IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Case No. DA 09-0131

On Appeal from the Montana Twenty-Second Judicial District Court, Big Horn County, the Honorable W. Blair Jones Presiding

NORTHERN CHEYENNE TRIBE, a federally recognized Indian tribe;
Plaintiff/Appellant,

and

TONGUE RIVER WATER USERS' ASSOCIATION and NORTHERN PLAINS RESOURCE COUNCIL, INC.,

Intervernor-Plaintiffs/Appellants

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and RICHARD OPPER, in his official capacity as Director of the Montana Department of Environmental Quality,

Defendants/Appellees

and

FIDELITY EXPLORATION & PRODUCTION COMPANY,

Intervenor-Defendant/Appellee.

INTERVENOR-DEFENDANT APPELLEE FIDELITY'S ANSWER BRIEF

Jon Metropoulos
Dana L. Hupp
Gough, Shanahan, Johnson & Waterman, PLLP
33 S. Last Chance Gulch
Helena, MT 59601
Tel: (406) 442-8560
Fax: (406) 442-8783
jonmetro@gsjw.com
dlh@gsjw.com
Attorneys for Fidelity Exploration & Production Company

Claudia Massman
Special Assistant Attorney General
Lee Metcalf Building
1520 E. Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
Tel: (406) 444-2630
Fax: (406) 444-2606
cmassman@mt.gov
Attorney for Montana Department of Environmental Quality

Jack Tuholske
Tuholske Law Office, P.C.
P.O. Box 7458
Missoula, MT 59807
Tel: (406) 721-6986
Fax: (406) 728-8445
tuholske@centric.net
Attorney for Northern Plains Resource Council, Inc.

James L. Vogel
VOGEL & WALD, PLLC
P.O. Box 525
Hardin, MT 59034
Tel: (406) 665-3900
Fax: (406) 665-3901
jimvlnt@email.com
Attorneys for Northern Cheyenne Tribe

Brenda Lindlief Hall
David K. Wilson
Reynolds, Motl & Sherwood, PLLP
401 North Last Chance Gulch
Helena, MT 59601
Tel: (406) 442-3261
Fax: (406) 443-7294
blh@rmslaw.net
kwilson@rsmlaw.net
Attorneys for Tongue River Water Users' Association

Brian C. Gruber
ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 4th Avenue #1230
Seattle, WA 98121
Tel: (206) 448-1230
Fax: (206) 448-0962
jarum@zcvbs.com
bgruber@zvbs.com
Attorneys for Northern Cheyenne Tribe

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES, AND REGULATIONS

United States Code

Code of Federal Regulations

Montana Code Annotated

Administrative Rules of Montana

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

1. Whether the Montana Department of Environmental Quality (DEQ) violated the federal Clean Water Act (CWA) when it issued two Montana Pollutant Elimination Discharge Permits (MPDES) to Fidelity in compliance with its Environmental Protection Agency (EPA)-approved water quality program, which does not require or allow, in the absence of rulemaking, the inclusion of technology-based effluent limitations (TBELs) in MPDES permits when the EPA has not promulgated industry-wide effluent limitation guidelines (ELGs).

2. Whether the DEQ's application of the nondegradation policy adopted in the 2003 rulemaking applicable here, which EPA approved, violated state and federal requirements.

3. Whether the Environmental Assessment's (EA) "reasonable range of alternatives" and the "no action alternative" complied with the Montana Environmental Policy Act (MEPA) since no factual basis existed that would allow DEQ to deny the permits.

STATEMENT OF THE CASE

Fidelity adopts the statement of the case of DEQ, which noted that Appellant Northern Cheyenne Tribe (Tribe) had asserted a constitutional claim in its Complaint. DEQ's Ans. Br., p. 2 (Aug. 24, 2009). The Tribe did not support the

claim with any argument of substance before this Court and the argument is waived. *See In re P.D.L.*, 2004 MT 346, ¶ 14, 324 Mont. 327, 102 P.3d 1225 (failure to raise constitutional claim in opening brief on appeal constitutes waiver of such claim).

STATEMENT OF THE FACTS

I. CBM DEVELOPMENT IN MONTANA

Numerous federal and state agencies oversee the exploration and development of coal bed natural gas, or coal bed methane (CBM) resources in Montana. These agencies implement a system of interlocking state and federal regulatory authority to regulate CBM development, from planning, to production, to reclamation. The Montana Board of Oil and Gas Conservation (BOGC) is responsible for regulating the development of state and fee oil and gas resources, including CBM. Mont. Code Ann. § 82-11-103 (2009). Similarly, the Bureau of Land Management (BLM) regulates the development of oil and gas resources with respect to federal surface and minerals. 43 U.S.C. §§ 1701-1782 (2009). The DNRC permits the beneficial uses of the produced ground water under the Montana Water Use Act. *See* Mont. Code Ann. § 85-2-302(1).

The DEQ regulates both the discharge of developed water into state waters under the Montana Water Quality Act (WQA), Mont. Code Ann. §§ 75-5-101 to -

1126, and air quality emissions related to CBM development pursuant to the Montana Clean Air Act (CAA), Mont. Code Ann. §§ 75-2-101 to -429. As authorized by Congress in § 402(b) of the CWA, 33 U.S.C. § 1342(b), the EPA delegated primacy to DEQ to act as the primary regulator, using the authority of the State of Montana, of water quality matters.

Fidelity began developing CBM resources in Montana in 1997. Aff. of G. Bruce Williams (Williams Aff.), ¶ 5 (June 5, 2006). Fidelity is the only producer of significant quantities of CBM in Montana. Its leases are situated in Big Horn County, primarily in the Tongue River Valley of the Powder River Basin. Fidelity has invested millions of dollars in infrastructure and other improvements necessary to develop its leases. *Id.* at ¶ 31. Fidelity and its royalty owners have paid approximately 10% of gross revenues from private wells to the state of Montana as production tax. *Id.* at ¶ 39. Through 2006, Fidelity has paid 9.26% of its net revenues from federal and state wells to the state of Montana as production tax. *Id.* Fidelity has also paid 12.5% of gross revenues from federal wells to the U.S. as royalty, half of which flows back to the general fund of the state of Montana. *Id.* Additionally, Fidelity has paid 12.5% of gross revenues from state wells to the state of Montana as royalty for the benefit of the school trust. *Id.*

Fidelity's interests in oil and gas leases from which it produces CBM are interests in real property, the protection and development of which is a fundamental right under Article II, § 3 of the Montana Constitution. *See Bretz v. Ayers* (1988), 232 Mont. 132, 137, 756 P.2d 1115, 1118; and *City of Bozeman on Behalf of Dept. of Transp. v. Vaniman* (1994), 264 Mont. 76, 79, 869 P.2d 790, 792. As applied to Fidelity's Montana operations, courts have recognized that "CBM is an efficient and clean-burning fossil fuel that produces fewer emissions than other fossil fuels" and that "the public interest favors both developing CBM and protecting the environment." *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 842 (9th Cir. 2007), quoting *N. Cheyenne v. Norton,* Cause No. CV 03-69-BLG-RWA and *NPRC v. BLM*, CV-03-78-BLG-RWA (consolidated) (D. Mont. April 5, 2005).

In 1999 and 2000, the BLM, the BOGC, and the DEQ announced their decisions to prepare, as co-lead agencies, a programmatic environmental impact statement (EIS) analyzing CBM development in Montana. Williams Aff., ¶ 6. The state agencies, the BOGC and the DEQ, signed separate Records of Decision (ROD), approving the Final Statewide Oil and Gas Environmental Impact Statement (FEIS) on March 26, 2003, and August 7, 2003, respectively. *Id.* at ¶ 7. In their RODs, each of these agencies formally adopted the environmental analysis

and decision-making process set forth in the FEIS and the agencies' respective RODs. *Id.*

Numerous lawsuits were filed in state and federal courts challenging the adequacy of the BLM, BOGC, and DEQ's RODs, in particular compliance with MEPA and NEPA. To date, no court has found the FEIS inadequate in any respect under MEPA. As to NEPA compliance, on February 25, 2005, Federal Magistrate Judge Anderson held the FEIS generally sufficient save for one respect: it did not include analysis of a phased development alternative. *N. Cheyenne Tribe*, 503 F.3d at 841. The court consequently issued an injunction allowing the development of 250 CBM wells each year in Montana on federal leases, with specified conditions, while BLM completed a supplemental EIS analyzing the phased development approach. *See* Order, *N. Cheyenne v. Norton,* Cause No. CV 03-69-BLG-RWA and *NPRC v. BLM*, CV-03-78-BLG-RWA (consolidated) (D. Mont. Apr. 5, 2005) (Ex. A to Hupp Aff.)[1] The BLM ultimately prepared a supplemental EIS (SEIS) addressing the District Court's concerns and signed the ROD adopting the final SEIS on December 30, 2008. The SEIS has not been legally challenged.

[1] The Ninth Circuit affirmed the District Court's decision both as to the FEIS and the injunction that allowed wells to be developed. *N. Cheyenne Tribe*, 503 F.3d at 846.

II. GROUNDWATER PRODUCED IN ASSOCIATION WITH CBM OPERATIONS

CBM is natural gas trapped in coal seams and held there by the pressure of groundwater contained in the coal. Williams Aff., ¶ 8. To produce CBM, an operator pumps a limited but significant amount of the groundwater around a well to the surface, decreasing the pressure and allowing the gas to be released. *Id.* CBM operators utilize numerous tools or methods to manage this unaltered groundwater. *Id.* at ¶ 17.

Fidelity's primary water management tools are discharging the groundwater pursuant to its two MPDES Permits being challenged here, one allowing direct discharge up to specified amounts and subject to specific effluent limitations and one allowing discharge up to specified amounts after treatment. DEQ's Br. Support Mot. S.J., Ex. 8-11 (Oct. 24, 2006). Other methods include discharging water into stock tanks or impoundments for wildlife and stock watering, supplying it for domestic and industrial uses, including dust suppression, and using the water for managed irrigation. *See generally id.*

The quality of the groundwater produced in association with CBM varies depending on the location of the development. In the Powder River Basin, while the water, unaltered, is useful for many domestic, industrial, and agricultural purposes, it contains two particular water quality parameters of concern if used on

some soils for irrigation: electrical conductivity (EC) and sodium adsorption ratio (SAR). For that reason, the BER promulgated numeric water quality based effluent limitations (WQBELs) in its 2003 rulemaking. The same concern drove the adoption by the BER of modifications to the 2003 rules in 2006. *See generally Pennaco v. BER*, 2008 MT 425, 347 Mont. 415, 199 P.3d 191.

The Tribe and Water Users inaccurately characterize water produced in association with CBM operations as "wastewater." *See, e.g.*, Tribe's Br., p. 4 (June 16, 2009). While Fidelity recognizes such produced water is a regulated "pollutant" under both state and federal water quality laws, it is not a waste product in the sense that it is useless. Unaltered ground water produced in association with CBM in Montana is no different from the ground water used by many farms and ranches in the area for domestic and agricultural. Fidelity's policy has been and continues to be to try to make it available for beneficial uses. In fact, in *Diamond Cross v. DEQ*, Mont. 22nd Jud. Dist. Ct., Civil Cause No. DV-05-70, the Intervenors-Appellants here, NPRC and TRWUA, intervened against the DEQ, asserting that the DEQ had permitted a CBM operator to "waste" the water and claiming that it should be put to a beneficial use. There, these appellants characterized CBM produced water as a precious and valuable resource to be carefully preserved and managed for beneficial uses.

III. FEASIBILITY OF TECHNOLOGY

The Tribe baldly asserts that technology is available to treat CBM produced water. Tribe's Br., p. 6. The BER rejected this assertion in its 2006 rulemaking. To date treatment technologies have not proven feasible, technologically and economically. The BER considered then unanimously rejected adoption of TBELs "because there was insufficient information to establish the technical or economical feasibility of them." BER Minutes, p. 7 (Mar. 23, 2006) (Ex. 20 to Decl. Brian Gruber re Ex. Support S.J. (Gruber Decl.) (Aug. 28, 2006)).

In fact, the evidence before the BER reflected that technologies such as ion exchange "have not been thoroughly evaluated for their performance on the range of [CBM] produced waters in the region." Statement by John Veil, p. 6 (Dec. 1, 2005) (Ex. C to Hupp Aff.). Moreover, the evidence demonstrated that the proponents of treatment failed to adequately assess the costs of treatment, both economically and environmentally, specifically regarding infrastructure costs, and potential issues associated with brine disposal. PAW Report, pp. 6-1 and 6-1 (Dec. 21, 2004) (Ex. D to Hupp Aff.).

Indeed, the reason for Fidelity's Treatment Permit being challenged here is to "evaluate the feasibility and cost of operating a full-scale treatment system for future development," demonstrating this technology remains in its infancy and

making Appellants' challenge here redundant and meritless. MPDES Permit Application, p. 2 (Ex. 13 to Gruber Decl.).

The BER also rejected mandating reinjection because the evidence before it demonstrated that reinjection is not technically feasible in the formations in the Powder River Basin and that "several important factors unique to the [Powder River Basin] preclude its *required* use as a water management option." BER Minutes, p. 7 (Ex. 20 to Gruber Decl.); PAW Report, p. 6-1 (emphasis in original) (Ex. D to Hupp Aff.).

The Tribe and Water Users also refer to discharge to impoundments as a potential alternative to direct discharge. Impoundments, useful for wildlife and stock watering, have, in fact, been utilized by Fidelity as one water management tool. Williams Aff., ¶ 17. They cannot serve as a complete substitute for the discharge permits, however, in part because, as the DEQ concluded, "[d]ischarges to the Tongue River would result in *less* impact to soils and wildlife habitat than impounding the wastewater on the surface." MPDES EA at p. 14 (Ex. 9 to Gruber Decl.) (emphasis added).

IV. FIDELITY'S MPDES DISCHARGE PERMITS

The DEQ's Answer Brief adequately described Fidelity's MPDES permits. The following points are offered for clarification or emphasis:

1. Both of Fidelity's MPDES permits under challenge here were issued pursuant to the 2003 rules regarding CBM promulgated by the BER. While they challenge their legality in other respects, the Tribe and Water Users concede Fidelity's permits are in compliance with the 2003 BER rules, which EPA approved. Both permits contain, among other things, specific, detailed WQBELs, conditions and monitoring requirements. Tr. Ex. C, pp. 3-14; and Tr. Ex. E, pp. 3-10.

2. The District Court whose ruling appellants attack here upheld both the 2003 rules and modifications adopted in 2006 in a separate challenge. Or. Mot. S.J. at 33, *Pennaco v. BER*, Cause No. DV-06-68 (Mont. 22nd Jud. Dist. Ct. Oct. 17, 2007). On appeal, this Court affirmed, explaining that the BER modified aspects of its 2003 rules, as it signaled it might when expressly agreeing to continue studying the issue when it adopted them, to "protect the waters of Montana and to achieve regulatory consistency." *Pennaco v. BER*, 2008 MT 425, ¶ 39. In addition, this Court relied, in part, on EPA's approval of the BER's 2006 nondegradation rule to find it is consistent with federal requirements. *Id.* at ¶ 39.

3. The Tribe states, without explanation, that "[a]lthough Fidelity began discharging untreated CBM produced water into the Tongue River sometime in 1998, it first obtained a discharge permit from DEQ on June 16, 2000," leaving an

adverse implication that Fidelity is a scofflaw. Tribe's Br., p. 10. Fidelity discharged without an MPDES permit during this time pursuant to Mont. Code Ann. § 75-5-401(1)(b)(1997), which at the time specifically provided no permit to discharge unaltered groundwater was necessary. In fact, in August 1998, Fidelity contacted the DEQ about the possibility of discharging its CBM water into the Tongue River and Squirrel Creek. *See NPRC v. Fidelity*, 325 F.3d 1155, 1158 (9th Cir. 2003). As the Ninth Circuit recognized, "[b]y letter, the MDEQ told Fidelity that it did not need a permit from the MDEQ to discharge into the Tongue River because the discharge was exempt under Montana Code section 75-5-401(1)(b)." *Id.* at 1158-59. Fidelity reasonably, and in good faith, relied on the statute and these regulatory interpretations. Nevertheless, it soon began the process of applying for an MPDES permit, which it received in June 2000.

4. In the course of its review and consideration of Fidelity's Permit applications, the DEQ prepared an EA to analyze the potential impacts associated with its issuance of the Permits. MPDES EA (Gruber Decl., Ex. 9). The DEQ concluded that "[i]ssuance of the permits ensures that standards for water quality will be met. Standards are protective of beneficial uses. Therefore, impacts are minor and non-significant." *Id.* at 14. The DEQ analyzed EC and SAR in drafting its response to comments on Fidelity's proposed Permits. *See* Analysis of

Electrical Conductivity and Sodium Adsorption Ratio, Tongue River at Birney Day School Bridge, p. 1 (Feb. 2, 2006) (Ex. E to Schafer Aff.). The DEQ's analysis "found that the proposed discharges would not cause or contribute to an exceedance of either the MT or NCT monthly mean or instantaneous max EC standards." *Id.* at 2. The Tribe's proposed EC standards differ from the State's. Schafer Aff., ¶ 18. Therefore, as to each parameter, the DEQ based its comparative analysis on the more stringent standard. *Id.*

5. At the time Fidelity's permits were issued, EPA had not developed ELGs for CBM. In fact, as of the Supreme Court *Pennaco* decision, December 2008, EPA was studying whether they are appropriate. *Pennaco*, ¶ 2.

STANDARD OF REVIEW

The District Court applied correct standards in its review of DEQ's actions. Fidelity adopts DEQ's statement of the correct standards in this Court.

SUMMARY OF ARGUMENT

As to Issues 1 and 2, the water quality issues, all parties agree Fidelity's permits comply with the 2003 rules adopted by the BER and in effect when the permits were issued. Similarly, no well-founded dispute exists that they also comply with the WQA. Section 75-5-305(1), Mont. Code Ann., expressly gives the BER discretion whether to adopt technology-based treatment standards or not

when the federal government has not done so. In addition, if it decides to adopt such standards, the statute specifically requires the BER to do it through rulemaking, the very thing it declined to do in 2006.

Consequently, as to the water quality issues, the only questions are whether DEQ, exercising the State of Montana's sovereign authority over water, violated the federal CWA when it issued permits without TBELs; and whether the EPA-approved non-degradation provision used in the permits violated the CWA.

The Tribe and Water Users argue that, because the federal EPA has not developed nationwide TBELs applicable to the CBM industry, DEQ was required by the federal CWA to exercise its best professional judgment (BPJ) to develop a TBEL and insert this in Fidelity's permits. In support they cite §402(a)(1) of the CWA, 33 U.S.C. § 1342(a)(1), while stirring in a mash of other sections with a spice of regulations, none of which directly address the issue. Consequently, they fall back on some of the policies and goals of the CWA – to eliminate discharges of pollution into the nation's waters and the important role technology-based limitations play in that regard – while ignoring others. They urge the Court to look at the "structure" of the CWA (Tribe's Br., pp. 18, 27, Water Users' Br., pp. 16-17) but ignore the specific language of §402(a) and (b), 33 U.S.C. § 1342(a) and (b), as well as § 101(b), 33 U.S.C. § 1251(b), and § 510, 33 U.S.C. § 1370. Ignoring the

fundamental federalism so carefully constructed by Congress, the Tribe and Water Users' arguments reduce the State of Montana, and all states, to mere agents of EPA.

Moreover, while they acknowledge a State may impose "standards or limitations" more stringent than the federal, the Tribe and Water Users ignore the fact that the water quality based effluent limitations in Fidelity's permits derived directly from the numeric WQBELs adopted in the 2003 BER rulemaking and that these are, in fact, more stringent than TBELs.

Concerning the nondegradation issue, the policy in place and enforced in the permits at issue did not conflict with EPA's antidegradation policy. In fact, EPA itself approved it. The fact that the policy was later changed, and was also approved by EPA, only shows the wisdom of continuing monitoring, regulation and adaptation of water quality regulatory programs, which are obviously iterative, dynamic processes.

Concerning the MEPA issue, the DEQ took the requisite "hard look" at potential effects of issuing the MPDES Permits. The Tribe and Water Users challenge the adequacy of the range of alternatives considered by the DEQ. This challenge overlooks the fact that the range of alternatives to be considered is dictated by the purpose and need of the contemplated action; *i.e.*, whether to grant

or deny the MPDES Permits. The DEQ correctly recognized it lacked the regulatory authority to deny the applications; and therefore opted to grant them with modifications. There were the only alternatives that could be considered, and the DEQ discharged its duties accordingly, in full compliance with MEPA.

ARGUMENT

I. NEITHER THE CWA NOR THE WQA REQUIRES OR AUTHORIZES THE DEQ TO IMPOSE TECHNOLOGY-BASED EFFLUENT LIMITS WHEN EPA HAS NOT PROMULGATED INDUSTRY-WIDE STANDARDS.

Beyond citation to §402(a)(1), 33 U.S.C. § 1342(a)(1) as the basis for their insistence that the CWA mandates that DEQ impose TBELs, even when EPA has not developed ELGs, the Tribe and Water Users rely on snippets from a mix of federal regulations and general propositions regarding the CWA, for example that its goal is to eliminate discharges and that technology figures prominently in that effort. They also cite decisions that either do not support their arguments or do not address the issues here. (For example, nowhere in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), did the U.S. Supreme Court say that all discharge permits must have both TBELs and WQBELs. Similarly, *Riverkeeper v. EPA*, 358 F.3d 174 (2d Cir. 2004), did not hold that TBELs are mandatory on states in this situation, because it concerned general challenges to EPA rulemaking regarding cooling water intake structures, not what

the CWA requires of states. *Id.* at 181. Finally, in *Our Children's Earth Foundation v. EPA* (*OCEF*), 527 F.3d 842 (9th Cir. 2008), on rehearing the Ninth Circuit reversed its earlier ruling and held the CWA does not mandate EPA to conduct a technology-based review and revision of existing ELGs. 527 F.3d at 851. Although, like the other cases from which the Tribe and Water Users cherry picked quotations, *OCEF* did not analyze the precise issues here, it does demonstrate the Appellants' view of the mandatory nature of all things technological is overbroad.

The text of § 402(a)(1) simply does not support Appellants' position. Similarly, the general propositions they cite, which are not disputed, neither support their assertions nor aid in answering the legal questions posed by the water quality issues here.

On the other hand, considering the overriding concern of Congress to respect the role and independent authority of the states and the specific language it used in §402(b) to effectuate this does help answer those questions. *See also Lake Cumberland Trust v. EPA*, 954 F.2d 1218, 1221 (6th Cir. 1992). Deciding whether the court of appeals had jurisdiction over a challenge to the agency's approval of a state control strategy, the Sixth Circuit noted that "[w]hen a state has been granted such authority, the EPA must suspend its own authority to issue permits. .

.'[which] creates a separate and independent State authority to administer the NPDES pollution control.'" *Id.*

In the CWA, Congress addressed the nationwide issue of water quality in a manner calculated to preserve and facilitate the leading role of States. In subsection (b) of the first section of the CWA it declared: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." 33 U.S.C. § 1251(b). (Subsection (g) is to the same effect regarding water quantity matters.)

In the same vein, in § 510, 33 U.S.C. § 1370, Congress specifically provided that nothing in the CWA precludes a State from adopting or enforcing "(A) any standard or limitation respecting discharges or pollutants, or (B) any requirement respecting control or abatement of pollution" so long as they are not "less stringent" than adopted federal standards or limitations. Note that this provision, does not say that every state must employ each and every procedure and regulatory tool and technique that EPA does.

Finally, in furtherance of its policy respecting the states' "responsibilities and rights" concerning water quality, Congress provided in § 402 of the CWA, 33

U.S.C. § 1342, at subsection (b), a procedure by which a state could apply to administer "its own permit program for discharges into navigable waters within its jurisdiction." The State is required to submit "a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." *Id.* If the State demonstrates its legal authority is adequate to carry out its program and that program requires permits to comply with specified sections of the CWA, the EPA Administrator "shall approve" such program. *Id.* Section 402 of the CWA, which, in subsection (a), contains the requirement for EPA to develop nationwide ELGs and the authority for it to develop technology-based limits in its permits on a case-by-case basis, is not one of the listed sections.

A. The Plain Language of the CWA and Implementing Regulations Do Not Require DEQ to Develop and Impose Technology-Based Effluent Limits.

Nowhere in the CWA, implementing regulations, or case law is there a requirement that, in the absence of EPA promulgated ELGs, the EPA or State must impose technology-based effluent limits on a case-by-case basis. In the absence of applicable ELGs, the EPA has the discretion to develop and impose case-by-case standards when it is the permit writer. The CWA, however, does not require the State to do so. In fact, Montana law gives the BER, not the DEQ, the discretion to do rulemaking to adopt such limits, but does not require it. Mont. Code Ann. § 75-

5-305(1). Finally, WQBELs are recognized as more stringent, not less, than TBELs.

Consequently, the DEQ's imposition of more stringent water quality-based effluent limitations in Fidelity's MPDES permits was a proper exercise of the State's sovereignty, as expressly allowed by § 510 of the CWA, and constitutes more protection for the State's water than would a TBEL. *See Riverkeeper*, 358 F.3d at 184, n. 10; and *Catskill Mt. Chapter of Trout Unlimited v. City of New York*, 451 F.3d 77, 85 (2d Cir. 2006). The Second Circuit, in dicta, explained the hierarchy of TBELs and WQBELs, stating that "[w]here, as here, no applicable TBELs have been set, the permit writer **may** set TBELs using best professional judgment," and noted that WQBELs are more stringent than TBELs. *Id.*

1. The Language of the CWA and Case Law Construing it Do Not Require Technology-Based Effluent Limits Under These Circumstances.

Nowhere in the language of the CWA is there a requirement that the EPA or DEQ develop and impose technology based effluent limitations absent industry-wide standards. Rather, § 402 gives the EPA discretion to do so on a case-by-case basis. 33 U.S.C. § 1342. Section 402(a)(1) provides "the Administrator may . . . issue a permit" after ensuring that all federally promulgated technology-based standards are met by the discharge, and in the event federal standards have not

been promulgated, impose "such conditions as the Administrator determines are necessary to carry out the provisions of [the CWA]." 33 U.S.C. § 1342(a)(1)(A)-(B) (emphasis added).

The Ninth Circuit has construed this language as being discretionary in two cases. *See Nat. Resources Def. Council v. EPA*, 863 F.2d 1420, 1425 (9th Cir. 1988) ("In the absence of national standards, the Act authorizes the Administrator to issue permits on 'such conditions as the Administrator determines are necessary to carry out the provisions of [the Act].'"); and *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) ("[T]he Act authorizes the EPA to issue permits on a case-by-case basis 'upon such conditions as the Administrator determines are necessary to carry out the provisions of this [Act].'"). Moreover, the United States Supreme Court in *E.I. du Pont Nemours & Co. v. Train*, 430 U.S. 112 (1977), expressly rejected the Tribe's argument that § 402 requires EPA or the State to impose technology-based effluent limits. *Id.* at 120. Specifically, the Court in *Train* ruled that "although [§ 402] authorizes the imposition of limitation on individual permits, the section itself does not mandate either the Administrator or the States to use permits as the method of prescribing effluent limitations." *Id.*

Similarly, the Supreme Court's analysis in *Train* defeats the argument that §§ 301, 304, and 305 (33 U.S.C. §§ 1311, 1314, and 1315) require the State to

develop and implement TBELs on a case-by-case basis. Rather, these sections apply to the EPA's promulgation of national standards, not to the state. For example, the Supreme Court concluded that "301 limitations are to be adopted by the Administrator, . . . based primarily on classes or categories, and . . . take the form of regulations." *Train*, 430 U.S. at 129. In any event, because the Supreme Court's analysis was limited to the scope of the EPA's duties under the CWA – not the duties of states – the District Court below properly rejected the Tribe and Water Users' attempted reliance on *Train* in the present case.

The § 301 regulations rely on guidelines, promulgated by EPA under § 304, to determine the appropriate technology for the § 301 regulations. *Id.* at 131. *See also* § 306 (33 U.S.C. § 1316) (requiring EPA to promulgate rules establishing "Federal standards of performance").

The Tribe and Water Users also erroneously rely upon *Texas Oil & Gas Association v. EPA*, 161 F.3d 923 (5th Cir. 1998) and *NRDC v. EPA*, 859 F.2d 156 (D.C. Cir. 1988) in support of their argument that § 402(a) requires the DEQ to develop and implement technology-based effluent limitations. Contrary to the Tribe and Water Users' suggestion, *Texas Oil* did not involve any dispute over BPJ limitations. On the contrary, the question before the court in *Texas Oil* was whether the national technology-based effluent limitations promulgated by EPA

met the CWA's requirements. 161 F.3d at 927. The court's analysis must be read with that question in mind, and does not answer the question of whether the DEQ must develop and impose such standards here. Again, as in *Train*, the court in the *Texas Oil* case was concerned with the EPA's compliance with the CWA – not the adequacy of state regulation. Therefore, *Texas Oil* is inapplicable.

The issue before the court in *NRDC v. EPA* was whether the EPA had veto authority over state permits that imposed technology-based effluent limits. 859 F.2d at 181. The court held that *if* state permit writers choose to impose such standards they must do so in accordance with the same statutory factors which apply to EPA. *Id.* at 183. Although the court stated that states must "pay heed" to the technology-based standards, the court did so in the context of upholding the EPA's ultimate power to override the state's judgment as to what constitutes an adequate technology-based limit under the CWA. *Id.* at 183-86. However, *NRDC* does not hold that states must, in every instance, create and impose such technology based limits where none have been promulgated by the EPA. The court's statement that § 401(a) requires BPJ should be read in its proper context and cannot be read to require the imposition of BPJ here.

2. Federal Regulations Do Not Require Technology-Based Effluent Limitations Under these Circumstances

The Tribe and Water Users' argument that the CWA's implementing regulations support the conclusion that the CWA mandates imposition of technology-based effluent limitations fails for the same reason their statutory arguments fail: the plain language of the regulations do not require the development and imposition of such standards. In fact, the opposite is true. The regulations support DEQ's conclusion that absent industry-wide standards the DEQ is not required to include such limitations in MPDES permits.

For example, 40 C.F.R. § 125.3(a) states: "Techonology-based treatment requirements under section 301(b) represent the minimum level of control that must be imposed in a permit issued under section 402 of the Act." As discussed above, § 301(b) applies to the EPA, not the DEQ. Consequently, the "minimum level of control" specified in 40 C.F.R. § 125.3(a) does not apply here. Moreover, because the water quality based standards imposed by the DEQ are more stringent than the technology-based standards, DEQ exceeded the requirements of 40 C.F.R. § 125.3(a).

In fact, 40 C.F.R. § 125.3(a) supports DEQ's position that state water quality standards are the "more stringent" limitation that should be applied here. 40 C.F.R. § 125.3(a) directs a permit writer to 40 C.F.R. § 122.44 for other "more

stringent limitations." Under 40 C.F.R. § 122.44(d)(1), permit writers are to impose any "more stringent limitation" necessary to achieve water quality standards. In this case, where industry-wide standards have not been promulgated, this supports the imposition of the more stringent water quality standards as set forth in Fidelity's MPDES permits.

The Tribe and Water Users argue that 40 C.F.R. § 122.44(a)(1) requires MPDES permits to include technology-based effluent limits. The rule provides that any technology-based effluent limitation must be based on 1) nationwide technology-based effluent limits promulgated by the EPA, 2) effluent limits developed under § 402(1)(a), or 3) a combination of the two. The District Court below correctly found that:

> Applying the rule in the context of Fidelity's permit leads to one conclusion – no effluent limitations under the rule apply because no basis for establishing effluent limitations under the rule apply. As Plaintiffs admit, there are currently no nation-wide effluent standards for the CBM industry. Furthermore, even though EPA has authority under § 402 of the CWA to develop technology-based limits on a case-by-case basis, Congress has not yet mandated that states must do the same.

Or. Mot. S.J. at 19.

B. The DEQ and EPA Have Two Distinct Permitting Programs and the WQA Correctly Provides for the Imposition of Water Quality Standards Under These Circumstances.

The Tribe and Water Users incorrectly contend § 402(a) applies to the DEQ and therefore, DEQ's permits must contain TBELs. Their arguments fail for two primary reasons. First, as discussed above, the language of § 402(a) is discretionary, not mandatory, even as to EPA. Therefore, even if § 402(a) applied to DEQ, it would not require DEQ to include technology-based effluent limitations absent nationwide standards. Second, and even more significant to this case, DEQ does not issue permits under § 402(a). Rather, § 402(b)(1) plainly provides that states that are operating their own program issue permits under the authority of state law. 33 U.S.C. § 1342(b)(1): A State "desiring to administer its own permit program" must apply to the EPA Administrator and describe the program it proposes to administer "under State law. . ." and include a statement "that the laws of such State. . .provide adequate authority to carry out the described program."

Section 402(b) does not reference the use of BPJ as set forth in § 402(a), whether in discretionary or mandatory language. As the Court stated in *Colorado Gas Compression Inc v. Commissioner of Internal Revenue*, when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." 366 F.3d 863, 867 (10th Cir. 2004) (quotations and citations omitted).

The Tribe and Water Users cite § 402(a)(3) in support of their argument that state permits must meet the same "minimum standards" as federal permits. Section 402(a)(3) provides that federal permits issued by EPA "shall be subject to the same terms, conditions, and requirements" as state permits issued under 402(b). 33 U.S.C. § 1342(a)(3). However, as the D.C. Circuit held, "[t]his provision on its face applies in only one direction: the federal program must meet specific requirements set out in subsection (b), such as a five year fixed permit term and incorporation of effluent limitation." *NRDC*, 859 F.2d at 176; *see also Arkansas v. Oklahoma*, 503 U.S. 91, 103 (1992).

The Tribe and Water Users further ignore that under Montana state law the BER – not the DEQ – has the exclusive authority to adopt technology-based requirements for an industry when there are no federal standards. Mont. Code. Ann. § 75-5-305(1); *see also American Wildlands v. Browner*, 94 F. Supp. 2d 1150, 1160 (D. Colo. 2000) ("Where the law expressly describes a particular situation to which it shall apply, an irrefutable inference must be drawn that what is excluded was intended to be excluded."). Additionally, except when the EPA has promulgated nationwide standards, the statute prohibits the impositions of technology-based limits "when the discharge is considered nonsignificant." Mont. Code Ann. § 75-5-305(1) ("minimum treatment may not be required to address the

discharge of a parameter when the discharge is considered nonsignificant under rules adopted pursuant to 75-5-301"). Here, the State has correctly determined that Fidelity's discharges are considered nonsignificant.

Section 75-5-305(1) provides that: "[t]o the extent that the federal government has not adopted minimum treatment requirements . . . the board may do so, through rulemaking . . . ensuring that the requirements are cost-effective and economically, environmentally, and technologically feasible." As discussed above, the BER did conduct rulemaking and determined that the proponents failed to provide evidence that treatment and injection were cost-effective or economically, environmentally, and technologically feasible in the Powder River basin of Montana. In other words, the State of Montana, through the BER, fully complied with its statutory mandate and exercised its discretion and carefully considered imposition of technology-based effluent limitations as applied to the CBM industry and rejected such standards as not proven to be technologically or economically feasible.

Additionally, since Fidelity's discharges are properly classified nonsignificant, § 75-5-305(1) prohibited DEQ from imposing TBELs. Consequently, in light of the absence of any federal standard, the DEQ properly relied on water-quality-based limits to impose "more stringent" limitations. The

importance of this point lies in its real-world impact, which is to provide more water quality protection than TBELs would.

EPA and courts recognize there are two types of effluent limits technology-based standards promulgated by the EPA, and water quality-based standards promulgated by the states, and that water quality-based limits are the more stringent.

This fact is reflected in the EPA's MPDES Permitting manual:

> A permit writer may find, by analyzing the effect of a discharge on the receiving water, that technology-based permit limits are not sufficiently stringent to meet these water quality standards. In such cases, the CWA and EPA regulations require development of more stringent, water quality-based effluent limits (WQBEL) designed to ensure that water quality standards are met.

NPDES Permit Writers' Manual, Off. of Wastewater Mgt., U.S. EPA, p. 87 (Dec. 1996).

Indeed, courts have also recognized this relationship between technology-based effluent limits and water quality-based effluent limits. *See e.g. Catskill Mt. Chapter of Trout Unlimited*, 451 F.3d at 85. Water quality-based limits are recognized as being more stringent due to the manner in which the two types of limits are derived. Technology-based limits are based on what can reasonably be achieved by proven treatment technology (*id.*, n. 7); whereas water quality-based limits do not depend on what has been proven. Rather, they are absolute:

whatever limits are required to assure receiving waters will meet water quality standards, including the nondegradation standard, are imposed and enforced (*id.*, n. 8).

Thus, DEQ's imposition of water quality-based standards ensured the highest degree of protection of Montana's valuable water resource, complying with both the spirit and the letter of the CWA. In this light, Appellants' arguments, unsupported by either the policy of the CWA or the specific language of §402, appear non-sensical.

To require DEQ to perform a discretionary function of EPA—develop TBELs—that would not add to the protection of the State's waters, especially in face of the BER's rejection of just such an exercise and EPA's uncertainty whether nationwide ELGs for the CBM industry are appropriate, would be to require a meaningless expenditure of DEQ's resources.

II. THE BER'S 2003 RULE COMPLIED WITH STATE AND FEDERAL NONDEGRADATION POLICIES AND THE DEQ CORRECTLY APPLIED THE 2003 RULE TO FIDELITY'S MPDES PERMITS.

Fidelity adopts the DEQ's argument in the section of DEQ's brief entitled "The 2003 Rule Complied with State and Federal Nondegradation Policies."

III. THE DEQ FULLY COMPLIED WITH MEPA IN ITS PREPARATION OF THE EA AND ISSUANCE OF FIDELITY'S MPDES PERMITS.

The Tribe and Water Users challenge the DEQ's compliance with MEPA in the DEQ's preparation of the MPDES EA and the issuance of the MPDES Permits. Tribe's Br., pp. 37-43; Water Users' Br., pp. 39-42. However, their arguments wholly ignore the fact that the EA is tiered to the FEIS which analyzed CBM development in the State of Montana, placing particular emphasis on water management.

Moreover, the Tribe's arguments misconstrue the purpose and need of the EA, and thereby erroneously conclude that the EA did not adequately evaluate a reasonable range of alternatives. The Tribe faults the DEQ for failing to consider alternatives such as revocation of Fidelity's permit, treatment of all produced water, injection, and surface impoundments. Tribe's Br., p. 39. However, the overriding flaw in the Tribe's argument is that it ignores the limitations on the DEQ's authority, as well as the context of the DEQ's action. The "alternatives" proposed by the Tribe are squarely outside the range of alternatives the DEQ could lawfully consider in its processing of Fidelity's MPDES permit applications.

A. The DEQ's ROD Accurately Sets Forth the Scope of the DEQ's Authority to Require Compliance with the CWA, Not to Mandate Specific Water Management Tools.

As discussed in the fact section above, the DEQ, along with the BLM and MBOGC, prepared the FEIS analyzing CBM development in the State of Montana. Or. Mot. S.J. at 27-34; *see also* DEQ Br. Support Mot. S.J., Ex. 13 at 1-1 (Oct. 24, 2006). In its ROD for the FEIS, the DEQ explained that its authority to select alternatives for CBM activities was more limited than BLM's or BOGC's because DEQ's "authority is to ensure compliance with air and water quality standards." *Id.*, Ex. 15 at 13. In contrast, the BLM and BOGC had the statutory authority to consider and select among alternatives for water management. Consequently, the BLM and BOGC adopted Alternative E in the FEIS, which includes various water management options and requires an operator to submit a water management plan prior to the approval of any CBM project. *Id.*, Ex. 13 at 2-13, 2-14. DEQ did not adopt Alternative E because it was constrained by statute from mandating the use of any specific water management tool. Instead, it concurred in the selection of Alternative E by the other agencies. *Id.*, Ex. 15 at 13.

This analysis is relevant because the Tribe argues that DEQ should have considered other water management options. However, the Tribe's argument ignores DEQ's role in the applicable regulatory scheme. The DEQ is to ensure

compliance with the Clean Air Act and the CWA. *Id.* Unlike the BLM and BOGC, the DEQ is not the resource manager, and does not have the authority to mandate which water management tool will be utilized in considering an MPDES permit application.

B. The MPDES EA Considered a Reasonable Range of Alternatives to the Issuance of the Proposed Permits.

The alternatives in the EA must only satisfy the purpose and need of the EA. The agency need not consider all of the possible alternative actions; it is only required to look at those that are reasonable in light of the project's stated purpose. *See Friends of S.E.'s Future v. Morrison*, 153 F.3d 1059, 1065-67 (9th Cir. 1998). Alternatives that are not feasible do not need to be considered. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense* Council, 435 U.S. 519, 551 (1978). Rather, an EA is to contain "a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented." Admin. R. Mont. 17.4.609(3)(f).

The Tribe faults the DEQ for purportedly failing to consider a reasonable range of alternatives. This criticism is unfounded. In the present case, the proposed action is the issuance of two discharge permits. MPDES EA, p. 1 (Ex. 9 to Gruber Decl.). The DEQ considered two primary alternatives: a "no action"

alternative, and "approval with modification." The DEQ's consideration of these alternatives was well within the agency's discretion given the purpose and need of the EA. As stated by the District Court,

> the purpose of the proposal considered by DEQ was Fidelity's plan to discharge water into the Tongue River under MPDES permits according to approved water management plans. [Tribe's Ex. 9 at 5; DEQ's Exs. 16, 17, 18.] Other water management options approved in the plans, such as dust suppression and livestock watering, did not need DEQ's approval because no MPDES permits are required for non-discharging activities. Consequently, the only decision pending before DEQ was whether to issue final MPDES permits for Fidelity's discharges to the Tongue River pursuant to the MPDES rules. [Tribe's Ex. 9 at 5].

Or. Mot. S.J. at 31-32

Here, reinjection and treatment of all CBM produced water fall outside the purpose of the project. As the Ninth Circuit recognized, "an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS." *Envtl. Protec. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1016 (9th Cir. 2006); *citing also Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1245-46 (9th Cir. 2005). The *Native Ecosystems* case is particularly instructive because there, as here, the EA contained only two alternatives given detailed consideration: no action, and the preferred alternative. Rejecting any suggestion that consideration of two alternatives was problematic, the Ninth Circuit recognized that statutory and

regulatory requirements do not dictate the minimum number of alternatives that an agency must consider. *Id.* at 1246.

Courts have recognized that "[a]n agency does not have to consider alternatives which are lacking feasibility, ineffective, or inconsistent with the basic policy objectives for the management area." *Siskiyou Regional Educ. Project v. Rose*, 87 F. Supp. 2d 1074, 1100-01 (D. Or. 1999). Here, no evidence has been submitted establishing that treatment of *all* produced water, or reinjection, *in the Powder River Basin of Montana* would be cost-effective and economically, environmentally, and technologically feasible. *See, e.g.,* Statement by John Veil, Argonne National Laboratory, Montana BER Public Hearing on Water Quality Proposal, p. 5 (Ex. C to Hupp Aff.).

Remarkably, the Tribe argues that the DEQ's failure to consider such alternatives was improper because, at the time the DEQ issued the permits, the BER was conducting rulemaking involving intensive review of the technical and economic feasibility of those alternatives to direct discharge. Tribe's Br., p. 39. The Tribe's argument ignores that the draft EA for Fidelity's permits and the draft permits themselves were issued for public comment before the rulemaking petition was filed with the BER. Plaintiffs' argument further overlooks the obvious: It is certainly true that the BER considered reinjection and technology-based effluent

limitations; however, the BER ultimately *rejected* them. BER Minutes, p. 7 (Mar. 23, 2006) (Ex. 20 to Gruber Decl.).

The BER rejected adoption of technology-based effluent limits "because there was insufficient information to establish the technical or economical feasibility of them." *Id.* The BER likewise *rejected* the reinjection proposal based on the evidence and testimony presented to the BER. *Id.* Indeed, the evidence submitted to the BER confirmed that proponents of treatment had not provided accurate or reliable data or analysis, and, in fact, "that there were *no data* to support Kuipers' findings that injection and treatment as exclusive water management practices is both practical and affordable to industry." PAW Report, p. 6-4 (Dec. 21, 2004) (emphasis added) (Ex. D to Hupp Aff.).

Moreover, as discussed previously, DEQ did not have authority to require treatment or injection under Mont. Code Ann. § 75-5-305(1). Rather, the BER has exclusive authority to develop technology-based treatment requirements. Additionally, neither the DEQ nor BER had authority to impose such limits where as here the discharges were deemed nonsignificant. Due to its lack of authority, DEQ argued and the District Court held that treatment and injection did not need to be considered in the EA because they were not "reasonably available or prudent to consider" under Admin. R. Mont. 17.4.609(3)(f).

3. The MPDES EA Properly Considered a "No Action" Alternative.

The Tribe also contends that the DEQ failed to conduct a "meaningful" analysis of the "no action" alternative rejected by the DEQ. Tribe's Br., p. 38. First, the Tribe incorrectly argues that the non-action alternative must consider the impact of the project's noncompletion. Tribe's Brief, p. 41, citing Mont. Code Ann. § 75-1-201(1)(b)(iv)(C)(IV). However, as the District Court correctly found this requirement does not apply to the preparation of an EA under these circumstances. Instead, the alternative section of the EA needed only to comply with subsections (b)(iv)(C)(I) through (b)(iv)(C)(III). Under those subsections, the DEQ was not required to consider the impacts of denying the permits in its EA.

Second, the Tribe ignores that under MEPA, "no action" means maintaining the status quo, in lieu of undertaking the proposed action. *Am. Rivers v. F.E.R.C.*, 201 F.3d 1186, 1201 (9th Cir. 1999). When Fidelity submitted its renewal application and DEQ completed the EA, the original direct discharge Permit was in effect. Contrary to the Tribe's argument, the DEQ did not have the discretion to deny Fidelity's permits. *See* Admin. R. Mont. 17.30.1363 (enumerating the four exclusive causes for denial of a permit: prior noncompliance by permit holder; misrepresentation of relevant facts; endangerment of human health or the environment; or change in conditions at the permitted facility.) It is beyond

dispute that none of the foregoing factors exist; therefore, the DEQ did not have the authority to deny Fidelity's permits. *See* Admin. R. Mont. 17.30.1377, 1378. The "alternative of denying the permits was not 'reasonably available' and therefore not 'prudent' for DEQ to consider when it issued the permits. ARM 17.4.609(3)(f)." Or. Mot. S.J. at 36. Consequently, the DEQ properly analyzed the "no action" alternative as the continuation of discharges under Fidelity's original Permit. Based on the foregoing, and in light of the DEQ's full compliance with MEPA, the District Court could reach no other result but to affirm the DEQ's actions.

CONCLUSION

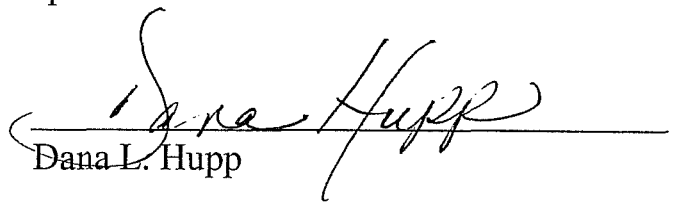
For the foregoing reasons, Fidelity Exploration & Production Company respectfully requests that the summary judgment of the District Court be affirmed.

Dated this 18th day of September, 2009.

Jon Metropoulos
Dana L. Hupp
Gough, Shanahan, Johnson & Waterman, PLLP
33 S. Last Chance Gulch
Helena, MT 59601
Tel: (406) 442-8560
Fax: (406) 442-8783
Attorneys for Fidelity Exploration & Production Company

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *Intervenor-Appellee Fidelity's Answer 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 not more than 8104 words, excluding the cover page and brief components.



Dana L. Hupp

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Intervenor-Appellee Fidelity's Anser Brief* was mailed, postage fully prepaid thereon at Helena, Montana, on the 18th day of July, 2009, to:

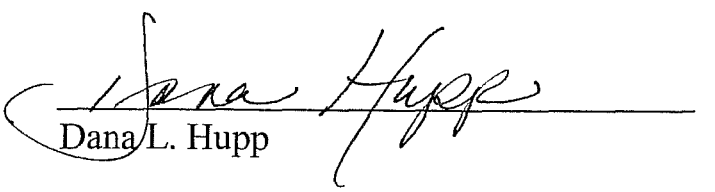
James L. Vogel
VOGEL & WALD, PLLC
P.O. Box 525
Hardin, MT 59034

John B. Arum
Brian C. Gruber
ZIONTZ, CHESTNUT, VARNELL,
BERLEY & SLONIM
2101 4th Avenue #1230
Seattle, WA 98121

Brenda Lindlief Hall
David K. Wilson
Reynolds, Motl & Sherwood, PLLP
401 North Last Chance Gulch
Helena, MT 59601

Jack Tuholske
Tuholske Law Office, P.C.
P.O. Box 7458
Missoula, MT 59807

Claudia Massman
Special Assistant Attorney General
Lee Metcalf Building
1520 E. Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901



Dana L. Hupp