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April 29, 2026

SD DANR – Water Rights Program
Attn: Adam Mathoiowitz, Chief Engineer
Joe Foss Building
523 E Capitol Avenue
Pierre SD 57501
via email and US Mail

Re: In the Matter of Water Permit Application No. 8987-3
GPNA File No. 15455.0013

Dear Chief Engineer Mathoiowitz:

Please find enclosed Applicant Vic Utech's Witness and Exhibit Lists, a copy of Exhibits 101 through 104, Prehearing Brief, and Certificate of Service to be filed in *In the Matter of Water Permit Application No. 8987-3, Vic Utech*.

Sincerely,

A handwritten signature in black ink that reads "Stacy R. Hegge". The signature is written in a cursive, flowing style.

Stacy R. Hegge

SRH:srh

Enclosures

Cc w/encls.: Emily Greco
James Moore
David McVey

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

IN THE MATTER OF WATER
PERMIT APPLICATION
NO. 8987-3, VIC UTECH

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**APPLICANT'S
PREHEARING BRIEF**

Applicant Victor Utech (hereinafter "Utech"), through his counsel Stacy R. Hegge and Marcus Hluchy of Gunderson, Palmer, Nelson, and Ashmore, LLP, submits the following Prehearing Brief in accordance with the Procedural and Scheduling Order (April 20, 2026).

FACTUAL BACKGROUND

In 2021, Applicant Victor Utech purchased certain real property in Sully County, South Dakota, in an unincorporated area commonly referred to as the Spring Creek Cow Creek community. The area encompasses two South Dakota state parks (the Spring Creek Recreation Area and the Cow Creek Recreation Area) and attracts a large number of summer residents and visitors, offering two recreational vehicle parks, campsites, cabins, picnic shelters, boat ramps, fish cleaning stations, restaurants, and a golf course that Utech has revitalized and purchased with an expected opening date of May 2026. To expand the lodging availability and recreational activities of the area, Utech has developed a new RV park on the far east side of the area.

On September 19, 2025, Utech filed a water permit application relating to an existing well on the property, seeking to convert the irrigation use water permit to a commercial use water permit, as well as to appropriate an additional amount of water from the existing well. On January 5, 2026, the Acting Chief Engineer filed his report recommending the approval of Utech's application, and notice was subsequently published.

On January 23, 2026, the Spring Creek Cow Creek Sanitary District (“Petitioner”) filed a petition opposing Utech’s application. In its Petition, Petitioner alleges that its unique injury is that Utech is required to connect to Petitioner’s water system under Petitioner’s ordinances and resolutions, and therefore, approval of the permit “will unlawfully contravene the [Petitioner’s] water use laws and will impair the [Petitioner’s] water services to its residents.” *See* Petition Opposing Application for a Water Right Permit (Jan. 23, 2026). Petitioner’s asserted reasons for its opposition relate to that same premise - that granting a water permit “runs afoul of [Petitioner’s] rules put in place to benefit all District residents, thus frustrating any public interest purpose and lacking in any beneficial use”. *Id.* Ultimately, Petitioner opposes the approval of Utech’s permit because it “would impede [Petitioner’s] ability to provide and enforce water regulations to its residents.” *Id.*

DISCUSSION

I. Petitioner has no standing to oppose the application of water permit pursuant to SDCL 46-2A-4(4).

A threshold issue in this contested hearing is whether Petitioner has standing to oppose Utech’s water permit application. A person opposing an application for a water permit may only participate in the hearing if three elements are met: First, the application’s approval will cause injury to the person that is unique from any injury suffered by the public in general. Second, the injury concerns a matter within the regulatory authority found in SDCL 46-2A-9, or SDCL 46-2-9 and 46-2-11. Lastly, the person must file a petition to oppose the application with the chief engineer within ten days of published notice. *See* SDCL 46-2A-4(4). Here, Petitioner fails to satisfy the first two elements.

a. The alleged injury is not unique to the Petitioner but rather a general grievance.

Petitioner appears to contend that the Applicant will be in violation of Petitioner's recently adopted Resolution, which was purportedly adopted to establish uniform requirements for expanding water systems within the District and [to protect] the public health conditions for District residents and domestic water use." See Petition Opposing Application for a Water Right Permit. In its own words,

This application, by nature, runs afoul of District rules put in place to *benefit all District residents*, thus frustrating any public interest purpose and lacking in any beneficial use.

Id. (emphasis added). By Petitioner's own admission, this injury is not unique to them, and it seems that Petitioner is also attempting to assert rights of its residents.

Under SDCL 46-2A-4(4)(a), a person may only participate in the hearing if the person is alleging an injury "that is unique from any injury suffered by the public in general." The South Dakota Supreme Court in analyzing identical terminology held that "[w]hen the threatened injury 'will affect not only the other freeholders besides the plaintiffs, but all the inhabitants of that local district, whether they are freeholders or not[,] the injury is not personal but rather an injury to all citizens and members of the community.'" *Cable v. Union Cnty. Bd. of Cnty. Comm'rs*, 2009 S.D. 59, ¶ 26, 769 N.W.2d 817, 827 (quoting *Wood v. Bangs*, 46 N.W. 586, 588, 1 Dakota 179 (Dakota Terr. 1875)). Accordingly, even if Petitioner can vicariously assert the rights of residents in the Spring Creek Cow Creek area, the alleged threatened injury is about "all District residents" and is not unique, separate, and different in kind to that of the general residents.

The alleged threatened injury here is even further removed than the injury alleged by the petitioner in *In the Matter of McCook Lake Recreation Area Assoc.'s Petition for Declaratory Ruling Regarding Appropriative Permits & Shoreline Alterations*, 2025 S.D. 53, 26 N.W.3d 711.

In that case, the water permit applicant intended to build a canal extending from McCook Lake. *Matter of McCook Lake*, 2025 S.D. 53, ¶ 3, 26 N.W.3d at 714. The petitioner sought a declaration from this Board “that the alteration of a public water body by a private party requires a permit for appropriation of water”, and also challenged the issuance of a water permit. *Id.* ¶ 5. Notably in that case, the petitioner itself had a water permit to pump water directly from the Missouri River into McCook Lake. *Id.* ¶ 3. The petitioner alleged that building the canal would injure the petitioner’s own water permit rights because the new canal would cause extra water loss, leading to the requirement that the petitioner would need to pump more water into McCook Lake. *Id.* ¶¶ 3, 6, and 63.

Here, unlike *McCook Lake* where the petitioner’s alleged injury was unique and related to its own water permit, Petitioner is not alleging that it has a unique injury. Rather, Petitioner argues that the benefit of all residents is being violated. Since the alleged threatened injury is not unique from that of the public and is not related to the Board’s regulatory authority (as addressed below), the Petitioner has no standing.

b. The alleged injury is not within the regulatory authority of the Water Management Board and therefore cannot be considered in the approval of the permit application.

As set forth above, the second requirement for standing is that the alleged injury is within the regulatory authority of the Water Management Board. Petitioner’s allegations fail to satisfy this requirement.

In South Dakota, “all water within the state is the property of the people of the state, but the right to the use of the water may be acquired by appropriated as provided by law.” *See* SDCL 46-1-3. “[T]he people of the state have a paramount interest in the use of all the water of the state and . . . the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection.” SDCL 46-1-1.

The South Dakota Legislature has set forth the Water Management Board's regulatory authority over the public waters. Pursuant to SDCL 46-2-9 and 46-2-11, the Board has authority to (1) "perform all duties and carry out all the functions assigned to it by law and shall have general supervision of the waters of the state, including measurement, appropriation, and distribution thereof"; (2) "exercise any powers, functions, and duties as the Legislature may provide"; and (3) "shall regulate and control 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 established by this title. The board may require reports and other information as it may deem advisable from all claimants or holders of any water permits or right." *See* SDCL 46-2-9; 46-2-11.

The appropriation of the public water is generally administered through the water rights permitting process. SDCL 46-1-15; SDCL chapter 46-2A. The Water Management 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 through 46-1-16; 46-2-11. As to the issuance of water permits, the exclusive factors for the Water Management Board's consideration are clearly delineated in SDCL 46-2A-9. An application may be approved if the following factors are met:

- 1) there is reasonable probability that there is unappropriated water available for the applicant's proposed use;
- 2) the proposed diversion can be developed without unlawful impairment of existing domestic water uses and water rights;
- 3) the proposed use is a beneficial use; and
- 4) it is in the public interest as it pertains to matters of public interest within the regulatory authority of the Water Management Board.

SDCL 46-2A-9; *In re McCook Lake Recreation Area Association*, 2025 SD 53, ¶ 48, 26 N.W.3d 711, 725.

Petitioner here alleges that granting the water permit application would injure the Petitioner because it passed ordinances and a resolution requiring residents to connect to its water system and if the Board were to approve the permit, Utech would violate those ordinances and resolution. However, even if those ordinances and resolutions were valid and applicable (which they are not), that alleged injury falls outside the scope of this Board's authority. Petitioner wishes for this Board to perform powers and duties beyond what is assigned by the Legislature, namely, the power and duty to interpret and enforce ordinances and a resolution of another governmental entity. Yet nowhere in the Board's regulatory framework is it contemplated that the Board must interpret and apply ordinances and resolutions of a separate political subdivision, and decide whether those laws are valid and whether the water permit applicant is abiding by that political subdivision's rules and regulations.

The Board is assigned with regulating and controlling the waters of the state according to the statutory authority provided to it by the Legislature. In regulating the waters of the state, the Legislature required the Board to analyze four factors. In doing so, the Legislature did not give it plenary power to analyze and apply the ordinances or resolutions of sanitary districts. Rather the Legislature bestowed upon the Board the power to approve or disapprove of water permits and the duty to review the water permits through the four factors established in law.

The South Dakota Supreme Court case of *In re Solid Waste Disposal Permit Application by the City of Sioux Falls*, 268 N.W.2d 599 (S.D. 1978) confirms that this Board must reject Petitioner's invitation to exceed the Board's authority granted to it by the Legislature. In that case, Petitioners Lincoln County, the Delapre Township, and the Citizens' Protest Group

opposed an application for a solid waste disposal permit before the South Dakota Board of Environmental Protection. *Id.* at 600. Separate and apart from the solid waste disposal permit procedure, the County and Township sought injunctive relief in a court proceeding relating to the County zoning ordinances. *See Lincoln County v. Johnson*, 257 N.W.2d 453 (S.D. 1977).¹

As to the matter before the Board – the solid waste disposal permit - the petitioners urged the Board to “take a hard look at all the relevant factors concerning the suitability of the site” for the solid waste disposal facility. *See In re Solid Waste Disposal Permit Application by the City of Sioux Falls*, 268 N.W.2d at 601. The Board rejected the petitioners’ position, concluding that its authority was limited by statute and any administrative rules enacted pursuant to the statute. The Supreme Court upheld the Board’s decision, concluding that the Board’s jurisdiction in dealing with the permit applications was “delineated” by the applicable statute and “confined” by that statute. *Id.* at 601. In other words, the Board’s “quasi-judicial authority extend[ed] only to the approval, denial, revocation, or modification of solid waste and disposal permits, based on the suitability of the site with regard to disposal criteria[.]” *See Id.* (quoting *Lincoln County v. Johnson*, 257 N.W.2d at 454).

The case of *In re Prevention of Significant Deterioration (PSD) Air Qualify Permit Application of Hyperion*, 2013 SD 10, 826 N.W.2d 649, likewise supports that a Board’s regulatory authority for the permitting process is limited to the applicable criteria set forth in statute. In *Hyperion*, three groups of petitioners requested that the Board of Minerals and Environment order an environmental impact statement when considering whether to grant an air qualify permit to the applicant. *Hyperion*, 2013 SD 10, ¶ 4, 826 N.W.2d 649, 652. The Board

¹ The petitioners in *In re Solid Waste Disposal Permit Application by the City of Sioux Falls* had argued that the Board should have postponed its decision on the permit application until the separate litigation in circuit court had concluded. In addressing this argument, the South Dakota Supreme Court indicated that “[w]e find no support for or merit in this argument.” *Id.* at 602.

rejected the petitioners' request, determining that an environmental impact statement "is much broader and encompasses many subject matters over which the Board has no jurisdiction." *Id.* ¶

19. The South Dakota Supreme Court affirmed the Board's decision, concluding that:

The Board's jurisdiction was limited to the specific requirements established in the statutes and regulations for issuance of the air quality permit. Thus, the Board correctly recognized that its jurisdiction was limited to the [air quality] permit issues, and the Board had no jurisdiction to regulate the other environmental effects of the proposed facility in this [air quality] proceeding."

Id. (internal citation omitted); see also *In re Solid Waste Disposal Permit Application of Clay County and City of Vermillion*, 295 N.W.2d 328 (S.D. 1980) (acknowledging the controlling authority of *In re Solid waste Disposal Permit, etc.*, 268 N.W.2d 599 (S.D. 1978) when recognizing that the South Dakota Board of Environmental Protection's authority as to waste disposal permits was limited to the criteria established by state law and administrative regulations). Given the foregoing, the Board is without authority to consider Petitioner's alleged injury when determining whether to approve the permit, and the Petitioner lacks standing.

II. Utech's application should be granted because there is no valid opposition and it satisfies the statutory requirements within this Board's authority.

Recognizing that the sole petitioner in this matter has no standing to oppose the issuance of the water permit to Utech and trigger the contested case procedure, Utech's application should become the decision of the Board, and the Chief Engineer shall issue the permit as recommended pursuant to SDCL 46-1-16 and ARSD 74:02:01:12.03. SDCL 46-1-16 provides:

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

The provisions of § 46-1-14 notwithstanding, the board may promulgate rules pursuant to chapter 1-26 to delegate the authority to issue permits to the chief engineer if the applicant does not contest the recommendation of the chief engineer and no person has filed a petition to oppose the application as provided in chapter 46-2A. Upon such delegation, the

recommendation of the chief engineer shall become the decision of the board and the chief engineer shall issue the permit as recommended. However, the chief engineer may schedule an application, even if uncontested, for hearing by the board pursuant to chapter 46-2A upon finding that an application presents important issues of public policy or public interest that should be heard by the board.

Consistent with that statute, ARSD 74:02:01:12.03 was promulgated to authorize the chief engineer to issue uncontested permits:

If no petition in opposition is filed pursuant to §74:02:01:12.04, the chief engineer may issue permits on behalf of the board pursuant to SDCL 46-1-16, 46-2-3.1, 46-2A-23, and 46-5-6.11. A permit may be issued no sooner than 15 days after the publication required by SDCL 46-2A-4. Petitions filed in support of an application will not result in a hearing before the board; however, the petitioner must receive notice if a hearing is held before the board.

Accordingly, Utech's permit should be issued at this time with no further proceeding.

Aside from the above, even if the Board independently analyzes the elements for issuance of the permit, the evidence will show that the permit satisfies the statutory requirements. As set forth above, 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 must approve the permit. *See* SDCL 46-2A-7. While Petitioner attempts to challenge these factors in its Petition, those challenges are deviate from the factors themselves.

First, the evidence will establish that there is a "reasonable probability of unappropriated water" and that "the diversion can be developed without unlawful impairment." The Recommendation of the Acting Chief Engineer and underlying Report to the Chief Engineer

dated December 19, 2025, as well as hearing testimony, will support these determinations.

Petitioner claims that this requirement is not met because there is a pre-existing well for irrigation purposes and this application is simply an attempt to “manipulate” the permit. *See* Petition Opposing Application for a Water Right Permit. However, this argument entirely fails to address this element. Petitioner likewise misses the mark on its “unlawful impairment” argument, contending that the permit would unlawfully impair the Petitioner’s laws (as opposed to impairment of existing domestic water uses and water rights).

Element three 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. Notably, at this stage of the application process, “the only nonspeculative information available to the Board is the intended use of the water.” *See In re McCook Lake Recreation Area Association*, 2025 S.D. 53, ¶¶ 65-66, 26 N.W.3d at 730. Speculation as to “whether an appropriation which begins as a beneficial use will become wasteful at some point in the future” should not be considered in granting a water permit. *See id.* ¶ 64 & ¶ 64 n. 11 (indicating that in briefing, DANR suggested that “if the Board was required to consider the future success of a project prior to issuing a water permit, ‘no water permit would ever be able to be granted.’”).

The evidence presented at the hearing will show that the proposed use of the water is a beneficial use and when considering the regulatory authority of the Board, the permit is in the public's interest. The RV park is a commercial operation, and the commercial use of the water has been recognized as a beneficial use by various authorities. *See, e.g.*, California Codes, Water Code App. § 95-4; Wash. Rev. Code Ann. § 90.14.031 (encompassing the water's use for municipal, recreation industrial water, [and] generation of electric power" within the definition of "[b]eneficial use"). In addition, the permit will benefit the public interest as the water is intended to be used for an RV park in an area known for its recreational activities. The RV park will increase the availability of accommodations and draw people to the area to enjoy all of its offerings. Accordingly, the evidence will show that the third and fourth statutory requirements for the issuance of the water permit are met.

Petitioner contends that the intended use of the water permit for the RV park is not beneficial because the current permit is designed for irrigation. *See* Petition Opposing Application for a Water Right Permit. However, that contention entirely disregards the permit application process itself, in which Utech is seeking to modify the existing permit's use. Finally, Petitioner claims that the water permit is not in the public interest, relying again on its main premise that the application is "an attempt to undermine [Petitioner's] law, [and so] it inherently goes against the public interest." However, as set forth above, the public interest considered by the Board is confined to the Board's regulatory authority. Accordingly, the Petitioner's challenges must fail.

CONCLUSION

Petitioner lacks standing to object to the application under SDCL 46-2A-4(4) because it fails to establish both a unique injury and an injury within the regulatory authority of the Board. Its asserted harm - that benefit to all its residents will be hindered - is, by its own

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characterization, a generalized grievance shared by all residents. Moreover, adjudicating a permit applicant's obligations under a sewer district's local ordinances and resolutions falls outside the Board's permitting regulatory authority, which is limited to evaluating water permit applications under the four factors set forth in SDCL 46-2A-9. Expanding that mandate to include the adjudication of Utech's rights and responsibilities under Petitioner's ordinances and resolutions would unlawfully exceed the authority granted by the Legislature.

For these reasons, Petitioner has no standing to oppose the permit application, and the permit should be granted in accordance with SDCL 46-1-16 and ARSD 74:02:01:12:03. Even if the Board analyzes statutory criteria governing water permit applications, Utech's permit meets all of the requirements and should be issued in accordance with SDCL 46-2A-7.

Dated: April 29, 2026.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: /s/ Stacy R. Hegge

Stacy R. Hegge
Marcus L. Hluchy
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STATE OF SOUTH DAKOTA
 DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES
 WATER MANAGEMENT BOARD

IN THE MATTER OF WATER) PERMIT APPLICATION) NO. 8987-3, VIC UTECH)))	APPLICANT'S WITNESS AND EXHIBIT LISTS
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Applicant Vic Utech, through his counsel Stacy R. Hegge of Gunderson, Palmer, Nelson & Ashmore, LLP, provides the following list of witnesses and exhibits that Applicant intends to offer at the hearing scheduled in the above matter on May 6 and 7, 2026:

	WITNESS NAME	ANTICIPATED TESTIMONY
1.	Adam Mathiowetz, PE, SD DANR – Water Rights Program*	Testimony consistent with Report to the Chief Engineer on Water Permit Application No. 8987-3, Vic Utech, dated December 19, 2025, and Recommendation of Chief Engineer (expert/fact witness)
2.	Victor Utech	Application, as well as beneficial use and public interest relating to the water permit application (fact witness)
3.	Andrew Utech	Application, as well as Beneficial use and public interest relating to the water permit application (may call as a fact witness)

* Applicant reserves the right to amend or supplement this list to the extent permissible, to call and examine any witness delineated by the other parties in this matter, and to call any witnesses made necessary for rebuttal or impeachment purposes. Applicant also specifically reserves the right to call a DANR representative other than Mr. Mathiowetz, including Mark Mayer, in the event that DANR designates an alternative representative.

EXHIBIT	OFFERED	ADMITTED	DENIED	NATURE
101				Water Permit Application No. 8987-3
102				Recommendation of Acting Chief Engineer for Water Permit Application No. 8987-3, Vic Utech, with attached Report to the Chief Engineer
103				Google Map of Spring Creek Cow Creek area
104				SD Game Fish and Parks Map of Spring Creek – Cow Creek - Okobojo

* Applicant reserves the right to supplement this exhibit list, to offer or utilize any exhibit delineated by the other parties, and to offer any exhibit made necessary for impeachment or rebuttal purposes.

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Dated: April 29, 2026.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: /s/ Stacy R. Hegge

Stacy R. Hegge

Attorneys for Applicant

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

IN THE MATTER OF WATER)
PERMIT APPLICATION)
NO. 8987-3, VIC UTECH)

CERTIFICATE OF SERVICE

I hereby certify on April 29, 2026, a true and correct copy of Applicant's Witness and Exhibit Lists, Exhibits 101-104, and Applicant's Prehearing Brief were filed with the following individual via email and by placing a copy in the United States Mail, postage prepaid:

SD DANR- Water Rights Program
Attn: Adam Mathiowetz, Chief Engineer
Joe Foss Building
523 E. Capitol Avenue
Pierre, SD 57501
Adam.mathiowetz@state.sd.us

and served upon the following via U.S. Mail postage prepaid, and email:

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c/o James Moore
PO Box 5027
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Attorneys for Petitioner Spring Creek Cow Sanitary District

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and provided via email to Ron Duvall, DANR Water Rights Program, at Ron.Duvall@state.sd.us

By: Stacy R. Hegge
Stacy R. Hegge