

2019 WL 2337474

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This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

BEAR GULCH SOLAR, LLC;
et al., Plaintiffs-Appellants,

v.

MONTANA PUBLIC SERVICE
COMMISSION; et al., Defendants-Appellees.

Bear **Gulch Solar**, LLC; et al., Plaintiffs-Appellees,

v.

Montana Public Service Commission;
et al., Defendants-Appellants.

No. 18-36061, No. 18-36095

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Argued and Submitted May
17, 2019 Portland, Oregon

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Filed June 3, 2019

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Attorneys and Law Firms

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Footnotes

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Appeal from the United States District Court for the District of Montana, Charles C. Lovell, District Judge, Presiding, D.C. No. 6:18-cv-00006-CCL

Before: N.R. SMITH and WATFORD, Circuit Judges, and SELNA, * District Judge.

MEMORANDUM **

*1 Plaintiffs¹ and the Montana Public Service Commission and its Commissioners (MPSC) both appeal the district court's decision granting in part and denying in part their cross-motions for summary judgment. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part and reverse in part.²

1. The district court erred in concluding it could reach the merits of Plaintiffs' request for declaratory relief.

"A statutory change ... is usually enough to render a case moot, even if the legislature possesses the...

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...g facility] could benefit from the [Prior Tariff] rate," thus "imposing a burden on the [MPSC] to determine which projects established [a] LEO on or before June 16, 2016 under [a] new standard and ... ordering retroactive relief." Such retroactive relief is barred by the Eleventh Amendment. See *Verizon Md., Inc.*, 535 U.S. at 645, 122 S.Ct. 1753.

*3 The parties shall bear their own costs for this appeal.

AFFIRMED in part and REVERSED in part.

All Citations

--- Fed.Appx. ----, 2019 WL 2337474

- * The Honorable James V. Selna, United States District Judge for the Central District of California, sitting by designation.
- ** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.
- 1 Plaintiffs are Bear **Gulch Solar**, LLC; Canyon Creek **Solar**, LLC; Couch **Solar**, LLC; Fox Farm **Solar**, LLC; Glass **Solar**, LLC; Malt **Solar**, LLC; Martin **Solar**, LLC; Middle **Solar**, LLC; River **Solar**, LLC; Sage Creek **Solar**, LLC; Sypes Canyon **Solar**, LLC; Valley View **Solar**, LLC; and Ulm **Solar**, LLC; and their parent company, Cypress Creek Renewables Development, LLC.
- 2 We grant the parties' motions to take judicial notice. Dkt. Nos. 43, 52.
- 3 We assume without deciding that Plaintiffs properly raised this requested relief below. However, we note that Plaintiffs requested two different forms of injunctive relief during the course of the district court proceedings, neither of which are the same as the relief requested before us. In their complaint, Plaintiffs requested "[p]ermanent injunctive relief directing [MPSC to] ... adopt[] a standard for establishment of a [LEO] that is [lawful], and directing [MPSC] to allow any [qualifying facility] that satisfied that standard on or before June 16, 2016, ... to contract with and sell their output to NorthWestern under the [Prior Tariff's] ... rates of approximately \$ 66/MW hr." On the other hand, in their motion for summary judgment, Plaintiffs asked the court to "declare that any [qualifying facility] that tendered a fully-negotiated ... [power purchase agreement] to NorthWestern on or before June 16, 2016, established a LEO ... and is entitled to contract with the utility under the [Prior Tariff's] terms." In their appellate brief, Plaintiffs expressly disclaimed the relief requested in the Complaint, and they do not reassert the precise relief requested in their summary judgment motion.

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