

SENATE TAXATION

EXHIBIT NO. 11

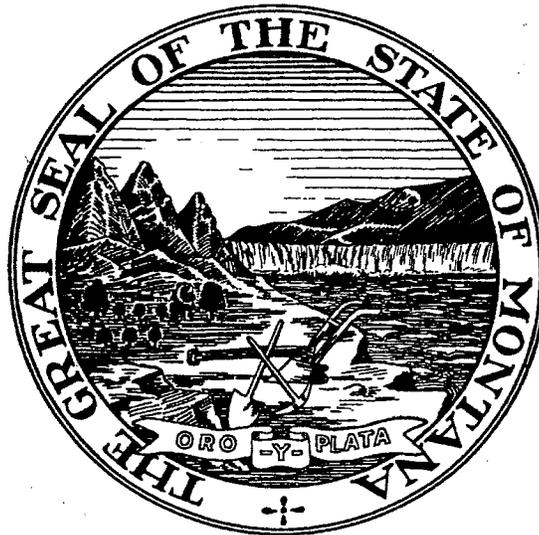
DATE 3.11.09

BILL NO. SB489

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

**Oil and Gas  
Conservation Division**

Brian Schweitzer, Governor



**ANNUAL REVIEW 2007**

Volume 51

**Board of Oil and Gas Conservation**

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Medicine Lake, Montana

WAYNE SMITH, Vice-Chair  
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Billings, Montana

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## 2007 Top Gas Producers

(Includes operators with over 10,000 MCF of gas produced during the calendar year.)

Company	MCF	Company	MCF
1 Fidelity Exploration & Production Co.	48,011,039	51 Robinson Oil Company, LLC	30,926
2 Devon Energy Production Co., LP	16,650,987	52 Dart Oil & Gas Corporation	26,283
3 Klabzuba Oil & Gas, Inc.	8,240,173	53 Northland Holdings, Inc.	26,281
4 Noble Energy, Inc.	6,325,328	54 Tensas Delta Exploration Company, LLC	24,869
5 Omimex Canada, Ltd.	3,256,166	55 Reserve Operating Corp.	24,265
6 Helis Oil and Gas Company, LLC	1,721,050	56 Artex Oil Company	23,791
7 Montana Land & Exploration, Inc.	1,331,918	57 Cut Bank Gas Company	23,323
8 MCR, LLC	1,012,455	58 Citation Oil & Gas Corporation	22,857
9 Saga Petroleum, LLC	771,528	59 DL Energy, LLC	20,045
10 Croft Petroleum Company	731,119	60 Pottlatch Oil & Refining Co	17,724
11 Brown, J. Burns Operating Company	691,461	61 Hardrock Oil Company	17,169
12 Somont Oil Company, Inc.	678,911	62 Cardinal Oil, LLC	16,806
13 Pinnacle Gas Resources, Inc.	482,423	63 Simon and Associates	16,460
14 Western Natural Gas Company	405,480	64 Quicksilver Resources, Inc.	16,349
15 T.W.O. (Taylor Well Operating)	366,112	65 Galuska Exploration & Production LLC	15,000
16 Westech Energy Corporation	345,949	66 Slow Poke Production-George L. Dobson DbA	14,247
17 Jurassic Resources Development NA LLC	331,906	67 McOil Montana One LLC	13,733
18 Keesun Corporation	326,415	68 St. Mary Land & Exploration Company	13,585
19 Branch Oil & Gas	315,378	69 Lease Technicians, James S. Brandt DbA	13,420
20 AltaMont Oil & Gas Inc.	268,154	70 City of Baker	13,335
21 Sands Oil Company	193,823	71 Self, E. M.	12,904
22 Ranck Oil Company, Inc.	181,827	72 Canyon Natural Gas, LLC	10,924
23 NorthWestern Corporation	170,468	73 Rincon Oil & Gas LLC	10,915
24 Macum Energy Inc.	147,613		
25 McMinn Operating Company	142,148		
26 Mountain Pacific General Inc.	127,069		
27 Saco, Town Of	118,163		
28 Bayswater Exploration & Production, LLC	114,778		
29 Whiting Oil and Gas Corporation	109,775		
30 G/S Producing, Inc.	105,728		
31 Nance Petroleum Corporation	102,419		
32 Georesources, Inc.	96,209		
33 Balko, Inc.	87,002		
34 AP Petroleum Company LLC	80,746		
35 Constitution Gas Transport Co., Inc.	79,839		
36 Unit Petroleum Company	79,801		
37 Montana Heartland LLC	77,353		
38 Coolidge, G. B., Inc.	68,637		
39 Topaz Oil & Gas Inc	66,537		
40 Sector Resources (II) Ltd.	61,592		
41 Griffon Petroleum, Inc.	61,019		
42 Rimrock Colony	58,254		
43 Porker Oil	55,046		
44 Great Northern Drilling Company	50,478		
45 Solomon Exploration Inc	48,007		

## 2007 Top 100 Oil Producers

Company	Barrels of Oil	Company	Barrels of Oil
1 Encore Operating LP	6,533,325	51 Thomas Operating Co., Inc.	38,848
2 Enerplus Resources USA Corporation	5,027,627	52 Ballard Petroleum Holdings LLC	33,482
3 Continental Resources Inc	4,484,806	53 Basic Earth Science Systems, Inc.	33,287
4 Burlington Resources Oil & Gas Company LP	4,183,351	54 Columbus Energy Corp.	32,547
5 Headington Oil Company LLC	3,494,813	55 H&R Energy, LLC	32,086
6 Nance Petroleum Corporation	2,054,378	56 McRae & Henry Ltd	30,904
7 Slawson Exploration Company Inc	933,942	57 Columbus Energy, LLC	30,358
8 Petro-Hunt, LLC	714,250	58 Beartooth Oil & Gas Company	29,944
9 EOG Resources, Inc.	650,149	59 Klazuba Oil & Gas, Inc.	27,653
10 Newfield Production Company	515,184	60 Croft Petroleum Company	27,615
11 PrimeWest Petroleum, Inc.	461,892	61 Bluebonnet Energy Corporation	25,767
12 Stone Energy Corporation	461,627	62 Wyoming Resources Corporation	25,023
13 Citation Oil & Gas Corporation	394,411	63 Shakespeare Oil Co Inc	24,762
14 Encore Energy Partners Operating LLC	378,803	64 Wesco Operating, Inc.	22,658
15 Whiting Oil and Gas Corporation	278,508	65 Carrell Oil Company DbA Coco	21,046
16 MCR, LLC	276,567	66 Hawley & Desimon	20,800
17 St. Mary Land & Exploration Company	178,334	67 Eagle Oil & Gas Co.	19,562
18 Quicksilver Resources, Inc.	170,141	68 Berexco, Inc.	19,510
19 Bill Barrett Corporation	143,166	69 Kipling Energy Incorporated	18,947
20 Kodiak Oil & Gas (USA) Inc.	142,933	70 Keesun Corporation	18,773
21 Luff Exploration Company	139,574	71 BTA Oil Producers	17,152
22 Hells Oil and Gas Company, LLC	122,702	72 Macum Energy Inc.	16,966
23 True Oil LLC	122,504	73 Lamamco Drilling Co.	16,917
24 Chaparral Energy, LLC	112,321	74 R & A Oil, Inc.	16,223
25 Somont Oil Company, Inc.	107,821	75 Coolidge, G. B., Inc.	15,940
26 Samson Resources Company	101,385	76 Beren Corporation	15,479
27 Forest Oil Corporation	97,338	77 Sannes, Ronald M. Or Margaret Ann	15,193
28 Oasis Petroleum North America LLC	94,630	78 Orion Energy Partners LP	14,775
29 Summit Resources, Inc.	93,962	79 Nadel and Gussman Rockies, LLC	14,734
30 Prima Exploration, Inc.	88,817	80 Behm Energy, Inc.	14,684
31 Kerr-McGee Oil & Gas Onshore LP	87,581	81 Provident Energy Assoc. Of Mt Llc	14,412
32 Armstrong Operating, Inc.	76,463	82 Big Snowy Resources LP	13,327
33 Chesapeake Operating Inc.	75,716	83 Great Plains Resources Inc.	13,035
34 Howell Petroleum Corp.	75,679	84 Blackjack Oil, Inc.	12,630
35 FX Drilling Company, Inc.	75,645	85 TOI Operating	12,042
36 Omimex Canada, Ltd.	69,256	86 Northern Oil Production, Inc.	11,901
37 Cline Production Company	67,349	87 Ritchie Exploration, Inc.	11,651
38 Flying J Oil and Gas, Inc.	60,622	88 Missouri River Royalty Corporation	11,642
39 Nautilus Poplar, LLC	57,613	89 Hofland, James D.	11,505
40 Sinclair Oil & Gas Company	57,218	90 Hawkins, Robert S.	11,267
41 Marathon Oil Company	51,683	91 XOIL Inc.	10,742
42 Cardinal Oil, LLC	49,545	92 K2 America Corporation	10,676
43 Cowry Enterprises, Ltd.	48,360	93 Upton Resources U.S.A., Inc.	10,251
44 Williston Industrial Supply Corporation	46,790	94 Grand Resources, Ltd.	9,956

MDU RESOURCES GROUP AMENDMENTS

to

SENATE BILL 489

(Prepared by John Alke 431-4630)

1. Page 2, line 19.  
Following: "injection point"  
Strike: "through"  
Insert: "on"
2. Page 2, line 19.  
Following: "natural gas"  
Insert: "transmission"
3. Page 2.  
Following line 25.  
Insert: "(6) The gas gathering facilities of a stand alone gas gathering company providing gas gathering services to third parties on a contractual basis, owning more than 500 miles of gas gathering lines in Montana, and centrally assessed in tax years prior to 2009, shall be treated as a natural gas transmission pipeline subject to central assessment under 15-23-101. For purposes of this subsection, the gas gathering line ownership of all affiliated companies, as defined in 26 USC § 1504(a), shall be aggregated for purposes of determining the 500 miles threshold."
4. Page 3, line 12.  
Following: "natural gas"  
Insert: "transmission"
5. Page 3, line 13.  
Following: "federal energy regulatory commission,"  
Insert: "the gas gathering facilities specified in 15-6-138(6)"
6. Page 4, line 4.  
Following: "natural gas"  
Insert: "transmission"
7. Page 4.  
Following line 7.  
Insert: "(e) the gas gathering facilities specified in 15-6-138(6)"  
Renummer subsequent subsections.
8. Page 4, line 24.

Following: "natural gas"  
Insert: "transmission"

9. Page 4, line 24  
Following: "oil"  
Insert: "transmission"

Bitter Creek Pipelines  
 2008 Property Taxes by County (Situs)

	Taxable Value	12% Tax	3% Tax	tax reduction
Big Horn	1,986,685	464,380	116,095	348,285
Phillips	2,512,877	664,645	166,161	498,484
Valley	220,674	82,859	20,715	62,144
	4,720,236	1,211,884	302,971	908,913

MDU Amendment  
 would eliminate  
 these property tax  
 reductions.

IN THE SUPREME COURT OF THE STATE OF MONTANA

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NO. DA 07-0356

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**OMIMEX CANADA, LTD.,**

Plaintiff and Appellant,

v.

**STATE OF MONTANA, DEPARTMENT OF REVENUE,**

Defendant and Respondent.

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**BRIEF OF AMICUS CURIAE  
MONTANA PETROLEUM ASSOCIATION**

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On Appeal from a Judgment of the Montana First Judicial District Court  
Lewis and Clark County, Cause No. BDV-2004-288  
The Honorable Jeffrey Sherlock, Presiding

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**Appearances**

James P. Sites  
Jared M. Le Fevre  
Crowley, Haughey, Hanson, Toole &  
Dietrich, PLLP  
P.O. Box 2529  
Billings, MT 59103-2529

**ATTORNEYS FOR APPELLANTS  
OMIMEX CANADA, LTD.**

John Alke  
Hughes, Kellner, Sullivan & Alke,  
PLLP  
P.O. Box 1166  
Helena, MT 59624-1166

**ATTORNEYS FOR AMICUS CURIAE  
MONTANA PETROLEUM ASSOCIATION**

Charlena Toro  
Dave Ohler  
Department of Revenue  
P.O. Box 7701  
Helena, MT 59604

**ATTORNEYS FOR RESPONDENTS  
MONTANA DEPARTMENT OF REVENUE**

## STATEMENT OF THE CASE

This case is an appeal of a District Court decision in a declaratory judgment action instituted by the Appellant, Omimex Canada, Ltd (Omimex) against the Montana Department of Revenue (DOR). In the proceedings below, Omimex challenged DOR's central assessment of its property. The District Court held that DOR had the authority to centrally assess Omimex. Dist. Ct. R. 141.0. Its decision is attached as Appendix 1 (Slip Opinion).

In this case, the issue of critical concern to Amicus Curiae Montana Petroleum Association (MPA) is whether the DOR can centrally assess the oil and gas production facilities of a taxpayer whose primary business is the production of oil and gas, thereby subjecting its properties to the 12 percent property tax rate applicable to centrally assessed property instead of the 3 percent property tax rate historically applied to oil and gas production facilities.

## STATEMENT OF INTEREST OF AMICUS CURIAE

The MPA is a trade association whose members include oil and gas producers in the State of Montana. With one exception, the oil and gas production properties of the MPA member producers, including their associated gathering lines, have not historically been the subject of central assessment. The one exception has been the gas production properties of a regulated public utility,

where the production properties were included in the regulated rate base of the utility.

Omimex is not a regulated public utility. Slip Op. at 10. A significant segment of its oil and gas production properties were once owned by the former Montana Power Company, a regulated utility, and included in the regulated rate base of that company. Slip Op. at 9-10. The assertion by DOR of the power and authority to centrally assess the oil and gas production properties of Omimex could have a far reaching impact upon the membership of MPA, as a DOR decision to centrally assess oil and gas production facilities, in and of itself, quadruples the property tax rate on such facilities from 3 percent to 12 percent.

### STATEMENT OF FACTS

There are many oil and gas producers doing business in Montana. These producers not only pay production taxes on the output from their wells, but property taxes on their production facilities, which are classified as Class Eight property under Section 15-6-138(I)(c) of the Montana Code Annotated (MCA), and taxed at a 3 percent property tax rate. Mont. Code Ann. § 15-6-138(4).

Historically, no company whose primary business has been the production of oil and gas has been centrally assessed by DOR and taxed at the 12 percent property tax rate applicable to centrally assessed property and specified in Section 15-6-141(2), MCA.

With one exception, oil and gas production facilities in Montana, including producer owned gathering lines, have been historically taxed at the property tax rate specified in Section 15-6-138(4), MCA instead of the 12 percent property tax rate specified in Section 15-6-141(2), MCA. That one exception has been the gas production facilities of a vertically integrated natural gas utility where the primary business of the taxpayer was the provision of utility services over transmission lines and distribution mains.

The production of either oil or gas requires what the District Court described as a "spider web" of gathering lines which connect the producing wells in an oil or gas field to central points for treatment and/or transmission. Slip Op. at p.7.

Although gathering lines are pipes in the ordinary sense of the word, when owned by the producer, they have historically not been treated as pipeline facilities subject to central assessment.

The Montana Board of Oil and Gas Conservation publicly reports on the Internet at [http://www.bogc.dnrc.state.mt.us/AR\\_2005.pdf](http://www.bogc.dnrc.state.mt.us/AR_2005.pdf) the production of the largest oil and gas producers in the State of Montana. The pertinent excerpts are attached as Appendix 2. None of the producers of oil listed in App. 2 at p. 2 are currently centrally assessed by DOR, even though their production wells may be located in several counties, and their gathering lines may cross county or state lines. Only two of the producers of natural gas listed in App. 2 at p. 3 are being

centrally assessed, even though their wells may be located in several counties and their gathering lines may cross county or state lines.

The two producers of natural gas that DOR is centrally assessing were, in 2005, the largest producer (Fidelity Exploration and Production Co.) and the fifth largest producer (Omimex). App. 2 at p. 3. The common thread between these two companies is that they have acquired gas production facilities that were once owned by a vertically integrated natural gas utility and included in the rate base of that utility. Omimex acquired gas production facilities once owned by the Montana Power Company. Slip Op. at pp. 9-10.<sup>1</sup> Fidelity acquired the gas production facilities once owned by Montana-Dakota Utilities Co. another utility regulated by the Montana Public Service Commission.

## ARGUMENT

- I. The long standing interpretation of Montana law by DOR has been that central assessment does not apply to oil and gas production facilities, including gathering lines, belonging to a taxpayer whose primary business is the production of oil or gas.

The long standing interpretation of Montana law by DOR has been that central assessment does not apply to oil and gas production facilities, including

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<sup>1</sup> DOR centrally assessed Saga Petroleum in 2005 after it acquired some of the former Montana Power Company production properties from Encana. That case was briefly before this Court in *Saga Petroleum v. Department of Revenue*, DA 07-0080. Saga is now locally assessed.

gathering lines, belonging to a taxpayer whose primary business is the production of oil and gas. The only oil and gas production facilities that have been centrally assessed by DOR have been the gas production facilities of vertically integrated natural gas utilities where the primary business of the property taxpayer has been the provision of utility services over linear facilities, such as transmission lines and distribution systems, and constituting a single and continuous property.

Prior to 1999, that long standing interpretation of Montana law by DOR was not only captured in its taxpayer specific applications of Sections 15-23-101(2) and 15-23-301, MCA, but reflected in its administrative rules:

Gathering lines owned and operated by centrally assessed pipeline companies will be considered operating property. All other gathering lines will be considered nonoperating property to be reported to the local county appraisers.

ARM 42.22.103(3), repealed at 1999 MAR p. 2914. An excerpt of MAR Notice 42-2-647, showing the repealed subsection, is attached as Appendix 3.

Central assessment statutes originated in the latter part of the nineteenth century to assess the property of railroads. Amdur, *Property Taxation of Regulated Industries*, Tax Lawyer, Vol. 40, No. 2 at p. 342 (1987); Bonbright, *The Valuation of Property*, at pp. 637-57 (1937). Montana instituted central assessment of railroad property in 1887. Sec. 1675, Fifth Division, General Laws of Montana, 1887. Montana provided for the central assessment of other

industries with linear facilities constituting a single continuous property in 1919.

In that year, the Montana Legislature enacted:

An Act Relating to the Assessment and Taxation of Telephone, Telegraph, Electric Power and Transmission Lines, Canals, Ditches, Flumes and other Property owned or operated in more than one County of the State and Constituting a single and continuous Property throughout more than one County.

Chapter 49, 1919 Session Laws of Montana.<sup>2</sup> As enacted, those statutes did not include natural gas or oil pipelines in the list of linear facilities to be centrally assessed. That occurred in 1939 when the Montana Legislature enacted a bill which added natural gas or oil pipelines. Chapter 17, 1939 Session Laws of Montana, sec. 1 and 2.<sup>3</sup> In 1974, the Montana Legislature added a reference to "microwave" after "telephone" to reflect that telephone companies were replacing their copper cables with microwave facilities on their long haul routes. Chapter 50, 1974 Session Laws of Montana, sec. 1.<sup>4</sup>

Since the application of central assessment to natural gas and oil pipelines in 1939, the statutes governing their central assessment have been applied by DOR to "a single and continuous property" such as a gas utility system or a transmission pipeline. The 1919 Act specifically reflected that requirement in its bill title, and

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<sup>2</sup> The session laws are attached as Appendix 4.

<sup>3</sup> The session laws are attached as Appendix 5.

<sup>4</sup> The session laws are attached as Appendix 6.

the body of the legislation. Chapter 49, 1919 Session Laws of Montana. The text of the controlling statutes governing the central assessment of natural gas and oil pipelines still read that way today. Section 15-23-101(2), MCA, applies to:

“[P]roperty owned by a corporation or other person operating a single and continuous property.” Section 15-23-301, MCA, applies to property: “[W]hich constitutes a single and continuous property.” Moreover, in the context of the oil and gas industry, it was consistently held by the DOR, through its application of the statutes, that gathering lines were not pipelines subject to central assessment unless they were owned by a taxpayer whose primary business was the operation of a public utility or natural gas or oil pipeline. ARM 42.22.103(3), attached as Appendix 3.

For sixty years, the administration of the central assessment statutes by DOR reflected that oil and gas production facilities, including gathering lines owned by a taxpayer that was primarily an oil and gas producer, were not subject to central assessment, even though its wells might be scattered across several counties, and its associated gathering lines might cross county or state lines. That long standing and contemporaneous interpretation of Sections 15-23-101(2) and 15-23-301, MCA by DOR is of “great importance” in interpreting the breadth of central assessment under the two statutory provisions. *Bartels v. Miles City*, 145 Mont. 116, 122, 399 P. 2d 768 (1965). In accord, *State v. King Colony Ranch*, 137 Mont. 145, 151-2,

350 P. 2d 841 (1960).

The long standing interpretation of Montana law by DOR has been that central assessment does not apply to oil and gas production facilities, including gathering lines, belonging to a taxpayer whose primary business is the production of oil or gas

II. DOR did not have the power or authority to dilute the legislative requirement that a natural gas or oil pipeline to be centrally assessed must be a “single and continuous property.”

DOR did not have the power or authority to dilute the legislative requirement that a natural gas or oil pipeline, to be centrally assessed must be a “single and continuous property.” The District Court correctly held that the DOR could not expand the breadth of the central assessment of linear facilities described in Sections 15-23-101(2) and 15-23-301, MCA, by administrative rule. In 1999, DOR not only repealed ARM 44.22.103(3),<sup>5</sup> but attempted to dilute, by administrative rule, the language in Sections 15-23-101(2) and 15-23-301 which required “a single and continuous property” as a factual predicate to central assessment under those statute sections. It adopted, in 1999, ARM 44.22.102(3) which provided:

The department will determine centrally assessed property based on the property’s operating characteristics such as but not limited to property use, integration of operations, management, and corporate structure.

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<sup>5</sup> See p. 5 above.

Although subsection (1) of the same rule still contained the statutory requirement of a “continuous property,” the new subsection (3) purported to allow DOR to determine whether property was centrally assessed based upon the highly subjective standard of the: “[I]ntegration of operations, management and corporate structure.”

The District Court invalidated ARM 44.22.102(3) in its August 9, 2005, Order

Granting Partial Summary Judgment to Omimex:

Despite DOR’s contention, however, it does appear that the administrative rule has impermissibly expanded that statute. The statute specifically states that centrally assessed property consists of “single and continuous property operated in more than one county or more than one state,” while the administrative rule includes in the definition property that is not single and continuous. The agency was not granted the authority in the statutes to include additional types of property to be centrally assessed. Because the DOR impermissibly exceeded its authority, this Court finds A.R.M. 42.2.102(3) to be invalid.

District Court Record 39.0, attached as Appendix 7 at pp. 4-5. The District Court correctly invalidated ARM 44.22.102(3) as exceeding the authority of DOR. DOR cannot, through the adoption of a rule, change statutory law. *Sharp v. Department of Revenue*, 284 Mont. 424, 429, 945 P.2d 48 (1997). In accord, *Bick v. State Department of Justice*, 224 Mont. 455, 457, 730 P.2d 38 (1986).

DOR did not have the power or authority to dilute the legislative requirement that a natural gas or oil pipeline, to be centrally assessed must be a “single and continuous property.”

III. The District Court committed reversible error when it concluded that the DOR could centrally assess Omimex's oil and gas production properties under Sections 15-23-101(2) and 15-23-301 without reference to the language of the statutes or their long standing interpretation by the DOR.

The District Court committed reversible error when it concluded that the DOR could centrally assess Omimex's oil and gas production properties under Sections 15-23-101(2) and 15-23-301 without reference to the language of the statutes or their long standing interpretation by the DOR. Its conclusion ignored the language of the controlling statutes, ignored how DOR itself had interpreted and administered those two sections for sixty years, and ignored its own prior ruling invalidating ARM 44.22.103(3) as being in excess of the DOR's power and authority.

The District Court articulated the following basis for its decision that Omimex was centrally assessable:

The Court concludes that the Omimex properties were properly centrally assessed under Section 15-23-101, MCA. It appears clear that the Omimex properties are operated as a single and continuous property. The Court bases this conclusion on the testimony of George Donkin, who noted that all Omimex property mentioned herein is centrally managed out of Fort Worth, Texas, and that all Omimex gas is sold pursuant to one sales agreement. Further, the Omimex properties are located in more than one county.

Slip Op. at 17. Its conclusion bears no resemblance to either the language of the controlling statutes, or the DOR's historic application of those statutes.

No provision of Montana law provides that the management of a business

from a centralized location determines the applicability of central assessment, either in whole or in part. If it did, every oil and gas producer owning more than one well with an associated gathering line would seemingly be centrally assessable.

No provision of Montana law provides that the number of customers a business has determines the applicability of central assessment, either in whole or in part. If it did, natural gas pipelines would seemingly flip-flop between local and central assessment based upon the number of customers they had the previous year. Under such a standard, Omimex could seemingly avoid central assessment next year by selling its gas to a number of different customers this year.

The ownership of property in more than one county describes a plethora of businesses. The District Court made the grave mistake of divorcing multi-county presence from the overarching requirement of a "single and continuous property." Mont. Code Ann. §§ 15-23-101(2) and 15-23-301.

The District Court committed reversible error when it concluded that the DOR could centrally assess Omimex's oil and gas production properties under Sections 15-23-101(2) and 15-23-301 without reference to the language of the statutes or their long standing interpretation by the DOR

### CONCLUSION

The oil and gas production facilities, including gathering lines, of a taxpayer that is primarily an oil and gas producer, are not centrally assessable under Sections

15-23-101(2) and 15-23-301, MCA. The District Court committed reversible error when it concluded that Omimex was centrally assessable without reference to the actual language of the statutes or their long standing interpretation by the DOR.

The District Court committed reversible error when it concluded that Omimex was centrally assessable because its oil and gas properties were centrally managed out of Fort Worth, Texas; its gas was sold to one customer; and it owned property in more than one county.

Dated this 21<sup>st</sup> day of August 2007.

**HUGHES, KELLNER, SULLIVAN & ALKE, PLLP**

By  \_\_\_\_\_

**John Alke**  
40 West Lawrence, Suite A  
P. O. Box 1166  
Helena, MT 59624-1166

**ATTORNEYS FOR AMICUS CURIAE  
MONTANA PETROLEUM ASSOCIATION**

DA 07-0356

IN THE SUPREME COURT OF THE STATE OF MONTANA

2008 MT 403

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OMIMEX CANADA, LTD.,

Plaintiff and Appellant,

v.

STATE OF MONTANA, DEPARTMENT OF REVENUE,

Defendant and Appellee.

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APPEAL FROM: District Court of the First Judicial District,  
In and For the County of Lewis and Clark, Cause No. BDV-2004-288  
Honorable Jeffrey M. Sherlock, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

James P. Sites, Jared M. Le Fevre; Crowley, Haughey, Hanson, Toole &  
Dietrich, PLLP, Billings, Montana

For Appellee:

Charlena Toro, Special Assistant Attorney General, Helena, Montana

David L. Ohler, Special Assistant Attorney General, Helena, Montana

For Amicus Curiae:

John Alke; Hughes, Kellner, Sullivan & Alke, PLLP, Helena, Montana  
(for Montana Petroleum Association)

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Submitted on Briefs: July 9, 2008

Decided: December 2, 2008

Filed:

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Clerk

District Court Judge Robert L. Deschamps, III delivered the Opinion of the Court.

¶1 Omimex Canada, Ltd. (“Omimex”) appeals from the judgment of the First Judicial District Court, Lewis and Clark County, declaring that the Montana Department of Revenue (“DOR”) may centrally assess Omimex’s property and classify it under § 15-6-141, MCA, as class nine property. We reverse.

¶2 Omimex raises several issues on appeal, which we consolidate and restate as follows:

¶3 Did the District Court err in considering Omimex’s operating characteristics in concluding Omimex was “operating a single and continuous property operated in more than one county or more than one state” and is, therefore, subject to central assessment pursuant to § 15-23-101, MCA?

¶4 Did the District Court err in concluding all of Omimex’s property should be centrally assessed pursuant to § 15-23-101, MCA, and classified as class nine property pursuant to § 15-6-141, MCA?

¶5 Did the District Court err in concluding Omimex did not meet its burden of proof for its equalization and equal protection challenges?

#### **BACKGROUND**

¶6 The facts of the case are largely undisputed. Omimex, a subsidiary of an international oil and gas corporation, owns an interest in five distinct large and scattered smaller properties in Montana. Omimex extracts primarily natural gas from these properties. The properties are not physically connected by Omimex-owned facilities, are not dependent on one another, and may be operated independently. Nonetheless, most of

the gas produced at these facilities is sold to a single buyer. The properties are supervised by a Montana-based foreman and are centrally managed out of Omimex's Texas headquarters.

¶7 The five main Omimex Montana properties are known as the Cut Bank Area properties ("Cut Bank properties"), the Shelby Area properties ("Shelby properties"), the Bowdoin properties, the Regan properties and the Battle Creek properties. ~~These~~

~~properties cover some 2.2 million acres containing approximately 1,450 wells. The wells collectively produce over 10 million cubic feet of natural gas a day and slightly less than 600 barrels of oil a day. Each property has gathering lines that, at low pressure, move untreated gas or oil from Omimex's and often other parties' individual wells to central collecting points for further transmission in large high pressure lines.~~

¶8 The collection point for the Cut Bank properties includes an Omimex plant where gas is treated to remove impurities and by-products before the gas is moved on in a large high-pressure line to a junction with another entity's transmission pipeline. Some of the properties cover more than one county (Cut Bank and Shelby properties), and at least one (Bowdoin properties) crosses the international border into Canada. The Regan properties produce only oil, which is sold to a ground transporter. While Omimex produces and sells some oil and other petroleum products, its main focus in Montana is natural gas. The parties and the District Court consistently considered it to be a natural gas company.

¶9 Most Omimex gas is sold to an entity known as WPS Energy Services, Inc. ("WPS"). Ownership of the gas is transferred to WPS at various locations where there are junctions between Omimex pipelines and transmission pipelines owned by third party

entities. In at least three of the properties (Shelby, Bowdoin, and Battle Creek) Omimex owns and operates high pressure transmission lines that carry accumulated gas owned by Omimex. For a fee, other entities may utilize the Omimex lines to convey their product to junctions with pipelines owned by third parties. At these junctions, the ownership of Omimex gas is transferred to WPS or another buyer, all of whom then transport the gas to distant markets. Omimex has a permit to import and export gas and owns a right to transport gas on some of the third party pipelines but not all of them. WPS transports the Omimex gas it purchases in cross-Canadian pipelines owned by other entities. WPS eventually distributes and sells the gas to consumers in other parts of North America.

¶10 ~~Four of the five Omimex Montana properties (Cut Bank, Shelby, Bowdoin, and Regan properties) were at one time owned and operated by the former Montana Power Company ("MPC") or one of its subsidiaries. Two of the former MPC properties, the Cut Bank and Shelby properties, were a part of the integrated natural gas production and distribution ("wellhead to burner tip") system operated by the MPC until the mid-1990s prior to that company's deregulation and ultimate piecemeal divestiture of its assets.~~

¶11 In Montana, property is assessed for taxation by DOR. Most property is assessed county by county by DOR personnel. This is called "local assessment." Exceptions include the statewide or "central" assessment of property owned in multiple counties or states by certain owners as defined by statute. Section 15-23-101, MCA, provides, "[t]he department shall centrally assess each year . . . (2) property owned by a corporation or other person operating a single and continuous property operated in more than one county or more than one state, including, but not limited to . . . natural gas or oil pipelines . . ."

¶12 The Cut Bank, Shelby and, apparently, the Regan properties were centrally assessed by the DOR when these properties were owned and operated by the MPC. The Bowdoin properties, while owned by a MPC subsidiary, were locally assessed because the gas from this property was sold differently than the rest of MPC's gas. The Battle Creek properties were not a part of the MPC system and were previously assessed locally.

¶13 After deregulation in 1997, the MPC properties were transferred by MPC to a subsidiary named Entech. In 2000, Entech sold these properties and others to PanCanadian Energy Resources, Inc., later called EnCana. Along the way EnCana also acquired the Battle Creek properties. In 2003, Omimex purchased the properties involved in this case from EnCana, while other former MPC properties owned by EnCana were sold to other buyers.

¶14 ~~The DOR has been centrally assessing the Omimex properties because some properties cross county lines and because all are operated by Omimex as a functional single entity or unity of operation.~~ Omimex does not contest DOR's valuation but has advanced several arguments in support of its contention that the properties should be assessed locally, not centrally. Because Omimex's properties are centrally assessed, DOR has classified the property as class nine property under § 15-6-141, MCA, which is taxed at a rate of 12%. Omimex contends that its properties should be locally assessed and classified as class eight properties under § 15-6-138, MCA, which are taxed at a rate of 3%.

¶15 The District Court agreed with the DOR and upheld the central assessment and class nine classification. Omimex appeals.

### STANDARD OF REVIEW

¶16 The standard of review for issues of law is de novo. *Citibank (South Dakota) N.A. v. Dahlquist*, 2007 MT 42, ¶ 8, 336 Mont. 100, ¶ 8, 152 P.3d 693, ¶ 8. The standard of review of any disputed issues of fact is clearly erroneous. *Leichtfuss v. Dabney*, 2005 MT 271, ¶ 20, 329 Mont. 129, ¶ 20, 122 P.3d 1220, ¶ 20.

### DISCUSSION

¶17 Omimex does not dispute the DOR's valuation of its property. The fundamental question in this case is whether Omimex's property should be taxed at a rate of 12% under § 15-6-141, MCA, or at a rate of 3% under § 15-6-138, MCA.

¶18 Regardless of whether Omimex's property is centrally or locally assessed, its tax rate class is determined by the application of the physical attributes of Omimex's Montana properties to the terms of the property classification statutes, §§ 15-6-138 and -141, MCA.

¶19 Pursuant to § 15-6-138, MCA,

(1) Class eight property includes:

(c) all oil and gas production machinery, fixtures, equipment, including pumping units, oil field storage tanks, water storage tanks, water disposal injection pumps, gas compressor and dehydrator units, communication towers, gas metering shacks, treaters, gas separators, water flood units, gas boosters, and similar equipment that is skidable, portable, or movable, tools that are not exempt under 15-6-219, and supplies except those included in class five;

. . . .  
(n) all other property that is not included in any other class in this part, except that property that is subject to a fee in lieu of a property tax.

. . . .  
(4) Class eight property is taxed at 3% of its market value.

¶20 Pursuant to § 15-6-141, MCA,

(1) Class nine property includes:

. . . .  
(b) allocations for centrally assessed natural gas companies having a major distribution system in this state; and

(c) centrally assessed companies' allocations except:

(i) electrical generation facilities classified under 15-6-156;

(ii) all property classified under 15-6-157;

(iii) all property classified under 15-6-158 and 15-6-159;

. . . .  
(2) Class nine property is taxed at 12% of market value.

¶21 The applicable rules of statutory construction to be used to construe these statutes are straightforward. When construing statutes, the court "is simply to ascertain and declare what is in terms or in substance contained therein . . . ." Section 1-2-101, MCA. The specific must prevail over the general. Section 1-2-102, MCA. Related to this is the canon of statutory construction known as *expressio unius est exclusio alterius* (the expression of one thing [in a statute] implies the exclusion of another). See e.g. *Dukes v. City of Missoula*, 2005 MT 196, ¶ 15, 328 Mont. 155, ¶ 15, 119 P.3d 61, ¶ 15 (applying the canon to enforcement of the Montana Scaffold Act); *Harris v. Smaritt*, 2003 MT 135,

¶ 17, 316 Mont. 130, ¶ 17, 68 P.3d 889, ¶ 17 (applying the canon to the Montana Constitution); *Mitchell v. University of Montana*, 240 Mont. 261, 265, 783 P.2d 1337, 1339 (1989) (applying the canon to the statutory definition of “local government units”). If the intent of the legislature can be determined from the plain meaning of the words used in the statute, the plain meaning controls and the Court need go no further. *Western Energy Co. v. State, Dept. of Rev.*, 1999 MT 289 ¶ 11, 297 Mont. 55, ¶ 11, 990 P.2d 767, ¶ 11. ~~Finally, tax statutes are to be strictly construed against the taxing authority and in favor of the taxpayer. *Western Energy*, ¶ 10.~~

¶ 22 Prior to 1999, § 15-6-141, MCA, contained not only the provisions of subsection (1)(b) regarding centrally assessed natural gas companies with major distribution systems, but also contained a separate provision under the exception provisions of subsection (1)(c). This provision was former § 15-6-141(1)(c)(i), MCA, until it was amended by Chapter 556, 1999 Session Laws. Before the amendment, the pertinent parts of the statute read: “(1) Class nine property includes . . . (b) allocations for centrally assessed natural gas companies having a major distribution system in this state; and (c) centrally assessed companies’ allocations except: (i) electric power and natural gas companies’ property . . . .” The 1999 amendments to (1)(c)(i) substituted “electrical generation facility property included in class thirteen” for “electric power and natural gas companies’ property.” Subsequent amendments modified the provision into its current form.

¶ 23 The Montana Legislature’s intent in enacting the “Electrical Generation Tax Reform Act,” Section 1, Chapter 556, 1999 Montana Session Laws, was to reform

taxation of electrical generation facilities in the aftermath of the restructuring of the electric utility industry following its 1997 deregulation. The natural gas industry is not mentioned anywhere within Chapter 556, 1999 Montana Session Laws. From this we conclude that the 1999 amendments to § 15-6-141, MCA, were not intended to alter the status quo regarding natural gas companies' tax classification.

¶24 Under the statute as it existed prior to the 1999 amendment, it was clear that the legislature intended to exempt centrally assessed natural gas companies from class nine *unless* the companies had a major distribution system in the state. Absent any statement of legislative intent to the contrary, this remains the rule.

¶25 ~~tax statutes must be construed in favor of the taxpayer. The explicit inclusion of centrally assessed natural gas companies having a major distribution system in this state implies the exclusion of all other centrally assessed natural gas companies under the *expressio unius est exclusio alterius* canon.~~ The specific description of "centrally assessed natural gas companies having a major distribution system in this state" in § 15-6-141(1)(b), MCA, prevails over the general catch-all provision for "centrally assessed companies" in § 15-6-141(1)(c), MCA. If the legislature had intended to place all centrally assessed natural gas companies into class nine, it had two simple ways to do so: it could have deleted § 15-6-141(1)(b), MCA, altogether or, if for some reason the legislature wanted to single out centrally assessed natural gas companies to be certain they would all be placed in class nine, it could have deleted the qualifier "having a major distribution system in this state." It did not do either.

¶26 Assuming, arguendo, that the District Court was correct in upholding DOR's central assessment of Omimex, and that Omimex is properly a "centrally-assessed natural gas company," it still does not have a major distribution system in this state as required by § 15-6-141(1)(b), MCA. Omimex's properties are manifestly designed not to distribute, but rather to accumulate natural gas from hundreds of individual wells to central points where the gas is commingled and delivered to a single buyer. It is the buyer who then transports the gas to distant locations where it is finally distributed to consumers. Therefore, Omimex's properties, regardless of whether they are centrally or locally assessed, should be classified as § 15-6-138(1)(c) or (n), MCA, class eight property subject to a 3% tax rate.

¶27 ~~For the foregoing reasons, it is not necessary to address whether the District Court was in error when it upheld the central assessment of Omimex's property since where the property is assessed does not make any difference for its classification. Similarly, since we hold that the District Court did err in upholding the DOR class nine classification, it is not necessary to address Omimex's due process and equal protection arguments concerning that classification.~~ Because the District Court erred in determining that the properties should be classified as class nine properties under § 15-6-141, MCA, we reverse and remand for entry of an amended judgment classifying the Omimex properties as class eight properties under § 15-6-138, MCA.

/S/ ROBERT L. DESCHAMPS, III  
District Court Judge Robert L. Deschamps, III  
sitting for Justice Brian Morris

We concur:

/S/ KARLA M. GRAY

/S/ PATRICIA COTTER

/S/ JOHN WARNER

/S/ W. WILLIAM LEAPHART

/S/ JIM RICE

/S/ JOE L. HEGEL

District Court Judge Joe L. Hegel  
sitting for Justice James C. Nelson