DAVENPORT EVANS

LAWYERS

DAVENPORT, EVANS, HURWITZ & SMITH, LLP

206 WEST 14TH STREET • P.O. BOX 1030 • SIOUX FALLS, SOUTH DAKOTA 57101-1030
T: (605) 336-2880 • F: (605) 335-3639 • WWW.DEHS.COM

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April 29, 2026

CONNOR R. SHAULL
Direct Dial: 605-357-1245
E-mail: cshaull@dehs.com

Adam Mathiowetz, Chief Engineer
DANR - Water Management Board
Joe Foss Building
523 East Capitol Avenue
Pierre, SD 57501

Emily M. Greco
David M. McVey
Assistant Attorney General
1302 East SD Highway 1889, Ste. 1
Pierre, SD 57501-8501

Jacob W. Tiede
Attorney at Law
304 South Splitrock Blvd, Suite 205
Brandon, SD 57005

Paul W. Tschetter
Joseph M. Dylla
Boyce Law Firm, L.L.P.
300 S. Main Avenue
P.O. Box 5015
Sioux Falls, SD 57117-5015

Colleen Haar
13713 336th Avenue
Roscoe, SD 57471

Lynette Kraft
P.O. Box 115
Ipswich, SD 57451

John Schneider
34033 138th Street
Roscoe, SD 57471

Delores Prisbie
P.O. Box 14
Roscoe, SD 57471

Bryce Rohrbach
33136 141st Street
Roscoe, SD 57471

Neil Haar
33136 141st Street
Roscoe, SD 57471

Duane Haar
13713 336th Avenue
Roscoe, SD 57471

Jaydon Allen
12174 Highway 25
Eden, SD 57232

Steve Hellwig
1111 South Stainless
Street
Aberdeen, SD 57401

Rick Rohrbach
33126 141st Street
Roscoe, SD 57471

Justin Baer
14725 342nd Avenue
Onaka, SD 57466

Re: In the Matter of Water Permit Application No. 8991-3, Century Swine RE, LLC

To Whom It May Concern:

Enclosed and intended as service upon you are the Pre-Hearing Submissions of Petitioners, Larry Heinz, Cindy Heinz, Garett Heinz, and Amanda Abarca, in the above-referenced matter.

Sincerely,

CONNOR R. SHAULL
For the Firm

Enclosures

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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. 8991-3, CENTURY SWINE RE, LLC	**PETITIONERS' PRE-HEARING SUBMISSIONS (HEINZS AND ABARCA)**

Petitioners, Larry Heinz, Cindy Heinz, Garett Heinz, and Amanda Abarca (collectively, "Petitioners"), by and through their counsel of record, submit the following:

1. **Fact Witnesses**: Petitioners intend to call the following during the hearing in this matter:

    a. Garett Heinz
    b. Larry Heinz
    c. Cindy Heinz
    d. Amanda Abarca
    e. Any records custodian or other similar witness to lay foundation for exhibits
    f. Any other witness to impeach the testimony from or credibility of any witness
    g. Any witness for rebuttal purpose
    h. Any witness identified by any other party in the above-referenced matter.

2. **Exhibits**: Petitioners intend to introduce Exhibits 201 through 204, which are attached hereto and described in the list on the following page. Petitioners reserve the right to introduce any document or exhibit that is publicly available as part of the contested case file or any other document or exhibit identified by any other party.

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Exhibit No.	Description
201	Letter, filed April 12, 2012, in *In the Matter of Water Permit Application No. 7239-3, by Hanson County Dairy v. Robert Bender*, Case No. 30CIV11-000054
202	Order, filed May 10, 2012, in *In the Matter of Water Permit Application No. 7239-3, by Hanson County Dairy v. Robert Bender*, Case No. 30CIV11-000054
203	Edmunds County Map
204	Declaration of Thiele R. Dunaway

Dated at Sioux Falls, South Dakota, this 29th day of April, 2026.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

/s/ Connor R. Shaull
Connor R. Shaull
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
cshaull@dehs.com

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of April 2026, a true and correct copy of the foregoing documents were served via First Class Mail upon the following:

Adam Mathiowetz, Chief Engineer
DANR - Water Management Board
Joe Foss Building
523 East Capitol Avenue
Pierre, SD 57501

Emily M. Greco
David M. McVey
Assistant Attorney General
1302 East SD Highway 1889, Ste. 1
Pierre, SD 57501-8501

Jacob W. Tiede
Attorney at Law
304 South Splitrock Blvd, Suite 205
Brandon, SD 57005

Paul W. Tschetter
Joseph M. Dylla
Boyce Law Firm, L.L.P.
300 S. Main Avenue
P.O. Box 5015
Sioux Falls, SD 57117-5015

Colleen Haar
13713 336th Avenue
Roscoe, SD 57471

Lynette Kraft
P.O. Box 115
Ipswich, SD 57451

John Schneider
34033 138th Street
Roscoe, SD 57471

Delores Prisbie
P.O. Box 14
Roscoe, SD 57471

Bryce Rohrbach
33136 141st Street
Roscoe, SD 57471

Neil Haar
33136 141st Street
Roscoe, SD 57471

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Jaydon Allen
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33126 141st Street
Roscoe, SD 57471

Justin Baer
14725 342nd Avenue
Onaka, SD 57466

/s/ Connor R. Shaull
Connor R. Shaull

EXHIBIT
201

-First Judicial Circuit Court-

Sean M. O'Brien
Circuit Court Judge
200 E. 4th Avenue
Mitchell, SD 57301
Phone: (605) 995-8243
Fax: (605) 995-8107
E-mail: Sean.OBrien@ujs.state.sd.us

Kristin Woodall
Official Court Reporter
200 E. 4th Avenue
Mitchell, SD 57301
Phone: (605) 995-8102
Fax: (605) 995-8107
E-mail: Kristin.Woodall@ujs.state.sd.us

Circuit Administrator
Kim L. Allison
Chief Court Services Officer
Charles R. Frieberg
Circuit Assistant
Joan Novak

Presiding Judge
Steven R. Jensen
Circuit Judges
Glen W. Eng
Bruce V. Anderson
Timothy W. Bjorkman
Sean M. O'Brien
Cheryle W. Gering
Magistrate Judges
Patrick W. Kiner
Tami A. Bern

April 11, 2012

FILED
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Ramona Schroeder
Hanson County Clerk of Courts
First Judicial Circuit Court of SD

R. Shawn Tornow
Tornow Law Office, P.C.
P.O. Box 90748
Sioux Falls, SD 57109-0748
Attorney for Appellants/Intervenors Robert Bender and Stace Nelson

Eric R. Kerkvliet
Lynn, Jackson, Shultz & Lebrun
P.O. Box 2700
Sioux Falls, SD 57101
Attorney for Appellee/Applicant Hanson County Dairy

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Diane Best
Assistant Attorney General
317 North Main Avenue
Sioux Falls, SD 57104
Attorney for Appellee/Department of Environment and Natural Resources

Re: In the Matter of Water Permit Application No. 7239-3, by Hanson County Dairy, Appellee/Applicant v. Robert Bender and Stace Nelson, Appellants/Intervenors

Dear Counsel,

The court has under advisement in the above-entitled matter an appeal from the Water Management Board's (WMB) decision granting Hanson County Dairy (HCD) a water permit for use in a dairy facility to be constructed in Hanson County, South Dakota. Robert Bender and Stace Nelson (Intervenors) intervened in the permit application process and have filed this appeal. The court held oral arguments on March 23, 2012, at the Hanson County Courthouse, in Alexandria, South Dakota. Having considered the evidence, the parties' briefs, and the arguments of counsel, the court now issues its decision.

I. STANDARD OF REVIEW

"The standard of review of an agency's decision is governed by SDCL § 1-26-36 and ordinarily requires de novo review of questions of law and clearly erroneous review of findings of fact." *Horn v. Dakota Pork*, 2006 SD 5, ¶ 12, 709 N.W.2d 38, 41 (citing *Brown v. Douglas School Dist.*, 2002 SD 92, ¶ 9, 650 N.W.2d 264, 267). "Mixed questions of law are also fully reviewable." *Kuhle v. Lecy Chiropractic*, 2006 SD 16, ¶ 16, 711 N.W.2d 244, 247 (citing *Enger v. FMC*, 1997 SD 70, ¶ 10, 565 N.W.2d 79, 83).

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II. BACKGROUND

On March 8, 2011, HCD applied for a commercial water permit. The application sought a permit to pump 500 gallons of water per minute (GPM), or 1.11 cubic feet per second (CFS) from three wells located in the James River basin, more specifically the Floyd East James Aquifer. The location of point of diversion is in Hanson County, South Dakota, SW ¼ Section 34, T104N, R58W. The project is described as "7,000 cow dairy."

On April 4, 2011, Hayes Haas, Natural Resources Engineer, submitted his Report on Water Permit Application No. 7239-3. His conclusions were as follows:

1. Water is available from the Floyd East James aquifer.
2. The aquifer is under confined conditions at this location. Drawdown will result from pumping. Interference is not expected to be a problem.
3. These wells must be constructed in accordance with SD Well Construction Standards.
4. Plans and specifications for this facility have not been received (as of 4/6/2011) and must be approved by the Department [of Environment and Natural Resources].

On April 7, 2011, Garland Eberle, Chief Engineer, recommended approval of HCD's water permit. He cited four reasons for this conclusion:

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 rights;
3. The proposed use is a beneficial use; and
4. It is in the public interest with the following qualifications:

    1. The wells approved under this Permit will be located near domestic wells and other wells which may obtain water from the same aquifer. The well owner under this Permit shall control his withdrawals so there is not a reduction of needed water supplies in adequate domestic wells or in adequate wells having prior water rights.
    2. The wells authorized by Permit No. 7239[1] shall be constructed by a licensed well driller and construction of the well and installation of the pump shall comply with Water Management Board Well Construction Rules, Chapter 74:02:04 with the well casing pressure grouted (bottom to top) pursuant to Section 74:02:04:28.
    3. Permit No. 7239-3 is subject to compliance with requirements of the Department's Water Pollution Control Permit issued pursuant to SDCL §34A-2-36 or 34A-2-112 for concentrated animal feeding operations.
    4. Permit No. 7239-3 is subject to compliance with all existing and applicable Water management Board Rules including but not limited to:

        a) Chapter 74:54:01 Ground Water Quality Standards;
        b) Chapter 74:54:02 Ground Water Discharge Permit;
        c) Chapter 74:51:01 Surface Water Quality Standards;
        d) Chapter 74:51:02 Uses Assigned to Lakes;
        e) Chapter 74:51:03 Uses Assigned to Streams; and

[1] This number is incorrect. All of the other references in this and other records used the correct permit number 7239-3. Appellants' argument that this error resulted in them not receiving adequate notice is without merit.

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f) Chapter 74:52:01 through 74:52:11 Surface Water Discharge Provisions
5. Hanson County Dairy shall report to the Chief Engineer annually the amount of water withdrawn from the Missouri: Elk Point Aquifer.[2] See report on application for additional information.

Also on April 7, 2011, Eric Gronlund, Natural Resources Engineer, sent a letter to HCD CEO Michael Crinion. The letter indicated the water permit was "examined and found to comply with the South Dakota Water Laws and applicable rules." The letter also stated that a notice had been sent to the Alexandria Review.[3] Gronlund explained to Crinion that Crinion would need to contact the newspaper and authorize publication of the notice.

In a letter dated May 1, 2011, Robert Bender sent a letter to the WMB indicating he was intervening against HCD's application. He stated that he has two wells on his property. In a letter dated May 9, 2011, Chief Engineer Erbele sent a notice of hearing concerning Bender's petition opposing approval to Crinion and Bender. The notice indicated the specifics of the hearing on water permit No. 7239-3. The notice briefly described the applicant's planned use, when and where the WMB will hold a hearing, the Chief Engineer's recommendation details, a statement that the "hearing may be an adversarial hearing," and enclosed a copy of the report, recommendation, affidavit of publication and petition.

On May 9, 2011, Stace Nelson wrote Gronlund, "as a potential affected property owner opposed to the granting of the above cited permit." He stated that he has one well on his property. In a letter dated May 17, 2011, Bender asked for an extension to the proposed June 1, 2011 hearing date. On May 19, 2011, Erbele sent a letter to Nelson, indicating the hearing date was moved to July 13, 2011. The letter also advised Nelson that he was not timely in filing his opposition, and that the WMB would consider his untimely filing prior to the start of the hearing. In the second paragraph of the May 19, 2011 letter, Erbele states, "Attached is the notice to the applicant and Mr. Bender scheduling a June 1st hearing."

In a May 23, 2011 letter to Crinion, Nelson, and Bender, the WMB indicated the hearing was now scheduled for July 13, 2011. "NOTICE" is indicated in bold print at the top of the letter. At the July 13, 2011 hearing, several people were present, including: the seven WMB members, counsel for the WMB, Assistant Attorney General Best, Attorney Kerkvliet, along with Nelson and Bender. Witnesses who testified were: Eric Gronlund, Hayes Haas, Garland Erbele, Michael Crinion, Walt Bones, Robert Bender, and Stace Nelson. At the conclusion of the hearing, a board member made a motion to approve the permit application in accordance with the recommendations of the Chief Engineer, and the correction of the aquifer. Another board member seconded the motion. Some discussion followed. The motion to approve the permit was unanimously passed by the board. July 13, 2011 hearing transcript, P 175, L 18. On July 19, 2011, the WMB sent a letter to Eric Kerkvliet, Bender, and Nelson indicating that Kerkvliet was responsible for preparing Findings of Fact, Conclusions of Law, and the Final Decision.

On September 14, 2011, Bender and Nelson [Intervenors] made a motion to the Department of Environment and Natural Resources (DENR) and WMB for rehearing and reconsideration. Their reasons for such a motion were that the notices in the Alexandria

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[2] This name is incorrect. The correct aquifer is the Floyd East James aquifer. Mr. Erbele corrected this at the July 13, 2011 hearing. TR 58:2-6.
[3] The name of the newspaper is the "Alexandria Herald," not the "Alexandria Review."

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Herald were untimely, did not comply with SDCL §46-2A-4, wrongfully referenced an erroneous recommendation by the Chief Engineer, were legally insufficient because they were not published in one official newspaper in each county where the water will be diverted or used or project works will be located, and testimony received by the WMB was improper and prejudicial pursuant to a conflict of interest or lack of foundation or assumed facts not in evidence. On this same day, HCD submitted its Proposed Findings of Fact and Conclusions of Law.

On September 21, 2011, the WMB sent a letter to all parties indicating that it would consider the motion for rehearing and reconsideration at its October 5, 2011 meeting. The DENR and Intervenors each made responses to the proposed Findings of Fact and Conclusions of Law. Rodney Freeman, Chairman of the WMB signed the final Findings of Fact, Conclusions of Law, and Final Decision on October 5, 2011. On the same day, the WMB issued its rulings on the various objections and responses to the proposed Findings of Fact and Conclusions of Law. Notice of the adopted Ruling and Final Decision was sent to all parties in a letter dated October 7, 2011. On October 14, 2011, Intervenors filed their Notice of Appeal, and Application for Stay of Water Management Board Decision and Notice of Hearing. This court denied the Application for Stay on December 2, 2011.

Intervenors filed a brief in this appeal on December 16, 2011. The issues identified within that brief for this court to review are as follows:

1. Whether the notices given to Appellants and/or published in the newspaper complied with state statutes;
2. Whether the requirements of SDCL 46-6-3.1 were met;
3. Whether it was a conflict of interest for the Secretary of Agriculture to testify in favor of the application at the hearing before the Water Management Board.

III. DECISION

1. Notices

Before deciding Appellants' first issue, the court must determine what standard to apply in deciding whether the appellees complied with the various statutory notices. Appellants argue that the appellees must strictly comply with the various notice provisions. Appellants cite *Hein v. Marts*, 295 N.W.2d 167 (S.D. 1980), for this assertion. *Hein* also involved a water permit. In October, 1976, Thomas Marts applied for a permit to build a dugout and pump water on his land. After notice was published in the local paper for two successive weeks, a hearing was held in Huron, South Dakota. Walter Hein appeared at the hearing, and objected to the issuance of the permit. Hein asserted that his water source, a spring-fed stream, would be depleted if Marts were granted the permit. A rehearing was held in Brookings, South Dakota on July 28, 1977. Marts was subsequently granted the permit. Hein was not sent notice of the final decision to grant the permit. Marts began constructing the dugout in accordance with the permit. After Hein observed this construction, he hired attorney Rick Johnson of Gregory, South Dakota to challenge the permit. Attorney Johnson contacted the Water Rights Commission, and was sent a letter indicating that Marts had been granted the permit. Attorney Johnson provided the Heins a copy of this letter. The Heins sued in July of 1978 for injunctive and prohibitive relief alleging the permit to be invalid for lack of notice of the final decision. Marts and the Department of Natural Resources Development [DNRD] (now known as the Department of Environment and Natural

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Resources) argued that the letter to attorney Johnson constituted notice of the final decision. SDCL § 1-26-25 required notice of any final decision or order to be made "either personally or by mail[.]" The Supreme Court of South Dakota disagreed with Marts and the DNRD that the letter to Attorney Johnson satisfied the statutory requirement for the method of notice. The court explained, "As a general rule, where a *method* of giving notice is prescribed by statute, there must be strict compliance with the prescribed method in form of notice." 295 N.W.2d at 170 (citing *Smith v. D.R.G., Inc.*, 29 Ill.App.3d 406, 331 N.E.2d 614 (1975)[4]; *Cowl v. Wentz*, 107 N.W.2d 697 (N.D. 1961); *In re Sioux City Stockyards Co.*, 222 Iowa 323, 268 N.W. 18 (1936)) (emphasis added). "Moreover these cases emphasize that there must be strict compliance with notice provisions where the notice affects property rights or where it is to form the basis for a suit." *Hein*, 295 N.W.2d at 170.

It is this court's position that *Hein* dealt with the issue of the proper statutory method of providing notice, such as personal service or service via mail. *Hein* did not address the issue of compliance with the contents of specific provisions of a notice statute, such as the Appellants assert in this case. Hein was not given notice, personally or via mail, of the final decision to grant Marts a permit. The Court's general rule, as stated above, involves strictly complying with the method of notice. In this case, Appellants' objections, pertaining to the various notices, deal mostly with the content of the notices. However, Appellants have an issue with the method of the notice provided to Appellant Nelson regarding the WMB hearing. This issue will be addressed on pages 8 and 9.

The DENR argues that the statutes "need not parrot the statutory language," and in the alternative that DENR substantially complied with the statutes. For this alternative argument, DENR cites *Gridley v. Engelhart*, 322 N.W.2d 3 (S.D. 1982). *Gridley* involved the state soliciting bids for insurance contracts. The notice required for the bid process was defined by statute. The appellant in *Gridley* argued that the state did not comply with the statutory language, which stated, "blank schedules and specifications in detail for bids may be obtained from the bureau of administration." 322 N.W.2d at 6. The appellant, and many other insurance agents, however, were able to obtain copies of the bid proposals and specifications. *Id.* The state Supreme Court also pointed to a statement in the notice that was in bold capital letters, ""THE DIRECTOR OF PURCHASING & PRINTING WILL OPEN IN HIS OFFICE AT PIERRE, SOUTH DAKOTA BIDS ON THE FOLLOWING . . . ." *Id.* The Court explained its holding on the notice issue as follows:

> This information, while not in strict compliance with the statutory language, would put prospective bidders on notice as to where they might obtain additional desired data. There is no showing in this record that anyone, including the appellant, was in any manner restricted or prevented from submitting a bid on these contracts. While there may have been a technical defect in the publication of notice, such deficiency, under the facts of this case, will not invalidate the execution of any subsequent contract. The intent of the legislature in requiring such notice was to give all interested persons an adequate opportunity to obtain the necessary information and allow them to submit a bid. The appellees, while strictly not in compliance with the statute, did carry out the intent of the legislature, and substantially complied with the statute. A technical defect in a notice of advertisement will not serve to invalidate a contract where there has been substantial compliance with such

[4] This citation is incorrect. The correct citation for the intermediate appellate court's ruling in *Smith v. D.R.G., Inc.* is 30 Ill.App.3d 162, 331 N.E.2d 614 (1975). Subsequently, the Illinois Supreme Court reversed that court's decision, and can be found at 63 Ill.2d 31, 344 N.E.2d 468 (1976).

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> statute. *Cf. Blood v. Spring Creek Number 12, Common School Dist.*, 78 S.D. 580, 105 N.W.2d 545 (1960). *See also Bud Johnson Const. Co. v. Metro. Tran. Com'n*, 272 N.W.2d 31 (Minn.1978); *Nielsen v. City of Saint Paul*, 252 Minn. 12, 88 N.W.2d 853 (1958); *Royal v. City of Des Moines*, 195 Iowa 23, 191 N.W. 377 (1923); 64 Am.Jur.2d *Public Works and Contracts* §§ 17, 50 (1972); 10 McQuillin, *Municipal Corporations* § 29.65 (3d ed. 1981).

Gridley, 322 N.W.2d at 6.

In its brief, appellee HCD adopts the arguments of the DENR in regard to the notice issues. In the alternative, HCD argues that if there was deficient notice, any error is harmless error. HCD argues that each of the Appellants received actual notice of the permit application, and subsequent hearings. Moreover, HCD argues that if the notices were provided to the satisfaction of the Appellants, the result would not have been any different.

For purposes of analyzing whether the Appellees complied with the various statutory notice requirements, the court finds the *Gridley* case persuasive and relies on this decision in adopting a substantial compliance standard. Whether the appellees substantially complied with the various statutory requirements will be determined in more detail below.

Appellants have pointed out several instances where they believe the notices were deficient, and the court will determine whether the appellees substantially complied in each of those areas. The court is mindful that the language of certain statutory provisions leaves open for interpretation the precise wording that may be used in the actual notices. However, certain provisions of the various statutory notices, in the court's view, leave no room for interpretation. Appellees have not provided any legal authority to support their argument that the Chief Engineer is granted discretion when providing the various statutorily required notices. Failure to follow a specific provision verbatim, however, does not always result in voiding the entire notice. The court agrees that the *method* of providing notice must be strictly complied with, as articulated by *Hein v. Marts*.

The first notice issue involves the newspaper notice required by SDCL § 46-2A-4.[5] That statute relates to SDCL § 46-2A-23,[6] which involves notice to determine opposition to an application or recommendation of the chief engineer. SDCL § 46-2A-23 requires the publication notice to contain subsections (1), (2), (3), (5), (6), and (10) of SDCL § 46-2A-4.

Appellants assert that this notice should have been published in Hanson, Sanborn, Miner, Kingsbury, and Beadle counties. SDCL § 42-2A-4 requires that "the applicant shall publish notice of the application and recommendation at least once a week for two successive weeks in one official newspaper in each county where the water will be diverted or used or project works will be located." There are two official newspapers in Hanson County, the Alexandria Herald and the Emery Enterprise. The water will be diverted in Hanson County, used in Hanson County, and all of the project works will be located in Hanson County. The court finds that the notice required by SDCL §§ 46-2A-4 and 46-2A-23 was published in the proper newspaper for the proper period of time, and that the Findings of Fact on this issue are not clearly erroneous.

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[5] As a reference, SDCL § 46-2A-4 is copied at the end of the court's decision.
[6] As a reference, SDCL § 46-2A-23 is copied at the end of the court's decision.

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Additionally, Appellants assert that subsections (10) and (6) were not complied with. The newspaper notice stated in pertinent part:

> In accordance with SDCL 46-2A-23, the Chief Engineer will act on this application, as recommended, unless a petition is filed opposing the application or the applicant files a petition contesting the Chief Engineer's recommendation. If a petition opposing the application or contesting the recommendation is filed, then a hearing will be scheduled and the Water Management Board will consider this application.

Appellants argue that "there was no clear indication to Appellants or the public at large that if no petitions were received from either Appellants or other persons similarly situated in, around or within the aquifer related to the proposed Hanson County Dairy location that 'no hearing may be held before the board.'" *Appellants Brief*, page 11. By reading the above-quoted portion of the newspaper notice, the court finds that the newspaper notice meets the requirement of SDCL § 46-2A-4(10). The notice begins by stating that the Chief Engineer will act on his recommendation unless a petition in opposition is filed. The notice indicates that if a petition opposing the application or contesting the recommendation is filed, then a hearing will be held. The court finds Appellants' argument regarding subsection (10) to be without merit.

As to subsection (6), Appellants argue that the notice is deficient because it does not indicate where copies of the Chief Engineer's recommendation can be obtained. Additionally, Appellants submit that the "notice deficiency should be deemed to have been compounded in its error" because the Chief Engineer's recommendation referred to the incorrect aquifer, the Missouri: Elk Point Aquifer instead of the Floyd East James Aquifer, and the incorrect permit number, no. 7239 instead of no. 7239-3. *Appellants Brief*, footnote 4. The Chief Engineer corrected these two errors at the July 13, 2011 hearing before the WMB. As to where copies of the Chief Engineer's recommendation can be obtained, the newspaper notice provided, "Contact Eric Gronlund at the above Water Rights Program address to request copies of information pertaining to this application." The Water Rights Program's phone number was also included in the notice. SDCL § 46-2A-4(6) requires, "A statement telling where copies of the recommendation, application, or other information may be obtained." While the statute is clear that the notice shall include a statement telling where copies of the recommendation, application, or other information may be obtained, and the DENR did not include the words "recommendation" and "application" within the notice, the court finds that the notice substantially complied with the intent of SDCL 46-2A-4(6). Moreover, the May 9, 2011 notice indicates that copies of the report, recommendation, affidavit of publication, and petition were enclosed.

The next notice issue involves notice of the contested hearing before the WMB, as required by SDCL § 1-26-17.[7] SDCL § 46-2A-23 states in part, "If a petition to contest the recommendation or to oppose the application is timely filed, the chief engineer shall provide notice of a board hearing pursuant to § 1-26-17." The contested hearing notice was sent to Michael Crinion of HCD and Robert Bender on May 9, 2011. Stace Nelson had not intervened as of this date. Appellants argue that SDCL §§ 1-26-17(6) and (7) were not complied with. Subsection (6) requires a statement that the hearing "is an adversary proceeding[.]" The notice letter indicated, "This hearing may be an adversarial proceeding. Any party of record and/or the applicant have the right to be represented by a lawyer and may present evidence or cross-examine witnesses according to SDCL 1-26." Appellants argue

[7] As a reference, SDCL § 1-26-17 is copied at the end of the court's decision.

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that the WMB's use of the phrase "may be an adversarial proceeding" was "significantly misleading to them as lay persons," and the error was "magnified given the fact that this contested case hearing, unfortunately, escalated into an extremely adversarial proceeding on July 13, 2011." Appellees argue that the notice was sufficient because the WMB is not sure, at the time the notice was given, whether the hearing will be a hotly contested adversarial hearing, in layman's terms.

The court disagrees with Appellees' assertion that this provision refers to an adversarial hearing in the sense of hostility, or disagreement. The DENR's argument that it re-phrases the statutory requirement set out in subsection (6) because it doesn't know if the meeting will become adversarial is incongruent with the meaning of the statute. The statute refers to "an adversary hearing," not an "adversarial hearing." The court interprets the statute's phrase to mean that the hearing will be one of opponents, with individuals advocating on both sides of the issue, witnesses, and the right to cross-examine those witnesses. Whether the meeting will become hostile or adversarial, is yet to be determined as of the time for noticing the hearing, and is not contemplated by the statute. The court finds, however, that the phrase used in the notice was not significantly misleading, as Appellants suggest. Appellants were notified, pursuant to SDCL § 1-26-17 that they were entitled to have an attorney represent them, and that their due process rights may be forfeited if not exercised at the hearing. The notice substantially complied with the intent of the statute.

Appellants also argue that SDCL § 1-26-17(7) was not complied with when the Chief Engineer made a discretionary determination that this hearing did not involve the termination of any property rights that may have allowed Appellants to utilize the Office of Hearing Examiners. The Chief Engineer made the following determination at the conclusion of his notice letter:

> NOTE: Since this matter does not involve a monetary controversy in excess of $2,500.00 or termination of a property right in accordance with SDCL 1-26-18.3, the Chief Engineer has determined this contested case need not be referred to the Office of Hearing Examiners. If any party disagrees with this determination, the Chief Engineer shall be notified by May 23, 2011.

Appellants argue that they were "arbitrarily and wrongly foreclosed of the prospect of seeking to elect to utilize the Office of Hearing Examiners since they were not fully and specifically apprised of such right as further required by the statutorily mandated provisions of SDCL § 1-26-17(7)." Appellants did not notify the Chief Engineer that they disagreed with this note. It is this court's position that the hearing did not involve a monetary controversy in excess of $2,500.00, nor did it involve termination of a property right. While Appellants may believe their water wells will be depleted, the court finds that the hearing that ultimately resulted in the granting of HCD's water permit did not involve the termination of a property right. The notice substantially complied with the intent of the statute.

As referenced on page 5, Appellant Nelson was not an Intervenor of record until the July 13, 2011 hearing. The board considered his petition and allowed him to intervene even though his petition was received after the deadline. On May 14, 2011 Nelson notified the DENR that he wished to intervene in the permit process. On May 19, 2011, he was notified by the DENR that it would consider his petition to intervene at the July 13, 2011 hearing. In the May 19, 2011 letter, the DENR states, "Attached is the notice to the applicant and Bender scheduling a June 1st hearing." This court can only assume that this notice was attached to Nelson's letter because the May 19, 2011 letter is Bates Stamped WMB22 but the record file from the WMB does not include the May 9, 2011 notice that was sent to Bender. *See* WMB

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22 and 23. It is also unclear if the May 19, 2011 notice letter also included the enclosures indicated in the May 9, 2011 notice letter, such as the report, recommendation, affidavit of publication, and petition. DENR attorney Diane Best indicated at the March 23, 2012 oral arguments that the WMB simply did not include the May 9, 2011 letter because it was already contained within the record file a few pages prior to the May 19, 2011 letter. Again, the WMB falls short of precisely following the statutory requirements. The court finds that Appellant Nelson was adequately notified of the July 13, 2011 hearing, and provided the same timely notice of the hearing as Bender. As such, the various findings of fact that relate to Nelson's late intervention and untimely petition are not clearly erroneous. *See* Findings of Fact 11-14.

The court cautions the DENR from straying too far from modifying the statutory language required in the various notice statutes. The court agrees that the DENR is not required to parrot all of the statutory language. Yet, some provisions by their very language do not leave room for interpretation. The court is not going to reverse these proceedings on the notice issues Appellants have asserted, even though the DENR made several mistakes in the various notices. The court finds that the DENR substantially complied with the intent of the various statutorily required notices, and that the Findings of Fact on this issue are not clearly erroneous.

2. SDCL § 46-6-3.1[8]

The second issue that the appellants raise in this appeal relates to the first criterion of SDCL § 46-2A-9. A permit may be issued for appropriating water only if the following four criteria are met: "there is reasonable probability that there is unappropriated water available for the applicant's proposed use, that the proposed diversion can be developed without unlawful impairment of existing rights and that the proposed use is a beneficial use and in the public interest." SDCL § 46-2A-9. For the purposes of that requirement, the DENR must determine, pursuant to SDCL § 46-6-3.1, if it is probable that the quantity of water withdrawn annually from the groundwater source (that HCD will draw water from) will exceed the quantity of the average estimated annual recharge of water to the groundwater source. Two Findings of Fact address this issue: Finding of Fact 33, which states, "Average annual recharge to the Floyd East James aquifer has not been quantified for the aquifer," and Finding of Fact 37, which states, "The Chief Engineer reviewed the best information reasonably available to determine whether the proposed use would exceed the annual recharge rate of the Floyd East James aquifer, pursuant to SDCL § 46-6-3.1." Moreover, Conclusions of Law 16 through 22 pertain to this issue as well:

> 16. Consideration of water availability also includes consideration of the criteria in SDCL § 46-6-3.1 pertaining to recharge/withdrawal: whether "according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from a groundwater source will exceed

[8] SDCL 46-6-3.1 states,

> No application to appropriate groundwater may be approved if, according to the best information reasonably available, it is probable that the quantity of water withdrawn annually from a groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source. An application may be approved, however, for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the greenhorn formation in excess of the average estimated annual recharge for use by water distribution systems.

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the quantity of the average annual recharge of water to the groundwater source." *SDCL § 46-6-3.1.*

17. Although there is an exception to the recharge/withdrawal consideration in SDCL § 46-6-3.1, it applies only to applications filed by water distributions systems and is not applicable here.

18. The DENR and the Chief Engineer have considered the best information reasonably available, and it is not probable that the quantity of water withdrawn annually from the Floyd East James aquifer will exceed the quantity of the average annual recharge of water to said aquifer.

19. Annual recharge to the Floyd East James aquifer has not been and is not likely to be quantified in the near future. The Floyd East James aquifer is a confined aquifer. The criteria of SDCL § 46-6-3.1 can be fulfilled by analysis of the observation well data and irrigation pumping records.

20. Water levels for these two observation wells show good response to climatic conditions, i.e., rising water levels during wet years (recharge) and gradually declining water levels during dry years due to natural discharge and pumping. The water level record of these two observation wells indicate that the Floyd East James aquifer is capable of sustaining additional withdrawals.

21. In general, the hydrographs of the two observation wells show that, over the period of record, withdrawals have not exceeded recharge of the Floyd East James aquifer.

22. Given the foregoing Findings of Fact and Conclusions of Law, the Board concludes that there is sufficient water available for the proposed water use.

Appellants argue that since the average estimated annual recharge of water to the aquifer was never calculated, "WMB was lacking in sufficient factual evidence from which to make the required findings under the statutory criteria as required under SDCL § 46-6-3.1." *Appellants Brief*, page 17. Appellants cite *In the Matter of Permit No. 4300-3*, 295 N.W.2d 743 (S.D. 1980), which is the only Supreme Court of South Dakota case that has reviewed SDCL § 46-6-3.1. The recharge of the aquifer in that case was also unknown. *Id.* at 746. The Court explained, "SDCL 46-6-3.1 precludes the Board from allowing the quantity of water withdrawn annually from a ground water source to exceed the quantity of the 'average estimated annual recharge of water to the ground water.'" *Id.* The Court, however, determined that the exception contained in SDCL § 46-6-3.1 was applicable. The exception states, "An application may be approved, however, for withdrawals of groundwater from any groundwater formation older than or stratigraphically lower than the greenhorn formation in excess of the average estimated annual recharge for use by water distribution systems." SDCL § 46-6-3.1. All parties seem to agree that the exception contained in SDCL § 46-6-3.1 does not apply because HCD is not a water distribution system as defined by SDCL § 46-1-6(17).[9] The Court concluded its discussion of this issue by explaining, "We therefore concur with the trial court's conclusion that the Board need not have made a determination regarding the rate of annual recharge because SDCL 46-6-3.1 vests the Commission with authority to

[9] SDCL §46-1-6(17) states,

> "Water distribution system," a system of piping, valves, storage tanks, pumps, and appurtenances by which water is conveyed for domestic or municipal use by a common distribution system, including a municipality as defined in § 9-1-1, a nonprofit rural water supply company as defined in § 10-36A-1, a water user district as defined in § 46A-9-2, a sanitary district as defined in chapter 34A-5, or homes, including mobile homes as defined in § 32-3-1, and manufactured homes as defined in § 34-34A-1.1 supplied by a common distribution system[.]

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grant the permit notwithstanding that withdrawal may exceed the average estimated annual recharge."

This court's interpretation of the Court's decision in the above case is that the WMB must make a determination regarding the rate of annual recharge, unless the exception applies. Here, the exception does not apply; therefore the WMB must make that determination. Regarding this issue, the WMB based its decision on a four-page report from Hayes Hass, Natural Resources Engineer. In the report, Haas discusses the general characteristics of the aquifer, highlights observation well data (hydrographs), and reviews existing water permits/rights/water use. *Report on Water Permit Application No. 7239-3*, WMB 7-10. Haas explains that the Water Rights Program monitors two observation wells that are within two miles of the proposed HCD wells. He notes that the water levels show rising levels during wet years and declining levels during dry years. He states, "The water level record indicates that the aquifer is capable of sustaining additional withdrawals (Water Rights, 2011)." Regarding the hydrographs, which show various water levels from August 1979 to more recent levels, Haas indicates, "In general, the hydrographs show that over the period of record, withdrawals have not exceeded recharge." As to existing water permits/rights/use, Haas states, "Water levels do fluctuate as a result of area pumping but this does not affect the availability of water from the aquifer." Finally, Haas explains in a section entitled "Recharge":

> Recharge to the Floyd East James aquifer in Hanson County is from the underlying Sioux Quartzite which is recharged by precipitation on outcrops in central Hanson County and by leakage from the till (Hansen, 1983). Direct recharge to the Floyd East James in this area probably occurs in McCook County and flows west-northwest into this area (Hansen, 1983). Average annual recharge to the aquifer has not been quantified for the aquifer.

Id. at 10. At the July 13, 2011 hearing, the following colloquy took place between Nelson and Haas:

> Q. But as far as estimations from this petition as far as how accurately or as far as an estimated appraisal on the actual drawdown that will result from this pumping, you don't have any type of estimations in your reports on that, correct?
>
> A. Correct.
>
> Q. Do you have the capabilities to provide that information?
>
> A. Yes.
>
> Q. So would you qualify that information as being reasonably available, since it's at your disposal?
>
> A. Could you rephrase that?
>
> Q. The estimations you said that you have come up with as far as the drawdown from this type of well on the aquifer, you indicated you could provide that information. Would you qualify that as being reasonably available to you, then, since you can come up with those calculations?
>
> A. Yes.

WMB July 13, 2011 hearing, P 48, L11 – P 49, L 3. Appellees rely on Haas's report, and the WMB's Findings of Fact and Conclusions of Law in arguing that the requirements of SDCL § 46-6-3.1 were met.

When read in the affirmative, SDCL § 46-6-3.1 requires the determination to be made that it is probable that the average estimated annual withdrawal of water from the groundwater source will not exceed the average estimated annual recharge of water to the

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groundwater source. In an in-depth law review article published in 1995, longtime Professor John Davidson of the University of South Dakota School of Law explained how groundwater is managed under South Dakota law:

> Groundwater managers refer to two concepts for calculating the potential yield of an aquifer. The first concept is the mining yield, which occurs when "groundwater is withdrawn at a rate exceeding the recharge." The second concept is perennial yield, which is "the rate at which water can be withdrawn perennially under specified operating conditions" without leading to adverse conditions. The determination of perennial yield requires accurate predictions of future pumping costs and discount rates as well as detailed knowledge of the underground (and invisible) aquifer. The obvious complexity of calculating a safe perennial yield makes it a daunting task.
>
> South Dakota's approach is both bold and conservative; bold because it sets the State apart from its western cousins, and conservative because it places preservation of groundwater ahead of short-term exploitation.
>
> ***
>
> The statute does not allow the WMB to grant a permit which will result in mining of groundwater aquifers. Recognizing the scientific uncertainty in every case to which the no-mining statute applies, the standard is that when it is "probable" mining will occur, no permit may be issued. This standard mandates the WMB err on the side of the no-mining rule.

Davidson, *South Dakota Groundwater Protection Law*, 40 S.D.L.Rev. 1, 23-24 (1995) (citing David K. Todd, *Groundwater Hydrology* 7-13, 363-4 (2d ed. 1980); Jeff Masten, *Current Issues in South Dakota Water Rights Litigation*, in South Dakota Water Law 3 -11, 3 -13 (State Bar of S.D. Comm. on Continuing Legal Educ. eds., 1980)).[10]

First, the court finds a contradiction in the WMB's Findings of Fact and Conclusions of Law relating to this issue. Finding of Fact 33 and Conclusion of Law 19 pertain to a similar subject matter. Finding of Fact 33 states, "Average annual recharge to the Floyd East James aquifer has not been quantified for the aquifer." Conclusion of Law 19 states in part, "Annual recharge to the Floyd East James aquifer has not been and is not likely to be quantified in the near future." The court considers Finding of Fact 33 and Conclusion of Law 19 to be contradictory to Conclusion of Law 18, which states, "The DENR and the Chief Engineer have considered the best information reasonably available, and it is not probable that the quantity of water withdrawn annually from the Floyd East James aquifer will exceed the quantity of the average annual recharge of water to said aquifer." The court finds these two conclusions to be inconsistent with one another. It seems contradictory to assert that it is not probable that the water withdrawn annually will exceed the average annual recharge without ever calculating the annual recharge or the average annual recharge. Attorney Best indicated that a recharge study could be done, but that the statute does not require it. She

[10] Davidson explains the potential pitfalls of inadequate recharges to an aquifer:

> Typically, groundwater is pumped at a greater rate during the summer and fall, especially in areas practicing agricultural irrigation. During such periods, aquifer levels fall below normal. Ideally, aquifers will naturally recharge during the annual hydrologic cycle and return to their normal level before the next pumping season. However, aquifers are often times exploited at rates which exceed recharge capacity. Such pumping has the potential to lead to adverse conditions including: "(1) progressive reduction of the water resource; (2) development of uneconomic pumping conditions; (3) degradation of groundwater quality; (4) interference with prior water rights; or (5) land subsidence caused by lower groundwater levels."

40 S.D.L.Rev. at 23 (citing Todd, *Groundwater Hydrology 7-13*, 363-4). HCD's application seeks a permit for year-round usage.

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explained that such a study would cost thousands of dollars. Interestingly, Best indicated at the July 13, 2011 hearing that some water permit applications include recharge studies as part of the process. July 13, 2011 hearing transcript, P 13, L 24-25. While there may be some other way to satisfy the statute, it is the court's view that the above-referenced conclusions are inconsistent with one another. Moreover, the 720,000 gallons per day that HCD is proposing it will use did not seem to be considered in this determination. The court finds this inconsistency calls into question the validity of the WMB's determinations regarding the first criterion of SDCL §§ 46-2A-9 and 46-6-3.1.

The court finds it perplexing that the board chose to analyze observation well data, almost exclusively, to satisfy the requirement set out in SDCL § 46-6-3.1. Engineer Haas largely based his report on the two hydrographs from the observation wells. His statement in his report is that "over the period of record, withdrawals have not exceeded recharge." It appears that Haas determined this by comparing the water level at the far right side of the hydrograph (the date is not listed, but appears to be around 2010), to the water level at the far left side of the hydrograph (measured on August 12, 1979). On both hydrographs, for observation wells HS-79D and HS-79E, the point on the right is slightly higher than the point on the left.[11] The WMB included this observation in Conclusion of Law 21. What the hydrographs do not show, and what Haas's report does not contain is whether it is probable that the quantity of water withdrawn *annually* from a groundwater source will exceed the quantity of the average estimated *annual* recharge of water to the groundwater source, as required by SDCL § 46-6-3.1. The court holds that simply looking at two hydrographs that contain three decades' worth of observations, and comparing the beginning observation with the last observation does not approach the requirements of SDCL § 46-6-3.1.

The court finds that Haas's observations of the hydrographs are not what SDCL § 46-6-3.1 contemplates when it refers to the quantity of water withdrawn annually compared to the quantity of average estimated annual recharge. The statute requires the two average annual quantities to be compared. Moreover, the inadequacy of Haas's report is exacerbated by the fact that no annual recharge of the aquifer has been quantified nor is it likely to be quantified in the near future. WMB Conclusion of Law 19. The board's conclusion that SDCL § 46-6-3.1 "can be fulfilled by analysis of the observation well data and irrigation pumping records" flies in the face of the statute requiring a comparison between the estimated annual withdraw and average estimated annual recharge of water. The court is aware that historic data is part of the information that may be considered when comparing the withdraw/recharge estimations, but that is not the sole piece of information reasonably available to form the basis for the requirement of SDCL § 46-6-3.1. Haas testified that he did not consider the drawdown that will occur with HCD's pumping. WMB July 13, 2011 hearing, P 48, L 11-16. SDCL § 46-6-3.1, however, requires a comparison between the annual withdraw and the annual recharge. The court finds that the statute necessarily requires not only analyzing existing, and historic drawdown and recharge to the aquifer, but also how the applicant's drawdowns will affect the recharge to the aquifer.

The board's Conclusion of Law 20 fails to relate in any meaningful way to the requirements of SDCL § 46-6-3.1. This conclusion states that water levels from the observation wells indicate declining levels during dry years and recharges during wet years.

[11] It seems apparent, specifically from the closer of the two wells to the HCD site (HS-79E), that the recharge did not always bring the water level back to where it was the year before. From around 1995 to the early 2000s, the water level steadily decreased, before increasing from 2006 to the end of the hydrograph. This is probably reflecting the various years of drought experienced throughout parts of South Dakota.

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This may be a fair statement for any well, in any part of South Dakota. The WMB concludes that the groundwater source is "capable of sustaining additional withdrawals." The board's conclusion, based on Haas's report, does not appropriately take into account, nor even estimate, the effect that HCD's use of 720,000 gallons of water per day will have on the annual recharge of the aquifer.

Appellees restate Haas's conclusions and argue that the WMB utilized the best information reasonably available. Therefore, Appellees argue, the WMB's findings and conclusions are not clearly erroneous. Appellee HCD filed a post-hearing brief, which contained a number of calculations. HCD comes to the conclusion that HCD's use of water per year represents 3.32% of the average acre feet of water per year of irrigation appropriations. It asserts that this is not a substantial proposed increase in the appropriations already being made to the Floyd East James aquifer. It is the court's opinion that this calculation does not address the requirements of SDCL § 46-6-3.1.

The court holds that the board did not satisfy the requirements of SDCL § 46-6-3.1, and that the Findings of Fact and Conclusions of Law on this issue are clearly erroneous. On this basis, the court reverses the WMB's decision and remands the water permit application back to the WMB for proceedings consistent with this court's decision.

3. Secretary Bones Testimony

Lastly, Appellants argue that the testimony given by South Dakota Department of Agriculture Secretary Walt Bones was improper. The WMB did not make a credibility determination concerning Bones, but did make such a determination for others that testified. *See Findings of Fact* 35 and 36. According to Appellants, since no credibility determination was made, reliance on Bones's testimony was "unsupported" and should be stricken from the record. Moreover, Appellants argue that Bones's testimony presented a conflict of interest. Appellants cite *Hanig v. City of Winner*, 2005 SD 10, ¶ 15, 692 N.W.2d 202, 207 (citing *Speckels v. Baldwin*, 512 N.W.2d 171, 175), for this argument. Appellants acknowledge the distinctions between this case and those cited above, chief among them is that "the primary thrust of the arguments behind such significant conflict of interest authority is in the realm of disinterested decision-makers in administrative hearing matters[.]" *Appellants brief*, page 22. Nonetheless, Appellants want this court to hold those arguments similarly applicable in this case. Such a leap this court is not willing to make. *Hanig* involved a city councilwoman's indirect pecuniary interest in a matter before the council. *Speckels* also involved a city officer having a personal interest in a city matter. Both were held to involve conflicts of interest. That is simply not the case here. One of the components of granting a water permit is the public interest involved in the granting of the permit. Secretary Bones testified from his personal and professional experiences to the public interest that would be served by such a dairy operation. He provided a number of financial benefits such an operation may have on the community specifically and the state in general. *See Conclusions of Law* 46-48. Appellants fail to cite any authority for the argument that the WMB must make a determination as to a witness's credibility, and any failure to do so means such testimony should be stricken. The court holds that the arguments set forth by Appellants in issue three are without merit. The WMB did not commit error when it considered Bones's testimony.

For all the reasons set forth above pertaining to Issue 2, this matter is remanded back to the WMB for proceedings consistent with this decision. Therefore, HCD's request for costs is denied. The parties may prepare Findings of Fact and Conclusions of Law, and Mr.

Tornow shall prepare Findings of Fact and Conclusions of Law, and an order consistent with this court's decision.

Sincerely,

Hon. Sean M. O'Brien
Circuit Court Judge

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SDCL 46-2A-4 states,

> Except in the case of an application for a well driller license or a well pump installer license, if a recommendation is to approve or defer an application or if an applicant has filed a petition to oppose a recommendation to deny an application, the applicant shall publish notice of the application and recommendation at least once a week for two successive weeks in one official newspaper in each county where the water will be diverted or used or project works will be located. The official newspaper shall be selected by the chief engineer and shall be a newspaper designated as an official newspaper pursuant to § 7-18-3. The second publication shall be at least twenty days before the first day of the Water Management Board meeting at which the matter is noticed to be heard. No application for a permit, license, or amendment may be considered and approved by the board until proof of all required publications has been filed with the chief engineer. The notice, which shall be provided by the chief engineer to the applicable newspapers, shall include the following, as applicable:
>
> (1) The name and address of the applicant;
>
> (2) A brief description of the project, including, where applicable, the proposed place or places of use of the water or facilities, including the point of diversion, the amount of water to be used and the purpose for which the water or facility is to be used;
>
> (3) A brief statement describing the recommendation and the reasons for the recommendation;
>
> (4) A statement that any interested person who intends to participate in the hearing shall file a petition to oppose or support the application and that the petition shall be filed with the chief engineer and applicant at least ten days before the published date for hearing;
>
> (5) A statement that a petition to oppose or support an application may be informal, but shall be in writing and shall contain the following:
>
> (a) A statement describing the petitioner's interest in the application;
>
> (b) The reasons for the petitioner's opposition to or support for the application; and
>
> (c) The signature and mailing address of the petitioner or the petitioner's legal counsel;
>
> (6) A statement telling where copies of the recommendation, application, or other information may be obtained;
>
> (7) The time when and the place where the application will be considered by the board;
>
> (8) A statement that the recommendation of the chief engineer is not final or binding upon the board and is subject to the approval of the board after it reaches a conclusion based on facts at the public hearing;
>
> (9) A statement that the time of hearing will be automatically extended for at least twenty days upon written request of the applicant or any person who has filed a petition to oppose or support the application and a statement that any such request by the applicant or person filing a petition shall be made at least ten days before the published date for hearing; and

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(10) A statement that if the applicant does not contest the recommendation of the chief engineer and no petition to oppose the application is received, the chief engineer shall act on the application pursuant to the chief engineer's recommendation and no hearing may be held before the board, unless the chief engineer makes a finding that an application, even if uncontested, presents important issues of public policy or public interest that should be heard by the board.

SDCL 46-2A-23 states,

Following the issuance of a recommendation to approve an application pursuant to § 46-2A-2, the chief engineer may publish, at the expense of the applicant, a notice to determine whether any person opposes the application or recommendation of the chief engineer. The notice shall be published as provided for in § 46-2A-4, and the notice shall contain the information provided for in subdivisions 46-2A-4(1), (2), (3), (5), (6), and (10). The notice is not required to refer to a board meeting or hearing date. In addition, the notice shall include a statement that if the applicant intends to contest the recommendation, the applicant shall file a petition with the chief engineer, and any interested person who intends to oppose or support the application or recommendation shall file a petition with the chief engineer and the applicant. Any petition shall be filed within ten days of the second published notice.

If no petition to contest the recommendation or to oppose an application is timely filed, the chief engineer, following receipt of proof of publication, shall act on the application consistent with the chief engineer's recommendation as provided by rules promulgated by the Water Management Board pursuant to chapter 1-26 delegating authority to the chief engineer to issue uncontested permits pursuant to §§ 46-1-16 and 46-2-3.1, without hearing by the board.

If a petition to contest the recommendation or to oppose the application is timely filed, the chief engineer shall provide notice of a board hearing pursuant to § 1-26-17. The notice shall also include a statement that the recommendation of the chief engineer is not final or binding upon the board and is subject to the decision of the board based on evidence and record of the public hearing. A statement shall also be included in the notice that the applicant or any interested person who has filed a petition to oppose or support an application, may file a written notice with the chief engineer requesting postponement of the original hearing date. The written notice requesting postponement shall be filed within twenty days of the date of the notice scheduling the board hearing, but not less than ten days before the date the application is scheduled for hearing. Upon timely receipt of a written notice, the chief engineer shall cancel the original hearing and reschedule the hearing not less than twenty days after the original hearing date. Notice of hearing shall be provided by personal service or by first class mail to the applicant and parties of record.

SDCL 1-26-17 states,

The notice shall include:

(1) A statement of the time, place, and nature of the hearing;

(2) A statement of the legal authority and jurisdiction under which the hearing is to be held;

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(3) A reference to the particular sections of the statutes and rules involved;
(4) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished;
(5) A statement of any action authorized by law, which may affect the parties, as a result of any decision made at the hearing, whether it be the revocation of a license, the assessment of a fine or other effect;
(6) A statement that the hearing is an adversary proceeding and that a party has the right at the hearing, to be present, to be represented by a lawyer, and that these and other due process rights will be forfeited if they are not exercised at the hearing;
(7) Except in contested cases before the Public Utilities Commission, a statement that 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 to the agency no later than ten days after service of a notice of hearing issued pursuant to § 1-26-17;
(8) A statement that the decision based on the hearing may be appealed to the circuit court and the State Supreme Court as provided by law.

EXHIBIT
202

STATE OF SOUTH DAKOTA) :SS
COUNTY OF HANSON)

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

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* *

IN THE MATTER OF WATER PERMIT APPLICATION NO. 7239-3, by HANSON COUNTY DAIRY,
Appellee,

vs.

ROBERT BENDER and STACE NELSON,
Appellants.

CIV. NO. 11-54

FILED
MAY 10 2012
Ramona Schroeder
Hanson County Clerk of Courts
First Judicial Circuit Court of SD

ORDER OF REVERSAL AND REMAND FOR REHEARING

* *

This Court having issued its Findings of Fact and Conclusions of Law, therefore, it is:

ORDERED that the water permit granted to HCD by and through the WMB's final decision and order as served on the parties on October 7, 2011, is hereby reversed and HCD's water permit application is remanded back for further proceedings consistent with the Court's decision herein; and, it is further

ORDERED that neither of Appellees are entitled to a recovery of costs pursuant to SDCL §1-26-36 and/or SDCL §15-17-37.

Dated this 9th day of May, 2012.

BY THE COURT:

[signature]

Honorable Sean O'Brien
Circuit Court Judge, First Judicial Circuit

ATTEST:
Ramona Schroeder, Clerk
By [signature]

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EXHIBIT 203

Edmunds County, SD

A

B

Edmunds Parcels

Aquifer

Category

Dakota

Sand and Gravel 100+ Continuous

Sand and Gravel 100+ Discontinuous

Map Scale
1 inch = 2.0 miles
4/28/2026

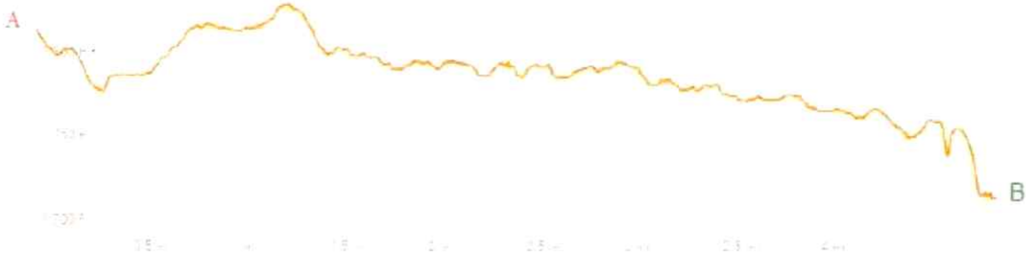

EXHIBIT
204

DECLARATION OF THIELE R. DUNAWAY IN SUPPORT OF PETITIONERS GARETT HEINZ, CINDY HEINZ, LARRY HEINZ AND AMANDA ABARCA REGARDING WATER PERMIT APPLICATION 8991-3

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I, Thiele R. Dunaway, declare and state:

1. I make this declaration pursuant to SDCL 18-7-4.1, and I submit it in support of Petitioners Garett Heinz, Cindy Heinz, Larry Heinz and Amanda Abarca ("Petitioners") in the matter pending before the Water Management Board ("Board") of the State of South Dakota Department of Agriculture and Natural Resources ("DANR") concerning Century Swine RE, LLC's Water Permit Application No. 8991-3 ("Permit Application"). I am not able to attend the hearing on the Permit Application on May 6, 2026, in person as I am currently living in California and preparing for my move back to my farm in Edmunds County, South Dakota in June. I am available to attend the hearing remotely through Zoom or a similar electronic appearance, but I am unaware of any such option at this time.

2. I have personal knowledge of the matters set forth herein and if called as a witness could and would competently testify thereto.

3. I own real property located in Section 24, Township 122 North, Range 72 West in Edmunds County, South Dakota ("Property"). Based on my review of a plat map and the information contained in the Permit Application, my Property is within a very few miles of the well proposed in the Permit Application to be located in Section 9, Township 121 North, Range 71 West in Edmunds County.

4. My Property has been in my family since the early 1900's. My mother was born there in 1920, was one of the younger of nine children, and during her youth she lived there with her parents and siblings who all worked on the farm, raising crops and livestock. After my grandparents died in the 1950's, two of my mother's brothers remained on the Property and continued farming the land, including raising crops and grazing cattle there. Since they moved onto that Property, my family has always relied on their well for all of their domestic water needs, and it has never been used for irrigation purposes. In the early years, they used a

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windmill and a hand-pump to draw water from the well. In later years, my uncle installed an electric pump.

5. When I was growing up, I spent all of my summers on the Property or on my mother's sister's property located directly west of, and adjacent to, the Property. When my remaining uncle decided to retire from farming, I bought the Property from him. I rented the land to my cousin (my mother's oldest brother's son) who lived on a nearby farm, and he continued to raise crops and graze livestock on the Property, using water from the well for the livestock. I continued to use the well for household purposes. When that cousin retired, another cousin of mine began farming the Property and continues to do so currently.

6. In 2001, the existing well on the Property, which had been in use my entire lifetime up to that point, began having trouble producing sufficient water for my household use. Consequently, I had a new well drilled that year by Huron Drilling, Inc. That well was drilled to a depth of 420 feet, and a well driller's report was filed with the Department of Environment and Natural Resources shortly after the well was completed. Since that new well has been in operation, I have always had sufficient water from that well to meet all of my reasonable domestic uses, including both household uses and watering livestock. Based on the well driller's report and other drilling information, it is my understanding that as constructed, my well is an adequate well within the meaning of ARSD 74:02:04:20(6).

7. My Property does not have a connection to rural water such as WEB Water, and, as a recent retiree on a fixed income, I have no intention of ever getting such a connection as it would be cost prohibitive. I rely solely on my existing well for all of my domestic water needs. When I move back to the Property in June 2026, I will be bringing my three horses and two dogs, so having a reliable, uninterrupted water source is imperative for the health and welfare of me and my animals.

8. Having reviewed the Permit Application and the Report to the Chief Engineer On Water Permit Application No. 8991-3, Century Swine RE, LLC, dated January 27, 2026 ("Engineer's Report" or "Report"), I am very concerned that applicant Century Swine RE,

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LLC's ("Applicant") proposed well and drawdown will have an adverse and unlawful impact on my senior water rights and will result in depriving me of the water I need for my domestic uses. This is particularly true given that the proposed well is so close to mine. SDCL 46-6-3.1 provides that "No application to appropriate groundwater may be approved if . . . it is probable that the quantity of water withdrawn annually from a groundwater source will exceed the quantity of the average estimated annual recharge of water to the groundwater source." However, neither the Application nor the Report provide any evidence to support a conclusion that the Applicant's proposed well will not exceed the estimated annual recharge of water. However, despite the fact that a determination based on actual evidence cannot be made as to whether the quantity of water proposed by the Applicant to be withdrawn annually from the aquifer will not exceed the estimated average annual recharge of the aquifer—as required under South Dakota law—the Report recommends approval of the Application.

9. The Applicant has not met its burden of showing that its proposed water Permit Application would not exceed the annual recharge rate of the Dakota Aquifer. Nor has the Applicant met its burden of establishing that there is a reasonable probability that unappropriated water is available for Applicant's use and that the proposed diversion can be made without unlawful impairment of existing domestic water uses and water rights.

10. I ask the Board to protect the water rights of all of the domestic users in the area by taking the following action:

(a) Deny this Permit Application, because the statutory requirements have not been met by the Applicant, as there is no evidence to support findings that Applicant's proposed well drawdowns would not exceed the annual recharge rate of the Dakota Aquifer, that there is a reasonable probability that unappropriated water is available for Applicant's use, and that the proposed diversion can be made without unlawful impairment of existing domestic water uses and water rights; or

(b) If the Board is inclined to approve the Permit Application, that the Board defer approval of the Application and order that one or more observation wells be drilled in the

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vicinity of Applicant's wells, and that those observation wells be operational for not less than two years before the Board reconsiders the Application, based on data accumulated from the observation wells; or

(c) If the Board chooses not to defer approval and approves this Permit Application now, that in addition to ordering the qualifications recommended by the Engineer's Report, the Board also order that one or more observation wells be completed in the area to allow monitoring of water levels to aid in determining the effects pumping has on area domestic wells and to monitor drawdowns and recharge for potential unlawful impairment of existing water rights.

I declare under penalty of perjury under the laws of the State of South Dakota that the foregoing is true and correct. Signed on this 28th day of April, 2026, at El Cerrito, California.

Thiele R. Dunaway

7254 Cutting Boulevard
El Cerrito, California 94530