STATE OF SOUTH DAKOTA COUNTY OF DEUEL	) : SS)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT

In the Matter of PUC Docket EL19-027, Application of Crowned Ridge Wind II, LLC For a Permit of a Wind Energy Facility in Deuel, Grant and Codington Counties GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ, *Appellants,* vs. SOUTH DAKOTA PUBLIC UTILITIES COMMISSION and CROWNED RIDGE WIND II, LLC. *Appellees.*	19CIV20-000021 APPELLANTS' OPENING BRIEF TO CIRCUIT JUDGE ELSHERE (SDCL 1-26-33.3)

A. *Jurisdictional Statement*

This case arises from a final decision of Appellee South Dakota Public Utilities Commission ("Agency" or "PUC"), entered and served April 6, 2020 ("Decision"); the Decision, being the unanimous order of the Agency's three Commissioners,[1] extends for 29 pages, embracing 73 findings of fact, and 16 conclusions of law, along with 49 separately stated "permit conditions." The Decision allows the issuance of a "facility siting permit" to Appellee Crowned Ridge II, LLC ("Applicant') under the provisions of Chapter 49-41B, SDCL, which in the context of a wind energy facility is required for each new facility (commonly called a "wind farm," and generally referenced in this brief as the "Project") having the capacity to generate one hundred megawatts or more of electricity, as provided in SDCL 49-41B-2(13).

[1] Chairman Gary Hanson, and Commissioners Chris Nelson and Kristie Fiegen.

The Notice of Appeal, itself a 13-page filing, was submitted to the Clerk of this Court on April 29, 2020, within the time period allowed for appeals (SDCL 1-26-31, as referenced in 49-41B-30).[2] Appellants are all residents of the immediate area of Goodwin, a small village within Goodwin Township, Deuel County; venue in this Court is thus appropriate. The Agency's record comprises some 14,258 pages, plus transcripts of proceedings. Reference to the former will include "R" followed by a six digit page number, with the latter by means of "TR" with page and line number. Citations may be bracketed or parenthetically enclosed if appearing in text.

B. *Legal Issues*

Appellants' Statement of Legal Issues was submitted to the Clerk on May 7, 2020, and are repeated here (albeit now many fewer and more concisely stated), reflecting also how the Agency decided the stated issue:

Issue 1:

> **Whether the Agency, authorized to promulgate rules concerning wind energy conversion facilities (SDCL 49-41B-35) but adopting no relevant rules as to the meaning of "minimal adverse effects,"[3] may proceed on a case-by-case or *ad hoc* basis to permit a burden of "Effects" upon both citizens and their properties under variable regulatory limits developed by others, including those interested in the promotion of wind development.**
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> *Agency's Decision on Issue 1:* As per the Agency's customary practice in several prior cases, Permit Condition 26, as to Noise and measurement, R014252, a sound level of 45 dBA for Non-Participants, and Permit Condition 35, as to Shadow Flicker, R014255, an annual limit of 30 hours, have been imposed based on testimony of Applicant's experts, and those hired and called by Staff.[4]

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[2] The Notice of Appeal, consisting of many pages, attempted to state the interests of Appellants, as the Agency's Decision managed only to state their names – but nothing of the interests of these Appellants.

[3] ARSD 20:10:21:12, citing to the Legislative findings in SDCL 49-41B-1, speaks in terms of "efforts of the utility to . . . minimize or avoid adverse environmental, social, economic, health, public safety, and historic or aesthetic preservation effects." To avoid adverse effects on Appellants' private homes and lands, Applicant need only use a conservative means of design (as opposed to one "aggressively devised," as opined here by Witness David Hessler, appearing for Staff, Exhibit S2, R012746), *and* obtain an easement for resulting, adverse effects – *neither of which was done in this case*. Thus, the Agency's permit itself becomes the alternative to securing an easement for such purposes, as the Agency's Decision is focused on *ad hoc* "regulatory limits" rather than pursuit of the statute's "minimal adverse effects."

[4] Each condition being more favorable to Applicant, less to Appellants, than the Agency's *ad hoc* determinations in *Prevailing Wind Park*, had such been applied in the instant case.

Issue 2:

Whether SDCL 43-13-2, "Easements and Servitudes," applies to the land and property interests of Appellants, bearing on the Applicant's claimed right to hereafter discharge adulterated light (in the form of Shadow Flicker, along with other Effects) onto and into the dwellings and lands of Appellants, given that the Agency's Decision offers or affords approval of such discharge but without the required consent of the fee owner.

Agency's Decision on Issue 2: While the PUC's Decision notes the names of Appellants [R014233], the Agency failed to make *any* pertinent findings or conclusions as to their particular land-based interests as nearby Non-Participants, including their claimed right as landowners to avoid burdens and servitudes of the Effects to be thrown off by the Project, other than to find, Finding of Fact 34, "Applicant has all land rights needed to construct and operate the Project." Appellants challenge that accuracy of finding, as the Project, without benefit of easement, will cast the Effects on their homes and lands.

Issue 3:

Whether the exercise of the Agency's permitting authority under Chapter 49-41B, SDCL, giving approval for the casting of Effects over the homes and lands of Non-Participants, but without an easement being conferred in favor of Applicant and also without the provisions of SDCL 21-35-31 having been invoked, is a taking of Appellants' private property interests?

Agency's Decision on Issue 3: The PUC decision, beyond noting the names of Appellants [R014233], makes no findings or conclusions regarding the property rights of Appellants, as nearby Non-Participants, other than to expressly approve the casting of Effects thereon in accordance with Permit Conditions 26 and 35.

C. *Standard of Review*

This appeal is governed by SDCL 1-26-36. While great weight is to be given the findings made by the Agency, the Court may reverse if substantial rights of the Appellants have been prejudiced because the findings, conclusions or decision is: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the Agency; or (3) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

D. *Statement of Facts*

The Project is being permitted and built by Applicant for eventual sale (by means of transferring control of Applicant) to Northern States Power Company (NSP) [R000011]. The

Project has been designed by Applicant, and now stands approved by the Agency (with but minor edits provided for a handful of turbine sites) for the construction and operation of 132 wind turbines within a Project embracing nearly 61,000 acres in seven townships of three counties, including Deuel.

The Project's design is exemplified by an overview map (within Exhibit A1-J, at R005098, albeit submitted upside down)[5] reflecting a solid black line (project boundary), and within that line, the Court will observe the location of four red dots, representing the location of the four homes inhabited by the five Appellants. Appellants, in the role of "Intervenors," did nothing to either attract Applicant's attention or to consent to any design of a Project now embracing the entirety of their homes and lands, apart from living near those who have entered into one of the many dozens (or hundreds) of "lease and easement agreements with private landowners within the Project Area for the placement of Project infrastructure."[6]

The placement of Project infrastructure on the lands of Participants is under the terms of a wind easement or lease referenced in SDCL 43-13-17, *et seq*. The terms are not fully detailed in the record other than by means of recording memoranda, generally providing the titles of individual paragraphs or sections. For example, in 2008, one Gary Jaeger signed a memorandum (written as an option in favor of Applicant's affiliate, Boulevard Associates, LLC) outlining six categories of property rights, including a "Noise Easement."[7] Nine years later (2017), Gary Jaeger would execute another memorandum for an option, now directly in favor of Applicant itself, stating eight distinct sections or paragraphs of rights, including an "Effects Easement."[8] (As used in this brief, the land use or land-rights agreements are sometimes referenced as a lease,

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[5] The map also appears in the record, right side up, as Exhibit A14-2, at R011280.
[6] Quoting from Agency's Final Order, at R014234.
[7] R001334
[8] R001337

or as an easement, but are often an option for such an arrangement; thus, the document referenced herein as the "Kranz Easement" is an option never executed by Appellant Kranz.)

The full text of Applicant's agreements appears nowhere in the voluminous record (or only belatedly), apart from the pleadings or evidentiary submissions of Appellants. Within the "Application for Party Status (Corrected)," dated August 6, 2019,[9] (hereafter, "Intervention Application") Intervenors (Appellants herein) quoted several sections of the so-called Kranz Easement, as proposed to Appellant Kranz in 2013[10] - the quotations (as also immediately follow) included Section 5.2, entitled "Effects Easement," and Section 11.10, "Remediation of Glare and Shadow Flicker." These provisions, respectively, provide:

> **Effects Easement**. Owner grants to Operator [Crowned Ridge Wind Energy Center, LLC] a non-exclusive easement for audio, visual, view, light, flicker, noise, shadow, vibration, air turbulence, wake, electromagnetic, electrical and radio frequency interference, and any other effects attributable to the Wind Farm or activity located on the Owner's Property or on adjacent properties over and across the Owner's Property ("**Effects Easement**").
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> **Remediation of Glare and Shadow Flicker**. Operator [Crowned Ridge Wind Energy Center, LLC] agrees that should Owner experience problems with glare or shadow flicker in Owner's house associated with the presence of the Turbines on Owner's Property or adjacent properties, Operator [Crowned Ridge Wind Energy Center, LLC] will promptly investigate the nature and extent of the problem and the best methods of correcting any problems found to exist. Operator [Crowned Ridge Wind Energy Center, LLC] at its expense, with agreement of Owner, will then promptly undertake measures such as tree planting or installation of awnings necessary to mitigate the offending glare or shadow.

Applicant took umbrage at quotations from its own instruments. On August 6, 2019, in the form of a letter, Applicant stated no objection to intervention, but asserted confidentiality and

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[9] R001197-1204.

[10] As referenced also by that name in writ of certiorari proceedings before this Court in 19CIV18-000061, *Ehlebracht, et al. vs. Deuel County Planning Commission, et al*, now on appeal to the South Dakota Supreme Court, Appeal # 29352.

trade secret protections for much of what was asserted (or quoted) in the intervention application.[11]

The Agency requested briefs on the claims of confidentiality. Applicant's brief, dated August 27, 2019 [R001480], with a highly redacted version of the option [R001499], suggests the concern was not Section 5.2 (Effects Easement) [R001502] but rather Section 11.10 (Remediation of Glare and Shadow Flicker) [R001503 to R001515 being entirely redacted].[12] On September 20, 2019, the Agency denied Applicant's request for confidential treatment of the Kranz Easement – or at least, Section 11.10 thereof [Commission Order, R003224].

While the record contains many references to an "Effects Easement," there is essentially but one document containing the text written by Applicant, namely, the Kranz Easement.[13] Clearly, the described easement references the various "effects" visited upon those attempting to carry on human habitation in close proximity to industrial scale wind turbines. An easement is thus obtained from Participants as to the consequences of such Effects, while no such instrument is extracted from (and no rights are conveyed by) those who are Non-Participants. Yet, as these Effects readily flow across and over property lines, unable to distinguish between those who have conferred land interests and those who have not, it is clear that *some* property owners (Participants) are compensated in some way for this burden or servitude, while *others* – as mere neighbors (Non-Participants) - *are not*.[14]

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[11] R001215.

[12] By letter of September 9, 2019, Applicant's objection was formally refined accordingly, R001925.

[13] Exhibit I-2. On or about December 1, 2019, Applicant did submit a full-text version of the "lease and easement" under the name "Supplemental Public Attachment 1 to Staff 1-7-1" – the record location is unknown. In any event, the Agency never addressed the "Effects Easement" issue or the property rights of Appellants (*see* counsel's letter March 16, 2020, R013977-79) beyond merely approving Applicant's intended delivery of "Effects" to both Participants (with easement) and Non-Participants (without) alike.

[14] Table 3, at R005094, asserts, of 102 occupied structures in Deuel County within 2 km of the Project, 32 receive no Shadow Flicker, and 70 will have *some* amount. Fifty-one are Non-Participants; the Intervention Application, at R001198, states each Appellants' home is afflicted by Shadow Flicker.

After the close of the hearing in February 2020, Applicant did disclose (and produce) one additional type of landowner agreement – a so-called "Participation Agreement" struck with an owner not hosting a wind turbine, but yet has entered into an easement – which includes a slightly different form of "Effects Easement."[15] (This person is thus a unique, one-of-a-kind *Non-Participating Participant*, we assume.) This form of agreement was marked and received by the hearing examiner (without objection) as Exhibit I-8. As the instrument was not disclosed during the hearing and cross-examination did not transpire as to this exhibit, Appellants are given to understand this "Participation Agreement" was used to allow an express easement (as a servitude) upon the Non-Participant's land[16] because the burden of "Effects" predicted to be coming soon (whether consisting of noise or Shadow Flicker is unknown to this writer) is supposedly greater than the limits imposed by the Zoning Ordinance.[17] That said, the Effects Easement and the Participation Agreement, along with the implications of land rights asserted by Appellants, are never mentioned in the Agency's decision.

Applicant applies a unique "receptor code" to identify each home within the noise and flicker studies. The Intervention Application (R001198 and as Exhibit I-3, R013293), reflects relevant information as to the four homes, the predicted burdens of sound and Shadow Flicker being imposed by Applicant and Agency, and distance to the nearest turbine:

Residence:	*Code:*	*Sound:*	*Shadow Flicker:*	*Distance:*
Kranz	CR2-D223-NP	42.5	3:04	2,749'
Ehlebracht	CR2-D220-NP	43.6	3:14	2,211'
Rall	CR2-D222-NP	42.0	15:02	2,260'
Greber	CR2-D221-NP	43.1	14:04	2,041' [18]

[15] Section 2, Exhibit I-8, see R013805-6, covering "sounds, visual, light, flicker, shadow. . ."
[16] For a parcel in Deuel County, the instrument is dated July 23, 2019.
[17] This *Non-Participating Participant* provides an easement and accepts the burden of Effects; for Appellants, no easement covers the very same burdens, even if of shorter or less intense predicted duration. Hearing Examiner Karen Cremer, by email dated February 21, 2020, noted these exhibits "will be admitted," but the ruling cannot be located (by this writer) in the record; the ruling included a staff-prepared map of Deuel County and area, reflecting turbine placements, Exhibit S8, R013802.
[18] The Greber home separation distance was later re-stated as 1,995' – see Exhibit A28, R007031.

The "Effects Easement" grants Applicant a non-exclusive easement as to "light, flicker, noise, shadow" and other attributes associated with proximity to wind turbines (all being negative in nature as to the Owner's estate). That an easement is warranted by circumstances – with burdens flowing from such proximity – seems amply proven by Applicant's own words and instrument. The easement embraces Effects coming from the Owner's own property (as occupied by Applicant), perceived by Owner on his or her property, and also those Effects originating from "activity" on adjacent properties, as felt, experienced or suffered by Owner.[19]

The *names* of Appellants listed in the Decision,[20] but without further identification of, or reference to, their respective, specific interests. Each is a resident of rural Goodwin, in Deuel County, South Dakota, as reflected in the "Intervention Application." Each is the fee owner of certain real estate, with Appellant's primary residence being fully embraced within the Project's boundary and exposed to the "Effects" of such proximity.[21] The interests of each Appellant is further outlined in the testimonial exhibits appearing in the record:

Appellant (Intervenor)	Exhibit #	Reference
Garry Ehlebracht	I-1	R013264
Laretta Kranz	I-4	R013301
Steven Greber	I-5	R013303
Amy Rall	I-6	R007167[22]

Each Appellant claims the privileges arising from fee ownership as represented by SDCL §§ 43-2-1, 43-2-5, and 43-13-4, among others. As a "Non-Participant," having neither imposed nor accepted any burden or servitude, no Appellant has conceded the Agency has *any* legal right

[19] Rights held by Applicant under an "Effects Easement" are thus appurtenant to the lands of others within the meaning of SDCL 43-1-3(3), 43-1-5, and 43-13-2, discussed *infra*.
[20] Agency's Finding of Fact 3.
[21] As denoted by four red dots on Applicant's upside-down map at R005098 or the version at R011280.
[22] The Rall exhibit is reflected at the time of filing January 27, 2020; while admitted February 5, 2020, the administrative record said to include all exhibits does not seem to contain Exhibit I-6.

or authority to impose burdens upon their lands and homes, whether a servitude in favor of the public or Applicant. Each is a party aggrieved by the Agency's decision, SDCL § 49-41B-30.

The Agency's Decision, in effect, directs the property interests of Appellants be made available to accommodate the operational needs of Applicant's Project. The lack of an "easement" (such as an Effects Easement) for that purpose warranted no discussion whatsoever within the Agency's Decision. Thus, Applicant now has a Permit to cast the "Effects" described in Permit Condition 26 (R014251), namely, noise not to exceed a sound pressure level (10-minute equivalent continuous sound level, Leq) of more than 45 dBA, measured within 25 feet of any non-participating residence (absent a signed waiver[23]), and also as further provided in Permit Condition 35 (R014255): "Shadow flicker at residences shall not exceed 30 hours per year unless the owner of the residence has signed a waiver."

These kinds of permit conditions have been fashioned by the Agency for several years on a case-by-case basis. Although the PUC has authority to adopt regulations as to the "minimal adverse effects" permitting authority expressed in SDCL 49-41B-1,[24] no relevant regulations establish limits or restrictions as to the "Effects" flowing from wind farms. Rather, the Agency has elected to establish such limits on an *ad hoc* basis.

Staff Witness Kearney recounts that 45 dBA is the *typical* noise limit employed in other South Dakota wind farm actions, but in EL18-026, *Prevailing Wind Park,* a noise limit of 40 dBA for non-participating residences, 45 dBA for participating residences, was deployed.[25] Kearney cites the views of expert David Hessler, who "has consistently maintained that wind

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[23] A giving over of land rights that implicitly constitutes an "easement" – *much like* the Participation Agreement, Exhibit 1-8, R013805, which itself declares the "option to acquire an easement for wind obstruction and an easement for effects on the Property attributable to the Wind Farm." The reticence of the Agency to utter the word "easement" in favor of "waiver" is somewhat understandable – but the legal effect, by acceptance of the burden, remains that of an easement. Applicant itself uses that term!

[24] SDCL 49-41B-35

[25] Exhibit S-1, R011799, at R011808.

projects should work to achieve an ideal design goal of 40 dBA if possible." According to Kearney, Hessler "acknowledges that in most instances it is difficult for wind projects to meet the ideal design goal and for regulatory purposes a permit limit of 45 dBA for non-participants is reasonable."[26]

As to the Effects of Shadow Flicker, Staff Witness Kearney recounts the history of nine other recent permit cases, noting that a limit of 30 hours per year is the usual result, although again in EL18-026, *Prevailing Wind Park*, a two-fold standard of 15 hours per year *and* not more than 30 minutes per day was used – unless the owner shall have, again, signed a "waiver."[27]

Witness Kearney's prepared testimony does not include the full title of the Prevailing Wind Park matter, but such is referenced in the post-hearing brief of these Appellants, at R013830: *Application of Prevailing Wind Park, LLC for a Permit . . . in Bon Homme County, Charles Mix County and Hutchinson County, South Dakota, for the Prevailing Wind Park Project*. Because the Agency has elected to create and then apply regulatory standards on an *ad hoc* basis, one must assume the result in *each case* is some admixture of Applicant's design of the particular Project, the identity of those successfully pursued by Applicant to secure easements for the "Effects," and the particular professional viewpoints of the expert(s) hired by Agency staff to review the record and work of Applicant's own prognostication experts.

Why the Agency takes a case-by-case approach for regulatory limits is unknown. But, that approach results in the neighbors to a wind farm in one county (such as Charles Mix) being subjected to imposed "Effects" standards that are considerably different from those applying to

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[26] R011808. Appellants submit the design goals *are* difficult to accomplish as regulators work under a misapprehension Non-Participants do not themselves have *any* land rights at stake (unlike that "Non-Participating Participant," as party to Exhibit I-8) warranting an easement in favor of Applicant (thus accepting the burden of Applicant's Effects), along with the further error that the regulators hold due authority to issue a permit that substitutes for such an easement. The Agency is wrong on both counts.

the neighbors of *this* Project in Deuel County. The distinction suggests the Agency is willing to accept an "aggressively devised" Project from this Applicant,[28] while ignoring that Non-Participants have property rights and interests worthy of protection.[29]

Light generated by the sun – particularly when adulterated or weaponized by those having activities here on earth – is key to understanding the legal rights of these Appellants, as further argued herein. The sun is about 93 million miles from earth, light travels at the speed of about 186,000 miles per second, thus requiring about 8 minutes for sunlight to reach earth.[30]

Upon reaching earth, the sunlight is captured or harnessed by man-made devices, including wind turbines. The rotating blades of the turbine produce "Shadow Flicker," a unique discharge described in the evidentiary submissions of several witnesses over the course of many pages, including by Applicant's expert Jay Haley (R002820 and R005087 being two examples). Given the speed of light, this adulterated form of light – *Shadow Flicker* – will pass from the rotating blades of the turbine and, a tiny fraction of a second later, reach to and into the homes of Appellants, some 2,000 *additional feet* distant from the sun.

Exposure to Shadow Flicker (for those actually exposed to this phenomenon from a nearby facility having a height approaching 500 feet and having no adequate defensive response) is a topic regulated to some degree by the local Zoning Ordinance and now in this case, via the *ad hoc* determination of this Agency. Each governmental agency has determined the Appellants

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[27] R011810. Truth be told, is not this "waiver" instrument an easement? Does it not accept the burden of "Effects" much like Applicant's form of agreements with Participants (Exhibit I-2) or the one "Non-Participating Participant" (Exhibit I-8)?

[28] In the words of Expert David Hessler, Exhibit S2, R012746.

[29] Auditory and visual capacities of persons near *Prevailing Wind Park*, Charles Mix County, are neither materially nor substantially different from those of Appellants in this case. Yet, the Agency has effectively decided that *some* (these Appellants, living in Deuel County) are entitled to *less* protection.

[30] Factual assertions re sunlight from www.encylopedia.com/science/news-wires-white-papers-and-books/sun-moon-and-earth.

(and other Non-Participants) must endure up to 30 hours per year. As predicted by the experts, each Appellant will annually receive between 3 and 15 hours of Shadow Flicker.[31]

The Effects, in general (but Shadow Flicker in particular) are not features of this Project that Appellants must accept and live with, whether by edict of this Agency or the local Board of Adjustment. The PUC asserts, out of whole cloth, lawful authority to intersect property rights of the nature held by Appellants, except as to when some specific duration period[32] – or intensity level[33] – is exceeded, in which case some kind of "waiver"[34] must be exacted from the landowner. Regardless, the PUC cannot cram these Effects onto Non-Participants, contrary to property rights, even if the dose isn't overly excessive (according to the German standards – or at least one of the borrowed German time elements). If the PUC has this authority, then, rather than borrowing some part from German authority (under a rather poor translation to English as discussed, *infra*) is not a rule making process appropriate to write the standard for this burden? Presently, the Agency's decisions are contested case constructs, a variable fashioning of "standards" that become a permanent servitude or burden, swallowed whole by South Dakota Non-Participants, case-by-case, county-by-county.

E. Restatement of Issues and Argument

Issue 1:

Whether the Agency, authorized to promulgate rules concerning wind energy conversion facilities (SDCL 49-41B-35) but adopting no relevant rules as to the meaning of "minimal adverse effects,"[35] may proceed on a case-by-case

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[31] Depending on the particular Appellant, this duration is somewhere between 3 and 15 hours too much.

[32] Such as 30 hours per year in Deuel County, but elsewhere, then 15 hours, or 30 minutes per day, maximum.

[33] Such as 45 dBA – in this case at least, but in another county, it might be 40 dBA.

[34] An Agency code word for an "easement," as Applicant itself uses "easement."

[35] ARSD 20:10:21:12, citing to the Legislative findings in SDCL 49-41B-1, speaks in terms of "efforts of the utility to . . . minimize or avoid adverse environmental, social, economic, health, public safety, and historic or aesthetic preservation effects." To avoid adverse effects on Appellants' homes, Applicant need only use conservative design (as opposed to "aggressively devised," as opined by Expert David Hessler, Exhibit S2, R012746), *and* obtain an easement for resulting, adverse effects – *neither of which was done*

or *ad hoc* basis to permit a burden of "Effects" upon both citizens and their properties under variable regulatory limits developed by others, including those interested in the promotion of wind development.

The Agency's mission outlined in SDCL 49-41B-1 (adopted in 1977) is to ensure the facility will "produce minimal adverse effects on the environment and upon the citizens of this state." Persons "residing in the area where the facility is proposed to be sited" may intervene as parties, if making timely application. SDCL 49-41B-17. The PUC is directed to promulgate rules pursuant to Chapter 1-26, SDCL, to establish "information requirements and procedures."

The Applicant for a Facility Siting Permit has the burden to establish, in accord with SDCL 49-41B-22, the facility will: (i) comply with applicable laws and rules, (ii) not pose a threat of serious injury to the environment nor to social and economic condition of inhabitants;[36] (iii) not substantially impair health, safety or welfare of the inhabitants; and (iv) not unduly interfere with orderly development of the region. No specific inquiry as to *property rights* of the inhabitants is referenced, there or elsewhere.

The Agency could have dealt with the property rights issue by requiring (by rule) that Effects are not to be cast upon Non-Participants, or failing that, an easement obtained from those receiving the Effects, including even those not hosting a turbine site.[37] Not only did the PUC *not* develop such a rule, the duration or intensity of the Effects (noise and Shadow Flicker, at least) was left to be developed from the testimony of hired experts, case-by-case.

This approach yields uneven outcomes, as outlined in the prepared testimony of Staff witness Kearney, Exhibit S1. The prior proceedings establishing Shadow Flicker limits are noted

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in this case. Thus, the Agency's permit itself becomes the alternative to securing an easement for such purposes, as the Agency's Decision focuses on *ad hoc* "regulatory limits" and "aggressive" designs, not the statute's goal of "minimal adverse effects."

[36] Amended in 2019 to provide that applicants holding a conditional use permit from local government is determined not to threaten such conditions; Applicant, of course, holds such a CUP (SEP) from Deuel County.

[37] Rather like the *Non-Participating Participant*, Exhibit I-8.

[R011810], with *Prevailing Wind Park* being the odd duck, where the annual maximum of 15 hours, along with a *daily limit* of 30 minutes, was imposed.[38] Kearny also outlines the noise limits imposed by the Agency in prior cases [R011808]. Again, *Prevailing Wind Park* is the exception, with a noise limit of 40 dBA for Non-Participating residences. In this case, however, noise is not to exceed 45 dBA. These differences are not small or trivial in nature.

The Effects (noise and Shadow Flicker) are burdens on the land that, as argued in connection with *Issue 2*, following, may be approved or allowed, provided the affected landowner has agreed to accept those burdens, *i.e.*, an easement. Rather than honoring the rights of these adjoining or nearby landowners, however, the Applicant presents a Project design that is "aggressively devised" (in the stated opinion of expert Hessler, Exhibit S2, R012746). Then, the Agency again abandons the standard in *Prevailing Wind Park* in favor of a more liberal approach, while also requiring no easement or acceptance of a servitude from Non-Participants, those who must now permanently bear these burdens in any event.

An agency decision is arbitrary and capricious when it is not governed by fixed rules or standards. *Smith v. Canton School District # 41-1*, 1999 S.D. 111, 599 N.W.2d 637. Imposing one standard *there* – in Charles Mix County – while adopting a different standard *here* for those living near *this* Project in Deuel County – is the flexibility those regulating (and also those designing and promoting) these Projects seem to highly prize.

Equal protection of the law, assured to Appellants by Art. 6, § 18, S.D. Const., and the 14th Amendment, U.S. Consti., pertains to such kinds of *ad hoc* flexibility. Thus, this question: is the PUC, acting on the advice of various experts and staff and looking to spatially accommodate

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[38] The daily limit, otherwise not mentioned in Applicant's evidence as possibly germane to this case, is based on a so-called German standard consisting of three time measurements for Shadow Flicker. *Prevailing Wind Park* happens to use two of those. But, for *Crowned Ridge II*, just one of the three German measures is used – the annual limit! Whether any receptor's daily exposure to Shadow Flicker exceeds 30 minutes is not disclosed on this record.

(meaning, to shoehorn into this area among Non-Participants) an "aggressively devised" Project,[39] entirely free to impose Permit Conditions (standards fashioned *not after statutes or regulations* but derived from contested case proceedings) that are materially different *here – in Deuel County* – than those recently imposed in Charles Mix County? The stated proposition seems highly doubtful.

Further, having held no rule-making proceedings concerning the imposition of limits for the Effects, the Agency has also not engaged in any process whereby *one* standard for duration or intensity of such Effects is selected or deemed more appropriate than *another*. The distinction between the purported safe dose of Shadow Flicker for receptors – or one affording peril and for which a "waiver" of excess duration is required – is narrowed to just this: *the time limit of thirty hours per year*. Such *ad hoc* acceptance (purely artificial, being linked nowhere in federal or state law or regulation) is reflected by witness Kearney [Exhibit S1, R011811]:

> The permit condition I recommend is:
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> > Shadow flicker at residences shall not exceed 30 hours per year unless the owner of the residence has signed a waiver. Prior to construction, Applicant shall obtain and file with the Commission a waiver signed by the owner of the residence for any occupied structure which will experience more than thirty hours of shadow flicker per year. If no waiver is obtained, Applicant shall curtail the necessary turbines to limit shadow flicker to no more than 30 hours per year.[40]

The Agency adopted Kearney's recommendation as a permit condition [# 35, at R014255].

Dr. Christopher Ollson sponsored Exhibit CO-S-1 [R002009], with numerous attached reports and research studies. The witness, *inter alia*, asserts that the "origins of the 30-hour shadow flicker threshold standard can be traced to Germany in 2002." Helpfully, the witness

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[39] As stated by Staff's noise expert, David Hessler, Exhibit S2, R012746.

[40] Granted, this *is* the very same Shadow Flicker limit used in the Deuel County Zoning Ordinance, but the County has no more legal authority than the PUC to impose burdens on the land rights of Appellants, or to adopt, by Zoning regulation, rule or, as the PUC has done, via *ad hoc* adjudicative rulings, a purported safety measure with an annual limit of 30 hours - all based on the German Shadow Flicker standard that itself uses *three* measurements, rather than merely one, as further discussed in this brief.

includes the originating document, in both German and English, marked as Exhibit CO-S-16 [R002319], "*Information on How to Identify and Assess Optical Immissions Wind Turbines.*" Reading this document (the portions in English), one notes that "optical [immissions] can lead to significant nuisance (stressor), especially in the form of periodic shadow discarding." [R002320], and "the human eye perceives brightness differences greater than 2.5%" [R002322].

According to this German source, the periodic shadow cast "is considered not to be significantly harassing if the astronomically maximum possible duration of the coverage . . . is no more than 30 hours per calendar year and beyond no more than 30 minutes per calendar day." [R002324.][41] Having stated two measures, a *third measurement* is then identified:

> If the values are exceeded for the astronomically maximum possible shade duration, technical measures to limit the operation of the [*Windenergieanlagen*, or Wind Turbine] for time can be considered, among other things. An important technical measure, as the subject of conditions and orders, constitutes the installation of a deduction switching automatically, which uses radiation or lighting strength sensors to detect the specific meteorological shading situation and thus limits the local document [sic] duration. Since the value of 30 hours per calendar year was developed on the basis of the astronomically possible shading, a corresponding value for defeat automobiles [sic] is determined for the actual, real shadow duration, the meteorological shading duration. Based on [2 – this being a citation to an article in the German language], this figure is 8 hours per calendar year. [R002325.]

Eight hours per calendar year is much less than 30 hours![42] This limit – *astronomically maximum possible shading time* (worse case) [as referenced and construed at R002322], is "the time when the sun theoretically shines continuously in cloudless skies throughout the time between sunrise

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[41] This limit harkens to the *daily limit* fashioned for *Prevailing Winds Park*, but which limit, of course, has *not* been applied in this case. Kearney didn't recommend it, the PUC didn't impose it, and more importantly, the Applicant's evidence – beyond this 2002 document from Germany – says nothing more about it. Will any "receptor" receive more than 30 minutes per day? Fair question, but that information is simply not of record. German opinions as to "immissions" aside, Appellants note they are in South Dakota, own land and homes here and fully expect to be accorded the rights and privileges ensured by the laws of this state. The German origin document, of course, considers none of these rights and privileges.

[42] The Greber and Rall homes receive more than 8 but under 30 hours per year, see chart, at 7, *supra*.

and sunset, the rotor surface stands perpendicular to solar radiation and the wind turbine is in operation."

Appellants didn't submit this exhibit. The document, not further explained by Applicant, raises serious questions about the PUC's approach for an *ad hoc* standard, ostensibly deployed for purposes of the "substantially impair health, safety or welfare" test under SDCL 49-41B-22(3), one using *just one of the three* German time elements. That the sun often shines brightly in South Dakota, even as the wind often blows, are facts that may be judicially noticed. Has Germany's *astronomically maximum possible shading time* been applied to this Project, or to these Non-Participants? No expert testimony claims as much. Further, if German authorities (in 2002) concluded that a 30-minute daily exposure limit is *also* crucial to human safety and welfare (as Exhibit CO-S-16 shows, notwithstanding the choppy translation), why has *that* daily limit been neither considered nor imposed *here* (beyond the single use in *Prevailing Wind Park*)?

The PUC is delegated quasi-legislative authority to deal with "facility siting permits" (SDCL 49-41B-1), the statutory goal being that of "minimal adverse effects" on the citizens. The Legislature, now many times, has further buttressed this charge with amendments to the chapter, and also the "wind easements" provisions collected at SDCL 43-13-16, *et seq*. As to the specific property interests of Appellants, as landowners and homeowners, and as Non-Participants, all clearly predicted to receive the "Effects" from this Project, the Legislature has said very little, and the PUC has said even less in the form of regulations as to such interests.

The PUC attempts to govern the topic on a case-by-case basis, considering Applicant's Project designs but without a fixed, ascertainable standard applicable to Appellants' property interests. It is no small wonder that Applicant's Project boundaries include each Appellant's home, even as this *design subjects each* to some dosage of Effects, without regard to the old (but yet viable) territorial law argued in *Issue 2*, following. It is no small wonder, in such an

environment, Applicant is emboldened to prosecute Project designs that are "aggressively devised," as stated by expert witness Hessler. The PUC mentions "easements," but only for landowners serving as hosts for wind turbines or other infrastructure.[43] The land rights of Non-Participants merit no findings. Thus, in fashioning the Permit Conditions, the Agency hands out doses of Effects consistent with the Project's design, while having no regard for Appellants' property rights.

Issue 2:

Whether SDCL 43-13-2, "Easements and Servitudes," applies to the land and property interests of Appellants, bearing on the Applicant's claimed right to hereafter discharge adulterated light (in the form of Shadow Flicker, along with other Effects) onto and into the dwellings and lands of Appellants, given that the Agency's Decision offers or affords approval of such discharge but without the required consent of the fee owner.

In 1872, the California legislature adopted as part of the Civil Code, § 801, Chapter 3, a statute entitled "Servitudes." In pertinent part, this law – which remains in place today – provides as follows:

> The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances and are then called easements:
> . . .
> 8. The right of receiving air, light, or heat from or over, or discharging the same upon or over land; . . .

Several years later, the legislature of Dakota Territory, by means of § 244 of Civil Code 1877, copied (apart from one missing comma) California's text, thusly:

> The following land burdens, or servitudes upon land may be attached to other land as incidents or appurtenances and are then called easements:
> . . .
> 8. The right of receiving air, light, or heat from or over, or discharging the same upon or over land; . . .

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[43] Final Decision, Permit Conditions # 21, [R014250] expresses concern for those having *easements* with Applicant; no such concerns expressed as to Non-Participants or the prescribed, permanent quota of Effects as outlined in Permit Conditions 26 and 35.

This territorial statute survives today as SDCL § 43-13-2(8). North Dakota Century Code also retains this law, with the omission of one additional comma along with a change in numbering, NDCC, § 47-05-01(7). Montana essentially copied South Dakota's statute in 1895 (Montana Code Annotated 2019, § 70-17-101(8)), followed by Oklahoma in 1910 (60 OK Stat. § 60-49 (2018)).

The South Dakota statute has gone unnoticed, or at least uncited, in reported cases. However, this law is directly relevant to the issue before the Agency, within the context of the land rights of Non-Participants – although the PUC has ignored the old statute and the related "Effects Easements," as otherwise authored by Applicant.

Some may claim this molds the old territorial statute into support for the Doctrine of Ancient Lights in South Dakota. Appellants, however, assert no such claim. Under the law of prescriptive use and with the passage of time, Appellants claim no rights over the adjoining lands of Participants, as might support a *negative easement right* for unblocked views or access to sunlight.[44] Their homes – and the consequential viewscapes – do not comprise an adverse use of open lands. Because the doctrine does *not* exist here (and perhaps it never has), the neighbors (Participants) could built a brick wall (even one 500 feet in height, constructed a few feet from the shared boundary line) to completely block some or even all access to sunlight, during the daily course of the sun's astronomical paths and travels. That wall could be maintained lawfully under South Dakota law.[45] But, this case does not entail a complete blocking of light; rather, this entails a modification and weaponization of discharged light.

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[44] Each of the homes are believed to have existed for more than 20 years; rather, Appellants contend the permit here is an attempted equivalent for an affirmative easement for "discharge . . . of light" contemplated by SDCL 43-13-2(8).

[45] The doctrine died out, as noted in *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So.2d 357 (Fl.App. 1959), and it seems unlikely to be alive in any sense within South Dakota today.

The South Dakota statute *does* clearly state this much: "The following land burdens, or servitudes upon land may be attached to other land as incidents or appurtenances and are then called easements: . . . The right of . . . discharging [light] upon or over land."

Webster's Ninth New Collegiate Dictionary defines the verb "discharge," *inter alia*, to "throw off or deliver a load, charge or burden." The record depicts when and how "Shadow Flicker" originates – sunlight passes through the rotating blades or rotors of a wind turbine.[46] No Shadow Flicker emerges when the turbines are still. Appellants submit that the entire point of the Shadow Flicker studies conducted by Applicant – and the attempted restraints imposed by either local Zoning Ordinance, or by way of adjudications by this Agency – is to *limit* the discharge of Shadow Flicker upon or over land. Shadow Flicker is a form of adulterated light or sunlight – it is part shadow, part light, quickly rotating or alternating, all discharged *from* the point of a wind turbine (one or more points of emissions per "receptor"), and quickly reaching to and into the nearby homes of Non-Participants.

South Dakota statutory law also dating from territorial days provides that the land to which an easement is attached is the "dominant tenement," while that upon which the "burden or servitude is laid is called the servient tenement." SDCL § 43-13-3. Although no decision of the South Dakota Supreme Court has yet to apply these labels, appurtenant easements are generally recognized as being of two distinct types, each differing significantly, namely, affirmative

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[46] See, for example, R002021, R002820, R005087. The article at R002222, "Monitoring annoyance and stress effects of wind turbines on nearby residents," begins: "Wind turbines (WT) change the landscape, generate noise and can cause shadow flicker. . . These emissions have impacts on people living nearby." Appellants submit their proximity to turbines and the predicted durations of Shadow Flicker means both *they and their properties* will be impacted - *burdened* - by this Project, along with neighboring Participants – the main distinction being, of course, Appellants have given *no* "Effects Easement" accepting the burden. Thus, Applicant's right to cast the Effects on Appellants hangs *entirely* on a county-given land use permit, along with the essential permit from this Agency.

easements *versus* negative easements.[47] The author observes that "[a]ffirmative easements allow the holder of the easement to engage in affirmative acts on the servient estate, acts in which he would not otherwise be privileged to engage." A negative easement, on the other hand, affords the easement holder the right to "prevent the owner subject to the easement from engaging in otherwise permissible acts on his own property."[48]

Returning to South Dakota's old statute, now SDCL 43-13-2-(8), the law clearly embraces *both* affirmative and negative aspects of appurtenant easements:

> The following land burdens, or servitudes upon land may be attached to other land as incidents or appurtenances and are then called easements:
> . . .
> 8. The right of receiving air, light, or heat from or over, or discharging the same upon or over land; . . .

The right to *receive light* from and across other lands (much like the Doctrine of Ancient Lights would have provided for as a prescriptive easement) is negative in nature, preventing the owner of lands from doing (or building) something on his or her lands to intersect or block light, acts that are otherwise lawful. In contrast, the right to *discharge light* upon or over land is an *affirmative* easement, as it permits the easement holder to do *something* on or as to the lands of others. The Effects Easement, as appearing within the Kranz Easement,[49] along with the slightly different version embraced by the belatedly-provided Participation Agreement,[50] are *each* in the nature of *affirmative easements*, as Applicant is thus enabled, at sites leased for the construction

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[47] Tara J. Foster, *Securing a Right to View: Broadening the Scope of Negative Easements*, 6 Pace Envtl. L. Rev. 269, 271 (1988), https://digitalcommons.pace.edu/pelr/vol6/iss1/7

[48] *Id.*, at 272. Judge Schreier recently applied a similar definition of "negative easement" to wetlands-conservation easements in *United States v. Mast*, 2020 WL 2574634 (May 21, 2020), citing also *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 626-27 (1950).

[49] Exhibit I-2, R013269.

[50] Exhibit I-8, R013805.

and operation of wind turbines (a dominant tenement), to henceforth cast the "Effects" upon other nearby lands of those who are also Participants, as servient tenements.[51]

In most of the jurisdictions long ago adopting statutes reading much like SDCL 43-13-2(8), there are few, if any, cases to guide this Court as to the meaning and legal effect of "the right of . . . discharging [light] upon or over land." No such cases are reported in South Dakota.[52]

The California case of *Katcher v. Home Savings and Loan Association*, 245 Cal.App.2d 425 (1966), involved a claimed negative easement. The plaintiffs were parties who had long established their homes along Mulholland Drive, near the crest of the Santa Monica Mountains above Laurel Canyon, overlooking the San Fernando Valley. Defendant acquired a large parcel and proposed to develop homesites along Mulholland Drive, thus destroying the panoramic view claimed by plaintiffs. Plaintiffs alleged a nuisance, and a violation of property rights associated with the view; the trial court granted summary judgment for defendant. The appellate court affirmed, noting "[i]t has long been established that a landowner has no easement over adjoining land for light and air in the absence of an express grant or covenant," while quoting 1 Cal.Jur.2d, Adjoining Landowners, 30, at 758-59:

> The English doctrine of ancient lights under which a landowner acquires, by uninterrupted use, an easement over adjoining land for the passage of light and air was early repudiated in this state because it was not adapted to the conditions existing in this country and could not be applied to rapidly growing communities without working mischievous consequences to property owners. The use of light and air from adjoining premises cannot be adverse, since there is no invasion of the adjoining proprietor's rights of which he can complain. Thus, he cannot be presumed to have assented to that use or have parted with a right. 245 Cal.App.2d at 429-30.

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[51] No Effects Easements are held for the properties of Non-Participants. Applicant has a Special Exception Permit from Deuel County, plus a Facility Siting Permit, but no easement. If state and local governmental agencies may accomplish that end regardless, through permits serving as *de facto* easements, then a "taking" of property without compensation has transpired.

[52] In *Brown v. Hanson*, 2007 S.D. 134, ¶ 15, 743 N.W.2d 677, the court noted similar servitude provisions in California law, comparing California Civil Code § 811, *Extinguishment of Servitudes*, to SDCL 43-13-12.

While *Katcher* involved a claim of easement, in negative form, that is to say, "for [access] to light and air," the decision did not specifically cite or rely on § 801, California Civil Code.

Also cited in *Katcher* is the much older decision in *Kennedy v. Burnap*, 120 Cal. 488, 52 P. 843 (1898), a lawsuit based on claims of an implied easement of light and air, such claimed easement being infringed by the defendant's construction of a three-story building on an adjacent lot, formerly owned by plaintiff's grantor. As California courts had previously rejected prescriptive use on which the Doctrine of Ancient Lights is based,[53] the California Supreme Court discussed and then also rejected implied easements for light and air, in the absence of express words. The court considered Section 801,[54] noting:

> The statute was not, in our opinion, intended to create any such right by severance of the estate. That light and air may be the subject of an easement cannot be doubted. *The statute says so plainly.* Section 801. That light and air may also become appurtenant to land is equally clear. Id., and section 662.[55] (Emphasis added.)

The term "negative easement" is not used by the court, but *Kennedy* clearly involves the claimed right, as a dominant estate, of continued, unimpeded access to the "light" flowing over the land adjoining. As to such claims, the court concluded:

> Before we should feel bound to hold that light and air are easements as they were regarded in England, to be governed in their acquisition, enjoyment, and disposition under common-law rules, we should require it clearly to appear that our statute is substantially the same in all these respects as the common law. *But the statute [§ 801] does no more than to declare that they may be the subject of an easement.* We think our court is left free to say that, while an easement of light and air such as is here claimed may be created, no such easement will be held to pass by implication. 52 P. at 845. (Emphasis supplied.)

The *Kennedy* case illustrates the rationale of California's § 801 – an easement for access to light *may be expressly created by the actions and express words* of the respective property owners.

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[53] *Western Granite and Marble Company v. Knickerbocker*, 103 Cal. 111, 37 Pac. 192 (1894).
[54] On which SDCL 43-13-2(8) is directly based.

And, this is precisely what Applicant has done: extracting "Effects Easements" from Participants, of similar if not identical text to the Effects Easement within the Kranz Easement.

No matter how long these residential uses have been established, Appellants simply have no effective claim for a *negative easement* for continued access to "light," flowing in their direction over lands of Participants. Any claim of implied easement, under the circumstances raised in *Kennedy*, seems infirm likewise. At the very least, however, SDCL 43-13-2(8) suggests the corresponding right (or claim) of *Applicant* – seeking to burden the nearby homes and lands of Non-Participants, while "discharging the same [light] upon or over land" – *must likewise require an easement.*[56] Applicant, of course, obtained no such easements, and does not seek one (other than the unsuccessful effort with Appellant Kranz).

Should there be an easement in favor of Applicant, allowing Applicant to discharge the "Effects" (including, *inter alia*, "light, flicker, noise [and] shadow")? Yes – in fact there *are* such easements in place as to *Participants*, expressly accepting and permitting these Effects to flow.[57]

But what of *Non-Participants*, administered the very same Effects, perhaps at even higher dosages? Appellants accept no burden on their lands and homes. Yet by edict of the Agency, the burden is declared apt, just and lawful, now about to be delivered. The Permit issued by the Agency does not *itself* constitute an easement in the usual sense, but if *it is the sole source* of authority for Applicant's intended actions, is it not a *de facto* easement, interests exclusively belonging to Appellants but which, by edict, must be shared – permanently - with Applicant?

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[55] 52 P. at 845. California Civil Code § 662 is also cited as the source for SDCL 43-1-5, A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse, or of a passage for light, air, or heat, from or across the land of another.

[56] This would be an affirmative form of easement. If there is no such easement, is the conduct not then a trespass, an adverse use of the premises?

[57] See, *e.g.*, Exhibit I-2, and as to the sole *Non-Participating Participant*, Exhibit I-8. As to the dozens and dozens of Participants committing their lands to Applicant's use, the text of the "Noise Easement," or the "Effects Easement" are not of record, beyond the recording memoranda referencing those titles.

As noted in *Blackmore v. Powell*, 150 Cal.App 4th 1593, 59 Cal.Rptr.3d 527, 531 (2007), "easements are distinguished from estates in land such as ownership in fee, tenancy in common, joint tenancy, and leaseholds, which are forms of possession of land." An easement involves primarily the privilege of doing a certain act on, or to the detriment of, another's property. *Wright v. Best*, 19 Cal.2d 368, 381, 121 P.2d 702 (1942). An easement gives a nonpossessory and restricted right to a specific use or activity upon another's property, which right must be *less* than the right of ownership. *Mesnick v. Caton*, 183 Cal.App.3d 1248, 228 CalRptr. 779 (1986).

Blackmore concerned an easement appurtenant, allowing the adjoining parcel to make use of the servient estate for "parking and garage purposes." That use was not specifically named in § 801 (which for at least the first dozen or more subsections, is identical to SDCL 43-13-2); thus, the question arose as to whether the land burdens or servitudes listed in statute comprise an exclusive list.[58] With an earlier decision of the California Supreme Court, the court concluded the "list of easements in Civil Code section 801 is not exhaustive." 59 Cal.Rptr.3d at 534.[59]

Both the Effects Easement and the Participation Agreement (in the form as written by Applicant) enumerate the burdens of "light, flicker, noise [and] shadow,"[60] along with several others. As to such burdens, the "Owner grants . . . an easement."[61] When another nearby occupant or proprietor of a property (such as this Applicant) needs or wishes to obtain an easement upon or over an adjoining property (thus placing a burden on the neighbor), with whom does Applicant deal? SDCL 43-13-4 clearly provides that "[a] servitude can be created only by one who has a vested estate in the servient tenement." By contrast here, however, this Applicant

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[58] The very same question arises for the list in SDCL 43-13-2, but our Court has not addressed the issue.
[59] In *Wright v. Best*, 19 Cal.2d 368, at 382 (1942), the Court concluded that while an easement of pollution is not among the servitudes specified in section 801 of the Civil Code, "that section does not purport to enumerate all the burdens which may be attached to land for the benefit of other property. . . "
[60] The order of burdens is slightly different in Exhibit I-8, with "sounds" appearing in lieu of "noise."
[61] Exhibit I-8, ¶ 2, R013806; Exhibit I-2, §5.2, "Owner grants . . . non-exclusive easement, *see* R013272.

has never dealt with *any* of the Appellants as to these servitudes, other than to offer predictions of how much or how bad the "Effects" will be once the Project commences operations.

South Dakota law imposes requirements for the placement of wind energy infrastructure, as outlined in SDCL 43-13-17. The easement shall be created in writing, duly recorded and indexed, and then "runs with the land or lands benefitted and burdened." What about lands that are *not* benefitted, but merely *burdened*, the lands and homes of Appellants? South Dakota law, at least within that part of Chapter 43-13, SDCL, "Easements and Servitudes," first adopted in 1996 and amended many times thereafter,[62] says nothing whatsoever about either the neighbors who are Non-Participants, or their burdened lands and homes. This statutory silence has emboldened Applicant to bring an "aggressively devised" Project,[63] which the Agency's Decision allows to proceed, while comprising a permanent burden on the lands and homes of Appellants.

Legislative silence and Agency's *ad hoc* efforts to regulate or limit the Project's Effects upon Non-Participants (having picked 30 hours per year), does not mean that Appellants can be (and thus are) shorn of their rights as property owners, arising under the much older statutes within the very same chapter regarding "Easements and Servitudes." Applicant will engage (permanently) in "discharging the same upon or over land" (as that affirmative easement is referenced in SDCL 43-13-2(8)), and Applicant certainly intends to do so. However, the statutes on servitudes also provide that such burdens may be created *only* by the owner of the servient estate (Appellants, among many others in the ranks of Non-Participants). It is certain they have

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[62] SDCL 43-13-16, *et seq.*

[63] Staff's noise expert, Dr. David Hessler, Exhibit S2, see R012746, TR-497:24-498:25. This expert advocates for noise not to exceed 40 dBA, but approves of Applicant's elevated noise design. Exhibit S2 generally, R012747-8. An "aggressively devised" Project hardly squares with Legislative findings, SDCL 49-41B-1, to "produce minimal adverse effects" on citizens, these neighbors being within those ranks.

not done so, even as Applicant felt no regulatory duty or compulsion to even ask.[64] Further, even assuming *arguendo* that these received "Effects" are fully and completely safe, posing no risk of harm to the occupants and owners of Non-Participating properties, the evidence adduced by *all* parties reflect that the Effects are *not* welcomed by Non-Participants. Further, the testimony of Appellants asserts the Effects are entirely detrimental to the use and enjoyment of their properties.[65]

Expert testimony regarding the health and welfare issues of the inhabitants (and Non-Participants), as to Applicant's burden of proof under SDCL 49-41B-22, does not approach, much less resolve, the issue of whether Appellants have a vested property right to either accept or reject the placement of such burdens upon their homes and lands, in accord with SDCL 43-13-2 and -4. This brief concludes with *Issue Three*, asserting that while the Agency is neither a suitable nor an authorized source for government-ordained servitudes, yet, if remedies avail nothing, then the Permit in question is yet a taking of property interests of these fee owners.

Issue Three:

Whether the exercise of the Agency's permitting authority under Chapter 49-41B, SDCL, giving approval for the casting of Effects over the homes and lands of Non-Participants, no easement being conferred in favor of Applicant, the provisions of SDCL 21-35-31 not having been invoked, represents a taking of Appellants' private property interests?

Appellants are the fee owners of their respective lands, homes and parcels, within the meaning of SDCL 43-2-1 ("possess and use . . . to the exclusion of others"); they have given no easement in favor of Applicant, and have accepted no proposed servitude upon their lands. Yet,

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[64] Apart from asking Mrs. Kranz, and seeking a PUC permit for the discharge of Effects upon Appellants, along with a Special Exception Permit from the County Board of Adjustment that purports to do likewise.

[65] Applicant's experts couch their "protective-of-health" opinions behind admissions of annoyance and nuisance. See, *e.g.*, Christopher Ollson, TR369, R013429; Dr. McCunney, TR323, R013383. One report states, "Wind Turbines . . . change the landscape, generate noise and can cause shadow flicker . . . These emissions have impacts on people living nearby." Hubner, *et al.*, *Monitoring annoyance and stress effects of wind turbines on nearby residents: A comparison of U.S. and European samples*, R002222.

the experts predict that *each* of the homes in question will be subject to the Effects given off by the Project. Appellants submit that Applicant's wind turbines will be discharging light, from the site of each turbine, over, onto and into each of their homes[66] and upon their lands also.

In the absence of an easement, the Agency's Permit is the *sole instrument* affording ostensible authority for this adverse use,[67] although based on our reading of the California cases involving § 801 of the Cal. Civ. Code (the source of South Dakota's statute), either the receipt or the discharge of light is a two-way street. As a negative easement, the dominant owner would need to have an easement to enforce the claimed rights (for receipt) as to the servient owner. As an affirmative easement, the dominant owner, again, would yet need to have an easement in order to *lawfully* discharge light upon the servient owner (who is now the recipient).

Here, the intended recipients of light extended no easement, accepted no burden, but regardless, this discharge of light will soon begin. Appellants are but four of the fifty-one Non-Participant homes in Deuel County[68] predicted for Shadow Flicker. If no further legal action is taken (assuming one is available in such circumstances), the use of Appellants' properties for the disposal of these Effects will, in time, certainly ripen into a prescriptive easement. As noted in *Rotenberger v. Burghduff*, 2007 S.D. 19, ¶ 8, 729 N.W.2d 175, prescriptive easement claims have two essential elements – open use of the land in the possession of another for a period of 20 years, and a use that is hostile or adverse to the owner. (In this case, how to stop this permitted use becomes the conundrum – it's not as if a high, solid fence thwarts the contemplated invasive use, descending from such nearby turbine heights.)

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[66] The duration of Shadow Flicker – and use of that term – is limited to presence at, upon or within an occupied dwelling. Nothing in the record reflects the duration of discharges of light, as referenced in SDCL 43-13-2(8), upon any part of the lands of Appellants, other than the occupied dwelling itself.

[67] Apart from the Special Exception Permit, recently affirmed by the Court in 19CIV18-000061, and now on appeal to the Supreme Court, # 29352.

[68] See note 14, above.

The Court need only read the studies and reports of Applicant's experts for some semblance of annoyance and nuisance arising from Shadow Flicker, appearing over and within a residence (to say nothing of the noise). Applicant's main premise is that Shadow Flicker may be annoying, a nuisance, but it will not kill you! That is of small comfort to these property owners, but also hardly the notion behind "possession and use to the exclusion of others," as referenced in SDCL 43-2-1, or of "enjoyment" as referenced in SDCL 43-3-21.

Applicant and the PUC – *on the assumption the property rights of Non-Participants are neither worth dealing with nor even mentioning en route to a Facility Siting Permit* – give these Appellants no choice, having been unwillingly embraced by a wind farm Project, now well under construction, soon operating to some extent. If this appeal fails to thwart the adverse use and intrusion upon their lands, subsequent legal action to enjoin the use of Appellants properties and homes for the disposal of these Effects (including the discharge of that form of light known as Shadow Flicker) seems likely, based on SDCL 43-13-2(8). And, if not *then* enjoined, the Agency has accomplished a *taking* of the property interests of these Appellants. Much like a forced donation, Appellants are required to surrender *their* property rights and interests, so that Applicant can make such free, invasive uses as it wishes for casting the Effects, subject to the particular confines or limits of the Permit Conditions, of course. (How ironic! What Mrs. Kranz refused to provide Applicant as to the Effects is now provided courtesy of the Agency.)

But, the Agency labors under a false assumption. It assumes that *if* Applicant can adduce expert testimony that market value of the Non-Participant's property will not be harmed, and further, that *if* the Effects visited upon Non-Participants are in line with (or comparable to) the land use regulatory limits applied in the Zoning Ordinance process (including a CUP or similar

land use permit issued by the Board of Adjustment),[69] then the PUC may focus purely on SDCL 49-41B-22(3) – that the Facility "will not substantially impair the health, safety or welfare of the inhabitants."[70] Under this assumption, the PUC does not focus on subpart (1) of the statute, (whether the facility will comply with all applicable laws and rules), even as it fails to consider the property rights of Non-Participants (protected by such laws), or the old 1877 statute listing "easements and servitudes." The Agency's complete lack of consideration as to the land or property rights of Appellants is as clear – as it is erroneous.[71] Further, while Appellants lack statutory or agreed rights (negative easement) for light from neighboring lands, then by the same measure, Applicant lacks statutory or agreed rights (affirmative easement) in the discharge of light upon Appellants.

The PUC, *ad hoc*, permits Shadow Flicker to be cast on Appellants under a purported health-based risk analysis, obviously founded on the *three-part* German standard identified by expert Ollson. However, except for the occasion of *Prevailing Wind Park*, in a different county, the PUC uses but *one part* of the three. Who has done the health analysis under a one-part standard? Not this Agency, and no other reference for apparent scientific support is found in this voluminous record.

What if the passage of time demonstrates the experts have missed the boat – that the PUC-specified quota of Effects (noise and Shadow Flicker) built into the Permit renders uninhabitable the homes and lands of Appellants? What is the remedy? In regarding Appellants' homes and properties as a buffer zone for the Project (fully eligible for the casting of Effects, notwithstanding the lack of acceptance of that burden by the owner), the Agency also neuters the

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[69] With Effects not to exceed 45 dBA in Deuel County, along with Shadow Flicker 30 hours or less annually.

[70] Thus, the assumption continues, no attention need be given to 49-41B-22(2) or (4), as amended in 2019, since Applicant – as of 2018 – has a CUP from the local government.

[71] These issues were raised and briefed by Appellants; the Agency merely listed their names.

potential remedy of nuisance. SDCL 21-10-1 describes a nuisance as "unlawfully doing an act, or omitting to perform a duty," which then annoys, injures, or endangers others. The risk of "annoyance" from the Effects is obvious. With the dose or quota to be delivered now expressly permitted,[72] this Project is no longer "unlawfully doing an act," or "omitting to perform a duty" as owed to Appellants. This is exactly as permitted, the permit thus becoming a type of insulator.

In this way, not only has the right to exclude others been wrested away from these owners, but, given the language of SDCL 21-10-1, also their right to challenge subsequent operations under and in compliance with that permit as comprising a "nuisance." This is the fallacy of governmental agencies, purporting to "permit" Applicant to engage in this "aggressively devised" conduct or activity, yielding a specific flow or duration of "Effects" upon homes and lands, places where no easement exists, even when Applicant thinks one is utterly unnecessary (a view obviously shared by the regulatory agencies). The Permit not only allows an adverse use contrary to the property rights of Non-Participants, but – *quite logically* – neuters the rights of landowners to challenge that never-accepted burden (for which an express Permit has issued) within the context of the nuisance law.

The text of Section 11.10, from the Kranz Easement (at 5, *supra*) is worthy of review. The language was developed several years before the PUC adopted just one leg of that three-legged "German standard" in permitting of Shadow Flicker. *In those days, Applicant would be contractually committed to remediation efforts.* Non-Participants now have a choice between accepting the burden of Shadow Flicker – *or accepting the burden of Shadow Flicker*. One could attempt to sell or abandon the home, moving away from this Project.[73] This Permit is a stain on the state's legacy of professing concern for individual property rights and the rule of law.

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[72] PUC's Permit Conditions 26 and 35, among others.

[73] This is what Appellant Amy Rall did on one prior occasion, in moving to Goodwin. See R007167.

F. Conclusion:

Do these Appellants actually have property rights? Can they refuse a demanded (or Agency-imposed) servitude? Or is it best to quietly step in line, accept that their homes must henceforth serve as part of the Project's buffer zone? Though surely and forever grateful to learn that they are not likely to be killed, seriously injured or maimed by this Project (being told as much by so many experts put forth by both Applicant and Staff), *nothing* yet said or done in this long, fulsome matter affords any honor to, recognition of or protection for the *property rights* these Appellants are certain they yet possess - or at least they thought they had prior to Applicant's arrival in South Dakota, with this "aggressively devised" design in hand.

Respectfully submitted,

July 13, 2020

/s/ A.J. Swanson
A.J. Swanson

A.J. Swanson
ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
605-743-2070
E-mail: aj@ajswanson.com
Attorney for Appellants,
GARRY EHLEBRACHT, STEVEN GREBER, MARY GREBER, RICHARD RALL, AMY RALL, and LARETTA KRANZ

CERTIFICATE OF SERVICE

Undersigned, as counsel for Appellants in the above entitled matter, being an appeal from the administrative agency, SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, Docket EL19-027, and the decision of such agency made and served April 6, 2020, hereby certifies that on the date entered or printed below, a true copy of the APPELLANTS' OPENING BRIEF has been electronically filed with the Clerk of Courts, Deuel County, through Odyssey File and Serve, Case 19CIV20-000021, *for further service upon counsel for Appellees, namely*:

Amanda M. Reiss, Special Assistant Attorney General:	amanda.reiss@state.sd.us
Kristen N. Edwards, Special Assistant Attorney General:	kristen.edwards@state.sd.us
Dana Van Beek Palmer, Lynn Jackson (Sioux Falls):	dpalmer@lynnjackson.com
Miles Schumacher, Lynn Jackson (Sioux Falls):	mschumacher@lynnjackson.com
Brian J. Murphy, NEXT ERA ENERGY (Juno Beach):	brian.j.murphy@nee.com

In addition, APPELLANTS' OPENING BRIEF is being served by electronic mail this date upon counsel for other invervenors in consolidated cases, namely:

Shawn Tornow, Tornow Law Office (Sioux Falls):	rst.tlo@midconetwork.com

Finally, a scan of the signed APPELLANTS' OPENING BRIEF has been served also this date by electronic mail upon:

Honorable Dawn Elshere, Circuit Judge:	dawn.elshere@ujs.state.sd.us

Dated at Canton, South Dakota, this 13th day of July 2020.

Respectfully submitted,

/s/ A.J. Swanson
A.J. Swanson

A.J. Swanson
ARVID J. SWANSON, P.C.
27452 482nd Ave.
Canton, SD 57013
605-743-2070
E-mail: aj@ajswanson.com

Attorney for Appellants,
GARRY EHLEBRACHT, STEVEN GREBER,
MARY GREBER, RICHARD RALL, AMY RALL and LARETTA KRANZ