

MINUTES OF THE 192<sup>ND</sup> MEETING OF THE  
WATER MANAGEMENT BOARD  
via TELEPHONE CONFERENCE at the  
FLOYD MATTHEW TRAINING CENTER  
523 EAST CAPITAL AVE  
PIERRE, SD

MARCH 4, 2015

**CALL TO ORDER:** Chairman Chad Comes called the meeting to order at 8:34 a.m.

**APPLICATIONS:** Water Permit Application No. 8068-3, Thunder Ridge RE LLC; Water Permit Application No. 2676-2, City of Rapid City; Water Permit Application Nos. 8047-3 & 8048-3, Rockport Hutterian Brethren; Water Permit Application Nos. 7858-3 & 7859-3, Brad Peterson; Water Permit Application No. 7860-3, Oscar Inc.; Water Permit Application No. 7894-3, Van Buskirk Farms; Water Permit Application Nos. 8032-3, 7876-3, & 7877-3, Lenny Peterson; Water Permit Application Nos. 7878-3, 7879-3, 7880-3, 7881-3, 7882-3, 7883-3, & 7884-3, Oscar Inc.; Water Permit Application Nos. 8032-3 & 8033-3, Arthur Olsen.

The following were present at the Training Center for the meeting:

**Board Member:** Tim Bjork.

**Department of Environment and Natural Resources (DENR):** Jami Burrer – Board Secretary; Eric Gronlund, Jeanne Goodman, Ken Buhler, Adam Mathiowetz, Bracken Capen, Karen Schlaak, Tim Schaal, Lynn Beck, Ron Duvall, Genny McMath and Mark Rath – Water Rights Program; Steve Pirner – Secretary's Office.

**Attorney General's Office:** Ann Mines-Bailey, counsel to the Water Rights Program.

**Legislative Oversight Committee:** Representative Mary Duvall.

The following were present via teleconference for the meeting:

**Board Members:** Chad Comes, Ev Hoyt, Jim Hutmacher, Peggy Dixon, and Rodney Freeman. Leo Holzbauer was absent.

**Attorney General's Office:** Jeff Hallem and Matthew Naasz, counsel to the board.

**Other parties:** Tom Glover (Cancellation Consideration), Todd Van Maanen, and Sherman Vomacka.

**APPROVE December 3, 2014, MINUTES:** Motion to approve the December 3, 2014, minutes by Freeman, seconded by Bjork. Motion carried by roll call vote with Dixon, Bjork, Freeman, and Hoyt voting in favor of the motion. Comes abstained, since he was not at the December 3, 2014, meeting. Mr. Hutmacher was not on the line yet.

**STATUS AND REVIEW OF WATER RIGHTS LITIGATION:** None.

**LEGISLATIVE UPDATE, Steve Pirner:**

Mr. Pirner stated the first issue is Governor Daugaard's 2015 Executive Reorganization Order No. 2015-01, which contains a number of different provisions to transfer responsibility within the executive branch. The one that affects DENR is the authority to regulate bottled water quality transferred from the Department of Public Safety to DENR. There is a long history as to why the authority was in public safety. DENR already handles some of those inspections with our Drinking Water Program. The second issue is the 2016 budget request for DENR. It is a "Status Quo Budget" where DENR is requesting no expansions in FTEs, personal services, and operating budget. DENR will continue managing the department using our existing resources to get the job done. The budget hearing was roughly two weeks ago. The joint appropriations committee listened for a full hour. The budget decisions will not be made until the very end of the legislative session. The third item is the DENR's repealer bill in House Bill (HB) 1014. In the past few years the Governor has encouraged all executive branch agencies to look at their laws and rules to repeal those that are old or obsolete. In the past, DENR repealed over 300 sections of code, and this year five more sections of code are recommended to be repealed. None of the sections in that bill pertain to the Water Management Board.

Mr. Pirner stated the fourth item is the Governor's bill (HB 1188) to develop a flood model of the lower Big Sioux River. With the Missouri River flood in 2011, there was massive flood protection activity that took place in the basin. Three years later in 2014, South Dakota got heavy rains that required massive flood control measures to be implemented. It was discovered that areas DENR thought would flood did not flood. HB 1188 appropriates \$500,000 to develop a flood model to help predict inundation areas. This work would be contracted out and not be done in house. In the House Appropriations Committee the bill was amended from \$500,000 to \$1, which kept the bill alive until revenue projections are complete. The Senate Appropriations Committee has had a hearing on the bill but are now deferring it and will hold it again until after the revenue projections are complete.

Mr. Pirner stated the fifth item to discuss is the Bureau of Finance and Management bill to amend FY 2015 budget (SB 55). The section of the bill pertaining to DENR includes special appropriations of \$350,000 for the Bureau of Information and Telecommunications (BIT) to complete DENR's 37 FoxPro Database Conversion Project sooner and provide natural resources data online using GIS interactive maps. It will take BIT between four and six years to complete. The Bureau of Finance and Management would like to advance the time schedule to give BIT more resources so the work can be completed faster. This bill did pass the Senate. There is a House appropriations hearing on this bill coming up.

Mr. Pirner stated the last item is Governor Daugaard's 2015 Water and Environment Funding bill (SB 173), which is also known as the Annual Governor's Omnibus Water Funding bill. The bill passed the Senate; the House Appropriations Committee also passed this bill. The Innovative Wheeling Option gets water to all South Dakota members of Lewis and Clark Regional Water System by putting the West River/Lyman-Jones \$12.5 million loan repayment immediately back to work. The bill appropriates \$7.7 million to Lewis and Clark Regional Water System and authorizes \$4.8 million in state consolidated grants for Big Sioux Community Water System and Minnehaha Community Water System for the Madison

Wheeling Option. The Wheeling Option saves \$17 million of state dollars needed to construct the remaining segments of the Lewis and Clark service line to Madison.

Mr. Comes asked, regarding the flood model for the lower Big Sioux River, if the study is going to be used for a map change such as the FEMA floodplain maps.

Mr. Pirner stated Tim Cowman, with the South Dakota Geologic Survey (SDGS), is the lead on this particular issue. He has discussed with FEMA that if the bill is passed the intent is to try and get FEMA and the flood map work to coincide and everyone using the same map.

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### **CONFLICT OF INTEREST MEMO FROM BOARD COUNSEL:**

Mr. Hallem stated the board was provided with memos that have been completed in the past regarding conflict of interest. Mr. Naasz looked into the law to see if anything needed to be added to the memo, and nothing was found. In conclusion, the memos that have been previously provided adequately describe the conflict of interest policy that the courts look at for recusal from subjects.

Mr. Hoyt stated it is important to keep the issue fresh. Board members have recused themselves on numerous occasions over the years.

Mr. Hallem stated that any new board member needs to be provided a copy of the memo in the orientation packet they receive from DENR.

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### **UPDATE ON WATER RIGHTS PROGRAM ACTIVITIES:**

#### Canyon Lake Dam

Ms. Goodman stated the first update regards the work on the Canyon Lake Dam in Rapid City. Work to correct continuing seepage issues at Canyon Lake Dam Spillway is under way as we speak. This is a City of Rapid City effort. Aaron Tieman with the Water Rights Program and Doug Baldwin with the department's Surface Water Quality Program are located in Rapid City and are actively involved in weekly on site updates with the project. Tim Schaal, Bracken Capen, and Whitney Kilts with the Water Rights Program in Pierre have also been on site to view the work.

Canyon Lake Dam is a category one high hazard dam, which could cause loss of life if it were to fail. The current structure was built in 1976 after the original dam failed during the 1972 flood. The spillway has had seepage issues since the construction was completed in 1976. The root of the problem is likely because one end of the physical foundation of the spillway sits on limestone and the other is built on the clay fill material of the dam. There have been several maintenance projects done on the spillway to address seepage problems. There have been sinkholes and boils that have occurred. Projects were completed attempting to address these issues in 1986, 1996, 2006, 2008, 2009, and now the present project.

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A Power Point presentation was given to the board. Ms. Goodman explains that on page one, the top picture shows the saddle forming in the spillway. The bottom photograph is looking towards the south wall, and shows a roster tail, which is water seeping through the spillway and coming out of the concrete. A close up of that is shown on page two of the handout. In the bottom photograph of page two you can see in the center of the photograph there is a boil, indicating a short cutting of the spillway and water coming up from underneath. On page three there are some photographs taken in 2008 of work being done to address these issues. A crane was brought in and tried to place bentonite behind the spillway, in an effort to plug the areas that are seeping. In 2009, shown on page four, they lowered the lake level. Bentonite was placed in an effort to plug up the seeps. When the lake level was lowered they buried a pipe in order to bypass the lake for any future projects that might be anticipated. In the lower photograph you can see were they dug a trench and placed a pipe to be used as a future bypass pipe.

The current project was originally planned to begin in the fall of 2013. Due to heavy snow fall it was put off until 2014 when the lake level was lower. Rapid Creek flow was then routed through the underground pipe to allow construction to start taking place. Unfortunately last fall there was heavy precipitation, which caused a lot of run-off and higher than expected releases from Pactola Dam. This added to the construction challenges that were planned through last fall and winter. They had to put additional pumping in the lake to keep the lake level down and kept the water out of the construction area through the winter. The project is expected to be completed by April 1, 2015.

The next few pages in the handout are the engineer's drawings and a couple of plan views and cross sections of what is planned. The southeast wall is on bedrock and identified in the plan view. In that area, cement grout will be placed in the limestone fractures to eliminate the seepage potential. On page five, the photographs shown were recently taken by Aaron Tieman. The first two were taken in January of this year and shows the sheet piling and the new concrete that forms the north wall of the spillway. On the bottom picture you can see that they have poured concrete over the sheet piling. The last photo shows you the downstream edge of what will be the spillway. The plan is to finish that by April 1, 2015, because on that date the Bureau of Reclamation will need to start lowering the level of Pactola to make sure they have the maximum flood pool storage for spring run-off. The irrigators can also start the irrigation season on April 1, 2015.

Mr. Hoyt stated the plan was to reroute the inflows through the bypass around Canyon Lake. This would allow water to be evacuated from the lake bed. The bypass is designed to handle 35 cfs capacity, which is normal for winter flows out of Pactola Lake. This winter the flows exceeded the capacity of the bypass and have caused issues with evacuation of water from the lake. DENR has assisted the project with a grant to provide for removal of muck in the lake bed. The concern now is whether the clean out the muck from Canyon Lake can take place.

#### Upper Vermillion Missouri Aquifer

Ms. Goodman stated at the March 2013 board meeting there were 17 applications for irrigation proposing to use water for the Upper Vermillion Missouri Aquifer. Those permits

were deferred by the board for one year, to allow for further study by the South Dakota Geological Survey (SDGS) of the aquifer. By March of 2014, there was preliminary information from the study that allowed Ken Buhler to look at the applications again. A hearing was scheduled for the board to reconsider those 17 applications and the four additional applications that were submitted to DENR for irrigation from this aquifer. The board was able to approve 17 of those applications, and continued deferral of four applications for additional time. One of the applications has since been pulled and recommended for denial at the last board meeting. This was done at the request of the applicant. That leaves three applications for further consideration. SDGS recently completed the final report on the Upper Vermillion Missouri. With that final report complete, the remaining three applications will be brought back in front of the board soon.

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**CONSIDER RANDOM SELECTION PROCESS TO USE FOR IMPLEMENTATION OF HOUSE BILL NO. 1015 FOR APPLICATIONS RECEIVED FROM THE TULARE: EAST JAMES AND TULARE: WESTERN SPINK HITCHCOCK AQUIFER:**

Mr. Duvall gave the background on House Bill No. 1015.

Mr. Duvall stated at the December 2014 board meeting, three different options were demonstrated for board consideration. Since that board meeting, DENR has public noticed the two fully appropriated aquifers in six newspapers once a week for two weeks. Public notice was also provided on the department website, the department's Facebook page, and a press release regarding the 30 day window for the acceptance of applications. In response to the public notice, 14 applications have been received from the Tulare: East James aquifer, one of those applications is currently incomplete. The applicant has 30 days to correct the deficiency. From the Tulare: Western Spink Hitchcock aquifer there is 28 applications and three of those are currently incomplete.

Mr. Duvall stated there were also some applications received after the deadline that will not qualify for the random selection process. DENR is asking for the board's assistance in how to handle the random selection process in May 2015.

Mr. Duvall suggested the option that involved the plastic tubes with the index cards rolled up inside. All those tubes should be pre-filled with the index cards. The tubes are suggested over the ping-pong balls because when the card is drawn out of the container and unrolled you can easily see the application number and name.

Mr. Hallem suggested a motion be made as to how the random selection process will be conducted.

Motion to approve the tube filled with index cards as the random selection process by Hutmacher, seconded by Dixon. Motion carried by roll call vote with all members voting in favor of the motion.

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**ADMINISTER OATH TO DENR STAFF:** The court reporter administered the oath to the DENR staff who intended to testify during the meeting.

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**RAPID VALLEY WATER MASTER:**

Mr. Rath stated there is a state law that requires the annual appointment of the Rapid Valley Water Master to be subject to the board's approval. The Water Master's duties include the allocation of water flows from Rapid Creek, both natural flows of Rapid Creek and purchase water releases from Pactola and Deerfield Reservoirs. The Water Master also acts as an agent to the board and the chief engineer if there are minor disputes with people taking water out of order or things of that nature. Each February, DENR contacts the Rapid Valley Conservancy District regarding this appointment for the upcoming irrigation season. This year the district requested that Kevin Ham be appointed as the Water Master. Mr. Ham has been the Water Master since 2005. The recommendation is for the board to approve the appointment of Kevin Ham for the 2015 season.

Motion to appoint Kevin Ham as the Rapid Valley Water Master by Hoyt, seconded by Hutmacher. Motion carried by roll call vote with all members voting in favor of the motion.

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Went back in the agenda to set the next board meeting, which was skipped.

**NEXT MEETING:** May 6-7, 2015, in Pierre.

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**VIOLATIONS FOR FAILURE TO REPORT ON IRRIGATION QUESTIONNAIRE:**

Ms. McMath stated each year irrigation questionnaires are mailed out to individuals with irrigation permits, to report how much water is being used from either a ground or a surface water source. These forms are typically due by December 1. The information contained on these forms is important for staff to use when reviewing new applications. In October of 2014 Water Rights staff mailed out 3,813 irrigation questionnaires that had a due date of December 1. The letter explains the different ways they can complete and return the questionnaires which includes online (the preferred method because it goes straight into the database), mail, fax, or telephone. The questionnaires that were not submitted by mid-January received another notice. There were 192 people that received a second notice, and they were scheduled for today's hearing. If the questionnaires were returned they were removed from today's hearing. The violations for not returning a questionnaire include suspension of irrigation for up to one year for the first violation, up to three years for the second violation, and if there were two previous suspensions the water right can be subject to cancellation.

Ms. McMath stated the list that was sent to the board does have some modifications. Some of the questionnaires have since been received in the mail, and one questionnaire was submitted online. The ones on the list that are not up for consideration under Violation 1 are

Gene De Vries and De Vries Inc., Ryan Edwards, and Donald J Stange, and Under Violation A Hellmann Quiet Creek Ranch. DENR is asking the remaining permits under Violation 1 be suspended for a period of up to one year, for those under Violation 2 to be suspended for up to three years, and those remaining under Violation A to be amended to include the irrigation questionnaire qualification, and in future years they would then be brought to the Board for suspension or possible cancellation.

Mr. Hoyt asked if there are any amendments that can be made to the irrigation questionnaire so that Mr. Buhler and others who provide reports to the board would have a greater confidence in the average irrigation rate.

Mr. Gronlund stated DENR is always looking for better ways to do the questionnaires. Some of the individuals provide electrical records, some are very detailed, and others have very little information. There is a check and balance system, so if something looks wrong, DENR normally follows up.

Motion by Freeman, seconded by Bjork, to suspend water rights listed under Violation 1 (Permit Nos. 4594-3, 876-1, 7114-3, 7336-3, 5777-3, 7005-3, 7067-3, 7068-3, 2954-3, 6682-3, and 7685-3) for one year, effective 30 days from today's date. Suspend licenses listed under Violation 2 (Permit Nos. 1714-2, 2063-2, 400-2, and 401-2) for three years to be effective 30 days from today's date. Under Violation A (Permit Nos. 1270-2, 1564-2, 3191-3, 4479-3, and 4252-3) be amended to include questionnaires effective immediately. Motion carried by roll call vote with all members voting in favor of the motion.

(All irrigation questionnaires for water permits and rights in Violation 1 and 2 were received within 30 days of the Board's March 4<sup>th</sup> motion and therefore the suspensions did not go into effect.)

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## **CANCELLATION CONSIDERATIONS:**

Mr. Gronlund stated that Mr. Tom Glover with South Central Water Development District is participating by phone.

Mr. Gronlund stated the board packet included a table of Water Rights scheduled for cancellation; in addition to that the board packet included the notice that was sent to the water right holder as well as the recommendation. On the table there are six Water Rights and one Future Use Permit scheduled for cancellation today.

Mr. Gronlund stated in the case of Future Use Permit No. 1508-2 for South Central Water Development District, the board of directors wrote a letter stating they were not renewing that permit. In the case of Water Right No. 1859-2 for Bruce or Alice Shafer only the irrigation component of the water right is subject to cancellation. South Dakota Codified Law (SDCL) 46:5:31.1 states that if irrigation use from a dam is abandoned or forfeited the water right can be reissued for stock watering. Pending the board action, if the irrigation component is cancelled, it is the intent to reissue that water right for only the storage in the dam for stock watering use.

Mr. Gronlund stated DENR is recommending the board cancel the other permits/rights. Notice was provided to the permit holder, nothing was received in response to the cancellation. In the case of 6710-3, Mr. Larson did call and state that maybe someday he would start it back up again. It was explained to him there is a “use it, or lose it” statute for water rights in South Dakota, but in the future he can reapply for a water right.

Motion to approve the cancellation requests as recommended by DENR staff, shown on the table below, by Hutmacher, seconded by Freeman. Motion carried by roll call vote with all members voting in favor of the motion.

Future Use Permit No. 1508-2	South Central Water Development District	Abandonment
Water Right No. 1859-2 (irrigation component only)	Bruce or Alice Shafer	Abandonment
Water Right No. 3288-3	Bonnie L Pies	Abandonment/Forfeiture
Water Right No. 4081-3	Kleinjan Farms	Abandonment/Forfeiture
Water Right No. 5360-3	Fred Harner	Abandonment/Forfeiture
Water Permit No. 5069-3	Spot RV Park	Abandonment/Forfeiture
Water Permit No. 6710-3	R Larsen's Aquaculture	Abandonment/Forfeiture

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#### **SEVEN YEAR REVIEW OF A FUTURE USE PERMIT:**

Mr. Gronlund stated he had email correspondence with Jason Anderson with the City of Vermillion in regards to the board meeting being held via telephone and was under the impression he was going to call in. There is only one future use permit up for review, No. 6237-3, City of Vermillion. It reserves 1,900 acre feet (AF) from the Missouri Elk Point aquifer for the City of Vermillion which was obtained back in 2001. This will be the second time it is up for the seven year review. DENR contacts the permit holder to inform them of the review, and ask what their intentions are. In this case the city stated they would like to retain the permit. This review was public noticed, and no one petitioned to intervene. Based on that the Chief Engineer is recommending the permit remain in effect for 1,900 AF. The board packet includes the recommendation, the letter from the City of Vermillion, and the affidavits of publication in this matter.

Motion for Future Use Permit No. 6237-3, City of Vermillion to remain in effect for 1,900 AF by Bjork, seconded by Hoyt. Motion carried by roll call vote with all members voting in favor of the motion.

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#### **WATER PERMIT APPLICATION NO. 8068-3, THUNDER RIDGE RE, LLC:**

Appearances via telephone:

Todd Van Maanen, Eisenbraun and Associates.

Mr. Buhler stated Permit Application 8068-3, Thunder Ridge RE, LLC was reviewed and a report was prepared for the Chief Engineer. This report is the basis for the Chief Engineer's recommendation to the board. This application proposes to appropriate water at a maximum diversion rate of 0.11 cubic feet of water per second (cfs) from two wells to be completed into the Sioux Quartzite Wash aquifer. The wells are expected to be approximately 272 feet deep and will be located in the N ½ NE ¼ Sec. 19, T100N-R55W. Water is to be used for commercial use in a swine confinement facility. The water source was identified on this permit application as the West Management Unit of the Upper Vermillion Missouri. Upon review of the completion report and discussion with the well driller, the aquifer is a bed rock aquifer. For the purpose of this application DENR considers the source to be the Sioux Quartzite Wash aquifer. The aerial extent of this aquifer has not been delineated, and it is unlikely that it is a single contiguous unit. There is insufficient data to provide any kind of hydrologic budget for this aquifer; therefore the observation well data information was reviewed. The Water Rights Program monitors two observation wells in Sioux Quartzite Wash in this area. One of them is three miles east and the other is four and three quarters miles northeast of this proposed site. Both of the observation wells document a decline in the potentiometric surface in this area since October of 2007.

Mr. Buhler stated as part of the evaluation of the hydrographs for the observation wells completed into the Sioux Quartzite Wash aquifer, they were compared to hydrographs from observation wells representative of the other aquifers located within approximately 40 miles of the wells. The Basal-outwash and the Sioux Quartzite Wash aquifers appear to be responding to similar hydrologic conditions that are not affecting other aquifers in the area, and/or a hydrologic connection exists between the aquifers. The Sioux Quartzite Wash aquifer is essentially undeveloped in this area and should be under more or less under steady state conditions. However, recent development has occurred in the Basal-outwash aquifer. Well withdrawals from the Basal-outwash aquifer are primarily for appropriate uses. Water permits/rights appropriating water from the Basal-outwash aquifer are limited to rights/permits held by TM Rural Water District, and Todd M. and Merlyn Hofer (Water Right No. 4752-3). Well withdrawals from the Basal-outwash aquifer have increased from a 1981-2007 average annual withdrawal of 78 acre-feet/year to a 2008-2014 average annual withdrawal of 1,028 acre-feet/year (Water Rights, 1982-2014; and Water Rights, 1992-2015).

Mr. Buhler stated the water level changes measured in these observation wells appear to coincide with pumping and the resulting drawdown from TM Rural Water District's two production wells.

Mr. Buhler stated in conclusion that Water Permit Application No. 8068-3 proposes to appropriate water at a maximum diversion rate of 0.11 cfs from two wells to be completed into the Sioux Quartzite Wash aquifer. Water levels in observation wells completed into the Sioux Quartzite Wash aquifer have declined significantly since 2007. The Basal-outwash and the Sioux Quartzite Wash aquifers appear to be responding to similar hydrologic conditions that are not affecting other aquifers in the area, and/or a hydrologic connection exists between the aquifers. The water level changes measured in these observation wells appear

to coincide with pumping and the resulting drawdown from TM Rural Water District's two production wells. Continued pumping will usually expand the cone of depression in the aquifer until recharge areas are intercepted. This causes the rate of water-level decline to be significantly reduced or stopped. It appears that additional recharge to the Basal-outwash aquifer has been induced from the Sioux Quartzite Wash aquifer, and a new steady state may have developed. A sufficiently long period of record is not available to determine if water levels have equilibrated in the Sioux Quartzite Wash aquifer in this area. There is not enough information available at this time to determine whether unappropriated water is available from the Sioux Quartzite Wash aquifer in this area.

Mr. Buhler stated Chief Engineer is recommending deferral of Application No. 8068-3 for one year in order to have a sufficient period of record in observation wells to determine if water levels have equilibrated in the Sioux Quartzite Wash aquifer in this area.

Ms. Mines-Bailey stated there is no one present for Thunder Ridge. It is the understanding that Thunder Ridge is not contesting the recommendation of the Chief Engineer. Mr. Buhler has laid the foundation for the recommendation.

Mr. Hallem stated that back in 2012, the South Dakota legislature amended the definition of domestic use to specifically allow water not exceeding 18 gallons per minute on an average daily basis for livestock in a confinement operation, including water for drink, sanitation, and general welfare purposes. The application is for commercial use, because diversions will be in excess of that domestic use limitation.

Mr. Buhler stated that reasonable domestic use has two numbers. One is 18 gallons per minute continuously which provides 25,920 gallons per day. The second number associated with reasonable domestic use is a maximum diversion rate of 25 gallons per minute. You can average 18 gallons per minute with a maximum rate of 25 gallons per minute.

Mr. Van Mannen asked if the application is still pending and will be revisited one year from now.

Mr. Buhler stated that is correct.

Motion to defer Water Permit Application No. 8068-3 for one year, as recommended by the Chief Engineer by Freeman, seconded by Bjork. Motion carried by roll call vote with all members voting in favor of the motion.

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#### **WATER PERMIT APPLICATION NO. 2676-2, CITY OF RAPID CITY:**

Ms. Mines-Bailey stated DENR is in receipt of a stipulation from the City of Rapid City and Southside Ditch Company requesting a continuance. Both parties are in the process of discussing an agreement and are hopeful they will be able to resolve the matter without a hearing.

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**WATER PERMIT APPLICATION NOS. 8047-3 AND 8048-3, ROCKPORT HUTTERIAN BRETHREN:**

Ms. Mines-Bailey stated the Rockport Hutterian Brethren have not contested the recommendation of the Chief Engineer on either of the applications. Therefore, DENR believes the hearing can proceed informally.

Ms. Beck stated Water Permit Application No. 8047-3 requests to appropriate 2.96 cubic feet of water per second (cfs) from the James River to irrigate 332 acres of land located in the S $\frac{1}{2}$  NW $\frac{1}{4}$ , S $\frac{1}{2}$  NE $\frac{1}{4}$ , S $\frac{1}{2}$  Section 36-T102N-R59W, and the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , W $\frac{1}{2}$  SW $\frac{1}{4}$  Section 31-T102N-R58W. Application No. 8047-3 utilizes the James River diversion point authorized by 1902-3 located in the NW $\frac{1}{4}$  NE $\frac{1}{4}$  Section 6-T101N-R58W. This application, if approved, and Water Right No. 1902-3, will authorize a total of 7.71 cfs to irrigate a total of 664.5 acres of land utilizing the same diversion point.

Ms. Beck stated Water Permit Application No. 8048-3 is to appropriate 5.35 cubic feet of water per second (cfs) from the James River to irrigate 469 acres of land located in the N $\frac{1}{2}$  of Section 36 and SW $\frac{1}{4}$  SE $\frac{1}{4}$  Section 35; all in T102N-R59W. This application utilizes the James River diversion point authorized by 1902-3 located in the NW $\frac{1}{4}$  NE $\frac{1}{4}$  Section 6-T101N-R58W. This application and Water Permit Application No. 8047-3, if approved, and Water Right No. 1902-3, will authorize a total of 13.06-cfs to irrigate a total of 1,140.5 acres of land utilizing the same diversion point.

Ms. Beck stated to date there are 101 Water Rights on the James River, totaling 300 cfs of appropriation from the North Dakota border to the Hutchinson County line. In 1965 the SD Water Rights Commission, a predecessor to the SD Water Management Board, placed a 300-cfs diversion limit on the James River in South Dakota with a maximum combined diversion limit of 200-cfs from North Dakota border to Huron, SD. Due to the Missouri River backwater into the James River, the 300-cfs restriction has been applied from the North Dakota border to the Yankton-Hutchinson County Line.

Ms. Beck stated due to the lack of water availability from the James River based on the 300 cfs limit, it is recommended that Water Permit Application Nos. 8047-3 and 8048-3 be deferred for up to one year for DENR to study whether any existing water rights/permits are subject to cancellation due to abandonment/forfeiture; the level of development of existing water permits ready for licensing; or other review that may result in water becoming available for this appropriation.

Mr. Freeman stated the Water Management Board established the 300 cfs diversion limit back in 1965. Has that 300 cfs been examined by Water Rights staff? Is 300 cfs still a good number after 50 years?

Ms. Beck stated the last time the number was examined was in 2007. That number comes from the assumption that 50 percent of the irrigators are pumping and 100 percent of the other permit holders are pumping. It is currently being looked at again, which is part of the further study, just to be sure that number is still appropriate at the 300 cfs limit.

Mr. Bjork asked how long the studies will take.

Ms. Beck stated staff is in the middle of the study now. Once there are answers or something solid to go on it will be presented to the board.

Motion to defer Application Nos. 8047-3 and 8048-3 for further study to evaluate the diversion rate status of water rights on the James River for up to one year as recommended by the Chief Engineer by Freeman, seconded by Bjork. Motion carried by roll call vote with all members voting in favor of the motion.

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## **FINDING OF FACTS, CONCLUSIONS OF LAW, AND FINAL RULING IN THE MATTER OF ATTEBERRY'S DECLARATORY RULING REQUEST:**

### Appearances via telephone

Sherman Vomacka

Mr. Naasz stated the board has the submissions from DENR. Board counsel also provided the proposed finding of facts, conclusions of law, and declaratory ruling as well as the Water Management Board ruling on party submissions. Neither Mr. Atteberry or Mr. Vomacka submitted any written proposed finding of facts, conclusions of law, and declaratory ruling, or objections to DENR's submission.

Mr. Naasz suggested changes be made to DENR findings of facts and conclusions of law. The first is in findings of fact number three, to add "with the Gregory County office of Register of Deed" to clarify where the Atteberry location notice was filed. The second change is to finding of fact number 10, to make a deletion at the beginning of the finding and insert the term "legally" which will make that finding a more complete reflection of the record. The third change is to conclusion of law number one, to specifically recognize Mr. Atteberry's request. Last is to move DENR conclusions of law four and five into a specific heading entitled declaratory ruling which will again make the submission more consistent with the record and clear on what the board is ruling on.

Motion to adopt the rulings as prepared by Board counsel by Hoyt, seconded by Freeman.

Mr. Naasz stated he believes the documents need to be signed by someone who attended the December 2014 board meeting since Chairman Comes did not attend. Mr. Freeman was elected to be the temporary chair at that meeting. The motion should indicate that it authorizes a member of the board present at the December 2014 meeting to sign both the ruling on the parties' submissions and the finding of facts, conclusions of law, and declaratory ruling.

Motion amended to adopt the rulings as prepared by board counsel and authorize Mr. Bjork, who is present in Pierre, to sign the rulings on the party submissions by Hoyt, seconded by Freeman. Motion carried by roll call vote with Hoyt, Dixon, Bjork, and Freeman voting in favor

of the motion. Hutmacher and Comes abstained since they were not present at the December 2014 meeting.

Motion to adopt the rulings on the proposed finding of facts, conclusions of law, and declaratory ruling as prepared by board counsel and authorize Mr. Bjork, who is present in Pierre, to sign the finding of facts, conclusions of law, and declaratory ruling by Hoyt, seconded by Freeman. Motion carried by roll call vote with Hoyt, Dixon, Bjork, and Freeman voting in favor of the motion. Hutmacher and Comes abstained since they were not present at the December 2014 meeting.

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**STIPULATED REQUEST FOR CONTINUANCE:**

Mr. Freeman recused himself from this matter.

Ms. Mines-Bailey stated the matters scheduled for the afternoon at 1:30 p.m. involving applications for Water Rights in the Tulare: Western Spink Hitchcock aquifer, the Tulare: East James aquifers, and the two applications for Arthur Olsen, were scheduled to be presented in a contested hearing. Due to the weather concerns and the transition of this meeting from a live meeting to a telephonic meeting, the attorneys for these parties met on the phone and discussed what to do. It was agreed to request a continuance by a signed stipulation by Mr. Rylance, on behalf of Brad Peterson, Oscar Inc., Lenny Peterson, and Van Buskirk Farms, and by Joel Arends as counsel for Arthur Olsen, and Ann Mines-Bailey on behalf of Water Rights. They are asking that the board continue the hearing until the May 2015 meeting. On behalf of all the parties, DENR asks that the board grant the motion for continuance.

Motion to grant the stipulated request for continuance by Hoyt, seconded by Bjork. Motion carried by roll call vote with all members voting in favor of the motion.

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ADJOURN: Chairman Comes declared the meeting adjourned.

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A court reporter was present for the meeting and transcript of the proceedings from March 4, 2015, may be obtained by contacting Carla Bachand, PO Box 903, Pierre, SD 57501-0903, telephone number (605) 224-7611.

The meeting was also digitally recorded and a copy of the recording is available on the department's website at <http://denr.sd.gov/boards/schedule.aspx>.

Approved this 6<sup>th</sup> day of May.

  
Chairman, Water Management Board

