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Chase Naber

Student, University of Montana School of Law

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NOTE

MURKY WATERS:
PRIVATE ACTION AND
THE RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT

AN EXAMINATION OF CAPE-FRANCE ENTERPRISES v. ESTATE OF PEED

Chase Naber*

I. INTRODUCTION

_Cape-France Enterprises v. Estate of Peed_ is only the second decision given by the Montana Supreme Court regarding Montana’s constitutionally guaranteed right to a clean and healthful environment.\(^1\) The right was first addressed in _Montana Environmental Information Center v. Department of Environmental Quality (MEIC)_ , a case involving a state action in violation of the constitution.\(^2\) Issued not quite two years after the headline-making decision in _MEIC_ , _Cape-France_ applies the

\* J.D. Candidate, University of Montana School of Law, 2003.

1. _Cape-France Enters. v. Est. of Peed_ , 2001 MT 139, 305 Mont. 513, 29 P.3d 1011.


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right to a clean and healthful environment to a private action involving a contract for sale of real property.\(^3\)

In its decision, the Cape-France court broke with precedent in three areas. First, it broke with its long-standing aversion of addressing the constitutional issues when a case could be decided on other grounds. Second, when it affirmed the lower court's grant of summary judgment based on impossibility. Finally, it broke with the principles of contract law and Montana precedent when it rescinded the agreement without substantiated evidence of impossibility. The court also failed to address the constitutional right to acquire and possess property and how it should be balanced against the right to a clean and healthful environment. Moreover, the substantive facts concerning possible environmental degradation were moot at the time of the appeal, and the court could have remanded the case for a decision based on the current facts. The facts of the case are laid forth in Part II. Part III describes the holding of the case, Part IV summarizes Montana constitutional law cited by the court. Part V discusses Montana contract law and extrajurisdictional cases the court used and misapplied in its holding, and analyzes what the court should have decided based on the cases it relied on.

II. FACTS

Respondents Lola H. Peed and Marthe E. Moore (Peed and Moore) submitted a request for summary judgment in an action seeking specific performance.\(^4\) They wanted to purchase the land they had contracted for. The land needed to be subdivided from a larger parcel, and to do so required a showing of a water supply.\(^5\) Before Peed and Moore submitted their brief on appeal to the court, the city of Bozeman extended the municipal water supply to the land in question, rendering the issue concerning the well moot.\(^6\) The court was made aware the property was connected to the municipal water supply.\(^7\)

In July of 1994, Peed, and her granddaughter Moore executed a Buy-Sell Agreement (Agreement) with Cape-France Enterprises (Cape-France). The Agreement involved the

\(^3\) Cape-France, ¶ 37.

\(^4\) Cape-France, ¶ 1.

\(^5\) Id. ¶ 6.

\(^6\) Appellants' Initial Br. at 20.

\(^7\) Id.
purchase approximately five acres of land near what later became the Wyndham Hotel adjacent to the then unconstructed 19th Street interchange with Interstate 90, northeast of Bozeman. Peed and Moore expressed their intention to build a hotel with Cape-France. Cape-France obligated itself in the Agreement to satisfy requirements necessary to ensure proper rezoning and subdivision permits.

Nearly four months after signing the Agreement, the city of Bozeman sent a letter to Lowell Springer, the engineer retained by Cape-France to develop the land in compliance with the rezoning and subdivision requirements. The letter from the city informed Springer that approval for subdividing Cape-France's land was conditioned on the establishment of a water supply to the proposed subdivision. Cape-France and Springer did not drill a well to gain approval for the subdivision as required by their obligation to establish a subdivision in the Agreement.

In late December of 1995, more than a year had passed and Cape-France had still not drilled the well. Approximately eighteen months after the Agreement had been signed, the Department of Environmental Quality (DEQ) wrote Springer to inform him that perchlorethylene (PCE) had been detected in the aquifer under Bozeman, and that the extent of the contamination was unknown. The DEQ recommended a pump test well be drilled on the proposed subdivision site to ascertain if the contamination plume had already reached the property. The DEQ informed Springer that as a condition of subdivision approval, any water supply wells drilled on the property would

10. Id. at 2. The closing date of the Agreement was September 1, 1994, and as that date approached the proposed plat for the subdivision had not been filed for approval. Without a filed plat, closing could not occur, and the parties entered into an extension agreement to postpone closing to no more than ten days past the established completion of the zoning change and compliance with subdivision laws.
11. Appellants' Initial Br. at 5.
12. Id.
13. Id.
14. Id. at 6-7.
15. The letter warned that water supply wells drilled in the proposed subdivision may tap contaminated groundwater, and that the legal owners of the subdivision lots would be liable if pollution resulted from improper well construction or if contaminated groundwater was pumped into a clean area (Id. at Ex. 4).
16. Id.
have to be sampled annually.\textsuperscript{17} When Springer received the letter, Costco Wholesale had already built on property near the proposed subdivision and had completed its own supply well system without encountering the PCE plume.\textsuperscript{18} Both Cape-France and Springer knew of the plume before Cape-France signed the Agreement.\textsuperscript{19}

In October 1998, nearly three years after the DEQ had written the letter and more than five years after the Agreement had been signed, Peed and Moore filed a motion for summary judgment requesting specific performance. Peed and Moore wanted Cape-France to complete the procedures necessary to obtain the subdivision permit so they could purchase the five acre tract.\textsuperscript{20} Cape-France followed with a cross-motion for summary judgment in November 1998, requesting rescission of the Agreement for mutual mistake.\textsuperscript{21}

Judge Salvagni found for Cape-France in April 1999, concluding that mutual mistake made it impossible for Cape-France to “proceed without exposing itself to a huge risk.”\textsuperscript{22} Peed and Moore appealed to the Supreme Court of Montana.

III. HOLDING

Justice Nelson, writing for the majority, affirmed the lower court and rescinded the Agreement.\textsuperscript{23} The issue on appeal was whether the district court was correct in holding the Agreement unenforceable on grounds of impossibility, and in refusing to order specific performance.\textsuperscript{24} Montana’s highest court found Cape-France could not fulfill the Agreement without exposing “itself, not only to substantial and unbargained-for economic risks but, as well, the public would be exposed to potential health risks and possible environmental degradation.”\textsuperscript{25} Therefore, the Agreement was, “most importantly, not in accord with the guarantees and mandates of Montana’s Constitution, Article II, Section 3 and Article IX, Section 1.”\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Appellants’ Initial Br. at 9-10; Ex.7 at 38 [France Dep.].
\item \textsuperscript{19} Appellants’ Initial Br. Ex.7 at 63-64 [France Dep.].
\item \textsuperscript{20} Appellants’ Initial Br. at 18.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Appellants’ Initial Br. Ex. 1.
\item \textsuperscript{23} Cape-France, ¶ 1.
\item \textsuperscript{24} Id. ¶ 3.
\item \textsuperscript{25} Id. ¶ 29.
\item \textsuperscript{26} Id. ¶ 37. Article II, Section 3 reads: Inalienable rights. All persons are born
\end{itemize}
The court cited Montana precedent dealing with impossibility and impracticability of fulfillment of contract obligations, and turned to secondary sources and extrajurisdictional cases to build its finding for Cape-France. The court finished its holding with an analysis of the potential violation of Montana's constitutional right to a clean and healthful environment if specific performance was ordered. The court's decision overturned Montana precedent concerning impossibility because Cape-France did not substantiate evidence to show impossibility. Justice Leaphart wrote a concurring opinion, restating the court's long-standing precedent of "avoid[ing] constitutional issues wherever possible," and that he would choose to resolve the case following that precedent. Justice Rice and Chief Justice Gray filed dissenting opinions.

free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring and possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities. Article IX, Section 1 states: The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

27. Cape-France, ¶ 41.
28. Id. ¶¶ 42-64. Justice Rice wrote, in pertinent part,

   In my view the majority misapplies the contract doctrine of impossibility and impracticability. Moreover, I believe this case can and should be resolved without reaching the constitutional issues—and without the sweeping constitutional holding—reached by the majority. ...This case can be resolved on the contract issues alone, consistent with this Court's long tradition of declining to address constitutional issues where it is unnecessary. ...While the majority discusses the inalienable right to a clean and healthful environment contained in Article II, Section 3, the Court fails to even mention, in a case about acquiring property, the co-existent inalienable right of our people contained in Article II, Section 3, to acquire, possess and protect property. ...The decision leaves important questions unanswered. How certain must the potential be before the contract is deemed to have an unlawful purpose? How is a contract's potential adverse impact on the environment to be measured? How significant must that potential impact be?...Is a notice from the State that there may be a pollution issue affecting a parcel of property sufficient enough to prohibit use of the property? While future decisions of the Court may eventually resolve such questions, far too much is today left in doubt. ...I would order a remand of this case, and after the material facts are established, the contract and constitutional principles at issue here could be properly adjudicated.

29. Id. ¶¶ 65-76. Chief Justice Gray wrote, in pertinent part,

   I respectfully dissent from the result the Court reaches in this case, from its analysis and application of the law regarding impossibility of performance, and from the inclusion in its opinion of constitutional issues not before us. ...Both courts also overlook the fact that the Buy Sell Agreement places responsibility for getting the subject property through subdivision requirements and approval on Cape-France, and that the test well was merely one remaining
IV. MONTANA CONSTITUTIONAL LAW

A. Constitutional Right to a Clean and Healthy Environment

The Cape-France court discussed the violation of the Montana Constitution that would occur if specific performance were granted. The court cited MEIC and its analysis of Article II, Section 3 and Article IX, Section 1. Many of the conclusions made in MEIC were held to be relevant only to the facts of MEIC, but the following language was not:

We conclude, based on the eloquent record of the Montana Constitutional Convention that to give effect to the rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution they must be read together and consideration given to all of the provisions of Article IX, Section 1, as well as the preamble to the Montana Constitution. In doing so, we conclude that the delegates' intention was to provide language and protections which are both anticipatory and preventative.

In MEIC, the plaintiffs brought an action against the state DEQ for allowing environmental degradation in contravention of the constitution. The lower court found the plaintiffs could not substantiate evidence of environmental injury and held for the defendant.

On appeal, the plaintiffs argued the statute in question did not allow for analysis of how a discharge might degrade water quality, and therefore did not meet the constitutional requirement of Article IX, Section 1, to maintain and improve a

item—arguably capable of performance and certainly not unlawful—in that process ... Finally with regard to the constitutional issues discussed in the Court's opinion, I agree with Justice Leaphart that we follow the long-standing and important principle that courts should avoid constitutional issues wherever possible. ...Consequently, I strenuously dissent from the Court's insertion—and resolution, on its own and without full briefing—of a nonexistent constitutional issue into this case. ...To that extent, the discussion is dicta in its entirety and, as a result, not controlling precedent. The problem is that dicta takes on a life of its own. The bigger problem is that the Montana constitutional rights relating to the environment are hugely important and impactful to the citizens of Montana and should not be dallied with by this Court in the absence of issues being raised in the District Court and fully briefed in this Court. For the reasons stated above, I dissent from the Court's opinion on the issue actually before us and strenuously dissent from its inappropriate insertion of the 'clean and healthful' discussion, which will unnecessarily fan the flames of controversy in Montana.

30. MEIC, ¶ 47.
31. Id. ¶ 77.
32. Id. ¶ 35.
clean and healthful environment. The court held for the plaintiffs, concluding that any statute or rule which implicated the constitutional right to a clean and healthful environment would be subject to strict scrutiny, and could survive only if justified by a compelling state interest. The court further held it would apply strict scrutiny to both state and private action.

Chief Justice Turnage, and Justices Leaphart and Gray submitted specially concurring opinions, splitting the court on the issue of the application of strict scrutiny to private action. Justice Gray joined Chief Justice Turnage and Justice Leaphart only in that she would not have addressed private action in the MEIC holding. The special concurrence of Chief Justice Turnage and Justice Leaphart also suggested that applying strict scrutiny analysis to private action might prove unworkable in the future:

As we state in this opinion, strict scrutiny analysis requires that the state demonstrate a compelling state interest and that its action is both closely tailored to effectuate that interest and the least onerous path that can be taken to achieve the State's objective. I am not clear as to how, or whether, private action lends itself to a 'compelling state interest' analysis.

The dissenting Justices were well founded in their apprehension surrounding the treatment of private action. The MEIC court held "that for the purposes of the facts presented in this case, § 75-5-303, MCA is a reasonable legislative implementation of the mandate provided for in Article IX, Section 1," but that it violated the constitution to the extent it "arbitrarily excludes certain 'activities' from nondegradation review without regard to the nature or volume of the substances being discharged."

Section 75-5-303 is the umbrella rule for water quality protection and allows for exemptions provided in MCA § 75-5-317. Subparts (3) and (3)(b) of § 75-5-303 state:

The department may not authorize degradation of high-quality waters unless it has been affirmatively demonstrated by a preponderance of the evidence to the department that: the

33. Id. ¶ 50.
34. Id. ¶ 63.
35. MEIC, ¶ 64.
36. Id. ¶ 83.
37. Id. ¶ 86.
38. Id. ¶ 83.
39. Id.
40. Id. ¶ 80.
proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of allowing degradation of high-quality waters.

One analysis summarized the decision this way:

Thus, while the Court in MEIC concluded that the environmental rights in Montana’s 1972 Constitution are fundamental and that they create enforceable limits at least on legislative action, the Court has also held that these rights are subject to a balancing against other, important public values such as economic and social development. As with other fundamental rights, they are subject to infringement in appropriate circumstances. The Court’s endorsement of § 75-5-303 indicates economic and social developments are among the values to be balanced against these environmental rights.41

Unfortunately, the MEIC court did not provide clear guidance regarding the balance of economic and social development against the right to a clean and healthful environment. In Cape-France, the court again failed to address how to balance right to a clean and healthful environment against private economic and social development.

B. Application in Cape-France

The court failed to address a key distinguishing factor between MEIC and Cape-France. In MEIC, environmental degradation was substantiated by science and numbers; in Cape-France, plaintiffs were granted summary judgment based only on the assertion of potential environmental risk. The Cape-France holding suggests the court has decided there will be no forthright balancing between environmental degradation and economic and social developments. The court did not address how to balance between two constitutionally guaranteed rights in conflict such as the right to a clean and healthful environment and the right to acquire and possess property, also listed in Article II, Section 3.

In Cape-France, the DEQ advised Springer that all wells drilled on the property would be tested annually as a condition of subdivision approval.42 The DEQ intended to test the wells for contaminants because it has policies for closing wells with an unacceptable contaminant level.43 Annual review of


42. Appellants' Initial Br., Ex.4.

43. Telephone Interview with Cindy Brooks, Staff Attorney, Montana DEQ (Mar.
contaminant levels by the DEQ in *Cape-France* should have satisfied the *MEIC* court's holding that the statute in *MEIC* violated the constitution to the extent it exempted certain contaminant discharge from review.

In *MEIC*, the court held that § 75-5-317(2)(j) was unconstitutional because it does not review certain types of degradation of the environment by the discharge of contaminants.\(^{44}\) The *MEIC* court stated that the protection afforded the environment is to be both anticipatory and preventative and strict scrutiny must be applied to both state and private actions that infringe on the right to a clean and healthful environment.\(^{45}\) The *MEIC* court also held that degradation subject to scientific analysis must be balanced against other values such as economic and social development.\(^{46}\)

The DEQ annually reviews potential contamination sites to determine if they need to be closed for unacceptable levels.\(^{47}\) The *MEIC* court held that § 75-10-303 is constitutional although it permits degradation for valuable social and economic developments. The *Cape-France* court needed to compare and analyze its holding in *MEIC* to clarify why annual review of contaminant levels in *Cape-France* was deficient, although degradation is allowed for valuable social and economic developments.

By neglecting to provide adequate analysis in *Cape-France*, the court left Montanans without parameters to design endeavors that will pass constitutional muster. Many issues in a contract for real property could be tied to degradation of the environment: digging wells, clearing trees, moving earth, making roads. The court's opinion in *Cape-France* did not limit the abuse that could arise from parties wishing to rescind contracts.

The court affirmed the lower court's assessment that the Agreement exposed the public to "potential health risks" and "potential environmental degradation."\(^{48}\) The terms themselves are nebulous at best, and the court did nothing to clarify them. Furthermore, the court ignored Article IX, Section 1, subsections 2 and 3 when it cited the 'pertinent' part of the Article as being

\(^{22}\) (2002).

\(^{44}\) *MEIC*, ¶ 80.

\(^{45}\) *Id.*, ¶ 77.

\(^{46}\) *Id.*, ¶ 7.

\(^{47}\) *Id.*

\(^{48}\) *Cape-France*, ¶ 29.
the duty to maintain and improve a clean and healthful environment. Subsections 2 and 3 provide the legislature with the duty to enforce the improvement and maintenance of the environment.\textsuperscript{49}

The legislature must utilize and clarify its enforcement mandate. Allowing the court to determine the constitutionality of property transactions involving possible degradation has created uncertainty. When the court ignored its precedent and unnecessarily addressed the constitutionality of the Agreement, it created questions surrounding the balancing of rights and left them unanswered. The people of Montana must clarify, through consensus, the bounds of tolerable environmental degradation. Anything less will murk the rights and responsibilities provided by the constitution.

V. CASE LAW

A. Montana Precedent

The court cited three Montana cases in its discussion of the doctrine of impossibility. The first two, \textit{Barrett v. Ballard}\textsuperscript{50} and \textit{360 Ranch Corp. v. R & D Holding}\textsuperscript{51} it gave cursory mention to. The court focused on the earlier case of \textit{Smith v. Zepp}\textsuperscript{52} and its quote from the Restatement of Contracts, § 454: "Impossibility encompasses 'not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.'"\textsuperscript{53}

In \textit{Smith}, the defendants purchased the plaintiff's mining properties, and as part of the contract, agreed to pay the plaintiff's monthly fee of 15\% of the net profits. To ensure maximization of the plaintiff's fee, the defendants agreed to produce a daily average of 300 yards of mined material for gold processing. The defendants failed to mine the contractually required amount, and the plaintiffs filed suit against them for breach. The defendants argued that impossibility excused their failure to perform. They alleged they were unable to obtain the equipment needed to remove the required daily quantity, and what earth they had mined in a month had produced only one

\begin{itemize}
\item \textsuperscript{49} MONT. CONST. art. IX, § 1, cls. 2, 3.
\item \textsuperscript{50} Barrett v. Ballard, 191 Mont. 39, 622 P.2d 180 (1980).
\item \textsuperscript{51} 360 Ranch Corp. v. R & D Holding, 278 Mont. 487, 926 P.2d 260 (1996).
\item \textsuperscript{52} Smith v. Zepp, 173 Mont. 358, 567 P.2d 923 (1977).
\item \textsuperscript{53} \textit{Id.} at 364, 567 P.2d at 927.
\end{itemize}
unprofitable ounce. The lower court found for the plaintiffs.\textsuperscript{54} The defendants appealed to the Montana Supreme Court which affirmed long-standing precedent when it held "[d]efendants are not excused from breaching their contractual duty to mine 300 yards of material daily."\textsuperscript{55}

The Cape-France court's reliance on the one-sentence quote of the Restatement it cited in Smith is contrary to its application. Smith indeed quoted the Restatement of Contracts, § 454.\textsuperscript{56} However, Smith also cited § 460,\textsuperscript{57} and held the defendants had the duty to prove the thing they contracted to do was impossible, as the party requesting excuse for failure to perform on grounds of impracticability creating impossibility. The court admonished the defendants for not bringing a single expert witness to testify to the truth of their claim.

[D]efendants presented no expert testimony to establish that production of merely 30-40 yards of material per day for one month was conclusive evidence that substantial quantities of gold did not exist on the property. Defendants did not introduce any evidence of geologists' or geophysicists' reports as to the minerals contained in the land.\textsuperscript{58}

In addition to its reliance on the Restatement, the Smith court relied on two Montana cases to support its finding. Smith first cited to Brown v. First Fed. Savings and Loan Ass'n,\textsuperscript{59} for the general rule that contract obligations must be performed according to contract terms.\textsuperscript{60} Smith also cited Hein v. Fox:

Courts can give no solace where parties to a contract find themselves minus expected profit through failure to exercise care in drawing up such contract. What this court said in Hinerman v. Baldwin, 67 Mont. 417, 433, 215 P. 1103, 1108, well applies here, viz: '***The court has no right to make a contract for the parties different from that actually entered into by them.*** "Whether the plaintiff made a good or a bad bargain is of no concern to the court.***Merely because the terms of the contract now appear unreasonable or burdensome affords no reason to permit him to

\textsuperscript{54} Id. at 360, 567 P.2d at 924.
\textsuperscript{55} Id. at 367, 567 P.2d at 928.
\textsuperscript{56} Id. at 364, 567 P.2d at 927.
\textsuperscript{57} Id. at 365, 567 P.2d at 927.
\textsuperscript{58} Where the existence of a specific thing ***is, either by the terms of a bargain or in the contemplation of both parties, necessary for the performance of a promise in the bargain, a duty to perform the promise (a) never arises if at the time the bargain is made the existence of the thing *** within the time for seasonable performance is impossible***.
\textsuperscript{60} Smith, 173 Mont. at 370, 567 P.2d at 929.
avoid his contract."*** "The duty of the court is to enforce contracts, not to make new ones for the parties, however unwise the terms may appear."61

Smith fortified precedent established as early as 1923, obligating promisors to fulfill their promises, no matter how weak the decision-making was in formulating the promise. The Smith court held the defendants liable for damages equal to the percentage owed the plaintiffs, had the defendants fulfilled the contract and mined 300 yards of material daily from the day the mine was ready for production, plus interest.62

The Cape-France court also cites Barrett v. Ballard.63 The Barrett court was unclear why the defendant, Mrs. Ballard, was claiming it was impossible to perform the contract to pay her real estate agent, Ms. Barrett.64 The court concluded, "Impossibility of performance is a strict standard that can only be maintained where the circumstances truly dictate impossibility."65

360 Ranch is relied on in Cape-France for the general rule that parties must be held to the terms of their contracts.66 The 360 Ranch court concluded that a lower court should rarely grant summary judgment based on impossibility:

There will, undoubtedly, be contract cases in which a district court could grant summary judgment based on impossibility of performance. For example, where an Act of God physically destroys the subject matter of a contract, or where the subject matter of a contract is subsequently declared illegal, then it could be held that, as a matter of law performance of the contract was impossible. In many other cases, however, whether performance of a contract was impossible will be a question of fact, and summary judgment will not be appropriate.67

In 360 Ranch, the plaintiff ranch sought summary judgment on its request for declaratory relief, based on the parties' intent and impossibility of compliance with the contract terms. The ranch sold a five-acre parcel of land to the defendant, but could not get proper subdivision approval before the closing date of the agreement. It gave title to 20 acres to the defendant to prevent breach, and entered an option to reclaim the 15 acres if the

61. Hein v. Fox, 126 Mont. 514, 520, 254 P.2d 1076, 1079 (1953).[punctuation from the original].
62. Smith, 173 Mont. at 370, 567 P.2d at 929.
64. Id. at 44, 622 P.2d at 184.
65. Id.
66. Cape-France, ¶ 17.
67. 360 Ranch, 278 Mont. at 493, 926 P.2d at 263.
subdivision was created within a year from closing. The ranch failed to obtain the subdivision in time.

The lower court found that conflicts between the Bozeman Area Master Plan and the Bozeman Area Zoning Ordinance made the plaintiff's efforts to subdivide impossible and granted summary judgment for the ranch. On appeal, the court reversed and remanded, holding summary judgment was inappropriate in light of genuine issues of material fact concerning the impossibility of compliance with the contract terms.

B. Extrajurisdictional Cases

As it did with its use of Smith, the Cape-France court aptly quoted Opera Co. of Boston v. Wolf Trap Foundation. However, while the court cited to Opera for language suggesting that the definitions of impossibility and impracticability have become synonymous, it ignored the application of the doctrine in Opera. In Opera, the lower court found the defendant open-air theater in breach. The theater had not provided a sufficient contingency lighting system, and when an electrical storm caused an outage of the main power supply, the plaintiff's performance had to be cancelled. The Fourth Circuit Court of Appeals remanded the case for findings surrounding the theater's claim of impossibility. It summarized the law this way:

[A] party relying on the defense of impossibility of performance must establish (1) the unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties, and (3) that occurrence made performance impracticable. When all those facts are established the defense is made out.

In its decision to expand impossibility to include impracticability, specifically supervening impracticability, the Cape-France court cited the decision of Bissell v. L.W. Edison Company. In Bissell, the Michigan Appeals Court cited § 261 of the Restatement (Second) of Contracts (1981), which excuses performance upon occurrence of a supervening event that

68. 360 Ranch, 278 Mont. at 490, 926 P.2d at 262.
69. 360 Ranch, 278 Mont. at 493, 926 P.2d at 263.
70. Opera Co. of Boston v. Wolf Trap Foundation, 817 F.2d 1094 (4th Cir. 1987).
71. Id. at 1098.
72. Id. at 1102.
renders fulfillment of the contract impracticable.74 The Michigan Appeals Court determined the plaintiff's contractual duties were properly discharged by the lower court because of impossibility due to a supervening event.75

The plaintiff contracted to obtain fill from a river bed and place it as the base of a highway approach.76 The defendant had pre-contractual knowledge that the highway department intended to place a water main in the right-of-way of the plaintiff's fill-extraction site during the time the plaintiff had contracted to complete work for the defendant.77 The defendant did not share his knowledge of the highway department's plans with the plaintiff.78 The water main froze and burst, freezing the plaintiff's hydraulic dredge, and causing him to be unable to fulfill his contractual obligations.79 The Michigan Appeals Court held that if the plaintiff had been made aware of the supervening event before entering into the contract, he could have declined to make the contract, or charged more to cover the risk of not being able to fulfill his duties as required.80

C. The Misapplication of Precedent and Extradisjursidictional Case Law to Cape-France

The Cape-France court extracted language from the aforementioned cases to justify upholding a grant of summary judgment for Cape-France. However, the holdings of the cases do not justify upholding summary judgment; the cases were misapplied. The Smith court held that the party asserting impossibility had the burden of proving fulfillment was impossible, and that a party would not be excused from its obligations based on poor contract planning.81 In 360 Ranch, the court held that grants of summary judgment should rarely be given by district courts in cases involving impossibility of performance, and remanded for further findings regarding the impossibility of compliance.82 Opera was remanded to establish whether an unexpected supervening event occurred, whether the

74. Id. at 627.
75. Id. at 628.
76. Id. at 624.
77. Id.
78. Bissell at 624.
79. Id. at 622.
80. Id. at 626.
81. Smith, 173 Mont. at 370, 567 P.2d at 928.
82. 360 Ranch, 926 P.2d at 263.
event was of such a nature that its non-occurrence was a basic assumption when the parties contracted, and whether the occurrence of the event rendered performance impracticable. The court in *Bissell* held a supervening event, unforeseeable to the plaintiff, rendered performance of the contract impossible.

*Cape-France* argued that drilling a pump test well would create a “huge risk” to the business and the public at large. As the party claiming the defense, Cape-France had the duty to demonstrate the veracity of its assertion with expert testimony. They did not offer any. They relied only on the letter from the DEQ. The DEQ’s letter simply said that it was aware of PCE in the area, which Cape-France knew when it signed the Agreement. The letter also stated that the DEQ did not know the extent of the spreading of the plume, and that water supply wells drilled in the proposed subdivision “may tap contaminated groundwater or become contaminated over time with pumping.”

The function of a pump test well is vastly different from that of a water supply well. A water supply well is just that: a well used for daily water supply. A pump test well is drilled to supply one clean liter of water to the DEQ for accurate testing of contaminant levels. In order to subdivide, Cape-France needed to establish the existence of a water supply on the property. After subdivision, according to the Agreement, the property would have been under the control of Peed and Moore. Peed and Moore consulted the Bozeman Master Plan and were aware the city intended to extend its municipal water supply to the property. Indeed, municipal water was available at the time of the appeal, rendering moot the environmental degradation possibly associated with a water supply well.

83. Telephone Interview with Pat Crowley, Hydrogeologist, Montana DEQ (Mar. 19, 2002). Mr. Crowley explained that a pump test well needs to provide only one liter of clean water to permit accurate testing. He did add that the well must be “pumped and surged” for approximately one hour before the initial test to clear the well of debris. He estimated that an average well, pumping 12 gallons per minute, would expel approximately 720 gallons in that hour before the clean liter would be obtained.

84. Appellants’ Initial Br., Ex.7.

85. Telephone Interview with Ryan Leeland, Environmental Engineer, Montana DEQ (Mar. 22, 2002). Mr. Leeland explained that a water supply well differs vastly from a pump test well in the quantity of gallons per minute pumped.

86. Appellants’ Initial Br., Ex.4.

87. See, Telephone Interview with Ryan Leeland, supra note 82.

88. Resp’t Br. at 2.

89. Telephone Interview with Marthe Moore Elliott, Appellant, Tonopah, Nevada (Mar. 21, 2002).
Cape-France was not told by the DEQ that there was a huge risk. The DEQ did not quantify the risk at all in the letter, nor did Cape-France ask the DEQ or any other expert to quantify the risk. Cape-France only asserted there was a huge risk in drilling a pump test well, just like the miners in Smith asserted there was not enough gold. The court should have made the same conclusion: fulfill the contract, unless it can be shown by expert testimony that the risk of pumping one liter of water is large enough to make fulfillment impossible.

Lacking such testimony, the court should have followed the remainder of the holding in Smith, and awarded damages to Peed and Moore. In Smith, the plaintiffs had sought forfeiture of the mine from defendants, and reversion of the property to themselves for defendants' breach and failure to pay. The court in Smith applied Montana Rules of Civil Procedure 54(c) to provide the plaintiffs with proper relief, which it determined to be the value of the royalties owed, plus interest for the years defendants did not mine the required 300 yards of material each working day.90

Peed and Moore were damaged when they did not acquire the rights to the parcel because Cape-France failed to get it subdivided. Had Cape-France not breached its duty to subdivide the land, Peed and Moore would have owned the five-acre parcel. Due to the breach, if the court refused to offer specific performance, proper relief would have been the current value of the property of the time of the decision, which was approximately two million dollars.91 Instead the court went against precedent, and misapplied Smith.

The entire discussion of constitutionality and the expansion of impossibility to include impracticability should have been avoided. If the court had based its decision on established precedent it would have remanded the case for further findings, because the lower court improperly found an absence of genuine issues of material fact.

The court had precedent directly on point in 360 Ranch,
when it held that a district court would rarely be in the position to properly grant summary judgment on a claim of breach excused by impossibility. The Cape-France court was not required to accept the lower court's finding of a lack of genuine issues of material fact. The lower court's confusion regarding two key issues of material fact should have caused the Montana Supreme Court to remand for further findings.

The lower court found that Cape-France was aware of the plume's existence and its movement towards Cape-France's property. At the same time, the lower court found the contamination was new, unexpected and unknown to Cape-France. Further findings needed to be made concerning to what extent Cape-France knew of the plume, and to what extent that knowledge made it liable for breach of the contract terms.

The lower court misperceived the DEQ's letter, believing it informed Cape-France that its property was located in an area of groundwater contamination. But in fact, the DEQ stated only that the extent of the contamination was unknown. The Montana Supreme Court should have found the lower court's holding of impossibility improper because of the limited information the lower court had.

Indeed, remanding Cape-France subject to resolution based on facts would have been more true to the holding of Opera as well. Furthermore, if the Fourth Circuit's concerns in Opera were applied to Cape-France, the court could not have found for the plaintiffs on the basis of impracticability. Cape-France is an experienced land-developer, and as such was aware of the use of indemnification clauses. Cape-France knew about the contamination plume. No supervening event occurred. The court should have enforced specific performance or granted relief per Montana Rules of Civil Procedure 54(c) as in Smith.

Finally, applying the logic of Bissell to Cape-France, the court should have found for Peed and Moore because no supervening event existed. Cape-France could not show an event took place after the formation of the contract that altered its ability to satisfy its contractual obligations. Its knowledge of the plume existed before the contract was signed. Its lack of forethought in not contracting for an appropriate indemnity provision should not have been grounds for rescinding the Agreement or for overturning precedent. The Cape-France court

92. Appellants' Initial Br., Ex.1 at 6.
93. Id. at 7.
did not apply the doctrine of supervening impracticability creating impossibility correctly.

VI. CONCLUSION

Bozeman extended the municipal water supply to the property before the appeal, making potential environmental degradation moot. The court should have remanded for a finding based on substantially changed circumstances. However, even if the water supply had not been established, the court should have remanded for further findings based on the doctrine of stare decisis. Precedent in Montana strongly discourages a district court from granting summary judgment based on grounds of impossibility, and Cape-France is a good example to justify continued practice of the holding laid out in 360 Ranch.

The lower court should not have been upheld when it simultaneously found Cape-France knew about the plume and its movement but found the contamination as new, unexpected, and unknown. The lower court also found that the property in question was located in a contaminated area, when the DEQ said the extent of contamination was unknown. Furthermore, scientific data was not submitted to the lower court to substantiate the claims of Cape-France. These statements demonstrate genuine issues of material fact, precluding summary judgment.

If the Montana Supreme Court had followed precedent and remanded, the lower court would have heard the science behind the claims of risk to the environment from drilling a pump test well. Then, if the case had been reappealed, the court would have had the hard science necessary to formulate solid conclusions concerning violations of the right to a clean and healthful environment.

The court prematurely addressed constitutional issues, breaking with its own wisdom. It did not qualify environmental degradation, nor did it provide direction concerning the balance of the right to a clean and healthful environment against permissible degradation related to economic and social developments. In MEIC, the court endorsed the water quality statute which balances degradation of water against the benefit of economic and social developments. Peed and Moore planned to construct a hotel, a project that would result in economic development. The court’s decision not to remand deprived Peed and Moore of their right to acquire and possess property.
Cape-France does not provide Montanans with clear factors the court will use to decide future cases involving private property issues and the right to a clean and healthful environment. A scientifically unsubstantiated assertion of environmental degradation led to the rescission of the Agreement. The decision murkied the waters of a clear pool of established precedent.