

ORIGINAL

FILED

11/19/2019

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 18-0110

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 18-0110

FILED

NOV 19 2019

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Clerk of Supreme Court  
State of Montana

MONTANA ENVIRONMENTAL INFORMATION  
CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY,

Defendant and Appellant,

and

WESTERN ENERGY COMPANY,

Defendant/Intervenor and Appellant.

ORDER

On October 10, 2019, Appellees Montana Environmental Information Center and The Sierra Club (MEIC) filed a petition for rehearing citing M. R. App. P. 20(1)(a), asserting the decision conflicts with a statute or controlling decision not addressed by the Supreme Court.<sup>1</sup> The Montana Department of Environmental Quality (DEQ) filed an objection to the petition.

In December 2012 Plaintiffs and Appellees filed a verified Complaint and Application for a Writ of Mandamus and Declaratory Relief challenging a discharge permit issued by DEQ to Western Energy. The complaint asserted four claims:

1. DEQ unlawfully sought to downgrade the receiving waters in the Rosebud Montana Pollutant Discharge Elimination System (MPDES) Permit without a use attainability analysis or acquiring EPA approval;
2. DEQ failed to ensure that the permit will protect water quality;

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<sup>1</sup> Amici Trout Unlimited, Inc. and Clark Fork Coalition filed a brief in support of the petition for rehearing.

3. The permit was illegal because DEQ allowed discharges into an Impaired Water for which no total maximum daily load (TMDL) has been developed; and

4. The permit is illegal because DEQ failed to require adequate monitoring to comply with water quality standards.

In addition to a writ of mandate, the complaint requested a declaration under the Declaratory Judgment Act and the Private Attorney General Doctrine that the permit was void, illegal and issued in violation of the Montana Water Quality Act and the federal Clean Water Act. The complaint also sought costs of suit and further relief as the court deemed equitable and just.

On March 14, 2016, the District Court issued a “Memorandum and Order on Judicial Review.” However, this is not technically an action for judicial review. The complaint itself does not implicate MAPA and the District Court order states that “The parties agree the Montana Administrative Procedures Act (MAPA) does not apply to this case.” The District Court noted that all parties moved for summary judgment. The District Court correctly held that the standard of review is set out in *Clark Fork Coalition v. Dep’t of Env’tl. Quality*, 2012 MT 240, 366 Mont. 427, 288 P.3d 183; *see also Skyline Sportsmen’s Ass’n v. Board of Land Comm’rs*, 286 Mont. 108, 951 P.2d 29 (1997).

In granting MEIC’s motion for summary judgment, the District Court issued a declaratory judgment that the MPDES permit was invalid, holding that “The decisions are arbitrary and not supported by the law applicable to the permitting process,” and referred the matter back to DEQ.

DEQ appealed. On September 10, 2019, this Court reversed the District Court, specifically on decisions of law related to the alleged reclassification of ephemeral streams and whether representative monitoring is allowed under Montana law. Moreover, we held that where it is apparent that issues of material fact are undecided summary judgment is not available, and remanded to the District Court for further proceedings and additional fact finding consistent with the Opinion.

The burden remains on the plaintiffs in this action to prove the remaining allegations alleged in the complaint.

Upon review, we hold that the decision does not conflict with a statute or controlling decision not addressed. The Appellees have not satisfied the requirements of M. R. App. P. 20.

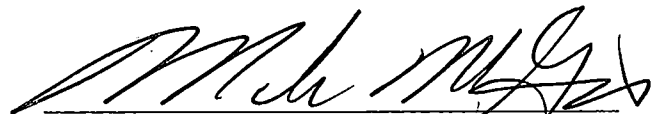
Therefore, having considered the petition and responses,


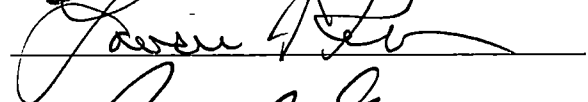
IT IS ORDERED that the petition for rehearing is DENIED.

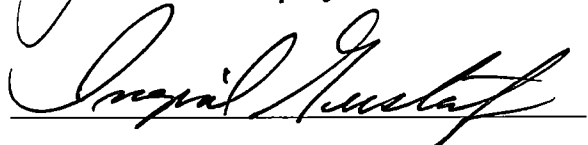
A corrected Opinion has been issued to correct party names and add additional appearances of counsel.

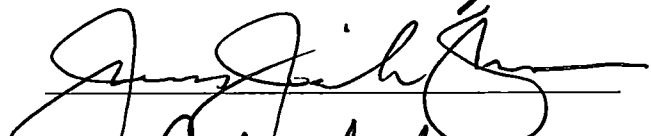

The Clerk is directed to provide a copy of this Order to all counsel of record and to the Honorable Kathy Seeley, presiding judge.

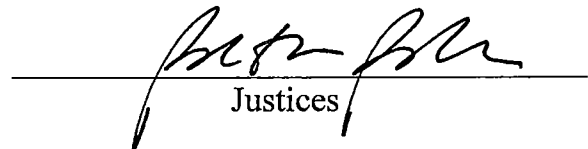
DATED this 19<sup>th</sup> day of November, 2019.

  
Chief Justice



  
Justices