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September 27, 2018

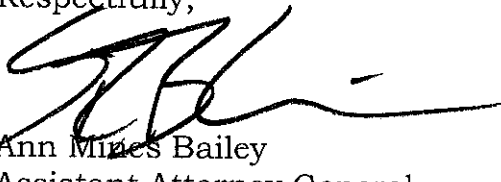
Parties on Certificate of Service

Re: *In the Matter of Request for Temporary Permit to Use Public Water (Mineral Mountain Resources (SD) Inc.*

To Whom It May Concern:

Enclosed please find a copy of the Chief Engineer's Objection to Petitions for Contested Case Proceedings and Continuance and Certificate of Service in the above-entitled matter.

Respectfully,

for 

Ann Mines Bailey
Assistant Attorney General
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AFM/cmm
Enclosures

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

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

BACKGROUND

Pending before the Board at its October meeting is a request for a temporary permit for use of public water by Mineral Mountain Resources.¹ Mineral Mountain is seeking a temporary permit for the purposes of exploratory drilling pursuant to SDCL § 46-5-40.1. Pursuant to ARSD 74:02:01:34, the Chief Engineer, in her discretion, has chosen to present the request to the Board and allow the Board to determine if the temporary permit should issue and what qualifications should be applied. Since placing that request on the agenda, a number of petitions have been received from third parties seeking to intervene in the matter and requesting a delay of the hearing. It is the Chief Engineer's position that this matter does not constitute

¹ South Dakota Codified Law, ch. 46-5 authorizes two types of temporary permits. The first type is outlined in SDCL § 46-5-39 and is referred to as a temporary use permit. The temporary use permit is authorized for the use of water subject to a future use permit that has yet to be developed until such time as the future use permit is developed. The second type of temporary permit is referred to as a temporary permit for use of public water under SDCL § 46-5-40.1. This temporary permit allows for the use of public water for a short duration, one year or less, for the purposes of construction, testing and drilling. These two types of permits are subject to different procedures. The temporary use permit is subject to the procedures outlined in SDCL ch. 46-2A. See SDCL § 46-5-39. The procedure for obtaining a temporary permit for use of public water, however, is controlled by ARSD 74:02:01:32 through 74:02:01:34.02.

a contested case whereby third parties may intervene. Accordingly, the Chief Engineer requests that the Board proceed in accordance with the statutes and rules which control the processing of temporary permits for use of public water.

DISCUSSION

South Dakota Codified Law, section 46-5-40.1 provides for the temporary use of the State's waters. It states as follows:

The Water Management Board may promulgate rules to authorize the chief engineer to issue temporary permits for the use of public water for construction, testing, or drilling purposes. No temporary permit is valid after December thirty-one of the year in which the permit is issued. No temporary permit may be issued if the permit interferes with or adversely affects prior appropriations or vested rights. A temporary permit shall contain qualifications and limitations necessary to protect the public interest. The issuance of a temporary permit is permission to use public water on a temporary basis and does not grant any water rights.

SDCL § 46-5-40.1. Based upon the authority granted in SDCL § 46-5-40.1, the Water Management Board promulgated ARSD 74:02:01:32 through 74:02:01:34.02 to set forth the procedures by which permission could be granted for the temporary use of the State's waters. Under these procedures, a request for a temporary permit may be submitted in writing or by telephone. See ARSD 74:02:01:32. The permit must contain certain information including the water source, location of diversion, and maximum total amount of water to be used along with the maximum daily withdrawal rate. See ARSD 74:02:01:33. Once that information is received, the Chief Engineer may issue

the permit or defer the permit to the Board. *See* ARSD 74:02:01:34.² There is no requirement that the request be publicly noticed or brought before the Board for hearing. Nor is there a process by which a third party may intervene and cause that such a hearing be held.

The petitions which have been received, however, appear to be requesting to invoke the provisions of SDCL ch. 46-2A which provide for an opportunity to intervene, as well as an opportunity to request a delay of hearing. The requirements of SDCL ch. 46-2A, however, are not applicable to this type of temporary permit for use of public water. *Compare* SDCL § 46-5-40.1 and § 46-5-39. Additionally, the provisions of the South Dakota Administrative Procedures Act, found at SDCL ch. 1-26, are not applicable as this matter does not qualify as a “contested case.”

A “contested case” under SDCL ch. 1-26 is defined 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 § 1-26-1(2). This, however, is not a proceeding during which “legal rights, duties, or privileges” are determined. In fact, SDCL § 46-5-40.1 specifically provides that “the issuance of a temporary permit is permission to use public water on a temporary basis and does not grant any water rights.” Additionally, as previously discussed, there is no requirement in rule or statute for notice and an opportunity to be heard prior to the issuance of the permit. *See* Matter of

² ARSD 74:02:01:34 provides that “[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.”

PUC Docket HP 14-0001, 2018 S.D. 44, ¶ 15, 914 N.W.2d 550, 556 (citations omitted) (holding “a hearing is ‘required by law’ when required by a statute, an agency rule, or a due-process constitutional requirement.”). There is no statute or rule requiring a hearing and the Legislature has determined that there is no conferral of a right, which would invoke due process protections³. See SDCL § 46-5-40.1 and ARSD 74:02:01:34.⁴ Accordingly, this matter does not constitute a contested case as defined by SDCL 1-26-1(2) and the requirements of SDCL ch. 1-26 do not apply.

CONCLUSION

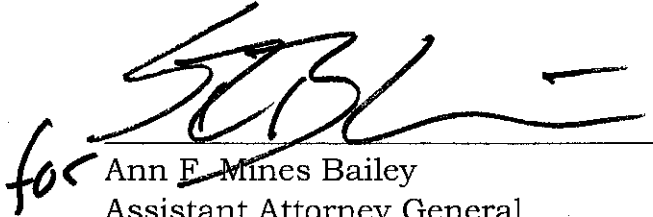
The request for permit at issue is not one which falls under the requirements of SDCL ch. 1-26. This type of permit, as noted by SDCL § 46-5-40.1, is for a short-term use of public water. The Legislature determined that there must be a way to allow the use of public water for short term projects without the requirements of notice and hearing which could go on for months. This is evidenced by the Legislature’s mandate that such a permit may not last longer than December 31 of the year it was issued and the specific disclaimer that such a permit does not confer any rights to the applicant. The Chief

³ The South Dakota Supreme Court has held that “the terms of a statute relating to a particular subject will prevail over the general terms of another statute.” *Matter of PUC Docket HP 14-0001*, 2018 S.D. 44, ¶ 18, 914 N.W.2d 550, 557 (quoting *In re Wintersteen Revocable Trust Agreement*, 2018 S.D. 12, ¶ 12, 907 N.W.2d 785, 789.). Here, SDCL § 46-5-40.1 provides specific guidance regarding the issuance of a temporary permit for use of public water including the manifestation of the legislative intent that the proceedings would not be subject to the requirements of SDCL ch. 1-26.

⁴ The only time the rules provide for a hearing regarding the temporary permit for use of public is when the Chief Engineer issues an order rescinding a temporary permit and only then may a hearing be held before the Board upon receipt of a written request of the applicant seeking to appeal the rescission. See ARSD 74:02:01:34.02.

Engineer has deferred the determination to the Board. There is no provision, however, for the intervention of third parties; nor is there a bestowal of rights due to that deferral or the grant of a temporary permit. See SDCL § 46-5-40.1. Accordingly, the Chief Engineer would request that the Board proceed with the agenda item as scheduled.

Dated this 27th day of September 2018.

for 

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pld_AFM Mineral Mountain Resources (SD) Inc. – Objection to Petitions for Contested Case Proceeding and Continuance (cm)

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 27th day of September 2018, true and correct copies of the Chief Engineer'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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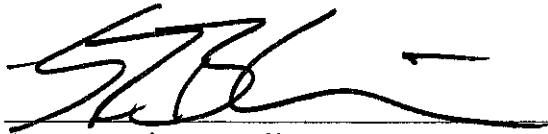
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pld_AFM Mineral Mountain Resources (SD) Inc. – Objection to Petitions for Contested Case Proceeding and Continuance -
Certificate of Service (cm)