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State of Montana

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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 23-0314

IN THE SUPREME COURT OF
THE STATE OF MONTANA No. DA 23-0314

DEBRA V. SCHUTTER and SIDNEY J. SCHUTTER,

Claimants and Appellants,

STATE OF MONTANA BOARD OF LAND
COMMISSIONERS,

Objector and Appellee.

REQUEST FOR LEAVE TO FILE AMICUS CURIAE BRIEF

APPEARANCES:

Brian C. Bramblett
Montana Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601
(406) 444-9758
bbramblett@mt.gov

Rachel K. Meredith
Office of the
Governor 1301 E.
6th Avenue PO Box
200801
Helena, MT 59620-0801
(406) 444-5503
Rachel.Meredith@mt.gov

Attorneys for Appellee State of Montana Board of Land Commissioners

KD Feedback
Toole & Feedback, PLLC
702 Main Street
P.O. Box 907
Lincoln, Montana 59609
Ph.: 406/362-4025
Email: kdfedback@gmail.com

Colleen A. Coyle
Coyle Law Firm PLLC
141 Discovery Drive, Suite 214
PO Box 1326
Bozeman, MT 59771
(406) 570-2740
colleen@coylelawmt.com

Counsel for Claimants-Appellants

Austin Knudsen
Montana Attorney General
Michael J. Noonan
Assistant Attorney General
MONTANA DEPT. OF JUSTICE
PO Box 201401 Helena, MT 59620-1401
Phone: 406-444-2026
michael.noonan@mt.gov

Emily Jones Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

*Counsel for Amicus Curiae, State of Montana,
by and through Attorney General Austin Knudsen*

Rocky Mountain Stockgrowers Association and Greenfields Irrigation District (collectively “*Amici*”) respectfully move this Court for leave to file an *amici curiae* brief in this matter pursuant to Rule 12(7) of the Montana Rules of Appellate Procedure.

I. STATEMENT OF INTEREST OF AMICI

Rocky Mountain Stockgrowers Association (“RMSA” is a non- profit, non-governmental organization based in Avon, Montana. RMSA’s 132 members are ranchers and farmers who support Montana agriculture through education, research, and community support. At least 50 of RMSA’s members incorporate state land leases in their farm and ranch operations. RMSA members also advocate for policy on issues such as property rights, water rights, water quality, use of public lands and the environment. This case involves issues that are of great importance to RMSA, its members, and its members’ farms and ranches.

Greenfields Irrigation District (GID) is an irrigation district created under Montana law in 1926 to operate and eventually take over the Sun River Project, authorized pursuant to the 1902 federal Reclamation Act and constructed under the authority of the federal Bureau of Reclamation. It is operated pursuant to MCA Section 85-7-101, et seq. By law it is a public corporation for the promotion of the public welfare, MCA Section 85-7-109,

and a governmental entity under the provisions of MCA Section 2-9-111(2). GID has 132,578 acres within its boundaries, including parcels of State land.

GID was previously involved in a case involving the State's efforts to expand the holding in the *Pettibone* case. In that case, (*DNRC v. Greenfields Irrigation District*, DA 20-0083, BDV-2016-999) the State sought a ruling that it had a right to receive water delivery service from GID free of charge, without paying the fee other landowners who receive water service within its boundaries pay. Citing *Dept. of State Lands v. Pettibone (In re Powder River Drainage Area)*, 216 Mont. 361, 371, 702 P.2d 948 (1985), the District Court of the First Judicial District, Lewis and Clark County (Hon. Michael F. McMahon) entered summary judgment in favor of the State of Montana, which GID subsequently appealed to this Court. Prior to decision, the parties reached a settlement.

II. REASONS THAT AN *AMICUS* BRIEF IS DESIRABLE IN THIS CASE.

This lawsuit arises from a groundwater well located on Schutters' private land in NWSESE of Section 28, Township 1 North, Range 3 East, Gallatin County. Claim 41H 13169 00 predates Montana's Constitution

(March 22, 1972) and subsequent Water Use Act of 1973 as well as the Court's decision in *Pettibone* (1985). The Schutter family grows potatoes and other crops on their private land as well as on a 160 acre state land lease located in the SW/4 of Section 28, Township 1 North, Range 3 East, Gallatin County. Water from the subject well, located on private land and developed by the Schutter family, is used on Schutters' land as well as the State lease noted above.

The State argues it has co-ownership of water right 41H 13169 00 as a matter of law because Claimants have used a portion of the water right to irrigate the crops they grow on the State land lease (POU No. 2) during the term of their lease. Record doc. 20, p. 5. The State's legal theory is drawn from, and amici will argue improperly extends, this Court's *Pettibone* decision. *Id.*; 216 Mont. 361, 368:

Pettibone applies. POU 2 is located on State land and as the source is a well on private property MSBLC/TLMD asks to be added as co-owner rather than having an implied claim generated. The POU was acquired for the Territory of Montana on 3/18/1889 and the GLO survey was accepted 11/18/1868. The priority date of this claim is 8/10/1960.

Schutters objected to the remark adding the State as owner of their water right. The State's motion for summary judgment followed.

Amici believe the State of Montana is attempting to expand the holding in *Pettibone* beyond its precedential foundation and in contravention of other legal bars. If Appellants do not prevail in their challenge to the

Montana Water Court's application of *Pettibone*, it would affect not only the parties to this case, but a large swath of Montana's agricultural community and Montana's water users including *Amici* and their members.

Amici, some of whose members irrigate and lease school trust lands for agricultural production, respectfully submit that they can provide a unique perspective to the Court about how the District Court's application of *Pettibone* will affect Montana farmers and ranchers, their water rights, their investments in state school trust land, and, importantly, the trust land itself. For *amici*, any expansion of the application of *Pettibone* beyond its facts presents a serious issue of statewide significance to Montana's farmers and ranchers, irrigators, and irrigation districts.

III. *AMICI* WILL FILE A BRIEF IN SUPPORT OF THE SCHUTTER FAMILY.

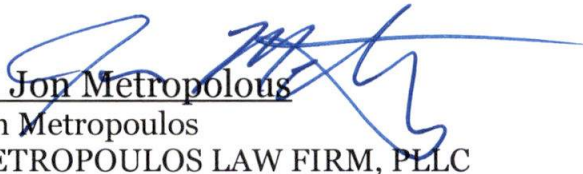
Accordingly, the undersigned *amici* respectfully request that the Court grant this Motion and permit them to appear in support of the position of Appellants. *Amici* propose to file their brief on or before the due date of appellants' reply brief, which amici understand under the rules would be November 29, if the Objector/Appellee State of Montana, Board of Land Commissioners' files its response brief on its current due date, which is November 15.

IV. PARTIES' OBJECTIONS

Counsel has contacted counsel for the parties in this case. Claimant/Appellants and Amicus State of Montana, Attorney General, do not oppose *amici's* Motion. Objector/Appellee State of Montana, Board of Land Commissioners' counsel stated it does oppose this motion.

DATED this 13th day of November, 2023

Respectfully submitted,


/s/ Jon Metropoulos
Jon Metropoulos
METROPOULOS LAW FIRM, PLLC
1 South Montana Ave. Suite L-3
Helena, Montana 59601
Ph.: 406-461-4296
Email: jon@metropouloslaw.com
*Attorneys for Amici Rocky Mountain
Stockgrowers Association and Greenfields
Irrigation District*

CERTIFICATE OF SERVICE

I, Jon Metropolous, hereby certify that I have served true and accurate copies of the foregoing Motion for Leave to File Amicus to the following on 11-13-2023:

Colleen A. Coyle (Attorney)

PO Box 1326

Bozeman MT 59771

Representing: Debra V. Schutter, Sidney J. Schutter

Service Method: Email Delivery

KD Feedback (Attorney)

PO Box 907

702 Main Street

Lincoln MT 59639

Representing: Debra V. Schutter, Sidney J. Schutter

Service Method: Email Delivery

Terisa Marie Oomens (Govt Attorney)

1712 9th Avenue

HELENA MT 59601-4522

Representing: Montana Board of Land Commissioners

Service Method: Email Delivery

Rachel K Meredith (Attorney)

44 W. 6th Avenue

Suite 200

Helena MT 59601


Representing: Montana Board of Land Commissioners

Service Method: Email Delivery

Brian C. Bramblett (Attorney)
1539 11th Ave
P.O. Box 201601
Helena MT 59620
Representing: Montana Board of Land Commissioners
Service Method: E-mail Delivery

Austin Knudsen (Attorney)
Montana Attorney General
Michael J. Noonan (Attorney)
Assistant Attorney General
MONTANA DEPT. OF JUSTICE
PO Box 201401 Helena, MT 59620-1401
Phone: 406-444-2026
michael.noonan@mt.gov
Service Method: E-mail Delivery

Emily Jones Special Assistant Attorney General (Attorney)
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com
Service Method: E-Mail Delivery


/s/ Jon Metropoulos