

Alaska Basin Grazing Association, et al. v. Department of Natural Resources  
and Conservation  
Cause No. Adv-2008-1151, 1st Judicial District, Lewis and Clark County  
Decided 2009

**ALASKA BASIN GRAZING ASSOCIATION, a Montana corporation, and ROGER  
and CARRIE PETERS, Plaintiffs, v. MONTANA DEPARTMENT OF NATURAL  
RESOURCES AND CONSERVATION, Defendants.**

Cause No. ADV-2008-1151

**FIRST JUDICIAL DISTRICT COURT OF MONTANA, LEWIS AND CLARK  
COUNTY**

*2009 Mont. Dist. LEXIS 478*

**October 8, 2009, Decided**

**PRIOR HISTORY:** *Alaska Basin Grazing Assoc. v. Mt. Dnrc*, 2009 Mont. Dist. LEXIS 149 (2009)

**JUDGES:** [\*1] DOROTHY McCARTER, District Court Judge.

**OPINION BY:** DOROTHY McCARTER

**OPINION**

**DECISION AND ORDER**

P1. The parties have filed cross-motions for summary judgment. A hearing on the motions was held on August 27, 2009. Plaintiffs were represented by Hertha L. Lund, and Defendant Montana Department of Natural Resources and Conservation (DNRC) was represented by Tommy H. Butler. The motions have been fully briefed and are ready for decision.

**UNCONTESTED BACKGROUND**

P2. This action involves livestock fencing on leased state land. The lease at issue, State Lease No. 10116, consisting of 3,414 acres in Beaverhead County, Montana, was previously owned by Matador Cattle Company and Carl and William Knox. Subsequently, in 2001, the Knox's assigned their interest to Matador Cattle Company. Roger Peters, a Plaintiff in this action, purchased private lands from the Knox's and believed that the purchase included the lease. A lawsuit in 2004 resulted in a determination that the lease belonged to the Matador Cattle Company. During this period of time, the leased property was largely unfenced, and Plaintiffs had access to the forage within this leased property.

P3. In December 2002, the Matador Cattle Company submitted an improvement [\*2] request to DNRC seeking approval of nine miles of boundary fence construction around its leases Nos. 10116 and 1341. Due to an administrative oversight, no Montana Environmental Protection Act (MEPA) document had been prepared to evaluate the impacts of this improvement. The fencing construction began in 2007,

and that same year, DNRC halted the construction of the fencing in order to prepare an environmental assessment. It completed the draft assessment on July 24, 2008, and then gathered public comments.

P4. DNRC received a significant number of comments about possible adverse impacts to soils, fisheries, and wildlife. In its environmental assessment, DNRC considered three alternatives to the proposed fencing: Alternative A -- a no-action alternative; Alternative B -- consisted of the requested nine miles of fencing with having smooth top and bottom wires along the Long Creek segment; and Alternative C -- reallocating the grazing acreage, reducing the new fence construction to three to four miles, giving Alaska Basin the grazing rights to the Long Creek segment, and leaving it totally unfenced between Alaska Basin lands to the west and the BLM lands to the east. This alternative would [\*3] essentially maintain the status quo in the most contentious area.

P5. On October 10, 2008, Garry Williams, area manager of the Central Land Office, issued a "Finding," which explained his decision to adopt and approve Alternative C. The document contained the following language: "Upon execution, this Finding becomes part of the Final Environmental Assessment for the Long Creek Fence Project proposed on state lands by the Matador Cattle Company."

P6. On October 31, 2008, Williams issued a letter clarifying and correcting some errors made in the October 10 decision. The letter contained the following language: "Since this information may affect your decision regarding a challenge in a contested case hearing before the Department under the Montana Administrative Procedures Act [MAPA], I have extended the date to contact me to November 7, 2008."

**STANDARD OF REVIEW**

P7. Legal actions under MEPA are not subject to MAPA, nor do individuals have the right to an administrative or contested case hearing before the

agency. Any challenge to MEPA compliance must be before a court. *Pompeys Pillar Historical Ass'n v. Dep't of Env'tl. Quality*, 2002 MT 352, P21, 313 Mont. 401, 61 P.3d 148.

P8. Any challenge [\*4] to the agency's decision not to issue an environmental impact statement or to the adequacy of that statement is governed by *Section 75-1-201(3)(a), MCA*. Under that statute, the district court may not set the agency decision aside unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law. The burden of proof is on the person challenging the agency's action.

P9. In the event new material relating to the adequacy or content of the agency's environment review document is presented, the district court is required to remand significant issues or evidence to the agency. If the new information is not material or significant, the court need not remand it. The court must review the agency's findings and decision to determine whether they are supported by substantial, credible evidence from the record. *Section 75-1-201(3)(b), MCA*.

#### DISCUSSION

P10. The cross-motions for summary judgment address the issue of whether DNRC complied with MEPA.

#### Statute of Limitations

P11. In its motion for summary judgment, DNRC asserts that Plaintiffs are barred from this lawsuit by the statute of limitations.

P12. *Section 75-1-201(6)(a)(ii), MCA*, [\*5] states: "Any action or proceeding challenging a final agency action alleging failure to comply with or inadequate compliance with a requirement under this part must be

brought within 60 days of the action that is the subject of the challenge." This provision was included in the 2001 legislative amendments to the statute. The bill provided that the amendments apply to environmental reviews that are begun after October 1, 2001. Section 16, Ch. 299, L. 2001.

P13. In the present case, the environmental review began as a result of Matador Cattle Company's improvement request made in December 2002. Thus, the 60-day statute of limitations applies. Although the "Findings" of the agency were issued on October 10, 2008, the letter of October 31, 2008 contained revisions significant enough that it should be considered the final agency decision. The 60th day from that date was December 30, 2008. The complaint in this Court was filed December 31, 2008 at 2:28 p.m, one day past the deadline.

P14. Plaintiffs argue that the 60-day statute does not apply to this action because DNRC has not issued a final decision. The Court disagrees. The October 10 and 31, 2008 documents, by their own language, clearly [\*6] indicate a final decision of the agency. As previously noted, the procedures for challenging the agency action are contained in the statutory provisions quoted above.

P15. In summary, Plaintiffs are barred by the statute of limitations from challenging DNRC's decision. It is therefore unnecessary to address the remaining issues in the cross-motions.

#### ORDER

P16. DNRC's motion for summary judgment is GRANTED.

DATED this 8th day of October, 2009.

DOROTHY McCARTER District Court Judge



**ALASKA BASIN GRAZING ASSOCIATION, a Montana corporation, and ROGER  
and CARRIE PETERS, Plaintiffs, v. MONTANA DEPARTMENT OF NATURAL  
RESOURCES AND CONSERVATION, Defendant.**

**Cause No. ADV-2008-1151**

**FIRST JUDICIAL DISTRICT COURT OF MONTANA, LEWIS AND CLARK  
COUNTY**

*2009 Mont. Dist. LEXIS 492*

**November 6, 2009, Decided**

**PRIOR HISTORY:** *Alaska Basin Grazing Assoc. v. Mt. Dnrc*, 2009 Mont. Dist. LEXIS 149 (2009)

**JUDGES:** [\*1] DOROTHY McCARTER, District Court Judge.

**OPINION BY:** DOROTHY McCARTER

**OPINION**

**DECISION AND ORDER**

P1. The parties have filed cross-motions for summary judgment. A hearing on the motions was held August 27, 2009. Plaintiffs (Alaska Basin) were represented by Hertha L. Lund, and Defendant (DNRC) was represented by Tommy H. Butler. The motions have been fully briefed and are ready for decision. Counsel for the parties agreed that since this matter is similar to judicial review and based entirely on the administrative record, cross-motions for summary judgment would be the practical way to address the issues.

**UNCONTESTED BACKGROUND**

P2. This action involves livestock fencing on leased state land. The lease at issue, State Lease No. 10116, consisting of 3,414 acres in Beaverhead County, was previously owned by Matador Cattle Company and Carl and William Knox. In 2001, the Knox's assigned their interest to Matador Cattle company. Roger Peters, a plaintiff in this action, purchased private lands from the Knox's and believed that the purchase included the lease. A lawsuit in 2004 resulted in a determination that the lease belonged to Matador Cattle Company. During this period of time, the leased property was largely [\*2] unfenced, and Plaintiffs had grazing access to the property.

P3. In December 2002, Matador Cattle Company submitted an improvement request to DNRC seeking approval of nine miles of boundary fence construction around its lease Nos. 10116 and 1341. Due to an administrative oversight, no Montana Environmental

Protection Act (MEPA) document had been prepared to evaluate the impacts of this improvement. The fencing construction began in 2007. Later that same year, DNRC halted the construction of the fence in order to prepare an environmental assessment (EA). It completed the draft assessment on July 24, 2008, and then gathered public comments.

P4. DNRC received a significant number of comments about possible adverse impacts to soils, fisheries, and wildlife. In its EA, DNRC considered three alternatives to the proposed fencing: Alternative A, a no-action alternative; Alternative B, consisted of the requested nine miles of fencing, with smooth top and bottom wires along the Long Creek Segment; and Alternative C, reallocating the grazing acreage, reducing the new fence construction to three to four miles, giving Alaska Basin the grazing rights to the Long Creek segment, and leaving it totally [\*3] unfenced between Alaska Basin lands to the west and the BLM lands to the east. This alternative would essentially maintain the status quo in the most contentious area.

P5. On October 10, 2008, Garry Williams, area manager of the Central Land Office, issued a "Finding," which explained his decision to adopt a modified Alternative C. The document contained the following language: "Upon execution, this Finding becomes part of the Final Environmental Assessment for the Long Creek Fence Project proposed on state lands by the Matador Cattle Company."

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P8. [\*4] Any challenge to the agency's decision not to issue an environmental impact statement or to the adequacy of that statement is governed by *Section 75-1-201(3)(a), MCA*. Under that section, the district court may not set the agency decision aside unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law. The burden of proof is on the person challenging the agency's action.

P9. In the event new material relating to the adequacy or content of the agency's environment review document is presented, the district court is required to remand significant issues or evidence to the agency. If the new information is not material or significant, the court need not remand it. The court must review the agency's findings and decision to determine whether they are supported by substantial, credible evidence from the record. *Section 75-1-201(3)(b), MCA*.

## DISCUSSION

P10. The cross-motions for summary judgment address the issue of whether DNRC complied with the MEPA. Several sub-issues are raised in the briefs and will be addressed.

### 1. Application of the Statute of Limitations

P11. *Section 75-1-201(6)(a)(ii), MCA*, states: "Any action or [\*5] proceeding challenging a final agency action alleging failure to comply with or inadequate compliance with a requirement under this part must be brought within 60 days of the action that is the subject of the challenge." This provision was included in 2001 legislative amendments to the statute. The bill provided that the amendments apply to environmental reviews that are begun after October 1, 2001. *Section 16, Ch. 299, L. 2001*.

P12. In the present case, the environmental review began as a result of Matador Cattle Company's improvement request made in December 2002. Although the "Finding" of the agency was issued on October 10, 2008, the letter of October 31, 2008 contained revisions significant enough that it was to be considered the final agency decision. The 60th day from that date was December 30, 2008. Thus, the 60-day statute of limitations applies to this case. The complaint was filed within this statute of limitations. Thus, the challenge to the final agency action regarding Matador Cattle Company's December 2002 improvement request is

timely. Any final agency decisions or actions occurring prior to October 31, 2008 are not within this MEPA appeal.

### 2. Whether DNRC violated MEPA [\*6] by Not Preparing an EIS Prior to Approving Matador's Improvement Request

P13. As previously noted, in December 2002, Matador Cattle Company submitted an improvement request to DNRC seeking approval of nine miles of boundary fence construction around its lease Nos. 10116 and 1341.

P14. DNRC conceded that due to an administrative oversight, no MEPA document had been prepared to evaluate the impacts of its approval of the placement of the improvement. However, fence construction was not begun until 2007 because of the high elevation and limited grazing season. The fencing on some of the property was already completed by October 16, 2007, when Plaintiff Roger Peters requested DNRC prepare a MEPA document to evaluate the impacts of the remaining fencing on lease No. 10116. DNRC halted the construction of the fencing and proceeded to prepare an EA. The EA was completed on July 24, 2008, and DNRC then gathered public comments. The final EA was completed with the Finding of the area manager Garry Williams and adopted a modified Alternative C.

P15. The challenge by Alaska Basin is to DNRC's failure to prepare an Environmental Impact Statement (EIS) prior to approving the improvements to lease [\*7] No. 10116 (hereinafter the fencing project). Alaska Basin argues that DNRC was required to prepare an EIS, and DNRC asserts that an EIS was not necessary because any impact of the fencing project would not be significant.

P16. *Section 75-1-201, MCA*, governs environmental impact statements. DNRC promulgated rules to implement that statute. *ARM. 36.2.523* details the procedure to be followed. Subsection (1) requires the agency to prepare an EIS:

"(a) whenever an EA indicates that an EIS is necessary, or (b) whenever, based on the criteria in *ARM 36.2.524*, the proposed action is a major action of state government significantly affecting the quality of the human environment." Subsection (4) permits the agency to prepare an EA as an alternative to an EIS:

The agency may . . . prepare an EA whenever the action is one that might normally require an EIS, but effects which might otherwise be deemed significant appear to be mitigable below the level of significance through design, or enforceable controls or stipulations or both imposed by the agency or other government agencies. For an EA to suffice in this instance, the agency must determine that all of the impacts of the proposed action have been [\*8] accurately identified,

that they will be mitigated below the level of significance, and that no significant impact is likely to occur.

P17. DNRC asserts that the mitigation measures imposed by the adopted alternative reduced the significance of impact of the fencing project.

P18. Determination of significance of impacts is contained in *ARM 36.2.524*. The agency is required to consider all the factors enumerated:

(1) the severity, duration, geographic extent, and frequency of occurrence of the impact;

(2) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;

(3) growth-inducing or growth-inhibiting aspects of the impact;

(4) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values;

(5) the importance to the state and to society of each environmental resource or value that would be affected;

(6) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision [\*9] in principle about such future actions; and

(7) potential conflict with local, state, or federal laws, requirements, or formal plans.

P19. The EA itself addresses all of these factors. Part III contains a detailed discussion of the impacts of the fencing project on the physical environment, which includes geology and soil quality; stability and moisture; water quality, quantity and distribution; air quality; vegetation cover quantity and quality; terrestrial, avian and aquatic life and habitats; unique, endangered, fragile, or limited environmental resources; historical and archaeological sites; aesthetics; demands on environmental resources of land, water, air, or energy; and other environmental documents pertinent to the area.

P20. Part IV of the EA considers the impacts of the project on the human population and includes human health and safety; industrial, commercial, and agricultural activities and production; quantity and distribution of employment; local and state tax base and tax revenues; demand for government services; locally adopted environmental plans and goals; access to and quality of recreational and wilderness activities; density and distribution of population and housing; [\*10] social structures and mores; cultural uniqueness and diversity; and other appropriate social and economic circumstances.

P21. In his Finding, Williams stated that "[b]ased on the information provided in the EA, review of comments and discussions with resource specialists, I conclude significant impacts would not occur as a result of implementing the selected alternative. Therefore preparation of an Environmental Impact Statement for the proposed project is not required." He then set forth the basis of his conclusion.

P22. Alaska Basin asserts that the fencing project is significant for purposes of requiring an EIS and relies on the affidavit of Clayton Marlow, a research scientist with the Montana Agricultural Experiment Station. Marlow has degrees in forest and range management and range sciences. He opined several negative impacts of the Matador Cattle Company's fencing on the leased land. It is not clear, however, whether Marlow's affidavit addressed Alternative C, the current fencing at the time, or the plan initially requested by Matador Cattle Company.

P23. In response, DNRC pointed out that the agency considered the affidavit and redesigned the fencing accordingly. For example, [\*11] Marlow's affidavit was critical of the impact of fencing along Long Creek on cutthroat trout, but Alternative C eliminated fencing along that creek. In addition, DNRC received input from other scientists and wildlife managers that assisted it in the creation and adoption of Alternative C, including wildlife biologist Ross Baty; Robert Brannon; fisheries biologist Dick Oswald; DNRC archeologist Patrick Rennie; and Tim Bozorth of the United States Bureau of Land Management.

P24. Williams' determination that the project would not have a significant impact on the quality of the human environment was adequately substantiated in the EA and was contained in his Finding. Alaska Basin has not persuaded this Court by clear and convincing evidence that Williams' determination was arbitrary, capricious, or in violation of law. DNRC's decision that an EIS was not required was substantiated by the administrative record and was in compliance with MEPA.

### **3. Whether the Environmental Assessment was Adequate**

P25. Alaska Basin asserts that DNRC failed to adequately review the environmental impact of the fencing project. DNRC responded that Alaska Basin has raised several issues relating to the criteria listed [\*12] under *Section 75-1-201(1)(b)(iv)*, MCA, but has not cited to where in the administrative record it first made DNRC aware of its concern about these issues prior to the agency's October 31, 2008 final decision. The only information this Court has to consider is the administrative record, and the Court has reviewed the entire record. The Court can address the issues based on

the administrative record, which includes the EA and Williams' Finding.

P26. The Court notes that Alaska Basin's assertions in its brief in support of its motion are vague and do not refer to much more than Marlow's opinions that conflict with Williams' decision.

P27. Alaska Basin argues that the agency used outdated information and failed to consider Marlow's opinion that the present fencing was already degrading the environment and streams from the cattle's forced movement through the creeks. It also argues that the EA did not fully address the unavoidable adverse effects of the project; that the EA did not describe any irreversible commitment of resources; and that it failed to address the economic impact of the proposed fencing.

P28. Again, the EA referred to all of the information received that pertained to the [\*13] project and provided a reasoned consideration of all of the factors listed in the document.

P29. Williams set forth the information he used as the basis of his adoption of a modified Alternative C in his decision:

I have carefully reviewed the EA, comments received, file history and discussed alternatives with the lessees and adjacent landowners. I have decided to implement a modified version of Alternative C, which will enact a partial and equitable exchange of grazing resources on state land held under lease by the Matador Cattle Company and the Alaska Basin Grazing Association. I have selected this alternative because I believe it is in the best long term interest of the trust resources.

P30. He then provided the details of the modified

Alternative C. He specifically addressed the impact of the proposed fencing on cattle, terrain, river banks, vegetation, and cutthroat trout habitat. He further stated that the fencing is not permanent and can be removed in the future because of "changes in lease terms, management activities or environmental conditions . . . . Consequently, there is no long term, irreversible commitment of resources associated with this proposal."

P31. Neither the EA nor [\*14] Williams was required to adopt only Marlow's opinions. Both the EA and Williams' Finding, taken in their entirety, indicate that all of the information sought and provided supported the adoption of an alternative that best met environmental needs as well as the interests of the lessees of the state land.

P32. Upon careful review of the administrative record cited in the motions and briefs, this Court concludes that the agency had adequate information to reach its decision that the agency's EA was adequately supported by the information it sought and received, and that it was not in violation of MEPA. The agency's decision that an EIS was not required is legally and factually correct. Alaska Basin has not provided clear and convincing evidence that DNRC's adoption of the modified Alternative C should be overturned.

P33. IT IS THEREFORE ORDERED that DNRC's motion for summary judgment is GRANTED, and Alaska Basin's motion for summary judgment is DENIED in accordance with this decision.

DATED this 6th day of November, 2009.

DOROTHY McCARTER District Court Judge