IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 22-0064

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs / Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

Respondent / Appellant,

and

WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION,

Respondent-Intervenors / Appellants,

and

MONTANA BOARD OF ENVIRONMENTAL REVIEW

Respondent / Appellant.

Appellant Board of Environmental Review's Opening Brief

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STATEMENT OF THE ISSUE

Whether the district court erred in denying the Board of Environmental Review's motion to dismiss when the quasi-judicial board: (1) adjudicated the administrative appeal, (2) is not a necessary party, (3) and did not issue the underlying permit.

STATEMENT OF THE CASE

1. DEQ's Permit Grant and BER's Administrative Review

The Board of Environmental Review (BER or Board) need not and should not be in this case. Even the Montana Environmental Information Center and the Sierra Club (collectively MEIC) admit BER is not a required party. And, as it turns out, BER was not needed: it did not substantively participate during judicial review (other than to argue it should be dismissed as a party), and the relief granted did not depend on BER being a named party. Because it was required to remain a party, however, BER was forced to expend attorney fees and Board time monitoring the case, which had well over one hundred filings in the district court and is on its third trip to this Court. This Court should hold that BER should not be a party to an appeal of its own decision, absent unique circumstances.

BER was a latecomer to the proceedings below. It was not until well after Western Energy had applied for the AM4 Permit (2009); after the eight rounds of Acceptability Deficiency notices and responses between Western Energy and

DEQ, including the disputed aquatic life survey (2009-2015); after MEIC's objections (2015); and after DEQ approved the permit (2015); that MEIC appealed DEQ's approval to the Board. BER Doc. 152 at 4, 13-15 (Board Order); BER Doc. 1 (MEIC's "Notice of Appeal and Request for Hearing").

By statute, the administrative appeal of DEQ's decision was adjudicated by BER via a contested case hearing. Mont. Code Ann. § 82-4-206; BER Doc. 152. On administrative appeal, the case had three parties: (1) DEQ, (2) Petitioners (MEIC), and (3) intervenors (Western Energy and others). BER Doc. 152 at 3. Understandably, because BER was the adjudicator, it was not a party.

After BER denied summary judgment for MEIC, it referred the matter to a hearing examiner. *Id.* at 4. The hearing examiner held a four-day contested case hearing, *id.* at 5, and then issued proposed findings of fact and conclusions of law recommending the Board affirm DEQ's issuance of the permit. BER Doc. 134. After oral argument, the Board adopted the proposed findings and conclusions almost verbatim (absent some explanatory language). Compare BER Doc. 134 to 152.

2. Petition for Judicial Review and Remand to DEQ

MEIC then filed a petition for judicial review. MEIC sub-captioned the petition: "Appeal of Case No. BER 2016-03 SM, Montana Board of Environmental Review." Doc. 1. Despite this overt acknowledgment that they were appealing

BER's adjudicative decision, MEIC named BER as a defendant, along with DEQ and Western Energy. *Id.*

BER filed a motion to dismiss the petition, explaining that BER, as a quasi-judicial board that issued the final order upholding DEQ's decision, was not a party to the underlying administrative action, should not be a party on judicial review, and that the relief sought was available under the Montana Administrative Procedures Act (MAPA) without BER's participation as a party. Doc. 13. MEIC initially responded that for "a judicial remedy to be effective—i.e., to correct the erroneous conduct," BER "must be a party to the judicial review." Doc. 21 at 2. MEIC later revised its position, in a proposed order adopted by the district court, and admitted the Board is not "required" to be a party, but that it "may be a party" if named by petitioner. *See* Doc. 40 at 3 (adopting MEIC's proposed order almost verbatim). The district court then denied the Board's motion to dismiss. Doc. 40.

The district court ultimately ruled for MEIC, "reversed the BER and remand[ed] to DEQ to revise the AM4 permit application consistent with this decision and applicable laws." Doc. 79 at 34 (emphasis added). The district court's remedy did not otherwise refer to BER. MEIC then moved for attorney fees and costs against DEQ only, which the court ultimately granted. Doc. 139. The court did not grant fees and costs against the Board.

Now that a final judgment has been entered, Doc. 141, the Board appeals

from the district court's denial of its motion to dismiss, Doc. 40.

STATEMENT OF FACTS

This case involves a challenge to DEQ's issuance of the AM4 Permit to Western Energy. BER does not have statutory authority to grant or deny the permit; DEQ does. Mont. Code Ann. §§ 82-4-205(2), 82-4-221 (DEQ is responsible for "general supervision, administration, and enforcement" of the strip-mining statutes and regulations, including issuing permits). As such, BER did not create the underlying permitting record; DEQ did. *Id.*; § 82-4-227; Doc. 79 at 7-8.

Instead, BER's role, as a quasi-judicial board, was to adjudicate MEIC's appeal of DEQ's permit issuance, utilizing the procedure laid out in MAPA. Mont. Code Ann. §§ 2-15-3502, 82-4-205(2), 82-4-206. That is what the Board did, appointing a hearing examiner, and then, after oral argument, adopting the hearing examiner's proposed findings and conclusions as its final order. *See* BER Doc. 152; Doc. 79 at 10-11. In short, DEQ acted as the permitting agency, and BER acted as the separate quasi-judicial adjudicatory board. *See* Doc. 79 at 7-11.

STANDARD OF REVIEW

A court should grant a motion to dismiss where plaintiff "can prove no set of facts in support of its claim which would entitle it to relief." *Hilands Golf Club v. Ashmore*, 277 Mont. 324, 328, 922 P.2d 469, 471-72 (1996). While this Court construes the complaint in the light most favorable to plaintiff on a motion to

dismiss, it reviews a district court's legal conclusions, for instance the interpretation of statutory provisions, for correctness. *Id.*

SUMMARY OF THE ARGUMENT

BER was improperly named as a party on judicial review, and the district court erred by requiring it to remain in the case. Indeed, MEIC and the district court acknowledged below that BER is not required to be a defendant. Nevertheless, the court denied BER's motion to dismiss, despite its unnecessary status, based on MEIC's argument that a petitioner has sole discretion to choose whether an adjudicatory board is a party on judicial review.

The district court legally erred. This Court has already determined, in *Young v. Great Falls* and progeny, that an adjudicating agency is not a necessary party and generally should not be a party on judicial review. Although this Court upheld the Department of Revenue's affirmative intervention in *Forsythe v. Great Falls Holdings*, this decision does not erode the *Young* precedent, as there the Department of Revenue had issued the disputed license (like DEQ here) and sought to defend its determination. Finally, while MAPA provides the relief sought by MEIC without requiring BER's participation as a party, requiring an adjudicatory board to defend its own decision has negative practical consequences. This Court should reverse the district court and hold that an adjudicatory board, such as BER, is not an appropriate respondent on petition for judicial review of its

decision unless required by statute or granted the right to intervene for a specific reason.

ARGUMENT

I. BER is not an appropriate respondent in a petition for judicial review of its decision because it is not a required party under statute and was not a party to the administrative proceedings.

BER was not a party to the administrative appeal of DEQ's permitting decision but instead was the quasi-judicial board tasked by statute with adjudicating the challenge to DEQ's issuance of the permit. Because BER was the adjudicating agency only, not the permitting agency, it is not a proper party to judicial review of its own adjudicatory decision.

Three principles from this Court's caselaw compel this result: (1) a quasi-judicial board is not a proper party on judicial review if it is not designated as a required party by statute, (*Young v. Great Falls*, 194 Mont. 514, 632 P.2d 1113 (1981); (2) the proper parties to a judicial review petition are the parties to "the administrative proceedings" (*Hilands Golf Club v. Ashmore*, 277 Mont. 324, 331, 922 P.2d 469, 474 (1996)); and (3) the only exception to this general rule is where the agency also took the administrative action that forms the basis of the dispute (such as issuing the permit or license) and affirmatively intervenes (*Forsythe v. Great Falls Holdings*, 2008 MT 384, ¶¶ 31-34, 347 Mont. 67, 196 P.3d 1233)).

A. BER is not a proper party because it is not designated as a party by statute.

No Montana statute requires BER to be designated as a party on judicial review. As such, under this Court's established case law, the Board is not a proper party on judicial review and the district court erred in not dismissing BER.

This Court has previously analyzed the issue of whether a quasi-judicial board should be a party on judicial review. *See Young v. Great Falls*, 194 Mont. 513, 632 P.2d 1111 (1981). In *Young*, the district court had ruled that the Board of Personnel Appeals was a necessary party and had dismissed the petition for judicial review of the board's decision because the board *had not* been named as a party. *Id.*, 194 Mont. at 514, 632 P.2d at 1112. This Court reversed, holding the board was not "required to be designated as a party on a petition for judicial review" for two reasons. *Id.*, 194 Mont. at 515, 632 P.2d at 1112-13.

First, MAPA contained "no provision for naming the 'board' as a party for purposes of review." *Id.* As this Court noted, "[w]here the legislature has intended for administrative bodies to be made parties, they have specifically so provided." *Id.* The Court, by way of example, cited to "§ 39-51-2410, MCA, providing for judicial review of a decision by the Board of Labor Appeals, [which] provides that the Employment Security Division shall be deemed to be a party in any action for judicial review." *Id.* No similar provision required the Board of Personnel Appeals to be a party on judicial review.

Second, as discussed more fully in part I(B) below, the procedural rules governing judicial review of board decisions should be read to "allow[] *the parties* to have their day in court." *Id.* (emphasis added). The "parties," by implication, were the parties to the administrative action—the petitioner-employee and the respondent-employer—not the adjudicating board. *Id.*

Notably, the dissent in *Young* made the same argument for the board's participation as does MEIC here: where a decision of a board is being challenged on judicial review, "the Board has a definite interest in the petition to review and, as a practical matter, must be joined to insure a complete and just adjudication of that interest." *Id.*, 194 Mont. at 517, 632 P.2d at 1114. The "majority, of course, disagree[d] with this conclusion[.]" *Id.*

Here, neither MAPA nor the Montana Strip and Underground Mine Reclamation Act[1] mandate BER's participation on judicial review. As such, and because BER is instead designated a quasi-judicial board, Mont. Code Ann. §§ 2-15-3502, the Board should not be joined as a party on judicial review.

B. BER is not a proper party because it was not a party to the administrative proceedings.

In addition to not being required by statute to be a party on judicial review, BER was not a party to the administrative proceeding; instead, it was the

[1] *See* Mont. Code Ann. §§ 2-4-702, 82-4-205(2), and 82-4-206.

adjudicator. Because this Court has made clear that the parties to judicial review are established at the administrative level, the Board was not a proper party to judicial review, and the district court erred in not dismissing BER.

This Court has previously held that adjudicative agencies are not "parties" to the administrative proceedings *or* judicial review action. *Hilands Golf Club*, 277 Mont. at 331, 922 P.2d at 474. The district court in *Hilands Golf Club*, in contrast to *Young*, had denied the Human Rights Commission's motion to intervene, "holding that the Commission was not properly a party" because "it had not been a party to the administrative proceedings below." *Hilands Golf Club*, 277 Mont. at 327, 922 P.2d at 471 (citing *Young*, 194 Mont. at 515-16, 632 P.2d at 1113). This Court affirmed, holding that "[b]y the time the matter is before the district court for judicial review, the parties have already been defined through their appearance at, and participation in, the administrative proceedings" and thus service under Rule 5 (as opposed to Rule 4) was sufficient. *Id.*, 277 Mont. at 331, 922 P.2d at 474.

As this Court explained, "a petition for judicial review to the district court is analogous to an appeal," and the Commission, like the district court during an appeal, is "a non-party" to the proceeding. *Id.*, 277 Mont. at 332, 922 P.2d at 474. This makes sense because an adjudicatory board, like a district court, is a neutral arbiter, not a litigant.

Montana federal courts, applying *Young* and *Hilands Golf Club*, have

likewise held that an adjudicatory agency, such as the Human Rights Commission, is not a "real party in interest," but instead a "non-party" or "nominal party" that has "no interest in [matters on judicial review] (other than their general interest in effectuation of the laws of the State of Montana)." *Reinhardt v. Mont. Human Rights Bureau*, 2010 U.S. Dist. LEXIS 133668, * 12-14 (D. Mont. 2010); accord *BNSF v. Feit*, 2011 U.S. Dist. LEXIS 44130, * 3-4 (D. Mont. 2011).

Because BER was not a party to the underlying administrative proceeding in this matter, but instead the quasi-judicial adjudicator, it was a "non-party" to judicial review and required only service of "copies of the petition" under Mont. Code Ann. § 2-4-702(2)(a). As such, it was improperly named as a party on judicial review and was entitled to dismissal.

C. BER is not a proper party because it did not issue the disputed permit.

The one exception where an adjudicatory agency may be a proper party to judicial review, aside from when it is statutorily required, is where the agency seeks to defend its regulatory action in addition to its administrative-review decision. This may arise where statute authorizes the agency to take a regulatory action *and* to issue the final decision after administrative appeal. That is not the case here, as discussed above, because DEQ, not BER, issued the disputed permit, and BER's limited statutory role was to adjudicate the subsequent administrative appeal.

This exception is demonstrated by this Court's opinion in *Forsythe*. Indeed, contrary to the district court's conclusion, *Forsythe's* reasoning supports BER's position that where an agency *does not* take the disputed regulatory action, it is not a proper party on judicial review. Specifically, *Forsythe* held that an agency is "*allowed* …to participate as a party in the judicial review," upon its motion to intervene, where it took the "specific action" subject to administrative dispute, such as granting a "license transfer application." *Forsythe*, ¶¶ 5, 34 (emphasis added).

The Department of Revenue, in *Forsythe*, had both granted the license transfer application and made the final decision on the hearing examiner's summary judgment recommendation. *Id.*, ¶ 31. The Department thus acted as both the licensing agency and the adjudicating agency, and affirmatively sought to participate as a party on judicial review to defend its licensing decision. *Id.* The Court noted that the Department would have also been an appropriate party, and perhaps the only appropriate party, in an action challenging its refusal to grant a license. *Id.*, ¶ 33. This is so because, for the district court to "properly order the Department to take specific action regarding [the] license transfer application," it needed to be "a party to that action." *Id.*, ¶ 34.

The unique circumstances of *Forsythe*, where the agency acted as both the licensing and adjudicatory agency, and affirmatively sought intervention, are not

applicable here. Instead, the Legislature created a separate quasi-judicial board, BER, to adjudicate DEQ's permitting decisions. BER was thus not properly joined as a party under *Young* and *Hilands Golf Club*, nor did it meet the circumstances for voluntary intervention under *Forsythe*. As such, the district court erred in denying BER's motion to dismiss.

II. The litigation and relief granted below demonstrate that the remedies provided under MAPA can be afforded without naming BER as a party on judicial review.

Though BER remained a party during the judicial review proceeding below, its presence did not affect the litigation or the outcome. The remedies requested and ultimately ordered were available under MAPA without regard to whether BER was in the case on judicial review.

As noted above, the district court's judgment required DEQ, not BER, to act on the contested permit application. Specifically, the district court "reverse[d] the BER and remand[ed] to DEQ to review the AM4 permit application consistent with this decision and applicable laws." Doc. 79 at 34. Just like the administrative hearing officer did not need to be a party to grant relief, and just like a district court need not be a party for this Court to provide relief on appeal, BER did not need to be a party for the district court to reverse its decision.

BER was treated as a de facto "non-party" during the judicial review proceedings in other ways as well. It was not a substantive participant in the

motions below—other than its motion to dismiss—and when MEIC moved for attorney fees, it moved for them only against DEQ, not BER. *See* Doc. 96. Likewise, the Court only granted fees against DEQ. Doc. 129.

As BER has argued all along, only DEQ needed to be a party to grant relief regarding the mining permit. Compare to *Forsythe*, ¶ 34 ("The District Court could not properly order the Department to take specific action *regarding GFH's license transfer application* unless the Department had been a party to that action.") (emphasis added). Likewise, this Court has previously granted relief to MEIC where DEQ, *but not BER*, was the respondent regarding BER's decision on a challenge to a DEQ-issued permit. *MEIC v. DEQ*, 2005 MT 96, ¶ 26, 326 Mont. 502, 112 P.3d 964 (determining BER applied an incorrect standard of review and remanding "to the District Court with instructions to remand to the Board for entry of new findings of fact and conclusions of law").

Indeed, the district court and MEIC acknowledged below that BER "is not a required party." Doc. 40 at 3. Even if the district court had ordered BER to take specific action—e.g. entering new findings or conducting an additional hearing—BER would not need to be a party to effectuate this relief, just as the district court need not be a party for this Court to order it to conduct an additional evidentiary hearing. *See MEIC v. DEQ*, 2019 MT 213, ¶¶ 100-101, 397 Mont. 161, 451 P.3d 493 ("remanded to the District Court for a hearing on the factual questions raised

in this Opinion."); *MEIC v. DEQ*, 2005 MT 96, ¶ 26 (remanding to BER for new findings).

Instead, MAPA provides a suite of remedies to fully address the relief sought by MEIC without requiring BER to be named as a party. MEIC below contended that BER: "relied on improper and inadmissible testimony"; prohibited Petitioners from presenting claims and evidence; incorrectly imposed the burden of proof on Petitioners; and "employed a fundamentally unfair and unlawful procedure[.]" Doc. 1, ¶¶ 9-12, 60-63. MAPA, in turn, provides for reversal or modification where the substantial rights of the petitioner have been prejudiced because the agency's decision violated "constitutional or statutory provisions," or was "made upon unlawful procedure," "affected by other error of law," "clearly erroneous," or "arbitrary or capricious." Mont. Code Ann. § 2-4-704(2); *MEIC v. DEQ*, 2005 MT 96, ¶ 26.

Importantly, a district court's review "must be confined to the record" and a court "may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Mont. Code Ann. § 2-4-704(1)-(2). Thus, what is reviewable is the record and BER's decision. BER need not be a party for this review to occur, and the district court is not authorized to address BER's actions beyond its administrative decision. Because a court, on judicial review, can provide relief under MAPA without BER as a party, BER should not have been

required to remain a party to that review here, and the court should have granted the Board's motion to dismiss.

III. Broader practical considerations underscore that BER need not and should not be a party.

While BER did not play a substantive role below, requiring BER to be a party against its wishes carries real risks. If BER advocates in support of its prior decision, then it may be compromised should the district court remand the case to BER for reconsideration. This is one of the reasons the district court is not a party to an appeal: to prevent the neutral adjudicator from being transformed into an advocate.

The risk of being both advocate and adjudicator is exemplified by certain extra-record evidence submitted by MEIC in the action below. *See* exhibits 1 and 2 to Doc. 54. Where additional evidence is submitted during judicial review, the district court may order the adjudicating agency to incorporate the evidence into the administrative record and modify its administrative findings and decision as necessary. Mont. Code Ann. § 2-4-703. Should the district court have ordered BER to incorporate and modify its decision based on the additional evidence submitted by MEIC, the Board would simultaneously have been a party on judicial review *and* the adjudicatory agency making a revised decision for consideration by the court in the same proceeding. *See id.* (the agency "shall file … any modifications, new findings, or decisions with the reviewing court."). This irregularity is not

contemplated by MAPA, which created separate and distinct roles in the administrative process for the adjudicative agency, the parties, and the court.

Even if BER can file a "notice of non-participation" instead of advocating for its decision, as suggested by the district court, Doc. 40 at 6, this still imposes a burden on BER, and of course begs the question why BER is a party at all and what role it is to play. It is therefore important for this Court to determine that the district court's denial of BER's motion to dismiss was in error so that BER will not be named in the next petition for judicial review of a DEQ-issued permit.

CONCLUSION

BER was not a necessary party—or even a helpful party—to judicial review of DEQ's grant of the mining permit. BER therefore should not have been named as a party, and the district court erred in refusing to dismiss BER. To prevent the waste of resources and provide guidance to petitioners and district courts regarding the proper role of a quasi-judicial board in the administrative process, this Court should reverse the district court's Order that required BER to be a party on judicial review of its own decision.

DATED this 10th day of August, 2022.

/s/ J. Stuart Segrest
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Certificate of Compliance

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 3,862 words, excluding certificate of service and certificate of compliance.

Dated this 10th day of August, 2022.

/s/ J. Stuart Segrest
J. STUART SEGREST

CERTIFICATE OF SERVICE

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