

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 18-0110

MONTANA ENVIRONMENTAL INFORMATION CENTER
and SIERRA CLUB,

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant and Appellant,

and

WESTERN ENERGY COMPANY,

Defendant/Intervenor and Appellant.

UNOPPOSED MOTION TO FILE BRIEF AS AMICI CURIAE

On Appeal from Montana First Judicial District Court, Lewis & Clark County,
Cause No. CDV 2012-1075, Hon. Kathy Seeley, Presiding

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COME NOW, Treasure State Resource Association of Montana ("TSRA"), the Montana Petroleum Association ("MPA"), the Montana Coal Council ("MCC"), and the Montana Mining Association ("MMA") (collectively "Trade Groups"), by and through their attorneys of record, Browning, Kaleczyc, Berry & Hoven, P.C., pursuant to Rule 12(7), Mont. R. App. P., and move the Court for leave to file a brief as *Amici Curiae* in the above-captioned matter. Counsel for Appellants and Appellee have been contacted and do not object to the Trade Groups filing a Brief as *Amici Curiae*.

STATEMENT OF INTEREST

TSRA is a statewide, non-profit trade association with its office located in Helena, Montana. TSRA was formally incorporated as a Montana non-profit corporation in 1976. TSRA currently represents approximately 89 members, many of whom conduct or work for large industrial or agricultural operations in Montana. TSRA's membership includes labor unions, small and large industrial operations, as well as mining, forest, and agricultural operations. TSRA's mission

is to provide information about the potential impact of proposed legislative and regulatory changes to members, elected officials, and the public; to develop coalitions to engage in legislative or regulatory developments important to members; and to provide a vehicle to help members be informed and involved in regulatory developments.

The MPA is also a statewide, non-profit voluntary trade association with its office located in Helena, Montana. The MPA currently represents more than 150 diverse members, including upstream, midstream, and downstream companies in the petroleum industry. The MPA's mission is to maintain a positive business climate for Montana's petroleum industry, and foster public awareness of its many economic and ecological contributions to the state and nation. The MPA aims to be the premier voice in Montana's oil and gas industry, particularly on land use and environmental policy.

The MCC is a non-profit industry association whose membership includes all major coal mine operators, holders of Montana coal reserves, those who ship the coal, utilities who use the coal, and numerous suppliers and businesses directly and indirectly involved in the coal industry. Its office is located in Helena, Montana. The MCC's mission is to promote and advocate for Montana's coal industry.

The MMA was founded in 1919 and is a voluntary trade association comprised of members from every sector of the mining industry. The MMA is committed to helping all parties involved in mining endeavors, from large companies, to small and independent miners and service providers, navigate through a complex regulatory environment to succeed in Montana's business climate. The MMA's primary purpose is to protect, preserve, and promote mining—an important contributor to Montana's economic fabric dating back to its territorial days. The MMA closely monitors issues of concern for its members and provides industry representation before Montana's decision makers, and it provides information to its members and distributes educational information to the general public, through a variety of outlets, about the many contributions of mining to Montana's economic well-being. MMA also promotes and enhances the public perception of mining by sharing the compelling story of the industry's longevity and modern advancement.

The Trade Groups have a special interest in the issues presented in the above-captioned case. In particular, each of the Trade Groups and their members have an interest in the Montana Department of Environmental Quality's ("MDEQ") interpretation and application of water quality statutes and regulations to ephemeral drainages. MDEQ issues Montana Pollutant Discharge Elimination

System (“MPDES”) Permits regularly to many of the Trade Groups’ members, some of which include discharges to ephemeral drainages.

This appeal involves the interpretation and evaluation of the Montana system for issuance of MPDES Permits under both federal and Montana law. The potential consequences of the order will have far-reaching effects on a significant number of Montana businesses and operations. The interpretation of water quality statutes and case law has a direct impact on the Trade Groups’ respective members who currently possess or who will need future MPDES Permits. Water quality statutes and their application to ephemeral drainages, as reflected in the issuance of MPDES Permits, have a direct impact on the operation of many regulated Montana operations and their ability to operate and provide goods and services to Montana citizens.

The Trade Groups seek to uphold their members’ important property and financial interests that are directly impacted by MDEQ’s application of water quality statutes to its issuance of MPDES Permits. Many of the Trade Groups’ members hold these permits or will need permits in the future, and modifying MDEQ’s application of the water quality statutes to ephemeral drainages would require their members to implement changes to their businesses and operations that may in some cases be either infeasible, technologically impracticable, or cost

prohibitive. Therefore, the relief sought in this appeal will directly impact the Trade Groups' members.

REASONS WHY AN AMICUS CURIAE BRIEF IS DESIRABLE

This appeal arises from a summary judgment ruling on a petition for judicial review of an administrative permitting decision by MDEQ. The district court framed the issues as: (1) whether MDEQ violated the federal Clean Water Act and the Montana Water Quality Act by issuance of Final Modified Permit number MT0023965 (the "Permit"), which allows the discharge of pollutants by the Rosebud Mine into surrounding waters; (2) a determination and declaration that the Montana system for issuance of a MPDES Permit is unlawful pursuant to federal and Montana law; (3) whether the Plaintiffs/Appellees had standing to bring this suit; and (4) whether the Plaintiffs/Appellees were entitled to reasonable fees, expenses, and costs. The district court held (1) the Plaintiffs/Appellees did have standing; (2) MDEQ's determination that all applicable waters under the Permit were ephemeral was arbitrary and not supported by the applicable law; (3) MDEQ's decision in the Permit to reduce the monitoring of outfalls and to modify the standards for the waters at issue was arbitrary. The district court declared the Permit invalid.

If the district court ruling is allowed to stand, it will affect a whole host of enterprises and operations across Montana. The district court's order as it now

stands could materially alter MDEQ's approach to issuing permits to ephemeral drainages, potentially requiring discharges to manage uses on ephemeral drainages in a manner normally found only on permanently flowing streams, such as swimming, recreation, and support of fish, aquatic life, waterfowl, and furbearers. The district court's order also potentially alters MDEQ's previous approach to restoring impaired water bodies, requiring development of Total Maximum Daily Loads (TMDLs) for "impaired" ephemeral drainages before and discharge is permitted, and even in instances where the drainage does not contribute to the impairment. All of these outcomes may well frustrate and delay the issuance or renewal of MPDES Permits throughout the State. Thus, the Court should hear from the Trade Groups, which represent members who operate businesses across Montana, on these very important legal issues. The district court's ruling could trigger a change in policy that will hamper businesses that depend on the current interpretation of water quality regulations as they apply to ephemeral drainages. This will be highly detrimental to Montana's economy and the Trade Groups' members.

PARTIES WHOSE POSITION TSRA SUPPORTS

The Trade Groups support the positions of Appellants MDEQ and Western Energy Company in this appeal.

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CONCLUSION

Based on the above, the Trade Groups support Appellants in this appeal. Counsel for the Trade Groups agrees to abide by the briefing schedule previously established by the Court. The Trade Groups are prepared to submit their Brief in a short period of time and will submit their Brief as directed by the Court.

Pursuant to Mont. R. App. P. 16(1), a proposed order has also been filed for the convenience of the Court.

Dated this ____ day of April, 2018.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By /s/ M. Christy S. McCann

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CERTIFICATE OF SERVICE

I, Mary Christina Surr McCann, hereby certify that I have served true and accurate copies of the foregoing Motion - Unopposed - Amicus - Leave to Participate to the following on 04-17-2018:

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