

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

MCCOOK LAKE RECREATION AREA)
ASSOCIATION) Appeal No. 30796
)
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 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 Dakota Bay, LLC (“Dakota Bay”), carried its burden in establishing the use of water described in Water Permit Application No. 8744-3 was a beneficial use and in the public interest. The Board ruled the record was sufficient to reach those conclusions, and approved Water Permit No. 8744-3.

Most relevant authority:

SDCL § 46-1-6

SDCL § 46-2A-7

SDCL § 46-2A-9

STATEMENT OF THE CASE AND FACTS

This is an appeal from the decision of the Honorable Tami Bern of the Union County Circuit Court affirming the Board decision regarding the Water Permit Application No. 8744-3 (“Application”), submitted by Dakota Bay. (Application for Permit to Appropriate Water in South Dakota; App. 12-13). Dakota Bay applied for the

Water Permit on or about March 29, 2023, to use water from an existing irrigation well for the purpose of pumping water into a proposed canal to be constructed on Dakota Bay's property and connected to McCook Lake. (Application for Permit to Appropriate Water; App. 12-13). Dakota Bay submitted the Application after the South Dakota Department of Game, Fish, and Parks ("GFP") raised concerns about the integrity of the liner of the proposed canal. (Letter from GFP, Dated March 24, 2023; App. 14; T.T.¹ p. 57-58; App. 19-20).

The Association shares GFP's concerns. The Association holds two water rights permits to pump water from the Missouri River to increase and maintain the water level of McCook Lake. (Petition Opposing Application for a Water Right Permit; App. 21-22). As a water rights holder whose permitted use of water is directly connected to McCook Lake, the Association obviously has a substantial and unique interest in a proposed canal connected to McCook Lake—and whether that canal would negatively impact the Association's pumping efforts. (Petition Opposing Application for a Water Right Permit; App. 22). The Association filed a petition in opposition to the Application on June 12, 2023. (Petition Opposing Application for a Water Right; App. 21).

The Board heard evidence and arguments on the Application and opposition on August 3, 2023. Neither the Board, nor the State's engineer, reviewed any design elements or specifications for the proposed canal. (T.T. p. 28-29; App. 16-17). The soil composition in the area where the canal would be constructed was also not reviewed. (T.T. p. 29; App. 17). Nor was any impact on the Association's existing permits considered. (T.T. p. 29; App. 17). Despite these omissions, the Board concluded that "the

¹ "T.T." used herein refers to the transcript of proceedings before the South Dakota

record in its entirety including the exhibits, expert testimony, and testimony of the witnesses is sufficient to support the Board's conclusion that the statutory requirements set forth in SDCL § 46-2A-9 have been satisfied" by Dakota Bay. (Water Management Board Findings of Fact, Conclusions of Law, and Decision; App. 29).

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. Substantial evidence means "such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." SDCL § 1-26-1(9).

II. The Circuit Court erred in affirming the Board ruling Dakota Bay, LLC provided substantial evidence that the use of water described in Water Permit Application No. 8744-3 would be beneficial and in the public interest

A. Analysis

The South Dakota Department of Agriculture and Natural Resources Water Rights Program is charged with issuing water rights permits under SDCL Chapter 46-1 *et seq.* “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 within the regulatory authority of the Water Management Board as defined by §§ 46-2-9 and 46-2-11.” SDCL § 46-2A-9.

“If the Water Management Board . . . determines that the requirements have not been met or that the evidence is insufficient to support a determination, it shall disapprove the application or defer it for further study.” SDCL § 46-2A-7. “‘Beneficial use,’ [means] 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[.]” SDCL § 46-1-6.

The engineer preparing the Chief Engineer’s report on the Application did not review the design elements, specifications, maintenance requirements, or soils for the proposed canal. (T.T. p. 28–29; App. 16-17). Whether pumping water from the existing well into the proposed canal as detailed in the Application will be a beneficial use and in the public interest necessarily depends on how the canal is constructed. If the canal cannot hold water, or if the amount of water authorized by the water permit is insufficient to satisfy the concerns raised by GFP, then pumping water into the canal would not only

be unbeneficial but would also be wasteful. Similarly, no public interest is served if the water is pumped into a canal that is inadequately designed or built.

Michael Chicoine (Dakota Bay's member/manager) testified that he has never constructed a canal before. (T.T. p. 40, App. 18). Dakota Bay did not make its engineer available to the Board, nor did it provide any of the engineering reports, designs, or specifications allegedly produced by the engineer. Other than Mr. Chicoine's sometimes contradictory lay testimony, Dakota Bay provided the Board with no information as to the design specifications for the canal. Due to the lack of any design details or specifications for the canal, it is impossible for the Board to have concluded that the use of water to fill or otherwise maintain the yet-to-be constructed canal would be beneficial or in the public interest.

The Board's decision is contrary to law and fact, is arbitrary or capricious, and is clearly erroneous in light of the entire evidence in the record and should be reversed by the Court. *See* SDCL § 1-26-36. The question on appeal under the "clearly erroneous" standard is not whether the Court would have made the same decision as did the administrative agency, but whether, after reviewing the entire evidence, the Court is "left with a definite and firm conviction that a mistake has been committed." *Matter of S. Lincoln Rural Water Sys. Application for Permit No. 4300-3*, 295 N.W.2d 743, 745 (S.D. 1980) (*quoting Fraser v. Water Rights Commission*, 294 N.W.2d 784, 788 (S.D.1980)).

No evidence in the record, save Mr. Chicoine's contradictory and self-serving testimony, establishes that the proposed use of water will be beneficial or in the public interest. Without reviewing soil reports, construction plans, and/or detailed specifications with respect to the construction of Dakota Bay's proposed canal, the Board cannot have

rationaly concluded that the use of water to fill the yet-to-be-constructed canal would be beneficial or in the public interest. No reasonable person would conclude the record is adequate to reach the Board's conclusion. Absent such evidence, Water Right Permit No. 8744-3 should have been denied or deferred for further study.

CONCLUSION

The Board's Decision was contrary to law, contrary to fact, was arbitrary or capricious, was clearly erroneous in light of the entire evidence in the record and was affected by errors of law prejudicial to the Association's substantial rights. The Association requests the Court to reverse or modify the Board's decision and conclude that the record does not establish the proposed use of water will be beneficial or in the public interest, and that Water Permit Application No. 8744-3 should be denied or referred for further study.

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 1,561 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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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

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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 13th, 2023.

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

Hearing was held before this court on April 9th, 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. Mtg. 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 action¹.

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.

¹ 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 *Chan 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.² 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.

² 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.³ 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

³ 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 2:00:02 PM

BY THE COURT:

Attest:
Meyer, Laura
Clerk/Deputy




Honorable Tami Bern
Circuit Court Judge

Filed on:07/17/2024 Union County, South Dakota 63CIV23-000172

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

NOTICE OF ENTRY OF ORDER

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

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

David Briese
John M. Hines
Crary Huff, P.C.
329 Pierce Street, Suite 200
Sioux City, IA 51101
jhines@craryhuff.com
dbriese@craryhuff.com

Attorneys for McCook Lake
Recreation Area Association

/s/ Stacy R. Hegge

Stacy R. Hegge

FILE COPY

RECEIVED

MAR 29 2023

OFFICE OF WATER

FORM 2: Application for new water appropriation

No. **8744-3** (State) - **10170101**
 Title **Missouri River**
 Name **Leader-Courier, Elk Point**
Press: Dakota, Yankton 605-7811

Application for Permit to Appropriate Water in South Dakota

Check use of water:

Municipal Water Distribution System Recreational
 Rural Water System Commercial Fish & Game
 Domestic Use Industrial Other

Type of Application: New Vested Right Future Use Reservation
 Place to Beneficial Use Water Reserved by Future Use Permit No. _____
 Amendment Correction to Permit No. **4557-3**

Description of water use: *to use the water for irrigation of 1/4 acre of corn & soybeans in the area of 132nd Street & Dakota Hwy in Yankton, SD*
 Location: **132nd Street Yankton, Jefferson SD 57132**

Priority: **712 975 9275** (mail) **712 975 9275** (phone)
 Amount of water wanted: **1.55** cfs (min) **2.66** cfs (max)

Source of water: **ground water**
 Name of landowner: **132nd St 145 16 145 150**

I certify that the proposed appropriation will be used for the purposes stated above.

Name of applicant: **K. N. N.**
 Name of applicant's business: **Yankton Press & Printing Co.**

See Attached

See 5/10/2023 site documentation

7.99 ac-ft recurring appropriation
20.61 ac-ft one time fill

Mike Chacon

owner Dakota Press

FORM 2: Application for water appropriation

SI DUNE Water Rights
777 E 4th St
Pierre, SD 57501-5052

800-735-4646

Application for Permit to appropriate Water in South Dakota

Check use(s) of water:

Municipal Water Distribution System Recreational Irrigation
 Rural Water System Commercial Fish & Wildlife Other
 Domestic Use (Drinking) Industrial Other

Type of Application: New "As-Is" Right Future Use Reservation

Place to Beneficial Use Water Reserved by Future Use Permit No. _____

Amendment/Correction to Permit No. 6557-3

Description of amendment/correction
The well log is 251,120 to show the water table to be 1 ft below ground level and the well is 3' deep. The well is located at the intersection of 1st St and 3rd St, Pierre, SD.

Location of well: 329th 132nd Avenue, Jefferson, SD 57143

Depth of well: 712 892 4175 (unit) by the owner of the permit.

Area of water claimed: 1.55 acres 226 sq ft

Water source: well

Estimated production: 12 to 15 gpm

Is the water available to the applicant within the area described?

Are there any other water rights in the area? None

Is there any other information which would be helpful? Yes, 1st and 3rd St, Pierre, SD

Is there any other information which would be helpful? See Attached

Mike Cherno

owner Dakota Bay

I, the undersigned, hereby certify that the information furnished herein is true and correct to the best of my knowledge and belief.
 Signature: _____ Date: _____
 Printed Name: _____ Title: _____



**SOUTH DAKOTA DEPARTMENT OF
GAME, FISH AND PARKS**

523 EAST CAPITOL AVENUE | PIERRE, SD 57501

March 24, 2023

Mike Chicoine
32926 482nd Avenue,
Jefferson, South Dakota 57038

Dear Mr. Chicoine,

South Dakota Department of Game, Fish and Parks (SDGFP) has consulted with South Dakota Department of Agriculture and Natural Resources (SDDANR) regarding your proposed use of the existing nearby well for canal water maintenance. The said well is currently permitted for irrigation use (Water Rights Permit # 6557-3). It has been determined that the initial filling of the canal for testing purposes prior to connecting to McCook Lake would qualify for a temporary permit under SDCL 46-5-40.1.

Ongoing use of the existing well to maintain water levels during periods of non-pumping would require a new water rights permit. In your response letter dated February 5, 2023, it was stated that "The canal would be periodically inspected through the off-season and water would be added to the canal from the existing well on the property." Without the ability to add water as needed to prevent the canal liner from drying out, cracking, floating, or otherwise failing, SDGFP's concerns about the integrity of the canal liner remain.

Until a proper water right has been obtained, it is the intention of SDGFP to hold the current shoreline alteration permit application in abeyance.

Sincerely,

Kevin Robling, *Secretary*
South Dakota Game, Fish & Parks

cc: Hunter Roberts, DANR Secretary
Jon Kotilnek, SDGFP Staff Attorney

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STATE OF SOUTH DAKOTA
COUNTY OF UNION

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

=====

IN THE MATTER OF MCCOOK LAKE Case No. 63CIV23-000171
RECREATION AREA ASSOCIATION'S
PETITION FOR DECLARATORY RULING
REGARDING APPROPRIATIVE PERMITS
AND SHORELINE ALTERATIONS

=====

Transcript of Proceedings
August 2, 2023

=====

BOARD MEMBERS PRESENT

- William Larson, Chairman
- Leo Holzbauer
- Rodney Freeman
- Tim Bjork
- Peggy Dixon

David M. McVey, Counsel for the Board

1 could impair a water right in another source?

2 A. It's possible.

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

8 MS. MINES-BAILEY: Objection. Speculation.

9 CHAIRMAN LARSON: I'll sustain that one.

10 Q. (BY MR. HINES) Ms. Steen, can you direct me to the
11 part of your report that discusses the specifications of the
12 proposed canal?

13 A. Can you clarify a little bit? What do you mean,
14 specifications?

15 Q. Does your report contain any of the design elements
16 for the proposed canal?

17 A. No, I don't believe that was in the scope of my
18 review.

19 Q. You didn't review those plans in preparing the report?

20 A. I analyzed the water permit application based on the
21 volume requested and in the proposed water source.

22 Q. And did that application include specifications for
23 the canal?

24 A. I would have to re-review it.

25 Q. Is there any part of your report that discusses the

1 integrity of the canal liner?

2 A. I believe the introduction does. It addresses what
3 the water -- why the water would be needed to maintain the
4 integrity, to cover any evaporation and seepage losses for
5 purposes of preventing the canal liner from drying out,
6 cracking, floating, or otherwise failing.

7 Q. Didn't you testify that you didn't have any part of
8 calculating those amounts required for that purpose?

9 A. Yes, I did not calculate the amount.

10 Q. Thank you. Is there any part of your report that
11 discusses the soil composition in the area where the canal
12 would be constructed?

13 A. I don't think so.

14 Q. Is there any part of your report that discusses the
15 McCook Lake Association's water right at all?

16 A. No, because it's authorized for use from the Missouri
17 River.

18 Q. Is there any part of your report that concludes that
19 1.55 cfs will be sufficient to prevent the liner of the canal
20 from drying out, cracking, floating, or otherwise failing?

21 A. I don't believe that was in the scope of my review.

22 Q. So that would not appear in your report?

23 A. Maybe in the introduction.

24 MR. HINES: Thank you. I don't have any further
25 questions.

1 Q. Is that a reasonable and useful use, in your mind, for
2 that water?

3 A. Yes.

4 Q. And to be clear, is that a recreational use --

5 A. Yes.

6 Q. -- or a sustaining use, maintenance? Do you believe,
7 based on what you have reviewed, that there will be some sort
8 of unique injury to somebody else's water right if you are
9 granted this permit?

10 A. I do not.

11 MR. FANKHAUSER: I have no further questions for Mr.
12 Chicoine at this point.

13 CHAIRMAN LARSON: Mr. Fankhauser, are you going to
14 offer your exhibit?

15 MR. FANKHAUSER: Yes, Mr. Chairman, my apologies. I
16 would offer Exhibit A.

17 CHAIRMAN LARSON: I'd like to see it.

18 MR. HINES: I have no objection. I'm sure it's part
19 of the administrative record that's also been offered.

20 CHAIRMAN LARSON: Go ahead, Mr. Hines.

21 CROSS-EXAMINATION

22 BY MR. HINES:

23 Q. John Hines for the association. Hello again, Mr.
24 Chicoine. Mr. Chicoine, have you ever built a canal before?

25 A. Have not.

1 record.

2 CHAIRMAN LARSON: That's normal and proper procedure.

3 DIRECT EXAMINATION

4 BY MR. HINES:

5 Q. Mr. Rounds, thank you, sorry. Thank you for your
6 patience. Reminder you are still under oath.

7 A. Yes.

8 Q. Can you briefly restate your name and occupation and
9 experience for the record in this hearing.

10 A. Yeah, name is Kip Rounds, regional supervisor for the
11 past three months. Prior to that I was the aquatic habitat and
12 access biologist for Game, Fish and Parks.

13 Q. In your prior role with Game, Fish and Parks and your
14 current role, are you familiar are Mr. Chicoine's application
15 for shoreline alteration?

16 A. Yes, I am.

17 Q. And you are familiar with his proposed canal?

18 A. Say that again.

19 Q. Are you familiar with the proposed canal?

20 A. Yes, I am.

21 Q. And remind us again, what are Game, Fish and Parks'
22 concerns about the canal liner?

23 A. Our engineers have concerns if the canal liner were to
24 dry out, the integrity of that liner and its ability to reduce
25 seepage, and so we shared those concerns with Mr. Chicoine.

1 Q. What does it mean for a canal liner to float?

2 A. That would be a better question for an engineer.

3 Q. If the water level falls in the canal, is there a
4 possibility that the canal liner would dry out, crack, or
5 otherwise fail?

6 MR. KOTILNEK: Objection. Improper lay opinion.

7 CHAIRMAN LARSON: I'll overrule it for now.

8 A. Can you repeat that please?

9 Q. [BY MR. HINES] The question was if the water level
10 falls in the canal, isn't it true there is a possibility the
11 liner would dry out, crack, or otherwise fail?

12 A. That was a concern with our engineers.

13 Q. If the canal is constructed and a water right permit
14 is granted to Dakota Bay, will Game, Fish and Parks monitor the
15 canal every year to check for canal liner failures?

16 A. I do not believe so.

17 Q. Do you know who would be responsible for that?

18 A. I do not.

19 Q. Do you know who would be responsible in the event of
20 the canal failing?

21 A. I do not.

22 MR. HINES: No further questions.

23 CHAIRMAN LARSON: Mr. Fankhauser.

24 MR. FANKHAUSER: Thank you, Mr. Chairman.

25 CROSS-EXAMINATION



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JUN 12 2023

OFFICE OF
WATER

DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES

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

Petition

Opposing Application for a Water Right Permit

Application No. 8744-3 Name of Applicant Dakota Bay, LLC c/o Michael Chicoine

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

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

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

Dakota Bay's "canal" project, and associated pumping described in the application will have a detrimental effect on the Petitioner, McCook Lake Recreation Area Association ("MLA"), in one or more of the following ways

- 1) The proposed diversion will unlawfully impair the MLA's existing water rights, permit 6479-3;
- 2) The proposed diversion will undermine the MLA's efforts in sustaining the water levels of McCook Lake, at MLA's considerable expense; and
- 3) The MLA has filed a Petition for Declaratory Ruling pertaining to other matters associated with the Dakota Bay project, and a ruling on that petition must first be reached before this application can be considered.

List the reasons for your opposition to this application.

The McCook Lake Recreation Area Association ("MLA") is a South Dakota non-profit corporation funded primarily by voluntary donations. The MLA and its volunteers maintain and preserve McCook Lake, which is a public body of water belonging to the people of the State of South Dakota. In connection with the MLA's efforts, the MLA holds a water rights permit number 6479-3 (and prior permits) to pump water from the Missouri River into McCook Lake. Due to channelization, McCook Lake sits above the Missouri River in elevation. The MLA maintains a 7,550 foot long pipe, connected to pumps, which fills the lake to a target level of 1088 to 1089 feet elevation. Pumping costs vary by month and weather conditions, but has previously cost approximately \$5,000.00 per month during dry conditions.

The Report to the Chief Engineer on Water Permit Application No. 8744-3 (the "Report") and the accompanying Recommendation of Chief Engineer for Water Permit Application No. 8744-3, ("Recommendation") fail to mention, let alone consider, the MLA's permit and whether the diversion described would impair the MLA's existing water rights. The Report and Recommendation also fail to consider whether the diversion described would negatively affect the water levels in McCook Lake, which are already sustained by the extraordinary efforts of the MLA, tens of thousands of dollars in annual expense, volunteers, and the system of pumping. MLA's existing water right would be adversely affected, because (i) the canal may cause the lake to drain, rendering it useless to the public; or (ii) MLA would need to provide additional water to support the canal, and it may be impossible to do so.

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

First Name: John Last Name: Hines (Crary Huff Law Firm, Attorney for MLA)

Mailing Address: 329 Pierce Street, PO Box 27, Suite 200

City: Sioux City State: Iowa Zip: 51102

Optional contact information. Phone: (712) 224-7550 Email: jhines@craryhuff.com

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

Application No. 8744-3

Petitioner's Name McCook Lake Recreation Area Association

Any additional description of the unique injury or reasons for opposing this application:

While the Application refers to "engineer's calculations" of the amount of water needed for the canal, no such "calculations" are shown-Only conclusory numbers are shown. None of the Application, Report, or Recommendation describe the canal, its dimensions, or proposed elevation. It is unclear how, without detailed plans of the canal, the SD DANR can meaningfully determine whether water rights will be impaired by "filling" the canal from the aquifer and whether water is available for appropriation. The MLA also disputes the evaporation, seepage, and runoff figures relied on in the Report overestimate the availability of water for appropriation. Further, MLA has not been provided any soil report for the canal area, and does not know how and whether any such report was considered by the Report and Recommendation. The "Well Completion Report" for Chicoine's existing well is 18 years old.

Additionally, the Report and Recommendation are inconsistent with the Application submitted - Application 8744-3 requests to "fill a canal once per year", whereas the Report and Recommendation only address a "one time" appropriation not to exceed 28.6 acre-feet for the first year. The SD DANR - Water Rights Program engineers should be required to re-evaluate the Application and issue a report on the Application as it was submitted.

The MLA, a non-profit corporation which lacks taxing authority, should not be responsible to sustain Dakota Bay's private development for its sole pecuniary gain. The diversion described in the Application will not be sufficient to maintain water levels in the canal, which will lead to deterioration of the lining, the shoreline, and the canal itself, unless the MLA provides sufficient water from the Missouri River. Furthermore, historical elevation levels of McCook Lake show that water levels in the Lake fall to 1082 feet during winter, which based on canal plans submitted by Chicoine to the South Dakota Department of Game, Fish, and Parks, will expose the proposed canal to winter frost, drying out, and cracking. By year 2, Dakota Bay will be pumping water into a sieve.

Application No. 8744-3 should be denied unless and until Dakota Bay can demonstrate its proposed project (i) will not unlawfully inhibit the MLA's water rights; and (ii) will not result in the draining of McCook Lake - which would have catastrophic ecological and economical consequences for both the MLA and the people of South Dakota.

The MLA is submitting contemporaneously herewith a request for automatic extension pursuant to SDCL 46-2A-5.

STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT	}	FINDINGS OF FACT,
APPLICATION NO. 8744-3, DAKOTA	}	CONCLUSIONS OF LAW
BAY, LLC,	}	AND DECISION

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. Applicant, Dakota Bay was represented by Dean A. Fankhauser and Stacy R. Hegge. Petitioner, McCook Lake Recreation Area Association (Association), was represented by John M. Hines. Ann F. Mines Bailey represented the Department of Agriculture and Natural Resources, Water Rights Program (Program) and the Chief Engineer.

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

A. FINDINGS OF FACT

1. On March 29, 2023, the Program received Water Permit Application No. 8744-3 from Michael Chicoine on behalf of Dakota Bay seeking an appropriation of 28.6 acre-feet of water for the first year and 7.99 acre-feet of water per year thereafter at a maximum diversion rate of 1.55 cubic feet of water per second (cfs) from one existing well completed into the

Missouri: Elk Point aquifer for recreational use for an initial fill of a canal to be constructed along southeast shore of McCook Lake and thereafter to cover losses due to evaporation and seepage. The well is located in the E½SE¼ Sec. 16 T89N-R48W and is permitted for irrigation use under Water Permit No. 6557-3.

2. The Chief Engineer, Eric Gronlund, recommended approval of the application subject to qualifications.

3. Notice of Water Permit Application No. 8744-3 was timely advertised on June 1, 2023, in The Leader-Courier (Union County) and the Yankton Daily Press and Dakotan (Yankton County) and posted on the DANR website.

4. Water Rights received a timely petition in opposition to Water Permit Application No. 8744-3 from the Association on June 12, 2023.

5. The matter was scheduled to be heard by the Water Management Board during its July 12, 2023 meeting. A request for an automatic delay was made and the July 12 hearing was delayed.

6. The Chief Engineer moved for a special meeting so that this matter could be heard in conjunction with the Association's petition for declaratory ruling which requested in part that the Board rule that Dakota Bay's project required a permit appropriating the waters of McCook Lake.

7. Water Permit Application No. 8744-3 is a new water permit application which requires a determination pursuant to SDCL § 46-2A-9 whether there is a reasonable probability that unappropriated water is

available for the proposed use, whether the proposed use would impair existing domestic water uses and water rights, whether the use would be a beneficial use, and whether the proposed use is in the public interest pertaining to matters of public interest within the regulatory authority of the Water Management Board.

8. The Association holds a permit/right for the appropriation of water from the Missouri River to be pumped into McCook Lake for the purpose of recreation to stabilize lake levels.

9. Nakaila Steen, a natural resources engineer with Water Rights, performed a technical review of the application, and prepared a report. Ms. Steen provided expert testimony regarding the technical review of the application to the Board.

10. The Missouri: Elk Point aquifer is composed of glacial outwash consisting of fine sand to very coarse gravel. Within the State of South Dakota, the aquifer underlies approximately 219,100 acres in Clay, Union, and Yankton Counties. At the time of completion, aquifer material at the proposed point of diversion was approximately 95 feet thick. The aquifer varies from unconfined to confined conditions but generally behaves as an unconfined aquifer. At the point of diversion, the aquifer is under confined conditions with the existing well completion report demonstrating an artesian head pressure of approximately 40 feet at the time the well was constructed.

11. The Missouri: Elk Point aquifer receives recharge through infiltration of precipitation and from seepage from the Big Sioux, James,

Missouri, and Vermillion rivers and inflow from the Lower Vermillion-Missouri, Lower James-Missouri, Big Sioux, and Dakota aquifers. The best information available regarding recharge to the Missouri: Elk Point aquifer includes two studies: One based upon the observation well data and the other involving induced recharge to the aquifer due to pumping by the Lewis and Clark Regional Water System. The combined total of the estimated average annual recharge equals approximately 114,593.9 acre-feet of water per year.

12. Ms. Steen calculated withdrawals from the Missouri: Elk Point aquifer in South Dakota to be approximately 100,591 acre-feet per year, including water reserved by future use permits and requested by this application.

13. Ms. Steen further testified that there are 36 observation wells completed into the Missouri: Elk Point aquifer. A review of the data from those observation wells indicates that the aquifer is responding to climatic conditions and that natural discharge is available for capture. Several of the observation wells located near the Missouri River indicate a gradual downward trend. Ms. Steen testified that the downward trend is a result of the lowering of the water table due to the entrenchment (deepening of the channel and/or widening of the bed) of the Missouri River and not evidence of over-appropriation of the aquifer.

14. Ms. Steen testified it is her conclusion that, based upon her review of the best information available regarding recharge to the aquifer,

existing water rights, and the observation well data, there is sufficient unappropriated water available to satisfy this application.

15. There were 647 existing water rights/permits authorized to withdraw water from the Missouri: Elk Point aquifer in South Dakota at the time this application was submitted.

16. Ms. Steen testified that the nearest existing domestic well on record is located approximately 0.25 miles south of the proposed point of diversion and owned by Mr. Chicoine. The next nearest domestic well not owned by the applicant is located approximately 0.3 miles northwest of the proposed point of diversion.

17. The nearest existing water rights are three separate water rights/permits each located approximately one mile from the proposed point of diversion: One to the west and two to the southeast.

18. The nearest observation well is located approximately 0.6 miles from the proposed point of diversion.

19. Ms. Steen testified that the Missouri: Elk Point aquifer is a tremendous resource and given the saturated thickness of the aquifer in the area of the proposed point of diversion and relatively small volume requested by this application, there is a reasonable probability that the application could be developed without unlawful impairment to existing domestic uses and water rights. Bolstering her conclusion is that this point of diversion has been operating with the same rate of diversion under the irrigation permit since 2005 and there is no history of complaints.

20. Ms. Steen further testified that in her expert opinion an unlawful impairment will first occur in the source from which the appropriation is made.

21. The Board finds Ms. Steen to be a credible expert witness and that these Findings of Fact are supported by the evidence presented including Ms. Steen's testimony and the reports and exhibits which she prepared and/or upon which she relied.

22. The Board received testimony from Michael Chicoine who sought the application on behalf of Dakota Bay. Mr. Chicoine testified that he has applied for a shoreline alteration permit from the South Dakota Department of Game, Fish and Parks. He plans to construct a canal stemming off McCook Lake to provide lake access for current residents, potential future residents, and the public. Mr. Chicoine provided testimony regarding the construction of the canal which includes an 18-inch fat, clay liner.

23. Kip Rounds, regional supervisor with the South Dakota Department of Game, Fish and Parks, also provided testimony to the Board. Mr. Rounds testified that he is familiar with Mr. Chicoine's shoreline alteration application and the proposed canal project. Mr. Rounds testified that the Department of Game, Fish and Parks has concerns that if the canal liner were to dry out, the integrity of the liner and ability to reduce seepage would be compromised.

24. The Board also received testimony from Dirk Lohry. Mr. Lohry testified that the Association will bear the burden of filling the canal should

Mr. Chicoine's well fail, or water is not pumped under this proposed appropriation.

25. Petitioner did not submit sufficient evidence through expert opinions, testimony, or other evidence that would support a determination that there is a not reasonable probability that there is unappropriated water available, that there would be an unlawful impairment should the application be granted, that this appropriation is not a beneficial use of water, or that it is not in the public interest.

26. The Board finds that, based upon the best information reasonably available, the factors of SDCL § 46-2A-9 are satisfied.

27. The evidence establishes that there is unappropriated water available in the Missouri: Elk Point aquifer to satisfy this application.

28. The evidence establishes the proposed diversion would not unlawfully impair existing domestic water uses or water rights.

29. The Board further finds that the proposed use of the water for recreation, to fill the proposed canal and replace losses of water due to evaporation or seepage, constitutes a beneficial use.

30. The Board further finds that placing the water to this beneficial use is in the public interest.

31. 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. The Association objects to Paragraph 20 of the Proposed Findings asserting that "SDCL § 46-2A-9 does not limit analysis of unlawful impairment to the same water source." There is ample evidence set forth in the record generally and especially by the expert testimony of Nakaila Steen and Exhibits 600 and 605 to support the Board's conclusion that the proposed diversion would not unlawfully impair existing domestic water uses or water rights. No alternative Finding is proposed. Petitioner's objection is noted.
2. The Association objects to Paragraph 25 of the proposed Findings and asserts that the applicant, Dakota Bay, LLC/Michael Chicoine, failed to carry their burden to prove that the requirements set forth in SDCL §46-2A-9 have been met. There is ample evidence set forth in the record generally and especially in Exhibits 600, 603, 604, and 605, along with the expert testimony of NaNakila Steen and the testimony of Applicant Michael Chicoine to support the Board's conclusion that the statutory requirements set forth in SDCL §46-2A-9 have been satisfied.
3. The Association objects to Paragraphs 26, 28, and 30 of the proposed Findings and asserts as support:

Dakota Bay, LLC/Michael Chicoine provided no evidence that the Association's water rights would not be unlawfully impaired. Mr. Chicoine's failure to provide engineering or technical specifications for his "canal" provides no basis for the Board to conclude the proposed water use will be beneficial. Mr. Chicoine's unsupported testimony regarding his intent to create public access is legally insufficient for the Board to conclude that the use is in the public interest.

Contrary to this assertion, the record in its entirety including the exhibits, expert testimony, and testimony of the witnesses is sufficient to support the Board's conclusion that the statutory requirements set forth in SDCL §46-2A-9 have been satisfied.

C. CONCLUSIONS OF LAW

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

1. The Board has jurisdiction over this matter. The application falls within the Board's responsibility over water appropriation and regulation in Title 46.
2. Publication was properly made, and the Notices of Hearing were properly issued pursuant to SDCL § 46-2A-4.
3. The Chief Engineer recommended granting the application. The recommendation, however, is not binding on the Board. SDCL § 46-2A-4(8).
4. The applicant is required to satisfy each of the factors set forth in SDCL § 46-2A-9.
5. The Board concludes that the applicant has satisfied each of the factors set forth in SDCL § 46-2A-9.

6. South Dakota Codified Law, section 46-2A-9 provides that a permit to appropriate water may be issued “only if there is reasonable probability that there is unappropriated water available for the applicant’s proposed use, that the proposed diversion can be developed without unlawful impairment of existing domestic 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 §§ 46-2-9 and 46-2-11.” Each of these factors must be met and the permit must be denied if the applicant does not meet its burden of proof on any one of them.

7. The first factor for consideration under SDCL § 46-2A-9 is whether there is water available for the appropriation. Determination of water availability includes consideration of the criteria in SDCL § 46-6-3.1 pertaining to recharge/withdrawal: whether “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.”

8. South Dakota Codified Law, section 46-6-3.1 provides an exception to the recharge/withdrawal limitation. It states in pertinent part, “[a]n 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 estimated average annual recharge for use by water distribution systems.” The Missouri: Elk Point aquifer is not older

and stratigraphically lower than the Greenhorn Formation. Additionally, the permit is not for use in a water distribution system. Thus, the appropriation may not be granted if the withdrawal would exceed the estimated annual recharge.

9. The Board concludes it is not probable withdrawals from the aquifer would exceed recharge to the aquifer in violation of SDCL § 46-6-3.1 if the application is granted.

10. The Board concludes there is a reasonable probability that there is unappropriated water available to fulfill the amount requested by the application.

11. The second requirement of SDCL § 46-2A-9 is that the proposed water use may not unlawfully impair existing domestic uses and water rights. The proposed diversion can be developed without unlawful impairment of existing water rights or domestic water uses.

12. The third element set forth in SDCL § 46-2A-9 is whether the use of water would be a beneficial use: one that is reasonable and useful and beneficial to the appropriator and also consistent with the interest of the public in the best utilization of water supplies under SDCL § 46-1-6(3). The proposed use for recreation is a beneficial use.

13. The fourth requirement of SDCL § 46-2A-9 concerns the public interest. The proposed use of the water must be "consistent with the interests of the public of this state in the best utilization of water supplies." SDCL

§ 6-1-6(3). The Board concludes that this appropriation of water for recreation is in the public interest.

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

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. The Association objects to Paragraph 3 of the proposed Conclusions of Law and asserts that the "applicant provided insufficient evidence of the factors set forth in SDCL § 46-2A-9." Contrary to this assertion, the record in its entirety including the exhibits, expert testimony, and testimony of the witnesses is sufficient to support the Board's conclusion that the statutory requirements set forth in SDCL §46-2A-9 have been satisfied.
2. The Association objects to Paragraph 11 of the proposed Conclusions of Law and asserts that the purpose of the proposed water use... will unlawfully impair the Association's existing water rights." This assertion is inconsistent with the evidence in the record specifically, Exhibits 600, 604, 604, and 605 and the expert testimony of NaNakila Steen.
3. The Association objects to Paragraphs 12 and 13 of the proposed Conclusions of Law and asserts no "evidence was presented regarding the design or specifications of the "canal"; thus, the Board has no basis to

conclude that the proposed use is reasonable, beneficial, or in the public interest." Beneficial use is defined in SDCL §46-1-6(3) as:

"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."

SDCL §46-1-1 further states 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 record in its entirety including the exhibits and testimony of the witnesses is sufficient to support the Board's conclusion that the proposed (recreational) use as set forth in the application is reasonable, in the public interest and is beneficial to the appropriator.

4. The Association objected to the proposed Findings of Fact, Conclusions of Law, and Final Decision in that the decision and states that:

"because the Board voted at its hearing that approval of Water Permit No. 8744-3 would be conditioned on requirements set by the Chief Engineer pertaining to the water use. The proposed decision contains no such requirements, and thus the proposed decision fails to comply with the Board's ruling."

Contrary to this assertion, the minutes show that there was a "Motion by Bjork, seconded by Freeman, to approve Water Permit Application No. 8744-3, Dakota Bay, subject to the qualifications set forth by the Chief Engineer." The qualifications are set out in full in the "Report of Chief

Engineer for Water Permit Application 8744-3, Dakota Bay" which was admitted into evidence as part of Exhibit 600.

D. FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Board enters its determination that Water Permit Application No. 8744-3 is granted 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.

Dated this 12 day of October, 2023.

BY THE BOARD:

Bill Larson

Bill Larson (Oct 12, 2023 16:40 CDT)

William Larson, Chairman
South Dakota Water Management Board

STATE OF SOUTH DAKOTA)
) : SS
 COUNTY OF UNION)

IN CIRCUIT COURT
 FIRST JUDICIAL COURT

(CIV NO. 63CIV23-000172)

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

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2.	March 29, 2023	Application for Permit to appropriate water for recreational use – Dakota Bay. Supplemental information, maps, well log.	8	2-9
3.	March 29-30, 2023	Email correspondence series between Eric Gronlund and Brenda Gabel (obo Mike Chicoine) regarding application and required fees	3	10-12
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5.	March 31, 2023	Validation from Secretary of State that Mike Chicoine was authorized signatory for Dakota Bay LLC	1	16
6.	May 18, 2023	Phone conversation notes - Eric Gronlund, Ron Duvall, and Mike Chicoine to clarify the annual volume of water being requested in Application for Permit. Mr. Chicoine confirmed a one-time fill of canal (20.61ac-ft) and an additional ongoing use of up to 7.99 ac-ft annually.	1	17
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30796

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.

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

THE HONORABLE TAMI A. BERN
CIRCUIT COURT JUDGE

**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. 30796

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 opposing a water permit application, which triggered a contested case hearing before the Board. App. 21. The Board found in favor of Dakota Bay and the Chief Engineer. App. 23-36. 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. The Chief Engineer timely filed a Notice of Review with this Court on August 27, 2024. This Court has jurisdiction under SDCL § 1-26-37 and SDCL § 15-26A-3(1).

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. WHETHER THE CIRCUIT COURT CORRECTLY AFFIRMED THE BOARD'S DECISION GRANTING DAKOTA BAY WATER PERMIT No. 8744-3 AFTER THE BOARD FOUND THAT DAKOTA BAY'S PROPOSED WATER USE WAS: 1) A BENEFICIAL USE, AND 2) IN THE PUBLIC INTEREST?

The Board found that the proposed water use constitutes a beneficial use. App. 29 (Findings of Fact #29). The Board found that placing the water to such beneficial use is in the public interest. *Id.* (Findings of Fact #30). The Board granted Water Permit Application No. 8744-3. App. 36. The circuit court affirmed the Board's findings and decision. App. 1.

SDCL § 46-1-4

SDCL § 46-1-8

SDCL § 46-2A-9

SDCL § 46-5-5

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

In re Water Right Claim No. 1927-2, 524 N.W.2d 855 (S.D. 1994)

Matter of SDDS, Inc., 472 N.W.2d 502 (S.D. 1991)

II. WHETHER THE CIRCUIT COURT ERRED IN APPLYING THE RULES OF CIVIL PROCEDURE TO THE BOARD'S HEARING PROCESS?

The circuit court stated that subpoenas were validly issued by the Association's attorney in accordance with SDCL § 15-6-45, a rule of civil procedure. App. 8. The Chief Engineer contends that the Rules of Civil Procedure do not apply to Board proceedings.

SDCL § 1-26-19.1

SDCL § 15-6-1

STATEMENT OF THE CASE

This case is an administrative appeal of the Board's decision in a contested case hearing regarding Water Permit Application No. 8744-3.

In 2023, Dakota Bay (through Michael Chicoine) submitted Water Permit Application No. 8744-3 for recreational use to the Chief Engineer for a proposed canal project. App. 12; AR 002. The proposed project requested to use ground water from a well for a one-time use of 20.61

acre-feet¹ to fill the canal, with a continuing yearly appropriation of 7.99 acre-feet of ground water. *Id.* The Chief Engineer recommended application approval. AR 018. The Chief Engineer's recommendation was properly noticed. AR 041-51. Numerous public comments on the application were timely received (AR 052-397), as well as a timely petition in opposition submitted by the Association (App. 21-22; AR 110-11).

The Board held a contested case hearing on August 2, 2023. App. 15. At the hearing's conclusion, the Board entered executive session. AR 482. Upon returning to open session, the Board voted to approve Water Permit Application No. 8744-3 subject to the Chief Engineer's recommended qualifications. *Id.* The Chief Engineer's counsel was instructed to prepare proposed Findings of Fact, Conclusions of Law, and a Final Decision for the Board's review. *Id.*

The Chief Engineer's proposed Findings of Fact, Conclusions of Law, and Final Decision were submitted (AR 512-22), and the Association submitted Objections and Alternative Findings of Fact and Conclusions of Law (AR 524-26) 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 546-47. The Board voted to adopt the final Findings of

¹ "[T]he 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." SDCL § 46-1-7. One acre-foot equals 325,851 gallons.

Fact, Conclusions of Law, and the Decision prepared by the Board's counsel. *Id.*; App. 23-36.

The Board mailed notice of entry of Order and the final adopted Findings of Fact, Conclusions of Law, and Decision on October 13, 2023. AR 549. Due to an incorrect zip code, the notice of entry of Order and the final adopted Findings of Fact, Conclusions of Law, and Decision were re-mailed on November 1, 2023. AR 565-80. The Association timely appealed to the 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 commingled its arguments in this case and a related case (No. 30795) 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 Chief Engineer, in turn, filed a Notice of Review.

The Association sought to consolidate this case and Case No. 30795, which this Court denied on November 1, 2024.

STATEMENT OF FACTS

While the record in this case is voluminous, the facts relevant to the appealed issues are not. They fall into two discrete categories. The first fact category deals with the issue regarding beneficial use and the public interest. The second fact category deals with the procedural matter regarding subpoenas.

Beneficial Use and Public Interest Facts

Mike Chicoine has been boating, tubing, and fishing with his kids (and now grandkids) on McCook Lake for over twenty years. TT 35:19-21. Mr. Chicoine (through his company Dakota Bay) owns property adjacent to McCook Lake. TT 34:1-2. To improve lake access across his own property, as well as to provide access to 15 additional homeowners, Mr. Chicoine would like to construct a canal through the Dakota Bay property to McCook Lake's southeast corner. TT 34:6-8; AR 491. This canal would provide two-way no-wake boat access to residential lots. AR 491. The canal would be clay-lined. TT 44:18-24; 51:7-10; 51:14-17.

After the canal is constructed, Dakota Bay plans to fill the canal with an initial one-time 20.61 acre-foot appropriation, with a continuing yearly 7.99 acre-foot appropriation. AR 002; TT 8:3-4; 48:14-17; 50:4-5. Dakota Bay's engineer calculated those amounts, and the Chief Engineer generally processes permit applications with an applicant's requested amounts. TT 48:14-17; 30:18-21.

The continuing appropriation use is to offset evaporation and seepage losses from the canal's clay liner, which could result in the liner drying out, cracking, floating, or otherwise failing. TT 29:3-6; 48:20-22; 59:19-60:1. The Board found that this proposed water use "to fill the proposed canal and replace losses of water due to evaporation or seepage, constitutes a beneficial use." App. 29 (Findings of Fact #29). The Board also found that placing the water to such beneficial use is in

the public interest. *Id.* (Findings of Fact #30). The Board granted Water Permit Application No. 8744-3. App. 36.

Subpoena Facts

On June 30, 2023, the Association mailed subpoenas to the South Dakota Game Fish and Parks (SDGFP) Secretary (Kevin Robling) and the Board (Ann Mines Bailey).² AR 414-17. The Chief Engineer received both subpoenas via regular mail on July 5, 2023. *Id.* The Board subpoena was served on Traci Kelly³ via highway patrol on July 11, 2023. AR 421-23.

At a Board meeting the following day, Ms. Mines Bailey made an oral motion to quash the Board subpoena. AR 426. Mr. Kotilnek, a SDGFP staff attorney, made a motion to quash the SDGFP subpoena. AR 427. Both subpoenas were quashed based on counsel arguments and statutory review, including the argument that the subpoenas were improperly issued under the Rules of Civil Procedure for Circuit Courts (SDCL ch. 15-6) instead of the Administrative Procedure and Rules Act (SDCL ch. 1-26). AR 426; 430.

A week later, the Board received a motion (properly under SDCL ch. 1-26) from the Association requesting the Board issue a subpoena to require SDGFP Secretary Robling or a competent designee to appear and

² Ms. Mines Bailey was previously an Assistant Attorney General, employed by the Attorney General's Office, and the Chief Engineer's counsel of record in this case during the contested case hearing. TT 2. The Board's counsel in this case was David McVey. TT 1.

³ Ms. Kelly is DANR Secretary Hunter Roberts' administrative assistant.

testify at the August 2 hearing. AR 439-40. The Board's Prehearing Chairman granted an order and issued the subpoena the day after the motion was received. AR 443-45.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY AFFIRMED THE BOARD'S DECISION GRANTING DAKOTA BAY WATER PERMIT No. 8744-3 AFTER THE BOARD FOUND THAT DAKOTA BAY'S PROPOSED WATER USE WAS: 1) A BENEFICIAL USE, AND 2) IN THE PUBLIC INTEREST.

A. 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 appeal may not be considered *de novo*. *Id.* In addition, the "clearly erroneous" standard applies to the Board's factual findings, which are given "great weight." SDCL § 1-26-36; *Hughes v. Dakota Mill & Grain, Inc.*, 2021 S.D. 31, ¶ 12, 959 N.W.2d 903, 907 (citations omitted). Factual findings are "clearly erroneous" only when the Court is "left with a definite and firm conviction that a mistake has been made." *Id.* 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.

B. *The Board did not err in concluding Dakota Bay provided evidence that its planned water use would be a beneficial use and in the public interest, and consequently granting Dakota Bay's Water Permit Application.*

The Board "regulate[s] and control[s] the development, conservation, and allocation of the right to use the waters of the state according to the principles of beneficial use and priority of appropriation." SDCL § 46-2-11. It has "general supervision of the waters of the state, including measurement, appropriation, and distribution thereof." SDCL § 46-2-9.

The Board grants water permits when four criteria are met:

1. "there is a reasonable probability that unappropriated water is available for the applicant's proposed use,"
2. there will be no "unlawful impairment of existing domestic water uses and water rights,"
3. the "proposed use is a beneficial use," and
4. the "permit is in the public interest as it pertains to matters of public interest" within the Board's regulatory authority.

SDCL § 46-2A-9. The Association challenges only the "beneficial use" and "public interest" criteria. Association Brief, p.4.

1. Beneficial Use – Generally

SDCL defines "beneficial use" broadly. "Beneficial use" means "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." SDCL § 46-1-6(3). Additionally, "[b]eneficial use is the basis, the measure and the limit of the right to the use of waters." SDCL

§ 46-1-8. In other words, there are two components to beneficial use – intent and quantity – and they are examined at different points in time.

One component recognizes the appropriator's project intent, as encompassed by SDCL § 46-1-6. Some common examples of beneficial use intent are irrigation, municipal, commercial, and recreation. This beneficial use component is questioned and examined at the application's outset. Does the applicant have an actual intention of using this water for some defined purpose that is reasonable, useful, and beneficial to the applicant? If the answer is yes, then there is nearly always a beneficial use. Conversely, is the applicant applying for the water just to secure their place in the "first-in-time, first-in-right" appropriation line without any specific plans for the water's use? If the answer to this question is yes, then there is not a beneficial use. This beneficial use component is also sometimes called the antispeculation doctrine. 94 C.J.S. Waters § 347 ("The antispeculation doctrine prohibits the acquisition of a conditional water right without a vested interest or a specific plan to possess and control the water for a specific beneficial use.").

The second beneficial use component is "the measure" of the right, the quantity, as encompassed by SDCL § 46-1-8. This beneficial use component is questioned and examined throughout the permit's duration because if a permit-holder "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.” SDCL § 46-5-37. For example, if a permit-holder is allowed 100 acre-feet of water use per year under a permit, but regularly only uses 25 acre-feet of water per year, the permit-holder’s “beneficial use” will be only the 25 acre-feet per year and the permit may be modified to reflect such beneficial use. Similarly, if the Chief Engineer determined that water was being wasted, unreasonably used, or unreasonably diverted, that water right could be curtailed. SDCL § 46-1-4. For example, if a permit holder is allowed 100 acre-feet of water use per year under a permit, and that water user actually uses all 100 acre-feet, but could accomplish the same task using 25 acre-feet, it’s reasonable that the Chief Engineer could curtail the permitted amount to the actual beneficial use of 25 acre-feet. This forward-looking beneficial use concept is summarized by SDCL § 46-5-5: “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.”

2. Beneficial Use Intent Categories

As noted by this Court in *Parks v. Cooper*, “[d]ecisions on beneficial use belong ultimately to the Legislature.” 2004 S.D. 27, ¶ 51, 676 N.W.2d 823, 841. The legislature has delegated this authority to the

Board, giving it the “general supervision of the water of the state, including . . . appropriation” SDCL § 46-2-9.

In this case, the Board found that “the proposed use of the water for recreation, to fill the proposed canal and replace losses of water due to evaporation or seepage, constitutes a beneficial use.” App. 29 (Findings of Fact #29). First, the Board has been granted the right to make this decision by the legislature, and this Court should not overturn the decision unless it is “definitely and firmly convinced a mistake has been made.” *In re Tinklenberg*, 2006 S.D. 52, ¶ 11, 716 N.W.2d 798, 801.

Second, the Board’s decision is consistent with administrative rules and previous case law. The Board defines several beneficial use categories in ARSD art. 74:51. Although the Chief Engineer concedes that the purpose of this administrative code article deals with water quality issues, this Court adopted at least some of those categories in the water quantity (appropriation permitting) context. *In re Water Right Claim No. 1927-2* examined whether an application by the United States Fish and Wildlife Service (FWS) for continued flow of six natural springs to maintain “marshes, sloughs, and wet meadows for wildlife habitat” constituted a beneficial use. 524 N.W.2d 855, 857 (S.D. 1994). As part of its analysis upholding FWS’s beneficial use, this Court cited ARSD ch. 74:03:04 (now located at ARSD ch. 74:51:03). *Id.* at 858. In that administrative code, the Board includes domestic water supply, fish and

wildlife propagation, recreation, stock watering, irrigation, and commerce and industry waters as beneficial uses. ARSD §§ 74:51:03:01, 74:51:03:02. The Board presumably considers these same uses to be beneficial uses in the water quantity appropriation process.

Thus, Dakota Bay's proposed intent to use the water to prevent cracking of the clay liner is a type of a beneficial use, falling into the recreation category given the canal's purpose. And although the Association does not appear in its briefing to challenge this beneficial use intent component determination, this is the only type of beneficial use determination that can be made at the time of application approval. Therefore, the Board's finding that Dakota Bay intends to beneficially use the water and the Board's subsequent permit application approval are not in error. Further, the Association does not appear to challenge that the proposed water use is a recreational use or challenge that recreational use is a beneficial use.

3. Beneficial Use Quantity

As noted, the second beneficial use component is a measure of the water quantity and is examined throughout the permit's duration. SDCL §§ 46-1-8; 46-5-37. This is the "beneficial use" that the Association appears to be challenging in its briefing. Association Brief, pp.7-8.

The Association argues that the Board cannot determine beneficial use without knowing "how the canal is constructed," whether it will hold water, whether the authorized water amount is sufficient to satisfy

SDGFP concerns, and whether the water use would be wasteful. *Id.* But all these concerns are forward-looking quantity-related beneficial use concepts that are addressed by SDCL § 46-5-5, which requires that the appropriation “remain[s] subject to the principle of beneficial use.”

The Association seems to want some type of crystal-ball guarantee that Dakota Bay’s plans will be successful before there can be a consideration of “beneficial use.” But future success is not a measure of beneficial use. Under that theory, no water permit would ever be able to be granted.

When irrigation permits are granted to farmers, the Chief Engineer and the Board do not inquire about what kind of crops the farmers will grow, what types of fertilizer they plan to use, what expected yields are, or what specific irrigation manufacturers will provide equipment. And when the FWS requested water to promote waterfowl habitat, this Court still found a beneficial use even though duck populations had precipitously declined by almost 90% between 1983 to 1990. *In re Water Right Claim No. 1927-2*, 524 N.W.2d at 858, n.2. Similarly, the beneficial use of the Association’s own recreational permit to pump water from the Missouri River to maintain lake levels is not dependent on showing how many boats use the lake, how many fish are caught, how many kids swim in the summer, or even whether the lake level is maintained.

The beneficial use of water is not measured by the endeavor’s success except to the extent that the permit holder must comply with

SDCL § 46-5-5 and is subject to the continuing beneficial use requirement of SDCL § 46-5-37.

As the Association notes, “it is impossible for the Board” to determine whether “the yet-to-be constructed canal would be beneficial or in the public interest.” Association Brief, p.8. This is because the on-going beneficial use quantity requirement is always impossible to determine at the time of the application. The only beneficial use component that the Board can examine when approving an application is the beneficial use intent category, which in this case is the unchallenged recreational use.

4. Public Interest

The Association additionally makes general allegations that granting Dakota Bay’s water permit is not in the public interest, though offers no specifics about how the permit is not in the public interest or even inconsistent with the public interest. Association Brief, pp .7-9. The Board found that placing the water to such beneficial use is in the public interest. App. 29 (Findings of Fact #30).

Similar to beneficial use, the legislature has not prescribed detailed guidance for the Board to follow when making a public interest determination. Perhaps because “[p]ublic interest is not susceptible of precise definition.” *Matter of SDDS, Inc.*, 472 N.W.2d 502, 516 (S.D. 1991) (quoting *In re Application of Bermensolo*, 82 Idaho 254, 352 P.2d 240, 242 (1960)).

While the legislature does not prescribe detailed guidance to make a public interest determination, the legislature is specific “that the water resources of the state be put to beneficial use to the fullest extent of which they are capable,” within certain conditions. SDCL § 46-1-4. Placing water to beneficial use to the fullest extent possible is qualified “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.” *Id.* These general public interest considerations are inclusive of and complementary to criteria in SDCL § 46-2A-9 in which unappropriated water needs to be available for use and existing rights may not be impaired. Absent the above public interest concerns or some other particularized harm allegation within the Board’s regulatory authority (SDCL § 46-2A-9), the Chief Engineer presumes that the legislature considers all beneficial water uses to be in the public interest.

5. Conclusion: Beneficial Use and Public Interest

At the time of permit application approval, the appropriator’s intent is the measure of beneficial use. Whether the initially appropriated quantity will remain lawfully appropriated and properly put to beneficial use can only be examined over time. But as of now, the Board decided the proposed application meets the beneficial use requirement. Additionally, because water is available and the use will

not impair other users, nor were any specific public interest matters within the Board's regulatory authority raised by the Association, permit approval is in the public interest.

Therefore, the Chief Engineer asks this Court to affirm that the Board did not err in concluding Dakota Bay provided evidence that its planned water use would be a beneficial use and in the public interest, and consequently granting Dakota Bay's Water Permit Application.

II. THE CIRCUIT COURT ERRED IN APPLYING THE RULES OF CIVIL PROCEDURE TO THE BOARD'S HEARING PROCESS.

Unless this Court remands this case on the first issue, a ruling on this issue is unnecessary. However, the Chief Engineer filed a Notice of Review on this issue to preserve its argument in future contested cases before the Board that the Rules of Civil Procedure do not apply.

Specifically in this case, the Association attempted to issue two subpoenas, which the Board quashed. AR 414-17; AR 430. Based on the Board's meeting minutes, the subpoenas were quashed for several procedural reasons, including that the subpoenas were issued without the Board's approval under SDCL § 15-6-45 instead of with the Board's approval in accordance with SDCL § 1-26-19.1. AR 426-30. But the circuit court held "that the subpoenas were validly issued by [the Association's] attorney without leave of the Board." App. 8.

The legislature has granted the Board jurisdiction over water permit application hearings. SDCL § 46-2A-2. When water permit

applications become contested cases, the procedure in SDCL ch. 1-26 (Administrative Procedure and Rules) governs such hearings. As such, subpoenas in contested administrative cases are governed by SDCL

§ 1-26-19.1, which states:

Each agency and the officers thereof charged with the duty to administer the laws of this state and rules of the agency shall have power to ... subpoena witnesses to appear and give testimony and to produce records, books, papers and documents relating to any matters in contested cases and likewise issue subpoenas for such purposes for persons interested therein as provided by § 15-6-45.

(Emphasis added). This means that only the Board had the authority to issue subpoenas in this case.

Instead of following the procedures in SDCL ch. 1-26 for administrative cases, the Association attempted to use the Rules of Civil Procedure for circuit court in SDCL ch. 15-6. The Association attempted to issue subpoenas through its attorney under SDCL § 15-6-45(a), which does allow “any attorney of record” in good standing and licensed by the State to issue subpoenas for witnesses and records. But the Association failed to recognize that SDCL ch. 15-6 only “governs the procedure in the circuit courts.” SDCL § 15-6-1. This case was not in circuit court, so SDCL § 15-6-1 does not apply. Similarly, had case jurisdiction been with the small claims court, the Association’s subpoena powers would have been governed by SDCL ch. 15-39 (Small Claims Procedure), which would have only allowed for subpoenas to be issued by the clerk. SDCL § 15-39-70.

It should go without saying that the rules governing case procedure depend on which forum has case jurisdiction. In this case, jurisdiction was with the administrative agency (Board), and so subpoenas could only be properly issued under the rules found in the Administrative Procedure and Rules Act (SDCL ch. 1-26). Any subpoenas issued under the Rules of Civil Procedure in Circuit Courts (SDCL ch. 15-6) were properly quashed. Thus, the circuit court erred in applying the Rules of Civil Procedure to the Board's hearing process.

CONCLUSION

The Chief Engineer respectfully requests that the Court affirm that the Board properly concluded Dakota Bay provided evidence that its planned water use would be a beneficial use and in the public interest, and consequently granted Dakota Bay's Water Permit Application. The Chief Engineer also respectfully requests that this Court affirm that the rules found in the Administrative Procedure and Rules Act (SDCL ch. 1-26), rather than the Rules of Civil Procedure in Circuit Courts (SDCL ch. 15-6), properly govern contested case hearings before the Board.

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 3,927 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
Jennifer L. Verleger
Assistant Attorney General

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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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30796

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

APPEAL FROM THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT
UNION COUNTY, SOUTH DAKOTA
(63CIV23-000172)

THE HONORABLE TAMI BERN PRESIDING

APPELLEE DAKOTA BAY, LLC'S BRIEF

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Notice of Appeal was filed on the 16th 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”; Appellee Dakota Bay LLC will be referred to as “Dakota Bay”; Appellees 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 granted Water Permit Application Number 8744-3, and Notice of Entry of Order concerning the Board’s Decision was given October 13, 2023, and again on November 1, 2023.¹ R. 820, App. P. 023. The Association filed a Notice of Appeal to the Circuit Court for the First Judicial Circuit on November 13, 2023. R. 29-30; App. P. 020-21, 023.

The circuit court issued its Memorandum Decision on July 2, 2024, which affirmed the Board’s Decision. R. 1019-26. The circuit court issued a Final Decision

¹ An incorrect zip code for the Association’s counsel was included on the initial mailing by the Board. See R. 820. Accordingly, the Notice of Entry of Order was re-sent to all parties on November 1, 2023. *Id.*

and Order on July 17, 2024, and Notice of Entry of that Order was given on July 19, 2024. R. 1027-28. For purposes of this Supreme Court appeal, the Association filed a Notice of Appeal on August 16, 2024. R. 1031.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

Whether the Circuit Court correctly affirmed the Board's ruling when it granted Dakota Bay, LLC's Water Permit Application No. 8744-3.

The circuit court correctly affirmed the Board's Decision granting Dakota Bay LLC's Water Permit Application No. 8744-3.

- SDCL 46-2A-9
- SDCL 46-1-6(3)

STATEMENT OF THE CASE AND FACTS

This is an appeal filed by the McCook Lake Recreation Area Association from the decision of the Honorable Tami L. Bern of the Union County Circuit Court affirming the Board's decision granting Water Permit Application No. 8744-3, (hereafter the "Application")

On March 29, 2023, Michael Chicoine (Chicoine), as owner of Dakota Bay, applied for a water permit to use water from an existing irrigation well completed into the Missouri: Elk Point aquifer to fill a proposed canal. R. 257-62; App. P. 001-003. This Application was submitted shortly after South Dakota Game Fish and Parks (hereinafter "SDGFP") communicated to Chicoine that it had consulted with the South Dakota Department of Agriculture and Natural Resources regarding the proposed canal. *See* R. 256; App. P. 057; R. 206-07, App. P. 068-69. Through that correspondence, the SDGFP had informed Chicoine that it would hold Chicoine's shoreline alteration permit in abeyance until Chicoine obtained the proper water right. R. 256, App. P. 057.

After submission of the Application and discussions between Chicoine and the Water Rights Program as to the necessary scope of the Application, an engineer with the Water Rights Program analyzed the “availability of unappropriated water and the potential for unlawful impairment of existing domestic water uses and water rights within the Missouri River: Elk Point aquifer.” R. 256-72; R. 274-95. The Chief Engineer compiled her findings and conclusions in a Report to the Chief Engineer dated May 19, 2023. R. 273-95. The report ultimately concluded *inter alia* that “there is a reasonable probability that unappropriated water is available from the Missouri: Elk Point aquifer to supply the proposed appropriation” and that “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.” R. 293. The Chief Engineer ultimately recommended approval of Dakota Bay’s Application. R. 273.

On June 12, 2023, the Association filed a Petition in Opposition to Dakota Bay’s Application. R. 365-66; App. P. 039-40. The Association does not hold any water rights as to Missouri: Elk Point aquifer; however, it does hold two water rights permits related to a separate water source, the Missouri River to divert water from the Missouri River into McCook Lake on occasion. *Id.*; *cf.* R. 172 (25:11-23); App. P. 59. The Association alleged that granting Dakota Bay’s application related to the Missouri: Elk Point aquifer would impair the Association’s water rights to divert water from the Missouri River into McCook Lake. R. 365-66; *cf.* R. 172-73.

On August 2, 2023, the Board held a hearing on the merits of Dakota Bay’s Application where it “considered the testimony and exhibits presented and all records

and documents on file....” R. 806-19; App. P. 006. At the hearing, the Board received testimony from Water Rights Program Engineer Nakaila Steen, who authored the Report to the Chief Engineer, Mr. Chicoine, and a representative of SDGFP. The Board also heard brief testimony from another individual, Dirk Lohry, called by the Association. After its consideration of the evidence, the Board issued an oral ruling approving Dakota Bay’s Application. R. 222-24; App. P. 69-71. The Board issued its Findings of Fact and Conclusions of Law, and a Proposed Final Decision on October 12, 2023, after the parties had the opportunity to provide written objections, comments, or alternative to those documents. R. 806-19. The Board ultimately concluded that “the record in its entirety including the exhibits, expert testimony, and testimony of the witnesses is sufficient to support the Board’s conclusion that the statutory requirements set for in SDCL § 46-2A-9 have been satisfied” by Dakota Bay, and it granted the Application. *Id.*; App. P. 009.

The Association appealed the Board’s decision to the circuit court on November 13, 2023, and on July 2, 2024, the circuit court issued a Memorandum Decision affirming the Board’s Decision. R. 29; 1019-26. The circuit court filed its Final Decision and Order on July 17, 2024. R. 1027. The Association has now appealed the circuit court’s decision.

ARGUMENT

The circuit court correctly affirmed the Board’s Decision granting Dakota Bay’s Water Permit Application No. 8744-3.

“In reviewing an agency ruling, [this Court] appl[ies] the same standard as the 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. To that end, 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 Board, and at times, the Chief Engineer of the Water Rights Program of the South Dakota Department of Agriculture and Natural Resources, is responsible for the issuance of water rights permits under SDCL chapter 46-1 et. seq. *See, e.g.*, SDCL 46-1-14; 46-1-16; 46-2-11. Pursuant to SDCL 46-2A-9, the Board may issue a water rights permit if (1) “there is reasonable probability that unappropriated water is 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) “the permit is in the public interest as it pertains to matters within the regulatory authority of the Water Management Board[.]” If the Board finds that these requirements have been met, the Board is required to approve the permit. *See* SDCL 46-2A-7. The Association does not appeal the Board’s findings or decision as it relates to requirements one or two, as described above, so only requirements three and four require analysis. *See* Appellant’s Brief at 4, 6.

The circuit court correctly determined that sufficient evidence was presented to the Board to support its conclusion that the Application's proposed use is for a beneficial use in the public interest, thus satisfying requirements three and four.

Element three for the issuance of a water right permit, requires that the proposed use in the application be for a beneficial use. SDCL 46-2A-9. A "beneficial use" is "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." SDCL 46-1-6(3). Notably, the definition of "beneficial use" incorporates a "public interest" element, and thus, the third and fourth requirements are intertwined. Element four requires that "the permit is in the public interest as it pertains to matters within the regulatory authority of the Water Management Board." SDCL 46-2A-9. The circuit court noted that the Appellant Association did not dispute that the greater access the canal would provide to the public for recreation activities is in the public interest. R. 1025.

The Board, in making the determination that the use of water is of beneficial use and in the public interest, considered evidence presented at the hearing, including the testimony from Dakota Bay's Chicoine, applicant and property owner; Kip Rounds, regional supervisor for the South Dakota Department of Game, Fish and Parks; Dirk Lohry; and the Water Rights Program Engineer. *See generally* Final Decision; App. P. 006-19; R. 110; App. P. 058. The Board also considered multiple exhibits and additional reports. R. 806; App. P. 006. Pursuant to Chicoine's testimony, Dakota Bay's overarching project is to construct a canal "to provide lake access for current residents, potential future residents, and the public." R. 826, App. P. 011. Water rights from the

Missouri: Elk Point aquifer will be put to beneficial use to initially fill the canal and to maintain the integrity of the clay liner. *See id.*; R..91, App. P. 061. Chicoine also testified as to the intended installation of a public access dock and that the water will be used for recreational purposes. R. 97 (41:1-6), App. P. 064; R. 96. Chicoine testified Dakota Bay's canal will provide better access to McCook Lake from Dakota Bay's property and to fifteen already-existing homes along the other side of the canal. R..90, App. P. 060; R. 107, App. P. 065. Chicoine testified about his intentions and plans of installing a public boat ramp, which will allow the public better access to McCook Lake in general, without a fee for lake access and providing for and better parking. R. 90-91; App. P. 060-61. Chicoine also testified that his property would possibly realize an increase in value if the water permit is granted. R. 95; App. P. 062.

Testimony from Mr. Rounds with SDGFP also supports that the third and fourth requirements have been met. Mr. Rounds testified that the water permit and the water use would provide a means to prevent the canal liner from drying out. *Id.* Mr. Rounds also testified that the water use would not only benefit Mr. Chicoine, but everybody. R. 115-16; App. P. 068-69.

Importantly, none of the above points were refuted by the Association, and the circuit court noted that on appeal, the Appellant Association did not dispute that the greater access the canal would provide to the public for recreation activities is in the public interest. R. 1025. At the hearing before the Board, Lohry was the only witness called by the Association, and Lohry's testimony only consisted of one substantive answer. *See* R. 120-123 (64:9-67:18); App. P. 070-72. That one answer was speculative and carried limited, if any, weight to the ultimate question of whether Dakota Bay's

application met the four requirements.² *See id.*

Appellant Association's only argument to both the circuit court and this Court suggests that the canal at issue *would* provide a beneficial use in the public interest, but it argues that the benefit may not be recognized if the canal is not viable. *See* Appellant's Brief at 7-8. The circuit court found that the viability of the project is relevant to the public interest consideration, and noted that the expert testimony before the Board was sufficient evidence to support the Board's finding that neighboring property rights and interests would not be unlawfully harmed by the project. R. 1025. The Association has failed to point this Court or the circuit court to any evidence before the Board to show that the project would not be viable or that the Board's finding that the proposed project would be a beneficial use for public interest was erroneous. R. 1026.

Ultimately, the record in its entirety, including exhibits and testimony of the witnesses, supports that the Board did not clearly err in finding that the proposed use of the water is a beneficial use and in the public's interest, and the circuit court correctly affirmed the Board's decision in issuing Permit Application No. 8744-3. R. 1019-26, App. P. 006 and 019.

CONCLUSION

When considering the facts that were effectively undisputed, the Board correctly granted Dakota Bay's permit application. The Board's Decision that the requested

² It appears that the question was most related to the Association's (misplaced) contention that granting the permit would unlawfully impair the Association's water rights, but as set forth above, the Association has not challenged the Board's decision on unlawful impairment. *See* R.122-24.

water permit is for a beneficial use and is in the public interest was not clearly erroneous. For the foregoing reasons, Appellee Dakota Bay respectfully requests this Court to affirm the Board's Findings of Fact, Conclusions of law, and Decision.

Respectfully submitted this 30th day of December, 2024,

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CERTIFICATE OF COMPLIANCE

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 2,383, 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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Stacy R. Hegge

APPENDIX

<u>Document</u>	<u>Page Number</u>
Application for Permit to Appropriate Water in South Dakota with information attached	App. P. 001
South Dakota Water Well Completion Report	005
Board's Findings of Fact, Conclusions of Law and Decision.....	006
Notice of Appeal (to Circuit Court) with Exhibit A attached.....	020
McCook Lake Recreation Area Association request for Automatic Delay of Hearing on Application No. 8744-3 to Appropriate Water dated June 9, 2023	038
Petition Opposing Application for a Water Right Permit by McCook Lake Recreation Area Association.....	039
Notice of Entry of Order dated November 1, 2023 with attached Decision.....	041
SD Department of Game, Fish and Parks Letter dated March 24, 2023	057
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Final Decision and Order of Circuit Court	087

FORM 2: Application for uses other than irrigation

No. 8744-3 Hydrograph Unit 10170101
 SD DNR, Water Rights
 523 E Capitol Ave
 Pierre, SD 57501-4102
 Phone: (605) 774-1152
 Name: Missouri River
 Newspaper: Leader-Courier, Elk Point (5-23)
Press: Dakotan, Yankton 605-7811

Application for Permit to Appropriate Water in South Dakota

Check use(s) of water:

Municipal
 Rural Water System
 Domestic (over 25 gpm)
 Water Distribution System
 Commercial
 Industrial
 Recreational
 Fish & Wildlife
 Other
 Irrigation
 Geological

Type of Application: (check one)

New
 Vested Right (see Section 47-1-1)
 Future Use Reservation
 Place to Beneficial Use Water Reserved by Future Use Permit No. _____
 Amendment/Correction to Permit No. 6557-3

Description of amendment/correction

I am requesting to use the existing well to full its capitol level 20 years old to be a specially old water if needed.

Name to Appear on Water Permit

Dakota Bay

Phone:

Mobile: 712-898-4173 Email: mychicene@tiscali.com

Amount of water claimed

1.55 CFS or 28.6 GPM and _____ gallon _____

Source of water supply

ground water

Location of point of diversion

N 1/4 SE 14 S 16 T49N 78W Cross 11022

If from a public water supply (e.g. municipal), will water be used outside of the area described above? Yes No

If "Yes", where will water be used?

Cities or counties where water will be used

None

Period of time during which water is to be used

year round only as needed

Goal or description of the project. When available include any preliminary engineering report or other scientific information that will help explain the project. (Attach sheet if more space is needed)

See Attached

Mike Chicone

owner Dakota Bay

Supplemental Information

(type or print)

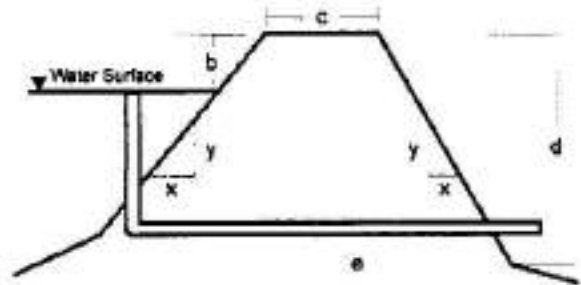
- 1. Well Information** (check one or both as applicable) Drilling new well(s) Using existing well(s)
- a) If new wells, how many _____ Have test holes been drilled? Yes No Drilled by _____
(if yes, please provide copies of logs)
- b) If existing wells, how many 1 Provide copy of log(s), if available. Drilled by Dakota Drilling & Backhoe, Inc.
(if yes, please provide copies of logs)
attached
- For either existing or proposed wells:
- c) Well Depth (required) 150' Depth to Top of Water Bearing Material _____ Depth to Water from Surface _____
- d) Distance to nearest domestic well on applicant's property Unused Property owned by others over 1 mile
submersible well

- 2. Wastewater Disposal System Information**
- a) Type of System (i.e. septic tank, drain field) None on property
- b) System Capacity (gallons) 650 GPM Year Constructed 2005
- c) Connected to the City of None Not Connected Sanitary System

- 3. Dugout Information** N/A
- a) Surface Dimensions _____ Depth _____
- b) Depth to water (ground surface to water level) _____

- 4. Water Storage Dams** N/A
- If the proposed water use system contains one or more storage dams, please furnish the information requested below for each dam. The locations of the dams need to be shown on the map submitted with the application.
- a) If a private engineering firm or government agency was involved in the design of this dam, please give their name and address.

- b) Freeboard _____
- c) Crest Width _____
 Crest Length _____
- d) Height _____
- e) Primary Outlet Capacity _____
 If pipe, diameter _____
- f) Secondary Spillway Capacity _____
 Spillway Width _____
- g) X & Y Slope (e.g. 3 to 1 is a typical slope)
 Upstream _____
 Downstream _____
- h) Area of Impoundment: _____
- i) Storage _____ Acre Feet
- j) Drainage Area Above Dam _____ Acres



Below are the engineer's calculations for the amount of water needed for the canal

Water to fill the canal – 20.61 AF

Water for evaporation – 7.90 AF

Water for seepage – .09 AF

There will also be the rainfall that lands on the water surface along with some draining from the backyards of the existing houses to the east. The water falling on the canal alone is 30" which is slightly more than the evaporation. We have not taken these figures in to account in the above "water needed" calculations. However, this will reduce the amount of water needed based on the amount of rainfall in any given year.

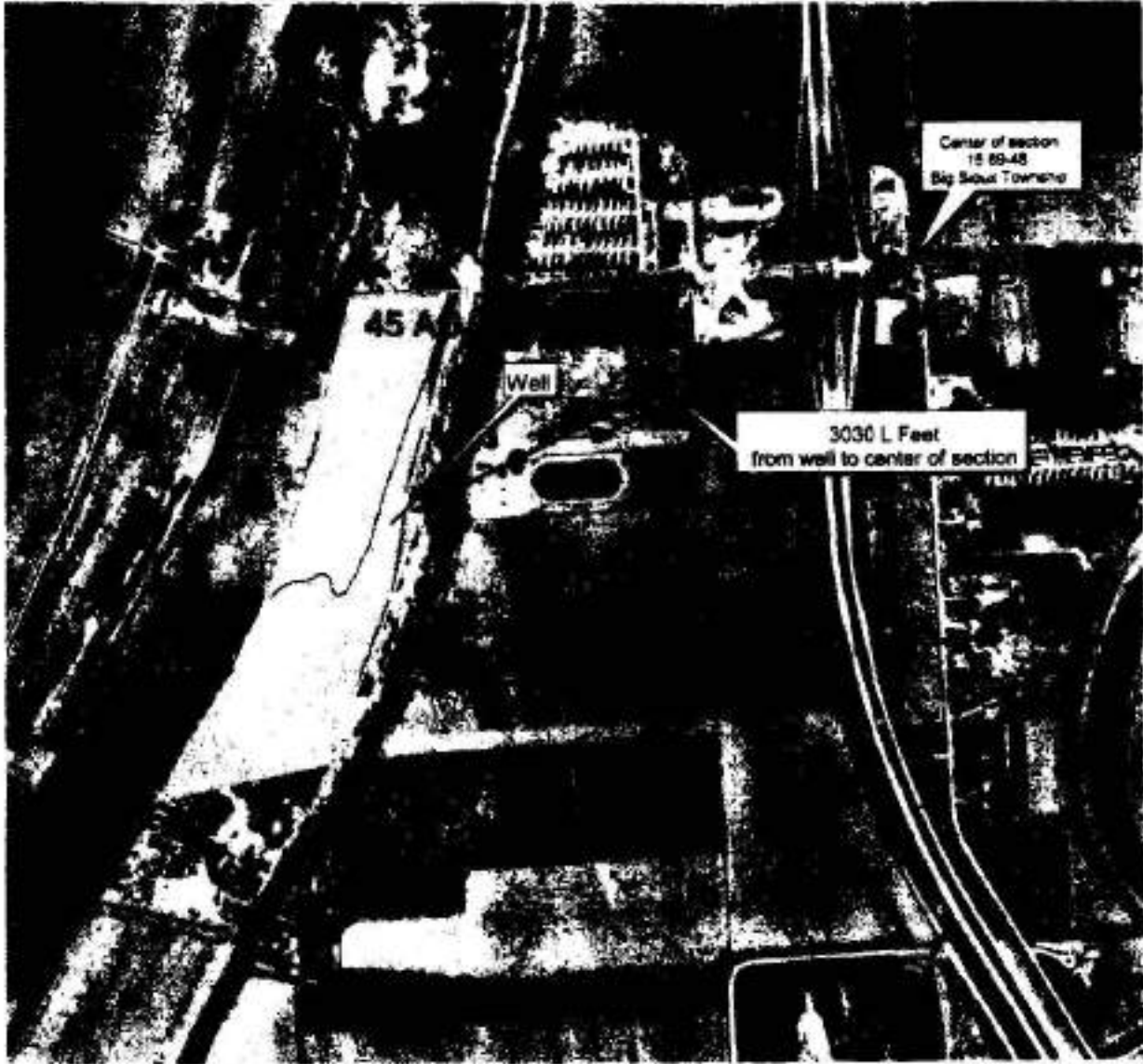
The total use for the canal is 28.6 acre-feet (AF). In comparison to the agriculture use which is up to 120 acre-feet (AF).

At a rate of 1.55 cfs from the well the total water for the canal would take 9.1 days of continuous pumping. The vast majority of this pumping would be during the spring prior to the start of the of annual ag irrigation usage.

Cropland Soils

MIKE CHICOINE
UNION
Date: 12/13/2004

ELK POINT FIELD OFFICE
NRCS
Kevin G. Beermann



Legend

- Shaded Land Use
- Soil
- Water
- Resource boundary line



500 0 500 1000 1500 2000 2500 3000 3500 4000 Feet

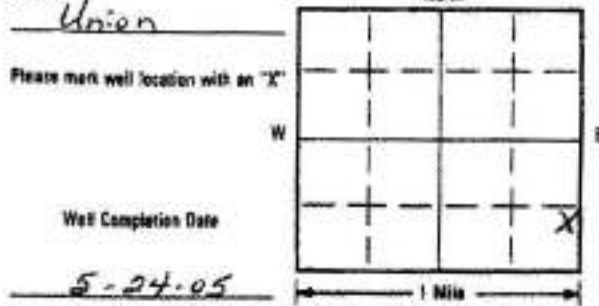
15 69-48

SOUTH DAKOTA WATER WELL COMPLETION REPORT

6557-3
07-92

Location NE 1/4 SE 1/4 Sec 16 Twp 89N Rg 48W
County Union

Well Owner Mike Chicoine
Business Name _____
Address 508 E. Clay
Eik Point, SD 57025



WELL LOG:

FORMATION	DEPTH	
	FROM	TO
Heavy clay	0	8
Sand	8	34
Clay	34	55
Gravel	55	62
Sand	62	72
Gravel	72	75
Sand	75	110
Med gravel	110	150

LOCATION:
Distance from nearest potential pollution source (septic tank, abandoned well, feed lot, etc.) 21000 ft. from Any (identify source)

PROPOSED USE:
 Domestic/Stock Municipal Business Test Holes
 Irrigation Industrial Institutional Monitoring well

METHOD OF DRILLING:
Mud Rotary

STATIC WATER LEVEL 13 Feet
if flowing, closed in pressure _____ PSI
GPM flow _____ through _____ inch pipe
Controlled by Valve Reducer Other _____
Reduced Flowrate _____ GPM
Can well be completely shut in? _____

CASING DATA: Steel Plastic Other

If other describe _____

PIPEWEIGHT	DIAMETER	FROM	TO	HOLE DIAMETER
<u>200</u> LB/FT	<u>12</u> IN	<u>0</u> FT	<u>150</u> FT	<u>15</u> IN
_____ LB/FT	_____ IN	_____ FT	_____ FT	_____ IN
_____ LB/FT	_____ IN	_____ FT	_____ FT	_____ IN

WELL TEST DATA:
 Pumped Describe _____
 Bailed _____
 Other _____
Pumping Level Below Land Surface
49 ft. After 1 Hrs. pumped 900 GPM
_____ ft. After _____ Hrs. pumped _____ GPM
If pump installed, pump rate 650 GPM

GROUTING DATA
Grout Type Cement No. of Sacks _____ Grout Weight _____ lb/gal From 30 ft To 10 ft
_____ lb/gal _____ ft _____ ft
Describe grouting procedure Pumped in

REMARKS
RECEIVED
JAN 25 2005
WATER RIGHTS
011003210

SCREEN: Perforated pipe Manufactured
Diameter 12 IN Length 40 FEET
Material PVC
Slot Size 60 Set From 110 Feet to 150 Feet
Other information _____

This well was drilled under license # 667
And this report is true and accurate.
Drilling firm Dakota Drilling & Backhoe, Inc.
Signature of License Representative: Garson Backe
Signature of Well Owner or Equitable Property Holder: _____
Date _____

WAS A PACKER OR SEAL USED? YES NO
If so, what material? _____
Describe packer(s) and location? _____
DISINFECTION: Was well disinfected upon completion?
 YES. How: Chlorine mixed
 NO. Why Not? with gravel pack
Laboratory sent to for water quality analysis No

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

IN THE MATTER OF WATER PERMIT APPLICATION NO. 8744-3, DAKOTA BAY, LLC,))))	FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION
--	------------------	---

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. Applicant, Dakota Bay was represented by Dean A. Fankhauser and Stacy R. Hegge. Petitioner, McCook Lake Recreation Area Association (Association), was represented by John M. Hines. Ann F. Mines Bailey represented the Department of Agriculture and Natural Resources, Water Rights Program (Program) and the Chief Engineer.

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

A. FINDINGS OF FACT

1. On March 29, 2023, the Program received Water Permit Application No. 8744-3 from Michael Chicoine on behalf of Dakota Bay seeking an appropriation of 28.6 acre-feet of water for the first year and 7.99 acre-feet of water per year thereafter at a maximum diversion rate of 1.55 cubic feet of water per second (cfs) from one existing well completed into the

Missouri: Elk Point aquifer for recreational use for an initial fill of a canal to be constructed along southeast shore of McCook Lake and thereafter to cover losses due to evaporation and seepage. The well is located in the E½SE¼ Sec. 16 T89N-R48W and is permitted for irrigation use under Water Permit No. 6557-3.

2. The Chief Engineer, Eric Gronlund, recommended approval of the application subject to qualifications.

3. Notice of Water Permit Application No. 8744-3 was timely advertised on June 1, 2023, in The Leader-Courier (Union County) and the Yankton Daily Press and Dakotan (Yankton County) and posted on the DANR website.

4. Water Rights received a timely petition in opposition to Water Permit Application No. 8744-3 from the Association on June 12, 2023.

5. The matter was scheduled to be heard by the Water Management Board during its July 12, 2023 meeting. A request for an automatic delay was made and the July 12 hearing was delayed.

6. The Chief Engineer moved for a special meeting so that this matter could be heard in conjunction with the Association's petition for declaratory ruling which requested in part that the Board rule that Dakota Bay's project required a permit appropriating the waters of McCook Lake.

7. Water Permit Application No. 8744-3 is a new water permit application which requires a determination pursuant to SDCL § 46-2A-9 whether there is a reasonable probability that unappropriated water is

available for the proposed use, whether the proposed use would impair existing domestic water uses and water rights, whether the use would be a beneficial use, and whether the proposed use is in the public interest pertaining to matters of public interest within the regulatory authority of the Water Management Board.

8. The Association holds a permit/right for the appropriation of water from the Missouri River to be pumped into McCook Lake for the purpose of recreation to stabilize lake levels.

9. Nakaila Steen, a natural resources engineer with Water Rights, performed a technical review of the application, and prepared a report. Ms. Steen provided expert testimony regarding the technical review of the application to the Board.

10. The Missouri: Elk Point aquifer is composed of glacial outwash consisting of fine sand to very coarse gravel. Within the State of South Dakota, the aquifer underlies approximately 219,100 acres in Clay, Union, and Yankton Counties. At the time of completion, aquifer material at the proposed point of diversion was approximately 95 feet thick. The aquifer varies from unconfined to confined conditions but generally behaves as an unconfined aquifer. At the point of diversion, the aquifer is under confined conditions with the existing well completion report demonstrating an artesian head pressure of approximately 40 feet at the time the well was constructed.

11. The Missouri: Elk Point aquifer receives recharge through infiltration of precipitation and from seepage from the Big Sioux, James,

Missouri, and Vermillion rivers and inflow from the Lower Vermillion-Missouri, Lower James-Missouri, Big Sioux, and Dakota aquifers. The best information available regarding recharge to the Missouri: Elk Point aquifer includes two studies: One based upon the observation well data and the other involving induced recharge to the aquifer due to pumping by the Lewis and Clark Regional Water System. The combined total of the estimated average annual recharge equals approximately 114,593.9 acre-feet of water per year.

12. Ms. Steen calculated withdrawals from the Missouri: Elk Point aquifer in South Dakota to be approximately 100,591 acre-feet per year, including water reserved by future use permits and requested by this application.

13. Ms. Steen further testified that there are 36 observation wells completed into the Missouri: Elk Point aquifer. A review of the data from those observation wells indicates that the aquifer is responding to climatic conditions and that natural discharge is available for capture. Several of the observation wells located near the Missouri River indicate a gradual downward trend. Ms. Steen testified that the downward trend is a result of the lowering of the water table due to the entrenchment (deepening of the channel and/or widening of the bed) of the Missouri River and not evidence of over-appropriation of the aquifer.

14. Ms. Steen testified it is her conclusion that, based upon her review of the best information available regarding recharge to the aquifer,

existing water rights, and the observation well data, there is sufficient unappropriated water available to satisfy this application.

15. There were 647 existing water rights/permits authorized to withdraw water from the Missouri: Elk Point aquifer in South Dakota at the time this application was submitted.

16. Ms. Steen testified that the nearest existing domestic well on record is located approximately 0.25 miles south of the proposed point of diversion and owned by Mr. Chicoine. The next nearest domestic well not owned by the applicant is located approximately 0.3 miles northwest of the proposed point of diversion.

17. The nearest existing water rights are three separate water rights/permits each located approximately one mile from the proposed point of diversion: One to the west and two to the southeast.

18. The nearest observation well is located approximately 0.6 miles from the proposed point of diversion.

19. Ms. Steen testified that the Missouri: Elk Point aquifer is a tremendous resource and given the saturated thickness of the aquifer in the area of the proposed point of diversion and relatively small volume requested by this application, there is a reasonable probability that the application could be developed without unlawful impairment to existing domestic uses and water rights. Bolstering her conclusion is that this point of diversion has been operating with the same rate of diversion under the irrigation permit since 2005 and there is no history of complaints.

20. Ms. Steen further testified that in her expert opinion an unlawful impairment will first occur in the source from which the appropriation is made.

21. The Board finds Ms. Steen to be a credible expert witness and that these Findings of Fact are supported by the evidence presented including Ms. Steen's testimony and the reports and exhibits which she prepared and/or upon which she relied.

22. The Board received testimony from Michael Chicoine who sought the application on behalf of Dakota Bay. Mr. Chicoine testified that he has applied for a shoreline alteration permit from the South Dakota Department of Game, Fish and Parks. He plans to construct a canal stemming off McCook Lake to provide lake access for current residents, potential future residents, and the public. Mr. Chicoine provided testimony regarding the construction of the canal which includes an 18-inch fat, clay liner.

23. Kip Rounds, regional supervisor with the South Dakota Department of Game, Fish and Parks, also provided testimony to the Board. Mr. Rounds testified that he is familiar with Mr. Chicoine's shoreline alteration application and the proposed canal project. Mr. Rounds testified that the Department of Game, Fish and Parks has concerns that if the canal liner were to dry out, the integrity of the liner and ability to reduce seepage would be compromised.

24. The Board also received testimony from Dirk Lohry. Mr. Lohry testified that the Association will bear the burden of filling the canal should

Mr. Chicoine's well fail, or water is not pumped under this proposed appropriation.

25. Petitioner did not submit sufficient evidence through expert opinions, testimony, or other evidence that would support a determination that there is a not reasonable probability that there is unappropriated water available, that there would be an unlawful impairment should the application be granted, that this appropriation is not a beneficial use of water, or that it is not in the public interest.

26. The Board finds that, based upon the best information reasonably available, the factors of SDCL § 46-2A-9 are satisfied.

27. The evidence establishes that there is unappropriated water available in the Missouri: Elk Point aquifer to satisfy this application.

28. The evidence establishes the proposed diversion would not unlawfully impair existing domestic water uses or water rights.

29. The Board further finds that the proposed use of the water for recreation, to fill the proposed canal and replace losses of water due to evaporation or seepage, constitutes a beneficial use.

30. The Board further finds that placing the water to this beneficial use is in the public interest.

31. 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. The Association objects to Paragraph 20 of the Proposed Findings asserting that "SDCL § 46-2A-9 does not limit analysis of unlawful impairment to the same water source." There is ample evidence set forth in the record generally and especially by the expert testimony of Nakaila Steen and Exhibits 600 and 605 to support the Board's conclusion that the proposed diversion would not unlawfully impair existing domestic water uses or water rights. No alternative Finding is proposed. Petitioner's objection is noted.
2. The Association objects to Paragraph 25 of the proposed Findings and asserts that the applicant, Dakota Bay, LLC/Michael Chicoine, failed to carry their burden to prove that the requirements set forth in SDCL §46-2A-9 have been met. There is ample evidence set forth in the record generally and especially in Exhibits 600, 603, 604, and 605, along with the expert testimony of NaNakila Steen and the testimony of Applicant Michael Chicoine to support the Board's conclusion that the statutory requirements set forth in SDCL §46-2A-9 have been satisfied.
3. The Association objects to Paragraphs 26, 28, and 30 of the proposed Findings and asserts as support:

Dakota Bay, LLC/Michael Chicoine provided no evidence that the Association's water rights would not be unlawfully impaired. Mr. Chicoine's failure to provide engineering or technical specifications for his "canal" provides no basis for the Board to conclude the proposed water use will be beneficial. Mr. Chicoine's unsupported testimony regarding his intent to create public access is legally insufficient for the Board to conclude that the use is in the public interest.

Contrary to this assertion, the record in its entirety including the exhibits, expert testimony, and testimony of the witnesses is sufficient to support the Board's conclusion that the statutory requirements set forth in SDCL §46-2A-9 have been satisfied.

C. CONCLUSIONS OF LAW

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

1. The Board has jurisdiction over this matter. The application falls within the Board's responsibility over water appropriation and regulation in Title 46.
2. Publication was properly made, and the Notices of Hearing were properly issued pursuant to SDCL § 46-2A-4.
3. The Chief Engineer recommended granting the application. The recommendation, however, is not binding on the Board. SDCL § 46-2A-4(8).
4. The applicant is required to satisfy each of the factors set forth in SDCL § 46-2A-9.
5. The Board concludes that the applicant has satisfied each of the factors set forth in SDCL § 46-2A-9.

6. South Dakota Codified Law, section 46-2A-9 provides that a permit to appropriate water may be issued "only if there is reasonable probability that there is unappropriated water available for the applicant's proposed use, that the proposed diversion can be developed without unlawful impairment of existing domestic 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 §§ 46-2-9 and 46-2-11." Each of these factors must be met and the permit must be denied if the applicant does not meet its burden of proof on any one of them.

7. The first factor for consideration under SDCL § 46-2A-9 is whether there is water available for the appropriation. Determination of water availability includes consideration of the criteria in SDCL § 46-6-3.1 pertaining to recharge/withdrawal: whether "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."

8. South Dakota Codified Law, section 46-6-3.1 provides an exception to the recharge/withdrawal limitation. It states in pertinent part, "[a]n 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 estimated average annual recharge for use by water distribution systems.* The Missouri: Elk Point aquifer is not older

and stratigraphically lower than the Greenhorn Formation. Additionally, the permit is not for use in a water distribution system. Thus, the appropriation may not be granted if the withdrawal would exceed the estimated annual recharge.

9. The Board concludes it is not probable withdrawals from the aquifer would exceed recharge to the aquifer in violation of SDCL § 46-6-3.1 if the application is granted.

10. The Board concludes there is a reasonable probability that there is unappropriated water available to fulfill the amount requested by the application.

11. The second requirement of SDCL § 46-2A-9 is that the proposed water use may not unlawfully impair existing domestic uses and water rights. The proposed diversion can be developed without unlawful impairment of existing water rights or domestic water uses.

12. The third element set forth in SDCL § 46-2A-9 is whether the use of water would be a beneficial use: one that is reasonable and useful and beneficial to the appropriator and also consistent with the interest of the public in the best utilization of water supplies under SDCL § 46-1-6(3). The proposed use for recreation is a beneficial use.

13. The fourth requirement of SDCL § 46-2A-9 concerns the public interest. The proposed use of the water must be "consistent with the interests of the public of this state in the best utilization of water supplies." SDCL

§ 6-1-6(3). The Board concludes that this appropriation of water for recreation is in the public interest.

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

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. The Association objects to Paragraph 3 of the proposed Conclusions of Law and asserts that the "applicant provided insufficient evidence of the factors set forth in SDCL § 46-2A-9." Contrary to this assertion, the record in its entirety including the exhibits, expert testimony, and testimony of the witnesses is sufficient to support the Board's conclusion that the statutory requirements set forth in SDCL §46-2A-9 have been satisfied.
2. The Association objects to Paragraph 11 of the proposed Conclusions of Law and asserts that the purpose of the proposed water use... will unlawfully impair the Association's existing water rights." This assertion is inconsistent with the evidence in the record specifically, Exhibits 600, 604, 604, and 605 and the expert testimony of NaNakila Steen.
3. The Association objects to Paragraphs 12 and 13 of the proposed Conclusions of Law and asserts no "evidence was presented regarding the design or specifications of the "canal"; thus, the Board has no basis to

conclude that the proposed use is reasonable, beneficial, or in the public interest." Beneficial use is defined in SDCL §46-1-6(3) as:

"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."

SDCL §46-1-1 further states 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 record in its entirety including the exhibits and testimony of the witnesses is sufficient to support the Board's conclusion that the proposed (recreational) use as set forth in the application is reasonable, in the public interest and is beneficial to the appropriator.

4. The Association objected to the proposed Findings of Fact, Conclusions of Law, and Final Decision in that the decision and states that:

"because the Board voted at its hearing that approval of Water Permit No. 8744-3 would be conditioned on requirements set by the Chief Engineer pertaining to the water use. The proposed decision contains no such requirements, and thus the proposed decision fails to comply with the Board's ruling."

Contrary to this assertion, the minutes show that there was a "Motion by Bjork, seconded by Freeman, to approve Water Permit Application No. 8744-3, Dakota Bay, subject to the qualifications set forth by the Chief Engineer." The qualifications are set out in full in the "Report of Chief

Engineer for Water Permit Application 8744-3, Dakota Bay" which was admitted into evidence as part of Exhibit 600.

D. FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Board enters its determination that Water Permit Application No. 8744-3 is granted 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.

Dated this 12 day of October, 2023.

BY THE BOARD:

Bill Larson

Bill Larson (Oct 12, 2023 16:40 CDT)

William Larson, Chairman
South Dakota Water Management Board

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF UNION)

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

IN THE MATTER OF WATER PERMIT APPLICATION NO. 8744-3, DAKOTA BAY, LLC,	CASE NO. 63CIV23-000172 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. Briese
John M. Hines
329 Pierce Street, Suite 200
Sioux City, IA 51011
(712) 224-7550 phone
(712) 277-4605 fax
dbriese@craryhuff.com
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

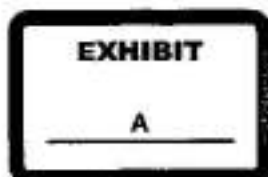
Water Management Board
Attn: Eric Gronlund
Joe Foss Building
523 E. Capitol Ave
Pierre, SD 57501

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. Briese



**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: Stacy R. Hegge, Attorney for Dakota Bay Dean A. Fankhauser, Attorney for Dakota Bay
111 W. Capitol Ave., Suite #230 PO Box 1557
Pierre SD 57501 Sioux City IA 51102

Charles McGuigan, Deputy Attorney John M. Hines, Attorney for McCook Lake
General Recreation Area Association
1302 East Highway 14, Suite 1 PO Box 27
Pierre SD 57501-8501 Sioux City IA 51102

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 Water Permit Application No. 8744-3, Dakota Bay

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

IN THE MATTER OF WATER PERMIT APPLICATION NO. 8744-3, DAKOTA BAY, LLC,)))))	FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION
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The Board, having considered the testimony and exhibits presented and all records and documents on file and having entered its oral decision and rulings on the parties' submissions, now enters the following:

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Missouri, and Vermillion rivers and inflow from the Lower Vermillion-Missouri, Lower James-Missouri, Big Sioux, and Dakota aquifers. The best information available regarding recharge to the Missouri: Elk Point aquifer includes two studies: One based upon the observation well data and the other involving induced recharge to the aquifer due to pumping by the Lewis and Clark Regional Water System. The combined total of the estimated average annual recharge equals approximately 114,593.9 acre-feet of water per year.

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13. Ms. Steen further testified that there are 36 observation wells completed into the Missouri: Elk Point aquifer. A review of the data from those observation wells indicates that the aquifer is responding to climatic conditions and that natural discharge is available for capture. Several of the observation wells located near the Missouri River indicate a gradual downward trend. Ms. Steen testified that the downward trend is a result of the lowering of the water table due to the entrenchment (deepening of the channel and/or widening of the bed) of the Missouri River and not evidence of over-appropriation of the aquifer.

14. Ms. Steen testified it is her conclusion that, based upon her review of the best information available regarding recharge to the aquifer,

existing water rights, and the observation well data, there is sufficient unappropriated water available to satisfy this application.

15. There were 647 existing water rights/permits authorized to withdraw water from the Missouri: Elk Point aquifer in South Dakota at the time this application was submitted.

16. Ms. Steen testified that the nearest existing domestic well on record is located approximately 0.25 miles south of the proposed point of diversion and owned by Mr. Chicoine. The next nearest domestic well not owned by the applicant is located approximately 0.3 miles northwest of the proposed point of diversion.

17. The nearest existing water rights are three separate water rights/permits each located approximately one mile from the proposed point of diversion: One to the west and two to the southeast.

18. The nearest observation well is located approximately 0.6 miles from the proposed point of diversion.

19. Ms. Steen testified that the Missouri: Elk Point aquifer is a tremendous resource and given the saturated thickness of the aquifer in the area of the proposed point of diversion and relatively small volume requested by this application, there is a reasonable probability that the application could be developed without unlawful impairment to existing domestic uses and water rights. Bolstering her conclusion is that this point of diversion has been operating with the same rate of diversion under the irrigation permit since 2005 and there is no history of complaints.

20. Ms. Steen further testified that in her expert opinion an unlawful impairment will first occur in the source from which the appropriation is made.

21. The Board finds Ms. Steen to be a credible expert witness and that these Findings of Fact are supported by the evidence presented including Ms. Steen's testimony and the reports and exhibits which she prepared and/or upon which she relied.

22. The Board received testimony from Michael Chicoine who sought the application on behalf of Dakota Bay. Mr. Chicoine testified that he has applied for a shoreline alteration permit from the South Dakota Department of Game, Fish and Parks. He plans to construct a canal stemming off McCook Lake to provide lake access for current residents, potential future residents, and the public. Mr. Chicoine provided testimony regarding the construction of the canal which includes an 18-inch fat, clay liner.

23. Kip Rounds, regional supervisor with the South Dakota Department of Game, Fish and Parks, also provided testimony to the Board. Mr. Rounds testified that he is familiar with Mr. Chicoine's shoreline alteration application and the proposed canal project. Mr. Rounds testified that the Department of Game, Fish and Parks has concerns that if the canal liner were to dry out, the integrity of the liner and ability to reduce seepage would be compromised.

24. The Board also received testimony from Dirk Lohry. Mr. Lohry testified that the Association will bear the burden of filling the canal should

Mr. Chicoine's well fail, or water is not pumped under this proposed appropriation.

25. Petitioner did not submit sufficient evidence through expert opinions, testimony, or other evidence that would support a determination that there is a not reasonable probability that there is unappropriated water available, that there would be an unlawful impairment should the application be granted, that this appropriation is not a beneficial use of water, or that it is not in the public interest.

26. The Board finds that, based upon the best information reasonably available, the factors of SDCL § 46-2A-9 are satisfied.

27. The evidence establishes that there is unappropriated water available in the Missouri: Elk Point aquifer to satisfy this application.

28. The evidence establishes the proposed diversion would not unlawfully impair existing domestic water uses or water rights.

29. The Board further finds that the proposed use of the water for recreation, to fill the proposed canal and replace losses of water due to evaporation or seepage, constitutes a beneficial use.

30. The Board further finds that placing the water to this beneficial use is in the public interest.

31. 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. The Association objects to Paragraph 20 of the Proposed Findings asserting that "SDCL § 46-2A-9 does not limit analysis of unlawful impairment to the same water source." There is ample evidence set forth in the record generally and especially by the expert testimony of Nakaila Steen and Exhibits 600 and 605 to support the Board's conclusion that the proposed diversion would not unlawfully impair existing domestic water uses or water rights. No alternative Finding is proposed. Petitioner's objection is noted.
2. The Association objects to Paragraph 25 of the proposed Findings and asserts that the applicant, Dakota Bay, LLC/Michael Chicoine, failed to carry their burden to prove that the requirements set forth in SDCL §46-2A-9 have been met. There is ample evidence set forth in the record generally and especially in Exhibits 600, 603, 604, and 605, along with the expert testimony of NaNakila Steen and the testimony of Applicant Michael Chicoine to support the Board's conclusion that the statutory requirements set forth in SDCL §46-2A-9 have been satisfied.
3. The Association objects to Paragraphs 26, 28, and 30 of the proposed Findings and asserts as support:

Dakota Bay, LLC/Michael Chicoine provided no evidence that the Association's water rights would not be unlawfully impaired. Mr. Chicoine's failure to provide engineering or technical specifications for his "canal" provides no basis for the Board to conclude the proposed water use will be beneficial. Mr. Chicoine's unsupported testimony regarding his intent to create public access is legally insufficient for the Board to conclude that the use is in the public interest.

Contrary to this assertion, the record in its entirety including the exhibits, expert testimony, and testimony of the witnesses is sufficient to support the Board's conclusion that the statutory requirements set forth in SDCL §46-2A-9 have been satisfied.

C. CONCLUSIONS OF LAW

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

1. The Board has jurisdiction over this matter. The application falls within the Board's responsibility over water appropriation and regulation in Title 46.
2. Publication was properly made, and the Notices of Hearing were properly issued pursuant to SDCL § 46-2A-4.
3. The Chief Engineer recommended granting the application. The recommendation, however, is not binding on the Board. SDCL § 46-2A-4(8).
4. The applicant is required to satisfy each of the factors set forth in SDCL § 46-2A-9.
5. The Board concludes that the applicant has satisfied each of the factors set forth in SDCL § 46-2A-9.

6. South Dakota Codified Law, section 46-2A-9 provides that a permit to appropriate water may be issued "only if there is reasonable probability that there is unappropriated water available for the applicant's proposed use, that the proposed diversion can be developed without unlawful impairment of existing domestic 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 §§ 46-2-9 and 46-2-11." Each of these factors must be met and the permit must be denied if the applicant does not meet its burden of proof on any one of them.

7. The first factor for consideration under SDCL § 46-2A-9 is whether there is water available for the appropriation. Determination of water availability includes consideration of the criteria in SDCL § 46-6-3.1 pertaining to recharge/withdrawal: whether "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."

8. South Dakota Codified Law, section 46-6-3.1 provides an exception to the recharge/withdrawal limitation. It states in pertinent part, "[a]n 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 estimated average annual recharge for use by water distribution systems." The Missouri: Elk Point aquifer is not older

and stratigraphically lower than the Greenhorn Formation. Additionally, the permit is not for use in a water distribution system. Thus, the appropriation may not be granted if the withdrawal would exceed the estimated annual recharge.

9. The Board concludes it is not probable withdrawals from the aquifer would exceed recharge to the aquifer in violation of SDCL § 46-6-3.1 if the application is granted.

10. The Board concludes there is a reasonable probability that there is unappropriated water available to fulfill the amount requested by the application.

11. The second requirement of SDCL § 46-2A-9 is that the proposed water use may not unlawfully impair existing domestic uses and water rights. The proposed diversion can be developed without unlawful impairment of existing water rights or domestic water uses.

12. The third element set forth in SDCL § 46-2A-9 is whether the use of water would be a beneficial use: one that is reasonable and useful and beneficial to the appropriator and also consistent with the interest of the public in the best utilization of water supplies under SDCL § 46-1-6(3). The proposed use for recreation is a beneficial use.

13. The fourth requirement of SDCL § 46-2A-9 concerns the public interest. The proposed use of the water must be "consistent with the interests of the public of this state in the best utilization of water supplies." SDCL

§ 6-1-6(3). The Board concludes that this appropriation of water for recreation is in the public interest.

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

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. The Association objects to Paragraph 3 of the proposed Conclusions of Law and asserts that the "applicant provided insufficient evidence of the factors set forth in SDCL § 46-2A-9." Contrary to this assertion, the record in its entirety including the exhibits, expert testimony, and testimony of the witnesses is sufficient to support the Board's conclusion that the statutory requirements set forth in SDCL §46-2A-9 have been satisfied.
2. The Association objects to Paragraph 11 of the proposed Conclusions of Law and asserts that the purpose of the proposed water use... will unlawfully impair the Association's existing water rights." This assertion is inconsistent with the evidence in the record specifically, Exhibits 600, 604, 604, and 605 and the expert testimony of NaNakila Steen.
3. The Association objects to Paragraphs 12 and 13 of the proposed Conclusions of Law and asserts no "evidence was presented regarding the design or specifications of the "canal"; thus, the Board has no basis to

conclude that the proposed use is reasonable, beneficial, or in the public interest." Beneficial use is defined in SDCL §46-1-6(3) as:

"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."

SDCL §46-1-1 further states 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 record in its entirety including the exhibits and testimony of the witnesses is sufficient to support the Board's conclusion that the proposed (recreational) use as set forth in the application is reasonable, in the public interest and is beneficial to the appropriator.

4. The Association objected to the proposed Findings of Fact, Conclusions of Law, and Final Decision in that the decision and states that:

"because the Board voted at its hearing that approval of Water Permit No. 8744-3 would be conditioned on requirements set by the Chief Engineer pertaining to the water use. The proposed decision contains no such requirements, and thus the proposed decision fails to comply with the Board's ruling."

Contrary to this assertion, the minutes show that there was a "Motion by Bjork, seconded by Freeman, to approve Water Permit Application No. 8744-3, Dakota Bay, subject to the qualifications set forth by the Chief Engineer." The qualifications are set out in full in the "Report of Chief

Engineer for Water Permit Application 8744-3, Dakota Bay" which was admitted into evidence as part of Exhibit 600.

D. FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Board enters its determination that Water Permit Application No. 8744-3 is granted 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.

Dated this 12 day of October, 2023.

BY THE BOARD:

Bill Larson

Bill Larson (Oct 12, 2023 16:40 CDT)

William Larson, Chairman
South Dakota Water Management Board

CRARY HUFF

RECEIVED

John M. Hines
Attorney

JUN 12 2023

712.224.7550
jhines@craryhuff.com

OFFICE OF
WATER

329 Pierce Street, Suite 200
Sioux City, IA 51101

craryhuff.com

June 9, 2023

VIA U.S. REGULAR AND CERTIFIED MAIL

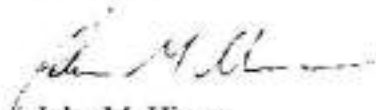
Water Rights Program
Attn: Chief Engineer
Foss Building
523 E Capitol
Pierre, SD 57501

Re: McCook Lake Recreation Area Association Request for Automatic Delay of Hearing on Application No. 8744-3 to Appropriate Water.

To the Chief Engineer:

This Firm Represents the McCook Lake Recreation Area Association ("MLA"). The MLA has filed an Opposition to Application No. 8744-3, and pursuant to South Dakota Codified Laws section 46-2A-5, the MLA requests an automatic postponement of the date set for hearing on the Application.

Sincerely,



John M. Hines
For the Firm



RECEIVED

JUN 12 2023

OFFICE OF
WATER

DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES

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

Petition

Opposing Application for a Water Right Permit

Application No. 8744-3 Name of Applicant Dakota Bay, LLC c/o Michael Chicoine

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

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

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

Dakota Bay's "canal" project, and associated pumping described in the application will have a detrimental effect on the Petitioner, McCook Lake Recreation Area Association ("MLA"), in one or more of the following ways

- 1) The proposed diversion will unlawfully impair the MLA's existing water rights, permit 6479-3;
- 2) The proposed diversion will undermine the MLA's efforts in sustaining the water levels of McCook Lake, at MLA's considerable expense; and
- 3) The MLA has filed a Petition for Declaratory Ruling pertaining to other matters associated with the Dakota Bay project, and a ruling on that petition must first be reached before this application can be considered.

List the reasons for your opposition to this application.

The McCook Lake Recreation Area Association ("MLA") is a South Dakota non-profit corporation funded primarily by voluntary donations. The MLA and its volunteers maintain and preserve McCook Lake, which is a public body of water belonging to the people of the State of South Dakota. In connection with the MLA's efforts, the MLA holds a water rights permit number 6479-3 (and prior permits) to pump water from the Missouri River into McCook Lake. Due to channelization, McCook Lake sits above the Missouri River in elevation. The MLA maintains a 7,550 foot long pipe, connected to pumps, which fills the lake to a target level of 1088 to 1089 feet elevation. Pumping costs vary by month and weather conditions, but has previously cost approximately \$5,000.00 per month during dry conditions.

The Report to the Chief Engineer on Water Permit Application No. 8744-3 (the "Report") and the accompanying Recommendation of Chief Engineer for Water Permit Application No. 8744-3, ("Recommendation") fail to mention, let alone consider, the MLA's permit and whether the diversion described would impair the MLA's existing water rights. The Report and Recommendation also fail to consider whether the diversion described would negatively affect the water levels in McCook Lake, which are already sustained by the extraordinary efforts of the MLA, tens of thousands of dollars in annual expense, volunteers, and the system of pumping. MLA's existing water right would be adversely affected, because (i) the canal may cause the lake to drain, rendering it useless to the public; or (ii) MLA would need to provide additional water to support the canal, and it may be impossible to do so.

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

First Name: John Last Name: Hines (Crary Huff Law Firm, Attorney for MLA)

Mailing Address: 329 Pierce Street, PO Box 27, Suite 200

City: Sioux City State: Iowa Zip: 51102

Optional contact information. Phone: (712) 224-7550 Email: jhines@craryhuff.com

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

Application No. 8744-3

Petitioner's Name McCook Lake Recreation Area Association

Any additional description of the unique injury or reasons for opposing this application:

While the Application refers to "engineer's calculations" of the amount of water needed for the canal, no such "calculations" are shown-Only conclusory numbers are shown. None of the Application, Report, or Recommendation describe the canal, its dimensions, or proposed elevation. It is unclear how, without detailed plans of the canal, the SD DANR can meaningfully determine whether water rights will be impaired by "filling" the canal from the aquifer and whether water is available for appropriation. The MLA also disputes the evaporation, seepage, and runoff figures relied on in the Report overestimate the availability of water for appropriation. Further, MLA has not been provided any soil report for the canal area, and does not know how and whether any such report was considered by the Report and Recommendation. The "Well Completion Report" for Chicoine's existing well is 18 years old.

Additionally, the Report and Recommendation are inconsistent with the Application submitted - Application 8744-3 requests to "fill a canal once per year", whereas the Report and Recommendation only address a "one time" appropriation not to exceed 28.6 acre-feet for the first year. The SD DANR - Water Rights Program engineers should be required to re-evaluate the Application and issue a report on the Application as it was submitted.

The MLA, a non-profit corporation which lacks taxing authority, should not be responsible to sustain Dakota Bay's private development for its sole pecuniary gain. The diversion described in the Application will not be sufficient to maintain water levels in the canal, which will lead to deterioration of the lining, the shoreline, and the canal itself, unless the MLA provides sufficient water from the Missouri River. Furthermore, historical elevation levels of McCook Lake show that water levels in the Lake fall to 1082 feet during winter, which based on canal plans submitted by Chicoine to the South Dakota Department of Game, Fish, and Parks, will expose the proposed canal to winter frost, drying out, and cracking. By year 2, Dakota Bay will be pumping water into a sieve.

Application No. 8744-3 should be denied unless and until Dakota Bay can demonstrate its proposed project (i) will not unlawfully inhibit the MLA's water rights; and (ii) will not result in the draining of McCook Lake - which would have catastrophic ecological and economical consequences for both the MLA and the people of South Dakota.

The MLA is submitting contemporaneously herewith a request for automatic extension pursuant to SDCL 46-2A-5.



**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: Stacy R. Hegge, Attorney for Dakota Bay Dean A. Fankhauser, Attorney for Dakota Bay
111 W. Capitol Ave., Suite #230 PO Box 1557
Pierre SD 57501 Sioux City IA 51102

Charles McGuigan, Deputy Attorney John M. Hines, Attorney for McCook Lake
General Recreation Area Association
1302 East Highway 14, Suite 1 PO Box 27
Pierre SD 57501-8501 Sioux City IA 51102

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 Water Permit Application No. 8744-3, Dakota Bay

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

IN THE MATTER OF WATER PERMIT)	FINDINGS OF FACT,
APPLICATION NO. 8744-3, DAKOTA)	CONCLUSIONS OF LAW
BAY, LLC,)	AND DECISION

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. Applicant, Dakota Bay was represented by Dean A. Fankhauser and Stacy R. Hegge. Petitioner, McCook Lake Recreation Area Association (Association), was represented by John M. Hines. Ann F. Mines Bailey represented the Department of Agriculture and Natural Resources, Water Rights Program (Program) and the Chief Engineer.

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

A. FINDINGS OF FACT

1. On March 29, 2023, the Program received Water Permit Application No. 8744-3 from Michael Chicoine on behalf of Dakota Bay seeking an appropriation of 28.6 acre-feet of water for the first year and 7.99 acre-feet of water per year thereafter at a maximum diversion rate of 1.55 cubic feet of water per second (cfs) from one existing well completed into the

Missouri: Elk Point aquifer for recreational use for an initial fill of a canal to be constructed along southeast shore of McCook Lake and thereafter to cover losses due to evaporation and seepage. The well is located in the E½SE¼ Sec. 16 T89N-R48W and is permitted for irrigation use under Water Permit No. 6557-3.

2. The Chief Engineer, Eric Gronlund, recommended approval of the application subject to qualifications.

3. Notice of Water Permit Application No. 8744-3 was timely advertised on June 1, 2023, in The Leader-Courier (Union County) and the Yankton Daily Press and Dakotan (Yankton County) and posted on the DANR website.

4. Water Rights received a timely petition in opposition to Water Permit Application No. 8744-3 from the Association on June 12, 2023.

5. The matter was scheduled to be heard by the Water Management Board during its July 12, 2023 meeting. A request for an automatic delay was made and the July 12 hearing was delayed.

6. The Chief Engineer moved for a special meeting so that this matter could be heard in conjunction with the Association's petition for declaratory ruling which requested in part that the Board rule that Dakota Bay's project required a permit appropriating the waters of McCook Lake.

7. Water Permit Application No. 8744-3 is a new water permit application which requires a determination pursuant to SDCL § 46-2A-9 whether there is a reasonable probability that unappropriated water is

available for the proposed use, whether the proposed use would impair existing domestic water uses and water rights, whether the use would be a beneficial use, and whether the proposed use is in the public interest pertaining to matters of public interest within the regulatory authority of the Water Management Board.

8. The Association holds a permit/right for the appropriation of water from the Missouri River to be pumped into McCook Lake for the purpose of recreation to stabilize lake levels.

9. Nakaila Steen, a natural resources engineer with Water Rights, performed a technical review of the application, and prepared a report. Ms. Steen provided expert testimony regarding the technical review of the application to the Board.

10. The Missouri: Elk Point aquifer is composed of glacial outwash consisting of fine sand to very coarse gravel. Within the State of South Dakota, the aquifer underlies approximately 219,100 acres in Clay, Union, and Yankton Counties. At the time of completion, aquifer material at the proposed point of diversion was approximately 95 feet thick. The aquifer varies from unconfined to confined conditions but generally behaves as an unconfined aquifer. At the point of diversion, the aquifer is under confined conditions with the existing well completion report demonstrating an artesian head pressure of approximately 40 feet at the time the well was constructed.

11. The Missouri: Elk Point aquifer receives recharge through infiltration of precipitation and from seepage from the Big Sioux, James,

Missouri, and Vermillion rivers and inflow from the Lower Vermillion-Missouri, Lower James-Missouri, Big Sioux, and Dakota aquifers. The best information available regarding recharge to the Missouri: Elk Point aquifer includes two studies: One based upon the observation well data and the other involving induced recharge to the aquifer due to pumping by the Lewis and Clark Regional Water System. The combined total of the estimated average annual recharge equals approximately 114,593.9 acre-feet of water per year.

12. Ms. Steen calculated withdrawals from the Missouri: Elk Point aquifer in South Dakota to be approximately 100,591 acre-feet per year, including water reserved by future use permits and requested by this application.

13. Ms. Steen further testified that there are 36 observation wells completed into the Missouri: Elk Point aquifer. A review of the data from those observation wells indicates that the aquifer is responding to climatic conditions and that natural discharge is available for capture. Several of the observation wells located near the Missouri River indicate a gradual downward trend. Ms. Steen testified that the downward trend is a result of the lowering of the water table due to the entrenchment (deepening of the channel and/or widening of the bed) of the Missouri River and not evidence of over-appropriation of the aquifer.

14. Ms. Steen testified it is her conclusion that, based upon her review of the best information available regarding recharge to the aquifer,

existing water rights, and the observation well data, there is sufficient unappropriated water available to satisfy this application.

15. There were 647 existing water rights/permits authorized to withdraw water from the Missouri: Elk Point aquifer in South Dakota at the time this application was submitted.

16. Ms. Steen testified that the nearest existing domestic well on record is located approximately 0.25 miles south of the proposed point of diversion and owned by Mr. Chicoine. The next nearest domestic well not owned by the applicant is located approximately 0.3 miles northwest of the proposed point of diversion.

17. The nearest existing water rights are three separate water rights/permits each located approximately one mile from the proposed point of diversion: One to the west and two to the southeast.

18. The nearest observation well is located approximately 0.6 miles from the proposed point of diversion.

19. Ms. Steen testified that the Missouri: Elk Point aquifer is a tremendous resource and given the saturated thickness of the aquifer in the area of the proposed point of diversion and relatively small volume requested by this application, there is a reasonable probability that the application could be developed without unlawful impairment to existing domestic uses and water rights. Bolstering her conclusion is that this point of diversion has been operating with the same rate of diversion under the irrigation permit since 2005 and there is no history of complaints.

20. Ms. Steen further testified that in her expert opinion an unlawful impairment will first occur in the source from which the appropriation is made.

21. The Board finds Ms. Steen to be a credible expert witness and that these Findings of Fact are supported by the evidence presented including Ms. Steen's testimony and the reports and exhibits which she prepared and/or upon which she relied.

22. The Board received testimony from Michael Chicoine who sought the application on behalf of Dakota Bay. Mr. Chicoine testified that he has applied for a shoreline alteration permit from the South Dakota Department of Game, Fish and Parks. He plans to construct a canal stemming off McCook Lake to provide lake access for current residents, potential future residents, and the public. Mr. Chicoine provided testimony regarding the construction of the canal which includes an 18-inch fat, clay liner.

23. Kip Rounds, regional supervisor with the South Dakota Department of Game, Fish and Parks, also provided testimony to the Board. Mr. Rounds testified that he is familiar with Mr. Chicoine's shoreline alteration application and the proposed canal project. Mr. Rounds testified that the Department of Game, Fish and Parks has concerns that if the canal liner were to dry out, the integrity of the liner and ability to reduce seepage would be compromised.

24. The Board also received testimony from Dirk Lohry. Mr. Lohry testified that the Association will bear the burden of filling the canal should

Mr. Chicoine's well fail, or water is not pumped under this proposed appropriation.

25. Petitioner did not submit sufficient evidence through expert opinions, testimony, or other evidence that would support a determination that there is a not reasonable probability that there is unappropriated water available, that there would be an unlawful impairment should the application be granted, that this appropriation is not a beneficial use of water, or that it is not in the public interest.

26. The Board finds that, based upon the best information reasonably available, the factors of SDCL § 46-2A-9 are satisfied.

27. The evidence establishes that there is unappropriated water available in the Missouri: Elk Point aquifer to satisfy this application.

28. The evidence establishes the proposed diversion would not unlawfully impair existing domestic water uses or water rights.

29. The Board further finds that the proposed use of the water for recreation, to fill the proposed canal and replace losses of water due to evaporation or seepage, constitutes a beneficial use.

30. The Board further finds that placing the water to this beneficial use is in the public interest.

31. 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. The Association objects to Paragraph 20 of the Proposed Findings asserting that "SDCL § 46-2A-9 does not limit analysis of unlawful impairment to the same water source." There is ample evidence set forth in the record generally and especially by the expert testimony of Nakaila Steen and Exhibits 600 and 605 to support the Board's conclusion that the proposed diversion would not unlawfully impair existing domestic water uses or water rights. No alternative Finding is proposed. Petitioner's objection is noted.
2. The Association objects to Paragraph 25 of the proposed Findings and asserts that the applicant, Dakota Bay, LLC/Michael Chicoine, failed to carry their burden to prove that the requirements set forth in SDCL §46-2A-9 have been met. There is ample evidence set forth in the record generally and especially in Exhibits 600, 603, 604, and 605, along with the expert testimony of NaNakila Steen and the testimony of Applicant Michael Chicoine to support the Board's conclusion that the statutory requirements set forth in SDCL §46-2A-9 have been satisfied.
3. The Association objects to Paragraphs 26, 28, and 30 of the proposed Findings and asserts as support:

Dakota Bay, LLC/Michael Chicoine provided no evidence that the Association's water rights would not be unlawfully impaired. Mr. Chicoine's failure to provide engineering or technical specifications for his "canal" provides no basis for the Board to conclude the proposed water use will be beneficial. Mr. Chicoine's unsupported testimony regarding his intent to create public access is legally insufficient for the Board to conclude that the use is in the public interest.

Contrary to this assertion, the record in its entirety including the exhibits, expert testimony, and testimony of the witnesses is sufficient to support the Board's conclusion that the statutory requirements set forth in SDCL §46-2A-9 have been satisfied.

C. CONCLUSIONS OF LAW

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

1. The Board has jurisdiction over this matter. The application falls within the Board's responsibility over water appropriation and regulation in Title 46.
2. Publication was properly made, and the Notices of Hearing were properly issued pursuant to SDCL § 46-2A-4.
3. The Chief Engineer recommended granting the application. The recommendation, however, is not binding on the Board. SDCL § 46-2A-4(8).
4. The applicant is required to satisfy each of the factors set forth in SDCL § 46-2A-9.
5. The Board concludes that the applicant has satisfied each of the factors set forth in SDCL § 46-2A-9.

6. South Dakota Codified Law, section 46-2A-9 provides that a permit to appropriate water may be issued “only if there is reasonable probability that there is unappropriated water available for the applicant’s proposed use, that the proposed diversion can be developed without unlawful impairment of existing domestic 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 §§ 46-2-9 and 46-2-11.” Each of these factors must be met and the permit must be denied if the applicant does not meet its burden of proof on any one of them.

7. The first factor for consideration under SDCL § 46-2A-9 is whether there is water available for the appropriation. Determination of water availability includes consideration of the criteria in SDCL § 46-6-3.1 pertaining to recharge/withdrawal: whether “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.”

8. South Dakota Codified Law, section 46-6-3.1 provides an exception to the recharge/withdrawal limitation. It states in pertinent part, “[a]n 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 estimated average annual recharge for use by water distribution systems.” The Missouri: Elk Point aquifer is not older

and stratigraphically lower than the Greenhorn Formation. Additionally, the permit is not for use in a water distribution system. Thus, the appropriation may not be granted if the withdrawal would exceed the estimated annual recharge.

9. The Board concludes it is not probable withdrawals from the aquifer would exceed recharge to the aquifer in violation of SDCL § 46-6-3.1 if the application is granted.

10. The Board concludes there is a reasonable probability that there is unappropriated water available to fulfill the amount requested by the application.

11. The second requirement of SDCL § 46-2A-9 is that the proposed water use may not unlawfully impair existing domestic uses and water rights. The proposed diversion can be developed without unlawful impairment of existing water rights or domestic water uses.

12. The third element set forth in SDCL § 46-2A-9 is whether the use of water would be a beneficial use: one that is reasonable and useful and beneficial to the appropriator and also consistent with the interest of the public in the best utilization of water supplies under SDCL § 46-1-6(3). The proposed use for recreation is a beneficial use.

13. The fourth requirement of SDCL § 46-2A-9 concerns the public interest. The proposed use of the water must be "consistent with the interests of the public of this state in the best utilization of water supplies." SDCL

§ 6-1-6(3). The Board concludes that this appropriation of water for recreation is in the public interest.

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

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. The Association objects to Paragraph 3 of the proposed Conclusions of Law and asserts that the "applicant provided insufficient evidence of the factors set forth in SDCL § 46-2A-9." Contrary to this assertion, the record in its entirety including the exhibits, expert testimony, and testimony of the witnesses is sufficient to support the Board's conclusion that the statutory requirements set forth in SDCL §46-2A-9 have been satisfied.
2. The Association objects to Paragraph 11 of the proposed Conclusions of Law and asserts that the purpose of the proposed water use... will unlawfully impair the Association's existing water rights." This assertion is inconsistent with the evidence in the record specifically, Exhibits 600, 604, 604, and 605 and the expert testimony of NaNakila Steen.
3. The Association objects to Paragraphs 12 and 13 of the proposed Conclusions of Law and asserts no "evidence was presented regarding the design or specifications of the "canal"; thus, the Board has no basis to

conclude that the proposed use is reasonable, beneficial, or in the public interest." Beneficial use is defined in SDCL §46-1-6(3) as:

"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."

SDCL §46-1-1 further states 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 record in its entirety including the exhibits and testimony of the witnesses is sufficient to support the Board's conclusion that the proposed (recreational) use as set forth in the application is reasonable, in the public interest and is beneficial to the appropriator.

4. The Association objected to the proposed Findings of Fact, Conclusions of Law, and Final Decision in that the decision and states that:

"because the Board voted at its hearing that approval of Water Permit No. 8744-3 would be conditioned on requirements set by the Chief Engineer pertaining to the water use. The proposed decision contains no such requirements, and thus the proposed decision fails to comply with the Board's ruling."

Contrary to this assertion, the minutes show that there was a "Motion by Bjork, seconded by Freeman, to approve Water Permit Application No. 8744-3, Dakota Bay, subject to the qualifications set forth by the Chief Engineer." The qualifications are set out in full in the "Report of Chief

Engineer for Water Permit Application 8744-3, Dakota Bay" which was admitted into evidence as part of Exhibit 600.

D. FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Board enters its determination that Water Permit Application No. 8744-3 is granted 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.

Dated this 12 day of October, 2023.

BY THE BOARD:

Bill Larson

Bill Larson (Oct 12, 2023 16:40 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 Water Permit Application No. 8744-3, Dakota Bay, was served upon the following by enclosing the same in envelopes with first class postage prepaid, and depositing said envelopes in the United States mail on November 1, 2023.

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

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

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

Above also 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

Vickie Maberry
Water Rights Program, DANR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 1st day of November 2023.

R. Rodriguez

Rachel Rodriguez
Notary Public
My Commission expires May 16, 2029





SOUTH DAKOTA DEPARTMENT OF
GAME, FISH AND PARKS

523 EAST CAPITOL AVENUE | PIERRE, SD 57501

March 24, 2023

Mike Chicoine
32926 482nd Avenue,
Jefferson, South Dakota 57038

Dear Mr. Chicoine,

South Dakota Department of Game, Fish and Parks (SDGFP) has consulted with South Dakota Department of Agriculture and Natural Resources (SDDANR) regarding your proposed use of the existing nearby well for canal water maintenance. The said well is currently permitted for irrigation use (Water Rights Permit # 6557-3). It has been determined that the initial filling of the canal for testing purposes prior to connecting to McCook Lake would qualify for a temporary permit under SDCL 46-5-40.1.

Ongoing use of the existing well to maintain water levels during periods of non-pumping would require a new water rights permit. In your response letter dated February 5, 2023, it was stated that "The canal would be periodically inspected through the off-season and water would be added to the canal from the existing well on the property." Without the ability to add water as needed to prevent the canal liner from drying out, cracking, floating, or otherwise failing, SDGFP's concerns about the integrity of the canal liner remain.

Until a proper water right has been obtained, it is the intention of SDGFP to hold the current shoreline alteration permit application in abeyance.

Sincerely,

Kevin Robling, *Secretary*
South Dakota Game, Fish & Parks

cc: Hunter Roberts, DANR Secretary
Jon Kotilnek, SDGFP Staff Attorney



I N D E X

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WITNESSES:

PAGE:

NAKAILA STEEN

Direct by Ms. Mines-Bailey
Cross by Mr. Hines
Examination by Chairman Larson

MICHAEL CHICOINE

Direct by Mr. Fankhauser
Cross by Mr. Hines
Redirect by Mr. Fankhauser
Examination by Chairman Larson

KIP ROUNDS

Direct by Mr. Hines.
Cross by Mr. Fankhauser.

NAKAILA STEEN

Direct by Mr. Hines. 170
Cross by Mr. Fankhauser. 171

DIRK LOHRY

Direct by Mr. Hines. 173

1 down.

2 Q. Have you reviewed the petition in opposition to this
3 application?

4 A. Yes.

5 Q. Could you describe for the board what your
6 understanding is of the association's concerns?

7 A. That approval of this permit would unlawfully impair
8 the association's water right and permit and that approval of
9 this permit will undermine their efforts in sustaining the
10 water levels in McCook Lake.

11 Q. Nakalla, when you conducted your review of unlawful
12 impairment, did you include the association's water rights?

13 A. No.

14 Q. Why not?

15 A. Because they are authorized for a diversion from the
16 Missouri River.

17 Q. When you conduct an unlawful impairment review, what
18 rights do you look at?

19 A. We generally only look at water rights completed into
20 the same water source. If we aren't seeing an unlawful
21 impairment within that water source at that time, we would not
22 expect to see an unlawful impairment from permit users in
23 outside water sources.

24 Q. Nakalla, what would be your opinion as to the
25 potential for unlawful impairment of the association's Missouri

1 Q. Yes, do you or Dakota Bay own property adjacent to or
2 near, next to McCook Lake?

3 A. Yes.

4 Q. And what advantage or what benefit do you get as the
5 applicant for this water permit for that canal to be built?

6 A. I would get better access to my property, but the
7 additional, the canal is going to be on my eastern side. The
8 15 homeowners there would like to have access to McCook Lake.

9 Q. Let's talk a little bit about the public access to
10 McCook Lake for a moment. What is public access like right now
11 for McCook Lake?

12 A. It's very steep and the parking is very poor.

13 Q. Could you describe that a little more?

14 A. It's only got room for I think like four or five
15 trucks and boats; so a lot of people park out on the street,
16 which they have had a lot of people have tickets, and a lot of
17 the public have not been happy about the existing boat ramp.

18 Q. And what is the cost or is there a fee to put a boat
19 on or off McCook Lake at its current boat ramp?

20 A. I think it's \$5 on and \$5 off and \$30 for all year
21 use.

22 Q. Is it your intention to install a public boat ramp on
23 the canal?

24 A. It is, I already have a permit approved for that.

25 Q. And --

1 MR. HINES: I object to that statement under the best
2 evidence rule. No such permit has been provided into evidence.

3 CHAIRMAN LARSON: I'll sustain that.

4 Q. (BY MR. FANKHAUSER) Is it your intention to build a
5 public boat ramp on the canal?

6 A. Yes.

7 Q. When this canal is built and if this water right is
8 granted, why do you believe -- or why is the water right
9 necessary for the protection of the liner?

10 A. If the lake would ever happen to be down or weather
11 precipitation was down, I would be able to maintain the water
12 liner so it would always be moist at all times. Plus the
13 barrier we are going to put on the end of it would help hold
14 the water there also.

15 Q. Who have you been in contact with to -- scratch that.
16 Do you use McCook Lake for recreational activities?

17 A. Yes, I do.

18 Q. And how long have you been doing that?

19 A. I've been on that property since 2002. I've taken my
20 kids boating, tubing, fishing, now I have grand kids that do
21 the same.

22 Q. And do you have any intention of jeopardizing or
23 harming the integrity of McCook Lake or its water levels?

24 A. No, not at all.

25 Q. In fact that would be against your own interest,

1 intentions today?

2 A. Yes.

3 Q. You and I have discussed a lot of the responses or we
4 have talked about the responses, the public responses to this
5 permit application. Why have you chosen not to respond
6 publicly or to do any sort of news conferences and stuff like
7 that related to this canal project?

8 A. I'm not going to trash any of my neighbors or friends.
9 They are just misinformed here. They have had a propaganda
10 campaign for over a year on TV, in the papers --

11 MR. HINES: Objection.

12 A. -- misinforming --

13 CHAIRMAN LARSON: What's the objection?

14 MR. HINES: I mean, Mr. Chicoine is slandering the
15 association. He's speculating. Speculation.

16 CHAIRMAN LARSON: I'm going to overrule that.

17 Q. (BY MR. FANKHAUSER) What is the benefit to you as the
18 applicant if your permit application is granted so the proposed
19 canal is built?

20 A. Those 15 people would be able to have access to McCook
21 Lake and would have access with the shoreline with a boat ramp.

22 Q. And what do you personally -- do you realize any sort
23 of benefit from that as far as property values or anything like
24 that?

25 A. Proposed possibly, yes.

1 Q. Is that a reasonable and useful use, in your mind, for
2 that water?

3 A. Yes.

4 Q. And to be clear, is that a recreational use --

5 A. Yes.

6 Q. -- or a sustaining use, maintenance? Do you believe,
7 based on what you have reviewed, that there will be some sort
8 of unique injury to somebody else's water right if you are
9 granted this permit?

10 A. I do not.

11 MR. FANKHAUSER: I have no further questions for Mr.
12 Chicoine at this point.

13 CHAIRMAN LARSON: Mr. Fankhauser, are you going to
14 offer your exhibit?

15 MR. FANKHAUSER: Yes, Mr. Chairman, my apologies. I
16 would offer Exhibit A.

17 CHAIRMAN LARSON: I'd like to see it.

18 MR. HINES: I have no objection. I'm sure it's part
19 of the administrative record that's also been offered.

20 CHAIRMAN LARSON: Go ahead, Mr. Hines.

21 CROSS-EXAMINATION

22 BY MR. HINES:

23 Q. John Hines for the association. Hello again, Mr.
24 Chicoine. Mr. Chicoine, have you ever built a canal before?

25 A. Have not.

1 Q. So this would be the first time. Isn't it true that
2 you have not dedicated any of your 72 acres for a public
3 purpose that would allow for a public access dock?

4 A. I plan on it with boat ramp I have got approved.

5 Q. You have not yet done that?

6 A. I'm waiting to see if we get this canal.

7 Q. Have you provided this board with any plans or
8 specifications of this proposed public boat ramp?

9 COURT REPORTER: I didn't hear anything.

10 A. I'm not sure.

11 Q. (BY MR. HINES) Of the 72 acres that you own in
12 proximity to McCook Lake, how many of those -- I guess how many
13 feet do you have currently of shoreline?

14 A. I'm not positive, but I think somewhere around 900 to
15 1,000 feet.

16 Q. How many feet of shoreline would you have after the
17 construction of the canal?

18 A. Eight or 900, I'm not sure, somewhere around there.

19 Q. Wouldn't you have the length of both sides of the
20 canal, whatever its ultimate length is going to be, initially
21 until the lots are sold?

22 A. I don't have the figures in front of me.

23 Q. And that is your intention, correct, to sell the lots
24 that would be developed alongside the canal?

25 A. The ones that are next to Sodrac Park, the 15 on the

1 loss would be.

2 A. Sure.

3 Q. If that monitoring and the requirement you pump
4 water -- so much water back in every year as part of your
5 permit, is that something you would comply with?

6 A. Yes.

7 Q. Now, the liner, is it just clay?

8 A. It's a type of a clay. When it gets wet, it seals
9 quite well. Eighteen inches thick is only an inch a year loss;
10 so pretty much seals her up. That was the same material that
11 was under McCook Lake before they dredged because my topsoil is
12 the same thing as what the bottom of their lake was. So when
13 they dredged theirs out, that created their problem.

14 Q. I know nothing about building a canal. So you don't
15 have to put concrete at the bottom or anything, you do it with
16 clay?

17 A. Correct.

18 Q. That will be 15 lots; is that right?

19 A. There is 15 lots there now. They are on the east side
20 of the canal, if it's granted.

21 Q. So 15 lots that you have already rented out or who
22 owns those 15 lots?

23 A. I have nothing to do with them. They are privately
24 owned. My canal would probably be, I'm guessing, 30, 40 feet
25 from those existing property lines.

1 Q. So your canal would abut up against these other
2 property owners?

3 A. Within 30, 40 feet or somewhere in there.

4 Q. Then you would be able to sell off 15 lots?

5 A. Potentially.

6 Q. Have you ever had any discussions with the McCook Lake
7 Association about working together to contribute or pump
8 additional water as it becomes necessary?

9 A. I talked to Dirk Lohry I think it's May 5th of 2022
10 for 29 minutes. I explained to him what we were planning on
11 doing, and I guess that's as far as it's ever went.

12 Q. I saw a calculation that your canal, it's
13 approximately going to have 145,000 square foot. Does that
14 sound about right? It was part of this -- it's Exhibit 8 in
15 the record, which is your US Army Corps of Engineers permit
16 preconstruction notification.

17 A. I'm not sure what it says, but if that's what it is.

18 Q. Did you have this engineer assist you with this
19 application?

20 A. Yes. Scott Gernhart, yes.

21 Q. I can barely read it here. Is it True Engineering or
22 Trace Engineering?

23 A. I think it's True, but I'm not 30.

24 Q. That's the name of the company? In the past, have you
25 contributed funds to the lake association?

1 record.

2 CHAIRMAN LARSON: That's normal and proper procedure.

3 DIRECT EXAMINATION

4 BY MR. HINES:

5 Q. Mr. Rounds, thank you, sorry. Thank you for your
6 patience. Reminder you are still under oath.

7 A. Yes.

8 Q. Can you briefly restate your name and occupation and
9 experience for the record in this hearing.

10 A. Yeah, name is Kip Rounds, regional supervisor for the
11 past three months. Prior to that I was the aquatic habitat and
12 access biologist for Game, Fish and Parks.

13 Q. In your prior role with Game, Fish and Parks and your
14 current role, are you familiar are Mr. Chicoine's application
15 for shoreline alteration?

16 A. Yes, I am.

17 Q. And you are familiar with his proposed canal?

18 A. Say that again.

19 Q. Are you familiar with the proposed canal?

20 A. Yes, I am.

21 Q. And remind us again, what are Game, Fish and Parks'
22 concerns about the canal liner?

23 A. Our engineers have concerns if the canal liner were to
24 dry out, the integrity of that liner and its ability to reduce
25 seepage, and so we shared those concerns with Mr. Chicoine.

1 BY MR. FANKHAUSER:

2 Q. Mr. Rounds, when the Department of Game, Fish and
3 Parks is working with an applicant to develop or to obtain in
4 this case a shoreline alteration permit, does it make
5 recommendations to the applicant about what its concerns are
6 and things it might be able to do to remediate those concerns?

7 A. If it's concerns about a proposed project, we will
8 share those concerns with the applicant.

9 Q. And have you been communicating to Mr. Chicoine about
10 the concerns that you have?

11 A. Yes.

12 Q. And has he been active in addressing your concerns?

13 A. So far, yes.

14 Q. In fact one of those is to obtain a water use permit;
15 is that right?

16 A. We did not request him to obtain a water rights
17 permit. We requested him to provide a means to keep the --
18 prevent the canal liner from drying out.

19 Q. And so the beneficial purpose of a water rights permit
20 like this one would be to help insure that the canal liner
21 would not dry out?

22 A. That's my understanding.

23 Q. And that both benefits Mr. Chicoine personally but
24 also the public; is that right?

25 A. I think it will benefit everybody if the canal liner

1 does not dry out.

2 Q. And have you had any conversations or other
3 correspondence with Mr. Chicoine about developing a plan to
4 insure that doesn't happen?

5 A. No, outside of -- outside of his proposal to monitor
6 the canal and add water as needed, there's been no additional
7 conversation.

8 Q. And you understand that he is currently working with
9 an engineer; is that right?

10 A. Correct.

11 Q. And the properties that are adjacent to where would be
12 the canal, are you familiar with those?

13 A. Yes.

14 Q. And those properties could be subject to an agreement,
15 isn't that right, to protect the canal liner or to insure water
16 is maintained in the canal?

17 MR. HINES: Objection. Foundation.

18 CHAIRMAN LARSON: Sustained.

19 MR. FANKHAUSER: No further questions, Mr. Chairman.

20 CHAIRMAN LARSON: Ms. Mines-Bailey?

21 MS. MINES-BAILEY: No questions. Thank you.

22 CHAIRMAN LARSON: Any redirect?

23 MR. HINES: Nothing further. I ask he be released
24 from his subpoena. Just to ask for the witness to be released
25 from the subpoena.

1 is.

2 MR. FANKHAUSER: No further questions.

3 MS. MINES-BAILEY: No questions from me.

4 MR. HINES: Nothing further.

5 CHAIRMAN LARSON: You are released. Any other
6 witnesses?

7 MR. HINES: I'm going to call Dirk Lohry.

8 Thereupon,

9 DIRK LOHRY,

10 called as a witness, having been previously duly sworn as
11 hereinafter certified, testified as follows:

12 MR. HINES: Do we need to swear Dirk in again or is he
13 still under oath? Is Dirk still under oath?

14 CHAIRMAN LARSON: Yes, he's still under oath.

15 DIRECT EXAMINATION

16 BY MR. HINES:

17 Q. Dirk, can you briefly just remind us of your education
18 and training?

19 A. In 1977 I graduated with a master's of chemical
20 engineering degree from Iowa State University. I have worked
21 extensively in the fertilizer industry as a process engineer,
22 ownership, management, operation, et cetera. I'm 70 years old.

23 Q. Do they use clay liners for fertilizer storage?

24 A. I have been very instrumental in writing laws for
25 secondary containment for fertilizer tanks. I was with the

1 Q. Do you have concerns about the long-term durability of
2 those types of containments?

3 A. Yes.

4 MS. MINES-BAILEY: I object to relevance. This is a
5 water appropriation permit, and the four factors are
6 availability of unappropriated water, potential for unlawful
7 impairment, beneficial use, and public interest.

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

9 MR. HINES: Can I respond for the record,
10 Mr. Chairman?

11 CHAIRMAN LARSON: You may.

12 MR. HINES: The purpose of the water rights permit Mr.
13 Chicoine is asking for is for the purpose of filling a canal
14 and insuring its canal liner will not fail. That's why I
15 believe the question is relevant.

16 CHAIRMAN LARSON: I am going to sustain it because the
17 question before the board is not whether or not the liner will
18 fail or is of a certain quality. We are just here to decide
19 whether the four factors are met on the water permit.

20 Q. (BY MR. HINES) If Mr. Chicoine's well, if the pump
21 fails for his well or if he or Dakota Bay don't pump water, who
22 will ultimately bear the burden of making sure that the canal
23 has water in it?

24 A. McCook Lake Association.

25 MR. FANKHAUSER: Objection. Speculation.

1 CHAIRMAN LARSON: I'm going to overrule that.

2 Q. (BY MR. HINES) Will it cost more money for the
3 association to pump water into the additional square footage of
4 the canal?

5 A. Yes.

6 MR. FANKHAUSER: Objection. Speculation. That's
7 dependent upon a bunch of different factors.

8 CHAIRMAN LARSON: I will sustain that one.

9 Q. (BY MR. HINES) What's the cost of pumping from the
10 McCook Lake Association based on?

11 MS. MINES-BAILEY: Objection. Relevance.

12 CHAIRMAN LARSON: I'll sustain that.

13 MR. HINES: I have nothing further for Dirk.

14 CHAIRMAN LARSON: Any redirect?

15 MR. FANKHAUSER: No cross-examination, Your Honor, or
16 Mr. Chairman. Thank you.

17 MS. MINES-BAILEY: No questions from me.

18 CHAIRMAN LARSON: Sir, you are dismissed as a witness.
19 Sorry, any board questions? Hearing none, you are dismissed.
20 Mr. Hines, any additional witnesses?

21 MR. HINES: I'm thinking. Nothing further.

22 CHAIRMAN LARSON: No other additional witnesses. At
23 this time, after hearing the evidence as presented and the
24 argument presented in regards to the association's motion for a
25 judgment as a matter of law, the Chair is going to deny that

1 application or at a minimum defer it until some of the
2 questions that have been raised tonight can be answered. Is
3 the calculation that Mr. Chicoine's engineer came up with, is
4 it sufficient to sustain the liner and satisfy the concerns of
5 Game, Fish and Parks? Are we going to be able to come to some
6 sort of agreement or Mr. Chicoine come up with a plan to insure
7 that the long-term maintenance and upkeep of this canal will be
8 satisfied? So the association asks that the board deny the
9 permit or defer the ruling until all of the concerns can be
10 satisfied. Thank you.

11 CHAIRMAN LARSON: Thank you, sir. (Brief pause) At
12 this time I'm going to make a motion, pursuant to SDCL
13 1-25-2(3), to enter into executive session for the purpose of
14 consulting with legal counsel regarding this pending
15 litigation. We are in recess.

16 MR. FREEMAN: Second.

17 CHAIRMAN LARSON: I have a second, all right. All in
18 favor.

19 (Motion passed unanimously.)

20 (Whereupon, the hearing was in recess at 5:56 p.m. and
21 subsequently reconvened at 6:07 p.m., and the following
22 proceedings were had and entered of record:)

23 CHAIRMAN LARSON: We are back in session of the
24 special meeting of the Water Management Board scheduled for
25 August 2nd, 2023. The board has returned from executive

1 session. The last item to be determined on this case is to
2 consider Water Permit Application No. 8744-3 for Dakota Bay.
3 Do I have a motion to grant or deny that application?

4 MR. BJORK: Mr. Chairman, I would move approval of
5 application 8744-3 for Dakota Bay.

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

7 MR. FREEMAN: I'm assuming that's subject to the
8 qualifications of the Chief Engineer.

9 MR. BJORK: Indeed.

10 MR. FREEMAN: Then I would second that motion.

11 CHAIRMAN LARSON: 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: Abstain.

22 MR. MCVEY: On this matter, we are going to need
23 findings of fact and conclusions of law and a proposed
24 decision. Water Rights, Ms. Mines, if you would be so kind as
25 to prepare those, August 23 is the date, and then again

1 September 11 as the date for any objections thereto and
2 proposed alternative facts and conclusions.

3 CHAIRMAN LARSON: Being no further business, we are
4 adjourned. We have to have a motion to adjourn.

5 MR. BJORK: So moved.

6 MR. FREEMAN: Second.

7 CHAIRMAN LARSON: We are adjourned.

8 (Whereupon, the proceedings were concluded at 6:08
9 p.m.)

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C E R T I F I C A T E

1
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3 STATE OF SOUTH DAKOTA)
) ss.
4 COUNTY OF HUGHES)

5 I, Carla A. Bachand, RMR, CRR, Freelance Court
6 Reporter for the State of South Dakota, residing in Pierre,
7 South Dakota, do hereby certify:

8 That I was duly authorized to and did report the
9 testimony and evidence in the above-entitled cause;

10 I further certify that the foregoing pages of this
11 transcript represents a true and accurate transcription of my
12 stenotype notes.

13 Dated this 11th day of December 2023.

14
15
16
17 /s/ Carla A. Bachand

18 Carla A. Bachand, RMR, CRR
19 Freelance Court Reporter



First Judicial Circuit Court

211 W. Main
Vermillion, SD 57069

Tami A. Bern
Circuit Court Judge

Phone: (605) 677-6755
Fax: (605) 677-8885

Presiding Judge
Cheryl Gering
Circuit Judges
Bruce Anderson
Tami Bern
Chris Giles
Patrick Smith
David Kroff
Magistrate Judges
Donna Bucher
Kasey Sorenson

Circuit Administrator
Kim L. Allison
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July 2nd, 2024

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Ms. Jennifer Verleger
1302 East Highway 14, Ste 1
Pierre, SD 57501

Mr. Dean Fankhauser
613 Pierce Street
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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.

App. P. 077

Filed on: 7/2/2024

Union County, South Dakota 63CIV23-000172

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 13th, 2023.

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

Hearing was held before this court on April 9th, 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 action¹.

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.

¹ 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 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.² 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.

² 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.³ 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

³ 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

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:

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Attorneys for McCook Lake
Recreation Area Association

/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 Tami Bern
Circuit Court Judge

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

SEP - 6 2024

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF UNION

Clerk

FIRST JUDICIAL CIRCUIT

IN THE MATTER OF WATER PERMIT
APPLICATION NO. 8714-3, DAKOTA
BAY, LLC

63CIV23-172

NOTICE OF REVIEW

To: David Briese & John Hines, attorneys for McCook Lake Recreation Area Association; Stacy Hegge & Dean Pankhauser, 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

Jennifer L. Verleger

Jennifer L. Verleger
Assistant Attorney General
1302 East Highway 14, Suite 1
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Attorneys for South Dakota Chief Engineer
and Water Rights Program

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the *Notice of Review* was filed electronically by the undersigned through the Odyssey File & Serve system with the above captioned court which caused said documents to be served by electronic means on:

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*Attorney for Dakota Bay, LLC and
Michael Chicoine*

on this 27th day of August 2024.

Jennifer L. Verleger
Jennifer L. Verleger
Assistant Attorney General
*Attorneys for South Dakota Chief Engineer
and Water Rights Program*

SEP - 6 2024

Shif A. Johnson Legd
Clerk

IN THE SUPREME COURT
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.	 	No. ____ .. APPELLEES SOUTH DAKOTA DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES, CHIEF ENGINEER AND WATER RIGHTS PROGRAM'S DOCKETING STATEMENT
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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

The undersigned hereby certifies that a true and correct copy of *Appellees South Dakota Department of Agriculture and Natural Resources, Chief Engineer and Water Rights Program's Docketing Statement* was filed electronically by the undersigned through the Odyssey File & Serve system with the above captioned court which caused said documents to be served by electronic means on:

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on this 27th day of August 2024.

Jennifer L. Verleger
Jennifer L. Verleger
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and Water Rights Program*

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

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

Appeal No. 30796

**APPELLEE DAKOTA BAY, LLC'S
JOINDER OF APPELLEE SOUTH
DAKOTA DEPARTMENT OF
AGRICULTURE AND NATURAL
RESOURCES, CHIEF ENGINEER AND
WATER RIGHTS PROGRAM'S
(COLLECTIVELY CHIEF
ENGINEER'S) LEGAL ISSUE RAISED
THROUGH THE CHIEF ENGINEER'S
NOTICE OF REVIEW**

Appellee Dakota Bay, LLC, through its undersigned legal counsel, hereby joins in Appellee South Dakota Department of Agriculture and Natural Resources, Chief Engineer and Water Rights Program's (collectively Chief Engineer's) position and argument on the legal issue raised through the Chief Engineer's Notice of Review, specifically Issue II, as set forth on pages 17 through 19 of the Chief Engineer's Brief filed December 30, 2024.

Respectfully submitted this 27th day of January, 2025.

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The Undersigned hereby certifies that on January 27, 2025, I electronically served the foregoing using the Odyssey File and Serve system upon the following individuals:

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