

## Public Land and Resources Law Review

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Volume 0 Case Summaries 2012-2013

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# Montana Wildlife Federation v. Montana Board of Oil & Gas Conservation

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### Recommended Citation

Guio, Ali (2013) "Montana Wildlife Federation v. Montana Board of Oil & Gas Conservation," *Public Land and Resources Law Review*: Vol. 0, Article 8.

Available at: <https://scholarship.law.umt.edu/plrlr/vol0/iss3/8>

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***Montana Wildlife Federation v. Montana Board of Oil & Gas Conservation*, 2012 MT 128,  
365 Mont. 232, 280 P.3d 877.**

**Ali Guio**

**ABSTRACT**

The Montana Wildlife Federation challenged the Montana Board of Oil and Gas Conservation decision to issue twenty-three gas well permits in the Cedar Creek Anticline. The Plaintiffs claimed that twenty-three individual Environmental Assessments completed by Montana Board of Oil and Gas Conservation staff were inadequate under the Montana Environmental Policy Act review standards and that the Board was required to conduct a programmatic review of the permits. The Montana Supreme Court affirmed the lower court's finding of summary judgment for the MBOGC, ruling that, under MEPA's arbitrary and capricious standard, the Court's role is not to determine if it would have made the same decision as the Board, but to decide whether the Board had sufficient information to make the decision it made. The Court found that the Board's decision did not violate Montana's statutory framework regulating oil and gas or MEPA's procedural requirements.

**I. INTRODUCTION**

*Montana Wildlife Federation v. Montana Board of Oil & Gas Conservation* concerns the adequacy of the Montana Board of Oil & Gas Conservation's (MBOGC or Board) oil and gas permitting review processes under the Montana Environmental Policy Act (MEPA).<sup>1</sup> The Montana Supreme Court considered three issues on appeal. First, whether the district court erred under Montana's statutory framework review provision for oil and gas permitting when it considered evidence not contained in the administrative record.<sup>2</sup> Second, whether the district court erred in finding that individual environmental assessments (EAs) for each of the twenty-

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<sup>1</sup> *Mont. Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conserv.*, 280 P.3d 877 (Mont. 2012).

<sup>2</sup> *Id.* at 880 (citing Mont. Code Ann. § 82-11-144 (2011)).

three proposed wells were adequate under MEPA.<sup>3</sup> Third, whether district court erred in holding that the Board was not required to conduct a programmatic environmental impact statement (EIS) for the permits at issue and any future permits for development in the Cedar Creek Anticline.<sup>4</sup> The Montana Supreme Court affirmed the district court's holdings and ruled that the lower court did not err when it granted summary judgment for the Board.<sup>5</sup>

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

The MBOGC is the permitting and regulatory agency for oil and gas conservation on private, fee, and State lands.<sup>6</sup> The state land at issue here is the Cedar Creek Anticline (CCA) in Eastern Montana. The CCA is the state's largest oil and gas producing geologic structure; as of 2008, it contained over 1,100 oil and gas wells.<sup>7</sup>

In 1989 the MBOGC conducted a Programmatic Environmental Impact Statement on Oil and Gas Drilling in Montana (1989 PEIS).<sup>8</sup> In that review, the MBOGC concluded that a checklist-format EA for each oil and gas well proposed for the Cedar Creek Anticline (CCA) would be sufficient to comply with MEPA's requirements.<sup>9</sup> In 2003 the Board issued an EIS regarding anticipated effects of coalbed natural gas (CBNG) development in the state (2003 FEIS).<sup>10</sup> Though the 2003 FEIS focused on CBNG, it also analyzed conventional oil and gas development.<sup>11</sup> Based on that analysis, the Board decided to continue using individual EAs for oil and gas well permits rather than implementing a programmatic assessment procedure.<sup>12</sup> The 2003 FEIS included discussions of wildlife impacts, including potential impacts on sage grouse,

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<sup>3</sup> *Id.* at 880.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 881.

<sup>7</sup> *Mont. Wildlife Fed'n*, 280 P.3d at 880.

<sup>8</sup> *Id.* at 882.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 882-883.

<sup>11</sup> *Id.* at 883.

<sup>12</sup> *Id.*

and noted that the document “may be tiered from or incorporate by reference other documents including the 1989 PEIS.”<sup>13</sup>

In 2008, Fidelity Exploration & Production Company (Fidelity) submitted applications for permits to drill twenty-three natural gas wells in the Cedar Creek Gas Field in the CCA.<sup>14</sup> The Montana Wildlife Federation and National Wildlife Federation (Federations) sued the MBOGC in Fallon County District Court after the Board issued the permits to Fidelity.<sup>15</sup> The district court granted motions by Fidelity and the Montana Petroleum Association to intervene as defendants.<sup>16</sup> The Federations’ complaint asked the district court to find the MBOGC EAs inadequate under MEPA, and to declare that the Board violated MEPA by failing to conduct a programmatic review of Fidelity’s permits.<sup>17</sup> The Federations also requested an injunction to prevent MBOGC from issuing any additional well permits until it performed a programmatic review of oil and gas development in the Cedar Creek Gas Field.<sup>18</sup>

Both parties moved for summary judgment.<sup>19</sup> The district court reviewed the case under Montana Code Annotated § 82-11-144, which contains the statutory basis for oil and gas conservation regulated by the Board. Based on that review, the court found that the EAs were adequate under MEPA.<sup>20</sup> The district court therefore granted summary judgment for the defendants.<sup>21</sup> The Federations appealed the case to the Montana Supreme Court.<sup>22</sup>

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<sup>13</sup> *Mont. Wildlife Fed’n*, 280 P.3d at 883.

<sup>14</sup> *Id.* at 880.

<sup>15</sup> *Id.* at 884.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Mont. Wildlife Fed’n*, 280 P.3d at 884.

<sup>20</sup> *Id.* at 884-885.

<sup>21</sup> *Id.* at 884.

<sup>22</sup> *Id.* at 885.

### III. ANALYSIS

While summary judgment is reviewed *de novo*, the standard in MEPA cases is whether “the agency acted arbitrarily, capriciously, or unlawfully.”<sup>23</sup> Reversal under this standard is appropriate when the challenged decision appears “random, unreasonable or seemingly unmotivated based on the existing record.”<sup>24</sup> Under Montana Code Annotated § 82-11-144(2), a court may set aside MBOGC decisions if they are

(a) arbitrary, unreasonable, capricious, [an] abuse of discretion or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations or short of statutory right; (d) without observance of procedure required by law; or (e) unwarranted by the facts[.]<sup>25</sup>

#### **A. Admittance of Evidence not in the Administrative Record**

The Supreme Court upheld the lower court’s consideration of information outside the administrative record.<sup>26</sup> Although plaintiffs brought the case as a MEPA violation, the Court found that Montana Code Annotated §§ 82-11-111(2)(c) authorized the MBOGC to enforce rules to meet its objectives and § 82-11-144 outlined the standard of review for cases challenging those rules.<sup>27</sup> Therefore, unlike other MEPA cases, it was proper to review evidence outside the administrative record because this case was brought as “a suit for injunction challenging [an] act of the MBOGC within its regulatory jurisdiction.”<sup>28</sup>

#### **B. Adequacy of the Environmental Assessments under MEPA**

MEPA guidelines require different levels of review depending on the potential impact of the proposed action, as outlined in the Administrative Rules of Montana Title 36, Chapter 2,

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<sup>23</sup> *Id.* at 885.

<sup>24</sup> *Id.*

<sup>25</sup> *Mont. Wildlife Fed’n*, 280 P.3d at 885.

<sup>26</sup> *Id.* at 886.

<sup>27</sup> Mont. Code Ann. §§ 82-11-111(2)(c), 82-11-144 (2011).

<sup>28</sup> *Mont. Wildlife Fed’n*, 280 P.3d at 886 (citing Mont. Code Ann. § 82-11-144).

Sub-chapter 5.<sup>29</sup> Agencies must complete an EIS for actions “significantly affecting the quality of the environment” or an EA when it is unclear if the action will significantly affect the environment.<sup>30</sup> Despite plaintiffs’ arguments that the Board did not properly tier its review to previous studies, that it did not take a “hard look” at permitting additional development in the CCA, and that it did not evaluate cumulative impacts of the wells, the Supreme Court found that MBOGC satisfied MEPA requirements.<sup>31</sup>

Even though the EAs did not explicitly mention the 1989 PEIS or the 2003 FEIS, the EAs were implicitly tiered from the previous studies because it was “clear from the record” that staff relied on the studies when evaluating the permits.<sup>32</sup> In light of the 2010 warranted-but-precluded finding for sage grouse, it is surprising that the Court found that MBOGC took a sufficiently “hard look” at cumulative impacts to sage grouse when the EAs were implicitly tiered to the 1989 PEIS and 2003 FEIS, which made what appear to be “general statements about possible effects,” and the individual EAs did not address existing sage grouse leks that were identified in DNRC EAs for the same area.<sup>33</sup> Despite that, the Court held that the MBOGC complied with MEPA’s review requirements because the Board completed the checklist EA, had access to “institutional knowledge,” and relied on the administrative record documenting preexisting wells.<sup>34</sup>

### **C. Requirement of a Programmatic Environmental Impact Statement**

Programmatic assessments are required for “major actions of state government significantly affecting the quality of the human environment.”<sup>35</sup> The Court determined that

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<sup>29</sup> *Id.* at 886.

<sup>30</sup> Admin. R. Mont. 36.2.523 (2011).

<sup>31</sup> *Mont. Wildlife Fed’n*, 280 P.3d at 887.

<sup>32</sup> *Id.* at 888.

<sup>33</sup> *Id.* at 889-891.

<sup>34</sup> *Id.* at 890-891.

<sup>35</sup> *Id.* at 892.

because the existing field had over one thousand wells and the infrastructure for the permitted wells was largely in place, the MBOGC was not arbitrary or capricious in determining that the permitting twenty-three new wells was not a “major state action” requiring a programmatic EIS.<sup>36</sup>

#### **IV. CONCLUSION**

The Montana Supreme Court determined that the MBOGC did not violate MEPA in permitting Fidelity’s twenty-three wells and that the district court properly granted summary judgment to the Board. The Court did caution MBOGC that future EAs should include more detailed information, including explicit mention of tiered studies, “to provide the public and a reviewing court with a clear statement of reasons to explain why a project’s impacts are not significant.”<sup>37</sup> Taking an even stricter view of MEPA review requirements, the dissent stated that implicit tiering frustrated MEPA’s purpose of informing the public of anticipated effects of agency actions because it made the administrative reasoning behind decisions unavailable to the public except through a lawsuit.<sup>38</sup> Ultimately, it appears that this case exemplifies the Montana Supreme Court’s strict reading of the “arbitrary and capricious” standard and deference to agency decisions when the Court finds a rational basis for those decisions.

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<sup>36</sup> *Id.* at 893.

<sup>37</sup> *Mont. Wildlife Fed’n*, 280 P.3d at 893.

<sup>38</sup> *Id.* at 894.