IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 21-0658

BISON OIL & GAS III, LLC, a Colorado limited liability company,

Appellants/Petitioners,

v.

MONTANA BOARD OF OIL AND GAS CONSERVATION

and

SLAWSON EXPLORATION COMPANY, INC.,

Appellees/Respondents.

ANSWER BRIEF OF MONTANA BOARD OF OIL AND GAS CONSERVATION

On Appeal from the Montana Fifteenth Judicial District Court,
Roosevelt County, The Honorable David Cybulski, Presiding

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ISSUE PRESENTED FOR REVIEW

Whether the district court correctly determined that Appellant was required to exhaust its administrative remedies before appealing a decision of the Montana Board of Oil and Gas Conservation.

STATEMENT OF THE CASE

This case arises from Order No. 48-2021 issued by the Montana Board of Oil and Gas Conservation ("BOGC" or "Board") denying Appellant Bison Oil & Gas III, LLC's ("Appellant," "Applicant," or "Bison") application for permits to drill three horizontal Bakken/Three Forks formation wells within the permanent spacing unit established by Board Order No. 224-2012 (the "PSU"). Intervenor Slawson Exploration Company, Inc. ("Slawson" or "Intervenor") is the operator of the only permitted and producing oil and gas well within the PSU and protested this application pursuant to Mont. Admin. R. 36.22.601.

On June 10, 2021, the Board held a public hearing on Bison's permit application in Docket Nos. 24-2021 and 56-2021. Slawson appeared at the hearing and contested Bison's permit application. After the hearing, the Board issued Order No. 48-2021 denying Bison's application. Bison did not request rehearing. Instead, on July 21, 2021, Bison went straight to district court and filed a complaint seeking judicial review of the Board's Order. Slawson intervened on October 1, 2021. The Board and Slawson both filed motions to dismiss Bison's complaint

pursuant to Mont. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction on the grounds that Bison had failed to exhaust its administrative remedies. On October 26, 2021, the district court granted the Board's motion to dismiss, holding that Bison failed to exhaust its administrative remedies when it did not request a rehearing and that no exception to the exhaustion requirement applied.

STANDARD OF REVIEW

The Montana Supreme Court will dismiss a complaint for failure to state a claim if the plaintiff can prove no set of facts in support of their claim that would entitle them to relief. *See Dennis v. Brown*, 2005 MT 85, ¶ 5, 362 Mont. 422, 110 P.3d 17.

SUMMARY OF ARGUMENT

The district court correctly determined that Bison was required to exhaust its administrative remedies before appealing the Board's decision. The district court's decision was based on a long history of common and administrative law; Bison's statutory interpretation is incorrect; Bison's futility argument contradicts existing case law; and Bison's argument about arbitrary and capricious action is not an adequate justification for its failure to exhaust.

ARGUMENT

Montana law has long required the exhaustion of available administrative remedies prior to the filing of a claim in district court. It is a straightforward rule:

before a party may seek judicial review of an administrative agency's action, it must exhaust its available remedies before that agency. In short, "if an administrative remedy is provided by statute, *that relief must be sought from the administrative body* and the statutory remedy exhausted *before* relief can be obtained by judicial review." *Barnicoat v. Comm'r of Dep't. of Labor & Indus.*, 201 Mont. 221, 225, 653 P.2d 498, 500 (1982) (emphasis added). Failure to do so deprives a court of subject matter jurisdiction. *Art v. Mont. Dep't of Labor & Indus*., 2002 MT 327, ¶¶ 17, 18, 313 Mont. 197, 60 P.3d 958. This Court has consistently applied this rule in a variety of contexts.[1] Likewise, the U.S. Supreme Court has applied this rule for almost a century. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938).

Here, Bison did not seek rehearing although it was available. Under *Barnicoat*, the availability of an administrative remedy is all that is required to trigger the duty to seek and exhaust that administrative remedy before judicial review. *Barnicoat*, 201 Mont. at 225, 653 P.2d at 500. Bison's arguments in

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[1] *See, e.g.*, *Kunz v. Butte-Silver Bow*, 244 Mont. 271, 274, 797 P.2d 224 (1990) (failure to follow city's internal administrative appeal after registering protest under zoning statutes); *State ex rel. Jones v. Giles*, 168 Mont. 130, 133, 541 P.2d 355, 357 (1975) (highway department administrative process for nuisance signs); *Blair v. Potter*, 132 Mont. 176, 184, 315 P.2d 177, 181 (1957) (taxation); *State ex rel. Saxtorph v. Dist. Court*, 128 Mont. 353, 368, 275 P.2d 209, 217 (1954) (Angstman, J., concurring: "This court has repeatedly held that a teacher discharged for cause must exhaust the administrative remedies provided for by [statute] before resorting to the courts.").

response are all legally insufficient to change this basic principle for the following reasons.

I. The exhaustion requirement is well established law.

A. The exhaustion requirement comes from decades of common law.

Bison argues that common law exhaustion principles do not apply in this case because the applicable statutes abrogate common law doctrine. Bison states that "[p]rinciples of statutory interpretation in Montana do not involve the insertion of presumed common law requirements into a statute." Appellant's Opening Br. at 20. However, in interpreting statutes, this Court has stated it should "presume the Legislature is aware of existing law when it enacts or revises statutes." *Exxon Mobil Corp. v. Mont. Dep't of Revenue*, 2019 MT 156, ¶ 20, 396 Mont. 298, 444 P.3d 407. The Legislature did not have to write the exhaustion requirement into its statute: the requirement was embodied in decades of case law, as the Legislature was aware. Bison argues that if "the legislature intended to make judicial review of BOGC orders available to a party only after making use of the rehearing statute it would have said so explicitly, and it did not." Appellant's Opening Br. at 21. This is a topsy-turvy argument. The Legislature said nothing about the exhaustion of administrative remedies in the relevant statute, knowing that the law in Montana already required exhaustion of administrative remedies prior to bringing a claim in district court. The Legislature's taciturnity does not

leave a vacuum; existing common law fills in what the Legislature has declined to address. *See Annala v. McLeod*, 122 Mont. 498, 503, 206 P.2d 811, 814 (1949) (quoting *State ex rel. La Point v. District Court*, 69 Mont. 29, 34, 220 P. 88, 89 (1923) for the proposition that "…when the statute is either silent or ambiguous, in order to determine rights under it an examination of both the common law and the statute is necessary"); *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, 338 Mont. 259, 165 P.3d 1079 (holding that the common law applies in Montana whenever it does not conflict with a statute); *Pritchard Petrol. Co. v. Farmers Coop. Oil & Supply Co.*, 121 Mont. 1, 15, 190 P.2d 55, 63 (1948) (holding that "…a statute, made in the affirmative, without a negative, expressed or implied, does not take away the common law save to the extent that is expressly or by necessary implication so declared.") *and see* Mont. Code Ann. § 1-1-108 (where a statute does not declare the law and common law does not conflict with statute, "the common law shall be the law and rule of decision"); "[w]hen the common law, as established by the decisions of this Court, is not in conflict with the statutes, the common law shall be the law." *O'Fallon v. Farmers Ins. Exch.*, 260 Mont. 233, 244, 859 P.2d 1008, 1015 (1993).

Moreover, Bison's proposed interpretation would make the right to rehearing superfluous: no party would seek rehearing if it could immediately proceed to district court without going back to the same body that just denied its

application. Yet "[t]he legislature does not perform useless acts." *Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶ 125, 303 Mont. 274, 16 P.3d 1002. Skipping rehearing would also flout the purpose of exhaustion doctrine, which is to avoid burdening the district courts and to allow an agency an opportunity to "correct its own errors within its specific expertise before a court interferes." *Bitterroot River Prot. Ass'n v. Bitterroot Conservation Dist.*, 2002 MT 66, ¶ 22, 309 Mont. 207, 45 P.3d 24. Bison's proposed approach would erase longstanding common law precedent and burden courts with de novo review before allowing an agency to resolve its own alleged mistakes, resulting in potentially needless hours of discovery and trial when simply calling an agency's attention to an issue could resolve the dispute. Bison asks this Court to presume this is what the legislature intended when it provided for BOGC review, all without an explicit statement to that effect. This is an improper reading of the statutes.

Rather, as described above, the existence of an administrative remedy triggers a duty to exhaust that remedy. *See Barnicoat*, 201 Mont. at 225, 653 P.2d at 500 ("if an administrative remedy is provided by statute, that relief must be sought...before relief can be obtained by judicial review"). Bison acknowledges that rehearing was available to it but incorrectly argues that it is the Montana legislature's "intent to allow parties aggrieved by a final decision of the Board to either request a rehearing under Section 143 ***or*** seek judicial review in the district

court under Section 144 regardless of any rehearing request." Appellant's Opening Br. at 16 (emphasis added). This ignores decades of Montana Supreme Court precedent that requires a party to make use of all its "options" (i.e., administrative remedies) before resorting to judicial review. *Barnicoat*, 201 Mont. at 225, 653 P.2d at 500. Here, Section 143 provides a right to petition for rehearing. This is the "administrative remedy…provided by statute." *Id*. Therefore, under *Barnicoat* and all other Montana Supreme Court cases addressing exhaustion, Bison was required to pursue that remedy first. Failure to do so bars judicial review.

B. MAPA's statutory exhaustion requirement does not conflict with common law.

The common law exhaustion requirement was codified into law when the legislature enacted the Montana Administrative Procedure Act (MAPA). MAPA states that "a person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final written decision in a contested case is entitled to judicial review under this chapter." Mont. Code Ann. § 2-4-702(1)(a). This statute clearly requires exhaustion as a condition precedent to seeking judicial review. Nonetheless, Bison states that because review of BOGC orders does not occur under the MAPA general review statute, it has no duty to exhaust its administrative remedies. This is incorrect. As described above, the exhaustion requirement is a common law principle that predates MAPA. This is a

longstanding principle of law that is not only established by decades of case law in a wide variety of contexts but is also codified by MAPA.

For its argument, Bison references *Ostby v. Bd. of Oil & Gas Conserv.*, 2014 MT 105, 374 Mont. 472, 324 P.3d 1155, stating that "[t]he Court's emphasis on the close adherence by the *Ostby* plaintiffs to the requirements of Section 144 is unmistakable. Nowhere in Section 144 is there any requirement for an attestation that a rehearing had been requested or held prior to bringing petition for judicial review of a final Board decision. Appellant Opening Br. at 17. However, Bison disregards the fact that the plaintiffs in *Ostby* did in fact seek a rehearing prior to involving the court. *See* Intervenor's Answer Br. App'x A at 2. Bison's citation to *Ostby* does not change this analysis. At issue in *Ostby* was whether review of BOGC orders took place under MAPA or Mont. Code Ann. § 82-11-144. *Ostby*, ¶ 10. Whether the Ostbys exhausted their administrative remedies was not at issue. The conclusion that "a proceeding seeking judicial review of an order of the Board of Oil and Gas Conservation must proceed as a de novo review in district court and not as a judicial review under MAPA" says nothing about what a party must do *before* seeking judicial review. *Id*. ¶ 11. The holding does not conflict with existing precedent that requires a party seeking judicial review to first exhaust its administrative remedies. Bison unreasonably suggests that this Court intended to

overturn decades of precedent without discussion. This Court should not indulge this claim.

II. Bison's statutory construction argument is incorrect.

Bison hangs a great deal of its analysis on the use of the word "may" in the rehearing statute, Mont. Code Ann. § 82-11-143. The rehearing statute states that a party "may" seek rehearing, but this is only a description of a right a party may choose to exercise, not an implicit repeal of longstanding precedent on exhaustion. Bison is correct that a party does not have to request rehearing: a party may decide to accept the decision of the BOGC, in which case it need not exercise the right to rehearing. This is the extent of the role of the word "may" in the statute. A party does not need to seek rehearing if it does not want rehearing. However, if it wants judicial review, it must first seek rehearing. Decades of case law unequivocally say so.

In *Russell v. Masonic Home of Mont. Inc.*, 2006 MT 286, 334 Mont. 351, 147 P.3d 216, the employee, Russell, brought a claim against her employer, Masonic Home of Montana, Inc., for wrongful discharge under the Montana Wrongful Discharge from Employment Act (WDEA). Russell resigned, claiming an intolerable work environment. Russell stated in her resignation letter that filing a grievance would be pointless because Masonic Home's grievance policy would require the very person who had aggrieved her to rule on the grievance. *Russell*,

¶ 6. Russell then filed a wrongful discharge claim in court. *Id.* ¶ 8. She claimed that the language in the employer's policy led her to believe that a written grievance was discretionary. *Id.* ¶ 13. Russell believed that filling a written grievance was discretionary as language in the policy stating that an employee "may" file a written complaint using the formal procedure. *Id.*

However, this Court held that "[t]his language does not relieve Russell…from complying with the mandatory requirement to exhaust the internal grievance policy…." *Id.* This Court stated that "[w]e discussed the word 'may' in the context of collective bargaining agreements with similar structure and content as Masonic's Policy and found that 'may' referred to the employee's choice either to file a grievance or to 'not file and let the matter drop.' *Id.* (quoting *MacKay v. State*, 2003 MT 274, ¶ 23, 317 Mont. 467, 79 P.3d 236). This Court goes on to further state, "[w]e explained that this language meant that if an employee chooses to seek a remedy, she may do so first by filing a formal written grievance, *not that an employee is excused from exhausting her administrative remedies before filing suit*." *Russell*, ¶ 14 (emphasis added). Here, likewise, the use of "may" in the rehearing statute only speaks in terms of what Bison could have done—it could have sought rehearing, or it could have "let the matter drop," *Id*. ¶ 13. What Bison could not do, however, was seek judicial review without exhausting its right to rehearing. The district court correctly dismissed Bison's petition on this basis.

Bison reaches too far in arguing that the statute's use of "may" makes rehearing optional *for the purpose of judicial review*, a matter not addressed in the rehearing statute at all. *See State v. Am. Bank*, 2008 MT 362, ¶ 17, 346 Mont. 405, 195 P.3d 844 (noting a court's interpretive task is "not to insert what has been omitted or to omit what has been inserted"). While a party may choose not to seek rehearing, by doing so it surrenders its right to judicial review. *Barnicoat*, 201 Mont. at 225, 653 P.2d at 500.

Moreover, in other contexts, this Court has required parties to exhaust administrative remedies which the relevant statutes provided they "may" exercise. For instance, in *Hedden-Empire Ltd. P'ship v. Dep't of Revenue*, 243 Mont. 206, 793 P.2d 828 (1990), this Court affirmed the district court's dismissal of a taxpayer's complaint for failure to first exhaust his administrative remedies, specifically his failure to appeal his taxes to the county or state tax appeal boards. *Id.* at 209, 793 P.2d at 830. The statutes in question provided that a taxpayer "*may* appeal to the Montana tax appeal board," Mont. Code Ann. § 15-2-301(1)(b) (emphasis added), and "*may* appeal the department's annual assessment." Mont. Code Ann. § 15-2-302(2) (emphasis added). This Court did not consider the use of the term "may" as addressing the exhaustion requirement at all—it still upheld dismissal for failure to exhaust administrative remedies. *Hedden-Empire*, 243 Mont. at 209, 793 P.2d at 830. The general rule still applied: where an

administrative remedy is available, a party must make use of it before seeking judicial review. *Id*.

The same was true in *Art* where this Court held the plaintiff's district court review was properly dismissed for failure to exhaust where the plaintiff failed to first take an administrative appeal. *Art*, ¶ 17. The statute providing the plaintiff's right to appeal stated it the same way: a party "*may* appeal the decision to the board." *Id*. ¶ 13 (citing Mont. Code Ann. § 39-3-217 (1995)) (emphasis added). Again, while the plaintiff's appellate rights were stated in terms of what he "may" do, it was an available remedy that needed to be exhausted before he could proceed to judicial review. This Court did not consider the use of "may" to eliminate the longstanding legal principle requiring exhaustion of administrative remedies.

III. Bison's futility argument contradicts existing case law and its argument about arbitrary and capricious action is not a defense to exhaustion, which is an issue that is not presently before this Court.

Bison argues that exhaustion was not required because resorting to rehearing would be futile. Bison claims that the Board's denial of Bison's application was arbitrary and capricious because "the Board failed to provide a reasonable explanation for its decision" and the "Board's decision appears plainly inconsistent with the spirit of the Oil and Gas Act." Appellant's Opening Br. at 33–34. However, Bison does not provide any explanation or evidence showing that the Board failed to provide a reasonable explanation for its decision, nor any

explanation or evidence that its decision is "inconsistent with the spirit of the Oil and Gas Act." It appears due to lack of any explanation of these claims that Bison merely believes rehearing would be futile because they might expect to dislike the outcome of a BOGC rehearing.

While Bison is correct that futility is an exception to the exhaustion requirement, "the mere possibility of an adverse decision does not mean that resort to an administrative agency is futile." *Mt. Water Co. v. Mont. Dep't of Pub. Serv. Regul.*, 2005 MT 84, ¶ 16, 326 Mont. 416, 110 P.3d 20; *Russell*, ¶ 15 (holding same). The rehearing process was not futile—Bison just chose not to use it because it expected to lose again. Case law specifically excludes this as a valid reason to avoid exhaustion. Bison has no excuse for failing to seek rehearing before seeking judicial review.

Additionally, Bison's claim that BOGC's decision was arbitrary and capricious is not a defense to exhaustion and this issue is not presently before this Court. The judicial review statute provides for the procedure by which BOGC's orders are reviewed, and it requires, among other things, that the suit be "tried de novo and disposed of as an ordinary civil suit and not upon the record of any hearing before the Board." Mont. Code Ann. § 82-11-144. This Court held the same in *Ostby* (¶ 11).

CONCLUSION

This Court should apply decades of its own precedent and affirm the district court's decision to dismiss Bison's appeal. Rehearing was an available remedy, but Bison did not use it. By failing to do so, it surrendered its right to judicial review by depriving the district court of subject matter jurisdiction.

DATED this 25th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal 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 3,274 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, Caitlin C. Buzzas, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-25-2022:

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