



April 29, 2026

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VIA EMAIL & FEDEX

Adam Mathiowetz, Chief Engineer
DANR - Water Management Board
Joe Foss Building
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Re: In the Matter of Water Permit Application No. 8987-3, Vic Utech

Dear Chief Engineer Mathiowetz:

Enclosed please find Petitioner Spring Creek Cow Creek Sanitary District's Prehearing Brief and Witness and Exhibit List to be filed in the above-referenced matter. I am also providing Exhibits 201 – 225 with this letter and will plan to bring to the hearing on May 6 sufficient copies for all parties participating in the contested case.

Thank you.

Yours very truly,

WOODS, FULLER, SHULTZ & SMITH P.C.

James E. Moore

Enclosures

cc: Emily Greco
Stacy Hegge
Marcus Hluchy
David McVey

governmental subdivision of this state and a public body, corporate and politic.” SDCL § 34A-5-14. Consistent with that public status, the District—through its board of trustees—is empowered “pass and implement all necessary ordinances, resolutions, orders, and regulations for the proper management and conduct of [its] business.” *Id.* § 34A-5-29. Of particular consequence here, the District “may require by ordinance or resolution that all dwellings or structures within the district . . . be connected with the sewers of the district.” *Id.* § 34A-5-35. South Dakota’s state administrative regulations reinforce this principle. They provide that “[n]o person may construct, install, or operate an on-site wastewater system where a public wastewater system is available”—including in circumstances in which either the system or the structure to be serviced “is located within the jurisdictional boundaries of a . . . sanitary district” or in circumstances in which the local “sanitary district requests to provide service to the premises.” ARSD 74:53:01:07.

In 2022, relying on these powers, the District adopted Ordinance 7. This ordinance replaced a prior ordinance of the same general substance. As relevant here, Ordinance 7 requires the owner of any structure that is situated within the District and that abuts a right-of-way to connect the structure to the District’s water main. (Ex. 206, art. IV, § 1.) In a similar vein, the District later adopted Resolution 2024-5. This resolution requires that all premises where water or sanitary-sewer service are “intended to be installed” within the District “be directly connected to the public water and wastewater collection and treatment system of the District.” (Ex. 201, § 1.) Together, the ordinance and the resolution (with the backing of state statutes and regulations) mandate that any structures constructed within District bounds receive water services from the District, rather than by digging a private well or by pursuing service elsewhere.

Vic Utech is in the process of building out an expansive residential and recreational development near the county line for Hughes and Sully Counties. The 217-acre development—dubbed “Codger’s Castaway”—is situated just off a peninsula on Lake Oahe, near the unincorporated community of Cow Creek. (*See* Ex. 221, at 1, 4.) The plans for the project contemplate a mix of residential and recreational uses. As originally proposed, Codger’s Castaway was to consist of 384 lots for residential use and a campground with 250 camper or RV hookups. (Ex. 217, at 1.) The proposed development is located within the District. To meet the increased future water demands posed by the project, the District has invested in improvements to its system. And, notably, it has obtained loans totaling roughly \$5.2 million from the state to fund these improvements. (*See* Ex. 225; *see also* Ex. 202, § 3.1 (authorizing a loan of roughly \$3.6 million); Ex. 203, § 3.1 (\$300,000); Ex. 204, § 3.1 (\$1.2 million); Ex. 205, § 3.1 (\$2.2 million).) These loans were to be repaid using surcharges levied upon all users paid to the District. The surcharges are pledged to repay the loans and are not used for day-to-day operations. To that end, each resolution authorizing the District to seek out funds includes a condition that prevents the District from “permit[ting] any person, firm or corporation to compete with it in the distribution of water for municipal, industrial, and domestic purposes within the . . . District.” (*E.g.*, Ex. 202, § 10.)

In early 2023, Utech petitioned under SDCL § 34A-5-42 to have Codger’s Castaway excluded from the District. (Ex. 210.) The District denied the request on May 10, 2023. (Ex. 209, at 3 (meeting minutes).) Utech then purported to appeal the denial to the circuit court. (Ex. 211, at 1.) After the appeal languished in court for more than a year without action, however, the clerk of courts notified Utech that his appeal would be dismissed unless he submitted a written objection setting forth good cause for the delay in prosecuting the action. (Ex. 212.) *See* SDCL

§ 15-11-11 (providing that a circuit court may dismiss a case for want of prosecution “where the record reflects that there has been no activity for one year, unless good cause is shown to the contrary”); *White Eagle v. City of Fort Pierre*, 647 N.W.2d 716, 720 (S.D. 2002) (recognizing that it is “the plaintiff’s duty to ensure that the case proceeds”). Utech did not object to the dismissal.

Later, Utech submitted for approval by the District incomplete plans for an RV park and a personal residence within the Codger’s Castaway development, each of which contemplated on-site wastewater systems and reflected Utech’s intent to “operate [his] own water distribution system.” On August 13, 2025, the District denied the plans. (Ex. 222.) In support of its decision, the District cited the legal authority requiring that any structures constructed within the District receive their water service from the District, in lieu of operating an independent system. (*Id.* (citing SDCL § 34A-5-29, SDCL § 34A-5-35, ARSD 74:53:01:07, and Resolution 2024-5).)

Having failed to convince the District to disregard its rules and make an exception for Codger’s Castaway (and having failed to successfully appeal the District’s decision to the state court system), Utech has since shifted gears. He now seeks to circumvent the District and obtain what is functionally the same result before this Board. On September 19, 2025, Utech applied to the Board for a water permit. The application, if granted, would amend a preexisting irrigation permit and thereby allow Utech to appropriate and allocate water for Codger’s Castaway from a private well, without connecting the development’s structures to the District’s water system.

The Chief Engineer for the Department of Agriculture and Natural Resources (the “*Department*”) has since recommended that the Board approve Utech’s application for a water permit. In a cover letter, the Chief Engineer concluded, without further elaboration, that

- 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 Board].

(Engineer's Report, Cover Letter.) The support for this opinion is a report submitted alongside the letter. By its terms, however, the report addresses only the technical "availability of unappropriated water and the potential for unlawful impairment of existing domestic water uses and water rights within the Grey Goose aquifer," the aquifer from which Utech's well would draw. (Engineer's Report 5, 13.) Outside the cover letter, the Chief Engineer does not offer any conclusions or substantive analysis concerning whether the proposed use is beneficial or in the public interest. (*Id.* at 13.) The report does not, for example, take a position on whether the Board should consider the fact that Utech's proposed use is contrary to local law. That approach is consistent with the Department's practices to this point. In past correspondence with Utech, the Department has, repeatedly, simply flagged the issue and directed Utech to contact the District "to determine if the installation is allowable under [its] ordinances." (*See* Ex. 207, at 1-2; Ex. 208, at 1.)

For its part, the District petitioned the Board to deny the application. As explained in the District's petition, the permit would allow Utech to "contravene the District's water-use laws" and "impair the District's water services to its residents." (Pet. 2.) For those reasons, it has explained, the application does not satisfy the statutory criteria concerning beneficial use and the public interest on which this Board's decision whether to issue a water permit must be based.

ARGUMENT

The decision whether to approve a water-permit application is vested in the Board. SDCL § 46-2A-7. By statute, the Board may approve a permit only if four criteria are satisfied: (i) there is a "reasonable probability" that unappropriated water is available, (ii) the proposed use

will not unlawfully impair “existing domestic water uses and water rights,” (iii) the proposed use is a “beneficial use,” and (iv) issuance of the permit would be in the public interest. *Id.* § 46-2A-9. In this case, the Department’s Chief Engineer recommended that Utech’s permit be approved and briefly referred to all four criteria. *See id.* § 46-2A-2. However, the engineer’s substantive analysis is limited to the former two criteria. His report does not explain why the proposed use qualifies as a “beneficial use” or why the permit would be in the public interest. Neither of these latter two criteria is satisfied. Accordingly, the permit application should be denied.

a. Utech’s application should be denied because it is inconsistent with the District’s ordinances and resolutions and thus is against the public interest.

First, take the public-interest criterion. A proposed use that is contrary to local law is, by definition, against the public interest. To see why, consider the nature of the “public interest.” The term “public interest” is not “easy to define.” *Matter of Jones*, 26 N.W.3d 567, 578 (S.D. 2025). But, when used in a statute, “the phrase must be given meaning.” *Id.* Generally, when it comes to water rights, the task of determining what the public interest requires is a matter “submitted to [the Board’s] sound discretion.” *Shokal v. Dunn*, 707 P.2d 441, 450 (Idaho 1985); SDCL § 46-2-11; *id.* § 46-2A-7; *see Knight v. Grimes*, 127 N.W.2d 708, 711-14 (S.D. 1964) (recognizing the state’s ability to allocate underground waters via its police powers). But that discretion has limits. For example, in 2021, the legislature amended § 46-2A-9 to clarify that the Board should consider the public interest only “as it pertains to matters of public interest within the regulatory authority of the [Board] as defined by §§ 46-2-9 and 46-2-11.” H.B. 1028, 96th Legis, § 4 (S.D. 2021). The point was to make clear that the Board may consider only water-related impacts on the public interest; it may not make a free-floating inquiry into all things impacting the public.

In another context, perhaps, discerning what is in the “public interest” might be difficult and involve a delicate balancing of competing concerns. Not so here. The South Dakota Supreme Court has observed in many cases and in all manner of settings that “[t]he primary sources for declarations of public policy in South Dakota are the constitution, statutes, and judicial decisions.” *E.g.*, *Two Eagle v. Avel Ecare, LLC*, 17 N.W.3d 242, 249 (S.D. 2025) (internal quotation omitted); *Sturzenbecher v. Sioux County Ranch, LLC*, 20 N.W.3d 419, 428 (S.D. 2025); *Dahl v. Combined Ins. Co.*, 621 N.W.2d 163, 166 (S.D. 2001). While a more searching inquiry might be necessary in circumstances in which a lawgiver has not spoken on what constitutes public policy, where there is existing water law already on point, there is no need to go hunting for the governing public interest. The Board’s task is not to devise its own policy that may or may not be consistent with the lawgiver’s. Instead, as one court has put it, the Board’s job is simply to determine, based on the factual circumstances at hand, “whether granting the permit would be detrimental to the public welfare, as declared in those enactments.” *Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674 (Tex. Ct. Civ. App. 1947); *cf. Parks v. Cooper*, 676 N.W.2d 823, 841 (S.D. 2004) (“[I]t is ultimately up to the Legislature to decide how these waters are to be beneficially used in the public interest.”).

Local ordinances and resolutions, too, are expressions of the public will—albeit on a smaller scale. *See, e.g., ESI/Emp. Sols., LP v. City of Dallas*, No. 19-00570, 2019 WL 5684668, at *5 (E.D. Tex. Oct. 31, 2019) (recognizing that a municipal ordinance, as “a product of deliberation and vote by elected officials at public meetings,” can fairly be said to reflect the “public will” of the municipality’s residents); *R.B. Constr. Co. v. Jackson*, 137 A. 278, 280 (Md. Ct. App. 1927) (observing that a local ordinance presumably reflects “the collective desire and judgment of the people” with respect to its subject matter). Indeed, in this case, it was the state

legislature—exercising its sovereign prerogative to set public policy—that first empowered the District to “pass and implement all necessary ordinances, resolutions, orders, and regulations for the proper management and conduct of [its] business.” SDCL § 34A-5-29. Regulations enacted pursuant to this power are reflections of the public interest. And it follows from that principle that actions that violate sanitary-district ordinances and resolutions are against public policy.

Here, Utech’s proposed use cannot be squared with the District’s ordinances and resolutions. At bottom, his application requests the right to operate a private water and sewer system for Codger’s Castaway, without connecting to the District’s water system. The District’s Ordinance 7, by contrast, requires “[e]very owner” of a “building or other structure[] used for human occupancy, employment, recreation, or for other purposes,” to connect “directly” to the main line. (Ex. 206, art. IV, § 1.) Resolution 2024-5, likewise, requires all premises where water or sanitary-sewer service are “intended to be installed” within the District to “be directly connected to the public water and wastewater collection and treatment system of the District.” (Ex. 201, § 1.) As noted above, District-imposed regulations of this sort are sanctioned by state statute. *See* SDCL § 34A-5-29; *id.* § 34A-5-35. And they are echoed in the state administrative code, which provides that “[n]o person may construct, install, or operate an on-site wastewater system” (i) where either the system or the structure to be serviced “is located within the jurisdictional boundaries of a . . . sanitary district” or (ii) where the applicable “sanitary district requests to provide service to the premises.” ARSD 74:53:01:07. Utech’s proposal flouts each of these sources of public law and instead attempts to go its own way.

While Utech may envision some personal benefit from relying on his own well, the costs of this approach would be pushed onto the District—and, by extension, its residents. To build out its capacity (including the increase in capacity necessitated by Codger’s Castaway), the

District has made substantial investments in its water and wastewater systems. To finance these improvements, it obtained millions in loans from the state. (Ex. 225 (current loan amount); *see* Ex. 202, § 3.1; Ex. 203, § 3.1; Ex. 204, § 3.1; Ex. 205, § 3.1.) The District is required to implement surcharges on all users to repay these loans. But if a major residential and recreational development like Codger's Castaway is permitted to circumvent the local regulations that require it to connect to the District's water main, the District will be stuck both with more capacity than may be needed to service its existing user base and without the user base projected to finance the improvements. The result will be increased costs for the District's existing users, for little to no practical gain. This waste of public and private resources conflicts with the public interest.

In short, Utech has failed to show that issuance of a water permit would be "in the public interest." SDCL § 46-2A-9. To the contrary, the use contemplated by the permit conflicts with the best available source for what qualifies as the public interest: ordinances and resolutions promulgated by the District in accordance pursuant to squarely-on-point state statutory and regulatory authority. Under those circumstances, the Board should deny the permit application.

b. The use contemplated by Utech's application is not a "beneficial use."

The analysis of whether Utech's application contemplates a "beneficial use" largely follows from the analysis of the public interests at stake. "These two factors are intertwined." *Matter of McCook Lake Recreation Area*, 26 N.W.3d 711, 728 (S.D. 2025). "Beneficial use" is defined by statute 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 § 46-1-6(3). The first half of this definition contemplates a broad and evolving standard, which "can be expanded to reflect

changes in society's recognition of the value of new uses of our resources." *In re Water Right Claim No. 1927-2*, 524 N.W.2d 855, 858 (S.D. 1994) (internal quotation omitted). But the latter half simply reincorporates the public-interest standard—which means that if a proposed use would be inconsistent with the public interest, it cannot qualify as a beneficial use. *Id.* at 859. That is the case here: Regardless of whether Utech's proposal meets the first two statutory criteria, it runs counter to the public interest—as reflected in state regulations and the District's rules—and therefore to two of the four statutory criteria.

CONCLUSION

The Board should deny Utech's permit application, the Chief Engineer's recommendation notwithstanding. It is against the public interest to grant a water permit when the use contemplated by that permit runs afoul of valid ordinances and regulations imposed by the local sanitary district. And, because the proposed use runs counter to the public interest, it cannot qualify as a "beneficial use," as that term is defined by statute. At least two of the four essential criteria contemplated by § 46-2A-9 are thus absent, and the permit must be denied.

Dated this 29th day of April, 2026.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 2026, a true and correct copy of Spring Creek Cow Creek Sanitary District's Prehearing Brief was submitted, via email and via FedEx, to the following to be filed in the above-captioned matter:

Adam Mathiowetz, Chief Engineer
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I further certify that on the 29th day of April, 2026, a true and correct copy of Spring Creek Cow Creek Sanitary District's Prehearing Brief was served via email upon the following:

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/s /James E. Moore

*One of the Attorneys for
Spring Creek Cow Creek Sanitary District*

210. Petition for a Resolution of Exclusion
211. Notice of Appeal, Civ. 23-16 (Sully County June 7, 2023)
212. Notice of Intent to Dismiss, Civ. 23-16 (Sully County, April 30, 2025)
213. Site Plan for Campground Development
214. DANR Lagoon Facility Plan (Rev 06-2023)
215. DANR letter dated August 22, 2023, addressing Codger's Castaway
216. DANR letter dated June 6, 2023, addressing Codger's Castaway
217. DANR letter dated October 19, 2022, addressing Codger's Castaway
218. Sanitary District Meeting Minutes dated November 20, 2024
219. Articles of Incorporation for Spring Creek/Cow Creek Sanitary District
220. Lift Station Calculation and Specs for Codger's Castaway
221. Site development plans for Codger's Castaway
222. Sanitary District's letter dated August 13, 2025, denying approval of plans
223. CUP hearing materials
224. Aerial photograph showing water line
225. Sanitary District spreadsheet showing grant/loan information

Petitioner reserves the right to offer any document marked by any party as a hearing exhibit and additional exhibits necessary to rebut evidence presented by any other party in this proceeding or for impeachment purposes. Paper copies of Petitioner's exhibits will be available at the hearing; the exhibits otherwise will be submitted electronically.

Dated this 29th day of April, 2026.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

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