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FILED this 19th day of
August AD 2009
 at 10:12 o'clock A.M.
 MONTANA BOARD OF
 ENVIRONMENTAL REVIEW
 by: M. Apple

Gary M. Zadick
 Mary K. Jaraczski
 UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.
 #2 Railroad Square
 P.O. Box 1746
 Great Falls, MT 59403
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*Counsel for Respondent-Intervenor Southern Montana
 Electric Generation and Transmission Cooperative, Inc.*

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
 OF THE STATE OF MONTANA**

)	
)	
IN THE MATTER OF:)	Case No. BER 2008-23 AQ
SOUTHERN MONTANA ELECTRIC)	
GENERATION AND TRANSMISSION)	RESPONDENT-INTERVENOR
COOPERATIVE - HIGHWOOD)	SOUTHERN MONTANA ELECTRIC'S
GENERATING STATION)	MOTION TO DISMISS APPEAL
AIR QUALITY PERMT No. 3423-01.)	WITH PREJUDICE AND
)	MEMORANDUM IN SUPPORT
)	

MOTION

Respondent and Intervenor Southern Montana Electric Generation and Transmission Cooperative, Inc. (hereinafter, "SME") hereby requests dismissal of this appeal with prejudice.

MEMORANDUM

In December of 2008, Appellants Montana Environmental Information Center, Citizens for Clean Energy, Sierra Club and National Park Conservation Association (hereinafter,

“Appellants”) filed this action challenging Air Quality Permit No. 3423-01 issued by the Montana Department of Environmental Review (hereinafter, “MDEQ”) for the proposed Highwood Generating Station coal-fired electrical power plant. On August 3, 2009, the MDEQ revoked the Permit, pursuant to the request of SME. (*See* Ex. A, Letter from DEQ to SME).

The fifteen day appeal period, which follows the revocation, expires on August 19. MDEQ, Appellants and SME all agree that only SME, as the permit holder, can appeal the revocation by MDEQ. SME, which voluntarily relinquished the Permit, does not intend to appeal the revocation, as indicated in its August 8, 2009, e-mail to DEQ, requesting waiver of the appeal period. (*See* Ex. B, E-mail from SME to DEQ).

MDEQ and Appellants have agreed to dismissal following the appeal period, which ends August 19. SME is requesting dismissal, with prejudice, on grounds that the case is now moot, in light of MDEQ having revoked the Permit at SME’s request. MDEQ has no objection to dismissal with prejudice. Appellants, however, object to dismissing the case with prejudice. SME offers the following legal authority and analysis in support of its request for dismissal with prejudice.

The governing principles on mootness are well-established in Montana caselaw:

Mootness is a threshold issue which must be resolved before addressing the underlying dispute. *Grabow v. Montana High School Assn.*, 2000 MT 159, ¶ 14, 300 Mont. 227, ¶ 14, 3 P.3d 650, ¶ 14 (citing *Shamrock Motors, Inc. v. Ford Motor Co.*, 1999 MT 21, ¶ 17, 293 Mont. 188, ¶ 17, 974 P.2d 1150, ¶ 17). This Court has consistently held that “a moot question is one which existed once but because of an event or happening, it has ceased to exist and no longer presents an actual controversy.” *Skinner v. Lewis and Clark*, 1999 MT 106, ¶ 12, 294 Mont. 310, ¶ 12, 980 P.2d 1049, ¶ 12 (quoting *State ex rel. Miller v. Murray*, 183 Mont. 499, 503, 600 P.2d 1174, 1176 (1979)). Moreover, a case will become moot for the purposes of an appeal “where by a change of circumstances prior to the appellate decision the case has lost any practical purpose for the parties, for instance where the grievance that gave rise to the case has been eliminated....” *Matter of T.J.F.*, 229 Mont. 473, 475, 747 P.2d 1356, 1357 (1987) (quoting 5 Am.Jur.2d *Appeal and Error* § 762 (1962)).

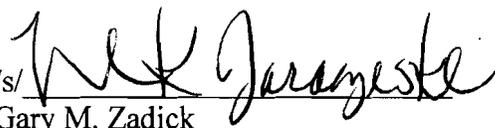
Povsha v. City of Billings, 2007 MT 353, ¶ 19, 340 Mont. 346, 174 P.3d 515.

Our Supreme Court has squarely held that dismissal, with prejudice, is proper when the issues presented are moot. In *Povsha*, the Court concluded that “[b]ecause we hold that the issues presented are moot, we dismiss this appeal with prejudice.” *Id.*, 2007 MT at ¶ 5. In an earlier case, *American Fed. Savings and Loan Assn. v. Madison Valley Prop., Inc.*, the Court likewise concluded that the appeal was moot and therefore “is properly dismissed with prejudice.” *American Fed. Savings and Loan Assn.*, 1998 MT 93, ¶ 55, 228 Mont. 365, 958 P.2d 57.

Because the issues presented in Appellants’ appeal are now moot, by virtue of revocation of the Permit, SME requests that the case be dismissed, with prejudice.

RESPECTFULLY SUBMITTED this 19th day of August, 2009.

Kenneth A. Reich
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Boston, MA 02110
Phone: (617) 502-8243
Fax: (617) 502-8274

/s/ 
Gary M. Zadick
Mary K. Jaraczski
UGRIN, ALEXANDER, ZADICK &
HIGGINS, P.C.
#2 Railroad Square
P.O. Box 1746
Great Falls, MT 59403
Phone: (406) 771-0007
Fax: (406) 452-9360

CERTIFICATE OF SERVICE

I hereby certify that I caused a complete and accurate copy of the foregoing *Respondent-Intervenor Southern Montana Electric's Motion to Dismiss Appeal With Prejudice and Memorandum in Support* to be served via e-mail on the following persons this 18th day of August, 2009:

Joyce Wittenberg, Secretary
Board of Environmental Review
1520 E. Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
ber@mt.gov
jwittenberg@mt.gov

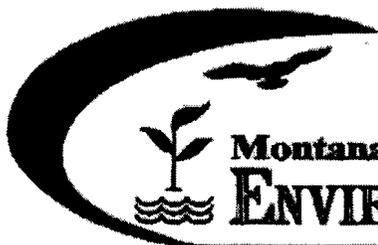
Katherine J. Orr
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440
korr@mt.gov

Abigail M. Dillen
Jenny K. Harbine
Earthjustice
209 South Willson Avenue
Bozeman, MT 59715
adillen@earthjustice.org
jharbine@earthjustice.org

David M. Rusoff
Department of Environmental Quality
1520 E. Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
drusoff@mt.gov



UGRIN, ALEXANDER, ZADICK & HIGGINS, P.C.



Montana Department of
ENVIRONMENTAL QUALITY

Brian Schweitzer, Governor

P.O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • www.deq.mt.gov

August 3, 2009

CERTIFIED MAIL: 7004 1350 0002 0840 8169

Tim Gregori
Southern Montana Electric Generation and Transmission Cooperative
Highwood Generating Station
3521 Gabel Road, Suite 5
Billings, MT 59102

Re: Revocation of Montana Air Quality Permit #3423-01

Dear Mr. Gregori:

The Department of Environmental Quality - Air Resources Management Bureau (Department) received your request to revoke Montana Air Quality Permit (MAQP) #3423-01. Your email, with attached letter dated July 31, 2009, was received by the Department on August 3, 2009.

Proposed Action. The Department intends to revoke MAQP #3423-01 at the request of the above-named permittee. In accordance with ARM 17.8.763, the Department's revocation of your permit shall become final within 15 days of your receipt of this letter. The Department has provided this letter to the permittee via both facsimile and Certified Mail with return receipt. The permittee may confirm receipt of this letter via a return facsimile to the Department at (406) 444-1499; otherwise, the return receipt will serve as confirmation that the permittee received this letter.

Procedures for Appeal. You may appeal the Department's decision by requesting a hearing before the Board of Environmental Review (Board) within 15 days of your receipt of this letter. The filing of a request for a hearing postpones the effective date of revocation until the conclusion of the hearing and issuance of a final decision of the Board. Requests for hearing must be sent in writing to: Chairman, Board of Environmental Review, P.O. Box 200901, Helena, MT 59620-0901.

Operation of a Facility once a Permit is Revoked. Once a permit is revoked, a permit application must be submitted and a new permit issued prior to any future construction or operation of the equipment or facility.

If you have any questions, please contact me at (406) 444-9741.

Sincerely,

Vickie Walsh
Air Permitting Program Supervisor
Air Resources Management Bureau
Email: viwalsh@mt.gov

Mary Jaraczski

From: Tim Gregori [gregori@mcn.net]
Sent: Saturday, August 08, 2009 11:26 AM
To: Richard Opper; David Klemp
Cc: Lignell, Brent; Walsh, Vickie
Subject: Request to Waive 15 Day Appeal Period
Attachments: Request to Waive Appeal Period Aug 09.PDF; DEQ Letter to Southern Revoking Permit 3 Aug 09.PDF

To: Director Richard Opper
From: Tim Gregori
Subject: Request to Waive 15 Day appeal Period

Attached to this transmittal is a PDF copy of a letter requesting that the 15 day appeal period be waived and that action taken by the Department to revoke MAQP 3423-1 be deemed final as of the date of the letter from the Department. Attached for reference purposes is a copy of the Department's letter dated 3 August 2009.

I look forward to your response.

Thanks

Tim Gregori



Abigail M. Dillen
Jenny K. Harbine
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Counsel for Appellants

FILED this 20th day of
September AD 2009
at 11:49 o'clock A M.
MONTANA BOARD OF
ENVIRONMENTAL REVIEW
by: M. Erbe

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:)
SOUTHERN MONTANA ELECTRIC)
GENERATION AND TRANSMISSION)
COOPERATIVE — HIGHWOOD)
GENERATING STATION)
AIR QUALITY PERMIT NO. 3423-01)
)
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Case No. 2008-23 AQ

**APPELLANTS' RESPONSE TO
SME'S MOTION TO DISMISS WITH
PREJUDICE**

This case challenges the decision of the Montana Department of Environmental Quality (“DEQ”) to issue an air quality permit for the construction and operation of the Highwood Generating Station near Great Falls, Montana, that failed to limit emissions of fine particulate and failed to comply with pollution control requirements for hazardous air pollutants. On August 20, 2009, DEQ revoked the challenged air permit, which rendered Appellants’ claims based on the permit moot. Because this case no longer presents a justiciable controversy, dismissal is appropriate. Montana-Dakota Utilities Co. v. City of Billings, 2003 MT 332, ¶ 9, 318 Mont. 407, 80 P.3d 1247 (setting forth elements of justiciability); see also Enrico’s, Inc. v.

Rice, 730 F.2d 1250 (9th Cir. 1984) (“Exercise of our power to adjudicate the instant case depends upon the existence of a case or controversy; we lack jurisdiction to hear moot cases.”). However, contrary to the suggestion of applicant Southern Montana Electric Generation and Transmission Co., Inc. (“SME”), this case should be dismissed without prejudice.

SME’s request that Appellants’ claims be dismissed with prejudice should be denied. Dismissal with prejudice has the effect of “an adjudication on the merits of the case, a final disposition of the controversy which bars the right to bring or maintain an action on the same claim or cause of action.” Schuster v. Northern Co. (1953) 127 Mont. 39, 48, 257 P.2d 249, 254 (quotation omitted); see also First Bank, (N.A.) W. Mont., Missoula v. Dist. Ct. for Fourth Jud. Dist. (1987) 226 Mont. 515, 524, 737 P.2d 1132, 1137 (“an order of dismissal with prejudice [is] the equivalent of a final judgment on the merits”). In circumstances such as this, where a case becomes moot due to circumstances outside of plaintiffs’ control, such judgment on the merits is improper. Flynt v. Weinberger, 762 F.2d 134, 135-136 (D.C. Cir. 1985) (“Where a controversy has become moot, it is the duty of the appellate court to clear the path for future relitigation of the issues raised. . . . The case is hereby remanded to the district court with instructions to dismiss appellants’ complaint on grounds of mootness, but without prejudice or any opinion on the merits of the underlying claim.”). The Montana legislature acknowledged the impropriety of such a judgment on the merits when a case is dismissed for lack of jurisdiction. See Mont. R. Civ. Proc. 41(b) (“Unless the court in its order for dismissal otherwise specifies, a[n] [involuntary] dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or failure to join a party under Rule 19, operates as an adjudication upon the merits.”) (emphasis added).

SME wrongly argues that the “Supreme Court has squarely held that dismissal, with prejudice, is proper when the issues presented are moot.” SME Mot. to Dismiss Case With Prejudice and Mem. in Supp. at 3. In fact, the issue of whether a case should be dismissed with or without prejudice was not squarely presented, and thus received no discussion, in either of SME’s cited authorities. Furthermore, these cases do not stand for the proposition that moot cases should be dismissed with prejudice under all circumstances.¹

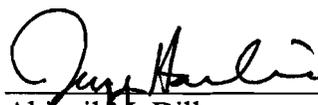
Here, the Board of Environmental Review should dismiss this case without prejudice. “A dismissal without prejudice ... simply shows that there has been no decision in the case upon the merits and prevents the defendant from setting up the defense of res judicata.” Schmitz v. Engstrom, 2000 MT 275, ¶ 11, 302 Mont. 121, ¶ 11,13 P.3d 38, ¶ 11 (citation omitted). Dismissal without prejudice is appropriate in this case because mootness arises from SME’s request that DEQ revoke its air quality permit, and DEQ’s compliance with that request. These facts are unrelated to the merits of Petitioners’ claim that the air quality permit was unlawfully issued in the first instance. “Dismissal on a ground not going to the merits [i]s not ordinarily a bar to a subsequent action on the same claim” and thus should be construed as a dismissal without prejudice. Costello v. U. S., 365 U.S. 265, 285, 81 S.Ct. 534, 545 (U.S. 1961) (affirming common law rule).

¹ Mootness in the cases cited by SME sprung from entirely different circumstances than those present here. In Povsha v. City of Billings, the Supreme Court dismissed as moot a challenge to the City’s zoning approval for a subdivision after the subdivision had been built. Povsha v. City of Billings, 2007 MT 353, ¶ 18, 340 Mont. 346, 174 P.3d 515. Thus, in that case, there was no doubt that that activity giving rise to the plaintiff’s claims could not reasonably be expected to recur. In American Federal Savings and Loan Association v. Madison Valley Properties, Inc., the Court dismissed an appeal on the issue of indemnity where the issue was rendered moot by the Court’s merits adjudication of the underlying claims. Am. Fed. Savings and Loan Ass’n v. Madison Valley Properties, Inc., 1998 MT 93, ¶ 55, 288 Mont. 365, 958 P.2d 57.

Further, SME has made clear its intentions to construct the Highwood coal plant in the future, which would require the developer to obtain a new air quality permit. See Exhibit 1, Karl Puckett, Highwood coal option off the table, Great Falls Tribune (Aug. 6, 2009) (“[SME general manager] Gregori described the request to have the permit revoked as a realignment of ‘our order of build-out’ of generation, not necessarily the death of a coal-fired facility.”). If DEQ commits the same legal errors in issuing a new coal plant permit as are the subject of this appeal, then Appellants should be free to file a new permit appeal without the possibility that the appeal might be precluded by dismissal with prejudice of the instant case. Thus, dismissal without prejudice is appropriate. See Schmitz, 2000 MT 275, ¶ 11.

For the foregoing reasons, Appellants respectfully request that SME’s motion to dismiss this case with prejudice be denied, and that this case be dismissed without prejudice.

Respectfully submitted on this 1st day of September, 2009,



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Counsel for Appellants

Exhibit 1



August 6, 2009

Highwood coal option 'off the table'

By *KARL PUCKETT*
Tribune Staff Writer

The state has revoked the air quality permit Southern Montana Electric Generation and Transmission needed to build a 250-megawatt coal-fired power plant east of Great Falls — at the request of SME, not critics of the plant.

"Assuming there is no appeal, the coal-fired plant would be off the table and they would be just proceeding with a gas-turbine plant," said Brent Lignell, an environmental engineer in the Department of Environmental Quality's Air Resource Management Bureau.

SME can't construct a coal-fired facility without the permit, which was first approved in 2007, he said.

General Manager Tim Gregori said it should be clear to the public now that SME intends to focus its efforts entirely on constructing a 120-megawatt natural gas-fired facility in an effort to provide a predictable source of affordable electricity for its customers.

Facing challenges over emissions and financing obstacles, SME announced plans to build the smaller natural gas plant in February, but it held onto the air permit for the coal facility, which made critics nervous.

"We're cautiously optimistic," said Richard Liebert, chairman of Citizens for Clean Energy.

The Montana Environmental Information Center, Citizens for Clean Energy, the Sierra Club and the National Parks Conservation Association have been trying to get that same permit thrown out for months, arguing it should require better emissions controls.

Challenges to the permit remain before the Board of Environmental Review and in district court.

Jenny Harbine, an Earthjustice attorney for the groups challenging the coal-fired facility, welcomed the permit revocation.

"This coal plant has been an inch from dead for months now and it appears as though the final nail in the coffin has been driven," she said.

Gregori described the request to have the permit revoked as a realignment of "our order of build-out" of generation, not necessarily the death of a coal-fired facility, although he acknowledged that construction would now require a new permit from the DEQ.

SME is made up five rural electric cooperatives and the utility arm of the city of Great Falls. Its request to have the DEQ revoke the permit was made in a letter received Monday, Lignell said.

The DEQ then sent a letter revoking the permit Tuesday, Lignell said.

The permit revocation will become final after 15 days on Aug. 20 assuming SME doesn't change its

mind and appeal its own request, Lignell said.

Lignell anticipates the release of an air quality permit for the natural gas plant for public comment later this month.

Lignell also said SME informed the agency it no longer is planning to put up wind turbines at the Highwood Generating Station site.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 2009, I caused a true and accurate copy of the foregoing Appellants' Response to SME Motion to Dismiss With Prejudice to be served by email and/or federal express on the following:

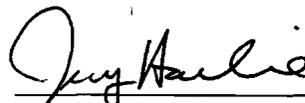
Joyce Wittenberg, Secretary
Board of Environmental Review
Department of Environmental Quality
1520 E. Sixth Avenue
P.O. Box 200301
Helena, MT 59620-0920
By email and Federal Express

Katherine J. Orr
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 2014400
Helena, MT 59620-1440
By email

David M. Rusoff
Department of Environmental Quality
1520 E. Sixth Avenue
P.O. Box 200301
Helena, MT 59620-0920
By email

Kenneth A. Reich
Wolf, Block, Schorr & Solis-Cohen LLP
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Boston, MA 02108
By email

Gary M. Zadick
Mary K Jaraczski
Ugrin, Alexander, Zadick & Higgins, P.C.
#2 Railroad Square
P.O. Box 1746
Great Falls, MT 59403
By email



Jenny K. Harbine

1 **BEFORE THE BOARD OF ENVIRONMENTAL REVIEW**
2 **OF THE STATE OF MONTANA**

3 **IN THE MATTER OF:**
4 **SOUTHERN MONTANA ELECTRIC**
5 **GENERATION AND TRANSMISSION**
6 **COOPERATIVE – HIGHWOOD**
7 **GENERATING STATION AIR QUALITY**
8 **PERMIT NO. 3423-01**

CASE NO. BER 2008-23 AQ

9 **PROPOSED ORDER OF DISMISSAL**

10 On August 18, 2009, Respondent and Intervenor, Southern Montana Electric
11 Generation and Transmission Cooperative, Inc. (“hereinafter, “SME”) filed
12 “Respondent-Intervenor Southern Montana Electric’s Motion to Dismiss Appeal
13 with Prejudice and Memorandum in Support” requesting that the Board of
14 Environmental Review (“Board”) dismiss the appeal of this case by Appellants,
15 Montana Environmental Information Center, Citizens for Clean Energy, Sierra Club
16 and National Park Conservation Association (“Appellants”) with prejudice.
17 Appellants in this appeal challenge the decision of the Montana Department of
18 Environmental Quality (“Department”) to issue an air quality permit for the
19 construction and operation of the Highwood Generating Station near Great Falls,
20 Montana on the basis that the permit failed to limit emissions of fine particulate and
21 failed to comply with pollution control requirements for hazardous air pollutants.

22 SME’s stated reasons for dismissing this case with prejudice are as follows.
23 On August 3, 2009, the Department of Environmental Quality, (“Department”)
24 revoked Air Quality Permit No. 3423-01 issued by the Department for the proposed
25 Highwood Generating Station coal-fired electrical power plant and the revocation
26 became final. SME argues that with the revocation of the Air Quality Permit No.
27 3423-01, the appeal is moot and the case should be dismissed with prejudice. SME
cites Povsha v. City of Billings, 2007 MT 353, ¶ 19, 340 Mont. 346, 174 P.3d 515

1 and American Fed. Savings and Loan Assn., 1998 MT 93, ¶ 55, 228 Mont. 365, 958
2 P.2d 57.

3 The Appellants filed a Response to SME's Motion to Dismiss With Prejudice
4 on September 1, 2009. In this Response, the Appellants advance the argument that
5 the Appellants' claims are moot and because this case no longer presents a
6 justiciable controversy, dismissal without prejudice is appropriate. Appellants cite
7 the case Schmitz v. Engstrom, 2000 MT 275, ¶ 11; 302 Mont. 121, ¶ 11 (2000) for
8 the proposition that dismissal without prejudice means that no right or remedy of the
9 parties is affected and that there has been no decision in the case upon the merits
10 and prevents the defendant from setting up the defense of *res judicata*.

11 Dismissal without prejudice is appropriate in this case because there has been
12 no decision on the merits. Schmitz v. Engstrom, Id. The revocation does make this
13 case moot but there has been no adjudication on the merits or any act that renders
14 further adjudication superfluous such as in Povsha v. City of Billings, supra, in
15 which the Montana Supreme Court dismissed as moot a challenge to the City of
16 Billings' zoning approval for a subdivision after the subdivision had already been
17 built. Further, this case, is moot, with the revocation of the permit, on jurisdictional
18 grounds because there is no longer any case or controversy and the Board does not
19 have jurisdiction or the basis to enter an order with a preclusive effect such as an
20 order of dismissal with prejudice that would prevent further appeals if SME were to
21 reapply for the same type of permit at the same site.

22 DATED this 5th day of November, 2008.

23
24 

25 KATHERINE J. ORR
26 Hearing Examiner
27 Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I caused a true and accurate copy of the foregoing

3 Proposed Order of Dismissal to be mailed to:

4 Ms. Joyce Wittenberg
5 Secretary, Board of Environmental Review
6 Department of Environmental Quality
7 1520 East Sixth Avenue
8 P.O. Box 200901
9 Helena, MT 59620-0901
10 **(original)**

11 Mr. David Russoff
12 Legal Counsel
13 Department of Environmental Quality
14 P.O. Box 200901
15 Helena, MT 59620-0901

16 Mr. Kenneth A. Reich
17 Wolf, Block, Schorr & Solis-Cohen LLP
18 One Boston Place, 40th Floor
19 Boston, MA 02108

20 Ms. Abigail M. Dillen
21 Ms. Jenny K. Harbine
22 Earthjustice
23 209 South Willson Avenue
24 Bozeman, MT 59715

25 DATED: November 5, 2009 

1 **BEFORE THE BOARD OF ENVIRONMENTAL REVIEW**
2 **OF THE STATE OF MONTANA**

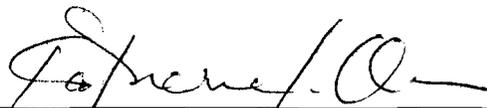
3 **IN THE MATTER OF:**
4 **SOUTHERN MONTANA ELECTRIC**
5 **GENERATION AND TRANSMISSION**
6 **COOPERATIVE – HIGHWOOD**
7 **GENERATING STATION AIR QUALITY**
8 **PERMIT NO. 3423-01**

CASE NO. BER 2008-23 AQ

7 **NOTICE OF OPPORTUNITY TO FILE EXCEPTIONS**

9 Pursuant to Mont. Code Ann. § 2-4-621, the Respondent and Intervenor,
10 Southern Montana Electric Generation and Transmission Cooperative Inc. may file
11 exceptions by December 1, 2009, to the Proposed Order of Dismissal. The
12 Department of Environmental Quality may participate in the process of filing
13 exceptions as well. The Appellants, Montana Environmental Information Center,
14 Citizens for Clean Energy, Sierra Club and National Park Conservation Association,
15 may file a response to the exceptions by December 4, 2009. Oral argument may be
16 held on the exceptions before the Board of Environmental Review on
17 December 11, 2009. The parties are encouraged to notify the Hearing Examiner
18 whether they intend to file exceptions or a response by November 30, 2009.

19 DATED this 23rd day of November, 2009.

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22 **KATHERINE J. ORR**
23 **Hearing Examiner**
24 **Agency Legal Services Bureau**
25 **1712 Ninth Avenue**
26 **P.O. Box 201440**
27 **Helena, MT 59620-1440**

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I caused a true and accurate copy of the foregoing Notice
3 of Opportunity to File Exceptions to be mailed to:

4 Ms. Joyce Wittenberg
5 Secretary, Board of Environmental Review
6 Department of Environmental Quality
7 1520 East Sixth Avenue
8 P.O. Box 200901
9 Helena, MT 59620-0901
10 **(original)**

11 Mr. David Russoff
12 Legal Counsel
13 Department of Environmental Quality
14 P.O. Box 200901
15 Helena, MT 59620-0901

16 Mr. Kenneth A. Reich
17 Wolf, Block, Schorr & Solis-Cohen LLP
18 One Boston Place, 40th Floor
19 Boston, MA 02108

20 Ms. Abigail M. Dillen
21 Ms. Jenny K. Harbine
22 Earthjustice
23 209 South Willson Avenue
24 Bozeman, MT 59715

25 DATED: _____
26
27

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I caused a true and accurate copy of the foregoing Notice
3 of Opportunity to File Exceptions to be mailed to:

4 Ms. Joyce Wittenberg
5 Secretary, Board of Environmental Review
6 Department of Environmental Quality
7 1520 East Sixth Avenue
8 P.O. Box 200901
9 Helena, MT 59620-0901
10 **(original)**

11 Mr. David Rusoff
12 Legal Counsel
13 Department of Environmental Quality
14 P.O. Box 200901
15 Helena, MT 59620-0901

16 Mr. Kenneth A. Reich
17 Wolf, Block, Schorr & Solis-Cohen LLP
18 One Boston Place, 40th Floor
19 Boston, MA 02108

20 Ms. Abigail M. Dillen
21 Ms. Jenny K. Harbine
22 Earthjustice
23 209 South Willson Avenue
24 Bozeman, MT 59715

25 DATED: _____

26 *November 23, 2009*

27 *F. J. [Signature]*

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**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

**IN THE MATTER OF:
SOUTHERN MONTANA ELECTRIC
GENERATION AND TRANSMISSION
COOPERATIVE – HIGHWOOD
GENERATING STATION AIR QUALITY
PERMIT NO. 3423-01**

CASE NO. BER 2008-23 AQ

ORDER

The Board of Environmental Review, (“Board”) having evaluated the Proposed Order of Dismissal of the Hearing Examiner, the Motion and Memorandum of the Respondent and Intervenor, Southern Montana Electric Generation and Transmission Cooperative, Inc. (SME) requesting dismissal of the appeal with prejudice and the request of the Appellants,’ Montana Environmental Information Center, Citizens for Clean Energy, Sierra Club and National Park Conservation Association (“Appellants”) to dismiss the case without prejudice, the Board adopts the Proposed Order of Dismissal. The Appellants’ appeal is dismissed without prejudice because this case is moot, there has been no decision on the merits and there is no longer any case or controversy.

DATED this _____ day of December, 2009.

JOSEPH W. RUSSELL
Chairman
Board of Environmental Review

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Order to be mailed to:

Ms. Joyce Wittenberg
Secretary, Board of Environmental Review
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Helena, MT 59620-0901
(original)

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