

IN THE DISTRICT COURT OF TETON COUNTY, WYOMING
NINTH JUDICIAL DISTRICT

PROTECT OUR WATER JACKSON HOLE,)	
a Wyoming nonprofit Corporation,)	
)	
Plaintiff,)	
)	
vs.)	No. 2024-CV-0019048
)	
WYOMING DEPARTMENT OF)	
ENVIRONMENTAL QUALITY and)	
BASECAMP TETON WY SPV, a Wyoming)	
limited liability company,)	
)	
Defendant.)	
-----)	

TRANSCRIPT OF HEARING ON MOTION TO DISMISS

Proceedings before the Honorable Keith G. Kautz, Retired Justice, State of Wyoming Supreme Court, held by Microsoft Teams videoconference, July 11, 2024.

Reported by Lance D. Oviatt, Official Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S

For the Plaintiff:

John Graham
Geittman Larson Swift, LLP
P.O. Box 1226
Jackson, WY 83001

For Defendant Department of Environmental Quality:

Abigail Boudewyns
Senior Assistant Attorney General
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, WY 82002

For Defendant Basecamp:

Kelly Shaw
Stacia Berry
Travis Koch
Koch Law, P.C.
P.O. Box 2660
Cheyenne, WY 82003

Christopher Hawks
Hawks & Associates, LC
P.O. Box 4430
Jackson, WY 83001

1 VIDEOCONFERENCE VIA MICROSOFT TEAMS
2 THURSDAY, JULY 11, 2024; 10:00 A.M.

3 --oOo--

4 THE COURT: Okay. Good morning, Counsel.
5 Here we are at ten o'clock. For the record this is a
6 hearing in Teton County in Case Number 19048. The Court
7 has made the courtroom available for the public, it
8 looks like all of us are appearing virtually.

9 And so we are ready to go with the two
10 pending motions to dismiss, one filed by Basecamp and
11 one filed by the State. I would like to hear argument
12 about all of them together. So, I'd like to hear from
13 Basecamp first, then from the State, and then from the
14 Plaintiffs. Okay.

15 So, Ms. Shaw are you going to argue?

16 MS. SHAW: Yes, we're prepared. Do you have
17 a time limitation in mind, Your Honor?

18 THE COURT: I don't.

19 MS. SHAW: Okay. Well, I will try to keep
20 it concise. I know the Court's time is valuable, but we
21 appreciate the opportunity to speak today.

22 THE COURT: Excuse me, let me add, folks,
23 with the advances of technology and the advantages I
24 have reviewed all of the file. I've reviewed the
25 pleadings, the Complaint, the Answer. I've reviewed the

1 motion. I've reviewed the memos, I've reviewed the
2 replies. I'm familiar with all of them, so if that
3 helps you for timing. I just wanted to be sure you're
4 aware of that.

5 MS. SHAW: Yes. Thank you, Your Honor. We
6 appreciate that.

7 Okay. Is everybody ready to proceed? The
8 court reporter, are you ready?

9 MR. REPORTER: I am, yes.

10 MS. SHAW: My name is Kelly Shaw, of course
11 you've seen me before. I, along with Ms. Stacia Berry,
12 Mr. Travis Koch, and Mr. Chris Hawks represent Basecamp
13 in this case. We do appreciate the Court's opportunity
14 to speak in support of our motion to dismiss today.
15 This is an extremely important motion for Basecamp
16 because as you know Basecamp is just trying to run a
17 business.

18 Basecamp operates a small resort of 13
19 geodome tent structures in Teton County. This resort
20 has been described as glamping, this is a combination
21 word for glamorous and camping. This is a type of
22 visitor accomodation that's become much more popular in
23 recent years. Glamping's popularity comes from its
24 ability to merge two worlds, which is what Basecamp is
25 doing. Visitors who want an intimate way to connect

1 with Wyoming's natural beauty can find that at Basecamp
2 and visitors who want to experience that natural beauty
3 with more modern amenities of a luxury resort can enjoy
4 that same level of comfort in one of their 13
5 semipermanent windowed domes.

6 So, this is a fairly new development, fairly
7 new idea in visitor accommodations, but Basecamp is very
8 passionate about it. In addition to the excitement that
9 this development has generated there's also been some
10 opposition. What makes Basecamp controversial is
11 primarily its location. Basecamp is on a small piece of
12 land owned by the State of Wyoming known as the Village
13 School Section.

14 Residents of Teton County and indeed all of
15 Wyoming have been deeply invested in what happens to
16 this little square of land for decades. Now, the Court
17 will likely recall that this lawsuit from POWJH is not
18 the only one lodged against Basecamp in an attempt to
19 quash its dream of building its little glamping
20 community, but the loudest voices seeking to shut
21 Basecamp down at any cost are not necessarily the
22 wisest.

23 Another citizen group recently filed a
24 similar lawsuit alleging that Basecamp was not complying
25 with certain terms of the temporary use permit that it

1 is using to occupy the Office of State Lands and
2 Investment state parcel. No matter how well-intentioned
3 or invested that citizen group may have been, this Court
4 correctly determined that that group lacked standing
5 because it was a stranger to the temporary use permit
6 between Basecamp and OSLI, the Office of State Lands and
7 Investment.

8 Equally here, Protect our Water Jackson Hole
9 is a stranger to the delegation agreement that it is
10 attempting to enforce, for that reason this Court should
11 follow a similar path and grant Basecamp's motion to
12 dismiss yet another frivolous lawsuit against it.

13 The Court can resolve this case simply and
14 quickly by evaluating just the standing issue first.
15 The first count of Plaintiff's Complaint is a request
16 for declaratory relief. Specifically the Plaintiff is
17 requesting a declaratory judgment that when DEQ
18 delegates permitting authority to a county or another
19 local government entity that DEQ has no residual
20 authority to issue permits in that county.

21 But crucially, Protect Our Water Jackson
22 Hole is a stranger to that agreement, they are not a
23 signatory, they are not a party to it. That delegation
24 agreement is between DEQ and Teton county, that's it.
25 POWJH can have no legitimate interest in enforcing it

1 that actually affects Protect Our Water Jackson Hole.
2 For that reason they don't have standing to seek a
3 declaratory judgment here.

4 What Protect Our Water Jackson Hole is
5 really seeking is general enforcement of an
6 administrative procedure and that is exactly the type of
7 claim that the Court, the Wyoming Supreme Court, has
8 stated in *Roe versus Board of County Commissioners* that
9 a citizen group does not have standing to enforce.
10 General enforcement of administrative processes,
11 administrative issues is not a proper subject for
12 citizen groups to seek declaratory judgment.

13 And what's more Protect Our Water has made
14 no clear explanation of how or even whether Protect Our
15 Water has been or will be harmed. If any harm occurred
16 when DEQ issued the permit in place of Teton County the
17 only entity that could possibly claim any harm is Teton
18 County and yet Teton County is not the plaintiff here.
19 Teton County is not the one complaining that this
20 delegation agreement has not been properly followed.

21 Now, one of the reasons that courts require
22 litigants to demonstrate a personal stake in the outcome
23 is to ensure that the parties vigorously and fully argue
24 the legal merits of the case. But Protect Our Water
25 Jackson Hole is plainly the wrong party to vigorously

1 assert this claim. They cannot vigorously assert a
2 claim that would be more properly brought by a different
3 party with a greater stake in the outcome of the case.

4 Whatever interest Protect Our Water has in
5 regional water quality does not empower it to delve into
6 a legal dispute about which arm of Wyoming government
7 had authority to issue this permit.

8 And I want to make clear that Basecamp was
9 not trying to circumvent Teton County in any way.
10 Basecamp went to DEQ to get its permit because it
11 understood that both permitting entities wanted that to
12 be the way the permit was issued. Basecamp had no
13 desire to go behind Teton County's back. They did this
14 with full awareness from Teton County, with full
15 awareness from DEQ.

16 This was just an administrative process
17 where Basecamp on instructions from the State went to
18 one permitting agency rather than another. That's not a
19 problem of which POWJH can legitimately complain because
20 it didn't affect their interest in any way.

21 Protect Our Water has explained its claimed
22 basis for standing in its Complaint in a single
23 paragraph, that's Paragraph 20. Now, this paragraph
24 states that Protect Our Water has expended a significant
25 sum of money on water quality monitoring, on stakeholder

1 involvement, and in water quality master planning. Now,
2 these goals are laudable and there is no doubt that
3 Protect Our Water is genuinely invested in them.

4 But if spending money is enough to confer
5 standing on an organization then standing is no longer a
6 jurisprudential requirement. Standing becomes then just
7 the price of admission to the courts. That holding
8 would run counter to all Wyoming precedent and really to
9 the constitutional underpinnings of standing doctrine
10 itself.

11 What we require to demonstrate standing in a
12 case is not that a plaintiff merely spend money on a
13 problem. Plaintiffs still have to be directly impacted,
14 they have to have a personal stake. Because Protect Our
15 Water has based its demonstration of standing in this
16 case entirely on money expended the Court should dismiss
17 this action for lack of standing without ever evaluating
18 any of the merits.

19 And what's more, even if standing could be
20 bought for some price, Protect Our Water has still
21 failed to demonstrate how the issue complained of has
22 harmed its interests in any way. Protect Our Water has
23 stated it has a genuine commitment to water quality, the
24 Court can take that claim at face value. In a motion to
25 dismiss Protect Our Water is entitled to that assumption

1 and to all favorable inferences that flow from it.

2 So, taking it as a given that Protect Our
3 Water is deeply and genuinely committed to water
4 quality, as they say they are, there is still a crucial
5 piece missing. Protect Our Water has not even alleged
6 how DEQ issuing the permit instead of Teton County has
7 harmed water quality in any way.

8 In it's response to DEQ's motion to dismiss
9 Protect Our Water points out that under DEQ's logic the
10 Wyoming Secretary of State could issue this permit. And
11 it makes me wonder if the Wyoming Secretary of State did
12 in fact issue Basecamp's permit and it was every bit as
13 stringent as POWJH desired, it incorporated every
14 possible element of environmental protection that they
15 wanted would Protect Our Water still object? If what
16 they truly care about is jurisdiction, then they should.
17 But if what they care about is water quality, then they
18 wouldn't. And if they did object would they have
19 standing to do so? Almost certainly not because they've
20 not demonstrated that any harm actually has occurred or
21 will occur on the basis of which entity signed this
22 permit.

23 Their claims here are allegations that an
24 administrative process was not followed without any
25 explanation of how that change in process harmed Protect

1 Our Water or its stated interests in water quality.
2 Under the holding of the Wyoming Supreme Court in the
3 *Moose Hollow Holdings* case this is not sufficient to
4 demonstrate standing. This Court can and should dismiss
5 the case because POWJH fundamentally lacks standing to
6 bring it.

7 And because they do not have standing to
8 seek an interpretation of an agreement to which they are
9 not a party and in which they have no genuine interest
10 the Court need not reach the merits of any of its
11 claims, the inquiry can stop there.

12 But if the Court takes even a brief look
13 under the hood of this lawsuit even more problems
14 appear. After an arduous, drawn-out permitting process
15 Basecamp received its permit from DEQ almost a year ago.
16 Since then Basecamp has made numerous investments in its
17 permit and in its facility. It's fully constructed a
18 state-of-the-art septic system. It's built it's
19 glamping resort. It's constructed its tents and domes
20 and other buildings on the premisses. It have invested
21 this money in good faith, relying on what it believes to
22 be a validly issued permit.

23 Declaratory judgment attacking the validity
24 of that permit at this late date is not time. Because
25 that request for declaratory judgment is not timely this

1 Court should not address the merits and should dismiss
2 it entirely.

3 Now, I want to make clear that we are not
4 arguing that declaratory judgment is never available
5 under the Environmental Quality Act. Declaratory
6 judgment was likely possible when DEQ first announced
7 that it intended to issue the permit. DEQ gave public
8 notice of its intent to issue the permit, it didn't hide
9 the ball, it didn't sneak this through without any sort
10 of publicity.

11 There was a statewide public notice that
12 went out to members of the public and directly to
13 Protect Our Water Jackson Hole. If they wanted
14 declaratory judgment, if they truly objected to DEQ
15 issuing this permit, that was the time to seek that
16 declaratory judgment.

17 Now, if they didn't do that they had another
18 opportunity. Once DEQ issued the permit POWJH could
19 have taken an administrative appeal with the
20 Environmental Quality Council within 30 days. POWJH has
21 availed itself of such an appeal and that appeal is
22 administratively proceeding through the Environmental
23 Quality Council as we speak.

24 Here I do want to update the Court on one
25 development that has occurred since Basecamp filed its

1 motion to dismiss. In our motion to dismiss we stated
2 that the delegation issue was not properly raised in the
3 administrative appeal and at the time of our motion that
4 was the case, the delegation issue was not part of the
5 appeal. But since that time Protect Our Water has
6 petitioned the Council for leave to amend its Petition
7 and add that delegation issue. The EQC granted that
8 request, so at this time that issue is currently pending
9 before the Environmental Quality Council.

10 Now, because the delegation issue is now
11 pending before the Environmental Quality Council there
12 appears to be a further problem of administrative
13 exhaustion here. If this case proceeds in this court
14 then the Environmental Quality Council and this Court
15 will both potentially decide the question about
16 delegation, potentially arriving at different answers on
17 different facts with different reasoning, potentially
18 with different remedies. And this is exactly the type
19 of problem that the requirement of administrative
20 exhaustion is intended to prevent.

21 And it further demonstrates that declaratory
22 judgment is just not the correct way to proceed on the
23 delegation question at this time. Now that the permit
24 has been issued if this question is answered at all, it
25 should be answered as part of the ongoing administrative

1 appeal and for that reason this Court should dismiss
2 this claim for declaratory relief in its entirety.

3 Now, I want to address Protect our Water's
4 second claim for relief as well. This is the request
5 for preliminary injunction contained in their Complaint.

6 As a procedural matter, as we stated in our
7 motion to dismiss, this request should be dismissed at
8 this time because it is not properly raised by a
9 separate motion as required by Rule 7. But even if it
10 had been properly raised POWJH is still not entitled to
11 a preliminary injunction here.

12 For one thing, Protect Our Water has not
13 demonstrated what irreparable harm will occur because
14 DEQ has issued a permit instead of Teton County. If it
15 does indeed turn out that Teton County should have been
16 the permitting entity, Teton County can issue the
17 permits going forward and no irreparable harm to the
18 County's authority will have occurred. It's a fixable
19 issue, not the type of problem that a preliminary
20 injunction is designed to fix.

21 Protec Our Water also cannot demonstrate
22 that it's likely to succeed on the merits. Protect Our
23 Water's sole legal complaint here is that DEQ exceeded
24 its statutory authority in issuing this permit. Yet, as
25 POWJH notes in its pleadings, the question is almost

1 entirely a legal one. DEQ, as the agency that
2 administers the Environmental Quality Act, has
3 determined that it does have authority to issue this
4 permit and Protect our Water is extremely unlikely to
5 overcome DEQ's longstanding interpretation of its own
6 statute. Therefor on either metric Protect Our Water
7 would not be entitled to a preliminary injunction. And
8 furthermore -- yes?

9 THE COURT: Counsel, we're talking about a
10 motion to dismiss today and really not the request for
11 an injunction as are they likely to prevail on the
12 merits. That's an issue for a later date if we get
13 there.

14 MS. SHAW: Yes, if there were going to be
15 any discussion of a preliminary injunction we would
16 request a hearing in which to explore these issues more
17 fully. Because this request was built into Protect Our
18 Water's Complaint we do want to address it. We have
19 moved to dismiss it because if this case proceeds we
20 would like that to be addressed properly by a motion
21 under Rule 7 with everything that entails.

22 The parties anticipate that probably
23 whatever happens there could be an appeal of any
24 preliminary injunction and I think it's especially
25 important that we get that procedural step right. So,

1 at this time if the Court does not dismiss the entire
2 Complaint based on standing, we would request that that
3 request for preliminary injunction be dismissed from the
4 Complaint to be brought by separate motion.

5 THE COURT: Thank you.

6 MS. SHAW: But really because Protect Our
7 Water's request for a preliminary injunction suffers
8 from the same fatal defect in standing as the rest of
9 its Complaint and the rest of its claim for relief, what
10 we're really asking the Court to do is dismiss the
11 Complaint in its entirety on the basis of standing.
12 That is the quickest, that is the most straightforward,
13 and this is the most legally appropriate way to handle
14 this case.

15 I would like to reserve the opportunity for
16 rebuttal to address anything that comes up from the
17 other parties with Your Honor's permission.

18 THE COURT: Thank you.

19 MS. SHAW: Thank you.

20 THE COURT: Ms. Boudewyns?

21 MS. BOUDEWYNS: May it please the Court?
22 Abigail Boudewyns, I'm with the Attorney Generals'
23 Office. I represent the Department of Environmental
24 Quality in this matter.

25 I want to take the approach of kind of

1 setting the stage in terms of what Wyoming Statute
2 35-11-304 really looks like and what that particular
3 requirement puts on the Department.

4 So, that statute requires the Department to
5 the extent requested by a county to delegate authority
6 to enforce and administer a permitting program related
7 to wastewater systems. That statute also requires that
8 any such delegation, the extent of that delegation, to
9 be by written agreement.

10 The Department and Teton County have entered
11 into the delegation agreement which was attached to
12 Plaintiff's Complaint as Exhibit E. And in this
13 declaratory action Plaintiff is really challenging
14 whether the Department and Teton County have complied
15 with Section 304 of the Environmental Quality Act and
16 the written delegation agreement.

17 And then ultimately the heart of the issue
18 that they're getting at through the declaratory action
19 is whether the permit issued to Basecamp was valid. The
20 Department moved to dismiss the action for two reasons.
21 First, the Department maintains that Plaintiff's action
22 is untimely in terms of seeking relief from the
23 Department issued by the Department last summer, last
24 July. As a result the Department has not waived
25 sovereign immunity for this type of action and so we

1 maintain sovereign immunity against this declaratory
2 action.

3 The second reason we moved to dismiss was
4 that Plaintiff lacked standing. Plaintiff's general
5 nonprofit status in environmental work in the watershed
6 does not equate to an automatic standing for this case.
7 Rather, Plaintiff still has to put forth a justiciable
8 claim and with respect to the delegation agreement issue
9 itself it has not and cannot do that due to a lack of
10 harm and they're not being a party -- POWJH not being a
11 party to the contract.

12 So, I want to start the discussion kind of
13 just talking about the standing issue because I think
14 even though the timeliness of the filing is a
15 jurisdictional issue, the Declaratory Judgment Act, it
16 doesn't extend the jurisdiction of the Court and so it's
17 still -- it's going to come down to Plaintiff still has
18 to have standing to bring this case. There's no
19 statutory standing provided by the declaratory judgment
20 -- you know, from the Declaratory Judgment Act.

21 And in this issue Plaintiff doesn't have
22 standing to enforce the delegation agreement or Section
23 304 against the Department and Teton County. So, in
24 getting into standing there's two types of standing. A
25 statutory provision provides a plaintiff with standing.

1 Plaintiff cited Wyoming Statute 35-11-801(d) as
2 providing standing for its appeal, but that provision is
3 specific to appeals of a general permit only. This case
4 involves an individual permit issued to Basecamp, LLC so
5 that provision is not applicable.

6 To the extent that Wyoming Statute
7 35-11-1001 which is under the kind of the general appeal
8 provision in the Environmental Quality Act could have
9 provided standing to Plaintiff they're now time-barred,
10 that requires an appeal be filed within 30 days.

11 So, then we get into the Uniform Declaratory
12 Judgment Act itself, which can't -- which can't provide
13 extend jurisdiction of the Court. So, Plaintiff cited
14 Wyoming Statute 1-37-102 and that's merely the scope of
15 the Act, what the act entails. Looking at 103 in the
16 Declaratory Judgment Act, that is a statutory standing
17 provision in a sense and it states, "Any person
18 interested under a written contract or whose rights,
19 status, or other legal relations are affected by a
20 statute may have any question of construction determined
21 and obtain a declaration of rights, status, or other
22 legal relation."

23 The issue though is that the Wyoming Supreme
24 Court has long applied a prudential standing analysis in
25 determining standing for declaratory judgment actions.

1 So, getting into prudential standing, really a party
2 seeking relief in a declaratory action has to be an
3 interested person. And this interest element really
4 equates to the general requirement that a court have a
5 judicial controversy before it can grant a plaintiff
6 relief.

7 So, the Wyoming Supreme Court in declaratory
8 actions has used the test outlined in *Brimmer v.*
9 *Thompson* which was a declaratory action as its
10 prudential standing test to determine whether a
11 justiciable controversy exists. I'm not going to recite
12 the *Brimmer* test in its entirety, but I'll hit it as I
13 sort of apply it with my motions for the actual test of
14 that test.

15 But the first element really requires that a
16 party have existing, genuine rights or interest, they
17 can't be theoretical. So, looking in terms of looking
18 for some sort of tangible interest, it can't be
19 something that could be raised by any citizen, meaning
20 that broad claims of injury aren't sufficient to show
21 that a person is aggrieved or adversely affected in
22 fact.

23 You know, Plaintiff has cited to this
24 *Northern Laramie Range Foundation* case as sort of its
25 basis of its standing in terms of sort of a general

1 nonprofit standing; however, that case really looked at
2 whether there's a prospective harm resulting from an
3 agency action as opposed to a speculative.

4 And I think that's really applicable in this
5 case because any harm Plaintiff is looking at is purely
6 speculative at this point. You know, that case said it
7 has to be a substantial, immediate, and pecuniary
8 interest, more than just a merely speculative.

9 So, I think the key in terms of looking at
10 this harm Plaintiff has alleged a number -- numerous
11 environmental harms and the monetary benefits that they
12 have added to this watershed and while all of that is --
13 the Department doesn't dispute that. The Department
14 disputes the fact that any of that is a harm actually
15 relevant to the narrow issues that they've brought in
16 this declaratory action, the fact that one state agency
17 has issued this over another agency, Teton County.

18 And there's no allegations of harm that
19 would be anything more than speculative that Teton
20 County would not similarly issue this permit. There's
21 nothing that one authority issuing the permit in lieu of
22 the other that has been alleged that has caused
23 Plaintiff any harm. Really their claim matters not who
24 issued the permit, their harm is that the permit was
25 issued, period. But the delegation agreement issue is

1 really who issued the permit and so there's a disconnect
2 there. And that's what the Department really hopes the
3 Court recognizes that your harm has to actually derive
4 from the cause of action you're bringing.

5 So, we don't challenge the EQC similar
6 claims of standing that they brought in that case, but
7 it is different in this case in terms of have they been
8 harmed by the Department issuing this permit in lieu of
9 Teton County and that's the sole issue the answer is no.

10 So, looking then -- you know, caselaw has
11 said if you don't have a tangible interest, if you've
12 had no harm to a tangible interest you can't meet the
13 remaining elements of *Brimmer*. I'm going to walk
14 through it a little bit just to cover all my bases.

15 The second element, you know, is whether a
16 controversy is one upon which the judgment of the court
17 can effectively operate. It can't be political,
18 administrative, seeking sort of academic conclusions.
19 And the reason for this is that the court can't remedy a
20 nonexistent harm.

21 And then the third element would be looking
22 at the contro -- may the controversy be a judicial
23 determination which is going to have the course and
24 effect of a final judgment in law. And it's you have to
25 look at the real parties in interest and that's where I

1 think Plaintiff really struck struggles with claiming
2 that it could have any sort of judicial determination of
3 effect the real parties in interest because the real
4 parties in this case are Basecamp who has the permit,
5 under the delegation agreement issue Teton County and
6 the State of Wyoming.

7 Finally under the fourth element the
8 proceeding has to be genuinely adversary in character.
9 And without harm or addressability and the ability to
10 affect the rights of the real parties in interest the
11 declaratory action here, it just fails to be genuinely
12 adversary. Plaintiff has no real cause of action to
13 enforce Section 304 in the delegation agreement against
14 the Department.

15 So, I also want to get into kind of the
16 delegation agreement itself because there's been sort of
17 a dispute as to how much that matters in this case.
18 Plaintiff has argued that its claims are not contractual
19 in nature and that this Court could purely interpret
20 Section 304 of the Environmental Quality Act.

21 The Department feels that's simply not the
22 case. Section 304 provides great leeway to both
23 counties and the State in terms of how and what
24 authority they delegate under Section 304 through that
25 language to the extent requested by and through the

1 provision of statute that requires any delegation be by
2 written agreement.

3 It's for these two parties, the County and
4 the State, to figure out how it's going to work between
5 us. The State statutorily has this duty to permit
6 septic systems and protect water quality through septic
7 systems, wastewater systems, and then they can delegate
8 that to a county and it's figuring out how that
9 cooperation works.

10 So, the result is the delegation agreement,
11 which Plaintiff put into evidence as Exhibit E and the
12 Department admitted its authenticity to, but there's no
13 question that the agreement exists. I think the
14 question is how much it matters. And the Department
15 thinks it's essential to the case. We've complied with
16 Section 304, we have an agreement with Teton County.
17 So, now we're looking at the terms of that agreement and
18 have are we -- have we complied with our contract in
19 terms of the performance of that contract.

20 And I think evidence of this delegation
21 agreement being essential is that Plaintiff quoted the
22 delegation agreement in Paragraph 36 of its Complaint in
23 terms of what authority was delegated. So, I think you
24 do have to get into the contractual terms. So, the real
25 issue is not in terms of enforcement of Section 304, but

1 rather the Department and Teton County have complied
2 with their delegation agreement.

3 And to that end it is longstanding Wyoming
4 law, back to 1877, that a stranger or nonparty to a
5 contract cannot maintain an action on that contract.
6 Plaintiff is not a party to the delegation agreement and
7 has no enforceable rights. So, a lack of privity of
8 contract fits very neatly into this Court's *Brimmer* test
9 in terms of prudential standing because without a party
10 being a party -- without a party being a party to the
11 contract Plaintiff isn't harmed by the Department and
12 Teton County's performance under that contract.

13 Ultimately Plaintiff's case revolves around
14 its dislike of the Department's decision to issue the
15 permit and Plaintiff's hope that Teton County would
16 issue a different decision and this is where we again
17 get back to that speculative harm. You can't bring a
18 lawsuit against the government because you simply hope a
19 different branch would have rendered a different
20 decision.

21 The Department asks the Court to find that
22 Plaintiff has failed to meet the *Brimmer* test in
23 judicial controversy and failed to be an interested
24 party under the Uniform Declaratory Judgments Act.

25 I'll go now kind of into the sovereign

1 immunity issue. The State maintains that it does have
2 sovereign immunity unless expressly waived.

3 And then in terms of declaratory judgment
4 actions, there are some action actions which the Supreme
5 Court has allowed to proceed despite spite sovereign
6 immunity. The sort of history of the caselaw is
7 interesting I think in terms of it started with the
8 *Retail Clerks Local 187 versus University of Wyoming*
9 case. And in that case the Supreme Court held that
10 declaratory actions in that one, which also contained a
11 request for monetary judgment, they did have sovereign
12 immunity.

13 It sort of backed that up a little, the
14 Court did, in holding in *Rocky Mountain Oil and Gas*
15 *Association versus State* where they said, well, okay,
16 but we're going to allow if it's purely for a
17 determination of rights, status, and other legal
18 relations of the party we're going to allow declaratory
19 judgment actions against the State and the rationale was
20 sort of, well, if it's just a simple declaration of
21 who's doing what then there's no harm to the State in
22 their sort of sovereign interest in terms of
23 administration of government or the *Retail Clerks Local*
24 case monetary. But it has to only be for the purpose of
25 determining rights and status of the legal relations of

1 the party.

2 If you're going after something else the
3 Court had sort of second holding in *Rocky Mountain Oil*
4 *and Gas Association* case where it said if you're seeking
5 something more than just a declaration of rights within
6 the declaratory action then you have to follow the
7 procedural aspects of that Act for which you're -- what
8 you're trying to seek. It cited the Governmental Claims
9 Act. If you're trying to get money out of the State for
10 some sort of harm you also need to comply with the
11 Governmental Claims Act procedural aspect.

12 So, I think that's -- in looking at the
13 facts of this case I think what Plaintiff is really
14 trying to get at here is the permit that was issued,
15 that's the heart of it. The declaratory action on who's
16 supposed to do what, the end result that they're seeking
17 is really I want this permit undone because the State
18 didn't have authority to issue it.

19 And in this instance I think that second
20 holding in *Rocky Mountain Oil and Gas Association*
21 prevails because they're seeking something more than
22 declaration of rights. And this is where the timing
23 aspect comes in, Plaintiff could have brought this
24 action, declaratory action, before the Department issued
25 it. They could have brought it within the 30 days as

1 allowed under the Environmental Quality Act for action
2 on the permit.

3 We're now close to eight or nine months
4 after the Department issued that permit and so this is
5 where the State -- the State at this point in terms of
6 any action related to relief on a permit it issued last
7 summer, the State has not waived sovereign immunity for
8 this suit. We waived it for 30 days following. We
9 waive it, apparently according to the Supreme Court, if
10 it's just for purely a determination of the rights of
11 the parties. But we have not waived it for nine months
12 later for an appeal on -- essentially an appeal on the
13 permit.

14 So, I think I want to be clear on one thing
15 which Basecamp and I think the Department disagrees with
16 them a little bit, that in terms of administrative
17 remedies the Department always maintained that the
18 Environmental Quality Council doesn't have jurisdiction
19 to determine whether the State complied with Section 304
20 in the contractual rights under the contract, the
21 delegation agreement. We think that's beyond the
22 administrative right -- the administrative appeal
23 process before the Council. We do think that's properly
24 held before the District Court. So, that is one issue
25 where I think we differ with Basecamp.

1 And I think there's precedent for that in
2 terms of *Department of Revenue versus Exxon Mobile* case
3 where in that case it's interesting Exxon Mobile did
4 actually file a declaratory action and an administrative
5 appeal fairly simultaneously from what I can tell in the
6 record and they proceeded lock in step and they were
7 stayed -- tried to stay one case because in the one
8 declaratory action they were simply seeking a
9 declaration of the rights of the termination of what
10 does this law mean and then on the other hand they were
11 doing their administrative appeal.

12 So, I think there's precedent for that in
13 terms of you need to bring the proper claims before the
14 proper jurisdiction.

15 So, with that I think I will reserve any
16 remaining time that I might be allowed at your pleasure
17 then I'll close my argument.

18 THE COURT: Thank you, counsel.

19 Mr. Graham?

20 I think you're muted, Mr. Graham.

21 MR. GRAHAM: Thank you for both turning the
22 floor over to me and alerting me to the fact that I was
23 muted, Justice Kautz, and counsel.

24 You know, I think the case that's pending in
25 front of you is extremely simple. There's a statute out

1 there, 35-11-304 that says to the extent a county
2 requests delegation the State has to give it. There's
3 evidence in the form of a contract that everybody
4 acknowledges is valid that Teton County requested
5 delegation and was given it.

6 It's not an issue of enforcing a contract,
7 it's an issue of whether the DEQ has complied with the
8 statute in light of --

9 THE COURT: Can anyone in the state raise
10 that issue?

11 MR. GRAHAM: No, I don't think anyone in the
12 state can raise that issue.

13 THE COURT: What does it take to be able to
14 raise that issue?

15 MR. GRAHAM: You know, to quote from your
16 recently issued decision in the CRUSL lawsuit I like
17 that language and I believe you said in there, and I'm
18 quoting, "Rather with respect to land use decisions
19 individuals or groups may seek judicial remedies only if
20 their claimed injury to legal right exceeds the general
21 interest in the community good shared in common with all
22 citizens."

23 If you look at the standings declaration
24 that was attached to POWJH's Complaint as Exhibit C,
25 Paragraph 3 details that since 2014, well before the

1 Basecamp permit development was even a kernel of an idea
2 in anybody's head POWJH was expending significant
3 resources to try to improve the water quality in Fish
4 Creek.

5 And then you have Paragraph of their
6 standing declaration which is because the permit will
7 increase the e-coli and nutrient levels in Fish Creek
8 POWJH is going to have to redouble those efforts and
9 invest more. And, you know, this is important because
10 it slots with both what the Supreme Court has said kind
11 of hypothetically, show standing for a nonprofit -- and
12 that's *Northern Laramie Range*.

13 In *Northern Laramie Range* the Supreme Court
14 rejected that nonprofit's standing but said what we are
15 looking for for nonprofit standing is essentially kind
16 of planned or existing activities that are going to be
17 impacted by the decision, that's exactly what you have
18 here. You have existing activities and programs that
19 are undermined by an allegedly illegal decision.

20 And that also fits directly with the way
21 federal courts treat this. And I'll stop there because
22 I can see that you're about to try and get a question
23 in.

24 THE COURT: So, I do have the question then,
25 does the injury have to flow from the thing that you're

1 complaining about or can it flow from anything?

2 Because as both defendants have pointed out,
3 the injury that you're claiming is from the issuance of
4 a permit, not from who has authority to issue that
5 permit.

6 MR. GRAHAM: So, I think there's an
7 important kind of distinction here. The underlying
8 claim in front of the EQC is that this permit was
9 substantively incorrect as well as procedurally
10 incorrect. So, in front of the EQC we've said that, you
11 know, the setbacks weren't right, the wetlands weren't
12 appropriately delineated, it doesn't meet the
13 appropriate performance standards. That's all in the
14 EQC complaint.

15 But there's a predicate question before you
16 get to those functional, substantive issues as to
17 whether the DEQ even had authority to issue the permit.
18 And I think it would be backwards to say that you have
19 to substantively prove the permit was invalid before you
20 can reach the issue of whether the proper agency
21 permitted it.

22 I mean the -- you know, so the harm that's
23 alleged is that the permit should not have been issued,
24 period. Right? That regardless of who the issuing
25 entity is, POWJH maintains that the permit was

1 inappropriately issued at the EQC they have not
2 challenged only the procedural aspect, they've
3 challenged the substantive aspect.

4 But, you know, it's part and parcel of that
5 that the DEQ actually has to have authority to issue it.
6 And this goes back to the Secretary of State example.
7 If the idea is that you can't challenge, you know,
8 noncompliance with the procedural requirements of a
9 septic permitting statute, Secretary of State Gray could
10 issue a septic permit and, you know, you would have to
11 go and prove that that septic permit didn't comply with
12 DEQ standards before you could challenge Secretary of
13 State Gray issuing the permit. It's just kind of a
14 nonsensical position.

15 THE COURT: Wouldn't that be Teton County's
16 business to challenge that Secretary of State Gray?

17 MR. GRAHAM: So, I think there are two
18 issues with that. I mean the first is there's no
19 requirement that a delegation agreement exists. If
20 there's no delegation agreement out there and kind of
21 the position is only Teton County can challenge
22 Secretary Gray permitting it, well, I don't know how
23 they could challenge it if they didn't have a delegation
24 agreement in the first place. So, you're kind of left
25 with nobody who can challenge Secretary of State Gray

1 issuing a permit in the event there's no delegation
2 agreement.

3 You know, I think the other thing that's
4 very important here is we haven't done discovery on
5 this. I'm just looking for my notes here, I apologize.

6 We haven't done discover on this. I mean
7 it's very easy for example to imagine that the five
8 county commissioners, three of whom were up for
9 reelection sent around an email saying we don't want to
10 deal with this. We want the State to do it because it's
11 politically untenable for us to engage in this
12 permitting process.

13 You know, if you accept Ms. Shaw's and
14 Ms. Boudewyns' position they're going to have to issue
15 it. We disagree with that, but, you know, they could
16 have sat around the table and said we don't want to be
17 forced to issue a permit that everybody's unhappy with,
18 we're going to conspire with the State to have the wrong
19 entity illegally permit this system.

20 The idea that the enforcement that has to be
21 one of those two entities that are involved in the
22 conspiracy, you know, is a nonstarter and there's no way
23 we can know or even allege that without being allowed to
24 proceed past the motion to dismiss stage.

25 THE COURT: Doesn't that just indicate how

1 this is a political issue that should be decided by a
2 political branch? Then you un-elect those commissioners
3 if the public thinks that and get a new commission?
4 That's the difference between the judicial branch's
5 interest in this and the political branch's interest in
6 this.

7 MR. GRAHAM: I would respond to that kind of
8 generally by saying, you know, many of the decisions
9 regarding declaratory judgment are arguably political
10 questions. You know, particularly I like the
11 *Hirschfield* case which is available at 944 P.2D 1139 and
12 the relevant passage is at Page 1142. That's actually
13 almost exactly analogous to this case.

14 In that case Teton County voted on issuing a
15 permit. The vote was a tie. The commissioners said,
16 well, a tie is a no vote, we'll bring it up at the next
17 meeting. And then they brought it up at the next
18 meeting and they voted affirmatively to issue the
19 permit. The group challenging that permit did not file
20 an administrative act appeal and a procedure for that
21 existed. They went over the 30 days, which was the
22 deadline, and then they filed a declaratory judgment act
23 asking the court to say that, hey, that predicate vote
24 that was a tie under, you know, Roberts Rules of Order,
25 et cetera, et cetera is actually a vote against and they

1 can't table it and then bring at back up. They failed
2 to comply with the procedural aspects of the permit.

3 And the court in that case said, yes,
4 absolutely this is precisely the type of question where
5 declaratory judgment is appropriate. You're not looking
6 at the substantive nature of the claim, but you're
7 asking if the relevant permitting entities complied with
8 the proper procedures.

9 And I think that that's kind of the lesson
10 of the declaratory judgment action is it is a mechanism
11 for citizens who have a heightened interest, like POWJH,
12 to ensure that their elected officials are complying
13 with the law and you don't have to wait until the next
14 election cycle to force your elected officials to comply
15 with the law. You can do it by bringing the declaratory
16 judgment action, that's why it exists and that's why it
17 provides for the interpretation of statute.

18 THE COURT: Thank you.

19 MR. GRAHAM: So, you know, a couple of odds
20 and ends here, I think we've covered a lot of the
21 highlights there, but, you know, I really did want to --
22 I think the Supreme Court has said it multiple times
23 better than I can say it. In particular I like *Black*
24 *Diamond Energy* which is available at 2020 WY 435 and
25 Paragraph 40. It's construing an analogous statute, but

1 it does a really good job of very recently articulating
2 the rule and collecting the relevant citation. The
3 Supreme Court in 2020 said that, "A declaratory judgment
4 action is available in administrative matters to
5 challenge the validity and construction of agency
6 regulations or the constitutionality or interpretation
7 of a statute upon which the administrative action is or
8 is to be based.

9 "We have found that declaratory judgment
10 action to be available if the party is seeking a
11 determination with regard to the constitutionality of a
12 given agency action, the authority of the agency to have
13 acted, or an agency interpretation of a statute."

14 That second-class phrase there, "the
15 authority of an agency to have acted," is exactly what
16 we are asking here. There is a statute that says you
17 must delegate, there is evidence that they did in fact
18 delegate and that they have no residual authority to
19 act. So, you know, this is precisely exactly what the
20 Court has said is subject to a declaratory judgment in
21 the past.

22 And the Court has also said, you know, in
23 that same *Black Diamond* case, "However, where the action
24 results in a prejudging of issues that should be decided
25 in the first instance by the administrative body --" and

1 I'll skip ahead. "An action for declaratory judgment
2 should not be entertained." And that's exactly why this
3 case is narrow. The substantive issues are still
4 pending in front of the EQC. This is just a question
5 about predicate authority.

6 And at this point, you know, I think it's
7 important to add a little context. You know, the DEQ
8 and Basecamp are hammering that this is allegedly a year
9 after the permit was issued and why are we doing this so
10 late in the game and that's just, I think, inaccurate.
11 If you look at Exhibit -- I believe it's Exhibit F to
12 our Complaint which is the response to comments from the
13 DEQ.

14 You'll see on Page 4, Comment 15, it notes
15 specifically that comment stated that the Wyoming DEQ
16 lacks the authority to issue the permit. That was
17 commented on at the time the permit was issued. The DEQ
18 chose to issue the permit anyway. I heard Ms. Shaw
19 argue essentially that we should have filed our dec.
20 action right at the outset when we knew this was
21 considered to be permitted. Well, then what is the
22 notice and comment period for if that's kind of the
23 action? There was comments that there's no authority.
24 The DEQ had an opportunity to consider that comment and
25 ignored it.

1 We then filed in front of the EQC within the
2 30 day deadline. After filing our first brief in the
3 matter was a motion to suspend the permit filed, I
4 believe, on 10/10 where we extensively discussed this
5 issue.

6 At that point the defendants here brought up
7 the fact that they didn't think it was properly alleged
8 in the original Complaint and we filed a motion to amend
9 that's subsequently been granted. This issue's always
10 been pending, it's always been part of this dispute, and
11 it's been raised multiple times.

12 In fact the EQC has essentially ducked
13 addressing this issue. We moved to get essentially a
14 preliminary injunction on the permit in front of the
15 EQC. They said, no, we don't have the authority to do
16 that and we're not going to issue a decision on the
17 merits. Ms. Boudewyns filed a motion to dismiss saying
18 that we can't consider this, period and even if they
19 could it's a bad argument. They declined to address
20 that too and instated granted our motion to amend and
21 then asked the parties to re-file the motion to dismiss
22 briefing to the extent they wanted it.

23 We also filed this action all the way back
24 into March and it's just taken awhile to get going, you
25 know. And the reason we filed it is explicitly because

1 the EQC is not giving us guidance on this.

2 And then -- and this really harks on the
3 role of the Court, to the extent they were to take it up
4 the EQC is a board of lay people and they're advised by
5 the Attorney General's Office who I'm sure do a great
6 job of screening kind of the advisory role versus the
7 advocacy role, but it kind of creates a little bit of
8 inherent conflict.

9 So, do you go for a statutory interpretation
10 question on the requisite authority, do you bring that
11 in front of five lay people being advised by the same
12 agency that you're arguing with or do you bring it in
13 front of a neutral arbiter with that expertise, which is
14 the District Court.

15 Again, you know, this is just an -- in all
16 avenues this is an extremely narrow, extremely common,
17 and kind of classic example of the type of dispute that
18 should be adjudicated within a declaratory judgment
19 action. And because of that we believe that the form of
20 the Complaint is appropriate and then kind of back to
21 our discussion of standing, you know, it's very clear we
22 have a heightened interest.

23 And I just wanted to go through a couple of
24 notes and then I can wrap this up. You know, again, I
25 would go back to the quote from your opinion in the

1 CRUSL matter, it's about a heightened interest. We have
2 that right there in our standing declaration. It's
3 consistent with what the Court has kind of provided in
4 dicta, but as advice to nonprofits going forward about
5 you get standing.

6 And it's extremely consistent as highlighted
7 in our response to Basecamp's original brief with when
8 federal courts allow incorporated nonprofits to bring
9 these actions.

10 Then there's this kind of question of the
11 harm being speculative. You know, I think that when we
12 look at our Complaint in front of EQC, our Petition for
13 Review, which is again attached as an exhibit,
14 incorporated by reference, we have all sorts of
15 substantive complaints about how the permit was issued,
16 what was analyzed, what wasn't analyzed, how data was
17 interpreted.

18 But as a predicate for that we are entitled
19 to raise those issues in front of the right tribunal.
20 And again this goes back to why this isn't just a
21 political question. Right? I mean we are the group
22 commenting, we are the group that has invested, we are
23 the group that's going to incur more cost because of
24 this position. And we -- and the law provides that our
25 tribunal for this is Teton County. We get to raise

1 these disputed issues in front of Teton County. And,
2 you know, it's not a hope for a different outcome that's
3 against the law. This is a disputed, contested permit
4 with lots of open questions and we have a right to be
5 heard in front of the proper tribunal.

6 And again, you know, this idea that this is
7 a speculative harm, in discovery in the EQC underlying
8 case the DEQ has produced a number of permits that they
9 issued in counties where delegation exists. And based
10 on their representations here today they're going to
11 continue to do that.

12 So, this is not a single retrospective
13 dispute about a single permit. This is --

14 THE COURT: But, counsel, I'm making this
15 decision based upon the Complaint and the allegations in
16 the Complaint and that's it. I'm not going into that
17 other stuff.

18 MR. GRAHAM: Yeah, well I mean -- so, I
19 guess kind of part of that is the Complaint was filed
20 before that discovery was lodged. But regardless of
21 whether that formal evidence of them issuing other
22 permits like this is involved, this is still not a
23 single permit challenge because it prospectively limits
24 their ability to do something that they are averring
25 they have the legal authority to do. It's not about a

1 single permit. It's about the scope of their authority
2 going forward.

3 And then, you know, again, they've made this
4 privity of contract argument. There's a delegation
5 agreement, Teton County's a party, DEQ's a party, POWJH
6 doesn't have a cause of action. I think that puts the
7 cart before the horse. The issue in this case is
8 there's a statute that says the DEQ has to delegate
9 authority to the extent requested and pretty explicitly
10 from our opinion revokes authority once it's been
11 delegated.

12 The existence of the delegation agreement is
13 not a contract to be enforced, it is evidence. It is a
14 piece of evidence that the request under 304 occurred
15 and that because that request occurred and was responded
16 to the DEQ now has no more authority under that statute.
17 And so I think that kind of, you know, it's a really
18 narrow question. It doesn't invoke privity of contract.

19 But even if the Court were not to consider
20 that kind of, you know, as the appropriate nexus for
21 analysis it goes back to this idea of can Teton County
22 and the DEQ conspire to avoid their legal requirements
23 and is the only remedy available the ballot box in
24 November? It's just not -- not true. If two government
25 agencies conspire to circumvent statute you -- anybody

1 who has or can meet the standing requirement has the
2 right to a declaratory judgment action and POWJH meets
3 those here.

4 And then, you know, just a couple of notes
5 on their arguments and then I'll wrap this up. Ms. Shaw
6 mentioned that spending money is not the gate -- the key
7 to the courthouse door. Again, the federal caselaw is
8 very clear on this and I think *Laramie* suggests this
9 too, there's a substantive difference between a post hoc
10 expenditure of funds like the firearms case Ms. Shaw
11 cited in her briefing where a nonprofit decides to spend
12 money on an issue to counteract a judgment and prior
13 existing spending like the *PETA* case we cited to you
14 that discusses that case where an agency's longstanding
15 mission is this issue, they are expending funds on it,
16 and then a decision undermines that expenditure.

17 In the first case the post hoc expenditure
18 you don't have standing. In the second case the
19 preexisting expenditures that are undermined by a
20 decision do you have standing.

21 I also have in here kind of that discussion
22 about the timeline, I think I've addressed that. This
23 issue was raised during the notice and comment period.
24 It was raised in the briefing before the EQC within two
25 months of filing. This has always been an issue and

1 it's only here now after the EQC has kind of failed to
2 address it.

3 Again, a lot of the arguments that Ms. Shaw
4 and Ms. Boudewyns made are kind of from the presumption
5 that this permit needs to be issued and all we are
6 saying is Teton County needs to issue it versus the DEQ,
7 that is not our position. Our position is that no
8 entity can issue this permit, it substantively fails.
9 The setbacks are wrong, the wetland delineation was
10 wrong, it does not meet the performance specification
11 requirements for standing on septic systems. But we do
12 get to appear in front of the right tribunal to make
13 those arguments.

14 And then kind of one last note, you know, on
15 the timing aspect I think the fact that it's existed in
16 comments highlights kind of why it's impractical to say
17 you have to file a declaratory judgment action prior to
18 the issuance of permits. But I just want to highlight
19 that's, you know, kind of an unworkable standard as well
20 in terms of a race to judgment. You know, Ms. Shaw
21 saying we should have filed this declaratory judgment
22 action as soon as we knew this was a possibility, even
23 though there's comment to the affect there's no
24 authority.

25 Does that mean that we have no more ability

1 to pursue a declaratory judgment action if the DEQ
2 issues the permit before we get a ruling from the Court?
3 You know, it's just kind of an unworkable standard to
4 say this needs to be filed beforehand.

5 And with that, you know, I know you had more
6 questions for me than the other presenters so I'm happy
7 to answer any followup. And I hope I wasn't too
8 strident, but I feel very passionate about this one.

9 THE COURT: Thank you, Mr. Graham.

10 Ms. Shaw, do you have any reply?

11 MS. SHAW: I do. I would like to briefly
12 address a couple of topics, Your Honor. The first one
13 being that in this hearing which is on a motion to
14 dismiss we are limited to what Protect Our Water Jackson
15 Hole has alleged in its Complaint. Now, we take
16 everything in its Complaint, we accept as true, we give
17 them all favorable inferences.

18 So, the corollary, the counterpart to that
19 is that Protect Our Water Jackson Hole had an obligation
20 in that Complaint to disclose the basis of its standing,
21 to spell out exactly how it's been harmed, to show how
22 this perceived procedural error directly flowed into
23 some sort of injury to Protect Our Water Jackson Hole
24 and that's just not there. As much latitude as we give
25 that Complaint, taking everything as true, there's just

1 no link between DEQ signing this permit rather than
2 Teton County and all of the perceived environmental harm
3 that Protect Our Water believes is going to occur.

4 Now, to the extent that Protect Our Water is
5 concerned that this septic system is going to cause
6 contamination, does not meet setbacks, et cetera, those
7 issues are before the Environmental Quality Counsel,
8 that is the body that is going to review that and
9 determine whether that's true or not. But that has
10 nothing to do with whether DEQ or Teton County was the
11 signatory.

12 So, there's an obligation on the part of a
13 plaintiff to spell that out in its Complaint and Protect
14 Our Water just hasn't done that here. They haven't
15 shown how they're standing, they haven't shown there is
16 any injury. They haven't shown any link between this
17 perceived administrative problem and the harm that they
18 say is going to occur. Without that, they failed to
19 meet their burden to survive a motion to dismiss.

20 The second topic that I want to address, the
21 final, is I want to talk about the *Black Diamond* case
22 that Mr. Graham brought up. And I wanted to point out
23 that although that case does state that declaratory
24 judgment can be had on administrative issues I want to
25 point out the Court actually wound up dismissing that

1 case because the plaintiff did not comply with the 30
2 day timeline to seek review of that decision.

3 So, although the Court recited all the
4 instances in which declaratory judgment could occur, in
5 that case declaratory judgment could not be had because
6 it was not timely. And the Court pointed out
7 specifically that in most cases the right way to address
8 these sorts of administrative problems is going to be
9 through a typical administrative appeal of that
10 decision. And that's what, if anything should happen
11 here, that's how this case should proceed.

12 Now, that's leaving aside the standing
13 issues, which I think are a problem throughout and I
14 think that regardless of when this lawsuit was filed
15 Protect Our Water just doesn't have standing to pursue
16 it. I know I've made a lot of the allegation that they
17 wanted declaratory judgment they should have sought it
18 last May. Now, that solves the timing issue, would not
19 have solved the standing issue.

20 So, even if we were having this discussion a
21 year ago, we would still be arguing this on the basis of
22 this Complaint Protect Our Water simply doesn't have
23 standing. So, regardless of the timing issue, before we
24 ever even get to that, standing is fatal and the Court
25 should dismiss the claims.

1 THE COURT: Thank you.

2 Ms. Boudewyns?

3 MS. BOUDEWYNS: Your Honor, I'll have just a
4 short statement. I think I want to come back to who
5 does have the right to bring a claim, a lawsuit, against
6 the State for its cooperation with counties and in
7 carrying out Section 34. And I will note we use
8 the word cooperation not conspiracy. Because it's
9 really two governmental entities working together to
10 effectively permit wastewater systems.

11 And so what sort of harm could any -- I
12 think it does get back to who has standing to bring
13 those claims. What harm has Protect Our Water Jackson
14 Hole suffered because of our cooperation? And on it --
15 in its Complaint there's nothing. There's nothing there
16 that isn't speculative and hopeful that another entity
17 would have issued this differently.

18 I'll touch on the Secretary Gray analogy
19 because I'm the only one who has hasn't. And when we
20 talked about this there's one person that could
21 challenge that and it would be the Department because
22 whose authority has been usurped by Secretary Gray
23 issuing it? We would have standing, we suffered harm
24 from another entity taking our right away to issue a
25 permit.

1 And so I want to close that loop in terms of
2 there is someone that would be harmed by governmental
3 entities doing something that someone else maybe should
4 have.

5 And the last issue I kind of want to touch
6 on is this sort of idea the predicate question being
7 brought up repeatedly. This is the predicate question,
8 this is exactly why it should have been decided before
9 issuance of the permit. It is untimely now to go after
10 a permit through a question of determining rights and
11 relations, which is a declaratory action. That is a
12 predicate question that should have been determined and
13 brought before nine months after this permit has been
14 issued and operated under by the -- by the permittee.

15 So, I'll close with that unless you have any
16 questions for the Department?

17 THE COURT: I don't.

18 Thank you very much for your fine -- oh,
19 Mr. Graham? You may.

20 MR. GRAHAM: I just wanted to point out two
21 quick things. A: *Black Diamond* denied the hearing --
22 or sorry, denied the declaratory judgment action because
23 of 30 day timeline, but it was analogizing a statute
24 that was specific. The relief requested could be a
25 declaratory judgment style claim or a damages style

1 claim in front of an agency. And they spelled out that
2 analysis when they were distinguishing between which
3 claim it properly was. But it's the agency rule that
4 set the 30 days, there's no equivalent for the
5 Declaratory Judgment Act and the Supreme Court has
6 repeatedly stated there's no timeline for bringing a
7 declaratory judgment act.

8 The second think I want to touch on is kind
9 of the substantive harm. You know, we've had some
10 debate today about where POWJH has alleged a permit was
11 issued inaccurately and the Department and Basecamp
12 saying, no, it's issued accurately. Kind of do you have
13 a harm with the initial permitting agency. Again, I
14 think that the harm is the denial of the right to be
15 heard in front of the proper tribunal for the
16 substantive dispute you have.

17 And I would say that that's kind of
18 supported by the caselaw. You know, the example would
19 be *Hirschfield*. Again, that's one where the Board of
20 County Commissioners made a decision, the substantive
21 merits of that decision were not challenged in the dec.
22 action. The harm was the procedure used because it
23 undermined the -- it undermined the ability to be
24 properly heard.

25 And in this case the proper tribunal if and

1 when we get to the merits will very clearly be Teton
2 County. And that's the harm that's occurred.

3 THE COURT: Okay. Thank you, very much.

4 Counsel, I'm prepared to give you a ruling,
5 a verbal ruling today, an oral ruling today. I
6 recognize that the standard of review when the Supreme
7 Court looks at this is de novo, so the point of my
8 verbal ruling is not be exhaustive and not to cover
9 every issue, but just to give you an explanation, you
10 and your clients an explanation of why I'm ruling the
11 way I am. And you'll fully argue all of this stuff
12 again to the Supreme Court.

13 The Court is going to grant both motions to
14 dismiss. Speaking about standing and the kind of harm
15 that is required, this is somewhat analogous to the
16 *Allred* case. In that case a contractor sought to
17 challenge the Capitol Construction Commission's approach
18 to letting bids and he said it should have been heard by
19 a different group and he was unable to show that the
20 result of that bidding would have been different. And
21 the Supreme Court said that's not the kind of
22 significant tangible harm that creates standing, rear
23 that's a political kind of issue.

24 And that's kind of what we have here.
25 There's no indication that Teton County would have

1 issued the permit or would have provided more stringent
2 requirements. And really that is at the heart of how
3 the Court reads this Complaint.

4 With respect to the requested relief from
5 the Complaint, the first request for declaratory relief
6 asks the Court to determine the language of the
7 Environmental Quality Act. But the second two, the
8 second two requests ask the Court to determine the
9 ambiguous language in the delegation agreement and asked
10 the Court to determine -- declare that the delegation
11 agreement gives sole authority to Teton County. Those
12 are certainly contractual claims and the Plaintiff is a
13 stranger to those two things.

14 So, we're left with the first request and
15 the Court finds, as I just started out with, that the
16 kind of harm that would give it standing isn't alleged
17 here.

18 So, Ms. Shaw, it will be incumbent upon you
19 to draft a brief order and you can recite -- you can
20 just say the Court gave a very short summary of its
21 reasons verbally and then get approval as to form from
22 counsel and that will get you guys forward at least with
23 this half of the case. I don't know how your other case
24 is proceeding and if you're going to want to put the two
25 of them together or not.

1 But thank you counsel for your fine
2 presentations and away we'll go.

3 MS. SHAW: Yes, Your Honor. Thank you for
4 your time. Would you like us to file that proposed
5 order or send it to the clerk by email? What's your
6 preference?

7 THE COURT: What I want you to do is obtain
8 approval as to form and then submit it to me by email
9 for my signature and then I'll provide it to the Court.

10 MS. SHAW: Understood. Thank you.

11 THE COURT: Okay. Thank you.

12 Yes, Mr. Graham?

13 MR. GRAHAM: Justice Kautz, I don't want to
14 beat a dead horse here, but I wonder if there might be
15 some consideration of a motion for leave to amend? We
16 included in our briefing that Teton County has already
17 represented to the Court that it would have denied the
18 permit. I think that's very easy to incorporate into
19 our briefing and addresses the predominating issue here.

20 So, you know, it seems that kind of leave
21 would be appropriate and I could do a brief to that
22 effect if the Court would entertain that.

23 THE COURT: Well, I appreciate your offer to
24 amend and the Court will decline that offer to amend
25 because frankly it's kind of -- it would be a curious

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S AFFIDAVIT

STATE OF WYOMING)
) ss.
County of Teton)

I, LANCE D. OVIATT, do hereby certify that I am a Certified Shorthand Reporter, and the Reporter who served as the Official Court Reporter of the proceedings had at the time, place, and hour heretofore given, and that the foregoing contains a full, true, and correct transcript of the proceedings had at such time as reported by me to the best of my knowledge and ability.

IN WITNESS WHEREOF, I have hereunto set my hand this the 16th day of July, 2023.

(Signature)



Lance D. Oviatt, Official Reporter
P.O. Box 1036
Jackson, WY 83001
Phone: (307) 733-1461