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September 28, 2018

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Jeanne Goodman
Chief Engineer, DENR – Water Rights Program
523 E. Capitol Avenue
Pierre, SD 57501

Re: Mineral Mountain Resources LTD - Water Rights
GPNA File No. 14089.0002

Dear Chief Engineer Goodman:

Enclosed please find the original of Mineral Mountain Resources (SD) Inc.'s Objections to Petitions for Contested Case Proceedings and Continuance and Certificate of Service in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Naasz', with a long horizontal flourish extending to the right.

Matthew E. Naasz

MEN:jkg

Enclosures

C: Parties on Certificate of Service

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF REQUEST FOR)	MINERAL MOUNTAIN
TEMPORARY PERMIT TO USE)	RESOURCES (SD) INC.'S OBJECTION
PUBLIC WATER (MINERAL)	TO PETITIONS FOR CONTESTED
MOUNTAIN RESOURCES (SD) INC.)	CASE PROCEEDINGS AND
)	CONTINUANCE

Mineral Mountain Resources (SD), Inc., through its undersigned counsel, hereby submits its objection to the Petitions for Contested Case Proceedings and Continuance filed in this matter.

INTRODUCTION

Mineral Mountain Resources (SD), Inc., submitted a request for a temporary permit to use public waters. The Chief Engineer, pursuant to ARSD 74:02:01:34, deferred this request to the South Dakota Water Management Board ("Board"). This request is on the Board's October meeting agenda. The Chief Engineer has recommended approval of the request, subject to certain qualifications. Mark Rath, Natural Resources Engineer III, concluded that water is available to meet this temporary water use request for the remainder of this calendar year.

Since the Chief Engineer's recommendation, several petitions in opposition to the temporary water request have been filed. This is not a contested case proceeding pursuant to SDCL ch. 1-26; and the provisions of SDCL ch. 46-2A do not apply. There is no authority for intervention, auto-delay, or appeal from this Board's decision on this matter, and therefore the petitions received should not be considered by this Board. Additionally, as described below, to treat an application for the temporary use of water as a contested case, and to apply SDCL ch. 46-2A, would defeat the purpose of requests for the temporary use of water.

ARGUMENT

SDCL 46-5-40.1 allows for temporary permits to be issued for certain limited purposes. The text of that section specifically states that the permit is not valid after December 31 in the year it was issued. *Id.* Additionally, a temporary permit can only be utilized for “construction, testing, or drilling purposes.” The Legislature has recognized the need for a temporary permit process that provides a mechanism for the short term use of this state’s waters, when the permanent-application process would be both cost and time prohibitive.

Petitioners have asked that the request for a temporary permit be continued and the matter considered by the Board at a special meeting in Rapid City. However, the provisions of SDCL 46-2A, including the auto-delay provision, simply cannot apply to a request for a temporary permit to use water. The Chief Engineer has provided the relevant statutory analysis. Mineral Mountain concurs with that analysis, and so won’t repeat it here. As addressed by the Chief Engineer, the statutes in SDCL ch. 46-2A and the contested case provisions of SDCL ch. 1-26 do not apply to Mineral Mountain’s request.

In addition to the statutory analysis provided by the Chief Engineer, there are practical considerations that must be considered. If a request for a temporary use of water, deferred by the Chief Engineer to this Board, is considered a contested case, subject to SDCL chs. 1-26 and 46-2A, every such deferral to this Board is a practical denial of the request.¹ Application of those statutes would allow anyone seeking to oppose such a request to manipulate the administrative system to prevent anyone from receiving a meaningful temporary permit.

¹ When a request for the temporary use of water is deferred by the Chief Engineer to this Board, the only thing that changes is the decision maker. See ARSD 74:02:01:34 (“[t]he chief engineer may issue permits but may, at the chief engineer’s discretion, defer issuance of a temporary permit and present the application to the board for action.”). In essence, this Board is filling the shoes of the Chief Engineer. If intervention is allowed and the provisions of SDCL chs. 1-26 and 46-2A apply when the Chief Engineer defers action to this Board, the next question that will need to be addressed is whether intervention must be allowed on those requests for temporary use of water that are not deferred to this Board.

Take, for example, a request for a temporary permit filed on the earliest day possible in a calendar year – January 2nd. If the provisions of SDCL 46-2A applied, the Chief Engineer would have 60 days to make a recommendation regarding the request. See, SDCL 46-2A-2. Sixty days after January 2nd would be March 3rd in most years. Using the 2018 Board meeting calendar, the March meeting was held on March 7. Publication of Notice of the application and recommendation must occur at least 20 days before the Board meeting where the request will be heard. See, SDCL § 46-2A-4. There are not 20 days between March 3 and March 7, so the request would have to be placed on the May Board agenda. Any petitioner could invoke the auto-delay provisions of SDCL § 46-2A-5. The request would then be pushed to the Board's next meeting, typically held around the fourth of July.

Assuming the request was approved by the Board in July, findings of fact and conclusions of law would be due from the applicant 20 days prior to the October Board meeting. See ARSD 74:02:01:13.01. The findings of fact and conclusions of law could then be signed following the October meeting. By statute, temporary permits to use water expire on December 31 of the year they are issued. SDCL § 46-5-40.1. Even if no appeal was filed, a petitioner opposing a temporary permit to use water could prevent the use for over 9 of the available 12 months - simply by filing a totally meritless petition.

Should that same petitioner appeal the Board's decision to the circuit court, the appeal process would last well into the next year – long after the permit would have naturally expired. SDCL 1-26-31 requires a notice of appeal to be filed 30 days after the decision of the Board. In this example, the notice of appeal wouldn't be filed until November. The petitioner could then request the Circuit Court to stay the Board's decision. See SDCL 1-26-32. By that point, though, there would be no reason to seek a stay as the request would be effectively denied through the

delay caused by the petition. In our example, SD DENR would then have 30 days (sometime in December) to transmit the record to the reviewing court following the filing of the notice of appeal. SDCL 1-26-33. The appellant would then have 30 days to file their brief, with appellee's brief to follow. SDCL 1-26-33.2. But of course, by this time, the party seeking to temporarily use water would have had to submit a new application for the new year.

It is easy to see how allowing intervention in a request to temporarily use water would effectively eliminate this essential tool. There would be no more requests for construction companies who wish to use water for a nearby road construction project. Nor could hopeful appropriators conduct an aquifer pump test in order to satisfy themselves and this Board that water is available for permanent appropriation. It is plain to see how allowing intervention in a request for a temporary permit to use water and applying the provisions of SDCL chs. 1-26 and 46-2A would frustrate the purpose of this state's water appropriation process.

The Chief Engineer has been provided the discretion to defer requests for temporary use of water to the Board. That decision does not transform a request for temporary use into a contested case, nor does it invoke the provisions of SDCL ch. 46-2A. To read the statutes and rules in such a manner would create an absurd result – any deferred request could effectively be stopped by filing a petition to intervene. There would have been no reason to provide the Chief Engineer the discretion to defer a temporary permit – a deferral would be tantamount to a denial. It is axiomatic that laws must not be interpreted to reach an absurd result. *See, e.g., Murray v. Mansheim*, 2010 S.D. 18, ¶ 7, 779 N.W.2d 379, 382. The rule providing for deferral would be entirely unnecessary, and would totally defeat the purpose of the statute allowing temporary use of the state's water.

CONCLUSION

The Legislature recognized the need for a process through which water could temporarily be put to use. In order to be of any value, this process needs to move quickly. For this reason, the procedure for such an application was kept separate from the procedure for applying for a permanent appropriation of water. The procedure for ruling on a request for a temporary appropriation does not contemplate, or allow, for intervention by third parties. The petitions, and their requests for continuances, should not be considered by this Board.

Dated this 28th day of September, 2018.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

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STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF REQUEST FOR)
TEMPORARY PERMIT TO USE) CERTIFICATE OF SERVICE
PUBLIC WATER (MINERAL
MOUNTAIN RESOURCES (SD) INC.)

The undersigned hereby certifies that on the 28th day of September, 2018, true and correct copies of Mineral Mountain Resources (SD) Inc.'s Objection to Petitions for Contested Case Proceedings and Continuance, in the above matter, were mailed by U.S. Mail, first class, postage prepaid, to:

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