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| STATE OF SOUTH DAKOTA )<br>)<br>COUNTY OF PENNINGTON ) | | IN CIRCUIT COURT<br><br>SEVENTH JUDICIAL CIRCUIT |
| IN RE FINAL DECISION OF BOARD OF MINERALS AND ENVIRONMENT OF SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES TRANSFERRING EXPLORATION NOTICE OF INTENT EXNI-427 FROM MINERAL MOUNTAIN RESOURCES LTD. TO MINERAL MOUNTAIN RESOURCES (SD) INC.<br><br>A. GAY KINGMAN, STEVEN C. EMERY, AND ROBIN L. ZEPHIER,<br>Appellants,<br><br>-vs-<br><br>MINERAL MOUNTAIN RESOURCES LTD., and MINERAL MOUNTAIN RESOURCES (SD), INC.,<br><br>and<br><br>SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES,<br>Appellees. | ) | 51CIV18-000304<br><br>DENR'S SUPPLEMENTAL POST-HEARING BRIEF |

On June 12, 2018, oral arguments in the above captioned matter were heard by the Hon. Robert Mandel on the motions to dismiss filed by both the Department of Environment & Natural Resources ("Department" or "DENR"), and Mineral Mountain Resources (SD), Inc. ("Mineral Mountain Resources"). After hearing oral argument from the parties, the Court requested supplemental briefs addressing the

issues discussed below. The Department, through the undersigned, hereby files this supplemental post-hearing brief as requested by the Court.

The Department incorporates by reference any arguments and authorities raised in its initial Motion to Dismiss, and its Reply to Appellants' resistance to said motion. Failure to address any argument or authority already provided to the Court in previous pleadings is not intended as a waiver of the Department's position as to that argument or authority.

## ISSUE(S)

### A. STANDING AS AGGRIEVED PARTIES

In the motions to dismiss filed by the DENR and Mineral Mountain Resources, it was asserted that the transfer of the Exploration Notice of Intent ("EXNI") by the South Dakota Board of Minerals and Environment ("Board") was not a contested case (as that term is contemplated by SDCL ch. 1-26) and that Appellants are not aggrieved parties as required by SDCL 1-26-30 to receive standing to appeal the Board's decision to circuit court. In their written response to the motions, and at oral argument before the Court, Appellants argued the contested case provisions of SDCL ch. 1-26 apply to the Board's action, and that Appellants are aggrieved parties. Hearing Transcript (HT) pg. 17-30.

As discussed at oral arguments, the DENR relies upon the definition of aggrieved party status initially discussed in *Barnum v. Ewing*, for the proposition that to receive appellate standing in this matter Appellants must establish they have suffered the denial of some right, the imposition of some burden, in their

personal or individual capacities as opposed to any injury they might suffer "common in nature to a similar grievance suffered by all or many other electors or taxpayers." *Barnum*, 220 N.W. 135, 138 (S.D. 1928).

Appellants have put forth numerous reasons why they believe they have attained aggrieved party status. Appellants' assertions include that they are residents of Rapid City (HT pg. 22), are traditional Lakota practitioners who pray at sacred lands near the exploration operation (HT pg. 22-27), and that they use the water in Rapid Creek, Deerfield Lake, and Pactola Reservoir for spiritual, recreation, and domestic purposes (HT pg. 22-27). Appellants argue, based upon the speculative presumption of an expert, that the exploration operation conducted by Mineral Mountain Resources carries a "threat of pollution" that will harm the proffered interests. HT pg. 23-24. Based upon this, Appellants conclude they have identified particularized injuries sufficient to support their status as aggrieved parties.

Appellants rely upon *Elk Point Independent School District No. 3 of Union County v. State Commission on Elementary and Secondary Educa*tion, 187 N.W.2d 666 (S.D. 1971), to support the argument that their generalized interests support aggrieved party status in this matter. In *Elk Point*, the state Supreme Court was tasked with determining whether the trial court had jurisdiction over a proceeding to annul the creation of a school district. *Id.* at 670. The Supreme Court noted that the right to judicial review was claimed by plaintiffs under the state Administrative Procedures Act, and then declared without further exposition that "[c]learly, the

electors and taxpayers seeking this review are authorized to do so by SDCL 1-26-30." *Id.*

*Elk Point* is not the controlling decision on aggrieved party status. Since 1971 there have been numerous decisions that have cited to the *Barnum v. Ewing* standard in discussing aggrieved parties. In *Application of Northern States Power Company*, the Court recognized *Barnum* and stated:

> In *Barnum* we set forth the following test: "[W]e think ['any person aggrieved'] can only include such persons when they are able affirmatively to show that they are 'aggrieved' in the sense that by the decision of the board they suffer the denial of some claim of right either of person or property . . . ."

328 N.W.2d 852, 855 (S.D. 1983) (internal citations omitted). This language was quoted again in *Keogan v. Bergh*, 348 N.W.2d 462, 463 (S.D. 1984); *State ex rel Johnson v. Public Utilities Commission of South Dakota*, 381 N.W.2d 226, 231 (S.D. 1986); *Tri County Landfill Association, Inc. v. Brule County*, 535 N.W.2d 760, 763 (S.D. 1995); *Stanton v. Hills Materials Company*, 1996 S.D. 109, ¶ 10, 553 N.W.2d 793, 795; and recently in *Petition for Declaratory Ruling re SDCL 62-1-1(6)*, 2016 S.D. 21, ¶ 16, 877 N.W.2d 340, 349.

In *Cable v. Union County Board of County Commissioners*, the Supreme Court discussed *Barnum*. The Court there noted that from the territorial era a "'person aggrieved' required a showing that the person suffered 'a personal and pecuniary loss not suffered by taxpayers in general, falling upon him in his individual capacity. . .'" 2009 S.D. 59, ¶ 26, 769 N.W.2d 817, 827. Further, the Court opined that *Barnum* "is instructive in determining when an injury is

'*personal*' to the plaintiff versus general and shared in common with the body politic." *Id.* ¶ 29 (italics added). The Court quoted from *Barnum* recognizing "[i]t is not enough to gain standing as an aggrieved person by suffering a loss that is 'common in nature to a similar grievance suffered by all or *many* other electors or taxpayers.'" *Id.* (italics in original). "The rationale for limiting the right of appeal to only those persons who are actually aggrieved is to preclude 'every citizen, elector, or taxpayer . . . who deems himself aggrieved . . . from appealing.'" *Id.* ¶ 30 (quoting *Barnum* 220 N.W. at 138). Allowing any citizen who deems themselves aggrieved to appeal would require state officials to litigate with everyone, and "'the . . . business of the state would be transacted mainly in the courts.'" *Id.* (quoting *Wood v. Bangs*, 46 N.W. 586, 588, 1 Dakota 179 (Dakota Terr. 1875)).

Recent decisions of the Court have reaffirmed *Barnum*'s place in determining aggrieved party status in South Dakota. Generalized interests are not enough. Appellants have not alleged that they have suffered an individualized and personal injury different from that held by any other resident of Rapid City, traditional Lakota religious practitioner, or recreational user or domestic consumer of water from Rapid Creek watershed. The interests proffered by Appellants are shared in common with a generalized host of individuals. Appellants are not aggrieved parties under SDCL 1-26-30.

**B. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

Appellants have alternatively argued that they have standing to appeal the Board's decision because they are persons who should be deemed to have exhausted

all available administrative remedies before the Board. HT pg. 40. As noted in previous pleadings, SDCL 1-26-30 allows "[a] person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case" to appeal that decision to circuit court.

Exhaustion of administrative remedies is a fundamental principle of administrative law, and has been statutorily enacted through the operative language of SDCL 1-26-30. *South Dakota Board of Regents v. Heege*, 428 N.W.2d 535, 539 (S.D. 1988). "It is a settled rule of judicial administration that 'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Id.* (quoting *Robinson v. Human Relations Commission*, 416 N.W.2d 864, 866 (S.D. 1987)). The failure to exhaust, where required, is a jurisdictional defect. *Id.* There are several exceptions to the exhaustion requirement including: 1) where the person who has not exhausted "through no fault of his own, does not discover the purported wrong until after the time for application of administrative relief," 2) an agency has failed to act, 3) any agency does not have subject matter jurisdiction, 4) the administrative decision was made prior to a hearing or the decision is so biased that an impartial hearing is impossible, and 5) an agency cannot grant "adequate or timely relief" and a party faces "irreparable harm." *Id.*

The purpose of statutory construction is to discover a statute's intent primarily through an analysis of its language. *In re Estate of Ricard*, 2014 S.D. 54, ¶ 8, 851 N.W.2d 753, 755-56. As a result, "[w]ords and phrases in a statute must be

given their plain meaning and effect." *In re Taliaferro*, 2014 S.D. 82, ¶ 6, 856 N.W.2d 805, 806-07 (citations omitted). A statute that has clear, certain, and unambiguous language does not need interpretation; a court need only declare the Legislature's clearly expressed intentions. *Id.* The clearly expressed intentions "must be determined from the statute as a whole, as well as enactments relating to the same subject." *Id.* In construing statutes "it is presumed that the Legislature did not intend an absurd and unreasonable result." *Id.*

Appellants contend that SDCL 1-26-30 recognizes that exhaustion must only occur where administrative remedies are available, that there was no remedy available to Appellants before the Board, and thereby they should be deemed to have exhausted their administrative remedies in this matter. HT pg. 32-33. SDCL 1-26-30 requires exhaustion of administrative remedies "available within any agency . . . ." The Department agrees that the plain language of the statute seems to indicate that if no remedy is available within the agency exhaustion is not required. The Department concedes that as to the transfer of an EXNI there is no remedy available before the Board, or the Department, for Appellants to exhaust. But this fact alone does not give rise to the right to appeal an EXNI transfer decision.

First, to interpret SDCL 1-26-30 in the manner Appellants have requested would reach an unreasonable interpretation of the statute. This cannot be done. *Taliaferro*, 2014 S.D. 82, ¶ 6.

A myriad of administrative decisions are made daily by the agencies and officials of state government, and done so outside of contested case proceedings. According to Appellants, an individual who after-the-fact disagrees with the result of one of these administrative decisions should be able to appeal that decision to circuit court simply because there is no administrative process for that individual to follow before doing so. This interpretation forces the State, and private entities involved in the state agency's decision, to be hailed into court by persons that theretofore had no participation in the decision-making process. As *Cable* noted, the State would be forced to litigate with everyone. 2009 S.D. 59, ¶ 30. This is an unreasonable result, and simply cannot be what the Legislature intended by including an exhaustion provision in SDCL 1-26-30.

In *Petition for Declaratory Ruling*, 2016 S.D. 21, ¶ 6, the state Supreme Court reviewed SDCL 1-26-30 and determined that "non-aggrieved parties" may seek judicial review of administrative decisions if they have exhausted administrative remedies. The Supreme Court held that "the Legislature authorized parties in agency proceedings to appeal to circuit court if they had either exhausted their remedies within the agency or if they were aggrieved by the agency's decision in a contested case."

The Department believes that the Court's choice of language in *Petition for Declaratory Ruling* leads to a more reasonable result when interpreting the statute. Specifically, the exhaustion provision of SDCL 1-26-30 should be interpreted to allow appeal of an administrative decision only by those individuals that were

parties to, or involved in, an administrative proceeding before the administrative entity (i.e. a declaratory ruling procedure) and who have exhausted whatever administrative remedies remain available based on that proceeding. This interpretation leads to a more reasonable interpretation of the exhaustion requirement of SDCL 1-26-30, and would limit appeals to those individuals that were somehow involved in an administrative decision-making process.

The above interpretation is also more reasonable in that it prevents encroachments by the judicial branch on the administrative decision-making power of the executive branch. Article II of the South Dakota Constitution explicitly divides the powers of government "into three distinct departments, the legislative, executive and judicial; and the powers and duties of each are prescribed by this Constitution." This separation of powers encompasses three prohibitions:

> (1) no branch may encroach on the powers of another, (2) no branch may delegate to another branch its essential constitutionally assigned functions, and (3) quasi-legislative powers may only be delegated to another branch with sufficient standards.

*Gray v. Gienapp*, 2007 S.D. 12, ¶ 17, 727 N.W.2d 808, 812 (quoting *State v. Moschell*, 2004 S.D. 35, ¶ 14, 677 N.W.2d 551, 558). "The doctrine of separation of powers has been a fundamental bedrock to the successful operation of our state government since South Dakota became a state in 1889." *Id.* ¶ 19.

Under the separation-of-powers doctrine, a court may not exercise government functions which are essentially legislative or administrative. *State of South Dakota, Department of Game, Fish and Parks v. Troy Township, Day County*, 2017 S.D. 50, ¶ 14, 900 N.W.2d 840, 846.

> Therefore, "executive or administrative duties of a nonjudicial nature may not be imposed on judges [,]" *Buckley v. Valeo*, 424 U.S. 1, 123, 96 S.Ct. 612, 684, 46 L.Ed.2d 659 (1976) (per curiam), "either directly or by appeal[,]" *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 444, 43 S.Ct. 445, 449, 67 L.Ed. 731 (1923). "The purpose of this limitation is to help ensure the independence of the Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches." *Morrison v. Olson*, 487 U.S. 654, 677–78, 108 S.Ct. 2597, 2612, 101 L.Ed.2d 569 (1988).

*Id.* The judicial branch is prevented from involvement in review of administrative decisions unless there exists specific legislative authority for the judiciary to act regarding the executive branch function. *Jundt v. Fuller*, 2007 S.D. 62, ¶ 10 736 N.W.2d 508, 513.

SDCL 45-6C-6 allows an operator that wishes to conduct an exploration for mineral resources to simply file a notice of intent with the Department. Thereafter the DENR is given an opportunity to place restrictions on the exploration operation. SDCL 45-6C-10 through 45-6C-12. However, under an EXNI, an operator may commence exploration activities thirty days after filing the notice of intent – or after receiving written restrictions from the Department – without further action by the Department and without any action by the Board. SDCL 45-6C-13. State law prohibits any state agency from requiring a permit for mineral explorations. SDCL 45-6C-4. SDCL 45-6C-53 requires a successor operator to make application to the Board for transfer of the EXNI. The Board may only deny the transfer in specific and limited circumstances. SDCL 45-6C-53.

The Department is convinced a review of the statutory scheme regarding EXNI's and their transfer reveals the Legislature's clear intent that the EXNI

process is predominantly administrative in nature. Administrative appeals are restricted to "contested cases" or to other instances when the Legislature has granted the use of the administrative appeals process by "specific reference to SDCL ch. 1-26." *Tracfone Wireless, Inc., v. South Dakota Department of Revenue and Regulation*, 2010 S.D. 6, ¶ 17, 778 N.W.2d 130, 135-36. While there is no procedure for Appellants to exhaust, SDCL ch. 45-6C also contains no specific grant of appellate authority or reference to SDCL ch. 1-26.

This matter is similar to the issues involved in *In re PUC Docket HP 14-0001, Order Accepting Certification of Permit Issued in Docket HP 09-001 to Construct the Keystone XL Pipeline*, 2018 S.D. 44, --- N.W.2d ---. There the Supreme Court was tasked with determining whether an appeal could be taken from the Public Utilities Commission's ("PUC") acceptance of a certification filed by TransCanada Keystone Pipeline LP pursuant to SDCL 49-41B-27. *Id.* That statute requires a utility to certify to the PUC that it continues to meet its obligations under its permit if construction commences more than four years after the permit has been issued. *Id.* ¶ 5. The PUC opened a docket and held a multi-day hearing for consideration of the certification. *Id.* ¶¶ 7-8. Ultimately the PUC approved the certification, which was appealed to circuit court. *Id.* ¶ 10. The circuit court affirmed the decision of the PUC. *Id.* ¶ 11.

The Supreme Court noted that "'when the [L]egislature provides for appeal to circuit court from an administrative agency, the circuit court's appellate jurisdiction depends on compliance with conditions precedent set by the [L]egislature.'" *Id.* ¶ 12

(quoting *Schreifels v. Kottke Trucking*, 2001 S.D. 90, ¶ 9, 631 N.W.2d 186, 188). The Court went on to note that the statutory scheme in SDCL ch. 49-41B did not authorize an appeal from certification proceedings. *Id.* ¶ 13. Appellants there claimed the Administrative Procedures Act alone gave them the right of judicial review. The Supreme Court found that the PUC's action was part of the PUC's responsibility to "regulate already permitted activities" and thereby the statutory duty was not a quasi-judicial administrative action and therefore not generally reviewable by appeal to the circuit courts. *Id.* ¶ 22

Appellants may argue that the Board's decision in this matter was quasi-judicial and therefore court review of the matter does not offend the separation of powers doctrine. The Department disagrees. Quasi-judicial decisions are those that could have been "'determined as an original action in the circuit court.'" *Troy Township*, 2017 S.D. 50, ¶ 21 (quoting *Champion v. Board of County Commissioners of Minnehaha County*, 41 N.W. 739, 742, 5 Dakota 416 (Dak. Terr. 1889)). Administrative decisions are quasi-judicial in nature if the agency "investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed to already exist." *Id.*

> "Perhaps as good a criterion as any for determining what is judicial is merely to compare the action in question with the ordinary business of courts: that which resembles what courts customarily do is judicial, and that which has no such resemblance is nonjudicial."

*Id.* (quoting *Francisco v. Bd. of Dirs. of Bellevue Pub. Sch., Dist. No. 405*, 537 P.2d 789, 792 (Wash. 1975)).

SDCL 45-6C-53 prohibits the Board from denying an EXHI transfer only if the current operation is not in compliance with – or cannot be brought into compliance with – all federal, state, and local laws "*pertaining to the operation prior to the transfer*," or the successor operation is not in compliance any statute, rule, or other requirement or condition "*with respect to any exploration or mining operation in the state.*" This statute gives the Board the administrative authority to carry out supervisory responsibility over already allowed (mineral exploration) or permitted (mining) activity. "Thus the [Board's] duty here is administrative . . ." *PUC Docket HP 14-001*, 2018 S.D. 44, ¶ 22. There is also no reference to SDCL ch. 1-26, and there is no specific authorization to appeal, found in the statutory scheme regarding EXNI's. SDCL ch. 45-6C.

Appellants' interpretation of the exhaustion provision contained in SDCL 1-26-30 reaches an unreasonable result. Appellants' interpretation would allow appeals by any individual that disagrees with a decision made by an administrative entity. Further, to conclude that the operative language allows Appellants to appeal the Board's decision below would place the circuit courts of the state in the role of an executive branch agency. The separation of powers doctrine prevents this. The Department believes that such an unreasonable result could not have been the intent of the Legislature in enacting the exhaustion provision of SDCL 1-26-30. A more reasonable interpretation, when reviewing SDCL ch. 1-26 as a whole, is to tie the exhaustion provision of SDCL 1-26-30 to an actual quasi-judicial process or proceeding.

## CONCLUSION

Public interest in the administrative decisions made by state government entities is encouraged, generates a robust discussion of important public policy issues, and ultimately results in better regulation and government. Not all administrative decisions, however, are appealable to the circuit court for review. There may be other legal processes through which the EXNI and its transfer could be reviewed, but the Department concludes the circuit court is without jurisdiction, under either SDCL ch. 45-6C or SDCL ch. 1-26, to conduct appellate review of the decision made by the Board. Regardless of the importance of the issues presented, if the threshold question of jurisdiction cannot be answered in the affirmative "the law constrains [the Court] to act no further." *PUC Docket HP 14-001*, 2018 S.D. 44, ¶ 25.

Based upon the above, and the arguments and authorities contained in any previous pleading, the South Dakota Department of Environment and Natural Resources respectfully requests the Court enter its order dismissing Appellants' appeal with prejudice.

Dated this 16th day of July 2018.

Respectfully Submitted

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of DENR'S SUPPLEMENTAL POST-HEARING BRIEF was filed electronically by the undersigned through the Odyssey File & Serve system with the above captioned court which caused said documents to be served by electronic means upon:

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on this 16th day of July 2018.

Respectfully Submitted

/s/ Steven R. Blair
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Assistant Attorney General

pld_srb In re Mineral Mountain Resources - Supplemental Post Hearing Brief (mn)

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| STATE OF SOUTH DAKOTA<br><br>COUNTY OF PENNINGTON | )<br>)<br>) | IN CIRCUIT COURT<br><br>SEVENTH JUDICIAL CIRCUIT |

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| IN RE FINAL DECISION OF BOARD OF MINERALS AND ENVIRONMENT OF SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES TRANSFERRING EXPLORATION NOTICE OF INTENT EXNI-427 FROM MINERAL MOUNTAIN RESOURCES LTD. TO MINERAL MOUNTAIN RESOURCES (SD) INC.<br><br>A. GAY KINGMAN, STEVEN C. EMERY, AND ROBIN L. ZEPHIER,<br>Plaintiffs-Appellants,<br><br>-vs-<br><br>MINERAL MOUNTAIN RESOURCES LTD., and MINERAL MOUNTAIN RESOURCES (SD), INC.,<br>Defendants-Appellees | ) | 51CIV18-000304<br><br>DENR'S REPLY TO APPELLANTS' RESPONSE TO MOTIONS TO DISMISS |

The South Dakota Department of Environment and Natural Resources ("Department"), through the undersigned, hereby files this reply to Appellants' response to the motions to dismiss filed in the above captioned matter by the Department and by Mineral Mountain Resources (SD), Incorporated.

**ISSUE(S)**

**A. THE ACTION BELOW WAS NOT A CONTESTED CASE**

Appellants conclude that the action by the Board of Minerals and Environment ("Board") below was a contested case within the meaning of SDCL 1-

26-1(2) and 1-26-27. Appellants' conclusion is incorrect. The action taken by the Board below was not a contested case within the meaning of SDCL ch. 1-26.

SDCL 1-26-1(2) defines a "contested case" as a proceeding "in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing…" SDCL 1-26-27 further states that "when the grant, denial, or renewal of a license is required to be proceeded by notice and an opportunity for hearing, or an applicant, a party or an agency requests a hearing, the provisions of this chapter concerning contested cases apply."

Appellants contend that the transfer of the Exploration Notice of Intent (EXNI) to Mineral Mtn. Resources was preceded by "opportunity for hearing" and therefore should be considered a contested case under the definition contained in SDCL 1-26-1(2). Appellants' Response p. 4. SDCL 45-6C-54 required Mineral Mountain Resources to publish its application for a transfer of the EXNI. The plain language of this statute does not confer an opportunity for a hearing upon any party.[1] The Department issued a public notice of hearing regarding the transfer of

[1] SDCL 45-6C-54. Publication of application for a transfer of notice of intent. The applicant shall cause notice of the filing of his application for a transfer to be published in a newspaper of general circulation in the locality of the proposed exploration operation within ten days after the application of transfer is received by the department. Such notice shall contain the identity and address of the first operator and resident agent and successor operator and resident agent, a brief description of the type of mineral exploration to be conducted, the legal description of the land to be explored, the approximate date upon which the operation will commence and location where additional information about the proposed exploration operation may be obtained. Proof of such publication, such as an affidavit of publication, shall be provided to the department and become a part of the transfer application.

the EXNI to Mineral Mountain Resources, (SD) Inc. Administrative Record, Attachment 1 bates 003. Nowhere does that document indicate that a contested hearing was to be held. Notices of hearing for contested actions are required by SDCL 1-26-17 to contain specific items, many of which cannot be found in the Department's published notice. None of the statutes found within SDCL ch. 45-6C provide an opportunity for a contested hearing regarding either an EXNI, or the transfer of that EXNI to a successor operator. While a proceeding was held before the Board (SDCL 45-6C-53 requires the Board to approve EXNI transfer applications), it was not a contested hearing as contemplated by SDCL 1-26-1(2).[2]

Appellants argue that the state Supreme Court's decision in *In re South Dakota Real Estate Commission*, 484 N.W.2d 123 (S.D. 1992), is distinguishable from this matter because Appellants allege the Board requested and conducted a hearing. Appellants' Response p. 5. The Board did not request or conduct a contested case hearing as contemplated by SDCL ch. 1-26. The Department gave the public notice that the Board would be considering the EXNI transfer request. Administrative Record, Attachment 1 bates 003. It is clear from the notice that no contested proceeding was contemplated or requested by the Department. Further, the Board did not request a contested case hearing be held regarding the transfer.

[2] Appeals of administrative decisions are to be decided entirely on the record before the administrative agency. SDCL 1-26-35. Appellants aver that "on information and belief, the Pennington County State's Attorney" requested a hearing be held on Mineral Mountain Resources' EXNI transfer application. Appellants' Response to Motions to Dismiss p. 2. Appellants also cite to numerous documents in their response that cannot be considered contents of the record of a contested case as enumerated by SDCL 1-26-21. The Department objects to these documents or averments being considered on appeal before the Circuit Court.

As occurred in *In re S.D. Real Estate Com'n*, the statues controlling EXNI transfers do not contemplate contested case proceedings, and neither the Board nor the Department requested a contested hearing.

Finally, Appellants argue that the transfer of the EXNI to Mineral Mountain Resources, (SD) Inc. was a license as that term is defined by SDCL 1-26-1(4). Whether the Board's approval of the transfer should be considered a "license" is not determinative of whether the proceeding before the Board was a contested case proceeding. Assuming for the sake of argument that the transfer of the EXNI should properly be considered a "license" under SDCL 1-26-27, the determinative factors remain whether the statutory scheme called for notice and an opportunity for hearing, or whether a hearing had been requested by a party. In this matter, neither factor is met.

**B. APPELLANTS ARE NOT AGGRIEVED PARTIES**

Appellants assert they are aggrieved parties because they are "residents of Rapid City, South Dakota[;]" they hold the Black Hills sacred, they are interested in protecting the land and natural resources, and they believe mineral exploration will pollute the natural resources and "adversely affect the flow of water in Rapid Creek...." Appellants' Response p. 6-7. These are not individual and personalized injuries distinct from those a person might suffer "common in nature to a similar grievance suffered by all or many other electors or taxpayers." *Barnum v. Ewing*, 220 N.W. 135, 138 (S.D. 1928). As such, Appellants are not aggrieved parties.

Appellants argue that *Barnum* is no longer valid law. Appellants' Response p. 8. Appellants cite to *Application of Northern States Power Co.*, 328 N.W.2d 852, 855 (S.D. 1983), to support this proposition. There the state Supreme Court indicated that it was not going to apply federal standing law to the concept of an aggrieved party under SDCL 1-26-30. *Id.* The Supreme Court has recognized that to establish aggrieved party status in appeals under other statutes outside of SDCL ch. 1-26, a person must satisfy the three elements of federal standing law discussed in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992)(*Lujan II*). *Cable v. Union County Board of Commissioners*, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825 (citing *Benson v. State*, 2006 S.D. 8, ¶ 22, 710 N.W.2d 131, 141). The Department agrees that the Supreme Court has indicated that federal standing law is not to be applied to determine aggrieved party status under SDCL 1-26-30. However, even in *Northern States Power* the Supreme Court cites numerous times to *Barnum* as support for its determination of aggrieved party status. 328 N.W.2d at 855. Appellants' are mistaken to conclude that *Barnum* is no longer valid.

**C. THERE IS NO FINAL DECISION**

SDCL 1-26-25 defines a "final decision" for purposes of the Administrative Procedures Act (SDCL ch. 1-26). A final decision is clearly defined as requiring the public body to "affirm, modify, or nullify an action previously taken or may direct the taking of new action within the scope of the notice of hearing." SDCL 1-26-25. SDCL 1-26-16 requires the issuance of a notice of hearing for a contested case

proceeding, and SDCL 1-26-17 enumerates the required contents of that notice. There was no notice of contested hearing issued in this matter, and no action taken by the Board consistent with the scope of a notice of contested hearing. Further, SDCL 1-26-25 requires entry of written findings of fact and conclusions of law as part of any final decision. There were no findings of fact or conclusions of law entered regarding the EXNI transfer. There is no "final decision" for Appellants to appeal from as that term is statutorily defined.

**CONCLUSION**

Based upon the above, and the arguments and authorities contained in the Department's initial motion, the South Dakota Department of Environment and Natural Resources respectfully requests the Court enter its order dismissing Appellants' appeal with prejudice.

Dated this 7th day of May, 2018.

Respectfully Submitted

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of DENR'S REPLY TO APPELLANTS' RESPONSE TO MOTIONS TO DISMISS was filed electronically by the undersigned through the Odyssey File & Serve system with the above captioned court which caused said documents to be served by electronic means upon:

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on this 7th day of May, 2018.

Respectfully Submitted

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pld SRB Mineral Mountain Resources – DENR's Reply to Appellants' Response to Motions to Dismiss (cm)