STATE OF SOUTH DAKOTA	)	CIRCUIT COURT
	) SS.	
PENNINGTON COUNTY	)	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.	)	**51CIV18-000304**
A. GAY KINGMAN, STEVEN C. EMERY, AND ROBIN ZEPHIER, Plaintiffs-Appellants, vs. MINERAL MOUNTAIN RESOURCES LTD., MINERAL MOUNTAIN RESOURCES (SD) INC., Defendants-Appellees.	)	**MINERAL MOUNTAIN RESOURCES' SUPPLEMENTAL BRIEF**

Mineral Mountain Resources Ltd. and Mineral Mountain Resources (SD) Inc. (hereinafter collectively referred to as "Mineral Mountain Resources"), file this supplemental brief in support of the Motion to Dismiss the appeal filed by Plaintiffs-Appellants, A. Gay Kingman, Steven C. Emery and Robin L. Zephier (hereinafter collectively referred to as "Plaintiffs-Appellants").

1. NOT ALL EXECUTIVE BRANCH ACTIONS ARE APPEALABLE.

Before this appeal can be considered, the Court must first determine whether it has jurisdiction. If the Legislature provides for appeal to Circuit Court from an administrative agency, the Circuit Court will have appellate jurisdiction. *Schreifels v. Kottke Trucking*, 2001 S.D. 90, ¶ 9, 631 N.W.2d 186, 188. "No right to appeal an administrative decision to Circuit Court exists unless the South Dakota legislature enacts a statute creating that right." *Daily vs. City of Sioux Falls*, 2011 S.D. 48 ¶ 802 N.W.2d 905, 915.

> The right to any appeal is statutory and established by the legislature. This court has consistently recognized that the right to an appeal is purely statutory and no appeal may be taken absent statutory authorization. An attempted appeal from which no appeal lies is a nullity and confers no jurisdiction on the court except to dismiss it. *Appeal of Lawrence County*, 499 N.W.2d 626, 628 (S.D.1993) (internal citations omitted).

Elliott v. Bd. of Cty. Comm'rs of Lake Cty., 2005 S.D. 92, ¶ 15, 703 N.W.2d 361, 368.

It is fundamental that the separation-of-powers doctrine determines the level of judicial review permitted in the appeal of administrative actions. *State v. Troy Twp.*, 2017 S.D. 50 ¶ 15. The judicial branch (Circuit Court) does not have jurisdiction to review an administrative decision of the executive branch (Board of Minerals and Environment) *unless* the legislative branch (Legislature) has authorized the right to appeal. *Daily, supra.*

On the day after this Court's June 12th hearing in this case, the South Dakota Supreme Court issued its decision in *Matter of PUC Docket HP 14-0001*, 2018 S.D. 44, squarely holding there is no right to appeal all administrative decisions by the executive branch of state government. *Id.*

Facts of *PUC Docket*

In *PUC Docket*, the law required TransCanada Keystone Pipeline LP ("Keystone") to file a statement with the Public Utilities Commission ("PUC") certifying that it remained in compliance with permit conditions. *Id.* at ¶ 5.

After Keystone filed its certification, the Cheyenne River Sioux Tribe, Yankton Sioux Tribe and others ("Intervenors") intervened with the PUC. *Id.* at ¶ 7. The Intervenors argued that Keystone was not in compliance with permit conditions. *Id.* at ¶ 9.

The law did not provide for a hearing on Keystone's certification. SDCL ch. 49-41B. Nevertheless, the PUC held a nine-day hearing at which all parties pre-filed testimony, called witnesses, and conducted extensive cross-examination. *Id* at 8.¶ After this extensive hearing, the PUC issued a final decision approving Keystone's certification. *Id.* at ¶ 9 & 10.

The Intervenors appealed the PUC's decision to Circuit Court. *Id.* at ¶ 10. The Circuit Court affirmed the PUC. *Id.* at ¶ 11.

The Intervenors then appealed to the South Dakota Supreme Court. *Id.* On appeal, the Supreme Court held that there was not jurisdiction to appeal from Keystone's certification with the PUC. *Id.* at ¶ 25.

The *PUC Docket* decision

The Supreme Court first recognized the South Dakota Administrative Procedures Act (APA):

> Under SDCL 1-26-30, "[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 is entitled to judicial review[.]" Further, SDCL 1-26-30.2 provides that "[a]n appeal shall be allowed in the circuit court to any party in a contested case from a final decision, ruling, or action of an agency."

Id. at ¶ 14.

The Court held that the Intervenors could not appeal from the PUC certification hearing because the PUC hearing was not a "contested case" and the PUC was not "required by law" to hold a hearing on Keystone's certification. *Id.* at ¶ 15.

> [T]his appeal was not from a contested case within the meaning of SDCL chapter 1-26. A contested case is "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 1-26-1(2). The parties dispute whether the commission's hearing was "required by law." We have said that a hearing is "required by law" when required by a statute, an agency rule, or a due-process constitutional requirement. *Carlson v. Hudson*, 277 N.W.2d 715, 717-

> 18 (S.D. 1979); *see also Valley State Bank of Canton v. Farmers State Bank of Canton*, 87 S.D. 614, 621, 213 N.W.2d 459, 463 (1973).

Id.

The Court held that "the administrative proceeding below [the PUC hearing] was not an appealable contested case within the meaning of SDCL chapter 1-26." *Id.*

The Supreme Court also rejected many different arguments for jurisdiction of the appeal. For example, the Court ruled that the more particular statutes governing the PUC govern the right of appeal. "[W]e note that the 'terms of a statute relating to a particular subject will prevail over the general terms of another statute."' *Id* at ¶ 18 (citing *In re Wintersteen Revocable Trust Agreement*, 2018 S.D. 12 ¶ 12, 907 N.W.2d 785, 789). The more particular PUC statutes did not authorize an appeal from Keystone's certification. *Id* at 13.

The Court also noted that the PUC statutes that do not authorize an appeal were adopted after the APA. *Id* at ¶ 19. "[W]e have said that the more recent statute supersedes an older statute." *Id*. The Court ruled that the more recent PUC statutes that do not authorize an appeal prevailed over the older appellate statutes in the APA. Id at 18.

Finally, the Supreme Court ruled that the appellants were not entitled to judicial review of the PUC's decision as a matter of due process. *Id*. at ¶ 23. The Court wrote:

> [T]he Commission's acceptance of TransCanada's certification was an administrative act that was part of the Commission's supervisory responsibilities to regulate already permitted activities. It was no different than the administrative activities of countless other regulatory agencies that must monitor compliance with filing requirements imposed on those who are engaged in previously authorized construction projects. Thus, the Commission's statutory duty here is administrative: it does not involve the quasi-judicial adjudication of Appellants' liberty and property interests. That type of administrative action is not generally reviewable by appeal to the courts. *See State, Dep't of Game, Fish & Parks v. Troy Township*, 2017 S.D. 50, ¶ 14, 900 N.W.2d 840, 846 (recognizing that "executive or administrative duties of a nonjudicial nature may not be imposed on judges, either directly or by appeal" (citations omitted)).

Id. at ¶ 22. (footnote omitted).

The Court ultimately vacated the Circuit Court's decision and dismissed the appeal because there was no authority to appeal from Keystone's certification with the PUC. *Id.* at 25.

Mineral Mountain Resources EXNI transfer

Just like *Matter of PUC*, this Court lacks jurisdiction to consider an appeal from the transfer of Mineral Mountain Resource's EXNI for the following reasons: (1) there was not a contested case hearing; (2) there is no statutory authorization for an appeal from the transfer of an EXNI; (3) mineral exploration statutes do not

authorize an appeal; and (4) the mineral exploration statutes were adopted after the APA.

For brevity purposes, we will not revisit the lack of a contested case hearing. This issue was thoroughly discussed in the initial briefing. There was no contested case.

Secondly, the legislature has not authorized an appeal of this administrative action. Nothing within the South Dakota Mineral Exploration Act ("Act") SDCL ch. 45-6C authorizes an appeal from the transfer of an EXNI. There is "no right to appeal an administrative decision to Circuit Court unless the South Dakota legislature enacts a statute creating that right." *Id.* at ¶ 12 (quoting *Daily vs. City of Sioux Falls*, *supra*.).

Third, the Act (SDCL ch. 45-6C) is particular to mineral exploration. These mineral exploration statutes do not authorize an appeal from the transfer of an EXNI. Because the Mineral Exploration Act is particular to mineral exploration, it should prevail over the general provisions of the APA. (SDCL ch. 1-26).

Fourth, the Act was adopted by the South Dakota legislature in 1982, sixteen years after the APA (SDCL ch. 1-26) was enacted in 1966. "The more recent statutes supersede the older statutes." *Matter of PUC Docket HP 14-0001* at ¶ 19.

This appeal should be dismissed.

2. MINERAL MOUNTAIN RESOURCES LTD., A CANADIAN CORPORATION, DID NOT NEED A CERTIFICATE OF AUTHORITY TO FILE OR TRANSFER THE EXNI.

Even though this court lacks jurisdiction, it asked the parties to include a discussion of the merits of the appeal in its supplemental brief.

The Plaintiffs-Appellants claim that the initial EXNI was void *ab initio* because Mineral Mountain Resources Ltd., a Canadian corporation did not have a certificate of authority from the South Dakota Secretary of State. Appellant's brief p. 4. This argument is a red herring.

First, nothing in state law requires a foreign corporation to have a certificate of authority to file an EXNI. *See* SDCL 45-6C-6, 45-6C-7, 45-6C-8 and 46-6C-9. The law requires "any person desiring to conduct mineral exploration" to file a notice of intent with the Board of Minerals and Environment. SDCL 45-6C-6.

Secondly, a foreign corporation is not required to obtain a certificate of authority when transacting business in interstate commerce. SDCL 47-1A-1501.

SDCL 47-1A-1501 first provides, "A foreign corporation may not transact business in this state until it obtains a certificate of authority from the Office of the Secretary of State." BUT, this statute also provides that "transacting business in interstate commerce"… "do[es] not constitute transacting business within the meaning of this section…". SDCL 47-1A-1501 (11). A certificate of authority is

not required when a foreign corporation is transacting business in interstate commerce. *Id*.

Mineral Mountain Resources Ltd. is transacting business in interstate commerce. It has hired and/or purchased goods and services for mineral exploration in many different states.

> It has been pointed out that "interstate commerce" is a term of such wide implications and ramifications that the courts have carefully avoided any attempt to give it a comprehensive definition.
>
> Generally, it has been said that the distinguishing feature and indispensable element of interstate commerce is importation into one state from another. But while transportation alone across state lines is commerce subject to the regulatory power of Congress, regardless of whether title to the merchandise passes before or after such transportation, such commerce is not confined to transportation among states, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. It embraces business or commercial intercourse in any and all of it forms and branches and in all its component parts between citizens of different states, and may embrace purely social intercourse between citizens of different states, as over the telephone, telegraph, or radio, or the mere passage of persons from one state to another for social intercourse or pleasure. Even local matters may amount to interstate commerce if they commence a chain of movement which culminates across state lines.

15 Am. Jur. 2d *Commerce* § 4.

There is no doubt, that Mineral Mountain Resources Ltd., is engaged in interstate commerce through the purchase of goods and services from multiple vendors in many different states. Consequently, the law does not require Mineral

Mountain Resources Ltd. to have a certificate of authority to transact business in the state of South Dakota. SDCL 47-1A-1501 (11).

CONCLUSION

Not all administrative actions are appealable. The Circuit Court lacks jurisdiction to consider an appeal from the transfer of an EXNI. This case should be dismissed.

Dated this 16th day of July, 2018.

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CERTIFICATE OF SERVICE

Max Main and Dwight A. Gubbrud, hereby certify that on the 16th day of July, 2018, they caused a full, true and complete copy of the foregoing **MINERAL MOUNTAIN RESOURCES' SUPPLEMENTAL BRIEF** and this Certificate of Service to be served through USJ Odyssey File & Serve and/or by depositing the same in the U.S. Mail in Belle Fourche, South Dakota with first class postage thereon fully prepaid, in an envelope addressed below, upon:

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STATE OF SOUTH DAKOTA PENNINGTON COUNTY	)) SS.)	CIRCUIT COURT 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. A. GAY KINGMAN, STEVEN C. EMERY, AND ROBIN ZEPHIER, Plaintiffs-Appellants, vs. MINERAL MOUNTAIN RESOURCES LTD., MINERAL MOUNTAIN RESOURCES (SD) INC., Defendants-Appellees.	)	**51CIV18-000304** **MINERAL MOUNTAIN RESOURCES' REPLY IN SUPPORT OF MOTION TO DISMISS**

Mineral Mountain Resources Ltd. and Mineral Mountain Resources (SD) Inc. (hereinafter collectively referred to as "Mineral Mountain Resources"), file this reply in support of their Motion to Dismiss the appeal filed by Plaintiffs-Appellants, A. Gay Kingman, Steven C. Emery and Robin L. Zephier (hereinafter collectively referred to as "Plaintiffs-Appellants").

REPLY

The Plaintiffs-Appellants' Response to Motions to Dismiss tries to extend the Circuit Court's jurisdiction based upon the "belief" that the Pennington County

State's Attorney requested a hearing before the Board of Minerals and Environment ("BME"). This argument does not produce a "contested case" from which an administrative appeal may be taken.

1. **There is no record of a request for hearing.**

The Plaintiffs-Appellants argue that the contested case procedures apply because "[o]n information and belief, the Pennington County State's Attorney requested the Board hold a hearing on the application for transfer." Response to Motions to Dismiss, page 2.

Nothing supports the Plaintiffs-Appellants' "information and belief". There is no evidence of any such request.

There is no "administrative record" for this matter. Instead, the Department of Environment and Natural Resources "DENR" provided copies of the materials received by the BME prior to or at the time it considered the transfer request. There is no evidence that a hearing was requested on the EXNI transfer.

2. **There is no contested case from which to appeal.**

If there were a contested case, specific procedures would have been followed. For example, South Dakota law requires publication of notice before a contested case hearing. SDCL 1-26-17 provides:

> 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;
> (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,

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> 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.

The BME did not give this notice because there is no "contested case".

There were no pleadings filed. SDCL 1-26-18. There was no pre-hearing discovery. Id. The Plaintiffs-Appellants never intervened as a party. SDCL 1-26-17.1. There was no sworn testimony. SDCL 1-26-19.1. There were no witnesses. SDCL 1-26-19. There was no cross-examination of witnesses. Id. There is no administrative record. SDCL 1-26-21. The agency made no transcript. SDCL 1-26-22. There are no findings of fact. SDCL 1-26-23. There are no conclusions of law for the Court to review. SDCL 1-26-25. There is no final decision from which to appeal. Id.

3. None of the Plaintiffs-Appellants is a party.

SDCL 1-26-30 provides that only "a *person* who has exhausted all administrative remedies… or a *party* who is aggrieved by a final decision in a contested case is entitled to judicial review…". (Emphasis added).

Neither A. Gay Kingman, Steven C. Emery nor Robin L. Zephier ("Plaintiffs-Appellants") made an appearance or filed anything with the BME. The Plaintiff-Appellants' failure to appear before the BME constitutes a failure to exhaust

administrative remedies. "Failure to exhaust administrative remedies is a jurisdictional defect." *Matter of Notice & Demand to Quash, Etc.* 339 NW2d 785, 786 (SD 1983).

In addition, none of the Plaintiffs-Appellants is a party. Page 6 of the Plaintiffs-Appellants' brief incorrectly quotes that "any *person* aggrieved" is "probably broad enough to include, under the proper circumstances, persons who are not actually parties to the proceeding before the [agency]." The Plaintiffs-Appellants represent that this language arises from SDCL 1-26-30. This is incorrect. This quoted language is from a 1928 appeal from a County Commission. *Barnum v. Ewing* 53 SD 47, 220 NW2d 135 (1928). This was not an appeal from an agency. This case predates the Administrative Procedures Act. The Plaintiffs-Appellants confuse the terms "any *person* aggrieved" with "a *party* who is aggrieved." (Emphasis added). SDCL 1-26-30 provides for appeal to be brought by "a *party* who is aggrieved." *See also,* SDCL 1-26-30.2.

None of the Plaintiffs-Appellants has the right to appeal under SDCL 1-26-30.

CONCLUSION

It is quite simple, the transfer of an EXNI-427 was not a "contested case" from which an appeal may be taken. Consequently, the Circuit Court lacks jurisdiction and this matter should be dismissed.

DATED this 7th day of May, 2018.

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