

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 Reply Brief

Amy D. Christensen
J. Stuart Segrest
The Montana Club Building
24 W 6th Avenue, Suite 501
Helena, MT 59601
Phone: 406-442-3690
Email: amy@cplawmt.com
stuart@cplawmt.com

TABLE OF CONTENTS

ARGUMENT.....	1
I. Under statute and this Court’s precedent, the district court erred by not dismissing BER as a party to judicial review of its adjudicatory decision	1
A. MEIC concedes no statute designates BER as a party to judicial review and BER did not issue the disputed permit	2
B. MEIC fails to address <i>Hilands Golf Club</i> ’s holding that the parties to judicial review are defined at the administrative proceeding	4
II. MEIC’s response ignores the question of why BER must be in the case, even as a non-participant, as well as the threat to BER’s neutrality	6
CONCLUSION	8
CERTIFICATE OF COMPLIANCE	9

TABLE OF AUTHORITIES

Cases

<i>Blaine Cnty. v. Stricker</i> , 2015 Mont. Dist. LEXIS 85 at (2015)	6
<i>Clark v. McDermott</i> , 2022 MT 186, 410 Mont. 174, 518 P.3d 76	6
<i>Forsythe v. Great Falls Holdings</i> , 2008 MT 384, 347 Mont. 67, 196 P.3d 1233)	3, 4, 5
<i>Hilands Golf Club v. Ashmore</i> , 277 Mont. 324, 331, 922 P.2d 469, 474 (1996)	4, 5
<i>Tacke v. Mont. Lakeshore Props.</i> , 2011 MT 197, 361 Mont. 390, 260 P.3d 128	7
<i>Whitehall Wind, LLC v. PSC</i> , 2010 MT 2, 355 Mont. 15, 223 P.3d 907)	5
<i>Young v. Great Falls</i> , 194 Mont. 515, 632 P.2d 1112-13 (1981)	2, 3, 4,

Statutes

Mont. Code Ann. § 2-4-702	2
Mont. Code Ann. § 69-3-402(1)	5
Mont. Code Ann. § 82-4-205(2)	2
Mont. Code Ann. § 82-4-206	2

The Board of Environmental Review (BER or Board) appealed the district court's order that required it to remain in this case while the Montana Environmental Information Center and the Sierra Club (collectively MEIC) seek judicial review of the Board's decision. MEIC, in the short section of its brief responding to BER's appeal, does not claim that BER is a necessary or even potentially useful party on judicial review of its adjudicatory decision. Instead, MEIC asserts that BER is a permissible party because sometimes agencies participate in review of their final decisions. However, BER did not take the regulatory action at issue here (issuing the disputed permit), was not a party in the administrative appeal (but instead the neutral adjudicator), and did not affirmatively intervene in the case. Lacking any role—statutory or practical—in defending its adjudicatory decision on judicial review, and in accordance with this Court's precedents, BER's motion to dismiss should have been granted. Requiring BER to remain a party on judicial review does not serve a purpose, wastes judicial and party resources, and may create conflict with the Board's adjudicatory function. This Court should reverse and dismiss BER from this action.

ARGUMENT

I. Under statute and this Court's precedent, the district court erred by not dismissing BER as a party to judicial review of its adjudicatory decision.

An adjudicatory board, such as BER, should be dismissed upon request

when it is not designated as a party on judicial review by statute, did not take the regulatory actions at issue, and was not a party to the administrative appeal.

A. MEIC concedes no statute designates BER as a party to judicial review and that BER did not issue the disputed permit.

BER argued in its Opening Brief that it should have been dismissed as a party because no statute required its participation on judicial review. As explained by this Court, “[w]here the legislature has intended for administrative bodies to be made parties, they have specifically so provided.” *Young v. Great Falls*, 194 Mont. 515, 632 P.2d 1112-13 (1981). In *Young*, the Court noted that the Legislature has provided for administrative agencies to be named as parties in judicial review of certain matters, *see* § 39-51-2410, MCA, but did not include such statutory language regarding the Board of Personnel Appeals. *Id.* Similarly, there is no statutory language that requires BER to be named a party on judicial review of one of its decisions. *See* Mont. Code Ann. §§ 2-4-702, 82-4-205(2), and 82-4-206. MEIC does not argue otherwise. *See* MEIC Resp. Br. at 73-75.

Instead, MEIC suggests BER’s reliance on *Young* is misplaced because *Young* concluded the agency was not an *indispensable* party under Rule 19, Mont. R. Civ. P., but did not decide the issue of whether it was a *permissible* party. However, the practical effect of MEIC’s inclusion of the Board in this case and its opposition to allowing it to be dismissed is to transform the Board into an

indispensable party that has to stay in the case. This argument and its result is directly contrary to *Young*, which held that an administrative agency that is not required by statute to be named as a party on judicial review *is not* a mandatory party.

MEIC further contends that the *Forsythe* case decided the issue of whether an adjudicatory agency is a permissible party to judicial review of its final decision. MEIC Resp. Br. at 74 (citing *Forsythe v. Great Falls Holdings*, 2008 MT 384, ¶¶ 27-34, 347 Mont. 67, 196 P.3d 1233). However, *Forsythe* is distinguishable. The Department of Revenue in *Forsythe* took the “specific action” being challenged (granting a “license transfer application”) and then affirmatively joined the judicial review action. *Forsythe*, ¶¶ 16, 34. Under these unique circumstances, this Court held the Department “must be granted the opportunity on judicial review to defend its conduct,” and was in fact required to be a party on judicial review for the district court to “properly order the Department to take specific action regarding GFH’s license transfer application” *Id.*, ¶¶ 31, 34.

BER acknowledges that the unique circumstances present in *Forsythe*—where the agency took the challenged regulatory action and affirmatively seeks to defend its conduct on judicial review—permits, indeed may require, the agency’s joinder as a party. *See* BER’s Opening Br. at 10-11. These *Forsythe* circumstances, however, are absent here. BER did not issue the disputed permit (DEQ did), and

BER's limited statutory role was to adjudicate the administrative appeal. As such, *Forsythe* is distinguishable, and *Young* controls. When an adjudicatory board's participation as a party on judicial review is not provided by statute, and the board does not seek to intervene, but instead affirmatively moves to be dismissed as a party, the district court should dismiss the board. The district court thus erred by not dismissing BER.

B. MEIC fails to address *Hilands Golf Club*'s holding that the parties to judicial review are defined at the administrative proceeding.

In its Opening Brief, BER argued that it is not a proper party on judicial review because it was not a party to the underlying administrative proceedings. As this Court has explained: "By 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." *Hilands Golf Club v. Ashmore*, 277 Mont. 324, 331, 922 P.2d 469, 474 (1996). Like "an appeal from district court to the Supreme Court," the parties need not be defined again at the judicial review stage. *Id.* The adjudicatory board is thus a "non-party" to the judicial review action. *Id.*, 277 Mont. at 332, 922 P.2d at 474.

MEIC does not directly address this argument, other than a footnote claiming *Hilands Golf Club* "did not address necessary or permissible parties." MEIC Resp. Br. at 74, n. 33. However, this Court specifically stated in *Hilands Golf Club* that the Human Rights Commission was a "non-party" to review of its

adjudicatory decision. *Hilands Golf Club*, 277 Mont. at 332, 922 P.2d at 474. A non-party is neither necessary nor permissible: it is not a party at all.

MEIC also suggests a non-party adjudicatory body may be named in a judicial review action because the Public Service Commission (PSC) was an active party on judicial review of its rate-setting decision. MEIC Resp. Br. at 75 (referencing *Whitehall Wind, LLC v. PSC*, 2010 MT 2, 355 Mont. 15, 223 P.3d 907). The *Whitehall Wind* case, however, is distinguishable from *Hilands Golf Club* and this case.

In *Whitehall Wind*, the PSC did not simply review another agency's regulatory action, as BER did in reviewing DEQ's permitting decision. Rather, the PSC took the regulatory action (rate setting) that was then challenged on judicial review by Whitehall Wind. *Whitehall Wind*, ¶ 10. The PSC, then, was a required party to judicial review because the relief requested (and granted) was to remand to the PSC to set a new rate. *Id.*, ¶ 14; *see also Forsythe*, ¶ 34 (DOR was a necessary party to the case because it took the specific action being challenged). This is also supported by the statutory scheme in effect when *Whitehall Wind* was decided, which required the PSC be named as a defendant in district court actions challenging its rate-setting decisions. *See* § 69-3-402(1) (2009). The PSC in *Whitehall Wind* met the *Forsythe* criteria and moreover was a statutorily required party. Under these circumstances, the PSC was appropriately named as a party and

was an active participant on judicial review.¹

Here, BER did not issue the challenged permit and was not designated as a party by statute. It simply adjudicated MEIC's challenge to DEQ's issuance of the permit. As such, the Board should have been dismissed from this lawsuit upon request.

II. MEIC's response ignores the question of why BER must be in the case, even as a non-participant, as well as the threat to BER's neutrality.

Under this Court's precedent, BER should not have been named as a party on judicial review and should have been dismissed upon request. BER's participation is not just contrary to statute and precedent, however, it also threatens its role as a neutral adjudicator.

First, all parties, including MEIC, and the district court, admit BER served no function on judicial review. Indeed, MEIC and the district court suggest the

¹ *Clark v. McDermott* and *Blaine County v. Stricker*, also cited by MEIC as examples of agency participation on judicial review, are likewise distinguishable. See MEIC Resp. Br. at 74-75. In *Clark*, the Human Rights Commission affirmatively did not "partake" in judicial review, other than defending against Clark's constitutional argument, and in fact the petition for judicial review was conceded on appeal, leaving only the issue of whether the separate § 1983 claim survived. *Clark v. McDermott*, 2022 MT 186, ¶¶ 11, 14, 410 Mont. 174, 518 P.3d 76. *Stricker* is even more of an outlier. There the district court "allowed discovery" of the Human Rights Commission and employees because of the "unusual" procedural irregularities alleged against the Commissioners individually and their attorney, including ex parte communication. See *Blaine Cnty. v. Stricker*, 2015 Mont. Dist. LEXIS 85 at *12-14 (2015). No such allegations are present in this case.

Board could simply “not participat[e]” and thus limit the waste of its resources. MEIC Resp. Br. at 75; Doc. 40 at 6. The law, however, does not require such useless acts. *See Tacke v. Mont. Lakeshore Props.*, 2011 MT 197, ¶ 16, 361 Mont. 390, 260 P.3d 128 (“[N]either law nor equity require[s] useless acts.”) (citing § 1-3-223, MCA).

Importantly, MEIC’s argument that BER could remain in the case but not participate acknowledges that BER has no role to play and begs the question as to why it needs to remain in the case in the first place. MEIC does not answer this question in its Response Brief or otherwise explain its purpose in naming BER as a party. MEIC also fails to respond to BER’s argument that the remedies MEIC seeks are available under Montana Administrative Procedures Act without regard to whether BER is a party on judicial review. It simply argues that it should be allowed to name BER as a party if it so chooses and that dismissing BER based on BER’s arguments “would destabilize established practice, creating great uncertainty.” MEIC Resp. Br. at 76. MEIC does not cite any legal authority for this unspecific “established practice” or explain what uncertainty would be caused if a party who it acknowledges does not have to participate in the case were allowed to be dismissed from it.

While forcing the BER to remain a party serves no practical purpose, it does risk placing the Board in the position of advocate which conflicts with its statutory

function as a neutral adjudicator. As discussed in BER's opening brief, this situation could have arisen below had the district court, upon receiving extra-record evidence from MEIC, ordered BER to modify its decision based on this evidence while BER was a party on judicial review. *See* BER's Op. Br. at 15-16. As with a district court, which is not a party to an appeal of its decision to this Court, BER should not be a party to judicial review of its administrative decision regarding DEQ's issuance of a permit and should have been dismissed upon request.

CONCLUSION

For these reasons, and those explained in BER's opening brief, this Court should reverse the district court's Order requiring BER to be a party on judicial review of its own decision and dismiss BER from this case.

DATED this 19th day of December, 2022.

/s/ J. Stuart Segrest
J. STUART SEGREST
Counsel for Respondent / Appellant
Montana Board of Environmental Review

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 1,923 words, excluding certificate of service and certificate of compliance.

Dated this 19th day of December, 2022.

/s/ J. Stuart Segrest
J. STUART SEGREST

CERTIFICATE OF SERVICE

I, J. Stuart Segrest, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 12-19-2022:

John C. Martin (Attorney)

P.O. Box 68

645 S. Cache Street

Suite 100

Jackson WY 83001

Representing: International Union of Operating Engineers, Local, Natural Resource Partners, L.P.,
Northern Cheyenne Coal Miners Association, Westmoreland Rosebud Mining LLC

Service Method: eService

Samuel R. Yemington (Attorney)

2515 Warren Avenue

Suite 450

P.O. Box 1347

Cheyenne WY 82003-1347

Representing: International Union of Operating Engineers, Local, Natural Resource Partners, L.P.,
Northern Cheyenne Coal Miners Association, Westmoreland Rosebud Mining LLC

Service Method: eService

Kyle Anne Gray (Attorney)

P.O. Box 639

Billings MT 59103

Representing: International Union of Operating Engineers, Local, Natural Resource Partners, L.P.,
Northern Cheyenne Coal Miners Association, Westmoreland Rosebud Mining LLC

Service Method: eService

Amy D. Christensen (Attorney)

The Montana Club Building

24 West 6th Avenue

Suite 501

Helena MT 59601

Representing: Montana Board of Environmental Review

Service Method: eService

Jeremiah Radford Langston (Govt Attorney)

1520 E 6th Ave.

Helena MT 59601

Representing: Environmental Quality, Montana Department of
Service Method: eService

Nicholas A. Whitaker (Attorney)
Department of Environmental Quality
Director's Office
1520 E Sixth Avenue
Helena MT 59601

Representing: Environmental Quality, Montana Department of
Service Method: eService

Shiloh Silvan Hernandez (Attorney)
313 East Main Street
PO Box 4743
Bozeman MT 59772

Representing: Montana Environmental Information Center, Sierra Club
Service Method: eService

Roger M. Sullivan (Attorney)
345 1st Avenue E
MT
Kalispell MT 59901

Representing: Montana Environmental Information Center, Sierra Club
Service Method: eService

Derf L. Johnson (Attorney)
PO Box 1184
Helena MT 59624

Representing: Montana Environmental Information Center, Sierra Club
Service Method: eService

Robert L. Sterup (Attorney)
315 North 24th Street
,

Billings MT 59101
Representing: Talen Montana, LLC
Service Method: eService

Walton Davis Morris (Attorney)
1901 Pheasant Lane
Charlottesville VA 22901

Representing: Montana Environmental Information Center, Sierra Club
Service Method: Conventional

Electronically Signed By: J. Stuart Segrest
Dated: 12-19-2022