

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.

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 the Montana Association of Oil, Gas, and Coal Counties (“MAOGCC”), and Rosebud County (collectively “Interested Parties”), by and through their attorneys, pursuant to Rule 12(7), Mont. R. App. P., and move the Court for leave to permit MAOGCC and Rosebud County to be signatories to the brief as *Amici Curiae* of Treasure State Resource Association of Montana, Montana Petroleum Association, Montana Coal Council, and Montana Mining Association (collectively “Trade Groups”) in the above-captioned matter. Counsel for Appellants and Appellee have been contacted. Counsel for Appellants Montana Department of Environmental Quality (“MDEQ”) and for Western Energy Company do not object to MAOGCC and Rosebud County signing onto the Trade Groups’ Brief as *Amici Curiae*. Counsel for Appellees stated they do object to the Motion.

STATEMENT OF INTEREST

The MAOGCC is a Montana non-profit corporation composed of 34 Montana counties and a number of Montana municipalities, Montana school districts, and resource industry representatives. All of the members of the MAOGCC directly benefit from the activities of businesses that commonly obtain Montana Pollutant Discharge Elimination System (“MPDES”) permits and whose business operations require MPDES permits. Changes to the ability of these businesses to obtain MPDES permits will have broad and lasting negative impacts

to the budgets of local communities including county governments, municipal governments, and Montana public school districts, many of which are members of MAOGCC.

Rosebud County is one of fifty-six counties organized and existing within the State of Montana. Rosebud County contains significant reserves of coal within its boundaries, and multiple operating and prospective coal mines, including the Rosebud Mine that is the subject of this action, are located there. The Rosebud Mine is the sole supplier of coal to the four electricity generating plants also located in Rosebud County. The owners of the Rosebud Mine and the four generating stations operating in Rosebud County generate approximately 85% of the taxes funding Rosebud County services, programs, and general operations. Changes to MPDES permitting requirements would significantly impact the ability of the Rosebud Mine to continue coal mining in Rosebud County and may cause the cessation of coal mining and electricity generation in Rosebud County. The results would be the loss of 85% of the tax income for Rosebud County, lasting detrimental impacts to the economic well-being of residents of Rosebud County, and an increase to the burden upon other property tax payers in Rosebud County—most likely retirees, small businesses, and agriculture.

Both MAOGCC and Rosebud County have a special interest in the issues presented in the above-captioned case. In particular, Rosebud County and the

members of MAOGCC have economic, tax base, and public well-being interests in the MDEQ's interpretation and application of water quality statutes and regulations to ephemeral drainages. MDEQ regularly issues MPDES permits to companies operating in Rosebud County and in the counties that are members of the MAOGCC.

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 significant impacts on the businesses operating within and providing economic activity and taxable value to Rosebud County and the members of MAOGCC. Water quality statutes and their application to ephemeral drainages, as reflected in the issuance of MPDES Permits, have a direct impact on the business and economic activity occurring within and funding the treasuries of Rosebud County and the counties, municipalities, and school districts of MAOGCC.

MAOGCC and Rosebud County seek to support the economic opportunity and well-being of businesses and individuals operating within their member entities as well as to uphold the taxable value of real property located within Rosebud County and the counties and municipalities that are members of MAOGCC. Many of the largest employers and owners of the highest value taxable real property within these counties, municipalities, and school districts hold

MPDES permits or will need permits in the future, and modifying MDEQ's application of the water quality statutes to ephemeral drainages would significantly impact the ability of businesses to undertake economic activity and would significantly impact the taxable value of real property and employment opportunities within these counties, municipalities, and school districts. Therefore, the relief sought in this appeal will directly impact Rosebud County and the members of the MAOGCC.

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 any 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 previously permitted the TSRA, MPA, MCC, and MMA, which represent members who operate businesses across Montana, to appear as amici curiae in this appeal. It should likewise permit participation by Rosebud County and the MAOGCC, which are or represent governmental entities that will need to address local economic problems and local government tax and budget problems. 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 to the government entities where these interested businesses operate.

PARTIES WHOSE POSITION THE INTERESTED PARTIES SUPPORT

The Interested Parties support the positions of Appellants MDEQ and Western Energy Company in this appeal.

CONCLUSION

Rosebud County and MAOGCC wish to sign onto the Amicus Brief of the Trade Groups. Based on the above, the Interested Parties support Appellants in this appeal. Counsel for the Interested Parties agrees to abide by the briefing schedule previously established by the Court. The Interested Parties 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.

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Dated this 13th day of June, 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 - Opposed - Amicus - Leave to Participate to the following on 06-13-2018:

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