GAS FLARING

April 6, 2016

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	3	0	3	0	1
EOG Resources	2	0	2	1	0
Oasis	1	0	1	0	0
Petro-Hunt	3	3	0	3	0
Whiting	4	1	3	6	0
XTO	1	0	1	0	0
Totals	14	4	10	10	1

Flaring Requests

Summary

There are 14 wells flaring over 100 MCFG per day based on current production numbers.

10 of the 14 wells have approved exceptions due to distance, pipeline capacity issues, or time to connection.

There are 10 exceptions requested at this time.

EOG Resources

Highline 2-0904H – API #25-085-21866, 29N-59E-9

1. Flaring 110 MCF/D. Fifth exception request.
2. Completed: 1/2013.
3. Estimated gas reserves: 450 MMCF.
4. Proximity to market: 2640 ft to pipeline.
5. Estimated gas price at nearest market: $1.51/MCF
6. Estimated cost of marketing the gas: $0.41/MCF.
7. Flaring alternatives: None.
8. Amount of gas used in lease operations: 5 MCF/D.
9. Justification to flare: Oneok has been unable to obtain ROW.

Petro-Hunt

Borntrager 2C-2-1 – API #25-021-21193, 19N-54E-2

1. Flaring 185 MCF/D. Third exception request.
2. Completed: 9/2012.
3. Proximity to market: >25 miles pipeline.
4. Estimated gas price at market: ~$2/MCF.
5. Estimated cost of marketing the gas: ~$3.2 million.
6. Flaring alternatives: None.
7. Amount of gas used in lease operations: 25-30 MCF/D.
8. Justification to flare: Uneconomic to connect due to lack of infrastructure in the area.

Boje Farms 19-54 – API #25-021-21193, 19N-54E-17

1. Flaring 150 MCF/D. Third exception request.
2. Completed: 2/2011.
3. Proximity to market: >25 miles pipeline.
4. Estimated gas price at market: ~$2/MCF.
5. Estimated cost of marketing the gas: ~$3.2 million.
6. Flaring alternatives: None.
7. Amount of gas used in lease operations: 25-30 MCF/D.
8. Justification to flare: Uneconomic to connect due to lack of infrastructure in the area.

Walter Senner 19-54 – API #25-021-21192, 19N-54E-18

1. Flaring 120 MCF/D. Third exception request.
2. Completed: 8/2012.
3. Proximity to market: >25 miles pipeline.
4. Estimated gas price at market: ~$2/MCF.
5. Estimated cost of marketing the gas: ~$3.2 million.
6. Flaring alternatives: None.
7. Amount of gas used in lease operations: 25-30 MCF/D.
8. Justification to flare: Uneconomic to connect due to lack of infrastructure in the area.

Whiting Oil & Gas

Christiansen 34-12-2H – API #25-083-23223, 25N-58E-12

1. Flaring 103 MCF/D. First exception request expired 6/3/15.
2. Completed: 8/2014.
3. Estimated gas reserves: 309 MMCF.
4. Proximity to market: 5280 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Flaring alternatives: None.
7. Amount of gas used in lease operations: 2 MCF/D.
8. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Hunter 21-26-1H – API #25-083-23258, 25N-58E-26

1. Flaring 72 MCF/D. First exception request expired 8/25/15.
2. Completed: 11/2014.
3. Estimated gas reserves: 379 MMCF.
4. Proximity to market: 500 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Flaring alternatives: None.
7. Amount of gas used in lease operations: 2 MCF/D.
8. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Hunter 21-26-2H – API #25-083-23274, 25N-58E-26

1. Flaring 103 MCF/D. First exception request expired 8/25/15.
2. Completed: 11/2014.
3. Estimated gas reserves: 404 MMCF.
4. Proximity to market: 500 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Flaring alternatives: None.
7. Amount of gas used in lease operations: 2 MCF/D.
8. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Hunter 21-26-3H – API #25-083-23275, 25N-58E-26

1. Flaring 92 MCF/D. First exception request expired 8/25/15.
2. Completed: 12/2014.
3. Estimated gas reserves: 455 MMCF.
4. Proximity to market: 500 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Flaring alternatives: None.
7. Amount of gas used in lease operations: 2 MCF/D.
8. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Hunter 21-26-4H – API #25-083-23276, 25N-58E-26

1. Flaring 84 MCF/D. First exception request expired 8/25/15.
2. Completed: 12/2014.
3. Estimated gas reserves: 368 MMCF.
4. Proximity to market: 500 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Flaring alternatives: None.
7. Amount of gas used in lease operations: 2 MCF/D.
8. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

Iversen 34-32-4H – API #25-083-23238, 26N-58E-32

1. Flaring 102 MCF/D. Third exception request expired 6/3/15.
2. Completed: 7/2014.
3. Estimated gas reserves: 315 MMCF.
4. Proximity to market: 5280 ft to pipeline.
5. Estimated gas price at market: ~$2.41/MCF.
6. Flaring alternatives: None.
7. Amount of gas used in lease operations: 2 MCF/D.
8. Justification to flare: Insufficient compression capacity on Oneok's system in this area.

RESOLUTION 15-2
Clarification and coordination of outreach regarding Board of Oil and Gas Form 22

WHEREAS, the Montana Streambed and Land Preservation Act (also commonly called the 310 permit) applies to projects that result in a change in the state of a natural, perennial-flowing stream, river, its bed or its immediate banks; and

WHEREAS, oil and gas development well pads, when located in natural drainages may as a result of runoff cause a physical alteration or modification in the state of a natural, perennial-flowing stream or river, its bed, or its immediate banks;, and

WHEREAS, oil & gas companies have expressed an interest in working with conservation districts in planning the site location of future well pads as to reduce the potential for the physical alteration or modification in the state of a natural, perennial-flowing stream or river, its bed, or its immediate banks; and

NOW, THEREFORE, BE IT RESOLVED, that the Montana Association of Conservation Districts work with the Montana Board of Oil & Gas Conservation to amend the wording on the Board of Oil & Gas Conservation Form 22, Supplemental Information # 6, to strike the phrase "stream crossing permit" and insert the phrase "310 Permit" to better inform an operator that a 310 permit covers projects in addition to stream crossings; and should contact the local conservation district in order for the district to determine if a 310 permit is required.

BE IT FURTHER RESOLVED, that the Montana Association of Conservation Districts request the Montana Board of Oil & Gas Conservation to encourage operators prior to filling out the Board of Oil & Gas Conservation Form 22, to meet with the local conservation districts to determine the extent of the local conservation district's jurisdiction over well pads under the 310 Law.

Submitted by: Roosevelt Conservation District
Area Meeting Action: Passed by Area 1
MACD Committee Assignment: Soil and Land Use Committee
General Session Action: Passed

OLD

SUPPLEMENTAL INFORMATION

Note: Additional information or attachments may be required by Rule or by special request.

1. Attach a survey plat certified by a registered surveyor. The survey plat must show the location of the well with reference to the nearest lines of an established public survey.

2. Attach an 8 1/2 x 11" photocopy of that portion of a topographic map showing the well location, the access route from county or other established roads, residences, and water wells within a 1/2 mile radius of the well.

3. Attach a sketch of the well site showing the dimensions and orientation of the site, the size and location of pits, topsoil stockpile, and the estimated cut/fill at the corners and centerstake. (Note: the diagram need not be done by an engineer or surveyor). Attach a sketch of a top view and two side views of the reserve pit(s), if utilized. The reserve pit sketch must show the length, width, depth, cut and fill, amount of freeboard, area of topsoil stockpile, and the height and width of berms.

4. Describe the type and amount of material or liner, if any, to be used to seal the reserve pit. If a synthetic liner is used, indicate the liner thickness (mils), bursting strength, tensile strength, tear strength, puncture resistance, hydrostatic resistance, or attach the manufacturer's specifications.

5. Describe the proposed plan for the treatment and/or the disposal of reserve pit fluids and solids after the well is drilled. If the operator intends to dispose of or treat the reserve pit contents off-site, specify the location and the method of waste treatment and disposal. (Note: The operator must comply with all applicable federal, state, county, and local laws and regulations with regard to the handling, transportation, treatment, and disposal of solid wastes.)

6. Does construction of the access road or location, or some other aspect of the drilling operation require additional federal, state, or local permits or authorizations? If yes, indicate the type of permit or authorization required:

- [ ] No additional permits needed
- [ ] Stream crossing permit (apply through county conservation district)
- [ ] Air quality permit (apply through Montana Department of Environmental Quality)
- [ ] Water discharge permit (apply through Montana Department of Environmental Quality)
- [ ] Water use permit (apply through Montana Department of Natural Resources and Conservation)
- [ ] Solid waste disposal permit (apply through Montana Department of Environmental Quality)
- [ ] State lands drilling authorization (apply through Montana Department of Natural Resources and Conservation)
- [ ] Federal drilling permit (specify agency)
- [ ] Other federal, state, county, or local permit or authorization: (specify type) _____

NOTICES:

1. Date and time of spudding must be reported to the Board verbally or in writing within 72 hours after the commencement of drilling operations.

2. The operator must give notice of drilling operations to the surface owner as required by Section 82-10-503, MCA, before the commencement of any surface activity.

BOARD USE ONLY | CONDITIONS OF APPROVAL

The operator must comply with the following condition(s) of approval:

WARNING: Failure to comply with conditions of approval may void this permit.

NEW

SUPPLEMENTAL INFORMATION

Note: Additional information or attachments may be required by Rule or by special request.

1. Attach a survey plat certified by a registered surveyor. The survey plat must show the location of the well with reference to the nearest lines of an established public survey.

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6. Does construction of the access road or location, or some other aspect of the drilling operation require additional federal, state, or local permits or authorizations? If yes, indicate the type of permit or authorization required:

- ☐ No additional permits needed
- ☐ **310 Permit (apply through county conservation district)**
- ☐ Air quality permit (apply through Montana Department of Environmental Quality)
- ☐ Water discharge permit (apply through Montana Department of Environmental Quality)
- ☐ Water use permit (apply through Montana Department of Natural Resources and Conservation)
- ☐ Solid waste disposal permit (apply through Montana Department of Environmental Quality)
- ☐ State lands drilling authorization (apply through Montana Department of Natural Resources and Conservation)
- ☐ Federal drilling permit (specify agency)
- ☐ Other federal, state, county, or local permit or authorization: (specify type) _____

NOTICES:

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EXHIBIT 10

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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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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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.

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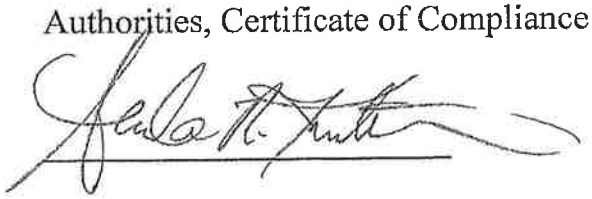
CERTIFICATE OF COMPLIANCE

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.



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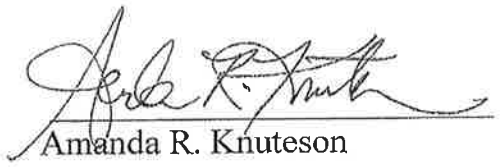
CERTIFICATE OF SERVICE

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

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, a Montana Non-profit public benefit corporation,

Appellants/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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STATEMENT OF THE ISSUES

1) Did the district court correctly conclude that the Appellants' challenge to Admin. R. Mont. 36.22.608 was not ripe?

STATEMENT OF THE CASE

Appellants Carbon County Resource Council and Northern Plains Resource Council (CCRC) had the opportunity to participate, were assisted in participation, and did, in fact, actively participate prior to the final action of Appellee Board of Oil and Gas Conservation (BOGC or Board) challenged in this lawsuit, the permitting of an oil well.

This case is about whether the district court correctly granted summary judgment on ripeness grounds in favor of BOGC on the Seventh Claim of CCRC's *Amended Complaint.* The claims in the *Amended Complaint* arose from the Board's decision in February 2014 to approve an application for a permit to drill (APD) filed by Energy Corporation of America (ECA). The permit allowed drilling of an exploratory, wildcat oil well – the Hunt Creek 1-H well – northeast of Belfry in Carbon County. The district court granted summary judgment to BOGC on the Sixth and Seventh Claims in the *Amended Complaint.*

CCRC did not appeal the grant of summary on the Sixth Claim. By way of context, though, the Sixth Claim sought an order "holding the Board's decision to approve the ECA well on February 27, 2014 [was] arbitrary, capricious, an abuse

of discretion and otherwise unlawful pursuant to Mont. Code Ann. § 82-11-144 and setting aside the decision made to approve the well." The Board's decision was made after the Board held a hearing lasting approximately 1.5 hours with testimony from CCRC members, with CCRC's representation by counsel, with CCRC's presentation of expert testimony and exhibits, with the Board's consideration of the APD materials, and with the Board's consideration of input from the professionals on its staff. The Board's approval included requiring the water management standard requested by CCRC's expert and supported by BOGC's staff. The Board's approval was on a five to one vote after consideration of the materials, testimony, evidence, and recommendations presented. The district court correctly granted summary judgment.

The Seventh Claim, which CCRC does appeal, sought an order "declaring that Admin. R. Mont. 36.22.608(2) is unconstitutional as alleged in Count Six as applied here." *Amended Complaint*, p. 17, ¶ 6. CCRC alleged speculative harm from potential hydraulic fracturing of the well, an allowed well stimulation activity under a drilling permit. The well was never hydraulically fractured or otherwise stimulated pursuant to Admin. R. Mont. 36.22.608(2). Thus, the application of that rule, as challenged in the Seventh Claim, never became ripe. The district court correctly granted summary judgment for BOGC.

Numerous arguments made by CCRC in its opening brief are not at issue in this appeal and are not appropriate for consideration by this Court. CCRC dismissed claims 1-5 in its *Complaint* and *Amended Complaint* regarding the December 2013 business meeting and public hearings. CCRC did not appeal the district court's decision on the Sixth Claim, as stated in *Appellants'/Plaintiffs' Opening Brief* (*Opening Brief*), regarding the merits of the Board's approval of the APD at the February 2014 hearing. Those claims are resolved and are not part of this appeal.

This Court should affirm the district court's grant of summary judgment in favor of BOGC on the Seventh Claim in the *Amended Complaint*.

STATEMENT OF THE FACTS

BOGC is a quasi-judicial Montana state agency administratively attached to the Department of Natural Resources and Conservation. Mont. Code Ann. § 2-15-3303. Located primarily in Billings, BOGC has an administrative office in Helena, a field office in Shelby, and field inspectors around the state. Among other responsibilities, BOGC reviews, considers, and may approve oil and gas drilling permits. Mont. Code Ann. §§ 82-11-122 and -134. BOGC has adopted rules for the process of applying for oil and gas drilling permits. See Admin. R. Mont. 36.22.601 *et seq*. BOGC's rules include a protest process for interested persons to seek a hearing on an APD. Admin. R. Mont. 36.22.601(4)-(6).

BOGC is governed by board members who receive public comment, oversee agency management activities, engage in rulemaking, and hold hearings. Mont. Code Ann. § 2-15-3303(2). The Board has authority to hire four professional, exempt staff positions. Mont. Code Ann. §§ 2-15-3303(3) and 2-18-103. One of the professional staff is designated by the Board to be the agency administrator. Tom Richmond, the petroleum engineer, served as the administrator until his retirement at the end of February 2014. Jim Halvorson, the petroleum geologist, has served as the administrator subsequent to Tom's retirement. Benjamin Jones was hired as the petroleum engineer in April 2014.

The Board meets every other month in BOGC's conference room in Billings on a Wednesday and Thursday. At the Wednesday "business meetings" the Board receives public comment, oversees management activities, engages in rulemaking, and otherwise performs the administrative tasks necessary to govern the agency. At the Thursday "public hearings" the Board exercises its quasi-judicial functions and holds hearings, including hearings on protests of APDs. The Legislature adopted a statutory administrative procedure for the public hearings. Mont. Code Ann. § 82-11-141. The Board adopted rules for demanding a hearing on an APD, including for interested persons to protest an APD. Admin. R. Mont. 36.22.601 (4)-(6).

ECA filed an APD for an exploratory, wildcat oil well with a proposed horizontal component that it sought to drill in Carbon County. Appx. 1, APD, p. 1 ("See Exhibit C for Well Plat showing proposed horizontal"). CCRC members sought to protest the well at the public hearing on December 12, 2013. However, the demand they filed did not comply with the rules for filing a protest because it lacked a certificate of service indicating that CCRC had served ECA. *Opening Brief*, p. 7 ("the document did not include a certificate of service"); see, also, Admin. R. Mont. 36.22.601 (6)(e) ("A certificate of such service must accompany the demand as filed with the board."). The rule violation was not discovered until December 9, 2013. CCRC was notified immediately of the rule violation and the cancellation of the BOGC hearing on December 12 because of the violation. At that time, BOGC invited CCRC and its members to attend the business meeting on December 11 to present public comment, even though the hearing was cancelled. Nineteen people, including CCRC members, provided public comment about prospective oil and gas exploration and development in Carbon County. This meeting, including the public comment, was widely reported in the media.

The APD was administratively approved December 16, as required by Admin. R. Mont. 36.22.604(1), because it complied in all respects with the Board's rules, the written protest demand had not complied with the Board's rules, and the planned drilling operations did not require further environmental review. Public

interest in the matter continued following the December 11 meeting, including in the press, in letters to the editor, and in contacts with BOGC and other public officials. CCRC filed the *Complaint* initiating this litigation on January 7, 2014, containing five claims arising from the December 2013 Board actions.

In consideration of the significant public interest that became apparent at and after the December 11 meeting, the Board's administrator exercised his authority under Admin. R. Mont. 36.22.602(2), conditioned the validity of the permit, and petitioned the Board under Admin. R. Mont. 36.22.309 for:

> an order denying or granting the permit under such conditions as the Board shall find appropriate, including consideration of any changes or permit modifications identified by public comment, should the factual situation warrant such modifications or conditions.

Administrator's Petition, Appx. 3, p. 1. The administrator's January 22 petition ensured CCRC would have the opportunity for the protest to be heard at a February 27 hearing, even though it's earlier protest was invalid and even though CCRC was invited to and did participate in public comment during the December 11 business meeting. In response, CCRC and BOGC stipulated to the withdrawal of Claim 5 seeking a writ of mandate. Appx. 4, *Stipulation to Dismiss*.

The Board provided notice of the February 27 hearing to CCRC and the public and held the hearing over the objections of ECA's attorney. Appx. 5, Hearing Agenda, p. 6; Appx. 6, *BOGC Order 22-2014*, p. 2. At the hearing,

CCRC was represented by its attorney, who requested that the permit be denied. Appx. 6, *BOGC Order 22-2014*, p. 2. Nine interested persons and one expert on behalf of CCRC were heard by the Board: 1) Deb Muth, the Chairwoman of CCRC; 2) Mark Quarles, an environmental geologist hired by CRCC to review the Board's environmental assessment; 3) Bonnie Martinell, owner of an organic farm close to the proposed well site; 4) Gordon Aisenbrey, a land owner close to the proposed well site; 5) Kurt Samuelson, who lives 1.5 miles from the proposed well site; 6) Debra Thomas, an employee of the Powder River Basin Resource Council 7) Kathryn Myers, who raises goats two miles away from the proposed well site; 8) Michelle Harper, a registered nurse who also lives two miles from the proposed well site; 9) Larry Smith, who farms two miles from the proposed drilling site; and 10) Bill Hand from Nye, who spoke about ECA's violations in Pennsylvania and West Virginia. *Id.* Their comments regarded the adequacy of the environmental assessment prepared by the Board for the APD, concerns about water quality and quantity, standards for hydraulic fracturing, potential environmental damage, potential loss of recreational opportunities, and the potential impact on property values. *Id.* CCRC's presentation lasted approximately 1.5 hours and included submission of a report prepared by their expert, Mr. Quarles. *Opening Brief*, p. 12.

Mr. Richmond took CCRC's testimony into consideration, reviewed the environmental assessment for the well, and made a recommendation to the Board.

Deposition of Thomas P. Richmond, p. 62, lns. 16-25 (attached to *Opening Brief*, Appx. 11). Based on his experience, Mr. Richmond understood that a vertical well would be drilled and evaluated by ECA prior to it deciding whether to drill horizontally or to stimulate the well with hydraulic fracturing. *Id.*, pp. 58-59, lns. 20-18. As he explained to the Board, CCRC, and the public at the hearing:

> So the process is to drill the vertical well, take samples, cut cores, run logs, and evaluate what your potential might be for drilling a horizontal lateral. If it doesn't appear that there is potential, it's likely the lateral won't be drilled. ... What's proposed is the drilling of a vertical well and the potential horizontal lateral with a fresh water base drilling fluid. ... I see no reason to reject the permit that I approved because it, because it proposes a vertical well that is a wildcat well with a potential horizontal lateral.

Audio Minutes of the Board of Oil and Gas Conservation Public Hearing, February 27, 2014, 11:15-25 (CD Exhibit filed by CCRC with the District Court). He also explained that wastewater and hydraulic fracturing issues are addressed by Board rules.

> Wastewater and hydraulic fracturing are regulated under the rules we adopted a couple of years ago. If hydraulic fracturing isn't approved with the drilling permit, then there's another process that has to be followed to approve it. Wastewater is managed under our administrative rules. That, that's why the permit doesn't address, nor the environmental assessment address in particular, waste management, because we have rules that regulate waste management, and there's no requirement that we duplicate the rules in each permit. The permit says they have to follow the rules. ... If the Board wants to approve or require that the hydraulic fracturing process include compliance with the API standards for water management, then I would certainly support that.

Id. Mr. Richmond stated that he saw no reason to reject the permit and that he supported compliance with the API HF2 standards for water management, as suggested by Mr. Quarles, if hydraulic fracturing was used to stimulate the well. *Id.*; Appx. 6, *BOGC Order 22-2014*, p. 2; Appx. 7, API HF2. When considering its motion, the Board understood it had the full authority to grant, deny, or grant with conditions the APD, as requested in Mr. Richmond's petition.

> Tom's petition gives the Board the full authority to grant, deny, or grant the, conditionally, the application for a drilling permit. So, the Board has the full authority. The motion wouldn't be to revoke the permit. The motion would be either to grant, or to deny, or to condition approval of the permit. And, that's based on, that's based on Tom's petition to the Board and his authority as the administrator to condition a permit or to refer a matter to the Board for a decision.

Audio Minutes of the Board of Oil and Gas Conservation Public Hearing, February 27, 2014, 11:25. By a vote of five in favor and one opposed, the Board approved the permit, with a condition that ECA comply with the API HF2 standard for water management, should hydraulic fracturing be used to stimulate the well. Appx. 6, *BOGC Order 22-2014*, p. 2.

CCRC filed the *Amended Complaint* on April 2, 2014, adding the Sixth and Seventh Claims arising from the February 27 public hearing. On November 21, 2014, CCRC filed an unopposed motion to dismiss Claims 1-4 of the *Amended Complaint*, stating:

> The parties have agreed that it would be inefficient to continue to adjudicate the first four claims for relief, which focus on the summary dismissal of Plaintiffs' Protest prior to the Board's December, 2013 hearing. Plaintiffs were given the opportunity to air their concerns about the well at the Board's February 2014 hearing. In addition, the Administrator has issued an e-mail directive to his staff designed to remedy the concerns that led to the summary dismissal of the original protest for lack of a certificate of service.

Appx. 8, *Motion to Dismiss*, p. 2. The parties briefed cross-motions for summary judgment on the Sixth and Seventh Claims, and the district court heard oral argument on those motions on April 13, 2015. The district court issued its order denying CCRC's motion and granting summary judgement for BOGC (*Summary Judgment Order*) on September 3, 2015.

CCRC did not appeal the district court's determination of the Sixth Claim. *Opening Brief*, p. 4. CCRC only appealed the district court's ripeness determination for the Seventh Claim.

The Hunt Creek 1-H well has not been drilled horizontally or hydraulically fractured, CCRC's assertions notwithstanding. *Opening Brief*, p. 2 (the well "subsequently was augmented with 'horizontal' drilling") and pp. 31-32 ("The Councils discovered the fracking after it had begun.").

STANDARD OF REVIEW

"This Court reviews a district court's decision on a motion for summary judgment using the same criteria as the district court under Rule 56, M. R. Civ. P.

We review the district court's conclusions of law to determine whether they are correct and the findings of fact to determine whether they are clearly erroneous." *Stokes v. Duncan*, 2015 MT 92, ¶ 9, 378 Mont. 433, 346 P.3d 353 (citation omitted). "[I]ssues of justiciability—such as standing, mootness, ripeness, and political question—are also questions of law, for which our review is de novo." *Reichert v. State*, 2012 MT 111, ¶ 20, 365 Mont. 92, 278 P.3d 455 (citation omitted). The exercise of police power through the adoption of regulations is "presumed valid and the burden of proving their invalidity is on the plaintiff." *McElwain v. County of Flathead*, 248 Mont. 231, 236-237, 811 P.2d 1267, 1271 (1991). "[A]s a matter of longstanding principle, courts avoid constitutional issues whenever possible." *Davis v. Davis*, 2016 MT 52, ¶ 10, ___ Mont. ___, ___ P.3d ___.

SUMMARY OF THE ARGUMENT

The well was never hydraulically fractured and, thus, Admin. R. Mont. 36.22.608, never applied to the well. CCRC has not demonstrated, and cannot demonstrate, that its "as applied" challenge to the rule was ripe because the rule applied only if hydraulic fracturing of a well were pursued. The district court correctly determined that CCRC's challenge to the application of this rule was not ripe. This Court should affirm the district court.

Even if CCRC's challenge were ripe, the Board assisted CCRC in its participation, and CCRC did meaningfully participate, in the Board's final decision about whether to issue a drilling permit. Well stimulation, including hydraulic fracturing, would be an allowable activity under a drilling permit. The appropriate time to protest the drilling permit, including protesting the activities allowed under the drilling permit, was when the APD was filed. The Board fulfilled the requirements for public participation prior to its final action on the drilling permit, and there were no statutory or constitutional requirements for additional public participation in activities allowable under that drilling permit. No constitutional issue need be addressed by this Court where the statutory requirements were met and the constitutionality of the statute was not challenged. This Court should affirm the district court.

If this Court reverses, it should remand the initial determination of the merits of CCRC's constitutional challenge to the district court.

ARGUMENT

I. The district court correctly concluded that the Appellants' challenge to Admin. R. Mont. 36.22.608 was not ripe.

"[T]he judicial power of Montana's courts is limited to "justiciable controversies.'" *Reichert*,at ¶ 53 (citation omitted). Cases regarding hypothetical, speculative, or illusory disputes are not ripe and "courts should not render

decisions absent a genuine need to resolve a real dispute." *Id.*, ¶ 54 (citations omitted). (citations omitted). Because a ripe controversy is absent in this litigation, this Court should affirm the district court.

A. The Hunt Creek 1-H well was never hydraulically fractured and the application of Admin. R. Mont. 36.22.608 never became ripe.

CCRC challenged Admin. R. Mont. 36.22.608, asserting "the *potential* adverse impacts from hydro-fracking [the] well ... will not be analyzed, deliberated, [or] discussed by the Board of [sic] its staff." *Amended Complaint*, ¶ 75 (emphasis added). Hydraulic fracturing was discussed and addressed by the Board, its staff, and CCRC at the February 27, 2014, hearing. Moreover, the well has not been hydraulically fractured. The district court correctly recognized that the hypothetical harm CCRC asserted in its *Amended Complaint* was speculative and too remote to establish an actual, justiciable dispute about BOGC's application of Admin. R. Mont. 36.22.608.

CCRC's "as applied" challenge to the Board's well stimulation rule is not ripe because that rule only applies if hydraulic fracturing is sought under the exploratory well's drilling permit. See Admin. R. Mont. 36.22.608(2) ("Well Stimulation Activities Covered by Drilling Permit"). To avoid a ripeness challenge to its claim, a central premise of CCRC's argument to the district court was that the well was hydraulically fractured in July 2014. See, e.g., *Plaintiffs'*

Response Brief in Support of Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment, p. 1 ("The regulation permitted the Board to 'rubber stamp' ECA's July 2014 request to hydrofrack"), p. 2 ("the Board's decision to approve a hydrofracking well"), p. 3 ("the Board's decision to approve ECA's hydrofracking request"), p. 4 ("the EA's total failure to mention hydrofacking on a well that was clearly destined to be hydrofracked"), p. 5 ("The decision to approve fracking for the ECA Hunt Creek well"), p. 6 ("the Board approving ECA's request to hydrofrack in July 2014"), p. 8 ("the Board approved ECA's request to hydrofrack"), p. 9 ("the Board offered no avenue for, public participation in the actual decision to frack that occurred in July 2014"), p. 10 ("the Councils knew that ECA would eventually file the 48-hour notice and frack the ECA well"), p. 13 ("the Board's decision to frack"), p. 14 ("permitted the Board to approve a highly controversial fracking well"). However, the district court found "that CCRC's assertion that [hydraulic fracturing] has occurred is speculation unsupported by any specific facts." *Summary Judgment Order*, p. 10. CCRC did not appeal the district court's determination or argue on appeal that the finding was clearly erroneous.

A well either has been or has not been hydraulically fractured. There was no evidence that the Hunt Creek 1-H well was hydraulically fractured, although there was evidence in an affidavit filed by BOGC's petroleum engineer, Benjamin Jones,

that it was not. Mr. Jones stated that, "The Hunt Creek 1-H well has not been hydraulically fractured to the knowledge of the BOGC," and, "BOGC has not approved the hydraulic fracturing of the Hunt Creek 1-H well." Appx. 9, *Affidavit of Benjamin Jones*, ¶ 7. There were no facts supporting the central premise underlying CCRC's summary judgment argument. That the well was not hydraulically fractured is a material fact not genuinely in dispute. Mont. R. Civ. P. 56(c)(3).

CCRC's contrary allegations misapply the legal definition of "fracturing," which is:

> the 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.*

Admin. R. Mont. 36.22.302(28) (emphasis added). In support of CCRC's motion for summary judgment it attached an exhibit, a BOGC "Form No. 2" submitted by ECA, indicating an intent to perform a diagnostic fracture injection test (DFIT) on the well. See *Opening Brief*, Appx. 17. That form does not demonstrate that the well at issue was hydraulically fractured. The form does demonstrate that 25-30 barrels of water will be "pumped into the formation" and the operator "will then shut down, shut in the well, and begin to monitor the pressure gauges." *Id.*

There are significant differences between a DFIT, which can be used for testing purposes, and hydraulic fracturing, which can be used for production purposes. Appx. 9, *Affidavit of Benjamin Jones*, ¶¶ 3-6. Importantly, "A DFIT is not intended as a method of well stimulation or to increase the production of oil and gas...." *Id.*, ¶ 3. Because a DFIT does not create "channels for fluids to move to or from the well bore," it is not hydraulic fracturing under Admin. R. Mont. 36.22.302(28).

No genuine issue of material fact under Mont. R. Civ. P. 56(c)(3) existed regarding whether the DFIT used on the Hunt Creek 1-H well constituted hydraulic fracturing. It did not. *Id.*, ¶ 7. Because the well was not hydraulically fractured, the premise of CCRC's Seventh Claim regarding application of Admin. R. Mont. 36.22.608 was unsupported by the facts of record.

Even so, on appeal CCRC continues to assert that the well has been hydraulically fractured. *Opening Brief*, pp. 31-32 ("The Councils discovered the fracking after it had begun."). CCRC incorporates a wide variety of activities under its moniker of "fracking." See, e.g., *Opening Brief*, p. 2 ("chemical injection or stimulation (which Appellants refer to as 'fracking')"). Lost in its assertions, though, is the simple fact that the well was never hydraulically fractured, as the district court found. CCRC claims there is "a distinction without a difference" between a DFIT and hydraulic fracturing and asserts that, "Both processes inject a

chemical solution under pressure into a horizontal well hole and store the waste material on site." *Opening Brief*, p. 16. The process suggested by CCRC's description does not reflect what occurred with the DFIT at the Hunt Creek 1-H well, which pumped 25-30 barrels of fresh water into a geologic formation "approximately 6,127'-6,137'" underground through a vertical well. See *Opening Brief*, Appx. 17. CCRC concedes that its "use of the terminology may have been imprecise, but their concerns were clearly articulated." *Opening Brief*, p. 16. The Board agrees. CCRC's concerns at the public hearing and during summary judgment focused on hydraulic fracturing, which has not occurred at or been proposed for the well.

Legislative rules have the force of law, as do definitions adopted in those rules. Mont. Code Ann. § 2-4-102(14)(a). CCRC should understand that hydraulic fracturing, as defined by the Board's rule, has not occurred on the Hunt Creek 1-H well. *Opening Brief*, p. 1 ("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.'" (Quoting *Summary Judgment Order*, p. 10.)). Nonetheless, CCRC continues to suggest that its moniker "fracking" is consistent with the Board's definition of "fracturing." See *Opening Brief*, p. 16 ("Further, the Councils' use of the term fracking is consistent with the Board's own definition of

the term....") and p. 26, n. 2 ("chemical stimulation ... falls squarely within the Board's own definition of 'fracking.'"). This is not the case based on the plain language of the definition of "fracturing" in Admin. R. Mont. 36.22.302(28), which creates "channels for fluids to move to or from the well bore" for production purposes. With the DFIT that did occur, the shut-in wellhead had no flow of fluids, the pressure was allowed to fall off naturally, and there was a natural closure of the temporary channels that were created in the rock. Appx. 9, *Affidavit of Benjamin Jones*, ¶¶ 1-2.

Although it was central to CCRC's presentation to the Board and its summary judgment argument, CCRC now asserts that whether or not hydraulic fracturing or a DFIT has occurred is irrelevant in this appeal. *Opening Brief*, p. 16 p. 27 ("Whether the board approved fracking, hydraulic fracturing, or a DFIT test has nothing to do with whether the challenge is ripe."). Previously the issue of hydraulic fracturing was the primary basis for CCRC's concerns in its Seventh Claim and as expressed by its members. *Amended Complaint*, ¶¶ 71-75, 77-78; *Opening Brief*, Appx. 4, *Muth Affidavit*, p. 2 ("CCRC is particularly concerned about hydro-fracking because of the sudden recent attention being focused on hydro-fracking in Carbon County and surrounding areas."); *Opening Brief*, Appx. 5, *Second Muth Affidavit*, ¶ 7 ("Thus, at no time, either during the initial permitting process or at any time before hydro-fracking of a well would the public be allowed

the opportunity to comment, testify, or present any evidence in opposition to the hydro-fracking of the well."); and *Opening Brief*, Appx. 6, *Zaback Affidavit*, ¶ 4 ("Northern Plains and CCRC are actively involved in learning about, and participating in, issues pertaining to hydro-fracking in Montana."). Without hydraulic fracturing, Admin. R. Mont. 36.22.608 never applied to the Hunt Creek 1-H well. Thus, CCRC's challenge to the application of that rule never became ripe because it was not "being brought at the proper time." *Reichert* at ¶ 55 (citation omitted).

CCRC cannot demonstrate an adverse impact from the application of Admin. R. Mont. 36.22.608 because that rule never applied to the Hunt Creek 1-H well. CCRC's allegations remain speculative and, thus, the issue is neither ripe nor justiciable. As a matter of law, the district court correctly granted summary judgment to BOGC on the Seventh Claim. This Court should affirm.

B. CCRC had the opportunity to participate, and did participate in, the Board's decision to approve the drilling permit, including consideration of the potential for hydraulic fracturing of the well.

The Montana Constitution requires public agencies to allow a reasonable opportunity for citizen participation in agency decisions as provided by law.

> 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.

Mont. Const. Art. II, sec. 8.[1] BOGC has adopted rules allowing an interested person to protest an APD, including protesting the well stimulation allowed under a drilling permit. Admin. R. Mont. 36.22.601(4)-(6) and 36.22.608. CCRC knew about this process, and, despite a defect in CCRC's protest demand, the Board and the administrator ensured CCRC's members were given the opportunity to participate in the decision on the APD. See, e.g., Plaintiffs' *Motion to Dismiss Claims for Relief One Through Four (unopposed)*, p. 2. ("Plaintiffs were given the opportunity to air their concerns about the well at the Board's February 2014 hearing."). Hydraulic fracturing was considered by the Board at the February hearing and CCRC members, its expert, and its attorney meaningfully weighed in on the Board's decision. Appx. 6, *BOGC Order 22-2014*.

The Montana Legislature provided in Mont. Code Ann. § 82-11-141 an administrative procedure for hearings before the Board. This procedure requires that "any interested person is entitled to be heard" during a public hearing. Mont. Code Ann. § 82-11-141(2). BOGC adopted a rule allowing interested persons to request a hearing to protest an APD. Admin. R. Mont. 36.22.601 (4)-(6). BOGC also adopted a rule allowing the administrator to refer administrative actions to the Board for consideration. Admin. R. Mont. 36.22.309. Although CCRC's attempt

[1] Although cited throughout CCRC's *Opening Brief*, the *Amended Complaint* did not address the right to know under Art. II, sec. 9 of the Montana Constitution.

to initiate a hearing under Admin. R. Mont. 36.22.601 was flawed, BOGC assisted and facilitated CCRC's participation in the decision when its administrator sought a hearing under Admin. R. Mont. 36.22.309 during the next public hearing. That hearing included testimony and evidence about well stimulation, an allowable activity under a drilling permit. Appx. 6, *BOGC Order 22-2014.* CCRC participated and offered substantial member and expert testimony and evidence to the Board primarily focusing on potential hydraulic fracturing of the well.

CCRC now asserts that the Board's well stimulation rule, Admin. R. Mont. 36.22.608, is unconstitutional either because "[*the rule*] allowed expansion of the scope of a permit for a 'conventional wildcat well' to include chemical stimulation (fracking)" or because "*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." *Opening Brief*, pp. 1, 2 (emphasis added); see, also, p. 29 ("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."). For the first time on appeal, CCRC raises the argument that hydraulic fracturing is an "expansion" of the scope of the drilling permit approved by the Board. The Board's well stimulation rule, however, has always allowed hydraulic fracturing under a drilling permit, which was why CCRC addressed is concerns about hydraulic fracturing to the Board.

"As a general rule, this Court will not address either an issue raised for the first time on appeal or a party's change in legal theory. This is because it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." *JAS, Inc. v. Eisele*, 2016 MT 33, ¶ 26, 382 Mont. 200, ___ P.3d ___ (citations and internal quotations omitted). CCRC cannot now, on appeal, claim for the first time that hydraulic fracturing would be an "expansion" of the scope of the drilling permit because the record demonstrates that CCRC has always known that hydraulic fracturing potentially could occur under a drilling permit. This Court should decline to address CCRC's new argument.

CCRC meaningfully participated in the Board's decision about whether to approve a drilling permit. CCRC members and their expert attended the February 27, 2014, meeting; raised concerns about the APD, including about the potential use of hydraulic fracturing on the well; and made recommendations for the Board's consideration. The Board heard 1.5 hours of testimony from CCRC members and its expert; solicited additional input from the BOGC staff, which included the administrator supporting CCRC's expert's recommendation to adopt the APF HF2 water management standard, should the well be hydraulically fractured; and approved the drilling permit on a split vote. The well stimulation rule, Admin. R. Mont. 36.22.608, did not impair CCRC's ability to participate because CCRC

actively and meaningfully participated in the Board's decision about whether to approve the drilling permit and, if so, what conditions would apply.

The participation of CCRC members in BOGC's decision, including the concerns the members expressed about potential environmental impacts of hydraulic fracturing, occurred prior to final agency action on the APD, as required by Mont. Code Ann. § 2-3-103(1)(a). See also Mont. Code Ann. § 2-3-111. CCRC asserts without authority that an *additional* opportunity for public participation must be provided prior to well stimulation. See, e.g., *Opening Brief*, p. 15 ("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."). However, because well stimulation is an allowed activity under a drilling permit, it can be protested at the time the permit is sought (Admin. R. Mont. 36.22.601(4)-(6)), it is subject to ongoing oversight by the Board's professional staff (Admin. R. Mont. 36.22.608), and it is an inherent part of, not distinct from, the process of drilling and completing wells.

An additional opportunity for public participation prior is not required by statute or by the Montana Constitution. Prior to final agency action on the drilling permit, CCRC members could have and did advocate for the Board to condition approval of the drilling permit, should hydraulic fracturing be used as a well

stimulation activity. CCRC's advocacy was successful in part, as demonstrated by the Board's approval of the water management standard advocated by CCRC members and the Board's split vote on approval of the drilling permit. The Board ensured that CCRC had the opportunity to participate in the decision on the APD, and there is no requirement that additional opportunities to participate must be provided for activities that could occur, but in this case did not occur, under a drilling permit.

Absent a demonstration that the rule violated the statute implementing the right to participate, even if the district court had disagreed with the Board's decision to approve the drilling permit it could not have substituted its "judgment for that of the agency by determining whether or not the decision was 'correct.'" *Core-Mark Int'l, Inc. v. Mont. Bd. of Livestock*, 2014 MT 197, ¶ 32, 376 Mont. 25, 329 P.3d 1278 (citation omitted). CCRC disagreed with the Board's decision, but it conceded that, "Plaintiffs were given the opportunity to air their concerns about the well at the Board's February 2014 hearing." Appx. 8, *Motion to Dismiss*, p. 2. The process the Board followed in implementing its rules ensured that CCRC was assisted in its participation before a final Board action on whether to approve and condition the drilling permit, as Mont. Code Ann. § 2-3-103(1)(a) requires. This Court should avoid the constitutional issue CCRC presents where, as here, the Board met the statutory public participation requirements and where, as here,

CCRC did not challenge the constitutionality of those underlying statutes. *Davis*, ¶ 10. This Court should affirm.

C. Should this Court reverse the district court's grant of summary judgment on CCRC's Seventh Claim, it should remand to the district court for further proceedings.

After determining that CCRC's challenge to Admin. R. Mont. 36.22.608 was not ripe, the district court granted summary judgment for BOGC without deciding the merits of that challenge. BOGC's well stimulation rule is "presumed valid and the burden of proving their invalidity is on the plaintiff." *McElwain*, 248 Mont. at 236-237, 811 P.2d at 1271. If this Court reverses the district court's grant of summary judgment, the district court in the first instance should weigh the arguments and evidence about CCRC's constitutional challenge and determine the merits of that challenge. *N. Cheyenne Tribe v. Roman Catholic Church*, 2013 MT 24, ¶ 60, 368 Mont. 330, 296 P.3d 450. The Board requests that a reversal, if any, of the district court's decision should include a remand to the district court for further proceedings to determine the merits of CCRC's challenge to Admin. R. Mont. 36.22.608.

CONCLUSION

This Court should affirm the district court's denial of summary judgment for CCRC and grant of summary judgment in favor of BOGC. If this court reverses, it

should remand to the district court for consideration in the first instance of the merits of CCRC's constitutional challenge.

Respectfully submitted this 23 day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and accurate copy of the foregoing Appellee's Answer Brief to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that Appellee's Answer Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6497 words, excluding the certificate of compliance.

By: 

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, a Montana non-profit public benefit corporation,

Appellants and Plaintiffs,

vs.

MONTANA BOARD OF OIL AND GAS CONSERVATION,

Appellee/Defendant.

BRIEF OF *AMICUS CURIAE* MONTANA PETROLEUM ASSOCIATION

On Appeal from the Thirteenth Judicial District Court, Yellowstone County, Montana
Cause No. DV-14-0027
Honorable Mary Jane Knisely

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INTRODUCTION

Appellants/Plaintiffs Carbon County Resource Counsel and Northern Plains Resource Counsel (collectively "CCRC") sued Appellee/Defendant Montana Board of Oil and Gas Conservation (the "Board") and now allege that Mont. Admin. R. 36.22.608(2) (the "48-Hour Rule") is unconstitutional as applied in this case. CCRC argues that the public's right to know and participate in government decisions was violated because Energy Corporation of America ("ECA") was allowed to conduct a reservoir test after providing 48 hours' notice to the Board on Form No. 2, also called a *Sundry Notice*.

CCRC claims this despite the fact that prior to both the Sundry Notice and reservoir test, a public hearing was held on February 27, 2014 regarding ECA's application for a permit to drill a wildcat well. At this hearing, CCRC's "public comments addressed the adequacy of the environmental assessment prepared by the Board for the ECA drilling permit, concerns about water quality and quantity, standards for potential environmental damage caused by hydro-fracking, potential loss of recreational opportunities, and the potential impact on property values." *Sept. 3, 2015 Order*, p. 4. CCRC also recommended water management standards should the well be hydraulically fractured. *Id.* at 5. The Board adopted CCRC's recommended standards, and by a split decision it approved ECA's drilling permit subject to compliance with the recommended standards. *Id.*

The Montana Petroleum Association (the "Association") is a non-profit trade association that strives to maintain a positive business climate for Montana's oil and gas industry and to foster public awareness of the industry's many contributions to the State and nation. The Association's membership consists of all segments of Montana's oil industry, including producers, pipeline companies, and all four of Montana's refineries. Its members include everyone from Mom and Pop independents to multi-national corporations. The Association strives to provide factual information to the public and to policy-makers, with the understanding that informed people make rational decisions.

The Association believes that the facts of this case show that no constitutional violations have occurred, that exploratory drilling provides great benefit to the state of Montana and its citizens, that any potential dangers of hydraulic fracturing ("fracing")[1] have been wildly exaggerated, that the 48-Hour Rule is workable and necessary, and that the relief requested by CCRC would adversely impact the ability of Association members to undertake exploratory drilling in the state of Montana. For these reasons, the Association files this brief in support of the Board's position.

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[1] Pursuant to industry custom, hydraulic fracturing is referred to as "fracing." Different quotations may contain various spellings.

ARGUMENT

Through phrases such as "injecting chemicals through aquifers" and "wastewater laced with oil," CCRC does its best to demonize fracing.[2] This Court should not fall for such misdirection. This case has nothing to do with fracing.

What this case could affect, however, is the ability of the oil and gas industry to effectively pursue exploratory drilling in the state of Montana. Exploration is necessary to finding new reserves critical to maintaining Montana's oil and gas production. At present, the operator of an exploratory well must give public notice of the proposed well. If interested persons protest, the matter is heard by the Board before a drilling permit can be issued. If CCRC's requested relief is granted, the operator may then have to go through a second notice and protest period *after* investing significant resources in drilling and *before* being able to complete the well. This would obviously result in greater risk, delay, and cost, making exploratory drilling in Montana much less attractive.

Why should the court care? Through taxes, employment, and purchasing, the oil and gas industry contributes significantly to Montana's economy. Estimates in 2013 (the last year for which data is available) reveal that Montana's oil and gas sector contributed over 15,600 jobs paying two-thirds more than the state average,

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[2] These charges will be briefly addressed in Section III, *infra*.

and a total of $2.3 billion (nearly 6%) to Montana's GDP.[3] The revenue received by Montana from oil and gas production taxes alone – just one component of the industry's economic contribution – grew from less than $50 million per year in the 1990's to over $236 million in 2014.[4] This revenue is used to help Montana school districts, countywide schools, and county governments, as well as the general fund.[5]

The increase in state revenue was due to a combination of higher oil prices and increased oil and gas production.[6] Much of the increased production came from newly-discovered fields, such as Elm Coulee,[7] that could not have been

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[3] Exh. 1, *The Economic and Fiscal Impacts of Montana's Oil & Gas Industry*, Treasure State Journal 2014, at MPA0006. All Exhibits may be found in the Appendix submitted herewith.

[4] *See* Exh. 2, *Montana's Oil & Gas Production Tax*, Mont. Legislative Fiscal Division (Nov. 2014), at MPA0010, http://leg.mt.gov/content/Publications/fiscal/Oil-Gas/Oil-Gas-Combined.pdf.

[5] *Id.* at MPA0011; MCA § 15-36-331 and § 15-36-332.

[6] *Compare* Exh. 3, *Mont. Tax Revenue From Oil & Gas Production* (a demonstrative exhibit created from the data in Exh. 2, at MPA0010, "Revenue Collections"); *with* Exh. 4, *Oil Production by Well Type*, MBOGC, http://bogc.dnrc.mt.gov/Misc/Statistics/Production/160120_HorizontalvsVerticalOil.pdf (Jan. 20, 2016). These graphs show a correlation between the increase in fracing in the state and state tax revenue.

[7] Exh. 5, *Wildcat Producer Sparks Oil Boom On Montana Plains*, Wall Street Journal, at MPA0015, https://www.wsj.com/articles/SB114420151900517294 (Apr. 5, 2006); Exh. 6, *Annual Production by Field*, MBOGC,

found without exploratory drilling. Due to natural production decline, oil production in Montana is now decreasing. This trend can only be reversed by finding new production. That will require exploratory drilling.

Invalidating the 48-Hour Rule would introduce additional delay, cost, and uncertainty into capital-intensive, high-risk drilling ventures – despite the fact that advance public notice was provided and a permit issued. Increased delay, cost, and uncertainty will negatively impact the industry's ability to drill and complete exploratory wells in the future. This diminishes the industry's continued viability in the state, which in turn negatively impacts state tax revenue, state employment, and state schools. These reasons compel the Court to closely examine CCRC's phantom frac job and imaginary infringements of constitutional rights.

I. A DFIT Is Not Fracing.

CCRC argues that the 48-Hour Rule is unconstitutional because it allowed "fracking or chemical stimulation" in this case without public notice or comment. *CCRC Opening Brief*, pp. 10-11. However to be clear, a diagnostic fracture injection test, or DFIT, is not fracing. No fracing occurred in this case.

A DFIT is not fracing. As the District Court recognized,

> the purpose of a DFIT is to test a well's reservoir pressure before it is productive, while the purpose of hydro-fracking is to increase production

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https://bogc.dnrc.mt.gov/WebApps/DataMiner/Production/ProdAnnualField.aspx (accessed Mar. 22, 2016) (showing the sustained production of Elm Coulee).

> from an active well. The fractures created during a DFIT are temporary. Because the testing solution does not contain proppant, the fractures close naturally after the test. In hydro-fracking, proppant keeps fractures open so that oil may be pumped through them and out of the well.

Sept. 3, 2015 Order, p. 10. Because a DFIT is temporary and not intended as a method of well stimulation to increase the production of oil and gas, it cannot be considered fracing.[8]

According to the Northern Plains Resource Council, "[h]ydraulic fracturing (fracking) is the process of drilling and injecting fluid into the ground at a high pressure in order to fracture shale rocks to release the oil and natural gas inside. The process consumes a tremendous amount of water, which is mixed with harmful chemicals and sand."[9] How much water? "We're talking about millions and millions of gallons of clean water that will be used."[10] Note that the DFIT in this case injected "27.4 bbls [barrels] of fresh water."[11] This is a far different from

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[8] Exh. 7, *Affidavit of Benjamin Jones*, ¶ 3 (originally part of the Board's *Reply Brief in Support of Motion For Summary Judgment*).

[9] Exh. 8, *Oil & Gas: Hydraulic Fracturing*, NPRC, at MPA0026, https://www.northernplains.org/issues/oil-gas/ (accessed Mar. 21, 2016).

[10] Exh. 9, *Protesters Line Up Against Beartooth Front Drilling Plans*, Billings Gazette, http://billingsgazette.com/news/local/protesters-line-up-against-beartooth-front-drilling-plans/article_6db1dc66-363e-5efa-abe5-a5be3c4f4975.html (Oct. 30, 2013), at MPA0032 (statement by Deborah Muth, chair of CCRC at the time of the ECA permit).

[11] Exh. 10, *Completion Report*, MBOGC (Dec. 18, 2014).

the fracing envisioned by CCRC. Yet, CCRC now pretends not to be able to tell the difference.

Despite the obvious differences between a DFIT and fracing, CCRC attempts to equate them by continually opining that a "chemical stimulation" occurred in this case. However, CCRC fails to recognize that a DFIT does nothing to stimulate a well. Rather, it is designed to test reservoir characteristics by injecting a small amount of water into the well for a short duration.[12] The "Completion Report" filed by ECA after the DFIT test was run states that "27.4 bbls of fresh water" were injected.[13] This indicates that no chemicals whatsoever were used in the DFIT test.

It is not clear why CCRC continues to claim that the DFIT test was a "chemical stimulation." Perhaps because this was one of two boxes checked on the Sundry Notice giving prior notice of the DFIT test[14] (perhaps by an employee wanting to make sure that all bases were covered), or perhaps because the record notes that potassium chloride is commonly used in DFIT tests.[15] Regardless, it does not appear that any chemicals were actually used in ECA's DFIT test.

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[12] Exh. 7, ¶ 2.

[13] Exh. 10.

[14] Exh. 11, *Sundry Notice*, MBOGC, at MPA0037 (Jul. 7, 2014).

[15] Exh. 7, ¶ 2.

Even in the event that potassium chloride was used, it is a naturally-occurring salt that is commonly used as a substitute for table salt.[16] It is also found in Dasani bottled drinking water.[17] It is added to the water used in a DFIT to control the swelling of clays adjacent to the wellbore so to obtain accurate test results.[18] CCRC's distorted emphasis on "chemical stimulation" fails to reflect the reality that water containing 2-3% potassium chloride is just saline water. No intervening public notice and comment period is necessary for a temporary injection of saline water, especially when CCRC had the opportunity to address water management, water quality, and environmental issues at the February 27, 2014 hearing.

II. The Board's Regulations Protect Public Rights While Providing Necessary Certainty and Flexibility.

Montana is unique in that it requires operators to give notice of proposed exploratory wells to the general public, as well as an opportunity for objections, prior to the issuance of a drilling permit. Whenever an operator proposes to drill a

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[16] Exh. 12, *Kalisel Potassium Chloride*, Morton Salt, http://www.mortonsalt.com/business-product/kalisel-potassium-chloride/ (accessed Mar. 21, 2016).

[17] Exh. 13, *Dasani*, Coca-Cola, at MPA0045, http://www.coca-colaproductfacts.com/en/coca-cola-products/dasani/ (accessed Mar. 21, 2016).

[18] Exh. 14, *Gauging an Unconventional Shale Well*, Journal of Petroleum Technology, at MPA0048, http://www.spe.org/jpt/article/8560-ep-notes-13/ (accessed Mar. 22, 2016).

well outside of an existing field delineated by the Board, it must publish notice of the well in newspapers of general circulation in both Helena and the county in which the well is to be located. Mont. Admin. R. 36.22.601(1). Interested persons are then afforded an opportunity to object. Upon proper demand by an interested person, the Board must set the matter for notice and public hearing. *Id.* at 36.22.601(4). After the hearing, the Board may either grant or deny the permit. *Id.* at 36.22.601(5). If it grants the permit, the Board may impose conditions that it finds are reasonably proper and necessary under the circumstances. *See id.* at 36.22.601(5)(a).

Well completion treatments such as hydraulic fracturing, acidizing or chemical stimulation are covered under the drilling permit so long as such processes were expressly described in the permit application. Mont. Admin. R. 36.22.608(1). When permitting an exploratory well, however, an operator cannot know whether it will even complete the well, let alone what completion treatments it may utilize. Recognizing this, the 48-Hour Rule requires the operator of an exploratory well who decides to employ a completion treatment that has not been described in the permit application to first submit a Sundry Notice describing the completion treatment. *Id.* at 36.22.608(2). The form must be provided to the Board's staff for their review at least 48 hours before commencement of well activities. *Id.*

a. No Constitutional Rights Were Infringed in This Case.

CCRC argues that its constitutional rights to know and to participate in government decisions were violated because ECA was allowed to conduct a DFIT test without providing CCRC notice and a second opportunity to protest. *CCRC Opening Brief*, pp. 13-15. Therefore, it argues, Mont. Admin R. 36.22.608(2) must fall. *Id.* at 35. This argument is without merit. CCRC's rights were fully satisfied by the published notice of ECA's application for permit to drill and CCRC's appearance at the Board's February 27, 2014 hearing.

CCRC does not allege any defect in the notice provisions of Mont. Admin. R. 36.22.601(1)(a), nor does it deny that public notice of ECA's application for drilling permit was in fact published in accordance with that rule. It admits that on February 27, 2014, the Board held a hearing on ECA's application, and that some of its members attended that hearing. *CCRC Opening Brief*, p. 2. CCRC admits that it presented both lay and expert testimony in support of its protest. *Id.* at 8. Its wide-ranging testimony included comments on the adequacy of the environmental assessment, concerns about water quality and quantity, potential harm caused by injecting chemicals through aquifers and storing chemicals onsite, and potential impact on property values. *Id.* CCRC's expert presented a report to the Board, and opined on subjects ranging from the design of the pits to the use and disposal of "millions of gallons of water." *Id.* He suggested a number of mitigation

measures, including adoption of the American Petroleum Institute ("API") HF2 water management standards. *Id.* at 10. This latter suggestion was adopted by the Board and made an express condition of the drilling permit.[19] By a split decision, the Board approved ECA's permit subject to the API HF2 water standards. *Id.*

Despite all of this, CCRC argues that it was denied *meaningful* participation in the Board's decision.[20] *CCRC Opening Brief*, p. 14. It argues that the hearing was inadequate because it was told that the permit application did not specify that the well would be hydraulically fractured. *Id.* at 11-12. Of course, this argument ignores the fact that, as explained above, no hydraulic fracturing ever took place. Therefore, CCRC was not harmed. CCRC's argument further ignores the fact that they *did* present testimony regarding hydraulic fracturing, which was heard by the Board *and acted upon* by adoption of the API HF2 water management standards. Significantly, the whole point of the API HF2 water standards is to provide guidance for the proper use and management of water *for purposes of hydraulic fracturing*. The standards are appropriately entitled, "Water Management

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[19] Exh. 15, *Board Order No. 22-2014*, ¶ 6 (Feb. 27, 2014).

[20] Ironically, while claiming exhaustive rights of notice and participation, CCRC characterizes its failure to provide proper proof of service to ECA as "an administrative technicality." *CCRC Opening Brief*, p. 2. The clear implication is that protection under the law only goes one way.

Associated with Hydraulic Fracturing."[21] There would be no reason for the Board to adopt these standards if they were not contemplating the possibility that ECA's well might be hydraulically fractured in the future.

CCRC argues that its primary concerns in this appeal are the "potential impacts to surface and ground water resulting from injecting a chemical solution in the well and storing wastes on site." *CCRC Opening Brief*, p. 16. However, these are the very concerns that were raised and addressed at the February 27, 2014 hearing. *Sept. 3, 2015 Order*, p. 4. CCRC's "public comments addressed the adequacy of the environmental assessment prepared by the Board for the ECA drilling permit, concerns about water quality and quantity, standards for potential environmental damage caused by hydro-fracking, potential loss of recreational opportunities, and the potential impact on property values." *Id.* at 4.

In this case, the regulatory process worked. CCRC was heard on all relevant issues, including water quality, environmental impacts, chemical stimulation and fracing. CCRC's suggested water quality standards were adopted by the Board. There was no need to hold another public hearing on the same issues before the DFIT test was conducted. Rehearing the same arguments accomplishes no

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[21] Exh. 16, *Water Management Associated with Hydraulic Fracturing*, API, at MPA0052, http://www.api.org/~/media/Files/Policy/Exploration/HF2_e1.pdf (accessed Mar. 21, 2016).

legitimate purpose, and only leads to added delay, expense, uncertainty and the potential for inconsistent outcomes.

b. The Board's 48-Hour Rule Provides Necessary Certainty in Exploratory Drilling.

Exploratory wells are capital-intensive and risky to drill. Wells in Eastern Montana commonly cost several millions of dollars to drill and complete.[22] Despite the high cost, a typical exploratory well in Montana has only a 1 in 20 chance of obtaining commercial production.[23]

Drilling is risky enough. Operators cannot risk further uncertainty in the regulatory process. Laws must be clear and evenly-administered to provide the legal and political certainty necessary to attract investment. The 48-Hour Rule provides the necessary certainty. After going through the public notice and comment process and obtaining a drilling permit, an operator knows that it will be able to complete the well it has drilled, subject only to the Board's safety and technical review.

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[22] Recent well costs statistics for Montana appear to be unavailable. But, see Exhibit 17 for Board certified copies of exhibits filed with pooling applications for several recent Eastern Montana Bakken and Red River wells. These disclose the actual cost of drilling and completing wells, which ranges from $3.5 – 8.5 million dollars per well. Exh. 17, at MPA0059-62.

[23] Exh. 18, *Board Meeting Minutes Dec. 11 & 12, 2013*, MBOGC, at MPA0069, http://bogc.dnrc.mt.gov/Hearings/2013/2013_12/2013_12_Minutes_r.pdf.

CCRC characterizes its appeal as an "as-applied" challenge to the 48-Hour Rule. *CCRC Opening Brief*, p. 35. If the rule fails under the facts of this case, however, it would be difficult to imagine any circumstances upon which it could be relied. For all practical purposes, this is a facial challenge to the 48-Hour Rule. If CCRC obtain the relief it seeks, future exploratory drilling may very well involve two hearings—one before the drilling permit issues, and another in the event the operator actually makes a well. The very concept is unworkable. "No one would drill a well if they could not complete it."[24]

c. The 48-Hour Rule Provides Operators Necessary Flexibility.

As stated, only 1 in 20 exploratory wells drilled in Montana find commercial production. Therefore, the operator of an exploratory well cannot know at the time of permitting whether it will complete the well, let alone whether it will attempt a completion treatment such as hydraulic fracturing, acidizing or chemical stimulation. The design of such completion treatments is dependent on the specific properties of the reservoir, properties which may not be known until the well has

[24] Exh. 19, *Hydraulic Fracturing Rule Hearing for MAR Notice No. 36-22-157*, MBOGC, at MPA0080, http://bogc.dnrc.mt.gov/PDF/Hydraulic%20Fracturing%20Rule%20Hearing06152011.pdf (June 15, 2011) (testimony of Tom Richmond).

been drilled and pipe has been run.[25] Therefore, the operator may not be able to describe the completion treatment at the time of permitting.

Once the well is drilled, further operations are subject to the availability of expensive and often hard-to-obtain completion rigs, frac trucks, and associated services and equipment, all of which must be concurrently scheduled. Thus, the requirement of an additional notice and protest period between drilling and completion could add considerable cost and delay – but nothing of value, as no new issues are raised. The 48-Hour Rule allows operators the necessary flexibility to permit an exploratory well and design an appropriate completion, while at the same time assuring that the Board will have adequate opportunity to review and approve of any proposed completion treatment.

d. Review of Completion Treatments Properly Lies with the Board.

The Board has been granted broad authority to regulate drilling activities. *See Ostby v. Board of Oil and Gas Conservation*, 2014 MT 105, ¶ 2, 374 Mont. 472, 324 P.3d 1155. The makeup of the Board is designed to ensure that the Board possesses expertise not only in the oil and gas industry, but also in areas affected by oil and gas drilling and production. Of the Board's seven members, three must

[25] Exh. 20, *Comments of the Association*, at MPA0093, http://bogc.dnrc.mt.gov/PDF/CombinedComments.pdf (June 23, 2011); Exh. 21, *Comments of Devon Energy Corp.*, at MPA0097, http://bogc.dnrc.mt.gov/PDF/CombinedComments.pdf (June 22, 2011).

have at least three years' experience in the production of oil and gas, and another two must be landowners residing in oil or gas producing counties (but not actively associated with the oil and gas industry). MCA § 2-15-3303(2).

In exercising its authority, the Board relies on a qualified staff, including trained and experienced petroleum geologists and engineers.[26] Over the years, the staff has developed an institutionalized knowledge and expertise that has been recognized by this Court. *See Montana Wildlife Federation v. Montana Bd. of Oil & Gas*, 2012 MT 128, ¶ 51, 365 Mont. 232, 280 P.3d 877. When it comes to matters lying within the particular expertise of an administrative agency, the agency is in the better position to determine what is safe and is not safe, and this court should defer to its expertise. *See Somont Oil Co., Inc. v. King*, 2012 MT 207, ¶ 18, 366 Mont. 251, 286 P.3d 585, *citing Gypsy Highview Gathering Sys., Inc. v. Stokes*, 221 Mont. 11, 716 P.2d 620 (1986). Public comment periods and hearings serve an important role in informing the agency of potential issues and alternatives of which it may not be aware. But once the public has been heard, additional comment periods and hearings serve no purpose other than added cost and increased delay, and the matter should be left to the expertise of the agency.

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[26] Exh. 22, *MBOGC Contact Us*, MBOGC, http://bogc.dnrc.mt.gov/staff.asp (accessed Mar. 21, 2016); Exh. 23, *A Legacy to Remember: Tom Richmond*, Treasure State Journal 2014.

That is especially true with the 48-Hour Rule, as illustrated in the facts of this case. A public hearing was held, CCRC expressed its concerns, and the Board adopted its suggested mitigation standards. The drilling permit issued (subject to CCRC's suggested water standards), and the well was drilled. ECA filed a Sundry Notice, giving the Board notice of its intent to perform a limited reservoir test and describing the technical details of that test. The Sundry Notice was reviewed and approved by the Board's staff. The test was performed without any demonstrated harm to CCRC, surface water, ground water, or the environment. CCRC has not alleged any new material facts discovered between permitting and completion of the ECA well that would justify a second notice and opportunity to protest. In short, the Board's regulatory process, including the 48-Hour Rule, worked as intended.

CCRC's suggested approach seeks to remove technical decision-making from trained agency experts and place it into the public arena. Emotional arguments[27] would be substituted for reasoned scientific analysis. The predictable result will be increased cost, delay, and unpredictability.

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[27] See, for example, comments made at the Board's Public Hearing on December 11-12, 2013, Exh. 18, at MPA0065-66, such as, "If Yellowstone decides to burp while they are drilling a well on the Beartooth front, the well will turn into a torch," and "If our water is fouled there will be no life."

e. CCRC's Proposed Additional Notice Period Was Rejected by Both the Board and the 2015 Montana Legislature.

The 48-Hour Rule was promulgated as part of the Board's 2011 update of its hydraulic fracturing regulations. As originally proposed, the rule would have required that the operator give the Board's staff 24 hours' advance notice and obtain written approval prior to commencing completion treatments such as hydraulic fracturing acidizing, or chemical stimulation.[28] The Board received 332 pages of comments regarding its proposed rules, plus another 85 pages of late comments.[29] The Northern Plains Resource Council requested, among other things, that the 24-hour timeframe be increased to 10 business days.[30] The Board modified its proposed rules in accordance with the comments received, including increasing the 24-hour notice period to 48 hours, and on August 15, 2011 adopted Mont. Admin. R. § 36.22.608 in its present configuration.[31]

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[28] Exh. 24, *Notice of Public Hearing on Proposed Adoption*, MBOGC, at MPA0106, http://bogc.dnrc.mt.gov/PDF/36-22-157pro-arm.pdf (May 16, 2011).

[29] *See Hydraulic Fracturing Rulemaking*, MBOGC, http://bogc.dnrc.mt.gov/Frac.asp (accessed Mar. 21, 2016).

[30] Exh. 25, *Comments of NPRC*, MBOGC, at MPA0112, http://bogc.dnrc.mt.gov/PDF/CombinedComments.pdf (June 23, 2011).

[31] Exh. 26, *Notice of Adoption*, MBOGC, at MPA0116, http://bogc.dnrc.mt.gov/PDF/36-22-157adp-arm.pdf (Aug. 15, 2011).

The Northern Plains Resource Council also supported HB 243 in the 2015 Montana Legislature.[32] Among other things, HB 243 would have required the Board to post notice of hydraulic fracturing on its website and then give least 45 days' notice by mail to each property owner with a water supply located within 3,000 feet of the well.[33] HB 243 was tabled in committee.[34] Having failed to obtain an extended notice and comment period in both rulemaking and in the legislature, CCRC now attempts to do the same through litigation. CCRC has raised no serious constitutional questions. This is a matter of policy. Such matters are best left to the Board and the Montana Legislature, who are in a better position to investigate and decide matters of public policy.

f. This Case Could Impact Other Well Operations.

If CCRC so strenuously argues that a simple reservoir test involving the injection of 27.4 barrels of fresh water is so serious a matter as to violate its

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[32] Exh. 27, *Kevin-Sunburst Oil and Gas Producers Speak Out*, Fairfield Sun Times, at MPA00132, http://www.fairfieldsuntimes.com/business/article_966d7a86-ae2a-11e4-978e-d312834d5788.html (Feb. 6, 2015); Exh. 28, *Dunwell Brings Fracking Disclosure Bill*, Helena Independent Record, at MPA0134-35, http://helenair.com/news/local/updated-dunwell-brings-fracking-disclosure-bill/article_147dc03f-5f22-5995-ac31-a5dc2ce9b7be.html (Jan. 23, 2015).

[33] Exh. 29, *House Bill No. 243*, Mont. 64th Legislature, at MPA0137, Section 1(2) & (3). http://leg.mt.gov/bills/2015/hb0299/HB0243_1.pdf (accessed Mar. 21, 2016).

[34] Exh. 30, *Mont. HB 243*, LegiScan, at MPA0149, https://legiscan.com/MT/bill/HB243/2015 (accessed Mar. 21, 2016).

constitutional rights, then virtually any change to a well could be claimed to be of significant public interest requiring prior public notice and comment. Other well operations routinely conducted under Sundry Notice without public notice and comment include mechanical integrity tests, stimulating or chemically treating wells, perforating, cementing, abandoning wells, and pulling or altering casings.[35] A similar process applies to reperforating, recompleting, and reworking under Mont. Admin. R. 36.22.1010(1). Further, Mont. Admin. R. 36.22.1010(2) authorizes acidizing or chemical treatment of less than 10,000 gallons without public notice or comment upon submittal of a Sundry Notice. Are these operations less significant than pumping 27.4 barrels of fresh water into an oil reservoir more than a mile beneath the ground? If not, a finding in favor of CCRC will be one small step from paralyzing the oil and gas industry in Montana.

III. The Claimed Dangers of Fracing Have Been Greatly Exaggerated.

As previously stated, this case has nothing to do with fracing. The DFIT process at issue is not fracing, and any suggestion otherwise is without merit. However, CCRC has spent much of its brief demonizing hydraulic fracturing. Contrary to CCRC's repeated allegations, there is "no proven case where the fracking process itself has affected water" according to former EPA Administrator

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[35] Exh. 11, at MPA0037; *see* Mont. Admin. R. 36.22.608.

Lisa Jackson.[36] Likewise, former BLM Director Bob Abbey has stated that the BLM "has never seen any evidence of impacts to groundwater from the use of fracking technology on wells that have been approved by [BLM]. . . . [BLM] believes, based upon the track record so far, that it is safe."[37]

Yes, there have been several highly-publicized cases involving allegations that fracing was responsible for well contamination or other environmental harm. Safe drinking water is a fundamental necessity to all people, and this need makes an attractive target for those willing to exploit human emotions. Even the most publicized allegations, however, have proven greatly exaggerated or false under further scrutiny.[38] Unfortunately, evidence tending to clear the reputation of the fracing industry has not been so widely-publicized.

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[36] Exh. 31, *What They've Said About Hydraulic Fracturing*, API, at MPA0151, http://www.api.org/~/media/Files/Policy/Hydraulic_Fracturing/HF-Comments-by-US-Officials.pdf (2014).

[37] *Id.*

[38] Exh 32, *Leaky Gas Wells, Not Fracking, Contaminated Drinking Water*, US News, http://www.usnews.com/news/articles/2014/09/15/leaky-gas-wells-not-fracking-contaminated-drinking-water-in-pa-tex (Sept. 15, 2014) (showing that leaky gas wells, not fracing, were the cause of contaminated water in Pennsylvania and Texas); Exh. 33, *State Investigation Finds Fracking "Unlikely" to Have Contaminated Water in Pavillion, WY*, Energy InDepth, http://energyindepth.org/mtn-states/state-investigation-finds-fracking-unlikely-to-have-contaminated-water-in-pavillion-wy/ (Dec. 21, 2015) (revealing that gas seepage was occurring before well development and finding that fracing did not cause water contamination).

Every industrial process – indeed every part of modern life – involves some risk. No one can say that the fracing process is entirely without risk. What we can say, however, is that experience has shown that fracing can be, and has been, conducted in a safe manner under the current regulations. Despite the many decades of drilling and fracing in Montana, not a single case involving the contamination of underground sources of drinking water by reason of hydraulic fracturing has been discovered by or reported to the Board.[39] This should be weighed against the tremendous benefit fracing has provided to the State of Montana.

CONCLUSION

ECA's well is no longer a relevant issue. After notice and hearing, the well was drilled, tested, and abandoned without any demonstrated harm to anyone or anything. But CCRC remains intent on using this well as a vehicle for political purposes. Having successfully manufactured a mountain out of a molehill, CCRC now offers its flimsy pretenses in the hope that this court will overturn the judgment of the Board and the Legislature and create new law altering decades of historical industry practice and needlessly subjecting ordinary wells to uncertainty, cost, and delay.

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[39] Exh. 26, at MPA0122.

No constitutional violations have occurred under the facts of this case. The Board's regulations adequately protect the public's rights and welfare, while providing the oil and gas industry necessary certainty and flexibility. Exploratory drilling and fracing provide great benefit to the state of Montana and its citizens, and the relief requested by CCRC would adversely impact the ability of Association members to continue exploratory drilling in the state of Montana. For these reasons, the Court should affirm the district court's ruling.

DATED this 23rd day of March, 2016.

CROWLEY FLECK PLLP

By 

COLBY L. BRANCH
JEFFERY J. OVEN
SHALISE C. ZOBELL

Attorneys for Amicus Curiae
Montana Petroleum Association

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Mont. R. App. P. 11(4), this *Amicus Curiae* Brief is proportionately spaced Times New Roman typeface of 14 points or more, and contains 4,993 words as determined by the undersigned's word processing program, excluding Certificate of Service and Certificate of Compliance.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of March, 2016 a copy of this *Amicus Curiae* Brief was served upon counsel in the manner detailed below:

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FILED March 31, 2016
NANCY SWEENEY, Clerk of District Court
By _____ Deputy

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

OMIMEX PETROLEUM, INC., **Plaintiff,** **vs.** **THE MONTANA BOARD OF OIL AND GAS CONSERVATION,** **Defendant.**	**Judge Mike Menahan** **CAUSE NO. ADV-15-383** **ORDER DISMISSING CASE WITH PREJUDICE**

Pursuant to the "**STIPULATION TO DISMISS CASE WITH PREJUDICE**" (the "Stipulation") filed herein, IT IS HEREBY ORDERED that the Stipulation is granted and this matter is dismissed with prejudice.

Dated March 30, 2016.

Mike Menahan, District Court Judge

EXHIBIT 12

Hon. Daniel A. Boucher
Twelfth District Judge
Hill County Courthouse
315 Fourth Street
Havre, MT 59501
406.265.5481

MONTANA SEVENTEENTH JUDICIAL DISTRICT COURT, BLAINE COUNTY

MALSAM FAMILY, LLC, Plaintiff, v. J. BURNS BROWN OPERATING CO., JOHN BROWN, JR. and TRAVIS BROWN, Defendants. J. BURNS BROWN OPERATING CO. Third-Party Plaintiff, v. MONTANA BOARD OF OIL AND GAS CONSERVATION Third-Party Defendant.	Cause No. DV-14-043 **ORDER SETTING PRE-TRIAL CONFERENCE**

A telephonic scheduling conference was held on February 23, 2016. Counsel Thomas Towe appeared for Plaintiff, Counsel Loren O'Toole II appeared for Defendants and Third-Party Plaintiff and Counsel Jeffrey Doud appeared for Third-Party Defendant. As a result of said conference,

IT IS HEREBY ORDERED as follows:

1. Expert witnesses who shall testify at trial shall be designated on or before May 6, 2016. Rebuttal expert witnesses shall be designated on or before May 20, 2016.

2. Discovery, including depositions, interrogatories, requests for admissions, and requests for production, shall be noticed so that said discovery may be completed by May 27, 2016.

3. Pre-trial motions, including summary judgment motions, shall be filed by June 10, 2016. The parties must file a written request for a hearing date at the time the motion or response is filed, or the Court will consider the motion submitted for decision based on the briefs filed.

Briefing Format and Requirements:

In addition to any other applicable rule of procedure or provision of law, all legal briefs shall strictly conform to M.R.Civ.P., Rules 10(a) and 11; Uniform District Court Rules 1 and 2; and Local Rule 6(a).

For each motion, there shall be a single and distinct support brief, opposition brief, and reply brief, as applicable. Other additional, supplemental, or "Sur-____" briefs are not permitted and shall not be filed without prior leave of Court. A motion and corresponding support brief may be combined in a single document. Multiple motions and corresponding support briefs may be combined in a single document. Combined multiple opposition and reply briefs may be filed in response to combined multiple motions and support briefs. However, this section does not authorize combined motions or briefs to exceed otherwise specified briefing page limits.

Parties may not and shall not file support/reply briefs for one motion combined with opposition briefs for another motion. For example, a party may not file a combined brief in support of the party's cross-motion for summary judgment and in opposition to the other party's motion for summary judgment. The party's supporting brief shall be filed separately from the party's brief in opposition to the other party's motion.

4. Motions in *limine* shall be filed by July 1, 2016.

5. A settlement conference shall be held on or before June 17, 2016. Parties' attendance at said conference is mandatory, and such appearance may be by video conferencing or telephone conferencing if agreed to by the mediator. If the parties are unable to agree on a settlement master, each party shall submit a list of three (3) masters by June 3, 2016. The parties must contact the proposed settlement masters before submitting their lists and must confirm to the Court that the proposed settlement masters are willing to serve. The Court shall appoint a master from said lists. Following the settlement conference, the settlement master shall notify the Court of the results within five (5) days.

6. Witness and exhibit lists shall be filed and exchanged on or before August 5, 2016. Objections thereto shall be filed and exchanged on or before August 9, 2016.

7. A final pre-trial conference is set for August 31, 2016, at 1:30 p.m., at the Blaine County Courthouse, Chinook, Montana. Counsel are permitted to attend via Judicial Video Network, are required to make all arrangements necessary for said

video appearance, and shall provide the IP address and location where they will be appearing from to the Court at least five (5) days prior to the hearing.

Dated February 23, 2016.

DISTRICT JUDGE

MONTANA SEVENTEENTH JUDICIAL DISTRICT COURT, BLAINE COUNTY

****

MALSAM FAMILY

Vs.

J. BURNS BROWN, ET AL

Vs.

MONTANA BOARD OF OIL AND GAS CONSERVATION

CASE NO. DV14-43

CERTIFICATE OF MAILING

****

Gail Obie, being duly sworn, says that she is the Deputy Clerk of the District Court of Blaine County, Montana, that on February 24, 2016, she transmitted or delivered, correct and true copies of: Order Setting Pre-Trial Conference
to:

E-MAILED

Thomas E. Towe
towe@tbems.com
abudge@tbems.com

DELIVERED

MAILED:

O'Toole Law Firm
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Jeffrey M. Doud
Robert Stutz
Assistant Attorneys General
PO Box 201440
Helena MT 59620-1440

Deputy Clerk of Court

PLUGGING PROJECTS & FIELD INSPECTOR SUMMARY

April 6, 2016

Training:
March 16-17
Inspectors and staff attended the annual H2S re-certification course presented by CS Consultants. Nine employees from state lands also attended the H2S training.
New this year was a 4 hour defensive driving class presented by Tort Defense Division.
Also new this year was a cement additive tutorial presented by Sanjel. Judging from the questions asked and the inspector participation this tutorial was very informative.
A big thank you goes out to Sanjel.

Orphaned Well Kopp #1:
The Kopp #1 well located north of Sidney is leaking oil and gas. H2S is present in concentrations greater than 50 ppm at times.

A slip-on wellhead was successfully installed February 9, 2016 on the Kopp #1 well.
The current shut-in pressure reading is 500 psi.

An invitation for bid to re-enter and re-plug the Kopp #1 well was posted on the state web site 2/25/16 by Procurement and Contracting. Bidding closes 4/6/2016. (Today)

Orphaned Well Kelly #1:
The Kelly #1 well is approximately 500 feet from Highway 2. A supper club used the well as a water well. The supper club has been burned down and hauled away. At present a new water pipe line for the area is in the process of being installed and runs close to this well.

An invitation for bid was posted on the state web site by Procurement and Contracting. Bidding closed 3/31/16. One bid for $19,360.00 was received from Liquid Gold Well Service. The bid was accepted and a contract is being drawn up at present.

Orphaned Well Flack #1
The Flack #1 located west of Big Sandy is leaking water and small amounts of gas.

A request for proposal was submitted to the Procurement and Contracting officer for approval before posting on the state web site. The RFP should be posted this week.