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MONTANA TWENTY-SECOND JUDICIAL DISTRICT, STILLWATER COUNTY

BEARTOOTH FRONT COALITION, LAZY Y DIAMOND BAR LP, LANA and CHARLES J. SANGMEISTER, WILLIAM A. and CAROLYN F. HAND, and MARGARET BARRON and DOXEY RAY HATCH, Plaintiffs, v. BOARD OF COUNTY COMMISSIONERS, STILLWATER COUNTY, and HEIDI STADEL, in her capacity as Clerk and Recorder of Stillwater County, Defendants.	Cause No.: DV-18-12 **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

COME NOW the Defendants, Board of County Commissioners, Stillwater County, and Heidi Stadel, in her capacity as Clerk and Recorder of Stillwater County (hereinafter "Defendants"), by and through their attorneys, Bethany A. Gross of the Budd-Falen Law Offices, LLC, and Nancy L. Rohde, Stillwater County Attorney and hereby reply in Support of Defendants' Motion to Dismiss as follows:

As set forth in Defendants' Motion to Dismiss Plaintiffs' Verified Complaint and as set forth below, Plaintiffs Beartooth Front Coalition, et al. (hereinafter "Plaintiffs") cannot obtain the relief they seek because the legal authority to regulate oil and gas activity has been delegated to and preempted by the authority of the Montana Board of Oil and Gas Conservation (hereinafter "BOGC"), therefore Defendants are prevented from accepting or considering Plaintiffs' petition to create a zoning district whose sole purpose is to regulate oil and gas activity (hereinafter "Petition").

STANDARD OF REVIEW

In considering a motion to dismiss for failure to state a claim for which relief can be granted, the only relevant documents are the complaint and any documents the complaint incorporates by reference. See Cowan v. Cowan, 2004 MT 97, ¶ 11, 321 Mont. 13, 17, 89 P.3d 6, 8 (emphasis added). Plaintiffs argue in their Response to Defendants' Motion to Dismiss ("Response") that "any documents the complaint incorporates by reference" can only mean documents that are attached to the complaint. See Plaintiffs' Response at 6. While the Cowan and Cut Bank cases involved the court's consideration of documents attached to the complaint, neither of those cases state that "incorporates by reference" means "attachments to the complaint." See Cowan, 2004 MT 97, ¶¶ 11-13, 321 Mont. at 17, 89 P.3d at 8-9; see also City of Cut Bank v. Tom Patrick Const., Inc., 1998 MT 219, ¶ 20, 290 Mont. 470, 477, 963 P.2d 1283, 1287. No cases define "incorporates by reference," however; "reference" is defined as "mention or citation of one

document or source in another document or source." See Black's Law Dictionary (4th pocket ed. 2011). Plaintiffs referred to the Petition numerous times in their Complaint. See Plaintiffs' Complaint at ¶¶ 1-5, 11, 13, 15-17, 20, 22-24, 26, 30, 32, 34, 39. Clearly, the Petition is relevant to Plaintiffs' Complaint because there would be no cause of action without it. The fact that Plaintiffs decided not to attach the Petition to their Complaint in support of their factual assertions does not mean that the Court should disregard the Petition.

Even if the Petition could be considered a matter outside of the pleadings, Plaintiffs' remedy would be for the Court to convert Defendants' Motion to Dismiss into a Rule 56 motion for summary judgment. Rule 12(d) of the Montana Rules of Civil Procedure provides that the Court may treat a motion filed under Rule 12(b)(6) as a Rule 56 motion for summary judgment when matters outside the pleadings are presented, and then the Court must allow all parties a reasonable opportunity to present all the material that is pertinent to the motion. M.R.C.P. 12(d). Here, the only material that is pertinent to the motion is the Petition.

Plaintiffs mischaracterize Defendants' statement that "there is no need for Plaintiffs to have further time to prepare for or consider the issues the petition presents" as an exception to the general Rule 12(b)(6) standard. See Plaintiffs' Response at 6. The Montana Supreme Court has stated that when the Court is converting a motion to dismiss into a motion for summary judgment, it must provide notice to the parties of its intention to do so. The

rationale for this requirement is to "allow the parties a reasonable opportunity to present all material made pertinent to the motion and avoid surprise." See Hoveland v. Petaja, 252 Mont. 268, 271, 828 P.2d 392, 394 (1992) (emphasis added). This is not an exception to the general Rule 12(b)(6) standard, rather Defendants were referencing the policy behind Rule 12(d).

As set forth in Defendants' Motion to Dismiss, Plaintiffs are not surprised by the Petition, or the fact that it raises an issue of preemption by the BOGC, since Plaintiffs included an opinion letter regarding preemption with the Petition that they submitted in 2015 and again in 2017. See Defendants' Motion to Dismiss at 2-3. The Court should not have to resort to Rule 12(d) because the only entity that did not have the ability to read the actual text of the Petition, which was referenced several times in the Complaint, was the Court due to Plaintiffs' failure to attach the Petition in support of their factual allegations, and as a citation for when Plaintiffs quoted the Petition verbatim. See Complaint at ¶ 13; and Plaintiffs' Response at 3 (quoting p. 7 of the petition). Regardless of whether the Court considers Defendants Motion to Dismiss as a Rule 12(b)(6) motion or a Rule 56 motion, for the Court to determine whether or not Defendants have the authority to consider Plaintiffs' Petition, the Court will need to examine the Petition itself.

ARGUMENT

Plaintiffs' Complaint should be dismissed as a matter of law because it requests the Court to mandate action that the Stillwater County Commissioners cannot legally take, thereby rendering determination of the

meaning of "affected real property owners" under M.C.A. § 76-2-101(1) moot. Defendants cannot consider a petition that proposes to establish a zoning district when its stated sole purpose is to regulate oil and gas activity in a manner that is preempted. This case may have been different if Plaintiffs had sought to establish the proposed zoning district regarding any other land use, but instead Plaintiffs chose to confine the purpose of the zoning district to regulation of oil and gas activities. See Defendants' Motion to Dismiss, Exhibit A at 4.

I. The Court Should Not Mandate the County Commissioners to Consider Plaintiffs' Petition Because the Petition is Invalid.

If the Petition is invalid because the County lacks the authority to do what the Petition proposes, Plaintiffs are not injured by the County's denial of the Petition, and Plaintiffs' standing to request declaratory or injunctive relief that mineral interest owners not be included within the meaning of "affected real property owners" under M.C.A. § 76-2-101(1) is eliminated. No practical purpose is served by requiring the County Commissioners to consider the Petition, approve the proposed zoning district, and then establish either no rules because the County lacks the authority to regulate oil and gas activity, or establish rules that ultimately will not affect the sole objectives the Petition is based on. Therefore, the issue of proposed rules or regulations is ripe before the Court and Defendants are not asking for an advisory opinion.

Plaintiffs' Petition, including the material listed in the Table of Contents (see Defendants' Motion to Dismiss, Exhibit A at 2) was submitted to Defendants as one document initially in 2015, and along with some corrected

signature sheets and affidavits, was resubmitted again in the same form in 2017. See Complaint at ¶16. In both "submissions" Plaintiffs included what they termed a "Development pattern and proposed rules for oil and gas activities." See Defendants' Motion to Dismiss, Exhibit A at 10 (emphasis added). Plaintiffs represented to the people that signed their Petition that the "proposed rules" would be the rules that would govern the proposed zoning district. See Defendants' Motion to Dismiss, Exhibit A at 10-11. It would be disingenuous for Plaintiffs to represent to the landowners certain enumerated "proposed rules," but then establish the zoning district with completely different rules than what Plaintiffs had proposed, and the landowners had signed their agreement with. By submitting to Defendants "proposed rules," Plaintiffs made it very clear what rules they would demand from the County Commissioners in establishing the proposed zoning district.

A. Preemption by the Department of the Interior

Even if Plaintiffs have obtained the required approval of 60% of the "affected real property owners" in the proposed district under M.C.A. § 76-2-101(1), Plaintiffs fail to explain how a zoning district whose sole purpose is to regulate oil and gas activity, and no other land use, would not be preempted by the authority of the Department of the Interior. The Petition for the proposed district did not exclude minerals owned by the federal government." See Exhibit A, p. 8. Counties lack jurisdiction to administer or regulate federally-owned minerals, as such jurisdiction is reserved to the Department of the Interior. See 43 C.F.R. § 3000.8 (the lease or sale, and administration

and management of the use of federally-owned mineral interests shall be accomplished under the regulations of §§ 3000 and 3100); see also 43 C.F.R. §§ 3100-3, et seq. (onshore oil and gas leasing regulations). Defendants could not consider a petition that would result in regulating federally-owned minerals regardless of whether the appropriate number of signatures was reached. This is not a hypothetical state of facts, and neither the Petition nor Plaintiffs' Response explain how the Petition would not be invalid on this basis alone.

B. Preemption by the BOGC

Additionally, even if Plaintiffs' Petition would seek to establish rules for their proposed zoning district in such a way as to avoid conflict with the BOGC's delegated authority to regulate oil and gas activity, Stillwater County still has no authority to regulate oil and gas activities. Plaintiffs fail to explain or provide any example of a regulation that could be established for the zoning district as they have proposed that would not result in a conflict with the authority of the BOGC.

Plaintiffs argue that the BOGC explicitly recognizes that local governments have concurrent jurisdiction over oil and gas activities because the agency's Form No. 22 "Permit to Drill" requires applicants to identify whether there are any local permits or authorizations required for the regulated activity. See Plaintiffs' Response at 14. The BOGC's Form No. 22 is not a statute or regulation, and as such lacks any delegative authority. Nevertheless, Plaintiffs mischaracterize the information that the Form No. 22

asks for. To provide clarity, a copy of the BOGC's Form No. 22 is attached hereto as Exhibit 1. On page 2 of the Form No. 22, question number 6 states "[d]oes construction of the access road or location, or some other aspect of the drilling operation require additional federal, state, or local permits or authorizations?" See Exhibit 1 at 2. Question number 6 then lists several different kinds of permits or authorizations that would pertain to aspects related to oil and gas operations; however, it does not ask for concurrent permits to drill. Id. Rather, question number 6 asks for permits issued through county conservation districts, the Montana Department of Environmental Quality, the Montana Department of Natural Resources and Conservation, and federal agencies. Id. With regards to other local permits, question number 6 is looking for other local permits that regulate technical aspects related to oil and gas operations rather than the oil and gas operations themselves; for instance counties issue construction permits, which may relate to an aspect of an oil and gas operation, but is not a permit to drill.

Plaintiffs also argue that several other Montana counties have adopted zoning districts which include regulation of oil and gas development, and that Gallatin County has adopted four zoning districts that regulate to some degree oil and gas activity. Id.; see also id. at 9. However, as Plaintiffs acknowledged in their Response, a challenge to those regulations has remained undetermined (see id. at 14-15), and it remains to be seen whether those regulations are valid. Moreover, not all counties have the same powers

or are organized in the same way that Stillwater County is, and Plaintiffs have not shown any established zoning district whose sole purpose is to regulate oil and gas activity as Plaintiffs propose to have the County Commissioners do here. Therefore, the zoning district regulations that Plaintiffs reference from other counties are irrelevant and should be disregarded. In addition, Plaintiffs are improperly introducing matters outside of the pleadings by asking the Court to compare regulations from zoning districts outside of Stillwater County. Plaintiffs never referenced such regulations in the Complaint, and accordingly such regulations should be disregarded.

Further, Plaintiffs' reference to a Part 1 zoning district in Stillwater County established on November 11, 1979 (see Complaint at ¶ 12; see also Plaintiffs' Response at 3) provides no support to the validity of Plaintiffs' Petition. As Plaintiffs have acknowledged, the 1979 zoning district was established to regulate surface uses and impacts associated with the Stillwater Platinum Mine. see id. (emphasis added). The Montana Oil and Gas Conservation Act, M.C.A. §§ 82-11-101, et seq., only applies to oil and gas activities and has no applicability to mining. Mining is governed generally by the Environmental Protection Agency (the BOGC has no authority); by Montana laws M.C.A. §§ 82-2-101, et seq. and 82-4-101, et seq.; and by the Montana Board of Environmental Review, the Montana Department of Environmental Quality, and the Montana Bureau of Mines and Geology. The Montana statutes governing mining do not establish or delegate regulatory authority over mines to any state agency. The Montana Bureau of Mines and

Geology is only statutorily charged with administering the Sand and Gravel Deposit Program and investigating sand and gravel deposits in areas of the state where conflicts between development and sand and gravel operations are high. See M.C.A. § 82-2-701(1). Results of such investigations are reported to the relevant counties, local governments, and the Montana Department of Environmental Quality. See M.C.A. § 82-2-701(4). The Environmental Protection Agency, Montana Board of Environmental Review and Montana Department of Environmental Quality all have statutory authority to oversee some siting and reclamation activities. See Surface Mining Control and Reclamation Act of 1977; see also M.C.A. § 82-4-101, et seq. However, neither of those agencies are statutorily charged with complete oversight of mines and mining activity as the State has done with oil and gas wells and activity. Neither express, implied or conflict preemption would apply to the State's interest in regulating mining activity, and counties have routinely regulated mining activity to prevent nuisance impacts to adjacent landowners.

On the other hand, the 1979 zoning district differs substantially from the zoning district Plaintiffs propose because the 1979 zoning district allows oil and gas activity to be conducted within the zone without requiring issuance of a conditional use permit. Since Plaintiffs refer to the 1979 zoning district in their Complaint, it may also be considered to be "incorporated by reference" into the Complaint. For the Court's convenience, the operational document, entitled "West Fork Stillwater Planning and Zoning Ordinance,"

establishing the 1979 zoning district is attached hereto as Exhibit 2. The 1979 zoning district splits the district into a Zone A and a Zone B. The listed uses under Zone A include agriculture, recreation, and "oil and gas production." See Exhibit 2 at 6. The listed uses under Zone B include all those listed under Zone A plus recreational home sites. Id. The 1979 zoning district states that the intent of issuing conditional use permits and variance permits is to "provide for specific uses, other than those specifically permitted in each zone . . . " Id. Since oil and gas production is listed as a permitted use in both Zones A and B, no conditional use permit or variance permit is necessary to conduct oil and gas activities within the 1979 zoning district.

Plaintiffs also argue that other states have upheld local regulation of oil and gas development. See Plaintiffs' Response at 15-16. Discussion of whether other states allow local regulation of oil and gas activity is especially irrelevant due to the precise nature of preemption within Montana. Preemption depends entirely on the intentions of the legislature, so what may be preempted in one state may not be preempted in another. Plaintiffs make no comparisons between Stillwater County and the counties at issue in the Colorado, Pennsylvania and New York cases that Plaintiffs cite. Id. Neither do Plaintiffs provide analysis as to the extent either state has delegated authority to an oil and gas board like the one established in Montana. Id. Therefore, Plaintiffs' discussion of other states should be disregarded.

Nevertheless, there is differing case law in which it was held that local laws or regulations were preempted by the state's interest in regulating oil

and gas activity. For instance, the Supreme Court of Pennsylvania held that a township ordinance that constituted a comprehensive regulatory scheme relative to oil and gas development (including permitting procedures for well drilling, bonding requirements, regulating well heads and capping procedures, site restoration, etc.) was preempted by the state's oil and gas act, thereby rendering the ordinance an impermissible form of regulation. See Range Res. Appalachia, LLC v. Salem Twp., 600 Pa. 231, 241-42, 964 A.2d 869, 875-76 (2009). In Colorado, courts have established an "operational conflicts" test, whereby the local imposition of technical conditions on well drilling, where no such conditions are imposed under state regulations, as well as the imposition of safety regulations or land restoration requirements contrary to those required by state law gives rise to an "operational conflict," and requires that the local regulations yield to the state interest. See Town of Frederick v. N. Am. Res. Co., 60 P.3d 758, 765 (Colo. App. 2002) (citing Bd. of Cty. Comm'rs, La Plata Cty. v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1060 (Colo. 1992)). In the Town of Frederick case, the court held that based on the operational conflicts test, a town's setback requirements, noise abatement requirements, and visual impact provisions pertaining to oil and gas activity were preempted by the state's interest and were thus invalid. Id.

As Plaintiffs acknowledge in their response, Stillwater County is a general power government and its power is limited to what is expressly or impliedly delegated to it by the State. See Plaintiffs' Response at 12; see also

D & F Sanitation Serv. v. City of Billings, 219 Mont. 437, 444, 713 P.2d 977, 981 (1986); Tipco Corp. v. City of Billings, 197 Mont. 339. 344, 642 P.2d 1074, 1077 (1982). It is important to note that this statement refers to express delegations of power, therefore express prohibitions[1] of power in this context are irrelevant, contrary to what Plaintiffs suggest. See Plaintiffs' Response at 13-14. Accordingly, that oil and gas activity is not included in the list of activities prohibited from zoning under the Part 1 zoning scheme does not change the fact that there must be an express delegation of power to regulate oil and gas activity in order for Stillwater County to so regulate as a general power government. The State could delegate to a general power government the power to regulate matters of local concern, as the State of Montana has done in delegating to counties such as Stillwater County the power to regulate land use activities. See City of Missoula v. Armitage, 2014 MT 274, ¶ 15, 376 Mont. 448, 451, 335 P.3d 736, 739 (citing City of Billings v. Herold, 130 Mont. 138, 142, 296 P.2d 263, 265 (1956)); see also M.C.A. ¶¶ 76-2-101, et seq.

However, it is well-settled that the State may take away or revoke a part or all the authority it may have delegated at any time. See Herold, 130 Mont. at 142, 296 P.2d at 265. The State has done so here in delegating the authority to regulate oil and gas activity to the BOGC. As Plaintiffs have

[1] Analysis of powers expressly prohibited to local governments relates to the kinds of powers that self-government local governments are authorized to exercise and does not apply to general power governments. There is no need to expressly prohibit powers to general power governments, since they can only exercise the powers expressly granted to them.

noted in their Response, class II injection wells have been expressly preempted by M.C.A. § 82-11-111, therefore the County is expressly prohibited from regulating in that area. See Plaintiffs' Response at 13. As set forth in Defendants' Motion to Dismiss, implied preemption and conflict preemption (i.e. operational conflicts) applies as well. See Defendants' Motion to Dismiss at 10-17. The fact that class II injection wells have been expressly preempted does not mean that a county's authority to regulate other oil and gas activity cannot be impliedly or operationally preempted as well. The Montana Oil and Gas Conservation Act is not ambiguous, and only the BOGC has the express authority under M.C.A. § 82-11-124(1) to regulate the drilling, spacing, producing and plugging of oil and gas wells. This leaves no room for Stillwater County to adopt a zoning district whose sole purpose is to regulate oil and gas activity and establish rules or regulations as Plaintiffs have proposed, thereby rendering Plaintiffs' Petition invalid. The County Commissioners cannot consider a petition if it is invalid.

This point is made even clearer by looking at the laws pertaining to self-government local governments, who may exercise any power not expressly prohibited by the constitution, or any other law or charter (see M.C.A. § 7-1-101), in contrast to general power governments like Stillwater County. One of the few limitations on self-government local governments is that such local governments are prohibited from exercising any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control. See M.C.A. ¶ 7-

1-113(1). An area is affirmatively subjected to state control if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency. See M.C.A. ¶ 7-1-113(3). As set forth in Defendants' Motion to Dismiss, since the Montana Oil and Gas Conservation Act directs the BOGC to establish administrative rules governing the matter of oil and gas, and the enforcement of standards or requirements established by the Montana Oil and Gas Conservation Act is vested in the BOGC, then the regulation of oil and gas activity is affirmatively subjected to state control. Therefore, even self-government local governments lack the authority to regulate oil and gas activity. If self-government local governments (whose powers are broader than general power governments) are prohibited from regulating oil and gas activity, then general power governments (whose powers are only those expressly authorized or those implied from such express powers) certainly would lack such power.

Clearly, the Legislature intended that BOGC would have exclusive jurisdiction of oil and gas activities within the State of Montana. The comprehensiveness of the state laws and BOGC regulations leaves no room for doubt that the Legislature intended to preclude enforcement of local laws on the siting of oil and gas wells. Further, the proposed regulations contained within the Petition constitute a regulatory apparatus parallel to and duplicative of the one established by the Montana Oil and Gas Conservation Act and implemented by BOGC. Local regulation cannot

prohibit what state enactments allow. If the Legislature intended to grant counties and municipalities the power to regulate oil and gas activities, it could have and should have plainly said so.

The BOGC has been given limitless authority to hear, consider, address or deny virtually every single issue of concern raised by Plaintiffs' Petition, and Plaintiffs have failed to identify any basis for which a zoning district whose only purpose is to regulate oil and gas activity may be established by the County Commissioners. Even to the extent the proposed rules or regulations pertain to items that are not specifically addressed in the Montana Oil and Gas Conservation Act, they plainly constitute an impermissible form of regulation, thereby rendering Plaintiffs Petition invalid as a matter of law. Stillwater County cannot consider a Petition that is invalid as a matter of law, or act as the Plaintiffs' propose. Therefore, Plaintiffs' Complaint should be dismissed.

CONCLUSION

Defendants respectfully request that Plaintiffs' Complaint be dismissed in its entirety, with prejudice, pursuant to Rule 12(b)(6) of the Montana Rules of Civil Procedure, for failing to state a claim for which relief can be granted.

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RESPECTFULLY SUBMITTED this 24th day of May, 2018.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I caused a true and correct copy of the foregoing to be deposited in the United States Mail, postage prepaid, and delivered via electronic mail on this 24th day of May, 2018 to the following:

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EXHIBIT 1

Form No. 22

EXHIBIT 2

1979 Zoning District