No. DA 18-0110

IN THE

Supreme Court of the State of Montana

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB,

Plaintiffs/Appellees,

VS.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant/Appellant

AND

WESTERN ENERGY COMPANY,

Defendant-Intervenor/Appellant.

ON APPEAL FROM THE MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY, HON. KATHY SEELEY, PRESIDING
CASE NO. CDV-12-1075

APPELLANT WESTERN ENERGY COMPANY'S OBJECTION TO PETITION FOR REHEARING

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INTRODUCTION

The Petition for Rehearing attempts an end-run around this Court's unanimous September 10, 2019 decision ("Opinion"). Petitioners Montana Environmental Information Center and Sierra Club contend the Court *erred* when it reversed summary judgment upon finding that material facts remain in dispute. Petitioners are wrong. The Petition neither satisfies Montana Rule of Appellate Procedure 20(a), nor proffers a basis for discarding this Court's application of Montana Rule of Civil Procedure 56(c)(3), which requires the district court to deny summary judgment if there are disputed issues of material fact, and instead (under Rule 52) "find the facts" itself at trial.

BACKGROUND

This Court's Opinion ("Op.") reviewed the district court's grant of summary judgment to Petitioners and vacatur of a Montana Pollutant Discharge Elimination System ("MPDES") Permit issued under the Montana Water Quality Act. The Court concluded, in decisions not challenged here, that the district court was wrong on the law: the Department of Environmental Quality ("DEQ") has the discretion to make certain permitting decisions. Op.,¶¶60,77. Then, reviewing *de novo* the grant of summary judgment, the Court found that "summary judgment is not available" because "issues of material fact are undecided," and remanded to the district court "for a trial on the critical issues of fact." Op.,¶¶72,98,100-101.

Petitioners now seek the exact remedy this Court properly denied them: vacatur and remand to the agency, rather than to the district court.

STANDARD OF REVIEW

Petitioners must demonstrate the Opinion "conflicts with a statute or controlling decision not addressed by the supreme court." Pet., p.2 (limiting the Petition to "Mont. R. App. P. 20(1)(a)(iii).") *See also State ex re. Bullock v. Phillip Morris, Inc.*, 2009 MT 261, ¶45-45A ("grounds" in Rule 20(1)(a) are exclusive); *State v. Snell*, 106 P.3d 100 (Mem.) (Mont., Nov. 4, 2004); 2004 MT 334, ¶1 ("controlling decision not addressed" standard is met when the decision is "in direct conflict with this Court's decision" in an earlier matter).

ARGUMENT

I. THE PETITION IS FACIALLY INADEQUATE.

A Petition for Rehearing may be considered only if it satisfies one of three, tightly cabined, criteria. Rule 20(1)(a), Mont.R.App.P. Petitioners (and *amici*) rely solely on one of these criteria, claiming that the Court's decision "conflicts with a … controlling decision not addressed by the supreme court." Rule 20(1)(a)(iii); Pet.,p.2, and Amicus Br.,p.1 (citing only "Mont.R.App.P. 20(1)(a)(iii)," case law, and no statutes). Astoundingly, Petitioners do not identify which "controlling decision" was "not addressed." Nor can they; there isn't one. The Court should therefore deny the petition.

Petitioners claim "unbroken precedent" requires vacatur and remand to the agency after reversing summary judgment based on material, disputed facts. Pet.,p.2. But Petitioners cite no controlling authority supporting this claim. The Petition is rife with case law, but only three cases can arguably be called "controlling." A "controlling case" is an earlier decision by this Court arising in the same context. *See, e.g., Snell*, ¶1. Here, at a minimum, that means judicial review of a MPDES permit. Only three cases, *Upper Missouri Waterkeeper v. DEQ*, 2019 MT 81 ¶1, *N. Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶3, *Clark Fork Coalition v. DEQ*, 2008 MT 407, ¶1, meet that standard. Petitioners' other cases involve different statutory schemes (with different judicial review provisions) and, in some cases, different courts this Court is not bound to follow regarding issues of Montana law. *See* Section II.B, *infra.*

Far from failing to address the controlling cases, this Court discussed, interpreted and relied upon *Clark Fork*, addressing it in ten paragraphs. Op., ¶¶15,19-20, 22-23, 25-27, 30, 79 *Id*.; *see also id.* at ¶¶18, 29, 37, 98 (addressing *N. Cheyenne Tribe*); *id.* at ¶¶19, 21, 29, 35 (addressing *Upper Missouri Riverkeeper*). Fatally, none of the controlling cases support Petitioners' "unbroken precedent" argument. Although this Court remanded to the agency in *Clark Fork*, that case involved no factual dispute. Indeed, none of the "controlling cases" involved a material dispute of fact. *See Upper Missouri Waterkeeper*, ¶11,

Northern Cheyenne Tribe, ¶3, and *Clark Fork*, ¶19. Thus, none stand for the proposition that, notwithstanding a material dispute of fact, remand to the agency is required at summary judgment. Because Petitioners have cited no "controlling authority" that was "not addressed" or "conflicts" with the Opinion, the Court should deny the Petition. Mont.R.App.P. 20(a)(iii).

II. THE COURT'S REMEDY APPROPRIATELY PROVIDES FOR RESOLVING THE FACTUAL DISPUTES.

Setting aside the Petition's facial inadequacy, Petitioners' legal argument is baseless. They argue this Court erred by remanding to the district court for fact-finding. Petitioners' theory violates basic principles of civil procedure. In contrast, the Opinion follows this Court's extensive case law consistently applying Rule 56 to environmental cases. *N. Cheyenne Tribe*, ¶18 (*quoting Pennaco Energy, Inc. v. Mont. Bd. of Envtl. Review*, 2008 MT 425, ¶17, that "a district court properly grants summary judgment *only* when no genuine issues of material fact exist") (emphasis added); Op.,¶18.

A. Petitioners' Requested Remedy Violates Rule 56.

Petitioners ask this Court to "vacate the permit and remand to DEQ to either support its decision with evidence and analysis, or change its decisions." Pet.,pp.13-14. That is the same remedy granted by the district court *before* this Court overturned that decision as erroneous. Op.,¶15. In reversing the district court, this Court stated: "where it is apparent that issues of material fact are

undecided, summary judgment is not available." *Id.,*¶72. The Court's holding complies with Rule 56 and its controlling precedent. M.R.Civ.P. 56(c)(3); *N. Cheyenne Tribe*, ¶18.

Petitioners admit factual questions remain. Pet.,pp.9-13. They contend, however, that where such questions exist in a challenge to an environmental permit, the appropriate remedy is *not* fact-finding by the district court, but remand to the agency. Pet.,pp.3-7. Petitioners are trying to carve out a new standard for environmental cases in which permit challengers need only identify "conflicting evidence" in the permitting process to justify vacatur of the agency action and remand for another round. Pet.,p.5 ("If review of the administrative record reveals that the agency's 'own records' show 'conflicting evidence' or that the agency 'ignore[d] "pertinent data,"' the remedy is to 'remand to the agency for additional explanation or explanation."). Thus, when Petitioners claim that Water Quality Act permit cases should be "resolved" at summary judgment (Pet.,p.7), they mean such cases should be decided only on legal questions, regardless of disputes of fact. The problems with this position are manifold.

First, Petitioners would turn the Rule 56 standard on its head. In an ordinary civil case, evidence of a material dispute of fact *prevents* an award of summary judgment (*see N. Cheyenne Tribe*, ¶18); Petitioners would have this Court establish

a new rule to *require* it. *See* Pet.,p.5 (arguing that "conflicting evidence" compels remand to the agency).

Second, Petitioners misrepresent the authority on which they rely. Petitioners do not acknowledge that in each of the Water Quality Act permit challenges they cite (Pet.,p.7), this Court "resolved" the case at summary judgment *because* there was no dispute of material fact. *See Upper Missouri Waterkeeper* ¶11 ("all parties agreed that no material facts were in dispute"); *N. Cheyenne Tribe*, ¶3 (only issue on appeal was a legal question); *Clark Fork*, ¶19 ("there are no material facts at issue."). This is the crucial distinction between a doctrine that *complies* with Rule 56, and one that does not, and Petitioners fail to address it. This blind spot leads Petitioners to mistake the happenstance that the previous cases *did not* have disputes of material fact for a legal rule that such cases *cannot* have disputes of fact. *See* Pet.,p.5 ("Thus, judicial review raises only *questions of law*, which should be resolved without judicial factfinding.") (emphasis in original).

Third, as a policy matter, Petitioners' proposed rule would *guarantee* that project opponents could vacate permits at will. Under Petitioners' proposal, a project opponent need only submit comments identifying a factual dispute to ensure that the only remedy available to the courts is vacatur and remand to the agency, setting up an endless revolving door back to the agency. This cynical use

of the public comment process would not improve public involvement and agency decision-making. Instead, it would create a failsafe for any group or person to indefinitely delay any non-Montana Administrative Procedure Act ("MAPA") agency decision they oppose (including all municipal and industrial Water Quality Act permits).

B. Petitioners Identify No Controlling Authority that Displaces Rule 56.

Only three of the cases cited by Petitioners involved the same legal regime as this case. The others are governed by statutes – the federal Administrative Procedure Act, MAPA, and the Montana Subdivision and Platting Act ("MSPA") – that do not apply to judicial review of a Water Quality Act permit. Petitioners mix and match among these cases, obscuring this Court's consistency in upholding summary judgment only when there are no disputes of material fact.

Petitioners' attempt to replace the summary judgment standard with the "arbitrary and capricious" standard for review of an agency action – which is often applied in federal administrative law (Pet.,pp.6-7) – fails because the standards do not conflict. Courts can and do apply both standards, separately, in the same case. Petitioners' misuse of *Ravalli Co. Fish & Game Ass'n, Inc. v. Mont. Dept. State Lands,* 273 Mont. 371 demonstrates their fundamental failure to understand how the two standards co-exist. Petitioners argue that *Ravalli* holds that "conflicting evidence" requires a remand to the agency. Pet.,p.5. But there, as in many

administrative review actions, the Court was examining two distinct sets of facts for two different purposes: (a) facts related to summary judgment before the district court, and (b) facts before the agency. *The facts before the court were not in dispute*. All parties agreed what the agency had (and had not) analyzed; they disputed whether the agency had the legal obligation to do more. *Ravalli* at 380 ("Both the revised EA and the DSL's brief to this Court concede that the revised EA did not address the significance of impacts.").

Because the facts before the district court were not in dispute, this Court resolved the matter at summary judgment on the legal issues. *Ravalli* at 376. The Court remanded to the agency because it determined that the agency erred *as a matter of law*. The error of *law* arose because conflicting facts *before the agency* triggered a *legal* obligation to undertake additional MEPA review. *Id.* This Court did *not* hold that remand to the agency could be appropriate where a court faces a dispute of facts on summary judgment. Only after the necessary facts have been settled – because none are in dispute in the context of a summary judgment motion, because the district court has ruled on all the facts, *e.g.,* after trial, or because the governing statute requires judicial review on an administrative record (as in a MAPA proceeding after facts have been found at a contested case hearing) – does the "arbitrary and capricious" standard come into play. *Clark Fork*, ¶21 (*quoting Johansen v. State*, 1999 MT 187, ¶11); *see also* Op., ¶19.

Petitioners' invocation of MSPA cases to displace the summary judgment standard fares no better. Petitioners misrepresent this Court's decisions regarding the scope of review in these cases. In *Aspen Ranch*, the Court expressly approved the district court's decision to conduct a "one-day evidentiary hearing" where both sides presented "testimony and evidence." *Aspen Ranch Trails, LLC v. Simmons*, 2010 MT 79, ¶¶ 11, 53. Petitioners ignore this express majority holding, instead citing to criticism of that decision in a concurrence. *See* Pet.,p.4.

Finally, Petitioners' citation to MAPA (Pet.,p.3 citing *Hilands Golf Club v. Ashmore*, 227 Mont. 324, 331 (1996)) is inapposite because MAPA requires a contested case fact-finding process *before* judicial review. *See MEIC v. DEQ*, 2005 MT 96, ¶¶ 22-23 (comparing the fact-finding MAPA requires in the contested case with the standard of review the statute imposes for subsequent judicial review of the contested case findings in the district court); Op.,¶19. Here, because no such fact-finding occurred before Petitioners brought their case to the district court, it is wholly inappropriate to apply judicial review standards that assume such fact-finding *has* taken place.

Petitioners are correct that judicial review of an agency decision can sometimes be restricted to the "record" before the agency. § 2-4-704(1), MCA (review under MAPA "must be conducted by the court without a jury and must be confined to the record."). However, the Water Quality Act includes no such

restriction (or judicial review provision at all), so this Court properly looked to its precedent regarding non-MAPA administrative decisions not subject to statutory review provisions. Op.,¶19. If Petitioners are dissatisfied, they have a remedy available – amendment by the Legislature. Absent a change in the law, the Montana Rules of Civil Procedure require the district court to conduct fact-finding where material facts are in dispute, even on appeal from an agency. Mont.R.Civ.P. 1, 52, 56(c) and 81(a).

C. A District Court Hearing Will Appropriately Resolve the Factual Questions.

Petitioners suggest that a remand hearing would equate to "*post hoc* rationalizations." Pet.,p.10. However, the questions raised by the Court do not ask the district court – or DEQ – to develop new analyses. Instead, they inquire into the agency's decision-making. Op.,¶100 ("whether DEQ arbitrarily and capriciously applied this interpretation to impaired and potentially intermittent segments of East Fork Armells Creek must be determined following a hearing on the questions of fact involved"); *Id.* ("it is unclear whether it is necessary for DEQ to adopt a TMDL budget for impaired segments of East Fork Armells Creek"); *Id.*,¶101 ("The record does not explain how DEQ examined the relevant data and articulated a satisfactory explanation for its action.").

These questions do not invite the parties to go beyond the record. They ask for explanation *of* the record. The Montana Board of Environmental Review,

which is charged with doing similar fact-finding in *contested cases* under MAPA, explained the distinction this way: an evidentiary hearing that "resolv[es] disputed issues of material fact" regarding an agency decision "reviews and explains the administrative decisions made by [the agency] during [the] administrative process and ultimately determines the sufficiency of the [agency's decision.]" *In the Matter of: Appeal Amendment AM4, Western Energy Company, Rosebud Strip Mine Area B, Permit No. C1984003B*, Order on Motions in Limine, pp.4-5 (copy attached).

Because this is not a MAPA-contested case, it is up to the district court to conduct this necessary fact-finding, as this Court ordered. Op.,¶¶19, 72, 98, 100-101. *See, e.g., Heffernan v. Missoula City Council*, 2011 MT 91, ¶24-25, 66 (approving district court fact-finding "for ascertaining," *inter alia,* "whether the agency fully explicated its course of conduct or grounds of decision"); *Skyline Sportsmen's Assn. v. Bd. of Land Comm'rs*, 286 Mont. 108 (1997) (same); Mont.R.Civ.P. 52, 81(a). "[F]ollowing [the] hearing on the questions of fact involved," the district court can then put its judicial review hat on and "determine[]" this matter (Op.,¶¶99-100), using the proper level of deference as now clarified by this Court. Op.,¶¶19-26.

CONCLUSION

The Court should deny the Petition because it is facially inadequate under Mont.R.App.P. 20(a). It also wrongly seeks to violate controlling law by creating an unprecedented exception to Rule 56(c) for environmental permitting cases.

Respectfully submitted this 8th day of November, 2019.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing complies with the requirements of Rule 20(3), Mont.R.App.P. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 2,500 words or fewer, excluding caption, table of contents, table of authorities, index of exhibits, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ Kyle Anne Gray

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CERTIFICATE OF SERVICE

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