SOUTH DAKOTA GAME, FISH, & PARKS COMMISSION
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION BY:
CATTAIL LAND AND CATTLE COMPANY, LLC

TO RESTRICT RECREATIONAL USE OF CERTAIN WATERS KNOWN AS PORTIONS OF CATTAIL LAKE AND KETTLE LAKE IN MARSHALL COUNTY, SOUTH DAKOTA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The hearing in this contested case was held on November 2, 2017, in Room 106 of the McCrory Gardens in Brookings, South Dakota, before a quorum of the South Dakota Game, Fish, & Parks Commission. The hearing was held before Game, Fish, & Parks Commissioners Gary Jensen, Mary Ann Boyd, Russell Olson, Paul Dennert, Doug Sharp, and Chairman Barry Jensen presiding. Two members of the eight-member Commission were absent. The Independent Hearing Officer was Robert B. Anderson.

The Petitioner, Cattail Land and Cattle Company, LLC, appeared through members Brad Pitzl, Scott Anderson, and James Pitzl, and through their attorney, Chris Healy of Sioux Falls, South Dakota. The intervenor, South Dakota Wildlife Association, appeared through its attorney, Eric Cleveringa, of Sioux Falls, South Dakota. Other intervenors appeared personally without counsel. Those intervenors were Chris Schuster, Tom Pischke, Ryan Roehr, and Trey Jones. Intervenor Chris Schuster spoke in support of the Petition, and the other intervenors spoke in opposition to the Petition.

The members of the Commission present heard all witnesses testify, and observed all witnesses in person. The Commissioners in attendance were able to observe the witnesses who testified personally and make their judgments as to the reliability and credibility of the testimony presented by all witnesses. All the Commissioners present heard all the testimony and reviewed all of the exhibits which were admitted at hearing. All Commissioners present heard argument from attorney for Petitioner and attorney for intervenor South Dakota Wildlife Association. After considering the record in its entirety, the testimony of the witnesses, the evidence produced, and the argument of the parties and their attorneys, and the objections and proposals submitted by Petitioners in response to the initial proposed Findings of Fact and Conclusions of Law having been considered, granted in part, and denied in part, and good cause appearing therefore, and the Commission previously having voted in open session to pass resolution 17-15, a copy of which is attached hereto, now the South Dakota Game, Fish, & Parks Commission does hereby make the following Findings of Fact and Conclusions of Law.
FINDINGS OF FACT

1. Petitioner, Cattail Land and Cattle Company, LLC (CLCC) is a South Dakota Limited Liability Company.
2. CLCC was formed in April, 2007.
3. In recent years, until approximately 1993, the Cattail-Kettle lakes were part of a chain of lakes southwest of the Roy Lake area, and were separate and distinct lakes.
4. In approximately 1993 and thereafter, rain, snow, and runoff filled these lakes and expanded the waters of the lakes to cover private property which had previously been dry and had been farmed, pastured, and hunted.
5. CLCC is the owner of real estate located in Sections 2, 11, and 12, Township 125 N, Range 56 W of the 5th p.m. in Marshall County, South Dakota.
6. Some or all of the real property described in paragraph 5 above is now covered by water and has been to varying degrees since approximately 1993.
7. CLCC acquired the property described in paragraph 5 above in approximately 2007, at a time when much of the property was covered by water.
8. In June, 2017 the South Dakota Legislature met in Special Session to pass House Bill 1001. It later became codified as SDCL 41-23 - Recreational Use of Nonmeandered Waters. As part of the bill, specific lakes were listed in SDCL 41-23-8 (section 8 lakes) as nonmeandered lakes that would remain open for recreational use. Cattail-Kettle Lake is one of the enumerated lakes listed in section 8.
9. SDCL 41-24-9 laid out specific criteria in which the Commission would consider when making a determination whether to grant a landowner’s petition to restrict recreational access to a Section 8 lake.
10. There are no occupied houses or other occupied human habitations located on any of the real property owned by CLCC which is the subject of their amended petition. No one resides on any of that property. There is an abandoned house on Petitioner’s property on the south side of Kettle Lake which trespassers have entered. There is no indication as to how the trespassers gained access to the house or the property.
11. The State of South Dakota has previously constructed a boat ramp on the west or southwest corner of Kettle Lake which is known as the Fort Sisseton boat ramp. This ramp provides access to boaters who use the waters in the summer and people who drive motor vehicles onto the ice in the winter, primarily to ice fish.

12. It is unclear from the evidence and the record as to what, if any, public access to Cattail or Kettle lakes existed prior to the boat ramp being constructed by the State of South Dakota.

13. In recent years, members of the public have utilized Kettle and Cattail lakes for fishing in both the summer and winter, waterfowl hunting, boating, canoeing, and snowmobiling.

14. Substantial recreational opportunities exist for the public on Kettle Lake and Cattail Lake, and the public has taken advantage of those opportunities.

15. Adjacent real estate which is not covered by water, but owned by CLCC, is used for farming, grazing, and hunting by the individual members of CLCC, their families, and invitees.

16. Depending on the water level, CLCC or its lessees have pastured between 25 and 40 cow/calf pairs on the property adjacent to the water. At present, no cattle are being pastured on the property.

17. There is no persuasive evidence that Petitioners have suffered any substantial financial losses as a result of the public’s access to Cattail-Kettle lake, and in particular, as a result of the public’s access to any of the waters or areas which the Petitioners seek to have closed in their pending petition. A calf was lost to fishing line that had apparently been littered in the lake, but there is no indication that granting the relief sought by the Petitioners would affect such a loss.

18. There is evidence that individual members of CLCC or people to whom they give access to on the property adjacent to the waters have had some interference with bow hunting near the waters. That interference generally comes in the form of people in boats who are close to the shore, ice fisherman, or snowmobilers close to the shore.

19. Recognizing that property which borders on non-meandered waters and land beneath such waters is private, the interference with the Petitioners’ ability to hunt on property adjacent to the waters in question is not significantly different than interference that other
hunters may have from those hunting and fishing, or recreating on other adjacent properties in other settings.

20. The recent drop in water levels has exposed tree stumps and fencing which has not been visible for many years.

21. The quantity of the water located in the Cattail-Kettle Lake chain has varied over the years dependent upon climatic conditions. For example, evidence shows that in general the water level on Cattail-Kettle Lakes has decreased approximately 8-10 feet in the past two years.

22. No one can predict what the water levels in the Cattail-Kettle Lake chain may be in the future.

23. Petitioners have experienced some problem with trespassers who have apparently entered on their private property from the waters of Cattail-Kettle lake without permission.

24. Petitioners have experienced some problems with debris washing up on the shores of the waters, or more typically, being visible on the shore as the waters have receded.

25. The debris which floats up on shore is characterized as the result of “bad behavior” on the part of certain members of the public which use the waters, and that may well be true. However, it does not represent a condition significantly different from that which occurs on the shoreline of other public waters.

26. In their amended petition, Petitioners seek authority to have a 100 yard buffer zone at Petitioners option restricting all types of public recreational access to waters within 100 yards from the shoreline of its overall property, and no access to the south slough of Kettle Lake.

27. If the buffer zone sought by the Petitioners were imposed, it could restrict or prohibit boating traffic from reaching public areas of Kettle and Cattail lakes if those boats were launched from the Fort Sisseton boat ramp, depending on how far the water recedes in the future. It could also prevent access from Kettle Lake to Cattail Lake through “Parson’s Pass”. However, at the hearing Petitioners agreed they would not close or prevent access through Parson’s Pass, even if the 100 yard buffer zone were granted.

28. Petitioner does not conduct any commercial hunting or fishing activities on the property adjacent to the waters in question, nor is there any type of hunting lodge located on that property.
29. Petitioners have a concern regarding safety involving the potential of shooting an arrow or a firearm towards members of the public who are utilizing the waters when the Petitioners are conducting hunting activities on the adjacent lands which they own and control. The concern also applies to members of the public who are utilizing the waters that may fire shots toward the shoreline and potentially endanger those using Petitioners’ property.

30. Petitioners’ privacy concerns relate mainly to their ability to use deer stands close to the waters without interference with fishermen and duck hunters. Petitioners expressed other privacy concerns, including interference with fishing, all types of hunting, and the general right to quiet enjoyment of private property.

31. Petitioners use the lands adjacent to the waters for hunting or other similar recreation on a fairly limited basis. However, livestock are often pastured close to the water.

32. Petitioners expressed a concern relating to safety of the members of the public who utilized the lake, especially in view of tree stumps, branches, and rocks reemerging as the water recedes. However, the safety concern described in SDCL 41-23-9 relates to safety on the part of the Petitioners and those who use the adjacent lands with permission of the Petitioners, and not members of the public who are lawfully using the public waters.

33. The State of South Dakota has, in recent years, conducted extensive stocking of game fish in the waters which would be affected by this Petition. If the relief sought by Petitioners were granted, the public would still have access to both bodies of water, but that access would be limited compared to the public’s present access.

34. The State of South Dakota has previously expended public funds to construct and maintain a boat ramp giving access to the water subject to this petition.

35. The commission has considered privacy, safety, and substantially affected financial interests of the Petitioner in reaching its decision on this Petition.

36. The Commission finds as fact that the considerations of privacy, safety, and the substantially affected financial interests of the Petitioner mitigate in favor of denying the Petition.

37. The Commission has also considered the history of use of the waters in question, the water quality, water quantity, and the public’s interest in recreational use of the water.
38. The Commission finds as fact that consideration of the history of the use of the waters in question, the water quality, water quantity, and the public’s interest in recreational use of the water mitigates in favor of denying the Petition.

CONCLUSIONS OF LAW

1. The South Dakota Game, Fish, & Parks Commission has jurisdiction over both subject matter and persons who are involved in this proceeding.

2. This proceeding was conducted pursuant to SDCL 41-23-9, and administrative rules impact this contested case, including but not necessarily limited to, ARSD 41:04:06:01, 41:04:06:02, 41:04:06:03, and 41:04:06:04.

3. The South Dakota Game, Fish, & Parks Commission and Department complied with all notice requirements relating to notice of the contested case hearing, whether imposed by statute or administrative rule.

4. The Petitioner had the burden of going forward and the burden of proof in this proceeding.

5. The Petitioner was granted the opportunity to present evidence and arguments supporting the petition and the relief which they sought.

6. Intervenors who appeared and desired to testify were permitted to give evidence both in support of and in opposition to the Petition.

7. A quorum of the entire Game, Fish, & Parks Commission was present for the entire hearing, heard and considered all the testimony, evidence, and argument.

8. The Petitioner failed to meet its burden of proof by a preponderance of the evidence that considerations of the privacy, safety, and substantially affected financial interests of the Petitioner support granting the restrictions sought in the Amended Petition.

9. The Petitioners failed to meet their burden of proof by a preponderance of the evidence that the history of use, water quality, water quantity, and the public’s interest in recreational use of the water support granting the restrictions sought in the Amended Petition.
10. Petitioner failed to meet its burden of proof under SDCL 41-23-9 and Administrative Rules promulgated pursuant to the authority of that statute to support the granting of the Petition and relief sought in the Amended Petition.

11. At the conclusion of the hearing and the deliberation of the Commission members present, the Commission returned to open session and unanimously approved resolution 17-15, which denied the Petition.

12. Resolution 17-15, which is attached hereto, should be incorporated and filed within the records of this Commission, and an order consistent with that resolution and these Findings of Fact and Conclusions of Law shall be entered by the Commission.

Dated this 14th day of December, 2017.

BY: BARRY JENSEN  
Chairman of the SD Game, Fish, & Parks Commission