

FILED

08/10/2022

DATE March 2, 2020 Bowen, Greenwood
CLERK OF DISTRICT COURT JUDGE OF THE SUPREME COURT
STATE OF MONTANA

By: [Signature]

KATHERINE M. BIDEGARAY
District Judge, Department 2
Seventh Judicial District
300 12th Ave. NW, Suite # 2
Sidney, Montana 59270

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT
ROSEBUD COUNTY

MONTANA ENVIRONMENTAL
INFORMATION CENTER, and SIERRA
CLUB,

Petitioners,

vs.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY;
MONTANA BOARD OF
ENVIRONMENTAL REVIEW; WESTERN
ENERGY CO.; NATURAL RESOURCE
PARTNERS, L.P.; INTERNATIONAL
UNION OF OPERATING ENGINEERS,
LOCAL 400; and NORTHERN
CHEYENNE COAL MINERS
ASSOCIATION,

Respondents.

Case No. DV 19-34

**ORDER DENYING RESPONDENT
MONTANA BOARD OF
ENVIRONMENTAL REVIEW'S MOTION
TO DISMISS**

Before the Court is the motion to dismiss for failure to state a claim, filed by
Respondent Montana Board of Environmental Review (Board). Petitioners Montana
Environmental Information Center and Sierra Club (Conservation Groups) oppose this
motion. For the reasons stated below, the motion is denied.

Case No. DV 19-34

File No. 40

BACKGROUND

This case challenges the final decision on June 6, 2019, of the Board upholding the AM4 Amendment of the permit for Area B of the Rosebud Mine, a coal strip-mine located in Colstrip, Montana. Pet. for Rev. ¶¶ 64, 66, 68, 70, 72, 74. Respondent Department of Environmental Quality (DEQ) originally issued the permit in December 2015 to Respondent Westmoreland Mining, LLC (WRM). *Id.*, ¶ 3, 19, 21. The Conservation Groups appealed the permit to the Board pursuant to the Montana Strip and Underground Mine Reclamation Act (MSUMRA) and the Montana Administrative Procedure Act (MAPA). *Id.*, ¶ 59.

The Conservation Groups' permit appeal challenged, among other things, DEQ's analysis of the mine's impacts on aquatic life and the mine's impacts to a receiving stream, East Fork Armells Creek, that DEQ had previously deemed impaired for failing to meet applicable water quality standards. *Id.*, ¶¶ 74, 76. In its final decision in June 2019, the Board rejected the Conservation Groups' claims and upheld the permit.

In their petition for judicial review, the Conservation Groups contend that the Board committed various errors in limiting their claims and evidence, admitting inadmissible evidence from DEQ and WRM, and improperly altering the burden of proof. *Id.*, ¶¶ 66, 68, 70, 72. The Conservation Groups assert that the Board's decisions violated the Montana Constitution, MSUMRA, and MAPA. *Id.*, ¶¶ 66-76. The Conservation Groups seek relief against the Board and DEQ. *Id.*, ¶¶ A-E (request for relief).

STANDARD OF REVIEW

"In considering a motion to dismiss made pursuant to Rule 12(b)(6), M.R.Civ.P., a court must view the allegations in a light most favorable to the plaintiff, admitting and accepting as true all facts well-pleaded." *Knudsen v. Ereaux*, 275 Mont. 146, 150, 911 P.2d 835, 838 (1996). "A court should not dismiss a complaint for failing to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle him or her to relief." *Id.*

DISCUSSION

The issue at the heart of the Board's motion is whether an agency¹ that issues a final decision in a contested case under MAPA, like the Board here, *may* be a party to a case seeking judicial review of that decision. While it is true, as the Board explains, that the agency is not a *required* party under Rule 19 in the absence of which a petition for review may not proceed, it is equally true under Montana Supreme Court precedent the agency that decides a contested case under MAPA *may* be a party to a case seeking judicial review of that decision. This distinction is sufficient to resolve the Board's motion to dismiss.

The controlling case, is *Forsythe v. Great Falls Holding, LLC*, 2008 MT 384, 347 Mont. 676, 196 P.3d 1233, in which the Montana Supreme Court held that an agency that issues a final decision in a contested case—like the Board here—*may be a party* to a case seeking judicial review of that final decision. *Id.*, ¶ 34. In reaching this conclusion, the Court noted that on judicial review, "[t]he District Court could not

¹ Mont. Code Ann. § 2-4-102(2)(a) (defining agency).

properly order the Department [of Revenue, which conducted the contested case] to take specific action regarding GFH's license transfer application unless the Department had been a party to that action." *Id.* That is, a district court cannot order a remedy against the agency that issued the final decision unless that agency is a party to the case seeking judicial review.

The case before this Court is analogous to *Forsythe*. The Conservation Groups have alleged specific errors committed by the Board, including improperly limiting Conservation Groups' claims, allowing the DEQ to present *post hoc* evidence, reversing the burden of proof, and allowing and relying on expert testimony from a non-expert. Pet. for Rev. ¶¶ 64, 66, 68, 70. The groups have specifically sought relief against the Board, as well as any other relief that may be just and proper. *Id.*, ¶¶ A, B, E. To obtain relief against the Board, the Board must be a party to this case. *Forsythe*, ¶ 34. The Board has not carried its burden to demonstrate "beyond doubt" that the groups can obtain all appropriate relief in the Board's absence. *Knudsen*, 275 Mont. at 150, 911 P.2d at 838.

On the other hand, the cases on which the Board relies are distinguishable. The question in *Young v. Great Falls*, 194 Mont. 513, 515-516, 632 P.2d 1111, 1112-13 (1981), was whether the agency that issued the final decision was *required* to be party to a petition for judicial review under Rule 19, not, as here, whether the agency *may* be a party. Noting the Court's long-standing preference for resolving cases on the merits rather than technicalities and the interest in "allowing parties to have their day in court," the Court held that the agency "need not be a party to proceedings for judicial review." *Id.* 191 Mont. at 516, 632 P.2d at 1113. But rejecting an argument that an agency *must*

be a party does not resolve the issue of whether the agency *may* be a party. The Court in *Forsythe*, ¶ 34, resolved this latter question, holding an agency that issues a final decision *may* be a party to a case seeking judicial review of the final decision when the agency's conduct in the contested case (rather than that of a third party) is at issue.

The Court in *Forsythe* distinguished *Young* on the basis that the plaintiff in *Young* had "sought redress through the administrative process against another party for alleged improper conduct," whereas the plaintiff in *Forsythe* challenged the "Department's conduct" in issuing its final decision in the contested case. *Forsythe*, ¶¶ 30-31. The instant case is analogous to *Forsythe* because here the Conservation Groups specifically challenge aspects of the Board's conduct in issuing its final decision: namely, its erroneous evidentiary decisions and its erroneous reversal of the burden of proof. Pet. for Rev. ¶¶ 64, 66, 68, 70.²

The Court in *Forsythe*, ¶¶ 31-32, further explained that "[n]umerous cases" have allowed judicial review against agencies issuing final decisions in contested cases. Similarly, as the Conservation Groups point out here, the Montana Supreme Court has resolved numerous cases in which members of the public have sought judicial review against the Board. *Citizens Awareness Network v. Montana Board of Environmental Review*, 2010 MT 10, 355 Mont. 60, 227 P.3d 583; *Pennaco Energy, Inc. v. Montana Bd. of Env'tl. Review*, 2008 MT 425, 347 Mont. 415, 199 P.3d 191 (judicial review against the Board); *Missoula City-Cty. Air Pollution Control Bd. v. Bd. of Env'tl. Review*, 282 Mont. 255, 257, 937 P.2d 463, 465 (1997). Thus, both the reasoning in *Forsythe*

² For these same reasons, *Reinhardt v. Mont. Human Rights Bureau*, 2010 U.S. District LEXIS 133668 (D. Mont. Dec. 17, 2010), and *BNSF Ry. Co. v. Feit*, 2011 U.S. Dist. LEXIS 44130 (D. Mont. Apr. 25, 2011), are distinguishable.

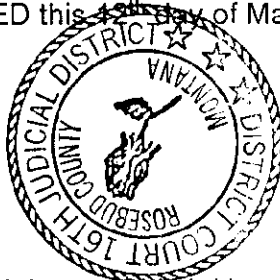
and numerous prior decisions of the Montana Supreme Court make clear that the Board may be a party to a case seeking judicial review of the Board's action.

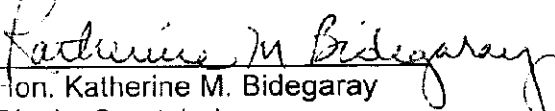
The Court, however, is not insensitive to the Board's concerns about avoiding the costs of litigation over its rulings in the underlying contested case. While the Board's concerns are not sufficient to deny the Conservation Groups' the opportunity to seek a complete remedy, they may be lessened by the Board's filing of a notice of non-participation, as it has done in other recent cases in which the Board has appeared as a party. The Court further notes that since the inception of this action, the Board's presence in this case has been helpful and informative.

CONCLUSION

For the foregoing reasons, the Board's motion to dismiss is DENIED.

DATED this 4th day of March, 2020.




Hon. Katherine M. Bidegaray
District Court Judge

cc: Derf Johnson/Shiloh Hernandez/Walton Morris
John C. Martin/Samuel R. Yemington/Victoria Marquis
Mark L. Lucas/Sarah Christopherson
Amy D. Christensen

Certificate of Service

I hereby certify that a true and correct copy of the original document was duly served upon counsel of record and interested parties by regular mail/e-mail on 3/12/20

By 
Clerk/Deputy Clerk