

IN THE SUPREME COURT OF THE STATE OF MONTANA

CITIZENS FOR BALANCED USE a
Montana not for profit corporation; W.R.H.
NEVADA PROPERTIES, LLC, a Nevada
Limited Liability Company;

Petitioners,

vs.

MONTANA NINETEENTH JUDICIAL
DISTRICT COURT, Lincoln County, The
Honorable Matthew J. Cuffe, Presiding Judge,

Respondent.

CASE NO. DA-24-0609

PLAINTIFFS' EMERGENCY PETITION FOR WRIT OF SUPERVISORY CONTROL

From the Nineteenth Judicial District Court, Lincoln County, Montana

Cause No. DV-27-2024-0000153-OC

The Honorable Matthew J. Cuffe, Presiding

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BACKGROUND AND POSTURE

On Monday October 21, 2024, the Montana the Board of Land Commissioners (“Land Board”) is scheduled to take up a recommendation by defendant Fish Wildlife and Parks (“FWP”) to accept a conservation easement that will encumber thousands of acres of private property. Fifty percent of the nearly 33,000 affected acres include severed mineral rights, a large fraction of which belong to Plaintiff WRH Nevada Properties, LLC (“WRH”). Plaintiffs complaint challenges whether all or part of the affected properties are eligible for acceptance into the Montana Forest Legacy Program. Supervisory control is needed because Land Board approval of the conservation easement will allow the transaction to close thereby depriving Plaintiffs of a meaningful remedy, which is the primary grounds for this *Emergency Petition for Writ of Supervisory Control*.

The request for supervisory control is narrowly tailored to allow time for appellate process. Specifically, the Supreme Court is asked to stay enforcement of the district court’s order dissolving a *Temporary Restraining Order* which will preserve Plaintiffs’ available remedies to allow for appellate review of: 1) a pending decision by the District Court regarding *Plaintiffs Expedited Motion for an Order Suspending Dissolution of the Temporary Restraining Order*, filed and served pursuant to Rule 22, Mont. R. App. P.; and 2) Plaintiffs’ *Notice of Appeal* from the

District Court's *Findings of Facts, conclusions of Law and Order Denying Application for Preliminary Injunction*.

This case challenges the Montana Forest Legacy Program and a conservation easement known as the Montana Great Outdoors Project, Phase 1 ("MTGO-1"). FWP issued its *Decision Notice* recommending approval of the MTGO-1 project on June 20, 2024. Appendix ("APP"), No. 1.

Plaintiffs challenged the proposed action in a complaint alleging the following seven counts,

Count I seeks declaratory judgment that standards implementing the Montana Forest Legacy Program constitute agency rules adopted in violation of the Montana Administrative Procedures Act;

Count II seeks declaratory judgment that the Montana Forest Legacy Program Violates Art. III, Sec. 1 of the Montana Constitution, and Art.1, Sec. 8 of the United States Constitution because no specific delegation of legislative authority authorizes FWP to create or operate the Montana Forest Legacy Program;

Count III seeks declaratory judgment that the Montana Forest Legacy Program does not comply with its own programmatic eligibility requirements, because no mineral potential analysis is included in any project documents.

Count IV seeks declaratory judgment that the MTGO-1 does not satisfy Montana Forest Legacy Program eligibility requirements because the Project expressly allows ground disturbing mineral activities, among other things;

Count V seeks declaratory judgment that the Montana Forest Legacy Program and the Montana Great Outdoors Project did not comply with the Montana Environmental Policy Act because no programmatic review was performed, no Environmental Impact Statement addresses the cumulative effect of interrelated programs covering hundreds of

thousands of acres of private land, and the inadequate project review failed to consider adequate alternatives;

Count VI requests declaratory judgment that FWP's Application of the Montana Environmental Policy Act to the Montana Great Outdoors Project and the Montana Forest Legacy [Program] was constitutionally deficient in depriving Plaintiffs of an opportunity to comment on; and

Count VII seeks preliminary and permanent injunctive relief unless or until the Montana Forest Legacy Program and the MTGO-1 Project stratify all constitutional, statutory, and administrative requirements.

APP 2.

Plaintiffs also made application for a *Temporary Restraining Order* ("TRO") and an *Order to Show Cause* why a Preliminary Injunction should be issued. On August 13, 2024, the district court entered a TRO and order to show cause, restraining defendants until further notice "from filing or recording any documents establishing a conservation easement or transferring ownership of the property that is the subject of MTGO-1 Project." APP 3.

Following the show cause hearing on September 6, 2024, the district court entered its *Findings of Facts, Conclusions of Law and Order Denying Application for Preliminary Injunction* (Oct 8, 2024) and dissolving the TRO. APP 4 at 12. On October 10, Defendants' Notice of Entry of Judgment was filed and served. APP 5. The following day, October 11, 2024, Plaintiffs filed and served *Notice of Appeal* (APP. 6) and an *Expedited Motion and Brief for an Order Suspending Dissolution of the Temporary Restraining Order* pursuant to Rule 22, Mont. R. App. P. APP 7.

The district court issued its denial of Plaintiffs’ Rule 22 motion on October 18, 2024 (the date of this filing). APP 8. Under the rule, jurisdiction over the request for relief from the order dissolving the TRO resides with the district court and Plaintiffs now have 11 days to file a motion with the Supreme Court challenging that denial. Rule 22(2), Mont. R. App. P.

SUPERVISORY CONTROL STANDARD

Article VII, Section 2(2) of the Montana Constitution grants this Court “general supervisory control over all other courts.” Supervisory control is an extraordinary remedy to be exercised only in extraordinary circumstances. Miller v. Eighteenth Judicial District Court, 2007 MT 149, ¶ 15, 337 Mont. 488, 162 P.3d 121 (citing cases). This Court may assume supervisory control over a district court “to direct the course of litigation if the court is proceeding based on a mistake of law, which if uncorrected, would cause significant injustice for which appeal is an inadequate remedy.” Stokes v. Mont. Thirteenth Jud. Dis. Ct., 2011 MT 182, ¶ 5, 361 Mont. 279, 259 P.3d 754; Rule 14(3)(a), Mont. R. App. P.

In addition, “Judicial economy and inevitable procedural entanglements [have been] cited as appropriate reasons for this Court to issue a writ of supervisory control.” *Id.* “In such instance, ‘the denial of a speedy remedy by supervisory control would be a denial of justice.’” *Id.* The normal appeal process does not provide an adequate remedy where a district court’s mistake of law is “a deviation

from well-established jurisprudence” and, thus, will “alter the cost of and preparation for trial, affect settlement negotiations, and call into question the value of any potential verdict resulting in additional time and expense for appellate resolution and subsequent litigation.” Payne v. Eighth Judicial Dist. Court, 2002 MT 313, ¶ 5, 313 Mont. 118, 60 P.3d 469; *see also* Stokes, supra, at ¶ 5; Truman v. Mont. Eleventh Judicial Dist. Court., 2003 MT 91, ¶ 15, 315 Mont. 165, 68 P.3d 654.

Supervisory control is justified when urgency or emergency factors make the normal appeal process inadequate, the case involves purely legal questions, and one or more of the three following circumstances exist: (1) the other court is proceeding under a mistake of law and is causing a gross injustice; (2) constitutional issues of state-wide importance are involved, or (3) the other court has granted or denied a motion for substitution of a judge in a criminal case. Rule 14(3) M. R. App. P.

“[A] writ of supervisory control is not to be used as a means to circumvent the appeal process. Only the most extenuating circumstances will such a writ be granted.” State ex. rel. Ward v. Schmall, 190 Mont. 1, 617 P.2d 140 (1980). The burden of persuasion is on the petitioner to convince this Court to issue a writ. Westphal v. Mont. Eleventh Judicial Dist. Court, No. OP 21-0387, 405 Mont. 438, 495 P.3d 421 (Aug. 17, 2021). Questions of fact are not susceptible to review on supervisory control. Alford v. Mont. Fifteenth Jud. Dist. Ct., No. OP 22-0204, 409 Mont. 555, 512 P.3d 1173 (May 3, 2022) (supervisory control is proper only in

the Court's discretion and upon affirmative showing that the lower court is proceeding under a manifest mistake of law involving purely legal questions not dependent on disputed material facts); Barrus v. Mont. First Jud. Dist. Ct., 2020 MT 14, ¶¶ 17-20, Mont. 353, 456 P.3d 577 (supervisory control unavailable if matter does not involve purely legal questions).

ARGUMENT

Plaintiffs are prepared to show on appeal that the district court's denial of the preliminary injunction is based upon one or more errors of law pertaining to constitutional issues of statewide importance (i.e., agency authority to exercise legislative powers in the absence of clear statutory authority). However, if the conservation easement closes and is recorded, Plaintiffs will be without a remedy.

Grounds for the requested *Writ of Supervisory Control* are found primarily in the procedural entanglements and exigencies of this case. Stokes, supra. The district court ordered dissolution of the TRO on October 8, 2024. APP 4. Judgment was entered on October 10th. Plaintiffs filed *Notice of Appeal* and *Expedited Motion for an Order Suspending Dissolution of the Temporary Restraining Order* the next day.

Under the appellate rules “[a] party shall file a motion in the district court for [] an order suspending, modifying, restoring, or granting an injunction pending appeal.” Rule 22(1)(c)(iii), M.R.App.P. The rule further provides that “[t]he district court retains the power to entertain and rule upon a motion filed pursuant to this rule

despite the filing of a notice of appeal or the pendency of an appeal” and “must promptly enter a written order on a motion filed under this rule and include in findings of fact and conclusions of law, or in a supporting rationale, the relevant facts and legal authority on which the district court's order is based.” Rule 22(1)(d), M.R.App.P. Finally, the rule provides a mechanism for appeal from the district court’s decision in response to a motion to suspend enforcement of its prior orders pending appeal. Rule 22(2), M.R.App.P.

With entry of the district court’s denial of Plaintiffs’ Rule 22 motion on this date, plaintiffs are deprived of the ability to fully brief a motion with the Supreme Court under part (2) of Rule 22, in advance of the Land Board meeting set for October 21st. For that reason, Plaintiffs seek a Writ of Supervisory Control in order to allow the parties to appeal from the district court’s decision to grant or deny Plaintiffs’ *Expedited Motion for an Order Suspending Dissolution of the Temporary Restraining Order*

Simply stated, without an order staying the district court’s order dissolving the TRO, Land Board approval of the MTGO-1 Project will deprive Plaintiffs of the remedy sought in this case seeking to enjoin the defendants from conveying the MTGO-1 conservation easement unless or until the alleged constitutional, statutory and administrative violations are corrected. APP 2 at 59.

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CONCLUSION

For the reasons stated, a writ of supervisory control and an order staying the district court's order dissolving the TRO pending appeal from Plaintiffs' Rule 22 motion is necessary to preserve Plaintiffs right to seek a remedy for alleged constitutional, statutory and programmatic violations. In addition, Plaintiffs ask for all further relief as this Court deems just and proper.

DATED this 18th day of October, 2024.

/s/ Peter G. Scott
Peter G. Scott, *Attorney for Petitioners*

CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 14(9)(b) and 11(4)(e), I certify that this brief is printed in proportionately spaced font and does not exceed 4,000 words, excluding the caption, certificate of compliance, exhibit index, and certificate of service.

/s/ Peter G. Scott
Peter G. Scott, *Attorney for Petitioners*

CERTIFICATE OF SERVICE

I, Peter Guillum Scott, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 10-18-2024:

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Dated: 10-18-2024