 obtained?

4 A. There is a statute that's similar to that effect;  
5 that's not the exact wording.

6 Q. Would you like me to read the exact wording?

7 A. No.

8 Q. *It is hereby declared that all water within the state*  
9 *is the property of the people of the state, but the right to*  
10 *the use of water may be acquired by appropriation as provided*  
11 *by law.* That's South Dakota Codified Law 46-1-3. Would you  
12 agree that that's the correct reading?

13 A. Yes.

14 Q. So in your opinion, would a canal built on McCook Lake  
15 use the water of McCook Lake?

16 A. No.

17 Q. How does the statute define use?

18 A. Repeat that please.

19 Q. How does South Dakota law define the word use?

20 A. I don't know that there's a specific definition for  
21 use.

22 Q. Isn't it true that if there's not a specific  
23 definition, that we are supposed to use the common  
24 understanding of that word?

25 A. I'm not an attorney.

1 Q. So in your opinion, what does use mean?

2 A. To take possession and control.

3 Q. What's the purpose of connecting a canal to McCook  
4 Lake?

5 A. You would have to ask the applicant that.

6 Q. If Mr. Chicoine dug a pond on his property, that  
7 wouldn't be able to access the lake; is that correct? If a  
8 pond doesn't breach the dike on the south end of the lake, they  
9 would be two separate bodies; is that correct?

10 A. I'm assuming -- I'm taking leave here, but you are  
11 assuming there being separation between where the pond is and  
12 where McCook Lake is.

13 Q. I'm making that assumption. So yes, they would be two  
14 separate bodies?

15 A. From the same source, since they both represent the  
16 ground water table, the water source is ultimately the same.

17 Q. Are you familiar with the South Dakota law related to  
18 the fees that your department collects for different types of  
19 projects?

20 A. I believe that's in 46-2-13.

21 Q. You are exactly correct. Are you familiar with  
22 paragraph three of that?

23 A. You will have to brief me on that one.

24 Q. Paragraph three states *For each inspection of*  
25 *constructed water use works, including diversion works, dams,*

1 levels in the lake and the canal correspond with one another?

2 A. Not necessarily.

3 Q. When would they not correspond with one another?

4 A. My understanding from my discussions with Mr. Chicoine  
5 on the phone before is that he intends to have a two-foot berm  
6 at the entrance between the McCook Lake and his canal. If that  
7 was the case and he had a fat clay liner, potentially that  
8 would hold water in the canal.

9 Q. Isn't it true that that's not part of the  
10 specifications that he provided to your department?

11 A. That is not part of the water -- he doesn't have a  
12 water permit application. He has a water permit application  
13 but --

14 Q. Isn't it true that's not part of the specifications?

15 MS. MINES-BAILEY: I object. We have been engaging in  
16 a lot of leading questions and asking questions that are not in  
17 evidence.

18 MR. HINES: This is opposing party, I'm allowed --

19 CHAIRMAN LARSON: I'll sustain the objection.

20 MR. HINES: Mr. Chairman --

21 COURT REPORTER: Hold on. One at a time please.

22 MR. HINES: Mr. Chairman, Mr. Gronlund is an opposing  
23 party in this action. I'm permitted to ask him leading  
24 questions.

25 CHAIRMAN LARSON: The question, you are basically

1 assuming facts not in evidence the way you posed the question.  
2 I'm sustaining the objection.

3 Q. (BY MR. HINES) Mr. Gronlund, it's your professional  
4 opinion that the water levels in the canal and the lake will  
5 not correspond to one another; is that correct?

6 A. At times they will, at times they may not.

7 Q. At the times they correspond to one another and the  
8 lake level goes down, the water level in the canal will go  
9 down.

10 A. Not necessarily.

11 Q. I'm only asking about the times that you just said  
12 they might correspond.

13 A. And I think there's -- in my mind, if I'm  
14 understanding your question right, there's a balance point here  
15 where if McCook Lake lowers to such a point that that water,  
16 because of the fat clay liner, will be retained in the canal.

17 Q. Is Mr. Chicoine proposing to construct a 110-foot  
18 wide, 11-foot tall barrier between the canal and the lake?

19 A. What height are you saying the barrier is?

20 Q. The depth of his canal.

21 A. No, that's not my understanding.

22 Q. If the water level goes down in the canal, will the  
23 canal liner be exposed?

24 A. I do not believe so.

25 Q. If the canal liner is exposed, would it be subject to

1 COVID.

2 Q. How long have you been with water rights?

3 A. 39 and a half -- excuse me, since February of 1990.

4 Q. Eric, are you familiar with the different ways water  
5 is administered throughout the United States?

6 A. Yes.

7 Q. Are you familiar with South Dakota's water permitting  
8 system and its evolution?

9 A. Yes.

10 Q. What type of approach does South Dakota take to the  
11 administration of water rights?

12 A. By and large we are like the other western states that  
13 are a prior appropriation state. We do have what I consider a  
14 riparian component to that, that riparian component is  
15 generally what this board would know as domestic uses of water  
16 that don't require a permit.

17 Q. Eric, what is a prior appropriation system?

18 A. Basically first in time, first in right, seniority,  
19 person with a senior right gets their water right satisfied  
20 before junior appropriators.

21 Q. Mr. Hines was using the word use. Is the appropriate  
22 word appropriation?

23 A. That's what we commonly use.

24 Q. What is an appropriation in terms of water permitting?

25 A. That's when I used the response it's basically taking

1 control and possession of that public water.

2 Q. What are the different types of appropriation permits  
3 in the State of South Dakota?

4 A. There is what this board is accustomed to, what I will  
5 call the standard water permit. Other people might call it the  
6 conditional water permit, that's what commonly comes before  
7 this board, someone who wants to irrigate, a municipality, a  
8 commercial user that requires a permit, that's an ongoing  
9 permit or right to use that water.

10 There is also a flood control permit, although there  
11 is that, there is a future use permit which allows certain  
12 entities in South Dakota to reserve water for future use, for  
13 future development, entities such as a municipality, rural  
14 water systems, things on that order.

15 There is a temporary use permit, and that's basically  
16 the ability for someone to come in for a water source that  
17 would otherwise be fully appropriated and use water in the  
18 interim, if there were future use permits in there that hadn't  
19 been developed, allow those people to use that in the interim  
20 until that future use permit is fully developed.

21 There is also a temporary permit for the use of public  
22 waters for construction, testing, and drilling purposes.  
23 That's basically a short-term permit. Commonly we issue those  
24 for road construction or filling of a lagoon or other testing  
25 purposes, things on that order.

1 Q. Would a temporary use permit -- or temporary permit  
2 for use in construction, et cetera, be the type of permit that  
3 would be necessary in this case to fill the canal?

4 A. It may be.

5 Q. Eric, what has to be satisfied for a more traditional  
6 appropriation permit?

7 A. This board is accustomed to the four criteria, that  
8 there needs to be a reasonable probability unappropriated water  
9 is available, whether it can be developed without unlawful  
10 impairment of existing domestic use and water rights, whether  
11 it's a beneficial use, and whether it's in the public use  
12 within the function and regulatory authority of this board.

13 Q. How does water rights and state law define or utilize  
14 the phrase unlawful impairment?

15 A. Basically it's the proven inability of a senior right  
16 to obtain their water due to the actions of a junior right.

17 Q. Do you recall the initial conversations that were had  
18 with Mr. Chicoine regarding his proposed canal project?

19 A. Yes.

20 Q. What was your understanding of the parameters of that  
21 project?

22 A. That he intended to construct a canal.

23 Q. Did he intend to supplement the canal with water, at  
24 the initial discussions you had?

25 A. No.

1 Q. Did you feel, based on what your understanding was,  
2 that the construction of the canal alone required a traditional  
3 permit?

4 A. No, I did not believe it did.

5 Q. Please finish.

6 A. I'm done.

7 Q. Why not?

8 A. Again, it's a shoreline alteration, it's not taking  
9 possession and control of the water.

10 Q. Are shoreline alterations under your purview?

11 A. No.

12 Q. You have heard a lot of testimony today about the  
13 association's water rights. What do the association's water  
14 right and permit authorize?

15 A. It authorizes the diversion of water from the Missouri  
16 River.

17 Q. For what purpose?

18 A. I believe the listed use is recreation.

19 Q. Does anybody have an appropriative permit for the  
20 waters of McCook Lake?

21 A. No.

22 Q. Does the association retain a use to the water once it  
23 is released into McCook Lake?

24 A. No.

25 Q. Are there other manmade canals in the state which are

1 The initial version in the petition which was filed requested a  
2 declaratory ruling regarding all public waters for any -- I'm  
3 sorry, I'll read it.

4 The initial petition requests a declaratory ruling on  
5 the alteration of a public water body by a private party  
6 requires a permit for appropriation of water, consistent with  
7 Mr. Gronlund's testimony to the Ag and Natural Resources  
8 Committee and consistent with state law.

9 COURT REPORTER: I'm having trouble hearing you.

10 MS. MINES-BAILEY: Would it be better if I stood so  
11 you could see me? So the petition asks for a very broad ruling  
12 which would entail arguably all water in the state of South  
13 Dakota and not just McCook Lake. If you read the petition in  
14 conjunction with the letter attached to it, you might be able  
15 to narrow it down to a ruling on just McCook Lake water. If  
16 you narrow it down even further with the public notice, then  
17 the question before the board or the request of relief before  
18 the board is specific that Dakota Bay is required for a permit  
19 to appropriate water, and presumably that appropriation of  
20 water would have to be from McCook Lake, before beginning any  
21 construction, before starting any construction or placement of  
22 works to expand McCook Lake.

23 My difficulty is I don't know whether to proceed  
24 statewide, McCook Lake in general, any shoreline alteration of  
25 McCook Lake, or Mr. Chicoine's project in specific. And if I

1 could get some clarification somehow, I would have a better  
2 idea of what it is I need to present.

3 MR. MCVEY: Was the letter by the McCook Lake  
4 Association in some way incorporated by reference into the  
5 original petition?

6 MR. HINES: This is John Hines, attorney for the  
7 association. Yes, Mr. McVey, in paragraph four, the letter is  
8 attached as an exhibit incorporating my reference.

9 MS. MINES-BAILEY: I believe it's referenced for  
10 specific facts. I believe the petition references it for the  
11 specific facts as the reason for the requested action. It's  
12 page two of the petition.

13 CHAIRMAN LARSON: I think the letter would serve as  
14 facts. (Brief pause) I'd like to make a motion, pursuant to  
15 SDCL 1-25-2(3), to enter into executive session for the purpose  
16 of consulting with legal counsel regarding the proposed matter  
17 before the board regarding the scope of the petition filed by  
18 the association. Am I phrasing that correctly, Ms. Mines?  
19 That's what you are asking the board?

20 MS. MINES-BAILEY: Yes, I'm asking the board what  
21 question they are entertaining in this hearing.

22 CHAIRMAN LARSON: Do I have a second?

23 MR. BJORK: Second.

24 CHAIRMAN LARSON: Roll call please.

25 MS. BINEGAR: Bjork.

1 MR. BJORK: Aye.

2 MS. BINEGAR: Dixon.

3 MS. DIXON: Aye.

4 MS. BINEGAR: Freeman.

5 MR. FREEMAN: Aye.

6 MS. BINEGAR: Holzbauer.

7 MR. HOLZBAUER: Aye.

8 MS. BINEGAR: Larson.

9 CHAIRMAN LARSON: Aye. We will go into executive  
10 session.

11 (Whereupon, the hearing was in recess at 1:37 p.m. and  
12 subsequently reconvened at 2:23 p.m., and the following  
13 proceedings were had and entered of record:)

14 CHAIRMAN LARSON: We will call the meeting back into  
15 session. The board, after -- Mr. Hines, the board, after  
16 meeting with counsel in executive session, is going to give you  
17 the opportunity to argue the same issue before we make our  
18 ruling.

19 MR. HINES: Thank you, Mr. Chairman. At the beginning  
20 of the hearing, I thought this would be one of the issues we  
21 would address later, and had I known it would affect Ms.  
22 Mines-Bailey's case, I would have maybe just addressed it on  
23 the front end. So my understanding is that the question is  
24 about the scope of the requested relief that the association is  
25 seeking in dealing with the petition, the attached letter, and

1 then the notice that was published.

2 And so the requested relief will ultimately be decided  
3 by the draft findings, conclusions that the board will create.  
4 Obviously we submitted a petition that asked for a requested  
5 action that submitted facts pertaining to McCook Lake and the  
6 Dakota Bay project. The ruling that is requested is not for  
7 every shoreline alteration nor is it for every lake. This is a  
8 question about a proposal for a shoreline alteration to expand  
9 McCook Lake. And so the witnesses that the association called  
10 today testified about McCook Lake, they testified about the  
11 Dakota Bay project.

12 We think that the -- so paragraph three of the  
13 petition, I know Ms. Mines-Bailey read the last paragraph of  
14 the petition. The petition was laid out to mirror the  
15 statutory requirements for the petition and so requested action  
16 in paragraph three for the board to issue a declaratory ruling  
17 finding that the expansion of a public body of water for  
18 private use or gain, such as by altering the shoreline of a  
19 lake and connecting a canal, requires a permit to appropriate  
20 water. Now, it would have been more precise, given the  
21 attached incorporated letter, to say *this public body of water*  
22 *than a public body of water.*

23 The notice that was published describing the contents  
24 of the petition doesn't have any effect of modifying that, but  
25 it did seek to clarify that, well, first, we weren't going to

1 print word for word the entire petition in the published  
2 notice. So the statutory requirement for publishing that  
3 notice describing the contents we think was accurate and  
4 consistent. My client's name is the McCook Lake Recreation  
5 Area Association. McCook Lake is their sole concern.

6 So the question that's intended to be put before the  
7 board today is whether a shoreline alteration for the expansion  
8 of McCook Lake under existing South Dakota law requires a water  
9 rights permit.

10 (Brief pause)

11 CHAIRMAN LARSON: Ms. Mines-Bailey, I have a question  
12 for you. In your prehearing brief on page nine, the point I  
13 believe you are trying to make here is that the association  
14 should be limited to the relief requested in the public notice.  
15 Can you narrow that down for me? The notice is extensive. Or  
16 was your understanding similar to what Mr. Hines just said,  
17 that it would only be specific to Dakota Bay's appropriation of  
18 water?

19 MS. MINES-BAILEY: Well, first I'll say my  
20 understanding of what Mr. Hines has just said is that it would  
21 still be any shoreline alteration for the expansion of McCook  
22 Lake. So we would be limited to McCook Lake, but it would be  
23 any shoreline alteration for expansion to McCook Lake.

24 I think that presents some procedural -- potential  
25 procedural issues. I think that they can proceed with regard

1 to what was specifically public noticed regarding Dakota Bay,  
2 specifically Dakota Bay's project specifically as to McCook  
3 Lake.

4 CHAIRMAN LARSON: It's your motion. You basically  
5 made an oral motion to determine what the scope of this  
6 petition was.

7 MS. MINES-BAILEY: I'll make one now. I will move to  
8 narrow the scope of this ruling to Dakota Bay's project on  
9 McCook Lake.

10 CHAIRMAN LARSON: Are you in agreement that's what  
11 your request is, Mr. Hines?

12 MR. HINES: We would not resist that motion.

13 MR. MCVEY: If I may, when you construct that motion,  
14 are you suggesting that it's limited to the Dakota Bay project  
15 as it's described within the public notice? Because there is  
16 specific language in the public notice, is that contemplated in  
17 your construction of your motion?

18 MS. MINES-BAILEY: Yes.

19 MR. MCVEY: In other words, the motion would be to  
20 proceed on the declaratory ruling request as consistent with  
21 the notice of hearing for petition.

22 MS. MINES-BAILEY: And as modified -- I apologize --  
23 and as modified by Mr. Hines's June 30 hearing, in which he  
24 provided that the last sentence of the public notice, which  
25 says, or the last phrase, *and would also unlawfully impair the*

1 McCook Lake Recreation Association's water rights, that that  
2 would not be part of this hearing.

3 MR. MCVEY: That sentence would be struck?

4 CHAIRMAN LARSON: Strike that last sentence, from  
5 because on?

6 MR. MCVEY: From because on?

7 MS. MINES-BAILEY: From and would.

8 MR. FREEMAN: Even though we are limiting alteration  
9 of a shoreline to just this project, how does that affect other  
10 projects all over the state? I want to put in rip-rap to  
11 secure this shoreline of my cabin on Lake Byron. I know I've  
12 got to go to Game, Fish and Parks. Am I now going to have to  
13 go to the water board and get a permit?

14 MS. MINES-BAILEY: My apologies, I didn't mean to  
15 speak over you. That has been the main concern for the Chief  
16 Engineer and one of the reasons why we were hoping for some  
17 specificity as to the actual request, because the potential  
18 impacts, if this were applicable to any shoreline alteration or  
19 to any public water, are just unimaginable.

20 MR. FREEMAN: How can we say that it's only specific  
21 to this project and exclude every other lake and the project  
22 that was just completed in Fort Pierre? Can we do that? I  
23 mean, I understand we can do it, but is that a good, sound way  
24 to make policy for the state and the water board?

25 MR. BJORK: Do we want to set that kind of precedent?

1 MS. MINES-BAILEY: It would be the preference of the  
2 Chief Engineer that you would not.

3 MR. MCVEY: Those questions are in the purview of the  
4 board to decide and within the scope of this pending  
5 application, and so the question as it appears to be  
6 constructed is when you look at the face of the petition in and  
7 of itself, it appears to implicate all of the waters of the  
8 state, et cetera, and I believe the pending motion is that that  
9 requested application would be narrowed to specifically McCook  
10 Lake, with taking out the sentence regarding the unlawful  
11 impairment of the McCook Lake water right. So that would  
12 necessarily exclude the other areas of the state, but it  
13 doesn't address the issue of whether that's a sound method of  
14 proceeding with policy in general. But that's the question for  
15 the board that you guys are going to have to answer. Would  
16 that be a fair and accurate assessment?

17 MS. MINES-BAILEY: I believe those are within the  
18 board's purview.

19 MR. HINES: Yes, this is John Hines, and I agree the  
20 sentence regarding the impairment of the rights, that's not  
21 part of the ruling that we are seeking in this declaratory  
22 action. And so as stated, it's not for every shoreline  
23 alteration, it's for expansion, which is a specific type of the  
24 shoreline alteration limited to McCook Lake, limited to this  
25 proposal.

1 MS. MINES-BAILEY: If I may, the whole purpose was  
2 just to figure out how broad of a scope I needed to address.  
3 We will obviously be making argument regarding whether or not  
4 the board is -- it doesn't change the position of the Chief  
5 Engineer, even if it were narrowed to the public notice.

6 {Brief pause}

7 CHAIRMAN LARSON: So Mr. Hines, you have no resistance  
8 to Ms. Mines-Bailey's motion to narrow the relief requested; is  
9 that correct?

10 MR. HINES: Correct.

11 CHAIRMAN LARSON: Mr. Fankhauser, what is your  
12 client's position on this issue?

13 MR. FANKHAUSER: Thank you, Mr. Chairman. It would  
14 seem that to limit the scope of this application for  
15 declaratory relief or declaratory action would create precedent  
16 in the state, no matter what project came before the board next  
17 time. Effectively what I'm saying is if the board determined  
18 that that was necessary for McCook Lake, that it was necessary  
19 to obtain a water appropriation permit for McCook Lake under  
20 these circumstances, then in the event another project comes  
21 before the board, it has already then set precedent if that  
22 lake is, let's say it's man made or let's say it's got water  
23 pumped into it from another source, all of those things are  
24 similar to McCook Lake, and so to differentiate McCook Lake  
25 out, I don't see how that changes the fact that it will set a

1 precedent across the state, if that makes sense.

2 CHAIRMAN LARSON: I think you may be misunderstanding  
3 what Ms. Mines-Bailey was asking, if I may. I believe, correct  
4 me if I'm wrong, what she's wanting the board to do now is to  
5 narrow the scope of this petition for declaratory ruling, that  
6 the board issue a declaratory ruling finding whether or not the  
7 expansion of McCook Lake requires, by altering the shoreline,  
8 requires a permit to appropriate water. I think that's what  
9 she's asking, versus the petition, which says for the board to  
10 issue a declaratory ruling finding that the expansion of a  
11 public water, without reference to any party.

12 MR. FANKHAUSER: Thank you, Mr. Chairman. So I still  
13 think that, based on what the board does today, even if it  
14 limits the scope to just McCook Lake, it's still setting a  
15 precedent for other similarly situated lakes. I think changing  
16 the name of the lake or saying that because this project is  
17 somehow unique doesn't change the overall circumstances of  
18 facts that bring us here today.

19 MS. MINES-BAILEY: Mr. Chair, perhaps it would be more  
20 efficient if I just withdrew my request, put on my witness and  
21 argued that it necessarily has to be limited to the scope of  
22 the public petition and then argue -- I'm sorry, to the scope  
23 of the public notice and then make the arguments I intend to  
24 make about why this board shouldn't deny, just in the interests  
25 of efficiency.

1 CHAIRMAN LARSON: I would have no objection to that.

2 MS. MINES-BAILEY: I so withdraw. I apologize, I  
3 would call Eric Gronlund.

4 MR. MCVEY: You didn't make a motion, correct?

5 MR. HINES: I did not make a motion, correct.  
6 Thereupon,

7 ERIC GRONLUND,  
8 called as a witness, having been previously duly sworn as  
9 hereinafter certified, testified as follows:

10 DIRECT EXAMINATION

11 BY MS. MINES-BAILEY:

12 Q. You were placed under oath earlier.

13 A. Yes.

14 Q. You understand you are still under oath?

15 A. Yes.

16 Q. Just thought I better clarify that for the record.  
17 Eric, for the record, what are your duties as Chief Engineer?

18 A. I have a number of duties, from administrating the  
19 staff of the Water Rights Program, administering the water  
20 permitting process, dam safety in the state, a couple that I'm  
21 missing. But really statutorily one of my primary  
22 responsibilities is to be an advisor to the Water Management  
23 Board.

24 Q. And in the course of your duties as Chief Engineer,  
25 are you charged with implementing the permitting system for the

1 State of South Dakota with regard to water appropriations?

2 A. Yes.

3 Q. Are you and your program charged with the duty to  
4 protect the waters of the state in that they will not be  
5 wasted?

6 A. Yes.

7 Q. Eric, let's talk about the project specifically and  
8 then we will talk more globally. Mr. Chicoine is proposing a  
9 canal. Do you consider that canal to be an extension of the  
10 lake or a separate structure?

11 A. If and when constructed, I believe it would be part of  
12 McCook Lake.

13 Q. Is there anything about that canal, once constructed  
14 and initially filled, that would require an ongoing  
15 appropriation of water?

16 A. Not from a water rights aspect, but there is the  
17 shoreline alteration permit that is out of my purview.

18 Q. Understood. Is the construction of the canal as  
19 proposed going to increase the amount of seepage of McCook  
20 Lake?

21 A. I do not believe so.

22 Q. Does the construction of the canal change the amount  
23 of water in McCook Lake?

24 A. No, the volume would remain the same.

25 Q. Eric, what regulatory authorities exist to oversee

1 Q. John Hines for the association. Hello again, Mr.  
2 Gronlund. Very quickly. You testified that it is your opinion  
3 that if the canal is constructed and connected to McCook Lake,  
4 that it will be part of McCook Lake?

5 A. I think a shoreline alteration that would basically in  
6 essence become part of the lake.

7 Q. And then I just wanted to clarify, you were asked by  
8 Ms. Mines-Bailey if you thought that the construction of the  
9 canal would change the amount of water in the lake, and you  
10 answered no. But isn't it true that if the canal becomes part  
11 of the lake, however much water the canal holds is an increase  
12 in the amount of water of the lake, assuming it can be filled  
13 to that level?

14 A. I can see how you can make that argument.

15 Q. And then you testified that McCook Lake faces certain  
16 challenges about maintaining water, the seepage situation not  
17 getting better. Are those concerns present for every lake in  
18 the state of South Dakota or just some lakes in the state of  
19 South Dakota?

20 A. To some extent, seepage probably occurs in any water  
21 body in the state. Certainly not to the severity that McCook  
22 Lake faces.

23 MR. HINES: Thank you.

24 CHAIRMAN LARSON: Mr. Fankhauser.

25 CROSS-EXAMINATION

1 WEDNESDAY, AUGUST 2, 2023

2 CHAIRMAN LARSON: We will consider the motion and any  
3 responses to the motion to disqualify Water Management Board's  
4 legal counsel and seek outside counsel. This motion was filed  
5 by John M. Hines, who is legal counsel for McCook Lake  
6 Recreation Area Association. Mr. Hines, it's your motion.

7 MR. HINES: Thank you, Mr. Chairman, and I won't  
8 belabor anything that has been stated in the written motion.  
9 Just to summarize the association's position on this, since the  
10 Attorney General's Office has filed an opposition in this  
11 matter, several legal, technical, and procedural challenges  
12 have been raised challenging the association's petition. And  
13 the association finds itself in the difficult, if not  
14 impossible, position of defending attacks from the Attorney  
15 General on the sufficiency of our legal action and then having  
16 the Attorney General's Office advise the board about whose  
17 legal position is correct. So we believe that that is a  
18 conflict of interest that should have been addressed, and so we  
19 would ask the board that they seek outside counsel other than  
20 the Attorney General's Office. Thank you.

21 CHAIRMAN LARSON: Ms. Mines-Bailey, do you have a  
22 response?

23 MS. MINES-BAILEY: Well, assuming that Mr. Hines is  
24 backing down from the questions or the implications of  
25 unethical conduct on behalf of Mr. McVey or myself, I would

1 simply say that the statutes 46 -- my apologies, I have the  
2 wrong notebook. First, the rules that he cites in his motion  
3 are the Rules of Professional Conduct, and he refers to the  
4 scope of the Rules of Professional Conduct. It specifically  
5 provides that they are designed to be guidance, they are not  
6 designed to be used as a weapon, and they are not to be used  
7 necessarily to disqualify counsel in a matter.

8         Second, I would say there is no conflict. Mr. McVey  
9 represents the board, I represent the Water Rights Program, and  
10 it's done by design of the legislature. So our office, this is  
11 not the only instance where the office represents both the  
12 board and the program. And to any extent that there might be a  
13 conflict, I would argue that it is waived by the legislature in  
14 the enactment of 46-2-4 and 46-2-4.1.

15         Additionally, I'll point out that Rule 1.7 allows a  
16 lawyer to represent, if there is a concurrent conflict, if the  
17 lawyer believes he is able to do so, it is not prohibited by  
18 law, no assertions by one client in conflict or against another  
19 client, and there is informed consent. And here I would argue,  
20 even under 1.7, Mr. Hines and the association are not the  
21 client. So I question whether or not he has standing. And  
22 two, as long as Mr. McVey believes he can represent the board  
23 fairly and appropriately and as long as I believe I can  
24 represent the board, we have satisfied the requirements of Rule  
25 1.7.

1           Additionally, I would say that the South Dakota  
2 Supreme Court has looked at this matter in Romey vs. Landers,  
3 392 N.W. 2d 415, and found as long as there is sufficient --  
4 and it was dealing with the Water Management Board then as  
5 well. As long as there is sufficient separation between the  
6 board and the program, it's perfectly acceptable for this kind  
7 of proceeding to take place. Thank you.

8           CHAIRMAN LARSON: Thank you. Any questions by the  
9 board members of either counsel? Can I have a motion to grant  
10 or deny the motion to disqualify Water Management Board's legal  
11 counsel?

12           MR. FREEMAN: Mr. Chairman, this is Rodney Freeman. I  
13 would move that we deny the motion to disqualify for the  
14 reasons as stated in the record.

15           CHAIRMAN LARSON: Thank you, Mr. Freeman. Do I have a  
16 second to deny the motion to disqualify the Water Management  
17 Board's counsel?

18           MR. BJORK: Second.

19           CHAIRMAN LARSON: Can we take a roll call please.

20           MS. BINEGAR: Bjork.

21           MR. BJORK: Aye.

22           MS. BINEGAR: Dixon.

23           MS. DIXON: Aye.

24           MS. BINEGAR: Freeman.

25           MR. FREEMAN: Aye.

1 MS. BINEGAR: Holzbauer.

2 MR. HOLZBAUER: Aye.

3 MS. BINEGAR: Larson.

4 CHAIRMAN LARSON: Aye. The motion to disqualify Water  
5 Management Board's legal counsel is hereby denied. We will  
6 move on to the next item on the agenda, which is to consider  
7 the motion and any responses to the motion to strike Dakota  
8 Bay's resistance, joinder, exhibits, and appearances regarding  
9 the McCook Lake Recreation Area Association's petition for  
10 declaratory ruling regarding appropriative permits and  
11 shoreline alteration that was filed by Mr. Hines on behalf of  
12 the McCook Lake Recreation Area Association. Mr. Hines, your  
13 motion.

14 MR. HINES: Thank you, Mr. Chairman. This is John  
15 Hines again. So I believe the board yesterday received the  
16 response from Ms. Hegge on behalf of Dakota Bay, and so I would  
17 just, in addition to what was submitted, offer a short response  
18 to that, which is that the rules and the South Dakota law do  
19 not state that a party who receives the declaratory ruling  
20 petition, as it's required to be served on a person who has a  
21 pecuniary interest, is entitled to receive that petition, the  
22 rule and the law do not say that that party is automatically a  
23 party to the declaratory ruling.

24 These declaratory rulings do not start as contested  
25 cases until someone files in opposition. The standard is

1 different for someone who has to receive the petition versus  
2 someone who is permitted to become an opposing party. For a  
3 party entitled to receive a -- a person entitled to receive a  
4 copy of the petition by service, they have to have a pecuniary  
5 interest that would be immediately and directly affected,  
6 whereas the standard for a party to become an opponent to a  
7 declaratory ruling is that they have to suffer a unique injury.

8         So that's why the board requires a party who wants to  
9 file in opposition to state for the record what unique injury  
10 they will be suffering. So while the association is seeking a  
11 ruling today that would likely affect Dakota Bay's pecuniary  
12 interest, we do not believe it rises to the level of an injury.  
13 For that matter, we question why the Chief Engineer is a party  
14 to this matter.

15         We are asking for an interpretation of existing law.  
16 If the board rules as we ask today, the Water Rights Program  
17 and the Chief Engineer will simply follow the law and do its  
18 job. So that's why we do not believe that Dakota Bay is a  
19 proper party to this action. They filed the resistance too  
20 late. It's not in the correct form. So with that, we would  
21 ask that they not be permitted to participate in this hearing.  
22 Obviously there is a second hearing today that relates to some  
23 of these matters, but for the declaratory ruling, Dakota Bay is  
24 not a party to this action. Thank you.

25         CHAIRMAN LARSON: Your response.

1           MR. FANKHAUSER: Thank you. Dean Fankhauser on behalf  
2 of Dakota Bay and Michael Chicoine. We do resist the motion to  
3 strike. It's very clear that Mr. Chicoine and Dakota Bay are  
4 original parties to this action. South Dakota Codified Law  
5 requires only a petition for intervention under provisions  
6 cited by Mr. Hines in his motion to strike in the event that  
7 somebody is not an original party to the case.

8           Michael Chicoine was named in the petition or rather  
9 the attachment to the petition, which effectively narrows the  
10 petition to make it more specific. Because he's specifically  
11 named, he had to be personally served. He was personally  
12 served with the petition, and Dakota Bay, LLC, was personally  
13 served with the petition separately. The Chief Engineer was  
14 not personally served, and no other party, to my understanding,  
15 was personally served this petition indicating that they are an  
16 original party to the petition.

17           Effectively the association's request would  
18 practically make it so that the plaintiff in any lawsuit would  
19 be able to argue, or any claim against a water rights board, in  
20 front of the Water Rights Management Board would have the  
21 ability to say, I'm suing you, but you are not a party to the  
22 case yet, and that just logically doesn't make any sense. So  
23 for that reason, we resist the motion to strike.

24           And it is accurate that we did file yesterday that  
25 response to the association's motion to strike dated July 25,

1 2023. I do have that in paper copy in the event it did not  
2 make it to all of you yet. Thank you.

3 CHAIRMAN LARSON: Ms. Mines-Bailey.

4 MS. MINES-BAILEY: Ann Mines-Bailey on behalf of the  
5 Chief Engineer and the Water Rights Program. First, I strongly  
6 disagree with Mr. Hines's position that it does not commence as  
7 a contested case. Specifically in Rule 74:02:01:48, the  
8 petitioner is required to serve upon all known persons whose  
9 pecuniary interest will be directly affected by a declaratory  
10 ruling. That provision goes on to provide, *In addition, the*  
11 *petitioner shall publish a notice of hearing describing the*  
12 *contents of the petition pursuant to SDCL 46-2A-4 and SDCL*  
13 *1-26-17. SDCL 1-26-17 provides -- it's entitled Contents of*  
14 *notice in contested cases. Moreover, the individual upon whom*  
15 *service is received is referred to in the rule as a party, and*  
16 *the Chief Engineer is required to give notice to the parties of*  
17 *the hearing that is going to commence.*

18 Moreover, I would join what Mr. Fankhauser has said,  
19 though I have some uncertainty as to what the relief being  
20 requested today actually is in the petition for declaratory  
21 ruling. It seems to have been narrowed down to a specific  
22 question of whether Mr. Chicoine, Dakota Bay needs to have an  
23 appropriation permit from the waters of McCook Lake. To me  
24 that necessarily involves Mr. Chicoine and Dakota Bay, and it  
25 would be erroneous to have a hearing regarding their rights and

1 obligations without them to be allowed to be a party. Thank  
2 you.

3 CHAIRMAN LARSON: Thank you. Any questions by the  
4 board members? Hearing none, do I have a motion to either  
5 grant or deny the motion to strike Dakota Bay's resistance?

6 MR. FREEMAN: Mr. Chairman, Freeman. I would move to  
7 deny the motion to strike.

8 CHAIRMAN LARSON: Do I have a second to Mr. Freeman's  
9 motion to deny the motion to strike?

10 MS. DIXON: Dixon. Second.

11 CHAIRMAN LARSON: Can we have a roll call please?

12 MS. BINEGAR: Bjork.

13 MR. BJORK: Aye.

14 MS. BINEGAR: Dixon.

15 MS. DIXON: Aye.

16 MS. BINEGAR: Freeman.

17 MR. FREEMAN: Aye.

18 MS. BINEGAR: Holzbauer.

19 MR. HOLZBAUER: Aye.

20 MS. BINEGAR: Larson.

21 CHAIRMAN LARSON: Aye. The motion to strike Dakota  
22 Bay's resistance is hereby denied. We will move on to the next  
23 item on the agenda, which is to consider the McCook Lake  
24 Recreation Area Association's petition for declaratory ruling  
25 filed by Mr. John Hines on behalf of the McCook Lake Recreation



# First Judicial Circuit Court

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July 2<sup>nd</sup>, 2024

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RE: Memorandum Decision

In the Matter of McCook Lake Recreation Area Association's Petition for  
Declaratory Ruling Regarding Appropriative Permits and Shoreline  
Alterations 63CIV23-171  
In the Matter of Water Permit Application No. 8744-3, Dakota Bay, LLC  
63CIV23-172

Dear Counsel:

63CIV23-171 and 63CIV23-172 are administrative appeals to the circuit court by McCook Lake Recreation Area Association ("Association") from decisions of the South Dakota Department of Agriculture and Natural Resources Water and Management Board ("Board").

Because the Board correctly determined no water right permit is required for the Dakota Bay canal construction, allowed the intervention of Dakota Bay and the Chief Engineer and did not require disqualification of legal counsel, the determination by the Board in 63CIV23-171 is affirmed. Because the Board correctly determined Dakota Bay's water use will be beneficial and in the public interest and quashed subpoenas not served, the determination by the Board in 63CIV23-172 is affirmed.

## Procedural History

63CIV23-171 is an administrative appeal by the Association of the Board's declaratory ruling that Michael Chicoine and Dakota Bay, LLC (jointly "Dakota Bay") were not required to make application to the Board for a permit to appropriate water before starting construction to expand McCook Lake for Dakota Bay's use as well as its Orders allowing the intervention of the Chief Engineer of the South Dakota Department of Agriculture and Natural Resources, Water

Filed on: 7/2/2024 Union County, South Dakota 63CIV23-000171

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Rights Program ("Chief Engineer") and denying the Association's motion to disqualify the Board's legal counsel. 63CIV23-172 is an administrative appeal by Association of the Board's approval of Dakota Bay's Water Permit No. 8744-3 and its Order quashing the Association's subpoena duces tecum to the South Dakota Department of Game, Fish and Parks ("GFP") and the Chief Engineer or Board.

Dakota Bay applied to GFP for a permit to alter lakeshore or bottom lands to construct a canal on McCook Lake for private development or sale of lots to adjoining property owners. Dakota Bay had not applied for a water rights permit from the Board for the project although it had applied for a water permit to use water from an existing irrigation well for the purpose of pumping water into the proposed canal. The Association commenced an action for declaratory ruling from the Board as to whether a permit is required, a petition opposing a permit for use of the existing irrigation water and issued subpoenas to GFP and the South Dakota Department of Agriculture and Natural Resources Water Rights Program ("DANR") which were subsequently quashed by the Board. The Chief Engineer filed a petition opposing the Association's declaratory ruling petition and was granted a continuance of the hearing. The Association filed a motion to disqualify the attorney general's office from serving as the Board's legal counsel which was denied at the hearing on the petition's merits. After hearing, the Board declared a water permit was not necessary concluding the construction of the canal is not an appropriation of water and granted a water rights permit for use of the irrigation well water in the separate application. The Board also overruled the Association's objection to participation by Dakota Bay and the Chief Engineer in the declaratory judgment proceeding and its motion to disqualify legal counsel for conflict of interest. The Board had quashed the subpoenas which are also a subject of appeal at a prior proceeding.

The Association filed its appeal of the Board's declaratory ruling on November 13<sup>th</sup>, 2023.

The Association filed its appeal of the water rights permit issued on November 13<sup>th</sup>, 2023.

Hearing was held before this court on April 9<sup>th</sup>, 2024.

#### **Standard of Review**

The circuit court's standard of review in these matters is set forth by the South Dakota Supreme Court referencing its own as follows:

"We review the Department's decision in the same manner as the circuit court," *Hughes v. Dakota Mill and Grain, Inc.*, 2021 S.D. 31, ¶ 12, 959 N.W.2d 903, 907; see SDCL 1-26-37; SDCL 1-26-36. We review the Department's findings of fact for clear error and overturn them only if "after reviewing the evidence we are left with a definite and firm conviction that a mistake has been made." *Hughes*, 2021 S.D. 31, ¶ 12, 959 N.W.2d at 907 (quoting *Schneider v. S.D. Dep't of Transp.*, 2001 S.D. 70, ¶ 10, 628 N.W.2d 725, 728). But "[w]e review the Department's factual determinations based on documentary evidence, such as depositions and

medical records, de novo.” *Id.*; see *Peterson v. Evangelical Lutheran Good Samaritan Soc’y*, 2012 S.D. 52, ¶¶ 18–19, 816 N.W.2d 843, 849 (explaining that proposed amendments to SDCL 1-26-36 failed, leaving this standard of review intact with respect to agency findings of fact derived from documentary evidence). “The Department’s conclusions of law are fully reviewable.” *Hughes*, 2021 S.D. 31, ¶ 12, 959 N.W.2d at 907.

*News Am. Mktg. v. Schoon*, 2022 S.D. 79, ¶18, 984 N.W.2d 127, 133.

...reviewing courts are required to “give great weight to the findings made and inferences drawn by the agency on questions of fact.” “However, questions of law are reviewed de novo.” *Manuel*, 2012 S.D. 47, ¶ 8, 815 N.W.2d at 670 (citing *Vollmer v. Wal-Mart Store, Inc.*, 2007 S.D. 25, ¶ 12, 729 N.W.2d 377, 382). “Mixed questions of law and fact require further analysis.” *Id.* (quoting *Darling v. W. River Masonry, Inc.*, 2010 S.D. 4, ¶ 10, 777 N.W.2d 363, 366). “If ... the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then ... the question should be classified as one of law and reviewed de novo.” *Id.*

*Easton v. Hanson Sch. Dist. 30-1*, 2013 S.D. 30, ¶7, 829 N.W.2d 468, 471.

**In the Matter of McCook Lake Recreation Area Association’s Petition for Declaratory Ruling Regarding Appropriative Permits and Shoreline Alterations 63CIV23-171**

**1. Permit Necessity**

The Board determined the canal as proposed is not an ongoing appropriation of water and, accordingly, no water permit is necessary.

Although the Association asserts the Board’s determination that there was no appropriation of water is an answer to a question not asked, such is a necessary resolution for deciding whether a permit from the Board was required for Dakota Bay’s project. The Association’s attempt to distinguish “acquiring the right to use water or to construct waterworks” (emphasis added) from an analysis of whether an appropriation of water will occur is nonpersuasive and not supported by precedent. Similarly unconvincing is the Association’s citation of *Parks v. Cooper*, 2004 SD 27, ¶ 32, 676 NW2d 823, 834 (SD 2004) for the premise that the history of South Dakota water law is not relevant to the Court’s analysis in this matter. To the contrary, the very premise of the Court’s holding in *Parks v. Cooper* is that **history and precedent have established** the public trust doctrine that exists apart from statute controlling as to its decision in that matter. *Id.* at ¶42, 837.

The Chief Engineer’s analysis is persuasive as to whether an appropriation such as to require a permit is implicated in this case. An ongoing appropriation permit is unnecessary because Dakota Bay would not have exclusive control of the water on the canal once it is joined to McCook Lake. The facts are undisputed and correctly found by the Board. The Board correctly concluded the canal is not an ongoing appropriation of water.

2. Proper Parties to the Action.

A. Chief Engineer

While the objection was not raised until submission of its Objections and Alternative Findings of Fact and Conclusions of Law, the Association argues the Board improperly allowed the participation of Dakota Bay and the Chief Engineer. Although SDCL 1-26-17.1 provides for intervention in a contested case by a person with a pecuniary interest, intervention is not confined to those with a pecuniary interest for purposes of a declaratory judgment action<sup>1</sup>.

Declaratory judgment proceedings are generally considered equitable in their nature as to bring them within the rule of equity which permits a joinder of defendants where there is a community of interest in questions of law and fact and which makes inapplicable the common-law rule that there can be a joinder of defendants only where they are under a joint obligation or liability. In addition, a state provision which was based on the federal rule dealing with permissive joinder of parties in civil proceedings has been construed as giving broad authority for permissive joinder of defendants and as having been intended to extend to all civil actions the principles of permissive joinder which had been followed in equity, which authority is to be liberally construed in a declaratory judgment suit.

22A Am. Jur. 2d *Declaratory Judgments* § 211 (West 2024) (internal citations omitted).

Although Association cites SDCL 46-2A-4 in support of its position that parties who file a petition in opposition to a declaratory ruling action may only participate if it suffers a unique injury which concerns a matter within the regulatory authority of the agency, that statute only applies to an application pursuant to SDCL 46-2A-1, not a declaratory judgment action. In the event a declaratory judgment action is construed to be an application pursuant to SDCL 46-2A-1, 46-2A-2 provides that the chief engineer shall make a recommendation on the application. The chief engineer's input is allowed and even required under these statutes and its participation cannot be considered prejudicial under any construction.

B. Dakota Bay

The Association objects to the Board's receipt and consideration of Dakota Bay's untimely Petition in Opposition to the Association's Petition for Declaratory Ruling. The Association made a motion to strike Dakota Bay's opposition and preclude their participation at hearing. The Board denied the Association's motions finding that because Dakota Bay is a necessary, original proper to the action, it was not required to additionally file a petition to participate in the proceedings.

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<sup>1</sup> SDCL 46-2-5 provides the Board may promulgate rules to establish practice procedures for issuing declaratory rulings.

The Association concedes the facts are not in dispute. Brief of Appellant, pg. 3. The participation of Dakota Bay and the Chief Engineer did not significantly delay the proceedings. There is no evidence that the Association was prejudiced by either Dakota Bay's or the Chief Engineer's participation.

The Board correctly concluded that Dakota Bay was a necessary, original party that was not required to file a petition to participate. The Board further correctly concluded that the Chief Engineer was a party to the action and also filed a timely petition to participate.

### 3. Representation by the Attorney General's Office

The Association asserts that the representation by separate attorneys under the employ of the Attorney General's Office of both the Board and the Chief Engineer is a conflict of interest resulting in violation of the Association's right to due process.

While the Association concedes that an administrative agency can both prosecute and adjudge a dispute by virtue of the South Dakota Supreme Court's holding in *Romey v. Landers*, 392 NW2d 415, 420 (SD 1986), it objects to the Attorney General's representation of both the prosecutor and adjudicator. SDCL 46-2-4 and 46-2-4.1 provide the Attorney General has an obligation to represent both the Board and the Chief Engineer.

To the extent that the attorney general is not a party to an action or personally interested in a private capacity, the attorney general may represent opposing state agencies in a dispute. Thus, unlike conflict of interest rules governing the conduct of lawyers representing private clients, the attorney general is not necessarily prohibited from representing governmental clients whose interests may be adverse to each other.

7 Am. Jur. 2d *Attorney General* § 19 (West 2024)(internal citations omitted).

As argued by the Chief Engineer, "...it has also been stated that, due to the attorney general's statutorily mandated role in the state legal system, the rules of professional conduct cannot be mechanically applied to the attorney general's office." 7 Am. Jur. 2d *Attorney General* § 17 (West 2024) citing *Chun v. Board of Trustees of Employees' Retirement System of State of Hawaii*, 87 Haw. 152, 952 P.2d 1215, 124 F.d. Law Rep. 1074 (1998); , *State ex rel. Com'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734 (Tenn. Ct. App. 2001) and *Attorney General v. Michigan Public Service Com'n*, 243 Mich. App. 487, 625 N.W.2d 16 (2000).

The Board correctly concluded the Attorney General's Office may properly represent both the Chief Engineer and the Board in this proceeding.

### **In the Matter of Water Permit Application No. 8744-3, Dakota Bay, LLC 63CIV23-172**

The Association appeals from a decision of the Board granting a water permit submitted by Dakota Bay arguing there is not substantial evidence to support the Board's determination

pursuant to SDCL 46-2A-9 as the Board failed to review soil reports, construction plans, and/or detailed specifications with respect to the proposed construction.

1. SDCL 46-2A-9 criteria

Dakota Bay submitted Water Permit 8744-3 for a proposed canal project. The proposed project requested one time use of well ground water of 20.61 acre-feet to fill the canal with a continuing yearly appropriation of 7.99 acre-feet of ground water. The Chief Engineer recommended approval of the permit. A contested hearing was held. The Board approved the permit subject to the Chief Engineer's recommended qualifications and entered Findings of Fact, Conclusions of Law and Decision.

SDCL 46-2A-9 provides as follows:

A permit to appropriate water may only be issued if there is reasonable probability that unappropriated water is available for the applicant's proposed use, the proposed diversion can be developed without unlawful impairment of existing domestic water uses and water rights, the proposed use is a beneficial use, and the permit is in the public interest as it pertains to matters of public interest within the regulatory authority of the Water Management Board as defined by §§ 46-2-9 and 46-2-11.

The Association appeals the Board's findings of fact which are reviewed under the clearly erroneous standard. *News Am. Mktg. supra*. Its decision will be upheld unless this court is left with a definite and firm conviction that a mistake has been committed. *Id.*

A. Reasonable probability unappropriated water is available for use.

The Board received the testimony of Nakaila Steen, a natural resources engineer with Water Rights, who performed a technical review of the application and was qualified as an expert by the Board. Ms. Steen opined that based upon information regarding recharge to the aquifer, existing water rights, and the observation well data, there is sufficient unappropriated water available to satisfy the use sought by Dakota Bay.

The Association has failed to show that the finding was erroneous.

B. Proposed use would not impair existing domestic water uses and rights.

Mr. Michael Chicoine, who sought the application on behalf of Dakota Bay, testified as to his plans to construct a canal stemming off McCook Lake to provide lake access for current and future residents as well as the public. Mr. Chicoine testified as to the construction of the canal including an 18-inch fat, clay liner.

Ms. Steen further testified that the nearest existing domestic well is owned by Mr. Chicoine of Dakota Bay, LLC; the next nearest domestic well is .3 miles northwest of the proposed point of diversion; the nearest existing water rights are three separate water

rights/permits each located approximately one mile from the proposed point of diversion; and the nearest observation well is .6 miles from the proposed point of diversion. Ms. Steen testified that because of the qualities of the Missouri Elk Point aquifer, the area of the proposed point of diversion and small volume requested, there is a reasonable probability that the application could be developed without unlawful impairment to existing domestic uses and water rights. The record established that, in fact, the point of diversion proposed has been operated with the same rate of diversion under an irrigation permit for nearly 20 years without complaint.

While the GFP provided testimony that it had concern that if the canal liner were to dry out, its integrity and ability to reduce seepage would be compromised and the Association provided testimony that it would bear the burden of filling the canal should Mr. Chicoine's well fail or water is not pumped under the proposed appropriation, the continuing appropriation addresses those concerns.

The Board determined there is a reasonable probability that unappropriated water is available for the proposed use and there will be no unlawful impairment of existing domestic water uses and water rights.

The Association has failed to show that the finding was erroneous.

C. Proposed use would be a beneficial use in the public interest.

SDCL 46-1-6(3) defines beneficial use:

"Beneficial use," any use of water within or outside the state, that is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interests of the public of this state in the best utilization of water supplies.

While "public interest" is not defined in SDCL 46-1-6, the Association does not seem to dispute that greater access to the public for recreation activities is in the public interest.<sup>2</sup> Instead, the Association argues the viability of the project precludes a determination that such is in the public's best interests.

The South Dakota Supreme Court has ruled that public interest review should include whether a proposed project will flood and damage neighboring property. *DeKay v. U.S. Fish & Wildlife Serv.*, 524 N.W.2d 855, 859 (S.D. 1994). Thus, the viability of the canal is a relevant consideration under public interest review. Here, the Board found the expert testimony established that the given the nature of proposed point of diversion and relative small volume requested by the application, there is a reasonable probability that the application could be developed without unlawful impairment to existing domestic uses and water rights. FOF #19. This finding satisfies the requirement of determining whether the proposed project will damage neighboring property or interests and is correctly found.

The Board found that the proposed use for recreation, to fill the proposed canal and replace losses due to evaporation or seepage constitutes a beneficial use in the public interest.

<sup>2</sup> See ARSD 74:51:03:01 which defines beneficial use of South Dakota streams to include recreation.

The Association has failed to show that these findings were erroneous.

The court is not left with a definite and firm conviction that a mistake has been committed in regard to any of the Board's findings as to approval of the permit.

## 2. Quashing of Subpoena

The Association claims as additional error that the Board's incorrectly quashed the Association's subpoenas to GFP and DANR.

The clear language of both SDCL 15-6-45(a) and SDCL 1-26-19.1 supports the Association's position that the subpoenas were validly issued by its attorney without leave of the Board. The Association failed, however, to effect service pursuant to SDCL 15-6-45(c) making the Board's decision to quash valid on that basis alone.<sup>3</sup> In addition, even if the Board's determination quashing the subpoenas was error, the Association did not establish prejudice as a result. The Association could have, and did, move the Board for issuance of subpoenas pursuant to the Board's construction of the procedural requirements. Further, the Association called a witness at hearing pursuant to subpoena.

The Board correctly quashed the subpoenas pursuant to motion. Even if that determination was in error, the Association was not prejudiced thereon.

In conclusion, the Board correctly determined no water right permit is required for the Dakota Bay canal construction, allowed the intervention of Dakota Bay and the Chief Engineer and did not require disqualification of legal counsel. Accordingly, the Board's determinations in 63CIV23-171 are affirmed. Further, as the Board correctly determined Dakota Bay's water use will be beneficial and in the public interest and quashed subpoenas not served, the determinations by the Board in 63CIV23-172 are affirmed.

Counsel for Dakota Bay may submit Orders in accordance with this memorandum opinion incorporating it by reference.

Sincerely,



Tami Bern  
Circuit Court Judge

<sup>3</sup> SDCL 15-6-45(c) provides the subpoena shall be served in the same manner as a summons except no service by publication is authorized. SDCL 15-6-5(b), the statute allowing service on a party's attorney, provides 15-6-5 does not apply to service of a summons or process for contempt. Accordingly, the subpoena must be personally served to be effective. Service on the administrative assistant is ineffective as is mailing to counsel. SDCL 15-6-4(d)(5); 15-6-4(d)(6); 15-6-4(e).

STATE OF SOUTH DAKOTA     )  
  ) SS  
COUNTY OF UNION            )

IN CIRCUIT COURT  
  
FIRST JUDICIAL CIRCUIT

IN THE MATTER OF MCCOOK     )  
LAKE RECREATION AREA        )  
ASSOCIATION'S PETITION FOR   )  
DECLARATORY RULING           )  
REGARDING APPROPRIATIVE      )  
PERMITS AND SHORELINE        )  
ALTERATIONS                   )

Case No. 63CIV23-171  
Case No. 63CIV23-172

IN THE MATTER OF WATER       )  
PERMIT                           )  
APPLICATION NO. 8744-3,        )  
DAKOTA BAY, LLC                )

**NOTICE OF ENTRY OF ORDER**

NOTICE HEREBY GIVEN that attached hereto and incorporate herein is a copy of the Final Decision and Order in the above-title action, the original of which was entered by the Honorable Tami Bern on July 17, 2024, and filed in the office of the Clerk of the First Judicial Circuit, Union County, at Elk Point, South Dakota.

Dated this 19th day of July 2024.

GUNDERSON, PALMER, NELSON  
& ASHMORE, LLP

By: /s/ Stacy R. Hegge

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### CERTIFICATE OF SERVICE

I certify that on July 19, 2024, a true and correct copy of the **NOTICE OF ENTRY OF ORDER** was electronically filed and served upon the following individuals through South Dakota's Odyssey File and Serve Portal:

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/s/ Stacy R. Hegge  
Stacy R. Hegge

STATE OF SOUTH DAKOTA     )  
  ) ss  
COUNTY OF UNION            )

IN CIRCUIT COURT  
  
FIRST JUDICIAL DISTRICT

IN THE MATTER OF MCCOOK     )  
LAKE RECREATION AREA        )  
ASSOCIATION'S PETITION FOR   )  
DECLARATORY RULING            )  
REGARDING APPROPRIATIVE       )  
PERMITS AND SHORELINE         )  
ALTERATIONS                    )

Case No. 63CIV23-171  
Case No. 63CIV23-172

IN THE MATTER OF WATER        )  
PERMIT                            )  
APPLICATION NO. 8744-3,         )  
DAKOTA BAY, LLC                 )

**FINAL DECISION AND ORDER**

Pursuant to SDCL 1-26-36, it is hereby ORDERED that the Memorandum Decision filed on July 2, 2024 is incorporated by reference; it is further

ORDERED that the South Dakota Department of Agriculture and Natural Resources Water Management Board's (Board's) Findings of Fact, Conclusions of Law, and Decision in 63CIV23-171 is affirmed; it is further

ORDERED that the Board's Findings of Fact, Conclusions of Law, and Decision in 63CIV23-172 is affirmed; it is further

ORDERED that the stay of proceedings is lifted in light of this Court's final decision, and Judgment is hereby entered accordingly.

7/17/2024 2:00:11 PM

BY THE COURT:

Attest:  
Meyer, Laura  
Clerk/Deputy



  
\_\_\_\_\_  
Honorable Tammi Bern  
Circuit Court Judge

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

MCCOOK LAKE RECREATION AREA  
ASSOCIATION

Appellant,

v.

DAKOTA BAY, LLC, MICHAEL  
CHICOINE, AND THE SOUTH  
DAKOTA DEPARTMENT OF  
AGRICULTURE AND NATURAL  
RESOURCES, CHIEF ENGINEER  
AND WATER RIGHTS PROGRAM

Appellees.

Appeal No. 30795

---

Appeal from the Circuit Court First Judicial Circuit, Union County, South Dakota.

The Hon. Tami Bern presiding.

**Appellant's Reply Brief to Appellee South Dakota Department of Agriculture and  
Natural Resources, Chief Engineer and Water Rights Program**

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The notice of appeal was filed on the 16th day of August, 2024

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## PRELIMINARY STATEMENT

The Appellee maintains that the plain, unambiguous language of South Dakota law does not decide the question of whether Michael Chicoine and Dakota Bay, LLC (collectively, “Dakota Bay”) must obtain a water rights permit prior to constructing a canal connected to McCook Lake. Instead, the Appellee asserts that the history of the development of water law, the 1881 Session Laws of the Dakota Territory, and the common law doctrine of exclusivity, should override the language chosen, passed, and enacted by the South Dakota Legislature.

This is not a case about “the basic aspects of water appropriation law as a whole.” (Appellee’s Brief, p. 7). Rather, this is a case about applying the statutes the South Dakota Legislature has adopted to the facts presented, to fulfill the stated purpose of those statutes: “It is hereby declared that the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection.” SDCL § 46-1-1.

## ARGUMENT

The Appellant now reviews the issues raised by the Appellee, in urging that the circuit court be affirmed.

### **I. South Dakota Law is Unambiguous with Respect to the Requirement for a Water Rights Permit, thus Statutory Construction is Unnecessary and Improper**

The Appellee’s Brief relies upon common law doctrines, legislative history, and long-abandoned territorial law to interpret the statutes passed by the South Dakota

Legislature. “[R]esorting to legislative history is justified only when legislation is ambiguous . . . .” *In re Petition of Famous Brands, Inc.*, 347 N.W.2d 882, 885 (S.D. 1984). “This [C]ourt assumes that statutes mean what they say and that legislators have said what they meant.” *Id.* “Words used are to be understood in their ordinary sense . . . .” SDCL § 2-14-1. “When the language in a statute is clear, certain[,] and unambiguous, there is no reason for construction, and the Court’s only function is to declare the meaning of the statute as clearly expressed.” *Rowley v. S.D. Bd. of Pardons & Paroles*, 2013 S.D. 6, ¶ 7, 826 N.W.2d 360, 363-64. “Thus, ambiguity is a prerequisite of construction.” *People ex rel. J.L.*, 2011 S.D. 36, ¶ 4, 800 N.W.2d 720, 722. Ambiguity “may exist where the literal meaning of a statute leads to an absurd or unreasonable conclusion[,]” or when a statute “is capable of being understood by reasonably well-informed persons in either of two or more senses.” *Kling v. Stern*, 2007 S.D. 51, ¶ 6, 733 N.W.2d 615, 617. Even in cases of ambiguity, “[s]tatutory construction is an exercise to determine legislative intent. In analyzing statutory language we adhere to two primary rules of statutory construction. The first rule is that the language expressed in the statute is the paramount consideration. The second rule is that if the words and phrases in the statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction. When we must, however, resort to statutory construction, the intent of the legislature is derived from the plain, ordinary and popular meaning of statutory language.” *State Auto Ins. Companies v. B.N.C.*, 2005 S.D. 89, ¶ 18, 702 N.W.2d 379, 386, (quoting *State v. Johnson*, 2004 S.D. 135, ¶ 5, 691 N.W.2d 319, 321–22).

In short, if the Legislature wanted to limit who must obtain a water rights permit based on common law doctrines, or anything else, the Legislature would have written

those limits into South Dakota Codified Law. “The will of the sovereign power is expressed . . . [b]y statutes enacted by the Legislature.” SDCL § 1-1-23. The Legislature did not do so. The Appellee’s singular focus on the term “appropriation”, and statutory construction of that term via common law doctrines and long-abandoned territorial laws, ignores the plain language of South Dakota statutes, and engages in unnecessary statutory construction of unambiguous language chosen by the Legislature.

## **II. The Appellee Admits in its Brief that a Permit is Required**

The Appellee goes to great lengths to explain the history of water law in South Dakota and why the construction of the Dakota Bay canal does not require a water rights permit. Yet in its own brief, the Appellee states: “Water to fill the canal in this case would require an appropriation permit from whatever water source Dakota Bay used.” (Appellee’s Brief, p.14). This is what the Association has been arguing all along. It is clear from the undisputed facts in this case, that when the Association annually pumps water from the Missouri River into McCook Lake, that same water will annually flow into the Dakota Bay canal. McCook Lake would serve as the canal’s source of water. Dakota Bay must have a water rights permit for the water of McCook Lake.

## **CONCLUSION**

No party to this action has ever argued, nor did the Board or Circuit Court find, any section of SDCL Chapter 46-1 is ambiguous. The only reasonable interpretation of SDCL chapter 46-1 is that the construction of Dakota Bay’s proposed “canal”, which will annually be filled by water from McCook Lake, is (1) the construction of a waterworks; (2) the acquisition of the right to the beneficial use of water; and (3) an

appropriation of water; any one of which requires that Dakota Bay obtain a water rights permit for the water of McCook Lake.

Respectfully submitted,

CRARY HUFF, P.C.

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ATTORNEYS FOR APPELLANT

### **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that the foregoing brief complies with the page limitation set by this Court. This brief was prepared and printed in a proportionally spaced typeface in Times New Roman font, size 12. This brief contains 904 words including headings, footnotes, and quotations, but excluding the table of contents, table of authorities, and certificates of counsel.

Dated this 29th day of January, 2025

/s/ John M. Hines

John M. Hines

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of January, 2025, I electronically filed the foregoing with the Clerk of the Court using the Odyssey File & Serve system. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system as follows:

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/s/ John M. Hines  
John M. Hines

STATE OF SOUTH DAKOTA    )  
                                      : SS  
COUNTY OF UNION            )

IN CIRCUIT COURT  
  
FIRST JUDICIAL CIRCUIT

---

IN THE MATTER OF MCCOOK LAKE    )  
RECREATION AREA ASSOCIATION'S    )  
PETITION FOR DECLARATORY        )  
RULING REGARDING APPROPRIATIVE    )  
PERMITS AND SHORELINE            )  
ALTERATIONS                        )

63CIV23-171  
  
NOTICE OF REVIEW

---

To: David Briesse & John Hines, attorneys for McCook Lake Recreation Area Association; Stacy Hegge & Dean Fankhauser, attorneys for Dakota Bay, LLC and Michael Chicoine:

Please take notice that the Respondents, South Dakota Chief Engineer and Water Rights Program, Department of Agriculture and Natural Resources, will seek review of the order of the circuit court entered on the 17th day of July 2024, to the extent it applied the Rules of Civil Procedure to the Water Management Board's hearing process.

Dated this 27th day of August 2024.

MARTY J. JACKLEY  
ATTORNEY GENERAL

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on this 27th day of August 2024.

*/s/ Jennifer L. Verleger*  
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*Attorneys for South Dakota Chief Engineer  
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IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

MCCOOK LAKE RECREATION AREA ASSOCIATION,	)	No. _____
	)	
Appellant,	)	
	)	APPELLEES SOUTH DAKOTA
v.	)	DEPARTMENT OF AGRICULTURE
	)	AND NATURAL RESOURCES, CHIEF
DAKOTA BAY, LLC, MICHAEL	)	ENGINEER AND WATER RIGHTS
CHICOINE, AND THE SOUTH	)	PROGRAM'S
DAKOTA DEPARTMENT OF	)	DOCKETING STATEMENT
AGRICULTURE AND NATURAL	)	
RESOURCES, CHIEF ENGINEER	)	
AND WATER RIGHTS PROGRAM,	)	
	)	
Appellees.	)	

SECTION A.

TRIAL COURT

1. The circuit court from which the appeal is taken: First Circuit
2. The county in which the action is venued at the time of appeal: Union
3. The name of the trial judge who entered the decision appealed:  
Judge Tami A. Bern

PARTIES AND ATTORNEYS

4. Identify each party presently of record and the name, address, and phone number of the attorney for each party.

SECTION B.

TIMELINESS OF APPEAL

(If section B is completed by an appellee filing a notice of review pursuant to SDCL 15-26A-22, the following questions are to be answered as they may apply to the decision the appellee is seeking to have reviewed.)

1. The date the judgment or order appealed from was signed and filed by the trial court: July 17, 2024
2. The date notice of entry of the judgment or order was served on each party: July 19, 2024
3. State whether either of the following motions was made:
  - a. Motion for judgment n.o.v., SDCL 15-6-50(b): ☐ Yes ☒ No
  - b. Motion for new trial, SDCL 15-6-59: ☐ Yes ☒ No

NATURE AND DISPOSITION OF CLAIMS

4. State the nature of each party's separate claims, counterclaims or cross-claims and the trial court's disposition of each claim (e.g., court trial, jury verdict, summary judgment, default judgment, agency decision, affirmed/reversed, etc.).

Circuit court review of agency decision (Water Management Board) affirmed.

5. Appeals of right may be taken only from final, appealable orders. See SDCL 15-26A-3 and -4.
  - a. Did the trial court enter a final judgment or order that resolves all of each party's individual claims, counterclaims, or cross-claims?  
☒ Yes ☐ No
  - b. If the trial court **did not** enter a final judgment or order as to each party's individual claims, counterclaims, or cross-claims, did the trial court make a determination and direct entry of judgment pursuant to SDCL 15-6-54(b)? Not applicable. ☐ Yes ☐ No

6. State each issue intended to be presented for review. (Parties will not be bound by these statements.)

1. Whether the rules of civil procedure apply to the Water Management Board's proceedings and handling of the proposed subpoenas.

Dated this 27th day of August 2024.

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## CERTIFICATE OF SERVICE

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