Cabinet Resource Group, et al. v. Department of State Lands, et al.
Cause No. 43914, 1st Judicial District
Judge Bennett
Decided 1982

MEPA Issue Litigated: Does MEPA supplement a state agency's permitting /licensing authority?

Court Decision: Yes

OPINION

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS & CLARK.

Judge Bennett

CABINET RESOURCE GROUP, a Montana non-profit corporation,

Plaintiff,

and

MONTANA WILDERNESS ASSOCIATION, a Montana non-profit corporation,

Plaintiff,

vs.

MONTANA DEPARTMENT OF STATE LANDS,

Defendant,

and

MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES,

Defendant,

and

ASARCO, INC.,

Defendant.

No. 43914

INDEXED

OPINION

The complaint in this action, filed June 8, 1979 and amended September 6, 1979, seeks a number of declaratory judgments and writs of mandate. These petitions involve the role of the Department of State Lands (DSL) and the Department of Health and Environmental Sciences (DHES) under the Montana Constitution; the Montana Environmental Policy Act (MEPA), 75-1-101, et seq., MCA: the Hard Rock Mining Act (HRMA), 82-4-351, MCA, and other statutes which apply specifically to the agencies. The case involves a mine which Asarco proposes to operate in the Cabinet Mountains near Troy, Montana. Preliminary motions to dismiss and for partial summary judgment were disposed of during the hearing and by our opinion and order of January 25, 1982. Asarco and DSL thereafter moved for partial summary judgment and for

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"clarification or reconsideration." These motions are addressed to Counts I, II and VIII of the amended complaint. In Count VIII plaintiffs allege groundwater will be polluted by discharge from the tailings ponds of the mine. Asarco's and DSL's motions for partial summary judgment on this count were granted during the hearing on the motions on the ground the count was not timely. The count may be revived, however, when timely.

Counts I and II involve DSL's assertion that MEPA does not provide it with authority to condition, reject or grant a permit under the HRMA. As to these counts we originally took the following action:

1.) Plaintiff's motion for partial summary judgment as to Count I, made on the ground DSL misinterpreted the effect of MEPA on its function under the HRMA, was granted.

2.) Plaintiff's motion for partial summary judgment as to Count II, made on the ground DSL relied upon an incorrect interpretation of the effect of MEPA on its function under the HRMA in granting the permit, was denied as there remained issues of material fact which were left unresolved.

Defendants Asarco and DSL present basically the same arguments as were made prior to our earlier decision, urging that their motions for summary judgment as to Count I should be granted, which would mandate a judgment in their favor as to Count II as well. These parties cite a 1980 decision by Judge Meloy which was not previously considered. We do not find that decision, Northern Tier Information Committee v. Northern Tier Pipeline Company (Lewis and Clark County, Cause No. 44987), controlling. The discussion in that opinion pertained to the eminent domain statute rather than the HRMA, and the issues in that case were determined moot.

We now address, for the second time, the contention that MEPA does not supplement DSL's permit authority under the HRMA. We reach the same conclusion as we reached in our first encounter with this issue but will discuss our holding in some detail in order to assure

complete understanding. We begin by noting that MEPA itself specifies that its policies and goals are supplementary to the existing authorizations of state boards, commissions and agencies. 75-1-105, MCA. Defendants, however, assert Montana case law mandates a contrary conclusion. We feel the major Montana cases on this issue, Montana Wilderness Association v. Board of Health and Environmental Sciences, 171 Mt. 477, 559 P.2d 1157 (1976), and Kadillak v. Anaconda Co., 36 St. Rptr. 1820, 602 P.2d 147 (1979), have been adequately distinguished in our earlier opinion. Those cases were decided on the basis of a direct conflict between the agency's specific regulatory statute and MEPA. Asarco and DSL contend a conflict can be found in this case in that the HRMA specifically enumerates the only basis for which a permit can be denied. 82-4-351, MCA. They say conflict would be created if MEPA were allowed to supplement these bases. A similar argument was made in Environmental Defense Fund, Inc. v. Matthews, 410 F. Supp. 336 (D.C.D.C.1976). Federal interpretation of the National Environmental Policy Act (NEPA) is relevant in interpreting MEPA. Kadillak, supra 602 P.2d at 153. The argument that a direct conflict was thus created was soundly rejected in Environmental Defens Fund, Inc. The following language seems pertinent:

> The FDCA does not state that the listed considerations are the only ones which the Commissioner may take into account in reaching a decision. Nor does it explicitly require that product applications be granted if the specified grounds are met. It merely lists criteria which the Commissioner must consider in reaching his decision. In the absence of a clear statutory provision excluding consideration of environmental factors, and in light of NEPA's broad mandate that all environmental considerations be taken into account, we find that NEPA provides FDA with supplementary authority to base its substantive decisions on all environmental considerations including those not expressly identified with the FDCA and FDA's other statutes. Environmental Defense Fund, Inc., supra at 338.

This line of analysis is buttressed by Zabel v. Tabb, 430 F. 2d 199 (5th Cir. 1970), in which NEPA and the Fish and Wildlife Conservation

Act were found to provide the Secretary of the Army with authority to refuse projects for ecological reasons despite the fact the project would not interfere with navigation, flood control or the production of power. In Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971), the court discusses the fact that prior to NEPA the Atomic Energy Commission asserted it was not statutorily authorized to weigh the adverse environmental impacts of its actions. "Now, however, its hands are no longer tied. It is not only permitted, but compelled, to take environmental values into account. Perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to consider environmental issues just as they consider other matters within their mandates." Id. at 1112 (emphasis in original).

We are aware of other federal cases in which a different conclusion has been reached. In Natural Resource Defense Council v. Berklund, 609 F.2d 553 (D.C. Cir. 1979), for example, the court held the Secretary of Interior was without discretion to deny a lease to a qualified applicant.The statutory language, which the court called "unequivocal and clear,"id. at 557, was that a permittee, upon establi ing the presence of 'commercial quantities' of coal, "shall be entitled to a lease under this chapter for all or part of the land in his permit." 30 USC §201(b)(1970)(amended 1976). Similarly, in State of South Dakota v. Andrus, 614 F.2d 1190 (8th Cir. 1980)cert. denied, 449 U.S. 822 (1980), the court noted the issuance of a mineral patent has been well established as a ministerial act and the environmental impact statement (EIS) requirement is usually not applied when a ministerial act is involved. In both of those cases the decision turns on the conclusion that the language of the statute removes discretion from the decision maker. In this case, however, a purely ministerial act is clearly not involved. The pertinent statutory language is: "A permit may be denied for any of the following

reasons. . . .". As opposed to a declaration that the applicant shall be entitled to a permit upon the establishment of certain conditions, the use of the word "may" in the statute indicates the decision maker does retain discretion. See American Electric Power Service Corporation v. Federal Energy Regulatory Commission, 675 F.2d 1226, 1241 (D.C. Cir. 1982). We think the language quoted above from Environmental Defense Fund, Inc., supra, is applicable here and conclude there is no clear statutory language barring consideration of environmental factors. There is, then, no conflict between MEPA and the HRMA and DSL can therefore reject or condition a permit on environmental grounds additional to those listed in Section 82-4-351, MCA.

Further support for this conclusion can be found in discussions of the purpose of an EIS. Asarco and DSL assert that their interpretation of MEPA as not supplementing DSL's decision making authority would not render an EIS meaningless as the EIS would still perform its function as a disclosure law. We conclude MEPA was intended to affect decision making as well as to disclose environmental consequences, and again refer to analysis of NEPA to support this statement. As recognized by the Council on Environmental Quality, "[t]he primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and action of the Federal Government. . . . An environmental impact statement is more than a disclosure statement. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions." 40 CFR §1502.1 (1981). In Weinberger v. Catholic Action of Hawaii, ____U.S. ____, 102 S.Ct. 197 (December 1, 1981), the United States Supreme Court noted that the aims of NEPA's EIS requirement are "to inject environmental considerations into the federal agency's decisionmaking process. . . . and to inform the public that agency has considered environmental concerns in its decisionmaking

process." Id. at 201. Environmental Defense Fund, Inc. v. Corps of Engineers, U.S. Army, 470 F.2d 289 (8th Cir. 1972), makes it clear NEPA "is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decisionmaking." Id. at 297. See also Environmental Defense Fund v. Tennessee Valley Authority, 468 F.2d 1164, 1174-1175 (6th Cir. 1972) and Trout Unlimited v. Morton 509 F.2d 1276, 1282 (9th Cir. 1974). As summarized in Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2nd Cir. 1972) ". . . the primary purpose of the impact statement is to compel federal agencies to give serious weight to environmental factors in making discretionary choices. . . ." The cases quoted above indicate serious weight involves more than merely disclosing environmental consequences. Those consequences must be considered in the agency's decisionmaking process, just as the agency considers other matters within its mandate. In this case, then, DSL must consider other environmental factors in making its decision to grant, condition or deny a permit just as it considers air and water quality and reclamation. It is not sufficient for the agency to note the presence of adverse environmental factors while denying authority to do anything about them. Nor can an agency "escape the requirements of NEPA [MEPA] by excessively constricting its statutory interpretation in order to erect a conflict with NEPA [MEPA] policies." Natural Resource Defense Council v. Berklund, supra at 558. We note the fact that other states have reached similar conclusions as to the impact of their state environmental policy acts. See Department of Natural Resources v. Lake Lawrence Public Lands, 92 Wash.2d 656, 601 P.2d 494 cert. denied, 449 U.S. 830 (1980); City of Roswell v. New Mexico Wate Quality Control Commission, 84 N.M. 561, 505 P.2d 1237 (1972), cert denied, 84 N.M. 560, 505 P.2d 1236 (1973); Town of Henrietta v. Department of Environmental Conservation of the State of New York, 43 N.Y.S. 2d 440 (1980).

We find additional authority for our conclusion in the following

sections of the 1972 Montana Constitution:

> Inalienable rights. All persons are born 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, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities. Art. II, §3 (emphasis added.)
>
> Protection and improvement. (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
> (2) The legislature shall provide for the administration and enforcement of this duty.
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources. Art. IX, §1.

The fact that Montana has given constitutional status to maintenance of a clean and healthful environment demonstrates the heightened importance which must be placed on actions which affect the environment of this state. There is no comparable constitutional protection afforded federal actions. The conclusion we reached above as to the impact of MEPA was based largely on federal interpretation of NEPA. The presence of these additional constitutional provisions provides authority for even stronger environmental protection in this state. See Tobias and McLean, Of Crabbed Interpretations and Frustrated Mandates, 41 Mt. L. Rev. 177 (1980). In the event we could not find support for our conclusion in NEPA interpretation, the combination of MEPA and the above constitutional sections would provide the necessary authority.

In the interest of thoroughness we respond to two additional arguments made by Asarco and DSL. The first is that the legislative background of MEPA and the HRMA provides support for their interpretation of MEPA's impact, or rather the absence thereof. The argument is since both acts were passed the same day, the

legislative intent could not have been to allow MEPA to supplement DSL's permitting authority. There would be no reason to specifically enumerate the bases for denial if these bases were already provided for and in fact enlarged by MEPA. We hesitate to attempt to conclusively ascertain the legislative intent on this issue from the fact of the simultaneous passage. We would point out, however, that in some instances, such as when no major state action i: involved, portions of MEPA would not apply to DSL's actions. The provisions of Section 32-4-351, MCA, would operate in the absence of certain supplementary MEPA provisions in such a situation.

Secondly, defendants repeatedly refer to a statement in Montana Wilderness Association, supra 559 P.2d at 1161, which purportedly supports defendant's interpretation of MEPA. The statement is that MEPA does not contain any regulatory language. [We repeat our observation that that case was decided on the basis of conflict betwee MEPA and the Subdivision and Platting Act, a factor which is not present here.] We would also point out that MEPA is patterned after, and almost identical to, NEPA. A great deal of our authority for reaching our conclusion comes from federal case law interpreting NEP/ The federal courts have based their decision on statutory language almost identical to ours, and we therefore cannot agree that the statement from Montana Wilderness requires a change of decision.

For the reasons stated above, Asarco's and DSL's motions for summary judgment as to Count I are denied. In light of this decisio: it is not necessary to discuss Count II except to note material issu of fact still remain as to that count. We therefore also deny the motions for summary judgment as to Count II.

Dated this 29th day of September, 1982.

District Judge

cc: Counsel of record