DEPARTMENT of AGRICULTURE and NATURAL RESOURCES
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October 6, 2026

VIA CERTIFIED MAIL

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Re: *In re City of Custer Surface Water Discharge Permit (No. SD0023281) Renewal Application*

To All Parties of Record:

Enclosed please find Dept. Sec. Walsh's Order Transferring File to Office of Hearing Examiners and Stay of Previous Deadlines. Copies of the enclosed are being served electronically and by certified mail. We have been informed that Judge Anita Fuoss has been assigned to preside over this file for the Office of Hearing Examiners.

If you have any questions, please don't hesitate to contact me.

Sincerely,

Steven R. Blair
General Counsel – Dept. of Agriculture & Natural Resources

Enclosures
Cc/encl: Brian Walsh – Deputy Secretary, DANR (via email only)
Judge Anita Fuoss – Office of Hearing Examiners (via email only)

STATE OF SOUTH DAKOTA

DEPARTMENT OF AGRICULTURE & NATURAL RESOURCES
OFFICE OF THE SECRETARY

IN THE MATTER OF SURFACE WATER DISCHARGE PERMIT APPLICATION NO. SD0023281, CITY OF CUSTER	))))	ORDER TRANSFERRING FILE TO OFFICE OF HEARING EXAMINERS AND STAY OF PREVIOUS DEADLINES

Deputy Secretary of the South Dakota Department of Agriculture & Natural Resources ("DANR"), Brian Walsh, having been otherwise fully informed of all facts and issues pertinent thereto, hereby enters the following ORDER in the above captioned matter.

Deputy Secretary Walsh hereby **FINDS** the following:

1. The Legislature has given the Secretary of the Department of Agriculture & Natural Resources jurisdiction, and final decision-making authority, to hear contested cases concerning the issuance of discharge permits for wastes or pollutants. See SDCL §§ 34A-2-31 & 36.

2. SDCL § 1-26-18.3 states that:

   > In any contested case, if the amount in controversy exceeds two thousand five hundred dollars or if a property right may be terminated, any party to the contested case may require the agency to use the Office of Hearing Examiners by giving notice of the request no later than ten days after service of a notice of hearing issued pursuant to § 1-26-17. This section does not apply to any contested case before the Public Utilities Commission.

3. Preserve French Creek, Inc., Petitioner in the above captioned matter, filed a Motion to Transfer to Office of Hearing Examiners. The Motion alleged that the statutory prerequisites of SDCL § 1-26-18.3 had been met and requested

that this file be transferred to the Office of Hearing Examiners for a neutral hearing examiner to be appointed to conduct the contested case hearing in this matter.

4. Through its filings, Preserve French Creek has stated that several of its members own property along French Creek and alleged that potential damage to the value of their property exceeds $2500 due to the City of Custer's discharge into French Creek.
5. Preserve French Creek has also alleged that several of its members owning property along French Creek hold riparian rights to the use and enjoyment of the waters in French Creek, and that authorization of the City's continued discharge to French Creek may terminate that riparian interest.
6. Petitioners Michelle Jeffrey and Todd Konechne joined in Preserve French Creek's motion. Jeffrey and Konechne are members of Preserve French Creek and individually joined this contested action. Both Jeffrey and Konechne own property adjoining French Creek and have alleged that potential damage to their property would exceed $2500 and that their riparian rights to the use and enjoyment of French Creek may be terminated.
7. The City of Custer, and the DANR Water Quality Program, objected to the motion. The City and the Water Quality Program assert that neither of the requirements of SDCL § 1-26-18.3 has been met in this case.
8. According to SDCL § 1-26-18.3, the "amount in controversy" in a contested case must exceed $2500 to trigger transfer of jurisdiction to hear a contested

case from its originating agency to the Office of Hearing Examiners. An "amount in controversy" is the damages claimed or relief demanded by an injured party. The contested case held in this matter will determine whether the City's surface water discharge permit, authorizing it to discharge into French Creek, will be renewed or denied. That decision would not grant any monetary amount to any party. Nor would it establish the value, or alleged diminishment in value, of property along French Creek. There is no amount in controversy to be determined through a contested hearing in this matter.

9. SDCL § 1-26-18.3 also establishes that termination of a property right in a contested case may trigger the use of the Office of Hearing Examiners. Here all petitioners hold riparian rights to the use and enjoyment of French Creek. The Water Quality Program has asserted that the permit limits established in the Program's recommended permit are protective of immersion recreation in French Creek. However, Petitioners have alleged that the limits recommended by the Program are not sufficient and that the riparian right to the recreational use and enjoyment of French Creek may be effectively terminated by the ultimate decision reached in this matter. Because of this outstanding dispute the Department finds sufficient basis to transfer this matter to the Office of Hearing Examiners.

Based upon the foregoing it is hereby **ORDERED**:

1. This matter is transferred to the Office of Hearing Examiners to preside over any further contested case proceedings to be held in this matter.

2. According to SDCL § 1-26D-6, after concluding the contested case proceedings, the Office of Hearing Examiners is requested to submit to the Department a proposed decision along with proposed findings of fact and conclusions of law. The Department retains the authority to accept, reject, or modify the proposed decision and any proposed findings or conclusions.
3. The parties have stipulated to stay all filing deadlines previously established by the Department's procedural and scheduling orders. All pending deadlines are stayed until the Office of Hearing Examiners has had an opportunity to issue a new procedural and scheduling order in this matter.
4. Currently pending is a motion concerning venue of the contested hearing to be held in this matter. That motion is deferred to the Office of Hearing Examiners for consideration and a final decision.

Dated this 6 of October, 2026.

DEPT. OF AGRICULTURE & NATURAL RESOURCES

By: _____
Brian Walsh, Deputy Secretary

CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the Hearing Chair's ORDER TRANSFERRING FILE TO OFFICE OF HEARING EXAMINERS were submitted electronically, and via United States Mail, Certified Mail -- Return Receipt Requested, upon the following:

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Dated this 6th day of October, 2026.

Steven R. Blair
General Counsel – DANR