EXHIBIT 6

Montana Board of Oil and Gas Conservation
Summary of Bond Activity

12/7/2015 Through 2/9/2016

Approved

Enerplus Resources USA Corporation Denver CO		118 T2	Approved Amount: Purpose:	1/11/2016 $10,000.00 UIC Single Well Bond
Surety Bond	$10,000.00	TRAVELERS CASUALTY & SURETY CO. OF AMERICA		ACT
Hofland, James D. Kevin MT		3497 W2	Approved Amount: Purpose:	1/14/2016 $1,500.00 One-Well Bond
Certificate of Deposit	$1,500.00	FIRST STATE BANK OF SHELBY		ACT
Hofland, James D. Kevin MT		3497 W1	Approved Amount: Purpose:	1/14/2016 $1,500.00 One-Well Bond
Certificate of Deposit	$1,500.00	1ST STATE BANK - SHELBY		ACT
Hofland, James D. Kevin MT		3497 W3	Approved Amount: Purpose:	1/14/2016 $1,500.00 One-Well Bond
Certificate of Deposit	$1,500.00	FIRST STATE BANK OF SHELBY		ACT

Bond Increase

Bensun Energy, LLC Sidney MT		622 M1	Bond Increase Amount: Purpose:	12/10/2015 $70,000.00 Multiple Well Bond
Certificate of Deposit	$50,000.00	STOCKMAN BANK, BILLINGS		ACT
Certificate of Deposit	$20,000.00	STOCKMAN BANK, BILLINGS		ACT

Released

Charger Resources, LLC North Richland Hills TX		697 T3	Released Amount: Purpose:	12/15/2015 $10,000.00 UIC Single Well Bond
Surety Bond	$10,000.00	U.S. Specialty Insurance Co.		ACT
Charger Resources, LLC North Richland Hills TX		697 T2	Released Amount: Purpose:	12/15/2015 $10,000.00 UIC Single Well Bond
Surety Bond	$10,000.00	U.S. Specialty Insurance Co.		ACT
Charger Resources, LLC North Richland Hills TX		697 T1	Released Amount: Purpose:	12/15/2015 $10,000.00 UIC Single Well Bond
Surety Bond	$10,000.00	U.S. Specialty Insurance Co.		ACT
Fairways Energy Resources, LLC Houston TX		762 M1	Released Amount: Purpose:	1/28/2016 $50,000.00 Multiple Well Bond

Montana Board of Oil and Gas Conservation
Summary of Bond Activity

12/7/2015 Through 2/9/2016

Released

Hofland, James D. Kevin MT	3497 L1	Released Amount: Purpose:	1/14/2016 $13,500.00 Limited Bond
Hofland, James D. Kevin MT	3497 M1	Released Amount: Purpose:	1/14/2016 $25,000.00 Multiple Well Bond
Rech, Mitchell L. Roundup MT	770 G1	Released Amount: Purpose:	1/28/2016 $10,000.00 Single Well Bond
Rech, Mitchell L. Roundup MT	770 G3	Released Amount: Purpose:	1/28/2016 $10,000.00 Single Well Bond
Rech, Mitchell L. Roundup MT	770 G2	Released Amount: Purpose:	1/28/2016 $10,000.00 Single Well Bond
Robinson Oil Company, LLC Billings MT	310 W2	Released Amount: Purpose:	1/7/2016 $1,500.00 Single Well Bond
Robinson Oil Company, LLC Billings MT	310 G6	Released Amount: Purpose:	1/7/2016 $1,500.00 Single Well Bond
Robinson Oil Company, LLC Billings MT	310 G11	Released Amount: Purpose:	1/7/2016 $1,500.00 Single Well Bond
Robinson Oil Company, LLC Billings MT	310 G10	Released Amount: Purpose:	1/7/2016 $1,500.00 Single Well Bond
Rosetta Resources Operating LP Houston TX	597 M1	Released Amount: Purpose:	1/14/2016 $50,000.00 Multiple Well Bond

Incident Report

EXHIBIT 7

Company	Responsibility	Date	Incident	Oil Released	Water Released	Source	Contained	Latitude	Longitud	County	T-R-S
Anadarko Minerals, Inc.	BOG	12/7/2015	Spill or Release	15 Barrels		Treater	Yes	48.39135	-105.99123	Valley	30N-44E-3 NENW
Mountain View Energy, Inc.	BOG	12/9/2015	Spill or Release	50 Barrels	100 Barrels	Tank or Tank Battery	No	48.98684	-112.21831	Glacier	37N-5W-2 SESE
Denbury Onshore, LLC	BOG	12/11/2015	Spill or Release		200 Barrels	Tank or Tank Battery	Yes	46.74123	-104.56123	Wibaux	11N-57E-4 NWN
Enerplus Resources USA Corporation	BOG	12/21/2015	Spill or Release	4 Barrels		Well Head	Yes	47.77693	-104.34882	Richland	23N-57E-1 SESW
Denbury Onshore, LLC	BOG	12/23/2015	Spill or Release	1 Barrels	2 Barrels	Flow Line - Production	No	46.62869	-104.44691	Fallon	10N-58E-8 SWSE
Denbury Onshore, LLC	BOG	12/26/2015	Spill or Release	21 Gallons	1 Barrels	Flow Line - Production	Yes	46.70132	-104.52567	Wibaux	11N-57E-15 SESE
Denbury Onshore, LLC	BOG	12/27/2015	Spill or Release		10 Barrels	Flow Line - Production	No	46.33570	-104.13290	Fallon	7N-61E-30 SWNW
Denbury Onshore, LLC	BOG	12/31/2015	Spill or Release	2 Barrels	8 Barrels	Treater	Yes	46.32368	-104.15884	Fallon	7N-60E-35 NENE
Bad Water Disposal, LLP	BOG	1/3/2016	Spill or Release		1 Barrels	Tank or Tank Battery	Yes	47.67583	-104.05933	Richland	22N-60E-7 SESE
True Oil LLC	BOG	1/4/2016	Spill or Release	5 Barrels		Flow Line - Injection	Yes	47.69997	-104.22246	Richland	22N-58E-1 SENW
Vanguard Operating, LLC	BOG	1/4/2016	Spill or Release	30 Barrels		Treater	Yes	47.80845	-104.31887	Richland	24N-58E-30 SESE
Slawson Exploration Company Inc	BOG	1/5/2016	Spill or Release	25 Barrels		Well Head	Yes	47.60080	-104.16075	Richland	21N-59E-4 S2SW
Beren Corporation	BOG	1/6/2016	Spill or Release	10 Barrels		Tank or Tank Battery	Yes	48.89783	-112.33396	Glacier	36N-6W-12 NEN
Whiting Oil and Gas Corporation	BOG	1/13/2016	Spill or Release		70 Barrels	Trucking/Transportati	Yes	47.88042	-104.10357	Richland	25N-59E-33 NWN
Anadarko Minerals, Inc.	BOG	1/22/2016	Spill or Release		100 Barrels	Tank or Tank Battery	Yes	48.40199	-106.09383	Valley	31N-43E-35 SWN
Anadarko Minerals, Inc.	BOG	1/23/2016	Spill or Release	246 Barrels		Tank or Tank Battery	No	48.39135	-105.99121	Valley	30N-44E-3 NENW
Triangle USA Petroleum Corporation	BOG	1/24/2016	Spill or Release	21 Gallons		Treater	No	48.44814	-104.12378	Sheridan	31N-58E-12 SES
Slawson Exploration Company Inc	BOG	1/26/2016	Spill or Release		55 Barrels	Tank or Tank Battery	Yes	47.74773	-104.95982	Richland	23N-53E-18 SESE

EXHIBIT 8

GAS FLARING

February 10, 2015

Company	Wells Flaring over 100	Wells Flaring over 100 w/o Exception	Current Exceptions (over 100)	Exception Requests	Wells over 100 Hooked to Pipeline
Continental	1	0	1	1	1
EOG Resources	0	0	2	1	0
Kraken	1	0	1	0	0
Petro-Hunt	3	0	3	0	0
True Oil	2	0	0	2	0
Whiting	15	0	0	15	0
XTO	1	0	1	0	0
Totals	23	0	8	19	1

Flaring Requests

Summary

There are 23 wells flaring over 100 MCFG per day based on current production numbers.

8 of the 23 wells have approved exceptions due to distance, pipeline capacity issues, or time to connection.

There are 19 exceptions requested at this time.

Continental Resources

Foxx 1-6H – API #25-085-21913, 29N-59E-6

1. Flaring >100MCF/D. First exception request expired 8/25/15.
2. Completed: 7/2013.
3. Estimated gas reserves: 147 MMCF.
4. Proximity to market: 4300 ft to pipeline.
5. Estimated cost of marketing the gas: $185,000.
6. Flaring alternatives: None.
7. Amount of gas used in lease operations: 15.5 MCF/D.
8. Justification to flare: Recently corrected downhole problem which increased gas production. Working with Oneok to determine if there is enough capacity to connect.

EOG Resources

Highline 3-0508H – API #25-085-21887, 29N-59E-5

9. Flaring 98 MCF/D. First exception request expires 2/12/16.
10. Completed: 7/2013.
11. Estimated gas reserves: 268 MMCF.
12. Proximity to market: 2.5 miles pipeline.
13. Estimated gas price at market: ~$1.93/MCF.
14. Estimated cost of marketing the gas: ~$0.41/MCF.
15. Flaring alternatives: None.
16. Amount of gas used in lease operations: 5 MCF/D.
17. Justification to flare: Oneok has been unable to obtain ROW.

True Oil

Anvick 21-3 3-10H – API #25-083-23113, 25N-58E-3

1. Flaring 103 MCF/D. First exception request.
2. Completed: 12/2013.
3. Estimated gas reserves: 197 MMCF.
4. Proximity to market: 0.5 miles pipeline.

5. Estimated gas price at market: ~$1.50/MCF.
6. Estimated cost of marketing the gas: $220,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 5 MCF/D.
9. Justification to flare: Economics analysis suggests a net loss of $209,000 if connected and Oneok has consistently informed True they were unable to take any gas due to full capacity at processing plants.

Delaney Federal 21-4 4-9H – API #25-083-23177, 25N-58E-4

1. Flaring 120 MCF/D. First exception request.
2. Completed: 1/2015.
3. Estimated gas reserves: 197 MMCF.
4. Proximity to market: 0.5 miles pipeline.
5. Estimated gas price at market: ~$1.50/MCF.
6. Estimated cost of marketing the gas: $220,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 5 MCF/D.
9. Justification to flare: Economics analysis suggests a net loss of $162,000 if connected and Oneok has consistently informed True they were unable to take any gas due to full capacity at processing plants.

Whiting Oil & Gas

Prewitt 21-25-1H – API #25-083-23318, 25N-58E-25

1. Flaring 140 MCF/D. First exception request expired 12/24/15.
2. Completed: 2/2015.
3. Estimated gas reserves: 323 MMCF.
4. Proximity to market: 500 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Estimated cost of marketing the gas: ~$200,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 2 MCF/D.
9. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Prewitt 21-25-2H – API #25-083-23317, 25N-58E-25

1. Flaring 152 MCF/D. First exception request expired 12/24/15.
2. Completed: 2/2015.
3. Estimated gas reserves: 492 MMCF.
4. Proximity to market: 500 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Estimated cost of marketing the gas: ~$200,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 2 MCF/D.
9. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Prewitt 21-25-3H – API #25-083-23319, 25N-58E-25

1. Flaring 158 MCF/D. First exception request expired 12/24/15.
2. Completed: 2/2015.
3. Estimated gas reserves: 469 MMCF.
4. Proximity to market: 500 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Estimated cost of marketing the gas: ~$200,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 2 MCF/D.
9. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Prewitt 21-25-4H – API #25-083-23257, 25N-58E-25

1. Flaring 172 MCF/D. First exception request expired 12/24/15.
2. Completed: 2/2015.
3. Estimated gas reserves: 442 MMCF.
4. Proximity to market: 500 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Estimated cost of marketing the gas: ~$200,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 2 MCF/D.
9. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Buxbaum 21-5-1H – API #25-083-23256, 24N-60E-5

1. Flaring 142 MCF/D. First exception request expired 12/24/15.
2. Completed: 2/2015.
3. Estimated gas reserves: 550 MMCF.
4. Proximity to market: 11,000 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Estimated cost of marketing the gas: ~$200,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 2 MCF/D.
9. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Buxbaum 21-5-2H – API #25-083-23316, 24N-60E-5

1. Flaring 106 MCF/D. First exception request expired 12/24/15.
2. Completed: 2/2015.
3. Estimated gas reserves: 783 MMCF.
4. Proximity to market: 11,000 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Estimated cost of marketing the gas: ~$200,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 2 MCF/D.
9. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Buxbaum 21-5-3H – API #25-083-23315, 24N-60E-5

1. Flaring 280 MCF/D. First exception request expired 12/24/15.

2. Completed: 2/2015.
3. Estimated gas reserves: 798 MMCF.
4. Proximity to market: 11,000 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Estimated cost of marketing the gas: ~$200,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 2 MCF/D.
9. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Malsam 14-18-1H – API #25-083-23263, 24N-60E-18

1. Flaring 155 MCF/D. First exception request expired 12/24/15.
2. Completed: 1/2015.
3. Estimated gas reserves: 361 MMCF.
4. Proximity to market: 1,500 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Estimated cost of marketing the gas: ~$200,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 2 MCF/D.
9. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Malsam 14-18-2H – API #25-083-23264, 24N-60E-18

1. Flaring 200 MCF/D. First exception request expired 12/24/15.
2. Completed: 1/2015.
3. Estimated gas reserves: 833 MMCF.
4. Proximity to market: 1,500 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Estimated cost of marketing the gas: ~$200,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 2 MCF/D.
9. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Malsam 14-18-3H – API #25-083-23265, 24N-60E-18

1. Flaring 155 MCF/D. First exception request expired 12/24/15.
2. Completed: 1/2015.
3. Estimated gas reserves: 410 MMCF.
4. Proximity to market: 1,500 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Estimated cost of marketing the gas: ~$200,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 2 MCF/D.
9. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Malsam 14-18-4H – API #25-083-23266, 24N-60E-18

1. Flaring 170 MCF/D. First exception request expired 12/24/15.
2. Completed: 1/2015.
3. Estimated gas reserves: 419 MMCF.

4. Proximity to market: 1,500 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Estimated cost of marketing the gas: ~$200,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 2 MCF/D.
9. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Skov 31-27-1H – API #25-083-23293, 25N-59E-27

1. Flaring 111 MCF/D. First exception request expired 12/24/15.
2. Completed: 1/2015.
3. Estimated gas reserves: 586 MMCF.
4. Proximity to market: 12,500 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Estimated cost of marketing the gas: ~$200,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 2 MCF/D.
9. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Skov 31-27-2H – API #25-083-23294, 25N-59E-27

1. Flaring 133 MCF/D. First exception request expired 12/24/15.
2. Completed: 1/2015.
3. Estimated gas reserves: 406 MMCF.
4. Proximity to market: 12,500 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Estimated cost of marketing the gas: ~$200,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 2 MCF/D.
9. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Skov 31-27-3H – API #25-083-23295, 25N-59E-27

1. Flaring 117 MCF/D. First exception request expired 12/24/15.
2. Completed: 1/2015.
3. Estimated gas reserves: 441 MMCF.
4. Proximity to market: 12,500 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Estimated cost of marketing the gas: ~$200,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 2 MCF/D.
9. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Palmer 24-21-4H – API #25-083-23250, 26N-57E-21

1. Flaring 122 MCF/D. Third exception request expired 12/24/15.
2. Completed: 7/2014.
3. Estimated gas reserves: 574 MMCF.
4. Proximity to market: 16,400 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.

6. Estimated cost of marketing the gas: ~$200,000.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 2 MCF/D.
9. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Exhibit 9

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 15-0613

CARBON COUNTY RESOURCE COUNCIL a Montana Non-profit public benefit corporation, AND NORTHERN PLAINS RESOURCE COUNCIL, Montana Non-profit public benefit corporation,

Appellants and Plaintiffs

v.

MONTANA BOARD OF OIL AND GAS CONSERVATION,

Appellee/Defendant.

On Appeal from Montana Thirteenth Judicial District Court,
Yellowstone County Cause No. DV-14-0027, Hon. Mary J. Knisely, District Judge

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APPELLANTS'/PLAINTIFFS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Montana State Cases **Page**

Other Authorities

I. STATEMENT OF ISSUES

1. Did the district court err by finding that Appellants' Right to Participate challenge to a regulation allowing chemical stimulation of a gas well was not ripe even though the regulation was applied to a specific gas well that Appellants challenged administratively and in court?
2. Did the application of Mont. Admin. R. 36.22.608 (2) violate Appellants' constitutional and statutory rights to know/participate in government decisions when the rule allowed expansion of the scope of a permit for a "conventional wildcat well" to include chemical stimulation (fracking) of a controversial exploratory gas well upon 48-Hours' notice to the Board , without any opportunity for public notice or participation?

II. STATEMENT OF CASE

All Montanans have a constitutional right to meaningful participation in government decisions. At issue in this case is Mont. Admin. R. 36.22.608 (2) (also referred to as the 48-Hour Regulation) which allows the Montana Board of Oil and Gas Conservation (Board) to approve the injection and storage of potentially toxic chemicals at a gas well site with only 48-Hours' advance notice to the Board and no public process. Appellants bring this as-applied challenge to

the permitting process involving an exploratory well that the Board consistently identified as a conventional "vertical" wildcat well, which subsequently was augmented with "horizontal" drilling and approved for chemical stimulation without notice to the public. The Board approved the well at the request of Energy Corporation of America, an international shale gas developer, without any serious consideration of the environmental impacts caused by chemical injection or stimulation (which Appellants refer to as "fracking"), and then the Board expanded the scope of the original permit to allow the well to be converted to a chemically stimulated well under the 48-Hour notice regulation. The latter requires completion of a simple form providing the Board 48-Hours advance notice without any requirement for further review.

The Appellant (hereafter collectively referred to as "the Councils") filed an administrative protest of the ECA well in October 2013. The Protest was denied on an administrative technicality, failure to timely include a certificate of service. The Board summarily approved the ECA well. The Councils filed this suit on January 8, 2014 in state district court, challenging the Board's summary denial of their administrative protest. The Board relented and allowed the Protest to proceed to hearing. A hearing before the Board was held on February 27, 2014. Councils provided lay and expert testimony to support their protest. Councils do not aver they were denied the opportunity to participate in this hearing though they do aver

a lack of meaningful, relevant participation. At the conclusion of the hearing the Board approved the ECA well as a "vertical" or conventional well.

The Councils filed an Amended Complaint challenging the Board's February 2014 approval of the ECA well. The parties proceeded with discovery. The parties also stipulated to the dismissal of the Councils' claims relating to the first Board meeting where the Councils' Protest was summarily denied. On July , 2014, without notice or further public input, ECA submitted its Sundry Notice under Mont. Admin. R. 36.22.608 (2). Under the Board's regulation, without public notice and without any further opportunity for public input, ECA could then commence chemical stimulation of the well.

The case was briefed on summary judgment and presented to the Honorable Judge Knisely for resolution. Two primary issues remained: (1) is Mont. Admin. R. 36.22.608 (2) unconstitutional as applied to the ECA well, and (2) was the Board's February 2014 approval of the ECA well arbitrary and capricious. Oral argument was held on April 13, 2015. The District Court issued its opinion an order on September 3, 2015, granting summary judgment to the Board and denying it to the Councils. Notice of Entry of Judgment was served on September 16, 2015.

The District Court denied the Councils' right to know/participate challenge as unripe. App. 1, Order at pp. 9-11.The District Court also ruled against the

Councils' claim that the Board's decision at the February 2014 meeting was arbitrary and capricious, a part of the ruling that is not under appeal here. The District Court did not address the constitutionality of ARM 36.22.608. The Councils timely filed a Notice of Appeal on October 13, 2015.

III. STATEMENT OF FACTS

Plaintiffs Northern Plains Resource Council, Inc. (Northern Plains) and Carbon County Resource Council (CCRC) are directly affiliated, Montana-based grassroots conservation and agriculture groups that support protection of family farms and ranches, surface and groundwater, wildlife habitat, natural aesthetics and the unique quality of life afforded by responsible environmental stewardship. App. 1, Order, at p. 2. Participation in public processes, including administrative protests and appeals, is a vital means by which Northern Plains and CCRC educate and inform their members, affiliates and the general public about resource issues, including hydro-fracking. App. 4, Muth Affidavit, at ¶ 6.

The Montana Board of Oil and Gas Conservation ("the Board") is a seven-member, quasi-judicial agency administratively attached to the Montana Department of Natural Resources and Conservation. App. 1, Order, at p. 2. The Board is responsible for issuing drilling permits for oil and gas wells in Montana. *Id.*

Energy Corporation of America ("ECA") is a large shale-gas company with

operations throughout the United States. *Id.* In October 2013, ECA announced it "would like to bring something like the Bakken to the Beartooths." App. 1, Order, at p. 2. The Bakken of course is one of the largest oil and gas fracking operations in the U.S. Local residents were concerned about the potential impacts of such development. According to CCRC, "[t]he farmers, ranchers, businesses and residents in the area expressed intense concern for their livelihoods as well as tourists and recreationists who frequent the area. Due to recently released studies, news stories of accidents and disasters caused by oil and gas wells, there was a lot of controversy around this well surrounded by productive agricultural and public land." App. 1, Order, at p. 2; App. 5, Second Muth Affidavit, at ¶ 5. The Councils' primary concern was water contamination from the use of chemicals associated with the well. App. 7, Espenscheid Affidavit, at ¶ 1-2; App. 4, Muth Affidavit, at ¶4.

ECA soon filed an application with the Board for a permit to drill (also referred to as an "APD") an exploratory oil and gas well in Carbon County, Montana, in close proximity to Silver Tip Creek and the Mutual Ditch. App. 1, Order, at p. 3. The District Court found that the Mutual Ditch is used by local agricultural producers for irrigation. *Id.* The District Court also found that ECA's APD did not mention plans to inject a chemical solution into the well to "stimulate" or hydrologically frack (hydro-frack) the well and did not include any

information regarding how ECA would mitigate potential environmental impacts associated with fracking. *Id.* Montana law lacks a specific definition for "hydraulic fracturing" but does define "Fracturing" as, "[T]he introduction of fluid that may or may not carry in suspension a propping agent under pressure into a formation containing oil or gas for the purpose of creating cracks in said formation to serve as channels for fluids to move to or from the well bore." Mont. Admin. R. 36.22.302 (28). The Councils' members, lay persons not associated with the oil and gas industry, used the terms "frack" and "hydro-frack" interchangeably. The Environmental Assessment ("EA") the Board prepared specifically stated fresh water would be used at the well; the EA characterized the well as a vertical "wildcat well" which, "pending evaluation…may be horizontally drilled…". App. 13, Environmental Assessment, at p.1.

CCRC filed a formal Protest letter regarding the APD with the Board, and a hearing was scheduled for December 12, 2013. App. 1 at 3. The Board placed Plaintiffs' Protest on the December 12, 2013 docket, but the Board canceled the hearing with three days' notice due to an alleged lack of the required certificate of service, though the Protest had been served via fax on ECA. App. 6, Zaback Affidavit, at ¶ 7. Plaintiffs, along with several Carbon County citizens who own property near the ECA well, including organic farmers, the President of the local ditch association and several local water rights holders, travelled to the hearing

from Carbon County and attempted to comment on the ECA well during the open public portion of the Board's regularly scheduled business meeting on December 11, 2013. App. 4, Muth Affidavit, at ¶ 13. The Board's attorney and the Chairwoman would not allow any public comment on the ECA well. App. 1, Order, at p. 3; App. 4, Muth Affidavit, at ¶ 13; App. 6, Zaback Affidavit, at ¶ 13. The public was instructed not to comment specifically on ECA's application for a permit to drill because their Protest had been dismissed. App. 1, Order, at p. 3-; App. 14, December 2013 Board Meeting Minutes, at p. 2. Because the Board had determined that CCRC's protest lacked an attached Certificate of Service required under the Board's protest rules outlined in Mont. Admin. R. § 36.33.601, the Board determined the Protest was not valid and administratively approved ECA's APD on December 16, 2013. App. 1, Order, at p. 3. The Councils had faxed their Protest to ECA, but ECA's attorney objected because the document did not include a certificate of service.

On January 8, 2014, CCRC filed a Complaint in Yellowstone County District Court against the Board regarding the canceled December 12, 2013 hearing. App. 1, Order, at p.3. After suit was filed, on January 22, 2014, Board Administrator Tom Richmond ("Richmond") petitioned the Board to allow the protest to proceed and hold a hearing on the ECA APD at its next meeting. App. 1, Order, at pp. 3-4. Consequently, the Board changed its position regarding the

validity of the Protest by conceding the Councils could proceed with their administrative protest over the ECA well specifically rather than just comment about fracking in general as the Board had required at the December meeting. Richmond conditioned the already-issued APD on the Board's review of the Council's Protest, and a hearing was set for February 27, 2014. *Id.*; App. 18, Richmond Petition, at p.1.

Nine local residents and one expert on behalf of CCRC testified at the hearing. These included farmers, irrigators, and other land owners in close proximity to the site. App. 1, Order, at p. 4. The public comments addressed the adequacy of the environmental assessment prepared by the Board for the ECA drilling permit, concerns about water quality and quantity, potential environmental damage caused by injecting chemicals through aquifers and storing the used chemicals in a poorly lined pit so close to water supplies, and the potential impact on property values. Id.

CCRC's expert Mark Quarles presented his Report to the Board and opined that ECA's proposed disposal pit design was inadequate for the volume of waste generated; ECA failed to identify where it planned to obtain the millions of gallons of water the well would likely require and how it would safely dispose of millions of gallons of wastewater laced with oil and other potentially hazardous chemicals used in the process; ECA failed to address how they would prevent

waste in the pit from overflowing onto neighboring properties in the event of a flood created by snowmelt or rain storms; the proposed liner for the disposal pit failed to meet industry standards, and other issues. See App. 3, Quarles Report, at pp. 2-4.

Specifically, Quarles noted, "ECA did not estimate the volume of wastes that will be generated in their Application, nor did they describe how the reserve pit will be adequate to contain all wastes." App. 3, Quarles Report, at p. 4, ¶ 1. He further commented, "The Water Management Plan prepared by ECA states that a "minimum of 2-foot freeboard will be maintained in the reserve pit at all times" - but this 2-foot height does not meet the 3-foot minimum requirements of Rule 36.22.1227, Earthen Pits and Ponds established in the Oil and Gas Conservation regulations. As a result, the pit design as planned is non-compliant." *Id.* Moreover, Quarles pointed out the lack of clarity regarding what liner thickness will be used in the pit, noting the EA shows a 20mil thickness while ECA's submitted design shows only 2.5 mil and clarifying that even 20 mil is still 60 times thinner than the minimum liner thickness required for landfills. App. 3, Quarles Report, at p. 4, ¶ 5, p. 5, ¶ 1. Quarles also observed that a large quantity of oily cuttings is expected from the ECA well. The US Fish and Wildlife Service has documented that oily cuttings stored in a reserve pit such as the one proposed by ECA can entrap and kill migratory birds and other wildlife.

App. 3, Quarles Report, at p. 4, ¶ 2.

Quarles suggested a number of potential mitigation measures; one such measure, which Board Administrator Richmond supported on the record, was the potential imposition of API HF2 water management standard if hydro-fracking were proposed at a later date. App. 1, Order, at p. 4; App. 16, February 2014 Board Order, at p. 44, ¶ 6.

Richmond noted that the APD did not propose hydro-fracking and proposed a vertical wildcat well, not a horizontal well. App. 1, Order, at p. 5. At the February hearing Board members noted they were not required to consider impacts from fracking on a well that did not propose fracking in its original application. App. 16, February 2014 Board Order, at p. 44, ¶ 6; *Audio Minutes of the Bd. Of Oil and Gas Conservation Public Hearing*, February 27, 2014, 11:16-11:26 (CD Exhibit filed at District Court April 13, 2015). Board Administrator Tom Richmond noted that the ECA permit application proposed a vertical well, not a horizontal well, and that the application did not mention any plans to engage in hydro-fracking or chemical stimulation. *Id.* Richmond previously told the press that the ECA permit proposed a basic wildcat well "...much like the 35,000 other wildcat wells drilled in Montana"; Richmond further stated that, "There's nothing special with what's proposed here that would require special conditions or stipulations." *See* App. 12, Billings Gazette Article. Richmond also asserted that a

"different process" would be used to approve any future request by ECA to initiate hydro-fracking at the ECA well. *Id.*

In a deposition several months after the February 2014 hearing, Richmond reiterated the permit the Board granted for the ECA well was for a vertical well rather than a horizontal well and he had no indication from the ECA application that ECA was planning to hydro-frack in the future. App. 11, Richmond Deposition, at p. 56:6-10.

While the Board did allow CCRC to voice their concerns about possible impacts if the ECA well were fractured at the February 2014 hearing, the Board repeatedly reminded meeting participants that ECA's permit application gave no indication the ECA well would be hydraulically fractured and therefore the Board lacked authority or jurisdiction to consider specific concerns regarding fracking at the ECA well. *Audio Minutes of the Bd. Of Oil and Gas Conservation Public Hearing,* February 27, 2014, 11:16-11:26 (CD Exhibit filed at District Court April 13, 2015).

Richmond briefly commented on CCRC's water quality and aquifer concerns, stating that there really weren't any wells close to the ECA well location (*Id.* at 11:24-11:25) but stating he would be "okay" if the Board wanted to approve the requirement that the hydrofracking process include compliance with API standards for water management. *Audio Minutes of the Bd. of Oil and Gas*

Conservation Public Hearing, February 27, 2014, 11:18-11:27 (CD Exhibit filed at District Court April 13, 2015). The Board spent a few minutes discussing CCRC's 1.5 hours of formal comments, including a 9-page written expert report, before issuing their final decision to approve the ECA permit. *Id.*

On July 7, 2014, the Board received a *Sundry Notice* from ECA pursuant to Mont. Admin. R. § 36.22.608 (2), which requires a 48-hour notice to the Board before fracking, acidizing, or other chemical treatment of a well may begin. App. 1, Order, at p. 5. The notice informed the Board that ECA was going "to perform a diagnostic fracture injection test [DFIT] on the ECA Hunt Creek #1H." *Id.* A box was checked on the notice form indicating ECA's intent to "stimulate" or to "chemically treat" the well. *Id.*

The Board did not engage in any additional environmental review or public process prior to administratively approving DFIT and chemical stimulation at the well. App. 1, Order, at p. 5.

The Sundry Notice form required by Mont. Admin. R. § 36.22.608 (2) lists eighteen options with corresponding checkboxes where an applicant may indicate the nature of the notice, report or other data being filed with the Board. See App. 17, July 2014 Form 2 Sundry Notice. Although the Form 2 Sundry Notice is the form the Board requires for notice of intent to engage in hydraulic fracturing activity on a well, none of the options listed on Form 2 mentions the terms

"hydraulic fracturing", "hydro-fracking" or "fracturing". *Id.*

IV. STANDARD OF REVIEW

Summary judgment under Mont. R. Civ. P. 56 is appropriate where there is an absence of genuine issues of material fact and a party is entitled to judgment as a matter of law. *Montana Wildlife Fed'n v. Montana Bd. of Oil & Gas Conservation*, 2012 MT 128, ¶ 24, 365 Mont. 232. The Court reviews a district court's grant of summary judgment de novo. *Id.* The Councils seek review of the District Court's summary judgment ruling.

This Court has plenary review power over questions of constitutional law. *Williams v. Bd. of Cty. Comm'rs of Missoula Cty.*, 2013 MT 243, ¶ 23, 371 Mont. 356, 363. The Court reviews a district court's constitutional conclusions as it reviews other issues of law to determine whether they are correct. *Montana Environmental Information Center v. Dept. of Environmental Quality,* 1999 MT 248 (*Citing Wadsworth v. State* (1996), 275 Mont. 287, 298, 911 P.2d 1165, 1171).

V. SUMMARY OF ARGUMENT

Appellants Carbon County Resource Council and Northern Plains Resource Council (the Councils) challenge the Board's application of Mont. Admin. R. 36.22.608 (2) because it fails to safeguard their members' rights under Article II, Sections 8 and 9 of the Montana Constitution to meaningfully participate in

government decisions. The Councils have farmer/rancher members who are concerned about potential adverse impacts of chemical stimulation on ground and surface waters. Those concerns were repeatedly expressed to the Board and District Court.

The Montana Constitution provides a fundamental right to meaningfully participate in government decisions. Mont. Const. Art. II, section 8. *Bryan v. Yellowstone Cty. Elementary Sch. Dist. No. 2,* 2002 MT 264, ¶ 24, 312 Mont. 257, 264 (Mont. 2002). Montana's Open Meetings law helps implement this Constitutional requirement by mandating that all agencies must have procedures to ensure adequate notice and assist public participation before a final agency decision is taken that is of significant interest to the public." Mont. Code Ann. § 2-3-103. The public must have the ability to submit data and views prior to a final decision. Mont. Code Ann. § 2-3-111.

The uncontested facts establish that the Councils' members did not meaningfully participate in the first approval of the ECA well because their Protest was summarily denied for lack of a certificate of service. The Board then changed its mind and decided to hear the Protest. However, because the February 2014 hearing concerned only a vertical exploratory well – an "ordinary wildcat well" – the public's concerns about fracking or chemical stimulation impacts on water resources were irrelevant. The Board's approval of chemical stimulation

occurred in July 2014 following ECA's Sundry Notice. The public had no notice or opportunity to comment on the Board's decision to allow ECA to frack or chemically stimulate its well based on ECA's Sundry Notice filed pursuant to the 48-Hour Regulation. That regulation neither requires public notification nor has ever resulted in a further environmental review by the Board. Thus, nothing in this record shows that the Councils' members had the opportunity to address the decision-maker (the Board) at the time the relevant decision (permission to chemically stimulate or frack the well) occurred.

The Board dodged the Councils' right to meaningfully participate by creating a game of semantics, zeroing in on Councils' alleged mistaken use of the term "fracking" to spark a technical debate regarding whether the underground fractures generated through a "Diagnostic Fracture Injection Test" actually qualified as "Fracturing".[1] The Board drew a distinction between hydrologic fracking and a "DFIT" test, which the District Court adopted. The Board argued that only a "DFIT" test was approved under the 48-Hour Rule and, because fractures created during a "DFIT" test apparently are different than fractures created in "Fracturing", the Councils were incorrect in asserting "fracking" had taken place at the well. Because the Councils' challenge focused on fracking, the

[1] The Board chose not to file extra-record testimony supporting this distinction until their final Reply Brief dated February 25, 2015. *See Affidavit of Benjamin Jones.* The Jones affidavit is a post hoc explanation. The record does not contain an explanation of the fine line distinctions that the Board attempted to draw before the Court. *See Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 419-420 (1971).

Board argued, and the District Court agreed, the constitutional challenge was not ripe because hydrological fracking had not yet occurred.

The Board's post hoc distinction between a "DFIT" test and hydrological fracking is, for the purposes of the Councils' "right to participate" claim, a distinction without a difference. Both processes inject a chemical solution under pressure into a horizontal well hole and store the waste material on site. The primary distinction is that hydrological fracking uses a proppant (such as sand) to permanently crack the shale rock while a DFIT test only temporarily cracks the rocks without a propping agent. Both processes inject a chemical solution through the bore hole. This record proves that Councils' concerns focused on potential impacts to surface and ground water resulting from injecting a chemical solution in the well and storing wastes on site, whether the process is referred to as fracking, hydro-fracking or a "DFIT" test. The Councils referred to the process as both "fracking" and "hydro-fracking" through the District Court proceedings. The Councils' use of the terminology may have been imprecise, but their concerns were clearly articulated. Further, the Councils' use of the term fracking is consistent with the Board's own definition of the term which covers the introduction of fluids into the well bore, whether or not a proppant is used. Mont. Admin. R. 36.22.3012 (28).

The District Court accepted the Board's assertion that the Councils' fracking concerns were not ripe. The District Court determined that because the DFIT test approved by the Board did not use a proppant, the fractures were temporary. App. 1, Order, at p. 10. The Court then determined that hydro-fracking involves keeping an existing well open for production, so technically hydro-fracking had not occurred, therefore Councils' concerns that "hydro-fracking has occurred is speculation." *Id.* Because the District Court found the claims speculative, the Court applied the test in *Reichert v. State* and dismissed the case as not ripe. Notably, the District Court did agree with the Councils' basic contention that "forty eight hours is a short notification period," and opined that a challenge to the rule may become ripe in the future. App. 1, Order, at p. 11.

The District Court erred in determining the case was not ripe. Under *Reichert*, a party must have actual rights at stake and they must be presented in an adversarial context "upon which the court's judgment will operate." *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 53, 365 Mont. 92, 115. The Councils allege an actual injury to their members, lack of public participation guaranteed by the Constitution, in a genuine controversy, a challenge to the approval of the ECA well. The requested relief is also redressable by the court: invalidate the rule upon which the Board acted.

Ripeness focuses solely on the timing of a lawsuit. *Reichert, supra* ¶ 55. Cases are not ripe when they request premature adjudication, for example, ruling on the legitimacy of a regulation before it is enforced. *See generally Abbott Labs v. Gardiner,* 387 U.S. 136 (1967). Councils' "as-applied" challenge to lack of participation in a decision to chemically stimulate a well was presented at the proper time, after the regulation was applied to a particular project. It is ripe for review. Though the Board did not challenge the Councils' standing, it fares no better with that argument. The Councils provided both organizational and member standing activities that allege injury to their right to participate.

This Court should determine the case is justiciable and adjudicate the merits. No further factual development is necessary. The Montana Constitution Article II sections 8 and 9, Public Participation Act, MCA § 2-3-101 *et seq*. and decisions of this Court mandate meaningful public participation in government decisions of significance interest to the public. The record demonstrates that the Board's February hearing did not provide Councils meaningful opportunity to present and discuss concerns over chemical stimulation because the Board was merely approving an "ordinary wildcat well." The Board then used its 48-Hour Regulation, ARM 36.22.608, to approve the Sundry Notice of ECA's intent to chemically stimulate, a decision-making process entirely shielded from public view. Under strict scrutiny, which is properly applied when Article II

fundamental rights are implemented, the Board can show neither a compelling purpose nor a narrowly tailored regulation. Nor can the Board demonstrate that the regulation, or any other Board regulation comports with MCA § 2-3-103 and 111, which require development of procedures to secure and facilitate public involvement on issues of significant concern. Surely the concern expressed by farmers, ranchers and other residents elevates the ECA well approval to a matter of significant interest.

VI. ARGUMENT

A. The Right to Know and the Right to Participate are fundamental, interrelated constitutional rights that are interpreted to protect the public interest.

The foundation for the right to participate comes from the plain language of the 1972 Montana Constitution, which states in Article II, section 8: "The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law." Article II section 9 provides a right of access to government documents. These rights are intertwined and are part of Montana's Bill of Rights. *Bryan* at ¶31-32, 40. In *Bryan,* the Court noted the Constitutional Delegates' clearly stated belief in the, "inextricable association between the 'companion' provisions" under Article II Sections 8 and 9, stating that for effective and knowledgeable participation, "[O]ne must be fully apprised

of what government is doing, has done, and is proposing to do." *Id.* at ¶31 (quoting Larry M. and Deborah E. Elison, *Comments on Government Censorship and Secrecy,* 55 Mont. L. Rev. 175, 177 (1994). The *Bryan* Court declined to adopt the District Court's reasoning that the right to know (including the right to inspect government documents) under Art. II, Section 9 should be evaluated separately from Right to Participate claims under Article II, Section 8, stating, "[W]e will not analyze the two provisions in a vacuum, "separate and distinct" from one another." *Id.* at ¶31.

Because they are contained in Article II of the Montana Constitution, these rights are fundamental. During the course of Montana's 1972 Constitutional Convention, the Bill of Rights Committee described the underpinnings of the right to participate:

> "The Committee adopted this section in response to the increased public concern and literature about citizen participation in the decision-making processed of government. The provision is in part a Constitutional sermon designed to serve notice to agencies of government that the citizens of the state will expect to participate in agency decisions prior to the time the agency makes up its mind. In part, it is also a commitment at the level of fundamental law to seek structures, rules or procedures that **maximize** the access of citizens to the decision-making institutions of state government."

Montana Constitutional Convention, Vol. II, Committee Reports, p. 630-631; *see also* Vol. V., Verbatim Transcript, p. 1651 (emphasis added).

Pursuant to the mandate of Article II, section 8 of the Montana Constitution, the Legislature enacted the Public Participation Act, MCA § 2-3-101, et seq., which implements the public's constitutional right to participate in the decision making process before a final decision is reached. The statutes confirm the Board's clear legal duties. "The procedures **must** ensure adequate notice and **assist** public participation before a final agency decision is taken that is of significant interest to the public" (emphasis added). MCA § 2-3-103. MCA § 2-3-111 further requires that government agencies develop "[P]rocedures for assisting public participation **must** include a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public (emphasis added)." These statutes, by their use of the words "shall" and "must" create mandatory duties on all state agencies, including the Board.

This Court has affirmed the importance of the right to know/participate. The Framers created a clear legal duty not only to *permit* and *afford* citizens' reasonable opportunity to participate in government decision-making processes, but to *secure* and *encourage* the public's exercise of this by establishing procedures that *assist* and provide adequate opportunities to citizens who wish to

share their views before the government makes a final decision. Mont. Const. Art II § 8; MCA § 2-3-101 et seq.; *Bryan v. Yellowstone Cty. Elementary Sch. Dist. No. 2,* 2002 MT 264, ¶ 24, 312 Mont. 257, 264 (Mont. 2002); *Bd. of Trustees, Huntley Project Sch. Dist. No. 24, Worden v. Bd. of Cty. Comm'rs of Yellowstone Cty.,* 186 Mont. 148, 151 (Mont.1980).

In *Jones v. Cty. of Missoula,* 2006 MT 2, 330 Mont. 205 (2006) this Court further defined the government's duty to provide adequate public notice prior to making a decision regarding an issue of significant public interest and determined the combination of published newspaper articles, county official's reference to upcoming meetings at a public hearing on the matter, posting of the notice on the county's bulletin board and publication of the notice in the local newspaper represented adequate public notice. *Id.* ¶ 35. Quite recently, this Court again upheld government agencies' duty to assist public participation in a case where the County Commissioners made a decision at an unannounced meeting, in violation of Montana's public participation and open meeting laws, to take cash payments in lieu of insurance benefits. In this Court's words, "[O]bviously, an opportunity to participate cannot occur unless adequate notice is first provided pursuant to the right to know." *Schoof v. Nesbit,* 2014 MT 6, ¶ 17, 373 Mont. 226, 231. The Court also refused to abdicate Defendants' legal duty to facilitate public participation on the basis of Plaintiffs' alleged inability to prove direct injury or

direct personal stake, stating, "The constitutional rights to know and participate could well be rendered superfluous because members of the public would be unable to satisfy traditional standing requirements to properly enforce them." *Id.* ¶ 19.

As discussed below, the gravamen of the Councils' complaint is that the 48-Hour Regulation did not provide any opportunity to address the Board's approval of ECA's request to chemically stimulate or frack its well. The regulation and the Board's required form simply require a Notice of Intent to frack or chemically treat a well.

B. The district court erred by finding that the Councils' challenge to the 48-Hour Rule was not ripe because the Councils presented an actual controversy and the Court could grant effective relief.

The doctrine of ripeness was created by federal courts as a constitutionally-grounded jurisdictional basis for courts to avoid legal issues raised in the abstract. *See Pearson v. Virginia City Ranches Ass'n,* 2000 MT 12, ¶ 30, 298 Mont. 52, ¶30, 993 P.2d 688, ¶30. By determining a case is ripe, courts avoid "premature adjudication" because an actual "case or controversy" is lacking. *Portman v. County of Santa Clara* (9th Cir. 1993), 995 F.2d 898, 902-903.

This Court's decision in *Montana Power Company v. Public Service Commission,* 2001 MT 102, 305 Mont. 260 (2001) (*MPC*) illustrates proper

application of the ripeness doctrine. At issue in *MPC* was the Public Service Commission's refusal to accept a cost tracking and accountability scheme sought by the company to recover its costs in the newly-deregulated electrical industry. The Montana Power Company challenged the Commission's rejection of its proposed cost recovery system, and also argued that de-regulation legislation would result in a future compensable taking of the company's property. The District Court sided with the company on both counts. This Court reversed, finding the takings claim unripe, because it was based on pure speculation about the cost of electricity years or decades in the future. *MPC, supra,* 2001 MT. 102 ¶ 36-37. Whether the takings claim would "come into existence in one year or 25 years is anyone's guess at this point." *Id.* ¶ 38.

In contrast, the case relied upon by the Board and the District Court, *Reichert v. State ex rel. McCullough,* 2012 MT 111, 278 P.3d 455, found that a constitutional challenge to a proposed referendum, which did not yet have the force of law, was indeed ripe for adjudication even though actual injury had not yet occurred. At issue was a referendum that changed the manner in which Supreme Court justices are elected by creating several districts within the state, each one of which would elect a Supreme Court justice. The new method of voting allegedly conflicted with the Montana Constitution's requirement for state-wide judicial elections. This Court found the issue ripe, even though no actual

injury had occurred because the referendum had not yet passed. *Id.* ¶ 58. The issues presented were purely legal, and application of the referendum threatened to injure the voting rights of the plaintiffs. This Court found the case ripe even though precedent dictated caution with interference with the referendum process. *Id.* ¶ 59. Where a "possible constitutional infirmity was clear on its face" and the issue was primarily legal and not factual, the case was ripe for review. *Id.*

The instant case falls within the ripeness bounds illustrated by this Court in *Reichert*, the very case the District Court used to dismiss the Councils' claims. An actual controversy is present. Originally ECA gained a permit to drill a vertical wildcat well. The Councils protested the permit because of concerns about injecting chemical solution through groundwater aquifers and storing the wastes in an on-site pit close to irrigation water. The protest was rejected because the Board approved an ordinary vertical well without chemical injection. In July 2014, when the case was pending, the Board approved ECA's request (via a Sundry Notice) to turn the well horizontal and inject chemical stimulants into the well bore. That approval was premised on the 48-Hour Regulation. The Councils received no notice of the filing of the Sundry Notice, had no opportunity to inspect any supplemental information ECA filed in July 2014 in support of their request under the Sundry Notice, and no opportunity to present concerns to the Board at the time the final decision to permit chemical stimulation was actually

being made. The Councils' participation in the February hearing failed to satisfy their right to *meaningful* (e.g., effective and knowledgeable) participation prior to the Board's decision to allow DFIT and Chemical Stimulation because neither the Board nor the Councils knew those processes would be proposed at the time of the hearing and, due to the 48-Hour Regulation, the Councils did not have access to the supplemental documents ECA filed in July 2014 until long after those processes had already been approved.

The District Court's reasoning was based on its conclusion that the Councils failed to prove that hydraulic fracking had occurred, because the Board merely approved a "DFIT" test.[2] But that conclusion misses the mark in a ripeness analysis. Whether or not the Councils' concerns about chemical stimulation are well-founded does not determine whether the case is ripe for review. The Councils have presented an actual controversy based on real events. Nothing is speculative about whether ECA filed a Sundry Notice on Form 2 pursuant to Mont. Admin. R. 36.22.608. Nothing in this record shows the Councils had the opportunity to present their concerns to the Board before time period outlined in the regulation expired and ECA was free to commence

[2] Under the 48-Hour Regulation, the Board actually approved both DFIT and Chemical Stimulation; in the Board's final reply brief, the Board provided a detailed argument that DFIT is not a form of fracking, but the argument did not address chemical stimulation which was also approved, and falls squarely within the Board's own definition of "fracking." See Defendant's Reply Brief (February 25, 2015); See Also Admin. R. Mont. 36.22.302(28).

chemical stimulation. Those are real events. The injury to the Councils' members occurred when they were denied the right to meaningfully participate in the Board's actual decision to allow chemical stimulation. Whether the board approved fracking, hydraulic fracturing, or a DFIT test has nothing to do with whether the challenge is ripe. What matters is that ECA and the Board used the process outlined in the regulation. Application of the ripeness doctrine ultimately turns on whether a suit "is being brought at the proper time." *Reichert* at ¶ 55 quoting *Texas v. United States,* 497 F.3d 491, 496 (5th Cir.2007). The Councils' claim challenging the 48-Hour Regulation was brought while the regulation was being applied to a specific controversy in a specific location affecting specific landowners. The claim is ripe for review and this Court has jurisdiction to determine whether the regulation as applied in the context of the ECA well comports with the Public Participation in Government Act and/or Article II section 8 of the Montana Constitution.

Neither the Board nor the District Court raised any other jurisdictional issues. Because jurisdiction can be raised at any time, even *sua sponte* by this Court, the Councils briefly touch on standing and mootness, also addressed in *Reichert.* The Councils have standing because they allege an actual injury: deprivation of a constitutional and statutory right to participate in the Board's decision to allow chemical stimulation of the ECA well. The injury can be

redressed by voiding the regulation upon which it is based. *Reichert,* ¶ 55; *Missoula City–County Air Pollution Control Bd. v. Bd. of Envtl. Rev.,* 282 Mont. 255, 261–63, 937 P.2d 463, 467–68 (1997). To establish standing, the Councils do not have prove that chemical stimulation or fracking of the well will damage water resources. They need only allege a "present, or threatened injury to a property or civil right." *Reichert,* ¶ 55. The right in question is provided by the Constitution – a right to meaningfully participate in government decisions. The Councils have standing.

Mootness is not grounds to bar this case either. It is true that the Board has granted ECA permission to stimulate and ECA's activities in that regard may be complete. For a case to be moot, this Court askes "whether an injury that has happened is too far beyond a useful remedy. *Id, quoting* Wright et al., *Federal Practice and Procedure* § 3531.12, 163, § 3532.1, 383. Here the Court can provide a useful remedy by voiding the regulation. Indeed the 48-Hour Regulation presents a classic application of the "capable of repetition yet evading review" exception to mootness. Given the mere two day turn-around time under the regulation and the fact that the driller can immediately commence chemical injection, the challenged conduct "*invariably* ceases before courts fully can adjudicate the matter." *Havre Daily News, LLC v. City of Havre,* 2006 MT 215, ¶¶ 33–34, 333 Mont. 331, 142 P.3d 864. The Councils have a reasonable

expectation that the regulation may be applied again; even the District Court recognized the likelihood of future challenges. App. 1, Order, at p. 11.

In sum, none of the jurisdictional doctrines bar this Court from reviewing the merits of the Councils' challenge.

C. The 48-Hour Regulation Violated the Open Government Act and the Constitutional Right to Participate in Government Decisions.

The Board failed to provide adequate notice or meaningful opportunity for public participation in the decision making process prior to approving ECA's request to chemically stimulate its well in violation of MCA § 2-3-103 and the Montana Constitution. That failure occurred in the Board's approval of ECA's request to expand the scope of ECA's permit on the basis of supplemental information ECA submitted to the Board in its July 2014 Sundry Notice. As this Court has explained in *Bryan*, *Jones*, *Schoof* and other cases discussed below, the constitutional rights to know and the right to participate are vital, interrelated fundamental rights. Government bodies cannot ignore or obfuscate their duty to provide meaningful public involvement.

The Board will counter that the Councils did indeed air their concerns at the Board's February 2014 hearing. It is true that the Board did alter its initial denial of the Councils' administrative protest, and did permit the public to testify. However it is undisputed that the Board, in the words of Administrator Richmond,

merely approved "an ordinary wildcat well." The Environmental Assessment accompanying the initial drilling proposal indicates fresh water, not chemical proppant, would be used on the well; the EA does not address fracking and the Board's minutes reveal no discussion of the issue. See App. 13, Hunt Creek 2013 Environmental Assessment. The February 2014 hearing cannot suffice as a meaningful opportunity to participate in a decision to chemically stimulate the ECA well when the Board was not making a decision about injecting and storing chemicals into a well bore. The Board made clear the fact that it was considering only a vertical wildcat well. See App. 11, Richmond Deposition, at 56:6-10. Administrator Richmond made clear that a decision to frack was not being proposed. *Id.* By restricting its February 2014 decision to an ordinary vertical well, the Board "reduced what should have been a genuine interchange into a mere formality." *Bryan supra at* ¶ 46. No genuine interchange or meaningful participation occurred because the decision being made, by the Board's own design, did not implicate the concerns of the public – i.e. surface and groundwater pollution from injecting chemicals into the bore hole. The mere fact that the public commented on the matter does not constitute "meaningful participation." As this Court explained, "[T]he public participation statutes contemplate more than merely eliciting public comment." *N. 93 Neighbors, Inc. v. Bd. of Cty.*

Comm'rs of Flathead Cty., 2006 MT 132, ¶ 35, 332 Mont. 327, 337, 137 P.3d 557, 564.

The Board's decision to allow chemical stimulation occurred when ECA filed its Sundry Notice. See App. 17, July 2014 Form 2 Notice of Intent. Under the 48-Hour Regulation, the operator must simply provide "the written information describing the fracturing, acidizing, or other chemical treatment must be provided to the board's staff at least 48-Hours before commencement of well stimulation activities." Mont. Admin. R. 36.22.608 (2) (a). Under the Board's rules, unless the Board intervenes within the 48-hour time frame, the operator is free to commence well stimulation or chemical treatment. This rule contains multiple flaws from a both a public notice and public participation perspective. First, even though members of the public may have expressed specific concerns about a particular well, that same operator has no obligation to notify any of them that well stimulation is about to commence. The Board itself has no obligation to notify the public. The Board does not revisit its environmental assessment. The Sundry Notice itself contains no information about the chemical stimulation, though under Mont. Admin. R. 36.22.608 (3) the operators is supposed to describe the chemicals or other substances to be used. Forty eight hours is far too short of a time span for the public to learn on its own accord that a Sundry Notice was filed and to try to comment. The Councils discovered the fracking after it had

begun. App. 5, Second Muth Affidavit, ¶8. Even if the Notice had been published, forty eight hours is far too short to evaluate what is proposed and provide comment or persuade the Board to change its mind. As a result the process permitted under Mont. Admin. R. 36.22.608, by design, takes place outside of public purview. Our Constitution and public participation laws demand more.

The 48-Hour Regulation violates both Montana law and the Constitution. Both require government agencies to develop rules and procedures that ensure adequate notice pursuant to citizens' fundamental right to know; without adequate notice, citizens' corresponding fundamental right to a meaningful opportunity to participate is necessarily infringed. *Schoof*, 2014 MT 6 ¶ 17. Meaningful participation means citizens have an opportunity not only to submit their own contrary data and viewpoints to the agency, but also that citizens have had the opportunity to examine all documents relevant to the agency's decision-making processes or to observe the agency's deliberations prior to the agency issuing a final decision. *Id.* None of those things occurred here.

This Court has sketched the parameters of what constitutes adequate notice for meaningful public participation. In *Jones,* the Court determined the county's duty to provide adequate public notice of an upcoming decision was satisfied through a combination of publications in the local newspaper, discussion

regarding the upcoming meeting at a prior public hearing and posting of printed notice on the county's bulletin board. *Jones v. Cty. of Missoula*, 2006 MT 2, ¶ 31-35, 330 Mont. 205, 214-217, 127 P.3d 406, 412-416. Here, unlike the situation in *Jones,* no efforts were made to post information about the chemical stimulation for this controversial project.

Nor can the Board find safe harbor by arguing that its regulation comports with statutory requirements for public participation. Under Mont. Code Ann. § 2-3-103 the Board must adopt procedures that ensure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public." The Board may argue that its regulation concerns actions that are not of "significant public interest." However that argument is laid to rest in this as-applied challenge by the record. Beginning with ECA's boast that the company would "bring the Bakken to the Beartooths" this controversial well generated enough interest to cause people to travel significant distances to twice appear before the Board (the first time turned away on a technicality), hire an expert, file affidavits and so forth. The ECA well is a matter of significant public interest. The affidavits filed with the District Court prove that. *See* App. 3, 4, 5, 6, 7, 8, 9.

Because the District Court found the challenge unripe, it did not address the merits of whether the 48-Hour Regulation violated statutory and constitutional

requirements for public participation. However Judge Knisely did recognize problems with the regulation: "This Court notes that 48 hours is a short notification period in this developing industry and recognizes that other states have expanded the time frame." App. 1, Order, at p. 11. The District Court was correct in that observation.

As discussed above, in addition to the plain language of the Constitution the Public Participation Act requires that public participation procedures **"must** ensure adequate notice and assist public participation... emphasis added). Mont. Code Ann. § 2-3-103. Those procedures must afford "reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public (emphasis added)." Mont. Code Ann. § 2-3-111. The 48-Hour Regulation does neither.

Nor can it pass constitutional muster. Because the Councils' members were denied meaningful participation, their fundamental right to it was implicated by the application of the rule. That rule is therefore subject to strict scrutiny review and the agency bears the burden of demonstrating the rule serves a compelling state interest and that the application of the rule is the least onerous means of achieving the agency's compelling interest. *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997). The Board has not demonstrated a compelling interest in such a short turn-around period for approving a Sundry Notice. The economic

interests of the oil and gas industry are not compelling enough to tread upon constitutional rights. Neither is the Board's interest in administrative efficiency. Nor is the regulation narrowly tailored; it would be easy to add provisions to allow the public meaningful opportunity to participate in situations like this where the public shows a strong interest in a particular well.

D. CONCLUSION

In conclusion the Councils request that the Court determine and declare that Mont. Admin. R. 36.22.608 is unconstitutional as applied in the case at bar.

DATED this 22 day of January, 2016.

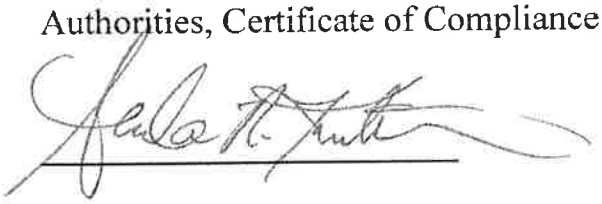
Jack R. Tuholske

Amanda R. Knuteson

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(d), I certify that the Opening Brief of Appellants Northern Plains Resource Council and Carbon County Resource Council is printed with proportionately-spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word 2010, is not more than 10,000 words, excluding Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.



Amanda Knuteson

CERTIFICATE OF SERVICE

The undersigned certifies that on January 22, 2016 a copy of Appellants' Opening Brief and accompanying Appendix were served via overnight Fed Ex on Assistant Attorneys General Rob Stutz and Rob Scheirer, Agency Legal Services, 1625 11th Avenue, P.O. Box 201601, Helena, MT 59620-1601.

Respectfully submitted this 22nd day of January, 2016.

Amanda R. Knuteson

DA 15-0472

IN THE SUPREME COURT OF THE STATE OF MONTANA

2016 MT 20

INTERSTATE EXPLORATIONS, LLC,

Plaintiff and Appellant,

v.

MORGEN FARM AND RANCH, INC.,

Defendant and Appellee.

APPEAL FROM: District Court of the Seventh Judicial District,
In and For the County of Wibaux, Cause No. DV-14-14
Honorable Richard A. Simonton, Presiding Judge

COUNSEL OF RECORD:

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Submitted on Briefs: December 9, 2015

Decided: January 26, 2016

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Interstate Explorations, LLC (Interstate), leases mineral rights beneath the surface estate of Morgen Farm and Ranch, Inc. (Morgen). Interstate filed this action against Morgen in the District Court of the Seventh Judicial District, Wibaux County, requesting a declaration that Morgen had wrongfully denied an easement necessary for installing a power line to operate the well drilled by Interstate on the property. Morgen answered and counterclaimed regarding alleged hydrocarbon spills on the property, requesting damages. Asserting that Morgen had failed to first exhaust administrative remedies before initiating legal action for damages, Interstate moved to dismiss Morgen's counterclaims for lack of subject matter jurisdiction, which the District Court denied. Interstate appeals. We affirm and state the issue as follows:

¶2 *Did the District Court err by denying Interstate's motion to dismiss Morgen's counterclaims for lack of subject matter jurisdiction because Morgen did not first exhaust statutory remedies?*

PROCEDURAL AND FACTUAL BACKGROUND

¶3 Morgen leased oil and gas rights on a portion of its property to Montana Oil Properties, Inc. Morgen owns the surface rights to the property. Montana Oil Properties later assigned its interest in the lease to Interstate, who drilled and completed a well on the Morgen property.

¶4 In July 2014, Interstate initiated this lawsuit, alleging that Morgen "has refused to execute the easement for [Montana-Dakota Utilities Co.] to enter the property to hook up the electrical line necessary to operate the well." Interstate requested a judgment

declaring Interstate's interests and rights in the property, and also requested damages for the "increase in expenses . . . incurred by having to use a generator" to maintain the well on the site.

¶5 Morgen answered by denying that an easement was necessary because Interstate had the right to run power to the well by virtue of the lease, but counterclaiming that Interstate had damaged the surface of the property by spilling hydrocarbons. Morgen alleged that the damage had not been remedied by compensation and that Interstate was wrongfully entering and remaining on the property until the damage was paid, stating claims for trespass, unjust enrichment, and wrongful occupation. Interstate moved to dismiss Morgen's counterclaims for lack of subject matter jurisdiction, which the District Court denied. Interstate again raises the issue of subject matter jurisdiction on appeal.

STANDARD OF REVIEW

¶6 "A district court's decision to grant or deny a motion to dismiss for lack of subject matter jurisdiction is a question of law that we review for correctness." *Pickett v. Cortese*, 2014 MT 166, ¶ 11, 375 Mont. 320, 328 P.3d 660 (citing *Ballas v. Missoula City Bd. of Adjustment*, 2007 MT 299, ¶ 9, 340 Mont. 56, 172 P.3d 1232). "[A] district court's conclusion as to its jurisdiction is always subject to *de novo* review, regardless of the context in which the conclusion is made." *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 53, n. 5, 345 Mont. 12, 192 P.3d 186 (citing *Stanley v. Lemire*, 2006 MT 304, 334 Mont. 489, 148 P.3d 643).

DISCUSSION

¶7 *Did the District Court err by denying Interstate's motion to dismiss Morgen's counterclaims for lack of subject matter jurisdiction because Morgen did not first exhaust statutory remedies?*

¶8 The District Court explained that, pursuant to the provisions governing Surface Owner Damage and Disruption Compensation, §§ 82-10-501, et seq., MCA (referred to herein as the "Surface Damage Act" or "Act"), oil and gas developers and operators are responsible for damages sustained by the surface owner caused by oil and gas operations. Sections 82-10-504, 505, MCA. However, citing §§ 82-10-508 and 82-11-142(2), MCA, the District Court reasoned that the Act was not the exclusive remedy for surface damage claims, and that surface owners were entitled to seek other remedies permitted by law. Therefore, the court concluded it had subject matter jurisdiction over Morgen's claims.

¶9 Interstate argues that the District Court erred by not holding that Morgen's failure to exhaust administrative remedies set forth in Title 82, chapter 10, MCA, addressing surface damage compensation, deprived the District Court of subject matter jurisdiction to entertain Morgen's counterclaims seeking damages. Noting that § 82-11-141(1), MCA, provides that "the Montana Administrative Procedure Act (MAPA) applies to this chapter," Interstate argues that § 2-4-702(1)(a), MCA, MAPA's administrative exhaustion provision, requires that Morgen's surface damage claims first be pursued before the Montana Board of Oil and Gas Conservation (Board).

¶10 "To determine whether or not [a party] must exhaust administrative remedies, we look first to the statutory language, and where that is unclear, to legislative intent." *Stanley v. Holms*, 267 Mont. 316, 320, 883 P.2d 837, 839 (1994) (citation omitted)

(considering whether administrative remedies within the Commissioner of Labor and Industry divested district courts of subject matter jurisdiction over statutory wage claims). This case is resolved by a careful review of the language and structure of the governing statutes.

¶11 The parties' arguments involve two chapters. Chapter 10 of Title 82 of the Montana Code Annotated governs oil and gas issues generally and includes the provisions of the Surface Damage Act in Part 5. Part 5 provides for notification to the surface owner of planned drilling operations, notification to the oil or gas operator of any surface damage, and a process of exchanging offers of settlement to resolve damages issues. Sections 82-10-501, et seq., MCA. Then, Chapter 11 of Title 82 governs oil and gas conservation and Part 1 thereof includes the extensive provisions entitled "Regulation by Board of Oil and Gas Conservation." Sections 82-11-101, et seq., MCA.

¶12 Notably, the Surface Damage Act, in Chapter 10, is not structured under the regulatory powers of the Board set forth in Chapter 11. Further, the Board is not expressly given any role within the damage resolution provisions of the Act, and, indeed, is not even referenced by the Act. While § 82-10-510, MCA, adopts the penalty provision of Chapter 11 for violation of "the notice requirements of § 82-10-503" by an oil and gas operator, *see Pinnacle Gas Res., Inc. v. Diamond Cross Properties, LLC*, 2009 MT 12, ¶ 28, 349 Mont. 17, 201 P.3d 160, the Act gives the Board no other duty in the damage resolution process. The Board's lack of involvement with the process under Chapter 10 was confirmed during the 2007 Legislative Session, when Senate Bill 19 was

passed to make a minor revision to the Act.[1] During a hearing before the Senate Natural Resources Committee, the following exchange occurred between Senator Greg Lind and Tom Richmond, administrator of the Board:

> Senator Lind: 'Under [] existing law, how often under § 82-10-505, liability and damages, can you give me an idea of the magnitude of the activity, does that come through your office? Are you aware of those actions and disputes?'
>
> Tom Richmond: 'Mr. Chairman, we typically are not. We don't have direct enforcement and rule-making authority under Chapter 10. Our enforcement is under Chapter 11, that's why you'll see the penalty section referring to the penalties in Section [sic] 11, because there are no penalties in Section [sic] 10. That was one of the rabbit holes we went down, trying to figure out what to do about penalties. We decided to best defer to existing law.'

Mont. S. Comm. on Natural Res., *Hearing on S. Bill 19*, 60th Legis., Reg. Sess. (Jan. 15, 2007).

¶13 Thus, consistent with the plain language of the Act, the Board assumes no direct enforcement or rule-making authority under Chapter 10 regarding the dispute resolution process. Rather, the Act is an attempt to facilitate communication between surface owners and oil and gas operators to help resolve damage disputes. As such, while a statutory process has been enacted, it is not an agency or administrative proceeding that must be exhausted before litigation may be commenced.

¶14 Even if the process created by the Act were considered to be an administrative process, the Act specifically provides that the process is not an exclusive one. Section

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[1] SB 19 added the following language to § 82-10-504(1)(a), MCA: "The surface owner and the oil and gas developer or operator shall attempt to negotiate an agreement on damages." Sec. 3, Ch. 57, L. 2007.

82-10-511, MCA, states that "[t]he remedies provided by this part do not preclude any person from seeking other remedies allowed by law." Thus, by statute, the process is not mandatory and need not be completed prior to initiation of litigation. While we need not cite legislative history in light of the statute's clear language, that history also demonstrates that the Legislature did not intend this process to be exclusive.[2]

¶15 Interstate's MAPA argument is likewise unavailing. Section 82-11-141(1), MCA, provides that MAPA is applicable "to this chapter"—meaning Chapter 11, the Board's enforcement powers, and not Chapter 10, which includes the Surface Damage Act.

¶16 The District Court correctly held that a surface owner is not required to exhaust an administrative remedy under the Surface Damage Act before litigating a damage claim in the courts, and correctly denied Interstate's motion to dismiss Morgen's counterclaims on this basis.

¶17 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ MICHAEL E WHEAT
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA

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[2] *See* Mont. S. Comm. on Natural Res., *Hearing on S. Bill 19*, 60th Legis., Reg. Sess. (Jan. 15, 2007).

PLUGGING PROJECTS & FIELD INSPECTOR SUMMARY

EXHIBIT 10

February 2016

Inspector Training:
Scheduled for this year will be the annual H2S re-certification course, a defensive driving class room course, and a cement additive tutorial presented by Sanjel. This training will be held March 16th and 17th here in Billings.

Kopp #1 Well:
12/21/15
Job summary for contract OG-LG-155.
Work to install wellhead equipment was not successful because of unforeseen circumstances. The following summary details the circumstances that were encountered.

The cap plate that was welded inside of the 9 5/8" casing was bulged out indicating excessive pressure pushing up against it. The evidence of pressure required a change of plans.

The decision was made to weld a slip-on casing collar onto the casing, install a 9 5/8" X 2" swedge w/ 2"valve and pressure gauge to acquire a pressure reading. The casing collar was being tack welded and leveled, after the third tack weld was applied the oil leak from the well began to worsen to the point that it was catching fire. The fire was extinguished and the vacuum truck was used to clean the cap so it could be inspected. The cap plate developed a crack towards the center of the plate. The crack was about 1 1/4"in length. It was determined that the tack welding of the casing collar to position it, put stresses on the casing causing the plate to crack. Any further welding to the casing could cause a complete loss of what control we have at present. A new plan utilizing specialized wellhead equipment will need to be devised to gain control of this well before work to re-plug it can commence.

2/9/2016
Contract OG-LG-156
A new slip-on wellhead was designed and will be installed this week. This new wellhead will require no welding. After installation is complete a pressure reading will obtained. This information will be useful to contractors when entering bids to re-enter and re-plug the Kopp #1 well.